THE JUDICIAL OFFICER

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FROM THE EDITOR:

This is the 3rd electronic edition of **The Judicial Officer**. I want to thank everyone who has submitted articles for publication and also Ron Laue who assisted me with 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.

BRIEF NOTES ON FINANCE CHARGES, COSTS, CHARGES AND FEES: LEGISLATION OLD AND NEW

Franz von Reiche
Additional Magistrate, Pretoria

INTRODUCTION

The National Credit Act, 2005 (Act 34 of 2005: 'the National Credit Act') finally became of full force and effect on 1 June 2007. It brought with it a number of sweeping changes. The purpose of the discussion that follows is not primarily a scholarly dissertation but to alert fellow judicial officers when considering cases where interest and charges are claimed under the National Credit Act and also under repealed legislation which continues to apply by virtue of the transitional provisions of the National Credit Act.

DISCUSSION

Of great importance for this discussion is section *4(2) of Schedule 3* (being the transitional provision) of the National Credit Act. *S*ection *4(2)* provides as follows:

> **'***The provisions of this Act referred to in the first column of the following table apply to a pre-existing credit agreement only to the extent indicated in the second column of the table.'*

'Pre-existing credit agreement' is defined in section 1 of the said Schedule as **'***an agreement that was made before the effective date, and to which this Act applies.'* In its turn **'***effective date'* in the same Schedule 3 is defined to mean **'***the date on which this Act, or any relevant provision of it, came into operation in terms of section 173'*

Section *173* is titled *'Short title and Commencement'* and reads as follows:

'*This Act is called the National Credit Act and comes into operation on a*

date fixed by the President by proclamation in the Gazette.'

Relevant for present purposes is the last item of the first column of the aforesaid table which refers to Part C of Chapter 5. In the adjacent second column of the table it is stated that Part C of Chapter 5 does not apply to pre-existing agreements, but subject to sub item (3). Sub item (3) in its turn relates to a duty to render to consumers statements, documents and returns which fall outside the scope of the discussion. Part C in the National Credit Act prescribes consumers' liability for interest, charges and fees.
The discussion focuses primarily on the legislation relating to interest and charges in certain agreements concluded before 1 June 2007 to which the National Credit Act applies, excepting the aforesaid Part C of Chapter 5.

Past experiences taught me to be alert and that the provisions of prior legislation relating among others to the charging of interest in agreements was not always adhered to by the parties and/or kept in mind by attorneys when parties resorted to the court to enforce prior agreements entered into between the parties. A few examples are provided of matters considered by me where agreements were concluded before 1 June 2007.

Agreements concluded before 1 June 2007

(1) On 22 January 2004 I did the motion court roll. An application for summary judgment under case number 142915/2003 served before me. I noticed in one of the prayers that finance charges were claimed at an annual rate of 50% per annum on the capital amount of R500000, 00.The aforementioned finance charge rate of 50% per annum was also embodied in a written agreement. It was evident that the interest that was charged was way above the maximum statutory interest rate of 19% per annum that would apply to the transaction. In this regard the *Usury Act, 1968* (Act 73 of 1968 – the 'Usury Act') provides in section *2(1) (a)* as follows:

'No money lender shall in connection with any money lending transaction stipulate for, demand or receive finance charges at an annual finance charge rate greater than the percentage determined by the Registrar by notice in the Gazette in accordance with the directions of the Minister'

Section 17 of the aforesaid Act makes any contravention thereof punishable as a criminal offence.

In view of these considerations I enquired of the plaintiff's attorney on what basis the court could sanction a criminal offence. The plaintiff's attorney asked for an amendment of the pleadings to allow only for a claim of 19% per annum (being the statutory maximum interest at the time).

Judgment was accordingly handed down for payment of an amount of R500000, 00 with interest thereon at the rate of 19% per annum from 1 June 2003 till the date of payment, and costs to be taxed.

(2) A request for default judgment which I considered claimed payment of an amount of R100000,00, interest thereon at the rate of 15,5% per annum from the date of judgment and costs of R595,38.

Analyzing the written agreement to which the maximum interest rate of the Usury Act applied, I was dumbstruck when I realized that the interest rate claimed was far in excess of the maximum rate which applied to the loan agreement. By virtue of the provisions of Government Gazette No. 29661 dated 26/2/07 the formula applicable to loan amounts in excess of R10000,00 was the Reserve Bank Repo Rate (which was 9% at the date of repayment of the loan in question) +1/3 thereof +8% which gave a rate of 20%. [*Note*: Section 5 of Schedule 3 of the National Credit Act provides that the maximum annual finance charge rate set in terms of the Usury Act, 1968 (Act No.73 of 1968), which is in effect immediately before the effective date, continues in force despite the repeal of that Act, as the maximum interest rate until the Minister first prescribes a maximum rate of interest in terms of section 105]. In the loan under consideration here the debtor

was required to pay R15000.00 per month on the loan amount of R100000, 00 which amounted to an interest rate of 15% per month or 180% per annum. The effect of this if allowed to go unnoticed, was that the plaintiff would have recovered interest at a rate of nine times the allowed interest rate! After a recalculation was done at the reduced rate and taking into account that the debtor had made payments totaling R24000, 00 the claim amount was reduced to R81000, 00. Judgment was accordingly granted for the claim amount of R81000, 00 with interest at the rate of 15.5% per annum and costs. A huge difference of R19000, 00 on the capital claimed and interest on the reduced amount which meant significantly less interest that had to be paid by the debtor.

The above two examples were given to illustrate the potential grave effects and injustices that can result if unlawful claims are upheld in judgments.
In my opinion the enactment of the new National Credit Act in itself is no guarantee that the rights of consumers will be adequately upheld and protected, unless judicial officers are astute and vigilant in applying the legal provisions prudently and carefully.

Of late civil magistrates are inundated (especially at larger centres) with default judgments since the commencement of the National Credit Act. The reasons for this are at least twofold. *Firstly* the National Credit Act applies to a far greater number of transactions than did the now repealed Usury Act and the *Credit Agreements Act, 1980* (Act 75 of 1980 'the Credit Agreements Act'). The latter Act, broadly speaking, applied only to the lease and hire purchase of certain movable things and categories of such agreements as specified by a Minister in the Gazette. *Secondly* the interpretation of rule 12(5) of the *Magistrates' Court Act, 1944* (Act 32 of 1944 'the Magistrates' Courts Act) which requires, in terms of the *Interpretation Act, 1957* (Act 33 of 1957 'the Interpretation Act'), that the reference in the said sub rule to the repealed Credit Agreements Act shall now be held to refer to the National Credit Act. (See also Visagie T "Collecting your debts against all odds" 2006 *De Rebus*). The effect of this construction is that all

requests for judgment in which the claim is founded on any cause of action arising out or based on an agreement governed by the National Credit Act shall be referred to the court by the clerk of the court. In my opinion, this interpretation accords with a basic rule of interpretation and will have to be followed (even bearing in mind the increased workload on magistrates) until such time as amendments are effected to the National Credit Act and the rules of court to the contrary.

Recently I have received quite a number of requests for default judgments, where the cause of action is stated to be money - lending transactions , invoking the provisions of the National Credit Act; among other things and providing proof that the provisions of sections 129 and 130 have been complied with and, where applicable, that reckless credit has not been granted; that the plaintiff has no knowledge of any debt review proceedings and that the credit receiver did not react to the section 129 letter or rejected it and that the prescribed time has lapsed. These allegations would ordinarily be *prima facie* sufficient and necessary to satisfy the judicial officer that there has been due and proper compliance with the provisions of the National Credit Act. However, to my astonishment, in quite a number of matters the summonses failed to disclose the initial loan amounts (refer to the mandatory statutory prescripts of rule 6(3) (a) (i) of the Magistrates Courts Act referred to below), the dates when the agreements were entered into (being of paramount importance, since, as was illustrated before, provisions of repealed legislation apply to agreements before the effective date, among other things, as to the maximum interest rates recoverable etc), the interest rate agreed upon, the general conditions applying to the loan, the terms of repayment, the actual amounts and dates of repayment by the debtors and failing to state whether the agreements entered into between the parties were oral or written. Accordingly, it was not possible for me to consider the matters properly in the light of the omissions referred to and the fact that a legal basis for a prayer for interest was omitted in the summons itself. In the latter instance, disregarding the mandatory prescripts of rule 6(3) (a) (ii) of the

Magistrates' Court Act, which compels the endorsement of the rate of interest claimed resulted in all such matters being referred to the plaintiffs or their attorneys with queries.

In quite a number of matters I have found that plaintiffs have endeavoured to claim interest to which they were not entitled to (the same having been capitalized) and they then wrongly try to recover all under the provisions of *The Prescribed Rate of Interest Act,1975* (Act 55 of 1975). For present purposes section 1(1) needs to be cited. It reads as follows*:*

"(1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise."

When considering claims it is of obvious importance that section 1 and the other provisions of the last mentioned Act must be considered and applied if found to be applicable. Section 1(1) will of course not apply if a trade custom or another law prescribes interest at a named rate or the parties in an agreement have agreed to a certain rate of interest or have agreed that the debt in question does not bear interest at all. Presently the interest rate (prescribed under section 1(2)) that has been fixed by the Minister in the Gazette still stands at 15, 5% per annum.

BRIEF REVIEW OF REPEALED LEGISLATION

SCOPE

Since the *Usury Act*, the exemptions under the provisions of the *Usury Act* and *the Credit Agreements Act* apply fully as regards interest and charges, as outlined above, it is appropriate to provide a basic background of the Acts in question in the discussion that follows. It would simply be possible, given the scope of the discussion, to refer to previous legislation in passing only, but judicial officers' tasks have been made more difficult when considering "pre-existing agreements" in claims where summonses have been issued after the National Credit Act became fully operative. The reason being that summonses now deal at some length with the said Act: stating that the Act applies or does not apply and if the Act applies to deal at some length with its provisions and averring compliance, but in many cases failing to give details of "pre-existing agreements" concluded before the effective date and failing to state that the Usury Act (or exemptions therefrom in terms of section 15A thereof) applies or not and/or that the Credit Agreements Act applies or does not apply and the reasons for not applying. A judicial officer would fail his or her duty not to require details and the written agreement if the pre-existing agreement was in writing or full details (preferably in the summons) to determine if the aforementioned legislation applies wholly, partially or not at all. (Refer to example (2) above where I would not have been able to deal with the matter judiciously had I not had the agreement to analyze and realize that the claim was excessive and not legally in order as regards capital and interest). It is important to note that non-compliance with previous legislation can result in a party to an agreement forfeiting protection in terms thereof. To furnish but one example with reference to the Usury Act: Section 2(9) of the Act prohibits any person subject to the provisions of sections 4, 5 and 5A in a money lending transaction or a credit transaction or a leasing transaction to stipulate for, demand or receive from a borrower or credit receiver or lessee finance charges not disclosed in an

instrument of debt.

An important matter that requires a discussion, albeit briefly is the *in duplum* rule before and after the National Credit Act. This rule which forms part of our common law places a ceiling on the maximum interest that may be recovered by a creditor from a defaulting debtor in respect of arrear and unpaid interest and provides that unpaid interest stops running once unpaid interest equals unpaid capital. Once the debtor resumes payment the money is applied to the unpaid interest, but in the event of a further default, the arrear interest once again accumulates but stops when it reaches the amount of the unpaid capital. The purpose of the rule is to protect debtors and is in its operation not restricted only to the Usury Act and money lending transactions, but applies to all agreements where a capital amount subject to a fixed interest rate, is owing. (*Standard Bank of SA Ltd v Oneanate Investments (Pty)Ltd 1995 (4) SA 510 (C), Ethekwini Municipality v Verulam Medicentre (Pty) Ltd [2006] 3 ALL SA 325 (SCA); and LTA Construction Bpk v Administrateur,Transvaal 1992 (1) SA 473 (A) at 482F and 482 I— 483 A*).This rule's ambit was significantly extended by the National Credit Act (section 103(5)) to include, apart from unpaid interest, also unpaid initiation fees, service fees, credit insurance, default administration charges and collection costs. It is however important to note as was set out before, that the *new in duplum* rule of the National Credit Act will not apply to all agreements entered into before the effective date. [Refer to *section 4(2)* of *Schedule 3* of the National Credit Act discussed *supra].* In all the last mentioned cases the *in duplum* rule will apply fully in its unamended form, as well as to all agreements entered into after the effective date to which the provisions of section 103(5) of the National Credit Act do not apply.

THE USURY ACT

In the long title of the Act the following aims and purposes are set forth:

"To provide for the limitation and disclosure of finance charges levied in respect of money lending transactions, credit transactions and leasing transactions and for matters incidental thereto; and to repeal the Usury Act,1926

As is apparent from the long title the Usury Act is concerned with three kinds of transactions. The basic structure that underlies each of the three types of transactions are made up of certain concepts which are precisely defined in the Act and which are the principal debt (or reduced principal debt in credit transactions or leasing transactions where cash amounts, the reasonable value of goods and/or the present value of the book value of the leased property have been deducted) finance charges, the annual finance charge rate, the amount in rand and cents of the finance charges calculated at the annual finance charge rate on the principal debt, variable finance charge rate, non-variable finance charge rate and the number of instalments in which the principal debt with finance charges must be paid, including the amount and date of each instalment to be paid. The Usury Act has a wider scope than the Credit Agreements Act and also includes a third transaction not dealt with in the last mentioned Act, namely a "money lending transaction." Section 15 of the Usury Act excludes the application of the provisions of the Act partially or wholly from the three types of agreements (also as to the maximum allowed as the principal debt in each of the three) in the Act, and certain other transactions referred to, and excluding the Land and Agricultural Bank of South Africa and the South African Reserve Bank from its operation.

In my opinion it is of paramount importance to carefully regard the items that are allowed in the principal debts of the three types of transactions referred to when considering claims (even in matters where summonses were issued after the effective date in view of the transitional provisions referred to herein before) since the items allowed are exhaustive or a *numerus clausus*. In fact my experience has been in a substantial number of cases laid before me, where the repealed Acts still apply, that items are included in agreements for which no provision was

made and indeed being unlawful. To mention but a few: Items [in many cases running into a few thousand Rands or more if simultaneously charged in the same agreement], such as *"administrative fees"," processing fees"*, *"extended guarantee"* or referred to as *"extended warranty"* [this item relates to a guarantee or warranty given by a credit grantor in respect of movables extending beyond the term of the contract]. Since the definition of *credit transaction* in the *Credit Agreements Act* requires the providing of a service against payment it is clear that an extended guarantee requires payment before the providing of the service and is therefore not sanctioned by the said Act. Furthermore, the recovery of finance charges on this item would be in contravention of *section 2(6) (c) of the Usury Act*] and *"documentation fees".* The last item needs to be considered and discussed in view of the allowing of attorney's costs in the preparation of documentation in the definition of *"principal debt"* in all three types of agreements in the Usury Act. Since the basic wording in this cost item corresponds in all three types of agreements only the one appearing in the definition of principal debt in a money lending transaction is cited, which reads as follows:

"the costs actually paid by the moneylender to a person who practices as an attorney on his own account or as a partner in a firm of attorneys or as a member of a professional company in respect of the preparation of the documents, including the instrument af debt in question and other documents for the security of the loan, embodying the money lending transaction in question."

Since the preparation of the documents has in mind the *"security of the loan"* in a *money lending transaction* or the *"security of the debts"* in respect of a *credit transaction* and a *leasing transaction*, I do not allow this item in the absence of proof that such costs were actually paid by the moneylender and others to an attorney for actual work done in the preparation of documents in each and every transaction laid before the court.

In quite a number of matters that were presented to me as requests for default

judgements (mostly based on credit agreement transactions), I noticed that the plaintiffs attempted to recover in statements of account an item described as “legal costs”; being, apparently, legal costs incurred before plaintiffs instituted action against defaulting debtors. Legal costs (which the plaintiff has incurred before instructions were given to institute legal proceedings are in conflict with the provisions of *section 5(1)(e)(ii)* of the *Usury Act* which prohibits a court from granting judgment for costs which include *”such legal costs [which] shall not include any costs incurred by or on behalf of a moneylender or a credit grantor or a lessor before the instructions to institute legal proceedings for the payment of such principal debt or finance charges were given.”*

Recently I dealt with a matter laid before me as a request for default judgment. Summons was issued in terms of the National Credit Act, but based on a pre-existing credit agreement. Contractual damages were claimed with reference also to the greatest of the value of the vehicle or its selling price. In the statement of account setting out the basis for arriving at the claim amount, I noticed that finance charges were charged for the whole period, whereas the initial contractual period had not yet expired. The plaintiff was entitled to claim interest only for the expired period (and not also for the unexpired period). Authority for this is the case of *Ex parte Minister of Justice 1978 (2) SA 572 (A).* [Note**:** Although the aforesaid decision dealt with the effect of an acceleration clause in a money lending transaction under the Usury Act, which had the effect of anticipating the agreed date of payment of the whole debt, and consequently decreasing the period for which finance charges in terms of section 5(1)(c) read with the definition of “finance charge rate per period” of the Usury Act had to be calculated, it is submitted that the principles laid down apply equally to determine the finance charges payable in respect of the reduced period, after cancellation of a credit transaction and a leasing transaction since sections 5(1) and 5(1)(c) equally apply to all three types of transactions dealt with in the Usury Act.]

Next, an attempt is made to summarize the definitions of principal debts found in

the *Usury Act* [judicial officers are obviously advised to always resort to the Act itself and not to rely on a summary alone.]

Principal debt in a *money lending transaction* constitutes “the cash amount in money actually received by or on behalf of a borrower in terms of the said transaction” and, among other things, where the money loan is wholly or partly secured by a mortgage bond over immovable property or a notarial bond over movable property and the moneylender, being authorized by a written agreement with the lender*, pays or is liable to pay* legal costs to have a bond registered, taxes, other fiscal charges and license fees and any compulsory charge actually paid or to be paid to a body corporate of a sectional title scheme by a moneylender in respect of the property concerned charges and premiums of a short term insurance against loss or damage in respect of the immovable property in question (including certain fees and premiums where a housing loan is involved), premiums of a policy on the life of the lender which policy is ceded to the moneylender, premiums on short term insurance against loss or damage of movable property which serves as security for the repayment of the loan, amounts expended in respect of fiscal charges, stamp and transfer duties, costs actually paid to an attorney preparing documents such as the instrument of debt and documents for the security of the loan embodying the money lending transaction and where the money loan is not secured by a mortgage or notarial bond the taxes, charges, fees and premiums of a similar kind as referred to above and applying to secured property both movable and immovable.

Principal debt in a *credit transaction* constitutes “the selling price of movable property or services or, if applicable, the difference between the selling price of movable property or services and the cash amount in money paid or to be paid or the reasonable value, agreed upon, of goods delivered or to be delivered by the credit receiver to the credit grantor for application in reduction of the selling price” or; and then another definition is given which is not repeated and where the use or enjoyment of movable property or services comes into play; and then follows a

list of items, similar to that under the foregoing definition, which can be gleaned and is not repeated.

Principal debt in a *leasing transaction* constitutes “the difference between the cash price at which the movable property leased in terms of such transaction is normally sold by the lessor on the date on which such transaction is entered into, or where the lessor is not a trader normally selling any such movable property, the market value of such movable property or, when applicable, the money value determined in terms of section 6K in respect of such movable property; and *the sum of* (i) the cash amount in money paid or to be paid on the date of such transaction by or on behalf of the lessee to or on behalf of the lessor, a*nd* (ii) the reasonable value agreed upon of property delivered or to be delivered by the lessee to the lessor for application in reduction of the cash price, market value referred to in (i) above; *and (iii)* the present value of the book value of the property leased in terms of such transaction plus; and then follows a list of items, similar to that under the definition of principal debt of a money lending transaction referred to above and is also not repeated.

The definition of ”principal debt” in the three types of agreements is of paramount importance since only the limited number of items provided for in the Usury Act may legally be recovered and no other. It has already been pointed out that it constitutes a so called *numerus clausus* or an exhaustive list. Should an item(s) be wrongly and illegally included in the “principal debt” it not only means that there is an over recovery in this regard but also that the total amount of finance charges at the annual finance charge rate on the principal debt will also be incorrectly calculated. A judicial officer would therefore be perfectly entitled to refer such matters [where the principal debts were wrongly determined] back for recalculations.

Exemptions of categories of money lending transactions in terms of section 15A of the Usury Act

Government Notice R713 of 1 June 1999 made provision for a category of money lending transactions which, but for sections 13,14 and 17A of the Usury Act, excluded the operation of the said Act to a named category of money lending transactions [these loans were referred in lay terms as micro loans or micro financing]. Certain definitions, rules and conditions [and due to the scope of the discussion not cited *verbatim*] were laid down and which had to be adhered to, to the letter, to avoid the Usury Act becoming applicable to such a "micro loan." Among other things the loan amount was not to exceed R10000, 00, the entity concluding the money lending transaction had to be registered with a regulatory institution and all the rules laid down in annexure "A" which related to among other things, to confidentiality, disclosure requirements in the agreements and so on were strictly adhered to. Extremely important was the provision of section 3.2 of the notice [which in the definition also included all the requirements laid down in annexure "A"], which provided that in the event of such a loan falling within the ambit of the notice, failed to adhere to the conditions of the notice, then it would result in the Usury Act,1968 becoming applicable to the transaction in question. The effect of this simply was that, if a lender failed to adhere to any one of the conditions then the Usury Act became applicable.

The aforesaid Government Notice was repealed and replaced by Government Notice 1406 of 8 August 2005. Among other things this Notice made provision for lenders to charge higher interest rates than allowed for in the Usury Act, provided that they were registered with the Micro Finance Regulatory Council [the "MFRC"] and they *complied with in all respects* [my emphasis] with the provisions of the Notice. Should a lender thus fail to comply with any one condition it would then result in the Usury Act becoming applicable to the transaction in question.

Frankly, in my experience so far, I do not recall one matter laid before me, among the many where “micro loans” were claimed in summonses [despite the fact that lengthy averments were made therein that an exemption notice applied and all the conditions were complied with by the plaintiffs! (“micro lenders”)], that proper proof was provided that the plaintiff was entitled to an exemption under the Usury Act.

My plea to judicial officers once again would be to critically examine “micro loans” claimed in summonses under the National Credit Act, and to require proof that all conditions of the applicable exemption Notice have been met and in the absence of which to apply the provisions of the Usury Act.

THE CREDIT AGREEMENTS ACT

In the long title of the Act the following aims and purposes are set forth:

“To provide for the regulation of certain transactions in terms of which movable goods are purchased or leased on credit or certain services are rendered on credit; for the repeal of the Hire Purchase Act,1942; and for incidental matters.”

Perhaps the two most important definitions in the Act for purposes of the discussion are *“instalment sale transaction”* which reads as follows:

“a transaction in terms of which- (a) goods are sold by the seller to the purchaser against payment by the purchaser to the seller of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future; and
(b) the purchaser does not become the owner of those goods merely by virtue of the delivery to or the use, possession or enjoyment by him thereof; or
(c) the seller is entitled to the return of those goods if the purchaser fails to comply with any terms of that transaction” ;and *“leasing transaction”* which reads as follows:
“a transaction in terms of which a lessor leases goods to a lessee against

payment by the lessee to the lessor of a stated or determinable sum of money at a stated or determinable future date or in whole or in part in instalments over a period in the future, but does not include a transaction by which it is agreed at the time of the inclusion thereof that the debtor or any person on his behalf, shall at any stage during or after the expiry of the lease or after the termination of that transaction become the owner of those goods or after such expiry or termination retain the possession or use or enjoyment of those goods."

In law the prime distinction between the two transactions is that in the first one ownership is retained by the seller during the duration of the transaction [the so called *pactum reservati domini*], but is transferred to the purchaser on satisfying the debt in full whereas in the last mentioned ownership is never to be transferred to the lessee, but remains with the lessor throughout; also after the conclusion of the lease. It is submitted that this clear distinction is blurred in the National Credit Act since in the definition of "lease" provision is made for the passing of ownership at the end of the lease absolutely to the lessee, or after the satisfying of certain specified conditions.

It is left to judicial officers to scrutinize the provisions of the Act and regulations promulgated in terms thereof when considering whether a pre-existing agreement is governed by its provisions or not.

In quite a number of matters (received as requests for default judgements) where summonses were issued in terms of the National Credit Act, I noticed that claims were for "goods sold and delivered" without giving any details of the agreements, among other things, the dates entered into (which made it impossible to ascertain if it is a pre-existing agreement to which the Credit Agreements Act applied or not), all the conditions of the agreements, whether orally and/or in writing and in the event of it being in writing failing to append the agreements (originals).The matters were accordingly referred back with detailed queries. In some of the matters, I noticed that the plaintiffs appeared to (with reference to their names) to

be in the retail furniture business which gave me reason to suspect that they attempted to enforce instalment sale agreements under the banner of the National Credit Act without complying with legal requirements of prior legislation.

ETIQUETTE IN MAGISTRATES' COURTS: GENERAL REMARKS AND USEFUL HINTS

Andre Dippenaar
Additional Magistrate Vredenburg

It is not without a bit of uneasiness that I would like to share some thoughts and ideas on this topic with you. I anticipate that my efforts might be construed as being prescriptive or be met with skepticism as being the ideas of a "Mr Know it All."

Furthermore, I will readily concede that what will follow might also be construed by some of you as dealing with Judicial Ethics rather than Etiquette, but the line between the two concepts is sometimes thinner than a condom – so bear with me!

Just as a matter of interest: The Little Oxford Dictionary [3d revised edition] defines:

Ethics **:** As *"moral principles"* [Therefore, "Judicial Ethics" establish standards for ethical conduct of magistrates on and off the bench –see Code of Conduct for Magistrates]

Etiquette: As *"conventional rules of manners : unwritten code of professional conduct"* [Therefore, "court etiquette" refers to the manner in which magistrates are expected to conduct themselves in court, how the proceedings should be conducted as well as their own conduct towards persons in court]

I might be wrong, but I have a gut feeling that Judicial Veterans [like myself] have fallen into a "Comfort Zone Trap" whilst newcomers to the Bench experience difficulty in embracing their "anointment" and sudden, newly, bestowed "independence" – hence the reason for a need to revisit the basics.

It is also common cause that Magistrates' style and preferences will differ from person to person – so what follows is derived from my own personal style and almost 30 years' experience on the bench in an honest effort to give you some food for thought and valuable tips to take back to the bench.

The Judiciary is facing trying times and has become the target of mud-slinging as well as what could be described as well deserved criticism. Unfortunately, even some of our supposed role models are not role-modeling at present. Therefore, we as Lower Court Judicial Officers should do some soul searching and set the example.

My point of departure is that everything that forms part of Court Etiquette, upholding the decorum of the court and enhancing efficiency can be traced back as far as 1943. An extract from the *American Bar Association Journal* reveals the following ever-golden rule:

"*One of the most important concerns of any judiciary is its right relations with the public. No court can satisfy the public need for faith in the processes of justice, or can function with the highest efficiency without the support of public confidence. The public gains its impressions of federal [read lower] courts, not so much by what it knows of the supreme court…., as from its first-hand acquaintance with what goes on in the district courts. For it is there that the average citizen who comes to court, as witness or suitor, sees with his own eyes how justice is administered. And so it is that the district courts are peculiarly the guardians of the right relationship between the federal courts and the public. That relationship is always strengthened by judicial punctuality, by dispatch in the handling of business, by dignity of judicial conduct and procedure and by firmness tempered by courtesy in the contacts of judges [read magistrates] and court officials with the public. These should be the attributes of courts as they are said to be of kings*" [SALJ 60 1943 205 at 206].

It is against this background that I would like us to do a bit of self-evaluation and

reconsider our role as Magistrates, our relationship with the Prosecuting Authorities, as well as all other role players who appear before us on a daily basis.

THE MAGISTRATE:

As long ago as 1960 Steyn CJ in *R v Pitje* 1960(4) SA 709 (A) at 710 in his wisdom remarked: "*A magistrate, like any other judicial functionaries, is in control of his* [or her] *courtroom and the proceedings therein. Matters incidental to such proceedings, if they are not regulated by law, are largely within his* [or her] *discretion.*"
I do not intend to deal with "matters……regulated by law" because I'm afraid I will undoubtedly reveal my ignorance. I'd rather concentrate on incidental matters.

The *Pitje* decision therefore dictates, as only reasonable inference to be drawn [A la *S v Blom* 1939 AD 188], that the Magistrate is at all times obliged to ensure that court proceedings are conducted in accordance with "unwritten codes of professional conduct and moral principles". In order to do so, it is imperative that we must:

1. Set the example to, at all times; conduct ourselves with dignity and integrity;
2. Refrain from bringing our bad mood swings into the courtroom and consciously guide against temptation to let our temper get the better of us and be reflected in our behaviour and attitude on the bench;
3. Be punctual;
4. Cherish judicial non-alignment;
5. At all times treat legal practitioners, prosecutors, accused, witnesses, court personnel and members of the public with courtesy;
6. Exercise patience and self-control;
7. Guide and train lawyers, prosecutors and other officers of the court and

court orderlies - even issuing instructions to them - to avoid incidents which might create the impression of disorganization;

8. Refrain from reprimanding prosecutors, legal practitioners, other officers of the court, court orderlies or investigating officers in open court for failing to perform their duties properly;
9. Make popularity subservient to our function and vocation as presiding officers and act without fear, favour or prejudice but with justness and strictness [if necessary], towards all and sundry who happens to appear before the judgment-seat;
10. Guide against the temptation to deliver judgments which will locally be popular and applauded instead of being based on principles of law and the evidence adduced;
11. Refrain from unnecessary remarks or comments from the bench which might lower the dignity of the court.

Langenhoven: " *Al verdien 'n man dit nie, eer hom na sy posisie. Dis al genoeg dat hy die posisie oneer aandoen."* May it never be said about Magistrates!

THE PROSECUTOR:

Van Zyl J, in *S v Rothman* 1971(1) SA 332 (K) at 334 remarked: "*The office of prosecutor is an independent position and is in no way subservient to the bench. The bench has no rights to give any instructions to the* prosecutor."

This independence has since been guaranteed by the promulgation of the National Prosecuting Authority Act, No. 32 of 1998 and we as Magistrates are therefore also by law now obliged to respect the Prosecuting Authority's independence.

Etiquette does not, however, dictate refraining from addressing behaviour in court which is unacceptable according to normal values and standards.

Therefore, I would like to argue, Presiding Officers have a moral and judicial duty, as matters incidental to proceedings, to guide, inform and train Prosecutors [as well as other officers of the court] to follow etiquette at all times.

In order to do just that, Prosecutors should constantly be reminded that:

1. They should not leave their designated desks in court during court proceedings unless it is absolutely necessary and then only with permission of the Magistrate;

2. They should, under no circumstances, perform duties of court orderlies e.g. calling witnesses, accused or try to keep order in court;

3. They must see to it that court proceedings start at 09h00**;**

4. They should refrain from conversations [even whispered communication] during court proceedings with lawyers, court orderlies or other court personnel unless it is absolutely necessary and then only with permission of the Presiding Officer;

5. In matters where they need investigating officers/expert witnesses to assist them during court proceedings, for whatever reasons, permission must be requested from and granted by the Presiding Officer;

6. They should refrain from the ghastly habit of personally handing documents etc. to witnesses during the course of the proceedings;

7. They should, like Magistrates, always treat witnesses, lawyers, accused, other officers of the court and members of the public with courtesy and respect and at all times act professionally so as to uphold the decorum of the courts;

8. They should absolutely refrain from the disturbing habit of exchanging notes with lawyers/court orderlies during proceedings or trying to attract the latters' attention by waving dockets or notes! If need be, they should request the Magistrate to permit them to converse with those parties;

9. They must remember that the status of *dominus litis* does not bestow upon them control of court proceedings – in the latter instance they are subservient to the bench!

LEGAL REPRESENTATIVES:

The lack of professional conduct [Etiquette] displayed by some attorneys [and even advocates] operating in Magistrates' courts, should, like in the case of prosecutors, be addressed by Presiding Officers in a tactful fashion.

Magistrates should guide them – as well as lead by example – in adhering to incidental matters such as:

1. To be punctual

2. Not to pay visits to the prosecutor when court sessions have already begun;

3. To refrain from leaving their designated desks without permission of the Presiding Officer and then only if absolutely necessary;

4. To refrain from conversations with their peers and the prosecution during court proceedings;

5. To organize remands/trial dates prior to the start of court proceedings;

6. To, at all times, act professionally and treat witnesses, prosecutors, other

officers of the court with courtesy and respect – thus enhancing the decorum of the courts.

COURT ORDERLIES:

Are also officers of the court and a vital component of the complete court set up. Unfortunately, these “underdogs” are more than often treated with disrespect. Firmness and tactfulness is often appropriate to according them the dignity that they are entitled to.

I would however like to argue that, once they have been sensitized about etiquette and ethics, Magistrates would be pleasantly surprised as to the value they can add in ensuring that court proceedings are conducted in accordance with the unwritten code of ethical behaviour.

Colleagues, take a little time off to train, guide and empower them in respect of the following issues:

1. To see to it that members of the public enter the court in an orderly fashion before commencement of and during proceedings;

2. Removing people, causing a nuisance or disturbance, from the courtroom by order of the Presiding Officer;

3. To refrain from conversing with prosecutors etc. during court proceedings;

4. To refrain from walking around in court during proceedings unless it is absolutely necessary;

5. To accompany the Presiding Officer to Court and call the public and other role players to order when the Magistrate enters - in such a way that it is conducive to upholding the decorum of the Court;

6. Not to be abused as errant runners for Prosecutors etc.;

7. To treat everybody, especially accused persons, witnesses and members of the public with courtesy and respect.

INTERPRETERS AND RECORDING MACHINE OPERATORS:

Are also officers of the court and what has been said in respect of prosecutors, attorneys and court orderlies also applies to them as far as their specific tasks are concerned.

INVESTIGATING OFFICERS, MEMBERS OF THE SAPS, MEMBERS OF DCS, TRAFFIC OFFICERS, OTHER MEMBERS OF THE OFFICE STAFF etc.:

They are not officers of the court and should not be afforded preferential treatment.

Magistrates should:

1. Under no circumstances allow them to take up position in the “arena” – which is reserved for court personnel and officers of the court only;

2. Under no circumstances allow them to pay visits to, and converse with, prosecutors and other personnel or officers of the court during court proceedings;

3. See to it that they take up their positions in the public gallery like members of

4. the general public attending court proceedings;

5. Under no circumstances allow them to perform duties designated to court personnel eg court orderlies.

General

The matters listed herein are not exhaustive by any means. The appropriate form of addressing the Bench, witnesses and accused persons, appropriate court attire; the use of cell phones; reading newspapers, eating and drinking or sleeping in court and the like are but some of the many additional examples that come to mind when considering what is incidental to controlling proceedings. Social context may also be an important factor to consider.

Langenhoven: "*Doen* wat *reg is en jy sal baie stampe kry, maar nie in jou gesig nie"*

LOWER COURTS IN SOUTH AFRICA

M E Kubone
Acting Magistrate, Chatsworth

INTRODUCTION

This article seeks to provoke debate about the integration of the magistrates', regional division and divorce courts into a single court.

OVERVIEW

The magistrates' courts are established in terms of the of the Magistrates' Courts Act[1] and have criminal[2] and civil[3] jurisdiction. The regional division courts are also established in terms of the Magistrates' Courts Act[4] and have only criminal jurisdiction[5]. They were created in order to relieve the then Supreme Courts of criminal court work.[6] The divorce courts owe their existence to an Administration Amendment Act[7] and deal with divorce and matters related thereto. The previous divorce courts dealt with divorce matters of Blacks as defined by the now repealed Section 2 of the Black Administration Act.[8] The existing divorce courts are open to all.[9]

THE CONSTITUTION

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[1] Act No. 32 of 1944 (formerly Act No. 32 of 1917)
[2] Chapter X11 Act No. 32 of 1944
[3] Chapter V1 Act No.32 of 1944
[4] Ibid (initially in terms of Section 2 of Act No. 40 of 1952)
[5] Chapter X11 Act No. 32 of 1944
[6] Union of South Africa House of Assembly Debates: Volume 79: 5th Session : 10th Parliament : 12th May – 6th June 1952 : page 6915
[7] Section 10 Act No. 9 of 1929
[8] Act No. 38 of 1927
[9] Section 3 Divorce Courts Amendment Act 65 of 1997

Section 166 of the Constitution reads:[10]

The Courts are:

" a) the Constitutional Court;

b) the Supreme Court of Appeal;

c) the High Courts, including any High Court of Appeal that may be established by an Act of Parliament to hear appeals from High Courts;

d) the Magistrates' courts ; and

e) any other court established or recognized in terms of an Act of Parliament, including any Court of a status similar to either the High Courts or the Magistrates' Courts."

CRIMINAL JURISDICTION ; MAGISTRATES' AND REGIONAL DIVISION COURTS

The maximum penal jurisdiction of the magistrates' and regional division courts respectively, was initially as follows :

a) imprisonment for a period not exceeding six months[11] or a fine not exceeding fifty pounds[12].

b) imprisonment for a period not exceeding three years[13] or a fine not exceeding three hundred pounds[14].

[10] The Constitution of South Africa Act No. 106 of 1996
[11] Section 89 (1) (a) Act 32 of 1944
[12] Section 89 (1) (b) Act 32 of 1944
[13] Section 21 (b) Magistrates' Court Amendment Act No. 40 of 1952

and is currently as follows:

c) imprisonment for a period not exceeding three years[15] or a fine not exceeding sixty thousand rands[16].

d) imprisonment for a period not exceeding fifteen years[17] or a fine not exceeding three hundred thousand rands[18].

CIVIL JURISDICTION : MAGISTRATES' COURTS

The maximum civil jurisdiction in respect of amount in dispute was initially two hundred pounds[19] and is currently one hundred thousand rands.[20]

DIVORCE COURTS

The divorce courts are accessible to all population groups[21] and are situated at certain magistrates' offices. They have the same jurisdiction as any High Court in relation to divorce actions and matters related thereto.[22]

INCREASED PENAL JURISDICTION OF MAGISTRATES' COURTS

Section 92 (1) (a) and (b) of the Magistrates' Courts Act[23] lays down the general maximum criminal jurisdiction of magistrates' courts. The repealed Magistrates'

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[14] Section 21 (c) Magistrates' Court Amendment Act No. 40 of 1952
[15] Section 92 (10) (a) Act 32 of 1944
[16] Government Notice No. 19435 Regulation 1411 dated 30/10/1998
[17] Section 92 (1) (b) Act 32 of 1944
[18] Government Notice No. 19435 Regulation 1411 dated 30/10/1998
[19] Section 29 (10 (b) Act No. 32 of 1917
[20] Jones and Buckle : The Civil Practice of the Magistrates' Courts of South Africa : 9th ed : Vol 1 : The Act : page 76A
[21] Section 10 (1) (a) Administration Amendment Act No. 9 of 1929
[22] Section 10 (1) (b) Administration Amendment Act No. 9 of 1929
[23] Act No. 32 of 1944

Courts Act[24] had a built in mechanism for increased jurisdiction. A number of Acts give the magistrates' courts increased maximum jurisdiction.

I will, for convenience refer to the maximum punishments which can be imposed by magistrates' court in terms of the following Acts:

a) [25] Use or possession of any dependence-producing substance is punishable with a fine or imprisonment not exceeding five years or both such fine and such imprisonment[26].

b) [27] Dealing in any dependence producing substance is punishable with a fine or imprisonment not exceeding ten years or both such fine and such imprisonment.[28]

c) Dealing in any dangerous or undesirable dependence-producing substance is punishable with a fine or imprisonment not exceeding twenty five years or both such fine and such imprisonment.[29]

d) Failing to stop a motor vehicle immediately after an accident and in the case of death or serious injury to a person is punishable with a fine or imprisonment not exceeding nine years.[30]

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[24] Section 92 Act No. 32 of 1917 –The magistrates' courts had jurisdiction to impose a maximum fine of one hundred pounds or imprisonment of one year in cases remitted by the Attorney-General
[25] Drugs and Drug Trafficking Act
[26] Section 17 (b) Act No. 140 of 1992
[27] Ibid
[28] Section 17 (c) Act No. 140 of 1992
[29] Contravening section 5 (b) read with section17 (e) Act No. 140 of 1992
[30] Contravening section 61 (a) (b) (c) read with section 89 (4) (a) of the National Road Traffic Act no. 93 of 1996

e) Negligent or reckless driving and where the court finds that the offence was committed by driving recklessly is punishable with a fine or imprisonment for a period not exceeding six years.[31]

I am tempted to refer to section 4 (1) of the Dangerous Weapons Act[32] which reads as follows:

"Whenever a person above the age of eighteen years is convicted of an offence involving violence to any person and it has been proved that he or she killed or injured such person by using a dangerous weapon or a firearm, he or she shall, . . . be sentenced to imprisonment for a period of not less than two years, and if he or she is so convicted by a magistrate's court, not exceeding eight years: *Provided that if the court is of the opinion that there are circumstances which justify the imposition of a lighter sentence than the punishment prescribed by this section, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lighter sentence on the person so convicted* : Provided further that in the case of a magistrate's court, such lighter sentence shall not exceed a fine of R40 000-00 or imprisonment for a period of two years."

The then Honourable Minister of Justice when introducing the Second Reading of the Dangerous Weapons Bill said:[33]

"This measure is an attempt at finding a solution for the reign of terror of the *KNIFE* which has particularly taken root in the Coloured and Bantu residential areas of the Peninsula and has reared its head on the streets of our mother city. . ."

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[31] Contravening section 63 (1) read with section 89 (5) (a) of the National Road Traffic Act
[32] Act No. 71 of 1968
[33] Republic of South Africa : House of Assembly Debates : 3rd Session : 3rd Parliament: 20 May-12 June
1968 page 7347

The magistrates' courts applied the Dangerous Weapon's Act, passed appropriate sentences and continue to do so in areas where it is still applicable.

It is common knowledge that the unprecedented level of crime led to the passing of the Criminal Law Amendment Act.[34] This Act is aimed at the indiscriminate use of *FIREARMS* and sexual offences which defy logic whereas the Dangerous Weapons Act is aimed at the indiscriminate use of *KNIVES.* I refer to section 51 (3) (a) of the Criminal Law Amendment Act [35] which is similar to Section 4 (1) of the Dangerous Weapons Act:

"If any court referred to in section (1) or (2) is satisfied that substantial and compelling circumstances exists which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence."

Since the magistrates' courts apply/applied the Dangerous Weapons Act there is no reason why they should not apply the Criminal Law Amendment Act.

THE REGIONAL DIVISION COURTS

The rationale for establishing the regional division courts was to relieve the then Supreme Courts of minor criminal cases because the magistrates' courts had limited jurisdiction. The then Minister of Justice said the following when introducing the Second Reading of the Bill on regional division courts:[35]

[34] Act No. 105 of 1997
[35] Union of South Africa House of Assembly Debates : Volune79 : 5th Session : 10th Parliament : 12th May
– 6th June 1952 page 6915

" There are cases where a person has stolen a sheep or one shilling and where such a person has to appear before the Supreme Court simply because he has a long record of previous convictions for if he appears before a magistrate the magistrate cannot sentence him to more than six months imprisonment. For that reason he is sent to the Supreme Court so that a more severe sentence can be imposed."

The Criminal Law Amendment Act[36] has increased the workload of the regional division courts so much that courts are sometimes held on Saturdays. The National Prosecuting Authority decides which cases should be tried by the regional division courts. Experienced magistrates ten to twenty five years experience cannot hear such cases simply because they are not regional magistrates. The court rolls in the regional courts are heavy, justice is delayed and justice delayed is justice denied. The members of the public could lose confidence in the courts.

JUDICIAL SYSTEMS : FOREIGN COUNTRIES

The structures of the lower courts in the following foreign countries are in line with the proposal advanced by this article.

a) MALAWI[37]

The lower court is the magistrates' court and is graded as follows:

RESIDENT AND FIRST GRADE MAGISTRATES'COURT

[36] Act 105 of 1997

[37] Law and Judicial Systems of Nations: Charles S Rhyme: Published by The World Peace Through Law Center: Washington D.C. U.S.A. : 1978 page 449: The High Commissioners of these countries were requested to confirm whether the position prevails and have until writing of this article not responded

These courts have a maximum criminal jurisdiction of fourteen years imprisonment and the civil jurisdiction in respect of the amount in dispute is 300 kwachas.

SECOND GRADE MAGISTRATES' COURT

They have a maximum penal jurisdiction of five years or a fine not exceeding 200 kwachas

THIRD GRADE MAGISTRATES' COURTS

These courts have limited jurisdiction over certain criminal and civil matters.

b) AUSTRALIA[38]

i) QUEENSLAND

The lower courts are the:

District Court

The maximum criminal jurisdiction is imprisonment not exceeding fourteen years and the maximum civil jurisdiction in respect of claims is $6 000 and $10 000 in traffic accident cases.

Magistrates' Court

The maximum jurisdiction in respect of claims is $1 200.

[38] Supra page 47

INTEGRATION

Is the time not ripe for the integration of the magistrates', regional division and divorce courts into a single court-be it a magistrate, district or whatever court?

The maximum jurisdiction of such integrated court could be as follows:

a) criminal- a fine or imprisonment not exceeding ten years and jurisdiction to apply the Criminal Law Amendment Act.

b) civil

i) three hundred thousand rand;

ii) divorce and matters related thereto;

iii) limited jurisdiction in matters involving status of persons; and

iv) limited jurisdiction in liquidation and insolvency of companies

The question which begs an already available answer is whether magistrates are qualified and experienced to handle such matters. I borrow the words of the then Minister of Justice who said the following when piloting the Second Reading of the Bill on regional division courts:[39]

[39] 37 Supra page 6916

" The magistrate must be a person holding an LL.B. degree or he must have passed the Higher Civil Service Examination. So our best magistrates with good qualifications will be appointed to do that work (regional court work). Here , however, you will find that a well qualified with possibly 15 to 20 years' service is appointed as a regional magistrate. He therefore not only has the necessary knowledge and qualifications but he has had more years of experience on the bench."

I am of the opinion that 90% of the magistrates are well qualified and experienced for such an integrated court provided appropriate orientation is offered. The Justice College can offer appropriate seminars for the integrated court. Retired Judges and Regional Court Magistrates can be requested to assist in building the judiciary. Advocates and attorneys may be more than willing to serve in such a court.

The Constitution[40] categorically mentions the courts of our country and caters for courts established in term of an Act of Parliament which are similar to either the High Courts or the Magistrates' Courts. The regional division and the divorce courts are courts similar to the Magistrates' Courts.

Dr Smit in his address to Parliament during the Second Reading of the Bill on regional division courts concluded by requesting the Minister to increase the jurisdiction of the magistrates' courts and thus relieve the then Supreme Court of a lot of work.[41] Dr Smit impliedly meant that there was no need for the regional

court division and that the solution was to increase the jurisdiction of the magistrates' courts. I align myself with this view espoused by Dr Smit in 1952.

[40] Section 166 Act No. 106 of 1996
[41] 37 Supra page 6920

CONCLUSION

The Superior Court Bills are under discussion and the Judges are involved. The regional court with civil jurisdiction is in the pipeline. The members of the Judicial Officers Association of South Africa (JOASA) who are at the coal face of justice, must debate the lower court structure, adopt a position and mandate JOASA to lobby Judges, the local and foreign legal minds, the Minister of Justice and the Portfolio Committee towards a certain position.