e-MANTSHI

A KZNJETCOM Newsletter

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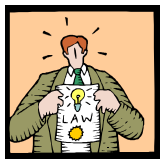
Welcome to the sixty ninth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. In Government Gazette no 34605 dated 14 September 2011 the Minister of Justice and Constitutional Development has under section 62 of the Sheriffs Act, 1986 (Act No. 90 of 1986}, and after consultation with the South African Board for Sheriffs, amended the regulations relating to Sheriffs. Of significance for magistrates is the amendment in respect of the advisory committee which now reads as follows:

"Advisory Committee
2C. (1) An Advisory Committee is hereby established in every province to shortlist, interview and recommend fit and proper applicants for a vacancy in the office of sheriff in the province in question to the Minister.
(2} An Advisory Committee contemplated in subregulation (1} comprises-
(a) a chairperson who shall be an appropriately experienced magistrate appointed by the Minister for a period determined by him or her, after consultation with the Magistrates Commission: Provided that the Minister may, at any time, remove a chairperson from office on his or her written request; or
(ii) if in the opinion of the Minister there are sound reasons for doing so;
(b) the person who occupies the post in the Department of Justice and Constitutional Development of regional head of the province or region in question or, if he or she is

absent or for any reason unable to perform his or her duties, a fit and proper person designated by him or her;
(c) the magistrate who heads the court where the vacancy occurs or will occur, or his or her nominee: Provided that if that magistrate is also the chairperson of the Advisory Committee in question, he or she shall nominate another appropriately experienced magistrate of that court as a member of that Advisory Committee;
(d) one attorney, or his or her alternate, in private practice, nominated by the law society in whose area of jurisdiction the vacancy occurs or will occur for a period determined by the law society concerned; and
(e) one sheriff who is not a member of the Board, or his or her alternate, nominated by the Board for a period determined by the Board, after receiving nominations from any association or professional body recognised by the Board and which represents sheriffs.
(3) The nomination of a person to an Advisory Committee shall, where feasible, be based on the principle of equitable demographic representation and inclusiveness in respect of race, gender, disability or any other constitutionally recognised ground.
(4) At the first meeting of an Advisory Committee, a member of that Advisory Committee shall be elected as deputy chairperson of the Advisory Committee in question.
(5) Three members of an Advisory Committee shall constitute a quorum.
(6) A decision supported by the majority of members present at a meeting of an Advisory Committee constitutes a binding decision of that Advisory Committee.
(7) In the case of an equality of votes, the chairperson of an Advisory Committee has a casting vote.
(8) The deputy chairperson of an Advisory Committee acts as chairperson of that Advisory Committee if.-
(a) the chairperson of the Advisory Committee in question is absent or, for any reason, is unable to perform his or her duties as chairperson; or
(b) the office of chairperson of the Advisory Committee in question is vacant,
and while he or she so acts he or she has all the powers and shall perform all the duties of the chairperson.
(9) If both the chairperson and deputy chairperson of an Advisory Committee are absent or, for any reason, are unable to preside at a meeting of that Advisory Committee, the members present shall elect another member to act as chairperson at that meeting and while he or she so acts he or she has all the powers and shall perform all the duties of the chairperson.".

2. The Minister of Social Development has, in terms of section 56(3)(a) of the Child Justice Act, 2008 (Act No. 75 of 2008), published the particulars of each diversion programme and diversion service provider in the Republic. The notice has been published in Government Gazette no 34659 dated 5 October 2011. The following are the accredited diversion programmes for Kwa-Zulu Natal:

SECTION 56(3) (a) of the Child Justice Act 75,2008
ACCREDITED DIVERSION PROGRAMMES:
KWA-ZULU NATAL PROVINCE:

NAME OF ENTITY	REG. NUMBER	OPERATIONAL SITE	PROGRAMME	STATUS AWARDED
1. Khulisa Durban	057-405	Suite 3, 45 Sunnyside Lane, Pinetown	Silence The Violence	Accreditation status granted in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29 August 2011.
2.Khulisa Empangeni	057-405	Suite 1 Tally Ho Building, 38 Union Building, Empangeni	Facing Your Shadow	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29 August 2011.
			Positively Cool Senior Diversion Programme Level One	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29 August 2011.
			Positively Cool Junior Diversion Programme Level Two	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29 August 2011.
			Positively Cool Junior Diversion Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29 August 2011.
			Silence The Violence Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29 August 2011.
3.Khulisa Newcastle	057-405	76 Sutherland Street, Newcastle	Positively Cool Senior Diversion	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice
			Programme Level One	Act 75 / 2008 for four (4) years, from 29 August 2011.
4. Khulisa	057-405		Positively Cool Senior Diversion Programme Level Two	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29 August 2011
			Positively Cool Junior Diversion Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29 August 2011.
			Facing Your Shadow	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29 August 2011.
			Silence The Violence Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29 August 2011.
			Restorative Justice Programme	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29

				August 2011.
5.Childline-Durban	004 156	Durban-031-312 9092	Child Justice Project-Children Who Molest	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years,. from 29 August 2011.
6.Childline-Pietermaritzburg	004 156	Pietermaritzburg-	Child Justice Project-Children Who Molest	Accreditation status granted, in line with Section 56 (2) (f) of the Child Justice Act 75 / 2008 for four (4) years, from 29 August 2011.

Recent Court Cases

1. Media 24 v NPA 2011(2) SACR 317 (GNP)

Where a child is an accused the court has a discretion in terms of section 63(5) of the Child Justice Act 75 of 2008, to allow entry into the court room only in exceptional circumstances.

Section 63(5) of the Act provides that:

'No person may be present at any sitting of a child justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present.'

The principle of the 'best interest of the child', coupled with the law's requirements that a child accused's dignity, privacy, and fair trial interest be protected, requires that, as a general rule, s 63(5) of the Act has to be understood as excluding public attendance at child justice court proceedings. However, this should be interpreted with the understanding that the legislature foresaw a possibility of exceptions. Whether a trial is held in camera or in open court, the right to a fair trial still applies. The fair trial standard associated with trying adult accused cannot be equated to a fair trial context of a child accused. It is always important to create a more sensitive courtroom environment for children. In doing so, the objectives of the Act regarding the protection of the rights of children are paramount — the underlying principle being that the courtroom should be closed to the public and entry should only be permitted by the presiding officer in very exceptional circumstances. Any permission for a trial to be heard in open court should be granted on a case-by-case basis, so that it does not militate against the proper consideration of exceptional circumstances. (Paragraphs [14], [19] and [25] at 328*c*, 331*b–f* and 334*i*)

The court's discretion — in the second part of the section — to allow access to the criminal proceedings, must, where constitutional rights are implicated, be

interpreted and applied with appropriate regard to the spirit, purport and objects of the Bill of Rights. Within the meaning of s 63(5), the fundamental principle of 'best interest of the child' does not automatically — irrespective of the circumstances of the individual case — trump the 'public's interest'. The Constitutional Court has made it clear that children's s 28(2) constitutional rights may be limited like all other rights. A choice will therefore have to be made between hearing the matter behind closed doors, and by that limiting the rights of the public; or limiting the rights of the accused, in terms of s 36 of the Constitution, and yielding to the rights of freedom to receive information. (Paragraphs [18], [13] , [17] and [16] at 330*h*, 328*a*, 330*b* and 329*j*–330*a.*)

Given the factors that have attracted public interest in this matter, the public is entitled to know, through the media, or on their own, what information is contained in the case. The trial should, to an extent, be allowed in the public domain. While exceptional circumstances exist in this case justifying that the minor accused's rights should be limited by granting media access to the trial, that right must still be balanced against the competing rights of the child. Permission for the applicants to attend the proceedings must be more restrictive. The media and the public can only be allowed to view the trial from a closed-circuit TV room. (Paragraphs [24] and [26]–[27] at 24*b*–*g* and 334*i*–335*d*.)

2. Maimela v Makhado Municipality 2011(2) SACR 339 (SCA)

When the defence of necessity is raised it must be enquired whether the means used in averting the danger is objectively reasonable in the circumstances.

When second respondent, an employee of first respondent, discharged his pistol into a crowd of striking workers — to ward off their life-theatening attack on him — he shot first appellant in the face and fatally wounded second appellant's husband. The High Court dismissed the delictual-damages claims that followed, upholding respondents' defence of necessity. On appeal,

Held, that whether or not a defendant's conduct would be covered by the defence of necessity depended on all the circumstances of the case; where a defendant was able to show that his conduct in causing the death of an innocent person was obectively reasonable in the particular circumstances, he would be exonerated. When second respondent fired the shots he was on the ground, with members of the crowd assaulting him while he was trying to cover his head. It would have been unreasonable, in the circumstances, to have expected him first to have looked up, carefully observing whether he could fire a warning shot. (Paragraphs [16], [20] and [22] at 346*a*–*b*, 347*d* and 348*c*–*e*.)

Held, further, that in determining whether the conduct of the defendant was reasonable, a court had to consider questions of proportionality. There could be no greater harm than a threat to one's life. The court below correctly concluded that, had he not fired the shots, he would, in all probability, have been killed. While due regard must be had to the victim's right to life, denying a person the right to act in

circumstances of necessity — by killing to protect his life — would be to deny that person his or her right to life. (Paragraphs [18] and [20] at 346*h* and 347*d–f*.)

3. S v Jeffries 2011(2) SACR 350 (FB)

An order of concurrent running of sentences is only allowed where imprisonment is the only punishment imposed.

The accused was convicted on two counts under the National Road Traffic Act 93 of 1996 and sentenced, on each count, to a fine of R1200 or four months' imprisonment. Both sentences were ordered to run concurrently. The trial magistrate referred the matter for review after the senior magistrate questioned the correctness of the sentence — ie whether it was competent to have ordered that the two sentences of payment of a fine, each with an alternative of imprisonment, were to run concurrently. On review,

Held, that the 1993 amendment s 280(2) of the Criminal Procedure Act 51 of 1977 made it clear that, where imprisonment was imposed as an alternative to a fine, an order that sentences were to run concurrently could not be made. Concurrent running under s 280(2) could only be ordered where there were sentences of imprisonment. Alternative imprisonment was not a sentence of imprisonment; it could never stand alone. (Paragraph [12] at 355*e–h*.)

4. Erasmus v MEC for Transport,Eastern Cape 2011(2) SACR 367 (ECM)

The power to arrest in terms of section 40(1)(b) of Act 51 of 1977 must only be exercised for the purpose of bringing a suspect to justice and not to teach someone a lesson.

Plaintiff was arrested at a roadblock by a traffic officer for driving a motor vehicle without a driver's licence, alternatively failing to carry her driver's licence in the vehicle which she was driving. After her arrest (without a warrant), plaintiff was taken into custody at a police station; this despite a colleague of hers indicating that he would fetch her driver's licence and bring it to the roadblock, which he did. She was released, about five and half hours later, after paying an admission of guilt fine on the alternative offence. The arresting officer, during cross-examination, acknowledged that he had arrested plaintiff to 'educate' her, but insisted it was lawful to have done so.

Held, that, as was stated in *Minister of Safety and Security v Sekhoto and Another* 2011 (1) SACR 315 (SCA), 'an intention to bring the arrested to justice' was required for the purposes of s 40(1)*(b)* of the Criminal Procedure Act 51 of 1977; an arrest 'for an ulterior purpose' would not be 'bona fide, but *in fraudem legis*'. The professed purpose of plaintiff's arrest was to 'educate' her or, putting it more colloquially, to 'teach her a lesson'; bringing the E plaintiff to justice was the last thing on the arrestor's mind. (Paragraphs [20]–[21] at 374*h*–375*c*.)

Held, further, the effect of a written notice in terms of s 56(2) of the CPA was that, when it was handed to a person in custody, that person had to be released from custody forthwith and with a choice of appearing in court or paying an F admission of guilt fine. The plaintiff was neither released nor allowed to exercise such choice — she had to remain in custody until the fine was paid. Such procedure was a complete abuse of s 56 of the CPA, the plaintiff's release effectively having had to be bought for a non-negotiable sum. (Paragraph [22] at 375*f*–*i*.)

Held, further, that there was no exercise whatsoever of a discretion to arrest; the evidence showing that, even if a person's driving licence were eventually to be brought to the roadblock, as was the case with plaintiff, the traffic officers were nonetheless determined to arrest the alleged perpetrators and take them to the police station. Such an absence of exercising discretion further underscores the illegal purpose of the plaintiff's arrest. The treatment of the plaintiff, from arrest to release, was therefore completely illegal. The defendant failed to establish, as it bore the onus to do, that the arrest and detention of the plaintiff were justified. The plaintiff therefore succeeded in her action. (Paragraphs [23]–[24] at 376*a*–*c*.)

5. S v Pauls 2011(2) SACR 417 (ECG)

The power to fix a non-parole period of imprisonment should only be invoked in exceptional circumstances.

The power of a court to control the minimum actual period of imprisonment to be served by a convicted person sentenced to imprisonment for two years or longer — by fixing a non-parole period in terms of s 276B of the Criminal Procedure Act 51 of 1977 — should be invoked only in exceptional circumstances. It is not possible to spell out what generally constitutes exceptional circumstances; the individual circumstances of each case having to be considered. While parole is not a sentenced offender's right, and the Act empowers courts to fix non-parole periods, courts are nevertheless duty- bound to judiciously and carefully consider, on a case-by-case basis, whether doing so is proper.
A proper judicial consideration as to whether exceptional circumstances in a particular case exist to warrant the ordering of a non-parole period in terms of s 276B of the Act, can only be made where both the State and the defence have made submissions on the issue. Where exceptional circumstances are found to exist in a particular case, it is the duty of the judicial officer to set them out explicitly in the judgment, or they must be apparent therefrom. (Paragraphs [14]–[16] at 421*b*–*h*, paraphrased.)

From The Legal Journals

Walker, S

" The requirements for criminal capacity in section 11(1) of the new Child Justice Act, 2008: A step in the wrong direction? "

SACJ 2011 33

Lombard, M & Ghyoot, V

"Shortfalls on mortgage loans in execution proceedings"

De Rebus October 2011

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

Contributions from the Law School

Protecting older persons – new developments in the law

It is trite that the inception of the constitutional era in South Africa has engendered a new dispensation founded on justiciable human rights. In this new dispensation the right to dignity is the basic foundation of all other rights. Where someone is deprived of their dignity, their personhood is inexorably diminished. Thus it is necessary to be particularly sensitive to the needs of the disempowered, the marginalized and the excluded in our society.

One such group consists of those who by reason of their advanced age are no longer treated with the respect that they deserve. Previously referred to as 'aged persons' (as per the Aged Persons Act 81 of 1967), this group are now referred to as

'older persons' in terms of the Older Persons Act 13 of 2006 (hereinafter referred to as 'the Act', which has repealed and replaced Act 81 of 1967). The gradual ageing of the South African population is a demographic reality (as noted by Olivier and Smit 'Social Security' *LAWSA* vol 13(2) at para 227), and this further underlines the need to deal effectively with what the long title of the Act refers to as the 'plight of older persons'. The preamble of the Act sets out its intent, within the constitutional context,

> 'to effect changes to existing laws relating to older persons in order to facilitate accessible, equitable and affordable services to older persons and to empower older persons to continue to live meaningfully and constructively in a society that recognizes them as important sources of knowledge, wisdom and expertise'.

An 'older person' is defined in s 1 of the Act as 'a person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older.' Section 2 sets out the objects of the Act: (i) the maintenance and promotion of the status, well-being, safety and security of older persons; (ii) the maintenance and protection of the rights of older persons; (iii) the shifting of the emphasis from institutional care to community-based care in order to ensure that an older person remains in his or her home within the community for as long as possible; (iv) the regulation of the registration, establishment and management of services and the establishment and management of residential facilities for older persons; and (v) combating the abuse of older persons. It is further notable that s 5(2) provides that 'all proceedings, actions or decisions' in a matter concerning an older person must (i) respect, protect, promote and fulfil the older person's rights and the best interests of the older person; (ii) must respect the older person's inherent dignity; (iii) must treat the older person fairly and equitably; and (iv) must protect the older person from unfair discrimination on any ground.

The most significant features of the Act fall to be mentioned briefly. Chapter 2 is entitled 'Creating an enabling and supportive environment for older persons', and it provides for the establishing of national norms and standards (s 6, see the Regulations regarding older persons GN R260 in GG 33075 of 1 April 2010, hereinafter 'the Regulations' at Annexure B for these standards), as well as providing for the support and regulation of services provided by third parties (s 8, and see Chapter 1 of the Regulations). The guiding principles informing the provision of services are set out in s 9. In addition, the particular rights of older persons (to participate in various activities, live in a nurturing environment, and access opportunities to promote his or her quality of life) are detailed in s 7.

Chapter 3 of the Act deals with 'Community-based care and support services for older persons', and the registration and regulation of these services (see also Chapter 2 of the Regulations). Once again the particular rights of older persons are articulated, in this instance, s 10 provides that in the context of an older person

receiving community-based care services (described in s 11), apart from the rights contemplated in s 7, such older person also has the right to reside at home as long as possible, the right to pursue opportunities for the full development of his or her potential, and the right to benefit from family and community care and protection.

Residential facilities are regulated in Chapter 4 of the Act (and Chapter 3 of the Regulations), including such matters as the regulation of compliance with conditions for registration (s 19); admission to residential facilities (s 21); and monitoring of registered residential facilities (s 22).

The enforcement of the provisions of the Act has primarily been devolved to the criminal law. A range of offences relate to the aspects of the Act already canvassed. Thus operating a community-based care and support service that is unregistered is an offence (s 12(2)), as is a failure on the part of someone providing home-based care to ensure caregivers are appropriately trained or to be properly registered (s 14(4)), as is the operation of residential facilities which are unregistered (s 18(9), although the penalty section (s 33) refers to s 18(8)), as is the failure to comply with conditions for registration of residential facilities (s 19(4)), as is the obstruction or hindering of a social worker (or designated person) in the monitoring of registered residential facilities (s 22(5)). All these offences carry the penalty of a fine or imprisonment for a period not exceeding one year, or to both (s 33(*a*)). In addition, (in terms of s 21(8) read with s 33(*b*)) contravention of s 21, which prohibits unfair discrimination against an older person applying for admission to a residential facility, and procedures relating to such admission, is an offence punishable by a fine or imprisonment for a period not exceeding five years, or to both.

There are also a number of prohibitions relating to Chapter 5 of the Act, which deals with ‘Protection for older persons’ (these are buttressed by the provisions in regs 20-22 of the Regulations, which detail measures to protect the rights of older persons). Thus it is an offence to obstruct or hinder a social worker or health care provider in relation to the procedure for bringing an alleged abuser of an elder person before a magistrate, punishable by a fine or imprisonment for a period not exceeding a year, or both (s 28(6) read with s 33(*a*)). Contravention of s 26(3), which deals with the obligation imposed on any person who suspects that an older person has been abused to immediately notify the Director-General of the Department of Social Development or the police is an offence which has a penalty of a fine or a period of imprisonment not exceeding five years, or both (s 33(*b*)). The same punishment is prescribed for failure to obey a written notice to an alleged offender to leave a place where an older person resides, or not to have contact with the older person, or to obey a court order in this regard (s 27(8) read with s 33(*b*)). Where a magistrate determines that the allegations of abuse are correct, he or she may place conditions on the person concerned rendering care to the older person in question, or prohibit that person from accommodating or caring for an older person for a

period not exceeding 10 years, and contravention or failure to comply with such order constitutes an offence, punishable by a fine or imprisonment for a period not exceeding five years, or both (s 29(11) read with s 33(*b*)).

The abuse of an older person is rendered an offence by s 30(1) of the Act, and such offence once again is subject to the punishment set out in s 33(*b*): a fine or imprisonment for a period not exceeding five years, or both. Abuse is described in subsection (2) as '[a]ny conduct or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress or is likely to cause harm or distress to an older person'. In subsection (3), the provision elaborates that 'abuse' includes physical, sexual, psychological and economic abuse, and each of these types of abuse are defined: physical abuse means 'any act or threat of physical violence'; sexual abuse means 'any conduct violating sexual integrity'; psychological abuse means 'any pattern of degrading or humiliating conduct towards an older person' (including repeated insults, repeated threats to cause emotional pain, and repeated invasion of an older person's privacy, liberty, integrity or security); and economic abuse means depriving an older person of the economic and financial resources to which he or she is entitled, or unreasonably depriving him or her of economic and financial resources which he or she requires out of necessity, or disposing of an older person's household effects or other property without his or her consent.

These definitions of forms of abuse substantially accord with those describing the same categories in s 1 of the Domestic Violence Act 116 of 1998 (for a general discussion of the provisions of this Act see Carnelley 'Domestic Violence' in Milton, Cowling and Hoctor *South African Criminal Law and Procedure Vol III: Statutory Offences* 2ed (2004) at M2). It may be noted that the definition of domestic violence extends beyond the definition of elder abuse set out in s 30 of the Act, nevertheless in terms of s 24 of the Act, it is provided that the provisions of the Domestic Violence Act are in no way limited or amended by the provisions of this Act, and thus the obligations arising under the Domestic Violence Act will have to be complied with. It follows that where the older person experiences abusive treatment within the context of a domestic relationship (such as where the abuser resides in the same residence as the older person), the provisions of the Domestic Violence Act could apply. At the same time, it may be noted that the categories of abuse within the definition of 'domestic violence' in the Domestic Violence act are formulated in some detail, and thus, being objectively verifiable, are limited in their scope. Thus whilst the definition of 'domestic violence' (in the Domestic Violence Act) is wide-ranging, it is constrained by the various detailed definitions of categories of abuse falling within it. It may be submitted that the definition of 'abuse' in the Act is rather wider. Although the categories mentioned above are identified as being included in what is entailed by 'abuse', the definition in subsection (2) includes any conduct or failure to act, occurring within a 'relationship where there is an expectation of trust' (this phrase is

not defined in the Act, and is susceptible to a broad interpretation), which 'causes harm or distress' (or is likely to do so). It seems that, like the common-law crime of assault, the presence of harm or distress would be subjectively assessed. In order to appropriately narrow the ambit of the crime, it is submitted that intention should be required as the form of fault for this offence.

The balance of the Act makes provision for a register of abuse of older persons (s 31, see further in this regard regs 23-26 of the Regulations), and further allows for delegation (s 32), and the making of regulations by the Minister (s 34). The enforcement of the Regulations is once again through the criminal law, as reg 27 provides that an offence is committed by anyone who does not 'adhere to a direction in terms of a provision of these regulations', punishable by a penalty of a fine or imprisonment for a period not exceeding one year or both.

In conclusion, the coming into force of the Act is a very welcome development, and it is hoped that it will achieve its goal of enhancing the rights and protection of older persons, a group which is so frequently disregarded or undervalued in modern South African society.

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Matters of Interest to Magistrates

Are the provisions of section 60(2B) of the Criminal Procedure Act no 51 of 1977 (as amended) worth the paper they are written on?__Is the individual Liberty of an accused to be secured at a premium? (1)

By Nkhangweni Elizabeth Denge (2)

1. INTRODUCTION

Section 60(2B)(a) of the Act mentioned above provides as follows:

> *"If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum."*

Section 60(2B)(b) of the same Act provides as follows:

> *"If, after an inquiry referred to in paragraph (a), it is found that the accused is-*
>
> *(i) unable to pay any sum of money, the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused on bail or must consider the release of the accused in terms of a guarantee as provided for in subsection (13)(b);*
>
> *or*
>
> *(ii) able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances."*

Section 60(2B) was introduced by s 9 of the Judicial Matters Second Amendment Act 66 of 2008.After it came into operation on the 17th day of February 2009, on the 08th day of July 2009, *'The Witness'* newspaper(3) reported that some legal sources have criticised the amendment. The belief held by those sources was reportedly that payment of large sums of money provided an incentive for persons who face serious charges not to abscond, but to stand trial.

The reporter added that where family or friends stood bail for the accused, the accused felt obligated to them, further arguing that this was an added encouragement not to evade trial.

It appears that the critics overlooked the inability to pay any bail money set, by the accused, the families of the accused, or the friends of the accused. This then meant that they would rather see those accused incarcerated pending finalisation of their trials.

It appears that they also overlooked the fact that where the court found that the accused was unable to pay any sum of money, the court was obliged to consider setting appropriate conditions that did not include an amount of money for the

release of the accused on bail.

Their attitude therefore appeared to indirectly put a price-tag on the right of an accused provided for in section 12(1)(a) of *The Constitution of the Republic of South Africa Act* of *1996*___ that is, the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

The foregoing highlights the way in which civil society reacted to the introduction of section 60(2B) of the aforementioned Act. But this paper seeks to interrogate the state of affairs in our Lower Courts, after the coming into operation of the same provisions. Reference shall also be made to the present state of our correctional facilities, in order to highlight the situation in the Lower Courts.

This paper also attempts to sketch out relevant provisions of the *Constitution of the Republic of South Africa, 1996* and case-law, in order to demonstrate the high regard that our law has for the liberty of the accused. I shall also make recommendations on how our Lower Courts, and the lawyers who represent the accused in these Courts, could go about maximising the right to individual liberty of the accused.

In the end, the first and the second questions that form part of the theme of this paper will be answered in the positive and in the negative, respectively.

2: THE STATE OF AFFAIRS IN THE LOWER COURTS: ARE WE MAGISTRATES OF THE VIEW THAT THE PROVISIONS OF SECTION 60(2B) ARE NOT WORTH THE PAPER THEY ARE WRITTEN ON?

As it appears from the introduction (above), if the court is satisfied that the interests of justice permit the release of an accused on bail, and if the payment of money is to be considered as a condition of bail, the court is obliged (see the word 'must') to hold a separate inquiry into the ability of the accused to pay the sum being considered or any other appropriate sum. A magistrate is a creature of statute. Therefore, if these provisions of the Act enjoin the magistrate to hold a financial inquiry, the magistrate must observe them. However what happens in practice seems to be an anomaly, with grave consequences. And some court cases that I will refer to bear me out. The recent report of the Inspecting Judge of Prisons seems to bear me out also.

I have to immediately point out that although I shall refer to cases that served before one court in Gauteng, the report of the Inspecting Judge of prisons, having been commissioned at national level, paints the national picture.

2: A:SELECT COURT CASES[SOURCED FROM PRETORIA-NORTH COURT]:-

(1) In *B725\2009(S vs F Ngobeni and Another),* the accused were arrested for house-breaking with intent to steal and theft. It is alleged that the stolen properties were cash, amounting to R1000, 00 and Airtime worth R2500, 00. The court established informally that the accused had no pending cases, and also that their addresses (residential) had been confirmed. The prosecutor asked the learned magistrate to fix the bail amount at R500, 00, for each of the accused persons.

In answer accused number 1 told the court that he did not have money, further saying that his grandmother looked after him. He also told the court that he was not employed, adding that he did not know how much money the family could bring together. Accused number 2 as well told the court that he was unemployed.

He however told the court that maybe he would pay the amount suggested, adding that they (presumably his family) cared for him. The learned magistrate fixed the amount of R1500,00 for each of the accused without first establishing whether the respective families of the accused could afford it. It must have been clear to the magistrate that the accused themselves could not afford a cent, because they were unemployed. What immediately comes to mind is that the court could have asked for reports in terms of the provisions of section 62F of the afore-mentioned act, in order to determine whether the accused could be released o warning, subject to supervision by correctional officials. The report I am speaking about is referred to in practice as the 'correctional officer's report' or the ‘correctional supervision report'.

If for argument's sake the said reports were sought and they turned out to be positive (which is to say that if released on warning, the accused would be monitorable), that very warning and monitoring by Correctional Services' officials would be regarded as appropriate conditions that do not include an amount of money, for the release of the accused.

In this very matter accused number one managed to pay bail on the 20th of August 2009. Accused number two could not. The plight of accused number 2 only came to light when he appeared in the Regional Court for the first time, a month later___ that was upon an inquiry by the magistrate regarding why the accused was in custody awaiting trial, when an amount of bail had been fixed.

(2) In Hammanskraal *Case 95\2011(S vs B Bokasa),* the accused was arrested on the 26th of January 2011. He was arrested on a charge of house-breaking with intent to steal and theft. The alleged stolen properties were two DVD Players, a pair of canvas shoes and a remote-control unit.

The prosecutor was not opposed to the release of the accused on bail. It was also established that the address of the accused was confirmed. The accused told

the learned magistrate that he was unmarried, and also that he had two children. He further indicated that he did some sales at the robots, making about R200,00 [it is not clear from the relevant record of proceedings whether the amount of money was his average weekly or monthly earnings].

The accused told the court that there was no-one who could help to pay the bail money. He went on to tell the court that he could only pay an amount of R500,00. further stating that he would call his brother telephonically. The magistrate fixed bail in the amount of R2000, 00. This the magistrate did without first establishing whether the brother of the accused was able to pay the amount of R2000,00.

The accused was still in custody awaiting trial when he appeared in the Regional Court after two months of the proceedings I am dealing with here. At that stage he had an attorney representing him. The attorney asked the court to postpone the matter to a date, for the Correctional supervision report to be secured. He based his request on the fact that there was no-one who could pay bail for the accused.

You already know from what I said earlier on, as to what I think could have been the least that the learned magistrate could have done, to ensure the liberty of the accused.

The two cases that I have referred to are mere examples. There are many more similar cases that I could draw your attention to, but for lack of time. However, I must state that there are also good cases_only that this paper does not concern them.

I must also indicate that while in the two examples, the accused appeared unrepresented, we also come across similar cases, where the opposite is the case. It suffices to mention at this stage, that it appears from the above that care is not always taken to ensure that the right to individual liberty of the accused is upheld.

And this unfortunately raises a perception that the accused are being denied bail indirectly, and therefore that there is no justice for the poor__ a suggestion that the poor are being unfairly discriminated against, on the basis of their socio-economic status.

2:B:EMPIRICAL EVIDENCE BASED ON THE REPORT BY THE INSPECTING JUDGE OF PRISONS, THE HONOURABLE JUDGE HURTER VAN ZYL

In analysing inmate population trends, the inspecting Judge in his recent report(4) laments the fact that although the number of awaiting-trialists in South Africa has declined, this group still constitutes 30% of the total inmate population___ a bulk or 52% of those detained in centres' which have reached a critical level of over 200% overcrowding.

He puts forward some recommendations on how these numbers could be

reduced. In the process the Judge deals with

(1) the role that can be played by the South African Police Service at arrest stage;

(2) the role that the prosecutor can play, in for example not asking further remands where they have a weak case, and where the accused had been in custody over a considerable period of time; and lastly, the role that the magistrate can play in making increased use of placement under supervision of a correctional official, in accordance with the legislative provisions that I referred to earlier on. It is important to note that the inspecting Judge recommends increased use of correctional supervision in cases where the accused is not in a position to pay or to guarantee payment of bail, and release on warning is inappropriate.

These recommendations are not being made in vacuum, but based on empirical evidence to the effect that some accused persons are in detention, merely because they cannot afford to pay the bail amounts fixed by the courts. This is confirmed by the concern that the report raises (on page 18),regarding the rare use by heads of prisons of the provisions of section 63A(1) of the Criminal Procedure Act (5).And this is also confirmed by comments made on the application of the same provisions by some legal writers / authorities.

It is conducive to clarity, to set out the said legislative provisions. Section 63A (1) provides as follows:

"If a Head of Prison contemplated in the *Correctional Services Act (Act 111 of 1998),* is satisfied that the prison population of a particular prison is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused-

(a) who is charged with an offence falling within the category of offences-

(i) for which a police official may grant bail in terms of section 59;

(ii) referred to in schedule 7;

(b) who has been granted bail by any lower court in respect of that offence, <u>but is unable to pay the amount of bail concerned</u>(6); and who is not also in detention in respect of any other offence falling outside the category of offences referred to in paragraph (a) that Head of Prison may apply to the said court for the-

(aa) release of the accused on warning in lieu of bail;

or

(bb) amendment of the bail conditions imposed by that court on the accused."

It appears from the concern raised in the report of the Inspecting Judge of prisons that today we do have awaiting-prisoners who are supposed to be outside. Those are the accused who before their first appearances in a lower court have either not been released on bail by a police official of a certain rank (7) or through the authority of a prosecutor acting in consultation with the investigating police official (8), and

have been granted bail by our courts, but are unable to pay the amount of bail set.

It is indeed so that while the 'police-baillable' cases are your trivial offences (9), 'prosecutorial-baillable offences' are fairly serious (10*). Du Toit et al*, at page 9-71 of the *'Commentary on the Criminal Procedure Act'*(11) submit that the Head of Prison should as a general guideline (rule) focus on those accused charged with offences for which *'police bail'* could have been considered.

With respect, I differ with *Du Toit et al*. I see no reason why the second category of awaiting-prisoners who have been granted bail by the court cannot feature in the priority-list of the Head of a Prison who contemplates bringing an application for the release of accused pending trial. Their submission in my view, suggests that the accused that face serious charges deserve to be in detention anyway.

I am of the view that this argument cannot stand, because courts ordered their release on bail after a careful consideration of the facts laid before them. I respectfully submit therefore that the Head of a Prison would in that way be discriminating unfairly between the two groups of awaiting-prisoners, and thus acting unconstitutionally.

I seem to have digressed a little. And this is because I want to draw your attention to the fact that we magistrates fix the bail amounts under the circumstances shown in subparagraph 2A above, maybe because we share the erroneous view that because the accused are facing serious charges, therefore they belong in prison.

3: OUR CONSTITUTION AND OUR COURTS HAVE A HIGH REGARD FOR THE RIGHT TO INDIVIDUAL LIBERTY (THE RIGHT NOT TO BE DEPRIVED OF FREEDOM ARBITRARILY OR WITHOUT JUST CAUSE)

3:A: The Constitution

Apart from section 12(a) of the Constitution, which specifically provides for the right to individual liberty, section 35(1)(f) as well addresses this particular right. Section 35(1)(f) provides as follows:

"Everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions."

What concerns us here is the phrase *'subject to reasonable conditions'*. Once the right to individual liberty has been upheld, the magistrate must ensure that the conditions of release are appropriate. Which is to say that the magistrate must attach conditions (including the bail money if applicable), which will ensure that the accused enjoys the very right. To do the opposite will be tantamount to not entertaining the matter at all_____ that is, what one can refer to as 'an abdication of

our responsibilities'

3:B: CASE-LAW

As a point of departure I would like to refer to remarks by *Nagel (ed)* in the work titled *'Rights of the Accused'* (12). I quote:

"The basic purpose of bail, from society's point of view, has always been and still is to ensure the accused's reappearance for trial. But pre-trial release serves other purposes as well, purposes recognized over the last decade as often dispositive of the fairness of the entire criminal proceeding. Pre-trial release allows a man accused of crime to keep the fabric of his life intact, to maintain employment in the event he is acquitted or given a suspended sentence or probation. It spares his family the hardship and indignity of welfare and enforced separation. It permits the accused to take an active part in planning his defence with his counsel, locating witnesses, proving his capability of staying free in the community without getting into trouble.... (13)"

These remarks are in my view very enlightening.

In short Nagel is saying, among others, that, although on the one hand the purpose of bail is to ensure the court-attendance by the accused (which in itself is in the interests of the administration of justice and society), on the other hand, the life of the accused and that of the family of the accused must go on. Nagel is also saying that the release of the accused also enables the accused to plan his defence, and further submits that the bail candidate should not pose a threat to society.

In the much celebrated Namibia High Court judgment of the *State vs Acheson* (14), the Court, per Mahomed AJ, held as follows:

"An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment.The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice...."

In the case of *S vs Visser* (15), the matter was on review (in respect of the conviction and sentence) when the attention of the magistrate was drawn to the fact that the accused had been in custody for a long time, because he could not pay bail. The magistrate responded, saying among others, that he\she fixed an amount(minimum) of R50,00 for the typical offence (driving under the influence of liquor) so that it could serve as a deterrent.

The Honourable Reviewing Judge Steyn (with Burger J concurring), held that bail was not a means which should be employed to deter offenders. The Court further held that the Court's approach was always to grant bail, where it was at all possible, further holding that the Court would lean in favour of the liberty of the citizen, rather than deprivation thereof__provided the interests of sound criminal law

administration are not prejudiced thereby. Lastly, but not least, the Court held that the duty of the magistrate in fixing the bail was not only to take into consideration the offence which has been committed, but also the ability of the accused to pay (among others).

In the Constitutional Court judgment in the case of *S vs Dlamini And Others;S vs Joubert;S vs Schietekat* (16),the Court, per the Honourable Kriegler J, (dealing with the provisions of section 35(1)(f) of the Constitution) held that *'the basic objective traditionally ascribed to the institution of bail was to maximise personal liberty'.*

It appears from the foregoing that the Courts' approach is to lean in favour of the liberty of an accused person. Therefore, a Court that fixes an amount of bail, conscious of the fact that the accused or the family of the accused would not be able to pay, or not having satisfied itself that the accused or the family of the accused could pay, is not at all upholding the liberty of the accused, but denying it.

4: THE ROLE OF LAWYERS REPRESENTING THE ACCUSED DURING THE BAIL HEARING OR WHEN THE BAIL MATTER IS CONSIDERED INFORMALLY IN THE LOWER COURTS

I have earlier on alluded to the fact that in some cases, where we magistrates did not satisfy ourselves on whether the accused or the family of the accused would be able to pay the sum of bail money fixed, the accused were legally represented.

The legal representative has a duty to establish from the accused as to whether the accused would afford the amount that is being considered. If the accused cannot afford that amount or any appropriate amount, the legal representative must establish if the family or even a friend of the accused was able to pay any of those amounts. So that if the family of the accused or the friends of the accused could not afford any of those amounts, the magistrate must be informed accordingly. Surely in that case the legal representative will then ask the magistrate to consider the release of the accused on bail, subject to appropriate conditions that shall not include payment of a sum of money. And if the magistrate will go ahead and fix a bail amount of money without good cause, the decision could be reviewed or be appealed against (depending on the circumstances).

I find it very concerning that some of the legal representatives of the accused seemed to have handled their cases in the manner that saw their clients being denied bail in the manner that I demonstrated in paragraph 2 above. It is my respectful view that they failed their clients.

5: CONCLUSION

The importance of the liberty of an accused person cannot be over-emphasized. The provisions of Section 60(2B) were introduced by parliament in order to ensure

(among others) that the accused should not be denied their right to liberty merely because they cannot pay any bail amount of money fixed by the Courts.

Some of the High Court judgments that were delivered even long before the amendment in question was effected, are to the same effect. To top it all, our own Constitution enjoins us to handle bail matters with care.

We are enjoined to observe precedent, and we are also enjoined to observe the Constitution.

It follows therefore, that the provisions of Section 60(2B) of Act no. 51 of 1977, as amended, are worth the paper they are written on, and therefore lack of money should not stand in the way of those who qualify to be released on bail.

END-NOTES

1. Paper delivered at the 2011 Law Week Conference, held at the University of Limpopo (29 August- 02 September 2011)
2. Regional Magistrate Pretoria North, Gauteng
3. Report by Ingrid Oellermann
4. Report for the period 01 April 2009 to 31 March 2010, in compliance with section 90(4) of the *Correctional Services Act, 111 of 1998*
5. See supra (4)
6. My underlining
7. See paragraph (a) (i) read with Part 1 of Schedule 2 to the same Act.
8. See paragraph (a)(ii) read with schedule 7 to the same Act
9. Any offence under any law relating to the illicit possession, conveyance, or supply of dependence-producing drugs or intoxicating liquor; any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones; breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence; and theft, whether under the common law or statutory provision.
10. Public violence; culpable homicide; bestiality as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; assault, involving the infliction of grievous bodily harm; arson; housebreaking, whether under common law or a statutory provision, with intent to commit an offence; malicious injury to property; robbery, other than robbery with aggravating circumstances, if the amount involved does not exceed R20 000,00; theft and any offence referred to in section 264(1)(a),(b) and (c), if the amount involved in the offence does not exceed R20 000,00; any offence in terms of the law relating to the illicit possession of dependence-producing drugs; any offence relating to extortion, fraud, forgery or uttering if the amount of value involved in the offence does not exceed R20 000,00; and

any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

11.Page 9-71, service 28, 2002,

12.Page 9-3 service 39, 2008 of the *Commentary* referred to in (11) above, but at pages 177- 178 of Nagel's work

13.My underlining

14.*1991(2) SA 805 (NM), page 822*

15.*1975(2) SA 342 (C),* headnote

16.*1999(2) SACR 51 CC,* page 58, paragraph (6).

A Last Thought

It's Time to stop Bullying Judges

The Bullies

In New Hampshire last week, 258 members of the House of Representatives passed a resolution that "repudiated" a ruling by the state's Supreme Court and urged the state Senate to simply ignore the judicial decision. On November 1st, reports William Raftery at his "Gavel to Gavel" site for the National Center for State Courts, those same legislators will spend more energy and taxpayer dollars seeking to impeach state-court family law judges.

I don't mean to pick on New Hampshire. All over America, GOP-led legislatures are pushing to impeach state judges. Lawmakers in Iowa, Massachusetts, Missouri, Oklahoma, New Jersey and Pennsylvania have moved in on the judicial branch, the most infamous of these crusades being the effort in Iowa to oust those state supreme court judges who voted in favor of same-sex marriage. Evidently that is still a "high crime or misdemeanor" to some.

It's one thing for politicians to seek out impeachment proceedings that are *sui generis.* But now legislators are including specific impeachment language in the text of their statutes. In Arizona, New Hampshire and Virginia, rump Republican lawmakers this year introduced bills making it an impeachable offense for judges to make rulings on FOIA requests or to merely *cite* international law. There's a legal term-of-art for such efforts: it's called "bat-shit crazy."

Nor is the national presidential conversation much better. Take Texas Governor Rick Perry, for example. He thinks Congress should get a legislative veto overriding Supreme Court decisions. Michelle Bachmann wants to strip the Supreme Court of the power to decide same-sex marriage cases. Rick Santorum wants to shut down the 9th U.S Circuit Court of Appeals.

The Meek

In response to this legislative noise there has been most silence from the judicial branch. The federal judiciary has no public relations firm. It has no savvy marketing arm. Judges are generally precluded by ethics rules and codes of conduct from engaging in the sort of political "quick-response" action that might help neutralize the partisan attacks upon their authority and independence. So they mostly sit there and have to take it.

Unfortunately, even the judges who *could* and *should* say something are silent on the topic. The Chief Justice of the United States, John Roberts, with a nearly perfect conservative voting record in his five years on the High Court bench, would be the natural and obvious tribune to deliver this message to conservatives. And he's occasionally spoken bravely on the topic of judicial independence. But he's been notably silent in this season of discontent.

Justice Antonin Scalia, himself capable of bullying on occasion, also would be a perfect judicial candidate to answer those legislators who want to diminish judicial independence. But when he came to Capitol Hill a few weeks ago, he declined the opportunity to do so. Justice Clarence Thomas? There's no chance he's part of the solution since he's part of the problem; he told a Nebraska audience recently that the Supreme Court has too much power."

This is an edited version of an article by Andrew Cohen which appeared in *The Atlantic* (www.theatlantic.com) on the 15th of October 2011.