e-MANTSHI

A KZNJETCOM Newsletter

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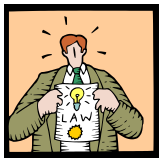
Welcome to the eighty sixth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. An invitation for public comment on a draft *Children's Amendment Bill* has been published in Government Gazette no 36196 dated 27 February 2013. The notice indicates that in accordance with Rule 241(1)(b) of the Rules of the National Assembly, notice is hereby given that Michael Waters, MP, intends introducing a private member's bill shortly in order to effect a correction to the Children's Act, No 38 of 2005.
Interested parties and institutions are invited to submit written representations on the draft bill to the Secretary to Parliament within 40 days of the publication of this notice. Representations can be delivered to the Secretary to Parliament, Old Assembly Building, Parliament Street, Cape Town; or mailed to the Secretary to Parliament, P 0 Box 15, Cape Town 8000; or emailed to coetzee@parliament.gov.za and copied to mwatersgparliament.gov.za.

The draft bill reads as follows:

“To amend the *Children's Act, 2005*, to provide for a person convicted of attempted rape to be unsuitable to work with children; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-
Amendment of section 120 of Act 38 of 2005

1. Section 120 of the *Children's Act 2005, Act 38 of 2005* (hereinafter referred to as the principal Act), is hereby amended – (The underlined words to be added to the Act).

(a) by the substitution for subsection (4) of the following subsection:
"(4) in criminal proceedings, a person must be found unsuitable to work with children (a) on conviction of murder, attempted murder, rape, attempted rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child; or

(b) if a court makes a finding and gives a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977 (Act 51 of 1977) that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental illness or mental defect not criminally responsible for the act which constituted murder, attempted murder, rape, attempted rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child."; and
(b) by the substitution for subsection (5) of the following subsection:

"(5) Any person who has been convicted of murder, attempted murder, rape, attempted rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child during the five years preceding the commencement of this Chapter, is deemed to have been found unsuitable to work with children.".

2. The Rules of the *Magistrates Court Act 32 of 1944* has been amended by notice in the Government Gazette no 36157 dated 15 February 2013. The amended rules amend Annexure 2 to the Rules in respect of the fees a Sheriff may ask who is not a member of the Public Service.

3. In terms of section 67 of the *Prevention of and Treatment for Substance Abuse Act, 2008 (Act No. 70 of 2008*) the President has determined 31 March 2013 as the date on which the said Act came into operation. The notice was published in Government Gazette no 36304 dated 28 March 2013. The Act repeals the *Prevention and Treatment of Drug Dependency Act, 1992 (Act No 20 of 1992*). The

sections that are of importance to Magistrates are sections 33 to 36 and 39 that deal with the procedure to commit a person to a treatment centre.

Recent Court Cases

1. S v NGQABUKO 2013 (1) SACR 275 (ECG)

Before a court may suspend a drivers licence of an accused who was convicted of contravening section 65(2) of Act 93 of 1996, evidence must be presented to court.

Roberson J:-

[1] This matter was before me on automatic review. The accused was convicted of contravening s 65 (2)(a) of the National Road Traffic Act 93 of 1996 (the Act), that is driving a motor vehicle while the concentration of alcohol in his blood was not less than 0,05 gram per 100 millilitres, namely 0,20 gram. He was sentenced to pay a fine of R4 000.00 or to undergo 8 months' imprisonment, half of which sentence was conditionally suspended. The conviction and sentence are in order.

[2] In terms of s 35 (3) of the Act the magistrate ordered that the provisions of s 35 (1) of the Act should not take effect.

[3] S 35 of the Act provides as follows:

"On conviction of certain offences licence and permit shall be suspended for minimum period and learner's or driving licence may not be obtained

1. Subject to subsection (3), every driving licence or every licence and permit of any person convicted of an offence referred to in –

1. section 61 (1)(a), (b), or (c), in the case of the death of or serious injury to a person;

(aA) section 59 (4), in the case of a conviction for an offence, where-

i. A speed in excess of 30 kilometres per hour over the prescribed general speed limit in an urban area was recorded; or

ii. A speed in excess of 40 kilometres per hour over the prescribed general speed limit outside an urban area or on a freeway was recorded;

(b) section 63 (1), if the court finds that the offence was committed by driving recklessly;

(c) section 65 (1), (2) or (5),

where such person is the holder of a driving licence or a licence and permit, shall be suspended in the case of –

i. a first offence, for a period of at least six months;

ii. a second offence, for a period of at least five years; or

iii. a third or subsequent offence, for a period of at least ten years, calculated from the date of sentence.

2. Subject to subsection (3), any person who is not the holder of a driving licence or of a licence and permit, shall, on conviction of an offence referred to in subsection (1), be disqualified for the periods mentioned in paragraphs (i) to (iii), inclusive, of subsection (1) calculated from the date of sentence, from obtaining a learner's or driving licence or a licence and permit.

3. If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit.

4. A court convicting any person of an offence referred to in subsection (1) shall, before imposing sentence, bring the provisions of subsection (1) or (2), as the case may be, and of subsection (3) to the notice of such person."

[4] The accused did not present evidence under oath with regard to the suspension of his driving licence, and merely made an unsworn statement providing reasons why it should not be suspended.

[5] I addressed the following query to the magistrate:

"The Magistrate ordered that the provisions of s 35(1) of Act 93 of 1996 should not take effect. S 35 (3) of the Act provides that such an order may be made "after the presentation of evidence under oath."

It appears from the record that the information given by the accused relating to the suspension or otherwise of his driving licence, was not given under oath. Was this proper compliance with s 35 (3)?"

A portion of the magistrate's reply was as follows:

"I apologise for the oversight as such will not find its repetition. However I respectfully submit as I did not suspend the accused driver's licence despite not complying with the amended Section requiring evidence under oath, no prejudice was suffered by accused.

In the circumstances it is prayed that the proceedings be confirmed."

[6] I am unable to confirm the order. A court is only empowered to order that the provisions of s 35(1) and (2) should not take effect, after the presentation of evidence under oath. The order made by the magistrate was therefore void. I would add that prejudice to an accused is not the only consideration in deciding whether or not to make such an order. The offences which bring about an automatic suspension of a driving licence are serious offences, involving potential harm to other road users. It is logical that such an order may only be made after the presentation of evidence under oath (or affirmation), which is by its nature supposed to be credible, and which may also be tested. Society has an interest in whether or not persons convicted of such offences should be allowed to drive again on a public road, and the decision that they may continue to do so should not be taken lightly.

[7] The following order is made:

7.1 The conviction and sentence are confirmed.

7.2 The order made by the magistrate in terms of s 35(3) of Act 93 of 1996 is set aside.

7.3 The matter is remitted to the magistrate in order to apply the provisions of s 35 of Act 93 of 1996.

2. NAIDOO AND ANOTHER v DE FREITAS AND OTHERS 2013(1) SACR 284 (KZP)

If there is a discrepancy between the accused's pleas and pre-sentencing reports the magistrate should have altered the accused's pleas to that of Not Guilty in terms of section 113(1) of Act 51 of 1977.

Kruger J:

[1] The Appellants, by way of Notice of Motion, supported by affidavits, seek an order reviewing and setting aside the convictions and sentences imposed by the Commercial Crime Court in Durban.

[2] The Applicants were, on the 15th March 2010, convicted of 182 counts of fraud; 23 counts of theft; a contravention of the Banks Act 94 of 1990; and a contravention of the Financial Advisory and Intermediary Act 37 of 2002. The Applicants were each

sentenced to an effective term of twenty two years imprisonment on the 17th December 2010. The First Respondent presided over the trial.

[3] The Appellants were arrested on the 2nd August 2005 on charges of fraud. They engaged the services of the Third Respondent to represent them. After many adjournments, the Applicants, on the 15th March 2010, pleaded guilty to all counts. A written statement, in terms of Section 112(2) of the Criminal Procedure Act, 51 of 1977, was read into the record and handed in as an exhibit in amplification of their plea. The Applicants thereafter confirmed the statement and the accuracy thereof and further confirmed their signatures on the documents. The First Respondent was satisfied that the Applicants had admitted all the elements of the offences and duly convicted them.

[4] After obtaining pre-sentencing reports from the Department of Social Development as well as a report in terms of Section 276 A(1)(a) of the Criminal Procedure Act – re: Consideration of Correctional Supervision as a sentence – and after numerous adjournments, the Applicants were duly sentenced as aforesaid.

[5] The application for review is based on two grounds:

1. That the Applicants "pleaded guilty because of misrepresentations made to us by our attorney at the time (the Third Respondent) that he had concluded a plea agreement with the State on our behalf to the effect that if we pleaded guilty, we would not receive a custodial sentence".
2. That "during the sentence proceedings, evidence was introduced which clearly indicated that we did not admit guilt and the First Respondent was accordingly under an obligation in terms of Section 113 of the Criminal Procedure Act to change the plea to one of "not guilty"."

[6] I propose to consider and deal with the second ground first. Section 113(1) of the Criminal Procedure Act 51 of 1977 (as amended) provides:

"If the court at any stage of the proceedings under section 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not gu8ilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accu7sed up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.

[Sub-s(1) amended by s 5 of Act 86 of 1996]"

[7] In terms of the aforesaid section a plea of “guilty” can be changed to one of “not guilty” at any time after a conviction but before sentence is passed. In *S v Nixon* 2000(2) SACR 79 (WLD) at 87 (i) Wunsh J observed as follows:

“Corrective action can be taken at any time before sentence is passed, that is even after a conviction (*Attorney-General, Transvaal v Botha* 1993(2) SACR 587(A) at 591 f).

At the trial the Appellant did not seek to withdraw any admission made by him or change his plea. However, the obligation to substitute a plea of guilty in terms of Section 113(1) of the Act exists even without any action on the part of an accused, as long as the Court is in doubt whether the accused is guilty. This applies also to the retraction of an admission”.

[8] In *Mokonoto and Others v Reynolds NO and Another* 2009(1) SACR 311 (TPD), Southwood J noted that the amendment to Section 113 resulted in the requirement, that a Court should be “satisfied” of certain circumstances before recording a plea of not guilty, is no longer applicable. “The threshold for the Section to come into operation is now less than a reasonable doubt. It merely requires an allegation”. (at 320 g). Accordingly, if there is an “allegation that the accused does not admit an allegation in the charge sheet or an allegation that the accused has incorrectly admitted any such allegation or an allegation that the accused has a valid defence to the charge”, then the provisions of Section 113(1) are to be invoked and the plea amended to one of “not guilty”. (at 320 e).

[9] In *casu*, both the Social Worker as well as the Correctional Services official testified that the Applicants did not intend to defraud or deceive the complainants but that the loss was due to the collapse of the Johannesburg Stock Exchange following the events of 11 September 2001, commonly referred to as 9/11.

[10] The First Respondent was alive to this allegation and questioned both the Social Worker and the Correctional Services official and sought clarification on this aspect. The relevant portions of the record are as follows:

“Court: But is that true? Did our stock market ever collapse? ---9/11.

Our stock market never collapsed. --- Collapse of the stock market 911 and they even stated – Mr Naidoo stated to me as well that they had no intention of robbing or stealing any individual and in their minds they do not think they have done anything wrong, but it was this situation with the stock marked that created the problem or the situation that they face today. Mr Naidoo also stated that they want to take responsible – they feel partly responsible because they can … [inaudible] they solicited the finances from the complainants.

Have you had sight of their plea? --- Yes, I have had sight of their plea. Your Worship, and … [intervention]

How does it compare to your report? --- Contrary to the version that they had given me and I have made that clear as well in my report."

Court: I am just glancing at page 4, paragraph 2 of accused 2's report that you drafted. It says that "there are … [inaudible] the accused set out with malicious crafty [?] intention to deprive these investors of their finances and yet stated to the correctional officer that he did not rob or steal from any of these individuals as he made them aware of the risk clause." What on earth is that all about? --- I did question him on that aspect and I stated to him that, you know, for example, when he solicited the finances from these individuals did he make it clear to them that he was going to invest the money on the stock market and what are the risks involved. He stated to me that yes, they did sign a risk clause, but the SAP investigation unit had taken these documents and they did not return it to him. That is why he couldn't present it to me."

[11] The aforesaid extracts clearly show that the First Respondent was aware that the Applicants' allegations were at variance to their plea. It has been held that if evidence is given by or on behalf of an accused for purposes of sentencing which is in conflict with an admission made during the Section 112 proceedings, there is an implied withdrawal of the admission concerned – *S v Nixon* (supra) at 87 (j).

[12] Having ascertained that the Applicants were now denying that they had the necessary intention, the First Respondent did nothing further. He did not seek clarification from the Applicants or their counsel (Mr Mossop) nor did he, *mero muto*, amend or alter the plea to one of "not guilty". Despite the allegations contained in the affidavits and annexures to the contrary, the record does not reflect that this issue was canvassed with the Applicants or their legal representatives.

[13] It also appears from the record, during the judgment on sentence, that the First Applicant attempted to interrupt the proceedings, possibly to explain the lack of intent as outlined above. The First Respondent however, refused to allow the First Applicant the opportunity to address the Court at that stage of the proceedings.

[14] Given the "lighter test" in terms of the amended Section 113(1), I am of the opinion that the First Respondent ought to have altered the Applicants' plea to that of "not guilty" and requested the State to lead the necessary evidence.

[15] Having reached this conclusion, I do not find it necessary to consider the first ground upon which this application has been based.

[16] In the result, I grant the following order:

1. The Applicants' convictions and sentences are set aside;
2. The matter is referred back to the Commercial Crime Court to record a plea of not guilty in respect of each Applicant and to proceed with the trial.

From The Legal Journals

McQuoid-Mason, D

"Mandatory reporting of sexual abuse under the Sexual Offences Act and the 'best interests of the child"

South African Journal of Bioethics and Law 2011 74

Hoctor, S & Carnelley, M

"The purpose and ambit of the offence of concealment of birth - S v Molefe 2012 (2) SACR 574 (GNP)"

Obiter 2012 732

Subramanien, D

"Section 86(10) of the National Credit Act 34 of 2005 - FirstRand Bank v Raheman (5345/2010) [2012] ZAKZDHC 3 (10 February 2012)

Obiter 2012 693

Okpaluba, C & Juma, L

"Pecuniary interests and the rule against adjudicative bias: The automatic disqualification or objective reasonable approach?"

Journal for Juridical Science 2011 97

Okpaluba, C & Juma, L

"The problems of proving actual or apparent bias: an analysis of contemporary developments in South Africa"

Potchefstroom Electronic Law Journal 2011 Volume 14 No 7

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

Contributions from the Law School

Diverse issues relating to the child witness.

It is a sad reflection on our society that so many of the recent decided cases relate to sexual offences against children. Issues regarding the child witness have been discussed before in this publication, but it is a topic that remains of tremendous importance. 3 issues relating to the child witness are highlighted in this contribution. It is alarming that significant irregularities relating to establishing the competence of a child witness, swearing the child in to testify, and the use of intermediaries continue to bedevil criminal cases.

1. Competence of a child witness, and compliance with section 164 of the Criminal Procedure Act 51 of 1977.

In the case of *S v BM* 2012(2) SACR 507 (FB), the appellant appealed against his conviction of the rape of a 9 year old child. The complainant, and her 11 year old friend, testified for the state. The appellant appealed against his conviction on two main grounds. Firstly, that the competence of the witnesses was not established, as they had not demonstrated that they understood the distinction between truth and lies. Secondly, that they had not been properly sworn in in terms of section 164 of the Criminal Procedure Act 51 of 1977, which provides that a child who is unable to understand the oath is not required to take the oath and will still be a competent witness as long as she is admonished to give truthful evidence.

The Constitutional Court has confirmed the well-established rule that a child who does not understand the distinction between truth and lies is not competent to testify, because the risk of a false conviction based on unreliable evidence is too great otherwise (*Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others* 2009 (2) SACR 130 (CC) at p 280). A child witness does not have to demonstrate a sophisticated or abstract understanding of the concepts of truth and falsehood, just that there is an understanding that she is required to tell what happened and nothing else (at p 279).

International literature suggests the use of simple identification questions that reduce the use of language in assessing children's understanding of the concept of truthfulness are most effective to establish the ability to distinguish truth from lies.

For example, a simple scenario is put to the child, who is then asked to identify who is lying and who is telling the truth (J Z Klemfuss and CJ Ceci 'Legal and psychological perspectives on children's competence to testify in court' Developmental Review 32 (2012) 268 at 277).

For the admonishment to be proper, it must be clear that the child witness does not appreciate the nature and import of the oath. It is well established that there need not be a formal enquiry into this question (*S v B* 2003 (1) SACR 52 SCA, at para 15). The presiding officer may reach that conclusion simply by virtue of the youthful age of the child (*DPP, KZN v Mekka* 2003 (2) SACR 1 SCA at para 11).

The admonishment itself need simply communicate to the child that she is required to tell the truth, and that there will be negative consequences for her if she does not (*S v QN* 2012 (1) SACR 380 (KZN) at para 11). This requirement is supported by research which shows that promises to behave in a particular way- including simple promises by children to tell the truth - are powerful motivators for truth telling (Klemfuss and Ceci at p 275).

In the case of *S v BN*, the complainant was 11 years old at the time she testified, and the second state witness was thirteen years old. The relevant questioning of the second state witness proceeded as follows:

> Hof: U volle name?
>
> Getuie: MR
>
> Hof: Hoe oud se u is u?
>
> Getuie: 13-jaar-oud.
>
> Hof: Gaan jy skool?
>
> Getuie: Ja
>
> Hof: Graad?
>
> Getuie: Graad vyf.
>
> Hof: Is jy bereid om in die opehof te getuig ne om hier te praat by ons.U is nie bang vir ons nie?
>
> Getuie: Dis korrek.
>
> Hof: Weet u wat dit is om die waarheid te praat of om n leuen to vertel?
>
> Getuie: Dis korrek.
>
> Hof: Gaan jy kerk toe?

Getuie: Dis korrek, ek behoort aan die kerk, die United Kerk.

Hof: Weet u wat dit is om n eed af te le, voor die Here to sweer om die waarheid te praat?

Getuie: Dis Korrek.

Hof: Wat beteken dit? Kan jy nie my vertel wat beteken dit om te sweer om die waarheid te praat voor die Here, of verstaan jy dit nie?

Getuie: Ek verstaan nie mooi nie.

Hof:Goed,ek gaan jou waarsku,Goed. MR, die Hof waarsku jou vandag om die waarheid te praat,die hele waarheid en niks ansderste as die waarheid nie. As jy nie die waarheid praat nie, kan jy in baie groot moelikheid beland. Verstyaan jy dit?

Getuie: Ja.

Hof: Die Hof is tevrede sy is n goeie getuie dat sy did verskil tussen die waarheid en n leuen verstaan. Sy word gewaarsku om die waarheid te praat.'

The High Court confirmed that the magistrate had correctly applied section 164 of the Criminal Procedure Act 51 of 1977, and found that it was not convinced by the appellant's argument that the magistrate's enquiry had been insufficient to properly establish her as a competent witness (para 8). The High Court justified this finding by referring to the content of the witness's evidence – highlighting features pointing to reliability (para 8.1).

This finding is astounding. The witness gives the formulaic answer 'Dis korrek' to the two part question of whether she is prepared to testify in court and whether she is afraid of 'them.' The second part of the question is expressed in the negative, and has only the intonation of the voice to indicate that it is a question rather than a statement. This formulaic and somewhat meaningless response is repeated to the next question as to whether she understands the difference between telling the truth and telling a lie, and to the question of whether she understands the oath. The magistrate then asks the witness another two questions in one – first what it means to take the oath, and second whether she can explain what it means to swear to tell the truth before the lord. She answers that she does not understand it clearly. Without any further investigation, the witness is admonished.

It is axiomatic that a witness can only be admonished once she has been established as a competent witness. (This was confirmed in the case of *AV Tshimbudzi v The State* (137/12) [2012] ZASCA 200 (30 November 2012) at para 7, discussed hereunder). If the witness cannot comprehend the distinction between truth and lies, not only is her testimony unreliable (according to the constitutional

court), but the admonishment, and her subsequent promise to tell the truth becomes meaningless.

This is not to say that there should be a rigid and artificial demarcation between the enquiry into competence, and the enquiry (if there should be a formal one) into the applicability of section 164 of the Criminal Procedure Act. For example, I would argue that the questions used to investigate the child's level of understanding of the oath, and the duty to tell the truth, may also serve to provide the magistrate with the basis to make a finding of competence.

However, even if the process of reasoning by the magistrate is understood on this basis, it is clear, in my opinion, that the witness did not demonstrate that she was a competent witness.

The High Court erred in considering the content of the evidence, and its apparent reliability, as relevant to the enquiry into competence. Competence is established independently of the probative value of the evidence. This is controversial. There is research which suggests that even if witnesses are not able to appreciate abstract concepts of truth and falsehood, they may yet be able to provide reliable evidence to the court. The High Court appears to accept this principle, in an obiter statement in the judgement (para 8.3). However, this is not the law as it stands. This aspect should however be investigated further – the common law relating to the admission of hearsay evidence was amended to allow a consideration of the probative value of the hearsay evidence as relevant to its admissibility. Perhaps the common law relating to the admissibility of childrens' evidence should be re-considered in the light of advances in knowledge in the field of child psychology and related fields. Empirical research shows that there is little correlation between a child's performance on truth/lie distinguishing tests, and their actual truth telling behaviour. It also suggests that even children who are unable to articulate the distinction between truth and lies are able to identify true and false statement, and indicate a preference for the truth (Klemfuss and Ceci at p 275-276).

The issue was raised in the case of *S v Mokoena,S v Phaswane* 2008 (2) SACR 230 (T), where it was argued that even a child who could not distinguish between truth and falsehood may be able to provide reliable evidence, and that the competency test (implicit in section 164(1) of the Criminal Procedure Act 51 of 1977) should therefore be abolished. The Constitutional Court rejected this argument, holding that 'the evidence of a child who does not understand what it means to tell the truth is not reliable…and [t]he risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify' (*DPP,Tvl v Minister of Justice and Constitutional Development and others* (supra) at para 165). It is interesting to note that, faced with similar arguments, the Canadian courts did abolish the competency test for children (Klemfuss and Ceci at p 283). In

South Africa, legislative intervention will almost certainly be required to change the position.

There are problematic aspects in the manner in which the magistrate established the competence of the complainant herself in the case of *S v BN*, but the problems are not as glaring as in the case of the second state witness discussed above (para 7.2). No worthwhile purpose will be served by discussing the case further. Ironically, the conviction may well have survived even without the evidence of the second state witness. In my view, the judgement would have had more integrity had that been the case. *G Raghubar v The State* (148/12)[2012]ZASCA 188 (30 November 2012)

In the case of *G Raghubar v The State* (148/12)[2012]ZASCA 188 (30 November 2012), the appellant appealed against his conviction of the crime of having indecently assaulted a 4 year old boy. The child was 14 years old at the time he testified. On perusing the appeal record, the justices became concerned at the question of the child's competence to testify, and the manner in which he had been sworn in (para3).The exchange between the magistrate and the child prior to him testifying was obviously inadequate to establish either competence or the child's understanding of the oath (para 7), but in this case, the magistrate proceeded to ask the appellant's legal representative whether he was prepared to accept that the witness was competent to give evidence. He replied that he was (ibid).

It is trite that the parties cannot consent to the competence of a witness – this is a finding which the court itself must make. The Supreme Court of Appeal commented that the appellant's legal representative was not qualified to express an opinion as to the witnesses competency, and that it was not clear on what basis the magistrate had solicited his opinion, nor the basis on which it had been provided (para 7).

The exchange between the witness and the court then proceeded as follows (ibid):

> Court: Do you believe in God, P?
>
> Witness: Ýes.
>
> Court: And do you believe that if you promised God that you would speak the truth about something, that you took an oath to God to speak the truth, do you believe that if you then went on and spoke lies, made up stories, getting somebody into big trouble, do you believe that God would know that you are telling lies and would punish you for doing that?
>
> Witness: Yes I do.

The Supreme Court of Appeal commented on the exchange as follows (para 8):

> The above leading, compound question posed by the court is…not helpful. It [is] not possible to gather from it whether the complainant understood what it

means to speak the truth; what he oath means; and, the difference between the truth and falsehood, nor the consequences if he did not tell the truth.

The Supreme Court of Appeal pointed out that what was required to establish competence and due compliance with section 164 of the Criminal Procedure Act 51 of 1977 had been spelt out by the Constitutional Court in the case of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others* 2009 (2) SACR 130 (CC) at paras 165-168, and that the enquiry undertaken by the magistrate fell far short of that standard (para 9).Counsel for the state conceded the point (ibid).

The Supreme Court nevertheless analysed the evidence in the case, applying the cautionary rule to the evidence of the complainant, and found that in any event, there was insufficient evidence to sustain the conviction, which was thus overturned (para 20).

2. Proof of age of Complainant: Sufficiency of J88; Competence of child witness

In the case of *A V Tshimbudzi v The State* (137/12) [2012] ZASCA 200 (30 November 2012), the appellant appealed against his conviction and sentence in the court a quo. One of the remarkable facts about this case is that it came before the Supreme Court of Appeal twelve years after the appellant was convicted and sentenced. Since the delay was due to the appellant's failure to submit an earlier application for leave to appeal to the Supreme Court of Appeal this is simply noted in the judgement (para 3).

The Supreme Court of Appeal found a number of irregularities with the trial in the court a quo which were sufficiently serious to set the conviction aside. I will discuss two of these. Firstly, the appellant was convicted of the rape of a 13 year old female (para 5). The Criminal Law Amendment Act 105 of 1997 requires that for a person to be convicted of the rape of a person under 16, there must be admissible evidence that the complainant was under the age of 16 (para 6). In this case, the relevant J88 medico-legal report was introduced into evidence with the consent of the defence (para 6). (It is not indicated in the judgement whether the applicant was represented in the court a quo or not.) The report indicated that the complainant was 13 years old, but the doctor did not provide any explanation for his finding, and he was not called as a witness (ibid).The Supreme Court of Appeal found that the doctor's bare opinion on the complainant's age in the report was not sufficient to prove that she was under 16 years old, which was crucial to determine the nature of the appellant's offence and the possible sentence to be imposed (para 6). The Supreme Court of Appeal did not provide any details regarding the nature of the consent to the admission of the J88 provided by the defence. This case provides a good example of why it is so important to record the terms of any such consent carefully. If the consent was simply to the document being admitted without the necessary

formalities regarding authenticity and originality being complied with, then it could not be said that the defence consented to the admission of the evidence that the complaint was 13 years old. In this case, the evidence of age would be an expert opinion in the form of hearsay evidence. It would be arguable that the facts supporting the doctor's opinion on age were implicit in the report – by virtue of the fact that he had examined the complainant. I would consider this to be a strong argument. If this were accepted than the opinion as to age would not be inadmissible for lack of supporting facts. The criteria for the admissibility of hearsay evidence would then need to be considered, including factors relevant to the reliability of the doctor's opinion as to the complaint's age.

If, on the other hand, the defence had consented to the admission of the J88, as proof of the facts recorded therein, the age of the complainant would be a fact admitted by the defence. This would constitute admissible evidence that the complainant was under the age of 16, as required by Act 105 of 1997.

The second irregularity in the trial which I wish to draw attention to relates to the manner in which the complainant was sworn in. All that was noted in the transcript of the trial proceedings were the letters 'd.s.s' after the complainant's name, which the Supreme Court of Appeal read to mean 'duly sworn in'(para 7). There was nothing to indicate that the complainant's ability to distinguish between truth and lies was investigated, nor her ability to understand the nature and import of the oath. The Supreme Court of Appeal concluded that this rendered her evidence inadmissible (ibid).

The Supreme Court of Appeal considered that these and the other irregularities struck at the heart of the fairness of the trial, and could not be corrected by remittal. The appeal was thus upheld (para 8).

3. Intermediaries: *S v CT* 2012 (2) SACR 517 (GNP)

In the case of *S v CT* 2012 (2) SACR 517 (GNP), the appellant appealed against his conviction in the court a quo of the crime of having raped his 9 year old daughter. His appeal was based on the argument that he had not had a fair trial as the complainant had not testified through an intermediary as provided for by section 170A of the Criminal Procedure Act 51 of 1977 (para 5) even though a social worker had recommended that she do so (para 7) and despite the fact that the Constitutional Court had recommended a pro-active approach to the use of intermediaries by the presiding magistrate in cases involving child complainants in sexual cases (*Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others* 2009 (2) SACR 130 (CC) at paras 112-113).

The High Court found that the magistrate had acted irregularly in not raising and investigating the question of whether the complainant should testify through an

intermediary (paras 8-9). However, since there had been no resultant prejudice to the appellant, there was no merit to this aspect of his appeal (paras 10-13). His appeal on the merits was also rejected, and his conviction confirmed (para 19).

S v SN 2012(2) SACR 317 (GNP)

The case of *S v SN* 2012(2) SACR 317 (GNP) was referred to the High Court as a special review. The accused,15 years old, was charged with the rape of a 14 year old (para 2). An intermediary was appointed, but it transpired during the course of the trial that the intermediary did not have the necessary qualifications for appointment as an intermediary (para 4). The court a quo ruled that the trial would continue with the intermediary but that at the end of the trial the matter would be referred to the High Court for a determination as to whether the irregular appointment had affected the proceeding and what the fate of the proceedings should be (para 4).

The High Court referred to section 170 A (5) (a) and (b) of the Criminal Procedure Act 51 of 1977, which make it clear that the mere lack of proper qualifications do not necessarily vitiate the proceedings (para 26). Section 170A (5) (a) provides that "…no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such an intermediary was not competent to be appointed as an intermediary…" Section 170A (5) (b) provides that "…if evidence is being presented through an intermediary who was appointed in good faith but, at the time of such appointment was not qualified to be appointed…the court must make a finding as to the…admissibility of that evidence…with due regard to :

i) the reason why the intermediary concerned was not qualified to be appointed …and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;
ii) The mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and
iii) The likelihood that real and substantial justice will be impaired if that evidence is admitted.

The Supreme Court correctly found that these issues could best be assessed by the magistrate presiding at the trial (para 29) and thus referred the matter back to the magistrate's court for a finding in this regard (para 31).

The Supreme Court of Appeal held that it was in future unnecessary to refer the issue of an unqualified intermediary to the High Court for a special review, and that

the trial court was empowered by section 170A (5) and (6) to make the necessary ruling (para 31).

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Matters of Interest to Magistrates

The Maintenance Act and division of the estate Stante Matrimonio

Introduction

The Matrimonial Property Act 88 of 1984 (hereinafter referred to as “the Act”), makes provision for the postnuptial alteration of the matrimonial property system and it also enables the spouses to apply for the division of their joint estate and the accrual during the subsistence of the marriage before it can be dissolved.

However, notwithstanding the above statutory provision, there seems to be cases that are brought to the Maintenance Court in an attempt to use maintenance channels to prohibit one spouse from abusing the estate. This practice is unacceptable. The provisions of the Maintenance Act 99 of 1998 are there for the vulnerable victims of maintenance and should not be used to secure the division of the estate of a married couple.

It is submitted that the Maintenance Court is not the proper forum to award relief pertaining to the division of an estate. It is trite law that maintenance is a personal consequence of the marriage and not a proprietary consequence thereof. According to Kahn *(1979 Annual Survey of South African Law 496)*, maintenance is one aspect of divorce and is not directly associated with the matrimonial property regime of the parties.

The purpose of this article is therefore to set out the legal channels and procedures that spouses need to follow in cases of abuse of the joint estate or accrual by one spouse against the other during the subsistence of the marriage.

Marriage out of Community of Property with the Accrual System

If spouses are married out of community of property subject to the accrual system, the spouse whose estate shows no accrual or a lesser accrual upon the dissolution of the marriage acquires a claim equivalent to half of the difference in accrual against the spouse whose estate showed a higher accrual.

The above claim can be lodged to the High Court during the dissolution of the marriage but equally important, it can also be applied for during the subsistence of the marriage if it appears to one spouse that his or her claim in the accrual is likely to be prejudiced or is indeed prejudiced by the conduct of the other spouse who abuses the accrual of the estate. The application in this regard can be lodged by the prejudiced spouse in terms of section 8(1) of the Act which provides as follows:

"A court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this chapter or on such other basis as the court may deem just".

In light of the above provision, the following requirements should be met before the court can grant an order for the immediate division of the accrual:

- The marriage must be subject to the accrual system;
- The court must be satisfied that a right to share in the accrual is being or will probably be seriously prejudiced;
- The presence of detrimental conduct or proposed detrimental conduct of the other spouse; and lastly
- The court must be satisfied that the order will not prejudice other persons.

A right to share in the accrual will be seriously prejudiced if the other spouse misuses the amount accrued and or accumulated by either spouse during the subsistence of the marriage subject to the accrual system. "Other persons" include the creditors of each party's estate.

If the above requirements have been complied with, the court may grant an order for the immediate division of the accrual and consequently, the court may in terms of section 8(2) of the Act, make an order that the accrual system applicable to the marriage be replaced by a matrimonial property system in terms of which the accrual sharing as well as community of property and community of profit and loss are

excluded. This means that the marriage will be subject to a complete separation of property from the date on which a division order was granted.

The prejudiced spouse cannot approach the Maintenance Court in circumstances whereby his or her right to share in the accrual is being or will probably be prejudiced. The maintenance court does not have jurisdiction to order a division of the accrual between the spouses even if one spouse's conduct detrimentally prejudices the other spouse's share in the accrual. The correct procedure is therefore to approach the high court and apply for the immediate division of the accrual *stante matrimonio* in terms of section 8(1) of the Act.

Marriage in Community of Property

If the parties are married in community of property, they both become the co-owners of the joint estate in undivided and indivisible half shares of all the assets and liabilities. This includes assets they have at the time of their marriage and also those acquired during the subsistence of the marriage. The process of joint administration of the estate always seems to be very complicated during the subsistence of the marriage *(Cronje & Heaton, SA Family Law, 2nd ed at 71).*

In some marriages spouses abuse the joint estate and consequently, one spouse suffers prejudice to his or her interest in the joint estate during the subsistence of the marriage and upon the dissolution thereof.

In this regard, it is not within the powers of the Maintenance Court to divide the joint estate between the spouses and/or to award maintenance in such a way as to secure the protection of the other spouse's interest in the joint estate. Equally important, the Maintenance Court does not grant maintenance orders using the method of *"protect and secure".* The main consideration in the law of maintenance is *"needs and affordability"*.

The Maintenance Court does not have any powers to order the division of the estate between the parties even if the marriage is in community of property but will only grant spousal maintenance in accordance with the general principle of the law of maintenance pertaining to spousal maintenance. It is however, within the jurisdiction of the High Court to order the division of the estate *stante matrimonio* should it appear that the other spouse's interest in the joint estate has been or will probably be prejudiced.

In light of the above, the Act in section 20(1) gives the High Court the necessary powers to order same and it provides as follows:

"A court may on the application of a spouse, if it is satisfied that the interest of that spouse in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be

prejudiced thereby, order the immediate division of the joint estate in equal shares or on such other basis as the court may deem just".

The following are the requirements for the immediate division to be granted:

- The marriage must be in community of property;
- The court must be satisfied that the interest of a spouse in the joint estate is being or will probably be seriously prejudiced;
- The presence of detrimental conduct or proposed detrimental conduct of the other spouse; and lastly
- The court must be satisfied that the order will not prejudice other persons.

In section 20(2), the Act provides that if the court grants the above order, it may order that the community of property be replaced by another matrimonial property system subject to such conditions as it may deem fit. The said systems include complete separation of property which may be desirable in the circumstances discussed.

The section also refers to the division of the estate in "*equal shares"* or on any "*other basis as the Court may deem just*." It is evident in this regard that the section refers to the power of the Court to order equal division of the estate or to the power to grant an adjustment order to achieve equal division of the estate, in instances where one spouse has already utilized a certain portion of the estate to the prejudice of the other.

The difference between Section 8(1) and 20(1)

The above sections are different in the following respects:

- Section 8(1) is only applicable to marriages that are subject to the accrual system whilst section 20(1) is applicable to marriages that are concluded in community of property;
- Section 8(1) protects a 'right' to share in the accrual while section 20(1) protects an 'interest' in the joint estate.

The accrual system entails the division of the estate accumulated by both parties during the subsistence of the marriage whilst community of property includes the estate amassed prior and during the subsistence of the marriage save for that which is excluded therefrom in accordance with the law.

Section 8(1) and 20(1) are therefore meant to safeguard the above during the subsistence of the marriage. The Maintenance Act can never be utilized to achieve the same results.

Authors / Academic writers

According to HCAW Schulze *(Some thoughts on the Interpretation and Application of section 8(1) of the Matrimonial Act 88 of 1984, 2000(63) THRHR 116)*, section 8(1) of the Act is not often applied in practice and this has resulted in uncertainty as to how to interpret its provisions. At the time of writing the above article, there were no cases, as he states, that have been reported which could give some guidance on the interpretation and application of the said section.

Sandra Ferreira *(Protection of the Right to Accrual Sharing, Reeder v Softline (2000) 3 All SA 105 (W)*, highlighted quite a number of conflicting views and misconceptions about the principles of the accrual system and its operation. She further indicated that *"although much has been written about the accrual system in general, it seems that the very important distinction between the patrimonial position of the spouses during the marriage and their position at the dissolution of the marriage has been neglected".*

According to her, for section 8(1) to have any significance at all, a right to claim accrual would have to exist during the subsistence of the marriage and not only on dissolution thereof. The claim arises however, only at the dissolution of the marriage. She further indicates that "section 20 is aimed at protecting a vested right whereas the aim of section 8(1) is to protect a contingent right."

Cronje and Heaton *(op cit at 99)* also indicated that a claim differs from a right and that in section 3(2), the Act makes it clear that the claim arises only upon dissolution of the marriage. A right arises during the subsistence of the marriage and that if there is no right during the subsistence of the marriage, section 8 would be meaningless. More closely analogous, is the submission of Schulze that the accrual system was created in order for both parties to share in the assets amassed through their mutual efforts and contribution during the subsistence of the marriage out of community of property and that the said system takes effect only on dissolution of the marriage when the claim to share in the accrual arises.

In *Reeder v Softline 2000 (4) All SA (W),* it was held that pending the dissolution of the marriage or the finalization of a claim in terms of section 8(1), a spouse who alleges that his/her estate has shown no accrual or a smaller accrual than the estate of the other spouse and who in divorce proceedings or in terms of section 8(1) claims half the difference of the accrual between the two estates, has a contingent right and not a vested right.

In circumstances of this nature, because a right exists during the subsistence of the marriage but a claim upon dissolution thereof, it is advisable (in terms of the decision in *Reeder v Softline* and the discussion of the above authors*)* for the prejudiced spouse to apply for an interdict *pendente lite* in order to protect his/her contingent

right by preventing the other spouse from dissipating the value of the estate. The latter can then be claimed upon dissolution of the marriage when the claim arises.

In *Gernetzky v Gernetzky 226/2007* (unreported decision of the Eastern Cape Division of the High Court of SA), the applicant succeeded in her application for an interdict *pendente lite* to prohibit the respondent from alienating or encumbering his farm at a low market rate pending the finalization of divorce proceedings. The applicant's case was that upon divorce she will be entitled to share in the accrual of the first respondent's estate and that by selling the farm at below market value the respondent will frustrate her claim to share in his accrual in terms of section 3(1) of the Act.

The court found that if the sale and transfer of the farm is not stopped in circumstances where the true value of the farm is in excess of the price at which it has been sold, then the value of applicant's accrual claim will be diminished and her chances of recovering that share will be prejudiced. Accordingly, the court found that the applicant had established a *prima facie* right to share in the accrual of the respondent and that her contingent right will become a vested one upon granting of the divorce.

In this regard, it is apparent that during the subsistence of the marriage, a spouse has a contingent right to share in the accrual of the estate of the other spouse and this right becomes a vested right upon dissolution of the marriage and can then be claimed. An interdict *pendente lite* plays a crucial role for the protection of this contingent right.

Conclusion

At no stage should the provisions of the Maintenance Act be used where the Matrimonial Property Act is applicable. Maintenance cases are *sui generis* in nature and should *inter alia*, not be confused with any other matters.

An interdict can be applied for by one spouse to protect his/her contingent right during the subsistence of the marriage and prevent the other spouse from dissipating the value of the estate pending the outcome of the divorce or an application in terms of section 8. A spouse has a contingent right to share in the accrual of the other spouse during the subsistence of the marriage and is entitled to claim same upon dissolution of the marriage when the claim arises. Equally important, section 20 protects a vested right and consequently, an interdict can also be applied for in order to protect this right pending the outcome of divorce or an application in terms of section 20.

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A Last Thought

"It needs to be stated that a career in law is not primarily an exercise in the accumulation of material wealth, status and glamour! Those who make this their aim will certainly die disappointed! A successful career in law is not only dependent on a combination of knowledge, appropriate legal skills and experience, but also requires character, personality, dedication, commitment and professionalism. This is the *first principle* about rekindling passion for the law: know the requirements for the legal profession and then one will know what is expected — if one understands what the professional expectations are, then 'live-up' to those expectations (or at least try to cultivate them). In this regard (in context of professional expectations), much is to be gleaned from the American Bar Associations' identification of the ten fundamental skills and four fundamental values which every successful lawyer should possess — the ten fundamental *skills* are: (1) problem solving; (2) legal analysis and reasoning; (3) legal research and writing; (4) fact investigation; (5) communication; (6) counselling; (7) negotiation; (8) litigation and alternative dispute resolution procedures; (9) organisation and management of legal work; (10) recognising and resolving ethical issues. The four fundamental *values* are: (1) providing competent representation; (2) striving to promote justice, fairness and morality; (3) striving to improve the profession; and (4) engaging in professional self-development. One would, however, be naïve to think that by simply slavishly implementing these listed skills and values on a daily basis passion for the law will follow as a matter of course. For passion to be rekindled one needs passion in itself! This is the *second principle*: the listed skills and values will only enhance one's professional life if these are pursued with passion; in this sense passion becomes, the *elixir*, as it were, for the development of these skills and values, without which the pursuit thereof becomes meaningless! While skills and values can be acquired, it needs passion, which comes from within, to propel these skills and values forward to professional articulation."

From *On becoming a passionate Lawyer* by Pieter Carstens (2011 Pretoria Student Law Review page 8).