E-MANTSHI

A KZNJETCOM Newsletter

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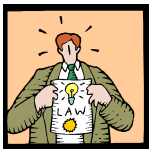
Welcome to the thirty ninth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The *Second-Hand Goods Act*, Act 6 of 2009 has been published in Government Gazette No. 32087 dated 1 April 2009. Although the Act will only come into operation on a date to be determined by the President by proclamation in the Gazette there are a few aspects of interest to magistrates:
   Section 30 authorizes the issuing of a search warrant in terms of the Act and reads as follows:
   30. (1) A warrant to enter, search, seize and seal off premises must be issued by a magistrate or a judge of the High Court who has jurisdiction in the area in which the premises in question are situated, if it appears from information on oath or affirmation that there are reasonable grounds to believe that a provision of this Act has been or is being contravened.
   (2) A warrant issued under this section must specify -
   (a) the premises which may be entered and which of the acts mentioned in section 29(1) may be performed by the police official;
   (b) the period for which the premises may be sealed off for purposes of section 29(1)(f), which may not exceed seven days; and
   (c) whether the warrant authorises execution by night.
   (3) A warrant contemplated in this section remains in force until –
   (a) it has been executed;
   (b) it is cancelled by the person who issued it, or if such person is not available, by any other person with similar authority;
   (c) one month from the date of its issue; or

(d) the purpose for which the warrant was issued no longer exists, whichever occurs first.

Section 40 of the Act provides for the jurisdiction of the magistrates court to impose any penalty provided for in the Act. Schedule 3 of the Act provides for penalties for a number of offences of a maximum of 10 years imprisonment. Magistrates' courts will therefore have the jurisdiction to impose these penalties.

Recent Court Cases

1. MAGOBODI v MINISTER OF SAFETY AND SECURITY AND ANOTHER 2009(1) SACR 355 TKHC

Random searches by police officers are not justifiable without objective grounds for such a search and properly obtained consent of the person involved.

The applicant was the owner of a motor vehicle that was seized by members of the South African Police Services while it was being driven by his cousin. According to one of the police officers, she and a colleague had been carrying out routine duties when they inspected the vehicle in question with the consent of the driver, and discovered that its engine and chassis numbers had been tampered with. She considered that the vehicle was a stolen one and that it could provide evidence of the commission of an offence, and asked the driver to drive it to the police station. This version was substantially different to that of the applicant, but the court found it unnecessary to hear oral evidence, since the respondents' version was, in any event, unsatisfactory.

Held, that searches and seizures must, in general, be carried out in terms of legislation that sets out the power to search and seize. *In casu*, that legislation was the Criminal Procedure Act 51 of 1977, and particularly ss 20-22 thereof. The issue of a search warrant under s 21 provided the best safeguard to regulate search and seizure. In the present matter, however, there was no such safeguard, and it was clear that no magistrate or justice acting judicially would have issued a search warrant in respect of the vehicle: neither of the officers concerned had any knowledge, or reasonable belief, that the vehicle had been involved in the commission of an offence, or that it might afford evidence of the commission of an offence. They had been on nothing more than a fishing expedition. (Paragraphs [8]-]10] at 359*c*-360*b*.)

Held, further, that searches without probable cause might be justifiable in certain

circumstances, for example, where the State interest was concerned, as in vehicle checks at national borders or the routine inspection of vehicles for roadworthiness. In such categories of search a good rationale existed to waive the standard approach to the protection of privacy. However, the search *in casu* did not fall into such a category. Merely going from vehicle to vehicle and asking permission to search, as had happened in the present matter, was not warranted and constituted an unjustifiable invasion of privacy. The question also arose as to whether the consent had been voluntarily given and was therefore valid. In this regard, a person should be informed of the purpose of the search: a mere request to search was insufficient. Furthermore, where there was no probable cause, the police official should establish, prior to requesting consent, whether the person concerned had the capacity to consent and had physical control over the vehicle. If so, the person should be informed of his or her right not to have the vehicle searched, and also of the right to refuse to consent to the search. Random searches by police officials without objective grounds for a search were contrary to the norms of an open and democratic society; if a random search were deemed necessary, then at least the aforementioned requirements relating to consent should be complied with. (Paragraphs [11]-[15] at 360*c*-361*b*.)

2. S v ADAMAS 2009(1) SACR 394 CPD

The failure of a presiding officer to allow parties to address the court before handing down judgment is an irregularity which can lead to the setting aside of the proceedings.

After all the evidence had been led in a rape trial, the matter was adjourned for closing argument and judgment. On resumption, the magistrate proceeded to deliver judgment without affording the parties an opportunity to address the court. The irregularity was brought to the magistrate's attention by defence counsel, whereupon he referred the matter to the High Court on special review, asking that the case be referred back to him so that he could hear closing argument and then give judgment again, taking the submissions of the State and the accused into account.

Held, that s 175 of the Criminal Procedure Act 51 of 1977 made it abundantly clear that failure to allow the defence and the prosecution an opportunity to address the court prior to judgment was an irregularity. The question was whether or not it was an irregularity that had 'poisoned' the proceedings to the point of vitiating the trial. Section 35(3) of the Constitution of the Republic of South Africa, 1996, formed the bedrock of the right to a fair trial. Even though s 35(3) contained no express provision in this regard, the right to be heard before any decision was taken affecting him or her was one of the most fundamental rights of an accused person. This was not only an expression of the *audi alteram partem* rule, but also an integral component of the right to adduce and challenge evidence embodied in s 35(3)(i) of the Constitution. The right to participate in the proceedings was a fundamental principle, the denial of which was *per se* an infringement of the right to a fair trial, regardless of the prospects of success. (Paragraphs [3]-[7] at 396*d*-398*g*.)

Held, further, that the delivery of judgment and the conviction of an accused without him or her and the prosecution being afforded the opportunity to address the court most certainly compromised the fairness of the trial; such a judgment was without legal efficacy. The magistrate's suggestion that only the judgement portion of the proceedings should be set aside and the matter referred back to him could not be acceded to, since the grievous error had tainted the whole case. In any event, even if this request was valid, it could surely not be expected of defence counsel to try to persuade a presiding officer differently when the latter had already announced his decision on the matter. (Paragraph [8] at 398*g-j*.)

Held, accordingly, the whole proceedings were to be set aside, and the matter was to be tried *de novo* before a different magistrate. (Paragraph [9] at 399*b*.)

3. S v EYSSEN 2009(1) SACR 406 SCA

There is an essential difference between the provisions of section 2(1)(e) and (f) of the Prevention of Organized Crime Act, 121 of 1998

The appellant was convicted in the High Court on two counts relating to racketeering activities, namely contraventions of ss 2(1) (e) and (f) of the Prevention of Organised Crime Act 121 of 1998, a count of contravening s 9 of the same Act, two counts of housebreaking with intent to rob and robbery, and one count of robbery with aggravating circumstances. All the sentences were ordered to run concurrently with a 20-year sentence on the racketeering counts. He was given leave to appeal against the racketeering convictions only.

Held, that the essence of the offence in ss (e) was that the accused must conduct, or participate in the conduct of, the affairs of an enterprise; actual participation was required. In that respect it differed from ss (f), the essence of which was that the accused, while managing an enterprise, must have known, or ought reasonably to have known, that another person, whilst associated with the enterprise, was engaged in racketeering activity; knowledge, rather than participation, was required. 'Manage' was not defined, and thus bore its ordinary meaning of being in charge of, or supervising. 'Enterprise' was very widely defined and covered both a single individual and every possible type of association of persons. Where a group of individuals associated in fact was concerned, the association would have to be conscious; there would have to be a common factor or purpose identifiable in the association; it would have to be ongoing; and the members would have to function as a continuing unit. (Paragraphs [5] and [6] at 409*b-g*.)

Held, further, that there was no requirement that the enterprise be legal or illegal; it was the pattern of racketeering activity that brought in the illegal element. The concepts of 'enterprise' and 'pattern of racketeering activity' were discrete, and while proof of the pattern might establish proof of the enterprise, this would not inevitably be the case. Since it was a requirement that the accused (in ss (e)) or another person (in ss(f)) must participate in the affairs of the enterprise, it would be important to identify what those affairs were, and for the State to establish that any criminal act relied upon constituted participation in such affairs. 'Pattern of racketeering activity'

was defined as 'the planned, ongoing, continuous or repeated participation or involvement in' a Schedule 1 offence. The word 'planned' qualified the three words which followed it; unrelated or coincidental instances of proscribed behaviour would not constitute a pattern. (Paragraphs [6]-[8] at 409*g*-410*e*.)

4. S v MAVUNGU 2009(1) SACR 425 TPD

A caravan can be a "house" for the purposes of housebreaking and also a "building" for purposes of trespassing.

"[40] The learned counsel submit that whilst a caravan is a 'house' for housebreaking, it is also a 'building' as intended by the Trespass Act. I find myself in respectful agreement with these submissions. In my view, the reminder in *Madyo* (supra) (S v Madyo 1990(1) SACR 292 (E)) that a caravan is a 'house on wheels' and a 'woonwa' is good authority for the proposition that a caravan should be regarded as a 'building' for purposes of interpreting the Trespass Act. Such an approach would seem to be in harmony with the general tenor of the judgments dealing with structures which lend themselves to competent convictions for housebreaking. Further support for this approach is, in my view, to be found in the attitude of De Wet & Swanepoel (at 351) to the effect that if the structure is used for human habitation it does not matter whether the structure is movable or immovable. This approach seems to be extended even to structures not used for human habitation, where the learned judges say the following in *Temmers* at 361f: (S v Temmers 1994(1) SACR 357 C).

"*What we find quite unacceptable, is the arbitrary insistence that where a structure is not used for human habitation, it has to be an immovable in the technical sense of the common law before any breaking and entry into it to commit an offence can fall within the ambit of the crime of housebreaking with intent to commit an offence.*"

[41] On a more generous and practical interpretation, some of the dictionary meanings, *supra*, for 'to build' and 'building' can, in my view, also accommodate a caravan.

[42] For all these reasons, I am of the view that it would be appropriate to extend the approach of our courts, *supra*, when it comes to structures (at least habitational ones) that lend themselves to convictions for housebreaking, also to the interpretation of the Trespass Act when it comes to 'any building or part of a building'.

[43] To hold otherwise could lead to the absurd result that one can break into a caravan (as long as nothing is damaged or stolen) and sleep there with impunity because it does not amount to trespassing, and housebreaking, in itself, is not a crime – see Snyman (Criminal Law 4 ed) at 540 and authorities there quoted."

From The Legal Journals

1. Dendy, M.

"Prescription and limitation periods"

De Rebus April 2009

2. Sibuyi, D.

"Certificate in terms of s 15 of the Electronic Communications and Transactions Act 25 of 2002 – Useful tool when dealing with the question of admissibility of electronic or data messages in court proceedings"

De Rebus April 2009

3. Gough, I.

"The role of the Common Law and Labour Law in the relationship between the public servant and the state"

De Rebus April 2009

4. Boezaart (Davel), T.

"Some comments on the interpretation and application of section 17 of the Children's Act 38 of 2005"

De Jure 2008 245

5. Stoop, P.N.

"Kritiese evaluasie van die toepassingsveld van die 'National Credit Act'"

De Jure 2008 352

6. Couzens, M.

"A very long engagement: The Children's Act 38 of 2005 and the 1993 Hague Convention on the Protection of Children and Cooperation in respect of intercountry adoption"

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

Contributions from the Law School

The application of the Domestic Violence Act 116 of 1998 in the courts

The Supreme Court of Appeal has noted that the scourge of domestic violence must be dealt with effectively by the State and society, and, if necessary by the courts (*S v Ferreira* 2004 (2) SACR 454 (SCA)). Although all crime has harsh effects on society, "what distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography and is all the more pernicious because it is so often concealed and so frequently goes unpunished" (*S v Baloyi (Minister of Justice)* 2000 (2) SA 425 (CC) par 11).

The aim of this note is to determine how the courts deal with the issue of domestic violence. When viewing all the reported judgments on the Domestic Violence Act 116 of 1998, several issues emerge: the constitutionality of the statute, the prescribed process and the possible interference by the high court in domestic violence matters that had already served before the magistrate's courts; instances of misuse of the process by complainants; with regard to the sentencing of the accused who contravened the domestic violence order, the severity of the sentence as well as the wording of the conditions of a suspended sentence seems particularly problematic; and lastly, the possible claim for damages in instances of unlawful arrests. Each of these issues will be discussed in more detail. It should be noted that the aim is not to discuss the statute or the cases in detail, but merely to highlight the judgments within the broader context to assist magistrates in their research should a domestic violence matter serve before them.

Constitutionality

The constitutionality of the statute has been confirmed in *Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality*, Amicus Curiae) 2006 (1) SACR 359 (CC) par 60. The contentious provision was the issuing of an interim protection order coupled with a suspended warrant of arrest without prior notification to the respondent. The court found that prior notice would defeat the purpose of the Act and that the *audi alteram partem* rule is satisfied when the respondent is given an opportunity to respond to the allegations on the return date (par 37). Furthermore, any arrest in terms of the warrant would not be arbitrary: firstly, because the warrant only comes into effect upon service of the order; and secondly, as the respondent retains various protective measures once arrested: those rights contained in s 35 of the Constitution - the right to legal representation, the right to be brought before the court within 48 hours and the right to bail if appropriate (par 40-44). Moreover, false allegations by a plaintiff would result in criminal prosecution of the plaintiff; and lastly, the police official has discretion in determining whether there are reasonable grounds to suspect that imminent harm would befall the plaintiff, before an arrest is made (par 47-48. See discussion *infra*). Although the court acknowledged that the procedure remains open to abuse, it concluded that this factor was outweighed by the potential of the Act to afford protection to victims of domestic violence (par 60).

Jurisdiction

Regarding the general application of the Act, the courts have confirmed that the magistrate's court is limited to those orders specified in s 7 as of the Act in as far as the types of orders are concerned and that these orders must be ancillary to a protection order. Stand alone orders for custody (care) and access (contact) of children fall outside the scope of the statute and thus fall outside the jurisdiction of the magistrate's court (*Narodien v Andrews* 2002 (3) SA 500 (C) (also reported as [2002] JOL 9420 (C)). Similarly, the domestic violence statute cannot be used in a divorce dispute to seek monetary information regarding bank accounts or for discovery of the contents of a bank safety deposit box – such orders clearly would fall outside the ambit of the Act. The law makes provision for other remedies in this regard (Horn "Misuse of Domestic Violence Act" April 2009 *De Rebus* 7).

The WLD in *B v B* 2008 (4) SA 535 (W) par 27 (also reported as *Blumenow v Blumenow* [2008] JOL 21382 (W)) confirmed that the high court has the power, in terms of its powers as upper guardian of all minor children, to annul any interim protection order granted in a magistrate's court in terms of the Act where it is in the best interests of the child. In this matter the interim protection order was being used by the custodian parent to deny the other access to her children in terms of another court order. The court found that it was never the intention of the legislature when enacting the Domestic Violence Act to remove these inherent common law powers of the high court (par 24).

Protection order

If, after a protection order is made, the circumstances between the parties change that would demand further protection, the correct procedure for an applicant would be to amend the existing order and not to seek a further order (*De Winter-Delange v Moonsamy* [2005] JOL 13203 (C) par 22). The court in this instance made a costs order on the scale of attorney and client as the second process against the respondent was regarded as needless, unjustified and vexatious (par 27. For other cases of possible abuse of the system, see *B v B (supra)*; and *S v Manqina* [2005] JOL 13510 (T) where the court suspended the protection order as it was unclear whether the process of the court was being abused to eject the accused from his home).

Where a respondent wishes to have the order set aside the appropriate procedure is set out in s 10(1) of the Act (*S v Zilwa* [2003] JOL 10897 (T) 2).

Although there is a right to appeal the decision to confirm a protection order, the high court will not interfere in the decision of the magistrate without good reason (*Kruger v Smith* [2006] JOL 18555 (W)).

Criminal prosecution

The normal court rules apply to domestic violence matters: for example, once a charge is laid for the breach of a protection order, it may not be withdrawn merely at the request of the complainant (*S v Morrison* [2005] JOL 15934 (T) 2); and where

the accused had pleaded and evidence adduced before one magistrate, another magistrate may not carry on with the trial (s 118 of Act 51 of 1977 as read with *Morrison* 4).

Depending on the circumstances and the understanding of the accused, a badly drafted charge sheet lacking in clarity regarding the nature, essence and content of the protection order may render the charge defective since the accused has the right to be informed of the charge in sufficient detail (*S v Mhlongo* [2005] JOL 14897 (T) par 6).

Care should be taken not to duplicate or split charges in instances where the action perpetrated falls within the definition of domestic violence prohibited in terms of the protection order as well as the definition of a common law crime (*S v Lottering* [2001] JOL 8504) (C)). In applying the "single intention test" where the same evidence proved both offences, a conviction on only one of the charges can follow (*S v Jita* [2005] JOL 13983 (E)).

In circumstances of alleged intimidation within a domestic violence setting, the Intimidation Act 72 of 1982 is not applicable, but rather the Domestic Violence Act (*S v Motshari* [2001] 2 All SA 207 (NC) 8.2.2).

The accused should be informed of his right to legal representation (*S v Masogo* [2005] JOL 14892 (T); *S v Hlatswayo* [2005] JOL 14989 (T) par 5) as well as his other constitutional and procedural rights (*S v Mathebula* [2005] JOL 15091 (T) par 6). The record should clearly show that these rights were explained to the accused and that he understood – especially in instances where the accused is unrepresented (*Hlatswayo* par 5-6. See also *S v Williams* [2005] JOL 16123 (SE) 2 (defence regarding non-compliance with a maintenance order); *S v Van Rooyen* [2005] JOL 14907 (T) (no evidence against the accused after close of the State case); *S v Ferreira* [2006] JOL 17021 (E) (questions confirming a plea of guilty) and *S v Mashelele* [2003] JOL 12274 (T) 9 (right to apply for payment of a fine in installments or for deferment of a fine)). These irregularities would result in the setting aside of any conviction as the accused would be deemed not to have had a fair trial. However, in *S v Masita* 2005 (1) SACR 272 (C) the high court found that the failure to explain to an undefended accused a competent verdict does not *per se* constitute a fatal irregularity. The court needs to establish whether the accused was prejudiced and whether he had a fair trial in light of the circumstances (277b).

It has been described as salutary practice to require the production of the original protection order before conviction although failure to do so, depending on the circumstances, would not vitiate the conviction (*S v Bangani* [2008] JOL 21277 (E) 2). However, the lack of production of the order coupled with no evidence that the order was served on the respondent could have the effect that the conviction would be fatally flawed (*S v Mbaxa* [2006] JOL 18578 (E); *S v Tyiwashe* [2005] JOL 16133 (E) 2). For a successful prosecution of a contravention of a protection order, the prosecutor has to, apart from service of the relevant order, also prove the terms of the order as well as that the order was valid and operative at the time of the alleged contravention (*S v Tyiwashe* 2; *Khonzapi v S* [2005] JOL 16319 (E)). If there is

uncertainty regarding the identity of any of the parties, a conviction cannot follow.

Where there are two mutually destructive versions before a magistrate, a conviction cannot follow (*Masekwa v S* [2007] JOL 19280 (T)). In considering the evidence, weight should be placed on independent (*in casu* medical) evidence (*S v Trainor* 2003 (1) SACR 35 (SCA) par 10). Depending on the circumstances the complainant's aggressive and provocative behaviour may (or may not) excuse the respondent's actions when breaching the protection order (*Trainor* par 18; *S v Molapo* [2006] JOL 18162 (O)). Where the complainant's evidence has been rejected as unreliable in one material respect, a similar finding may follow in respect of the other evidence where there is no reason to justify a finding that the truth is spoken. The rejection of the evidence on one material aspect may be fatal to the reliability of the evidence in total (*S v Christie* [2002] JOL 9640 (T) 3).

Where the interim protection order has not yet been made a final protection order, a conviction cannot follow in terms of s 17(a) as this section refers to the contravention of the final order (*S v Zondani* 2005 (2) SACR 304 (CkH) par 8 also reported as *S v Zondani* (2005) JOL 15312 (Ck)). However, in *Khonzapi v S* [2005] JOL 16319 (E) 3 the court found the accused guilty of contravention of s 17(a) vis-à-vis incidents relating to the interim protection order. In the same matter incidences relating to the final protection order were set aside as there was evidence that the final order was made, but not that it was served on the accused. As the interim order lapsed with the making of the final order, a conviction under the interim order would no longer be possible. It is submitted that careful drafting of the charge sheet referring to the actual order should solve this problem.

What happens if the parties to the protection order, that prohibits the respondent from entering certain premises or contacting the other, reconcile? In such instance where the respondent is invited back to the premises by the complainant, the court found that the complainant waived reliance on the order as the presence of the respondent is no longer unlawful. As he had her consent, he has no *mens rea* to commit the offence and a conviction cannot follow (*S v Hlalatu* [2005] JOL 15119 (E) par 15-16). Similarly, where a person is prohibited from having "contact with" another and the plaintiff initiates contact, a conviction should not follow. In *S v Maseko* 2005 (1) SACR 497 (W) the plaintiff called the accused and when her call was cut off he phoned her back. His conviction was set aside.

Sentencing

The SCA noted that inappropriate sentences in domestic violence cases that fail to reflect the gravity of the crime and fail to take into account the prevalence of domestic violence in South Africa "ignores the need for the courts to be seen to be ready to impose direct imprisonment for crimes of this kind, lest others be misled into believing that they run no real risk of imprisonment if they inflict physical violence upon those with whom they may have intimate personal relationships" (*S v Roberts* 2000 (2) SACR 522 (SCA)).

As an aside - a prosecutor may not present evidence from the bar with regard to

allegations made by the complainant to the prosecutor. Where the court took into account such inadmissible evidence, the sentence will be set aside and remitted back to the magistrate for sentencing (*S v Van Zyl* [2006] JOL 17061 (E) 2).

The Domestic Violence Act makes provision for a maximum sentence of a fine and/or five years imprisonment for a conviction of s 17(a) (s 17). The courts are bound hereto and may not exceed the prescribed sentence (*S v Maseloane* [2005] JOL 14994 (T) 2). In *S v Maletta* [2006] JOL 17876 (E) the court found that there was nothing in the Domestic Violence Act to authorise a magistrate to exceed its normal criminal jurisdiction of a sentence of three years. If he is of the view that a heavier sentence is required, the matter should be referred to the regional court for sentencing or the accused could be warned that should he be convicted again, he runs the risk of being officially declared a habitual criminal (*Brandt v S* [2006] JOL 16980 (NC)). In this matter the accused had numerous previous convictions and was regarded as “dangerous, obscene, vile, mendacious, cavalier, contemptous and showed absolutely no remorse” (par 21).

In about half of the reported cases the high court reduced the sentence imposed by the magistrate. Although sentencing depends on various factors and although each matter should be considered and decided upon its merits, certain trends were noticed. Most of the sentences were in the form of direct imprisonment, although all or at least half of the sentences were suspended on condition that the accused is not convicted of another breach of the protection order (see discussion hereunder). For first offenders, unless the contravention of the protection order resulted in severe injuries or damage, the offender was not sentenced to a period of actual imprisonment: in most cases a totally suspended sentences were handed down or an option of payment of a fine was included (*Stuurman v S* [2008] JOL 21937) (E); *S v Hobyane* [2008] JOL 22045 (T); *S v Makhaluza* [2001] JOL 8998 (Tk); *S v Geelbooi* [2006] JOL 17756 (E); *S v Tshinyolo* [2002] JOL 9712 (T); *S v Alexander* [2006] JOL 16726 (E); *S v Gewula* [2003] JOL 11079 (E); *S v Maluleke* [2007] JOL 19314 (T); *S v Marakalla* [2005] JOL 15790 (T); *S v Mathebula* [2003] JOL 10592 (T); *S v Matsekei* [2005] JOL 14542 (T); *S v Mokgehle* [2004] JOL 13160 (T); *S v Ndou* [2005] JOL 14386 (T); *S v Ngxezu* [2006] JOL 18547 (E)). In two cases the sentence consisted of actual time served in prison pending the review (*S v Ringana* [2006] JOL 17589 (T); and *S v Tladi* [2003] JOL 10871 (T)). Certain exceptions did occur (*S v Phasha* [2005] JOL 13651 (T)). Second offenders were obviously treated more severely (*S v Dukisa* [2003] JOL 11283 (E); *S v Fillis* [2003] JOL 11669 (E); *S v Van der Roos* [2005] JOL 13980 (E)) except where the previous conviction was very old (*S v Kekana* [2006] JOL 17527 (T)).

Two judgments deserve special mention as confirming sentencing options seldom used by magistrates: in *S v De Figueredo* [2005] JOL 15949 (T) the court conditionally postponed the sentencing for five years. The accused was released on condition that he was not convicted of a contravention of the conditions of the protection order or convicted of assault during the period of postponement. The accused was ordered to appear before the court at the expiration of the period of postponement. In *S v Moagi* [2005] JOL 14519 (T) the court sentenced the accused to periodical imprisonment over weekends at the local police station for a period of

three months. It is submitted that, depending on the relevant circumstances, these options, as well as correctional supervision (*S v Bergh* 2006 (2) SACR 225 (N)), could be used with success by the courts for first offenders – specifically as it would retain the accused as a productive member of society, potentially earning a living for himself and his family.

In numerous cases the high court had to correct the conditions of suspension of a sentence as a result of the conditions being defective: either too vague or too wide (*S v Makua* [2005] JOL 15678 (T); *S v Nyamfu* [2005] JOL 16192 (E); *S v Flanagan* [2005] JOL 14700 (E) 5; *S v Fesi* [2005] JOL 16031 (E); *S v Adams* [2006] JOL 18215(E); *S v Theron* [2006] 16466 (SE); S v Mqwelane [2006] JOL 16911 (Ck) and *S v Abrahams* [2008] JOL 21699 (E)). Two examples of corrected conditions would suffice: In *Abrahams* it was suggested that the sentence reads as follows: "The accused is sentenced to ____ months imprisonment, suspended for ____ years, on condition that the accused is not convicted of being in breach of s 17 of the Domestic Violence Act 116 of 1998 (read with sections 1. 5 and 11(2) of that Act), committed during the period of suspension, and for which breach thereof, imprisonment, without the option of a fine, may be imposed" (par 6). In *Adams* 2 the conditions were simpler, but also adequate: "____ months imprisonment suspended for a period of ___ years on condition that the accused is not convicted of contravention of s 17(a) of Act 116 of 1998, committed during the period of suspension."

Damages for unlawful arrest

Three reported cases deal with successful claims against the Minister of Safety and Security resulting from unlawful arrests after the court authorized a protection order in terms of the domestic violence legislation: *Mohlabeng v Minister, Safety & Security* [2008] JOL 21389 (T) (R85 000); *Luiters v Minster of Safety & Security* [2008] JOL 22221 (T) (R130 000) and *Seria v Minister of Safety and Security* [2005] 2 All SA 614 (C) (R50 000). In terms of s 8(4)(b) of the Act an arrest may follow, upon evidence that a protection order has been contravened where there are *reasonable grounds* to suspect that the complainant may suffer *imminent harm* as a result of the alleged breach of the protection order by the respondent (my emphasis). In considering whether or not the complainant may suffer imminent harm, the following must be taken into account by the SAPS: (*a*) the risk to the safety, health or wellbeing of the complainant; (*b*) the seriousness of the conduct comprising an alleged breach of the protection order; and (*c*) the length of time since the alleged breach occurred (s 8(5)).

Where the arresting police officer fails to exercise his discretion, or where the conduct of the respondent does not satisfy these requirements, the arrest would be unlawful and wrongful (*Luiters* 4.3 and *Seria* 629). In *Seria* the court noted that "imminent harm" is "harm which is about to happen, if not certain to happen" (629). The test is objective and must be considered in light of the standards set out in s 8(4) and (5) of the Act (*Seria* 629). The court reiterated the enormous responsibility of members of the SAPS when asked to effect an arrest: "a responsibility which must be exercised with care and wisdom, striking a balance between the rights of

complainants and those of respondents who may be deprived of their liberty" (631).

Conclusion

Sachs J in December 1999 in *S v Baloyi* noted that the "*ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little*". From the cases above it seems as if this no longer holds true and that in the majority of the cases the courts deal with domestic violence issues with rigour and effectiveness.

In the recent study by Artz and Smythe "Bridges and barriers: a five year retrospective on the Domestic Violence Act" (2005) *Acta Juridica* 200, it was found that although there are still problems with the implementation of the Act, most of the role-players are comfortable, committed and confident in applying the Act and are responsive to the needs of the victims. Areas of concern remain however, such as the need for more resources and ongoing training and education; the need for a positive duty on the health sector to assist victims of domestic violence; concerns about vexations and vengeful claims; and the need to understand that it is difficult for women to finally leave an abusive relationship and that this should not prevent assistance to the victim. It is noteworthy that these concerns no longer include an ineffectual court system.

(Prof) Marita Carnelley
University of KwaZulu-Natal

If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

REPUBLIC OF SOUTH AFRICA

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Date: 2009-04-23

The Secretary
JETcom

Dear Gerhard,

E MANTSHI PUBLICATION.

Kindly publish the following contribution as soon as possible:-

BENCH BOOK: ENVIRONMENTAL CRIMES.

1. I am involved (with Justice College and the Department of Environmental Affairs) in the publication of a bench book on environmental crimes, and as such I have been charged with writing chapters about:-
   1.1 Why magistrates matter and the roles of the courts; and
   1.2 lessons learned from magistrates

2. I have also been requested to think of a suitable name for the publication.

3. It is no secret that E Mantshi is read by each and every magistrate in South Africa and I consequently take the liberty to request through this medium:-
   3.1 That magistrates from all over kindly provide me with examples from their own experience covering the two topics mentioned in 1.1 and 1.2;
   3.2.1 If case numbers are available, please quote them;
   3.2.2 If interesting legislation was relevant, please quote the same;
   3.2.2 If it is too involved, simply provide me with a copy of the case, or other relevant documentation.

4. Moreover, please favour me with your thoughts on a name for the envisaged bench book.

5. With your assistance we can certainly go a long way in putting together a legal publication, which will not only make interesting reading material, but will also serve as a very helpful reference manual in and out of court.

6. Your contribution does not have to be a work of art. Simply let me have it in

whatever format. You may rest assured that you will receive proper acknowledgement.

7. My particulars are:
   7.1 Name: Louis Radyn,
   7.2 Postal Address: Private Bag X02 Mobeni 4060
   7.3 Tel: 031-9072190 (w)
   Cell: 082-8572260
   7.4 Fax: 086 – 5074696
   7.5 E mail: LRadyn@justice.gov.za or lrad@mweb.co.za

8. Looking forward to hear from you within the near future.

Louis Radyn

Misuse of the Domestic Violence Act

The Domestic Violence Act 116 of 1998 was enacted for good reason and provides a speedy and inexpensive remedy to those on the receiving end of domestic violence. It is available to persons who are involved in a domestic relationship (which is defined and is relatively broad). The preamble to the Act is clear.

Unhappily some practitioners are using the Act to obtain orders and relief that were never contemplated and are sometimes not even competent under the Act. In addition, it appears that some presiding officers lack an understanding of the Act and its purpose, or simply grant whatever order is sought without properly applying their minds.

I am told that one practitioner has created a thriving business for himself by drafting the supporting affidavit for a complainant, completing the statutory form and charging a fee of R1 500. The merits are seldom considered and the process is akin to a sausage machine.

The cherry on top is a matter that I am involved in at present. The parties are married to each other in community of property and the value of the joint estate runs into millions. The wife, on good grounds applied for and was granted an order in terms of the Act. In retaliation the husband proceeded to obtain an order against his wife in terms of the Act, inclusive of an order: 'To disclose all secret bank accounts belonging to her'. The application was supported by two affidavits, drawn by his attorney.

Such an order cannot fall within the ambit of the Act and certainly not within the definition of 'economic abuse' as defined in the Act. That the magistrate could even have contemplated such an order on the facts before him is difficult to comprehend. In addition, the terms of the order were so vague as to be virtually meaningless. It was no more that a fishing expedition. If the husband (and his attorney) believed that

secret bank accounts existed, he had other remedies available to him. The Act was not the correct vehicle to use.

As if this was not enough, the husband then applied for and was granted an order under the Act against his married daughter, who held a safety deposit box in her own name at a local bank. The supporting affidavits were duplicates of the affidavits that had been filed in support of the application against the wife. Extraordinarily, the magistrate granted, in addition to the other relief, the following order against her: '… to open a safety box in the presence of police who will make an inventory'. (No mention of a bank or whose safety box had to be opened.)

The order was served on the daughter shortly before 1 pm and the sheriff informed her that she had to be at a specific bank at 2 pm to open a safety deposit box in the presence of the sheriff, the police and her father, that photographs would be taken of the contents and that, if she failed to comply, she would be arrested.

I advised her not to attend at the bank and accompanied her to the magistrate who had granted the order. We canvassed the validity of that part of the order relating to the safety deposit box. The magistrate indicated that she was *functus officio* and could do nothing to rectify the matter.

We approached the High Court immediately and led *viva voce* evidence by the daughter. I had in the meantime telephoned the husband's attorney to advise that we were approaching the High Court, with the result that counsel appeared to represent the husband to oppose an application for relief.

The judge, I believe, quite correctly, made an interim order, effective immediately, calling on the husband to show cause why the order of the magistrate should not be declared a nullity and set aside. In my view, in both of the examples quoted, the magistrate should not have granted the orders. The question arises whether both applications amounted to an abuse of the provision of the Act and the process of the court.

Part of the solution lies in the proper training of judicial officers so that they have a better understanding of the Act, have a grasp of the reasons for its enactment and do not allow it to be used to achieve improper objectives.

In conclusion, in both examples referred to, if the practitioner who acted for the husband had grounds for believing that assets were being concealed (bearing in mind the substantial value of the joint estate) his client's remedy was to approach the High Court for relief. (The judge, in addressing the opposing counsel, remarked that his client should have brought the application to the High Court in which the divorce action was pending.)

Peter Horn,
attorney, Kimberley

(The above letter appears in the April issue of *De Rebus*.)

A Last Thought

"The most obvious ultimate justification for the imposition of punishment would seem to be that organised society has the right (perhaps even the duty) to protect itself, and that punishment is considered – rightly or wrongly – as the most suitable weapon against criminals. The situation in which the State defends society against its criminal members may be compared with that of an inidividual who acts in self-defence against someone who unlawfully attacks him. Self-defence is a ground of justification which renders a *prima facie* unlawful act lawful. Similarly, criminal punishment – which would otherwise constitute an unjust interference with the individual's person or his property – is justified by the offender's action."

Punishment – an introduction to Principles: M.A. Rabie & S.A. Strauss.

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http://www.justiceforum.co.za/JET-LTN.asp
For further information or queries please contact RLaue@justice.gov.za