e-MANTSHI

A KZNJETCOM Newsletter

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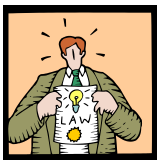
Welcome to the hundredth and thirtieth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Social Development in terms of Section 56 (3) (a) of the Child Justice Act, 2008 (Act No. 75 of 2008) has published particulars of each accredited diversion service provider and diversion programme in Government gazette no 40793 dated 21 April 2017. The notice covers diversion programmes and diversion service providers that are granted an accredited status. The full list of diversion service providers and the accredited programmes are attached to this newsletter.

Recent Court Cases

1. S v NJIVA AND ANOTHER 2017 (1) SACR 395 (ECM)

A magistrate is not allowed to use intemperate and aggressive language when responding to queries raised by a Reviewing Judge. Responses by magistrates must always be couched in civil and respectful language.

Nhlangulela DJP

[1] This is a review of the conviction and sentence of the two accused by the Bizana Magistrate's Court. The two accused were found guilty by the learned magistrate on charges of stock theft, and accused 1 was sentenced to 3 years imprisonment and accused 2 was sentenced to 18 months imprisonment. The test on review is to determine whether the proceedings appear to be in accordance with justice. A material irregularity would vitiate the proceedings and render same not in accordance with justice.

[2] The relevant facts may be summarised as follows:

[3] During the early hours of the morning on 17 July 2015 W/O *Jungqwana* of the Stock Theft Unit of the Bizana Police Station and his colleague were patrolling the road between Nomlacu and Harding. They stopped a suspicious looking sedan motor vehicle driven by one *Lazola Ndamase* with the two accused as front seat passengers. The back seat had been removed and they found eleven live goats in the back and in the luggage compartment.

[4] Upon questioning the driver and the accused they ascertained that *Ndamase* and the two accused were not in possession of the necessary permits to transport or possess the stock. The two accused confirmed that the goats belonged to them and that they had hired *Ndamase* to transport the goats to Harding. Accused 1 and 2 were unable to furnish any documentary proof that they were lawfully in possession of the stock.

[5] The evidence of W/O *Jungqwana* proceeded as follows, and I quote *verbatim* from the record:

"*Accused No.1 and 2 further informed me that five of these 11 goats, they have stolen them from a location which is –a locality which is close to that vicinity by the name of Umbukeni."*

[6] W/O *Jungqwana* then proceeded to testify that after first taking the goats to the Bizana Police Station, the two accused then took him to the homestead in Umbukeni locality where they had stolen the goats. He found a lady at such homestead by the name of *Beatrice Loggenberg* who is the complainant in the case, and who confirmed that five goats had been stolen from her kraal during the night of 16/17 July 2015. She subsequently identified five of the 11 goats found in *Ndamase*'s vehicle as being her goats stolen that night. The five goats were returned to her with the consent of the accused.

[7] Upon being asked by the prosecutor, W/O *Jungqwana* testified that the complainant had produced the stock card relating to the five goats. He was then asked whether the accused explained how they got hold of the goats at the complainant's homestead. Before answering, the Court intervened and I quote *verbatim* from the record:
"*COURT: Who showed – who showed?* Warrant Officer *Jungwana* replied as follows: *They were taken – they told me that they taken out at (sic) – the goats from the kraal and they even showed me the –where they torn up (sic) the fence so as to gain exit."*
[8] W/O *Jungqwana* proceeded to testify that he personally inspected the area where the fence had been cut and it appeared to be freshly cut (presumably due to the absence of rust marks).

[9] The prosecutor then established from W/O *Jungwana* that the "*admissions"* were freely and voluntarily made without any undue influence. All this evidence was freely admitted. Neither of the accused was legally represented at this stage of the proceedings.

[10] When the accused testified, they denied that they had stolen the goats. Both were strenuously cross-examined by the prosecutor and they were reminded of the "*admissions"* they made to W/O *Jungqwana*. They denied that they made such admissions. This cross-examination was allowed by the Court.

[11] When accused 2 was cross-examined by the prosecutor the following questions were asked:

"*PROSECUTOR: Was it your first time to be in this business of theft of goats? … I've never stolen … At all? … … At all. Have you never been arrested or convicted of theft of goats … … Yes, I was once convicted of goats which had no stock card in my homestead.*
Okay, have no further questions."

[12] Following the cross-examination by the prosecutor, the Court put the following follow-up questions to accused 2:

"*COURT: Is it your evidence that you were once convicted of theft of goats … That is correct, Your Honour.*
What was the sentence? … Your Worship, I was convicted and then I was sentenced to five months imprisonment."

[13] These question were followed up by a number of other questions by the Court designed to show that having been convicted and sentenced previously of stock-theft, the accused must have realised that it was a crime to be in possession of stock without the necessary permit. Further, when the wife of accused 2 testified in defence of her husband, the Court put the following questions to her:

"*COURT: Your husband was once convicted of a stock theft related incident, do you know anything about that? … Yes, Your Honour. What was he convicted of? … Two goats – were found, Your Honour, in his possession. There was no stock card for those goats.*
Your husband made admissions to the police on his arrest. (Long pause). Would you like to make any comment on that? … No comment Your Honour."

[14] In the last (3rd) paragraph on the first page of his judgment, the leaned magistrate summarises the facts. He states:

"*And it is also an undisputed fact that accused no. 1 admitted that he had stolen the goats from the complainant's premises …"*

[15] Of course, it is incorrect to say that it is "… *an undisputed fact …"* Both accused, when giving evidence denied that they made the "admissions" testified to by W/O *Jungqwana*. But this is immaterial. What is material is that this is the only direct evidence linking the accused to the theft of stock. It is clear from a contextual reading of the judgment that this evidence of W/O *Jungqwana* played a major role, if not the decisive role, in the conviction of both accused of stock theft.

[16] It is equally clear from the judgment that the previous conviction of accused no. 2 of stock theft played an important, if not a decisive role in his conviction. When dealing with accused no.2, the learned magistrate observed:

"*He (accused no.2) never became suspicious of accused no.1's actions, despite the fact that he has a previous conviction of theft of stock under the same circumstances."*

[17] In addition, the magistrate also referred to the "*admission"* made by accused no.2 that he had stolen the goats. There is no doubt in my mind that the learned

magistrate took both the "*admissions"* into account when convicting the two accused, and in addition also took the previous conviction of accused no.2 into account in convicting him.

[18] This matter first came before *Griffiths* J sitting as a Court of Review. He addressed a query to the learned magistrate in the following terms:

"*It seems from the record (page 18 line 21−page 19 line 10) that a confession made by the accused to a warrant officer was accepted in evidence. Indeed, this confession was used in cross-examination of the two accused and was relied on by the magistrate in his judgment in convicting both accused. Was this confession admissible bearing in mind the provisions of section 217 of the Criminal Procedure Act?*
Secondly, from what appears at page 58 of the record it seems that the magistrate himself questioned accused two about a previous conviction relating to stock theft. Such previous convictions ought not to be disclosed to the court prior to conviction. How and why did this occur?
Because of these irregularities, unless they can be explained, should the convictions of both accused not be set aside?"

[19] The learned magistrate responded with a lengthy answer, essentially disputing that the admissions amount to a confession and disputing that he committed any irregularity in the proceedings. It is unnecessary to repeat the grounds advanced by the learned magistrate for his expressed views. What is disconcerting, however, is the intemperate and aggressive language used by the learned magistrate in his response to the queries raised by the Reviewing Judge. I refer to only a few examples:

"*Nothing in this record of these proceedings can confuse anyone to record the evidence of an admission as a confession …. With respect, his opinion is not understandable."*
"*It is shocking to learn that the Honourable Reviewing Judge is quick to express an opinion that the magistrate committed an irregularity whereas the magistrate properly followed laid-down legal procedures which were correctly interpreted by our courts."*
"*Had these selected 'irregularities' appearing in his query been fairly considered with the totality of the evidence, including the correct application of the legal principles thereto, even from the cursory reading of the record of these proceedings, it would have been easily discovered without questioning, that the proceedings are regular … … The alleged irregularities pointed out by the judge do not exist."*

[20] I will later return to the language used by the learned magistrate, but first it is necessary to determine whether the evidence of the "*admissions"* amount to admissible confessions or admissions; and secondly, whether it was proper to place

evidence of a previous conviction before Court before conviction and not for purpose of sentence.

[21] The first issue is whether the evidence constitutes a confession or an admission. There is no statutory definition of a confession, but for more than 87 years the definition proposed by *De Villiers* ACJ in *R v Becker* 1929 AD at 171 has been regarded as being of unquestionable authority and a "*self-contained statutory definition."*

The Chief Justice said:
"*A confession could only mean an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law."*

[22] It is now recognised that for an admission to be regarded as a confession, it must be an extra-curial admission of **all** the elements of the offence charged. For instance, the admission "*I killed my wife"* is not a confession of murder because it lacks an admission of the required *mens rea.* The statement "*I murdered my wife,"* however, is a confession because the word "*murder"* is a judicial technical term which includes all the definitional elements of the crime of murder. (See: Du Toit et al: *Commentary on the Criminal Procedure Act* (vol 2) 24-53 (service 56, 2016) and the decided cases cited starting with *R v Blyth* 1940 AD 355.)

[23] The evidence that the accused said they have stolen the goats must be looked at in the context of the further evidence that the accused took W/O *Jungwana* to the homestead of the complainant where they showed him fresh markings where they cut the fence to remove the goats.

[24] The evidence relied on can never, in my respectful view, be a mere admission because then the rhetorical question arises: an admission of what? And the answer can only be an admission of theft of goats, which elevates the admission to a confession.

[25] I therefore find that the evidence of the "admissions" by the two accused, against the totality of all the other evidence, amount to a confession of stock theft.

[26] The next question is whether the confession was admissible in evidence.

[27] Section 217 of the Criminal Procedure Act governs the admissibility of confessions. It is well known and does not bear repeating. It suffices to say that confessions are generally admissible subject to the proviso's under sub-sections (1) (a) and (b), and further subject to the requirements under s. 217 (1). For purposes of this judgment I accept that the requirements of the confession being freely and voluntarily made under s. 217 (1) are met. The only issue is whether the proviso under sub-section 1 (a) was met.

[28] Confessions are inadmissible under the proviso to s.217 (1) (a) unless they are confirmed and reduced in writing in the presence of a magistrate or justice. A non-commissioned officer of the SAPS, such as W/O *Jungqwana*, is not a justice of the peace in terms of s. 4 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (only commissioned officers are), and therefore not entitled to take confessions. The requirement that the confession must have been confirmed and reduced in writing in the presence of a magistrate or justice has therefore not been met, and the confession was clearly inadmissible in evidence.

[29] The learned magistrate's contention that he was entitled to treat the statement as an admission and not as a confession is, with respect, devoid of any merit. For the reasons mentioned, the statement that the accused "*stole"* the goats is a confession and not an admission, and must be treated as such.

[30] The tendering of this evidence by the prosecutor and the acceptance thereof by the Court, both constitute gross irregularities which do not render the trial in accordance with justice.

[31] The same applies, in my respectful view, to the tendering in evidence and the acceptance of the previous conviction of stock theft of accused no.2 before conviction.

[32] Section 271 (1) of the CPA reads as follows:
"*(1) The prosecution may, after an accused has been convicted but* ***before sentence*** *has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused."* (My emphasis)

[33] It has repeatedly and authoritatively been held that previous convictions are relevant only to the issue of sentence, and not to any aspect of conviction. This is why s. 271 (1) clearly and unambiguously provides for the proof of previous convictions **after** conviction and **before** sentence. The ratio for this requirement is to guard against the fallibility of human nature to (even subconsciously) assume that because an accused person had previously committed a similar crime he has a propensity to repeat the commission of such a crime in the future. (See the commentary and case law in Du Toit (*supra*) at 27-6A to 27-7).

[34] In *S v Njikaza* 2002 (2) SACR 481(C) it was held that for a magistrate to question an accused on his previous convictions even after conviction but in circumstances where the State had indicated that it would not prove previous convictions, constitutes a "*serious irregularity."* To question an accused on his previous convictions – for whatever reason – **before** conviction, as had both the

prosecutor and magistrate done in this case, constitute in my respectful view an even more serious irregularity.

[35] The question whether the proceedings were in accordance with justice must also be determined with reference to the accused's constitutional rights and right to a fair trial.

[36] Section 35 (1) (a) – (c) of the constitution provide that an accused has a right "… *not to be compelled to make any confession or admission …"* Such a person is also given the right to remain silent and to consult with a legal representative.

[37] In *S v Maliga* 2015(2) SACR 202 (SCA) the prosecutor and presiding officer were severely criticised for the breach of their professional duty to ensure that "*justice is done."* In that case the appellant was lured into testifying following the reception into evidence of a plainly inadmissible confession. Section 35 (3) of the Constitution, said *Pillay* JA, at [19], "*compels presiding officers and indeed all officers of the court to play a role during the course of a trial in order to achieve a fair and just outcome."*

[38] In my respectful view, the prosecutor in this case acted unprofessionally by tendering into evidence not only a plainly inadmissible confession, but also previous convictions before conviction. The learned magistrate also acted in breach of his professional duty by not only allowing clearly inadmissible evidence, but in addition relying on such evidence in convicting the accused.

[39] A final issue calls for comment. It is the custom – indeed the duty – of reviewing Judges to draw the attention of magistrates to perceived irregularities in the proceedings. Very often satisfactory answers and explanations are given by magistrates to the Judges' queries which clear the perceived irregularities up, resulting in the certification of the proceedings as being in accordance with justice. Sometimes the perceived irregularities are conceded and orders are set aside or amended. But the queries of Judges and the responses of magistrates are always, always couched in civil and respectful language. Issues are discussed and addressed, never the persons. The exchanges are *ad rem*, never *ad hominem.*

[40] The queries raised in this matter by the reviewing Judge are set out earlier in this judgment. They are couched in respectful and moderate terms. Many of the responses by the learned magistrate, also set out above, do not address the merits of the issues raised, but cast aspersions on the integrity and intellectual and judicial capacity of the Judge. The intemperate, uncivil and disrespectful language used by the learned magistrate is not only totally unacceptable, but also calls for strong censure.

[41] Under our Constitution, the Judiciary and Magistracy constitute one undivided Judiciary under the administrative management of the Office of the Chief Justice. It will be a sad day in our democracy if these two arms of our Judiciary are allowed to continue to address each other in the terms used by the learned magistrate in this case. I intend to forward a copy of this judgment to the D.P.P. Mthatha, to the Magistrate's Commission, and to the Chief Magistrate, Mthatha.

[42] I make the following orders:
1. The conviction and sentences of accused no.1 and accused no.2 imposed by the Magistrates' Court, Bizana, on 26 January 2016 in this case be and are hereby set aside.
2. The convictions of both accused are replaced by an order in the following terms:
Accused no. 1 and accused no. 2 are both found not guilty and are discharged.
3. The return of the five stolen goats by the SAPS to the complainant Beatrice Loggenberg, is confirmed.
4. The Registrar of this Court is requested to forward a copy of this judgment to the Office of the D.P.P. Mthatha, and the Office of the Magistrate's Commission, and to the Chief Magistrate, Mthatha.

2. S v QHAYISO 2017 (1) SACR 470 (ECB)

If a Court accepted that an accused's innocent explanation was reasonably possibly true the court cannot just convict an accused since this meant that there must, at the same time, have been a reasonable possibility that the evidence which implicated him might be false.

The accused was charged in the magistrates' court with two counts of assault with the intention to cause grievous bodily harm, arising from an incident in which he was alleged to have assaulted the complainants who had robbed him the previous day of his cellphone. The magistrate found the second complainant's evidence unreliable and acquitted the accused on this count, but on the first count, although accepting that the accused had acted in self-defence, convicted him on the basis that he had exceeded the bounds thereof. On review,

Held, that the magistrate was not entitled to reject the accused's defence that he had exceeded the bounds of self-defence, as that was never the case of the prosecution in the first place. The finding was also at odds with the court's acceptance that there was a reasonable possibility that his innocent explanation was true, since this meant that there must, at the same time, have been a reasonable possibility that the evidence which implicated him might be false. The magistrate had accordingly wrongly convicted the accused after invoking a wrong test and the proceedings had to be set aside. (Paragraphs [17] and [30] at 475*b–c* and 482*f–g*.)
The record indicated that the magistrate had (i) in effect cross-examined the accused

after he was cross-examined by the state; (ii) refused to allow him to show the scar from his stab wound to the court; (iii) neglected to allow the prosecutor or the accused's attorney to question the accused in respect of the magistrate's questions to the accused; and (iv) allowed the state to reopen its case without a formal application in order to allow a state witness to show his scar. In her explanation the magistrate blamed the latter on the inexperience of the prosecutor.

Held, further that the magistrate's questions were hardly questions to get clarity on unclear issues, but constituted cross-examination, resulting in the magistrate descending into the arena. Her attempt to shift blame for an oversight on her part to the prosecutor, in respect of the reopening of the state case, was inappropriate. It remained the duty of magistrates to ensure that proper procedures were followed at all stages in a trial, and there was a duty on the magistrate in question to guide the inexperienced prosecutor where there were indications of his floundering. (Paragraph [29] at 482*c–d*.)

From The Legal Journals

Bellengere, A & Swales,L
"Can Facebook ever be a substitute for the real thing? A review of *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD)"

2016 Stell LR 454

Abstract
The Internet has brought about a significant shift in methods of communication. This profound change notwithstanding, the judicial imperative of clarity and certainty has meant slow, hesitant progress in the information communication and technology environments, particularly insofar as social media and the law are concerned.
With this in mind, this article will summarise and comment on the seminal matter of CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens, which dealt with substituted service via social media (Facebook in particular).
Moreover, the article reviews recent amendments to the Uniform Rules of Court, the Electronic Communications and Transactions Act 25 of 2002, the concept of substituted service and foreign jurisprudence relating to digital substituted service.

The article concludes with practical, clear suggested solutions insofar as social media and substituted service are concerned with a view to the process, or something of a similar ilk, becoming common-place in the years to come. In summary, local and foreign jurisprudence in this environment consistently holds that applicants seeking to effect substituted service via social media platforms must show a) that all reasonable attempts have been made to contact the defendant and conventional service of process has failed; b) with reasonable certainty that the profile on Facebook (or the chosen social network) is in fact that of the defendant or respondent; c) with reasonable certainty that the defendant or respondent utilises the chosen social network to ensure that the notice is likely to come to the defendant's or respondent's attention; and d) satisfy the court that legal certainty is being achieved.

Watney, M

*"Crimen iniuria***:** Its role *vis-à-vis* sexual-offences legislation"

2017 TSAR 405

Abstract
It is recommended that the legislature should consider adding crimen iniuria as a competent verdict to sections 5, 6 and 7 of the Sexual Offences Act (s 261(2) of the Criminal Procedure Act) and possibly also in respect of assault with the intent to do grievous bodily harm (s 266 of the Criminal Procedure Act) and common assault (s 267 of the Criminal Procedure Act). In the absence of the safety net which competent verdicts provide, prosecutors should be vigilant in the drafting of charge sheets and should rather include all charges which could possibly be sustained on the available evidence. Although a conviction of contravening section 5(1) of the Sexual Offences Act would have been the correct outcome in the Van Leperen case, a miscarriage of justice could have been prevented if the state had added a main or alternative charge of crimen iniuria, as such a conviction is also supported by the law and the facts.

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

Contributions from the Law School

The unlawfulness requirement in the crime of housebreaking

Whilst the “breaking” and “premises” requirements for the housebreaking crime have engendered some debate, as has the “further intent” requirement, relating to the intention to commit a crime within the premises after the intrusion, the unlawfulness requirement typically does not present significant difficulties (CR Snyman “Reforming the law relating to housebreaking” (1993) 6 *South African Journal of Criminal Justice* 38 at 40). For the most part, the issue of unlawfulness relates to the absence of consent by the owner or lawful occupier to the breaking and entering. The time of acting is not relevant for liability, as it was in the English common law, where it was held that burglary could only be committed by night, and if the elements of the crime were committed by day, the charge would be one of housebreaking (JWC Turner *Kenny’s Outlines of Criminal Law* 19ed (1966) 261). It is required that both the breaking and the entering be unlawful (CR Snyman *Criminal Law* 6ed (2014) 548). If, as Milton indicates, only the entry were required to be unlawful, it would undermine the very nature of the offence, which is breaking and entering, and further that “subtle problems and distinctions are likely to arise if a different test is applied to ‘breaking’ and to ‘entering’ which after all in practice usually coincide..” (JRL Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 797).

First, the crime of housebreaking with intent is not committed where the intruder has a right of entry under a title or contract, as where he breaks and enters his own house or a house shared with another (*R v Steyn* 1946 OPD 426, *R v Faison* 1952 (2) SA 671 (SR)). Where an accused breaks into and enters the house of another in order to retrieve her own goods, the crime of housebreaking with intent is committed (*R v Mhlongo* 1959 (1) SA 167 (N)). It was part of the English common law definition of the crime that the breaking and entry had to be into the dwelling-house “of another” (EH East *A Treatise of the Pleas of the Crown* Vol II (1803) 506). The present position in South African law is that an owner can only incur criminal liability for the housebreaking crime if he breaks into his own house in mistake for someone else's house, for attempt liability (Milton 796n33). Secondly, the crime is not committed where the intruder has received an express or implicit invitation to enter the premises from the owner or lawful occupier (see *R v Willy Ovamboland* 1931 SWA 11, where a milkman customarily entered a house to deliver milk). Where an accused had broken into a church to find shelter from inclement weather, it was

held that he had committed the crime of housebreaking with intent to commit the statutory crime of trespass (*S v Bopheka* 1986 (2) PH H135 (O)). In this case it seems that the manner of entry weighed heavier than the (at least implicit) invitation to enter. Indeed, although the court convicted the accused, Findlay AJ, in the course of his judgment, queries (at 237):

"Wat wel twyfelagtig is, is of toestemming onder sulke omstandighede geweier sou word... [m]et ander woorde as hy vir skuiling gevra het, sou die kerk of sy predikant dit geweier het veral as mens kyk na die leer van die Bybel ?"[1]

It is arguable that there is an implicit invitation to enter certain public buildings - if, for example, the accused in *R v Dyantyi* (1958 (2) PH H253 (EC)) had entered the charge office of a police station where he stole a policeman's watch, there could be no housebreaking, even if he entered with an unlawful intent. Where there is no proof of unlawfulness, then the accused must escape liability. As Brink J points out in *S v Smith* (1979 (1) PH H9 (O)), where an accused was found to have broken into a building; "[die beskuldige] kon...die toestemming van die eienaar van die gebou gehad het om so op te tree".[2] (See also the extraordinary English case of *R v Collins* ([1973] 1 QB 100), for a further consideration of invitation to enter premises (discussed in JM Burchell *Principles of Criminal Law* 5ed (2016) 768n19).
Thirdly, there will be no housebreaking liability where the intruder is a servant or employee who has a right of entry to the premises in terms of his contract of employment, although this consent may be qualified in terms of the time or degree of entry (*R v Coetzee* 1958 (2) SA 8 (T)). Snyman (*Criminal Law* 554) cites the example of a locksmith who is hired to open the door of some unfortunate person who has lost his keys - the breaking and entry is clearly executed with the permission of the customer. (The author cites *S v Mashigo* 1976 (2) PH H210 (A) as authority for this point, but this case does not deal with the permission granted to an employee to enter, but with permission granted to an estranged lover). Milton (797) notes that typically a servant will escape liability for housebreaking despite an unlawful intent, since his entry was lawful, and unlawfulness is an element separate from intent. However, Milton postulates (797n40) that

"it is strongly arguable that as a servant's entry is lawful only by virtue of his master's permission to enter, and as this permission must be regarded as conditional upon the servant's entering at the permitted time and place, by the permitted means and for the permitted purpose, his entry is unlawful when it is for an illicit purpose. Hitherto, however, the courts have not regarded the illicit purpose as negativing the legality of

[1] My translation: "What is indeed questionable, is whether consent under such circumstances would be refused…in other words, if he had asked for shelter, whether the church or its minister would have refused this, especially if one looks at the teaching of the Bible."

[2] My translation: "[the accused] could have had the consent of the owner of the building to act in this way"

the entry, though they have regarded an irregular time and place of entry as negativing it…"

However, it seems that even if a servant's entry is lawful in the sense that he enters at a permitted time and place, it is to be regarded as unlawful if he uses an unauthorized means of entry. Milton (797n43) submits that the accused in *R v Ngxukuma* (1913 EDL 341), if he had intent to steal, would have been convicted despite his permission to enter the premises, by choosing an "eccentric means of entry" in climbing through an unlocked window. Milton motivates this view by arguing that just as an accused's permission to enter is conditioned by considerations of time and place, so too it ought to be regarded as conditioned by the manner of effecting entry. However, Milton concedes that the courts have as yet not been swayed by the purpose of entry, and thus it is possible that they will not accept this argument either, reasoning that in both these cases the accused's presence in the premises (intent apart) is not unlawful (797n43). Milton (797) cites the further example of "if X breaks the door open with a crowbar or climbs through a window because he has lost his key to the door".
The unlawfulness of the accused's conduct could also be negated if he was acting on the basis of a ground of justification, such as necessity, superior orders, *negotiorum gestio* or official capacity (Snyman *Criminal Law* 548 – "as where a policeman breaks open a door in order to arrest a criminal"). In respect of *negotiorum gestio*, in the case of *R v Louw* 1907 EDC 46, the accused was told by a man that an intruder had entered a nearby house, and that the owner of the house was absent. The accused climbed into the wrong house, apparently in an attempt to apprehend the intruder. He was acquitted on the basis of lack of intent. Had he climbed into the correct house, he may have been able to raise an argument of acting on the basis of *negotiorum gestio*, and avoid liability on the strength of this justification ground (see Snyman *Criminal Law* 127; Burchell 248 for further discussion of this topic).

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COUNCIL ON HIGHER EDUCATION

Outcomes of the National Review of the Bachelor of Laws (LLB) Qualification

In 2012, the Council on Higher Education (CHE) and South African Law Deans Association (SALDA) extensively deliberated the matter of whether the CHE should undertake a national review of the Bachelor of Laws (LLB) qualification. Ultimately, an agreement was reached that a national review of the LLB programme would be appropriate to strengthen the quality of legal education provision across South African universities. Again, at the LLB Summit held in May 2013, SALDA and the legal professions (General Bar Council and the Law Society of South Africa) reiterated the need to conduct a national review of the LLB programme. Given the nature of the issues raised, the LLB Summit also proposed that the standard development process should precede the start of the proposed national review of the LLB programme. The threshold standard was envisaged to serve as a national benchmark against which all programmes leading to the LLB qualification would be measured.

Development of the LLB Qualification Standard

The Qualification Standard was developed by a working group of expert law academics, established by the CHE after consultation with SALDA. The draft Qualification Standard was published for public comment; this was accompanied by a series of consultation meetings, attended by universities, the Law Society of South Africa (LSSA) and the General Bar Council. The finally approved version took into account comments and recommendations received from all quarters of the legal sector. The CHE agreed that, because the Standard had been developed long after LLB programmes had been in existence, it would not be used as the sole, or primary, benchmark for programme re-accreditation (i.e. national review). Institutions were requested, as part of the national review, to identify any areas in their programmes which, currently, do not meet the Standard, and to indicate plans for improvement together with proposed timelines for implementation. While there is considerable overlap between the Qualification Standard and Higher Education Quality Committee (HEQC) Criteria for Re-Accreditation, the Criteria served as a sharp edge of evaluation. The Qualification Standard was regarded largely as an instrument for programme development.

National Review process:

Institutional self-evaluation reports

The Self-Evaluation Report (SER) template was designed, again, in consultation with a group of expert law academics. It took the form of a series of questions, based on,

and referring to, both the Qualification Standard and the Criteria for Re-Accreditation. Institutions were required to address all the questions and to submit, with the SER, only that documentation that was essential for a comprehensive understanding of the claims made in the SER. The national review included all LLB programmes (whether first-degree integrated programmes or second-degree programmes following a BA (Law), BCom (Law), etc.). It did not include the other such initial programmes, except insofar as credit for law-related modules/courses was transferred to the LLB programme and integrated with the LLB credit requirements.

Desktop evaluation of the SERs

Desktop evaluation of the SERs was conducted by a panel of law educators, many of whom also participated in the development of the Qualification Standard. The desktop evaluation was aimed at advising the institution on aspects of the Qualification Standard that appeared to be in need of attention, and identifying gaps and absences in the SER response to the lines of enquiry. The desktop evaluation reports (DERs) were then moderated, for consistency, by a separate group of expert law academics. Each DER was sent to the institution. In some cases, additional information was requested, to be submitted prior to the site visit; in other cases, supplementary information would be required during the site visit. No comments on the prospects of re-accreditation of the programme were included in the DERs.

Institutional site visit

The site visit is an integral aspect of the national review of a programme. Site visit panels comprised three or four law academics from all 17 participating law schools and a representative from the CHE. A site-visit schedule comprised a series of time slots and included:

- the meeting of the review panel with the relevant Deputy Vice-Chancellor, the head of the academic unit (dean, head of school), programme coordinator/s and the quality assurance manager/representative;
- reading and reflection periods for members of the review panel
- interviews with academic staff, administrative and support staff, students and alumni.
- Visits to libraries, lecture venues, law clinic (if applicable), moot courts, computer facilities and other elements in the physical infrastructure of the institution where relevant.

The site-visit report

The site-visit review panel report is an evidenced-based report that ensures consistency of arguments across the criteria. It further ensures even-handedness and fairness of critical comments, and adequacy of evidence in respect of judgements. The panel ensures that the report is factually accurate, error-free, stylistically acceptable, and has a suitable tone. The site-visit reports together with

the SERs provided the HEQC (the decision making body) with a comprehensive understanding of the programme offered at an institution.
The review panel under the guidance of the chairperson agreed in principle –as far as possible- on the provisional judgements on the programme. The review panel reached a broad consensus with regards to judgements related to each criterion and the programme as a whole.

HEQC ratification of outcomes

The National Standards and Review Committee of the HEQC scrutinized and assessed the site-visit panel reports, together with the institutional SER and any other relevant documentation, and recommended an accreditation outcome to the HEQC. Prior to making a final decision, the HEQC made its recommendations available to the institution, together with the report on which the recommendations were based. The institutions were given an opportunity to make representations within 21 days of receipt of the draft report. In the representations, the institutions were asked to seek correction of factual information affecting the findings in the report. Additional evidence was provided to support claims already made, clarify existing claims, but not used to introduce new claims.
Representations were scrutinized and evaluated and the HEQC made its final decision on 30 March 2017. The decision by the HEQC was then conveyed to the relevant institution on 07 April 2017. Notably, the HEQC decision is final and binding on the institution.

Final HEQC outcomes of the LLB National Review:
Accreditation confirmed, with commendation
 None
Accreditation confirmed
 None
Re-accreditation subject to meeting specified conditions (in no particular order)
 Nelson Mandela University
 University of Johannesburg
 University of Venda
 University of Limpopo
 Rhodes University
 University of Zululand
 University of the Western Cape
 University of Cape Town
 University of Stellenbosch
 University of Witwatersrand
 University of Fort Hare
 University of KwaZulu-Natal
 University of Pretoria
Notice of withdrawal of accreditation (in no particular order)

 North West University
 Walter Sisulu University
 University of South Africa
 University of the Free State

Accreditation withdrawn

 None

Improvement plans

The HEQC has requested the universities put measures in place to address the reasons, concerns, conditions and recommendations set out in the institutional review reports. Furthermore, the HEQC requires an Improvement Plan with clear targets, resource allocations and milestones within six months of receipt of the review report. Institutions are therefore required to report to the HEQC from time to time on progress made in respect of improvement to the programme. All improvement plans and progress reports received by the HEQC will be evaluated and the HEQC may, at its discretion and for good reason; request follow-up site visits. Taking into account the progress reports submitted by the institutions, the HEQC will continue to revise and update its re-accreditation decision to reflect improvements made. In cases where the timelines for conditions to be met are not adhered to, or it becomes clear that the conditions are not being adequately addressed, the HEQC may alter a decision of “Re-accreditation subject to meeting specified conditions” to “notice of withdrawal of accreditation” or from “notice of withdrawal of accreditation” to ‘withdrawal of accreditation’.

Of equal importance in a national review is an evaluation of the composite national picture in respect of the LLB qualification. To this end, the CHE will produce and publish a report on the national state of the LLB qualification addressing the main findings, strengths, shortcomings and concerns emerging from the review as a whole Furthermore, the institutions were informed that the accreditation outcomes, not the review reports, will be published on the CHE website and other media platforms.

We trust that the national review will contribute to the enhancement of the quality of the LLB programme. The CHE would like to thank all the participating institutions for their co-operation in facilitating the LLB national review.

For enquiries regarding the HEQC outcomes, please contact the Chief Executive Officer of the Council on Higher Education at ceo@che.ac.za.

By Council on Higher Education
Dated: 12 April 2017

A Last Thought

"Justice is present in society when people enjoy the good to which they have rightful claim: protection against assault, freedom to worship as they see fit, sufficient food to live and work etc. Now the strong and powerful in society will generally be able to secure such goods on their own. Hence to find out whether a society is just, one must not look at the powerful but at the weak: Do the practices and institutions of the society secure to them the enjoyment of relevant goods? The test is not whether the economically powerful have enough to eat, but whether the economically powerless have enough. Justice is society's charter of protection of the little ones." (p. 97)

Wolterstorff, N.P., 2011, *Justice in love.*