Matters of Interest to Magistrates

Magistrates as primary drivers and players in the change processes in Child Justice and the plight of an unaccompanied foreign child

Under the African sky, sitting in the shade of an old Mopani tree at the foot of Modimolle Mountain, one of my ancestors, aptly named *Motswatema (The progressor),* thought too loud in expressing her observations of a young mother removing a sharp edged knife from her infant's grasp.

The lucidity, eloquence and spirit of what she said caught the attention of her audience and her articulation of the true role of the mother became entrenched as an idiomatic expression:
"MMANGWANA O TSWHARA THIPA KA MO BOGALENG"
"The mother handles the knife at its sharpest edge"

Mothering, in Africa, has got nothing to do with conception, gestation period, labour pains, giving birth, sex or gender. Just to illustrate the point, there were no prisons in South Africa before the arrival of Jan van Riebeeck. Today, a prison visit by a Magistrate and a discussion with prisoners reveals that the absence of mothering is almost the sole cause of prison overcrowding. However, prisoners were conceived, carried for nine months; the females who gave birth to them went through labour pains in giving birth.

Although the females were and are still present, they were or remain simply not alive in the lives of their children. Every woman can give birth to a child. But not every woman can be the mother of a child. Similarly, every Magistrate can preside over a case. But not every Magistrate has a passion for children, which passion manifests his understanding of his/her primary guardianship of a child.

A Magistrate involved in Child Law can unfortunately, in the current prevailing circumstances, not strive for popularity with other stake holders, especially the Administration within the Department of Justice and Constitutional Development and other officials in other sister Departments in general, in particular the SAPS, Social Development and Home Affairs, if she has to succeed to act in the best interests of the children. Dealing with unaccompanied foreign children is not for conformists. It requires a Magistrate to move out of the alcoves of complacency, out of the box in the comfort zone of an air-conditioned courtroom and/or information technologically advanced chambers into the world of reality where the only mouse known to the child is the one in the family of rats; informed by integrity, values and a focus on the greater good.

This is not a declaration of war with our Court Support Services or my many friends within the sister Departments. This is being courageous in stating the truth some of us would rather not speak about, to wit, that our constitutional roles are often irreconcilable. My colleague, Advocate Simon Jiyane, in his capacity as

the Director-General, is also the Accounting Officer of our Department. As a Presiding Officer, I do not have to account to our internal auditors, the Auditor-General and/or Parliament, nor am I constrained by the Public Finance Management Act in taking decisions, like he is. Therefore, on the same issue, to wit, the best interests of the child in a particular matter, I am not constrained by Treasury Instructions as he is. The premise, nature, scope and content of our work are not the same. Our views are likely not to be the same and our conclusions are likely not to be the same although both of us profess to act in the best interests of the child.

What is important, after recognizing that our roles are sometimes irreconcilable, is to manage our processes and discuss differences so that the factors which inform our differences do not lead to or amount to open conflict and/or disrespect to the other.

The Magistrate must be prepared to grab the knife at its sharpest edge as the primary guardian of the child that appears before him or her.

Barriers to the enjoyment of human dignity, equality and freedom, for children, manifest themselves in different forms. Some are inherent in the make-up of a child; others are in the administrative and judicial systems whereas others are founded within society.

The different forms may be:

1. Problems inherent within a child, for example
    - problems with one or more of the senses of the child, e.g. sight, hearing, smelling, feeling and taste, or even physical disability as well as emotional maturity and general intelligence

2. Administrative and Judicial systems, for example
    - methods and processes of assessments and adjudication
    - medium of instructions, languages of record and mother tongue
    - assistive and ancillary services

    These are problems brought about by the jurisprudence

3. Societal, for example
    - poverty
    - race, class, disability, sexual orientation and gender discrimination
    - negative attitudes
    - political instability

Apologists for children do not want us to acknowledge that there are barriers which may be inherent within a child. They refuse to accept that children are also mere mortals with flaws. It is primarily because of the prevailing view of

apologists that children with inherent problems are pushed through the academic ladders in our schools even though the children themselves, the educators and school management, the parents and the Department of Education officials know that the children are not ready for the next phase and therefore they cannot be declared competent. We are happy to fool ourselves as if we have a constitutional and democratic right to be stupid. Our children deserve better.

It is because of the apologetic view towards children that we refuse to acknowledge that in the foundation phase, which is between the ages of six and ten, punishment of the child is a necessary evil to help correct behaviour. Apologists have succeeded in elevating a tool of discipline, whatever the circumstances, to abuse - so much so that parents, including Magistrates and Judges, do not know whether physical correction of a child's behaviour by a parent is acceptable or not, and if it is, where the line is between discipline and violence or abuse. Apologists have blurred, if not removed, the line. I have not been invited to discuss this aspect of our children; therefore these comments will suffice to illustrate the first of the barriers I mentioned.

The third form of barrier is, in the main, the social context in which the children find themselves. Our aim as the Magistracy must be to limit exposure of the children to these societal ills. Generally, the Government of the Republic of South Africa must be commended in the strides it has made to minimise the exposure of our children to these risks. Amongst others, the Government made sure that laws are in place to answer to these ills.

"Kom by die punt, Meneer Thulare": I can already hear some of you thinking. *"Etswa ka mooko wa taba, Morena".* I then turn to discuss the second form of barrier, to wit the problems of jurisprudence.

The Gauteng Provincial Child Justice Forum recently learned that there is a need, perhaps by the Magistracy, especially Commissioners for Child Welfare who in terms of the Judicial Manual must be the Head of Office, with exceptions, to visit centres within their districts where children are normally kept, to ascertain whether these children are actually detained in accordance with the legal processes. It was discovered in the East Rand that childrens' removals, especially by the South African Police Services, were never brought to the notice of the Childrens' Courts within 48 hours as prescribed by the Child Care Act 74 of 1983 for judicial review of such removals. In certain instances, children spent more than a year within the centre without any judicial review. In one centre in Benoni, 60 foreign unaccompanied minors were found where the removal and detention was never brought to the courts within 48 hours and some of the children were at the centre for a very long time.

Children under ten in general, in particular foreign unaccompanied minor children who may be removed following the provisions of section 9(1) (b) of the Child Justice Act 75 of 2008 and placed in a child and youth care centre, run the risk of

spending considerable periods of time in such detention without judicial review, unless Magistrates who are Heads of Courthouses or in exceptional circumstances their designates, visit the centres for inspection purposes.

With respect, the developments in the East Rand, as regards foreign unaccompanied minor children at Kids Haven in Benoni, happened under the watch of our sister Departments the SAPS, Social Development and Home Affairs. It was a Magistrate who identified the problem when he was asked to review detentions or removals of children in the Childrens' Courts of Daveyton and then directed the middle management of Social Development to inspect all Places of Safety and correct the unlawful detention of children in his jurisdiction.

The other problem identified is that children removed, in practice, undergo a medical assessment before admission to a centre. Most of the time, the child is yo-yoed between the SAPS and the centre, most often because the SAPS struggle to have personnel of the Department of Health available at all times to do such medical assessments.

Police on the one hand argue that in terms of prescripts there is no provision for this assessments and that it is a creation of the centres; the centres on the other hand argue that most often they have fingers pointed at them for the medical condition and sometimes injuries to children, which conditions or injuries the children were admitted with and in the absence of that assessment on admission, they also do not have an informed identification of the medical challenges of the child to determine whether they will be able to render the necessary interventions. For example, not all centres have the resources to render palliative care or ARV therapy to children.

Where the Magistrate, when asked to review a detention, observes a failure to comply with the law in any manner whatsoever, such failure must be investigated, shortcomings identified and corrected. The unfortunate truth is that, in the main, public servants depend on institutional memory for training, as Departments do not generally have sufficient resources to train staff without adversely affecting service delivery. As a result, most of our Administrative personnel's only recourse to tuition or on the job training is what the "experienced personnel" convey to them.

A member of the SAPS, the Social Worker and the Clerk of the Court may not necessarily know that the person from whom a child is removed is entitled to be heard when the review of the removal is done by the Magistrate and that they carry the responsibility of informing such person of the date, time and place of the review in the Children's Court, unless the Magistrate trains them. It is for that reason that some Senior Officials in Social Development and in our own Department of Justice and Constitutional Development disputed my note that in terms of the Child Care Act 74 of 1983, Regulation 2, a Children's Court

Assistant cannot be an Administrative Clerk in the Department of Justice and Constitutional Development. It has to be a qualified Social Worker.

I was informed by reading the provisions of the Regulation. They were basing their contention on institutional memory. Somebody decided long before 1994, without regard to the law, to elevate Administrative Clerks to the status of Children's Court Assistant. Justice College, with respect, did not correct the terminology or the illegal and misdirected position, and continued to train Administrative Clerks as "Children's Court Assistants". This unfortunately led to the Department of Social Development and the Department of Justice and Constitutional Development moving into a comfort zone. Childrens' Courts, throughout the country, do not have Children's Court Assistants as provided for by law. Whereas the law provides for a Clerk of the Children's Court and a Children's Court Assistant, in practice we have no Children's Court Assistants in the legal sense. Clerks of the Court wear borrowed clothes and by their attire they are called Children's Court Assistants; in substance and in law they can never be Children's Court Assistants. This is the truth Magistrates must tell Court Managers, Area Court Managers and Regional Heads in our Department, as well as the Directors-General of Social Development in the Provinces.

It is unfortunate that children, who are brought before the Children's Court by civil processes, will be more equal than Children in conflict with the law who are brought before the Children's Courts.

In terms of the Child Care Act 74 of 1983, the Children's Court Assistant must be notified of the removal of the child within 48 hours of such removal (Regulation 9(2)(b)(i)); no later than the first court day after receipt of such notice by the courthouse the Commissioner shall be informed (Regulation 9 (2)(c)) and the Commissioner shall review the removal no later than the first court day following his/her receipt of the request for review (Regulation 9(2)(c)). Therefore, the review must happen within 4 court days of the removal of the child.

In terms of the Children's Act 38 of 2005 the Social Worker (section 152(2)(b)) or Police official (section 152(3)(d)) removing a child must notify the Clerk of the Children's Court not later than the next court date of the removal of the child.
In terms of section 9(2) of the Child Justice Act 75 of 2008, the probation officer must assess the child not later than seven days after being notified by the Police official of the removal of the child. We have already three days more for a child in conflict with the law.

The member of the SAPS has no defined period within which he/she should bring the removal to the notice of the probation officer. All that section 9(1) (b) of the Child Justice Act 75 of 2008 tells him/her is that it must be immediately. The DK Illustrated Oxford Dictionary, 1998, defines this word as done at once; most pressing or urgent.

The trouble is that this is not the only definition. Living by hope, as faith enjoins us, this is the definition we anticipate the SAPS will attach to this word. 'Immediately', in the Police station where there is lack of vehicular resources, may translate into more than two days. The SAPS may be compelled by circumstances to read more (or less) than the first definition into the word 'immediate' in their quest not to fall foul of the law and the result will be that children under 10 years who are in conflict with the law may spend up to ten days, basically up to two weeks in detention, before being assessed.

The training in law does not necessarily cover psychology and specifically child development sufficiently. Lawyers, Prosecutors and Presiding Officers therefore need experts from those fields in order to gain a deeper understanding of the relevant developmental forces underlying the behaviour of the child in order to formulate an appropriate intervention which will hold maximum benefit for the child, the parents and society in general.

The Presiding Officer requires information on the child as a person, on his/her strengths and weaknesses, on his/her characteristic behaviour patterns, on his/her family background and on the socio-economic environment in which the child grew up in order to formulate his/her methods and processes of interventions.

A decision formulated without having adequate information on the character and personality of the child, his/her relationship with members of his family and with other people, as well as on the environment from which the child originates, has little predictive value. It is an intuitive rather than a scientific process. A Presiding Officer should know the child better than its own mother, father, siblings or other relatives.

A Presiding Officer must be able to answer the questions, "who is this child?; what kind of person is the child?; what factors contribute to the child's experiences and expectations?; what is the best possible intervention that can be made to ensure the tripartite goals of removing the barriers from the child, improving the science and philosophy of the law, and adding value to the community, are actually met?".

This information can only be obtained through a factual and diagnostic study of the child and the child justice system, to enable the Presiding Officer to formulate an objective, rational and an effective intervention.

Such an investigation must be carried out by a person with sufficient diagnostic and analytical skills as well as a thorough understanding of human behaviour. Unfortunately, in our developing countries, many children are invisible. Birth registration is the manifestation of the State's responsibility in recognising the

existence and identity, including name and nationality, of a child when recorded by the State. Many African children do not have birth certificates and therefore their membership of society is not acknowledged through visible official evidence. This reality often leads to rural children in particular, routinely being omitted from benefitting when policies are implemented and programmes designed. This invisibility and other risks of missing out on environments that protect children, often lead to children being excluded from accessing services necessary for their survival and/or development.

A proper investigation by the Social Worker will be able to assist in determining from which country the child came from, how the child came to South Africa and even why the child came to South Africa. It is necessary, once it is established that it is an unaccompanied foreign child, to direct, if the child does not yet enjoy legal representation, that the matter be referred to Legal Aid South Africa for their consideration.

After exhausting the internal remedies within Legal Aid South Africa as provided for by section 3(B) of the Legal Aid Act 22 of 1969, Magistrates should not hesitate to make orders that the Legal Aid provide legal representation for the child where otherwise substantial injustice may result if the child is not legally represented.

The Child Justice Act 75 of 2008 makes it peremptory for legal representation for purposes of trial of a child, even against the wishes of the child (see section 82 and 83). Unaccompanied foreign children generally need legal representation before the trial stage and even if they are not tried, at their first encounter with the authorities and most often long after they had appeared in court. For instance, where the social worker's industry traces the relatives of the child, and he or she is convinced that the circumstances warrant reunification with the relatives and community, and none of the relatives has a bar-coded South African identity document, they cannot be enlisted as beneficiaries of the grants in terms of our Social Assistance regime simply because the information technology systems of Social Development and or the South African Social Security Agency allegedly cannot provide for them.

The other reason is that some of the children qualify for refugee status in terms of section 3 of the Refugees Act 130 of 1998. Social Workers are not experts in law and therefore lawyers must intervene. Only a lawyer can assist to determine whether the child from Zimbabwe is a person who has been, owing to *"events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality,… compelled to leave his or her place of habitual residence in order to seek refuge elsewhere (section 3(b))* or *is a dependent of a person contemplated in paragraph (a) or (b)" (section 3(c).* Paragraph (a) refers to a person who *"owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group ,is outside the country of his*

or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it;".

Magistrates must take particular note of section 32 of the Refugees Act whichprovides that an unaccompanied child who appears to qualify for refugee status in terms of section 3 and who is found in circumstances which clearly indicate that such child is a child in need of care as contemplated in the Child Care Act 74 of 1983, must forthwith be brought before the Children's Court for the district in which he/she was found and that the Children's Court may order that that child be assisted in applying for asylum in terms of the Refugees Act 130 of 1998.

A legal representative may be able to establish that the unaccompanied foreign child qualifies for permission to remain within the Republic on any of the grounds provided for in section 33 of the Refugees Act 130 of 1998.

The legal representative may assist the child with representation in the review of the decision of the Refugee Status Determination Officer by the Standing Committee for Refugee Affairs. The legal representative may assist the child in lodging an appeal with the Refugee Appeal Board. These competencies do not reside within Social Workers; at best for unaccompanied foreign children they reside within Legal Aid South Africa where the Magistrate refers the matter to them. The legal representative may also assist the foreign unaccompanied child in enjoying the protection and general rights of refugees in terms of section 27, rights of refugees in respect of removal from the Republic in terms of section 28, restriction and detention in terms of section 29, issuing of identity documents in terms of section 30, application for travel documents in terms of section 31, reception and accommodation of asylum seekers in the event of mass influx in terms of section 35, withdrawal of refugee status in terms of section 36, offences and penalties in terms of section 37 and other related and ancillary issues outside the civil, family and criminal courts.

Referral of a matter to Legal Aid South Africa is not a favour done by the Magistrate to the child, neither is provision of legal representation for such a child a favour done by Executive of Legal Aid South Africa: it is the manifestation of the obligations imposed on South Africa by its signature to the Convention of the Rights of the Child, in particular Article 22 subsection 1.

Magistrates must make sure that unaccompanied foreign children are forthwith brought to the attention of the International Social Services Unit in the Provincial Office of the Department of Social Development. This is necessary because we have to give effect to Article 22 subsection 2. It is simply unfortunate that most

provinces, although having these units, do not yet have guidelines to Social Workers on the ground as well as publicised points of contact for intergovernmental cooperation.

I urge Limpopo Province to make sure that each and every Magistrate's Office receives the contact details of the personnel at this unit of the Department of Social Development.

With regard to unaccompanied foreign children, we have the responsibility as a country
1. To re-unite the child with her family in the country of origin.
2. To make sure that the country of origin of the child takes care of its children and therefore assist in the placement of the child into the formal care processes in the country of origin of the child.
3. When we have not succeeded in the primary goal mentioned in 1 above and secondary goal mentioned in 2 above, to place the child with a blood relative in our own country, or
4. To place the child in alternative care

This is what article 22 subsection 2 enjoins us to do.

Magistrates should also take cognisance of the provisions of Article 31 to 34 of the Convention Relating to the Status of Refugees. In the main these articles provide that the mere fact that a refugee is in the country without authorisation is no reason to impose penalties; that states shall allow refugees reasonable periods and all the necessary facilities to obtain admission into another country; that expulsion of a refugee shall be only in pursuance of a decision reached in accordance with due process of the law and the refugee shall be allowed to submit evidence to clear himself, to appeal and to be represented before the competent authority or person designated by the competent authority; that no state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The Immigration Act no 13 of 2002 defines a foreigner as an individual who is not a citizen. It is a legal representative who may assist a child in his challenges with the findings of an Immigration Officer that the child and/or the parents, guardian or a person in whose custody the child is, is an illegal foreigner in terms of section 8 of Act 13 of 2002. It is a legal representative who may assist the child in the review of such decision by the Minister of Home Affairs. The legal representative may also assist the child in the review or appeal of any decision that materially and adversely affects an unaccompanied foreign child when such child receives notice thereof (section 8(3)). The Director-General's decision, if still adverse to the child upon review or appeal (section 8(4) read with 8(5)), may be taken for higher relief to the Minister (section 8(6)).

Other reference material within the legal framework includes the 1967 Protocol Relating to the Status of Refugees, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the African Charter on the Rights of the Child and the Constitution of the Republic of South Africa Act 108 of 1996.

My sense of justice finds the provisions of section 47 (2) (b) (i) of the Child Justice Act 75 of 2008 objectionable. To have diversion founded by acknowledgement of responsibility by the child is simply too close to injustice for my comfort. In my view, we appear to be happy to bury justice in the cemetery of statistics for the National Prosecuting Authority. If it is in the best interests of the child to divert, we should divert. We should not only divert when the response of the child places a smile on the face of the prosecutor. Having grown up within the criminal justice system and the courts of South Africa, even those that in the privacy of rooms Prosecutors call "*hardegat"* deserve to be diverted, if the best interests of the child so demand. To burden a child with a criminal record when subsection 1 of Article 40 of the Convention on the Rights of the Child reads that we, as South Africa treat a child in a manner *"… which takes into account the child's age and the desirability of promoting the child's reintegration and the child's* ***assuming a constructive role in society,*** is for me too much a departure from this stated goal.

Conclusion

A man who, in the history of South Africa, was tried and sentenced by Parliament and not the courts, Robert Mangaliso Sobukwe, had this to say about leadership: *"True leadership demands complete subjugation of self, absolute honesty, integrity and uprightness of character, fearlessness and above all, a consuming love for one's people."*

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