e-MANTSHI

A KZNJETCOM Newsletter

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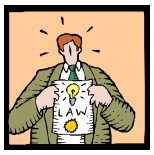
Welcome to the sixty eighth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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**.** In Government Gazette no 34535 of 19 August 2011 the President has transferred the following functions under section 97 of the Constitution to the Minister of Police.

(a) the administration; and the powers that may be performed by the Minister of Justice under sections 16, 17 and 18,of the Stock Theft Act, 1959 (Act No. 57 of 1959); and

(b) the administration of the Game Theft Act, 1991 (Act No. 105 of 1991), but excluding the power of the Minister of Justice to determine amounts as provided for in section *7(b)* of the Act.

2 The State Liability Amendment Act, 2011 Act 14 of 2011 was promulgated on 22 August 2011 in Government Gazette no 34545.The purpose of the Act is to amend the State Liability Act, 1957, so as to regulate the manner in which a final court order sounding in money against the State must be satisfied; and to provide for matters connected therewith.

3. The Minister of Justice and Constitutional Development has invited interested parties to submit comments on draft determinations in terms of sections 9(1)(a),56(1),57(1)(a) and (5)(b),57A(1), 112(1)(a) and (b), section 300(1)(a) and

302(1)(a)(ii) of the Criminal Procedure Act,1977 (Act No. 51 of 1977) and in terms of section 92(1)(b) of the Magistrates Courts Act, 1944 (Act 32 of 1944).The notice to this effect was published in Government Gazette no 34584 dated 2 September 2011.The proposed amounts are:

	Column 1 **Relevant section of the Act**	**Column 2** **Amount determined**
(a)	Section 9(1)(a)	R2 500
(b)	Section 56(1)	R5 000
(c)	Section 57(1)(a) and (5)(b)	R10 000
(d)	Section 57A(1)	R10 000
(e)	Section 112(1)(a) and (b)	R5 000
(f)	Section 300(1)(a)	R750 000 in respect of a regional court, and R150 000 in respect of a magistrate's court
(g)	Section 302(1)(a)(ii)	R5 000 in the case of a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, and R10 000 in the case of a judicial officer who has held the substantive rank of magistrate or higher for a period of seven year or longer

The proposed amount in terms of Section 92(1)(b) of Act 32 of 1944 is R100,000 where the court is not the court of a regional division, and R500,000 where the court is the court of a regional division. Comments in respect of the proposed amendments can be directed on or before 15 October 2011 to srobbertse@justice.gov.za .

4. Following the decision of the Constitutional Court in the matter of *S v Thunzi and S v Mlonzi (Case CCT/81/09)*, the Minister of Police intends to introduce a draft Dangerous Weapons Bill, 2011, to Parliament, in order to repeal and substitute the Dangerous Weapons Acts in operation in the areas of the erstwhile Republics of South Africa, Transkei, Bophuthatswana, Venda and Ciskei, and to provide for matters connected therewith. The draft Bill was published in Government Gazette no 34579 dated 2 September 2011. Interested persons are invited to submit written comments on the draft Bill within 30 days from the date of publication of the notice to: jacobspc@saps.org.za

Recent Court Cases

1. Swart v Minister of Correctional Services 2011(2) SACR 217 (ECP)

For a prisoner to have his imprisonment of more than five years converted to correctional supervision he must show that his release date is not more than five years into the future.

"[29] On a proper interpretation of the provisions of the Correctional Services Act 111 of 1998, relating to the conversion of a term of imprisonment in terms of s 276A(3)(a)(ii) of the Criminal Procedure Act, I conclude that, where a person had been sentenced by a court to imprisonment exceeding five years, as in the case of the applicant, his/her date of release, in terms of s 73(7)(c)(ii) read with s 73(1)(a), s 73(3) and s 73(4) of the new Correctional Services Act 111 of 1998 and the regulations thereunder, is to be regarded as the date upon which his/her sentence expires. In other words, for him/her to qualify for consideration, the date of the expiry of sentence should not be more than five years into the future at the time of application. The applicant therefore had not served the required time, which would be five (5) years before his date of release, being 7 February 2021, in order for his sentence of imprisonment to be considered for conversion into correctional supervision."

2. S v Gcoba 2011(2) SACR 231 (KZP)

Section 17(e) of the Drugs and Drug Trafficking Act 140 of 1992 makes the imposition of imprisonment mandatory and does not allow an alternative fine to be imposed.

The accused pleaded guilty to a charge of dealing in 13,35 kg of dagga and, in terms of s 17(e) of the Drugs and Drug Trafficking Act 140 of 1992, was sentenced to five years' imprisonment, with an additional fine of R4000 or 12 months' imprisonment. The senior magistrate of the district took the view that the sentence was not a competent one, and referred it to the High Court on review.

Held, that the wording of s 17*(e)* was somewhat ambiguous, and had led to conflicting interpretations in various decided cases. The penalty clause for dealing in dagga made the imposition of a term of imprisonment mandatory. There was also provision for a fine, but it could be imposed only in addition to the sentence of imprisonment, not in substitution thereof. Cases in which a fine had been imposed

as an alternative to imprisonment were clearly wrong. *In* casu, the magistrate had acted within the ambit of s 17(e), and no criticism could be levelled against the propriety of the sentence. (Paragraphs [4] – [15] at 233e – 235d.)

Held, further, however, that the coupling of the two punishments had led to a disturbingly severe sentence. Although the accused had been dealing in large quantities of the drug, and had one previous conviction for a similar offence, there were a number of mitigating factors. She had pleaded guilty — a sign of remorse. She had been selling dagga in order to support her children, exchanging it for food and could hardly be described as a 'drug baroness' requiring severe punishment. There had also been no inquiry into her ability to pay a fine after the expiration of the five-year prison sentence. It was clear that she would not be able to pay it, as she had already been living from hand to mouth. She would thus have had to serve the further 12 months' imprisonment upon the expiry of the five-year term. In order to mitigate the cumulative effect of the sentence, the imprisonment ought to have been fully suspended, and a fine added to it, with the alternative of further imprisonment only in default of the payment of the fine. (Paragraphs [16] – [20] at 235e – 236d and [23] at 236i – j.)

Sentence reviewed and set aside. Accused sentenced to five years' imprisonment, wholly and conditionally suspended, and ordered to pay a fine of R4000 or to undergo 12 months' imprisonment.

3. S v Mzwempi 2011(2) SACR 237 (ECM)

In the case of the doctrine of common purpose a distinction is to be drawn between liability based on prior agreement and liability based on active association.

The state of the law in respect of criminal liability under the common purpose doctrine seems to have become settled by the rule and approach adopted in S v Safatsa and Others 1988 (1) SA 868 (A); and S v Mgedezi and Others 1989 (1) SA 687 (A) — affirmed in S v Thebus and Another 2003 (2) SACR 319 (CC) (2003 (6) SA 505; 2003 (10) BCLR 1100). The salient features of the rule may perhaps be summarised as follows: First, a distinction needs to be drawn between liability based on a prior agreement, and liability based on active association. On either basis, the conduct imputed to the accused is the conduct of the participants in the execution of their joint venture. Second, in the absence of a prior agreement, only the active association of the accused in the particular events which contributed to, or caused, the crime, triggers the principle of imputation in the manner described above. In this sense, liability arising from active association is much more restrictive. Such association will depend on the factual context of each case, and must be decided with regard to the individual actions of each accused. In the assessment of the individual actions of each accused, the first four requirements for active association, as set out in S v Mgedezi at 705I – 706B, must be satisfied. Third, the other definitional elements of the crime, such as unlawfulness and culpa, must be present.

The jurisprudential objections to liability under the common purpose doctrine was, to a great extent, met by the approach and rule in Safatsa/Mgedezi, in that the definitional element of causation was replaced with active association with the conduct which caused the death or other crime. The causal element thus remained between the conduct and the death. The actus reus constitutes either the conclusion of the prior agreement, or the active association. Either of these events triggers the imputation principle. In this sense, the invasion of common-purpose liability into the common-law requirement of causation is limited and serves the need for criminal expediency. (Paragraphs [75] – [79] at 253e – j.)

Following the judgments in *S v Thebus and Another* 2002 (2) SACR 566 (SCA); and *S v Thebus and Another* 2003 (2) SACR 319 (CC) (2003 (6) SA 505; 2003 (10) BCLR 1100), a court, in dealing with criminal liability under the common purpose doctrine, must follow the rule in *Safatsa/Mgedezi* in preference to the extension of that rule in *S v Nzo and Another* 1990 (3) SA 1 (A). In the light of the judgments in *Thebus* (SCA) and *Thebus* (CC), the judgment in *Nzo* is no longer binding on a court. The development of the common purpose doctrine in South African criminal law since the judgment in *Nzo*, and particularly the constitutional development as formulated by *Thebus* (CC), has overtaken the judgment in *Nzo.* Notwithstanding, it bears repetition that the Supreme Court of Appeal or Constitutional Court will undoubtedly have the last say on the subject. (Paragraphs [117] and [118] at 260*h*–*j*.)

4. S v Masondo: In Re S v Mthembu and Others 2011(2) SACR 286 (GSJ)

In an application for the discharge of an accused at the close of the state's case the court is to act judicially, with sound judgment and in the interests of justice.

The applicant and his co-accused stood arraigned on a number of charges, including the charges in respect of which the applicant applied for his discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 — the unlawful possession of an unlicensed firearm and ammunition. The applicant contended that the evidence led by the State witnesses failed to link him to these charges, and, if it did, then it was of such poor quality that it would be an injustice to have expected him to remain standing trial thereon. In the latter regard, the applicant challenged the credibility of the State witnesses and the probabilities of their version, contending that these were factors to be considered by the court in deciding his discharge application.

Held, that there was a difference of opinion in several judgments on whether the credibility of witnesses should be playing a part at the stage of s 174 proceedings. The section placed a competency, not an obligation, on the court to discharge an accused. The court was called upon to act judicially, with sound judgment and in the interests of justice. Not too much stress or emphasis was to be placed on the say-so or decisions of other judges in previous cases per se — the facts and circumstances of each case dictated what route to follow. There was no need to lay down rigid or fixed rules in advance for an infinite variety of factual situations which

may or may not arise. It was thus also unwise to attempt to banish issues of credibility in the assessment of issues during s 174 proceedings or confine judicial discretion to 'musts' or 'must nots'. (Paragraphs [31], [33], [37] and [39] at 291*h*, 291*i*, 292*e* and 292*j*–293*a*.)

Held, further, that the gist of the matter was that, as opposed to situations where there was no evidence led, evidence was led against the applicant — forensic evidence, which, when juxtaposed with the already accepted evidence of the pointing-out, possibly amounted to a prima facie case against him and which called for a reply. The evidence, further, was such that it had to be evaluated holistically, taking all probabilities and circumstances into account. Such a stage — where probabilities come into reckoning, and a finding had not yet been reached — belonged at the end of the trial. The accused had every right to close his case on these counts if he believed the evidence thereon was of such a poor quality that a reasonable court, acting carefully, could not have convicted thereon. In such circumstances, the totality of the evidence led — the entire State case and the entire defence case — would then be evaluated, and, thereafter, the probabilities and preponderances inherent therein, or emanating therefrom, would be applied. (Paragraphs [44], [47] and [49] at 293g–h, 294a and 294b–c.) Application for discharge dismissed.

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From The Legal Journals

Sloth-Nielsen, J & Gallinetti, J

"'Just say sorry?' *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008"

Potchefstroom Electronic Law Journal 2011 vol 14 no 4

Slabbert, M

"The requirement of being a 'fit and proper' person for the legal profession"

Potchefstroom Electronic Law Journal 2011 vol 14 no 4

Mwambene, L & Sloth-Nielsen,J

“Benign accommodation? *Ukuthwala,* 'forced marriage' and the South African Children's Act”

African Human Rights Law Journal 2011 1

Van Eeden, H;Hopkins, K & Adendorff, C

“Criminal liability of morally blameless corporations”

De Rebus September 2011

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

Contributions from the Law School

Battered women and the requirement of imminence in Self-defence

The imminence requirement lies at the heart of the justification of self-defence. The state is not always competent to provide immediate and necessary protection in respect of citizen’s rights. For this reason individual can resort to self-defence where the attack is imminent or about to take place (*Cicero Pro Milone* 4). Modern case law has sought to expound a coherent statement of the elements of self-defence over the years. This includes imminence as a core requirement (*S v Mogohlwane* 1982 (2) SA 587 (T). By requiring imminence there is an intrinsic limitation on the scope of self-defence (Rosen “The Excuse of Self-Defence: Correcting a Historical Accident on Behalf o f Battered Women who kill” (1986) *American University Law Review* 11 at 31). However, certain cases such as that of *S v Engelbrecht* 2005 (92) SACR 41 (W) which deals with the position of abused women acting in self-defence suggests that the traditional imminence requirement does not adequately cater for these women’s situations. For instance Mrs Engelbrecht killed her husband in a non-confrontational situation. She proceeded to kill her abusive husband while he was asleep. She did this by locking his thumbs in thumb cuffs behind his back and tied a plastic bag around his head, causing him to suffocate (*S v Engelbrecht supra* at par [10]-[11]). In terms of general principles of criminal law, this claim would be rejected on the ground that it is unreasonable to believe that such an attack was imminent.

Burchell notes that "the importance lies not in the imminence of the threat, but rather the immediacy of the response required to avoid the attack" (*Principles of Criminal Law* 8th ed (2010) at 234). Ossifications of specific rules of self-defence are based on what a reasonable response to deadly force might be. This is based on the paradigm of an encounter between two men of roughly equal physical size and ability. In such cases the abused woman is clearly disadvantaged. A woman's' reasonable response to physical violence is likely to be different. This is due to her size, strength and socialization (Hatcher "The Gendered Nature of the Battered Woman Syndrome: why gender neutrality does not mean gender equality" (2003) *University Annual Survey of American Law* 21 at 22). In light of this consideration it is not surprising that that imminence requirement has been the focus point of judicial criticism. It has led to judges and legal commentators blurring the edges of self-defence in order to defend the women's actions. For instance in *Engelbrecht* (*supra*) the court held that where the abuse can be termed a "pattern" or "cycle" of "abuse" then it would seem that the requirement of "imminence" should extend to encompass abuse which is inevitable (*S v Engelbrecht supra* at par [349]). This would dispense with the requirement that an attack is imminent and that the person could defend themselves at any time.

There have been calls for the abolition of the imminence requirement. In this respect Schulhofer notes that he distinctive feature of battering situations has rendered the imminence requirement redundant (The Gender Question in Criminal Law" (1990) *Society, Philosophy and Policy* 105 at 127). This is consistent with and demonstrated in the work of Dr. Lenore Walker. This author posited the theoretical construct of the cycle of violence theory which refers to three stage recurrent pattern. This includes "tension-building", "acute battering", and "loving contrition" that characterizes these relationships. The recurrent, yet unpredictable nature of the violence plays a key role. It explains why an abused woman may not leave an abusive relationship. In addition, martin Seligman's theory of learned helpless explains the woman's sense of "psychological paralysis". That is given the repetitive, yet unpredictable nature of the violence; the woman is eventually reduced to a state of perpetual fear. She perceives that there is little she can do to alter her situation (Walker *The Battered Woman* (1979) 65-70). The obvious problem with abolishing imminence is that something must stand in its stead to distinguish legitimate cases of self-defence from illegitimate ones (Veinsreideris "The Prospective effects of modifying existing law to accommodate pre-emptive self-defense by battered women" (2000) *University of Pennsylvania Law Review* 1 at 3).

Reformers have suggested that imminence is really a question of the battered woman's perspective on imminence. Because of her experience, she is more sensitized to the cues signalling violence. Such an approach proved appealing since it "unified criminal laws theory on emphasizing the characteristics of the accused with the needs of women" (Nourse "Self-Defense and Subjectivity" (2001) *University of Chicago Law Review* 1235 at 1266). This move has led to what is known as the establishment of the "reasonable woman standard." In *Engelbrecht* (*supra*) Satchwell J noted that the "reasonable woman must not be forgotten in the analysis. She therefore deserves to be as much part of the objective standard of a reasonable person as does the reasonable man" (at par [358]). On this basis it was held that

there was compelling justification for focusing not only on the specific form which the abuse may have over time and the particular circumstances. It focuses also on the impact of the abuse upon her psyche, make-up and entire world view (*S v Engelbrecht supra* at par [343]).

By taking the abused woman's situation into account, the traditional requirements for self-defence are relaxed. Further, in determining the lawfulness of the self-defensive act, the "attack" element has become more broadly defined. That is, one individual incident of abuse, a series of violations or an ongoing cycle of maltreatment (*S v Engelbrecht supra* at par [344]). Further, the court in *Engelbrecht* (*supra*) held that requiring a systematically abused woman to wait until the commencement of an attack to defend herself is "tantamount to sentencing her to murder by instalment" (at par [348]). For this reason Satchwell J decided to reinterpret the common law to address this shortcoming. She stated that "where the abuse is frequent and regular such that it can be termed a "pattern" or "cycle" of abuse then imminence should be extended. It should be extended to include that which is inevitable (*S v Engelbrecht supra* at par [349]). To determine whether the action was necessary, it must be established to what extent normal legal channels were ineffective (*S v Engelbrecht supra* at par [352]). Further, her particular circumstances should be taken into consideration (*S v Engelbrecht supra* at par [357]). The end result of this is that in evaluating whether her actions were reasonable, the analysis is partly objective and partly subjective (*S v Engelbrecht supra* at par [358]).

The problem is that if imminence is viewed from a battered woman's perspective her response to danger will always be reasonable and therefore imminent. This leads to subjectivizing the test for self-defence. The terms "psyche" and "entire world view of an abused woman" tend to relate to the issue of culpability. Any issue relating to culpability is dealt with in terms of putative self defence. Putative self-defence is subjectively assessed. From her perspective "she would have honestly believed [her] life was in danger but objectively viewed, [it was] not" (*S v De Oliviera* 1993 (2) SACR 59 (A) 163I-J). If this is what Satchwell J had in mind it was not expressly. No mention is made of this point anywhere in the judgment. While there is difficulty in establishing which subjective factors should be taken into consideration, judges and defence counsel must operate within the parameters set by the law: objective elements in criminal liability are objectively assessed in terms of *actus reus* and subjective (mental elements) of the crime are dealt with in terms of *mens rea* (Snyman "The Normative Concept of Mens Rea- A New Development in Germany" (1979) *International and Comparative Law Quarterly* 211 at 212).

The distinction remains important since altering self-defence to accommodate an actor's personal psychology undermines the notion of self-defence as a justification. Justification defences operate when the accused's act is the morally preferred option. Because justified acts are viewed as objectively preferable, the psychological, subjective peculiarities are irrelevant in the application of a justification defence. Assuming that Satchwell J is correct in incorporating the actor's altered perceptions (i.e. abused woman's psyche, make-up and whole world view) into the objective test it would prove unworkable. First, in cases of non-confrontational killings even where there is expert testimony explaining how the

battered woman's syndrome affects individual perception, the judge has no meaningful way to determine whether that abused woman's belief in imminence of danger is reasonable. This is the case, even if viewed from her distorted perspective (Goldman "Non-confrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse" (1994) *Case Western Reserve law Review* 185 200-201). In light of the three distinct phases of the domestic violence cycle, the cycle theory seems to require knowledge of where the abused woman's allegedly defensive use of force fell within the cycle and how long each distinct phase typically lasted before one can determine the reasonableness of the perception of imminent harm. Therefore, if an abuser becomes contrite immediately before he fell asleep intoxicated, it would follow from the cycle that there was no imminent threat of harm. Therefore no reasonable belief otherwise, until the contrition phase was compete and the tension-building phase was well under way (Burke "Rational Actors, Self-Defense and Duress: making sense not syndromes out of the Battered Woman" (2002) *North Carolina Law Review* 211 at 241). Even if battered woman syndrome theory was helpful in supporting an abused woman's account of her subjective perceptions, the theory does little to support a claim that such perceptions were objectively reasonable. Where she subjectively but unreasonably believes that her use of force is justified at best she has a claim of putative self-defence. This merely mitigates punishment, not exculpate her (Burke *supra* at 142). Second, even if the court were to disregard the source of perceptions an s subjective psychological phenomenon, the actual effect of the syndrome on an actor's perceptions must be considered. While it is true that a battered woman who is afraid and isolated may respond more quickly an intensely to the threat and therefore may overestimate the danger. It becomes clear that her initial extreme responses to abuse may become over-generalized. These responses may occur in situations where there is no objective danger (Goldman *supra* at 201).What emerges is an extremely hyper vigilant woman. Given that society does not allow a claim of self-defence in cases where the actor is "extremely nervous or cowardly, it should not allow an abused woman to do so because she is hyper vigilant" (Goldman *supra*)

Should imminence be a requirement in South African Law?

The traditional element of imminence should remain in force. If the abused woman is being attacked and the threat is imminent (in the traditional sense), she should be able to rely on self-defence. It should be noted that the court should consider the fact that the abused woman placed herself in this dangerous situation (in terms of *actio libera in causa*). No reference need be made to the "battered woman syndrome" in attempting to explain the circumstances that may have impacted upon the woman's conduct, since South African courts already do this to a limited extent as a matter of course.

The case of *S v Steyn* (2010 (1) SACR 411 (SCA) is one such case in which the South African courts have demonstrated their ability to take the abused woman's situation into account. In this case the accused shot and killed her former husband when he threatened her with a knife (at par [1]). The deceased had abused the accused both mentally and physically over the years. For instance he would often

tell her he would slit her throat with a smile on her face and regularly locked her in the bedroom for extended periods of time. She often kept food in her bedroom to sustain her during these periods. On the night of the shooting the accused told the deceased that she had contacted her medical aid to ascertain if they would pay for the treatment of her anxiety disorder. This statement sent the deceased into a rage and he threatened and chocked her. As a result she fled to the bedroom. However, since she was not in good health and required food before taking medication, she ignored the deceased's instructions to remain the in the bedroom, When the decades say her his reaction was immediate and violent. He jumped up and proceeded towards her with a steak knife he had been using to eat his meal with. She perceived this threat as deadly serious and fearing for her life she raised her revolver and fired a single shot (*Steyn supra* at par [10]).

In determining whether the attack was imminent the court a quo held that when the accused left her bedroom to fetch food, a reasonable person in her position would have foreseen the possibility that the deceased (given his mood) might attempt to attack her. Therefore a reasonable person would not have proceeded to place herself in the position of danger where she might be forced to use a weapon to defend herself. The court found that she had acted unreasonably and therefore negligently (*S v Steyn* supra at par [17]). The Court of Appeal found that the court a quo had misdirected itself. The reason was confusing the question of unlawfulness with the test of negligence (*Steyn supra* at par [18]). At any rate the test for negligence only arises once the accused conduct has been established as being unlawful (*S v Steyn supra*).

The Court of Appeal then dealt with the issue of lawfulness of the accused's conduct. The court noted that the accused's conduct was to be measured against that of the reasonable person. This would operate in the sense that reasonable conduct is usually acceptable in the eyes of society and therefore considered lawful (*S v Steyn supra*). Modern legal systems don't insist on strict proportionality between the attack and the defence. The question is whether taking all factors into account the accused acted reasonably in the manner in which she defended herself (*S v Steyn supra* at par [19]). The factors relevant in this regard include (1) relationship between the parties (2) their ages, genders and physical strengths (3) location of the incident (4) the nature, severity and persistence of the attack (5) nature of any weapon used in the attack (6) nature and severity of any injury or harm likely to be sustained in the attack (7) means available to avert the attack (8) nature of the means used to offer defence (9) nature and extent of the harm likely to be caused by the defence (*S v Steyn supra*).

When considering whether these factors are sufficient in taking the abused woman's situation into account, it becomes clear that they are adequate. For instance, regarding the location of the incident, it could not have been expected of the accused to gamble with her life by turning her back on the deceased. This is so because he was extremely close to her and about to attack her with a knife (in the hope that he would not stab her in the back). She would have had to turn around in order to return to her bedroom. By this time the deceased would have been upon her and flight would have been futile (*S v Steyn supra* at par [21]). Regarding the history

of the relationship, the accused was never able to resist the deceased or his unlawful assaults during the years of the abuse she suffered at his hands. This demonstrates that her training in conflict management had been of no use to her in her daily life. She was clearly dominated by him (*S v Steyn supra* at par [23]). Given her frightened emotional state due to the assault, she was entitled to leave her bedroom, in her own home to get food. There was nothing unlawful in her action in doing so. It could not have been expected of her to telephone for assistance every time she needed to do something in her home (*S v Steyn supra*). What these factors demonstrate is that the court already takes the abused woman's situation into account to a limited extent as a matter of course. No single profile of a battered woman exists. For this reason it would be inadvisable to expect the court to assess whether the killing was a reasonable response for a battered woman (Reddi "Battered woman syndrome: some reflections on the utility of this 'syndrome' to South African women who kill their abusers" (2005) *South African Journal of Criminal Justice* 175). However, the court would have to also consider the difficulty that the abused woman faced in extricating herself from this position.

Conclusion

By utilizing an imminence requirement, the courts have been able to limit the intrinsic scope of self-defence. The traditional imminence requirement has proved problematic. This is so because it does not adequately account for an abused woman's situation. However, no reference should be made to the "reasonable battered woman" standard. The reason is that the South African courts already take the abused woman's situation into account to a limited extent. This is done by taking a number of factors into account in determining whether the abused woman acted reasonably. Once case which has illustrated this point well is *S v Steyn supra*) By rethinking certain situational factors as a set of relatively innocuous normative propositions the abused woman's situation is consistent with standard propositions in the law of self-defence.

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Discussion regarding the wording of section 60(11) of the Criminal procedure Act, 1977 (Act 51 of 1977) as amended.

Some 5 years ago a question arose regarding the interpretation of section 60(11) of the Criminal procedure Act, 1977 (Act 51 of 1977) as amended, particularly as a result of the substitution of the then existing provision, by section 4(f) of the Criminal Procedure Second Amendment Act, 1997 (Act 85 of 1997), with effect from 1 August 1998, which is now still the current provision and which provides as follows:

"60 Bail application of accused in court
…
"(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to—
(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
(b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release."

The question that was raised at the time was whether a court was entitled to incarcerate an accused who appeared in court by way of summons (in terms of section 54) in respect of an offence listed in Schedule 5 or 6, given that the wording in the opening line of section 60(11), namely: "Notwithstanding any provision of this Act, …" and the continuation in sub-subsections (a) and (b) with the phrase: "shall order that the accused be detained in custody …", (my underlining) directed (according to certain persons) the court to order the accused remain in custody until he or she satisfied the court, by adducing evidence, and in the case of an offence included in Schedule 6 that exceptional circumstances existed, warranting that the interests of justice permitted his or her release.

It was strange that this new 'interpretation' arose about 8 years after the provision was put into operation, or should I say, I only heard of this 'interpretation' in 2006, (8 years after the wording appeared) although the subsection's predecessor, introduced in1995 by the Criminal Procedure Second Amendment Act, 1995 (Act 75 of 1995) with effect from 21 September 1995, contained similar wording.

When I became aware of what I regarded as a ridiculous 'interpretation, in 2006, I penned the following suggestion in a memo to the Department's Legislative Branch:

"PROPOSED AMENDMENT OF SECTION 60(11) OF THE CRIMINAL PROCEDURE ACT, 1977 (ACT 51 OF 1977) AS AMENDED.

This proposed amendment to section 60(11) of the Criminal Procedure Act, 1977 is submitted herewith for your urgent attention.
The amendment suggested is that the word, “Act”, as contained in section 60(11), be substituted by the word, “Chapter”.
I am of the opinion that this will in no way derogate from the application of the section but will in fact clarify its use as only being relevant when a decision on someone’s further incarceration or their release on bail is considered and primarily prevent its abuse.
Section 60(11) as contained in Chapter 9 “Bail” of the Criminal Procedure Act, 1977 reads as follows:

“[60](11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-
(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;
(b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.” (own underlining).

Recently I have discovered that certain magistrates are interpreting this provision in a manner that allows them to place a person summoned for court in respect of certain offences, in custody.
The justification, it is argued, is that because the section has reference to the Act and not merely to the Chapter (on bail) it gives them such power notwithstanding the fact that the State utilized the obviously more unobtrusive method of acquiring the accused’s attendance in court, namely by way of summons as opposed to arrest.
To quote an example in this regard:
An accused is arrested on a charge of murder (or rape), both being offences that fall within the ambit of section 60(11)(a) and (b), requiring that at the very least the accused is obliged to adduce evidence that satisfies the court that the interests of justice permit his or her release. At the accused’s first appearance or shortly thereafter he or she brings a bail application and is granted bail. The matter then has numerous postponements until a stage is reached where the court refuses to entertain any further applications for postponement for whatever reason and the State ‘provisionally’ withdraws the charge. Up to this point the accused has obediently complied with his or her bail conditions.
At some later stage the State eventually finalizes its previously unfinished business and the case is effectively ready for trial.
The State then decides on using the so-called less obtrusive means of acquiring the accused’s attendance in court and summonses him or her as authorized by section 54 of the Criminal Procedure Act, 1977. Upon such individual’s appearance in court the presiding officer now purports to act in terms of section 60(11), arguing that the section states, ‘Notwithstanding any provision of this Act’, thus inclusive of the

‘summons’ process, and orders the accused to remain in custody pending a bail application., which, unfortunately for the individual, does not necessarily happen on the same date as his or her first appearance.

Chapter 4 of the Criminal Procedure Act deals with: “METHODS OF SECURING ATTENDANCE OF ACCUSED IN COURT” and section 38 reads:

“38 Methods of securing attendance of accused in court
The methods of securing the attendance of accused in court for the purposes of his trial shall be arrest, summons, written notice and indictment in accordance with the relevant provisions of this Act.”

Section 54, which resorts under Chapter 6 of the Act and is one of the methods authorized by section 38, reads as follows:

“54 Summons as method of securing attendance of accused in magistrate's court
(1) Where the prosecution intends prosecuting an accused in respect of any offence and the accused is not in custody in respect of that offence and no warrant has been or is to be issued for the arrest of the accused for that offence, the prosecutor may secure the attendance of the accused for a summary trial in a lower court having jurisdiction … . ” (own underlining).

There are no restrictions placed on the nature or type of offences for which a summons as a means of securing an accused’s attendance can be utilized, other than with “written notice” as contained in section 56 of the Act which is ‘limited’ in the sense that a peace officer forms an opinion that a court upon conviction of the offence in respect of which the written notice is issued would not attract a fine in excess of a stipulated amount, currently R2500.

This ‘summary’ deprivation of liberty ordered by the court is, in my opinion, not only contrary the spirit of the Constitution, in particular, section 12(1)(a) thereof but could lead to claims against the State, or individual magistrates for that matter, for such actions.
The justification of the actions of these presiding officers is stated to fall under the interpretation of the provision (section 60(11)’s wording) together with the ‘rider’ in section 12 (1)(a) of the Constitution, “without just cause”, as they maintain they are acting in terms of the provisions of section 60(11), which gives them ‘just cause’!
Whilst I argue that such orders are not justifiable in the application of the Constitutional provisions or on an ordinary interpretation of statutes, it is, at present, an open debate as to the correctness thereof.
I submit then that the suggested amendment will clarify the situation as I find nothing in the memorandum submitted at the time of the amendment of section 60(11) to imply that the section was designed to ‘interfere’ with, what has always been, a legitimate method of securing an accused’s attendance without depriving him or her of their liberty.
Should a contrary view be expressed by the legislative drafting division or any other interested party I would appreciate entering into debate thereon.

B J KING
Justice College
2006-10-09

It is apparent from the lack of any subsequent amendment or even response to my memo that the Legislative Branch did not deem such necessary.
I now understand that certain presiding officers have taken to striking such matters from their court rolls for the same reason as was previously given, namely that they feel that to incarcerate the summonsed accused may give rise to civil claims, implying that the State cannot utilize one of the given legal methods to obtain an accused's presence in court.

My concern in this regard goes further than my remarks in the memo quoted above.
Other than to follow the ordinary 'Rules' of Interpretation of Statutes, whereby one ought to realize that Chapter 9 (the Chapter dealing with Bail) only applies to an accused who is in custody at his or her first appearance, no other interpretation, viewed from a Constitutional perspective, appears possible.
This is easily gleaned from a reading of various sections, namely section 50, as a start.
Section 50(1)(a) reads:

> "50 Procedure after arrest
> (1)(a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant."

Section 50(6) follows:

> "(6) (a) At his or her first appearance in court a person contemplated in subsection (1)(a) who—
> (i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60 —
> (aa) be informed by the court of the reason for his or her further detention; or
> (bb) be charged and be entitled to apply to be released on bail,
> … "

The whole of section 50 goes to show what follows subsequent an arrest.
An arrest, as indicated in the memo above, is but one of the methods of securing an accused's attendance in court. Summons is another and it is difficult to understand how the procedure that follows an arrest can be brought to bear on a summonsed individual.
I hear the detractors of this view saying, but see the words, "Notwithstanding any provision of this Act … " in section 60(11). These words cannot be viewed in isolation.

They must be dealt with, as all legislation must, namely, be interpreted for their meaning. When doing so, Section 39(2) of the Constitution of the Republic of South Africa, 1996 provides as follows:

> "When interpreting any legislation, and when developing the common law . . . every court . . . must promote the spirit, purport and objects of the Bill of Rights."

It appears clear that the Legislature made a technical drafting error in the composition of the introduction to section 60(11) and that is why it has always been a court's duty to ensure the correct meaning is attached thereto in the context of a provision. To do otherwise would be in conflict with all known legal principles.
It is then even more difficult, if not impossible, to fathom out how a presiding officer in criminal proceedings, acquires powers or grants him or herself the authority to do something that he or she is not actually granted authority for in terms of the Criminal Procedure Act and which then conflicts with section 12 of the Constitution which provides that:

> "Everyone has the right to freedom and security of the person, which includes the right –
>
> (a) not to be deprived of freedom arbitrarily or without just cause; … ."

The second aspect of concern is that I was given to understand that the accused's case (the one that he(she) appeared on summons for) was 'struck off the roll.
In Attorney-General, Transkei v Additional Magistrate, Umtata, and others 1988 (3) SA 229 (Tk) the court specifically pointed out that:

> "… all agreed that insofar as the magistrate ordered the matter to be 'struck off the roll' he had erred, since he had no power whatsoever to make such an order. This concession … is obviously well founded. Neither the Criminal Procedure Act 13of 1985 (Tk) nor the Magistrates' Courts Act 32 of 1944 confers any such power on the magistrate, and to that extent his decision cannot stand."

The same applies in South Africa, no provision, except section 342A(3)(c) (inserted in by the Criminal Procedure Amendment Act, 1996 (Act 86 of 1996) which, with effect from 1 September 1997, allows a court such an option following an enquiry into any undue delay in finalizing the proceedings. It is highly unlikely that this section would be utilized at a first appearance matter.
I realize that in criminal courts this incorrect practice is often adopted when presiding officers are faced with a matter that they are of the view should not be on the court roll. It is a 'spin-off' from the practice in civil courts where, due to whatever technicality present, the parties (unless one or neither is present) usually agree to it being so 'struck off the roll'. The difference however is quite apparent, a matter struck from a civil roll can be put back on the roll with the same case number, parties, etc whereas this does not occur in the criminal court where a matter to be re-enrolled (so to speak) receives a new case number, etc., primarily because the accused does not 'agree' to come back to court but his or her attendance is secured

by utilizing one of the methods mentioned in section 38 of the Criminal Procedure Act.

B J KING
Senior Magistrate
Justice College
August 2011

A Last Thought

"An ubuntu-based jurisprudence has been developed particularly by the Constitutional Court. Ubuntu is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies which contribute towards more mutually acceptable remedies for the parties in such cases. Ubuntu is a concept which:

1. is to be contrasted with vengeance;
2. dictates that a high value be placed on the life of a human being;
3. is inextricably linked to the values of and which places a high premium on dignity, compassion, humaneness and respect for humanity of another;
4. dictates a shift from confrontation to mediation and conciliation;
5. dictates good attitudes and shared concern;
6. favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant;
7. favours restorative rather than retributive justice;
8. operates in a direction favouring reconciliation rather than estrangement of disputants;
9. works towards sensitising a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards changing such conduct rather than merely punishing the disputant;
10. promotes mutual understanding rather than punishment;
11. favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful;
12. favours civility and civilised dialogue premised on mutual tolerance."

Per Lamont J in *Afriforum & another v Malema and others* [2011] JOL 27740 (EqJ)