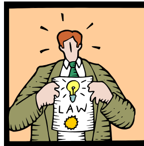
e-MANTSHI

A KZNJETCOM Newsletter

May 2014: Issue 98

Welcome to the ninety eight 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. Some of the sections of *The Traditional Health Practitioners Act, Act No 22 of 2007* has been put into operation from 1 May 2014. The notice to this effect has been published in Government Gazette no 37600 dated 2 May 2014. Of relevance to magistrates are the definition of a "traditional health practitioner" and the provisions of section 49 which are the offences created in the Act. Section 49 is one of the sections which has been put into operation.

"traditional health practitioner" means a person registered under this Act in one or more of the categories of traditional health practitioners;

49. Offences.—(1) A person who is not registered as a traditional health practitioner or as a student in terms of this Act is guilty of an offence if he or she—
(*a*) for gain practises as a traditional health practitioner, whether or not purporting to be registered;
(*b*) for gain—
(i) physically examines any person;

(ii) performs any act of diagnosing, treating or preventing any physical defect, illness or deficiency in respect of any person;
(iii) advises any person on his or her physical or mental state;
(iv) by reason of information provided by any person or obtained from such person in any manner whatsoever—
(*aa*) diagnoses such person's physical or mental state;
(*bb*) advises such person on his or her physical or mental state;
(*cc*) supplies or sells to or prescribes for such person any traditional medicine or treatment;
(v) prescribes or provides any traditional medicine, substance or thing; or
(vi) performs any other act specially pertaining to the profession;
(*c*) except in accordance with any other law, performs any act having as its object—
(i) the diagnosis, treatment or prevention of any physical defect, illness or deficiency in any person; and
(ii) obtaining by virtue of the performance of such act, either for himself or herself or for any other person, any benefit by way of deriving profit from the sale or disposal of any traditional medicine, foodstuff or substance or by way of any donation or gift or by way of providing accommodation, or obtaining, either for himself or herself or for any other person, any gain whatsoever;
(*d*) pretends, or holds himself or herself out, to be a traditional health practitioner or student (whether or not purporting to be registered), of whatever description, of physical defects, illnesses or deficiencies;
(*e*) uses the name of traditional health practitioner, student, healer or doctor or any name, title, description or symbol indicating, or calculated to lead persons to infer, that he or she is the holder of any qualification as a traditional health practitioner or of any other qualification enabling him or her to diagnose, treat or prevent physical defects, illnesses or deficiencies, or that he or she is registered under this Act as a traditional health practitioner or a student;
(*f*) except in accordance with any other law, by words, conduct or demeanour holds himself or herself out to be able, qualified or competent to diagnose, treat or prevent physical defects, illnesses or deficiencies or to prescribe or supply any traditional medicine, substance or thing in respect of such defects, illnesses or deficiencies; or
(*g*) (i) diagnoses, treats or offers to treat, or prescribes treatment or any cure for, cancer, HIV and AIDS or any other prescribed terminal disease;
(ii) holds himself or herself out to be able to treat or cure cancer, HIV and AIDS or any other prescribed terminal disease or to prescribe treatment therefor; or
(iii) holds out that any article, compound, traditional medicine or apparatus is or may be of value for the alleviation, curing or treatment of cancer, HIV and AIDS or any other prescribed terminal disease.
(2) For the purposes of subsection (1) "cancer" includes all neoplasms, irrespective of their origin, including lymphoma and leukaemia.
(3) A person who is not registered as a traditional health practitioner, is guilty of an offence if he or she—
(*a*) pretends to be so registered in respect of such occupation; or

(*b*) uses any name declared by regulation to be a name which may not be used.
(4) A person found guilty of an offence in terms of this section is liable on conviction to a fine or to imprisonment for a period not exceeding 12 months or to both a fine and such imprisonment
(5) This section does not apply to a medical practitioner or dentist contemplated in the Health Professions Act, 1974 (Act No. 56 of 1974).

Recent Court Cases

1. S v SWARTZ 2014 (1) SACR 461 (NCK)

In terms of section 113(2) of Act 51 of 1977 if a court records a plea of not guilty after a plea on an alternative charge the trial will proceed on the original charge unless the prosecutor explicitly indicates otherwise.

The accused had been charged in a magistrates' court with two counts of assault with intent to do grievous bodily harm. He pleaded not guilty to these charges, but guilty to common assault. The prosecutor accepted this plea. On questioning by the magistrate, however, the accused did not admit all the elements of the offence and the magistrate accordingly recorded a plea of not guilty. The matter then proceeded on the original charges of assault with intent to do grievous bodily harm, and after hearing evidence the magistrate duly convicted the accused on these charges. The magistrate then submitted the matter for special review and requested that the convictions be set aside on the basis that, in terms of s 113(2) of the Criminal Procedure Act 51 of 1977, the trial should have proceeded on the charges of common assault, to which the accused had pleaded. On review the court embarked upon an analysis of the proper interpretation of s 113(2) of the Act.

Held that, on a proper interpretation of the section, it did not require an election by the prosecutor, as to the charge in respect of which the prosecution was to proceed, before the trial could proceed. It provided that the trial would proceed on the original charge/s, and, in other words, not on the lesser charge/s, unless the prosecutor indicated otherwise. In the absence-as in the present case-of an indication by the prosecutor, the magistrate had correctly proceeded on the basis of the original

charges against the accused, namely of assault with intent to do grievous bodily harm. (Paragraphs [40]-[41] at *470c-e.)*

2. BOTHA v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT 2014 (1) SACR 479 (NCK)

An application for the exhumation of a body in terms of section 3(4) of the Inquests Act may be made ex parte without notice to the family of the deceased.

The applicant applied to review and set aside a decision made by the third respondent (the magistrate) to exhume the body of the deceased. The applicant was the son of the deceased and his mother was standing trial for his murder. It appeared that the postmortem report had been done in a rather perfunctory manner and it was not clear what the effect of two gunshot wounds to his head had been, and whether his death could have been a suicide. The applicant contended that the magistrate was not empowered by the Inquests Act 58 of 1959 (the Act) to grant permission to exhume the body of the deceased. He argued that the National Director of Public Prosecutions (NDPP) could use the provisions of the Act up to the point that it took the decision to implement the prosecution of the accused, thereafter the magistrate was no longer empowered by the provisions of the Act to grant the relevant permission. With reliance on the provisions of s 21 (2) of the Act he argued that the NDPP had one bite at the cherry and that, insofar as the prosecution of the applicant's mother was concerned, the NDPP had made its decision and now had to abide by it. Secondly, he argued that the decision made by the magistrate was an administrative act and was subject to the provisions of the Promotion of Administrative Justice Act 3 of 2000, and, as such, having regard to the fact that the magistrate had granted permission without having regard to the requirements of the rules of natural justice, in that no notice of the application was given to the accused or the deceased's family, the permission had to be set aside.

Held, as regards the first contention, that the method of interpretation that the applicant sought to impose was pedantic and mechanical and was no longer favoured by the courts, which had adopted the 'purposive' method of interpretation of statutory enactments. Section 4 of the Act stated that the investigating officer provided a report, together with all the relevant information, to the public prosecutor who could, if he deemed it necessary, call for additional information regarding the death. To restrict the access of the NDPP to this mechanism of obtaining relevant information, only up to the point postulated by the applicant, would lead to an absurd and undesirable result that Parliament could never have intended when enact-

ing the Act. If a DPP was made aware of new information which required a further examination of the remains of the deceased who had already been buried, on the interpretation proposed by the applicant this would lead to the absurd result that the DPP would not have a mechanism to conduct such further examination. If he were deprived of this mechanism of obtaining relevant evidence, this might lead to a miscarriage of justice and an absurd result which Parliament could never have intended. (Paragraphs [20] at *486j-487a,* [22] at *487f-g* and [23] at *487h-488a.)*

Held, as regards the applicant's second contention, that s 3(4) of the Act did not require notice to be given to any person for an application granting permission to exhume a body. In the context of a criminal investigation or a criminal trial, an ex parte application was appropriate. The exhumation of the deceased was regulated by statute and it was clear from the magistrate's reasons that he had considered and applied the relevant statute. Evidence on oath had been placed before him, including that of the investigating officer and a forensic pathologist, and he had evaluated this evidence. From his reasons it was clear that he had brought a judicial discretion to bear on the relevant request to exhume the body of the deceased, and in those circumstances the act of considering and granting the permission was a judicial act which was not subject to the provisions of the Promotion of Administrative Justice Act. In these circumstances the application had to be dismissed. (Paragraphs [35] at *491h-492a* and [36] at *492b.)*

3. S v LUPHUWANA 2014(1) SACR 503 (GJ)

In an enquiry in terms of section 78(2) of Act 51 of 1977 the charge must be put to the accused, he must plead to it and admissible evidence must be led to establish the commission of the offence.

The accused, a 34-year-old man, was arrested on a warrant of arrest and brought before a magistrate on charges of making threats against a family member and of contravening the Domestic Violence Act 116 of 1998. At no stage were the charges put to him, nor was he asked to plead to any charges. The prosecutor requested that the court proceed in terms of s 78(2) of the Criminal Procedure Act 51 of 1977 and hold an enquiry into the mental state of the accused. The accused's mother testified that he took drugs and that he had a mental condition that caused him to act aggressively. After hearing evidence the magistrate referred the accused for observation at a mental-healthcare facility. A psychiatric report was subsequently produced to the court, which stated that the accused suffered from a psychotic condition as a result of cannabis use and that at the time of the commission of the offences he had been unable to distinguish between right and wrong. The report recommended that the accused be referred as an involuntary healthcare user to a mental healthcare facility. After production of the report the

investigating officer testified as to the commission of the offences, but could only give hearsay evidence in this regard. Based on this information the magistrate proceeded to make an order in terms of s 78(6) *(a)* (ii) *(aa).* The matter came on review and the reviewing judge requested the magistrate's reasons for his order, and queried whether the order was competent in the light of the procedure adopted.

Held, that s 78(6) of the Act clearly assumes that, in respect of an accused who has the requisite capacity to understand the proceedings so as to make a proper defence, the charge, detailing the act or omission of the accused, be put to the accused and that he plead to it. It also assumes that the finding, that the accused committed the act, or omission, in question, would be based on admissible evidence. Unless that has occurred, evidence, in support of the charge, cannot be led and the accused cannot, lawfully, be found to have committed the act or omission. Where the procedures laid down in the Act and in the law relating, particularly, to the putting of the charge, the pleading to it and to the production of evidence have not been complied with, the accused cannot, lawfully, be found not guilty by reason of mental illness or intellectual disability. Before a court, applying s 78(6) of the Act, may find that an accused has committed the act or omission in question, but is not guilty due to mental illness or intellectual defect, the accused must have pleaded to a charge that was put to him, and the finding must be based on admissible evidence that establishes his commission of the act or omission in question, beyond a reasonable doubt. (Paragraph [18] at *509b-e.)* The court accordingly set aside the proceedings and remitted the matter to the magistrate to finalise the proceedings in the light of the provisions of the judgment.

From The Legal Journals

De Jong, M & Sephai, K K B

"New measures to better secure maintenance payments for disempowered women and vulnerable children"

THRHR 2014 195

Van Heerden, C & Roestoff, M

"Over-indebtedness under the National Credit Act as a bona fide defence to summary judgment"

THRHR 2014 276

Badenhorst, C

"Diversion provisions in terms of the Child Justice Act 75 of 2008"

SACJ 2013 302

Skelton, A

"Proposals for the review of the minimum age of criminal responsibility"

SACJ 2013 257

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

Contributions from the Law School

The admissibility of children's evidence in the context of recent cases

In the case of *S v Matshivha* 2014 (1) SACR 29 (SCA), the appellant was convicted in the high court of rape and murder. He appealed against his conviction on both counts. It is the appeal against the conviction for rape that this discussion will focus on.

The appellant's conviction of rape was based on the evidence of the complainant and her brother who were 8 and 13 years old respectively at the time of the trial. They both identified the appellant as the perpetrator of the crime.

The Supreme Court of Appeal, *mero motu*, raised the question of whether the evidence given by the children was properly before the court in light of how the issue of their competence to testify was dealt with and how they were sworn in.

In order for a child to be a competent witness the child must be able to demonstrate that s/he understands the difference between truth and falsehood and must have sufficient cognitive ability, including the ability to understand questions put and formulate rational answers in response. There is no standard test for this (*S v Swartz* 2009 (1) SACR 452 (C) at para 20).If the child is competent the court must then proceed to swear the child in. The capacity to understand the distinction between truth and lies is a prerequisite for the oath or admonishment to be administered (*S v Swartz* (supra) at para 14).

The questioning of the child to establish whether she understands the difference between truth and lies should, in my submission, establish that the child understands that a lie involves deliberately deceiving another person by providing inaccurate, incomplete or otherwise misleading information. This need not be done in an overly technical manner (*Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR (CC) at para 164)

In my submission it would be desirable to develop a standard test to be used in South African courts to establish a child's competence to testify – although this would possibly raise the spectre of children being coached to 'pass' the test.

In the case of *S v Mokoena, S v Phaswane* 2008 (2) SACR 230 (T) it was argued that the competency test should be abolished since even a child who could not demonstrate to the court that she understood the distinction between truth and lies might be capable of providing reliable testimony. This argument is in line with international research which suggests that there is little correlation between a demonstrated ability to distinguish truth and lies and actual truth telling (Klemfuss and Ceci 'Legal and Psychological Perspectives on Children's Competence to Testify in Court' (2012) 32 *Developmental Review* 268 at p 277). This argument was however rejected by the constitutional court in the case of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* (supra) where the court held that the risk of false convictions was too high to abolish the competency test (at para 165). This is in contrast to the approach taken by the Canadian courts (Klemfuss and Ceci 'Legal and Psychological Perspectives on Children's Competence to Testify in Court' (supra) at p 283).

The court must establish whether the child has the ability to understand the nature and the import of the oath. If so, the child may be sworn in in the usual way. If not, then the court must simply admonish the child to tell the truth. The admonishment

must convey to the child that s/he is required to tell the truth and that there will be negative consequences if s/he does not. There is no set format for the admonishment. Empirical research suggests that truth telling is promoted by simply asking the child, in a developmentally appropriate way, to tell the truth (Klemfus and Ceci 'Legal and Psychological Perspectives on Children's Competence to Testify in Court' (supra) at p 275). In *S v Mokoena, S v Phaswane* (supra) the high court concluded that section 164(1) of the CPA was unconstitutional because … but the constitutional court did not confirm this (*Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* (supra) at para 168).Whether the child is admonished or sworn in with the oath has no bearing on the evaluation of the child's evidence.

In *Matshivha's case* (supra), it was established that the transcript did not contain the full record of all that had transpired between the judge and the child witnesses before they testified. The transcript was thus supplemented with an affidavit prepared after listening to the audio recording of the proceedings. The court assumed, without deciding, that the affidavit could be taken into account in deciding on the question of the admissibility of the childrens' evidence (at para 4).

The Supreme Court of Appeal held that it was clear from the wording of section 164(1) that for it to be triggered there must be a finding that the witness does not understand the nature and import of the oath. The court held that the finding must be 'preceded by some kind of enquiry by the judicial officer to establish whether the witness understands the nature and import of the oath' (at para 10). If the enquiry shows that the child does not understand it, the court must establish whether the child can differentiate truth and lies, and if so, proceed to admonish the witness (at para 11).

In analysing the questions put to the witnesses, the court was not satisfied that it was clear what the purpose of the questions put by the judge to the children was. The court found further that the witnesses were 'simply sworn in before their capacity to understand the nature and import of the oath was established' (at para…).

The court referred to the case of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* (supra) in which the constitutional court had held that the reason it is imperative for the child to know what it is to tell the truth, that a child who cannot show that he knows this is not reliable and therefore the admission of the child's evidence in these circumstances would jeopardise the accused's right to a fair trial. The constitutional court held that what the court should be trying to ascertain is not whether the child has an understanding of abstract notions of truth and falsehood but simply that the child understands what it means to tell the truth.

With respect, the extracts quoted from the constitutional court case do not deal with the issue which was before the court in *Matshivha's case* (supra), which was

whether it had been established that the children understood the nature and import of the oath before they were sworn in (at para 13).The court *a quo* had questioned the complainant about the distinction between truth and lies and she had said that she spoke truth not lies (at para 7). The court *a quo* had questioned the complainant's brother in this regard too and although the child clearly did not understand the judge's initial questions the child eventually said that when a person is telling the truth, he is saying things that he is sure of. This is a good definition of truthfulness, and the presiding officer was clearly impressed with the boy in this regard.

It is clear from the supplemented transcript that the court *a quo* did not question the complainant at all on her understanding of the oath. However in respect of her brother, there was an attempt made to explain the concept of oath taking to him in a way he would understand. After the oath was administered the child said "God help me to tell the truth". Nevertheless, the court found that the questions put to the children were insufficient to establish that they understood the nature of the oath, and their evidence was thus set aside as inadmissible. Since their evidence formed the basis of the appellant's conviction, the conviction was set aside

The court did not refer to the case of *Director of Public Prosecutions, Kwa-Zulu Natal v Mekka* 2003 (2) SACR 1 (SCA) where the court found that the case of *S v B* 2003 (1) SACR 52 (SCA) had been correctly decided. In *S v B* (supra) the Supreme Court of Appeal held that section 164 of the Criminal Procedure Act 51 of 1977 required nothing more than that the presiding judicial officer had to form an opinion that the witness did not understand the nature and import of the oath due to ignorance arising from youth, defective education or another cause before admonishing the child witness, and that an investigation into this aspect did not need to be held in every case before such an opinion could be reached. The court held further that, although preferred, a formally noted fining was not required (*S v B* (supra) at paras 7, 9, 10). In the *Mekka case* (supra) the child complainant was nine years old and the failure to hold an enquiry into whether she understood the oath before administering the admonishment was held not to be irregular, since the court accepted that the mere fact that the magistrate had administered the admonishment was sufficient to demonstrate that he had formed the opinion that she did not understand the oath (para 11). In the case of *S v B* (supra) the thirteen year old complainant and her brother testified under admonishment without a formal enquiry into their understanding of the oath. This was held to be acceptable.

In the case of *S v Sikhipha* 2006 (2) SACR 439 (SCA) the court noted (albeit obiter) that there was no requirement for the trial court to hold a formal enquiry as to whether a child witness understands the oath prior to administering the admonishment (at para 13). However the presiding officer must form an opinion that the child does not understand the oath before administering the admonishment. Again, the court found that there was no need for this opinion to be formally noted (at para 13).

In the case of *Nedzamba v S* (911/2012)[2013]ZASCA 69 (27 May 2013) the Supreme Court of Appeal criticised the court *a quo* regarding the manner in which the 14 year old complainant was treated. The Supreme Court of Appeal remarked that 'she was a child witness with whom care should have been taken at the outset. There had been no attempt to establish whether the child understood truth and falsehood. No thought was given to whether the child understood the nature and import of the oath. Neither was the use of an intermediary or other means to protect the child witness considered' (at para 26). For this, and other reasons, the appeal against the conviction and sentence was upheld.

In the case of *Mangoma v S* (155/13) [2013] ZASCA 205 (2 December 2013) the appellant appealed against his conviction for the rape of his 13 year old daughter. One of the grounds of the appeal was that the complainant and her brother, who were 13 and 12 years old respectively at the time of the incident, were not properly sworn in or admonished to tell the truth and that their evidence was thus inadmissible and unable to support the conviction (para 4). In the heads of argument, the state conceded that the two child witnesses had not been properly sworn in and were not admonished to tell the truth. The court found that the concession was unwarranted, and the state then conceded that it had been made without proper thought and due to a misreading of the record (at para 3). The record revealed that the children were sworn in, and that thereafter a very short enquiry into whether each of them understood the meaning of the truth had followed. The Supreme Court of Appeal noted that the sequence was wrong: the ability of a witness to understand the distinction between truth and falsehood must precede the oath or admonishment (at para 5). The Supreme Court of Appeal noted also that had there been any doubt about whether the children understood the nature and import of the oath, the admonishment ought to have been administered (at para 5). However the court found that there was nothing on the record to indicate that any doubt about whether the children understood the difference between truth and falsehood ought to have been entertained, and that notwithstanding the fact that the oath had been administered prior to establishing the children's competence, the principles established in the case of *S v B* (supra) ought to have been followed, namely: that all that was required was for the presiding officer to form an opinion that the children understood the oath, that a formal enquiry need not be held into this, and that the finding need not be noted (at para 15).

The SCA also noted concern that it appeared from the record that no thought had been given to the use of an intermediary for the child witnesses (at para 6).

Concluding thoughts:

"Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief" (*Mudau v the State (*supra) at para 14).

It is in the interests of justice that child witnesses not be excluded unnecessarily (*S v Swartz* (supra) at para 21).

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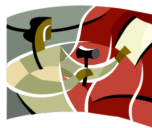

Matters of Interest to Magistrates

FUTURE MAINTENANCE AND MAINTENANCE CLAIMS AGAINST AN ESTATE

1. INTRODUCTION

Future Maintenance is commonly understood as maintenance which can be granted by the court in respect of the future expenses of the child.

In terms of the common law and section 15 of the Maintenance Act 99 of 1998, the duty to support a child is an obligation which is expected to continue and it continues until the child becomes self-supporting.

The said duty can never be terminated by the parent's death, resignation or retirement from employment but can *inter alia,* be terminated by the child's death. In instances of the parent's death, the child has a legitimate maintenance claim against the estate of the deceased parent (s).

2. PRACTICAL ASPECTS OF FUTURE MAINTENANCE

Future Maintenance can be granted by the court in instances where the respondent has left employment either as a form of retrenchment, retirement or resignation and is going to receive or has received his package benefits such as pension funds, provident funds, annuities or any other lump sum benefits.

In the above instances, it is in the best interests of the child to be awarded future maintenance as in many cases, most respondents are not employable after

retirement and some misuse the retirement or pension benefits to the prejudice of their children who at the time, are still in need of support or will still need same in future. In circumstances of this nature, it was held in *Magewu vs Zozo 2004 (4) SA 578 (C)* that the attachment of pension fund benefits in respect of future maintenance claims was a direct and effective means of ensuring that the rights of the child are upheld.

It is however, noteworthy to mention that cases of future maintenance differ according to their facts and merits. Consequently, not in all cases where the respondents retire, should future maintenance applications be needed.

3. INSTANCES WHERE FUTURE MAINTENANCE IS UNDESIRABLE:

(a) Respondent's Good conduct

It may appear that although responded retired, he has voluntarily and sufficiently complied with his obligation to maintain his children without an order of court. It would be undesirable in such a case to apply for future maintenance.

(b) Non schooling dependent children

There are major children who are not schooling though still dependent on their parents for *inter alia*, necessities of life, like food and clothing. In ***B v B (1997) 1 All SA 598 (E)***, the court found that although the duty of support continues after the attainment of majority by the child, the scale of support varies and is limited to the necessaries.

In this regard, if a child has attained majority and is not schooling for any apparent reason, it is futile to lodge an application on his/her behalf. A maintenance limited to the necessities is therefore appropriate for the above category of children should they be found to be still dependent on their parents for support.

(c) Young and employable respondents

A young respondent who worked for a very limited period is still employable. The amount due to him as pension shall never be sufficient to qualify for a future maintenance claim. In circumstances of this nature, the Maintenance Officer should rather ensure that the arrear maintenance (if any), is settled in full. It must however be ensured that the unemployment is not connected with the unwillingness to work or misconduct otherwise section 31 proceedings can be invoked.

4. INSTANCES WHERE FUTURE MAINTENANCE IS DESIRABLE:

(a) Children still in need of support

It is in the best interests of every child who is still in need of support to be awarded a future maintenance from his or her parent's retirement, retrenchment or resignation benefits. In the case of *Bursey v Bursey 1999 (3) SA 33 SCA*, it was held that the duty of a parent to support a child does not come to an end at any particular age but continues until the child becomes self-supporting.

(b) Retirement, retrenchment or resignation on the part of the respondent

Respondent must have left employment either as a form of resignation, retirement, retrenchment or any other way, provided that he is going to receive or has received his employment benefits (lump sum amount, annuity, pension or provident fund, etc).

(c) Availability of means of the respondent.

If the Respondent does not get any benefits as results of his leaving employment, future maintenance application will be futile. The Respondent must have the means to qualify for future maintenance. Availability of means is one of the fundamental principles of support in maintenance applications that the person from whom maintenance is claimed must have the means to maintain. In ***Reyneke v Reyneke*** *1990 (3) SA 927 (E)*, the court held that a maintenance order can only be granted if the court is satisfied that the person from whom maintenance is claimed is able to pay it.

5. PROCEDURAL ASPECTS FOR FUTURE MAINTENANCE

5.1. Investigation

The financial position of the respondent should be investigated. Section 8 of the Maintenance Act can be utilized for this purpose in order to obtain the financial information resulting from the respondent's retirement, retrenchment or resignation.

5.2. Interdicts

If the matter is urgent, it is advisable to apply for an interdict prohibiting the relevant Fund from paying out the benefits. An urgent application can be brought to the court if the grounds for such urgency can be proved.

5.3. Application

A duly prepared application accompanied by Applicant's affidavit should be presented before the court. An e*x parte* application is preferable in instances where there is a reasonable belief that the Respondent will squander the amount and / or package benefits if notified of the application. A *rule nisi* can be granted by the court for all the respondents to show cause on the return date why the order should not be made final, since the one granted will only be interim pending the finalization of the application.

5.3.1 The necessary averments of the application:

- It should be signed by the Applicant and the Maintenance Officer / Legal representative of the former (if any); and
- It should contain the relief sought.

5.4. Affidavit

Generally, the affidavit should *inter alia* include the following:

- It should be deposed to by the Applicant;
- State the full names and the children's date of birth;
- The nature of the relationship between the Child, the Respondent as well as the Applicant;
- State clearly that the children are still in need of support;
- Information about the Respondent's retirement, retrenchment or resignation;
- The fact that the Respondent will squander or is already getting rid of his benefits and the reasons therefor;
- The fact that the children will suffer irreparable harm if the order is not granted;
- The details of the investigation; and lastly
- The fact that the court has jurisdiction to consider the application.

If the order is granted, it is only a provisional or interim order and should be served to all the Respondents requiring them to show cause on the return date why the interim order should not be made final.

If the Respondents fail to appear on the return date, then the order will be made final by the court provided that there is a Sheriff's return of service to the effect that the Respondents were notified with the application.

If the Respondents appear on the return date, then the matter will be heard by the court and a final order will be made based on the evidence presented. The application can either be successful or declined.

6. Legislation and Case Law

In terms of section 15(1) of the Maintenance Act 99 of 1998, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child and this duty exists at the time of the issue of the maintenance order and as the Act provides, "**it is expected to continue**". In light of this, if the Respondent left his employment, the duty of support shall not terminate as same **is expected to continue**, hence future maintenance applications are the appropriate mechanisms to ensure that the best interests of the children are protected.

The following provisions of our South African Statutes are applicable to future maintenance cases:

- *Section 26(4) of the Maintenance Act 99 of 1998 – makes provision for the attachment of any pension, annuity, gratuity, compassionate allowance or similar benefits*;
- *Section 37A(1) of the Pension Funds Act 24 of 1956 – makes provisions for the attachment of benefits in the rules of a registered fund, annuities and contributions to the extent permitted by amongst others, the Maintenance Act, and it protects the dependents of a member; and lastly*
- *Section 28(2) of the Constitution as well as section 9 of the Children's Act 38 of 2005 - makes provision for the protection of the best interests of the child.*

Article 3 of the United Nations Convention on the Rights of the Child 1989, of which South Africa is a signatory, also protects the best interests of the child.

The following cases are applicable in future maintenance matters:

- **Magewu v Zozo 2004 (4) SA 578 (C)**
  It was held that the attachment of pension fund benefits in respect of future maintenance claims is a direct and effective means of ensuring that the rights of the child and the dignity of women are upheld. Further since the Respondent has been in arrears on several occasions before, he has not conducting himself in a manner that would create the impression that the provision of the child's maintenance is of paramount importance to him. The Pension Fund was therefore ordered to withhold his withdrawal benefit in order to secure the future maintenance claims of the minor child.

- **Mngadi v Beacon Sweets & Chocolates Provident Fund and others 2003 (2) All SA 279 (D)**
  The judge held that the applicant needs to show a particular state of mind on the part of the respondent, that he for instance, is getting rid of funds or is

likely to do so with the intention of defeating the claims of creditors. On interdicts, it was held that the effect of same is to prevent the respondent from freely dealing with his own property to which the applicant lays claim and that justice may require this restriction in cases where the respondent is shown to be acting *mala fide* with the intent of preventing execution in respect of the applicant's claim. The respondent's pension fund was therefore found to be obliged to retain such amount of the withdrawal benefits payable to him for the future maintenance of the children.

- **Nancy Soller v The Maintenance Presiding Officer Wynberg and Others 2006 (2) SA 66 (C)**
  An interdict was sought by the applicant preventing Sanlam Personal Portfolios (Pty) Ltd from making any payment from the annuity to the respondent until such time as the child became self-supporting. This application was dismissed in the Maintenance court which held that the Maintenance court did not have the power to grant a prohibitory interdict of this nature. In the High Court, it was held that the legislature accepts the need to introduce strong measures to ensure that maintenance required for children is paid by those persons obliged to do so and that the maintenance courts are fully empowered to make orders relating to the periodic payment of future maintenance from pension funds, annuities and the like. An interdict was therefore granted against Sanlam prohibiting it from making any payments to the respondent until such time that the child becomes self-supporting.

- **Gerber v Gerber 2007 JDR 1162 (C) / High court case No. 12166/07**
  The above case dealt with an application for the attachment and retention of the proceeds from a sale of immovable property for the payment of a future maintenance claim. It was held that it has been firmly established by the courts that where the future maintenance claim of a minor child are threatened, courts do not hesitate to issue orders attaching lump sum pension fund benefits, and that this is the position whether or not the recalcitrant parent is in arrears or not. Consequently, a final order was granted for the attachment and retention of the said proceeds to satisfy the future maintenance claim of the child.

- **GEPF v Francina Bezuidenhout and Another case No. 2113/04**
  The court held that the Pension Fund should be joined as a party before the court makes an order. If it has not been joined as a party the court cannot grant a final order. The Court must issue a *rule nisi* calling upon the fund to give reasons why an order should not be made. That will afford the fund the opportunity to explain its position before a final order is made.

The following principles are, in *lieu* of the above cases, applicable:

- Future maintenance applications are possible and permissible in law;
- Maintenance courts have the necessary jurisdiction to grant applications of this nature;
- Future maintenance applications protect the best interests of the child;
- The fact that the respondent is not in arrears with his maintenance payments does not mean that these applications should fail;
- A provident / pension fund institution may be interdicted from paying out the respondent's benefits until such time that the matter is finalized;
- The respondent's conduct to the effect that he will not abide by the terms of the maintenance order on his own accord, will be important in the prospects of the application being successful;
- A Pension or Provident Fund Institution, should be cited in the application otherwise the court will not grant a final order (*audi alterem partem rule*);
- A pension, provident or retirement annuity may be attached not only to satisfy the future maintenance of the child but also to cover the amount in arrears.

7. Conclusion

In summary, the Constitution in section 28(2) regards the best interests of the child as paramount. In its preamble, the Maintenance Act provides that South Africa is committed to giving priority to the rights of children, to their survival and to their protection and development. It is therefore vital for all Maintenance Practitioners to ensure that applications of this nature are pursued in order to protect the future of our children.

A maintenance claim against an estate is also possible and permissible. For maintenance claims against an estate, please see the article of ***Themba Alfred Ndaba March 2012 De Rebus Journal entitled "Maintenance of a Child after a parent's death" at 26.***

Themba Alfred Ndaba
LLB (University of Limpopo) a non-practicing Advocate, is a Maintenance Prosecutor in the North West.

A Last Thought

The following publication has just been released and is of huge value to all magistrates dealing with undefended accused. It is also very useful for all acting and aspirant magistrates.

New Release

Questioning: The Undefended Accused – Practical Examples for Magistrates Volume 2

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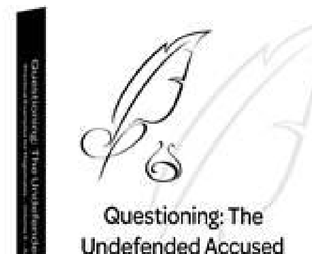
Price: R650
Author: Advocate DJ Steyn
Available June 2014



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- Fraud
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- Uttering of a false document knowing that the document involved, is a false document
- Corruption: The Prevention and Combating of Corrupt Activities Act 12 of 2004
- Extortion
- Robbery
- Perjury: In terms of the common law
- Subornation of [common-law] perjury
- Perjury: In terms of section 319(3) of the (previous) Criminal Procedure Act 56 of 1955 (The making of conflicting sworn statements under different oaths)
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