FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A217/2008

In the appeal between:

MINISTER OF SAFETY AND SECURITY Appellant

and

GABRIELLE LUPACCHINI 1st Respondent
ROCHELLE CONRADIE 2nd Respondent
LUIGI DAVIDE GABRIELLE LUPACCHINI 3rd Respondent

CORAM: VAN DER MERWE, J *et* VAN ZYL, J *et* CLAASEN, AJ

JUDGMENT: VAN DER MERWE, J

HEARD ON: 3 AUGUST 2009

DELIVERED ON: 3 SEPTEMBER 2009

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[1] This appeal concerns the interpretation of section 6(1) of the Trust Property Control Act, no 57 of 1988 ("the Act"), which provides as follows:

> "Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master."

The crisp question for decision is whether section 6(1) of the Act prohibits the institution of legal proceedings on behalf of a trust by a person acting in the capacity of trustee without having received the written authorization of the Master.

[2] The Lupacchini Family Trust ("the trust") was created by trust deed signed by all concerned on 29 September 1994. In terms of the trust deed there was both a founder and patron (beskermheer) of the trust. The founder of the trust was one L R Preller and the patron thereof is the third respondent. Both the capital and income beneficiaries of the trust are the children, born and unborn, of the third respondent. The trust deed provides that there shall at all times be no less than two trustees but not more than six trustees.

[3] The first trustees of the trust were the first respondent and Melinda Lupacchini, who were authorised to act in their capacities as trustees of the trust in terms of section 6(1) of the Act on 4 October 1994. However, by letter dated 24 June 2003, Melinda Lupacchini resigned as trustee of the

trust. On 13 November 2003 and/or 20 November 2003 the second respondent was appointed as trustee in place of Melinda Lupacchini, with immediate effect and the second respondent thereafter at all times relevant hereto acted as duly appointed trustee of the trust.

[4] On 24 August 2004 the present action was instituted and on 26 August 2004 the combined summons was served on the appellant. The particulars of claim contain three claims. The second and third claims are instituted by the third respondent and are not relevant to the appeal. Although Melinda Lupacchini was initially mistakenly cited as plaintiff in the action, it is clear that the first claim contained in the particulars claim is one instituted by the first and second respondents in their capacities as trustees of the trust. The first and second respondents do not rely on any provision allowing departure from the fundamental rule of trust law that all trustees must act jointly.

[5] The said claim instituted by the trust is a rather convoluted one. I perceive its essential elements to be the following. The trust was the owner of a night club by the name of

Reds. On 29 August 2003 members of the South African Police Service acting in the execution and within the scope of their employment with the appellant, executed a police raid at the premises of the night club. During this raid *inter alia* customers of Reds were searched and/or taken away for interrogation. Also an alleged notorious drug smuggler was arrested. The raid was filmed and later broadcast on national television. It was also reported on in several reports in the local press. A similar raid took place on or about 31 October 2003. According to the particulars of claim both the raids and accompanying conduct were executed with the intent of prejudicing Reds in its business as a night club, alternatively constituted negligent conduct of the appellant's employees contrary to a legal duty that had the effect of prejudicing the business of the night club. It is alleged that as a result hereof the night club had to be closed as a result of which the trust suffered damages consisting of loss of profits in the amount R2 994 756,71.

[6] Importantly however, a letter of authority authorising the second respondent to act as trustee of the trust was only issued by the Master in terms of section 6(1) of the Act on

15th December 2004. This led to a special plea by the appellant and to the argument referred to below.

[7] The parties prepared a special case for adjudication by the court in terms of rule 33(1). The concluding paragraphs of the special case read as follows:

> "C. **THE PARTIES' CONTENTIONS:**
>
> The Plaintiff contends that:
>
> 7.1 although a letter of authority appointing Second Plaintiff as trustee had not been issued by the Master prior to issue of summons on 24 August 2004, Second Plaintiff had, prior to 24 August 2004, been duly appointed as trustee in terms of and in pursuance of the provisions and objectives of the Trust Deed and Trust, and therefore:
>
> 7.2 the Trust had at all times relevant to the action the necessary *locus standi in iudicio*.
>
> 8.
>
> The Defendant contends that, due to the fact that the Second Plaintiff was only authorised by the Master as a trustee on 14 December 2004:
>
> 8.1 no valid resolution by the trustees of the Trust could, alternatively had been taken to institute such action;

8.2 that no action could have been instituted for and on behalf of the Trust.

9.

The Honourable Court is therefore requested to decide whether:

9.1 the action for damages allegedly suffered by the Lupacchini Family Trust could have been instituted in, as it was, August 2004;

9.2 the First and Second Plaintiff's action can be entertained.

10.

The parties agree that:

10.1 if the Court decides in the Defendant's favour, the Defendant's Special Plea should be upheld and the action on behalf of the Trust should be dismissed with costs, including the costs of two counsel;

10.2 if the Court decides in the Plaintiff's favour, the Defendant's Special Plea should be dismissed with costs, including the costs of two counsel."

[8] Relying heavily on the judgment in **WATT v SEAPLANT PRODUCTS LIMITED AND OTHERS** [1998] 4 ALL SA 109 (C), the trial court found for the respondents and ordered

that the special plea be dismissed with costs, including the costs of two counsel. The appeal is with its leave.

[9] It is clear that the Act distinguishes between the appointment of a trustee and his/her authorization in terms of section 6(1). It is trite that a trustee is appointed in terms of the trust instrument and in exceptional cases by the Master or Court as provided for in the Act. At the hearing before us counsel for the appellant argued, in the alternative to the contention contained in the special case quoted above, that the second respondent was also or in any event not properly appointed as trustee in terms of the provisions of the trust deed. I doubt very much whether on the formulation of the special case by the parties, this argument is open to the appellant. In view of the conclusion that I have reached, it is however unnecessary to deal with this further. I accept without deciding that the second respondent was duly appointed as trustee of the trust on 13 November 2003 and/or 20 November 2003.

[10] It follows that the appeal will be decided on the basis that the claim of the trust was instituted by its required minimum

number of two trustees, both of whom had been properly appointed but only one of whom at the time was authorised to act in terms of section 6(1) of the Act.

[11] In **SIMPLEX (PTY) LTD v VAN MERWE AND OTHERS NNO** 1996 (1) SA 111 (W), Goldblatt J held that a contract concluded by trustees prior to the receipt of the written authority of the Master referred to in section 6(1) of the Act, is *ab initio void* and incapable of ratification. This judgment therefore lays down that non-compliance with the provisions of section 6(1) of the Act is visited with nullity. This judgment was followed by Griesel J in **VAN DER MERWE v VAN DER MERWE EN ANDERE** 2000 (2) SA 519 (C), wherein he also disagreed with the view that an act committed without authority in terms of section 6(1) of the Act can be retrospectively validated by a court, expressed in **KROPMAN AND OTHERS NNO v NYSSCHEN** 1999 (2) SA 567 (T). See also **M J DE WAAL**, "Authorisation of Trustees in terms of the Trust Property Control Act" 2000 (63) THRHR, 472 to 478.

[12] It is clear that the special case was premised on acceptance of the correctness of the two Van der Merwe decisions. This was confirmed by both counsel during argument. The question whether these decisions were correctly decided does therefore not arise in this matter.

[13] The question then is what the ambit of section 6(1) of the Act is, in other words what exactly is prohibited thereby. This must of course be established by interpretation in terms of accepted principles of interpretation of statutes. In this regard I refer to the seminal and oft-quoted exposition of Schreiner JA in **JAGA v DöNGES, NO AND ANOTHER**; **BHANA v DöNGES NO AND ANOTHER** 1950 (4) SA 662G – 664 H. See for instance **ARMSTRONG v SEHADEW OREE t/a OREE'S CARTAGE AND PLANT HIRE** 2004 (3) SA 152 (SCA) at 58J – 159A and **BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS** 2004 (4) SA 490 (CC) at 526G – 527I. In terms hereof the ordinary or normal meaning of the words in the context in which they were used, must be established. The context is not limited to the language of the rest of the statute but includes the

matter of the statute, its apparent scope and purpose and within limits, its background.

[14] To my mind, the words used in section 6(1) are unambiguous and their normal grammatical meaning is clear, namely that a person appointed as trustee after the commencement of the Act, shall not act in that capacity at all unless authorised thereto in writing by the Master.

[15] The Act provides for a supervisory scheme in respect of trusts that includes very wide powers to the Master. See for instance sections 6(4), 7(2), 10, 11, 16, 19 and 20 of the Act. For present purposes "trustee" is defined in the Act as any person who acts as trustee by virtue of an authorisation under section 6. It follows that the supervisory scheme of the Act only applies to acts for which authorisation in terms of section 6(1) are required. In **SIMPLEX (PTY) LTD v VAN DER MERWE AND OTHERS NNO,** *supra* it was stated that section 6(1) of the Act is not only aimed at the benefit of the beneficiaries of a trust but also in the public interest. I prefer to express no opinion on whether or to what extent the object of the Act is to protect

outsiders to a trust. However, even if it is accepted that the object of section 6(1) is only the protection and benefit of beneficiaries, the context as described above, in my judgment indicates that the meaning of section 6(1) cannot be limited to require authorisation and therefore supervision in terms of the Act for contractual acts only and not for instance for litigation on behalf of the trust, as the respondents contended. This may be illustrated by the following: A right to claim (vorderingsreg) of a trust clearly forms part of the trust estate. It is a reality that ill-conceived litigation may be ruinous not only in respect of costs but also in respect of the subject matter of the litigation. On the interpretation of the respondents a trustee who has not been authorised in terms section 6(1) could validly deal with and expose trust assets by the institution, defence and prosecution to completion of legal proceedings, including appeals, but a contract by that trustee to purchase a paper or a pen or to compromise a claim that is the subject of pending litigation, would be invalid and of no force and effect.

[16] The same result is obtained by consideration of section 9 of the Act. Section 9(1) provides that a trustee (as defined, that is one that had been authorised in terms of section 6(1)) shall in the performance of his duties and the exercise of his power act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. Section 9(2) provides that any provision contained in a trust instrument shall be void insofar as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in section 9(1). The trust deed in question provides for several duties and powers of the trustees of that are not of a contractual nature. These include for instance the duty to provide yearly financial statements of the trust that comply with requirements set out in the trust deed, the power to institute, defend and prosecute legal proceedings and the power to decide what portion of the yearly income of the trust should be added to the trust fund and what portion thereof should be utilised for the maintenance, education etc. of the beneficiaries. Again, on the respondents' interpretation, the execution of these

powers and duties would not be subject to the requirements of section 9 of the Act. Could that be the meaning of section 6(1)? I think not.

[17] It was suggested that the interpretation that section 6(1) of the Act requires prior authorisation for all acts performed in the capacity of trustee, could lead to unintended results such as that a trustee may not be able to institute urgent legal proceedings for the benefit of the trust because of lack of authorisation. In my view there is no reason why the authorisation of the Master in terms of section 6(1) may not be obtained expeditiously or on urgent basis. In terms of section 6(2) the Master may even where the furnishing of security is required, pending the furnishing of security authorise a trustee in writing to perform specified acts with regard to trust property. But mainly the argument must fail because the same applies to contractual situations. A contract that would have been most beneficial to a trust and its beneficiaries may be lost because the trustees did not or could not timeously obtain authorisation in terms of section 6(1).

[18] In his lucid judgment in **LAND AND AGRICULTURAL BANK OF SOUTH AFRICA v PARKER AND OTHERS** 2005 (2) SA 77 (SCA), Cameron JA reiterated that a trust such as the one in question is not a legal person but an accumulation of assets and liabilities that vest in its trustees. Therefore the trust can only act through its trustees. Cameron JA then pointed out that a provision in a trust deed requiring that a specified minimum number of trustees must hold office is a "capacity-defining condition". Therefore, when fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf. It is clear from the judgment that because the trust in question did not have the number of trustees required by its trust deed, the trust had neither the capacity to act nor the capacity to litigate. See paras 10 – 14 and 39 – 46 of the judgment. In my judgment, section 6(1) of the Act is also capacity-defining in the sense that it provides capacity to act. For the reasons mentioned, I find no basis for distinguishing in section 6(1) of the Act between capacity to act and capacity to litigate.

[19] This brings me to the judgment of Conradie J, as he then was, in **WATT v SEA PLANT PRODUCTS LIMITED AND OTHERS**, *supra*. The salient facts in this matter were that although the second and third defendants were appointed trustees of a trust on 19 June 1991 and 21 March 1994 respectively, they obtained letters of authority in terms of section 6(1) of the Act only on 23 August 1996. The summons in which the second and third defendants were sued in their capacities of trustees of the trust was however issued before 23 August 1996. This led to what was described by Conradie J as a "devilish little point" on behalf of the second and third defendants, namely that at the time of issue of the summons against them the second and third defendants lacked *locus standi in iudicio* as they had not by then been authorised by the Master to act as trustees of the trust.

[20] In interpreting section 6(1) of the Act Conradie J said the following:

> "In my view the prohibitory phrase '… shall act in that capacity only if authorised thereto …', wide as it is, must be interpreted to mean that a trustee may not, prior to authorisation, acquire

> rights for, or contractually incur liabilities on behalf of, the trust. I do not, for the reasons which I shall discuss shortly, believe that the legislature intended with a provision of this kind to regulate questions of *locus standi in iudicio*."

What follows in the judgment after this quoted passage can for convenience of dealing therewith be summarised in the following four paragraphs.

[21] First, it was stated that in entering appearance to defend the action the second and third defendants incurred no contractual liability on behalf of the trust save possibly for the payment of the fees of their attorneys. It was further stated that the trust incurred no contractual liability for costs to the plaintiff nor even potential liability for costs, on the basis that if the second and third defendants were not authorised to conduct the litigation they would incur personal liability for any adverse costs order.

[22] Second, it was stated that *locus standi in iudicio* and contractual power are not identical concepts, as was recognised by Goldblatt J in **SIMPLEX (PTY) LTD v VAN DER MERWE AND OTHERS NNO**, *supra.* It was added

that *locus standi in iudicio* is an access mechanism controlled by the court that is not dependent on authority to act. It was further stated that *locus standi in iudicio* depends on whether the litigant is regarded by the court as having a sufficiently close interest in the litigation as described in **JACOBS EN 'N ANDER v WAKS EN ANDERE** 1992 (1) SA 521 (AD) at 533J – 534A. The judgment then continues by saying that therefore the question to be posed is whether at the time summons was issued the trustees' interest in the trust was too remote. It was then stated that where a trustee has been appointed, the appointment is not void pending authorisation by the Master in terms of section 6(1) of the Act and that although the trustee's power to act in that capacity is suspended by section 6(1) of the Act, he/she would have a sufficiently well defined and close interest in the administration of the trust to have *locus standi in iudicio*.

[23] Third, the judgment dealt with the decision of **KRUGER v BOTHA NO** 1949 (3) SA 1147 (O), relied upon by counsel for the second and third defendants. In this case a *curator bonis* raised a special defence that he had no *locus standi*

to be sued since he had not furnished the security required by the Administration of Estates Act, no 24 of 1913. Conradie J however held that the true defence of the defendant in that case was that he could not be compelled to perform the contract entered into by the patient before he was declared incapable of managing his own affairs, in other words the plaintiff had no cause of action against him. Conradie J held that the defendant incorrectly took the point that he had no *locus standi* to be sued and that the court was influenced by this incorrect characterisation of defence to conclude that the defendant had no *locus standi*. Conradie J therefore declined to regard the decision in **KRUGER v BOTHA**, *supra* as a valuable precedent.

[24] Fourth, the judgment on this aspect of the case concluded as follows:

> "Any conclusion that the second and third defendants were by section 6(1) of the Act deprived of *locus standi in iudicio* (which would mean not only that they could not be sued but also that they could not approach the court to protect the interest of the trust) would not give effect to the intention to

> legislature. Whilst recognising the desire of the legislature to regulate the rights and duties of trustees in the Act, one should, I think, be slow to conclude that it would have desired to accomplish this by controlling their access to, or accountability in, a court of law.
>
> The focus of the legislation, after all, is on what trustees should or should not do; it is not on whether they may or may not be sued."

[25] Whether in that instance the trust in fact incurred contractual liability for costs or otherwise, is with respect irrelevant to the construction of section 6(1) of the Act. The reference to contractual liability to their attorneys does however illustrate the difficulty with this interpretation; the contract between the defendants and their attorney would be void but not the act of defending the action on behalf of the trust without authorization in terms of section 6(1). It is also with respect wrong to say that the trust did not even incur potential liability for costs of the action. On Conradie J's construction of section 6(1) the action was validly defended on behalf of the trust and the trust would be liable for costs awarded against the defendants.

[26] The term *locus standi in iudicio* is properly used in two senses. In its primary sense it refers to the capacity to litigate, that is the capacity to sue or to be sued at all. Capacity to litigate is of course not the same as the capacity to act ("handelingsbevoegdheid") but there is usually a close correlation between them. In its secondary sense the term *locus standi in iudicio* deals with whether a person has a sufficient interest in the subject matter of the case to be allowed to bring or defend the claim. See Harms, **Civil Procedure in the Supreme Court,** A47-A48 and Boberg, **Law of Persons and the Family**, 2nd Edition, p. 896 - 897.

[27] The judgment in **WATT v SEA PLANT PRODUCTS LIMITED AND ANOTHER,** *supra* deals only with *locus standi in iudicio* in the secondary sense thereof. In my judgment however, the real question was whether a trust of which the trustee or trustees have not been authorised to act as such in terms of section 6(1) of the Act, has *locus standi in iudicio* in the primary sense thereof, namely whether it has capacity to litigate at all. In this regard the

judgment in **KRUGER v BOTHA NO**, *supra* in my view indeed provides a valuable precedent.

[28] In **KRUGER v BOTHA NO**, *supra* a Full Bench of this division (Horwitz and Brink JJ) dealt with a claim against a *curator bonis* of a patient, based on a contract entered into between the plaintiff and the patient. To this claim the *curator bonis* pleaded specially that because he had not provided security in terms of section 82(1) of Act 24 of 1913 for administering the affairs of the patient, he had no *locus standi* to be sued on behalf of the patient. To this plea the plaintiff excepted on the basis that it did not disclose a defence. The court dealt extensively with the common law in this regard and concluded that where a *curator bonis* that had an obligation to provide security for the administration of the affairs of a minor or a patient did not provide security, his conduct in the administration of the estate of the minor or patient is null and void and not binding on the minor or patient. In the construction of the said section 82(1) of Act 24 of 1913 the court referred to the presumption that the legislature does not intend to vary

existing law more than necessary and concluded as follows on 1153:

> "As dit dus juis is dat volgens die gemene reg 'n *kurator* nie in sy sodanige hoedanigheid in die administrasie van die goed van 'n pasiënt kan optree alvorens hy die vereiste sekuriteit verskaf het nie, dan, met die toepassing van die genoemde vermoede, moet dit volg dat die verskaffing van sekuriteit onder artikel 82(1) 'n voorvereiste is om die aangestelde persoon *locus standi in iudicio* te gee om die pasiënt in 'n regsgeding te verteenwoordig."

In my judgement this means that the defendant *curator* had neither the capacity to act nor the capacity to litigate and therefore did not have *locus stand in iudicio,* even though he may have had a sufficient interest in the matter.

[29] When Goldblatt J in **SIMPLEX (PTY) LTD v VAN DER MERWE AND OTHERS NNO**, *supra* at 114F – G referred to the distinction between *locus standi in iudicio* and contractual capacity, he did so in a different context. The question there dealt with was not for which acts authorization in terms of section 6(1) of the Act are

required, but what the consequences are where an act for which authorization is indeed required, is performed without that authorization. It is in this context that Goldblatt J found the cases mentioned there to be distinguishable.

[30] For reasons already stated, I respectfully disagree with the passage quoted in para 24 above. It follows that I also disagree with the approval of the **WATT**-case in **Honore's South African Law of Trusts, 5th Edition** by Cameron *et al*, at 221. It may perhaps be pointed out that the support for this judgment in this respected work on page 270 and 419 thereof appears to be less emphatic.

[31] Much as I respect the views of as eminent a judge as Conradie JA and much as I dislike the result of the appeal, I am unable to agree with the trial court. To sum up: In order for the trust to have had the capacity to litigate, the common law required that both the trustees of the trust had to act jointly and section 6(1) of the Act required that both these trustees had to be authorised in writing by the Master to act in the capacity of trustee. As one of the trustees did

not meet the last-mentioned requirement, the trial court should in my view have found for the appellant.

[31] The following orders are issued:

1. The appeal succeeds with costs.
2. The orders of the trial court are set aside and replaced with the following:

> "The defendant's special plea is upheld and the action on behalf of the trust is dismissed with costs, including the costs of two counsel."

C. H. G. VAN DER MERWE, J

I concur.

C. VAN ZYL, J

I concur.

J. Y. CLAASEN, AJ

On behalf of the appellant:	Adv. M.H. Wessels SC Instructed by: State Attorney BLOEMFONTEIN
On behalf of the respondents:	Adv. A. J. R. van Rhyn SC with Adv. M. D. J. Steenkamp Instructed by: Kramer Weihmann & Joubert BLOEMFONTEIN

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FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No.: 435/2009

In the case between:

THE STATE

and

AGNES PHOTYO

CORAM: H. M. MUSI, JP *et* LEKALE, AJ

JUDGEMENT: LEKALE, AJ

DELIVERED ON:

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[1] The matter came before me by way of an automatic review in terms of section 302 read with section 304 of the Criminal Procedure Act nr 51 of 1977 ('the act").

[2] The accused, 17 year old young woman going into a 18 years of age at the time of the trial, was convicted of assault with intent to do grievous bodily harm and sentenced to 12 months imprisonment conditionally and wholly suspended for 4 years by the magistrate's court at Koffiefontein on the 15th June 2009.

[3] At the time of the commission of the relevant crime on the 12 October 2008 the accused was serving a six months imprisonment sentence conditionally and wholly suspended for 4 years for a similar offence committed on the 6 January 2008. The said suspended prison sentence was imposed on the 16 April 2008.

[4] A reading of the record revealed that the accused had, initially, pleaded guilty to the charge but the presiding

magistrate entered a plea of not guilty after it became clear that the accused was, effectively, raising self-defence as justification for her conduct.

[5] I found it both strange and curious that a further suspended sentence was imposed, without further ado, in the circumstances of the matter and directed a query to, *inter alia*, that affect. The magistrate has since responded and I am both thankful and grateful to him therefore.

[6] The salient facts apparent from the record are that:

6.1 The accused did not testify either in her defence or in mitigation of sentence;

6.2 The undisputed evidence of the complainant was that the accused stabbed her in the face with a piece of broken beer bottle after a physical altercation between them over spilled beer. The stabbing took place at a time the complainant was already on her way moving away from the tavern;

6.3 In mitigation of sentence the accused's husband testified that she, the accused, is a bit naughty;

6.4 A pre-sentencing report was secured after the

accused's previously convictions secured and presented to the magistrate;

6.5 The accused's record of previous convictions was not available to the probation officer at the time of preparing the report although it was disclosed that the accused was, in the past, once assist by a social worker;

6.6 The probation officer recommended a suspended sentence in her report which was admitted with a consent of both the prosecutor and the accused;

6.7 In determining the sentence to be imposed the magistrate warned the accused that:

> **"Jy moet aanvaar dat as jy nou weer 'n opgeskorte vonnis kry sou dit heel moontlik die laaste een wees want as jy nou weer voorkom glo ek …. gaan jy met twee vorige veroordelings teen jou sit en jy gaan swaar gestraf word."**

[7] In response to the query the magistrate painstakingly explained, *inter alia*, that:

7.1 He requested a pre-sentencing report because the accused is a minor and

"It is not easy these days for a normal criminal court to sentence minors that come in conflict of the law. Although minors are committing hideous crimes and become more violent every day or year it is expected of the courts to be careful how your sentence the young perpetrators…I treat the social workers as professionals and although the court is not bound by their recommendation it carries a lot of weight.

In this instance the report recommended a suspended sentence and the State echoed these sentiments. The court then decided to lean backwards and impose another suspended sentence.";

"2. The accused was assessed by a probation officer once in the past already. The probation officer knows that she had been in conflict with the law in the past. I am of the opinion that knowledge of a previous conviction would not have changed the recommendation of the probation officer at all.";

"3. … with respect, I am of the opinion that the fact that the accused is still serving a wholly suspended sentence would also not have

affected the officer's recommendation. What other options are there? The accused cannot pay a fine. She cannot really be sent to jail. To caution and discharge her would not be appropriate under the circumstances and I felt that correctional supervision was not an option as well.

4. **Correctional supervision was not considered as it is a form of jail sentence. To sentence a child to correctional supervision is inhuman. To confine a child to his house for a few months and deny him/her the freedom of playing sport, going to school functions, interact with friends and the like is cruel. There are a view things that disqualify the accused for correctional supervision. She is still a minor, but does not go to school any more. Her parents are separated. … She does not work … and is dependant on her mother. The mother or the father was not present when she was sentenced. Here is no probation officer in Koffiefontein and we have to rely on a probation officer from a nearby town. She received a suspended sentence a year before this crime was committed and she was not deterred by the conditions of the suspended sentence. The**

guardian said the accused is a naughty child. To think that this child will stay at home while her mother is at work is expecting to much."

[8] From the aforegoing it became, immediately, very vivid in my mind that the magistrate's point of departure was that he had to respect the presentencing report as well as the agreement between the parties viz the prosecutor and the accused in accepting the report. Although his quick to point out that he was not bound by the probation officer's recommendations, his submission that

> **"the court then decided to lean backwards and impose another suspended sentence"**

suggest otherwise.

[9] The aforegoing feeling on my party is, further, buttressed by the fact that, in his response to the query, the magistrate points out that the accused was not deterred by the conditions of the previous suspended sentence and this fact was clearly before him when he imposed the sentence herein insofar as he warned the accused about the possible consequences of her further conviction in the light of both sentences.

[10] It is correct, as effectively pointed out, by the magistrate, that the recommendation of the pre-sentence report is not binding on the court and that the decision was supposed to be his as was pointed out in **S v Lewis** 1986 (2) PHH 96 (A) and **S v H** 1978 (4) SA 385 (B) at page 386 D – E. The court has to analise the presentencing report carefully and particularly and may not simply follow the recommendations set out therein.

[11] In **S v Lister** 1993 (2) SACR 228 (A) at 232H the court observed as follows in relation to a similar report by a physiatrist:

> **"…the approach of a sentencing officer is not the same as that of a psychiatrist. The sentencing officer takes account of all the recognised aims of sentencing including retribution; the psychiatrist is concerned with diagnosis and rehabilitation."**

[12] In *casu* the only reasonable inference to draw, in my view, from the record and the magistrate's reasons is that he accepted the report as a matter of cause and felt bound,

consciously or inadvertently, to do so because the prosecutor and the accused agreed to its admission into the proceedings. He followed it despite it being clear *ex facie* the same that the reporter was not aware of the accused's previous conviction as well as the fact that she had already been afforded an opportunity to benefit from a non-custodial sentence in form of a suspended sentence on the same conditions and for similar crime. It is, thus, probable that the magistrate did not analise the report critically.

[13] It is, further, disturbing in my view that the magistrate, in his response, opines that the aforegoing fact will not have effected the officers recommendation. Even in the alikely event that such a fact would not have affected the proffesional recommendation of the reporter, it was still in my view, the duty of the magistrate to bring it pertinently to her attention in order for him to benefit from the correct and reliable assistence from the expert that the reporter was. As Kriegler J observed in **S v M** 1991 (1) SACR 91 (T) at 100A-B:

> **"…the wise judicial officer does not lightly reject expert evidence on matters falling within the purview of the expert witness's field. The judicial process is difficult enough."**

In my view for such expert evidence to be beneficial to the judicial officer it has to be based on the correct and full facts.

[14] The magistrate, further, contends that there was no other options available and admits that correctional supervision was not considered as it is a form of jail centence. The aforegoing clearly looses site of the fact

L. J. LEKALE, AJ

I concur.

J. JORDAAN, J

/em