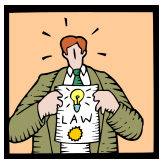
e-MANTSHI

A KZNJETCOM Newsletter

July 2015: Issue 111

Welcome to the hundredth and eleventh 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. Act No. 5 of 2015**:** The Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2015 was published in Government Gazette no 38977 dated the 7th of July 2015. The purpose of the amendment act is to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to ensure that children of certain ages are not held criminally liable for engaging in consensual sexual acts with each other; to give presiding officers a discretion in order to decide in individual cases whether the particulars of children should be included in the National Register for Sex Offenders or not; to provide for a procedure in terms of which certain persons may apply for the removal of their particulars from the National Register for Sex Offenders; to provide for the removal of the particulars of children who were convicted for having engaged in consensual sexual acts with each other, from the National Register for Sex Offenders; to provide for the expungement of the criminal records of certain persons; and to provide for matters connected therewith.

Recent Court Cases

1. S v SEBOFI 2015 (2) SACR 179 (GJ)

An adversarial process was founded on proper preparation and commitment to testing the testimony available. It was not served by treating the process as a clerical chore.

The appellant was convicted in a regional magistrates' court of two counts of rape and was sentenced to life imprisonment. He appealed against the convictions as well as the sentence. After evaluating the evidence the court held that it could not be satisfied that a fair trial had taken place but expressed no view on the guilt or innocence of the appellant. (Paragraph [80] at 192*i*.)

The court remarked that the calibre of the case presentations, both prosecution and defence, was unacceptable for a case of this seriousness. A prosecutor could not present a case by just pouring out a jumble of random facts. This was unfair to a court and it retarded the aim of a fair trial which, apart from other factors, needed to be coherent and orderly. The defence fared little better. The cross-examination hardly plumbed the body of evidence and appeared to have no plan or objective and was either blind or inattentive to several material or potentially material details. The narrative of the testimony referred to relevant aspects which were ignored or overlooked. An adversarial process was founded on proper preparation and commitment to testing the testimony available. It was not served by treating the process as a clerical chore. (Paragraph [65] at 190*b*.)

These disturbing features troubled the court and if the forensic standards exhibited in this trial were typical of the regional court, it begged the question whether the regional court was a fit forum to hear matters of such a serious nature. Victims of rape, as a class of vulnerable people in our society, ought to have a reasonable expectation that their cases were taken seriously enough to be investigated properly and tried at a standard so that the guilty did not wriggle free because of superficial attention to detail by those who were responsible to protect them. In rape cases the most familiar scenario would be that the victim was a single witness and it was therefore a foreseeable and generic aspect of such cases. Accordingly any police officer who was involved ought to appreciate that an axiomatic line of enquiry was the circumstances which might offer corroboration or throw suspicion on the truth or accuracy of the complaint. Similarly, when a person accused of rape was confronted, what he said in response, whether a flat denial, an explanation or alibi, or whether he

said nothing whatever, was relevant. Whatever rebuttal he offered had to be taken seriously and investigated and reported on in evidence to demonstrate whether it supported or destroyed the denial. Medical forensic tests had to be properly processed and reported on when they could resolve critical issues which might exclude a suspect from culpability. (Paragraphs [66]–[68] at 190*d* – 191*a*.)
The court remarked further that investigating officers should, ideally, participate in the running and presentation of the evidence to court and should be active in assisting the prosecution. Often versions were disclosed for the first time during cross-examination of state witnesses, or aspects of a witness's evidence required amplification, qualification or simply explanation. These matters needed to be followed up and, if necessary, postponements sought to investigate the correctness, or otherwise, of the facts in question. A matter as serious as a rape charge, carrying the drastic sanctions which followed upon a conviction, fell into the category of matters in which an active role for the investigating officer ought to be mandatory in terms of standard prosecutorial and police procedures. (Paragraph [69] at 191*b*–*d*.)
In the circumstances the court held that the interests of justice required remedial E action in the present matter in the form of setting aside the conviction and remitting the matter for further evidence. The verdict of guilty was set aside and the case remitted to the trial magistrate in terms of the provisions of s 304(2)*(c)*(v) of the Criminal Procedure Act 51 of 1977, and the trial was to be reopened and the magistrate was to call for evidence in terms of ss 167 and 186 of the Criminal Procedure Act 51 of 1977 about the specimens taken at the medical examination and the laboratory test results, as well as alleged cell phone communications of the appellant and such records thereof that might exist. (Paragraphs [93]–[97] at 195*c*–*f*.)

2. S v SEHOOLE 2015 (2) SACR 196 (SCA)

The state, as dominus litis, had a discretion regarding prosecution and pre-trial procedures.

The respondent was convicted in a regional magistrates' court of contravening ss 3 and 90 of the Firearms Control Act 60 of 2000, in that he was found in unlawful possession of a firearm and ammunition. He was sentenced to ten and five years' imprisonment, respectively, for the possession of the firearm and ammunition. The sentences were ordered to run concurrently. He appealed to the High Court against the convictions and sentences. The High Court set aside the convictions and sentences on the ground that the respondent should have been charged with the more serious offence of a contravention of s 4 of the Act, having been in possession of a firearm, the serial number of which had been filed off. As regards the conviction for being in possession of the ammunition, the High Court held that there was no evidence before the court that the items found in the possession of the respondent constituted ammunition. The state appealed against the judgment of the court on

questions of law in terms of s 311(1) of the Criminal Procedure Act 51 of 1977, with the leave of the court a quo.

Held, as to the issue of the correct charge, that the state, as dominus litis, had a discretion regarding prosecution and pre-trial procedures. The state could elect to charge a person with a less serious offence. In the present case the state had so elected under that general prohibition of possession of a firearm without a licence in terms of s 3, rather than under s 4 of the Act. There was no statutory provision which compelled the state to charge a person with the more serious offence. (Paragraphs [10] at 199*i* and [11] at 200*d*.)

Held, further, that, ordinarily, courts were not at liberty to interfere with the prosecutor's discretion unless there were truly exceptional circumstances for doing so. In the present case the state's decision to prosecute the respondent under s 3 of the Act did not fall into any category warranting the court to interfere and to be prescriptive regarding the charge that was preferred. (Paragraphs [12] at 200*e* and [13] at 200*h*.)

Held, further, as to the charge of the possession of ammunition, that, whilst it was undoubtedly so that a ballistics report would provide proof that a specific object was indeed ammunition, there was no authority compelling the state to produce such evidence in every case. Where there was acceptable evidence disclosing that ammunition had been found inside a properly working firearm it could, in the absence of any countervailing evidence, be deduced to be ammunition related to the firearm. It followed that the High Court had erred in finding that a ballistics report was the only manner of proving that the offence had been committed. (Paragraphs [19] at 201*g* and [20] at 201*i*.) The appeal was accordingly upheld and the order of the High Court was set aside in its entirety, and the convictions and sentences of the regional court were reinstated, and the matter was remitted to the High Court for a de novo hearing on the respondent's appeal.

3. S v MALIGA 2015 (2) SACR 202 (SCA)

A presiding officer must raise the question of the discharge of an accused at the end of the state's case mero motu if the state has not made out a prima facie case against the accused.

The appellant was charged in the Venda Provincial Division in January 2000 with the murder of his wife. The state produced in evidence a statement made by the appellant to the effect that he had shot his wife during an argument. The statement was elicited by the investigating officer, a sergeant in the South African Police Service and another sergeant (who were accordingly not commissioned officers as envisaged by s 334 of the Criminal Procedure Act 51 of 1977), who did not warn the

appellant of his constitutional rights as envisaged in s 35 of the Constitution. The statement was not confirmed or reduced to writing in the presence of a magistrate or justice of the peace. Despite this, there was no objection on the part of the appellant's legal representative to the introduction of what amounted to inadmissible evidence. An application was brought in terms of s 174 for the discharge of the appellant at the end of the state's case but this was refused. The appellant was convicted and was sentenced to 48 years of imprisonment. He appealed against his conviction and sentence and the appeal came before the court only in 2014 without any explanation being offered for the delay of 12 years between conviction and appeal.

Held, that the court had a duty to ensure that the accused was properly defended and that his or her constitutional rights were not negatively affected, either by commission or omission. If at the end of the state's case, the state had not made out a prima facie case, the presiding officer had to raise the question of a discharge mero motu, especially in the absence of an application for discharge. This duty was not dependent on whether the accused was represented or not. (Paragraph [18] at 208*c*.)

Held, further, that even more important was the role of the prosecutor. A prosecutor stood in a special position in relation to the court. The paramount duty of a prosecutor was not to procure a conviction but to assist the court in ascertaining the truth. In the instant case the prosecutor was duty-bound to alert the presiding officer of the possible dangers which were lurking in admitting the warning statement. The prosecutor, who was the only person likely to know exactly what evidence he was about to place before court, ought to have at least sought a ruling on the admissibility of the warning statement and the statement allegedly made by the policeman who arrested him. The written statement introduced to the court was a confession and could not have been admitted as it did not comply with the legal formalities. If the prosecutor were intent on having the evidence admitted, at the very least he should have requested a trial-within-a-trial in order to determine the admissibility of the statement. (Paragraphs [20] at 208*h* and [21] at 209*a*.)

Held, further, that the appellant had clearly been lured into testifying and consequently did not receive a fair trial as envisaged in s 35 of the Constitution. The conviction accordingly had to be set aside. (Paragraph [22] at 209*d*.)

From The Legal Journals

Bezuidenhout, I & Karels, M

"Die bekostigbaarheid van 'n aktiewe verdedigingsreg in die Suid-Afrikaanse strafregstelsel"

2014 Journal for Juridical Science 39(2):122-140

Mujuzi, J D

"Evidence by means of closed circuit television or similar electronic media in South Africa: Does section 158 of the Criminal Procedure Act have extra-territorial application?"

2015 *De Jure* 1-16

Brits, R

"The "reinstatement" of credit agreements: Remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act"

2015 *De Jure* 75-91

Msaule, P R

"Minister of Safety and Security v Sekhoto 2011 1 SACR 315 (SCA): A critique of reasonableness as the fifth jurisdictional fact for a lawful arrest"

2015 *De Jure* 243-254

Nkosi, T G

"The President of RSA v Reinecke 2014 3 SA 205 (SCA): Constructive dismissal, common law remedies and the changing identity of the employer: A Critique of some of the findings made by the Supreme Court of Appeal"

2015 *De Jure* 232-243

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

Contributions from the Law School

An appreciation of the criminal law legacy of Jonathan Burchell on the occasion of his retirement

[This is an address in tribute of Jonathan Burchell, delivered at the University of Cape Town on 20 April 2015. Other panellists included Justice Edwin Cameron and Professor Danie Visser.)

To begin with, allow me to express my gratitude and appreciation to the organizers, and particularly to Professor Elrena van der Spuy for inviting me from the far-flung climes of Pietermaritzburg to participate in this event. It is a great pleasure and privilege to be here.

Although there are many who have been enriched by Jonathan's exceptional criminal law expertise who would be far more eminent speakers than myself, I may at least justify my honoured position at this event on three grounds. First, Jonathan was there when the love affair began. When I was in the first flush of my devotion to criminal law theory, brilliantly nurtured by Solly Leeman in LT1 of the old Law Faculty building on UCT Upper Campus, my very first criminal law textbook was the second edition of Volume 1 of *South African Criminal Law and Procedure*.[1] Jonathan took over the co-authorship of this volume upon the sad and sudden death of his father Exton Burchell. Secondly, in 2002 I accepted the responsibility of stepping into the shoes of both Jonathan and John Milton when moving to the then University of Natal in Pietermaritzburg – a manoeuvre just as impossible in practice as it sounds. It was only on my arrival in Maritzburg that I could more fully appreciate the astonishing Burchell legacy – three generations of law professors, each in his own inimitable and extraordinary way impacting on the lives of law students and the development of the law. And the third humble suggestion favouring my suitability is that it is one of the more enjoyable obligations in the joyful journey that is teaching and writing criminal law to engage with Burchell. I have spent many long hours gazing with rapt attention at the latest wisdom from the master, poring over his words, fixating on them, getting lost in supermarkets whilst lost in thought…Jonathan, is anyone else quite as

[1] EM Burchell, JRL Milton & JM Burchell *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* 2ed (1983).

interested in what you have to say? Jonathan's moving tribute to his grandfather and father in *Stella Iuris* is entitled 'On the shoulders of father and son'.[2] I think that there is not a single one of the present generation of criminal lawyers in South Africa who are not deeply indebted to his own rigorous and authoritative scholarship. I for one want to acknowledge with deep gratitude that I am one who stands on your shoulders Jonathan – my own attempts at understanding criminal law theory would be considerably the poorer without the privilege of engaging with your work.

The contribution of Professor Burchell to criminal law scholarship is considerable simply in terms of quantity. He has authored *Principles of Criminal Law*, now in its fourth edition,[3] along with a number of revised reprints of this book, and *South African Criminal Law and Procedure Vol I: General Principles*, also now in its fourth edition,[4] for which he has had sole responsibility for the last two editions. Also, after initial collaboration with John Milton, he is now solely responsible for *Cases and Materials on Criminal Law.* Add to that at least 30 scholarly publications devoted to criminal law – he has written extensively in delict and legal education as well of course, and some of his contributions don't appear on the latest version of his *curriculum vitae* – and the extent of his industry becomes more evident. But it is not so much the quantity of the Burchell corpus that demands our attention, rather the quality. The *South African Criminal Law and Procedure* series has profoundly influenced the course of South African criminal law since its publication in the early 1970's, replacing the moribund *Gardiner & Lansdown* publication. So much more than the practitioners' handbook that its predecessor had become, in the first three volumes of the series, authors such as Exton Burchell, Peter Hunt and John Milton brought a rich and rigorous level of analysis to the substantive aspects of criminal law, providing an authoritative statement of the law for practitioners. Jonathan Burchell has expertly developed the volume on general principles, and has further enhanced the value of this publication. However, his finest contribution is no doubt *Principles of Criminal Law*.

Writing in 1989, Burchell commented as follows on South African criminal law monographs:[5]

'Without detracting from the undisputed value of the essential and influential textbooks by De Wet and Swanepoel, Burchell and Hunt [volume 1] and Snyman, there is still a need for an innovative and challenging work along the lines of Fletcher's *Rethinking Criminal Law*, and in particular, for a work that will place the South African criminal law firmly in its social context, both present and future.'

And so he wrote it. *Principles of Criminal Law* first appeared in 1991, under the co-authorship of John Milton, with Burchell being responsible for the general principles part of the book. Along with a crisp and lucid statement of the rules of law, and a

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[2] 'On the shoulders of father and son – academic leadership in the Law Faculty of the Natal University College (later University of Natal) in Pietermaritzburg: 1920 to 1982' in M Kidd & SV Hoctor (eds) *Stella Iuris – Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 32.

[3] *Principles of Criminal Law* 4ed (2013).

[4] *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* 4ed (2011).

[5] 'Of more than academic importance – applied legal research overshadows pure legal science' in C Visser (ed) *Essays in honour of Ellison Kahn* (1989) 62 at 80.

thoughtful analysis of the relevant cases, the book brought a fresh perspective on criminal law scholarship in South Africa, locating the rules in their societal context and providing a probing critique of such rules. The value of the publication was further enhanced by the comprehensive consideration of constitutional issues in the second edition, published (in 1997) shortly after the final Bill of Rights came into force. But even the second edition was dwarfed, both in physical size and import by the first edition of the work under Burchell's sole authorship, the third edition, first published in 2005. As I wrote in reviewing this work, 'Building on the strengths of what has consistently been a fine publication, Burchell has produced a massive and masterly tome which compellingly testifies to his pre-eminence as a criminal law academic in South Africa.'[6]

The fourth edition of this work, published in 2013, is slightly slimmer in size (although still described by one reviewer as a 'voluminous leviathan'[7]), but even richer in analysis, authoritative commentary and incisive comparative perspective. It is simply impossible to do full justice to all that is contained in *Principles* in the time allotted, so that will have to wait for, I hope, a future *Festschrift*. Suffice it to say that Burchell's *magnum opus* has received significant accolades both nationally and internationally, and is a peerless achievement in South African criminal law.

I have little time left, so let me say just a few things about Burchell's output of articles and chapters. First, his recognition as a criminal law academic of international stature is evident from his publication of chapters on the South African system of criminal law in various books, as well as reports and articles dealing with English and Scots law in particular. His articles and chapters in local publications and journals reflect the breadth of his expertise: not only has he written on numerous issues related to the general principles of criminal law, but he has produced excellent analyses of common-law crimes such as *crimen iniuria*, theft, contempt of court, extortion, and public indecency, as well as influential writing on statutory issues such as the use of deadly force in arrest (s 49 of the Criminal Procedure Act), theft of use, criminal liability for breach of statutorily-imposed duties, and sexual offences legislation. It is upon the general principles publications, which reflect the most significant aspects of his criminal law philosophy, that I wish to dwell for a moment.

First, Burchell has written, with a strong comparative focus, on the defence of duress and necessity, and particularly the question of killing under compulsion, which he contends should not be regarded as objectively lawful (i.e. a justification ground) but rather as a ground excluding *mens rea*, where the prosecution cannot prove that a reasonable person in the circumstances would have resisted the pressure. Burchell has consistently expressed grave concern about what he regards as the excessive subjectivity ('the obsession with subjectivity') of South African law regarding the defence of non-pathological incapacity on the grounds of voluntary intoxication and provocation, and has argued for the introduction of an objective, normative assessment to limit these defences, along the lines of the approach in a number of

[6] *South African Law Journal* (2005) 122(3) 696.
[7] *De Rebus* (July 2014) 56.

common law jurisdictions. This approach dovetails with his suggested solution for the problem of killing under compulsion, and is consistent with his argument for *dolus eventualis* to be limited to foresight of a qualified possibility of harm.

Another significant focus of Burchell's scholarship has been his outspoken criticism of the scope of the common purpose rule (particularly so-called 'active association' common purpose), once again an area where he has constructed a closely reasoned challenge to the *status quo*, drawing on comparative and constitutional arguments. His approval of the case of *Goosen*,[8] which introduced the defence of mistake as to the causal sequence of a crime is founded on his support for the limitation of common purpose.

Burchell's expertise in the law of delict, and his foregrounding of the *actio injuriarum* as a primary means to protect the right to dignity, has provided fertile ground for his criminal law scholarship, and his latest (we trust not the last!) article in the *South African Journal of Criminal Justice* testifies to the skill and insight with which he employs the concept of dignity in evaluating the current South African law, and argues for a wider recognition of this right.[9] Incidentally his first published article in criminal law was also on *crimen injuria*,[10] so it was richly appropriate that he should 'sign off' this phase of his academic career in this way.

Whilst I have 'known' Jonathan in print far longer than in person, it has been my great pleasure to get to know him a little better in recent years. For me he exhibits all the best characteristics of a scholar, intellectually curious, rigorous in reasoning, masterful in argument, lucid in exposition. His warmth and generosity are evidence by his tributes to Ellison Kahn[11] and John Milton.[12] For 22 years, from 1988 to 2009, he served the *South African Journal of Criminal Justice* in an editorial capacity, for the last 10 years as editor-in-chief. He is indeed a scholar and a gentleman. There is one more aspect that I would like to highlight – that as a true scholar he exhibits a teachable spirit, and is sufficiently secure in his primacy as a leading academic to change his mind and learn from others. This is a tremendous example for any academic to follow. Jonathan and I have our ideological differences as far as criminal law theory is concerned, and we have had some spirited discussion and disagreement on some matters – I think that the score is 'deuce' - but I have benefited enormously from his insights, even where they run contrary to mine. In fact, appropriating Blake's apothegm that 'opposition is true friendship', I would go so far as to say that some of my most significant insights have come in confronting Burchellian views which do not immediately accord with my own, and which have relentlessly required me to clarify my own position. My debt to you is enormous

[8] *S v Goosen* 1989 (4) SA 1013 (A).

[9] 'Protecting dignity under common law and the Constitution: The significance of *crimen iniuria* in South African criminal law' *SACJ* 27(3) (2014) 250.

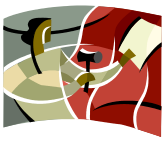
[10] 'Is the adulterers' home their castle? A case of criminal *injuria*' *SALJ* 93 (1976) 265.

[11] See footnote 5.

[12] 'A personal and academic tribute to John Milton: Reflections on aspects of the reform of the law of sexual offences in South Africa' in SV Hoctor & PJ Schwikkard (eds) *The Examplary Scholar: Essays in honour of John Milton* (2007) 27.

Jonathan, and my wish is that you continue to write for many more healthy and happy years in retirement.
The editor of the *Journal of Commonwealth Criminal Law*, James Richardson, once described Jonathan Burchell as a 'titan of South African law'. A titan is of course one who is great in strength, influence and intellect. I can do no better than to add my wholehearted agreement. Tonight we celebrate a titan, and an extraordinary criminal lawyer.

Prof SV Hoctor
Professor of Law (UKZN Pietermaritzburg)



Matters of Interest to Magistrates

Profession stands behind Chief Justice and judiciary in raising concern on attacks on the judiciary and the rule of law

Law Society of South Africa (LSSA) Co-chairpersons, Richard Scott and Busani Mabunda, attended a press conference by Chief Justice Mogoeng Mogoeng on 8 July 2015 to support the judiciary in its call for respect for its independence and for the rule of law. The press conference was also attended by Gcina Malindi SC representing Advocates for Transformation and the National Association of Democratic Lawyers (NADEL). Mr. Mabunda was present also in his capacity as President of the Black Lawyers Association (BLA).

At the unprecedented press conference, the Chief Justice – together with Deputy Chief Justice Dikgang Moseneke, the President of the Supreme Court of Appeal, Justice Lex Mpati, and Judges President, Deputy Judges President and senior judges – said the Heads of Court and senior judges of all divisions had requested him, as head of the judiciary, to meet with President Jacob Zuma to point out and discuss the dangers of the repeated and unfounded criticism of the judiciary. 'Criticism of that kind has the potential to delegitimize the courts. Courts serve a public purpose and should not be undermined,' said the Chief Justice.

President Zuma responded immediately via a press statement indicating that he would attend to the matter. The President reasserted his own commitment and that of the executive to the independence of the judiciary and its role as the final arbiter in

all disputes in society. At the time of this issue going to press, the meeting date between the President and the Chief Justice was still to be announced.

In his statement on behalf of the judiciary, the Chief Justice noted that a judge's principal article of faith is to adjudicate without fear, favour or prejudice. 'When each judge assumes office she or he takes an oath or affirmation in the following terms: To be faithful to the Republic of South Africa; to uphold and protect the constitution and the human rights entrenched in it; to administer justice to all persons alike without fear favour or prejudice and in accordance with the Constitution and the law. To judges this obligation and the oath are sacred.' He added that, in terms of the Constitution, no arm of the state is entitled to intrude on the domain of the other. However, the Constitution requires the judiciary ultimately to determine the limits and regulate the exercise of public power.

'Judges like others should be susceptible to constructive criticism. However, in this regard, the criticism should be fair and in good faith. Importantly the criticism should be specific and clear. General gratuitous criticism is unacceptable,' said the Chief Justice. He acknowledged that judges, like other mortals, err, but he said that several levels of courts – through an appeal mechanism – serve a corrective purpose when judges make a mistake. Moreover, judgments were often subjected to intensive peer and academic scrutiny and criticism.

The Chief Justice rejected the notion that in certain cases judges had been prompted by others to arrive at a predetermined result. He added that, in a case in which a judge did overstep, the general public, litigants or other aggrieved or interested parties should refer the matter to the Judicial Conduct Committee of Judicial Service Commission.

With regard to the issue of court orders being ignored, the Chief Justice stressed that the rule of law, in simple terms, meant that everybody – whatever their status – is subject to and bound by the Constitution and the law. He warned: 'As a nation, we ignore it at our peril. Also, the rule of law dictates that court orders should be obeyed. Our experience by and large is that court orders have been honoured by other arms of state. The few instances of where court orders have not been compiled with, whatever the reasons, have the effect of undermining the rule of law.'

Support by the profession

The LSSA has stressed the support of the attorneys' profession for the judiciary on an ongoing basis. Soon after the Gauteng High Court judgment in the *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* [2015] JOL 33405 (GP) (the 'Bashir' matter), the LSSA raised its serious concern at the clear trend emerging of undermining the rule of law and disregarding court orders. 'Generally, this has been a concern for some time, but the clear flouting of our constitutional and international obligations and the order of the Gauteng High Court in the events surrounding the African Union Summit, have been a glaring

manifestation of this trend,' said Mr. Scott and Mr. Mabunda. They added: 'The LSSA commends our judiciary for its independence and the strong stance taken in protecting the rule of law without fear, favour or prejudice.'

NADEL publicity secretary, Gcina Malindi, urged the government to consider itself bound by international agreements, especially the ones that have been enacted into law by national legislation. 'NADEL express its disappointment that an order of court was disregarded.'

BLA said the action by the government was a serious cause of concern and 'as the Black Lawyers Association we find it highly depressing that our government openly disregarded the rule of law seemingly with impunity'.

After the Chief Justice's press conference, the KwaZulu-Natal Law Society (KZNLS) welcomed the public and unprecedented stance by judicial officers as a testament to the nation and to the world, that the judiciary will stand firm to protect and perpetuate its independence. 'The KZNLS is gravely concerned over the unfounded criticism levelled at the judiciary. It unequivocally supports the judiciary in its commitment to the rule of law.'

Similarly, the Cape Law Society (CLS) publically supported the initiatives spearheaded by the Chief Justice, the heads of court and senior judges in support of the rule of law as a fundamental principle of our constitutional democracy. 'We believe that this initiative will go a long way towards restoring the public image of the judiciary and the relationship between the executive, legislature and the judiciary,' said CLS President, Ashraf Mahomed.

In a statement, Law Society of the Northern Provinces (LSNP) President, Strike Madiba, said: 'The LSNP unreservedly and unconditionally supports the statement by the Chief Justice Mogoeng Mogoeng and condemns this unwarranted and baseless attack on the judiciary.' He also noted that the Constitution and the judiciary are the main democratic bulwarks for freedom-loving South Africans. Judicial authority is vested in the courts, which are independent and subject to the Constitution and the law, and must apply the law impartially without fear, favour and prejudice. An order or decision issued by the courts binds all persons to whom and organs of state to which it applies.

The 'Al-Bashir' matter

In condemning the flouting of the Gauteng High Court order in the 'Al-Bashir' matter in mid-June following the African Union Summit in Johannesburg when Sudanese President Al-Bashir was allowed to enter and leave the country in contravention of an International Criminal Court (ICC) warrant for his arrest for war crimes and the Gauteng High Court judgment that he should not be permitted to leave pending his handing over to the ICC, the profession also expressed its concern at the government's disregard for its obligations as a signatory to the Rome Statute of the

ICC, which was domesticated in our Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

In a press statement following the Gauteng High Court judgment, LSSA Co-chairpersons, Busani Mabunda and Richard Scott said: 'We express our serious concern at the trend by African leaders – including our government – to emasculate regional and international instruments and tribunals set up to protect human rights and the victims of human rights abuses. This is evident in the attitude adopted towards the International Criminal Court and the SADC Tribunal, and the lack of progress in granting criminal jurisdiction to the African Court on Human and Peoples' Rights.'

They added: 'The threat to withdraw from the Rome Statute is akin to the developments that have taken place at SADC Tribunal level, where heads of states have agreed to change the protocol to deprive members of the public from the right to approach the court for redress if their own courts do not provide such. The protocol now provides only for interstate access, namely access by states only, not individuals. These developments do not bode well for the African Court's expanded jurisdiction.' The LSSA launched an application in the Gauteng High Court on 19 March 2015 to declare the actions of the President, as well as the Ministers of Justice and International Relations and Cooperation in voting for, signing and planning to ratify the SADC Summit Protocol in 2014 as it relates to the SADC Tribunal, to be unconstitutional. The responding affidavit by the state had not been filed by mid-July despite three extensions.

The LSSA urged government to consider its stance carefully in the 'Al-Bashir' matter and also its obligations when it accedes to and domesticates international treaties; particularly in the light of the collapse of the SADC Tribunal. This would have serious ramifications for us as South African and regional citizens.

In responding to the 'Bashir' judgment, the BLA pointed out that, in not adhering to the judgment the government had violated the principle of legality. Firstly, by virtue of South Africa being a signatory to the Rome Statute it had domesticated the statute and consequently was obliged to arrest people who contravened the provisions of the statute. 'In a clear contrast to what was expected of South Africa, to arrest President Omar Al-Bashir, they paraded him on national TV as a hero disregarding their international obligation in as far as the Rome Statute is concerned,' said the BLA.

Secondly, the government had undermined the valid court order by allowing President Al-Bashir to leave the country when the High Court ordered that he should not leave the country pending finalization of the case on whether he should be arrested or not.

BLA also expressed its concern at the continued reluctance on the part of government to support regional, continental and international tribunal structures that

are meant to protect the lives and rights of the peoples of Africa. BLA noted: 'The people of Sudan must be afforded justice by the international structure if their national justice systems do not protect them. In this regard the government of South Africa failed the people of Sudan and the continent as a whole.'

NADEL too noted with deep concern and trepidation the events relating to President Al-Bashir's entry into and departure from South Africa, as well as the government's actions (or omission to take action) contrary to the terms of the court order.

'We must remind ourselves that the proceedings before the ICC aim to provide justice for the people of Sudan for the untold levels of atrocities, including wanton murder, visited upon them; and for the estimated 1,8 million people in Darfur who were internally displaced. The warrants of arrest issued by the ICC for President Al-Bashir must be located in context,' said NADEL publicity secretary Mr. Malindi. He added: 'The children, our brothers and sisters in the Sudan, need our help and empathy. As South Africans we cannot remain complicit nor silent. NADEL calls upon the South African government, the African Union and the people of Africa in general, and the international community to fight for justice for the millions of people in Darfur sooner rather than never. After all, justice delayed is justice denied.'

NADEL urged the government of South Africa to consider itself bound by international agreements, especially the ones that have been enacted into law by national legislation.

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A Last Thought

"Besides, I too believe that the fact that judges are not elected must be seen as an important strength of our judicial system, rather than its weakness. For me, it reinforces the impartially interventionist and protective role of the courts. Here there is no room for populism. Personal views and positions are irrelevant. That is the role mandated to the judiciary by the Constitution. In many respects, that role is assigned to the judiciary by the legislature who is the authority elected by the people. And as our Constitution has it, the legislature and executive must protect

this role and assist the courts to remain independent, impartial, accessible, effective and perform their role and function with outmost dignity. That obligation to protect the courts is therefore assigned to them in the Constitution by the people who they represent.

But then, to manage the irony of the lack of their own physical resources for the effective execution of their orders, the judiciary can only continue to cultivate for its self-respect and legitimacy in the minds of the society they serve generally, and of the litigants who appear before them – based on their fierce independence and awe-inspiring integrity at both individual and institutional level. It is on this independence and integrity that the legitimacy and esteem of the courts will thrive, as long as judicial officers continue to ensure that the judicial power they exercise is matched by the depth of responsibility they have to fulfil their constitutional mandate and to do so honourably, without fear, favour or prejudice. That too is a responsibility mandated by the Constitution.

It is important, however, for judges to be cognisant of the notion that when litigants appear before the courts, they are entitled and will anticipate an outcome of a case in their favour. If the decision goes the other way, there will certainly be disappointments. Where the outcome is about striking down and invalidating laws or conduct of the executive, controversy and/or vigorous debate may ensue from time to time. Besides, robust and constructive debate and free expression of views or opinion are integral to a vibrant democracy and must be welcomed. However, what places the legitimacy and integrity of the courts at risk is the reckless responses of litigants amounting to attacks without substance to decisions of the courts, whenever they are dissatisfied with the outcome of their cases. And it makes it so much more dangerous when litigants are influential public officials. In that case, it easily sends the wrong message to an already restless public that if the outcome of a court case is not favourable, a litigant is entitled to publicly “attack” the judicial officer and may even disregard court orders. This is a culture of disrespect for courts and the judiciary we can least afford.

However, judges can take solace in the idea that their decisions are the outcome of a fair adjudication process, where relevant issues are raised and submissions are made in open court, and each party has a fair opportunity to make compelling arguments in support of their contentions. It is then the responsibility of the judicial officer to ensure that the orders they make are just and equitable, taking into account facts of the case in the context of surrounding circumstances, the issues raised in argument, the contentions submitted, research analysis and interpretation of the applicable law and the Constitution using classical judicial approaches and rational objective standards of assessing available evidence. Important for the judge is to recognise and identify the limits of their judicial power in the decisions they arrive at and the orders they make.

Of course, judges are human and are not infallible. However, errors in law and in fact are appealable to the highest court through the hierarchy of courts. That too is the case when a judge has over-reached herself or himself. That is the discipline the

rule of law requires of each litigant who comes before the courts and is aggrieved by court decisions.

Further, judgments are handed down in open court, in the presence of litigants and or their representatives. They are presented with a copy of the judgment to study and determine whether or not to lodge an appeal within a stipulated time. A litigant will know if even an iota of irrelevant, extraneous, undue and unbecoming influence has affected the decision of the court and or the logic of the courts reasoning does not add up. Any unbecoming conduct identified and affecting the integrity of the judge and amounting to misconduct in terms of the judicial oath of office and or under the Judges' Code of Conduct, may be basis for lodging a complaint against the judge with the Judicial Services Commission (JSC). The process before the JSC may result in the impeachment of the particular judicial officer. This disciplined route is equally available to all litigants including organs of state and all public officials."

Justice Yvonne Mokgoro on "The Rule of Law, Judicial Authority, and Constitutional Democracy in South Africa". Kader Asmal lecture delivered at the University of the Witwatersrand on 21 July 2015.