e-MANTSHI

A KZNJETCOM Newsletter

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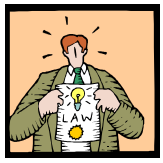
Welcome to the sixty sixth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search all the 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 key 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. The following response was received recently:

Dear Sir / Madam

I would like to thank you for all your innovations and efforts pertaining to e-Mantshi newsletter. This newsletter is absolutely important and contributes a lot to update readers about the recent developments in our law.
*I have also decided to sit down and write the attached article in order to contribute to e-Mantshi newsletter. If the article interests you, I kindly request that it be published in e-Mantshi and please let me know in which Issue of the e-Mantshi will it be published? (*The article is included in this issue under **Matters of Interest to Magistrates**) (ed)

Yours faithfully,

Adv Themba Alfred Ndaba



New Legislation

1. The Minister of Transport has published amended regulations in terms of the *National Road Traffic Act, 1996 (Act 93 of 1996*). These regulations were published in Government Gazette no 34407 of 29 June 2011 and came into operation on the same date. The most important amendments are the following:

"**332.** (1) The following equipment are prescribed equipment in terms of section 65(7) of the Act, complies with SABS 1793: Evidential Breath Testing Equipment or SANS 1793: Evidential Breath Testing Equipment and may be used to ascertain the concentration of alcohol in breath -

(a) Dräger Alcotest 7110 MK III Part No 8314647 (Germany);

(b) Dräger Alcotest 7110 MK IV Part No 35307791 (Australia); and

(c) Intoxilyzer 8000.

(2) In any prosecution for an offence under section 65(5) of the Act, a certified copy of a certificate issued by the manufacturer or supplier of the equipment referred to in subregulation (1) or (3), that contains the make and model of the equipment and a statement that such equipment is of such make and model and complies with the requirements of the specifications referred to in subregulation (1), shall in absence of evidence to the contrary, by mere production thereof, be prima facie evidence that such equipment is of such make and model and complies with such specifications.

(3) Notwithstanding the provisions of subregulation (1), any equipment that is not referred to such subregulation, shall be considered prescribed equipment in terms of section 65(7), subject to such equipment being type-approved in terms of SANS 1793: Evidential breath testing equipment as contemplated in subregulation (4).

(4) For the purpose of this regulation, type-approved and type-approval means that one example of a specific make and model of equipment has been tested in terms of SANS 1793: "Evidential Breath Testing Equipment" by a test laboratory accredited by the South African National Accreditation System (SANAS) for such purpose, and a test report indicating compliance with such specification is issued to the manufacturer or supplier in respect of such make and model of equipment.".

Amendment of regulation 332A of the Regulations

13. Regulation 332A of the regulations is amended by the substitution for subregulation of the following subregulation:

"Presumption regarding calibration or verification certificate for equipment used for road traffic law enforcement purposes

332A. Where in any prosecution for an alleged offence in terms of this Act, it is necessary to prove that any equipment used for road traffic law enforcement purposes, was calibrated or verified to establish the accuracy and traceability, of such equipment, a certificate issued by a laboratory that is accredited for the purpose of issuing such certificates and conducting the tests required for such calibration or verification, by the South African National Accreditation System (SANAS), shall in absence of evidence to the contrary, by mere production thereof be prima facie evidence as to such calibration or verification.".

Recent Court Cases

1. S v Kubheka [2011] JOL 27424 (GSJ)

Magistrates courts have jurisdiction to punish common law contempt of court but only to a limited degree in terms of section 108 of Act 32 of 1944 when committed in court during the sitting thereof.

The accused was convicted in the Magistrates' Court of contempt *in facie curiae* and was sentenced to six months' imprisonment, three months whereof were conditionally suspended. The matter came before the present Court on review in terms of the provisions of section 108(2) of the Magistrates' Courts Act 32 of 1944 ("the Act").

On receiving the case on review, the Court formed the opinion that the conviction and the sentence were not in accordance with justice and that the accused would be prejudiced if the aforesaid papers were not forthwith placed before this division. The Court submitted the papers to the Director of Public Prosecutions for comment as to whether there was a proper charge, whether the conviction was in order, and whether the sentence could be in accordance with justice. The office of the Director of Public Prosecutions advised that the conviction could not be supported and the Court ordered the immediate release of the accused. Its reasons followed.

Held that the Court's powers of review under section 108 of Act 32 of 1944 needed to be examined. It was found that reviews under section 108(2) of the Act are reviews in the ordinary course and the provisions of sections 302, 303, 304 and 306 of the Criminal Procedure Act 51 of 1977 applied in respect of the present matter.

The papers to be transmitted or forwarded to the registrar in reviews under section 108 are a statement, certified by the magistrate, of the grounds and reasons for the proceedings. However, the papers transmitted to the registrar as aforesaid did not include any transcribed record of the proceedings on the day in question.

The Court referred to the common law offence of contempt of court, the provisions of section 108 of the Act, and various authorities before considering the present review. It also considered the jurisdiction of the superior courts and the magistrates' courts, to punish contempt. It concluded that in terms of section 89 of the Act, Magistrates' Courts have jurisdiction to punish common law contempt of court, and a limited jurisdiction to do so summarily is conferred by section 108. The present review had to be considered on the basis that section 108 of the Act empowers Magistrates' Courts summarily to punish only the forms of common law contempt of court specified therein, if committed in court during the sitting thereof.

The magistrate's findings against the accused in this case did not support his verdict. Firstly there was not a single finding that the accused interrupted the proceedings in the ordinary sense of the word, that there was any break in the continuity of the proceedings or that the accused prevented the continuation of the proceedings of the court, or in fact that there was any interruption of the proceedings at all. The accused had thus not been proved to have committed contempt of court.

The conviction was quashed and the sentence set aside.

2. S v Van der Westhuizen 2011(2) SACR 26 (SCA)

Where an accused is represented, it is not the function of a prosecutor to call evidence which is destructive of the State's case, or which advances the case of the accused.

The concept of impartiality in the South African and international codes and guidelines of prosecutorial conduct is not used in the sense of not acting adversarially, but in the sense of acting even-handedly, ie avoiding discrimination. The duty to act impartially is therefore part of the more general duty to act without fear, favour or prejudice. In an adversarial system the prosecutor's function is essentially to discredit defence's evidence for the very purpose of obtaining a conviction. Where an accused is represented, it is not the function of a prosecutor to call evidence which is destructive of the State's case, or which advances the case of the accused. The duty of a prosecutor, to see that all available legal proof of the facts is presented, is discharged by making the evidence available to the accused's legal representatives; the prosecutor's obligation is not to put the information before the court .There is therefore no substance in the argument that the appellant did not receive a fair trial because the State called some witnesses, and not others. (Paragraphs [9]–[14] at 32*i*–33*a*, 33*f*–34*b*, 35*c*–*d*, 36*f*–*g* and 37*f*–*h*.)

The prohibition on disclosure of plea-bargain negotiations contained in s 105A(10) of the Criminal Procedure Act 51 of 1977 applies equally to the situation, as in the present case, where no agreement is reached. However, the effect of the proviso to the section is that an accused may waive the protection afforded by the section, and agree to the recording of admissions. A fortiori, an accused can agree to the use of documents, brought into existence for the purposes of s 105A proceedings, which do not contain admissions but are unfavourable or, for that matter, favourable to the accused. In the circumstances, the proposition that the appellant did not have a fair trial because reports handed to the State in the course of s 105A proceedings had come into the hands of State witnesses and were commented on by the State witness, was untenable. (Paragraphs [16] and [18] at 38*f*–39*a* and 40*a*)

It is unnecessary to consider whether, initially, the court unjustifiably limited cross-examination, when any irregularity that there may have been in that regard was cured by the court allowing further cross-examination. The submission, on appeal, that the procedure followed by the court was irregular and that the court was obliged to make special entries in terms of s 317(1) of the Criminal Procedure Act 51 of 1977, is devoid of authority, logic and merit. (Paragraphs [19] and [23] at 40*d*–*e* and 42e *f*)

For so long as a formal admission stands, it cannot be contradicted by an accused, whether by way of evidence or in argument. To hold otherwise would defeat the purpose of s 220, eliminate the distinction between a formal admission in terms of that section and an informal admission which may be qualified or explained away, and thereby lead to confusion in criminal trials. The minimum that an accused who wishes to lead evidence or advance argument inconsistent with a formal admission in terms of s 220 would first have to show, before being allowed to do so, is that there is an explanation, consistent with bona fides, why the admission was made in the first place; and why he or she now wishes to resile from it. (Paragraphs [34] and [37] at 47*g–h* and 49*e–f*.)

3. S v Baartman 2011(2) SACR 79 (WCC)

The Mandatory minimum-penalty provision in the Criminal Law Amendment Act is irreconcilable with the identical 15 years imprisonment that may be imposed as the maximum in terms of the Firearms Control Act.

From an overall reading of the Firearms Control Act 60 of 2000, it is apparent that a system of regulation of firearms was introduced by means of a comprehensive regime of licensing, permit and official authority, and that every violation created therein was attached to a prescribed maximum penalty. The general prohibition in respect of firearms, contained in s 3 of the Act, is arranged in a pattern together with 142 other prohibitions and directives. Section 120(1)*(a)* of the Act provides that a person is guilty of an offence if he or she contravenes or fails to comply with any provision of the Act; and furthermore, s 121 of the Act, read with Schedule 4 thereto, introduced a sentencing regime for contraventions of the Act, which regime had not existed previously. While Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 imposes the identical minimum sentence (of 15 years' imprisonment) for any offence relating to the possession of an automatic or a semi-automatic firearm as the maximum therefor under the Firearms Control Act, their regulation—by licensing and sentence under the later Firearms Control Act—is systematically differentiated. The mandatory minimum-penalty provisions for semi-automatic firearms in the Amendment Act are irreconcilable with the identical sentence of 15 years that may be imposed as a maximum in accordance with Schedule 4 to the Firearms Control Act. The regulation of semi-automatic firearms under the Firearms Control Act cannot be harmonised with the provisions of s 51(2)*(a)*(i) of the Amendment Act. The phrase '(n)ot withstanding any other law', introducing s 51(2) of the Amendment Act, could never have been intended to override any future law (statute) containing the regulatory and sentencing provisions such as those provided for in the Firearms Control Act. Accordingly, the sentencing provisions provided for in s 51(2), read with Part II of Schedule 2, of the Criminal Law Amendment Act, have been impliedly revoked in respect of offences under the Firearms Control Act. (Paragraphs [19]–[23] and [32]–[35] at 84*b–f* and 86*c–g*,)

4. Minister of Safety and Security v Venter and others 2011(2) SACR 67 (SCA)

The SAPS are required by the Domestic Violence Act 116 of 1998, s 2 and by National Instructions on Domestic Violence to advise and assist persons in asserting their rights under Act.

The High Court awarded respondents damages arising from the negligent failure by members of the South African Police Service (SAPS) to perform their duties under the Domestic Violence Act 116 of 1998 — to advise and assist persons in asserting their rights under the Act. The respondents contended that, had they been aware of and understood their rights under the Act — in particular their right to apply for a protection order — they would have taken the appropriate steps to protect themselves. The appellant's response was that they did not establish that they would have taken steps to protect themselves even if the police had assisted them, and therefore failed to prove that such negligence caused their damages; or, at the very least, that their own negligence contributed to what had happened.

Held, that it was abundantly evident that the Act and the Instructions issued by the Commissioner of the SAPS afforded complainants wide-ranging remedies and imposed extensive duties on SAPS members to assist complainants in accessing these remedies. The Act was specifically enacted to deal effectively with family violence, since the criminal justice system was palpably unable to do so. The extensive protection available under the Act would be meaningless if those responsible for enforcing it, namely SAPS members, failed to render the assistance required of them under the Act and the Instructions. (Paragraph [27] at 74*g*–75*b*.)

Held, further, that the High Court's finding, that the evidence established that the police's failure to have advised the respondents of their remedies under the Act was the critical cause for why they had not pursued this course, cannot be faulted and it followed that the respondents established factual causation. Concerning legal causation, the appellant had not advanced any grounds to suggest that there were any policy considerations that stood in the way of a finding against the appellant. Our courts had in the recent past consistently held the police liable for failure to perform their statutory duty to protect citizens where harm was suffered through such failure. Legal causation was clearly established in this case. (Paragraphs [29]–[30] at 75*e*–76*e*.)

Held, further, that the respondents were negligent in failing to obtain the common-law interdict, and that contributed to the harm: a common-law interdict may well have stopped the destructive course of action. In determining their respective degrees of negligence — their respective deviation from the norm of the reasonable person, expressed as a percentage — it was plain that the negligence of the appellant was far greater than that of the respondents. The SAPS had clear guidelines in the Act and the Instructions, which they failed to adhere to. Over and above this they have a constitutional duty to protect citizens. The respondents' degree of culpability is much less — 25% would be fair and equitable in the circumstances. (Paragraphs [33]–[34] at 77*c*–*g*.)

From The Legal Journals

Meintjies van der Walt, L

"Tracing trends :The impact of science and technology on the law of criminal evidence and procedure"

SALJ 2011 147

Van Wyk , J

" The role of Local Government in evictions"

Potchefstroom Electronic Law Journal 2011 vol 14 no 3

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

Contributions from the Law School

Child pornography

Nicci Whitear-Nel*

1. Introduction

The Films and Publications Act 65 of 1996 (as amended)[1] (the Act) outlaws child pornography, and makes it a punishable offence.[2]

2. The offence

Offences related to child pornography are broadly defined in the Act. Section 24B provides that not only the creation, production and distribution of child pornography is an offence, but also that any person who unlawfully possesses any film, game or publication[3] which contains depictions, descriptions[4] or scenes of child pornography or which advocates, advertises, encourages or promotes child pornography, or the sexual exploitation of children, is guilty of an offence.[5] It is also an offence to access, or to take steps to access, child pornography.[6]

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[1] Act 3 of 2009

[2] Section 2

[3] 'publication' means –

(a) any newspaper, book, periodical, pamphlet, poster or other printed matter;
(b) any writing or typescript which has in any manner been duplicated;
(c) any drawing, picture, illustration or painting;
(d) any print, photograph, engraving or lithograph;
(e) any record, magnetic tape, soundtrack or any other object in or on which sound has been recorded for reproduction;
(f) computer software which is not a film;
(g) the cover or packaging of a film;
(h) any figure, carving, statue or model; and
(i) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet.

[4] This word is included in the Films and Publications Act (supra) because sexual predators often use descriptions of sexual acts to groom children for future sexual activity (Memorandum on Proposed Amendments to the Films and Publications Act, 1996 at p. 7)

[5] Section 24B, Act 3 of 2009

[6] Section 24B, Act 3 of 2009

2.1 Possession

The ordinary meaning of the word 'possession' would cover instances where child pornography was downloaded from the Internet onto a computer's hard drive or data storage device, but would not necessarily cover the viewing of such material via a browser on a computer screen.[7]

The word 'possession' is now defined in the Act (supra) as including keeping or storing child pornography in or on a computer or computer system or computer data storage medium.[8] The definition now also covers instances where child pornography is accessed and viewed without being downloaded.

Possession of child pornography includes a situation in which a person has custody, control or supervision over a computer or computer system or computer data storage medium on behalf of another person.[9]

2.2 Fault

Ordinary common law principles would however require a form of fault, intention or negligence, in order for a person to be found guilty of an offence. The Memorandum to the Act[10] makes it clear that 'dolus eventualis' is foreseen as being a sufficient form of fault to trigger criminal liability.

Inadvertent 'possession' of child pornography, would therefore not constitute criminal possession. In determining whether access to child pornography was accidental, the context in which the site was accessed would be relevant. There are cases where sites with legitimate sounding names host offensive material, and occasionally a typographical error might result in unintended sites being accessed. Any evidence of a 'pattern' of such behaviour would be sufficient in most cases to prove that the possession was not merely 'accidental'. Another indicator would be whether the user has taken active steps to access the material or not. The latter would be the case, for example, where unsolicited email containing child pornography was received.

2.3 Unlawfulness

The act only criminalises the *unlawful* possession of child pornography. Factors that would tend to eliminate the element of unlawfulness would be where the material was accessed or created for its artistic merit, or for educational, research or medical purposes.

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[7] Sanette Nel 'Child Pornography and the Internet- a Comparative Perspective.' 2008 (XL) CILSA 221 at 234

[8] Section 1

[9] Definition of 'possession' inserted by s. 1 (e) of Act 18 of 2004

[10] Memorandum on Proposed Amendments to the Films and Publications Act,1996 at p. 8

3. Obligation to report the crime

Not only is the possession, creation and distribution of child pornography a criminal offence, but anyone who has 'custody, control or supervision over a computer, or computer system or computer data storage system' which is implicated in these crimes, has a positive obligation to report the matter to the South African Police Services, as does any person who otherwise has knowledge of the offence. This obligation exists even if the person does not know for a fact, but merely suspects, another of accessing and viewing child pornography. This is in terms of section 24B of the Act.[11] The report must be made 'as soon as possible'. The individual has a further duty to provide the South African Police Service with all the particulars of the knowledge or suspicion of child pornography offences. This means, for example, retaining and handing over evidence from internal company computer audits, or information technology (IT) reports on employees' activities on the Internet, or employee reports on their colleagues.

A failure to comply with the obligation to report is an offence.

Further, section 24B (3) provides that " Any person who processes, facilitates or attempts to process or facilitate a financial transaction, knowing that such transaction will facilitate access to, or the distribution or possession of child pornography, shall be guilty of an offence."

4. Internet Service Providers (ISP's)

Internet Service Provider's (for example, Telkom or MWEB) are also legally obliged to report suspected offenders to the police. This includes an obligation to furnish the police with the particulars of users who gained or attempted to gain access to an Internet address[12] that contains child pornography, as well as to take all reasonable steps to preserve evidence for investigation and prosecution purposes.[13] Internet Service Providers which provide child oriented[14] contact-services[15] (like chat rooms) have additional duties. The Electronic Communications and Transactions Act[16]is also relevant as regards an Internet Service Provider's obligations with regard to child pornography.[17]

Internet Service providers are also required to take all reasonable steps to prevent their servers from being used to host or distribute child pornography. Internet

[11] Supra
[12] An Internet address is defined in section 1 of the Act (supra) as a web site, a bulletin board service, an Internet chat room or newsgroup or any other Internet or shared network protocol address.
[13] Section 24C (2)
[14] A 'child - oriented service' is defined in section 24C (1)(a) of the Act (supra) as a contact service and includes a content service which is specifically targeted at children; A 'content service' is defined in section 24C(1)(d) of the Act (supra) and content is defined in section 24C(1)(c) of the Act (supra).
[15] A 'contact service' is defined in section 1 of the Act (supra)as any service intended to enable people previously unacquainted with each other to make initial contact and to communicate with each other.
[16] No 25 of 2002
[17] Sections 71-79

Service Providers are not, however, required to actively monitor their users' online activity.[18] In practice, the South African Police service maintains a list of Internet sites which host child pornography and provides such information to Internet Service Providers.[19] Nevertheless, new child pornography sites emerge daily.

5. Presumptions and Proof

In terms of section 30B 1 (b) of the Act[20] there is a presumption that if 'access was gained, or attempted to be gained, to child pornography on a distributed network, including the Internet, by means of the access provided or granted to a registered subscriber or user, it shall be presumed, in the absence of evidence to the contrary which raises reasonable doubt, that such access was gained or attempted to be gained by the registered subscriber or user.'[21]

The onus is thus on the registered subscriber or user of the Internet facilities to provide evidence which raises reasonable doubt as to whether the access was in fact gained by the registered subscriber or user, to avoid liability. There is a similar presumption in the case of child pornography uploaded onto the Internet.

It is therefore crucial for people to protect their Wi-Fi facilities with passwords, and in addition to ensure that they have adequate internet security and control over sites visited by people who are able to access the registered subscriber or user's internet facilities. Particularly those who are vulnerable, like, for example a business (like a coffee shop) which attracts clients by advertising that they have Wi-Fi facilities for customer use.

Wi-Fi is not a technical term. It is a trade mark. A Wi-Fi enabled device, as most laptop computers and smartphones are, can connect to the Internet when within range of a wireless network connected to the Internet. A wireless network generally can have a range from an area the size of a few rooms, to an area covering a number of square kilometers. The area of coverage is called a hotspot.

6. What constitutes child pornography?

6.1 Definitions

In terms of section (1) of the Films and Publications Act,[22] child pornography includes:

[18] Electronic Communications and Transactions Act (supra) section 78
[19] Sanette Nel (supra) at p. 239
[20] Supra
[21] Section 30B (1) (a) of the Act (supra)
[22] Supra

any image, however created, or any description of a person, real or simulated, who is or who is depicted, made to appear, look like, represented or described as being under the age of 18 years –

(a) engaged in sexual conduct;

(b) participating in, or assisting another person to participate in, sexual conduct; or

(c) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.[23]

There was some uncertainty about what was meant by the words 'sexual conduct' within the definition, and the Act[24] now includes the following definition of ‘sexual conduct’:

(i) male genitals in a state of arousal or stimulation;
(ii) the undue display of genitals or of the anal region;
(iii) masturbation;
(iv) bestiality;
(v) sexual intercourse, whether real or simulated, including anal sexual intercourse;
(vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object;
(vii) the penetration of a vagina or anus with any object;
(viii) oral genital contact; or
(ix) oral anal contact[25];

Three points arise out of the definition which are worth drawing special attention to here:

6.2 Age

The offence of possessing child pornography does not depend on whether the person being depicted is in fact under the age of 18. The definition contemplates persons who are merely depicted, or described, as being under the age of 18 years.

6.3 Digital Alteration

The definition covers situations where the original material was innocent but which was subsequently digitially (or otherwise) manipulated so that it became offensive. This is indicated by the words ‘however created’ in the definition.

[23] Current definition of 'child pornography' inserted by section 1(c) of Act 3 of 2009.
[24] Supra
[25] Definition of 'sexual conduct' inserted by s. 1 (f) of Act 18 of 2004

6.4 Virtual

The definition includes virtual, or computer graphics generated, child pornography, by referring to a person being either 'real' or 'simulated'. This is controversial and a similar provision was challenged as a violation of the constitutional right of freedom of expression in the United States of America. There are two conflicting cases in this regard. The first challenge, in United States v Acheson, 1999,[26] was unsuccessful. However, a later challenge in the case of Ashcroft v Free Speech Coalition, 2002,[27] was successful. In many states, legislation prohibiting virtual child pornography was introduced almost immediately following this decision.[28]

Whether the inclusion of virtual child pornography in the definition of child pornography will survive a constitutional challenge in South Africa remains to be seen. Indications are that it will. The matter was dealt with in the case of De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and others,[29] where the court held:

> The objective of the Legislature was clear. It was to eradicate child pornography in every form. The viewing and dissemination of child pornography promotes the heinous impression that children are suitable and acceptable sexual partners; it is debased, dehumanises and has no redeeming qualities whatsoever. It presents one of the most, if not the most, serious problems threatening the fabric of South African society. It is inextricably linked to paedophilia which is rapidly and systematically destroying and scarring children, parents, and families. Section 27(1) which outlaws the possession of child pornography, cannot be said to be disproportionate to the objectives which the Legislature has sought to achieve. In my view the definition of 'child pornography' is not overbroad.

7. Constitutional rights

Will this Act be struck down as unconstitutional on the basis of the constitutional rights of privacy, freedom of expression or equality of the user?

It is unlikely. Section 28 (2) of the Constitution of the RSA Act[30] makes the rights of the child paramount. The court in De Reuck's case[31] held that when seeking to balance conflicting rights, the rights of the child 'will always be deferred to',[32] even to the extent 'that the constitutional rights of privacy or freedom of expression are curtailed'.[33]

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[26] United States v Acheson 195 F. 3d. 645 (11th Cir.1999)
[27] Ashcroft v Free Speech Coalition 122 S. Ct. 1389 (2002)
[28] Jeffrey Kessler 'Ashcroft v Free Speech Coalition.' 2003 (61) Appalachian Journal of Law 61 at 74-5
[29] 2003 (1) SACR 448 (W) at para 86
[30] Act 108 of 1996
[31] De Reuck (supra)
[32] De Reuck paras 45 and 71
[33] Ibid

In any event, the constitutional right to privacy in the workplace also only arises where a person has a subjective belief in his/her privacy, which is objectively justifiable.[34] Even if a person were to establish a right to privacy in this context, his rights may be limited in terms of to section 36 of the Constitution[35], the limitations clause, which provides that constitutional rights may be limited:

> …only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.[36]

The court in *De Reuck's* case[37] held that: 'When one has regard to the objectives of the legislation and the spirit of the Constitution, it can never be said that child pornography has any place in an open and democratic society based on freedom and equality.'[38]

[34] Protea Technology ltd v Another v Wainer and others 1997 (() BCLR 1225 (W)
[35] The Constitution of the RSA Act 108 of 1996
[36] The Constitution of the RSA Act 108 of 1996, section 36
[37] De Reuck (supra)
[38] 2003 (1) SACR 448 (W) at para 86

Matters of Interest to Magistrates

Critical evaluation of the debacles experienced in the law of maintenance.

Self-supporting child and termination of the duty of support

The Constitution of the Republic of South Africa provides in section 28(2) that the best interests of the child are of paramount importance in every matter concerning a child. In section 28(3) it provides that a "child" means a person under the age of 18 years.

In terms of our South African law, a duty to support a "child" does not terminate when a child reaches a particular age but when a child becomes self supporting. In this regard, following the provisions of section 28(3) of the Constitution, any person above the age of 18 years is no longer a "child" but a "major," and the best interests of the child criterion is no longer applicable to that person since the latter is no longer a child within the provisions of the said section. However, the above section does not mean that a duty to maintain a child should terminate when a child is 18 years old, parental duty of support in respect of the child continues until the child is self supporting even though s/he is a major.

In light of the above, it is noteworthy to mention that in order for a major (dependent) child to survive the scrutiny of the age of majority for the continuation of the duty of support, the said major child must still be in need of support. In the case of *Bursey v Bursey 1999 (3) SA 33 SCA*, it was held that the duty of a parent to support a child does not come to an end at any particular age but continues after majority until the child becomes self-supporting. In addition, the Court further held that, the fact that the duty to maintain extends beyond majority, is recognised by section 6(1) of the *Divorce Act 70 of 1979* which provides that a decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances, and that in terms of section 6(3), a Court granting a decree of divorce may make any order which it deems fit in regard to the maintenance of a dependent child of the marriage.

In *B v B 1997 (1) All SA 598 (E)*, it was found that although this duty endures after the attainment of majority by the child, the scale of support varies and is limited to the necessaries. In this regard a major child who claims support bears the onus of proving that he or she is still in need of same. In the premises, it is hereby submitted that legal practitioners who are representing major children in maintenance cases, should at least establish before approaching the court , that the child concerned is still in need of support for the successful application of maintenance.

Age of Majority and Legal Standing

In terms of section 17 of the *Children's Act 38 of 2005*, the age of majority is currently 18 years. The said section together with section 28(3) of the Constitution has the necessary implications on matters pertaining to the *locus standi* in a maintenance claim for major children. In *Butcher v Butcher 2009 (2) SA 421 (C)*, the court held that adult dependent children have *locus standi* and they themselves should make application for maintenance against their parent(s) since parents have no *locus standi* to do same on their behalf, and that there is no statutory provision in either the *Divorce Act 70 of 1979* or the *Children's Act 38 of 2005* enabling a parent of an adult child to bring a maintenance claim on behalf of an adult child.

However, "where there is an existing maintenance order, the situation will be different in that an obligation to maintain a child, which was incorporated in a consent paper concluded when the child was a minor, is enforceable at the instance of the mother by means of a writ in circumstances where the maintenance obligation continued after the child attained majority" *(Prof Marita Carnelley, e-Mantshi newsletter issue 48, January 2010,* obtainable at *http://www.justiceforum.co.za/JET-LTN.asp).* In other words, the said obligation should have emanated from the consent paper which was concluded during the period when the child concerned lacked the necessary legal standing to approach the court, thereby making it enforceable at the instance of the mother who applied for maintenance at that particular time and provided that this obligation continued after the attainment of majority by the child concerned.

Disrespectful Children

It is quite strange and frustrating in some of the maintenance enquiries to find that children wholeheartedly disrespect and even hate their parents, whilst expecting to receive support and or maintenance from their parents. In my opinion, "a child can't really plant a potato and expects to reap an apple and can't bite a hand that feeds him/her".

In this regard I support Voet's contention *(*As highlighted by *Lesbury Van Zyl (Handbook of SA Law of Maintenance 2005, p10, LexisNexis)* that the duty of support ceases when the person to be maintained is guilty of ingratitude of a degree that would justify disinheritance. However, this is not settled law in our country.

Future Maintenance

Future maintenance is commonly understood as maintenance which can be made by the Court in respect of the future expenses of the child. It is normally made by the court in instances such as for example, where the respondent has retired and is going to receive or has received his package benefits (i.e pension funds, provident funds, etc). In these instances, it is in the best interest of the child that s/he be awarded future maintenance in that in many instances, most respondents are not

employable after retirement and others misuse the money to the prejudice of their children who are still in need of support.

In circumstances of this nature, it was found in *Magewu v Zozo 2004 (4) SA 578* (C), that the attachment of pension fund benefits in respect of future maintenance claims was a direct and effective means of ensuring that the rights of the child and the dignity of women were upheld. The Respondent's conduct in this case did not sufficiently convince the court that he will abide by the provisions of the maintenance order on his own accord *(Van Zyl (op cit))*. Future maintenance was therefore granted by the Court in favour of the minor child.

It is noteworthy to mention in this regard that many cases of future maintenance differ according to their facts and merits, and not in all the cases where the respondents retire should a future maintenance order be made. In some cases, one may find that although the respondent has retired, he has since been voluntarily and sufficiently supporting his children without an order of the court, thereby creating the impression that he will continue to abide by his obligation; in other cases, his children are no longer in need of support or have reached the age of majority , are not schooling, etc, but are claiming future maintenance. Awarding future maintenance in these instances will be tantamount to an unjustified award of inheritance to his children whilst the respondent is still alive. If a child does not have a future, which future maintenance will the court award?

In light of the above and for consideration of spousal maintenance, it does happen sometimes that an immediate division of half the pension funds is sought by the wife during the subsistence of the marriage and by virtue of the marriage being in community of property. Clearly, awarding the said division in these circumstances and as a form of maintenance, will be tantamount to an incorrect application of the law since this can only take place during divorce or in certain circumstances such as those pertaining to the accrual system under section 8(1) of the *Matrimonial Property Act 88 of 1984* and in accordance with the latter Act . It is noteworthy to mention in this regard that maintenance cases are *sui generis* in nature and should not be confused with other aspects of the law such as divorce, estates, accrual systems, etc.

The provisions of future maintenance should be dealt with in terms of the *Maintenance Act 99 of 1998* which is specifically designed for this purpose.

Conversion of Criminal Trial into a maintenance enquiry

In terms of section 41 of the *Maintenance Act 99 of 1998*, a criminal trial can only be converted into a maintenance enquiry in terms of section 31of the act if it appears to the Court that it is desirable to do so or when the public prosecutor so requests. Legal practitioners representing an accused should not lodge this application during the trial, however, the burden lies on them to create a picture which will convince the court to decide on its own accord, whether it is desirable or not to convert the proceedings into an enquiry.

According to *Van Zyl* (*Op cit*), the following are inter alia, some of the circumstances which may lead to the desirability to convert the proceedings into an enquiry:

- Where any form of defence unrelated to the ability to pay is raised;
- Where the accused has not raised the issue of paternity at the correct stage of the proceeding;
- Where a father *bona fide* believed that his child had become self supporting and that his duty to support that child had come to an end *ipso iure (by the mere operation of law)* but this was denied by his former spouse; and
- Where the court is of the opinion that the amount of maintenance payable is inappropriate.

In terms of *S v Sohlezi 2000 (2) SACR 231 (NC),* as soon as the question of paternity is raised , the magistrate should consider whether conversion of the proceedings is desirable or not, and if desirable, the proceedings should be converted as such. The results of converting the proceedings into an inquiry as stated in *S v Magagula 2001 (2) SACR 123*, are that the court puts an end to the criminal trial, eliminates any verdict of guilty that may have been entered, precludes itself from convicting the accused and also from ordering payment in arrears.

Failure by the Court to hold an enquiry after conviction and before sentencing

The Maintenance Act in section 40(2) and (3) enables the court to hold an enquiry into certain circumstances including the financial position of the accused in order to satisfy the maintenance order which is in arrears. However, it does happen that a court makes an order that the accused pays as follows: R500-00 for the existing maintenance order plus maybe R200-00 to liquidate the amount in arrears which in some cases exceeds R10 000. This will clearly mean that the accused will take many years to liquidate his arrears and as a result the whole process of maintenance is invaded upon, including a maintenance application to increase should a good cause arise. The reason for this statement is that in some other cases, one may find that where an enquiry was held by the court, the accused could have afforded to pay say , R6000-00 in cash, and then settles the remaining balance by installment.

The above issues were highlighted and appeared to be alarming to the court in the case *of S v Lionel November and 3 Others (*unreported*, High Court reference no: 0034557),* where the court found that the terms upon which the accused were required to pay off their arrears were so lenient and indefensible, and further that the underlying reason for these inappropriate orders stemmed from the failure by the presiding officer to conduct a proper enquiry into the accused's financial circumstances in order to ascertain what he could reasonably be required to pay in respect of the arrears. Further that another likely reason for the leniency was a failure by the presiding officer to view the accused's non-compliance in a sufficiently serious light.

In circumstances of this nature, Justice Mokgoro in *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae) 2003 (3) SA 363 (CC)* clearly stated as follows:

*"*Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The Judiciary must endeavor to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised by those dependent on the law. It is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system"

It is therefore, vital for the judiciary to conduct a proper enquiry after the conviction and before sentencing the accused in order to establish his financial position for the purpose of reducing or settling his arrears.

Extension of the duty of support and claims against the Parent's estate

When one of the child's parents dies, the primary obligation to maintain the child will rest with the surviving parent. However, If both parents cannot support the child, this obligation will be extended to the grandparents of the child. This obligation will pass to the siblings of the child only if the grandparents have passed away or don't have sufficient means to provide support.

In addition to the above, it is a legal principle that the obligation of a parent to support a child can only be terminated by the child's death and not by the parent's death, because in the latter case the child has a right to claim maintenance from the deceased parent's estate.

Taking all of the above discussed aspects into consideration, *Cronje and Heaton* (*SA Family law, 2nd ed 2004*) state that "the duty of support ends when the child is adopted, becomes self-supporting or dies. If the child marries, the duty of support rests on his or her spouse first, but if the child's spouse is unable to support him or her, the child can still claim maintenance from his or her parent, grandparent or siblings.

Conclusion and Recommendation

In summing up, for major children to claim support upon reaching the age of majority and / or put differently, for the duty of support to persists into majority, it is my opinion and suggestion that our law of maintenance really deserves to be developed as follows in order to encourage our children to have a brighter future and to make sure that they do not depend on their parents indefinitely:

- A child must have passed grade 12 and be prepared to further their studies at a tertiary level;

- The said child must not be having a child of his / her own;
- Must have a clear history quantifying his/her educational progress and performance which will enhance his/her application for maintenance in respect of tertiary expenses;
- The said child must convince the court in terms of his/her needs, to grant him/her further progress;
- Must have respect for both his/her parents
- Must be curious to learn and to further his/her studies
- Must be given a period plus a grace period within which he/she must complete his/her studies;
- There must be a very little and /or a minimum amount put in place for limited necessaries in respect of a maintenance of major children who are not schooling for some justifiable reasons.
- The issue of self supporting should be developed as follows: “If a child is not self supporting by the age of, for argument sake 26 years, the duty of support shall terminate .

The above criteria might assist in encouraging children to work hard so that they can have a brighter future and become capable of forming their own families. Our future South Africa is dependent on them. They therefore ought to be independent as well.

Adv Themba Alfred Ndaba
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A Last Thought

"In relation to court administration, I would like to make three propositions that I have previously made:

First, the efficiency in dispensing justice should not be influenced by decisions in which the needs of the administration of justice are not the overriding factor;

Second, the involvement of the Judiciary in decisions relating to the provision of administrative functions connected with the administration of justice is essential to the efficient functioning of our courts; and

Third, the capacity of the courts to deliver justice can best be secured by placing the administration of the courts under the ultimate control of the Judiciary, which is responsible for the delivery of justice."

Chief Justice Sandile Ngcobo at the *Access to Justice Conference 7-10 July 2011*