

NOTES / AANTEKENINGE

ADMINISTERING OF AN OATH BY AN INTERPRETER IN THE MAGISTRATES' COURT: AN EVALUATION OF RECENT CASE LAW

1 Introduction

The High Court of South Africa, in different divisions, had the opportunity to consider whether an interpreter, in the Magistrates' Court, is permitted to administer an oath. The High Court has come up with two different answers to this question. First, the High Court, in *Pilane v S* ((CA 10/2014) [2015] ZANWHC 10; 2016 (1) SACR 247 (NWM)), decided that in the Magistrates' Court, only a presiding officer is permitted to administer an oath. This was based on the fact that section 162 of the Criminal Procedure Act (51 of 1977 (CPA)) only permits a presiding officer to administer the oath. Secondly, it has decided, in *S v Maloma* ((A376/2015) [2015] ZAGPPHC 496) and *Mkhari v S* ((A433/15) [2016] ZAGPPHC 186), that interpreters, in terms of section 162 and section 165 of the CPA, are permitted to administer an oath.

This submission provides a critical evaluation of the recent case law in order to elicit the principles applicable to the administering of the oath in the Magistrates' Court. The provisions of section 162 and section 165 of the CPA will be discussed first, in order to provide the background. A discussion of the recent case law will follow. The facts and the decision of the cases will be presented and followed by the discussion of these decisions in light of the current jurisprudence on the issue.

After the discussion, the contribution will elicit the principles that must be followed when interpreters administer an oath to witnesses. The contribution is limited to the administering of an oath in criminal matters.

2 Section 162 and section 165 of the CPA

Section 162(1) of the CPA provides that no person shall be examined as a witness in criminal proceedings unless he or she is under oath, and such oaths shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court. Section 162(1) does not apply to witnesses who take an affirmation *in lieu* of the oath and witnesses who are found not to understand the nature and import of the oath or the affirmation (see s 162, 163 and 164 of the CPA). Section 162(1) goes further and prescribes the content of the oath. The oath must be in the following form: "I swear that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God". Section 162(2) of the

CPA, permits any witness taking the oath, to take the oath with an uplifted hand if the witness so wishes.

Section 162 clearly prescribes who should administer the oath in the Magistrates' Court and the superior courts. In the Magistrates' Court, no person other than the magistrate or regional magistrate may administer the oath (see also Kruger *Hiemstra Criminal Procedure Law* (2016) 22–46(1)). No other person may be authorized to administer the oath and the requirement that the judicial officer must do it is peremptory (see *Henderson v S* [1997] 1 All SA 594 (C) and *S v Mashava* 1994 (1) SACR 224 (T)). In *S v Vumazonke* (2000 (1) SACR 619 (C) par 9), the court emphasised that section 162 of the CPA was peremptory in so far as the witness taking the oath is not a witness who takes an affirmation in terms of section 163 or a witness who does not understand the oath or affirmation in terms of section 164 of the CPA. In the superior courts, section 162 prescribes that the presiding judge or the registrar of the court may administer the oath. It is not peremptory that only the presiding judge or the registrar administers the oath. The identity of the person administering the oath is of lesser importance and the fact that the person is at the time not a presiding judge or registrar may not be according to the letter of the section but is really not an irregularity of any consequence (see Kruger *Hiemstra Criminal Procedure Law* 22–46(1)). In *S v Orphanou* (1990 (2) SACR 429 (W)) the court made the following remarks regarding the peremptory nature of section 162 as it relates to the superior courts:

“But in that case the Court held that what was peremptory was that every witness not covered by s 163 or 164 must have the oath administered to him. The case does not hold that the whole section [162] is peremptory.”

It is submitted that this is in accordance with the procedure followed in practice in the superior court. The oath may be administered through an interpreter in the presence of the presiding officer or by the presiding officer himself or the registrar of the court; or by a judge's clerk or in his absence by a court orderly acting temporarily as court registrar and that is proper compliance, or at the least substantial compliance, with section 162 (Du Toit, De Jager, Paizes, Skee and Van der Merwe (eds) *Commentary on the Criminal Procedure Act* 2016 22–68). This is so because the superior court has the power to determine its own procedure.

The Magistrates' Court is a creature of statute and does not have the power to determine its own procedure. Failing to comply with the provisions of section 162, in respect of administering an oath in the Magistrates' Court, has far-reaching implications. Section 162(1) makes it clear that, with the exception of certain categories of witnesses falling under section 163 or section 164 of the CPA, it is peremptory for witnesses in a criminal trial to be examined under oath. The testimony of a witness who has not been placed under oath properly, as provided for in the CPA, lacks the status and character of evidence and is inadmissible (see *S v Matshivha* (656/12) [2013] ZASCA 124; 2014 (1) SACR 29 (SCA); [2014] 2 All SA 141 (SCA) par 10). The effect on the testimony of a witness, except a witness who has taken an affirmation or properly admonished, testifying without taking an oath is that the testimony is set aside and in some instances, the court of

appeal or review will find that the proceedings were irregular and may set aside any decision taken in the matter (see *S v Matshivha supra* par 10).

Section 165 seems to supplement the provisions of section 162 as far as it relates to the peremptory requirement that in the Magistrates' Court, only the presiding officer must administer the oath. Section 165 provides that:

"Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under section 170A(1), the oath, affirmation or admonition under section[s] 162, 163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be."

Du Toit (Du Toit *et al Commentary on the Criminal Procedure Act 22–76*) cautions that the section does not give the presiding officer the latitude that a casual reading of its wording might suggest. In *Motsisi v S* ((513/11) [2012] ZASCA 59), the court considered the role of the presiding officer in terms of section 165. It is submitted that the following principles may be deduced in respect of the duty of the presiding officers in respect of section 165 of the CPA (see *Motsisi v S supra* par 15):

- a) The duty to ensure that a witness has properly taken the oath rests on a presiding officer.
- b) The presiding officer has to be satisfied that the witness comprehends what it means to take an oath.
- c) The fact that a presiding officer may administer an oath through an interpreter or an intermediary or a registrar of the court does not relieve the presiding officer of the duty to perform this function.
- d) Section 165 provides the presiding officer with a means to use the assistance of the interpreter to perform his or her functions.
- e) A judicial officer cannot simply abdicate his or her responsibilities and hope that an interpreter or intermediary will be able to administer an oath.

It is clear that the court in *Motsisi v S* did not find that an interpreter may not administer an oath in terms of section 165. The implication of the decision in *Motsisi v S (supra)* is that even when the interpreter administers the oath, it is still the duty of the presiding officer to ensure that the oath is administered and it is properly administered.

It is important to note that section 165 of the CPA was amended by section 2 of the Criminal Law Amendment Act (135 of 1991). However, the reason for the amendment had nothing to do with the issue discussed in this submission. The purpose of the amendment was to provide that where a witness is to give evidence through an intermediary appointed under section 170A(1) of the CPA, the oath, affirmation or admonition may be administered by the presiding judge or judicial officer or the registrar of the court through the intermediary; or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be (see s 2 of the Criminal Law Amendment Act 135 of 1991). The wording of section 165 prior

to the amendment already made provision for the interpreter to be utilised to administer the oath.

Furthermore, the interpreter must have taken an oath to interpret. Evidence interpreted by an interpreter who had not taken an interpreter's oath is inadmissible (see *S v Sydow* 2003 (2) SACR 302 (C), *S v Ndala* 1996 (2) SACR 218 (C), *S v Naidoo* 1962 (2) SA 625 (A); *S v Kwali* 1967 (3) SA 193 (A); *S v Sigotula* 2003 (1) SACR 154 (E)). On whether the intermediaries are required to take the oath, the authorities are not in harmony because there are conflicting High Court decisions (see Du Toit *et al Commentary on the Criminal Procedure Act 22–114A*). In *S v Motaung* (2007 (1) SACR 476 (SE)) and *S v Booï* (2005 (1) SACR 599 (B)), the court found that if the oath or affirmation was not administered on the intermediaries, they were not correctly appointed in terms of section 170A of the CPA. A different approach was taken in *S v QN* (2012 (1) SACR 380 (KZP)). The court, in *S v QN* (*supra*), found that there was no requirement that the oath be administered on intermediaries. This finding appears more clearly on par 22 of the judgment, where the court differed, from the approach taken in *S v Booï* (*supra*) and *S v Motaung* (*supra*), in respect of the finding that, if an intermediary is not sworn in, it amounts to an irregularity. The court noted that a practice of swearing in an intermediary had emerged after *S v Booï* (*supra*) and *S v Motaung* (*supra*). Recognising that requiring an intermediary to take an oath was a salutary practice, the court in *S v QN* (*supra*) differed only in that failing to take an oath leads to an irregularity.

The position in *S v QN* (*supra*) is accepted in this submission, and it is further suggested that the legislature prescribes the taking of the oath by intermediaries as a requirement for appointment, but not to attach any detrimental consequences of the failure to take such oaths (see also Du Toit *et al Commentary on the Criminal Procedure Act 22–115*). No consequences are prescribed for the failure to take an oath by intermediaries in terms of the CPA (see *S v QN supra* par 22). Rule 68(1) of the Magistrates' Court Rules and rule 61 of the Uniform Rules of the superior courts clearly provides that interpreters are required to take an oath and failure to do so, the evidence will be inadmissible. The Magistrates' Court Rules and the Uniform Rules of the superior courts are silent on the taking of the oath of intermediaries. It is submitted that this is an indication that the legislature never intended that the evidence led through an intermediary who has not taken the oath would lead to an irregularity, which would lead to inadmissibility of the evidence.

3 Recent Case Law

- 3 1 *Pilane v S* (CA 10/2014) [2015] ZANWHC 10; 2016 (1) SACR 247 (NWM)

In *Pilane v S* (*supra*), the court dealt with the issue under discussion. This judgment will now be discussed in detail.

The appellant was convicted of rape and sentenced to an effective term of imprisonment for ten years. Leave to appeal was granted against the conviction. One of the grounds that the appellant relied upon was that the court did not follow the correct procedure for administering an oath to the witnesses. The interpreter and not the presiding officer swore in all the State witnesses. The court had to decide whether such a procedure amounted to an irregularity. The following appeared from the record of the proceedings regarding the administering of the oath to witnesses (see *Pilane v S supra* par 4):

“COURT: Full names and surname?
 WITNESS: G..... K..... P..... Your Worship.
 COURT: Let her take the oath.
 INTERPRETER: Sworn in Your Worship.
 COURT: Full names and surname?
 WITNESS: B..... G..... M..... M..... Your Worship.
 COURT: Please administer the oath.
 INTERPRETER: Witness sworn in Your Worship.
 COURT: Full names and surname?
 WITNESS: C..... L.....
 COURT: Administer the oath, please.
 INTERPRETER: Sworn in Your Worship.”

The record of the proceedings clearly indicates that the presiding officer played no role in administering the oath to the witnesses.

After considering the provisions of section 162 of the CPA, the court pointed out that the requirement that the witnesses be sworn in by the presiding officer was peremptory in nature. The court found that the oath must be administered by a judicial officer and not the interpreter. In the event that the oath was not administered by the judicial officer as prescribed by section 162, the witnesses were not properly sworn in and their evidence was therefore inadmissible (see *Pilane v S supra* par 6). The court made such a finding on the basis that it accepted that it was bound, in terms of the principle of *stare decisis*, by the decision of the Supreme Court of Appeal, in *S v Matshivha (supra)*. The Supreme Court of Appeal, in *S v Matshivha (supra)*, found that section 162 (1) was clear that, with the exception of witnesses falling under section 163 or section 164, it is peremptory for all witnesses to be examined under oath.

The court went further and found that since the oath was not administered properly in terms of section 162 of the CPA, there was no evidence tendered in the proceedings. The effect was that the irregularity committed by the Regional Magistrate vitiated the entire proceedings. The court found it was not necessary to consider the other grounds of appeal.

3 2 *S v Maloma* (A376/2015) [2015] ZAGPPHC 496

In *S v Maloma (supra)*, the matter went to the North Gauteng High Court as a special review in terms of section 304 of the CPA. The basis for such review was for the court to decide whether the procedure of interpreters administering the oath to witnesses in the presence of the judicial officer constituted an irregularity as found in *Pilane v S (supra)*. Similarly, to *Pilane*

v S (supra), the interpreter in the presence of the presiding officer administered the oath.

The court noted that it appeared from the judgment in *Pilane v S (supra)* that the court was called upon to only consider section 162 of the CPA. The court pointed out that the conclusion reached in *Pilane v S (supra)*, while the court did not consider section 165, could not be supported. The court in keeping with the long-standing practice in our lower courts found that the administration of the oath by the interpreter in the matter was consistent with the provisions of section 162, read with section 165 and that no irregularity was committed (see *S v Maloma supra* par 16).

The court rejected the view that the Supreme Court of Appeal, in *Machaba v The State* ((20401/2014) [2015] ZASCA 60) supports the decision in *Pilane v S (supra)* in respect of the administering of the oath by the interpreter, because all that *Machaba v The State (supra)* endorses is the view that section 162 of the CPA is preemptory (see par 12).

The court also rejected that the court in *Pilane v S (supra)* was bound by the decision in *S v Matshivha (supra)* to conclude that it was irregular to allow the interpreter to administer the oath. It is trite and clear in terms of the mandatory provisions of section 162, subject to the provisions of sections 163 and 164, that the oath has to be administered to every witness, but the court in *S v Matshivha (supra)* does not consider the provisions of section 165 of the CPA (see *S v Maloma supra* par 6 to 9). It is submitted that, as far as whether section 165 authorises an interpreter to administer an oath was not decided in *S v Matshivha (supra)* and *Pilane v S (supra)*, the court was not bound by the decisions in *S v Matshivha (supra)*; and *Machaba v The State (supra)*.

3 3 *Mkhari v S* (A433/15) [2016] ZAGPPHC 186

The facts of the case were that the appellant was convicted in the Nelspruit Regional Court, Mpumalanga on a count of rape of a minor child and was sentenced to life imprisonment. The appellant contended that the court failed to comply with the provisions of section 162 of the CPA, by failing properly to administer the oath. The following process appeared from the record of the proceedings (see *Mkhari v S supra* par 5–8):

“[5] Firstly and in respect of the evidence of the complainant the following appears from the record:

COURT: How old are you?

WITNESS: On the 8th of September I am turning 16.

COURT: Ja. Thank you, swear her in.

INTERPRETER: This witness is sworn in your Worship.”

[6] The second state witness, T. X. Z. (“T...”), testified through an intermediary and the following appears from the record:

“COURT: Thank you, the full names of the witness.

WITNESS: T. X. Z.

COURT: Thank you, how old are you?

WITNESS: (indistinct).

COURT: We cannot hear you, how old are you?

WITNESS: Eleven.

COURT: That is better thank you where do you stay?

WITNESS: Barberton.
COURT: Thank you and how many brothers and sisters do you have?
WITNESS: I have one brother I do not have a sister.
COURT: Thank you do you go to school?
WITNESS: Yes.
COURT: Which grade are you?
WITNESS: Grade 7.
COURT: And do you go to church?
WITNESS: Yes.
COURT: And are you taught about God?
WITNESS: Yes.
COURT: Now if you go home today and you say you were here with Ms Mthethwa will that be the truth or will it be a lie?
WITNESS: The truth.
COURT: And are you allowed to tell lies?
WITNESS: No.
COURT: Now do you realise that if you tell lies you can be punished?
WITNESS: Yes.
COURT: Now if you take the, or let me put it this way do you believe in God?
WITNESS: Yes.
COURT: Now if you take the oath and you call God as your witness that you speak the truth and nothing else but the truth do you understand it?
WITNESS: Yes.
COURT: And if you tell lies you can be punished?
WITNESS: Yes.
COURT: Thank you swear him in.
WITNESS: So help me God."

[7] Thirdly and in respect of the appellant, the record reflects the following:

"COURT: Full names?
WITNESS: Albert Mkhari.
COURT: Swear him in. Thank you, mister, is he sworn in?
WITNESS: So help me God."

[8] Lastly, the appellant's wife, Dorah Tivani, was sworn in as follows:

"COURT: Full names?
WITNESS: Dorah Tivani before Court.
COURT: The surname is?
WITNESS: Tivani Your Worship.
COURT: Please swear her in.
WITNESS: So help me God."

Similarly, as in *S v Pilane (supra)* and *S v Maloma (supra)*, the witnesses, in this case, were sworn in by an interpreter instead of the presiding officer.

The court noted that the provisions of section 162 of the CPA were peremptory in nature. Then the court held that section 165 of the CPA was also applicable in these instances. The court cautioned that it should be acknowledged that section 165 provides for two distinct situations. Firstly, a presiding official may administer the oath through an interpreter or an intermediary; and secondly, the oath may be administered by an interpreter or an intermediary as long as it is done in the presence of or under the eyes of the presiding judicial officer (see par 15). The court was satisfied that there was due compliance with the requirements of section 162 read with section 165 of the CPA. The oath was duly administered in the presence of and under the eyes of the magistrate and the magistrate clearly did not simply abdicate these duties to the intermediary and interpreter, but remained in control of the administering of the oath. The court did not consider the decision in *Pilane v S (supra)*. It would have been very

interesting to see how the court would have responded to *Pilane v S (supra)*. It is submitted that it would have rejected the decision on the basis that the court failed to consider the implications of section 165 of the CPA. The court followed the same reasoning in *S v Maloma (supra)*.

4 Discussion

From the reading of the three decisions above, it is clear that the majority of the judgments support the view that not only the presiding officer may administer the oath in the Magistrates' Court, but the interpreters may also do so in the presence of the presiding officer. However, the decision in *Pilane v S (supra)* seems to have been endorsed by the Supreme Court of Appeal. In *Machaba v The State (supra)*, the Supreme Court of Appeal made the following finding (see *Machaba v The State supra*):

"In light of an unreported decision of the North West Division, Mahikeng, *Nkoketseng Elliot Pilane v The State* it was argued on behalf of the first appellant that the record does not reflect that the witnesses for the State were duly sworn in, in terms of s 162 of the CPA. In *Pilane*, all the witnesses were sworn in by the interpreter and not the presiding magistrate. The record reflects that the magistrate said: 'Let her take the oath'; 'Please administer the oath' and 'Administer the oath please'. The record thereafter reflects the following after the witnesses' names: 'd.u.o.', which probably is an abbreviation for: 'declares under oath'. It is peremptory in terms of s 162 that all witnesses be sworn in by either the presiding judge or the registrar in the case of a superior court."

The court went further in support of *Pilane v S (supra)*, by pointing out that due to the peremptory wording of section 162 of the CPA the requirement that it is the presiding officer or the registrar of the court, that must administer the oath, cannot be dispensed with (see *Machaba v The State supra* par 10).

The problem with the decision in *Machaba v The State (supra)*, is that no reference is made to the provisions of section 165 of the CPA. However, it is submitted that it was not necessary, for the court, to consider the provisions of section 165 of the CPA. The court rejected the argument that section 162 of the CPA was not complied with. It appeared in *Machaba v The State (supra)* that the record was not complete and the appellant relied on the appearance of the abbreviation "(d.s.s.)" after the names of witnesses, followed by the words "(through interpreter)", as a basis for the argument that the oath was not properly administered (see *Machaba v The State supra* par 11). The court went further and indicated that there was no indication that the judge had instructed the interpreter to administer the oath or that the judge, or registrar of the court, did not themselves administer the oath through the interpreter and in the absence of any clear evidence that the judge left it to the interpreter to administer the oath, no deduction can be made that the oath had not been properly administered.

The practice in the Magistrates' Court seems not to be supported by the decision in *Pilane v S (supra)* (see Kruger *Hiemstra Criminal Procedure Law* 22–46(1)). Kruger points out that "[t]he practice in the Magistrates' Court is that the magistrate tells the interpreter what to say to the witness" (see Kruger *Hiemstra Criminal Procedure Law* 22–46(1)). Kruger further points

out that section 165 provides that the oath can be administered by the interpreter in the presence or under the eyes of the presiding judge or judicial officer, and this is in accordance with the practice in both the high and lower courts (see also *S v Bothma* 1971 (1) SA 332 (C) 340E).

Pilane v S (supra) seems to be further supported by the decision in *Motsisi v S (supra)*, where the court found that the presiding officer “cannot simply abdicate his or her responsibilities and hope that an interpreter or intermediary will be able to admonish a witness” (see *Motsisi v S supra* par 15). Du Toit points out that section 165 of the CPA does not relieve the presiding officer of the duty to perform his function of administering the oath. The role of interpreters is limited to ensuring, because of their skill, that questions by the court to the witness were conveyed in a manner that the witness could comprehend and that the answers given by the witness were conveyed in a manner that the court would understand. (Du Toit *et al Commentary on the Criminal Procedure Act* 22–76). However, *Pilane v S (supra)* completely ignores the provisions of section 165 of the CPA. In *Motsisi v S (supra)*, the court seems to suggest that the magistrate must perform the function himself as required by the CPA (see *Motsisi v S supra* par 15). It is submitted that the court did not mean that section 165 does not authorise any other person than the presiding officer or registrar because section 165 provides that an interpreter could administer the oath in the presence and under the eyes of the presiding officer. Assuming that the court meant that no other person than the presiding officer or registrar may administer the oath, it cannot be binding on the lower courts, because this was made in passing. The decision of the court was that the witness was not properly admonished in terms of section 164 of the CPA because the questions that were asked were irrelevant and clearly did not demonstrate to the court whether the witness was able to testify and importantly, whether the witness was able to distinguish between truth and falsehood (see *Motsisi v S supra* par 12–14).

Rikhotso in support of the decision in *Pilane v S (supra)* state that “the legislation is clear that an oath can be administered by a court interpreter” but in his concluding remarks states that:

“From my point of view, the interpretation of s 162 and 165 provides a clear general practice for the oath to be administered by a presiding judge, judicial officer or registrar of court. The phrase ‘Registrar of court’ in my view is not wide enough to include court interpreters. Therefore, the oath administered by the interpreter causes irregularity and as a result the evidence given by the witnesses tend to be inadmissible since they were not properly sworn in.”

(See Rikhotso “Bad Practice Continues: Who must administer an oath in Criminal Proceedings” 2016 *De Rebus* 18).

The question, at this point, remains. Is the interpreter empowered to administer an oath in the Magistrates’ Court? In terms of *Pilane v S (supra)*, the interpreter is not empowered. However, the decisions in *Mkhari v S (supra)* and *Maloma v S (supra)* provide a different perspective. Section 165, in terms of these two judgments, empowers the interpreter to administer an oath, provided it is done in the presence of the presiding officer. The two cases relied on the wording of section 165, which states very clearly that the interpreter may administer the oath as long as it transpires in the presence

of or under the eyes of the presiding judicial officer. It is submitted the use of the phrases “in the presence of” and “under the eyes of” indicates that the duty still lies in the presiding officer to ensure that the oath is taken and it is properly taken (see Du Toit *et al Commentary on the Criminal Procedure Act* 22–76).

It is submitted that the interpretation that the interpreter may administer the oath, is not in conflict with the duty placed on the presiding officer in *S v Motsisi (supra)*. The fact that *Pilane v S (supra)* did not consider the provisions of section 165 and consequently did not find that the interpreter, in terms of section 165, could not administer an oath; means that *Pilane v S (supra)* cannot be authority for the argument that the interpreter may not administer an oath. Similarly, in *Machaba v S (supra)*, the court makes no mention of section 165 and consequently no finding that section 165 does not empower the interpreter to administer an oath. It should be noted that, even though the provisions of section 165 of the CPA were not considered, *Machaba v S (supra)* seem to suggest that the interpreter is not empowered to administer an oath.

Section 112 of the Magistrates’ Court Act (32 of 1944) regulates the administering of the oath in a civil matter. Prior to its amendment by the Lower Courts Amendment Act (91 of 1977), it regulated the administration of the oath in criminal and civil matters. Section 112 of the Magistrates’ Court Act, provided that the oath to be taken by any witness in any proceedings shall be administered by the officer presiding at such proceedings or by the clerk of the court (or any person acting in his stead) in the presence of the said officer, or if the witness is to give his evidence through an interpreter, by the said officer through the interpreter or by the interpreter in the said officer’s presence. In *S v Bothma (supra)*, the court commented that section 112 had placed the administration of the oath in the Magistrates’ Court, on the same footing as the administration of the oath in the superior courts where matters concerning the oath are governed by our common law. The court further states that in the court’s practice, a custom had arisen for the judge generally to call upon the clerk or the interpreter to swear the witnesses. Section 112 is still applicable to civil matters and clearly allows the interpreter administering the oath in the presence of the presiding officer. Section 112 also authorises clerk of the court or any person acting in his stead to administer the oath in the presence of the presiding officer. The implication is that the procedure of administering the oath, in civil matters, in the Magistrates’ Courts is not different to the process followed in the superior courts.

Section 112 was amended by section 11 of the Lower Courts Amendment Act, to provide that it no longer applied to criminal matters. The Lower Court Amendment Act commenced on 1 July 1977. The CPA, section 162, and section 165 included, commenced on 22 July 1977. It is submitted that section 162 and section 165 of the CPA was necessitated by the enactment of the Lower Court Amendment Act because section 112 of the Magistrates’ Act no longer regulated the administering of the oath in the Magistrates’ Court. It is noted that section 112 of the Magistrates’ Court Act; and section 162 and section 165 of the CPA are not identical, in that section 162 and section 165 do not make provision for the administering of the oath by the

clerk of the court. It is submitted that, if the legislature intended to not give the interpreter the power to administer the oath, it would not have enacted the provision of section 165. This can be deducted from the fact that the legislature did not reproduce section 112 of the Magistrates' Court Act in the CPA, it opted to create a new provision in section 162 and section 165; but still ensured that the interpreters are empowered to administer an oath.

From the reading of section 162 and section 165, it is clear that the interpreter is empowered to administer the oath. However, what is left to consider is whether it is sufficient for the presiding officer to say, "administer the oath please" or "let her take the oath". Section 165 clearly provides for two situations. First, the presiding officer will administer the oath through an interpreter or an intermediary. It is submitted that this means that the presiding officer will administer the oath and the interpreter will be utilised to interpret to the witness.

Secondly, the interpreter or intermediary may administer the oath in the presence or under the eyes of the presiding officer. The phrase "under the eyes" was introduced by section 2 of the Criminal Law Amendment Act (135 of 1991). It is submitted that with the addition of the phrase, the legislature intended to cover a situation when the witness testifies through an intermediary and testifies from any other place remote to the presiding officer.

The legislature could not have intended that the two provisions provided in section 165 of the CPA cover the same circumstances. Therefore, it is submitted that it is sufficient for the presiding officer to say, "administer the oath please" or "let her take the oath", to the interpreter.

5 Conclusion

This submission considered whether the interpreter, in the Magistrates' Court, is permitted to administer an oath to witnesses. The provisions of section 162 and section 165 of the CPA were examined. Two differing groups of judgments exist on this issue; the one group found that only the presiding officer might administer an oath, while the other group found that the interpreter is also empowered to administer an oath.

Section 162 of the CPA clearly stipulates that, in the Magistrates' Court, only the presiding officer be authorised to administer the oath. However, section 165 of the CPA cannot be ignored. Section 165 allows the interpreter to administer the oath in the presence or under the eyes of the presiding officer. The judgment in *Pilane v S (supra)* did not consider section 165 of the CPA and the Supreme Court of Appeal is yet to decide on the matter. As it was mentioned in *Motsisi v S (supra)*, the presiding officer cannot simply abdicate his or her responsibilities and hope that an interpreter will be able to administer the oath. It is submitted further that *Motsisi v S (supra)*, is not authority for the argument that the section 165 does not authorise the interpreter to administer the oath. It is submitted that these provisions (s 162 and s 165 of the CPA), read together, provide that, in the Magistrates' Court, the presiding officer may administer the oath, him/herself, or through an interpreter; or the interpreter may administer the oath in the presence or under the eyes of the presiding officer.

It is clear from the reading of the current case law and the CPA, that the following principles are applicable in respect of the administering of the oath in the Magistrates' Court:

- The oath may be administered by a presiding officer or an interpreter.
- The presiding officer may administer such oaths through the interpreter.
- If the interpreter is administering the oath, he/she must do so in the presence or under the eyes of the presiding officer.
- If the interpreter is administering the oath, the presiding officer cannot simply abdicate his or her responsibilities and hope that an interpreter will be able to administer the oath to a witness. This, it is submitted, means that the presiding officer must be in control of the process, it does not mean that the interpreter is precluded from administering an oath.
- If the oath is administered through or by an interpreter, the interpreter must have taken an oath in terms of rule 68 of the Magistrates' Court Rules. If the oath is administered by an interpreter who has not taken such oaths, the court of appeal may set aside the testimonies of the witnesses sworn in by such an interpreter.

The decision in *S v Pilane (supra)* cannot be supported by section 162, read with section 165 of the CPA. It is submitted that, if section 165 was considered, the court would have come to a similar decision as in *S v Maloma (supra)* and *Mkhari v S (supra)*.

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