e-MANTSHI

A KZNJETCOM Newsletter

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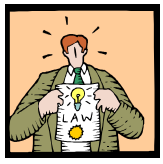
Welcome to the sixty fourth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search all the 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 gvanrooyen@justice.gov.za.



New Legislation

1. An *Independent Police Investigative Directorate Act, 2011 Act 1 of 2011* has been published in Government Gazette no 34298 dated 16 May 2011.The Act was assented to by the President on 12 May 2011.The purpose of the Act is:

"To make provision for the establishment of an Independent Police Investigative Directorate and to regulate the functions of the Directorate, to provide for the establishment of a Management Committee and Consultative Forum and their respective functions; to provide for the appointment and powers of investigators; to provide for reporting obligations and cooperation by members of the South African Police Service and Municipal Police Services; to provide for transitional arrangements; to provide for the repeal and amendment of certain laws; and to provide for matters connected therewith."

2. A *Civilian Secretariat for Police Service Act, 2011 Act 2 of 2011* has been published in Government Gazette no 34299 dated 16 May 2011.This Act was also assented to by the President on 12 May 2011.The purpose of the Act is:

"To provide for the establishment of a Civilian Secretariat for the Police Service in the Republic; to define the objects, functions and powers of the Civilian Secretariat, and for this purpose to align the operations of the Civilian Secretariat in the national and provincial spheres of government and reorganise the Civilian Secretariat into an effective and efficient organ of state; to regulate the appointment, duties and

functions, powers and removal from office of the Secretary for the Police Service and heads of provincial secretariats; to provide for the establishment of a senior management forum and a Ministerial Executive Committee; to provide for co-operation between the Civilian Secretariat and the Independent Police Investigative Directorate; to provide for co-operation between the Civilian Secretariat and the South African Police Service; to provide for intervention into the affairs of provincial secretariats by the Civilian Secretariat; and to provide for matters connected therewith."

3. In Government Gazette no 34303 dated 20 May 2011 the following order of The North Gauteng High Court was published which was obtained by the Centre for Child Law on the 10th of May 2011:

COURT ORDER

In the matter between the Centre for Child Law (Applicant) and the Minister of Social Development, the South African Social Security Agency and the MECs for Social Development in Limpopo, Mpumalanga, Gauteng, Northwest, Free State, Northern Cape, Kwa Zulu Natal, Eastern Cape and Western Cape (Respondents) (case number 21726/11) the North Gauteng High Court ordered on 10 May 2011 as follows:

1. Notwithstanding the provisions of section 314 of the Children's Act 38 of 2005, any foster care order that was granted prior to 1 April 2010 that has not yet expired, shall, when it becomes due to expire, be dealt with under an administrative process following the procedure previously provided for in terms of the Child Care Act 74 of 1983 and the regulations thereto.

2. The procedure set out in paragraph 1 will continue to be followed until 31 December 2014 or until such time as the Children's Act 38 of 2005 is amended to provide for a more comprehensive legal solution, whichever happens first.

3. All foster care orders that have expired since 1 April 2010 are deemed not to have expired and are hereby extended for a period of 2 (two) years from the date of the court order (10 May 2011).

4. All foster care orders that expired within a period of not more that 2 (two) years prior to 1 April 2011, are deemed not to have expired and are hereby extended for a period of 2 (two) years from the date of the court order (10 may 2011).

5. The MECs for Social Development shall direct the relevant social workers to identify foster care orders referred to in paragraphs 3 and 4 that should be extended, and must extend them administratively following the procedure that was previously provided for in terms of the Child Care Act 74 of 1983 and the regulations thereto.

6. The administrative extensions referred to in paragraphs 3 and 4 shall be communicated to the South African Social Security Agency as soon as they are effected.

Recent Court Cases

1.S v HANEKOM 2011 (1) SACR 430 (WCC)

In a case where a complainant is both a single witness and a child witness it must be borne in mind that two cautionary rules apply.

The appellant was convicted in a regional court on one count of indecent assault and sentenced to three years' imprisonment. The only direct evidence against the appellant was that of the complainant, his 8-year-old daughter — who was 5 years old at the time of the incident. In his appeal against conviction and sentence, the question was whether or not the trial court had misdirected itself in its approach to the evidence.

Held , that the trial court had failed to have sufficient regard to the two cautionary rules applicable in the case, and had failed to apply them with the degree of attention to detail that the circumstances of the case required. The complainant was both a single witness and a child witness. A court had to be alive to the danger of relying on the evidence of only one witness, since it could not be checked against the evidence of other witnesses. In addition, the evidence of a child was potentially unreliable and untrustworthy due to a child's immaturity, suggestibility, lack of judgment, and, particularly where the allegation was one of sexual misconduct, a child's capacity to convince itself of the truth of a statement that might not be true, entirely or at all. Certain guidelines were of assistance in applying the cautionary rules: the need for caution, and the reasons therefor, should be articulated in the judgment; the evidence should be examined to ensure that it was clear and substantially satisfactory in all material respects; although corroboration was not a prerequisite, in appropriate circumstances a court should seek it before convicting the accused; and, failing corroboration, a court should look for some feature in the evidence which gave a hallmark of trustworthiness, sufficient to reduce the risk of a wrong reliance on the evidence. (Paragraphs [6]–[15] at 433*c*– 435*h*.)

Held , further, that the cautionary rules were a 'red flag', warning a court to bear a number of factors in mind when evaluating evidence. These factors included evasiveness on the part of the witness; the lapse of a significant period of time between the incident complained of and the trial; the possibility of the witness having a grudge against the accused, or a motive falsely to implicate him; and the fact that, in general, a child might have difficulty separating reality from fantasy. These factors appeared to be present *in casu* . Three years had elapsed between the incident and the trial. The complainant had not got on well with her father. Most pertinently, while there had never been a report of more than one incident, the complainant had suddenly — in her evidence-in-chief — elevated the number of assaults to two, although she could not explain when each had been reported and to whom. This

suggested that she had difficulty separating fantasy from reality. (Paragraphs [12]–[14] at 434*i*– 435*e*.)

Held , further, that, contrary to the trial court's finding, the so-called 'first report' the complainant had made to her mother was not consistent with her evidence in court in all material respects. Furthermore, the trial court had found that the complainant's evidence was consistent with her statement to the police, and had taken this into account as a factor that positively affected her credibility. This approach was in error, as it clearly violated the rule against self-corroboration by self-consistent statements. The trial court had further erred in finding that the medical evidence supported the complainant's version. Although this evidence established that there had possibly been forcible penetration of the complainant, it established no link in time or in any other way to the appellant. (Paragraphs [16]–[28] at 435*i*– 438*c*.)

Held , further, that the evidence of the appellant had not been shaken in any way in cross-examination. He had been honest and direct, not evasive or untruthful, and his evidence appeared entirely probable. No adverse credibility findings had been made against him by the trial court. With the cautionary rules in mind, the conclusion was inevitable that the complainant's evidence lacked the degree of trustworthiness which would allow the state to overcome the burden of proof. Given this, and in light of the acceptable evidence given by the appellant, his guilt had not been proved beyond a reasonable doubt. (Paragraphs [29]–[30] at 438*c*–438*i*) Appeal upheld. Conviction and sentence set aside.

2. S v BOTES 2011 (1) SACR 439 (GNP)

There is a duty on the courts to impose harsher sentences in racially motivated crimes.

“[22] The gravity of the offence committed by the appellant and his *socii criminis* does not lie only in the killing of an innocent person, and/or the severity and the brutality in the commission thereof, but more in the motive which propelled them to commit it — racism! Racially motivated offences, committed by whomever, offend against the ethos and aspirations of the peoples of this nascent democracy. The evil of racism is that it has the potential to plunge this country into the abyss of pre-1994, and opens the healing wounds of the past, and further divides the citizenry along racial lines. See Preamble of the Constitution of the Republic of South Africa, 1996.

[23] It is apposite to once more cite in full (the late) Mahomed AJA (as he then was) in *S v Van Wyk* : *1992 (1) SACR 147 (NmS)* at 172*f* –173 *g* .

'Mr *Botes* repeatedly contended that because the appellant was "socialised" or conditioned by a racist environment for many years, the fact that the murder of the deceased was racially motivated should in the circumstances be treated as a mitigating factor and not as an aggravating factor. He accordingly contended that the Court a quo had erred in finding that . . . the racial undertone must be seen as an aggravating factor. . . .

This submission raises an important issue pertaining to sentencing policy in post-independence Namibia. Crucial to the identification of that policy is the spirit and the tenor of the Namibian Constitution.

As I have previously said:

"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion. '(*S v Acheson* 1991 (2) SA 805 (Nm) at 813A–B.)

Throughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread — an abiding revulsion of racism and apartheid". It articulates a vigorous consciousness of the suffering and the wounds which racism has inflicted on the Namibian people for so long and a commitment to build a new nation to cherish and to protect the gains of our long struggle against the pathology of apartheid. I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity. (See the Preamble of the Constitution and parts 10 and 23.)

That ethos must preside and permeate the processes of judicial interpretation and discretion as much in the area of criminal sentencing as in other areas of law.

To state that the appellant's racism was conditioned by a racist environment is to explain but not necessarily to mitigate. At different times in history, societies have sought to condition citizens to legitimise discrimination against retribution, and to permit monstrous invasions of human dignity and freedom through the institution of slavery. But there comes a time in the life of a nation, when it must and is able to identify such practices as pathologies and when it seeks consciously, visibly and irreversibly to reject its shameful past. That time for the Namibian nation arrived with its independence. The commitment to build a new nation was then articulated for everybody inside and outside Namibia to understand, to cherish, to share and to further that commitment. The appellant must, like other citizens, have been exposed to the force and the significance of this message.

To allow the racist socialisation of pre-independence Namibia to continue to operate as a mitigating circumstance, after the new Constitution has been publicly adopted, widely disseminated and vigorously debated both in Namibia and the international community, would substantially be to subvert the objectives of the Constitution, to impair the process of national reconciliation and nation building and to retard the speed with which Namibian society has to recover from the legacy of its colonial past.

Having regard to the foregoing, I can find no fault with the finding of the Court *a quo* that the racial motive which influenced the appellant to commit a serious crime must in the circumstances of the case be considered as an aggravating factor. The

sentence imposed should and did, in my view, correctly reflect the determination of the Courts to give effect to the constitutional values of the nation and to project a strong message that such criminal manifestations of racism will not be tolerated by the Courts of the new Namibia.' "

3. S v KHOZA 2011 (1) SACR 482 (GSJ)

An order in terms of section 300 of Act 51 of 1977 was only appropriate where an accused had sufficient assets to compensate a complainant in full.

The accused was convicted of stealing R35 000 in cash from her employer and sentenced to a fine of R10 000 or 36 months' imprisonment, conditionally suspended. In addition, a compensation order was made, in terms of s 300 of the Criminal Procedure Act 51 of 1977, requiring the accused to pay an amount of R20 000 — beginning with an initial payment of R2000 on the day of sentence and followed by installments of R500 per month until the balance was paid in full. The senior magistrate of the district, being of the opinion that the compensation order was inappropriate since it had not been made a condition of the suspended sentence, referred the matter to the High Court on special review. It was unclear from the record whether or not the complainant had been prepared to accept compensation in a lower amount than the damages she had suffered. It was also unclear whether the accused, whose only employment had been terminated by the complainant, would be in a position to comply with the order, and whether the complainant was prepared to re-employ the accused in order to enable her to comply with it.

Held , that there were two ways in which a court could provide compensation to a complainant who had suffered loss or damage to property due to a criminal offence: it could make a compensation order part of the suspensive conditions to a sentence in terms of s 297 of the Act; or it could make a compensation order under s 300 of the Act, which had the effect of a civil judgment. The latter would be appropriate only where the accused had sufficient assets to compensate the complainant in full, or to a large extent. Where the accused was able to make payments in installments, it would be more appropriate and practical to impose a sentence suspended on condition of periodical payments. A condition of suspension under s 297 was the more flexible, since it could be adapted judicially if the accused failed to pay, without the complainant having to incur the costs and bother of execution, as was the case with a compensation order. While the magistrate had been entitled to make a compensation order, more could and should have been done to establish whether the accused could comply with it; whether it satisfied the complainant; and whether there was any real prospect of the complainant re-employing the accused, thus enabling her to comply with the order. In the result, the proceedings had not been in accordance with justice; the sentence was to be set aside and the matter referred back to the sentencing court for sentencing afresh. (Paragraphs [8]–[13] at 484*e*–486*f* .)

4. S v BHADU 2011 (1) SACR 487 (ECG)

In imposing sentence, the period for which the accused was in custody awaiting trial, should be taken into account in determining the period of imprisonment to be imposed.

"[5] I turn to the merits of the appeal. The unlawful possession of a firearm is a serious offence which warrants sending the offender to prison, even if he is a youthful first offender. Mr *Van der Spuy* was not able to contend otherwise on appeal before us. He did, however, submit that the period of imprisonment which the magistrate imposed — six years' imprisonment — was, in the light of the appellant's personal circumstances and the other mitigating features, unduly harsh, to the point of being shockingly inappropriate, and that this court is accordingly entitled and obliged to interfere (*S v Hlapezula and Others* 1965 (4) SA 439 (A) at 444; *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10 at 241). He relied on the following considerations:

- the youthfulness of the appellant (21 years);
- his clean record;
- the fact that he was not shown to have possessed the firearm for some specific criminal purpose;
- the fact that he had no magazine or ammunition at the time of his possession, and therefore could not have fired the pistol;
- the fact that he is a candidate for rehabilitation;
- the fact that he had been in custody awaiting trial for a year.

In my view, these are weighty considerations which should have induced the magistrate — in the exercise of a proper discretion — to suspend a portion of the sentence, which he was entitled to do once he found that the prescribed sentence did not have to be imposed. The magistrate, in my view, also adopted an improper approach to the period the appellant was in custody awaiting trial, by stating that he had only himself to blame for this by not pleading guilty. See *S v Vilakazi* 2009 (1) SACR 552 (SCA) ([2008] 4 All SA 396) para 60:

'The appellant was arrested on the day the offence was committed and has been incarcerated ever since. At the time he was sentenced he had accordingly been imprisoned for just over two years. While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed.'

[6] In my view, a proper sentence for this offence is one of six years' imprisonment of which two years' imprisonment is suspended on appropriate conditions for a period of five years. Such a sentence will bring home to the appellant the seriousness of his crime, and will also operate as an inducement for him not to repeat it. To make allowance for the period during which the appellant was awaiting trial, I shall order suspension of three years', and not two years', imprisonment.

[7] In the result, the appeal on sentence is allowed. The sentence will remain one of six years' imprisonment, but the following will be added to it: 'of which three years' imprisonment is suspended for a period of five years on condition that the accused is not convicted of a contravention of s 3 of the Firearms Control Act 60 of 2000, or of any other offence involving the unlawful use or possession of a firearm or ammunition, committed during the period of suspension, for which he is sentenced to unsuspended imprisonment without the option of a fine'.

5. S v JACOBS 2011 (1) SACR 490 (ECP)

In bail applications courts are entitled to take judicial notice of the fact that the country's prisons are grossly overcrowded especially where an accused remains in custody only because of his inability to pay bail.

Section 60(2B) *(b)* (i) of the Criminal Procedure Act 51 of 1977 provides for release on appropriate bail conditions, not including payment of an amount of money. The appellant, unable to pay the amount extended as bail for his release, and having applied unsuccessfully for his release in terms of this subsection, appealed to the High Court.

Held , that it had long been recognised that bail should not be set in an amount that was unaffordable, since that would effectively constitute a refusal of bail. However, the means of an accused were not the only consideration and nothing in s 60(2B) *(b)* (i) suggested that the courts could not take into account other factors, such as the seriousness of the offence. The subsection did not say that the court must release an impecunious accused without the payment of a sum of money, but merely that it should 'consider' that option. In the context, 'consider' meant 'look at attentively' or 'show regard for'. If the legislature had intended that a court had no discretion but to release an accused who could not afford bail, it would have left out the word 'consider'. Accordingly, the court retained a discretion with regard to the conditions of release of an accused who could not afford bail. (Paragraphs [10]–[11] at 494*e*–495*b* .)

Held , further, that the courts could take judicial notice of the fact that the country's prisons were grossly overcrowded, and that a large number of awaiting-trial prisoners who had been granted bail could not afford to pay it. No person who had been granted bail should have to remain in custody. Section 60(2B) served as a reminder to judicial officers to consider properly the amount of bail to be set, as well as other conditions of release which would be just as effective for the administration of justice as the payment of money. Section 63A of the Act provided that the head of a prison could apply for an accused to be released on warning or on amended bail conditions if overcrowding had reached such proportions as to threaten the dignity, physical health or safety of an accused. Although this section was of application only to comparatively minor offences, there was no reason why the courts should not have regard to its purpose, when deciding bail applications where the offence fell outside the section's ambit. The ongoing violation of a person's dignity and the threat to his health and safety were vitally important factors, especially where an accused

had been granted bail and was in custody only because he could not afford to pay it. (Paragraphs [12]–[16] at 495*c*–496*c*.)

Held , further, that in the present case the magistrate had over-emphasised the seriousness of the offence, and had failed to consider the imposition of conditions that did not include the payment of a sum of money. While the offence was a serious one, there had been no evidence of the strength of the State's case, and the appellant had indicated his denial of the charge. The amount of bail set was a nominal one, which did not fulfil the purpose of providing the accused with an incentive to stand trial. The accused had been supporting his family prior to his arrest, and would be able to do so again if released. He was willing to abide by the court's conditions, including weekly reporting to the police. Accordingly, and in view of the violation of his dignity and the threat to his health and safety resulting from the overcrowded conditions in prison, he was to be released on conditions that did not include the payment of a sum of money. (Paragraphs [18]–[20] at 496*d*– 497*a*.) Appeal upheld. Appellant conditionally released, such conditions not including the payment of a sum of money.

From The Legal Journals

Coetzee, E

"Can the application of the human rights of the child in a criminal case result in a therapeutic outcome?"

Potchefstroom Electronic Law Journal 2010 No 3

Jacobs, W ; Stoop, P & Van Niekerk, R

"Fundamental consumer rights under the *Consumer Protection Act 68 of 2008*: a critical overview and analysis."

Potchefstroom Electronic Law Journal 2010 No 3

Boraine, A & Van Heerden, C

"To sequestrate or not to sequestrate in view of the *National Credit Act Act 34 of 2005* : A tale of two judgments"

Potchefstroom Electronic Law Journal 2010 No 3

Louw, A

"The constitutionality of a biological father's recognition as a parent."

Potchefstroom Electronic Law Journal 2010 No 3

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

Contributions from the Law School

Misattributed Paternity

Nel v Jonker (WCHC) unreported case number A653/2009 dated 2011-02-17 was the first reported judgment dealing with misattributed paternity. An ex-husband regarded the child born during his marriage as his biological child and maintained her as such - only to discover that the child had actually been fathered by another man. In this matter Gamble J overturned the damage award that the court *a quo* granted to the cuckolded ex-husband.

The claim was based on the *condictio indebiti.* The ex-husband argued that he supported the child in the *bona fide* and reasonable belief that it was due and payable (para 10). The court found that he did not meet all the requirements of the claim: specifically, his error in paying maintenance was found to be unreasonable (para 63) and that there was no proof that the mother of the child was enriched by the maintenance payments (para 64; 69).

In addition, the court noted that prescription could have reduced his claim, but as it was not pleaded it was not necessary to consider (para 62). With regard to considerations of public policy the court did not find it necessary to make a final decision in this regard (para 79).

The reading of the case leaves one with a feeling of dissatisfaction: partly because the set of facts was not ideal to deal with this complex issue, and partly because of the fact that the pleadings and evidence were deficient, making a precedential judgment on misattributed paternity impossible.

In terms of the South African common law there is a duty on both parents to maintain a child according to their respective means. Because the child was born during the marriage the husband of the mother was presumed to be the father of the child. When the husband (now ex-husband) finds out that he is not the biological

father of the child, various questions spring to mind: how will this affect the relationships between the presumed father, the mother and the child? Is the presumed father still liable for the maintenance of the child in future? Can he re-claim any maintenance paid to the mother from the mother and/or the real biological father (presuming he is known)? Each of these three questions will be discussed hereunder.

With regard to the various relationships research has shown that discovery of the truth has a devastating effect on the parties and their various relationships. It is an emotional bombshell that destroys families. Bearing in mind the obvious emotions of anger, frustration, guilt and sorrow, how does this impact on the relationship between the presumed father and the child? He now has no automatic legal rights towards the child although he can, if he can show it to be in the best interests of the child, apply to the court for such rights or negotiate it with the mother in light of the Children's Act, 2005.

Added hereto, the biological father of the child has been deprived of a relationship with his child.

With regard to maintenance, the obligation of support was placed on the wrong man and the real father has been allowed to ignore his financial obligations. Is the presumed father liable for the future maintenance of the child? The short answer is "No". Irrespective of the history of the maintenance paid, once it is factually established that the man is NOT the biological father of the child, the duty to maintain should cease as there is no relationship between the parties (putative father and the child). The only exception hereto would presumably be where the court finds it not to be in the best interests of the child to make a new paternity finding.

Whether the money that he has paid over the years is re-claimable from the mother of the child is less easy to answer. There is no claim in contract or delict and unjustified enrichment seems the obvious answer. The pleadings in the above case were not adequate for the court to make a specific finding on the matter. Although not referred to in the judgment, Sonnekus in his *Unjustified Enrichment in South African Law* gives some illustrations of early examples of unjustified enrichment. With reference to the French case of *L v V* Civ 1.2.1984 he gives the following example:

> "Following her divorce, a woman marries her lover. A year later, and supported by results of DNA-testing, she applies to have her child, born during the subsistence of her earlier marriage, re-registered as the son of her current husband, her previous lover. The original husband, who religiously paid all costs relating to the child's birth and subsequent maintenance while under the mistaken belief that it was his own, institutes action against the "new" husband for the expenses thus incurred. Obviously he also enjoys a similar claim against his former wife as mother of the child if she had not contributed as yet to the child's maintenance, because the law recognises that both natural parents are responsible for their child's maintenance and that each is accordingly liable *in solidum* for the costs of maintenance. The

> plaintiff is however not compelled to claim against both the natural parents for one half of his expenditure from each."

In principle, a misattributed paternity scenario would *prima facie* meet the unjustified enrichment criteria: the presumed father has been impoverished at the expense of the mother and/or the natural father (if he is known) and there is no other legal basis for the claim. What is important for a husband, suspecting that the child is not his, is to do the DNA testing as soon as possible so that he cannot later be found to have lacked the necessary diligence by bringing his challenge late.

This view of Sonnekus is supported by the Roman-Dutch law principles. For 2000 years (at least) the basis for paternity has been biology. In instances of *stuprum*, where a husband finds out after his marriage that his wife was pregnant with the child of another man when he married her, he can have the marriage annulled. Originally, adultery could only be committed by a married woman because it was regarded as a scandalous mixing of the seed. These examples serve to show the importance to ensure certainty of the lineage. It was only because there was no other way to determine who the father was that the law used the presumptions of paternity. The only time the courts have closed their eyes to the truth is where it could be shown that it was in the best interests of the child.

Looking at jurisdictions around the world, there are various ways to deal with the question of refunding of the maintenance payments. On the one side of the spectrum certain jurisdictions by legislation or judicial precedent deny such an action mostly on the best interests of the child. It has also been argued that where a man accepts fatherhood, he cannot recant his fatherhood merely based on the fact that he is not the biological father - fatherhood after all encompasses much more than biology. In other jurisdictions (and on the other side of the spectrum) the legislation and the courts provide for a re-claim of maintenance contributions. Which side the South African courts will lean towards remains to be seen.

One last question that can be asked is whether the mother of the child can be prosecuted for the crime of fraud or whether public policy should exclude this possibility? This aspect falls however outside this discussion.

In conclusion, this scenario is becoming more common around the world and also in South Africa. With DNA tests becoming cheaper and more available, the courts (or the legislature) will have to grapple with this problem sooner rather than later.

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Matters of Interest to Magistrates

The Two Types of Foster Care Placements

Background.

Fostering, worldwide, is probably the most widely practiced form of substitute care for children. Fostering is often regarded as being one of two types:

- Foster care, where children are placed with non-relatives; and
- Kinship foster care, where children are placed with relatives.

The Children's Act, 38 of 2005, speaks only of "foster care" and no mention is made of "kinship foster care". The question that arises is: Does the Children's Act recognise both forms of foster care.

The Children's Act mentions foster care placements in two different sections of the Act.

- Section 156 (i) (e); and
- Section 46 (1) (a) (i).

Section 156 (i) (e) Placements.

Section 156 (i) (e) enables the Children's Court to consider placing a child in foster care once the child has been found by the court to be a child in "need of care and protection".

The court may only declare a child to be a child in need of care and protection if there has been compliance with the provisions of Chapter 9, "Children in Need of Care and Protection"

Chapter 9 is divided into two parts:

- Identification of a child in need of care and protection, (sections 150 - 154); and
- Children's Court processes (sections 155 - 160).

The process of declaring a child to be in need of care and protection requires, *inter alia*:

- An investigation by a social worker,
- A report by the social worker in a prescribed format, and
- A formal hearing by the Children's Court.

Once there has been compliance with the provisions of Chapter 9, the Children's Court may consider placing a child in foster care IF the court is satisfied that the child neither has a parent nor a caregiver, or if so, that neither the parent nor the caregiver is able or suitable to care for the child.[1]

A caregiver is defined as any person other than a parent or guardian who factually cares for a child.[2] Factually cared for would include a situation where a child is provided with food, shelter and a place that they can call home.

This means that if a child is cared for by a person, whether or not that person is a relative, that that child is not eligible for placement in foster care in terms of section 156 (1) (e).

Section 46 (1) (a) (i) Placements.

Chapter 4 of the Children's Act is divided into four parts:

- Establishment, status and jurisdiction, (sections 42 - 51).
- Court proceedings, (sections 52 - 68).
- Pre-hearing conferences, family groups, other lay forums and settling matters out of court (sections 69 - 73).
- Miscellaneous matters (sections 74 - 75).

Section 45 sets out the matters that the court may adjudicate and section 46 sets out the orders that a Children's court may grant.

Section 46 (1) (a) (i) entitles the Children's Court to make an order placing a child in the care of a person *designated* (my emphasis) by the court to be the foster parent of the child.

A child placed in foster care in terms of section 46 (1) (a) (i) will not be a child identified in terms of section 150 s being a child in need of care and protection but will however be a child in need of a foster parent.

Often the person entrusted in terms of section 46 with the fostering of a child will be a relative and a foster placement made in terms of this section may be regarded as being "Kinship Foster Care".

As section 46(1)(a)(i) dies not limit the designated person to being a relative of the child, the label "Kinship Foster Care" should not be seen as excluding other suitable persons, albeit that they are non-relatives, from being appointed as the designated foster parent of a child.

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[1] S 156 (1) (e) of Act 38 of 2005

[2] S 1 (xx) of Act 38 of 2005

The Need for Kinship Foster Care.

In South Africa the majority of children in substitute foster care are simply absorbed into the extended family system. Members of the extended family will take in a child after death, abandonment or incapacity of one or both of the biological parents.

These children do not fit into the definition of a child in need of care and protection. However, they and the person caring for them are entitled to the benefits of a formal foster relationship.

Benefits of a Formal Foster Placement

The purposes of foster care are to[3]:

- Protect and nurture children by providing a safe, healthy environment with positive support;
- Promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime; and
- Respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity.

When the Children's Court makes a foster care placement the Court may grant the foster parent certain parental rights and responsibilities.[4] Should the relationship not be formalised by the Children's Court the person who factually cares for the child merely retains the status of a caregiver.

A caregiver has no rights in respect of a child only the responsibilities not to abuse, neglect or abandon the child.[5]

A formalised foster care placement will give the child more stability as e.g. should a biological parent reclaim the child the foster relationship will not be terminated unless a Children's Court makes a finding that do so will be in the best interests of the child. In contrast to this, if the child is in an informal caregiver relationship the biological parent may, at any time, remove the child from their "home" and possibly the "parent" that they know. The best interests of the child need never to be considered.

Differences between Section 156 and Section 46 Placements.

A section 156 placement is aimed at providing abused, neglected and abandoned children with the opportunity of experiencing a normal family life. These children are among the most vulnerable members of society. Many of these children will come to the attention of the Children's Court because they are in need of an emergency intervention to remove them circumstances that may seriously harm their physical, mental and emotional well-being. Even after the removal from their dire

[3] S 182 of Act 38 of 2005
[4] S 188 of Act 38 of 2005
[5] S 305(3) of Act 38 of 2005

circumstances these children will continue to need the services and resources of the Department of Social Services.

A section 46 placement, on the other hand, does not require the removal of the child. In most instances it will be the confirmation of the continuity of an existing living relationship. Further in such placements the child will be placed with family members or person well known to the child. The Department of Social Services will be required to monitor the placement but their involvement will be minimal compared to the times and resources that will be devoted to section 156 placements.

Conclusion.

In South Africa two types of foster care placements are recognised:

- Chapter 9 placements, where a child has been found to be in need of care and protection; and
- Chapter 4 placements, where the child is not a child in need of care and protection.

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A Last Thought

." —Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it…indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, is ‗a cornerstone' of that democracy; ‗it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom."

Ngcobo J in *Barkhuizen v Napier 2007 (5) SA 323 (CC)* at 333 para 28;