e-MANTSHI

A KZNJETCOM Newsletter

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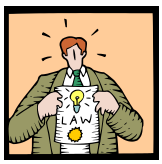
Welcome to the seventy ninth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 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.



New Legislation

1. The Minister of Justice and Constitutional Development has, under section 23 of the Debt Collectors Act, 1998 (Act No. 114 of 1998), and after consultation with the Council for Debt Collectors, made the regulations in the Schedule. These regulations were published in Government Gazette No 35573 dated 10 August 2012.

5. The following Annexure is hereby substituted for Annexure B to the

Regulations:

"ANNEXURE B
Expenses and fees
[Regulation 11]

Note: The total amount to be recovered from the debtor in respect of items 1 to 7 of the Annexure shall not exceed the capital amount of the debt or R736 00 whichever is the lesser.

Item	Description	Amount
1.(a)	Necessary ordinary letter, registered letter, facsimile or e-mail:	R15,00 (and in the case of a registered letter, the costs of the registration fee to be added).
1.(b)	Registered letter (section 57 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944)):	The amount as prescribed from time to time in item 8 of Annexure 2, Table A, Part II of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa.
1.(c)	Necessary electronic communication, other than facsimile or e-mail, (per electronic communication):	R2,00 (maximum of ten electronic communications per month).
2.	Necessary phone call, which is not a consultation (per call):	R15,00.
3.	Other necessary expenses not specifically provided for, a total amount of:	R15,00.
4.(a)	Acknowledgement of debt and undertaking to pay debt in terms of section 57 or section 58 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) (including the necessary consultation with debtor):	The amount as prescribed from time to time in items 9 and 10 of Annexure 2, Table A, Part II of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa.
4.(b)	Original documents signed by the debtor under item 4(a) at the debtor's residence or place of work:	R150,00.
4.(c)	Necessary registered credit bureau search:	R10,00 (maximum of four searches per month).
5.	At the request of the debtor, the drawing up and furnishing of a settlement account, other than the six monthly settlement account:	R30,00.
6.	Correspondence received and attended to:	R7,00.
7.	Necessary consultation with debtor:	R37,00.
8.	Attending taxation:	R59,00.
9.	On receipt of an instalment (one or more) in redemption of the debt inclusive of instalments made directly to the client:	A fee of 10% of the instalment received, subject to a maximum amount of R368,00. No additional fee shall be charged for any attendance in connection with the receipt or payment of any instalment.".

Recent Court Cases

1. S v MAJIKAZANA 2012 (2) SACR 107 (SCA)

If recusal is sought of a presiding officer for the first time on appeal, actual bias would have to be proved for the appeal to succeed.

[12] In *President of the Republic of South Africa & others v South African Rugby Football Union & others 1999 (4) SA 147(CC)* the Constitutional Court held that a judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that she or he might be biased, acts in a manner inconsistent with s 34 of the Constitution and in breach of the requirements of s 165(2) and the prescribed oath of office. Because of the failure, on the part of the appellant and his legal representative, to apply for the recusal of the trial judge, the inference must be that there was no reasonable apprehension of bias before and during the trial. But, on the assumption that none of them had realised that Froneman J had dealt with the bail appeal, this court has said that the special entry procedure 'is a useful, or perhaps even necessary, one when the irregularity or illegality complained of is discovered only after the conclusion of the trial'(Sefatsa 1989 (1) SA 821 (A) at 843 H).

[13] It seems to me that where, as in the present matter, no application was made for the trial judge's recusal before or during the proceedings, and the judge never entertained the question of his or her recusal in his or her mind, actual bias would have to be proved for an appeal, based on a special entry, to succeed. In those circumstances, the convicted accused's weapon would be the record of the proceedings and the reasoned decision of the presiding officer which allow for close scrutiny for any evidence of bias. As counsel for the appellant has conceded, there is nothing on the record in the present matter to indicate that the trial judge was in any way biased. In view of the fact that counsel made no submissions relating to the merits of the appeal on the murder conviction, and wisely so, it follows that the appeal in respect of that conviction must fail.

2. S v VAN ROOYEN 2012(2) SACR 141 (ECG)

A second contravention in terms of section 35(1) of Act 93 of 1996 is only a conviction of the exact same section of which an accused had been convicted before.

> "This is an appeal, with leave granted by this Court, against an order made by the Magistrate for the district Uitenhage confirming the suspension of the appellant's driving licence for a period of five years as provided for in section 35(1) of the National Road Traffic Act. The facts are that the appellant was charged with a contravention of section 65(2)(a) read with section 89(1) of the Act by driving a motor vehicle on a public road when his blood alcohol was in excess of the statutory limit. In a written plea of guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 the appellant pleaded guilty to the charge.
>
> According to the appellant in his section 112(2) statement, he was driving a motor vehicle on a public road in Uitenhage on 15 November 2008. His vehicle was stopped by a police officer in the course of a routine inspection. On suspicion that he had consumed alcohol the appellant was taken to the Uitenhage Provincial Hospital where a blood specimen was taken. An analysis thereof has shown the concentration of alcohol in the specimen to be 0.21 gram per 100ml, which is considerably in excess of the legal limit of 0.05 gram per 100ml as provided in section 65(2)(a) of the Act. The State accepted the averments and facts set out in the appellant's plea and he was duly convicted as charged.
>
> Before sentencing the prosecution proved a previous conviction which was admitted by the appellant. According to his criminal record he was convicted in June 2008 of having contravened the provisions of section 65(1)(a) of the Act. The Magistrate thereupon sentenced the appellant to a fine of R10 000 00 or 10 months imprisonment. In addition the Magistrate confirmed the suspension of the applicant's driving licence for a period of 5 years in accordance with the provisions of section 35(1)(c)(ii) of the Act after having conducted an enquiry as envisaged in subsection (3) of that section.

The appeal is directed solely at the suspension of the appellant's driving licence. The appellant raised two grounds of appeal. The first is that the Magistrate erred in treating his conviction in the present proceedings as a second contravention for purposes of section 35(1) of the Act. What is immediately evident from the appellant's criminal record is that his conviction in 2008 was a conviction for impaired driving ie. driving a vehicle while under the influence of intoxicating liquor or

drug having a narcotic effect contrary to section 65(1)(a) of the Act, whereas the sentence in the appeal was imposed in respect of the offence of driving a vehicle after having consumed liquor in such a quantity that the appellant had more than the permitted percentage of alcohol in his blood in contravention of section 65(2)(a).8 The second ground of appeal is that the failure of the Magistrate to order that the compulsory suspension of the appellant's driving licence should not take effect, as authorised in subsection (3), resulted in the imposition of an unjustly severe and inappropriate sentence to the extent that no reasonable court would impose it. The contention is that the cumulative effect of the sentence and the 5 year suspension of the appellant's driving licence, resulted in a severe sentence which warrants interference on appeal.

The suspension of the driving licence of a person convicted of a contravention of the provisions of the Act is not limited to section 35. Where section 35 mandates the compulsory suspension of a driving licence for certain periods of time, the Court has a general discretionary power in terms of section 34(1)(a) to order the suspension of the driving licence of an offender for a period "as the Court may deem fit". The phrase "relating to the driving of a motor vehicle" has been interpreted as meaning an offence involving the actual driving of a vehicle. Accordingly, offences such as the failure to stop after an accident, to report an accident, illegal parking or obstructing a public road are thus not offences in respect of which a Court may exercise its power under section 34 as they are not offences which depend on the manner in which a motor vehicle is driven. It is clear from (a) and (b) of section 34 that the period of suspension of an offender's driving licence is not limited, but is within the discretion of the Court. It has however been held that the section does not empower the Court to suspend a licence indefinitely or for life. As in the case of section 35, the suspension of a driving licence is considered not to be designed solely to advance the public interest, but is also regarded as part of the punishment. As a result the principles guiding a Court in deciding whether to cancel a driving licence are effectively the same as those which apply to the imposition of sentence and the determination of an appropriate sentence.

It is evident from the Magistrate's reasons for ordering the confirmation of the suspension of the appellant's driving licence for a period of five years that he regarded the appellant's conviction as a second offence as contemplated in paragraph (ii) of sub-section (1). In his reasons the Magistrate acknowledged the fact that the appellant's present conviction was for a different offence to the one he was convicted of in 2008. He however expressed the view that it constitutes a second offence as contemplated in paragraph (ii) of section 35(1) as they both "relate to driving a motor vehicle under the influence of alcohol".

Section 35(1) on a reading thereof in my view says nothing more than that subject to the provisions of subsection (3), the driving licence of a person whose conviction of

an offence referred to in subsection (1) constitutes a first, second and subsequent offence, shall be suspended for the time periods referred to in paragraphs (a), (b) and (c). Whether or not such a conviction constitutes a second or subsequent conviction is to be determined with reference to the nature of the offender's prior conviction. If they correspond, then the later conviction constitutes a second offence for purposes of section 35(1).

That this is the correct construction for section 35(1) is evident from a reading thereof. It is the conviction of an offence mentioned in subsection (1) that constitutes the "first", "second" or "third or subsequent offence". That this is so is also evident from the wording of subsection (2). It does not provide that a previous conviction for any of the offences referred to in subsection (1) constitutes a "second" or "third or subsequent offence". If it was the intention of the legislature to provide that a previous conviction for any of the offences in subsection (1), or for that matter, in any particular paragraph thereof, was to be deemed to be a second or subsequent offence, or alternatively, as in essence contended by the State, that the compulsory suspension of an offender's driving licence would take effect if the offender has a previous conviction for any one or more of those offences, it could easily have said so. A further consideration which strengthens the aforementioned construction of the subsection is the purpose and scope thereof in the scheme of the Act. I shall deal with this when considering the question whether the ordinary meaning of the phrase "second offence" leads to an absurdity.

I am satisfied that when the provisions of section 35 are looked at in its proper context with reference to section 34, and given its ordinary and plain meaning, the phrase "a second offence" in subsection (1) correctly expresses the intention of the legislature. I therefore conclude that it must be accorded its ordinary meaning, namely a second contravention of the provisions of the same section in the Act. A previous conviction for a contravention of another section in the Act is however not without relevance. It is not only a factor relevant to the determination of an appropriate sentence, but also in deciding whether, in the exercise of the Court's discretion in terms of section 34, the driving licence of the offender should be suspended, and if so, for what period of time."

3. S v WILLIAMS 2012(2) SACR 158 (WCC)

Section 67(2) of Act 51 of 1977 does not make provision for a conviction and sentence to flow from an enquiry into accused's failure to appear in court.

Section 67(2) of the Criminal Procedure Act 51 of 1977 does not provide that at the stage when the accused appears before the court an inquiry into his failure to appear can be instituted or launched from which a conviction and sentence can flow.

Section 67A does create an offence but the authorities are unanimous that a conviction and sentence can only follow a formal trial and not a summary inquiry.

4. S v RS AND OTHERS 2012(2) SACR 160 (WCC)

In sentencing a juvenile offender a court must impose sentence in terms of chapter 10 of the Child Justice Act 75 of 2008.

"[24] The provisions of the Child Justice Act 75 of 2008 (the Act) which commenced on 1 April 2010, has ushered into the South African criminal justice system, more particularly its juvenile justice system, a new era, similar to that of the introduction of Section 276 (l)(h) and Section 276 (1) (i) of the Criminal Procedure Act. These provisions are however confined to that part of the criminal justice system that deals with, and includes juvenile justice. The intention of the legislature with this legislation is clearly to give effect, form and content to the constitutionally guaranteed rights of children as set out in Section 28 of the Constitution read with Section 35 of the Constitution, in the context of the criminal justice system.

[25] Chapter 10 (Sections 68-79) of this Act 75 of 2008 is of particular importance in this case. This chapter deals with sentencing of a convicted child and provides, in peremptory terms in Part 3 thereof, in its introductory section, Section 68 that: "A child justice court must, after convicting a child, impose a sentence in accordance with this chapter" (emphasis added). A child is "any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older, but under the age of 21 years whose matter is dealt with in terms of Section 4 (2)" (see Section 1 of the Act). Section 69 sets out the objectives of sentencing in terms of this Act, as well as the factors which must be taken into account by the sentencing court in deciding on an appropriate sentence, and before imposing any sentence. These objectives are, in addition to any other considerations, the following:

> "(1). In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of the Act are to -
>
> > a) encourage the child to understand the implications of and be accountable for the harm caused;
> >
> > b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;
> >
> > c) promote the reintegration of the child into the family and community;
> >
> > d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and

e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time", (emphasis added).

The sentencing court in respect of a child - the child justice court - is "encouraged" to adopt "a restorative justice approach" in order to promote these objectives, and to that end, "sentences may be used in combination" (in Section 69 (2) of the Act).

[26] The factors that such a court must take into account before sentencing are the following:

"a) Whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities;

b) whether the harm caused by the offence indicates that a residential sentence is appropriate;

c) the extent to which the harm caused by the offence causing or risking the harm; and

d) whether the child is in need of a particular service provided at a

child and youth care centre.

Subsection 4 of Section 69 prescribes, in peremptory terms, the additional factors that must be considered, in addition to the abovestated factors, by that court when it is considering direct imprisonment in respect of such an offender. These are the following:

a) The seriousness of the offence, with due regard to -

(i) The amount of harm done or risked through the offence; and

(ii) The culpability of the child in causing or risking the harm;

b) the protection of the community;

c) the severity of the impact of the offence on the victim;

d) the previous failure of the child to respond to non-residential alternatives, if applicable; and

e) the desirability of keeping the child out of prison.

[27] Section 70 makes provision for a victim impact assessment report regarding the physical, psychological, social, financial or other impact of the offence on the victim, called a victim impact statement, its admissibility as evidence, and for the prosecutor to furnish such a report to the court.

[28] Section 71 makes it obligatory for the child justice court to request a pre-sentence report prepared by a probation officer before it imposes any sentence. This requirement may only be disposed with where a child is convicted of an offence referred to in Schedule 1 of the Criminal Procedure Act (which is not applicable in

this case) or where requiring such a report would cause undue delay, to the prejudice of the child. However, no child may be sentenced to compulsory residence in a child and youth care centre or to imprisonment unless a pre-sentence report has first been obtained (in terms of Section 71 (1) (b) of the Act). Importantly, a child justice court may impose a sentence other than that recommended in the pre-sentence report, but in that event, that court "MUST enter the reasons for the imposition of a different sentence on the record of the proceedings" (Section 71 (4) of Act: emphasis added).

[29] Part Two of this Chapter (Sections 72-79), deals with the different sentencing options open to the sentencing court, which include:

a) community - based sentences, as set out in Section 72 of the Act;

b) restorative justice sentences, as set out in Section 73 of the Act;

c) the imposition of a fine or alternatives to a fine, as set out in section 74 of the Act;

d) sentences involving correctional supervision both in terms of Section 276 (1) (h) and Section 276 (1) (i) of the Criminal Procedure Act 51 of 1977, as provided for and set out in Section 75 of the Act;

e) a sentence of compulsory residence in a child and youth care centre, as set out and provided for in Section 76 of the Act;

f) an order by the court to postpone or to suspend the passing of sentence in respect of a convicted child as set out and provided for in Section 78 of the Act;

g) holding of an enquiry into an alleged breach of, or failure to comply with any imposed sentencing condition(s), on the part of the child, and the powers of the court in such an event, as set out and provided for in Section 79 of the Act; and

h) to impose a sentence of imprisonment, as set out and provided for in Section 77 of the Act. The relevant parts of this section read as follows:

77. Sentence of imprisonment. - (1) A child justice court -

a) may not impose a sentence of imprisonment on a child who is under the age of 14 years at the time of being sentenced for the offence; and

b) when sentencing a child who is 14 years or older at the time of being sentenced for the offence, **must only do so as a measure of last resort and for the shortest appropriate period of time,** (emphasis added).

(3) A child who is 14 years or older at the time of being sentenced for the offence, and in respect of whom subsection (2) does not apply, may only be sentenced to imprisonment, if the child is convicted of an offence referred to in -

(a) Schedule 3;

(b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment; or

(c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.

(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment for a period not exceeding 25 years.

(5) A child justice court imposing a sentence of imprisonment must antedate the term of imprisonment by the number of days that the child has spent in prison or child and youth care centre prior to the sentence being imposed.

What is clear from the provisions of Section 77 read with Section 71, and Section 1, is that,

(a) a child for the purposes of this Act, is any person/child under the ages of 18 years, but may also be a person of 18 years or older but under 21 years;

(b) a sentence of direct imprisonment in terms of Section 77 cannot be imposed before and unless a pre-sentence report in respect of the offender had been obtained and considered by the sentencing court (in terms of Section 71 (l)(b) of the Act);

(c) direct imprisonment in respect of a child under the age of 14 years of age at the time of being sentenced, may not be imposed (in terms of Section 77 (1) (a) of the Act);

(d) direct imprisonment in respect of a child of 14 years or older may ONLY be imposed if the child has been convicted of an offence referred to in Schedules 1, 2 or 3 of the Criminal Procedure Act;

(e) where such a child has been convicted on an offence referred to in Schedule 2, he or she may only be sentenced to direct imprisonment "if substantial and compelling reasons exist for imposing a sentence of imprisonment" (Section 77 (3) (b); emphasis added);

(f) where such a child has been convicted of an offence referred to in Schedule 3, he or she may only be sentenced to direct imprisonment, "if the child has a record of relevant previous convictions AND substantial and compelling reasons exist for imposing a sentence of imprisonment". (Section 77 (3) (c); emphasis added));

(g) where such a child has been convicted of an offence referred to in Schedule 3, he or she may be sentenced to a period not exceeding 25 years (Section 77 (3) (a) read with Section 77 (4).

h) where such a child has been convicted of an offence referred to in Schedule 2, and provided substantial and compelling reasons exist for imposing direct imprisonment, he or she may be sentenced to a period of imprisonment not exceeding 25 years;

i) where such a child has been convicted of an offence referred to in Schedule 1, and provided he or she has a record of relevant previous convictions AND substantial and compelling reasons exist for imposing direct imprisonment, he or she may be sentenced to a period of imprisonment not exceeding 25 years;

j) Where such a child has however been convicted of any other offence than these referred to in Schedule 1, 2 or 3, or, where NO substantial and compelling reasons exist in respect of the Schedule 1 and 2 offences of which he/she was convicted, the sentencing court is obliged to impose direct imprisonment "only as a measure of last resort

AND for the shortest appropriate period of time" (Section 77 (1) (b) of the Act; emphasis added).

[30] The legislature has therefore in unequivocal terms incorporated those principles, guidelines and considerations as developed by our highest courts in the case law referred to above, in this Act, and has elevated those, in the context of our juvenile justice system, to having legal force and effect. Non- compliance thereof will henceforth not only be irregular, but also unlawful, in violation of the principle of legality.

[31] The magistrate, sitting as the sentencing court clearly did not consider these provisions nor the importance thereof in respect of the accused before him at the time of sentence, particularly accused 2 who was 17 years old. It is indeed very unfortunate that neither the prosecutor, nor the defence, nor the officials from the Department of Correctional Services and the Department of Social Services referred the magistrate to this Act and its provisions. The magistrate has, in his subsequent reasons/reply, acknowledged that the provisions of this Act were/are indeed applicable to accused 2. He said that he did indeed consider and apply these

provisions in respect of accused 2. This assertion flies in the face of at least five objective facts:

> 1. The trial court record is devoid of any reference to or mentioning of, the provisions of this Act, particularly Chapter 10 thereof;
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> 2. The magistrate did not request any pre-sentence report in respect of accused 2 before imposing and/or considering direct imprisonment, in violation of Section 71 (1) (b) of the Act;
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> 3. Should the reports of the correctional official and the probation officer be regarded as a report for purposes of Section 77 - which it was clearly not, although the magistrate disingenuously purported it to be such a report - the magistrate clearly did not follow the recommendations of the either the correctional official and the probation officer. In the event, he was obliged to enter on the record of the proceedings his reasons for imposing a different sentence, namely, that of direct imprisonment. He did not.
>
> 4. Even if it can be said that the sentence imposed by the magistrate in respect of accused 2, was in terms of and pursuant to, the provisions of Section 77 (3) of the Child Justice Act of 2008, the offence being a Schedule 2 offence, - such a sentence, of 3 years direct imprisonment in respect of accused 2 could only have been imposed if substantial and compelling reasons existed for imposing such a sentence, and as a last resort, and for the shortest appropriate time. There is no reference to such an enquiry having been done by the magistrate, nor is there any reference to the terms "substantial and compelling reasons", in respect of any finding made by the magistrate in that regard. There was therefore no compliance with Section 77 (1) and (3) of this Act.
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> 5. A final indication that the magistrate did not consider and apply the provisions of this Chapter, is that he, when imposing the said sentence in respect of all three accused, in particular with reference to accused 2, did not antedate the term of imprisonment of accused 2 by the number of days that accused 2 spent in prison since his arrest, as he was obliged but failed to do, in violation of Section 77 (4) of the Act.

[32] These constitute, to my mind gross irregularities and serious violations of the provisions of the Child Justice Act, 2008, which necessitated this court to enquire urgently into this matter, as was done."

From The Legal Journals

Hess, B

"Consumer protection now debtor protection? Acknowledgments of debt and the National Credit Act"

De Rebus August 2012

Mashile, T C

"Parental rights and responsibilities, guardianship and same-sex parents"

De Rebus August 2012

Bentley, B

"Debt counselling: Challenge and proposed solution"

De Rebus August 2012

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

Contributions from the Law School

Killing in defence of property: A constitutional approach

Killing in defence of property can be justified in terms of South Africa's new constitutional dispensation based on two reasons. First, it is supported by established common law precedent. In *Ex Parte Die Minister van Justisie: in re S v Van Wyk* (1967 (1) SA 488 (A) at 496 the Appellate Division noted that "If the use of necessary force is justified… then it is not clear to me why *deadly* force must be excluded from that principle. The objection, arising from understandable humanitarian views, concerning the imbalance between life and property, does not in my view create a persuasive basis for a general exception…. Proportionality will not do as a general basis for private defence…[Why] should the defender, who is unquestionably entitled to protect his rights, be viewed as the one acting unlawfully, if he uses deadly force rather than sacrifice his rights." Despite this view, the court did appear to caution the use of fatal force in defence of property was reserved for exceptional circumstances which rendered it reasonable and necessary to do so. In other words where the threat to property coincides with a threat to life, the owner is entitled to use violence which necessarily entails lethal force (Ally and Viljoen "Homicide in defence of property in an age of constitutionalism" (2003) *South African Journal of Criminal Justice* 121). In *S v Moghlwane* 1982 (2) SA 587 (T) the court noted that the accused used his knife because "his life or body was threatened. Because he could have hurt the accused with the axe, the accused fatally stabbed the deceased (at 589E).The problem with this ruling is that it has been criticised for going against the fundamental right to life which is entrenched in our Constitution (Yeo "African approaches to killing in defence of property" (2008) *CILSA* 341). A comment made in *Ex Parte minister of safety and Security: in re S v Walters* (2002 (2) SACR 105 lends support to this view. While Kriegler J avoided determining whether the law permits killing in defence of property, he emphasised that it "was material…that the law applies a proportionality test, weighing the interest protected against the interest of the wrongdoer… and that these interests must now be weighed in light of the Constitution" (at 134, discussed in Yeo supra at 341). This suggests that the Constitution's emphasis on proportionality will place higher value

on human life than on property – therefore leaving the decisions in the *Van Wyk* case questionable (Yeo *supra* at 341).

Given that South African law views private defence as a justification ground, and given that South Africa is in an era of constitutionalism, the Bill of Rights requires that a value-based interpretation be adopted (Ally and Viljoen *supra* 135). The development by our courts of common law rules which may entail the limitation of rights, must comply with section 36 of the Constitution (the limitation clause). The question is whether the common law rule set out in *S v Van Wyk supra* which violates the right to life (section 11), human dignity (section 10) and bodily integrity (section 22), is in accordance with section 36. In determining whether a moral justification for using deadly force in defence of property exists, it is suggested that Green's analysis be adopted. This theorist poses two questions. First, is proportionality a requirement where defensive force is required for a perceived threat? ("Castles and carjackers: Proportionality and use of deadly force in defence of dwellings and vehicles" (1999) *University of Illinois Law Review* 4). If the answer is yes, the a further question remains. Can such force ever be deemed proportional, given that death or grievous bodily harm is not likely? (Green *supra* 19). Green mentions various basic theories to answer the first question such as (1) the choice of evils theory (2) moral forfeiture (3) principle of double effect and (4) the right to preserve personal autonomy. The theory upon which justified homicide is thought to rest is crucial, since it determines both whether proportionality should be required and what proportionality will mean in practice (Green supra). Given the problems posed by the other theories (for a discussion of these see Green *supra* at 23-25), and given that South African law subscribes to the notion of the right to preserve personal autonomy, this theory will be the focus of the discussion. A person can act to defend himself where there is an unlawful attack ("The two reasons for the existence of private defence and their effect on the rules relating to the defence in South Africa" (2004) *South African Journal of Criminal Justice* 180). The act of defence is done not only to protect persons, but also the entire legal order (Snyman supra). From a practical standpoint, the defender acts in place of authorities where they are not able to act, thereby maintaining the legal order. This is known as the upholding of justice theory, it is important, since it influences the extent to which the right to private defence can be restricted by socio-ethical considerations (Snyman supra). Given the general prohibition on homicide, a unitary account of justified self-defence would require that an unqualified right to life be conditional. To hold this unqualified right would depend on one's actions: that is not being an unjust immediate threat to another's equal rights or proportionate interest (Uniacke *Permissible killing: The self-defense justification of homicide* (1994) 213). This accords with South Africa's upholding of justice theory, which provides that there must be a reasonable relationship between the act and the defensive act (Snyman *supra* at 189). Therefore a defender is not entitled to protect his rights by any means

necessary, according to the individual protection theory (Snyman *supra* 189). Furthermore, gross disproportion between the interest so f the defender and the attacker are not tolerated by the legal order (Snyman *supra* 190). Snyman posits that it is wrong to accept only on of the two theories that underlie private defence as being correct. Both the individual protection theory and the upholding of justice theory are valid and necessary, and serve as "underlying principles of the specific rules relating to private defence. This is the reason for the reference in German legal literature to a dualistic private defence theory (Snyman *supra* 181). This reasoning cannot be faulted.

The autonomy theory, narrowly circumscribed, will provide the best justification for killing in defence of property. Traditionally, there are both proportionality and necessity limits placed on the theory. The defender's right to protect his autonomy (property) by using deadly force is limited to cases in which such an extreme response is necessary. Richards notes that "[an] unqualified right of self-defence fails to accord to aggressors the modicum of respect that is, despite possibly wrongful or unprivileged aggression, their fair due, It introduces into the right of self-defence a punitive element which is alien to its justification not as an alternative form of punishment which remains in the hands of the background state and its criminal justice system) but as a faute mieux a form of private violence whose legitimacy rests completely on the circumstances of necessity and exigency in which it arises" (Human Rights and Human Wrongs: establishing a jurisprudential foundation for a right to violence: Rights, resistance and the demands of self-respect (1983) *Emory Law Journal* 426).

If South African law subscribes to the autonomy theory, narrowly circumscribed, which constructs support the requirement of proportionality in relation to killing in defence of property? Green suggests that an aggregation of interests may be required (Green supra 40). One approach suggests that the focus be on the threat posed to dignity or privacy of the defender (as opposed to his right to life or property) (Green *supra* 35). The problem with this contention is that some rights in the Constitution are more foundational than others, constituting a core of rights from which others are derived (Ally and Viljoen *supra* 131). In *S v Makwanyane* 1995 (6) BCLR 665 (CC) at par 84 that "…together [the right to life and human dignity] are the source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found the in the preservation of the twin rights of life and dignity. These twin rights are essential content of all rights under the Constitution. Take them away, and all other rights cease."

The inevitable effect of applying lethal force in defence of property entails the deprivation of life, one of the core rights which has been described in Walters supra as "collectively foundational to the value system prescribed by the Constitution (Ally

and Viljoen *supra* 132). Perhaps it could be suggested that the right to dignity is violated where a burglar enters the premises, and the use of deadly force is justified and proportional, given that the home "is a place of privacy where intimate activities are conducted" (Green *supra* 46). But such an approach is based on a lesser extent on a choice of evils theory (which requires proportionality) as opposed to the right to preserve one's personal autonomy which does not. It should also be noted that deadly force is not a proportional response to a burglary (Green supra 47).

Another that satisfies proportionality is based on the premise that given the high crime rate in South Africa and the incidence of violence that accompanies it, it would be reasonable to presume the existence of commission of a serious crime whenever there is an intrusion (Green *supra* 123). One suggested solution is that lethal force of killing in defence of property be permitted in circumstances where the threat involves both harm to property and person (Yeo *supra* 346). In the case of the international criminal law, the Rome Statute contains provisions which set out the general provisions which set out the general principles of criminal responsibility. Such a development is noteworthy, since South Africa has ratified the Rome Statute. In terms of article 31(1)(c), it holds that "[A] person shall not be criminal responsible, if at the time of that person's conduct the person acts reasonably to defend…property which is essential for the survival of the person or another person….against an imminent and unlawful use of force in a manner proportional to the degree of danger…to the property protected. It is notable that the threat to property and person is more intertwined under the Rome Statute's formulation since the accused's survival must be dependent on the property that has been threatened (Yeo "Killing in defence of property" (2010) *Commonwealth Law Bulletin* 289). The operation of article 31(1(c) in the national sphere is illustrated in *Sudan Government v Musa Gibril Musa* (1959) SLJR 12. In this case the accused lived in an area where water was a scarce commodity. This necessitated the collection and storage of water during dry spells of the year. The deceased were thieves who had stolen the accused's water. They did so by placing it in water skins. The accused managed to follow the tracks of the camels ridden by the thieves and when he overtook them, he demanded they return his water. The thieves refused this request and threatened to shoot the accused unless he left. At this point, a camel unseated its occupant and the accused attacked him with an axe. Although the other riders began shooting the accused and wounded him, he continued to attack the deceased, and killed him. The court held that the accused was not guilty of any offence, since "[h]e caused the death of the deceased in the lawful exercise of his right of defence of himself and his property. Water is an invaluable property in the dry season in eastern Darfur. [The] accused's life was in danger" (at 13).

This reasoning is consistent with the finding in *S v Mogohlwane supra* where the wording of the case seems to suggest that defence of property and life were closely

linked. However, in *S v Van Wyk supra* where the owner set a spring gun to kill intruders (where his life was not threatened, is more difficult to explain. In terms of section 36(1)(d) of the Constitution, the nature of the rights that are violated would need to be assessed, the right to life, dignity and bodily integrity. Since the constitution establishes a hierarchy of rights, some being more foundational such as the right to life, it is also necessary to consider the purpose of the limitation (section 36(1)(b)). In this case the purpose of allowing killing is to retain and secure the enjoyment of the right to property and for further discouraging others from committing theft. Ally and Viljoen *supra* 132 note that "loss of property may result in financial loss that may be recovered, but loss of human life can never be recovered." Are less restrictive means available to achieve the stated objectives? These authors suggest that police services and private security firms are all available (Ally and Vijoen *supra* 133).

It is submitted that while the right to life is of paramount importance, it could be suggested that in such a case, the unqualified nature of the right to life in the Constitution provides for a wider interpretation of the concept of life: something more than mere physical existence. In other words, this would signify at least a certain quality of life. In *S v Makwanyane supra* 326-327 it was held that "[T]he right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life, the right as a human being, to be part of a broader community, to share in the experience of humanity, this concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognized and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity, so the rights to human dignity and life are entwined. The right to life is more than existence – it is the right to be treated as a human being with dignity; without dignity, human life is substantially diminished. Without life, there can be no dignity."

Snyman further illustrates the point that the right to life does not include mere existence but also a measure of dignity by means of a hypothetical example. During the course of a mass demonstration, a jewellery store is looted. The goods comprising the owner's stock constitute her life's possessions. The demonstrators smash the windows, force the burglar bars open, and take her property. She subsequently warns them of the consequence so continuing in their course of action. She fires warning shot sin the air, but to no avail. Should she "not be allowed to kill the plunderer, it essentially means that the law expects her to stand with folded arms and look on as they rob her of all her life's possessions. It also means that the plunderers have the right to steal which is stronger than her right to protect her life's property. Why must justice yield to injustice?" (*Criminal Law* (2008) 110 footnote 55).

In both the hypothetical example of the jewellery store owner and the *Van Wyk supra* case, being the victim of robbery would have led to financial ruin. The value of property was not minimal, but had great significance.

In determining whether killing in defence of property is justified, the emphasis that is placed one each factor taken into consideration by the court is subject to change, depending on the circumstances. It is not a one-size-fits-all solution (Bertelsman "Grensgebiede van noodweer" (1967) *Tydskrif vir die Hedendaagse Romeinse Hollandse Reg* 118). When viewing the factors suggested by Bertelsman, it becomes clear how *Van Wyk* was justified in killing in defence of property. First, it is necessary to consider the interests which were threatened by the unlawful conduct (Bertelsman *supra* 117). Van Wyk, the right to life was not directly implicated, when viewing it in terms of the fact that dignity informs one's quality of life, it becomes clear that given that the shopkeeper was facing financial ruin, the threat to his dignity was of paramount importance. Second, the interests which were warded off in self-defence must be considered (Bertelsman supra) This means the intruder's right to life. Perhaps it could be suggested that the intruder, by continuing in his course of action in committing break-ins forfeited his right to life (Snyman *SACJ* 191). The problem with the attacker forfeiting his rights is that the forfeiture theory requires a measure of proportionality, whereas the autonomy theory does not. Given that South prescribes to the autonomy theory (albeit narrowly circumscribed), a measure of proportionality is required. Third, the seriousness of the impact of the unlawful conduct must be considered (Bertelsman *supra* 118).Clearly, the upholding of justice theory acts in place of the state or police, because it is impossible for them to protect everybody at all times (Snyman *SACJ* 178). When viewing these factors in totality (aggregation of interests), it become clear that *Van Wyk* was justified in acting as he did.

In respect of home break-ins a presumption of serious harm is not only stronger when the intruder is committing a serious crime or has made a violent entry (Greens supra 25-26) but it can be viewed as analogous to the "bright line rules" that have developed in the body of constitutional law governing police searches and seizures. An example of this would be the amendment to section 49 (by means of section 7 of the Judicial Matters Second Amendment Act 122 of 1998) which has been passed by parliament. Section 2 states that "The arrestor is justified in terms of this section in suing deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he believes on reasonable grounds – that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm, that there is substantial risk that the suspect will cause imminent or future grievous bodily harm (or if the arrest is delayed); or that the offence for which the arrest is ought is in progress and is of forcible and serious

nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm." The "future danger" principle is expressly used in the new section 49. Furthermore, in circumstances resembling private defence, it holds that an arrestor is justified in using deadly force intended or likely to cause death or grievous bodily harm to a suspect, only if there is belief on reasonable grounds, inter alia that "there is a substantial risk that the suspect twill cause imminent or future death or grievous bodily harm if the arrest is delayed (Bruce "Killing and the Constitution – arrest and the use of lethal force" (2003) *South African Journal on Human Rights* 436). While it has been suggested that using lethal force to effect an arrest implies that it is the nature of the offence which the suspect has committed which provides the motivation for the use of lethal force, this judgment indicates that this is not the case (Bruce supra 446). It is not a question of the seriousness of the offence only which justifies the use of lethal force. The case of *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) demonstrates this point by stating that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to theirs, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given (at 17). This is essentially not a test of offence seriousness, but rather a test of the threat which the individual poses of "serious physical harm to others" (Bruce *supra* 446). As Bruce notes: "[w]hat the test in effect is that an individual who has (is reasonably believed to have) committed a crime involving the infliction or threatened infliction of serious physical harm, has thereby defined himself as posing a danger of such harm to other people. The test put forward is therefore a test of future danger, and the motivation for the use of lethal force, is that of preventing future harm" (Bruce *supra* 447).

Conclusion

Since South Africa criminal law views private defence as a justification, it is submitted that the autonomy theory, narrowly circumscribed ought to be followed. Such a theory necessarily entails that a degree of proportionality be present. In respect of killing in defence of property, the question whether it is ever reasonable and subsequently proportional to taken another human life in order to property, various constructs have been suggested. When these constructs are aggregated, depending on the facts of the case, it is submitted they adequately support killing in defence of property. More specifically, given the high crime rate, and violence that accompanies burglaries, it is reasonable to presume existence of such a threat wherever there is an intrusion. Therefore lethal force to kill in defence of property should be permitted in circumstances where the life and property are closely linked.

In cases such as *Van Wyk* where there is no direct threat to the life of the owner, it is suggest d that the “right to life” be viewed as more than simple human existence – it also necessarily entails quality of life.

Samantha Krause
Post Doctoral Research Fellow, UKZN

Matters of Interest to Magistrates

Hi Gerhard

Just a little ‘technical’ correction to your front page article:

The Amendment Act’s correct title is the “Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2012”.

Again poor drafting by the Legislature as the first “Amendment Act” should have an apostrophe ‘s’ after it.

Another issue I have with the newly inserted provision in section 56A, which reads:

“*56A Sentencing*

(1) A court shall, if-

(a) that or another court has convicted a person of an offence in terms of this Act; and

(b) a penalty is not prescribed in respect of that offence in terms of this Act or by any other Act,

impose a sentence, as provided for in section 276 of the Criminal Procedure Act, 1977 (Act 51 of 1977), which that court considers appropriate and which is within that court's penal jurisdiction.”

is that it raises the following question: does the Child Justice Act, 2008 (Act 75 of 2008) “prescribe” a sentence?

I ask this for the following reason, the new provision provides for a court to impose a sentence “provided for in section 276”of the Criminal Procedure Act of 1977, yet

certain child offenders can include someone under the age of 18 years but, in certain circumstances, could mean a person who is 18 years or older but under the age of 21 years, are to be punished in terms of the CJA.

I don't read the Child Justice Act as 'prescribing' a sentence because all it does is list a number of sentence options in Part 2 of Chapter 10 (from section 72 to 77, as well as allowing the application of section 297 of the CPA via section 78).

A court thus dealing with a child via the extended definition of such and faced with, let's say, a 20 year old is precluded from sentencing such person (child) other than by way of the CJA, see section 68 of the CJA, ("*A child justice court must, after convicting a child, impose a sentence in accordance with this Chapter*."[Chapter 10]), yet according to the Amendment Act's Amendment Act's amendment it SHALL impose a sentence as provided for in section 276 of the CPA!

Is another Amendment Act going to add to the Amendment Act's Amendment Act?

Regards

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A Last Thought

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Creating well-rounded law graduates

Kim Hawkey

As debates continue about the fate of the four-year LLB degree, it is opportune to consider whether law graduates are being adequately prepared for both practising law and being a professional in the legal profession.

There is no doubt that concerns about rudimentary skills such as reading, writing and numeracy must be addressed (at school level, rather than placing this additional burden on tertiary institutions), as must issues regarding the uniformity of the LLB curricula at the various tertiary institutions. However, addressing these two aspects alone will not ensure that we generate the calibre of law graduates we wish to create.

The number of court applications to have legal practitioners suspended or struck from the roll for unprofessional conduct is cause for concern that, too, must be addressed.

It is not sufficient to assume that law graduates exit university as inherently fit and proper professionals – the numbers being removed from the profession for conduct unbefitting of a legal professional indicate that graduates are ill-prepared for the realities of practising law.

Bad apples aside, there are many in the profession who simply do not have adequate bookkeeping or other practice management skills, while others get stuck in grey ethical areas, with no basis on which to form an appropriate response to the situation with which they are confronted.

One wrong decision in the legal environment can have severe consequences for all role players involved – the client, who may lose a viable case or funds; the practitioner, who may be suspended or struck from the roll in a profession where there are rarely second chances; as well as the legal profession, which stands to have its reputation degraded. Society too suffers as a result of justice being impeded.

Interventions should therefore be made at the very outset of practitioners' careers – at the tertiary institution level – to inculcate practising law in an ethical manner.

This challenge is not unique to South Africa and mirrors the content of debates that are happening internationally with regard to legal education.

For example, a report by the Carnegie Foundation for the Advancement of Teaching titled 'Educating lawyers: Preparation for the profession of law' lists 'inadequate concern with professional responsibility' as one of two major limitations of current legal education, the other being a lack of attention to direct training in professional practice (WM Sullivan, A Colby, J Welch Wegner, L Bond & LS Shulman 'Educating lawyers: Preparation for the profession of law: Summary' www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf, accessed 10-7-2012).

'Law schools fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills. Students need opportunities to learn about, reflect on, and practise the responsibilities of legal professionals. Despite progress in making legal ethics a part of the curriculum, law schools rarely pay consistent attention to the social and cultural contexts of legal institutions and the varied forms of legal practice. To engage the moral imagination of students as they move toward professional practice, seminaries and medical, business, and

engineering schools employ well-elaborated case studies of professional work. Law schools, which pioneered the use of case teaching, only occasionally do so,' the authors of the report state.

While it is true that the universities cannot be held responsible for instilling a moral compass in each student, they can assist in developing and improving certain qualities by providing more practical tuition in the form of 'real life' case studies, as well as ensuring that students fully understand the ethical and professional parameters in which they will be expected to work as legal practitioners, including those provided for in legislation and professional rules.

By the end of their tertiary education, students should have a proper understanding of what it means to be fit and proper and to ensure that they meet this standard in all that they do.

As the authors of the Carnegie Foundation study state:

> 'Legal education needs to … combine the elements of legal professionalism – conceptual knowledge, skill and moral discernment – into the capacity for judgment guided by a sense of professional responsibility.'

A well-rounded law graduate, after all, needs much more than the knowledge of legal theory to succeed in the legal profession.

(This is the editorial in the August issue of *De Rebus*.)