e-MANTSHI

A KZNJETCOM Newsletter

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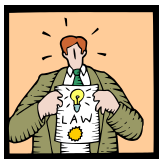
Welcome to the hundredth and fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), with the approval of the Minister of Justice and Correctional Services, amended the rules of the Magistrates Courts in South Africa. The notice to this effect was published in Government Gazette no 38380 dated 9 January 2015. The amended rules are rule 27 and 55 and come into operation on 13 February 2015.

"Rule 27 of the Rules is hereby amended by the substitution for sub-rules (5), (6), (7) and (8) of the following sub-rules:
"(5) If in any proceedings a settlement or an agreement to postpone or withdraw is reached, the attorney for the plaintiff or applicant shall inform the registrar or clerk of the court and other parties [to the action] thereto by delivering a notice accordingly.
(6)(a) Application may be made to the court by any party at any time [after delivery of notice of intention to defend and] before judgment to record the terms of any settlement [of an action] agreed to by the parties to a proceeding without entry of judgment: Provided that if the terms of settlement so provide, the court may make such settlement an order of court.

(b) Where any party to a settlement agreement is not present at the time when the terms of a settlement agreement are recorded or made an order of court, the presiding Magistrate may call for the verification of the authenticity of any signature of a party to a settlement agreement before recording the terms thereof or recording same as an order of court or granting judgment in terms thereof.

(7) An application referred to in sub-rule (6) shall be on notice, except when the application is made in court during the hearing of any proceeding [in the action] at which the other party is represented or when a written waiver (which may be included in the statement of the terms of settlement) by such other party of notice of the application is produced to the court.

(8) At the hearing of an application referred to in sub-rule (6) the applicant shall lodge with the court a statement of the terms of settlement signed by all parties to the [action] proceeding and, if no objection thereto be made by any other party, the court shall note that the [action] proceeding has been settled on the terms set out in the statement and thereupon all further proceedings [in the action] shall, save as provided in sub-rules (9) and (10), be stayed."

3. Rule 55 of the Rules is hereby amended by the insertion of the following sub-rule (10):

"(10) Rules 28 and 28A shall apply equally to all applications."

2. In Government Gazette no 38399 dated 23 January 2015 further amendments to the Rules of the Magistrates Courts has been proclaimed. Annexure 2 to the Rules is amended by the substitution for Part II of Table C with new tariffs for Sheriffs who are not officers of the public service. These new tariffs will come into operation on the 24th of February 2015. Annexure 2 to the Rules was also amended with the substitution of Tables A and B with new tariffs for costs. These new tariffs will also come into operation on the 24th of February 2015.

Recent Court Cases

1. S V ZUMANI 2015(1) SACR 84 (GJ)

The requirement that all reasonable steps must be taken to link an accused to the possession of a firearm in terms of section 117(2) of the Firearms Control Act is not met where the firearm is not subjected to fingerprint analysis.

The three appellants and one other person were the occupants of a BMW vehicle, and appeared, to the police officials travelling behind them, to be acting suspiciously.

The BMW did not have rear number plates and, when the blue lights of the police vehicle were activated, the BMW sped off and two firearms were thrown from the windows of the car. The BMW was eventually forced to stop and the appellants were arrested. The two firearms were recovered and examined by a ballistics expert who identified them as a J 7.65 mm semi-automatic pistol and a .38 revolver, both of which functioned normally. The appellants were convicted in a regional court of the possession of the firearms and ammunition in contravention of s 3 and 4*(f)*(iv) and s 90 of the Firearms Control Act 60 of 2000 (the Act) and sentenced to periods of imprisonment. The state relied on the presumption in s 117(2) of the Act in order to prove possession, the appellants all being over the age of 16 years and present in the vehicle. On appeal,

Held, that the requirement in s 117(2) of the Act that before the presumption could operate, all reasonable steps had to be taken to link the accused to the possession of the firearms, had not been met in the absence of evidence that the firearms had been submitted for examination for the presence of fingerprints. The court a quo had accordingly wrongly applied the presumption. (Paragraph [6] at 87*h* – *i*.)

Held, further, that mere knowledge of the presence of the firearms in the vehicle was not sufficient to establish joint possession and, as the evidence did not establish which of the occupants was in possession of the firearms and ammunition, it followed that the appellants should have been acquitted by the court a quo. Convictions and sentences set aside. (Paragraph [7] at 88*b*.)

2. S V PEDRO 2015 (1) SACR 42 (WCC)

In regard to s 79(1)*(b)*(ii) of Act 51 of 1977, the appointment of a private psychiatrist is mandatory unless the court, upon application from the prosecutor, directs that the appointment of a private psychiatrist may be dispensed with.

The accused was charged with culpable homicide arising from the death of a young child through his negligent driving of a motor vehicle. He was referred to a psychiatric hospital — Valkenberg Hospital — for assessment and a report in terms of s 79(1)*(b)* of the Criminal Procedure Act 51 of 1977. The report of two state psychiatrists at Valkenberg Hospital was that the accused had suffered a head injury in 2008 and had to be supervised in his self-care, and needed assistance to dress. He suffered from dementia and in their opinion he did not understand the proceedings as contemplated in s 77; and at the time of committing the offence he was incapable of appreciating the wrongfulness of the offence and of acting accordingly. It was recommended that he be detained at Valkenberg Hospital as a state patient in terms of s 77(6)*(a)*(i). At a subsequent court appearance the magistrate found the accused not guilty in terms of s 78(6)*(a)* and ordered in terms of s 77(6)*(a)*(ii) that he be detained in Valkenberg Hospital as if he were an involuntary mental health care user as contemplated in the Mental Health Care Act 17 of 2002. The accused had,

however, not pleaded to the charge and the matter then came before the court on review. The reviewing court sought the views of the Director of Public Prosecutions. The Minister of Justice and Constitutional Development was permitted to intervene to make submissions in view of the constitutional implications relating to the composition of psychiatric panels in terms of s 79 of the Criminal Procedure Act. There were four questions that the court posed, together with a proposed course to be followed: *(a)* whether the second psychiatrist on the panel should have been a psychiatrist expressly appointed by the court for the accused; *(b)* whether, in the absence of any request and direction to the contrary, the magistrate was required to appoint a private psychiatrist as a third psychiatrist on the panel; *(c)* whether, in view of the finding of the psychiatrists that the accused was not fit to stand trial, the entering of a not guilty verdict was correct; *(d)* whether, given that the accused was charged with culpable homicide, the detention order should have been in terms of subpara (i) rather than subpara (ii) of s 77(6)*(a)*; and if the answer to one or more of the above questions were to indicate that the proceedings in the lower court were irregular, what course the court should follow; and in particular, whether it should exercise its review jurisdiction to set aside and correct or remit the matter or whether it should decline to intervene, leaving it to the state or the accused to launch such review or appeal proceedings as they considered appropriate.

The court noted that the amendment to s 79(1)*(b)*(ii) by the Judicial Matters Amendment Act 66 of 2008 and the introduction of s 79(13) were intended to provide some scope for a departure from the hitherto mandatory appointment of psychiatrist B (the private psychiatrist), a state of affairs which had prevailed for about 33 years since the enactment of the Criminal Procedure Act. The scope of the intended departure was the problematic issue. Three possible interpretations were mooted: *(a)* unless the court, on application by the prosecutor, directs otherwise, the panel had to include a second psychiatrist. In deciding whether or not to make an application to dispense with the appointment of that psychiatrist, the prosecutor had to be guided by directives issued in accordance with s 79(13); *(b)* the court could, if the prosecutor applied to the court for the appointment of the second psychiatrist, appoint the said psychiatrist. He or she must be a private psychiatrist unless the court directed that he or she may be a state psychiatrist. In deciding whether to apply for the appointment of the second psychiatrist (regardless of whether the proposed psychiatrist was a private or state psychiatrist), the prosecutor had to be guided by directives issued in accordance with s 79(13); *(c)* the court always had to appoint a second psychiatrist but, if the prosecutor applied for a direction that that psychiatrist need not be a private psychiatrist, the court may appoint a state psychiatrist as the second psychiatrist. (Paragraph [29] at 52*f* – *i*.)

After considering the legislative history and the explanatory memorandum to the Judicial Matters Amendment Bill of 2008, which proposed the amendments to s 79, the court held that it was the first interpretation, *(a)* above. (Paragraph [48] at 56*i*.)

Although this conclusion required one to find that something went wrong in the formulation of s 79(13), this was not sufficient to compel one to adopt either of the other two interpretations, since neither of the other interpretations could plausibly represent the intention of the lawmaker. The most natural meaning of the words used in s 79(1)*(b)*(ii) was that the 'unless' phrase followed the whole of what preceded it. The preceding words had stood in the statute for about 33 years. If the lawmaker had intended to do anything other than insert a general qualification to the general requirement, a different formulation would have been used. (Paragraphs [48] at 56*j* – 57*a* and [50] at 57*d* – *e*.)

For all these reasons the court considered that three psychiatrists, including a private psychiatrist, had to be appointed when the case fell within s 79(1)*(b)* unless the court, upon application by the prosecutor, directed that a private psychiatrist need not be appointed, in which case there had to be two psychiatrists. In either event, the court may appoint a clinical psychologist. The directives contemplated in s 79(13) were directives setting out the cases and circumstances in which prosecutors had to request the court to dispense with the appointment of a private psychiatrist. In the present case the prosecutor did not request the trial court to dispense with the appointment of a private psychiatrist. A private psychiatrist should thus have been appointed by the court. (Paragraphs [68] at 63*b* – *c* and [69] at 63*d*.)

It appeared that in the present case the J138, a form used as a warrant, prescribed only one psychiatrist, a doctor at the George Psychiatric Hospital. The form was not signed by the magistrate but by the clerk of the court. In the event, the accused was not examined by that psychiatrist but by two state psychiatrists at Valkenberg Hospital. The court held that on these facts the appointment of the psychiatrist was irregular and the matter had to be remitted to the lower court so that a fresh psychiatric assessment could be ordered. (Paragraph [75] at 64*f*.)

The court held further that where an accused, who by virtue of mental illness or I mental defect was currently unable to understand the proceedings, was shown on the probabilities to have committed the actus reus element of an offence specified in subpara (i) of s 77(6)*(a)*, the court was obliged to order his or her detention as a state patient pending a decision in terms of s 47 of the Mental Health Care Act, whether or not the person lacked criminal responsibility at the time of the alleged offence. In the present case, therefore, the magistrate erred in law by finding the accused not guilty.

A furthermore, the magistrate should have made an order in terms of s 77(6)*(a)*(i) that the accused be detained in a psychiatric hospital or prison pending the decision of a judge in chambers in terms of s 47 of the Mental Health Care Act. (Paragraphs [101] at 71*g* – *h* and [104] at 72*e*.)

The court ordered accordingly. It also made recommendations that the Director of Public Prosecutions and the mental health care authorities establish a protocol to ensure that the prosecution service be timeously informed of relevant developments in the accused's mental health status. (Paragraph [115] at 74*j*.)

3. S V VELEBHAYI 2015 (1) SACR 7 (ECG)

When sentencing on offender for multiple offences a court must take into account the cumulative effect of the sentences.

The three appellants were convicted in a regional magistrates' court of seven counts of stock theft in that they had stolen 168 sheep from four farms over a period of two months. Two of the appellants were sentenced to an effective sentence of 23 years' imprisonment and the third appellant — who had a previous conviction for contravention of s 3(1) of the Stock Theft Act 57 of 1969, for acquiring stock in the absence of reasonable cause for believing that it was properly acquired — to 28 years' imprisonment. The offences had been well planned and fences on the farms were cut, and sheep were driven from their camps close to the nearest access roads where they were slaughtered and skinned. The scale of the operation and its brazen nature led the farmers in the area to take extraordinary measures to protect their stock. There were forced to employ guards to patrol the area at night. In addition to the losses caused directly by the theft they had to mend their fences and replace locks and chains that had been destroyed or damaged by the thieves. In sentencing the appellants the magistrate had imposed sentences of nine years' imprisonment in respect of those counts where more than 20 sheep were stolen, and five years' imprisonment in respect of those counts where fewer than 20 sheep were stolen. The appellants appealed only against their sentences and contended that the cumulative effect of the sentences rendered them excessive.

Held, that, in terms of its combination of scale, method and motive, the present case was a more serious instance of stock theft than any other in reported or unreported judgments and this meant that while previous decisions on sentence may have some relevance to show trends and judicial attitudes, the unique facts of the case, seen within the general principles applicable to sentencing, would ultimately be decisive. (Paragraph [23] at 14*a*–*b*.)

Held, further, that, although the sentences imposed by the magistrate in respect of each count were undoubtedly robust, the magistrate had not misdirected himself in that respect as a robust approach was justified by the extreme seriousness of the appellants' course of conduct. Moreover it was appropriate for the court to send out an unequivocal message that people who plundered the property of others and thereby endangered fragile rural economies had to expect a severe response from the courts when they were caught. (Paragraph [36] at 17*b*–*c*.)

Held, further, that the magistrate had, however, misdirected himself by paying insufficient regard to the cumulative effect of the sentences with the result that the sentences of 23 and 28 years' imprisonment were too harsh, to the point where it

could be said that they were startlingly inappropriate. These were the sort of sentences that were imposed to deter serious crimes involving violence, and then only rarely. They were far out of kilter with the effective sentences that had been imposed for multiple counts of stock theft involving large numbers of small stock. (Paragraph [37] at 17*d*.)

Held, further, that an appropriate sentence for the first two appellants would be one of an effective term of 14 years' imprisonment and, in respect of the third appellant, 16 years' imprisonment. (Paragraph [40] at 17*h*–18*d*.)

From The Legal Journals

Malan,K

“Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa”

Potchefstroom Electronic Law Journal 2014 Volume 17 No 5

Holness, W & Rule, S

“Barriers to advocacy and litigation in the equality courts for persons with disabilities”

Potchefstroom Electronic Law Journal 2014 Volume 17 No 5

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

THE DUTY TO MAINTAIN

In recent weeks, a few judgments clarified the duty to maintain relating to specific groups of women and children: foster children (*RAF v Coughlan* 702/13 [2014] ZASCA 106 (3 September 2014)); adopted children in instances where the natural father still contributed to maintenance (*T v Road Accident Fund* (2013/22829) [2014] ZAGPJHC 229; 2015 (1) SA 609 (GJ) (26 September 2014)); and Muslim women who entered into a religious marriage with a man already married in terms of civil law (*R v R and Others* (14770/2011) [2015] ZAWCHC 6 (29 January 2015)). Each of these deserves a closer look.

Coughlan

In the *Coughlan* matter the issue arose from a fatal collision of the deceased who left behind one minor child who had, prior to the accident, been placed in foster care with the grandparents due to the mother's incarceration and unemployment at times. When she could, she contributed to their maintenance although it was never sufficient. The grandparents received a child grant for the fostering in the amount of R146 790. After the death of the mother, the grandparents received a foster grant for the child which was more that the mother's contribution when she was still alive.

The issue for consideration was whether the foster grant payment received should be deducted from the amount agreed on for loss of support or whether such payments are to be considered *res inter alios acta* and therefore non-deductible.

The plaintiff argued that "child foster grants are paid to people who elect to become foster parents and that such payment is to be considered as *res inter alios acta*. The patrimonial damages suffered by a Plaintiff are the difference between the patrimony before and after the commentaries of a delict." (para 9). The plaintiff continues that there is an exception to the general rule, namely that advantageous consequence should be taken into account and the court thus has to determine which benefits are deductible and which are considered *res inter alios acta* or collateral benefits (para 10). In this determination, the court should take into consideration public policy, reasonableness and justice (para 11 with reference to *Zysset & Others v Santam Limited* 1996 (1) SA 273 C at 278 B-D, and 278 H - 279 C. There are two conflicting considerations; the plaintiff should not receive double compensation and the wrong-doer (insurer) should not be released of his liability on account of some fortuitous event such as the generosity of a third party (para 11). As the foster parent grant is payable to a foster parent to meet the child's obligations, the child has no claim to the grant. Therefore, the grant is *res inter alios acta* and not deductible from the damages claimed. (para 12 with reference to *Makhuvela v Road Accident Fund* 2010 (1) SA 29 (GSJ) para [8].

The defendant argues, based *Road Accident Fund v N F Timis* (29/09) [2010] ZA SCA 30 (26 March 2010), that a child care grant it is deductible from the damages to be awarded in respect of children. In addition, s 6 of Social Assistance

Act 13 of 2004 notes that "... Each case in which the deduction of a benefit is in issue must, of course, be considered on its own facts and having regard to the applicable statutes. It is necessary to have regard to the person or objects of the Act. The purpose of the grant is to supplement the income of indigent families. The grants are meant for those who have insufficient means to support themselves and to provide for the child who does not have maintenance." (*Timis* pare 6). As a foster care grant is awarded to a child in need of care, the grant is for the benefit of the foster child and not the foster parent (para 14). The parent does not have the discretion to spend the money on anyone else but for the benefit of the foster child (para 17). Both the grants and the RAF compensation are paid from the Treasury through two State organs. “Not to deduct the child grant would amount to double recovery by the Respondent at the expense of the tax payer and this incapable of justification. In my view, it was not the intention of, the legislature to compensate the dependents twice." (para 16).

The court found that both the grants and the compensation are in essence funded by the public (para 20). However, child grants and foster grant serve different purposes and cannot be equated. In casu the death of the deceased formalised their placement as foster children to the grandparents. It did not cause the grand parents to take care of the children. “The later formalization and appointment of them as foster parents and the subsequent grant was to assist them to enable them to comply with the obligations they already had prior to the death of their daughter to care for the children.” (para 31)

The court ordered that the child foster grants are *res inter alios acta* and that the RAF was ordered to pay the proven damages to the Plaintiff.

T

In this matter a minor claimed for loss of support as a result of the death of her natural father who *de facto* contributed to her maintenance even though she was legally adopted by his parents when she was 7 years old. The RAF argued that as the adoption order extinguished all his parental rights and obligations in favour of his parents, there was no legal duty on him to maintain the child and thus no liability on RAF to compensate her for his loss.

The court however found that the common law had previously been developed to enforceable a duty of support against a third party in family-type relationships where there was a voluntarily agreement to support the dependent (*Du Plessis v RAF* 2004 (1) SA 359 (SCA); *Verheem v RAF* 2012 (2) SA 409 (GNP); *Paixao v RAF* 2012 (6) SA 377 (SCA)). As such, the court found it appropriate to extend the enforceability to a natural father who voluntarily (tacitly agreed to) supported his daughter as it meets the requirements set out by the SCA in earlier cases (para 19).

R v R

In this matter the parties were married in terms of Islamic law in 1988. At the time, the defendant was still married in terms of civil law to another woman – a marriage which was concluded in 1975, but ended in 1998.The plaintiff could not terminate her Islamic marriage in a South Africa court as it was not concluded in terms of the Marriage Act, 1961 (para 14). The Islamic marriage was annulled on 20 July 2009 by the Muslim Judicial Council.

The court had to decide whether: (1) the Islamic marriage was valid in light of the pre-existing civil marriage; and (2) the pre-existing civil marriage would prevent the plaintiff from claiming proprietary relief resulting from her Islamic marriage. In this regard she claimed R1000 monthly maintenance from the date of divorce and/or end of the *iddah* period to death or remarriage; and half the defendant's pension interests.

The court found that in light of the common law and legislative provisions, that the Plaintiff's Islamic marriage is, for the purposes of South African Law, not considered to have been validly contracted (para 28). However, this did not prevent the plaintiff from claiming relief in the courts – the answer to this question does not turn upon the validity or otherwise of the said Islamic marriage; taking into account the interpretation of the word "marriage" by the Constitutional Court in the *Hassam* and *Daniels* cases; *AM v RM* 2010 (2) SA 223 (ECP) and *Hoossain v Dangor* [2009] JOL 24617 (WCC) (para 57).

The plaintiff could proceed with the proving of her claims. Whether she would be able to prove post-*iddah* maintenance or the equal sharing of pension interests in terms of Islamic principles the court did not comment on and has been the cause for much debate in legal literature (See R Denson & M Carnelley "The awarding of post-divorce maintenance to a Muslim ex-wife and children in the South African courts: The interaction between divine and secular law" (2009) 3 *Obiter* 679-701. For an opposite view, see N Moosa & S Karbanee "An exploration of mata's [post divorce] maintenance in anticipation of the recognition of Muslim marriages in South Africa: (Re-) opening a veritable Pandora's box?" (2004) *Law, Democracy and Development* 267-288).

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Matters of Interest to Magistrates

Solving the crime problem: what South Africans really think

16 January 2015

Many South Africans believe that crime is on the increase. Most people also believe that solving crime in the country does not rest with the criminal justice sector alone, but also requires improved social and economic development.

Fortunately, there is data to back up this view, namely the South African National Victims of Crime Survey (VOCS), which is regularly undertaken by Statistics South Africa (Stats SA). The aim of the survey is to elicit the views and experiences of 31 390 households across the country on topics related to crime and criminal justice. The objective is to provide policymakers with a better understanding of the extent and nature of different crime types, the impact it has on victims and public perceptions of the performance of the criminal justice system.

The most recent findings for the period April 2013 to March 2014 were released in December 2014. These findings reflect the same trends contained in the annual police crime statistics that were released last year in September, most importantly that there has been an increase in many violent crime categories over the past two years. Overall, the survey found that more households (41%) believed violent crime to have increased in the past year, while far fewer thought that it had either decreased (32%) or remained stable (27%).

Respondents feared housebreaking the most (60%) followed by home robbery (50%), street robbery (40%), murder (37%), sexual assault (31%), pick-pocketing (26%) and assault (24%).

Out of the most three most populous provinces, the Western Cape had the highest level of fear of crime (1 776 households per 10 000 population) – to the extent that it may prevent people from leaving their homes to go to work or town; as compared with Gauteng (1 457 households per 10 000) and KwaZulu-Natal (1 216 households per 10 000 population). Interestingly, Northern Cape households were the most fearful (1 889 households per 10 000 population) and the lowest rates were in Limpopo (634 per 10 000) and the Free State (838 per 10 000).

The 2013/14 survey also confirms that reporting rates vary greatly by crime type. Traditionally, murders have high reporting rates because bodies can be counted. Most motor vehicle thefts are reported because insurance companies require case numbers to process insurance claims. The VOCS households indicated that 92% of all car thefts were reported and 89% of all murders. Other crime categories, however, are notoriously under-reported.

For instance, 54% of respondents did not report cases of assault to the police. Reasons for non-reporting included, among others, that the victim solved the issue themselves (22%), 'other reasons' (18,5%) and that it was not serious enough (10%).

Given the low reporting rates for certain crime categories, Stats SA stated that 'the prevalence and under-reporting of crime incidents to the South African Police Service (SAPS) remain a major concern in the country. It is important to measure the extent of crime and gain insights about its dynamics in order to better understand how it manifests itself in communities. This will enable better formulation, implementation and monitoring of strategies for prevention of crime and management.'

That the government does not appear to be on top of the crime situation could be the reason why there was a decline in the number of households who were satisfied with the police. Households that reported being generally satisfied with the police in their areas decreased from 62,4% in 2012 to 59,2% in 2014. In contrast, 40,8% of respondents were dissatisfied with the police.

Satisfaction levels are highest in the Eastern Cape (66%) and Western Cape (64%) and lowest in Mpumalanga (55%) and North West (51%). While it is positive that a majority of households still report being satisfied with the police, the overall decline in satisfaction is concerning.

Households were slightly more satisfied with the performance of the courts than with the police: 64,3% of respondents said they were satisfied with the courts, compared to 63,7% in 2012.

Yet most South Africans do not believe that solving crime rests exclusively with the criminal justice system. When asked where government should spend money to reduce crime, a majority of households (64%) said it should be on social or economic development. Only 20% thought that more money should be spent on law enforcement and 16% believed it should be spent on the courts.

The notion that households do not rely solely on the police for their safety is quite apparent in the survey findings. Half of the households implemented physical measures to protect their homes (such as installing security gates and alarm systems), while 12% relied on private security, 7% belonged to a 'self-help group' and only 5% took to carrying a weapon for protection.

The VOCS findings provide a welcome addition to the body of information available to understand crime and violence in South Africa. Currently, the way in which police

release their statistics does not provide detail on how crimes like murder are committed, and who is most at risk. For the government to best utilise its resources to reduce crime and violence, this kind of information is crucial.

While there are rich sources of information on crime in South Africa, they continue to be underutilised. The SAPS have a vast amount of information about crime reported to them that could be used for developing effective multi-agency crime reduction strategies. Currently however, the statistics released by the SAPS are not vetted and approved by the Statistician General. Without independently recognised collection and verification processes, these statistics are open to question and cannot be regarded as official.

According to Stats SA's 2012 VOCS presentation, an integrated national crime statistics system is expected to be implemented by 2017 after Stats SA, in partnership with SAPS, will complete their assessment of SAPS's current data collection system. Hopefully Stats SA, with proper funding and cooperation from security cluster departments such as SAPS, will be instrumental in the development of an integrated national crime statistics system that is responsive to the needs of not only policymakers, but also communities and the public.

Lizette Lancaster, Manager: Crime and Justice Information Hub, Governance, Crime and Justice Division, ISS Pretoria

A Last Thought

Separation of powers is not constitutional Kryptonite

In 1748 that Baron de Montesquieu published '*De L'Esprit des Lois*' (the Spirit of the Laws) in which he proposed the doctrine of the *trias politica* or separation of powers between the executive, legislative and judicial branches of government. This work would have a profound influence on the constitutional development of countries such as the United States and South Africa post 1994.

Separation of powers is fast becoming the mantra of public officials or public institutions seeking to immunise their activities from oversight by the courts. In many cases reliance on the doctrine is misplaced and unless that reliance is disingenuous

there is a fundamental misunderstanding that prompts a discussion of the doctrine itself and of its application by the Constitutional Court (CC).

The separation of powers is intended to prevent the overconcentration of power in any one particular organ of state (GE Devenish *A Commentary on the South African Constitution* (Durban: LexisNexis 2005) at 11). As Montesquieu wrote: 'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty' (quoted by S Ngcobo 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' (2011) *Stellenbosch Law Review* 1 at 37). There is no universal model of separation of powers and there is no separation that is absolute (*In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para 108). The CC has recognised that the doctrine is not fixed or rigid and is made subject to checks and balances of many kinds. Much of South Africa's hybrid legal system is based on English law, which is in essence a parliamentary system where to an extent the executive and the legislature are amalgamated. Given the abuses of power that flowed from such a system in South Africa's history, the idea of a separation of powers with checks and balances between branches of government was enthusiastically imported into our post-apartheid constitutional order.

Under the American constitutional system, there is a separation of personnel between the executive and legislative branches of state that is almost complete (I Currie & J de Waal 'The New Constitutional & Administrative Law' vol 1 (Cape Town: Juta 2002) at 18). Congress holds legislative power, executive power vests in the President and the Supreme Court holds judicial power. No power may remove another from office and no member of the President's cabinet may simultaneously be a member of Congress. This application of the doctrine is distinguishable from our own which, for example, does not provide for such a strict separation of personnel. The doctrine is not expressly stated in the final text of the Constitution, despite appearing in the Interim Constitution. It arose in the Constitutional Principles, which governed the drafting of the final text (*Glenister v President of the Republic of South Africa and Others* 2009 (2) BCLR 136 (CC) para 29). In the South African model of the doctrine, functions are delineated and separated but not always performed by different persons (Devenish *op cit* at 11). Members of the executive may also be members of the legislature and judicial officers may, from time to time, carry out administrative tasks (*South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 (CC) at para 35). Whether or not there has been an infringement of the doctrine will depend on the circumstances of the case.

A brief overview of key decisions by the CC demonstrates the already recognised flexibility of the doctrine and gives substance to the indication by the CC, more than 15 years ago, that the South African courts would over time develop a 'distinctively South African model of separation of powers' (*De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC) at para 60). In the *Certification* case, the CC had to determine whether the new text of the Constitution complied with all the Constitutional Principles. The court held the following:

‘The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: The scheme is always one of partial separation.’ (The *Certification* case at para 109.)

In the *Glenister* case the CC had to decide whether, in view of the doctrine, courts could set aside a decision of the National Executive or interdict the respondents from pursuing the passage of certain bills through parliament. The court recognised that the power of the courts is not to amend legislation but to pronounce on whether or not legislation is consistent with the Constitution. The courts not only have the right but a duty to intervene and prevent violation of the Constitution. As the ‘ultimate guardians of the Constitution’, the courts have an ‘obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds’ (see the *Glenister* case at para 33). The court held that although, as a general principle, a court should not interfere in the legislative process, it accepted that there may be circumstances, although rare, in which a court could intervene in parliamentary proceedings. Demonstrating the judicial restraint that is required of a court under the separation of powers doctrine, the CC declined to intervene where the applicant had not established that its intervention was necessary in the circumstances (*Glenister* at para 41, 44, 57). The clear message from the judgment appears to be that if the courts’ intervention is necessary, the courts can and will intervene.

That the courts in general, and the CC in particular, are aware of the limits of their judicial review powers is also evidenced in a number of other notable judgments. After declining to order the state to provide expensive dialysis treatment to save a critically ill, unemployed patient in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (12) BCLR 1696 (CC), the Constitutional Court was heavily criticised for its failure to hold the other branches of government sufficiently accountable for their inadequacies. Similarly, in *Mazibuko and Others v City of Johannesburg* 2010 (3) BCLR 239 (CC), socio economic scholars and other critics denounced what they deemed to be the CC’s callous attitude toward the poor when the court declined to prescribe to the City of Johannesburg the minimum quantity of free basic water it should provide to each person daily. Considering the immense public pressure placed on the CC in these cases, the court’s response hardly reflects an institution that wants to step into the shoes of the executive.

Although these decisions represent only a small portion of the jurisprudence that has developed around the separation of powers in South Africa, it is abundantly clear that there is no infringement of the doctrine where a court reviews and if necessary invalidates an act of the executive or parliament where that act contravenes the Constitution. It is equally clear that the courts are not trying to take over the role of

the executive or the legislature.
It is also not controversial to accept that some aspects of decision making are more appropriately left to the non-judicial branches of government. The executive makes and executes policy but it is the courts that must then test policies and decisions for constitutional compliance. It is that obligation of the courts that the naysayers of judicial review ignore choosing instead to misapply the doctrine of separation of powers in an attempt to disempower our courts.
The point is that our courts have a constitutional mandate and it is baseless to argue as a principle that the court may not interrogate the constitutionality of decisions of the executive or of state institutions or officials.

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