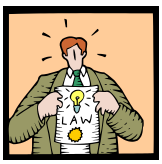
e-MANTSHI

A KZNJETCOM Newsletter

May 2012 : Issue 76

Welcome to the seventy sixth 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 key 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 Minister of Trade and Industry, has in terms of section 171 of the National Credit Act, 2005 (Act No. 34 of 2005), made Debt Counselling Regulations, as set out in the schedule hereto. These regulations were published in Government Gazette no 35327 dated 10 May 2012 and came into operation on the same day.

SCHEDULE

DEFINITIONS

1. In these regulations any word or expression to which a meaning has been assigned in the Act bears the meaning assigned to it in the Act, and unless the context indicates otherwise;

"clerk of the court" means a clerk of the court appointed in terms of section 13 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) and includes an assistant clerk of the court so appointed;

"court" means Magistrates' Court established in terms of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), having jurisdiction over a consumer by virtue of such consumer's residence or place of business;

"deliver" means to file with the registrar or clerk of the court and serve a copy on the opposite party either by hand-delivery, registered post, or, where agreed between the parties or so ordered by court, by facsimile or electronic mail (in which instance Chapter III, Part 2 of the Electronic Communications and Transactions Act, Act No. 25 of 2002 will apply), and "delivery", "delivered" and "delivering" have corresponding meanings;

"Magistrates' Courts Rules" means rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa published in Government Notice No. R. 740 of 23 August 2010; and

"the Act" means National Credit Act, 2005 (Act No. 34 of 2005).

APPLICATION BY A DEBT COUNSELLOR FOR ORDERS CONTEMPLATED IN SECTION 86(7) (c) OF THE ACT

2. (1) an application by a debt counsellor for an order contemplated in section 86(7) (c) of the Act must be lodged in a manner and form prescribed by Rule 55 of the Magistrates' Courts Rules, unless the court direct otherwise.

(2) The application referred to in regulation 2(1) above must be substantiated by an affidavit deposed to by the debt counsellor in which the following is set out:

(a) An exposition of the debt counsellor's assessment conducted in terms of section 86(6) of the Act, read with sections 78(3),79,80 of the Act and regulation 24 of the Regulations;

(b) the relief claimed in terms of section 86(7)(c);

(c) full particulars of each credit provider;

(d) full particulars of the consumer and the debt counsellor; and

(e) confirmatory affidavit from the affected consumer.

(3) The debt counsellor must collect a copy of the court order from the clerk of the court and deliver it within five (5) working days from the date of issue to the affected consumer and each credit provider.

(4) Each credit provider must comply and implement the terms of the court order within Ten (10) working days of receipt thereof.

APPLICATION BY A DEBT COUNSELLOR FOR CONFIRMATION OF A CONSENT ORDER CONTEMPLATED IN SECTION 86(8) (a), READ WITH SECTION 138 OF THE ACT

3. (1) An application by a debt counsellor for confirmation of a consent order contemplated in section 86(8)(a), read with section 138 of the Act, must be lodged in a manner and form prescribed by Rule 55 of the Magistrates Courts Rules, unless the court direct otherwise: provided that if the application is lodged with the Tribunal, the rules prescribed for the conduct of proceedings in the Tribunal shall apply.

(2) An application referred to in regulation 3(1) above must, be substantiated by the debt counsellor through an affidavit supported by confirmatory affidavit from the affected consumer and each credit provider indicating that they have consented and agreed upon a plan of debt re-arrangement, which may include arrangements —

(a) that one or more of the consumer's existing obligations be re-arranged by-

(i) extending the period of the agreement and reducing the amount of each payment due accordingly;

(ii) postponing the date on which payments are due under the agreement during a specific period;

(iii) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(iv) re-calculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6;and

(b) regarding the manner in which payments must be made by the consumer and distributed amongst the affected credit providers.

(3) The debt counselor must collect a copy of the court order from the clerk of the court and deliver it within five (5) working days from the date of issue to the affected consumer and each credit provider.

(4) The credit provider must comply and implement the terms of the court order within Ten (10) working days of receipt thereof.

APPLICATION BY A CONSUMER IN TERMS OF SECTIONS 86(9) AND 86(7) (C) OF THE ACT

4. (1) An application by a consumer in terms of section 86(9) of the Act, to request leave of the court to institute proceedings contemplated in section 86(7)(c)

of the Act, must be lodged in the manner and form prescribed by Rule 55 of the Magistrates' Courts Rules, unless the court direct otherwise.

(2) The application must be accompanied by —

(a) the decision of the debt counsellor, made in terms of section 86(7)(a) of the Act;

(b) an affidavit by the consumer annexed to the application in which reasons must be set out why leave should be granted to apply for an order contemplated in section 86(7)(c) of Act;

(c) an application for an order contemplated in section 86(7)(c); and

(d) if required by the court, an affidavit deposed to by any person.

(3) An application referred to in regulation 4(2)(c) above must be substantiated by a founding affidavit deposed to by the consumer setting out the following:

(a) an exposition which indicates that the consumer is over-indebted, read with sections 78(3), 79 and 80 of the Act as well as regulation 24 of the Regulations;

(b) the relief claimed in terms of section 86(7)(c);

(c) the full particulars of each credit provider; and

(d) full particulars of the consumer.

(4) The consumer must deliver within five (5) working days from the date of the issuing of the court order a copy of the court order to each affected credit provider.

(5) Each credit provider must comply and implement the terms of the court order within Ten (10) working days of receiving the court order.

SHORT TITLE AND COMMENCEMENT

5. These Regulations are called Debt Counselling Regulations, 2012 and shall come into operation on the date of publication in the *Gazette.*

Recent Court Cases

1. S v MOKELA 2012 (1) SACR 431 (SCA)

A presiding officer should give reasons for his/her decisions.

"[11] I have already stated that the court below did not give reasons why it interfered with the order made by the regional magistrate in exercising his or her discretion for the sentences to run together. In the absence of such reasons we are unable to conclude that the regional magistrate did not exercise the discretion properly or judicially. In fact the order by the court below has the hallmarks of an arbitrary decision. It follows that the court below erred in setting aside the order by the regional magistrate for the sentence imposed in respect of count 2 to run concurrently with that imposed in respect of count 1. This is so because the evidence shows that the two offences are inextricably linked in terms of the locality, time, protagonists and importantly the fact that they were committed with one common intent. (See, for example, *S v Brophy & another* 2007 (2) SACR 56 para 14).

[12] I find it necessary to emphasise the importance of judicial officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know that courts do not act arbitrarily but base their decisions on rational grounds. Of even greater significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person. The giving of reasons becomes even more critical if not obligatory where one judicial officer interferes with an order or ruling made by another judicial officer. To my mind this underpins the important principle of fairness to the parties. I find it un-judicial for a judicial officer to interfere with an order made by another court, particularly where such an order is based on the exercise of a discretion, without giving any reasons therefore. In *Strategic Liquor Services v Mvumbi NO & others* 2010 (2) SA 92 (CC) para 15 the Constitutional Court whilst dealing with a failure by a judicial officer to give reasons for a judicial decision stated that:

'…Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process…'. See also *Botes & another v Nedbank Ltd* 1983 (3) SA 27 (A) at 28.

[13] Regarding the duty of judicial officers to give reasons for their decisions it is instructive to have regard to what the RT Hon Sir Harry Gibbs GCMG, AC, KBE, the former Chief Justice of the high court of Australia stated in the Australian Law Journal 1993 (67A) 494 where he said at 494:

'…The citizens of a modern democracy – at any rate in Australia – are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society it is of particular importance that the parties to litigation – and the public – should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and that the delivery of reasons is part of the process which has that end in view…'.

See also *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC) para 12; *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA) paras 28-30".

2. S v CARSTENS 2012(1) SACR 485 (WCC)

The prosecutor should alert a presiding officer if hearsay evidence is led and s/he does not intend calling the source person.

"[9] It is common cause that the trial magistrate found the accused guilty of both charges preferred by the State against him. I have, however, grave difficulty in accepting that the first charge, namely theft of the imbuia chairs was proved beyond a reasonable doubt against the accused. The only evidence on the strength of which the accused was convicted on this particular charge was that of Sergeant Booysen. The latter never saw the accused carrying these two (2) chairs, in his testimony he was told by another person that the accused carried these chairs and was given a description of the clothing the accused had on. This person who told Sergeant Booysen about the accused was never called to testify.

[10] All that which Sergeant Booysen testified about which he gathered from the unknown person became inadmissible evidence. The admission of this evidence dangerously prejudiced the accused person. I would understand if Sergeant Booysen testified that he received a certain report from this unknown person and that on the strength of that report he investigated and independently found the accused person carrying these chairs and that he saw when the accused person threw those chairs on the other side of the fence. That is not what Sergeant Booysen testified. On the contrary, he freely put before the Court hearsay evidence.

[11] One can hardly blame the Presiding Magistrate for admitting this evidence. It had all features of being evidence that necessarily had to be provisionally allowed as the source person would thereafter be called to enable it to be finally allowed in. The person who should have guided Sergeant Booysen in this regard is the prosecutor. The prosecutor clearly knew that the unknown person was not one of the witnesses he intended calling. He should have alerted the Presiding Officer also that he was not going to call the so-called unknown source person. Therefore, if one puts aside the hearsay evidence inadvertedly led in this matter all what remains is that Sergeant Booysen patrolled the area along Malherbe Street. At a certain stage he saw the accused person walking in the street carrying nothing. He subsequently found the two (2) chairs on the other side of the fence. He suspected that the accused had something to do with those two (2) imbuia chairs. However, the accused person denied any knowledge of such chairs on being confronted.

[12] Would such evidence be said to be proof beyond a reasonable doubt? No, it cannot be. The accused was admittedly walking along that street as much as the unknown person was. No criminal conduct can be ascribed to a person for merely being found walking along the public road even if it was late at night. As matters stand presently, the Court was never told why the accused was said to be associated with the two (2) chairs found on the other side of the fence. It remains more than sufficient for him to have told Sergeant Booysen and the Court that he has no knowledge of such chairs. I would understand if such chairs were found in his possession because then he would have had to account on the basis of recent possession. The accused person had no control over that vicinity where the chairs were found. This was never his place. It is irrelevant that the place was not far from where he walked.

[13] One must at all times bear in mind what Flemming J said in *S v Alex Carriers (Pty) Ltd en ‘n Ander* 1985 (3) SA (T) at 88 I - 89 D about the burden of proof, namely:

> *"[O]rtuiging bo redelike twyfel is die krag wat die Staat moet uitoefen voordat hy daarin slaag om die muur van skuld op die besktddigde te laat intuimel; dit is onnodig vir die beskuldigde om enige deel van die muur na die Staat se kant om te stoot. 'n Besktddigde sal gevolglik vry uitgaan as die Staat se saak nie sterk genoeg is nie en dit sou daarom volgens heginsels soms voldoende wees dat die beskuldigde hoegenaamd niks doen nie en soms dat hy daarmee volstaan om swakhede in die Staat se saak aan die kaak te stel (deur bywoorbeeld kruisverhoor wat 'n getuie se onbetroubaarheid laat blyk) of uit te wys. Nornate die Siaat 'n sterker saak voorle, is die praktiese uitwerking dat sulke beperkte optrede onvoldoende sal blyk en dat aktiewe weerlegging van die Staat se saak prakties nodig is om die krag wat die Staat uitoefen, teen te werk. Selfs dan is daar geen bewyslas op die beskuldigde nie. (Omdat*

verwarring steeds voorkom, mag dit helderheid bevorder om te se dat 'n beskuldigde 'n weerleggingsnoodsaak ondervind eerder as dat hy 'n w eerieggingslas dra). Hoeveel en hoe sterk die beskuldigde se weerleggende oorwegings moet wees om te verhoed dat die Staat 'n oortuigende saak het, hang dan uiteraard van die sterkte van die Staat se saak of. Die beskuldigde hoef niks meer te doen nie as om te veroorsaak dat wanneer die hof sy beslissing veL 'n redelike twyfel omtrent die beskuldigde se skuld aanwesig is. "

Numerous decisions by the Supreme Court of Appeal have exhaustively dealt with the question of proof beyond a reasonable doubt. It is not necessary to overburden this short Judgment with any such decisions. In any event in the instant matter the admissible evidence leaves doors wide open for numerous possibilities. It is very-possible that the unknown source person was himself the culprit. It is possible that some other thieves stole these chairs and that when they became heavy to carry they threw them away and that same came to land on the spot where Sergeant Booysen found them. How can it then be contended that the State proved the guilt of the accused person in the light of such remarkably weak testimony that allows of so many possibilities? Evidence intended to be supportive of the theft charge in this matter lacks cogency and sufficiency such that even if the accused chose not to testify at the end of the State's version, he still would have qualified for a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 as amended. It does not matter that Sergeant Booysen may have been a good witness in the knowledge of the trial Court. The fact of the matter is simply that his testimony standing alone as it does cannot be used to sustain a conviction in the instant matter. This is quite apart from the fact that he was a single witness whose evidence necessarily had to be approached with caution.

[14] Another aspect which perhaps deserves to be mentioned in this matter is that evidence tendered in the instant matter, like in all other matters, fell to be considered holistically before any conclusion of guilt or otherwise was arrived at. This is not to say that it is wrong for a trial Court to look at the individual components of the evidence advanced at trial. But the point is that the Court must at all times guard against focusing too intently upon the separate and individual parts of the body of evidence. As correctly stated in *S* v *Hadebe and Others* 1998 (1) SACR 422 (SCA), the call of duty is that the mosaic as a whole falls to be considered. The trial Court most certainly fell short of pursuing this call of duty as efficiently as it could. The State had onus of proof (in respect of the first count too) to be discharged only if the evidence establishes the guilt of the accused person beyond a reasonable doubt. The accused person remains entitled to be acquitted if it is reasonably possible that he might be innocent. The Court must be satisfied upon a consideration of all the evidence. Importantly, a Court does not look at the evidence implicating the accused person in isolation in order to make a determination whether there is proof beyond a

reasonable doubt. Neither does it look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it may be true. See: *S v Van Der Meyden* 1999 (1) SACR (WLD) at 448 f-h. The proper handling of the criminal trial I agree with is stipulated in *S* v *Tellingen* 1992 (2) SASV 104 (K) as follows: *"Indien daar wel na behoorlike evaluering van al die getuienis 'n redelike moontlikheid bestaan dat die beskuldigde se weergawe dalk waar mag wees sal die voordeel van die twyfel aan die beskuldigde vergun moet word. " "*

3. S v FILANI 2012(1) SACR 508 (ECG)

In cases of unlawful possession of firearms in terms of the Firearms Control Act 60 of 2000 expert evidence is required that a weapon was indeed a firearm as intended by the Act.

"In supporting the convictions Ms. Hendricks, who appeared for the State, referred to S v Matinisi 2010 JDR 1334 (ECG). In that matter the appellant was charged with murder and with the unlawful possession of a firearm in contravention of Act 60 of 2000. The cause of death of the deceased was a gunshot wound to the head. No firearm was recovered from the appellant, who, it was common cause, had no licence to possess a firearm. The appeal against the murder conviction failed. With regard to the appeal against conviction in respect of the firearm the following was stated:

> "*Regarding the submission that the appellant was never found in possession of an unlicensed firearm, as I have stated, the record reveals that the firearm that was used to kill the deceased was never found, either on the appellant or anywhere else. But my view is that once the evidence of Mgxekwa, Noyo and Godlo was accepted, together with the common cause fact that no firearm licence had ever been issued to the appellant, such evidence constituted conclusive proof that the appellant was, at the time of the shooting at the deceased, in* 'actual' *possession of a firearm and that the firearm with which he shot the deceased was a firearm as defined in the* Firearms Control Act. The *trial Court correctly found that the person who killed the deceased must have been in possession of a firearm.*"

It does not appear from the judgment, with respect, on what basis the conclusion was reached that the firearm with which the deceased was shot was indeed a firearm as defined in the Firearms Control Act. It may well be that that particular issue was not argued before the learned Judges and that their attention was not therefore directed pertinently to the issue under discussion in the present case.

Even were I to be wrong in this I am of the view, with respect, that the decision cannot be construed as laying down the proposition that in order to discharge the

onus upon it of proving that a particular weapon falls within the ambit of the definition of a firearm in s 1 of Act 60 of 2000 the State need do no more than prove that a bullet or projectile was fired from that weapon. It is clear, in my view, from the definition of "*firearm"* in Act 60 of 2000, as opposed to the definition of "*arm*" in Act 75 of 1969, that the Legislature no longer intended "*firearm*" to bear its ordinary meaning as explained in S v Shezi *supra*.

In these circumstances it was incumbent on the State to prove that the weapon of which appellant was allegedly in possession was a firearm as defined in the Act.

In my view the State has failed to discharge that onus.

According to the evidence of van Eck the complainant pointed out to him the cartridge and the "*bullet point*" as well as the hole in the wall which was struck by the projectile. According to van Eck he pointed these out to the photographer and "*these items were also photographed and collected by the photographer*."

As I have stated above no forensic analysis was conducted on these items nor were any photographs in respect thereof handed into Court. No explanation as to the whereabouts of these items was advanced by van Eck or by any other witness and, indeed, no further reference was made to the cartridge and "*bullet point*" thereafter. Not surprisingly, the defence attorney did not address any questions to van Eck in this regard. Had the bullet point and cartridge been subjected to forensic analysis then, depending on the results of such analysis, the State may well have been able to establish that the projectile had been fired from a device falling within the ambit of the definition of "*firearm*".

In the absence of such forensic evidence the submission of Ms. Hendricks was in effect that, because the weapon in possession of the appellant discharged or propelled a missile with enough force or velocity for it to be used for offensive purposes, it must therefore fall within the ambit of the definition of a firearm in s 1 of Act 60 of 2000. In other words, on an acceptance of Ms. Hendricks's submission any weapon which was capable of discharging or propelling a missile as set out above would fall within the ambit of the definition. In my view, however, given the increased technical nature of the various definitions of "*firearm*" contained in the later and current Act such a finding cannot be made in the absence of expert evidence to that effect. Certainly it is not a matter of which this court may take judicial notice. The State failed to lead any such expert evidence and accordingly failed, in my view, to discharge the onus upon it. "

4. EX PARTE DEPARTMENT OF CORRECTIONAL SERVICES: IN RE S v MTSHABE 2012(1) SACR 526 (ECM)

In an application for the reconsideration of sentence in terms of section 276A(3) of Act 51 of 1977 all the circumstances existing at the time of the trial and the new circumstances that have since arisen must be taken into account by the Court.

In an application in terms of s 276A(3) of the Criminal Procedure Act 51 of 1977 for the reconsideration of a sentence of imprisonment, in order for the detainee to be placed under correctional supervision, the court is called upon to reconsider the sentence which was imposed by the trial court in the light of all the circumstances, including facts and circumstances since the imprisonment of the person concerned. Therefore, the circumstances that existed at the trial continue to have significance when the sentence is reconsidered in terms of the section; but in reconsidering the sentence it is also necessary to take into account fresh or new factors that have since arisen. On a reading of the section as a whole there can be little doubt that, in requiring the court to reconsider the sentence originally imposed, it is required to consider all the circumstances relevant to the imposition of sentence. In this regard, the nature and circumstances of the crime, questions of remorse or the lack thereof and the various other factors which emerged during the course of the trial proceedings (which, of course, include the sentencing proceedings at the end of the trial) must play a significant role when reconsidering the sentence afresh in terms of s 276A(3). To play down these factors during the course of these subsequent proceedings, and to over-emphasise fresh or new factors which have arisen since the trial, could, to my mind, result in a miscarriage of justice, as the court might place too much emphasis on the more recent occurrences (which will generally involve the accused's good conduct during incarceration) in contrast to the crime itself, the interests of the victim or victims thereof, and the interests of society in general. (Paragraphs [17] and [18] at 532*a*–*g*.)

It is clear that the judge who is to reconsider the sentence of the accused should, in order to make a proper assessment thereof, be in possession of all the relevant factors pertinent to such reassessment, which include a full knowledge of the trial proceedings, the sentencing proceedings and the subsequent relevant facts and circumstances which may have arisen post the imposition of sentence. The judicial officer who is clearly the primary target of this duty to reconsider the sentence must be the judicial officer who heard the trial and imposed the sentence so called upon to be reconsidered. The reason for this is that such judicial officer is steeped in the atmosphere of the trial and would be better suited to carry out this function. (Paragraph [21] at 533*g*–*h*.)

In terms of the provisions of s 276A(3)*(c)*(i) of the Act such an application for reconsideration of the sentence should be brought before the trial judge, 'or, if he is not available, another judicial officer of the same court'. Whether or not the trial judge is 'not available' for the purposes of this section is an aspect which ought to be decided on the consideration of all the relevant factors, including, obviously, the interests of the detainee involved. In determining this aspect there must, however, be a measure of flexibility. (Paragraph [24] at 534*e*–*h*, paraphrased.)

From The Legal Journals

Van Loggerenberg, D

“Pending suits in the magistrates' courts - The effect of the lack of transitional provisions in the new rules of court ”

2011 SALJ 607

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

Contributions from the Law School

Disposal of a child’s body to conceal the birth: *S v Molefe* (GNP) 2012-04-03 unreported case number A 240/12.

Although the Roman-Dutch common law recognised the exposure and abandonment of children as criminal offences, it did not recognise the disposal of a child’s body to conceal its birth as an offence (*S v Oliphant* 1950 1 SA 48 (O) at 50 and Hoctor (ed) *SA Criminal Law and Procedure Vol III: Specific Offences* (2012) D2-5 fn 1 referring to the lamentation of Huber about the absence of such a crime (*HR* 6.13.33)). The crime, to dispose of a child’s body to conceal the birth, was

introduced to the South African law by various statutes from 1845. All these statutes were based on English legislation.

In South Africa, the offence was first contained in several statutes: Ordinance 10 of 1845 (Cape); Ordinance 22 of 1846 (Natal) that adopted the Cape ordinance; Ordinance 4 of 1867 (Free State); Transkeian Territories Penal Code Act 24 of 1886 (s 149); and Chapter 141 of the Wetboek; and Law 4 of 1892 (Transvaal).

The statutory provisions were similar. Five issues were consistently part of the Acts: One, the crime was described as the secret burial or otherwise disposing of the body of a dead child. Two, the crime could in most places only be committed by birth mother. However, in the Transvaal it could only be committed by an unmarried or deserted birth mother and under the Transkeian Code by any person). Three, it was not necessary to prove whether the child died before, during or after birth (This clause was not contained in the original Free State ordinance, although it was included in the Wetboek). Four, the sentence upon conviction was imprisonment with or without hard labour for a period less than five years (Cape, Natal and Transkeian Code) or two years (Free State and Transvaal). In the Free State an option of a fine less than £250 was a possibility and in the Transkeian Code an undetermined fine could be imposed with or without imprisonment.

These statutes were consolidated in s 113 of the General Law Amendment Act 46 of 1935 that read as follows:

1) Any person who disposes of the body of any child with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding three years.
2) Whenever a person disposes of the body of any such child which was recently born, otherwise than under a lawful burial order, he shall be deemed to have disposed of such body with intent to conceal the fact of the child's birth, unless it is proved that he had no such intent.
3) A person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of.

The provision provided that the offender could include any person and amended the penalty clause to an option of a fine and imprisonment of less than three years. This section departed from the usual presumption of innocence principle as the accused bore the onus to prove the lack of intent. Both Hoctor (D2-10) and Snyman (*Criminal Law* (4th ed) at 416) argued that this shifting of the onus was unconstitutional. Hoctor noted: "Given that the presumption of innocence is

infringed whenever there is a possibility of a conviction despite the existence of a reasonable doubt; any reverse onus provision is likely to be held to unjustifiably limit the constitutional right to be presumed innocent."

The section was amended in 2008 and deleted the offending provision to ensure that the provision is constitutional. In the Memorandum on the Objects of the Judicial Matters Amendment Bill, 2008, the object of the relevant amendment was as follows:

> Section 113 of the General Law Amendment Act, 1935, criminalises the act of disposing of a newly born child's body with the intention of concealing the birth of the child, irrespective of whether the child died before, during or after birth. The Women's Legal Centre argues that these provisions are overly broad, lacking in definition, archaic and their constitutional validity is questionable, often impinging on the right to human dignity of women charged under it. The amendments contained in clause 1 address the evidentiary burden of proof that is placed on accused persons, bringing it in line with constitutional jurisprudence. As a safety mechanism, the clause also requires a Director of Public Prosecutions to authorise a prosecution in terms of the section.

The amended section currently reads as follows (s 113 of the Judicial Matters Amendment Act 66 of 2008 that substituted s 113 of the General Law Amendment Act 46 of 1935):

> "113(1) Any person who, without a lawful burial order, disposes of the body of any newly born child with the intention to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.
>
> (2) A person may be convicted under subsection (1) although it had not been proven that the child in question died before its body was disposed of.
>
> (3) The institution of a prosecution under this section must be authorised in writing by the Director of Public Prosecutions having jurisdiction."

It should be noted that ss 239(2) of the Criminal Procedure Act 51 of 1977 (and its predecessor s 272(2) of the Criminal Procedure Act 56 of 1955) confirmed that in the trial of a person charged with the concealment of the birth of a child, it shall not be necessary to prove whether the child died before, at, or after its birth.

As there have not been any prosecutions in South African for concealment of birth under this newly worded section, the judgment of *S v Molefe* conveniently clarifies some interpretation issues.

The issue was brought to the high court as a special review from the Magistrate's court Bloemhof. The court had to consider the conviction of the accused for the concealment of the birth of a newly born child in terms of s 113(1) as read with s 113(2) and (3) of the General Law Amendment Act 46 of 1935 (at para 1).

The accused, an adult female, pleaded guilty and *inter alia* stated the following: "... I unlawfully with the intent to conceal the fact of the birth of a child denied to a sister at the clinic that I had given birth to a dead child. I had not yet disposed of the dead child's body and when I was confronted by the police I went to show the police the body in a bucket in my house. The child was prematurely born and was dead at birth" (at paras 1-2).

Although the Magistrate enquired whether the NDPP authorised the prosecution in writing as required by s 113(3) of the Act, the court accepted the argument by the prosecutor that verbal permission would constitute compliance and found the accused guilty (at para 3). On appeal, the court set the conviction aside based on the following arguments:

Firstly, that the mandatory requirement of written permission by the NDPP had not been met. Although it could be argued that failure to obtain such written permission prior to the prosecution may be ratified by the DPP, *in casu* there was no ratification this procedural omission is fatal and the conviction should be set aside (at paras 4-5).

Secondly, the facts (and the admissions by the accused) did not support a finding that the accused "disposed" of the body as required by s 113(1) as all the essential elements of the crime had not been admitted. The court referred with approval to the finding in the case of *S v Dema* 1947 (1) SA 599 (E) (and *Rex v Smith* 1918 CPD 260) that "disposal" involves a measure of permanence and that it should be placed in the place where it is intended to remain – and not where it was likely to be discovered. *In casu* the accused noted that she had not yet disposed of the body and that it was in a bucket at her house (at paras 6-7). The court noted that one cannot draw an inference that she attempted to dispose of the body from the fact that she lied about the birth (at para 8) as many mothers of newly born babies are "unable to act with calm and balanced judgment" (at para 8 with reference to *S v D* 1967(2) SA 537 (W)). Moreover, even though she may have formed the intention to dispose of the body, her actions to that point did not constitute disposal or an attempt to do so (at para 9).

Thirdly, the facts did not support the requirement that, for a conviction to follow there must be evidence that the child had been viable, *id est* that it had the potential to be born alive. In this regard the court referred to the judgments of *S v Jasi* 1994 (1) SACR 568 (ZH) and *S v Madombe* 1977 (3) SA 1008 (R) (based on a similar provision) that a foetus younger than 28 weeks cannot be regarded as a viable child for purposes of this section (at paras 10 & 12); and *S v Manngo* 1980 (3) SA 1041 (V) that a three months old foetus did not meet the requirements of a "child" as it was not of a stage of maturity that it might have been born alive (at para 11). *In casu* there was no evidence that the foetus found was older than 28 weeks and that the conviction had to be set aside (at paras 13-14).

This case is important for a number of reasons. One, it confirms by implication that the pre-2008 constitutional issue relating to the presumption of innocence has been rectified. The broader constitutional issue pertaining to the gender issue, namely that the validity of the section is questionable as it often impinges on the right to human dignity of women charged under it, was however not considered. It is interesting to note that in Canada the similar wording of their equivalent provision is currently being constitutionally challenged.

Two, written permission of the NDPP is mandatory and although ratification is possible prior to the hearing, non-adherence to the provision is fatal.

Three, the court merely noted that there was no evidence that the foetus was over 28 weeks and thus cannot be regarded as a viable child. It should be noted that the viability of a foetus is dependent on numerous factors and should ultimately be determined medically by the pathologist – especially in cases where the body is available for examination as it was *in casu*.

The factors to be considered about the viability are the following: First, according to the British Medical Association (BMA), determining the gestational age of a foetus is difficult as there are four ways in which the calculation can be made: from the first day of the woman's last period, the date of conception or implantation or the first day of the woman's first missed period (BMA "Fetal viability" (17 June 2005)). Second, although most neonatologists agree that survival of infants younger than approximately 22 to 23 weeks' estimated gestational age is universally dire (Halamek, L. "Prenatal Consultation at the Limits of Viability" (2003) 4(6) *NeoReviews* 153 -156 at 153), the likelihood of survival from 28 weeks are about 90% (Danielsson, K "Premature birth and viability" 15 August 2008 *About.com Health's Disease and Condition* 1). However, other factors affect the viability, such as professional guidance during pregnancy and birth (including steroid to speed up lung development), low birth weight and placenta abruption (BMA *ibid* and Danielsson *ibid*). In concealment cases the mothers are often very young,

inexperienced and without professional assistance. Even if the child may have been viable under specialist care, the same is not necessarily applicable where she delivers alone and in secret.

Four, the century old tradition of judicial leniency in these matters can be seen in interpretation of term “disposal” and the fact that the mother’s emotional state is considered. The court confirmed previous judgments that the attempt to dispose of the child has to have some form of permanency. It is submitted that this is nonsensical in light of the wording of the Act and that the finding should depend on the factual circumstances of each matter and not the stage of discovery of the crime.

Cases like *Molefe* should be distinguished from cases of late abortions and infanticide that raises additional constitutional and moral issues. These issues are disregarded for purposes of this discussion. With mere concealment of a child that was stillborn or who naturally died before, during or immediate after birth, the courts are rightly compassionate and merciful in their decisions even though the actions of the mother are criminal. A truly tragic situation.

Marita Carnelley
University of KwaZulu-Natal
Pietermaritzburg Campus

Matters of Interest to Magistrates

AUTOMATIC REVIEW IN CERTAIN CASES: SECTION 85 READ WITH SECTIONS 82 AND 83 OF THE CHILD JUSTICE ACT 75 OF 2008

INTRODUCTION

The *Child Justice Act* (CJA), promulgated to establish a criminal justice system for children in conflict with the law and accused of committing offences, came into operation on the 1st April 2010. It has, amongst others, as its main objective the prevention of children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in

accordance with the Constitution, including the use of diversion. It introduces quite a number of new progressive procedures aimed at protecting the child offender from being exposed to the conventional criminal process. One such process is a preliminary inquiry, which is a process aimed at determining whether the matter involving the child may be diverted, and thereby preventing the child offender from facing the criminal charge in the criminal court (referred to as the child justice court). If the matter, for some reason, cannot be diverted, it is then referred to the child justice court (CJC), which is a new term for the then juvenile court. In terms of s 1, any court which hears a matter where the child is involved, seats as the CJC.

This article is going to focus on the question of automatic review of certain types of sentences of the Child Justice Court by the High Courts, and is prompted by four recent High Court decisions on this question, all of which were review judgments. The first is by the Western Cape High Court, per Dlodlo J, in *The State v Johan Pierre Ruiter, Case No. A 278/2011*, delivered on the 14th June 2011; the second is Northern Cape High Court, per Olivier J, in *The State v Wildene Fortuin, Case No. 38/2011*, delivered on the 11 November 2011; the third is the North West High Court, per Gutta J, in *The State v Jan Nakedi, Case No. 12/2012*, delivered on the 2nd February 2012; and the fourth one is the Eastern Cape High Court, per Tshiki J, in *S v Stander (120037) [2012] ZAECPEHC 22 (30 March 2012).* All these decisions are yet to be reported. Except for the North West High Court, all the other three High Courts held that irrespective of whether or not the child was legally represented, such cases are subject to automatic review.

APPLICABLE LEGISLATION

The following are the provisions of the section:

'85. Automatic review in certain cases

(1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged offence –
   (a) under the age of 16 years; or
   (b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)(j) of the Children's Act,

   the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence.

(2) The provisions of subsection (1) do not apply if an appeal has been noted in terms of section 84.'

Generally, a sentence of a child under the age of 16 years, or of a child of 16 years or older but under the age of 18 years who has been sentenced to imprisonment which is not wholly suspended (irrespective of the amount of fine or period of imprisonment) or any sentence of such a child (16yrs or older but under 18yrs) to compulsory residence in a child and youth care centre providing a programme provided for in *s 191(2)(j)* of the *Children's Act*, is subject to automatic review. There appears to be no difficulty there. The complication is caused by the first part to the section which makes reference to the provisions of *Chapter 30* of the *Criminal Procedure Act (CPA)*. *Section 302(1)* of the CPA contains provisions similar to those of s 85 of CJA, and renders sentences reviewable if imposed by lower courts' judicial officers of the respective ranks referred to in that section. In turn, s 302(3) expressly takes out of the ambit of automatic review sentences by such judicial officers, where the accused person was legally represented. There is no such provision in the CJA, and as such, by clear reference in s 85 CJA to Chapter 30 of the CPA, it should, it is submitted, follow that the express provisions of the CPA should prevail [see Nakedi, *supra* at par 12&13].

HIGH COURT DECISIONS

Dlodlo J, in *Ruiters* held that *'the High Court is the upper guardian of all minors within its jurisdictional area. For that reason and that one alone... cases provided for or referred to in section 85* [of the CJA]*... should always be the subject of automatic review in the ordinary cause regardless of whether or not the said minor child was legally represented at trial'*. Olivier J, in *Fortuin* gave a detailed analysis of the possible interpretation of s 85(1) and in the end, after, *inter alia*, considering the provisions of s 82 and s 83 of the CJA and regulation 48, thereto, came to the same conclusion as Dlodlo J. Tshiki J, in my view, took the matter further as he held that the automatic review of proceedings herein is triggered not by the application of s 302 of the Criminal Procedure Act but by the provisions of s 85(1) of the CJA.

Further, he held that *'the review of the proceedings in terms of section 85(1) of the CJA is an exception and cannot be said to be done in terms of section 302 of the CPA. It is a provision sui generis and should be treated as an exception on its own. In terms of section 302 of the CPA, sentences which do not exceed three months and six months respectively depending on the experience of the presiding magistrate are not reviewable whether or not the accused was legally represented. Therefore, review cases in terms of section 85(1) of the CJA cannot be said to be governed by section 302 of the CPA. This is so for the reason, inter alia, that in terms of section 85(1) of the CJA the reviewability of the sentence does not depend on the experience or otherwise of the presiding magistrate but is sanctioned by the*

CJA. This is confirmed by the proviso that review of the sentence will take place irrespective of the duration of the sentence'. It is submitted that what the learned judge refers to here must be limited only to the proviso in s 85(1) and not the entire section itself. In other words, section 302 is not applicable, only, to review of cases referred to in the proviso in s 85(1), as that is an exception the judge refers to.

In as far as other sentences involving a child (16yrs or older but under 18yrs) are concerned, for example, a wholly suspended imprisonment sentence of four or more months imposed by a judicial officer of less than seven years' experience, or a wholly suspended imprisonment sentence of six or more months imposed by a judicial officer of seven or more years' experience, the provisions of s 302 CPA should still find application, as those are not covered by the exception created by the proviso. Thus the first sentence to section 85 CJA should be applicable to those instances. Olivier J, at para 18 in *Fortuin* reasoned that the proviso in s 85 ***'expands the scope of automatic reviewability of sentences*** *in the case of* [child] *accused persons and sentences as envisaged in section 85(1) of the CJA, and it therefore provides for the benefit of automatic review* ***in more instances than provided for in section 302(1)*** *of the CPA (as incorporated into section 85(1) of the CJA)'* [my emphasis]. It should be in this light that the exception Tshiki J recognised should be viewed. In that regard, it will leave the room open for those cases where an unrepresented child accused was sentenced to a wholly suspended term of imprisonment, which exceeds the respective time frames of the experiences of the judicial officers, to still be subject to automatic review in terms of s 302 of the CPA.

Those cases therefore covered by the proviso will have to be automatically reviewable irrespective of whether or not the child accused was represented. But those cases which are not covered by the proviso will be reviewable in accordance with the provisions of s 302.

LEGAL REPRESENTATION AND CHILD APPEARANCE IN COURT

Since it is a salient rule of interpretation that words should primarily be given their ordinary grammatical meaning before an extended interpretation can be afforded, I respectfully suggest that that is what the High Courts should have done under the circumstances, with particular reference to s 83 of the CJA. On the one hand, Olivier J in *Fortuin*, after considering amongst others, the local DPP's opinion, referring him to the provisions of sections 82 and 83 of the CJA, at para 49 reasoned that *'it is indeed clear that, as submitted by Mr Barnard, a child appearing before a child justice court will in effect never be without legal representation. The duties and rights of a legal representative appointed to assist the court will, for all practical purposes, be the same as in the case of an own legal representative'*. Tshiki J, on the other hand, in *Stander* said the following at para 10 and 11:

'[10] In my view, legal representation of a child who appears before a Child Justice Court is compulsory, if not peremptory. It seems to me that when the legislature enacted the provisions in terms of section 85 of the CJA it also had in mind the provisions of section 83 of the CJA which provide:

> "**83 Child may not waive legal representation in certain circumstances**
>
> 1. No child appearing before a child justice court may waive his or her right to legal representation.
>
> 2. If a child referred to in subsection (1) does not wish to have a legal representative or declines to give instructions to an appointed legal representative the court must enter this on the record of the proceedings and a legal representative must, subject to the provisions of the Legal Aid Guide referred to in section 3A of the Legal Aid Act, 1969 (Act 22 of 1969), be appointed by the Legal Aid Board to assist the court in the prescribed manner."

[11] It is apparently clear from the provisions of the above section that it is compulsory for a child to be legally represented during the trial before the Child Justice Court. Therefore, a legal representative will be appointed for the child accused even if he or she refuses to be legally represented, and this is done in the interests of justice for the purposes of assisting the Court with a view to protect the interests of the child in question. Invariably, the appointed legal representative would represent the child in question.'

In my view, this is a case of missed opportunities by the courts to recognise what plainly appears to have been the intention behind the provision. Section 83 introduces in our law a new phenomenon, never heard of before, i.e a legal representative to assist *'the court'*, in criminal cases involving children.

It must be borne in mind that, in terms of s 82(1) of the CJA, on the one hand, when a child appears before the CJC and is not represented by a legal representative of his/her own choice (privately paid attorney), the court *is obliged* to refer the matter to the Legal Aid Board for an attorney to be appointed. In terms of s 82(2), no plea proceedings may take place unless the child *'has been granted a reasonable opportunity to obtain'* his privately paid attorney, or the obligatory Legal Aid attorney, referred to in s 82(1), has been appointed.

In terms of s 83(1), on the other hand, no child appearing before the CJC may waive the right to legal representation. However, s 83(2) becomes realistic in foreseeing that there may be circumstances where the child may not wish to be legally represented or, if the obligatory legal aid attorney has been appointed, decline to

give instructions, in keeping with his/her wish not to be legally represented. In such instances, s 83(2) obliges that *'the court must enter this on the record of proceedings'*, in the same way, it is suggested, a court does when deviating from the prescribed minimum sentencing legislation and imposing, thereafter, a lesser sentence. This recording by the court is deemed necessary in the light of s 83(1). After the court has so recorded, for all intents and purposes *that a child is not legally represented*, either by his own private attorney or the obligatory Legal Aid attorney appointed in terms of s 82(1).

In order to give effect to the safeguarding of the best interests of the child, and assisting the court in that regard, the Legislature provides *'special protection'* and *'specific safeguard'* in s 83(2) by *obliging* the court to appoint another Legal Aid attorney (which in practise, it is suggested, may be the same as the one previously declined by the child), only this time, to assist the court. From the CJA, it would only be under those circumstances that plea proceedings, when the child is not legally represented, may commence, as the reasons thereto shall have been entered on record. Under these circumstances, the only legal representative before court shall be the one to *assist the court*, and *not the child*.

In turn, and in giving further clarity to this, regulation 48 in chapter 10 of the regulations published in terms of the CJA, details the duties that must, and those which may, be performed by the legal representative appointed to *assist the court*. Interestingly, and to indicate that this legal representative is not representing the child, no-where in that regulation is it indicated that he/she must/may consult with the child (not that it is suggested that such is prohibited). Instead, the regulation empowers the legal representative of the court to do what the court in conventional criminal court process cannot do, which, amongst others, is to *'have access to the documents and statements to the extent permissible in criminal proceedings'*, *'cross-examine a witness in relation to the evidence adduced by the witness'*, *'discredit the evidence of a witness'*, *'raise objection to a question posed to the child or state witness'* or even *'question the admissibility of evidence led by the state'*. Even with these powers, it can hardly be foreseen that the legal representative appointed to assist the court can ever be taken to task by the child for professional misconduct, as there exists no professional relationship between the two.

CONCLUSION

It is, therefore, submitted that in terms of s 82 read with s 83 of the CJA, it is possible for the child accused to appear before the CJC completely unrepresented, but that under those circumstances there must be a legal representative appointed to assist the court.

If, the lower court, in dealing with the child accused, irrespective of whether s/he was legally represented or not, the provisions to the proviso in s 85(1) of the CJA apply, such cases should, under all circumstances be subject to automatic review [see *Stander* para 23]. However, if the provisions of the proviso do not apply, and the child accused was not legally represented, and noting the time frames and respective experience of the judicial officer concerned, such cases should be subject to automatic review in terms of s 302 of the CPA, as s 85(1) of the CJA does not *per se* exclude the application of s 302 of the CPA in those matters.

It is on this basis that, with respect to s 83 of the CJA, in particular, I believe that this was a case of missed opportunity by the honourable High Courts to recognise the creation of this new phenomenon in our law of a legal representative to assist the court. However, one remains hopeful that the situation might be changed in future, and the situation rectified.

Oswald Spiwo Mazwi,

Magistrate, Groblershoop

Northern Cape.

A Last Thought

The gap is too wide: High Courts and magistrates' courts

A vast majority of practitioners who appear in both the magistrates' courts and the High Courts will agree with me that the two courts are worlds apart. It is not a question of the jurisdictional limits that makes them so different from each other. It is rather the quality of services that practitioners receive from those who are involved – starting from the most junior office administrators to the most senior presiding officers. It appears to me that most of our magistrates are either ill-trained or are not appointed on merit. Magistrates are always late to courts, their conduct in court is questionable and their judgments leave a lot to be desired.

I do civil litigation and a couple of times I have met magistrates who do not understand the basics on the subject in general. I suppose that the recruitment strategy to the Bench is not spot-on and should be revisited. Most magistrates are former prosecutors who have never had exposure to civil litigation. It seems to me that the trend is that if you were a prosecutor for a long time then it is assumed you will be a good magistrate. Those making appointments fail to reason that a prosecutor never conducts civil litigation and his appointment will mean that he has to adjudicate civil disputes. Without regular training, he and others in his position are bound to be clueless about civil litigation. Unfortunately I appear before most of them on a regular basis and it is annoying to experience the injustice meted out to our people. The more clueless magistrates we have on the Bench, the more people lose confidence in the judicial system.

One wonders if it is not time that we should have magistrates who deal specifically with either criminal or civil litigation. Maybe our magistrates should be encouraged to attend the higher courts to observe how things should be done and learn from their seniors (judges). I always ask myself why there are few or no magistrates recommended for posts as judges in the High Courts. Maybe the answer is simple: The High Court is a far higher step for the magistrates to climb.

I must not fail to mention that there are very capable magistrates out there. It is only that there are those elements on the Bench who will continue to tarnish the image of the others. The number of those who are incompetent is, however, far more than the number of those that one can call competent. The questions to be considered are: Is a magistrate's performance monitored and how is such monitoring done? I have never seen or heard of an official from the Magistrates' Commission who was in court to observe a magistrate perform in the court room. I stand to be corrected, but I challenge those who are directly involved to come forward with different views. I wish that the powers that be would somehow consult the attorneys' profession for candidates before making appointments to the Bench in our lower courts – as it is done with High Court appointments.

Matimba Hlungwani,
attorney, Tzaneen

(The above letter appears in the May 2012 issue of *De Rebus*)