# E-MANTSHI

A KZNJETCOM Newsletter

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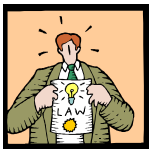
Welcome to the thirty fifth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.




## New Legislation

1. The Correctional Services Amendment Act, 2008 Act 25 of 2008 was published in Government Gazette No. 31593 dated 11 November 2008. The Act will only come into operation on a date to be fixed by the President by proclamation in the Gazette. One of the most interesting new sections that have been incorporated into the Act is section 73A which deals with an incarceration framework. The section reads as follows:

   *73A. (1) The National Council must, in consultation with the National Commissioner-*

   *(a) determine minimum periods for which sentenced offenders must be incarcerated before being considered for placement under community corrections; and*

   *(b) develop a framework (hereinafter referred to as 'the incarceration framework') in terms of which such minimum periods will be determined.*

   *(2) The incarceration framework-*

   *(a) must prescribe sufficient periods in custody to indicate the seriousness of the offences;*

   *(b) must apply to all sentenced offenders generally;*

   *(c) must provide for consistent application of its provisions;*

   *(d) may provide for different periods in relation to the same offence, depending on the measure of good behaviour or co-operation of a sentenced offender during incarceration; and*

   *(e) may provide for any ancillary or incidental administrative matter necessary for the proper implementation or administration of the incarceration framework.*

*(3) The incarceration framework may not be applied in a manner that would be in conflict with any other law or any direction given or decision made by a court of law.*
*(4) The incarceration framework must be ratified by the Minister.*
*(5) If the Minister ratifies the incarceration framework, he or she must submit it to the relevant Parliamentary Committees on Correctional Services for approval.*
*(6) After the Parliamentary Committees contemplated in subsection (5) have approved the incarceration framework, the Minister must make regulations enacting such framework into law.*

2. The Renaming of High Courts Act, Act 30 of 2008 has been published in Government Gazette No. 31636 dated 24 November 2008. The Act makes provision for the renaming of the High Courts of the Republic as follows:

| **Seat of High Court** | **Name of High Court** |
|---|---|
| Bhisho | Eastern Cape High Court, Bhisho |
| Bloemfontein | Free State High Court, Bloemfontein |
| Cape Town | Western Cape High Court, Cape Town |
| Durban | KwaZulu-Natal High Court, Durban |
| Grahamstown | Eastern Cape High Court, Grahamstown |
| Johannesburg | South Gauteng High Court, Johannesburg |
| Kimberley | Northern Cape High Court, Kimberley |
| Mafikeng | North West High Court, Mafikeng |
| Mthatha | Eastern Cape High Court, Mthatha |
| Pietermaritzburg | KwaZulu-Natal High Court, Pietermaritzburg |
| Port Elizabeth | Eastern Cape High Court, Port Elizabeth |
| Pretoria | North Gauteng High Court, Pretoria |
| Thohoyandou | Limpopo High Court, Thohoyandou |

The Act will come into operation on a date fixed by the President by proclamation in the Gazette.

## Recent Court Cases

**1. S. v. MAVELA 2008 (2) SACR 608 CKHC**

**If an accused person breaks a window but does not insert his hand or any part of his body into the premises he cannot be convicted of housebreaking with intent to steal.**

The accused was charged with, and convicted of, housebreaking with intent to steal, and sentenced to a fine of R2 000, alternatively, one year's imprisonment, suspended for five years.

In the s 112(1)(b) proceedings at the trial the accused stated, inter alia, that:

"I broke the window and [was] about to enter but I was seen by an old lady. I used my hand to break the window and I pushed it open. I was about to enter with my body when I was seen and she asked me what I wanted. I said I was looking for the owner of the house. She asked me why I had broken the window [and] I said I was hungry and looking for food."

On automatic review the court noted that the question of what constituted breaking into premises had been the subject of much judicial and academic discussion. The magistrate's contention that all the elements required for 'entering' the premises had been admitted by the accused, could not be upheld. While it was apparent that the accused had been about to enter, it was by no means clear that he had already inserted a part of his body or his hand into the premises. This aspect ought to have been more fully explored by the magistrate, but in view of the lack of clarity, the accused's admissions established only attempted housebreaking with intent to steal. The sentence imposed was an appropriate one for an attempt to break into a house and there was consequently no reason to alter it. (Paragraphs [6] and [8]-[11] at 610a and 610e-i.)

Conviction of housebreaking with intent to steal set aside and substituted with a conviction of attempted housebreaking with intent to steal. Sentence confirmed.

## 2. S. v. VAN STADEN 2008(2) SACR 626 NCD

**The proper approach in a case where the unavailability of at least a reconstructed record made it impossible to finalise an application for condonation and/or for leave to appeal, would be to determine whether the accused was to blame for the situation and, if so, to what extent.**

The accused lodged an application for leave to appeal against a 15-year sentence for murder. It was discovered, however, that the record of the trial proceedings was missing, and could not be reconstructed. The magistrate submitted the case for special review.

*Held*, that the constitutional right of an accused to a fair trial included the right of appeal. A conviction or sentence would be set aside if a valid and enforceable right of appeal was frustrated by the fact that the trial record was lost or incomplete and could not be reconstructed. The State was burdened with the responsibility of keeping a proper record of trial proceedings, and an accused's right to a fair trial – including the right of appeal – should not be frustrated by the State's failure to do so. However, there was a protectable right of appeal only where the accused had

complied with the applicable rules and legislation, or was able to furnish a sufficient explanation for having failed to comply. It would lead to an untenable delay in the finality of criminal proceedings if accused persons were allowed to blatantly disregard legal procedures and still claim that their right of appeal had been frustrated by the loss of a record. Accordingly, the fact that an accused was to blame for the delay was a relevant consideration in deciding whether or not the unavailability of the record had led to a failure of justice. (Paragraphs [3] and [5.1]-[9] at 629h and 630c-632a.)

*Held*, further, that the accused had been convicted and sentenced in February 2002, but had lodged a notice of appeal only in June 2005. Eleven months later he had lodged an application for leave to appeal, followed by a further application in April 2007. The only reason advanced by the accused was 'gevangenis probleme' and 'gevangenis omstandighede'. He had been legally represented at trial and when he finally appeared before the magistrate to apply for condonation and for leave to appeal. The fact of the accused's completely inadequate explanation for the delay would in any event have militated against the granting of condonation. Furthermore, even if the record or a reconstruction had been available, it was extremely unlikely that the grounds of appeal advanced by the accused would have shown such strong prospects of success as to outweigh the inadequacy of the explanation for the delay. It would also not be in the interests of justice and of society if a convicted person, who had caused, or contributed to, the fact that not even a reconstruction of the record was available, should be entitled to have either conviction or sentence set aside. (Paragraphs [11]-[17] at 632g-634d.)

*Held*, further, regarding the possibility of the matter being rescinded, that if this route was followed the conviction would have to be set aside even though only the sentence had been appealed against, because without the part of the record dealing with the conviction it would be impossible to deal with the issue of sentence. It would also be necessary for the prosecutor to present evidence on the merits and, even though the State witnesses were still available, the lapse of such a long time since the trial would undoubtedly prejudice these witnesses. Had there been an acceptable explanation for the delay, and therefore for the resultant impossibility of reconstructing the record, however, the position may have been different. (Paragraphs [22]-[26] at 635j-636g.)

*Held*, further, that it would be legally unsound to adopt the approach that condonation should be refused on the grounds that the inadequacy of the accused's explanation must outweigh any possible prospects of success on appeal. The fact was that such prospects could not be considered, and could not therefore be regarded as insignificant or even be compared to any other factor. Had the record been available it could conceivably have shown that the accused had excellent prospects of success with both the application for leave to appeal and the appeal itself. The proper approach in a case where the unavailability of at least a reconstructed record made it impossible to finalise an application for condonation and/or for leave to appeal, would be to determine whether the accused was to blame for the situation and, if so, to what extent. Should it appear that the accused was substantially to blame, the proper order would be to strike the matter from the roll, on

the basis that it could not be properly entertained without the record and that the accused was to blame for the lack thereof. Only where it appeared that the accused was not to blame would the setting aside of a conviction or sentence possibly be justified. (Paragraphs [32]-[39] at 637i-639c.)

Application for condonation and for leave to appeal struck from the roll.

### 3. S. v. GOUWS 2008(2) SACR 640 TPD

**The mere acceptance of a plea by a prosecutor did not amount to a stopping of prosecution i.t.o. section 6(b) of Act 51 of 1977**

After the accused had pleaded not guilty to a charge of defeating the ends of justice, and following a number of postponements, the prosecutor closed the State's case without calling any witnesses; in the prosecutor's opinion, the accused had pleaded to the wrong charge. Thereupon, the magistrate found the accused not guilty and discharged him. The matter was subsequently referred to the High Court on special review, on the basis that the prosecutor's actions amounted to a stopping of the prosecution, and that, in terms of s 6(b) of the Criminal Procedure Act 51 of 1977, this could be done only with the consent of the Director of Public Prosecutions. Among the questions that fell to be determined was whether there was any duty upon the court to enquire, under such circumstances, whether the prosecutor was indeed stopping the prosecution and, if so, whether he or she had the necessary consent to do so. The court reviewed relevant authority in considerable detail before proceeding.

*Held*, that the mere acceptance of a plea could not amount to a stoppage of the prosecution in the manner contemplated in s 6(b) of the Act. A prosecutor who accepted a plea was doing no more than taking a day-to-day decision which all prosecutors were called upon to take in the course of their duties. Furthermore, there was no duty on a court to enquire whether or not a prosecutor who accepted an accused person's plea, or who decided not to call witnesses, or further witnesses, was thereby stopping the proceedings. All that a prosecutor was doing under such circumstances was to leave before the court whatever had been placed before it up to that stage. It was then up to the court to make a decision: if there was no evidence, or inadequate evidence, the accused would surely be acquitted. It there was some evidence, this would be weighed to determine whether the accused's guilt had been proven or not. It would cause an accused person great concern to hear a magistrate questioning whether or not it was appropriate for the State to call no further evidence; he or she might understandably believe that the court wanted him or her to be convicted. (Paragraph [22] at 650h-651c.)

*Held*, further, that where a prosecution was halted by the withdrawal of the charge before plea in terms of s 6(a), it was clearly provided that the accused person was not entitled to an acquittal, and could not plead *autrefois acquit* if charged again. The situation under s 6(b), which dealt with prosecutions halted after the accused's plea, was different; it would be against all fairness for an accused person in such circumstances to be denied what would ordinarily be available to him or her, namely,

a plea of *autrefois acquit*. A successful application by the State for the setting aside of an acquittal, based on the grounds that the prosecutor had failed to obtain the necessary approval before stopping the proceedings, would be tantamount to giving the State a second bite at the cherry. (Paragraphs [23] and [24] at 651e-I and 651j-652b.)

*Held*, further, that the prosecutor *in casu* had had to deal with the fact that there had been numerous postponements, and it was understandable that she had felt constrained to close her case without asking for a further postponement. In so doing she had merely been exercising a day-to-day discretion. Accordingly, she had not acted inappropriately, and had not purported to act in terms of s 6(b). (Paragraphs [25] and [26] at 652d-h and 652j.)

Judgment of court a quo confirmed.

### 4. S. v. MAFU 2008 (2) SACR 653 WLD

**Effective legal representation does not simply mean that there is somebody speaking on behalf of an accused.**

The idea of being represented by a legal adviser cannot simply mean to have somebody stand next to one to speak on one's behalf. Effective legal representation entails that the legal adviser acts in the client's best interests, saying everything that is needed to be said in the client's favour and calling such evidence as was justified by the circumstances in order to put the best case possible before the court in the client's defence. Implicit in the rights entrenched in s 35(3)(f) of the Constitution of the Republic of South Africa, 1996, is the concept that legal assistance to the accused person must be real, proper and designed to protect the interest of the accused. The legal representative has an obligation to conduct the case in the best interest of the client while still ensuring that the inherent duty towards justice is maintained. In order to be able to conduct a trial in such manner the legal representative has to acquaint him- or herself with the charges, the facts with which the accused is confronted and, more importantly, the version of the accused. The principles just set out accord with the concept of the right to effective legal representation in an open and democratic society. (Paragraph [24] at 666d-g.)

In the present case the court, in an appeal against the convictions and sentences imposed upon the appellants for robbery with aggravating circumstances, found that the legal representative acting on behalf of the appellants in the trial had been incompetent. In particular, the court found that the gravity of the legal representative's incompetency in failing to (i) make himself *au fait* with the defence of the appellants; (ii) put such defence in full to the State witnesses; and (iii) challenge and cross-examine the State witnesses either effectively or at all, constituted a gross irregularity of such monumental proportions that it went 'to the very ethos of justice and notions of fairness'. The court found further that the incompetency of the legal representative caused a failure of justice to such extent that the appellants were not afforded a fair trial as entrenched in s 35(3) of the Constitution. (Paragraphs [25] and [30] at 666h-I and 668e.)

## From The Legal Journals

**Neethling, J**

"Die hoogste hof van appèl bevestig die onderskeid tussen en vereistes vir onregmatige arrestasie en kwaadwillige vervolging."

**TSAR –2008 (4) 809**

**Watney, M.**

"Admissibility of extra-curial admissions as hearsay evidence against a co-accused."

**TSAR – 2008 (4) 834**

**Van Heerden, C.M.**

"Perspective on jurisdiction in terms of the National Credit Act 34 of 2005"

**TSAR – 2008 (4) 840**

**Watney, M**

"The effect of pathological gambling disorder on sentence"

**SACJ 2008 285**

**Carnelly, M**

"The role of pathological gambling in the sentencing of a person convicted of armed robbery: A comparative discussion of the South African, Canadian and Australian jurisdictions"

**SACJ 2008 291**

**Kufa, M**

"Cybersurfing without boundaries – The relationship between evidence and computer crime"

**De Rebus December 2008**

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

## Contributions from the Law School

# ENFORCEMENT OF MAINTENANCE ARREARS

### Introduction

South Africans are generally not an affluent people and the disregarding of maintenance orders often results in hardship for the children. The manner in which the maintenance courts deal with defaulters in terms of the Maintenance Act 99 of 1998 is an important mechanism endorsing the rights of children and ensuring that maintenance obligations are met. Early action seems to set the tone – if a maintenance defaulter manages to continuously circumvent the court order made in the maintenance court, there would be no reason compelling him/her to make the maintenance duty a priority. Both the courts and the maintenance defaulters themselves should realise that maintenance obligations are different from other financial obligations, in that the money is generally for immediate personal needs and should be regarded as being life-sustaining, relied upon for survival. The maintenance obligation must always be regarded as a primary obligation.

The remedies created in the Act are regarded as *sui generis* and span both civil and criminal law. This focus of this note is not to repeat what is in the Act, but limited to a consideration of the position of maintenance defaulters vis-à-vis the payment of arrears as well as securing payment of future maintenance. A series of recent cases, motivated by the Constitutional Court judgment of *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 2 SA 363 (CC), highlight the importance of fair and effective measures to ensure that children receive the maintenance due to them, stressing that to ignore the rights of children in this regard would be unconstitutional.

The court in *Bannatyne* specifically found that the courts needed to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children (par 32). Other aspects regarding maintenance were also highlighted: (i) the practical logistical difficulties with the operation of the Maintenance Act within the maintenance courts that, in some instances, resulted in systemic failures to enforce maintenance orders (par 26-28); (ii) that these failures constituted an infringement of the constitutional rights of children and gender equality (par 26-28); and (iii) that there is a duty on the courts to ensure that the remedies available are effective, placing an obligation on the courts to 'forge new tools' and shape innovative remedies to effectively vindicate the infringement of the entrenched right (par 19 & 31). It is against this backdrop that this note should be read.

### Civil enforcement of maintenance orders

**Contempt of court orders**

In *Bannatyne* itself, the court confirmed that the High Court has a discretion to make a contempt of court order against a maintenance defaulter (on application not by the prosecutor but the maintenance creditor), where good and sufficient circumstances exist (par 23). In this matter, the proceedings in the relevant maintenance court were shown to have been totally ineffective and the court, in light of the constitutional rights of children, ruled that the judiciary was required to secure the life-sustaining legal entitlements for children (and disempowered women) (par 29-30).

**Securing future maintenance**

Recently, the issue of securing the *future* maintenance rights of children has been the focus of various courts. Four cases are deserving of mention: *Mngadi v Beacon Sweets & Chocolates Provident Fund* 2004 5 SA 388 (D); *Magewu v Zozo* [2004] 3 All SA 235 (C); *Soller v Maintenance Magistrate, Wynberg* 2006 2 SA 66 (C) and *Burger v Burger* 2006 JDR 0305 (D). Section 26 of the Maintenance Act specifically makes provision for maintenance orders to be enforced by execution against property, by the attachment of emoluments or by the attachment of debts. These courts however interpreted s 26 not to be a *numerus clausus* and extended the enforcement possibilities available to the courts, holding that the intention of the legislature was not to restrict the remedies contained in the Act (*Mngadi* supra 395H-J; *Magewu* supra par 15; *Soller* supra par 29 and *Burger* supra 6), especially since, the maintenance debtor in all these matters had a history of non-payment of maintenance (*Mngadi* supra 390B-D; *Magewu* supra par 3; *Soller* supra par 4 and *Burger* supra 2).

These courts, with reference to s 28 of the Constitution and *Bannatyne*, came to the conclusion that it would be in the best interests of the children to secure funds for their future maintenance as opposed to undermining their future rights (*Mngadi* supra 398G-H; *Magewu* supra par 18; *Soller* supra par 41 and *Burger* supra 10). The court in *Mngadi* made an order declaring that the minor children were entitled to share in the withdrawal benefit from a pension fund by means of monthly payments towards their maintenance. The fund was ordered to retain the maintenance debtor-member's withdrawal benefit so as to make equitable and proper provision for the support and maintenance of the children, for such a period as they are in need of such support and maintenance (398G-I). Similarly, the court in the *Magewu* matter made an order for the attachment of the maintenance debtor's pension fund to secure future maintenance for his child as he had a history of non-payment of maintenance, even though he was not in arrears at the time of the order (par 24 as read with par 4). These approaches found favour with the court in *Soller,* where the court also secured payment of future maintenance debts for a minor child from a parent's annuity, by interdicting the holder of the maintenance debtor's annuity from making payment to the debtor until the minor becomes self-supporting except with the leave of the other parent or the maintenance court. It is also worth noting that the court ordered that the payments be made on an annual rather than a monthly basis (par 42). In *Burger* the court ordered the retention of the parent's share, from the proceeds of the sale of immovable property, to secure future maintenance payments for his children (p 11 as read with p 1).

**Criminal enforcement**
In the realm of the criminal law the realistic sentencing options of maintenance defaulters remain problematic as a fine and imprisonment are generally regarded as counter-productive and not in the best interests of children. The dilemma of the court in the sentencing of maintenance defaulters is real: on the one hand the court does not want to kill the goose that lays the golden eggs by destroying or diminishing the earning capacity of the defaulter in sentencing him/her to a fine or imprisonment (*S v Magagula* (2001 (2) SACR 123 (T) at par 82 and *S v Morekhure* 2000 (2) SACR 730 (T) 732h) – especially where indigent offenders ought to apply every cent of their earnings to their own and their dependants' maintenance (*S v Koopman* 1998 (1) SACR 621 (C) 624d-e). On the other hand the usefulness of this argument only lasts as long as the offender does not default on his maintenance payments. It is submitted that a suspended sentence is not the only possibility available to the courts: periodical imprisonment and correctional supervision are under-utilised forms of punishment.

**Periodical imprisonment over weekends**
In the case of *S v Visser* 2004 1 SACR 393 (SCA) the innovative approach by the presiding officer was described as commendable by the Supreme Court of Appeal (par 18). Although there were some problems with certain aspects of the sentence, the SCA supported the principle of periodical imprisonment for a maintenance defaulter to be served over weekends (par 19) to ensure that the rights of the child were upheld (par 16).

**Duty on the court to investigate the repayment rate of maintenance arrears**
In *S v November* 2006 1 SACR 213 (C) four maintenance matters came before the High Court on automatic review (par 1). In each matter the accused pleaded guilty to, and was convicted of, contravening s 31(1) of the Maintenance Act by defaulting on the maintenance order made in respect of maintenance of his minor child (or children) (par 2). In each case the sentence was between eight and twelve months, suspended for four years on two conditions: first, that the accused not be found guilty of a further contravention of s 31(1) committed during the period of suspension and second, that the accused was to pay off the arrears at a specified rate per month. However, in each case either the rate of repayment or the term of repayment appeared inadequate in relation to the total arrears where the accused's financial capacity was taken into account (par 3).

The facts of the four matters were as follows (par 4-7): November was in arrears of R2000 and ordered to repay the amount at a rate of R50 per month, making the term of repayment more than three years. Although he had R3000 available at hearing, no enquiry (or order) was made concerning that money. In Meas the arrear amount was R7450, repayable at a rate of R100 per month, resulting in a term of repayment of more than six years. Although his earnings were R1700 per month, again no enquiry was held into his ability to repay the arrears. In Plaatjies (R3060 arrears) and Brooks (R11800 arrears) the repayment rates were R25 and R100 per month, respectively, making their terms of repayment more that ten years in each case. Although Plaatjies earned R1100 per month and Brooks R1000 per week, neither court held an enquiry into what the defaulter could afford to pay.

The court made it clear that in all these cases there was a failure of justice vis-à-vis the complainant and the minor children. No valid reason was given by any of the defaulters for their failure to meet their obligations and the required rate of payment of the arrears was so lenient as to be indefensible in some cases. It was evident to the court that these inappropriate orders arose out of the presiding officer's failure to conduct a proper financial inquiry, and merely resorting instead to what the accused offered to pay or to an order which the presiding officer deemed appropriate. The court noted that the leniency seemed to stem from a failure to view the non-payment in a sufficiently serious light (par 8).

The court confirmed the duty of the courts to ensure that the rights and best interests of the children are upheld by holding parents to their duty to maintain their children (par 9-11). Furthermore, the court beseeched prosecutors and magistrates to inform themselves of the comprehensive range of tools and procedures available to them in the Maintenance Act (par 11): "The instalment should be set on the basis that maintenance is a *primary* obligation on the part of the defaulter and not one which ranks equally with every other expense which the defaulter may have" (par 12).

The court held that it could see no reason why an order could not have been made for the repayment of the arrears at a more realistic rate and why interest was not levied on the capital sum. Interest would at least partly compensate for the loss due to the decrease in the value of money. A proper financial inquiry would have brought to light any money available, or readily realisable assets to pay off the arrears (par 14). It noted: "A more rigorous approach by presiding officers will help to bring home to defaulters that maintenance obligations cannot be ignored with impunity in the expectation that, if a conviction eventually follows, it will invariably lead to no more than a suspended term of imprisonment coupled with lenient terms of repayment in respect of the arrears" (par 15).

Unfortunately the High Court found that it could not interfere in the decisions by the magistrates as it would in effect make the sentence more onerous for the accused. Although this conclusion is debatable in light of the constitutional duty regarding the best interests of the children, it highlights the need for magistrates to carefully consider the appropriate order in the first instance (par 17).

**(Prof) Shannon Hoctor & (Prof) Marita Carnelley**

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If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

# Matters of Interest to Magistrates

**From the editorial of the De Rebus December 2008**

## Have an annual law day to celebrate the rule of law

A special day to mark the opening of the legal year could play an important part in emphasising the importance of the rule of law. We believe that the profession should take the lead in organising an annual law day. The benefits could be substantial (see 2008 (Oct) *DR* 11).

First, it would provide a unique opportunity for the representatives of the whole profession – the judiciary, attorneys, advocates, legal advisers and academics – to come together as colleagues and exchange views.

Second, it would enhance the image of the whole profession as a unified, independent and essential pillar in the maintenance of the rule of law and constitutional democracy.

Constitutional Hill in Johannesburg would make an eye-catching venue for a public ceremony, led by the senior judges and representatives of the other branches of the profession, to mark the annual opening of the Constitutional Court's first term in mid February.

Such a day – as is celebrated in many other common law jurisdictions – could also have the benefit of allowing the public to see the judiciary in a more appropriate context than the cut and thrust of the political dramas and judicial infighting that have beleaguered the courts for much of the time in recent months.

**MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION (SALRC) ON ITS INVESTIGATION INTO STALKING (PROJECT 130)**

The SALRC releases its Report on Stalking for general information.
The Report contains the final recommendations of the SALRC regarding its investigation into stalking and a draft Bill which embodies a civil remedy to address stalking behaviour. The proposed Bill, with the exception of domestic violence specific provisions, largely mirrors the Domestic Violence Act, 1998. The aim of this remedy is to enable victims of stalking, who fall outside the protection of the Domestic Violence Act, with the option of obtaining a protection order which is coupled to a suspended warrant of arrest. The primary focus of the Bill is to interrupt stalking behaviour before physical harm ensues.

Internationally the legal understanding of stalking has evolved to the point where it now resorts under what is broadly termed harassment. In order to provide greater protection the SALRC recommends that, as has been done in the United Kingdom and Canada, the broader term harassment should be used.

The proposed Bill defines harassment as engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused.

The SALRC has found that although stalking is not recognised by name as a crime in South Africa, stalking or harassing behaviour is addressed by a number of existing offences, such as assault, *crimen injuria*, trespassing and malicious damage to property. Therefore the SALRC does not recommend the enactment of a specific offence of stalking. The SALRC is of the opinion that an improved understanding of and application of the existing law would acknowledge the rights of certain victims of stalking to redress in terms of the criminal law and provide immediate intervention.

The Report will be made available on the Internet at:
http://salawreform.justice.gov.za/

## A Last Thought

"We accept that the public flinches when courts exclude evidence indicating guilt:

At the best of times but particularly in the current state of endemic violent crime in all parts of our country it is unacceptable to the public that such evidence be excluded. Indeed the reaction is one of shock, fury and outrage when a criminal is freed because of the exclusion of such evidence (*evidence obtained by assault and torture*).

But in this country's struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only through means that have moral authority. We forfeit that authority if we condone coercion and violence and other corrupt means in sustaining order"

*S v Tandwa and others* 2008 (1) SACR 613 on 649 para 121.

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