



THE JUDICIAL OFFICER

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FROM THE EDITOR:

This is the 2nd electronic edition of the **Judicial Officer**. I want to thank the contributors for their contributions and would like to ask that magistrates please submit any articles to me for publication. It is your journal and without your contributions the journal cannot grow. I also want to thank Ron Laue who again assisted with the editing. Naturally opinions expressed by authors are their own and do not necessarily reflect that of the editor or the Judicial Officers' Association of South Africa.

Gerhard van Rooyen
Magistrate/Greytown

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THE JUDICIAL OFFICER – GUIDELINES FOR AUTHORS

1. Readers are invited to submit articles, notes, reviews of cases and correspondence to the editor with a view to publication. In general we welcome contributions of 1 000 to 3 000 words.

We wish to publish articles of practical interest for magistrates that include the several aspects of public law and private law that magistrates encounter every day.

2. Submissions should be in English and all submissions should be submitted by e-mail in MS Word to the editor, Gerhard van Rooyen at gvanrooyen@justice.gov.za . Pages should be numbered. Titles and headings should be kept as short as possible.
3. Footnotes should be kept to a minimum and numbered consecutively with Arabic numerals.
4. Cases and statutes should be cited accurately and fully.
5. It is assumed that contributions are original and have not been submitted for publication elsewhere.

The Sexual Offences Act, No. 32 of 2007 under Judicial Spotlight.

TV Ratshibvumo*
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Introduction

While the Sexual Offences and Related Matters Act, No. 32 of 2007 (SORMA) has been welcomed by the courts (especially the Lower Courts which had been trying to extend the definition of rape to also include anal penetration by a male organ)¹ for extending the definition of rape, not everyone is happy with the duties it comes with. These would include criminalizing acts that before the 16th December 2007 were not offences, but are now criminal offences under the same Act; extra duties of the DPP and the NDPP; duties of the employers; employees and of citizens as a whole.

When one analyzes SORMA, it is easy to gather that it took more than four years to be legislated and that it has been written, deleted and rewritten. Some of the deleted passages are still visible beneath the current passages if one looks deep along the deleted lines. The Act would not have been completed if it was not for the decision by the legislators to delegate most of the responsibilities and scribing (without which the Act would just be another piece of paper); to the Ministers² and Directors General¹ who are yet to pass regulations to see to it that

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¹ See the decision by the CC in *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae) 2007 (2) SACR 435 (CC)*.

² Examples would be section 29 which requires that the Minister of Health has to designate particular health establishments or hospitals for PEP (Post Exposure Prophylaxis) and for compulsory HIV testing. The Minister has until 21 May 2008 before making the first designation by Government Gazette. Another example would be section 53 pertaining to the establishment of the Register of sexual offenders which requires the Minister of Justice (and Constitutional Development) to make regulations regarding “the manner and the format in which the Register is to be established and maintained” after consulting 4 other cabinet members. This phrase delegates legislative authorities to the Executive.

the Act is user friendly to both the Courts and members of the community. It is yet to be seen whether these regulations would be passed within the limited times prescribed by SORMA. The fact that this Act leaves the bulk of the work to be completed in the regulations to the extent of authorizing the Minister of Justice (and Constitutional Development) to create offences carrying the maximum penalty of 12 months imprisonment, is a clear indication that this Statute was not passed because the Legislature believed it to be ripe and ready to be used, but rather pushing the responsibilities to the other role players such as the Executive and senior administrators in various government departments.²

1. Sexual assault through kissing.

The media attention and the subsequent teenage kissing in various malls in Gauteng in defiance of the Act, which made headlines, caused some special focus to be paid on this Act.

SORMA repealed a number of common law crimes. Just to start with, the common law crime of indecent assault has been replaced by sexual assault.³ The one sentence definition of indecent assault has been replaced by several paragraphs that try to explain what sexual assault is, which in turn requires one to refer to the definition of sexual violation as contained in section 1 of the Act. In fact sexual assault is so wide that it cannot be defined in a single explanation in the result that a number of other previously innocent acts are now categorized under sexual assault.

¹ Section 29 requires the Director General of the Department of Justice and Constitutional Development to distribute the regulations to the Commissioners of Police and Correctional Services who in turn should distribute the regulations received to all the role players under their jurisdiction.

² See section 53 (3).

³ See section 68 (1) (b).

A person (A) who commits an act of sexual violation with a child (B) is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.¹

Although sexual violation is defined in a few paragraphs that attempt to describe various acts that can constitute sexual assault, of particular interest is the one about the kissing. Section 1 of SORMA defines sexual violation as (*inter alia*) including any act which causes “direct or indirect contact between the mouth of one person and the mouth of another person.”² A child is further defined as a person who at the time of the incident is 12 years and older, but below the age of 16.³

From the above it is very clear that the Legislature wanted to outlaw the kissing of the child (below the age of 16), whether or not it is a light or deep kiss. It is clear that it went a distance in trying to protect the sexual abuse of the children. I am not sure if the children perceive it to be in their interests. What is clear is that the Legislature did not just want the sexual violation of children to be outlawed, but the act of preparation before the actual sexual violation; hence the kissing is now defined as sexual violation. I can only presume and hope that the Legislature must have had tangible evidence at its disposal that confirms the view that sexual violation of children is usually preceded by the preparation in the form of kissing.

What is interesting is that this is an offence even when the said child is a willing party to the kiss. This serves a new message to parents who have a tendency of kissing their children before dropping them off to school or before they sleep: they now have to learn to kiss other parts such as the cheeks or foreheads

¹ See section 16 (1). It is also referred to as ‘statutory sexual assault.’

² See the definition of sexual violation in section 1.

³ See the definition of a child in section 1.

before they reach the age of 12. The maximum permissible age for parents to kiss their babies on the mouth is 12; after that, they will now be committing the offence of sexual assault on their children.

As if that is not enough, kissing by two willing children is also outlawed.¹ In such instances, both children should be prosecuted if such a decision to prosecute is finally taken by the DPP (Director of Public Prosecutions).² There is a view that the Legislature may have been concerned about teenage pregnancies, knowing that the Department of Social Services would later be liable to pay a monthly grant for those offspring. There is a notion that some children out of frustration caused by unemployment are resorting to children-making knowing they would finally have a monthly stipend for daily survival from the government. If this is what caused the Legislature to outlaw the kissing by teenagers, one wonders if there was no other better option other than making it an offence for the children to kiss each other.

The outlawing of kissing by the consenting children can result in outcries about the already full prisons. This is because anyone (journalists included) who has the knowledge of sexual offences having been committed (including children kissing each other or parents kissing their own children) or has witnessed it, has a duty to report such an activity to the police.³ Failure to report such an activity is an offence that carries a maximum penalty of 5 years imprisonment.⁴ This is not surprising since there is also a common law responsibility to report to the police any criminal activity any citizen has information about. This places a duty on every citizen who knows of anyone who witnessed such kissing and did not report it to the police, to have him or her reported to the police. The penalty prescribed by the Legislature for not reporting it indicates how grave the offence is or should be in the eyes of the Legislature. The vast majority of statutory

¹ It is however a valid defence if both parties were children (aged between 12 and 16) and the age difference is less than 2 years. See section 56 (2) (b).

² See footnote 31 below.

³ See section 54 (1) (a).

⁴ See section 54 (1) (b).

offences (such as traffic offences and many others) carry a maximum penalty of 6 or 12 months imprisonment. This shows that the Legislature regards the offence of not reporting a sexual assault as being more serious than a number of other statutory offences. My major concern is whether the police are going to cope with the volume of the work that can now be anticipated, or whether more police officers would be employed to help with the extra work.

While I appreciate the seriousness on the part of the Legislature in protecting children and other victims of sexual offences from sexual violations, what puzzles me is the provisions in a statute enacted by the same Legislature just over a year earlier in which it does not echo the same seriousness.¹ The Children's Act provides that "no person may refuse to sell condoms to a child over the age of 12 or to give them for free if they are available for free."² It goes on to permit the giving of contraceptives to children of the same age even "without consent by a parent or caregiver."³ Surely, when condoms are given to children of that age, one should know that a crime of statutory rape is about to take place.⁴ Under common law, every citizen has an obligation to report a crime about to be committed to the authorities. Instead of making it an obligation for the said medical officers giving contraceptives to report it to authorities, the Children's Act rather guarantees confidentiality to the children for having been issued with contraceptives and/or condoms.⁵ As if that is not enough, anyone who refuses to give such condoms to the children demanding them is guilty of an offence and liable on conviction to imprisonment for up to 10 years.⁶

¹ See the Children's Act no. 38 of 2005 which came into operation on 1 July 2007

² At section 134 (1).

³ At section 134 (2).

⁴ Section 15 of SORMA provides that a person who has sexual intercourse with a child (aged between 12 and 16) is guilty of sexual penetration with a child, even when it was a consensual penetration (statutory rape).

⁵ At section 134 (3) of Act 38 of 2005.

⁶ See section 305 (1) and (6) of Act 38 of 2005.

2. Duties of Employers and Employees (including domestic servants) after the Establishment of the Sexual Offenders Register.

If everything goes according to the provision of SORMA, a Register containing details of all persons who have previous convictions of sexual offences against children or mentally disabled persons shall be established by the 16th June 2008.¹ All the persons who have been convicted of sexual offences against children are not allowed to take up employment that would see them working with a child or place them in a position of authority or supervision over a child.² In fact all the persons whose details would be contained in the Register would not be employable in any position that would put them in contact with child(ren).³

Although the definition of an employer is wide, it includes “any person... who employs employees who in any manner during the course of their employment will be placed in a position of authority, supervision or care of a child...”⁴ There is no doubt that this also includes the domestic servants employed, provided there would be children to care for in those families. Current and prospective employers would be entitled to apply from the Registrar for a certificate stating whether their employees’ details are contained in the Register.⁵ It is interesting that the Legislature used the word “may” meaning the employers would have the discretion on whether to apply or not; whereas it makes it compulsory for employers to take steps such as terminating the employment once it becomes clear that the employee’s details are contained in the Register.⁶ Once the details of an employee are found to be contained in the Register, the employers would have to take all reasonable steps to see to it that such employees whose details

¹ See section 42 of SORMA.

² See section 41 (1). Note that for purposes of these provisions, children are those whose ages are below 18 years.

³ Note however that the Act goes on to extended this provision to all those convicted of sexual offences against mentally disabled persons.

⁴ See paragraph (b) (i) under the definition of “Employer” in section 40.

⁵ See section 44.

⁶ The same phrase was repeated in section 45 (1) (a).

are contained in the Register, are prevented from having access to the children; and in cases where such steps would not ensure the safety of the children, the employment relationship must be terminated immediately.¹ An employer who fails to comply with these provisions is guilty of an offence that carries the maximum penalty of 7 years imprisonment.²

Unlike the employer who has a discretion on whether to ascertain whether the employee's details are contained in the Register, the employee has an obligation to disclose such information to the employer.³ Failure to disclose this information carries the same penalty as that of the employer above.⁴

There is a strong possibility that some categories of employers' particulars could be removed, modified or exempted while other categories could be included by way of Regulations by the Minister of Justice and Constitutional Development, since she or he is vested with such authority.⁵

Conclusion

The concern in the minds of most critics is whether our justice system is ready for this legislation and whether it will cope. Already, with the potential of so many matters that could be reported to the police which involve *inter alia* teenage kissing, those who witness and not report to authorities, domestic workers not disclosing their previous convictions and employers who do not terminate the services of such workers; a valid concern is whether more police officers will be employed to cater for the needs or whether the same police battling crime on the streets will be removed to police these extra responsibilities.

The same can be said in respect of the NDPP's and the DPP's extra work load to their busy schedules. In an attempt to achieve uniformity in decision-making by

¹ See section 45 (2) (d).

² See section 45 (3).

³ See section 46.

⁴ *Supra* at 26.

⁵ See footnote 1 above.

the prosecution, and to show the high level of seriousness, the Legislature requires that only the NDPP personally (no delegation of authority allowed), is allowed to take certain decisions¹ while the same applies to the DPP in respect of other matters.² Either the Legislature attached little value to other ways of achieving the goals it had or it evaluated and found this to be the best method of achieving its goals. The other ways I refer to are the issuing of regular directives from the office of the NDPP through which the NPA achieves uniformity throughout the country.

It is very clear that the Legislature was prepared to resort to any lengths in its endeavor to protect the children and all the victims of sexual offences.

The fears I have just raised were also raised sometime ago when smoking in prohibited areas was outlawed. People were concerned about whether our judicial system was going to cope. It later turned out that it was just a piece of legislation, while day to day life continues. While many of us see the teenagers kissing in the malls in defiance, we know of no child arrested as a result as yet. Life goes on as it did in the past. As of now, it looks like the judicial system is coping. One can only hope it will carry on coping as it did in the past.

¹ An example is section 15 (2) which requires the NDPP to authorise in writing (personally) the prosecution of statutory rape in case both parties were children at the time of the commission of the offence.

² An example is section 16 (2) which requires the DPP to authorise in writing (personally) the prosecution of statutory sexual assault (children kissing) in case both parties were children at the time of the commission of the offence.

**DOES FIRST REALLY MEAN FIRST?-A FEW ASPECTS CONCERNING
POLICE DETENTION AFTER EXPIRY OF THE 48 HOURS PERIOD.**

M F T BOTHA

Regional Magistrate, Middelburg (Mpumalanga)

Just when I thought I had control over the most basic aspects concerning criminal procedure in court, I was confronted with a matter that made me realize all over again that the law is not a matter of simple logic as a few lost souls tend to think and that it is indeed a science. I realized that again about five years ago (and I publish this document now only!) in the District Court when I was confronted with the question of the legality of the detention of an accused after expiry of the 48 hour period.

It seems to be generally accepted policy, in the District Court at least, that when an accused is brought to court after expiry of the 48 hour period and there was not compliance with the provisions of the relevant legislation that governs the matter, that the case should be removed from the roll because, so it is argued, the accused is brought before the court illegally. To be able to deal with this matter properly in court, a presiding officer should know and understand the relevant legislative provisions applicable, especially the provisions of the Criminal Procedure Act 51 of 1977.

Guidance is usually sought in *Hiemstra*, now known as *Kriegler met Kruger*, *Suid-Afrikaanse Strafproses* and the *Commentary on the Criminal Procedure Act* of Du Toit *et al*, the moment one is uncertain of the answer to a problem

concerning criminal procedure. The trust is always that the answer to the problem will be contained in either one or both of these text books. In the specific instance, I came to realize, to my disappointment, that all the text books on criminal procedure were of no help at all on the matter, and in some instances even hopelessly outdated.

The period for the detention of an accused before his or her first appearance in court, is governed *inter alia* by section 50(1) of the Criminal Procedure Act 51 of 1977. Section 50(1)(c) states that, subject to the provisions of subsection (d), an accused shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest. In this paper I just want to address the aspects relating to section 50(1) (d) (i).

Section 50(1) (d) (i) of the Criminal Procedure Act states:

‘If the period of 48 hours expires outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day.’

Section 50(2) states:

‘For purposes of this section-

(a) “a court day” means a day on which the court in question normally sits as a court and “ordinary court day” has a corresponding meaning; and

(b) “ordinary court hours” means the hours from 09h00 until 16h00 on a court day’

If an accused is arrested during court hours and the 48 hour period expires on a court day, there should be little problem, if any. The problem arises when the

accused is arrested outside ordinary court hours and on a day that is not an ordinary court day.

On a scant perusal of the provisions of the section the first interpretation that comes to mind is that the accused must be brought to court on the first court day *after expiry of the 48 hours*. After careful perusal one realizes that it is not as simple as that.

I could not find any reported judgment that addresses the specific issue. It seems as if the problem escapes even the most trained eye. Subsection 50(1) (d) (i) states only *'first court day'*. Nowhere in the subsection is it written, as most people read the section, ***'first court day after expiry of the 48 hours.'***

The argument that is raised instantaneously is that it is obvious that the section should be interpreted like that.

It is, in my opinion, not obvious that the section should be interpreted like that. People interpret it so because they are doing it through force of habit. It seems as if very few realize that section 50(1) (d) (i) of the Criminal Procedure Act 51 of 1977 has been amended significantly in such a way that its reading is problematic. What is disturbing is that it seems as if the problematic wording of the section has not been realized by most, so many years after the amendment. Even Kriegler and Kruger, in *Hiemstra, Suid Afrikaanse Strafproses*, did not pick it up. In the sixth edition of their book they say:

‘Die voorbehoudsbepaling by sub-a. (1) gee ‘n baie rekbare betekenis aan “ 48 uur ” ten einde dit prakties uitvoerbaar te maak om die persoon voor

die hof te bring voordat die tydperk verstryk het. Pare. (a) en (b) is duidelik genoeg. Wat par. (c) betref, moet die polisie¹

It is apparent from this commentary that the wording of their commentary is exactly the same as it was in the fourth edition of 1987 when the section read differently. Since then no adjustment has been made to the commentary to address the amended version of the section, so much so that the book still refers to the sections as subsections (a) tot (c) as they were in the previous section (so many years after the amendment!). If one compares the fourth edition (1987)² with the fifth edition (1993)² and the sixth edition (2002) it is clear that their commentary on section 50(1) is exactly the same on this aspect. This, to me, is an inexcusable oversight by the new authors if one considers the status of the book in our law of criminal procedure.

Du Toit et al mentions the amendment, but discuss section 50(1) (d) around subsection (i) and as such they do not even touch on the problem.³ Is this another inexcusable oversight by respected authors?

In my opinion it is not logical that the section must be interpreted as many interpret it. '*First court day*' in subsection (i) is not necessarily the first court day *after the expiry of the 48 hour period*. The situation with which I was confronted will illustrate the problem. In that case the accused was arrested on a Saturday at

¹ At page 119

² At page 112.

³ At 5-40.

18h00. His 48 hours therefore expired at 18h00 on the Monday which was an ordinary court day. He was brought to court on the Tuesday. I raised the question whether the accused was brought to court in time *in terms of the provisions of the Criminal Procedure Act*. Everyone, including all my colleagues, held the view that the accused was indeed properly before court *in terms of the provisions of the Criminal Procedure Act*; everyone but me.

If one interprets '*first court day*' exactly as the section reads, and as I think it should be interpreted, then the accused was not properly before court *in terms of the provisions of the Criminal Procedure Act*. In this specific instance, '*first court day*' means the Monday, because Monday is the first court day after Saturday. If one reads section 50(1) (d)(i) with subsections (ii) en (iii), it should be clear that this is the only true meaning that comes to the fore in the specific situation.

In the situations covered by subsections (ii) en (iii) the legislature uses totally different wording than in subsection (i) and in my opinion this change in subsection (i) was a deliberate amendment. The legislature chose to use the words '*next succeeding court day*' in subsection (ii) and '*the court day next succeeding the day on which such a person is brought within the area of jurisdiction of such court*' in subsection (iii). These subsections are respectively worded as follows:

- '(ii) ...if not made before the expiration of the period of 48 hours, may be done at any time before, or on, the next succeeding court day,...
- (iii) ...the said period shall be deemed to expire at the end of the court day next succeeding the day on which such arrested person is brought within the area of jurisdiction of such court'

From the wording of the other subsections, more specifically subsection (ii), it is clear that the words *'first court day'* in subsection (i) do not mean the first court day after expiry of the 48 hours, because the term *'next succeeding court day'* in subsection (ii) carries that meaning (as was the case when subsection (i), was still 50(a) before the amendment). If the legislature wanted subsection (i) to have that meaning it would have retained the previous wording as it did with the current subsection (ii).

Subsection (i) reads differently now and a further indication that the legislature wanted it to read differently is to be found in the fact that the terminology of subsection (i) and (ii) was the same before the amendment.

Before the amendment subsection (i) (then 50(a)), also read *'next succeeding court day'*, as subsection (ii) still reads. I could only find an Afrikaans version of the section as it previously read in the 4th edition of *Hiemstra* which reads:

'50(1) (a)...bedoelde tydperk geag word te verstryk om vieruur op die namiddag van *die eersvolgende hofdag*.'

If that is the case, then the current subsection (i) cannot be interpreted to mean *'next succeeding court day'* and it must then have a different meaning. If not, then *'next succeeding court day'* in the current subsection (ii) must have a different meaning than its current meaning, which can never be the case.

In the fifth edition of *Strafprosesreg Handboek* of Joubert the following statement is made:

'Die 48 uur-tydperk word aansienlik gewysig deur a 50(1) (d) (i)-(iii):
Indien die 48 uur verstryk-

- (a) op 'n dag wat nie 'n hofdag is nie, of na 4nm (16h00) op 'n hofdag, dan word dit *geag* dat genoemde tydperk om 4nm (16h00) op die eersvolgende hofdag verstryk...'¹

From this statement it is clear that this author is aware of the significant amendment but still the author uses the wording of the section as it read before the amendment where he speaks of '*geag word te verstryk*' and '*eersvolgende hofdag*'.

Even Steytler in *Constitutional Criminal Procedure*, 2000 edition does not deal with the matter properly. He puts his view as follows:

'First, if the period of 48 hours expires during a court day, the 48 hours are deemed to expire at the end of that court day. Second, if the 48th hour falls on a non court day, the period terminates at the end of the next court day.'²

From this commentary of *Steytler* it is clear that even he uses the wording of the section as it read before the amendment and does not identify the problem. He uses the words '*next court day*' whereas the section speaks of '*first court day*' in subsection (i) and '*next succeeding day*' in (ii) and even he still uses the wording '*deemed to expire*' which is not found in subsection (i) anymore. One cannot even gather from his discussion whether he discusses the section of the Constitution only or whether he is also considering the provision of the Criminal Procedure Act. The wording he uses is however not found in the constitutional provision.

In my opinion it is not correct to interpret the subsection like this. It should be interpreted the way it reads and the case scenario I sketched illustrates the point

¹ At page 109.

² At page 126 to 127.

perfectly well. It seems as if none of the authors that I mentioned paid any attention to the new wording of the section.

'*First court day*' does not, in my opinion, in all cases, if at all, mean the first court day that follows on the expiry of the 48 hours. The legislature clearly amended the section and did away with that meaning.

Interesting enough the Constitution has its own provision and it gives a totally different dimension to the problem. The Constitution reads:

'35(1)(d) Everyone who is arrested for allegedly committing an offence has the right to be brought before a court as soon as reasonably possible, but not later than-

- (i) 48 hours after the arrest; or
- (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

According to the wording of the Constitution it is clear that the wording of the Criminal Procedure Act is indeed problematic. There is an addition to the wording of the section in the Constitution that is not found in the section of the Criminal Procedure Act namely '*the first court day after expiry of the 48 hours*'. From the wording of the section in the Constitution '*first court day*' clearly means the first court day *after expiry of the 48 hours*, because the section clearly reads like that.

In *Criminal Procedure in the Magistrate's Courts*, Bertelsmann *et al*, Sixth edition, the matter is discussed under paragraph 1.4.2. by the application of the section of the Constitution. In paragraph 3.26 where the section of the Criminal Procedure Act is apparently discussed, no mention is made of the problematic

wording and the matter is dealt with the same way as it is dealt with under paragraph 1.4.2.as if the two sections are worded the same.

The Constitution is however the supreme law and as such the wording of the Constitution should be given effect to, if one is confronted with a problem of this kind. It means that you must then expressly identify the problem and by the application of the rules of constitutional interpretation clearly indicate that you interpret the section in the Criminal Procedure Act in conformity with the provisions of the Constitution.

Interesting enough a similar kind of problem received the attention of the court in the Namibian case of *S v Mbahapha* 1991 (4) SA 668 (NmHc). There the issue was the problem where the 48 hours expires on a day which is not a normal court day for a periodical court. The answer to the problem was set out as follows at 676C:

'In reaching this conclusion Kannemeyer JP was, of course, uninfluenced by any constitutional provision. He decided the matter in accordance with his view of what the legislature must have intended in enacting s 50. Here in Namibia the continued detention of an arrested person is dealt with in the Constitution and regard can be had to art 11(3) when determining what construction should be placed on s 50. There is what is sometimes termed a presumption of constitutionality and if a piece of legislation is capable of two meanings, one which would render it unconstitutional and the other not, the court will inevitably adopt the latter meaning. The position was summed up by Georges CJ in *Minister of Home Affairs v Bickle and Others* 1984 (2) SA 439 (ZC) at 448F in the following words:

"The other task of the court must be to interpret the Constitution, applying the normal canons, then to interpret the challenged legislation

and then to decide whether a meaning can fairly be placed on that legislation which enables it to fit within the already determined constitutional framework.”

In *Mbahapha* the section was discussed as it read before the amendment but this should make no difference because the principles involved are the same.

Although Constitutional interpretation can solve the problem discussed here, the legislature should however for the sake of legal certainty amend the section in the Criminal Procedure Act so that it can be in conformity with the wording of the section in the Constitution.

ADMISSION OF GUILT AND CASES DISPOSED OF IN TERMS OF SECTION 112(1) (a) OF THE CRIMINAL PROCEDURE ACT, 1977

A P Dippenaar
Additional Magistrate, Vredenburg

Introduction

For practical purposes I intend to deal with the last matter, disposing of cases in terms of Section 112(1) (a), first and then comment on admission of guilt.

Disposing of cases in terms of Section 112(1) (a) ACT 51 of 1977

I have dealt extensively with this practice in an article which was published in **Die Landdros/The Magistrate** as long ago as 1994^[1] and still maintain it to be a sound approach to address situations such as the one encountered in the **Fisher** case.

If presiding officers follow the route suggested, the accused's rights, as enshrined in the Constitution, will still be protected and the pitfalls as well as "serious indictment[s] of our judicial system all around" referred to by Ntsebeza AJ will most certainly be avoided.

I would however like to comment on certain aspects not dealt with in the article mentioned in par 1 *supra*.

^[1] Die Landdros Vol 29 No 2 02/06/94 pp 75

Legal representation

- Whether it is a minor offence or one of a more serious nature, magistrates are compelled to explain the accused's rights in respect of legal representation and record the explanation properly^[2]
- Once the accused has made his/her choice, the trial must proceed. The learned judge's comment : "How in a case involving a charge of possession of a prohibited drug an accused can be said to have "elected" to proceed to trial without legal representation baffles me" [**Fisher** judgment pp 7[12] – 8], with the greatest of respect, indicates that he is unfortunately out of touch with reality. Magistrates, on a daily basis, conduct trials where the accused has elected to conduct his/her own defence – whether facing minor or serious charges.
- The second proviso in **Section 73(2C)** of the Act 51 of 1977 clearly states that "the accused **shall not be compelled to appoint a legal adviser if he or she prefers to conduct his or her own defence**"
- Be that as it may, I even deal with matters in terms of Section 112(1) (a) where the accused is legally represented, provided that the route suggested is followed.

Penal jurisdiction

Since 1994 the penal jurisdiction of Magistrates' Courts has been increased from one to three years imprisonment. For the purpose of Section 112(1) (a) it means that a sentence of not more than R1500 or **3 years** imprisonment may be imposed.

This fact confirms my suggestion that Section 112(1)(a) is not restricted to "minor" offences and not only could, but should, find more general application as "a speedy and simple procedurefor the swift and expeditious disposal ofcriminal cases"

^[2] Constitution Section 35, Section 73(2A) Criminal Procedure Act

Matters in which Section 112(1) (a) should be applied carefully [as the exception rather than the rule]

Case law dictates that where forensic reports are in issue, the court is obliged to have such reports at hand when Section 112(1) (b) is to be applied.^[3] Although these cases refer to charges of contravening Section 65(2) Act 93/96 [Driving with excessive alcohol in blood), I am of the opinion that the same *dicta* apply to charges pertaining to the possession of dependence producing substances [e.g. “tik”, “mandrax”] and all other similar situations.

In such matters Section 112(1) (a) could find application, but then the presiding officer will be obliged to entertain the matter according to the judgments in the mentioned cases in conjunction with the practice which I have referred to in “Artikel 112(1) (a) van die Strafproseswet 51 van 1977: Skeermes of skalpel” ^[4] In doing so the court will then comply with my submissions as is discussed on page 77 of the “Skeermes” article.

In situations as referred to above, magistrates will however have to exercise the utmost care and discretion and record the proceedings properly and meticulously.

Prescribed statutory factors, compulsory and other orders

Magistrates will have to ensure that they take cognizance of, and familiarize themselves with, all relevant legislation in this regard when dealing with cases in terms of Section 112(1)(a) These factors and orders should however not deter them from disposing of cases in terms of the said section as it does not impinge on their penal jurisdiction.

Conclusion

^[3] S v Viljoen 1991(2) SACR 215 (C), S v Tentelil 2003(1) SACR 48 (C)

^[4] See 1 (supra)

Despite remarks such as were made in the **Fisher** judgment, magistrates should rather be persuaded than dissuaded to utilize Section 112(1)(a) as a mechanism to swiftly , expeditiously and effectively dispose of cases, but should constantly remind themselves to carefully exercise their judicial discretion within the ambit of case law, statutory provisions and the Constitution.

Admission of Guilt Fines

Admission of Guilt Fines where a statute dictates compulsory orders to be made

Despite the judgment in **S v Makolane**^[5] I am of the opinion that in all matters where compulsory orders are to be made within the discretion of the court, admission of guilt fines should, and could, not be fixed. Driving under the influence of liquor/or with excessive alcohol in blood, for example, can never be disposed of by means of admission of guilt.^[6]

As far as Section 25 of Act 140 of 1992 is concerned, as it refers to forfeiting of drugs to the State, I have no problem. It can also effectively be done by the SAPS^[7]

In the Western Cape the Chief Magistrate, Cape Town, has made determinations in respect of certain common law crimes^[8] One can however argue that in fixing admission of guilt for theft [especially shoplifting] the views of the High Court were not really taken into consideration^[9]. Similarly, the fixing of R150 admission of guilt for “common assault : without injuries or use of a weapon” might not only be susceptible to abuse by unscrupulous police officers but it also has the propensity that serious crime is made to look trivial by imposing too small a fine

^[5] 2006(1) SACR 589 (TPD)

^[6] See Section 35 Act 93/96

^[7] S v Tengana 2007(1) SACR 138 [CPD]

^[8] See Annexure to a letter 1/4/5 dd 15.12.06

^[9] S v Gqobozi 2005(1) SACR 589 (CPD), S v Serabo and Five Similar Cases 2002(1) SACR 391 (OK) 339 at 339c, S v Hluhela 2003(1) SACR 642 (TPD) at 643e

The anomaly regarding admission of guilt fines and Section 112(1)(a) proceedings

I would like to suggest that this matter should be addressed on an urgent basis.

Taking into consideration that a court can only impose a fine not exceeding R1500 [with an alternative of up to 3 years imprisonment] in Section 112(1)(a) proceedings, whilst peace officers, clerks of the court and the like are empowered to “impose” fines up to R5000, does not make judicial sense at all.

It could easily develop into a situation where, for example, the prosecutor has elected to determine an amount of R5000 as admission of guilt fine and the accused elects to appear before court and tender a plea of guilty. If the magistrate is of the opinion that the offence does merit the option of a fine exceeding R1500 but less than the fixed amount [e.g. R2500] and the case should be dealt with in terms of Section 112(1) (a), the court will be in no position to impose such a fine. It will be compelled to stick to the ceiling of R1500.

Such a scenario will give rise to two unacceptable, negative results:

- It will [once it becomes common knowledge] afford an accused an opportunity to abuse the system by opting for the “lesser” punishment; and
- It will seriously interfere with and unjustly impair the court’s discretion as far as sentencing is concerned.

Conclusion

- **Serious consideration** should be given to the **amendment** of section 112(1)(a) to read: “...or of a fine exceeding the maximum amount determined by the Minister from time to time...”
- Determination of admission of guilt fines for common law crimes should be revisited by all role players.