

E - M A N T S H I

A KZNJETCOM Newsletter

May 2006 : Issue 2

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



New Legislation

1. In *Government Gazette No. 28646 of 7 April 2006* directives were published which were issued by the Commissioner of Correctional Services in regard to Complainant Participation in Correctional Supervision and Parole Boards. These directives are Applicable to the provisions of section 299A of the Criminal Procedure Act, 1977 where a court sentences a person to imprisonment for amongst others, assault of a sexual nature. The court is obliged to inform the complainant, if he or she is present, of his or her right to make representations when placement of that offender on parole is being considered, or to attend any relevant meeting of the Parole Board
2. In *Government Gazette No. 28680 of 7 April 2006* a Mutual Legal Assistance in Criminal Matters Treaty between the Republic of South Africa and the Republic of India was published. This treaty came into operation on 6 December 2005. In the same *Gazette* an Extradition Treaty between the Republic of South Africa and the Republic of India is published which also entered into force on 6 December 2005.
3. *The Repeal of the, Black Administration Act and amendment of certain laws Act 2005, Act 28 of 2005* was published in the *Government Gazette of 12 April 2006*. The Act repeals all remaining sections of the Black Administration Act, Act 38 of 1927 on the 31st of July 2006 or an earlier date if alternative legislation is implemented before that date. The provisions on succession will therefore be repealed as well as the Code of Zulu Law which was promulgated in terms of the Act. The date of commencement of the Act is 12 April 2006.



Recent Court Cases

a) S v GOVENDER 2006(1) SALR 322 ECD

This case dealt with the assessment of evidence where state witnesses deviated from police statements. The following was held in this regard:

It should always be borne in mind that police statements were frequently not taken with as much care, accuracy and completeness as was desirable. The purpose of such statements was to obtain details of an offence in order to decide whether or not to institute a prosecution; the statement was not intended to be a precursor to the witness' court testimony. They were often written in a language other than that of the witness, with the assistance of an untrained interpreter, and tended to be a summary of what the witness had said to the police officer, expressed in terms familiar to the officer, but not necessarily to the witness. Accordingly, it was neither unusual nor surprising that discrepancies occurred between a witness' evidence and the contents of that witness' police statement. (At 324j-325e.)

That a proper approach to discrepancies between a witness' statement and the evidence he or she gave in court entailed the following: it was necessary to determine what the witness meant to say on each occasion in order to decide whether or not there was an actual contradiction and, if so, what the nature thereof was; language and cultural differences between the person giving the statement and the person writing it down could affect its precise meaning; not every contradiction, error or deviation was material; the circumstances under which the two versions were given, the effect of any contradictions on the witness' credibility, and the quality of any explanation given by the witness for such contradictions must be taken into account. (At 325f-326b.)

That, in assessing the quality of a witness' explanation for a contradiction or omission, regard must be had to the type of person the witness was. Less intelligent or less sophisticated witnesses were more likely to react in an unsatisfactory way, believing that they were in a predicament due to the variance between what they had told the police and what they had said in court. The same was also true, at times, of educated and sophisticated people. However, an unfavourable reaction on being taxed with a contradiction did not necessarily mean that the evidence of that witness was to be rejected. Even where it was concluded that a witness was being untruthful in his or her attempts to explain contradictions, it did not mean that all the witness's evidence should be rejected. (At 326d-h.)

b) S v SALMANS 2006(1) SALR 333 CPD

The court had to consider amongst others, what constituted robbery. The evidence clearly showed that the appellant had grabbed the complainant's cell phone from her hand. The question was whether this act constituted theft or robbery. Upon an extensive review of the case law and academic opinion, it was clear that any force applied to the person of a victim, however slight, was sufficient to constitute robbery. The physical grabbing of a handbag or a cell phone out of a complainant's hand was a physical intervention necessary for dispossession; whether it was called force or violence it was a physical act committed against the person of another, as such, it complied with the definition of robbery. In the result the appellant had been correctly convicted of robbery. (At 340d-f.)

c) S v DIAL 2006(1) SALR 395 ECD

During the course of the proceedings, the magistrate, invoking the provisions of s 337 of

the Criminal Procedure Act 51 of 1977, had estimated the age of the accused to be 19 years. This was done because it appeared that there was no birth certificate available for the accused, and because there was apparently no district surgeon at Aliwal North to examine the accused and provide an expert opinion on his age.

Held, that it was clear from the cases that s 337 was to be resorted to, not out of convenience, but necessity. Only if all else failed could a presiding officer estimate the age of an accused. In the present case it was far from certain that enough had been done to ascertain the accused's age by more reliable methods. The social worker who had compiled the pre-sentence report had not tried to obtain the accused's birth certificate from the Department of Home Affairs; she had simply assumed that none was available. If it was the case that there was no district surgeon in Aliwal North, the accused could have been referred to the nearest district surgeon or to the nearest State-run hospital for the necessary examination. (Paragraphs [4]-[10] at 397d-398h.

Held, further, that the consequences of an estimate of age might be significant. The fact that the accused was deemed to be 19, rather than 17, years of age meant that he was denied the special protection of s 28 of the Constitution of the Republic of South Africa, 1996, which dealt with children's fundamental rights. (Paragraph [13] at 399d-3.)



From The Legal Periodicals

1. Chetty, N and Reddi, M: *"The Criminal Law (Sexual offences) Amendment Bill: is it an adequate weapon in the war against the sexual abuse of children?"* 122.3 **SALJ** 501.
2. Du Plessis, L *"The (re)systematization of the canons of and aids to statutory interpretation."* 122.3. **SALJ** 591.



Contributions from Peers

SPECIAL STATUTORY MEASURES AIMED AT PROMOTING EQUALITY WITH REGARD TO RACE, GENDER AND DISABILITY IN THE COURSE OF CRIMINAL TRIALS

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 [Act No. 4 of 2000], as amended, is in operation. Magistrates have been designated as presiding officers in the Equality Courts that have been designated as such. Apart from the specialized civil court function that these courts will be performing in terms of the Act [the 'Equality Act'], section 28 of the Equality Act introduces special measures to promote equality with regard to race, gender and disability, which are applicable in criminal proceedings. Section 28(1) provides:

“Special measures to promote equality with regard to race, gender and disability”

“If it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of an offence, this must be regarded as an aggravating circumstance for purposes of sentence.”

The purpose of this communication is to highlight the importance of this special measure and to explore the practical implications that may arise in seeking to give effect to it.

The importance of the measure

The term “special “ in the heading of section 28 of the Equality Act is in itself a significant indicator of how important the measure is. The three grounds of discrimination that are referred to in section 28(1) are included in section 9(3) of the Constitution, which contains a much wider range of grounds of discrimination. Section 2(c) of the Equality Act, which stipulates one of the objects of the Act as being “*to provide for measures to facilitate the eradication of unfair discrimination,.....particularly on the grounds of race, gender and disability,*” provides a further indication of the importance of the special measure. The reason why these three grounds have been singled out is most probably because they are systemic and thus section 3(1)(b) of the Equality Act makes it obligatory, in interpreting the provisions of the Act, to give effect to the Preamble. Ordinarily the Preamble comes into play as an interpretive aid only where the intention of the legislator is not clear. The Preamble is linked to the values of the Constitution and thereby one is constantly obliged to look to the past [the historical and social context of inequalities and discrimination] as well as to the future [what the law seeks to achieve] where these three grounds of unfair discrimination are in issue. Section 28(1) thus aims at importing the values of the Constitution into the sentencing process by way of a special deterrent and/or retributive and/or rehabilitative measure in order to promote equality with regard to race, gender and disability.

Practical implications

Whilst section 28(1) of the Equality Act makes it mandatory to regard unfair discrimination on one or more of the three grounds as an aggravating circumstance for the purpose of sentence where it is proved that it played a part in the commission of an offence, a court would still retain a general sentencing discretion in respect of any other proven ground of unfair discrimination which is not listed in section 28(1) in determining whether or not it might constitute an aggravating factor for purposes of the sentence to be imposed.

Questions that may arise in the application of section 28(1) are:

- Up to which stage in the course of criminal proceedings may it be proved that unfair discrimination played a part in the commission of an offence?
- Is the onus upon the State, and what is the standard of proof that is required?
- What is discrimination and when is it unfair?

The first question

The difficulty here seems to be that it will not always be possible to readily determine at the pre-trial stage that unfair discrimination on one or more of the three listed grounds [or any others] did play a role in the commission of an offence. Its presence may only become obvious during the course of the trial and, therefore, an awareness of the existence of the special measure is an important initial requirement. In those instances where its possible

presence is obvious, for example in a *crimen iniuria* charge involving a specific form of impairment of human dignity or a charge involving gender-based violence, a reference to section 28(1) of the Equality Act in the charge sheet should suffice as an indication that possible aggravating circumstances are in issue. Needless to say, it would generally be conducive towards a fair trial if a represented or an unrepresented accused were to be informed as a matter of course of the possible implications arising from section 28(1) whenever the evidence points in that direction at any stage before or after conviction and before sentence is imposed.

The second question

The adversarial nature of criminal proceedings would seem to make it obvious that the intention of section 28(1) is that proof beyond reasonable doubt is the required standard and the State bears the onus. In practice, however, the question of onus does not often become an issue during the sentencing process. The real difficulty will often lie in actually proving that the grounds of unfair discrimination exist. This will become evident when one explores the various forms of discrimination that can manifest themselves apart from those specifically listed in the Constitution and the Equality Act. Often acts or omissions constituting discrimination are not overt, but subtle or based on innuendo. Often it may be a combination of grounds. Section 13 of the Equality Act seems to recognize the potential difficulties attending matters relating to proof by making provision for the burden of proof for purposes of proceedings in the Equality Court, which are civil in nature. This section, however, does not apply to criminal proceedings where section 28(1) may be invoked. The Constitution is paramount and section 9(5) provides that “*Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair*”. Section 9(3) of the Constitution lists race, gender and disability as grounds of unfair discrimination, whilst sections 9(3) and 9(4), respectively, prohibit unfair discrimination by the State and any [other] person. These provisions could very well be construed as placing the onus on the ‘discriminator’ to establish that proven discrimination is fair where section 28(1) of the Equality Act is concerned. A related question is whether such conduct must be deliberate [i.e. intentional] or whether *culpa* is sufficient. It is perhaps arguable that *culpa* is sufficient, based on the relative constitutional prominence that the rights to equality and human dignity enjoy, the purpose and content of the Equality Act and also the constitutional duty that is borne by all courts when interpreting legislation and developing the common law, namely to promote the spirit, purport and objects of the Bill of rights. Moreover, the fact that indirect indiscriminate and discrimination by omission are prohibited, is a persuasive indication that *culpa* should not be excluded.

The third question

Section 28(1) refers to “unfair discrimination”, but that term as such is not defined in section 1 of the Equality Act. The word “discrimination”, however, is defined therein and for purposes of applying section 28(1) the meaning attributed to it by the Equality Act could be a starting point in establishing whether the listed grounds of unfair discrimination have been brought into play. Section 1(1)(viii) defines “discrimination” [which can for convenience be labeled as objectively ascertainable prejudicial acts or omissions] with reference to “prohibited grounds”, which term is defined in section 1(1)(xxii)(a) and includes race, gender and disability in addition to others. Section 6, 7, 8 and 9 prohibit unfair discrimination and extend the prohibition in respect of race, gender and disability to certain forms of conduct [objectively ascertainable criteria], which could assist in determining the extent to which

section 28(1) is applicable in any given case. Section 14 of the Equality Act assists in determining the fairness or unfairness of discrimination, specifically for purposes of civil proceedings instituted in terms of that Act. Having regard to the primacy of the Constitution, its purpose and objectives with regard to unfair discrimination, the objects of the Equality Act and the Constitution's rules of interpretation applicable to the Bill of Rights and all legislation [section 39 of the Constitution], it would be difficult to conclude that it would not be permissible to apply section 14 of the Equality Act and the developing jurisprudence in relation to the right to equality [and human dignity] as a guide where the application of section 28(1) is concerned.

An inquiry in terms of the Constitution into what constitutes discrimination and prejudice, respectively, is an objective one [*Harksen v Lane NO 1997 (11) BCLR 1489 (CC)* at pars. 48 and 62 and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000(2) SALR 1 (CC)* at par. 32]. In effect, the courts have asked whether there has been a differentiation or a failure to differentiate on a listed ground and whether it causes prejudice in the application of the objective test. The provisions of the Equality Act discussed in the above paragraph seem to have been patterned on these and other decisions and it is thus highly probable that the objective approach will be the correct one.

An inquiry into the fairness of alleged discrimination seems to be inevitable, irrespective of where the onus lies. In the *National Coalition* case [at para. 19] it was held that the inquiry must be "comprehensive and nuanced" and the cumulative effect of all factors must be considered in the impact assessment [i.e. on the effect that the alleged unfair discrimination had on the affected person in the particular context (cf. *President of the RSA v Hugo 1997(4) SA 1 (CC)* at par. 41)]. Some of the factors that the courts have considered in such an assessment are:

- The position of the affected person in relation to a group that has suffered discrimination in the past.
- The extent to which the discrimination amounts to an invasion of dignity and other rights of the affected person.
- Vulnerability, stereotyping, division on the grounds of race, gender and disability.

Conclusion

It will soon become evident that many questions that may be raised have not been answered, but it is nevertheless hoped that these observations will serve the purpose of alerting judicial officers in regard to their statutory obligations in matters relating to unfair discrimination and the promotion of equality. The punishment that will be imposed upon accused persons will still be for the crime committed, even though aggravated by unfair discrimination. The special measure is ultimately aimed at promoting equality and nevertheless, individual judicial discretion still remains insofar as grounds of unfair discrimination external to section 28(1) are proven. Lastly, it could prove useful if presiding officers in the Equality Court were to refer matters that come before them to the prosecuting authority, where it appears that section 28 (1) could come into play.

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



Matters of Interest for Magistrates

The Rules of the Government Employees Pension fund were amended in a notice Published in Government Gazette No. 28685 of 31 March 2006.

The amendments are as follows:

a) Rule 14.5.3 is hereby amended by the deletion of:

In the event of spouses and orphans being eligible for benefits, the deceased parent of the orphans will also be treated as a spouse for the purpose of apportioning the spouse's pension.

b) Rule 14.5.4 is hereby substituted by the following rule:

14.5.4 An orphan's pension, calculated as ten percent of the member's annuity will be payable to any eligible child, as defined, orphaned by the death of the member, his or her spouse or the other parent, natural or adopted, subject to a minimum orphan's pension as determined by the Board of Trustees, which minimum orphan's pension may not be less than R200, 00 per month.

c) Rule 14.6.3 is hereby substituted by the following rule:

14.6.3 If a pensioner, whose pension commenced on or after 1 December 2002 dies and there is no surviving spouse or where a spouse who receives benefits in terms of rule 14.6.2 subsequently dies, an orphan's pension will be payable, calculated as ten percent of the pensioner's annuity on the date of his or her death, for each eligible child, as defined, orphaned by the death of the pensioner, his or her spouse or other parent, natural or adopted, subject to a minimum orphan's pension as determined by the Board of Trustees, which minimum orphan's pension may not be less than R200,00 per month.

Provided that where an orphan's pension only commences after the Subsequent death of the spouse who receives benefits in terms of rule 14.6.2, the orphan's pensions will be based upon the annuity which the pensioner received on the date of his or her death, increased by the ratio of the spouse's pension at the date of his or her death to the initial spouse's pension.

d) Rule 14.9.1 is hereby substituted by the following rule:

14.9 Funeral benefits

14.9.1 In the case of a member or a pensioner who became entitled to a gratuity and annuity on or after 1 December 2002, the funeral benefits payable upon the death of such member or pensioner and/or his or her spouse and/or eligible children and/or stillborn, as defined, are as follows:

- (a) in the case of the member or pensioner, a payment of R7 500;
- (b) in the case of a spouse, a payment of R7 500;
- (c) in the case of an eligible child, a payment of R3 000 per child;
- (d) in the case of a stillborn, a payment of R3 000,00 per stillborn.

Provided that any termination of pregnancy as determined in the Choice On Termination of Pregnancy Act, 92 of 1996, as amended, or any Termination of pregnancy that is self-inflicted is specifically excluded.

Back copies of Learning Together are available on

<http://www.justiceforum.co.za/JET-LTN.asp>

For further information or queries please contact RLaue@justice.gov.za