e-MANTSHI

A KZNJETCOM Newsletter

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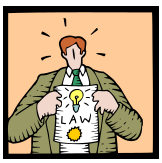
Welcome to the ninety second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 and these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. On 22 August 2013 the *Constitution Seventeenth Amendment Act* came into operation. The proclamation was published in Government Gazette no 36774 dated 22 August 2013.

2**.** The National Policy Framework on the management of Sexual Offences which was adopted in terms of section 62(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), was published on 6 September 2013 in Government Gazette no 36804.

3. The National Commissioner of the SAPS has published the National Instruction on Protection from Harassment in terms of section 20(2)(a) of the Protection from Harassment Act, 2011 (Act No. 17 of 2011) for general information. It was published in Government Gazette No 36845 dated 16 September 2013. The Protection from Harassment Act, 2011 (Act No. 17 of 2011) provides protection to victims of *harassment* by affording them the right to apply for a protection order as an effective remedy against *harassment.* In order to achieve this purpose, Police members have certain powers and responsibilities to ensure that proper protection is afforded to the victims. The purpose of the instruction is to provide clear direction to members on how to respond to a complaint of *harassment* in order to comply with the obligations

imposed upon a member in terms of *the Act.*

Recent Court Cases

1. S v PIATER 2013 (2) SACR 254 (GNP)

A custodial sentence of a primary caregiver of minor children can be imposed depending on the circumstances of each case.

The appellant, a 41-year-old woman who was married and had two minor children, a boy aged 15 and a girl aged 12, was convicted in a regional court of 22 counts of fraud, seven counts of forgery and uttering and one count of theft. She was sentenced to an effective seven years' imprisonment. She appealed against the sentence. It appeared that she had worked as an administrative clerk at the local magistrates' court and misappropriated numerous social grant payments amounting in value to some R444 000. The appellant did not testify in mitigation but a pre-sentencing evaluation report was prepared by a forensic criminologist who testified on behalf of her. After her discharge from employment the appellant obtained work at her local church where she earned a monthly salary of R3000. Her husband was employed at a transport company and earned R6000 per month. The couple was under debt administration at the time of sentence. On appeal it was contended, inter alia, that the trial court had misdirected itself in disregarding mitigating factors placed on record by the appellant's counsel from the bar; and that the court had not had due regard to the best interests of the appellant's two minor children during sentencing.

Held, that statements from the bar by a practitioner were normally no more than argument and if they were to receive greater weight they had to be admitted by the representative of the state or accepted as fact by the court. If this happened they acquired, for the purposes of sentencing, the weight of facts proven in evidence and the court was bound to consider them as though they had been proved in evidence. They could not simply be ignored by the court. (Paragraph [18] at *260i-261b.)*

Held, further, that, where a presiding officer was not prepared to accept facts stated on behalf of an accused in mitigation of sentence, he or she should require the attorney or counsel to lead evidence to establish his or her statements. It was desirable that facts in mitigation should be proved in the ordinary manner so that the state could be in a position to cross-examine if necessary. In the circumstances of the present case the magistrate was obliged to accept the ex parte statements of the appellant's counsel and failure in this regard amounted to a misdirection. There was no doubt that such non-acceptance had a direct influence as to how he approached the sentence. It was the type of misdirection which justified interference by the court and the court was therefore at large to consider sentence afresh. (Paragraphs [19]-[20] at *261c-f)*

Held, further, that ss 28(2) and 28(1) *(b)* of the Constitution imposed four responsibilities on a sentencing court when a custodial sentence for a primary caregiver was in issue, namely: *(a)* to establish whether there would be an impact on a child; *(b)* to consider independently the child's best interests, not as an appendage to the primary caregiver's personal circum-stances; *(c)* to attach appropriate weight to the child's best interests; and *(d)* to ensure that the child would be taken care of if the primary caregiver were sent to prison. (Paragraph [23] at *262e-f)*

Held, further, that the appellant was not the children's sole caregiver. Although her husband worked long hours there was nothing to indicate that he would not be able to engage the childcare resources needed to ensure that the children were well looked after during his absence at work. A custodial sentence would not inappropriately compromise the children's interests. There was no doubt that the imprisonment of the appellant would have a negative impact on her minor children, especially her daughter, but the appropriate sentence in the matter was clearly custodial. (Paragraph [25] at *262h-263b.)*

Held, further, that the fact that the appellant had pleaded guilty was not of itself an indication of remorse. The state had a very strong case against the appellant and a plea of guilty was unavoidable. Furthermore, her decision not to testify in mitigation of sentence meant that she had not demonstrated her candour, by subjecting her statements of being needy to the scrutiny of cross-examination. (Paragraph [40] at *266d-f)*

Held, further, that, although there were a number of mitigating circumstances and there was little likelihood that the appellant would repeat the offences, and her prospects for rehabilitation looked good, there were a number of aggravating factors. The offences had been committed whilst she occupied a position of trust; the offences were committed over a period of time, when she had an opportunity for proper reflection, and to stop; and after the theft was discovered and an investigation was under way, she tried to cover it up

by falsifying bank deposit slips. There was nothing to suggest that she would have stopped stealing but for being discovered. (Paragraphs [41]-[42] at *266f-267 a.)*

Held, further, that the contention that the appellant did not deserve to be imprisoned matter was untenable. The notion that the perpetrators of white-collar crime did not deserve imprisonment was incorrect. In the present case the gravity of the offences, coupled with the aggravating factors, called for long-term imprisonment. These, and the interests of society, far outweighed the appellant's interests and those of her family. The appeal succeeded to the extent that the period of imprisonment was reduced to four years' imprisonment, and an order was made that the National Commissioner for Correctional Services be directed to ensure that a social worker visit the children of the appellant at least once every month during the first three months of her incarceration and submit a report to the National Commissioner as to whether her children were in need of care and protection as envisaged in s 150 of the Children's Act 38 of 2005. (Paragraphs [45]-[48] at *267f-268h.)*

2. S v CKM 2013(2) SACR 303 (GNP)

In sentencing children who were involved in crimes committed before 1 April 2010 when the Child Justice Act came into operation constitutional principles should be taken into account.

The child and youth care centre referred to in s 191 (2) (j) of the Children's Act 38 of 2005 is an institution that replaced the reform school as determined in s 290 of the Criminal Procedure Act 51 of 1977 prior to its being repealed. It is obvious that the referral to a reform school, which amounts to an involuntary, compulsory admission to a facility where the convicted child is obliged to participate in various programmes, represents a serious invasion of the child's rights to freedom of movement and decision-making. Such a sentence should therefore not be imposed lightly or without compelling reasons.

Three matters came before the high court on review, each one involving a child who had been convicted and sentenced in a magistrates' court to be admitted to a reform school. They escaped repeatedly and were readmitted after being apprehended from time to time. On the last occasion they were apprehended after having escaped and were taken instead to the Polokwane secure care centre, an awaiting-trial facility. They were assigned to the

centre administratively, without any court order and without having been charged with any offence in respect of which they were awaiting trial. The first accused had been charged with assault for allegedly having hit another person with open hands and tripping him, causing him to fall. He was 14 years old at the time of the offence and there was no allegation of any injuries suffered by the complainant. He pleaded guilty and was convicted without any evidence having been led. He had no previous convictions. Prior to being charged he had been placed in a diversion programme but had failed to attend any of the individual counselling sessions that formed part of the programme and it was this failure that led to his being charged. The magistrate sentenced him to detention in a reform school on the strength of the recommendation of the probation officer as the accused was without supervision by a parent and had developed into a difficult child. The matter was not sent on review as ought to have happened. The second accused was convicted on a different charge, of assault with intent to do grievous bodily harm, and his committal to the reform school was confirmed on review by a judge. The third child was convicted by the same court, of housebreaking with intent to commit an unknown crime. He, too, had developed into a troubled and troublesome child and the social worker made a similar recommendation that he be sent to a reform school after he had failed to participate in a diversion programme. After they had spent six months in the secure care facility, their cases were sent on special review to the court.

On review, the court held that the provisions of s 98(1) of the Child Justice Act 75 of 2008 were not applicable to the proceedings against the children involved in these three matters as their matters had been concluded before the commencement of the Act on 1 April 2010. Notwithstanding this, however, the constitutional principles enshrined in the Bill of Rights should have been applied by the courts generally, and by the magistrate trying the child accused in the present matters at the time the children were prosecuted. These principles were the paramountcy of a child's best interests that had to be observed and given effect to in all circumstances, and the children's right not to be incarcerated except as a measure of last resort and for the shortest time possible. The trial court's motivation when sentencing the child accused and the pre-sentencing reports presented to him were devoid of any reference to these considerations. The trial magistrate's failure to observe the application of these principles was a significant misdirection resulting in justice having failed the accused. In addition, the committal to the reform school of the first and third boys had to be regarded as inappropriate as one was convicted of a minor offence, both were first offenders and both appeared to have suffered parental neglect, strongly suggesting that a referral to a children's court was the most appropriate course of action to follow. In neither instance was proper

cognisance taken of the approach that had to be followed in sentencing children and it was therefore clear that the sentence imposed by the trial court and the consequent committal to the reform school had to be set aside. Given that a significant time had elapsed since the accused had been sentenced, the fairest order that would do justice to all concerned would be to set aside the committal to a reform school and to substitute in its stead a caution and discharge. (Paragraphs [30], [32] and [35] at *319a-c, 319g-i* and *320e-f)*

The Polokwane secure care facility had been created as an awaiting-trial facility and was therefore only empowered to accommodate awaiting-trial detainees. The three accused were therefore held unlawfully in this facility. The court noted that it was a matter for concern and comment that the committal to the facility had been effected by a professional official of the provincial Department of Social Development. Such action could not be a countenanced and should not be allowed to occur again, particularly not in respect of children whose interests were gravely compromised by their unlawful detention. (Paragraph [38] at *322f-i.)*

3. S v CS 2013(2) SACR 323 (ECG)

Compulsory residence in a child and youth care centre is a severe sentence and should not generally be imposed on a first offender in the Child Justice Court.

The appellant was 17 years old when he was convicted of two offences, namely using a motor vehicle without the owner's consent in contravention of s 66(2) of the National Road Traffic Act 93 of 1996, and housebreaking with intent to steal and theft. The circumstances of the offences were that he visited his mother at work and asked for her car keys so that he could remove something from the car. Instead, he took the car and drove it and returned the car half an hour later. Some three months later he broke into a house in the complex where he lived with his mother and stole certain items which he then sold for one-tenth of their value. Later that same day, after he was arrested, he took the police to the place where the items were sold and they were all recovered. It appeared that the appellant had become addicted to drugs and that he had sold the items in order to buy drugs. He had attended school until Grade 10 and achieved academically and in sport but during 2010 he started to use drugs and became friendly with druglords and gangsters who were older than he. As a result of his addiction he left school. Counselling and substance-abuse treatment were not successful

owing to his lack of cooperation. His mother wanted him placed in a structured environment so that he could be rehabilitated. If he had been returned to her care she would have had to find alternative accommodation as the body corporate of the complex in which she lived told her she would have to leave if the appellant returned home. The probation officer was of the view that detention in a reform school was appropriate because it would enable the appellant to complete his schooling, and he would have the benefit of life skills, rehabilitative programmes and social work services. Accordingly, in February 2012 he was sentenced to compulsory residence in a child and youth care centre for a minimum period of two years in terms of s 76(1) of the Child Justice Act 75 of2008. After sentence the magistrate sent the matter on review, querying whether the matter was reviewable in terms of s 85 of the Child Justice Act as the appellant had been legally represented at his trial. The court on review found that the proceedings were reviewable and that they were in accordance with justice. In an appeal against the sentence imposed, the court was faced firstly with the question whether the appeal was competent, given that the matter had already been reviewed, and secondly whether the sentence was appropriate.

Held, that the court did have jurisdiction on appeal: in the review proceedings the record had not been lain before the reviewing judges on the basis that there was doubt whether the proceedings were in accordance with justice and there had been no interference with the sentence of the magistrate. (Paragraph [5] at *326c-d.)*

Held, further, that compulsory residence in a child and youth care centre was the second-to-last sentencing option contained in the Criminal Justice Act, the last being imprisonment. It was a severe sentence and was not warranted in the circumstances of the present case. The appellant was a first offender and, although psychological and substance-abuse treatment had not been successful, he had not previously been in the criminal justice system where court-ordered intervention could have occurred. He should not have been regarded in the same light as a person who had been given opportunities to rehabilitate through previous sentences but had failed to take advantage of such opportunities. (Paragraph [16] at *329a-c.)*

Held, further, that in any event the period of residence described as a minimum of two years was incompetent and should have contained a definite period of residence. (Paragraph [18] at *330a-b.)*

Held, further, that in the circumstances it would have been appropriate to refer the appellant to a children's court in terms of s 64 of the Child Justice Act. **In** the circumstances where the appellant had in the meantime turned 18, had absconded from the centre and now had relatives who were prepared to take care of him and provide a supportive environment, it was appropriate

that the sentence be set aside and be replaced with a caution and discharge. (Paragraph [22] at *33h-332a.)*

From The Legal Journals

Kotze, C

"Debt collection"

De Rebus September 2013

Fuchs, M M

"The impact of theNational Credit Act 34 of 2005 on the enforcement of a mortgage bond: Sebola v Sandard Bank of South Africa Ltd 2012 5 SA 142 (CC)"

Potchefstroom Electronic Law Journal 2013 Volume 16 3

Feldhaus, C & Van den Heever, C

"The sexual orientation of a parent as a factor when considering care"

Potchefstroom Electronic Law Journal 2013 Volume 16 3

Friedman, A & Otto, J M

"Section 103(5) of the National Credit Act 34 of 2005 as inspired by the common-law *in duplum* rule (2)"

THRHR August 2013 361

Aucamp, R-L

"The incidental credit agreement: A theoretical and practical perspective (1)"

THRHR August 2013 377

Robinson, J A

"Reflections on the conflict of interests of children and parents"

THRHR August 2013 400

Grove, L B & Papadopoulos, S M

"You have been served . . . on Facebook!"

THRHR August 2013 424

Stevens, G P

"Reassessing the interpretation of "pointing" for purposes of establishing the offence of pointing a firearm – *Xabendlini v State"*

THRHR August 2013 468

Zaal, F N & Matthias, C R

"Protecting children from inappropriate alternative care transfers – *Jonker v The Manager, Gali Thembani/ JJ Serfontein School "*

THRHR August 2013 498

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

Contributions from the Law School

Breach of promise claims and the return of engagement gifts: *Cloete v Maritz* 2013 JDR 0912 (WCC) and *Van Jaarsveld v Bridges* 2010 4 SA 558 (SCA)

In 2010 the Supreme Court of Appeal in *Van Jaarsveld v Bridges* 2010 4 SA 558 (SCA) gave some *obiter* guidelines to future courts faced with breach of promise claims by an innocent party, arising from the termination of an engagement without a just cause. The SCA did not abolish these claims and Henny J in *Cloete v Maritz* 2013 JDR 0912 (WCC) was the first court called upon to interpret what he calls the 'strong persuasive precedent' of the SCA (*Cloete* 38 & 47).

Breach of promise claims have always been fault-based and the damages claims have only been available to the innocent party. The key issue is whether there was a *justa causa* (a just cause) for the repudiation of the engagement contract. The *justa causa* can be an event, condition or action of the other party which would seriously jeopardize a possible happy marriage between the parties. Only if there was no *justa causa* would a damages claim be a possibility – depending on the circumstances (Hahlo 1946 *SALJ* 379). A discussion of what constitutes a *justa causa* is ignored for current purposes (see *Family Law Services* A14 & A16).

The South African claims developed out of the Roman Dutch principles into two distinct possibilities (*Guggenheim v Rosenbaum* 1961 4 SA 21 (W) 36-7).

The first of the two claims is contractual in nature, with two sub-divisions: (a) the recovery of actual financial loss or wasted expenses incurred in connection with the planning of the wedding and (b) a claim for prospective loss of benefits of the marriage. These benefits are determined with reference to the social position, wealth and other advantages that can include consideration of the envisaged matrimonial property system of the eventual marriage (*Sepheri v Scanlan* 2008 1 SA 322 (C) 336) as well as the loss of maintenance that the innocent party would have received during the marriage (*Family Law Service* A14). The calculation of prospective loss is *sui generis* and determined by taking into account additional factors such as the probable length of the marriage, the age of the plaintiff and the possibility of the plaintiff entering into another marriage (*Sepheri* 337).

The second possible claim is delictual in nature, based on the *actio iniuriarum* for satisfaction for an actual personality infringement or for 'wounded dignity or sullied honour' (Heaton *South African Family Law* 3rd (2010) 12). Although the courts originally argued that the unlawful termination of an engagement automatically gave rise to a satisfaction claim, it was later accepted that breach of promise *per se* is not enough to give rise to an iniuria, but that it must also be wrongful, injurious or contumelious (*Van Jaarsveld* 4).

Van den Heever noted that 'an engagement may be broken off under such humiliating circumstances as to constitute a grave injury and such misconduct on the part of the defendant, for example, where defendant unjustifiably breaks off the engagement when all the arrangements for the wedding have been made and the invitations are out; where the defendant willfully fails to appear at the wedding and shames the bride before the assembled congregation; where on the eve of the marriage the bridegroom marries another' (Van den Heever *Breach of Promise and Seduction in South African Law* (1954) 31).

The amount awarded falls within the discretion of the courts and is influenced by a number of factors such as the manner of the breach of the engagement, the motives behind it, social status of the parties and previous life experience (Heaton 12).

Over the years calls for the reconsideration of these breach of promise claims were heard from both legal commentators and the courts. Joubert and Labuschagne already argued in the 1990s that these breach of promise claims were outdated and not a reflection of the *mores* of society (Joubert 1990 (23) *De Jure* 201 at 214 and Labuschagne 1993 (26) *De Jure* 126 at 139). Davis J in *Sepheri* (330-331)

concurred that the claims should be reconsidered, as it places the marital relationship on a 'rigid contractual footing'; raises constitutional issues in an era of diverse personal relationships and asked whether it is advisable to see the termination of an engagement 'purely in the context of contractual damages.'

But who should develop the law? Davis J in *Sepheri* felt uncomfortable to take the lead (*Sepheri* 330). Although the legislature should ideally amend the law (*Cloete* 43; 12), the courts also have a duty in terms of s 39(2) of the Constitution to develop the common law in light of the purport and objects of the Bill of Rights and can overturn existing judicial precedent if the pre-Constitutional judgment no longer reflects the mores of society (*Cloete* 42 – 46).

What is the rationale for the reconsideration of these claims? The arguments for the amendment or abolishment of these claims are based mainly on the changing morals of society and the fact that repudiation of an engagement is no longer seen in a serious light (*Cloete* 51).

Hahlo (388) in 1946 already noted:

'Our courts, on a whole, do not look with much favour on breach of promise actions, and it has been suggested that they have no place in modern law. Yet, provided such actions are not permitted to degenerate into 'gold-digger' suits, they fulfill a useful function. They restrain frivolous engagements, in which the woman is usually the sufferer. And they are in accordance with the fundamental principles of equity: surely, if in view of the forthcoming marriage a betrothed person has incurred expenses or given up a job, and the other party subsequently repudiates the espousals for no better reason than a change of mind, it is only fair and equitable that the former should be entitled to recover his (or her) loss from the latter.

Van den Heever (at 31) nine years later stated that '(t)he notion that a woman necessarily loses social position or 'face' when an engagement is broken off under non-injurious circumstances seems to me to reflect the moral of a bygone age when espousals constituted an inchoate marriage and repudiation was equivalent to malicious desertion. In this age and this society a woman does not lose esteem because she is no longer engaged.'

The court in *Lloyd v Mitchell* ([2004] JOL 12668 (C) at 10) agreed that the withdrawal from an engagement is not attended by drastic social consequences as marriages are not the only future for a woman. In addition, the 'marriageability of a woman is probably not impaired by a prior broken promise to marry.'

Joubert argues that modern women are not dependent on a marriage for the security of their existence or the fulfillment of their needs as there is ample opportunity for participation in the economy and for self-realisation. There is also ample opportunity to find a replacement spouse (Joubert 214).

Apart from the changing mores, a further reason for the abolishment of the claims is the nonsensical nature of the continued distinction between an engagement and a marriage. Why does the law recognise no-fault divorces, but fault-based breach of promise claims? The court in *Van Jaarsveld* argued that there was no reason why a just cause should not include a lack of desire to marry, irrespective of guilt, as unwillingness to marry is after all a clear indication of the irretrievable breakdown of

the engagement (6). It is illogical to attach more serious consequences to an engagement than to a marriage (6; *Cloete* 50; 53). The application of the fault-principle vis-à-vis engagements makes a person financially liable for actions that are no longer viewed by society as reprehensible. This is nonsensical. Persons should not be pushed into a marriage merely to avoid a damages claim (*Cloete* 51; 55).

An additional argument for the reconsideration of breach of promise claims is that there is not any justification for placing engagements on rigid contractual footing, especially since marriage does not give rise to similar commercial or rigid contractual relationships (*Van Jaarsveld* 7; *Cloete* 16-17). The court did not accept that when parties get engaged, they would contemplate that if their engagement ends, it would have financial consequences as if they had in fact married (*Van Jaarsveld* 8; *Cloete* 18).

What are the applicable legal principles now? How has it changed after the *Van Jaarsveld* and *Cloete* judgments?

With regard to actual losses, the courts noted that although it was possible to justify the claim, it was difficult to rationalise it based on breach of promise *per se* (*Van Jaarsveld* 11; *Cloete* 20). The SCA noted that '(t)hese losses do not flow from the breach of promise *per se,* but from a number of express or tacit agreements or by necessary implication reached between the parties during the course of their engagement. To be recoverable, the losses must have been within the contemplation of the parties.' (*Van Jaarsveld* 11). The SCA indicated that with the calculation, the innocent party must be placed in the position he/she would have been had the agreement not been concluded. And what has been received must be set off against what the other had paid or provided (*Van Jaarsveld* 11).

Most of the critique in the judgments was aimed at claims for prospective losses which the SCA found difficult to rationalize (*Van Jaarsveld* 9; *Cloete* 20). The main problem is that the court has to base its finding on a number of assumptions: the intended non-finalised and non-concluded matrimonial property system; the anticipated length of the marriage; and the probable divorce orders. The SCA felt strongly that it should not be expected to make these assumptions (*Van Jaarsveld* 9-10). In addition, with regard to the claim for loss of support, the slightly absurd situation is that at the time of divorce, it is in discretion of court, but with a broken engagement, it becomes commercial entitlement (*Van Jaarsveld* 10). The court concluded in both *Van Jaarsveld (obiter)* and *Cloete* that prospective losses are too remote and speculative and should not be allowed. This action is no longer part of the South African law.

The SCA in *Van Jaarsveld* (19) confirmed that the breach has to be wrongful in a delictual sense and that it is not enough merely that the engagement was broken off without just cause. The wrongful act must be offensive or insulting in nature and to determine if it is, the test for reasonableness used is an objective test (*Cloete* 3).

After *Van Jaarsveld* and *Cloete* it was clear that breach of promise claims would not remain the same and that the SCA re-characterised these claims by no longer applying the fault principle. An engagement is now an unenforceable *pactum de*

contrahendo providing a *spatium deliberandi* – a time to get to know each other better and to decide whether or not to get married *(Cloete* 19).
The basis of claims for actual losses should be based on contract between the parties. To be recoverable, the losses must have been within the contemplation of the parties. Claims for prospective losses have become obsolete. By using an objective approach the bar for the delictual claim was raised (Sharp & Zaal 2011 *THRHR* 333 at 339).

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Matters of Interest to Magistrates

Q&A with Deputy Minister John Jeffery

Deputy Minister of the Department of Justice and Constitutional Development, John Jeffery took office on 9 July 2013. Deputy Minister Jeffery was born in Mauritius and spent most of his childhood in George. He did not always want to become an attorney as he was interested in nature conservation. However, during high school he decided to study law. *De Rebus* news editor Nomfundo Manyathi-Jele met up with the deputy minister a month after his appointment to talk to him about life, his career and the Legal Practice Bill.

Nomfundo Manyathi (NM): What is an average day like for you as deputy minister, and how does this differ from your role as Member of Parliament (MP)?

John Jeffery (JJ): My days vary; a day in parliament as an MP meant committee meetings and a series of political or community meetings. As deputy minister I must also attend structured meetings such as cabinet meetings that are relevant to my portfolio.

The difference between being a deputy minister and an MP is that there are far more public engagements now. I also want to put days aside when I will go out and visit the courts and see for myself how things are working.

NM: What is your office responsible for?

JJ: I have specific delegations from the Justice Minister and those include the sheriffs, magistrates and the Magistrates' Commission. I appoint acting magistrates and the minister makes the permanent appointments. I am also responsible for the small claims courts; I appoint the commissioners. I also look at and comment on most memoranda going to the minister. Legal Aid South Africa and the Law Commission are also part of my responsibilities and so are the two Chapter Nine institutions, the Office of the Public Protector and the South African Human Rights Commission.

NM: What is your ambition for the office of deputy minister and personally?

JJ: It is a short appointment until the next elections in April/May 2014. I want to do my best to ensure that the administration of justice is improved.

NM: Can you tell me a little bit about yourself: Who are you, where were you born, where did you grow up, etcetera – something that is not outlined in your CV?

JJ: I did not always want to be a lawyer, I was quite interested in nature conservation but, when I was in grade 10, I decided that I would rather study law. I went to the University of Natal in Pietermaritzburg, everyone that was in high school in George was either going to the universities of Cape Town, Rhodes or Stellenbosch and I wanted to be different and also wanted to see more of the country. Because I was from a small town, Johannesburg and Durban were a little scary so I chose something a bit smaller.

I matriculated in 1981. My parents were not political, but growing up as a white South African in the country in the late 70s and seeing all the things that were banned, made me want to know more about the liberation struggle. It was not logical to me that people who were not white were treated differently. I became more actively engaged in politics when I started university.

NM: Did you practise as an attorney?

JJ: I practised, but briefly.

NM: Why did you not remain an attorney for longer?

JJ: I did not practise longer because I was in the provincial legislature in KwaZulu-Natal and I liked litigation. I would have loved to have done a trial a month but things were a bit chaotic in the legislature in those days.

I would agree to a matter being set for trial and then there would be a meeting I had to go to. The magistrates were all supportive and sympathetic, but I reckoned I cannot keep doing this; it is not fair on the court or my clients, so I stopped practising.

NM: How can reporting on legal issues/court matters be improved to assist the public to understand the legal system better?

JJ: I think part of the problem with the law is that lawyers like trying to make things as complicated as possible. I suspect it is because they want members of the public to feel that this thing is so complicated they cannot handle it themselves, they need to pay for lawyers. A lot of what goes on in court, I think, is unnecessarily complicated and it could be simplified.

The use of Latin complicates things further. Why do you have to go around throwing the term '*sui generis*' when you can just use the word 'unique'?

I think more access to the courts and live coverage would be useful. I think there is also a need for the training of journalists because often you read an account about a trial in the media and what the journalist finds interesting and relevant is not necessarily what the court finds relevant. The public therefore often has the wrong understanding of what is happening in a trial and people are then shocked when the person is acquitted or found guilty. The problem with trials is that you have to sit there for the whole duration of the hearing. You cannot just pop in to see what is happening, and that is when journalists miss out on a lot of things.

Another question is whether judges or magistrates should be involved more in explaining their judgments. At this stage, a judgment is like what 'God gave to Moses on the top of Mount Sinai', this is it, the ten commandments, take it and use it. If court judgments were explained a little bit better, that might make things easier.

NM: You waited to do your articles for five years with a specific firm. Readers who read your CV in *De Rebus* may have asked why you did not do your articles under a different principal?

JJ: Basically, the work I was doing was important at that point. It was during the time of vigilante groups killing people and the justice system was doing nothing. The police were not doing anything either. What the law firm I was working at was doing, at the request of the Congress of South African Trade Unions, was to try and look at ways of getting the law to work.

If I had chosen to do articles with a different principal I would have had to do normal articles of commercial work, whereas this was cutting-edge stuff that was affecting people's lives at that time.

NM: What inspired you to choose a career in law?

JJ: Law is very empowering. In the context of an apartheid South Africa, I studied it to learn how I could use of all the rules and laws to improve people's lives.

NM: You come from parliament where there is a substantial representation of women. What do you think are the most common challenges faced by women in the legal profession?

JJ: One of the challenges is attitude. Lawyers are basically ‘hired guns’ as they take on a case because they have been instructed and are paid to do it. They do not necessarily feel any particular relationship with the client. Male attorneys and advocates tend to be quite macho, aggressive and assertive. So I think that could be one problem – the culture.

There is also the preconceived idea that men and women cannot equally raise a child. The assumption is that the woman will do it and that it would be her primary responsibility.

I think there is also the attitude from men that if you employ a younger woman she will get pregnant, she will go on maternity leave and will have to look after the baby. These are the challenges that women face in the legal profession, I do not know how conducive to child care the legal profession is?

NM: How do these differ from challenges in the past?

JJ: It has obviously improved and there are far more women in the legal profession. When I was at university there were very few women law students. I think now, at some universities, more than half the law students are women, so there are far more women going into the profession. Also, when I was at law school there was one white woman judge. This has changed significantly. There is a lot of improvement but there is a long way to go.

NM: How far is South Africa from reaching the ideal of gender transformation in the legal profession?

JJ: It is on the way, but it has a long way to go.

NM: What still needs to happen to achieve this?

JJ: There will be gender transformation when the number of women on the Bench proportionally is around 50% or more as I think, statistically, there are more women than men, and when it is reflective of the demographics of the population. It would be when the majority or at least half of the senior managers of a big law firm are women and when senior positions in law firms are also occupied by women and where women feel that they are not discriminated against. The lack of gender transformation also relates to the attitudes of clients. There are some clients who do not want to be represented by women and that is not correct.

NM: You served on the Justice and Constitutional Development Portfolio Committee. What were some of the interesting trends that you observed in your discussions on various pieces of important legislation?

JJ: The Bills I found most rewarding were the Child Justice Act [75 of 2008], the Prevention and Combating of Trafficking in Persons Act [7 of 2013], the Protection from Harassment Act [17 of 2011], the Superior Courts Act [10 of 2013] and the Protection of Personal Information Bill [B9B of 2009]. The challenges were basically to ensure that we pass legislation that was implementable by government, rather than having a whole lot of grand ideals. I enjoyed working on legislation that made a difference, that improved the rights of people and addressed needs in society.

NM: What challenges are there for the rule of law in a country with huge economic disparities and where access to the courts or the legal system is still difficult for the majority? What role can your office play in easing the situation?

JJ: We have two justice systems in the country, one for the rich and one for the poor. One of the challenges is trying to ensure that poor people can get access to justice, primarily through Legal Aid South Africa and their extension of work. That is also where the small claims courts come in, as well as trying to get systems in place so that you do not need a lawyer.

Another challenge is how to use the law to address the problems of disadvantaged people and that is where socio-economic rights are also important.

NM: How do you think the public's perception of the justice system being mainly for the rich can be changed?

JJ: By ensuring that poor people have access to justice in whatever form, for example, if a poor person is accused in a criminal matter, that he or she has access to good quality lawyers. We must also ensure that they are able to approach the courts for civil relief.

At one point it seemed that a large number of the Constitutional Court judgments were about the rights of the privileged rather than the underprivileged, but I think that has changed to some extent.

So the perception can be changed by ensuring that disadvantaged people, poorer people, have access to courts.

NM: Do you think that there is enough information to inform people that there is help for them at the courts?

JJ: No, there is a lot more that needs to be done.

NM: How do you think that will happen? Is it through the media?

JJ: It would be in a variety of ways, such as through moot court competitions, human rights day, communication from the Justice Department and community radio talk shows. Soap operas on television also sometimes pick on some issues – although some of the ones that I have seen have mangled the court processes quite

substantially and had people being sued when they actually should have been charged criminally, for example.

NM: Do you feel that the role of courts through their jurisprudence is to help shape society or vice versa?

JJ: Both. The courts, in their judgments, change the common law and interpret the meaning of statutes. They are influenced by sections in society. If you look at the whole issue of the evidence of rape and the cautionary rule, it was societal changes and attitudes to women that resulted in the Supreme Court of Appeal abolishing the cautionary rule.

Coming from a more patriarchal society made the cautionary rule necessary because women could not be trusted. A woman victim of rape could not be trusted if she was the sole witness, but the changing attitude to the position and role of women led to that judgment.

If you look at the death penalty, which was specifically outlawed, that was the courts saying, in terms of society, or in terms of the Constitution, that the death penalty is unconstitutional. That is an example of the law having an impact on society.

Regarding same-sex marriages in terms of the Bill of Rights and the equality clause, it is discriminatory for same-sex couples not to be allowed to form a union to get married, but we live in a society that is quite conservative on those issues so, that is why I am saying, it is both.

NM: What are your views about government's plan to regulate both branches of the practising profession by means of the Legal Practice Bill?

JJ: The profession will regulate itself through the legal practice council, but we will have one council representing both attorneys and advocates. There is a lot of transformation that needs to take place in the legal profession. There are issues around government's duty to ensure that people have access to quality legal services. It is a very important Bill.

NM: Why has it taken so long to get the Bill passed?

JJ: It has taken long because lawyers are so argumentative and disagree with one another. Government was waiting for, and trying to get the lawyers to agree.

There has been a fair amount of hysteria over the Bill from certain quarters, but if you look at reform in other countries, I think the question that should be asked is if we can afford, in a country where so many people are poor, to have this split profession of attorneys and advocates.

It is interesting that Namibia, on independence, abolished the split Bar; Zimbabwe and Nigeria did the same, I think New Zealand is abolishing it too. South Africa is not doing that now, but what we are providing for is for the branches of the profession to

get closer; for advocates to take briefs direct from the public but subject to certain conditions, and for attorneys to appear in the higher courts, again subject to certain conditions.

One of my issues with advocates is the process of pupilage, which I think is appalling. Advocates have to do pupilage for a year during which time they are not paid. Once they are admitted as an advocate they then have to set up their practices, which also takes time and money. I do not know how any person who is not from a rich family or already has money can go into that profession. It is quite shocking that the profession has not looked at that issue.

I was even more shocked to find that pupils in England are paid. Why was this issue never brought up in all our transformation discussions. It basically would have been affecting black people and women and people from poorer backgrounds. It is shocking that 19 years into democracy, the advocates' profession was not dealing with that. Some of the independent counsel brought it up, but the General Council of the Bar never did, and that is something that the Bill is trying to address.

NM: What are the implications of unifying the two professions? Should we have gone for fusion?

JJ: I think the whole unification thing is a non-argument. I think that even if the profession were unified that you would have court specialists and general practitioners and that is generally what has happened in the countries that have gone for fusion. So you will *de facto* still have people known as 'advocates'.

We did not have fusion this time because there was too much opposition to it. I think having one statutory council for both advocates and attorneys will be a good start.

I do not support the two-chamber argument [separate chambers for attorneys and advocates]. I think if advocates want to form their own non-statutory grouping, if they want to continue with the Bar council, it is up to them. But the statutory functions of the profession would be exercised by the council.

NM: How has the Bill generally been received by the advocates, attorneys, the General Council of the Bar, law societies and the public?

JJ: I will put it as to when I was on the committee. We are trying to be as inclusive as possible through the coverage of the committee's deliberations and the Parliamentary Monitoring Group minutes, which can be accessed online. There seems to be quite a large number of people following the debates and the arguments.

The problem is that there are vested interests in the profession and I think this is where some of the opposition comes from. But generally, because of the inclusive process, I would hope that there is a lot less opposition than there was before.

NM: Where was the most opposition coming from?

JJ: Opposition was coming mostly from the profession. Public involvement was not really that much. The Competition Commission was involved over the whole issue of fees, but there was actually disturbingly little input from members of the public.

NM: Do you think the National Council of Provinces will allow public hearings on the Legal Practice Bill as they did for the Protection of State Information Bill?

JJ: It is currently a s 76 Bill and if it remains a s 76 Bill, which looks like it will have to, then there will have to be public hearings if people want them.

The council will have to advertise for public comment and if people come forward and say they would like to make a submission to the provincial legislature then they will have to have a hearing.

NM: What message do you have at this point for the attorneys' profession in particular?

JJ: Do not see it just as a job with your main goal being that of making money. You are officers of the court. You have ethics, you have duties to uphold. Think of the people that are being affected by the work that you do.

NM: Can you give me an update on the courts? How is the construction of the Limpopo High Court going? Has the construction of the Mpumalanga High Court commenced?

JJ: With regard the Limpopo High Court, the completion date of the building is August/September 2014. The anticipated commencement date of the operation of the court is October/November 2014.

The construction of the Mpumalanga High Court is expected to commence in January 2014 with completion targeted for March 2016.

NM: Do you think having a seat of the High Court in these two provinces will encourage practitioners to practise there, rather than move to the more densely populated provinces?

JJ: Yes. There was a big debate on moving the seat of the Eastern Cape High Court from Grahamstown to Bhisho. People in Grahamstown were extremely worried that, if the court was moved, lawyers would leave and it would damage the economy of the area. So, obviously if you have a High Court in Polokwane and in Nelspruit, you are going to have more lawyers there.

It is an issue of access to justice. Why must people in Limpopo travel all the way to Pretoria to have a case heard? The same with people in Mpumalanga. The two High Courts currently being built are crucial in terms of ensuring better geographical access to justice.

Nomfundo Manyathi-Jele,

(The above interview appears in the October issue of the *De Rebus* journal)

A Last Thought

"137. In conclusion, therefore, the law enacted by Parliament, in compliance with the obligation entrusted to it by the founders of our Constitution, imposes a duty on judges to review certain prosecutorial decisions. Far from trespassing into the executive domain, any judge in the South African constitutional order who declines deferentially to review a decision not to prosecute, in the mistaken belief that he or she is mandated by the doctrine of the separation of powers to do so, will ironically be acting in violation of the doctrine of the separation of powers. PAJA has separated the powers. And the power to review a decision not to prosecute has been constitutionally and legislatively separated to the judiciary.

138. A similarly misplaced argument calling for deference was advanced in the CC in *Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC)* in an attempt to persuade the court to adopt restraint in a rationality review of a decision of the President on the ground that review would violate the separation of powers. The argument was rejected as follows:

'It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not.'"

As per Murphy J in *Freedom Under Law v NDPP and Others*- Case no. 26912/12 North Gauteng High Court