e-MANTSHI

A KZNJETCOM Newsletter

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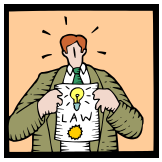
Welcome to the eighty seventh issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is 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 explanatory memorandum has been published in Government Gazette no 36347 dated 8 April 2013 in respect of a Judicial Matters Amendment Bill which is soon to be introduced in the National Assembly. The Bill intends to amend -
the Magistrates' Courts Act, 1944, so as to bring the Afrikaans text relating to causes of action over which magistrates' courts have jurisdiction in line with that of the English text; and to further regulate the jurisdiction of magistrates' courts in line with a decision of the Constitutional Court;

- the Criminal Procedure Act, 1977, so as to effect certain textual corrections; and to further regulate the provisions relating to the expungement of certain criminal records;
- the Attorneys Act, 1979, so as to further regulate the constitution and the powers of the board of control of the Attorneys Fidelity Fund;
- the Small Claims Courts Act, 1984, so as to further regulate the appointment of commissioners;
- the Judicial Service Commission Act, 1994, so as to allow the Chairperson of the Judicial Conduct Committee to delegate certain powers or functions to an acting

Chairperson; to further regulate the election of an acting Chairperson of the Judicial Conduct Committee; to provide for the referral of a complaint to the Deputy Chief Justice; to provide that the Minister may make regulations regarding witness fees; and to effect certain textual corrections;

- the Criminal Law Amendment Act, 1997, so as to exclude persons under the age of 18 years from the operation of that Act;
- the Promotion of Access to Information Act, 2000, so as to extend the time periods within which to bring court applications;
- the Children's Act, 2005, so as to allow for information in the National Child Protection Register to be made available in the case of applications for the expungement of certain criminal records;
- the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to effect certain textual corrections; to allow for information in the National Register for Sex Offenders to be made available in the case of applications for the expungement of certain criminal records; and to further regulate the issuing of directives by the National Director of Public Prosecutions;
- the Child Justice Act, 2008, so as to further regulate the evaluation of the criminal capacity of a child; to further regulate the reporting of any injury sustained or severe psychological trauma suffered by a child while in police custody; to further regulate the holding of preliminary inquiries; to provide for the delegation of certain powers and assignment of certain duties by the Cabinet member responsible for social development in respect of the accreditation of diversion programmes and diversion service providers; to effect certain textual corrections; to repeal provisions that make the Criminal Law Amendment Act, 1997, applicable to persons under the age of 18 years; to further regulate the automatic review of children in certain cases; and to further regulate the expungement of records of certain convictions of children; and
- the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, so as to effect certain textual corrections, and to provide for matters connected therewith.

A copy of the Bill can be found on the websites of the Parliamentary Monitoring Group at http://www. pmg.org.za and the Department of Justice and Constitutional Development at www.justice.gov.za .

2. A notice was published in Government Gazette no 36357 dated 12 April 2013 in which the *Protection from Harassment Act, 2011* (Act 17 of 2011) comes into operation on 27 April 2013. The Regulations in terms of the Act were also published in the same Government Gazette as well as directives in terms of section 20(3) and the tariff of compensation payable to electronic communications service providers in terms of section 4(8) of the Act.

3. The Rules Board for Courts of Law has amended Rule 58 of the Magistrates Court Rules. The notice to this effect was published in Government Gazette no 36338 of 12 April 2013. The amended rule comes into operation on 17 May 2013.

Recent Court Cases

1. S v BOTHA 2013 (1) SACR 353 (ECP)

When considering suspending an accused's driver's licence in terms of the provisions of section 35(1) and (2) of the Road Traffic Act, Act 93 of 1996 evidence under oath must be adduced by an accused to persuade the court not to suspend his/her licence. A mere submission from the bar is not sufficient.

Tshiki J:

"[1] In this case the accused, who was a 33 year old female at the time of the offence and was legally represented throughout the trial proceedings, pleaded guilty and was convicted of a contravention of section 65(2)(a) of the National Road Traffic Act 93, of 1996 (as amended) (the Act). In her statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA) she admitted, *inter alia*, that at the time she was driving the motor vehicle on a public road her blood alcohol concentration exceeded the legal limit and was 0.18 grams per 100 millilitres of blood. She was sentenced to pay a fine of R5 000.00 (five thousand rand) or in default of such payment to undergo five (5) months imprisonment. Half of her sentence was suspended for five (5) years on appropriate conditions. Of note and more importantly for the purposes of this judgment, the Court ordered that circumstances existed which justified the departure from the provisions of section 35(1) of the Act, which prescribes for the automatic suspension of licences and permits.

[2] During the stage of sentence proceedings the presiding magistrate had to consider, *inter alia,* the application or otherwise of section 35(1) of the Act with regard to the automatic suspension of the accused's driving licence, subject to the provisions of section 35(3) of the Act which deals with the oath opportunity to present evidence regarding circumstances under which a court would not order such

a suspension. The accused's legal representative informed the Court that she is aware of all the provisions of section 35 of the Act but that she nonetheless elected not to testify. Thereafter, her legal representative addressed the Court from the bar both in respect of mitigating factors, as well as in respect of the application of the provisions of section 35(1) of the Act. The presiding magistrate then ordered that provisions of section 35(1) (suspension of her driver's licence) shall not take effect.

A senior magistrate had noticed the apparent irregularity in the application of section 35 of the Act, and referred the presiding magistrate to the judgment in *S v Ngqabuko (2012) JOL 28816* (ECG) and instructed him to send the proceedings to this Court by way of special review with the purpose of having the proceedings relating to section 35 of the Act set aside and for an appropriate order to be made……

4] In his reasons for judgment, which accompanied the record, the presiding magistrate herein seems to agree, and correctly in my view, that the provisions of section 35(3) of the Act are peremptory in nature in that they require the convicted person to present evidence under oath if he or she intends to persuade the Court that the provisions of subsection (1) or (2), as the case may be, should not take effect.

[5] Consequently, where an accused person is convicted of contravening any of the specified offences, the conviction triggers the automatic suspension of the licence or permit in the case of a holder thereof, or where the person who drove without a licence, disqualification from obtaining one, as the case may be. It is clear from the language used in section 35(3), of the Act that only persuasive facts which are adduced by way of evidence under oath may persuade the Court from granting an order in terms of the provisions of section 35(1) or (2). (*S v Van Rooyen* 2012 (2) SACR 141 at 146 para [6]).

[6] In other words, if the Court has only heard submissions from the bar, there has been no enquiry in accordance with section 35(3) of the Act. Consequently, the Court is precluded from making any order, other than suspending the licence or disqualifying the person from obtaining one, as provided for in section 35(1) and (2) of the Act. An accused person, as in the present case, who elects not to testify, cannot be held to have persuaded the Court not to order the suspension of her driver's licence if the accused willingly elected not to give evidence under oath. Evidence on oath is a jurisdictional requirement before a Court may even consider whether or not to deviate from applying the peremptory provisions of section 35(1) of the Act.

[7] In my view, the wording of section 35(3) of the Act envisages a hearing in compliance with the constitutional provisions, before the convicted person's right to keep or obtain his or her licence can be taken away by operation of law. It is for this reason that the Court, in terms of section 35(4) of the Act, has to advise the convicted person of the provisions of sections 35(1)-(3) of the Act before the

imposition of sentence. Sentencing in the sense used in section 35(4) of the Act, includes the suspension of a licence or disqualification to obtain one, as the case may be.

[8] Another concern raised by the presiding magistrate, was the fact that the accused in this case was aware of all the provisions of section 35 of the Act, because she was represented by her legal counsel who also informed the Court of her awareness of her rights in terms of the provisions of section 35 of the Act. However, the accused elected not to testify on oath in terms of the provisions of section 35(3) of the Act, but to proceed by way of submissions from the bar. My view is that the provisions of section 35(1)-(4) of the Act do not undermine a convicted person's right to silence. The Act does not compel such an accused to testify, but the consequences of electing not to testify, will not favour an accused convicted of any of the specified offences, because the Court in that situation has no discretion which it can exercise in terms of section 35(3) of the Act, if there is no evidence on oath. The court is bound to apply the peremptory provisions of section 35(1) or (2) of the Act in the absence of evidence on oath.

[9] The Court in the present circumstances should have invoked the provisions of section 35(1), because there were no existing circumstances placed before it on oath which justified a decision not to impose the suspension of the accused driving licence. I say so, *inter alia*, because on page 15 of the record, and after the accused had been informed by her counsel of her rights in terms of section 35(3), there is evidence to show that she was aware of the consequences of her election. Furthermore, on page 18 lines 5-10 the following discussion is reflected on the record:

"Court : Thank you. Of course your client understands that by

refusing to testify or by electing not to testify, runs a risk that her driving licence may be cancelled, endorsed or suspended? She is acutely aware of that?

Van Der Spuy : She is aware of that Your Worship."

[10] An accused person who is legally represented is assumed to have been fully and adequately informed by his or her legal representative of his or her rights which pertain to the merits and demerits of the case he or she is facing in Court. The common law principle is that for the duration of his or her mandate, the legal representative is in control of the manner of presentation of the defence of his or her client. Ordinarily the Court should not likely interfere with such relationship unless there are apparent indications that a failure of justice or illegality may occur. In this case, the presiding magistrate pertinently enquired from accused's counsel if his client understood the consequences of exercising her rights to remain silent and the answer was in the affirmative. (*S v Matonsi* 1958 (2) SA 450 (AD), *S v Mvelase* 2004 (2) SACR 531 (W) at 536h-537a).

[11] Every accused person has the right to elect not to testify in Court. That the consequences of such an election may at a later stage prove not to be beneficial, does not assist the accused. That is the inevitable risk involved in choosing not to testify. Up to the stage when the present accused's legal representative confirmed his client's awareness of her rights in terms of section 35 of the Act, there was no irregularity in the proceedings. The only irregularity committed by the Court was ordering that the provisions of section 35(1) shall not take effect.

[12] The trial Court was not empowered to deviate from the provisions of section 35(1) which are peremptory in nature. The deviation, in the absence of evidence under oath regarding circumstances which would justify it, was a reviewable irregularity.

[13] As provided for in section 35(1) of the Act, the Court ought to have suspended the accused's driver's licence for the prescribed period of six months (the minimum period) for a first offender such as the accused was. The magistrate's failure to do so, warrants the setting aside of his order and substituting it with one imposing the suspension of the accused's driver's licence for the reasons set out above."

2. S v RAMULIFHO 2013(1) SACR 388 (SCA)

Evidence in a criminal trial must ultimately be assessed as a whole.

The appellant was convicted in a regional court of rape and was sentenced by the high court to life imprisonment in 2002. He was granted leave to appeal in 2010 and, after hearing argument at the hearing of the appeal in November 2012, the court upheld the appeal and ordered the immediate release of the appellant. It appeared that the appellant was approximately 16 years old at the time of the offence and 18 years old when he eventually stood trial after having been in custody for two years. His correct age was never properly ascertained by the police or prosecution. By the time the trial commenced he had been arrested, interrogated, detained for almost two years, and been forced, to make admissions or a confession, all without the assistance of a legal representative or the advice of his parents or guardian. It appeared furthermore that the regional magistrate did not inform the appellant of his right to legal representation; he did not properly explain to the appellant how to cross-examine, and when the appellant showed, through his questions, that he did not understand how to cross-examine, he did not assist the appellant to put questions; he allowed the prosecutor to ask obviously leading questions on the material issues and to lead inadmissible evidence; and he did not properly explain to the appellant his rights in respect of the medico legal report and he clearly did not read it, or, if he did, he did not understand its import. Eventually, when he gave judgment he

did not properly consider all the evidence. With regard to the complainant, he did not remind himself about the dangers inherent in dealing with a child's evidence and there is no suggestion that he carefully considered her evidence to determine whether it could be found to be reliable. He dealt with the defense evidence in two or three lines, and what he said did not properly reflect the substance of what the witnesses said, and he did not consider their evidence in the light of the medico legal report which obviously indicated that they were telling the truth. The conduct of the trial showed that a lack of legal representation prejudiced the appellant.

The court held that, even if it were accepted that all the evidence was properly before the court, it did not prove beyond a reasonable doubt that the appellant was guilty, and he should have been acquitted. (Paragraph [13] at *395g-396a.)*

As regards the delay in the matter coming before the court on appeal, it appeared that these delays were caused by (1) the failure of the appellant's advocate to inform him, immediately after sentence, of his right to apply for leave to appeal and his right to appeal; (2) the failure of the Legal Aid officer who consulted with the appellant in August 2003 to appoint an attorney to represent the appellant and order a transcript of the proceedings to enable the appellant to apply for leave to appeal; (3) the failure of the appellant to follow up his instructions to ascertain what progress his attorney was making (which was probably due to the appellant's lack of education and means); and (4) the failure of the Legal Aid officer or attorney appointed by the Legal Aid Board to expeditiously obtain the record (81 pages in extent) for the purpose of the application for leave to appeal and the appeal itself.

Held, that delays of this nature, in the prosecution of a criminal appeal when the appellant was serving a prison sentence, were not acceptable and ran contrary to the ethic which should prevail in the administration of the criminal-justice system. Where a convicted person who is serving a prison sentence wishes to appeal, every person involved in the process must ensure that he or she does, with the utmost expedition, what he or she is required to do. The judge or magistrate must hear the application for leave to appeal without delay, the registrar or clerk of the court must have the record transcribed and prepare the record of proceedings, and transmit and file all necessary documents without delay, and the attorney representing the accused must ensure that everyone involved expeditiously does what is required. And that is because the freedom of the individual is involved and must be safeguarded within the limits of the law. It is an egregious violation of individual freedom to detain a person in prison, and it is the solemn duty of every judicial officer, official involved in the administration of justice, and the legal practitioner representing the accused, to ensure that it will happen

only with the full authority of the legal process. The judicial officer and every other official involved in the legal process whereby a person is deprived of his freedom are obliged to ensure that that process obtains the full stamp of approval of the law as quickly as possible, and the impression must never be created that our courts and judicial officials are indifferent to the freedom of the individual. (Paragraph [17] at 397 *e-h.)*

3. S V RAGHUBAR 2013 (1) SACR 398 (SCA)

When questioning a child to determine whether the child understands what it means to speak the truth a judicial officer must not try and test a child's knowledge of abstract concepts of truth and falsehood. What is required is that the child relates what happened truthfully.

Tshiqi J A

"Sections 162–164 of the Criminal Procedure Act provide as follows:
'162 Witness to be examined under oath
(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:
"I swear that the evidence that I shall give shall be the truth, the whole truth and nothing but the truth, so help me God."
(2) If any person to whom the oath is administered wishes to take the oath with uplifted hand, he shall be permitted to do so.
163 Affirmation in lieu of oath
(1) Any person who is or may be required to take the oath and–
(a) who objects to taking the oath;
(b) who objects to taking the oath in the prescribed form;
(c) who does not consider the oath in the prescribed form to be binding on his conscience; or
(d) who informs the presiding judge or, as the case may be, the presiding judicial officer, that he has no religious belief or that the taking of the oath is contrary to his religious belief,
shall make an affirmation in the following words in lieu of the oath and at the direction of the presiding judicial officer or, in the case of a superior court, the presiding judge or the registrar of the court:

“I solemnly affirm that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth.”
(2) Such affirmation shall have the same legal force and effect as if the person making it had taken the oath.
(3) The validity of an oath duly taken by a witness shall not be affected if such witness does not on any of the grounds referred to in subsection (1) decline to take the oath.
164 When unsworn or unaffirmed evidence admissible

1. Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence.’

The reason for giving evidence under oath (s162), affirmation (s163) or admonishment (s164) is to ensure that the evidence given is reliable.

5. Section 192 of the Criminal Procedure Act declares generally that unless specially excluded all persons are both competent and compellable witnesses. A witness is competent to testify if his or her evidence may properly be put before the court. If a child does not have the ability to distinguish between truth and untruth, such a child is not a competent witness. It is the duty of the presiding officer to satisfy himself or herself that the child can distinguish between truth and untruth. The court can also hear evidence as to the competence of the child to testify. Such evidence assists the court in deciding (a) whether the evidence of the child is to be admitted, and (b) the weight (value) to be attached to that evidence. The maturity and understanding of the particular child must be considered by the presiding judicial officer, who must determine whether the child has sufficient intelligence to testify and a proper appreciation of the duty to speak the truth. The court may not merely accept assurances of competency from counsel. The language used in all three sections is peremptory.

6. The following exchange is recorded between the magistrate and P when the latter entered the witness stand:

‘COURT: P, please state your full names, your date of birth if you know, your age and the grade that you are presently in.

INTERMEDIARY: What are your full names, sir?
WITNESS: P.
INTERMEDIARY: You have to speak aloud.
WITNESS: P.
INTERMEDIARY: And what age are you? How old are you?
WITNESS: 14.
INTERMEDIARY: Your date of birth? When you were born?
WITNESS: 1994
INTERMEDIARY: The date.
WITNESS: 1994, 7th month, 18
INTERMEDIARY: What grade are you doing now?
WITNESS: Nine
INTERMEDIARY: Grade 9.
COURT: 1994/7 and what day?
INTERMEDIARY: You said what date you were born?
WITNESS: 18 July.
COURT: 18.
WITNESS: July.
The magistrate then directed the following question to the appellant's legal representative:
'COURT: Okay. Mr Ramouthar, are you prepared to accept the witness is competent to give evidence?
MR RAMOUTHAR: That's correct, Your Worship.'

7. Firstly, it cannot be accepted that the magistrate managed to determine merely from such an elementary line of questioning pertaining to the complainant's age, date of birth and level of education that the complainant was competent to testify. Secondly, the appellant's legal representative was not qualified to express an opinion on the complainant's competency. It is not clear on what basis his opinion was solicited by the magistrate nor on what basis he expressed it. The magistrate reverted to the complainant and posed the following questions:

'COURT: Do you believe in God, P?
WITNESS: Yes.
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 that God would punish you for doing that?
WITNESS: Yes I do.'

8. The above leading, compound question posed by the court is also not helpful. It was impossible to gather from it whether the complainant understood what it means to speak the truth; what the oath means; and, the difference between the truth and falsehood, nor the consequences if he did not speak the truth. All that the complainant could say in response to the question was 'yes' or 'no'. The magistrate felt compelled to undertake an enquiry. No doubt on seeing the child in the witness stand she entertained certain doubts that caused her to embark upon that enquiry. What was required of her in embarking upon that enquiry has been spelt out by the Constitutional Court (per Ngcobo J) in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC) paras 165, 167 and 168 as follows:

'The practice followed in courts is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth. As pointed out above, some of these questions are very theoretical and seek to determine the child's understanding of the abstract concepts of truth and falsehood. The questioning may at times be very confusing and even terrifying for a child. The result is that the judicial officer may be left with the impression that the child does not understand what it means to speak the truth and then disqualify the child from giving evidence. Yet with skilful questioning, that child may be able to convey in his or her own child language, to the presiding officer that he or she understands what it means to speak the truth. What the section requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth. As the High Court observed, the child may not know the intellectual concepts of truth or falsehood, but will understand what it means to be required to relate what happened and nothing else.

When a child, in the court's words, cannot convey the appreciation of the abstract concepts of truth and falsehood to the court, the solution does not lie in allowing every child to testify in court. The solution lies in the proper questioning of children; in particular, younger children. The purpose of questioning a child is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood. The purpose is to determine whether the child understands what it means to speak the truth. Here the manner in which the child is questioned is crucial to the enquiry. It is here where the role of an intermediary becomes vital. The intermediary will ensure that questions by the court to the child are conveyed in a manner that the child can comprehend and that the answers given by the child are conveyed in a manner that the court will understand.

As pointed out earlier, questioning a child requires a special skill. Not many judicial officers have this skill, although there are some who, over the years and because of their constant contact with child witnesses, have developed a particular skill in questioning children. This illustrates the importance of using intermediaries where

young children are called upon to testify. They have particular skills in questioning and communicating with children. Counsel for the Centre for Child Law and Childline was quite correct when, in her reply, she submitted that everything seems to turn upon the need for intermediaries when young children testify in court. Properly trained intermediaries are key to ensuring the fairness of the trial. Their integrity and skill will be vital in ensuring both that innocent people are not wrongly convicted and that guilty people are properly held to account.'

[9] Counsel for the State was ultimately constrained to concede that the enquiry undertaken by the magistrate fell far short of meeting that suggested by the Constitutional Court. Thus as Ngcobo J made plain in *Director of Public Prosecutions,Transvaal v Minister of Justice and Constitutional Development* (para 166):
'(T)he evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of s 28(2) to exclude the evidence of such a child. The 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. This would indeed have serious consequences for the administration of justice.'
It follows that as no reliance can be placed on the evidence of the complainant, the conviction cannot stand."

From The Legal Journals

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"Should a dead person forfeit bail money? A discussion of *S v BJ Engelbrecht* 2012(2) SACR 212(GSJ)"

SACJ 2012 390

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

Contributions from the Law School

Recent developments in the South African maintenance laws:

The duty to maintain in the South Africa family law has undergone a number of subtle changes during the past few years. The first development relates to the *locus standi* in matters relating to a maintenance dispute pertaining to a dependent adult child; the second, to the possible extension of the maintenance duty to include

stepparents and unmarried cohabitants in certain instances; and the third development to the duty of parties to mediate maintenance disputes rather than to resort to litigation.

Locus Standi

The age of majority is not a defining moment in the duty to maintain, as the duty continues until a child is self-supporting. A claim for the maintenance of a minor child is generally brought by the parent in whose care the child is. However, the major child has the required capacity to litigate and can thus personally claim for maintenance against his or her parents. Flemming J in *Smit v Smit* 1980 (3) SA 1010 (O) at 1018B – C argued that

> '(W)hen the child turns 21 … [i]t is the child itself who henceforth must claim directly against one or both parents to the extent that he may have a claim for support with effective content.'

On this interpretation the parent who has care of the major child does not have *locus standi* to bring a claim for maintenance relating to that major child. The reality in South Africa is that most 'children' over the age of 18 are still at secondary school and thus not generating income, let alone being self-supporting.

With the decrease of the age of majority from 21 to 18 years, the question arose as to who the litigant should be in any new claim for the increase or decrease of the maintenance amount: the dependent adult child or the parent with whom the child resides. Neither the Divorce Act 79 of 1979 nor the Children's Act 38 of 2005 expressly authorises a parent with whom an adult dependent 'child' resides to claim maintenance on his/her behalf from the other parent. "Although the Children's Act implicitly assumes that children are financially independent at 18 and that parental financial responsibility should end at that date, the social reality in South Africa is that many children have not concluded their secondary education, let alone completed their tertiary education, when they turn 18, and remain financially dependent on their parents several years after they attain the age of majority." (*Butcher* para 14)

In two judgments, *JG v CG* 2012 (3) SA 103 (GSJ) and *Butcher v Butcher* 2009 (2) SA 421 (C), the courts allowed the primary residence parent to include the costs of the adult dependent 'child' in their claim for maintenance. The argument was the following (*Butcher* (para 14):

> "Placing this burden on an adult dependent child who still lives at home in most circumstances puts him/her in an invidious position. Also, where an adult dependent child still lives at home and the primary residence parent requires a contribution in respect of his living costs, it is undesirable that such a parent should look towards the adult child to pay over a contribution from an amount received as maintenance from the other parent."

The court went further (*Butcher* para 17):

> "In terms of s 7(2) of the Divorce Act a court, when determining a spousal maintenance claim, must take into account, amongst other factors, the parties' respective financial needs and obligations, as well as their standard of living during the marriage. Where the parties have separated and the adult children of the marriage have continued to live with the mother who has had to use her household budget to run the family home and provide groceries for a three-member household, such parent's responsibility to provide the children with a home, with all that this entails, constitutes an 'obligation' within the meaning of s 7(2) of the Divorce Act which can validly be taken into account in determining the quantum of her interim maintenance claim."

Step-parents

In terms of the common law the duty to maintain a child rests on the biological parents of a child and a stepfather is not *ex lege* subject to the duty to maintain a stepchild (Spiro Parent and Child 4th ed 58 – 9). However where a parent enters into a marriage in community of property with children from a previous relationship or marriage, the application of the rule is less clear.

The court in *Heystek v Heystek* 2002 (2) SA 754 (T) 756 followed the two earlier cases, *Wilkie-Page v Wilkie-Page* 1979 (2) SA 258 (R) 259H and *Mentz v Simpson* 1990 (4) SA 455 (A) 460C - D Hefer JA (as he then was) stated:

> "(T)he respondent may, in the event of his present marriage being one in community of property, be liable for the maintenance of his stepchildren in his capacity as administrator of the joint estate…

And at 757:

> "I am of the view that the inevitable concomitant of a marriage in community of property is the shared responsibility of both spouses for the maintenance of the common household, which, in this case, certainly includes the applicant's children since the respondent had and has consortium with the children's mother. Whilst the marriage subsists and until divorce is decreed the consortium prevails. In the circumstances, the respondent is to provide maintenance for the applicant even if portion of that maintenance is utilised for the children."

These judgments were severely criticized by academic writers as a clear violation of the common law and clearly incorrect, but the matter has not been resolved. The issue of step-parents took a new turn in *MB v NB* 2010 (3) SA 220 (GSJ). In this matter the court recognised the obligation of a husband (stepfather) to contribute to the schooling of the wife's minor child from previous marriage. The stepfather did not legally adopt the child. The court nevertheless found that he was responsible for one third of the school fees based on a tacit agreement. The court argued that the issue was not whether the defendant has a general duty to support and maintain the child,

but whether he must be required to contribute to the boy's school fees and in consequence of his promise to treat him as his son, the step-father does have such a duty (para 28).

Cohabitants

The Constitutional court in *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) confirmed the common law position that there is no maintenance duty between cohabitants. The court re-iterated that it is constitutional for the law to distinguish between married and unmarried couples and that once married, *ex lege,* certain legal rights and privileges accrue to married persons. One of these duties that fall upon spouses, but not cohabitants, is the duty to maintain (para 56). There are however two exceptions to this rule that has been the subject of numerous cases the past two to three years: an agreement by cohabitants to maintain each other and a universal partnership. [Although the last possibility is not strictly speaking directly a maintenance issue, it is related as it may make provision for a division of the assets between the cohabitants at the time of dissolution of the cohabitation. If not, one of the cohabitants, often the woman, would walk away with nothing – no assets, no maintenance…]

With regard to an agreement to maintain, whether express or tacit, the court in *Mcdonald v Young* 2012 (3) SA 1 (SCA) para 19 recognised that there could be a duty of support between unmarried cohabitants. Although such a duty does not arise by operation of law, it may arise by agreement between parties (para 19). However, proof of the (tacit) agreement must be presented to the court and the conduct of the parties must justify the inference that there was such an agreement which was not possible *in casu* (para 20-22). In *EH v SH* 2012 (4) SA 164 (SCA) the issue was whether public policy barred a wife claiming maintenance from her husband at the time of divorce, where the wife had been living with, and being maintained, by another man for several years. The court held that public policy no longer barred a claim solely on the ground of such cohabitation (para 11) but as she was not in need of maintenance, as her partner expressly agreed to maintain her, no order could be made (para 11).

Looking at the cases where the claim for assets (in lieu of maintenance) was made based on a universal partnership, *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) is particularly useful. The court summarized the essentials of a universal partnership: (1) each of the partners bring something into the partnership, whether it be 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 (para 19).The SCA noted that our courts have recognised that a universal partnership can come into existence between spouses and cohabitees where they agree to pool their resources (*Mühlmann v Mühlmann*1984 (3) SA 102 (A); *Kritzinger v Kritzinger*1989 (1) SA 67

(A); *Ally v Dinath*1984 (2) SA 451 (T) *and V (aka L) v De Wet* 1953 (1) SA 612 (O) 615 (para 19).

This universal partnership in which the 'parties agree to put in common all their property, both present and future', is known as *universum bonorum* (*Isaacs v Isaacs*1949 (1) SA 952 (C) at 955), and has been described (*Sepheri v Scanlan* 2008 (1) SA 322 (C) at 338C – D) as effectively a community of property. Again, there must be proof of the tacit agreement (Mühlmann *v Mühlmann* 1984 (3) SA 102 (A) at 124C – D). The courts will be careful to ensure that there is an *animus contrahendi* and that the conduct from which a contract is sought to be inferred is not simply that which reflects what is ordinarily to be expected of a wife in a given situation (*Mühlmann v Mühlmann* 123H – I).

So, although a universal partnership can exist in a marriage (*Mühlmann; Fink v Fink* 1945 WLD 226), the question was whether a universal partnership can exist between parties who are engaged to be married. The SCA in *Ponelat* found that a universal partnership can exist if the necessary requirements are met, regardless of whether the parties are married, engaged or cohabiting (para 22). *In casu* the court found that a universal partnership did exist between the parties (para 23). This resulted in a sharing of the assets at the time of the division of the partnership. Although the principles were similar, the outcome in another matter, *Butters v Mncora* 2012 (4) SA 1 (SCA) based on the facts, was the opposite.

Mediation

Both the Children's Act (s 6(4)(a)) and a number of cases have stressed the importance of mediation in settling disputes relating to children. In *MB v NB* the court for the first time showed its displeasure with non-adherence to this move towards ADR. It argued that the parties have a duty to attempt to mediate a dispute and that their legal representatives are obligated to encourage such mediation before litigation. The cost order of the court reflected this view by capping the fees of the attorneys to a party-and-party scale.

The court noted that it had "little doubt that they would have been able to solve most of the monetary disputes that stood between them. … Everyone would, in the process, have been spared the burden of … wasted days" (para 58). "[M]ediation was the better alternative and it should have been tried" and not rejected in the pre-trial conference by council. "For this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients." (para 59). The court used its overriding discretion to show its disapproval of the way the dispute has been ventilated. It ordered that the fees claimable by the attorneys may not exceed those taxable on a party and party basis (para 60 and the order).

The pre-trial conciliation conference remained part of the litigation process.These developments make subtle but important changes to the manner in which the courts should deal with the maintenance of children.

Prof M Carnelley
UKZN School of Law
Pietermaritzburg campus

Matters of Interest to Magistrates

WHEN IS A 'COMMITTAL' NOT A COMMITTAL?

Comment on S v Duma 2012 (2) SACR 585 KZP

In the judgment in *S v Mongezi Duma 2012 (2) SACR 585 KZP*, the High Court decided that a committal in terms of section 114 or 116 of the Criminal Procedure Act, 1977 (Act 51 of 1977) is merely a direction into the future conduct of a case and not a final judgment or order and that such ruling was capable of subsequent reconsideration, alteration or amendment by the magistrate (of the District Court).

The unfortunate situation that gave rise to this decision was a concatenation of events beginning with the District Magistrate.

Firstly, the District magistrate decided to refer a matter involving 2 statutory offences to the Regional Court for sentence. The obvious 'error' committed by the District Court Magistrate was that he or she enjoyed the same penal jurisdictional limit that the Regional Court would have and so such referral was a waste of time and resources – (the record to be typed, the accused remaining in custody as an awaiting trial detainee, etc, to mention but a few).

The accused had been arraigned before the magistrates' court on two counts, namely that, firstly, in contravention of section 66(1) read with section 89 of the *National Road Traffic Act, 1996 (Act 93 of 1996),* he unlawfully tampered with a motor vehicle without the consent of its owner and, secondly, in contravention of section 82 of the *General Law Amendment Act, 1993* (Act 129 of 1993) he was found in unlawful possession of car breaking implements.

The accused was legally represented and pleaded guilty to both counts.

A section 112(2) statement (in terms of the *Criminal Procedure Act*) was tendered, according to the review judgment, wherein he apparently amplified his guilty pleas to the satisfaction of the presiding magistrate who then convicted him on both counts as charged. [The Review judgment incorrectly reflects that the magistrate dealt with the matter in terms of section 112(1)(a) thereby convicting him. (If that had been the case any subsequent committal would have been futile in any event as the Regional Court would have been bound by the section 112(1)(a) judgment and not been able to impose any term of imprisonment or any fine exceeding R1500)].

Be that as it may, the Regional Magistrate, when tasked with the matter, chose the option of submitting it for review as opposed to merely finalizing the matter. The 'option' I refer to here is, as was stated in *S v Bron* 1986(4) SA 394 (C), where the court, faced with a similar situation (ie the District Court having the same penal jurisdictional limit as the Regional Court to whom it had committed the accused for sentence), remarked that the Regional Magistrate enjoyed 2 options when faced with such a situation, namely to refer it to a High Court on review as the Regional Court had *no power* to refer the matter back to the trial magistrate or to sentence the accused itself, this latter option, the court stated, would save undue administrative hassles and be less time-consuming.

Obviously neither the District Magistrate nor his/her counterpart in the Regional Court had taken the time or trouble to consult, either a noter-up, or the leading work on Criminal Procedure, namely Du Toit ***et al's*** work: "*Commentary on the Criminal Procedure Act",* which would have steered them in the correct direction.

Instead, the case, being referred on review to the High Court on special review, meant the taking up of the valuable time of at least 2 reviewing judges, never mind the administrative personnel who were burdened with the matter as a matter of course.

In *S v Masobane en 'n ander 2000(1) SACR 586 (T), at 588*, the court had stated as follows:

"*Wanneer 'n aangeleentheid na die streekhof oorgeplaas word vir doeleindes van vonnis is die landdros functus officio. Vergelyk S v Bron 1986(4) SA 394 (K) op 396B*."

[Where a matter is referred to a Regional Court for purposes of sentence the magistrate is *functus officio*. Compare *S v Bron 1986(4) SA 394 (C) at 396B*. (Own translation)]

The High Court Judges tasked with the review apparently also never sought precedent prior making their decision to refer it back to the District Court Magistrate for disposal.

Their decision, as such, being one of the choices referred to in *Bron (supra)*, cannot be faulted in itself, however, the remarks made regarding the question as to whether the District Magistrate was *functus officio* or not and whether he or she enjoyed the power to 'review' his or her own decision gives rise for concern as they fly in the face of both the *Masobane* case and the *Bron* case without any reasons given as to why a different or contradictory decision was reached.

The Criminal Procedure Act provides for the procedure governing the conduct of a criminal trial and amongst other matters, the process for finalizing trials.

Sections 114 and 116 both contain the words "*… stop the proceedings and commit the accused …*", which a District Court must obviously utilize if it finds itself in the situation where it is of the opinion that the appropriate punishment for an accused should be considered by a court with higher jurisdiction.

In law, a lower court is a creature of statute, – its powers are derived solely by and from legislation, and it is not clothed with the inherent jurisdiction that a High court has in determining matters of procedure. Thus, whilst a High Court is entitled to make rules (within limits) regarding matters, a lower court is bound by statute to do only what it is allowed to do and nothing more.

This too is a reason why a 'review' process exists – a process which can be utilized to regulate and control in order to ensure that lower courts act within their authority.

One can but imagine the chaos if the words 'stop the proceedings' are taken not to mean exactly that, namely, stop the proceedings and await a decision; for example in sections 121 and 122 of the Act – what would occur if the court 'stopped' the proceedings and whilst awaiting the DPP's decision decided to 'recall' the accused and perhaps deal with him differently.

According to the wording in the *Duma* judgment, "… *it* [the District magistrate's order] *was only a ruling, capable of subsequent reconsideration, alteration or amendment by the magistrate.*", a District Court could 'recall' a matter wherein an accused had been 'committed' to a Regional Court and then deal with it as he or she deems fit. On the other hand, given the finding by the High Court, a Regional Court could now technically 'refuse' to entertain a matter 'committed' to it and the District Court would find itself in a rather embarrassing situation in being forced, so to speak, to recall its order. None of the 2 scenarios provide for good law.

Should any abuse or other untoward behaviour occur in regard to such referrals/ committals it may be necessary for the NDPP to refer the matter to the Minister of

Justice and Constitutional Development to invoke the decision of the Supreme Court of Appeal, in terms of section 333 of the Criminal procedure Act, 1977, on this question of law.

B J King, Senior Magistrate.

A Last Thought

"Judges are hierarchs. By this, I mean that judges in our society enjoy positions of unusual authority associated with four important characteristics. First, judges possess remarkable power to decide the fates and fortunes of others. Second, they possess this power not because they have purchased it in the market or acquired it by force, but because they have been selected to receive it, sometimes by the very persons whose fates and fortunes they will decide.' Third, judges are expected to use their power not to pursue their own interests - which would be viewed as an abuse of power - but to serve the social goal of the fair and impartial application of law. (One can of course argue over where judges should look to find the law - indeed, this is a central problem in jurisprudence - but whatever "the law" is, it is commonly understood that it is normatively desirable that judges follow it). Fourth, judges are expected to serve this social goal faithfully, even though they have remarkably little financial incentive to do so."

From "*Judges as altruistic hierarchs*" by Lynn A Stout 43 William & Mary Law Review. 1605 (2002) p 1605