e-MANTSHI

A KZNJETCOM Newsletter

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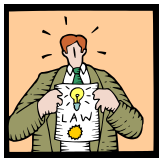
Welcome to the eighty third issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Social Development in terms of section 56(3)(a) of the Child Justice Act, 2008 (Act No. 75 of 2008), published particulars of accredited diversion programmes in the schedule. This notice was published in Government Gazette no 35916 of 27 November 2012
The notice covers diversion programmes and diversion service providers that are granted an accredited status.
Diversion programmes and diversion service providers that have been granted candidacy status, have received certificates and are allowed to operate, based on condition(s) set by the accrediting committee. The Policy Framework on Accreditation of Diversion Services in South Africa defines candidacy status as a 'pre-accreditation status, awarded to an organisation pursuing accreditation... Candidacy indicates that an organisation or programme has achieved recognition and is progressing towards receiving full accreditation, and has the potential to achieve compliance with standards within two years'.
SECTION 56(3) (a) of the Child Justice Act 75, 2008

ACCREDITED DIVERSION PROGRAMMES:
NORTH WEST PROVINCE:

NAME OF ENTITY	REG. NUMBER	OPERATIONAL SITE	PROGRAMME	STATUS AWARDED
1. Bosasa	Reg no: 2003/002608/07	Matlosana Secure Care Centre 21591 Benji Olifant Road, Jouberton 2574	Substance abuse programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.
		Matlosana Secure Care Centre 21591 Benji Olifant Road, Jouberto 2574	Life Skills Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.
		Matlosana Secure Care Centre 21591 Benji Olifant Road, Jouberton 2574	Sex Offender Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.

2. Bosasa	Reg no: 2003/002608/07	2461 Unit 5 Mmabatho 2735	Behavioural Modification Based Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.
		2461 Unit 5 Mmabatho 2735	Sex Offender Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.
		2461 Unit 5 Mmabatho 2735	Substance Abuse Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.
		2461 Unit 5 Mmabatho 2735	Psycho-Emotional Based Programme	Accreditation status granted, in line with Section 56 (2) (f) of the

				Child Justice Act 75 / 2008 for four (4) years, from 31October 2012.

SECTION 56(3) (a) of the Child Justice Act 75/2008
ACCREDITED DIVERSION PROGRAMMES:
GAUTENG PROVINCE:

NAME OF ENTITY	REG. NUMBER	OPERATIONAL SITE	PROGRAMME	STATUS AWARDED
1. Teddy Bear Clinic	023-286-NPO	Parktown TMI Building 13 Parktown 2193	Support Program for Abuse Reactive Children	Accreditation status granted in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.

SECTION 56(3) (a) of the Child Justice Act 75/2008
ACCREDITED DIVERSION PROGRAMMES:
EASTERN CAPE PROVINCE:

NAME OF ENTITY	REG. NUMBER	OPERATIONAL SITE	PROGRAMME	STATUS AWARDED
1. Bosasa-Sikhuseleki le Child Youth Care Centre	Reg no: 2003/002608/07	Corner Stanford Terrace & Elliot Mthatha 5099	Whitney's Kiss Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.
		Corner Stanford Terrace & Elliot	Bright Star Programme	Accreditation status

		Mthatha 5099		granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.
		Corner Stanford Terrace & Elliot Mthatha 5099	Bridges to Life Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.
		Corner Stanford Terrace & Elliot Mthatha 5099	Aggressive Replacement Training	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.
2. Nicro	003-147	12 Webb Street Southernwood East London 5200	Restorative Justice Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008

				for four (4) years, from 31 October 2012.

SECTION 56(3) (a) of the Child Justice Act 75/2008
ACCREDITED DIVERSION PROGRAMMES:
WESTERN CAPE PROVINCE:

NAME OF ENTITY	REG. NUMBER	OPERATIONAL SITE	PROGRAMME	STATUS AWARDED
1. Creating Effective Families	010-933-NPO	Elhof Rylaan D-Almeada Mossel Bay 6506	My Life My Choice: Therapeutic Life Skills Programme	Accreditation status granted in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.
2. Outward Bound	003-590-NPO	42 Green Point Avenue Plettenburg Bay 6600	Life Skills and Development: Adventure Based Experiential Learning Education	Accreditation status granted in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 31 October 2012.

SECTION 56(3) (a) of the Child Justice Act 75/2008
ACCREDITED DIVERSION PROGRAMMES:
FREE STATE PROVINCE:

NAME OF ENTITY	REG. NUMBER	OPERATIONAL SITE	PROGRAMME	STATUS AWARDED
1. Nicro	003-147-NPO	3 Piet Human Street Bloemfontein 9300	Journey Programme	Accreditation status granted in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four

				(4) years, from 31 October 2012.

Recent Court Cases

1. S v MBATHA 2012 (2) SACR 551 (KZP)

An accused who has cultivated dagga (even if it was only for his personal use) is guilty of dealing in dagga in contravention of section 5(b) of Act 140 of 1992.

"Gyanda J

[1] In this matter, the accused, Selby Nhlanhla Mbatha, was charged in the Magistrates' Court for the District of Dundee on the main count of dealing in dagga in contravention of the provisions of Section 5(b) read with Sections 1, 13(f), 17(e), 18, 19, 25 and 64 of the Drugs and Drug Trafficking Act, No. 140 of 1992, in that on or about 14 January 2011 and at or near Dlamini Village in the District of Dundee, he did wrongfully and unlawfully deal in an undesirable dependence producing substance, to wit Cannabis (Dagga) in the quantity of 3.45 kg; 6.50 grams and 15.5 grams. In the alternative the accused was charged with contravening Section 4(b) read with Sections 1, 13(d), 17(d), 18, 19, 25 and 64 of the Drugs and Drug Trafficking Act, No. 140 of 1992 for unlawful possession of dagga in that on or about 14 January 2011 and at or near Dlamini Village in the District of Dundee, the accused did wrongfully and unlawfully have use or have in his possession an undesirable dependence-producing substance, to wit Cannabis (Dagga), in the quantity of 3.45 kg; 6.50 grams and 15.5 grams.

[2] The accused, who was unrepresented, pleaded not guilty to the main count but pleaded guilty to possession of the dagga because he smoked it. The State did not accept the plea of the accused on the alternative count and proceeded to trial on the main count. The State called the evidence of Sonesh Singh, a Warrant Officer in the South African Police Services, stationed at the Glencoe Dog Unit, who testified that on 4 January 2011, he proceeded to the home of the accused in the company of one Constable Ndima as a result of information received. They proceeded to the home of the accused armed with a warrant to search the premises.

[3] On searching the premises of the accused, subsequent to obtaining his permission to search the said premises, the police found a parcel of loose dagga in a clear plastic wrapping alongside the bed. On proceeding with their search outside the premises alongside the house, a clear bread plastic packet containing dagga seeds were found. In addition, they also found a newspaper bundle with a few loose dagga in it. On further searching the yard of the premises next to the house, they found a fully grown dagga tree.

[4] According to the evidence of Warrant Officer Singh, one could see that the tree had been taken care of as it was cleaned and maintained and there were no weeds in the yard. Moreover, the yard was well fenced and there is an access gate allowing access into the premises. The accused was taken with the dagga found, to a pharmacy where the dagga was weighed and thereafter to the offices of the South African Police Services at Dundee where the dagga was handed into evidence into the SAP13 register.

[5] The evidence led by the State in this regard was not challenged at all by the accused in cross-examination in spite of his rights thereto having being adequately explained to him. At the close of the State case and upon his rights to testify or call witnesses being explained to him, the accused elected to remain silent and stated that he wished to leave everything to the Court.

[6] The Trial Magistrate, as he was obliged to do, applied the meaning accorded to the word “cultivate” in the decision of *S v Van Zyl* 1975 (2) SA 489 (N)*, R v Potgieter* 1951(1) SA 750 (N) and *S v Buthelezi* 1968 (2) SA 750 (N) as contained in the definition of “deal in” in Section 1(1) of Act, No. 140 of 1992, and convicted the accused on the main count of dealing in dagga. The definition of “deal in” in the Drugs and Drug Trafficking Act, No. 140 of 1992 reads:-

“deal in”, in relation to a drug, includes performing any act in connection with a transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the Drug.”

The accused was sentenced to 18 [eighteen] months imprisonment wholly suspended for a period of 3 [three] years on condition that he is not again convicted of contravening Sections 5(b) or 4(b) of Act, No. 140 of 1992 committed during the period os suspension and in addition he was ordered to pay a fine of R1 000-00 [one thousand rand] or in default thereof to undergo 6 [six] months imprisonment. The dagga was declared forfeited to the State.

The case of the accused was thereafter referred on Automatic Review to Wallis, J (as he then was), who, in a Judgment dated 31 March 2011 opined that the meaning accorded to the word “cultivate” was not the ordinary meaning of the word “cultivate” which in relation to ground is essentially an agrarian term, and relates to an activity associated with agriculture, relying on the decision in *HTF Developers (Pty) Ltd v*

Minister of Environmental Affairs and Tourism and Others 2007(5) SA 438 (SCA) para7, Wallis, J stated that:-

"If the more conventional meaning is applied, the conviction would fall to be set aside."

He accordingly referred the matter for Argument before the Full Court in relation to the meaning of the word "cultivation" in the definition of "deal in" in Section 1 of the Drugs and Drug Trafficking Act, No. 140 of 1992.

[8] The definition of the term "cultivate" as contained in the forerunner to the existing Act, namely Act, No. 41 of 1971, was dealt with by the Transvaal Provincial Division consisting of, Cillié, JP and Bekker, J in the case of *S v Kgupane en Andere* 1975 (2) SA 73 (T) at 75H in the Judgment of Bekker, J, where he stated:-

"Na my mening geld die volgende: Dat ń kweker van dagga skuldig is aan "handeldryf" is nie te betwyfel nie. Hy word regstreeks getref en val binne die trefwydte van die statutêre omskrywing van "handeldryf" wat werskyn in art. 1 van die Wet. Kweek van dagga is handeldryf. Die afleiding wat gemaak moet word uit hoofde van die omskrywing van "handeldryf" gesien in die lig van die voorgeskrewe vonnis, is dat dit die bedoeling van die Wetgewer is om die nekslag toe te dien aan kweek van dagga al sou dit deur die kweker vir eie gebruik bestem wees. Met ander woorder, soos ek die artikel vertolk is die verbod gemik op die kweek van die plant ongeag vir watter doel dit ook al bestem is. Natuurlik is dit terselfdertyd dan ook so dat die kweker "in besit" van die daggaplant is en dat ń pas ontkiemde plant minder as 115 gram kan weeg. Dit egter, gesien in die lig van die omskrywing van "handeldryf" bied hom geen uitkoms nie. Die klem val nie op die woord "besit" nie maar op "kweek" van dagga, wat hom dan binne die trefwydte van handeldryf insleep."

In this particular case the Court had been dealing with a number of review cases *inter alia* the review case of the *State v Isaak Mashinini* who, like the accused in the present matter under consideration was found in possession of a solitary dagga plant and based on a similar definition of "deal in" in the 1971 Act, he was convicted of dealing in dagga and his conviction and sentence were confirmed. The Provincial Division had to deal with the selfsame query as in the case under consideration, namely whether or not the possession of one dagga plant amounted to dealing in the substance which the Transvaal Provincial Division answered in the affirmative and confirmed the conviction and sentence. It is indeed instructive that the headnote in *S v Kgupane en Andere* reads:-

"Cultivation of dagga is dealing in dagga. It is directly hit by, and falls within the scope of, the statutory definition of "dealing in" which appears in Section 1 of Act 41 of 1971. The inference must be drawn from the definition of "dealing in", seen in the light of the prescribed sentence, is that the intention of the Legislature to put an end

to the cultivation of dagga even though it was intended by the cultivator for his own use. *(my underlining).* The prescribed sentence must then be imposed. The escape which Section 10 (1)(b) offers the accused is, for example, the possibility of persuading the Court that he was not in fact the cultivator of dagga."

[9] In this regard, counsel for the State also referred us to the decision in *State v Guess* 1976 (4) SA 715(A)*,* a decision of the Appellate Division (as it then was) , a decision of Joubert, AJA, in which Holmes, JA and Trollip, JA concurred, where the Appeal Court had to deal with the definition of the word "cultivate" or "cultivation" as they appeared in the preceding Act, namely Act, No. 41 of 1971 as amended. In his Judgment at page 717, Joubert, AJA stated:-

In cases dealing with "cultivation" of dagga plants, our Courts have accepted the word, "cultivate" as ordinarily meaning "to promote or stimulate or foster the growth of a plant by any person".

The learned Judge of appeal thereafter referred to various decisions in which this definition was accepted and applied.

[10] In the matter of *State v Guess,* however, the Court questioned whether the State succeeded in establishing beyond a reasonable doubt, the factual premises so as to give rise to the presumption contained in Section 10(1)(b) that the appellant dealt in 85 dagga plants in contravention of Section 2(a) of the Act and, if so, whether the appellant succeeded in rebutting the presumption by proving on the balance of probabilities that he did not cultivate the dagga plants. The Court concluded that the State proved beyond a reasonable doubt that the appellant was in possession of the dagga plants and therefore the Court *a quo* ought to have properly convicted him of the alternative charge under Section 2(b) of having being in possession of 85 dagga plants and not of dealing therein.

[11] In the light of the aforegoing it must be presumed, therefore, on the so called "Barras" Principle, that the legislature, when they enacted current Drugs and Drug Trafficking Act, No. 140 of 1992 must have been aware of the definition accorded to the word "cultivate" in the decisions referred to above, more especially the decision of the Appellate Division in *S v Guess* and, therefore, they must have accepted that that definition would apply to the word "cultivation" as it appears in Section 1(1) of the present Act or they would have stated otherwise. The "Barras" Principle, as it has become to be known, is the decision in the House of Lords and the Privy Council in the case of *Barras v The Aberdeen Steam Trawling and Fishing Company, Limited*, as reported in the 1933 English Law Reports, Appeal Cases at pages 402 where the Court dealing with the definition of the word "wreck" stated that:-

"… on the ground of the word "wreck" having being used in the Act of 1894 and having received a judicial interpretation must, when used in the same context in the Act of 1925, bear that interpretation unless a contrary meaning is indicated …"

The principle of interpretation in the *Barras* decision, (although it was not specifically referred to), was followed by the Appellate Division (as it then was) in the matter of *The Minister van Justisie v Alexander* 1975 (4) SA 530 (A) at 550 in the Judgment of *Corbett JA* where he stated:-

"It is one of the canons of statutory interpretation that the Legislature is presumed to know the existing state of the law: and from this presumption arises the rule that a statute must be interpreted in the light of the existing law (see *Steyn*, op. cit., pp. 105, 139, xliv; Craies on Statute Law, 7th ed., pp. 96 – 8."

[12] I am of the view therefore, that in spite of the sympathy that may be felt for a user of dagga planting a single dagga plant for his own use to be convicted of dealing in dagga rather than possession thereof, as stated by Bekker, J, in *S v Kgupane en Andere* it is quite clear that the intention of the Legislature was that in its pursuit of the sharks that unfortunately some minnows may be caught in the same net.

[13] It is instructive, in this regard, that the State of Maine in the United States in it's statutory definition of "cultivation" defines it as:-

"to grow a seed; to grow, raise or tend to a plant; to harvest a plant; or to knowingly possess a plant." (No. 10 – 1281. – *McGuire v Holder* – US First Circuit as quoted in Findlaw for English Professionals."

In view of the foregoing and in spite of the definition accorded to "cultivate" by Combrink, JA in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* where he stated:-

" 'Cultivate' in relation to ground is essentially an agrarian term and relates to an activity associated with agriculture. There is no reason why the primary meaning should not be applied considering that the Act makes serious inroads on the rights of owners."

That definition in my view, is not applicable to the present case as it clearly applied in a different context to the present case wherein the word "cultivate" has, as already been seen been dealt with and defined by our Courts directly on point in relation to its applicability to the Drugs and Drug Trafficking Act more especially dealing therein.

[14] It has been argued that a proper interpretation to be attached to the word "cultivate" would be the Oxford dictionary one, meaning:-

"raise or grow (plants) especially on a large scale for commercial purpose"

on the basis that such a definition would do justice to the case of a dagga user who grew a solitary plant to satisfy his own needs and cannot really be deemed a dealer. This in my view, is merely based on the sympathy felt for a user who is not in actual fact a dealer. To put into perspective this attitude one would have to, in due course, extend this "extended definition" to the situation of a manufacturer of mandrax or cocaine who has a laboratory at home and manufactures small amounts for his own consumption. This could definitely never have been the intention of the Legislature. It is abundantly clear that the intention of the legislature was to stop the production and supply of drugs when it enacted Act No. 140 of 1992 and defined "deal in" as it did in Section (1) of the Act.

The circumstances in relation to drug users found in the position of the accused herein are factors that may be relevant only to the question of the sentences to be imposed.

[15] I am of the view, in all the circumstances, that this Court cannot come to the assistance of a user of dagga who cultivates a dagga plant for his own personal use, in the light of the definition of "dealing in" to say that in as much as he did not cultivate it for the purposes of dealing in the substance but for his own use and possession, he should therefore not be convicted of dealing in dagga.

[16] In my view, would be wrong as his act of cultivation falls full square within the definition of the phrase "dealing in" in the Act and he has, in my view, correctly been convicted of dealing in dagga."

2. S v MOLEFE 2012(2) SACR 574 (GNP)

If an accused places the body of her child in a bucket at her house it is not enough for a 'disposal' of a body of a child in a contravention of section 113(1) of Act 46 of 1935.

"Rabie J :

1. The accused, an adult female, was convicted in the Magistrates' Court of Bloemhof on a charge of contravention of section 113 (1) read with section 113 (2) and (3) of the General Law Amendment Act 46 of 1935 in that she had unlawfully and with the intent to conceal the fact of the birth of a child, attempted to dispose of the body of the said child.

2. The accused pleaded guilty and in a statement in terms of section 112 (2) of the Criminal Procedure Act, the accused stated the following:

1. I am voluntarily pleading guilty to the charge to me attempt to conceal birth, Act 46 of 1935.

2. On or about 3-4 October 2009 at Bloemhof, district Bloemhof, I unlawfully with intent to attempt 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 at my house. The child was prematurely born and was dead at birth.

3. I know my actions were wrong and unlawful. I have remorse for my actions."

3. Before convicting the accused the Magistrate enquired from the prosecutor whether the Director of Public Prosecutions had authorised the prosecution in writing as required by section 113(3) of the General Law Amendment Act, Act 46 of 1935 ("the Act"). The matter stood down and was then postponed and on resumption the prosecutor informed the court that no written authorisation existed but that the Director of Public Prosecutions had given verbal permission for the prosecution to proceed. The prosecutor submitted that verbal permission constitute compliance with section 113 (3) of the Act. The Magistrate thereupon found the accused guilty but also referred the matter for special review regarding the issue as to whether the permission to prosecute can be verbal or whether it should be writing. The Magistrate was not convinced of the validity of the prosecution.

2. Senior State Advocate A.J. Fourie wrote an opinion with which Deputy Director of Public Prosecutions, Advocate M van Vuuren, concurred. I am indebted to these advocates for their assistance and since I agree with their opinion, I shall repeat much of what is contained in the opinion.

3. Section 113 of the Act provides as follows: "Concealment of birth of newly born child

(1) Any person who, without a lawful burial order, disposes of the body of any newly born 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 or to imprisonment for a period not exceeding three years.

(2) 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.

(3) The institution of a prosecution under this section must be authorised in writing by the Director of Public Prosecutions having jurisdiction.” (my underlining)

4. The State Advocates were of the view that given the unequivocal requirement that the authorisation must be in writing, the mandatory prerequisite for the prosecution was not adhered to in casu. It was submitted that although it might be argued that failure to obtain written authorisation prior to a prosecution can be (or was in this instance) ratified by the Director of Public Prosecutions, the conviction ought nevertheless to be set aside not only as a result of the procedural omission but also for other reasons.

5. Regarding the issue of written authorisation it does not appear, even if it were to be possible, that there had, in casu, been a written authorisation ratifying the institution of the prosecution prior to conviction. Consequently the accused could not have been prosecuted and the conviction should be set aside.

6. Regarding the aforesaid other reasons why the conviction should be set aside, the following may be referred to: Firstly, section 113 (1) of the Act makes it an offence to "... dispose of the body of a child..." with the intent to thereby conceal the birth of a child. According to the plea explanation quoted above, the accused, however, only admitted that she lied to a sister at the clinic about the fact that she gave birth. She specifically stated that "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 at my house."

7. It was submitted that the essence of the offence is the "disposal" or "attempted disposal" of the body of a child. In casu there was no admission by the accused that she either disposed or attempted to dispose of the body. The Magistrate could therefore not have been satisfied that the accused admitted all the essential elements of the offence. In this regard it was submitted that the act of "disposing" calls for some act or measure of permanence and not just placement for all to see. In *R v Dema* 1947(1) SA 599 (E) Pittman JP found on the issue as follows:

"Now, the provision of the law, sec. 113 of the General Law Amendment Act 46 of 1935, which defines the crime with which accused stands charged, uses the word 'disposes' to describe the act constituting it. And when it speaks of 'disposing' of the body we think it means an act involving some measure of permanence. Merely to place a body on the floor or on a table or bed is not in the requisite sense to 'dispose' of it. The body to be 'disposed of must be put or placed in some place where it is intended by the party placing or putting it there that it should remain. Here the evidence shows that accused put the child's dead body in the box; we are satisfied that she did, but it, the evidence, does not convince us that doing so she meant the body to remain there for any time. The box was fully exposed to view. Anyone entering the room would see it, as the witness Nokampi did, and seeing it would in the circumstances be led to open it. The act relied upon as a disposition of the body is not in our view a disposition in the sense intended by the legislature. In the case relied upon by the *Crown of Rex v Smith* {1918 CPD 260) the facts went far more strongly to establish a disposition of the body. Here we are not satisfied that there was a disposition on accused's part and we find her not guilty."

8. It was submitted by the State Advocates that the admission by the accused that she had lied to the sister at the clinic does not allow for the inference that she thereby attempted to dispose of the body. Reference was made to *S v D* 1967(2) SA 537 (W) wherein it was remarked that it is notorious that many mothers of newly

born children are under considerable physical and mental stress and are unable to act with the calm and balanced judgement which the circumstances require.

9. I agree with all of the aforesaid but it goes further. The evidence before the court, which only consisted of the admissions by the accused, does not prove a disposal of the body nor of an attempt to do so. The accused may have formed an intention to dispose of the body of the child but her actions to that point do not constitute a disposal or an attempt to do so. The lie which she told to the sister at the clinic does not, by itself, constitute a disposal of the body or an attempt to do so.

10. The second reason why the State Advocates do not support the conviction is based on the fact that in order for a conviction to follow, there must be evidence, which includes admissions in terms of section 112 (2) of the Criminal Procedure Act, that the child (fetus) have the potential of being born alive, in other words, being a viable child. See *S v Jasi* 1994(1) SACR 568 (ZH). That matter related to an intra-uterine stillbirth fetus. In a well-researched judgement Adam J came to the conclusion that A 'child' for the purposes of section 2 of the Concealment of Birth Act [Chapter 57] which applied in that case, and which is similar to its South African counterpart, is one that has reached a stage of development, irrespective of the duration of the pregnancy, which makes the child capable of being born alive, i.e., after separation from its mother the child is able to breathe independently, either naturally or with the aid of a ventilator. As such the court could not find that a fetus younger than 28 weeks was a viable child for purposes of the section.

11. In *S v Manngo* 1980 (3) SA 1041 (V) van Rhyn CJ was concerned with an offence of concealment of birth in contravention of s 113 of Act 46 of 1935. The accused testified that she had been three months pregnant when she "gave birth to the child". Van Rhyn CJ agreed with the statement in Milton and Fuller South African Criminal Law and Procedure vol 111 at 271, and the authorities cited by the learned authors, that the offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been born a living child. He found that in that instance it was clear that the foetus could not have been considered a child in terms of the provisions of the Act and consequently set aside the conviction and sentence.

12. In *S v Madombwe* 1977 (3) SA 1008 (R) Whitaker J with whom Goldin J concurred, found that for the purpose of an offence under the Concealment of Birth Act, Chapter 57 (R), a child must be regarded as one whose birth is required to be registered in terms of the Births and Deaths Registration Act, Chapter 30 (R). It was further found that a foetus of less than 28 weeks should not be regarded as a child within the provisions of the Concealment of Birth Act.

13. It was submitted by the State Advocates that in casu there was no evidence, nor was it admitted, that the fetus found by the police was indeed older than 28 weeks

and thus a viable child. Consequently, so it was submitted, the conviction can for this reason also not be sustained.

14. I agree with this submission. The Act refers to the disposal of the body of a newly born "child". Consequently, in order to sustain a conviction, there has to be evidence before the court that the fetus had arrived at that stage of maturity at the time of birth that it might have been born a living child. In casu there was no evidence regarding the duration of the pregnancy nor of the viability of the fetus/child. All that is known is that the "child" was in fact born prematurely and was dead at birth. For this reason alone it could not be found that the accused disposed of the body of a child and consequently the conviction and sentence should be set aside."

3. S V DUMA 2012 (2) SACR 585 KZP

An order made by a district court in terms of section 114 or 116 of Act 51 of 1977 referring a case to the Regional Court is procedural in nature and the magistrate making the order is not functus officio after making the referral.

"Ndlovu J

[1] The issue arising in this matter, which was submitted by the acting regional magistrate of Verulam in terms of section 304(4) of the Criminal Procedure Act (the CPA), is whether an order made by a district court magistrate in terms of section 114 or 116, as the case may be, of the CPA referring a case for sentence by a regional court, renders the district court magistrate concerned *functus officio* to deal with the case any further, where it subsequently transpires that the referral to the regional court was erroneously made.

[2] On 4 February 2011 the accused was arraigned before the magistrate's court for the district of Verulam on two counts; in that, firstly, he unlawfully tampered with a motor vehicle without the consent of its owner in contravention of section 66(1) read with section 89 of the National Roads Traffic Act; and, secondly, he was found in unlawful possession of car breaking implements in contravention of section 82 of the General Law Amendment Act, Act 129 of 1993. The accused was legally represented at the trial and he pleaded guilty to both counts. A statement, the contents of which were confirmed by the accused, was handed up by the defence attorney in terms of section 112(2) of the CPA, amplifying the accused's guilty pleas. Thereupon the magistrate dealt with the matter in terms of section 112(1)(a) and convicted the accused on both counts as charged.

[3] However, upon the state having proved that the accused had a previous conviction of theft dated 23 June 2004 in respect of which he was sentenced to eight

years' imprisonment, conditionally released on 23 September 2008 under parole supervision until 12 January 2011, the magistrate determined that the accused, by virtue of his previous conviction, deserved punishment in excess of the jurisdiction of the magistrate's court. Hence the magistrate, citing reliance on section 116 of the CPA, stopped the proceedings and committed the accused for sentence by the regional court.

[4] When the matter came before the regional court for sentence, as envisaged by the magistrate, the acting regional magistrate opined, correctly so in my view, that since in both instances the relevant statutes prescribed for punishment which was within the jurisdiction of the magistrate's court, the matter ought not to have been referred to the regional court for sentence in the first place. It is on this basis that the acting regional magistrate submitted the matter to this court with the request that the order made by the magistrate's court be set aside and that the matter be remitted to that court for sentence by the magistrate who dealt with the matter initially.

[5] The penalties prescribed for the offences referred to in counts 1 and 2 are, respectively, "*a fine or to imprisonment for a period not exceeding one year*" and "*a fine or to imprisonment for a period not exceeding three years*". The penal criminal jurisdiction of the magistrate's court is a fine not exceeding "*the amount determined from time to time by the Minister by notice in the Gazette"* or *to imprisonment not exceeding three years*. Clearly, therefore, the penalties prescribed as maximum sentences in both instances in this case fell within the magistrate's jurisdiction and, on this basis, it was indeed an error on the part of the magistrate to refer the matter to the regional court for sentence, but the magistrate ought to have dealt with the sentencing himself.

[6] It is apparent that the acting regional magistrate assumed that the magistrate's referral in terms of section 114 was a final order which rendered the magistrate concerned *functus officio* in the matter. I do not believe that the assumption reflects the correct legal position.

[7] Sections 114 and 116 of the CPA provide, to the extent relevant:

"114 (1) If a magistrate's court, after conviction following on a plea of guilty but before sentence, is of the opinion –

(a) …..

(b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court;

(c) …

the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction.

(2) Where an accused is committed under subsection (1) for sentence by a regional court, the record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court and the plea of guilty and any admission by the accused shall stand

unless the accused satisfies the court that such plea or such admission was incorrectly recorded."

"116(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion –

(a) …

(b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishment in excess of the jurisdiction of a magistrate's court;

(c) …

the court shall stop the proceedings and commit the accused for sentence by a regional court having jurisdiction."

Since the accused was convicted on his guilty plea, it followed that section 114, and not 116 (as the magistrate recorded), was applicable in this case.

[8] The general rule is that once a court has pronounced a final judgment or order in a given matter, the court has itself no authority to correct, alter or supplement that judgment or order. In that respect the court has become *functus officio* in that its jurisdiction in the matter has been fully and finally exercised and, therefore, its authority over the subject matter has ceased. However, as it was noted by the court in *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A), not every decision which a court makes constituted a 'judgment or order' which was appealable. In certain circumstances the court's decision would only constitute a 'ruling' which was merely a direction against which there was no appeal; unless the decision disposed of a part of the relief claimed.

[9] In *Van Streepen* the court also explained that the main reason that the concept of 'judgment or order' is construed restrictively is to avoid piecemeal decision of cases, adding that:

'This is undoubtedly a very cogent consideration, particularly where the decision in question relates, for instance, to a procedural matter or to the admissibility of evidence and it may in the end not have a decisive effect upon the outcome of the case.'

[10] As was reiterated in *Van Heerden v De Kock* 1979(3) SA 315 (E), in criminal proceedings a presiding officer is not *functus officio* until after conviction and only becomes so at the point when the accused is sentenced. In the present instance the accused was only convicted but not yet sentenced. What the magistrate did was only to give a direction into the future conduct of the case, namely, to refer the matter to the regional court for the accused to be sentenced by that court. This direction was clearly not a final judgment or order which finally disposed of the case but was, in my view, only a ruling, capable of subsequent reconsideration, alteration or amendment by the magistrate.

[11] It seems to me, therefore, that the district magistrate's decision or referral under section 114 or 116 of the CPA is merely a ruling of a procedural nature seeking to direct the future conduct of proceedings in a given case. In no way does this decision dispose, or seek to dispose, of the case. Consequently, the decision does not, in my view, constitute a final judgment or order and no appeal lies against it. Accordingly, the presiding officer who made the decision is not, as I see it, rendered *functus officio* in the matter.

[12] It ought to be borne in mind that no amount of previous convictions is, in respect of a statutory offence, capable of increasing the maximum sentence prescribed by statute, regardless of the penal jurisdiction of the sentencing court. In other words, even if the regional court, in the present instance, had decided to proceed and deal with the matter it would still have had no power to impose any sentence beyond the maximum penalties prescribed by the relevant statutes under which the accused was charged and convicted.

[13] Every court is obliged, in determining an appropriate sentence, to take into account previous convictions that have been proved against an accused. However, the relevance and importance of the previous convictions so proved will largely depend upon the elements which the previous crimes have in common with the one that the accused is currently convicted of. Whether or not the previous conviction of theft is 'relevant and important' in relation to the accused's present convictions is another question, which I think is to be better left in the hands of the magistrate to determine. It seems to me that the appropriate step for this court to take, in the circumstances, is to issue the necessary declaratory orders and refer the matter back to the magistrate for sentencing of the accused, in the hope that regional magistrates shall in the future not need to refer matters such as this one to the high court, as it happened here. In the event of the magistrate who convicted the accused being not available, any other magistrate of the same court shall, by virtue of section 275(1) of the CPA, have the power to deal with the matter accordingly.

[14] In the consequence, the following order is made:

1. The conviction of the accused is confirmed.
2. It is declared that the provisions of section 114 of the Criminal Procedure Act 51 of 1977are not applicable in this case.
3. It is further declared that the magistrate's court for the district of Verulam has the requisite penal jurisdiction to deal with the matter.
4. The matter is remitted to the magistrate to give effect to the order referred to in paragraph 3 above; and, in the event of the magistrate who convicted the accused being unavailable, the matter shall be dealt with by any other magistrate of the same court, in terms of section 275.
5. The magistrate shall, amongst others, take cognizance of any period during which the accused was incarcerated, both prior and after his conviction, when determining the appropriate sentence."

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2012 SACJ 297

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Contributions from the Law School

Permanent heterosexual life partnerships – some recent changes

There is no reciprocal duty of support that arises by operation of law between permanent heterosexual life partnerships. This has always been the position in common law and our highest courts have confirmed this.

In the case of *Volks NO v Robinson* 2005 (5) BCLR 446 (CC), the Constitutional Court expressly confirmed the common law position. There is no claim for reciprocal maintenance between parties living together in a permanent heterosexual life partnership during the existence of the cohabitation. There is also no possibly claim for maintenance after the death of one of the parties.

In this case, the couple lived together for years without validly marrying despite there not being any legal impediment to such a marriage. After the man's death, the surviving cohabitant instituted a claim for maintenance against the deceased cohabitant's estate in terms of section 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990. The court rejected the claim on the basis that the parties had never been validly married and that she did not qualify as a "spouse" in terms of the statute.

The court *a quo,* the Cape High Court, held that the surviving cohabitant could institute a claim for maintenance against the deceased party's estate, as the statute discriminated unfairly against her based on marital status. As such, it violated the right to equality and dignity that rendering it unconstitutional (*Robinson v Volks NO* 2004 6 SA 288 (C) / 2004 2 All SA 61 (C)).

The Constitutional Court disagreed and refused to confirm the finding that the statute was unconstitutional. The majority of the court was prepared to accept that there was *prima facie* discrimination based on marital status. He found that marriage is an important institution: an "intentionally recognised social institution" (para 53) that afforded benefits to married people to which unmarried people would not be entitled. He noted that there were fundamental differences between the position of a surviving cohabitant and that of a surviving spouse. Their choice of relationship determined the formalities and the legal consequences.

The court found that the discrimination between the type of relationships was fair "when considered in the larger context of the rights and obligations uniquely attached to marriage" (para 61). In addition, as the parties have a choice to conclude a marriage or not, there is no violation of the respondent's right to dignity. In light of the importance of the institution of marriage, it would be inappropriate to impose a duty of support on a deceased estate when such a duty had never arisen while both parties were alive. In fact, to do so would be "incongruous, unfair, irrational and untenable." (para 60)

Two years later the Constitutional Court in *Gory v Kolver NO* 2007 4 SA 97 (CC) seemingly softened their position by finding that s 1(1) of the Intestate Succession Act 81 of 1987 may be unconstitutional to the extent that it only provided for spouses to a marriage to inherit intestate. It found that this statute must be read to include, after the definition of the word 'spouse': "or partner in a permanent same-sex life partnership in which the parties have undertaken reciprocal duties of support." The court did not address the issue of heterosexual life partnerships.

A recent spate of judgments, the issue of permanent heterosexual life partnerships became the focus of the courts. In all these matters, there was a claim

by one of the cohabitants after the dissolution of the relationship. In these cases, the applicants based their claims on the concept of a universal partnership entered into through a tacit agreement between the parties.

There are three *essentialia* of a universal partnership: (1) that each of the partners must bring something into the partnership, whether money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit (*Purdon v Muller* 1961 (2) SA 211 (A) at 218B-D).

Thus, it must be "a universal partnership in which the 'parties agree to put in common all their property, both present and future'" (*Isaacs v Isaacs* 1949 (1) SA 952 (C) at 955; *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 338C-D. See also *Ally v Dinath* 1984 (2) SA 451 (T)).

The most problematic of the requirements seems to be the second – that the venture is carried out for the joint benefit of both the parties and not just for the benefit of the partner that are directly involved in the profit-making venture / business at the time. However, the problem in most of the cases seems to be related to evidence of the intention of the parties to create this partnership within the context of their chosen lifestyle. Each of the instances was obviously decided on the facts itself.

Although the applicants were unsuccessful on the facts in *McDonald v Young* 2012 (3) SA 1 (SCA) and *Francis v Dhanai* [2006] JOL 18401 (N), the applicants in *Botha NO v Deetlefs* 2008 (3) SA 419 (N), *ES v HP* 2010 JDR 0959 (ECLD) and *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) was successful. The crux of success was whether the requirements were met and it made no difference whether the parties were married, engaged or cohabiting.

In *Butters v Mncora* [2012] ZASCA 29 (28 March 2012) the court, by majority, found that the parties had formed a universal partnership during the 19 years together. It specifically confirmed that a universal partnership is not confined to commercial activities and that the contribution of a party to the partnership need not be confined to profit-making activities.

From these cases there seems to be a sense that the courts are more sympathetic towards the cohabitee-applicant.

The most recent Supreme Court of Appeal case of *Paixão v Road Accident Fund* [2012] ZASCA 130 (26 September 2012) is slightly different. The breadwinner died in a motor vehicle accident and the claim of his partner and child was for loss of maintenance and support. The court here found that there was a tacit agreement for a reciprocal duty of support between the parties. On the facts, three issues were important: one, that he supported her when she was retrenched, taking full responsibility of the household and her children (from a previous relationship); two, that he concluded a joint will with her to the effect that the survivor would become the sole heir of the first dying; and three, that they were making plans to marry. From these factors, the court found that although there was no common law duty to

maintain, in this case there was an agreement between the parties to maintain and support each other.

This was however not the end of the investigation. The second leg was whether the nature of the relationship, being akin to a family relationship, was such that it deserved the protection of the law. In this regard, the court noted that the decision of this issue rests on the *boni mores* of society. The court noted that life partnerships are being increasingly recognised by both the legislature and the courts and that this recognition reflects the changing values in society. The court recognised that the nuclear family is no longer the norm in the country. It noted that millions of South Africans live together without entering into formal marriages. “This is simply a fact of life.” (para 32).

The court noted that it “could see no reason in principle or policy not the extend the protection of the common law to the appellants here. In my view, the ‘general sense of justice of the community’ demands this’” (para 36).

The rights, duties and obligations between cohabitants are unclear and thus unsatisfactory. Attempts by the South African Law Reform Commission in their Report and the draft Domestic Partnership Bill, 2008 have not yet come to fruition. This state of affairs leaves cohabitants with only one option - the courts. Accessing the courts to try and confirm these rights and obligations is time-consuming and expensive, leaving many (especially women) in a vulnerable position. This remains a gender and thus constitutional issue that has to be re-addressed by the Constitutional Court at some stage. The changing *mores* of society is evident also in the sympathetic approach that the judiciary had shown towards same-sex life partners by slowly expanding these rights to heterosexual life-partners, be it on an ad hoc basis. It is time for the legislature to bring certainty to the lives of the millions of South African living in this uncertain legal morass.

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Matters of Interest to Magistrates

Transformation, independence and poor ‘products’ of the LLB

By Judge Phineas Mojapelo

The attorneys’ profession occupies an important position in the legal life of society. Yours is a profession that serves most of the time as a point of first contact for those

who seek remedies from the law. For many, your image is the image and face of the law. The rest of the legal profession watches this face and understandably expects you to keep it shining in the mind of users of legal services. That carries with it a number of challenges and expectations, some of which I will share with you.

Transformation of the legal profession and the judiciary

Transformation of the legal profession is essential for transformation of the judiciary, and transformation of the judiciary is important to align it with the Constitution. One therefore welcomes the move to transform the legal profession and significant steps have been taken in this direction.

Transformation of the governance of the profession is another area and the profession appears to have found a model that has worked reasonably well for 18 years. However, the negotiations that resulted in the 50/50 model were not easy. Change is never easy. Be assured, however, that the profession is better off with that deal than it would have been without it. Defend and preserve it until you find something better that works.

According to records of the General Council of the Bar of members of its constituent Bars, as at 30 April 2012 there are 2 384 practising advocates, 60% of which are in Johannesburg and Pretoria. Of that total, 76% are male, 24% female, 73% white and 27% black.

According to figures from the Law Society of South Africa, as at 5 May 2012 there are 21 007 practising attorneys. Of that number, 65% are male, 35% female, 65% white and 34% black [in the remaining 1% race was not specified].

These figures show that in regard to race and gender representivity, the attorneys' profession has made 10% more progress on the transformation trajectory than the advocates' profession. The average of the two professions shows that there are 23 391 legal practitioners in total, 67% of which are male, 33% female, 66% white and 33% black.

The representation of black lawyers in the legal profession has moved in the 20 years since 1992 from 10% to 33%.

Gender representation has moved to about the same level, although it took off from an even lower base. It is a noteworthy improvement but one that unfortunately still reflects the deep impact of some 342 years of racial segregation. It is true that the legacy of centuries of racial domination cannot be undone over two decades. On the other hand, we do not have the luxury of another 300 to 400 years to correct the imbalances. This simply means that our generation, which transcends an era of a repressive system to an ideal one envisaged by the Constitution, is challenged to find effective measures to transform society. Speed, however, should not outpace

sustainability. It will be fruitless to bring quick-fix measures overnight that will simply be swept away by lack of attention to sustainability. Effectiveness and sustainability must underpin our transformation programme as we resolve to speed it up.

The position of the judiciary at the High Courts, the Supreme Court of Appeal and the Constitutional Court, according to figures kept by the Judicial Service Commission (JSC) is, as at 31 May 2012: Of the 237 judges, 34% are white, 66% black, 71,7% male and 28,7% female (I have included in the term 'black' those who were referred to as 'coloured' and 'Indian'. In the figures provided by the professional groupings, the category 'black' is subdivided into 'African, coloured and Indian' and at least one of the groups refers to 'Asians').

A comparison of the legal profession with the judiciary shows that racial transformation of the judiciary has gone almost 100% faster than that of the legal profession. Black judges constitute 66% of judges, while practising black practitioners constitute 33% of legal practitioners. Gender transformation of the legal profession has gone a tiny bit faster than the judiciary. This is thanks mainly to the faster transformation of the attorneys' profession (34%) compared to the advocates' profession (27%). At almost 29%, gender transformation of the judiciary is between that of the Bar and the attorneys' profession. On all fronts we still have a lot to do to advance gender transformation. If one looks at the figures, we need to do doubly more to advance black women than women in general.

The fact that racial representivity of the judiciary has moved faster than that of the legal profession is a lopsided development that not unexpectedly induces a strain on the judiciary, given the fact that a transformed legal profession has to feed into a transformed judiciary. The legal profession is challenged to work harder to advance transformation in the profession in order to sustain and improve transformation in the judiciary.

When I focus on the judiciary alone, and on race transformation in particular, like a typical lawyer I am tempted to pose one or two questions about transformation, which I will not answer, but will leave you to debate and possibly answer. Initially the Constitutional Court's 11-judge Bench consisted of four serving judges, who were judges prior to 1994. The first judges to that court were appointed in 1994 through the JSC. None of them was appointed to that Bench by or under the apartheid government. The question then is: Was there ever a need to transform the Constitutional Court judiciary? Today, there is in fact none of them who was a judge before 1994. Is there today a need to transform the judiciary of that court? Let me go a step further, all judges at the South Gauteng High Court were appointed after 1994 and through the JSC. There is not a single one, and there has not been any in the last two years, who was appointed prior 1994. Then, the next question: Is there a need to transform that Bench? This is probably true of most Benches in SA. There is probably no more than a handful of serving judges who were appointed under the

old government. Is it racial transformation of the judiciary that we require? Or what else do we require? What do we mean by transformation in this context? Do we have a new, clearly defined meaning or agenda for transformation, presuming that we still pursue it? Who is going to announce the end of the race component of that programme and under what circumstances?

It is necessary to debate these questions intelligently and unemotionally so that we are on the same page when we speak about racial transformation of the judiciary. Or is it more appropriate to talk about assessing the work of the JSC in appointing judges? Unless these questions are faced squarely and answers are sought, there is a danger that we may not realise the moment that may come, if it has not come as yet, when protection of the independence and the impartiality of the courts has become as important as, if not more important than, their transformation. We should be alert for the moment when those who may wish to interfere with and undermine the independence and impartiality of the courts may find it convenient to do so under the guise or in the name of transformation.

Independence of the judiciary

The independence of the judiciary is inextricably linked to the independence of the legal profession. The independence of the courts, and thus of the judiciary, is a constitutional mandate. We therefore cannot and should not have a court or a member of the judiciary that is not independent. The courts (judges) are independent and subject only to the Constitution and the law. They are required to apply these 'impartially and without fear, favour or prejudice'. Judges thus have to be fearless in executing their duties. They should not be partial or inclined to favour any side or party – whether an individual, a corporate entity or statutory body – in disputes before courts. There is a constitutional prohibition against interfering with the function of the courts.

Independence resides in each judicial officer sitting as a court of law. It does not evolve from the head of the court; it is sourced directly for each judicial officer from the Constitution and it evolves from and is protected by it.

Organs of state are obliged by the Constitution to protect the independence, impartiality, dignity, accessibility and effectiveness of the courts. The constitutional obligation in this regard clearly rests on both the executive and the legislature. The primary obligation to uphold these values rests in the first place on the individual officer, who commits to these values in his oath of office.

It may be that to some public officials an oath of office is a mere prerequisite to enter public office. However, to a judicial officer, the taking of that oath is a life-changing moment.

One is thus justly critical of a judge who, having been appointed as such, fails to uphold and support the fundamental dictates of that office. There have unfortunately been instances where the behaviour of individual judges has not served the integrity and independence of judicial office but rather denigrated and disparaged it. When this happens, public jealousy rightly views the conduct with disdain and disapproval. The controlling body is expected to act with swiftness to express its disapproval and, if necessary, correct errant conduct. In our immediate national confine, I hold the view that the leadership of the judiciary will find it hard and may never be able to justify morally a situation in which one of their own is retained on the public purse for what will soon be six years while not performing the duties for the office for which he is being remunerated.

This and other instances of uncomplimentary behaviour fall into what I categorise as internal weak links. There are external ones as well. The cancer that erodes public confidence in the judiciary is not all within the body. In fact, one would dare say much is outside it.

The judiciary has been a subject of attack from a number of public platforms. It has been accused of being ‘counter-revolutionary’, of having a particular ‘collective mindset’ that needs to be changed; of behaving as if it has more power than the democratically elected political representatives (which is not correct). It has been accused of affording an opportunity for those who have lost at the polls to rule through the judiciary.

I am not aware that any of these criticisms has referred to a specific case. It was a generalised attack. The judiciary is not and must not be thought to be above criticism. In execution of their duties, judges generally speak through their judgments, which are delivered publicly. The judgments are recorded and remain open for public scrutiny. The public and academics are welcome to comment on these and critique them. Constructive criticism of judgments strengthens and does not weaken jurisprudence. Judges must therefore welcome constructive, informed and balanced criticism of their judgments. An occasional uninformed criticism should also not cause a storm. At its healthiest, the exercise of judicial independence allows for an atmosphere where, within the appellate structure of the courts, judges criticise each other’s judgments for correctness, overturn them or decline to follow them if their correctness is in issue. Counsel are daily encouraged to compare various judgments, even against those from international jurisdictions and point out, without fear of reprisal, which is correct and which is not. This is how our rich jurisprudence, which is revered worldwide, develops. This is not criticism that weakens public confidence; it strengthens it.

The kind of attack that I referred to earlier often comes from high echelons of power in the form of generalised non-specific comments about the judiciary and judgments in general, as if indeed judges have anything close to a ‘collective mindset’. If they

did, they would not be independent. But like scientists in the same field, they follow each other's judgments, until overturned. This is healthy and leads to legal certainty. This, it is hoped, is not what is referred to as a collective mindset that needs to be corrected or transformed. Judges are part of society and deal with the ills that beset it. They do so impartially, without fear, favour or prejudice. That is their constitutional mandate.

Judges do not create rights and do not make the law; they merely apply it. Judges are merely umpires and have to do so fearlessly. Where they exercise judicial review of legislation and administrative action, they do so within the Constitution and the law. The consequence of their pronouncements cannot and should not be the cause of a generalised, vague and non-specific attack for their position. It will be dangerous to launch a wild and non-specific criticism of the judiciary to a point that may lead to the loss of public confidence in the judiciary. A society with no confidence in the judicial system may tend to take the law into its hands.

Independent legal profession

An independent legal profession is essential for an independent judiciary - just as a transformed legal profession is a *sine qua non* for a transformed judiciary.

One therefore watches with interest the developments around the Legal Practice Bill (B20 of 2012). One has noted concerns of the legal profession about aspects that the profession claims may pose a threat to its independence (such as the powers of the Justice Minister with regard to the composition of the governing council and the fee structure). It is heart-warming to see that the debate is formulated around the examination of constitutionality and not on any narrow one-sided and self-serving consideration. Resort to a test or examination of constitutionality is a healthy development. After all, the Constitution is and should remain our supreme law.

These are however disputes that we shall not enter but shall nevertheless watch with intense interest, albeit from a distance.

Access to justice and tough economic times

If it is true that in a fierce economic battle it is survival of the fittest, where dog eats dog, let it not be so with the need to access justice. I am fully aware that the unfavourable economic situation may threaten the survival of those in the legal profession, especially at the lower end of the economic ladder. The pressure will be higher on small legal firms. I have heard that changes in the operation of the Road Accident Fund are causing many small firms to close down or reconsider their future. It is precisely when times are hard that access to justice becomes critical among the marginalised. I am aware too that the attorneys' profession is almost constantly talking to the Justice Minister or the Rules Board for revision of the fee structure; that process and other legitimate measures in the profession no doubt need to continue.

There are however measures that should never be resorted to, even in the fight for survival.

If I may venture a suggestion: The profession would do well to move towards specialisation where everyone becomes an expert in what he offers. We appear to have gone past the days of a small general practitioner who sells his time and charges a fee to every poor person who touches his door, dares to speak to him or ask a question. Such inquiries must simply be referred to an appropriate specialising office or to another specialising colleague. Practitioners in such small general corner shops rarely give any real value and are often forced to exact a fee from those who can hardly afford any. Specialisation should lead to a situation where each practitioner is an expert in something and gives value to clients in what he does. On the other hand, those who specialise and whose services legitimately command higher fees must still be sensitive to the poor and marginalised.

Legal training

I was previously, while still an attorney, a proponent of the five/four-year undergraduate LLB degree in order to increase entry into the legal profession. Let me be one of those who admit openly: It has not worked and it has not produced the product we expected. I have seen the product arrive raw in our courts, especially via the independent Bar route, where people simply take their LLB certificates and apply for admission as advocates. There is no prior training other than this LLB degree and the product is unleashed on the High Courts. In most cases the product can barely utter a few coherent sentences, never mind articulate the case of his client. Trying to assist the product from the Bench is like pulling out teeth. Often one gets the impression that the poor client would have been better off on his own. We may have produced quantity but certainly not quality. I have read with pain about the finding of a survey that many such products have problems with basic numeracy and literacy. They have problems with counting, reading and reasoning. Many of us had already made that observation. I am therefore in full support of a redesigned LLB. The profession and universities have to go back to the postgraduate LLB with initial non-legal courses. I hope that we do not take long before we reach that goal about which there now appears to be enough, if not overall, consensus.

Conclusion

As we progress with the transformation agenda, we should keep focus on the terrain and not hesitate to ask and debate critical questions. The transformation agenda should not be high-jacked for other motives. The independence of the judiciary and consequently of the legal profession are important for a democratic order and must be jealously guarded. We must promote and advance access to justice, especially for the poor and marginalised, and we should actively guard against the abuse and

exploitation of those who struggle to access justice. Finally, the revision of legal qualifications and training must receive urgent attention.

Phineas Mojapelo is Deputy Judge President of the South Gauteng High Court in Johannesburg. This is an edited version of an address to the annual general meeting of the Limpopo Law Council in Polokwane, 7 September 2012.

A copy of the full speech can be found at www.derebus.org.za under 'Documents'.

A Last Thought

"Courts do not run the country, nor were they intended to govern (it). Courts exist to police the constitutional boundaries…. Where (they) are breached or transgressed, courts … must … act without fear or favour. There is a danger, however, of the politicisation of the judiciary, drawing (it) into every and all political disputes ... Judges cannot be expected to dictate to Parliament when and how it should arrange its precise order of business matters. What courts can do … is to say to Parliament: you must operate within a constitutionally compatible framework ... I regret the need to emphasise this point, but it appears to be vital for the future integrity of the judicial institution. An overreach of the powers of judges … can only result in jeopardy for our constitutional democracy ... I am not prepared to create a juristocracy".

Per Davis J in *Lindiwe Mazibuko v Maxwell Vuyisile Sisulu, MP Speaker and others*. Case No 21990/2012 WCC