e-MANTSHI

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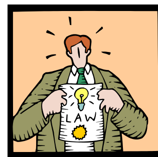
Welcome to the Eightieth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), with the approval of the Minister for Justice and Constitutional Development, made the rules in the Schedule. These rules were published in Government Gazette no 35626 dated 31 August 2012.

SCHEDULE

GENERAL EXPLANATORY NOTE:

[ ] Expressions in bold type in square brackets indicate omissions from existing rules.

_____Expressions underlined with a solid line indicate insertions into existing rules.

Definition

1. In this Schedule "the Rules" means the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa published under Government

Notice No. R. 740 of 23 August 2010, as amended by Government Notices Nos. R. 1222 of 24 December 2010, R. 611 of 29 July 2011 and R.1085 of 30 December 2011.

Amendment of rule 43 of the Rules

2. Rule 43 of the Rules is hereby amended by the substitution for subrule (13) of the following subrule:

> "(13) (a) The sheriff shall give transfer of immovable property sold in execution to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer, and anything so done by him or her shall be as valid and effectual as if he or she were the owner of the property.
>
> (b) If the purchaser fails to carry out his or her obligations under the conditions of sale, the sale may be cancelled by a magistrate in chambers on the request and report of the sheriff conducting the sale, after due notice to the purchaser, and the property may again be put up for sale."

Commencement

3. These rules shall come into operation on **5 October 2012.**

Recent Court Cases

1. S v RATHUMBU 2012 (2) SACR 219 (SCA)

The probative value of hearsay evidence is determined by the credibility of the witness at the time of making the statement.

"[9] The reception of hearsay evidence is regulated by s 3(1) of the Law of Evidence Amendment Act 45 of 1988. The section provides as follows:

'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence in criminal proceedings, unless -

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to -

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

For reasons that follow I am of the view that the statement was correctly admitted in terms of the section.

[10] Section 3 enjoins a court in determining whether it is in the interests of justice to admit hearsay evidence, to have regard to every factor that should be taken into account and, more specifically, to have regard to the factors mentioned in s 3(1)*(c)*. This court in *S v Ndhlovu* 2002 (6) SA 305 (SCA) considered the provision of s 3 and at paragraph 31 held that:

'The probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration, and the central question is whether the interests of justice require that the prior statement be admitted notwithstanding its later disavowal or non-affirmation. And though the witness's disavowal of or inability to affirm the prior statement may bear on question of the statement's reliability at the time it was made, it does not change the nature of the essential inquiry, which is whether the interests of justice require its admission.'

In amplification, at paragraph 33, it was stated that:

'The "probative" value' of the accused's statements to the police did not depend on their credibility at the time of the trial – which the Court right found totally lacking – but on their credibility at the time of their arrest. And the admissibility of those statements depended not on the happenstance of whether they chose to testify but on the interests of justice.'

[11] In the present appeal, following the approach set out in *Ndhlovu*, and considering the totality of the circumstances under which the statement was made, one is driven to the conclusion that the court below was correct in admitting Ms Rathumbu's statement. Substantial corroboration for the truthfulness of the statement is to be found in other evidence tendered by the State. I now deal with such corroborative evidence.

11.1 It is common cause that Ms Rathumbu proceeded to the appellant's home at approximately 21h00 on 16 June 2008. According to her evidence as well as her statement, her visit to the deceased's home was prompted by a telephone call from the deceased requesting her to bring her child to her. In the statement, she stated that in that telephonic conversation, the deceased told her that she was leaving her husband and she needed her assistance in carrying her goods. Mulaudzi testified that he observed that outside the house, about three paces from the kitchen door, there was clothing packed inside a box 'like one is moving somewhere else.' This provides corroboration for Ms Rathumbu's assertion in her statement that the deceased told her that she was leaving her husband and that she needed help in carrying her goods. Importantly, a photograph taken by the police depicts a pile of items outside the house, which lends further credence and weight to the statement.

11.2 Mulaudzi testified that when he enquired from Ms Rathumbu as to the identity of the person who wanted to be taken to the police station, her response was that he was the person who had stabbed his wife in the room. This accords with what, according Mulaudzi, she had said at the police station earlier. This spontaneous response by Ms Rathumbu at the scene whilst the deceased's body was still lying in the house affirms the reliability of the original statement in preference to her later disavowal. Furthermore, these words were uttered in the presence of the appellant. The utterances did not attract any protestation from the appellant. Nor was the evidence challenged in cross-examination.

11.3 Ms Rathumbu confirmed in her evidence that she had made a statement to Inspector Sirunwa. But she said that the contents had been read back to her in English (which Sirunwa denied). She also averred that she knew nothing about of the contents of the statement that implicate the appellant. That means, according to her, parts of the statement are a complete fabrication. But the contents of the statement accord with what she had told Inspector Tshivhase in the presence of Constable Mulaudzi when she arrived at the police station. Shortly thereafter she repeated the same version to Nndwambi. It is highly improbable that three policemen, two of whom arrived at different intervals at the murder scene, would conjure up all the details contained in the statement on the same night of the murder of the deceased. Similarly, it is not likely that Inspector Sirunwa could have concocted the information contained in the statement before leaving the scene of the murder.

[12] Applying the principles set out in the *Ndhlovu* case, all of the above factors clearly demonstrate that when she made the statement Ms Rathumbu was telling the truth. Her inconsistent evidence at the trial can be easily explained on the basis that she wished to protect her brother. Her statement therefore, was correctly admitted into evidence.

[13] Ms Rathumbu's statement is not the only evidence to be considered in determining the appellant's guilt. The conduct of the appellant is also relevant. Mulaudzi gave evidence to the effect that whilst the police were awaiting the arrival of the paramedics, the appellant appeared. After entering the yard and without saying anything to the police officers or people at the scene, he climbed into what seemed to the witness to be a disused motor vehicle. I have already said that the appellant did not give evidence. Neither did he deny Ms Rathumbu's assertion at the scene that he had stabbed the deceased. The appellant did not enquire as to the reason for the presence of the police in his own home or why members of the community were present. He made no attempt to ascertain what the problem was and the inference is irresistible that he already knew why all these people were there

[14] The court below considered the State witnesses to be credible and rejected the appellant's defence. In the present appeal, once Ms Rathumbu's statement was admitted, and in the face of all the evidence tendered by the State, it called for an answer from the appellant. Thus, the court a quo correctly considered the evidence tendered by the State to be such as to warrant a response from the appellant. In *S v Mapande* [2010] ZASCA 119 it was reiterated that if a witness has given evidence implicating an accused, the latter can seldom afford to leave such testimony unanswered. The court is unlikely to reject credible evidence which the accused has chosen not to deny. Thus in *S v Chabalala 2003(1) SACR 134 (SCA)* it was stated that:

'The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. He was also called on to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralised by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge. If he was innocent appellant must have ascertained his own whereabouts and activities on 29 May and be able for his non-participation. . . To have remained silent in the face of the evidence was damning. He thereby left the *prima facie* case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt.'

[15] In my view, the appellant's culpability for the murder of the deceased was established beyond any reasonable doubt. In the circumstances, the appeal against conviction must fail."

2. S v MZIMBA 2012(2) SACR 233 (KZP)

In a case of driving under the influence of liquor in terms of section 65(1) (a) of Act 93 of 1996 the impairment of an accused's driving ability must be proven and not only the impairment of his state of mind.

STEYN, J

"[1] The accused in the present matter was convicted in the Magistrates' Court Kokstad, in the district of Mount Currie on contravening section 65(1)(a) of the National Road Traffic Act,[1] No. 93 of 1996, in that he drove a motor vehicle while under the influence of intoxicating liquor. The conviction follows on the accused's plea of guilty and the subsequent questions asked to him and his admissions in terms of section 112(1)(b) of the Criminal Procedure Act, No. 51 of 1977 ('the Act'). The accused was sentenced on the same day to a fine of R3000.00 (three thousand rand) or to undergo twenty-four (24) months' imprisonment. No order was made in terms of section 35 of the NRTA.

[2] The matter was automatically reviewable under section 302 of the Act and the record was placed before a reviewing judge of this division to determine whether the proceedings were in accordance with justice.

[3] On 16 March 2012, Booyens AJ asked the Magistrate for reasons and to explain the following:

> "*The Magistrate is requested to indicate why she convicted the accused of drunken driving on his section 112 statement. The accused did not admit all the elements of the offence driving under the influence of liquor. He did admit that he did drink some liquor but he does not admit that his driving was affected by that, nor is the reading of the breathalyser or the blood alcohol sample attached to the judgment.*
>
> *The Magistrate is requested to supply her reasons for convicting the accused in this matter."*

[4] The learned Magistrate proffered the following explanation, which was received by the Registrar of this Court on 29 May 2012:

"I kindly acknowledge the Honourable Mr Acting Justice Booyens (Acting) requests.

I admit that I have made a mistake by not asking the question about whether accused mental facilities were impaired by driving under the influence of liquor which is one of the elements of driving under the influence of liquor.

I humbly request Honourable Mr Justice Booyens (Acting) to confirm the sentence imposed has (sic) an option of a reasonable fine on traffic offences of this nature."

[5] I shall now turn to the reasons of the learned Magistrate which in my view fail to deal with the misdirection of the accused being convicted without questioning him on the effect that the alcohol had on his ability to drive the motor vehicle or him acknowledging that he lacked the necessary skill to drive the motor vehicle. In *S v Engelbrecht 2001(2) SACR 38 (C)* Knoll J, after considering a host of relevant cases pertaining to the offence of driving under the influence of alcohol, refers to the essential elements of the crime as follows:

"*That the accused (i) drove; (ii) a vehicle; (iii) on a public road; (iv) while under the influence of liquor or drugs; (v)* mens rea.

[6] It is evident from the query raised by the reviewing judge that he was not convinced that the accused admitted that he was driving his motor vehicle while 'under the influence.'

This element of the crime requires an impairment, not only of an accused's mental state of mind, i.e. that the alcohol induced him to a state that he was prepared to take risks, but that his driving ability was impaired. It is therefore necessary that an accused charged with an offence of drunken driving should admit that he/she lacked the necessary skill and judgment normally required in the manipulation of a motor vehicle and that such skill or judgment has been diminished or impaired as a result of the consumption of alcohol or drugs.[4]

[7] The learned Magistrate in this instant case, in my view, erroneously holds the view that the accused should have been questioned on his mental ability which is not sufficient for a conviction on a count of drunken driving. Secondly, the learned Magistrate had lost sight of the fact that the conviction must be overturned since the accused failed to admit that the alcohol had an influence on his driving ability. It is trite that when an accused does not admit all the elements of an offence charged with, that a court cannot be satisfied with his guilt and that a plea of not guilty should be entered. The learned Magistrate's request to confirm the sentence cannot be adhered to because no court would be competent to confirm a sentence in the absence of a conviction. The Magistrate also failed to conduct an enquiry as is required by

the NRTA or issue and order in terms of section 35 of the NRTA. In my view the learned Magistrate was obliged to inform the accused, who was unrepresented, of the provisions of section 35(1) and (2) of the Act, before imposing sentence. It is important to state that the record is silent on the issue whether the accused is the holder of a driver's licence."

From The Legal Journals

Moosa, F

"Paying a small claims court judgment debt in instalments"

De Rebus September 2012

Botha, R & Visser, J

"Forceful arrests: an overview of section 49 of the Criminal Procedure Act 51 of 1977 and its recent amendments"

Potchefstroom Electronic Law Journal 2012 Volume 15 no 2

Harms, L T C

"Law and language in a multilingual society"

Potchefstroom Electronic Law Journal 2012 Volume 15 no 2

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

Contributions from the Law School

De minimis non curat lex

De minimis non curat lex is an age-old maxim, which is often applied, but infrequently rationalised.[1] Burchell[2] and Snyman[3] both adopt the meaning that 'the law does not concern itself with trifles'. The maxim has been applied by courts in many jurisdictions through the centuries, and in relation to a number of differing areas of law. The apparent universality of this notion is telling of the extent to which courts have considered themselves 'empowered' to make use of this rule. In the context of South African law, the *de minimis* rule has been applied in respect of insolvency, property law and contract, as well as the criminal law. It is submitted that the application of the *de minimis* rule to the criminal law is of particular significance and interest, especially in the context of a justiciable Bill of Rights in South Africa, and the inevitable power imbalance inherent in the criminal law: where the criminal law is used as a blunt instrument in the hands of the State against the individual, where the full might of State power is employed against the individual. Where the criminal process is initiated against a person in respect of a trivial matter, the starkness of the power imbalance between State and individual, and the potential for this process to unjustifiably limit the rights of the individual, is all too evident.

Hence the significance of the *de minimis* rule in being used to allow courts to overlook a mere technical breach of the law.[4] Veech and Moon describe the functioning of the *de minimis* maxim as 'an interpretive tool to inject reason into technical rules of law and to round-off the sharp corners of [the] legal structure'.[5] This rule of reason (or perhaps reasonableness) confers upon the courts a discretionary power to dispense with charges that are too trivial to merit the special condemnation of criminal conviction.[6] In Feinberg's words, the *de minimis* rule is a 'mediating maxim for the application of the harm principle'.[7] In the Canadian case of *Canadian Foundation for Children, Youth and Law v Attorney General*[8] Arbour J set

[1]Veech and Moon 1947 *Michigan Law Review* 537.
[2]Burchell *Principles of Criminal Law* 3ed (2005) 355.
[3]Snyman *Criminal Law* 5ed (2008) 143.
[4]See Mewett and Manning *Mewett and Manning on Criminal Law* 3ed (1994) 544.
[5]Supra (n1) 543.
[6]Stuart *Canadian Criminal Law* (1995) 545; Robinson *Criminal Law Defenses* Vol I (1984) 324; as reflected in the Model Penal Code §2.12(2).
[7]Feinberg *Harm to Others* (1984) 216.
[8] [2004] 1 SCR 76, 2004 SCC 4 at par 204.

out the justifications for this defence: (a) it reserves the application of the criminal law to serious misconduct; (b) it protects an accused from the stigma of a criminal conviction and from the imposition of severe penalties for relatively trivial conduct; and (c) it saves courts from being swamped by an enormous number of trivial cases. Feinberg adds a further argument: that legal interference with trivia is likely to cause more harm than it prevents, not only to the person interfered with, but also his victim, and other third parties, in interfering with individual liberty.[9]

It follows then that *de minimis non curat lex* relates to the issue of prosecutability, rather than functioning as a defence excluding unlawfulness. Burchell and Hunt classified *de minimis* as a defence excluding unlawfulness in their first edition of *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* published in 1970, and this view is also heralded in *S v Zengeya*.[10] However, most writers now expressly reject this view, following Strauss' criticism of Burchell and Hunt's position.[11] Thus the trivial act remains unlawful, but due to the unreasonableness of convicting and punishing the accused in the circumstances, the court does not regard/heed/take account of the unlawful conduct. Kok has argued that the *de minimis* defence does exclude unlawfulness, but that where the defence is successfully raised, liability may nevertheless follow for attempt.[12] This reflects a misunderstanding of the *de minimis* defence however: the defence operates because the court deems the conduct too be too trivial to warrant the condemnation of conviction (to use the phrasing of the US Model Penal Code). The same logic would apply to any possible attempt conviction for such conduct. In contrast, liability for attempt occurs because the actor's conduct *does* warrant the condemnation of conviction, even if he is unsuccessful, because he intends or risks bringing about a societal harm or evil.[13]

As Stuart acknowledges, a test for triviality is undoubtedly elastic.[14] How does one determine whether the *de minimis* rule should find application? A number of factors have been identified as providing guidance,[15] which will now be discussed in the light of South African authority.

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[9]Supra (n7) 189-90.
[10]1978 (2) SA 319 (RA) at 321B.
[11] Strauss 1970 *SALJ* 483. See Snyman (n3) 144.
[12] Kok 1981 THRHR 66.
[13]Robinson *Criminal Law* (1997) 133.
[14]Supra (n6) 545.
[15] For a more detailed discussion of these factors, see Veech and Moon supra (n1); Ruedin 2008 *European Human Rights Law Review* 80 87ff..

1 Purpose

The first factor which falls to be considered is the purpose behind the statutory or common-law rule sought to be interpreted, which gives rise to the associated question: whether a strict or technical application of the rule would give rise to injustice? As stated in *S v Van Wyk*[16] it is necessary to look at the nature of the offence and the surrounding circumstances in assessing whether the offence so trivial that it should not appear before the court.

One practical application of this factor in the case law has been in the context of drugs offences. In the Canadian case of *S*[17]where the accused was found in possession of a quantity of marijuana too small to use, the court held that the *de minimis* rule was applicable, and dismissed the charges against the accused – a clear instance of the court invoking the social purpose of the legislation rather than employing a literal approach to interpretation of the section.

In South African law, in *S v Van der Merwe*[18] the court applied the maxim to set aside a conviction of dealing in dagga where the evidence disclosed that he had cultivated one small dagga plant in a tin in his room, holding that it could not have been the intention of the legislature that the appellant's acts could constitute dealing (as opposed to possession, which he was ultimately convicted of). In *S v Van Zyl*[19]a conviction of dealing in dagga was set aside as *de minimis* where the only evidence against the appellant was that had watered three small dagga plants found in a flowerpot once, in order for the seeds planted in the pot to germinate, so that he could see what a dagga plant looked like. The court held that the 'single act of watering the seed' was of such minor importance as to be disregarded by an application of the *de minimis* maxim.

These decisions were criticised by certain commentators,[20] who argue that the *de minimis* maxim ought to be restricted to those cases where not only the individual complainant, but also society in general has for all practical purposes suffered no prejudice. Snyman argues that the interests of society are at stake in virtually every single contravention of the Act, however slight or isolated it may be.[21] Thus the argument is that the *purpose* of the drugs legislation is to punish every contravention. In *S v Danster*[22] decided shortly thereafter it was held that in respect of a charge of dealing in dagga, the *de minimis* rule did not apply.

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[16] 1974 (1) SA 36 (A) 43A.
[17](1974) 17 CCC (2d) 181 (Man Prov Ct).
[18]1974 (4) SA 310 (E).
[19]1975 (2) SA 489 (N).
[20]Snyman 1975 *SALJ* 372; Klopper 1976 *TM* 32.
[21] Supra (n19) 373.
[22]1976 (3) SA 668 (SWA).

Similar concerns have been raised in respect of drink-driving. In *DPP (EC) v Klue*[23] the acquittal on the basis of *de minimis* in the court *a quo* on a charge of driving with excessive alcohol in the blood was overturned. The court held that in the light of the carnage on the roads, which the section prohibiting drink-driving (s 65 of Act 93 of 1996) sought to combat, there was no room for the application of the *de minimis* defence in this context. Williams[24] notes the difference in terms of policy: regarding speeding offences, the speed limit is not rigorously enforced, as doing so would undermine the intention of Parliament by forcing people to drive even more slowly than the limit, whilst closely watching their speedometers. On the other hand, nothing but good would come if no-one drank alcohol before driving. The permitted blood-alcohol limit is thus a concession to a pernicious practice, which ought not to be further extended by prosecutorial or judicial discretion.

To give an example from a common-law context it is instructive to examine some *crimen injuria* cases dealing with insulting words. It bears mentioning that by definition the violation of the dignity of the complainant must be serious, thus incorporating a *de minimis* type of inquiry. In *R v Muller*[25] the charge arose out of words being uttered whereby (in the phrasing of Van den Heever J) the accused 'threatened to cause an ignoble part of complainant's anatomy to be belaboured by some person unknown'. The court held that the injury to the complainant's dignity was very slight, if any, and set aside the conviction.[26] In *S v Seweya*[27] the accused's conviction for *crimen injuria* based on his statement that the complainant 'speaks like a three month's pregnant woman' was set aside as the words – essentially calling the complainant a woman - were regarded as no more than trivial, the court asserting that to hold otherwise would undermine the sexual equality entrenched in the Constitution.

In contrast, where the nature of the uttered words constituted a racial slur of some kind the courts have been quick to find that such utterances could not be regarded as trivial, and hence liability for *crimen injuria* has ensued.[28]

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[23]2003 (1) SACR 389 (E).

[24]Williams *Textbook of Criminal Law* 2ed (1983) 619-620.

[25]1938 OPD 141.

[26]In *R v Innes* 1917 CPD 151 it was held that a conviction of breach of the peace (s 10 of Act 27 of 1882) as a result of the use of abusive words should be set aside, on the basis of this being a very trivial prosecution. In *R v Robinson* 1937 TPD 117, an appeal against a conviction of using insulting language in or near a public place was set aside, the uttering of the words 'ga na die hel, jou donder, bliksem' being regarded as a trivial incident, and that the prosecution should not have ensued.

[27][2005] JOL 13487 (T).

[28]See *S v Steenberg* 1999 (1) SACR (N); *S v Mostert* 2006 (1) SACR 560 (N).

2 Practicality

The second factor which may be identified is that of practicality, which is intertwined with the promotion of the practical and speedy administration of justice. An example of such reasoning which gave rise to the court applying the *de minimis* rule is *S v Bester*,[29] an assault case where a father cuffed an 11-year-old boy who had tripped his daughter. The court noted the lengthy heads of argument, the time spent in court, and the setting in motion of the full might of the State machinery involving the administration of justice before commenting:[30]

> 'Ek moet eerlik sê dat as sake van hierdie aard reëlmatig voor die howe sou kom waar 'n korrektiewe oorveeg aanleiding gee tot 'n strafaanklag, die howe hulle uitsluitlik besig sal moet hou – asmede die polisie en distriksgeneeshere – met beuselagtighede van hierdie aard'
>
> 'I must honestly say that if cases of this nature are regularly heard in the courts, where a corrective box on the ears gives rise to a criminal charge, the courts will have to exclusively busy themselves with trivialities of this nature, as will the police and the district surgeons' (my translation)

Snyman[31] further states that from the point of view of policy it is undesirable that the administration of criminal justice, which is already overloaded, should be burdened with the adjudication of trivial charges. He notes further that the reason for the recognition of the *de minimis* defence is based on the practical demands of the administration of justice.

3 Intent

The third factor is that of intent, in that the reasonableness of the situation to which the maxim is to be applied is considered, and the presence or absence of intent is indicative of whether the accused's actions can be considered reasonable. In the most recent case in which the *de minimis* maxim was considered in some detail, *S v Visagie*,[32] the assault conviction flowing from an incident in a mechanical workshop was overturned. The court examined a number of cases where it was contrary to public policy to allow the operation of the *de minimis* rule, and then concluded that the case at hand was not of the same ilk. The court, noting that provocation could be considered as a possibly important circumstance in arriving at a value judgment as to whether or not, all circumstances considered, the gravity of the matter warrants

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[29] 1971 (4) SA 28 (T).
[30] At 29F-G.
[31] Snyman 2002 TSAR 139 141.
[32] 2009 (2) SACR 70 (W). See also *R v Van Vuuren* 1961 (3) SA 305 (E).

the court's attention, held that the *de minimis* rule was applicable and overturned the conviction.

4 Value

Another factor to be taken into account is value. In some cases it may seem as if value is the only factor to be considered,[33] but as Veech and Moon note, if value were the only factor this would lead to the case law being in conflict and confusion.[34] Moreover, value is an indefinite term, and the focus in *de minimis* cases is less on the value per se, as opposed to the reasonableness of the interpretation of the rule of law involved:

> 'Thus the values are often expressed in terms of money, distance, weight, time or other quantitative terms because there is no other way to designate them, but the means must not be confused with the end.'[35]

The question of value has arisen in relation to malicious injury to property and theft. In respect of the first crime, in *R v Dane*[36] the court applied the *de minimis* rule to a case where the cause of complaint was the trimming of a hedge between the properties of the complainant and the appellant. (Holmes J, always quotable, said that the prosecution had made a mountain out of a mole-hill.) Similarly, in *S v Windvogel*[37] the court held that, in the light of the trivial damage caused by the stones thrown onto the complainant's roof, the *de minimis* rule applied, and the conviction was set aside.

With regard to theft, the leading case dealing with the *de minimis* maxim is that of *S v Kgogong*[38] where it was held that the theft of a piece of paper was a trivial matter. The court regarded the paper as scrap paper, and so assigned no value to it, setting aside the conviction. It bears noting that where the stolen pieces of paper were in fact blank cheques, it was held that the *de minimis* rule did not apply.[39] It is interesting that in the labour law context it was held by the Labour Court in *Shoprite Checkers (Pty) Ltd v CCMA*[40] that the theft of bones worth R1 could not be regarded as *de minimis*, and the dismissal was upheld.

[33] This is Labuschagne's criticism of the *Tshabalala* case (2002 (1) SACR 605 (W)) (at 2003 THRHR 459).
[34] Supra (n1) 558.
[35] Supra (n1) 560.
[36] 1957 (2) SA 472 (N).
[37] [2007] JOL 19378 (E).
[38] 1980 (3) SA 600 (A).
[39] *S v Murbane* 1992 (1) SACR 298 (NC); *S v Nedzamba* 1993 (1) SACR 673 (V).
[40] [2007] JOL 17267 (LC).

In conclusion, the discussed factors may thus be employed to assist the court to answer the question as to whether it is appropriate to prosecute the accused in the light of the facts of the case, and in particular, whether the facts disclose that the charge is too trivial to warrant the condemnation of conviction. Where the court finds that the *de minimis* rule finds application, it is in essence adjudicating that the prosecutorial discretion entrusted to the Director of Public Prosecutions has been improperly exercised. As indicated earlier, the abuse of prosecutorial discretion in improperly instituting prosecutions in trivial cases is purely and simply a misuse of the enormous power vested in the state in so far as the criminal process is concerned. Such discretion must be exercised cautiously and thoughtfully,[41] lest prosecution become persecution.[42] The rights of the accused are at stake.

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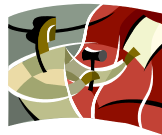

Matters of Interest to Magistrates

Media Release for the Third National Schools Court Competition October 201-August 2013

The second South African National Schools Moot Court Competition was held during 2011 and 2012, with the final round being held in the Constitutional Court on 29 April 2012. Based on a countrywide essay competition, a total of 77 teams were selected to compete in the nine provinces in March and April 2012 for the provincial oral rounds. The four best teams per province were selected for participation in the semi-final oral rounds, which took place at the University of Pretoria, directly before the final round. The Deputy Ministers of Basic Education and Justice and Constitutional Development spoke at the opening and closing ceremonies, respectively. There was wide participation from the legal profession and from Law Faculties from other Universities.

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[41] See Richings 1977 SACC 143; Nairn 1978 SACC 86
[42] Snyman 1980 SACC 313.

The Deputy Minister of Basic Education, Mr Enver Surty, emphasised the significance of the Moot Court in educating the youth, as he contended, “While we have a first class Bill of Rights which we could be proud of there were still many constitutional challenges to be taken on. The youngsters were the future of the country and it was up to them to take on these challenges, whether they one day decided to become lawyers or politicians or pursued other careers. Through the Constitution we strive towards equality for all whether it be in terms of race, gender or class.”

The Deputy Minister of Justice and Constitutional Development, Mr Andries Nel confirmed the importance of an event of this nature, as he emphasised the following, “We hope that through initiatives such as this Moot Court Competition we have begun a process to build unity and harmony between the different and diverse sections of South African society by promoting, protecting and appreciating the constitutional values. That indeed we have laid the groundwork for the ongoing realisation of all South Africans”.

The Universities of Pretoria, Venda, the Western Cape, CLASI at the University of Cape Town and the Departments of Justice and Constitutional Development and Basic Education, the South African Human Rights Commission and the Foundation for Human Rights will be presenting the third annual National Schools Moot Court Competition for senior learners (grade 10 and 11 in 2012) in all secondary schools in South Africa.

The Department of Basic Education is taking full responsibility for liaison with the schools and organisation of the provincial oral rounds. The Law Faculties will be taking responsibility for the legal aspects and the final round of the Competition.

The moot will be held during 2012/13, with the provincial oral rounds taking place in May and June 2013 and the semi final and final rounds taking place on 9-11 August 2013. The initiative enjoys the support of other law faculties, the organised legal profession and the judiciary.

The Competition is aimed at creating greater awareness of the Constitution of the Republic of South Africa, 1996 and the values that it embodies. The focus will be on schools and communities. This Competition will also provide a unique opportunity for learners to consider a career in the field of law.

Professor Christof Heyns, UN Special Rapporteur on extrajudicial, summary or arbitrary executions OHCHR is of the opinion that “the Schools Moot has proven itself to be a highly enjoyable as well as an educational way of promoting the values of our Constitution among learners and their communities. We hope that it will expand to reach all schools in the country. This is how we can make our society work for all of us”.

A Moot is a role-play exercise in which participants play the role of lawyers in a fictional court case.

All secondary schools in South Africa are invited to enter a team of two learners, preferably one male and one female. A fictional problem involving a constitutional issue is set. Learners are expected to write two short essays setting out the opposing sides of the case. The essays will be evaluated by a panel of experts.

The best nine submissions in each of the nine provinces will be identified and the selected learners will be invited to participate in person in the provincial oral rounds, in the nine provinces, in May and June 2013.

The best four teams from each province will then participate in the national oral rounds in Pretoria in August 2013. The two winning teams with the highest scores will compete against each other to determine an overall winning team in the final round on 11 August 2013.

Participants will also be given the opportunity to attend lectures on the Constitution and to visit places of significance to the South African history in August 2013.

The language medium will be English, but participants will be allowed to use any official language in the final round.

The Schools Moot provides a singular opportunity for the entire legal profession of the country to be engaged with the promotion of the Constitution and of the role of the law in our society. It is hoped that practising attorneys, magistrates, law graduates, law clinics and university lecturers and students will reach out to schools in their neighbourhood and encourage them to participate – and provide assistance to the learners who are interested in participating in the Competition. It is hoped that schools who do not normally participate in such events will also take the opportunity – there is room for everyone.

For more details on the competition, please see www.up.ac.za/law. The website will be up and running from October 2012. Alternatively contact the organiser, Cherryl Botterill, at cherryl.botterill@gmail.com for more information.

Family Court Matters

PARENTAL RESPONSIBILITIES AND RIGHTS

CHILDREN'S ACT 38 OF 2005

What are parental responsibilities and rights?

Section 18(2) of the Children's Act, 38 of 2005 (herein after 'the Act') defines parental responsibilities and rights as follows:

"*(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-*

(a) to care for the child;

(b) to maintain contact with the child;

(c) to act as guardian of the child; and

(d) to contribute to the maintenance of the child."

A person may have either full or specific parental responsibilities and rights. (s 18(1))

How are parental responsibilities and rights obtained?

- Birth. The natural mother of a child, who is herself a major, obtains full parental responsibilities and rights when her child is born.
- Marriage.
- Operation of the law:
  - s 21(1)(a) and (b)(i)-(iii)
  - s 22 parental responsibilities and rights agreements
  - s 23 court orders for care and contact
  - s 24 court orders for guardianship
  - s 27 assignment in a will
  - Adoption orders

How are parental responsibilities and rights lost?

- Death
- Attainment of majority
- Operation of the law:
    - s 28 court order / high Court orders
    - Adoption

PARENTAL RESPONSIBILITIES AND RIGHTS IN THE CHILDREN'S COURT

Who are the applicants?

The applicants in these matters are usually the natural fathers of children born out of wedlock.

What is the relief they want?

These applicants are more often than not people with a very limited or basic education and little or no knowledge of the law. They have heard somewhere that there is a new act on the statute book giving them access rights with regards to their children. A large number of them are also not legally represented. The relief they claim is therefore very basis: care and contact.

How do these matters come to the attention of the Presiding Officer in the Children's Court?

An applicant is required to complete Form 2 of the DOJ Regulations and to attach thereto a brief affidavit identifying himself, the respondent (who is the mother of the child), the child(ren) and a brief basis for the relief he claims.

These documents are then lodged with the Clerk of the Children's Court, who must then open a Children's Court file for the matter. The Clerk must within 5 days from receipt of the documents refer the matter to the Presiding Officer of the Children's Court.

When the file is presented to the Presiding Officer it will consist of a Form 17 (Record of Appearance), Form 2(together with the affidavit by the applicant and any other documents the applicant wished to attach to the Form 2.)

What must the Presiding Officer do on receipt of the file?

The Presiding Officer must, within 7 days from receipt of the file, peruse the contents thereof and either allocate a date for the hearing of the matter or refuse the matter on the roll.

If the Presiding Officer is satisfied that the matter is one over which the Children's Court has jurisdiction she/he must allocate a date for hearing the matter and note it on the Form 17, together with instructions to the Clerk to issue Form 4 Notices to Appear to the applicant and respondent. The respondent's Notice must also state whether attendance of the child is required or not. The notice to the respondent must also be accompanied by a copy of the Form 2 and all the documents attached thereto, so as to inform the respondent of the basis of the case she/he will be facing in court.

The Presiding Officer may also authorize a person or group of persons to serve the Form 4 Notices. This authority may be used to authorize members of the SAPS to serve these documents, thereby saving time and money it would have cost for service through a Sherriff of the Court. If such a person or group of persons are authorized it must be noted on the Form 17 record.

Once the Presiding Officer has made the rulings described above, the file must be returned to the Clerk of the Court to comply with the instructions of the Presiding Officer.

<u>What happens on the day of the first appearance (hearing)?</u>

As with all Children's Court proceedings these matters are heard *in camera*. Because of the nature of the proceedings it is advised to conduct these matters in chambers where there is a more relaxed atmosphere than in a court room.

The Presiding Officer should, as far as possible, without losing objectivity, attempt to create a relaxed atmosphere in which the parties would be more inclined to set aside their own differences and work amicably towards a speedy solution that would be in the best interests of the child.

The Presiding Officer should bring it to the attention of the respondent that she is not brought before court to humiliate her or the child or because either one has done something wrong, but that the purpose of the hearing is to determine the extent of the applicant's parental responsibilities and rights (if any) and to assist them to have a structure regulating the manner in which rights may be obtained and, where applicable, have a plan setting out how they will together exercise their respective responsibilities and rights with regards to their child.

After explaining the nature and purpose of the proceedings to the parties the Presiding Officer must also explain the right to legal representation to the parties, and postpone the proceedings, if necessary.

<u>What happens during the hearing?</u>

Before any consideration can be given to a possible order it is necessary to determine whether or not the applicant already has any parental responsibilities and rights.

The Presiding Officer can informally enquire from both parties whether the conditions referred to in sections 20 and 21 have been met.

If both parties are in agreement that the requirements have been met, it means the applicant has already acquired full parental responsibilities and rights. He and the mother (respondent) are thus co-holders of parental responsibilities and rights. This is a status he acquired not because of any court order, but by operation of the law.

In these circumstances it is necessary for the parties to decide how they are going to exercise their parental responsibilities and rights. They will be required to draw up a parenting plan.

What is a parenting plan?

A parenting plan is a written agreement between the parties wherein both recognise the fact that they are co-holders of parental responsibilities and rights and wherein they say how they will be exercising these responsibilities and rights.

In terms of s 33(3) of the Act a parenting plan may determine any matter in connection with parental responsibilities and rights, including maintenance.

If the parties indicate they would be able to work out a parenting plan on their own the matters should be adjourned for them to draw up such a plan and to present it to the Court in the prescribed manner.

Should the parties indicate they would not be able to draw up a parenting plan without assistance the matter should be adjourned for the parties to seek assistance and mediation as prescribed in s 33(5) of the Act. In these circumstances the Presiding Officer may assist by referring the matter to the local Family Advocate.

What happens if there is a dispute regarding the s 21 requirements?

If there is a dispute as to whether the requirements in s 21 have been met the matter must be adjourned and the dispute must be referred to a person referred to in s 21(3) for mediation.

In most cases in Johannesburg this means referral to the Family Advocate.

The Family Advocate will draft a report for the Court on the mediation process and provide the Court with a Statement of Outcome of Mediation (Form 6)

If the dispute becomes resolved during the mediation the matter will proceed to the next step which is a parenting plan or parental responsibilities and rights agreement.

Where the dispute does not become resolved the Court will have to conduct a hearing to determine whether or not the requirements have been met.

What happens if the s 21 requirements have not been met?

If the requirements in s 21 of the Act have not been met the applicant did not acquire parental responsibilities and rights. Such a person can be given parental responsibilities and rights by the mother of the child or another person who has parental responsibilities and rights in respect of the child. In these circumstances parental responsibilities and rights are conferred by means of a parental responsibilities and rights agreement.

What is a parental responsibilities and rights agreement?

A parental responsibilities and rights agreement is a written agreement that complies with the prescribed requirements. (See s 22(3) read with regulation 7 of the DSD regulations)

A person with parental responsibilities and rights may confer as many or little parental responsibilities and rights she/he wants to, but may not confer more rights than what that person has. So for instance would it be possible for a mother with full parental responsibilities and rights to confer full parental responsibilities and rights on a father, but a grandmother, for instance, to whom contact rights were given cannot confer 'care' of the child.

Where guardianship forms part of the parental responsibilities and rights agreement the Children's Court does not have jurisdiction to make it an order.

Parental responsibilities and rights agreements are not restricted to only the parents or family of a child. Many people may at the same time have full or specific parental responsibilities and rights in respect of the same child.

Can a mother be forced to enter into a parental responsibilities and rights agreement?

It is submitted that nobody, not even a Court, can force a mother or other person with parental responsibilities and rights to confer rights on the biological father of the child or anybody else.

Where the mother refuses to confer parental responsibilities and rights an application must be brought in either the High Court or Children's Court, depending on the scope of parental responsibilities and rights applied for.

It is respectfully submitted that the recent case of **M v V(born N) [2011] JOL 27045 (WCC)** is not authority for the view that a Court can force a mother to enter into a parental responsibilities and rights agreement. At best a Court can compel a mother

to consider entering into such an agreement. To hold differently would defeat the essence of an agreement, to wit, a meeting of minds.

What other orders may be given?

In terms of s 23 of the Act 'care' and 'contact' may be assigned to an interested person.

Section 24 of the Act gives the High Court the same powers with regards to guardianship too.

Both these orders should only be granted if it is in the best interests of the child in question.

W J Britz

Additional Magistrate: Johannesburg

A Last Thought

"[4] I am respectfully of the view that drastic approaches are sometimes called for as was adopted by the Supreme Court of Appeal in New Clicks South Africa (Pty) Ltd v Minister of Health and another 2005 (3) SA 238 (SCA) at pages 249 – 250, paragraphs [5] – [8]. In this regard it was stated in paragraph [31]:

"The Supreme Court Act assumes that the judicial system will operate properly and that a ruling of either aye or nay will follow within a reasonable time. The Act – not surprisingly – does not deal with the situation where there is neither and a party's right to litigate further is frustrated or obstructed. The failure of a lower Court to give a ruling within a reasonable time interferes with the process of this Court and frustrates the right of an applicant to apply to this Court for leave. Inexplicable inaction makes the right to apply for leave from this Court illusory. This Court has a constitutional duty to protect its processes and to ensure that parties, who in principle have the right to approach it, should not be prevented by an unreasonable delay by a lower court. In appropriate circumstances, where there is deliberate obstructionism on the part of a Court of first instance or sheer laxity or unjustifiable or inexplicable inaction, or some ulterior motive, this Court may be compelled, in the

spirit of the Constitution and the obligation to do justice, to entertain an application of the kind presently before us."

[5] In my respectful view, judges ought not to be the cause for the adage, "justice delayed, is justice denied" to apply to any case. The rendering of judgment within a reasonable time is not merely a matter of courtesy towards the litigants – the public's respect for the administration of justice is at stake. It was stated more than half a century ago:

"Much more than a matter of courtesy is involved. By such conduct the administration of justice is hampered, and may be seriously hampered, by an arbiter of justice himself, whose responsibility it is to render it effective and not add judicial remissness to its already irksome delays."

As per Claassen J in *Myaka and 2 others v the State 2012 SA (GSJ)*