# e-MANTSHI

A KZNJETCOM Newsletter

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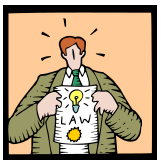
Welcome to the hundredth and thirty third issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Justice and Correctional Services has determined the following categories or classes of persons to be competent to be appointed as intermediaries:

(i) Medical practitioners who are registered in terms of section 17 of the Health Professions Act, 1974 (Act No. 56 of 1974), and against whose names the specialty of-

(aa) paediatrics; or

(bb) psychiatry, are registered.

(ii) Clinical, counselling or educational psychologists who are registered in terms of section 17 of the Health Professions Act, 1974 (Act No. 56 of 1974)

(iii) Family counsellors who are appointed under section 3(1) of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), and who are or were –

(aa) clinical, counselling or educational psychologists as determined in item (ii);

(bb) social workers as determined in item (iv);

(cc) educators as determined in item (v); or

(dd) child and youth care workers as determined in item (vi).

(iv) Social workers who are registered in terms of section 17 of the Social Service Professions Act, 1978 (Act No. 110 of 1978), and who have at least two year's experience in social work.

(v) Educators as defined in section 1 of the South African Schools Act, 1996 (Act No. 84 of 1996), who have

(aa) obtained a minimum post Matriculation teachers education qualification of three years at a recognised tertiary educational institution;

(bb) have at least three years experience in teaching; and (cc) are registered in terms of section 21 of the South African Council for Educators Act, 2000 (Act No. 31 of 2000), and include former or retired educators, who comply with paragraphs (aa) and (bb), and whose names have not been removed from the register in terms of section 23(1) of the South African Council for Educators Act, 2000.

(vi) Child and youth care workers who have

(aa) obtained a minimum post Matriculation education qualification of three years at a recognised tertiary educational institution in child and youth care; and

(bb) at least three year's experience in child or youth care.

The determination will come into effect from 1 September 2017. The notice was published in Government Gazette no 40976 dated 14 July 2017.

## Recent Court Cases

### 1. Venter v S (A505/2016) [2017] ZAGPPHC 384 (21 July 2017)

**On a charge of failing to lock a firearm away in a prescribed manner (Section 120(8)(a) of Act 60 of 2000), if a firearm is not on the person of an authorised person or locked away in a prescribed manner, the control is restricted by law to circumstances where such control is directly exercised by such authorised person and not through a third party.**

Mudau J:

[1] The appellant, Mr Jacobus Daniel Venter, appeared in the Benoni Regional Court charged with contravening s 120 (8) (a) of the Firearms Control Act 60 of 2000 ('the Act') and other relevant provisions as well as the Regulations for failing to lock a firearm away in a prescribed manner. He was ultimately convicted as charged and subsequently sentenced to pay a fine of R20-000-00 or to serve 12 months imprisonment. A further 12 months imprisonment was imposed but was suspended for five years on customary grounds. In terms of s 103 of the Act, no determination to the contrary was made with result that the appellant remained unfit to possess a firearm. The appeal against conviction, sentence and the resultant order, is with leave of the court *a quo*. The issue in this appeal regarding the merits is whether the State discharged the onus it had in establishing the appellant's guilt as he denied to have had the requisite *dolus* or *culpa* to contravene the relevant provisions of the Act. Added to this is whether the appellant should not have been discharged at the close of the State's case in terms of s 174 of the Criminal Procedure Act 51 of 1977 ('the CPA'). Regarding sentence, the question in dispute is whether the sentence imposed (including the order) by the trial court is justified.

[2] The facts on which he was convicted were essentially common cause at the trial, and they may be summarised as follows: The appellant is the licensed owner of a 9 mm CZ pistol which he acquired for purposes of self-defence. On 20 December 2012 between 13h00 and 14h00 he and a friend, Chris Ehlers, attended to the Ducks Inn bar. They ordered alcoholic beverages which they imbibed. A few hours later and after several drinks, the appellant approached the bar lady, Ms Oosthuizen, to put away his firearm in the presence of Ehlers. It was bothering him as it was pulling down his pants. When the appellant handed over his firearm it was in its holster. She bent down and put the firearm behind a stationary box under the bar

counter where it was not readily visible opposite where the appellant sat. Ducks Inn had no safe to keep firearms. Neither was the firearm stored in a strong room or device for safekeeping, an aspect in respect of which there was a formal admission made in terms of s 220 of the CPA. In order to reach the firearm, one would have to get behind the counter, bend down and reach out for it.

[3] At approximately 18:00 to 19:00 hours later that evening, a certain Mr Leon Roos ("the deceased") arrived. A dispute arose between the deceased and Mr Ehlers about money owed between them which resulted into a fist fight. Mr Ehlers went behind the bar counter and took possession of the appellant's firearm. The appellant tried to disarm Mr Ehlers of the firearm but in vain. A struggle ensued; the firearm fell and slid on the floor. Mr Ehlers picked up the firearm and shot the deceased who as a result succumbed to the gunshot wound.

[4] After an unsuccessful application for discharge intended in s 174 of the CPA, the appellant testified that he had control over his firearm from where he sat at the bar. The door leading to the back of the counter was approximately 2 meters from where he was seated. He knew he had an obligation to put the firearm in a safe place. The added reason why he gave his firearm to the bar lady for safekeeping was because he feared that any other person could have taken it from his waist as the holster in which he kept it was a "quick draw" one. He however conceded during cross examination that there were occasions when he went to the bathroom leaving the firearm where it was, but insisted that he left it under the control of the bar lady. He further conceded knowing the relevant rules attendant with ownership of a firearm.

[5] I find it convenient to deal first with the ground of appeal that the appellant was convicted on his evidence and should have succeeded in an application for discharge in terms of s 174 of the CPA. In support of this contention he relied *upon S v Lubaxa*[1] where the Supreme Court of Appeal found it an unlawful breach of an accused's rights under ss 10 and 12 of the Constitution, 1996, to refuse him a discharge at the end of the State's case if there is no possibility of a conviction except if he testifies and incriminates himself. Reliance on *Lubaxa* given the common cause facts is in my view misplaced. The evidence and admissions before the Court a *quo* at that stage established that the appellant on face value contravened the provisions of the statute and the regulations under consideration.

[6] The Legislature has undoubtedly been increasing the stringency of the requirements relating to the safekeeping of firearms over the years. By way of background, in terms of s 7 of the Arms and Ammunition Amendment Act 19 of 1983 the legislature had introduced statutory criminal sanctions for the failure to safeguard a firearm and for the negligent loss of a firearm. This was done by introducing paras

[1] *S v Lubaxa* 2001 (2) SACR 703 (SCA).

(j) and (k) into s 39(1) of the then Arms and Ammunition Act 75 of 1969. In addition by enacting s 23 (a) to (c) of the Arms and Ammunition Amendment Act 60 of 1988, the Legislature created new offences for failure to lock away a firearm in a safe place and for failure to prevent loss or theft of a firearm by amending s 39(1) (j) and (k) of the Arms and Ammunition Act 75 of 1969.

[7] Over an extended period of time, however, it was perceived that the evil of unqualified possessors of firearms required combatting on another front. The Arms and Ammunition Act has since been repealed and replaced by the Act the provisions of which are the subject matter in this appeal. Quite clearly the degree of care and responsibility that the Legislature has intended a firearm owner to take when the firearm is not in his or her person or under his or her direct control evolved over time from there being no law in that regard, to a requirement to safeguarding or taking reasonable steps to safeguard, and lately to ensuring that it is kept in a prescribed safe, strong room or other device for safekeeping.

[8] Section 120 (8) of the Act provides that a person is guilty of an offence if he or she-

(a) fails to lock away his or her firearm or a firearm in his or her possession in a prescribed safe, strong-room or device for the safe-keeping when such firearm is not carried on his or her person or is not under his or her direct control; or

(b) loses a firearm, or is otherwise dispossessed of a firearm owing to that person's failure to-

(i) lock the firearm away in a prescribed safe, strong-room or device for the safekeeping of a firearm;

(ii) take reasonable steps to prevent the loss or theft of the firearm while the firearm was on his or her person or under his or her direct control; or

(iii) keep the keys to such safe, strong-room or device in safe custody.

[9] Regulation 86 (Firearms Control Regualtions-2004 GN R345 of 2004) to the Act deals with safes and safe custody of firearms. Regulation 86 (1) provides that:

“When a firearm [or muzzle loading firearm] is not under the direct personal and physical control of a holder of a licence, authorisation or permit to possess the firearm [or muzzle loading firearm], the firearm [or muzzle loading firearm] and its ammunition must be stored in a safe or strong room that conforms to the prescripts of SABS Standard 953-1 and 953- 2, unless otherwise specifically provided in these Regulations”.

Regulation 86 (4) (a) also provides that:

“A person who holds a licence to possess a firearm [or is a holder of a competency certificate in respect of a muzzle loading firearm], may store a firearm [or muzzle loading firearm] in respect of which he or she does not hold a licence or competency certificate, if-

(i) he or she is in possession of a written authorisation given by the person who holds a licence, permit or authorisation to possess that firearm [or competency

certificate in respect of a muzzle loading firearm] and which authorisation is endorsed by a relevant Designated Firearms Officer; and
(ii) the firearm [or muzzle loading firearm] is stored in a prescribed safe at the place mentioned in the authorisation contemplated in subparagraph (i)".

[10] It seems clear in the light of the foregoing that there was evidence upon which a court acting carefully, could properly find it was proved that appellant contravened s 120 (8) (a) of the Act as the firearm was not stored in a prescribed safe nor under his direct control (by his own admission) at times when he had to use the toilet. Plainly, the court *a quo* did not in my view fail to properly consider the evidence at the end of the State's case or wrongly exercise its discretion. It was observed in *S v Nkosi and Another*[2], that the question whether a trial court should discharge such an accused is not one that can be answered in the abstract. In any event the appellant, who enjoyed legal representation in this case, had no obligation to testify and give self-incriminating evidence as he remained protected by the Bill of Rights as provided for in 35 ( 3) (h) and (i).
[11] It was contended on behalf of the appellant before the court *a quo* and in this court that "under direct control" is not physical possession as envisaged by the words "on his/her person", in the subsection. Counsel for the appellant argued that "an arm's length is sufficient constitute possession for the purposes of the Act". Counsel was however constrained to concede that each time that the appellant left the bar to use the bathroom; he had relinquished direct control of his firearm. The concise Oxford Dictionary defines the word "direct" thus:
"1. control the operations of", 2. "aim something in a particular direction" 3. Give an order or authoritative instructions to".
Control is defined as "to have control or command of" or "to regulate".

[12] From a proper reading of the words "direct control" within the context of the statute and the Regulations, it is accordingly clear to me that if a firearm is not on the person of an authorised person or locked away in a prescribed manner, the control is restricted by law to circumstances where such control is directly exercised by such authorised person and not through a third party. Any other interpretation would in my view defeat the intention of the Legislature in this regard.

[13] From the facts of this case it would seem that the person with direct control of the firearm was the bar lady since the appellant could not see where the firearm was placed under the counter out of his sight. To make matters worse, the request to put away the firearm was made in the presence of his friend who later took advantage of the situation by retrieving the firearm in plain view of the bar lady which he used with fatal consequences. In any event the request by the appellant to the bar lady fell afoul of Regulation 86 (4) (a) as he clearly did not establish whether she had a

[2] 2011 (2) SACR 482 (SCA) at para 21.

licence for a firearm. The appeal against conviction is clearly without merit and stands to be dismissed.

[14] I turn to deal with the sentence and the resultant order. The law is settled on when an appeal court may interfere with a sentence imposed by a lower court. It can only do so when there is a material misdirection by the sentencing court. An appeal court may interfere with the exercise by the sentencing court of its discretion, even in the absence of a material misdirection, when the disparity between the sentence imposed by the trial court and the sentence which the appeal court would have imposed, had it been the trial court is 'so marked that it can properly be described as shocking, startling or disturbingly inappropriate'. Marais JA stated the test in *S v Sadler*[3] as follows:
'(I)t is important to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been an appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which face courts and it is not surprising that honest differences of opinion will frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate Court which must prevail.'

[15] Before being sentenced, the following personal factors of the appellant were placed before the court *a quo*. The appellant was at that time a 26 years old married business man and a father of 2 minor children. He had a staff compliment of about 120 employees and also owned a game farm of international repute with accommodation valued at about R10 million Rands. From his business interests he drew a monthly salary of R60-000-00. The appellant admitted to a record of a previous conviction emanating from a drunken driving charge which was disregarded by the court for purposes of sentence as the appellant was considered a first offender. He is a licenced holder of two hunting rifles.

[16] The court *a quo* was of the view that the offence committed was a serious one. In this regard that approach was and remains correct. The appellant was clearly in a position to pay the fine as he did. Firearms are by their very nature lethal, more especially so in the hands of the unskilled, irresponsible, or, worse, the criminal as borne out by the tragic facts in this case. Stolen or lost firearms end up in the possession of persons who have not passed through the administrative screening procedure designed to ensure that only the qualified and responsible are entrusted with the care and control of lethal weapons (*S v Robson*; *S v Hattingh*[4]). In my view the sentence imposed was not visited by any misdirection.

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[3] 2000 (1) SACR 331 (SCA) para 10
[4] 1991 (3) SA p322 (W) 331 F.

[17] However, the effect of the order regarding s 103 of the Act, in essence rendered the appellant unfit to possess any arm, entailing in turn, forfeiture of all other firearms in his possession. Regard being had to the various relevant factors indicated above as well as the approach in the classical case of S v Zinn[5], the interest of the appellant was not properly evaluated given the nature of his business; and relatively large personnel in a game farm, in a country with heightened crime rate. In argument before us, counsel for the respondent readily conceded this aspect. The consequence is that the order made is liable to be set aside.

[18] In light of the conclusions reached, the following order is made:

1. The appeal against conviction and sentence is dismissed.

2. The order of the court below in respect of the appellant's unfitness to possess a firearm is set aside and substituted as follows:

'In terms of section 103 of the Firearms Control Act 60 of 2000 the accused is fit to possess a firearm.'

## 2. Centre for Child Law and Others v Media 24 Limited and Others (23871/15) [2017] ZAGPPHC 313 (11 July 2017)

**The protections afforded by section 154 (3) of the Criminal Procedure Act 51 of 1977 apply to victims of crime who are under the age of 18 years.**

(This is an edited extract from the judgment. The full judgment can be accessed here: http://www.saflii.org/za/cases/ZAGPPHC/2017/313.html )

Hughes J

The Issue

[7] The manner in which proceedings are conducted in criminal cases is enunciated in the CPA sections 150 to 178. The section pertinent to this application as alluded to above is section 154 (3), which I set out below for easy reference:

***"154 Prohibition of publication of certain information relating to criminal proceedings***

*(3) No person shall publish in any manner whatsoever any information which reveals or may reveal the identity of an accused under the age of eighteen years of age or of* a *witness at criminal proceedings who is under the age of eighteen years of age: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information* as *he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person."* [My emphasis]

[8] The existing CPA protects the identity of an accused and a witness, under the age

[5] 1969 (2) SA 537 (A).

of eighteen, who participates in criminal proceedings. This protection may be uplifted by the court, if it is just and equitable to do so, and is in the interest of a particular person. Failure to adhere to the protection afforded to these children, that being an accused or witness under the age of eighteen and involved in criminal proceedings, is a criminal offence, in terms of section 154 (5) of the CPA, which attracts a sanction of a fine or imprisonment for a period not exceeding five years, or both a fine and imprisonment.

[9] In the current situation as is set out above, the applicants propose two areas of concern as regards section 154 (3):
(a) That from a reading of section 154 (3), the child victim under the age of eighteen involved in criminal proceedings, is not afforded the anonymity, like that which is afforded to the child accused and child witnesses. The applicants submit that, if this is indeed so, then this would be inconsistent with the Constitution;
(b) Section 154 (3) only provides anonymity until the child accused or witness turns eighteen, thereafter the anonymity falls away, and as such, this too is not consistent with the Constitution.

[10] The applicants together with the 13th and 14th respondents (the Minister) agree, that anonymity protection under this section is afforded to the child accused and witnesses. Once afforded such protection, same ceases to exist once the child attains the age of eighteen. On the other hand, the 1st to 3rd respondents (the Media) submit that the protection is only afforded to the child accused and witnesses, and is forfeited when the child attains age eighteen.

[11] Simplistically, this application encompasses ascribing an interpretation to section 154 (3), to include the anonymity protection of child victims involved in criminal proceedings. Further, that this protection of anonymity ought not to cease at age eighteen.

Interpretation of section 154 (3) of the CPA
[44] The applicants argue that on a proper interpretation of section 154 (3), it can be interpreted that the section protects the child victims from the harm of publication of their identity. In the alternative, they argue that if it does not protect the child victim, then to the extent that it does not protect the anonymity of the child victim, it is unconstitutional.

[45] The Media respondents contend that in terms of section 152 of the CPA, criminal court proceedings are to be conducted in open court. An exception to the open justice principle is section 154 (3) which affords protection to an accused and a witness, under the age of eighteen, taking part in criminal proceedings.

[46] The applicants argue that if one interprets section 154(3) purposefully it emerges that the purpose of the section is to ensure the protection, privacy and dignity of the

child, which culminates in the section having been enacted to warrant the best interest of the child in criminal proceedings.

[47] The applicants contend that the default position provided by section 154 (3) is that the rights of all children, be they an accused, witness or victim in criminal proceedings, are protected as the rights of the child are paramount.

[48] The Media contend that a strict interpretation ought to be ascribed when interpreting section 154 (3). The language used is clear and unambiguous that the protection under the aforesaid section is only afforded to an accused or witness under the age of eighteen at criminal proceedings.

[49] The Media argue that the language used does not include a victim who is not a witness in criminal proceedings. The default position proposed by the Media lies in section 152, the open justice principle, meaning criminal proceedings are to be held in open court. The exception of the open justice principle lies in section 154 (3) and 153 (3), which cater for victims of sexual offences and related cases. Other than the aforesaid the open justice principle should prevail. The Media submit that as reference is had to *"towards or connection with any other person "* in section 153 (3) (a), this in itself is reference to the victim in sexual offences and related cases. The further submission made is the protection afforded in these exceptional cases, that is sections 154 (3) and 153 (3), is only during criminal proceedings.

[50] It is prudent, in my view, to appreciate that section 154, which encompasses the relevant subsection section (3), must be read with section 153 (1) of the CPA and section 63 (5) of the CJA. Section 63 (5) states:

" *63 (5) No person may be present at any sitting of* a *child justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present."*

[51] Firstly, in my view, on a reading of section 63 *supra,* it covers the proceedings in the child justice courts, the procedure and conduct of trials in these courts which involve children.

[52] It is thus judicious to define the child justice court. In the CJA under definitions the following definition is ascribed to the child justice court:

***"Child justice court"****·means any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child;"*

[53] Section 154 makes provision for a court in terms of section 153 (1) which in turn make provision for a court in terms of section 63(5).Thus, this fortifies my view that section 154 and 153 of the CPA and section 63 (5) of the CJA are to be read

together. For easy reference section 153 (1) and 154 (1) read as follows:

***"Circumstances in which criminal proceedings shall not take place in open court***
*153 (1) In addition to the provisions of section 63 (5) of the Child Justice Act, 2008, [if] it appears to any court that it would, in any criminal proceedings pending before the court, be in the interest of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be presented at such proceedings or any part thereof ...*

***Prohibition of publication of certain information relating to criminal proceedings***
*154 (1) Where a court under section 153 (1) on any of the grounds referred to in that subsection directs that the public or any class thereof shall not be present at any proceedings or part thereof, the court may direct that no information relating to the proceedings or any part thereof held behind closed doors shall be published in any manner whatever, provided that a direction by the court shall not prevent the publication of information relating to the name and personal particulars of the accused, the charge against him, the plea, the verdict and the sentence, unless the court is of the opinion that the publication of any part of such information might defeat the object of its direction under section 153(1), in which event the court may direct that such part shall not be published."*

[54] I am of the view that section 153 (1) when read with section 154 (3) and 63(5) provision is made for proceedings involving a child in a criminal court to be closed to the public unless permission is sought from the presiding officer to have same in open court. Notably section 154 places reliance on section 153 (1) " *154 (1) Where* a *court under section 153 (1) on any of the grounds referred to in that subsection directs that the public or any class thereof shall not be present at any proceedings ...";* and section 153 places reliance on section 63 (5);
*"153(1) In addition to the provisions of section 63 (5) of the Child Justice Act,2008,[if] it appears to any court that it would, in any criminal proceedings ... be held behind closed doors ..."*

[55] Noticeably, when read together, the aforementioned sections do not differentiate whether the child referred to is an accused, a witness, a complainant or a victim. The emphasis, as I gather, from the aforesaid is that the protection is afforded within the realm of criminal proceedings involving a child.

[56] Having come to the conclusion above I find that there is sufficient as I have set out *supra* to read into section 154 (3), if one applies the purposive manner of interpretation, that the child victim is therefore covered in section 154 (3). Critically though I find that the restriction to be found in section 154 (3) in fact relates to

criminal court proceedings. In my view this restriction cannot be used as a blanket clause in other legal insistences, but for criminal proceedings.

[57] The purpose of chapter 22, sections 150 to 178, regulates the conduct of criminal proceedings, hence my emphasis above that the interpretation given pertains to proceedings only of a criminal nature. Thus, I find no course to declare section 154 (3) unconstitutional in the circumstances.

[58] If I am wrong in concluding as I have done above; another view is, having regard to section 28 (2), the best interest of the child, in conjunction with section 154 (3), the protection afforded is such that, in my view, other rights as proposed by the media, such as the right to freedom of expression and open court policy, would be limited, to afford the protection sought from section 154 (3) in order to accent the best interest of the child in terms of section 28 (2) of the Bill of rights. This is so because from my understanding, the purpose found in section 154 (3) is such that it heralds the best interest of the child, whether the child is an accused, complainant, witness or victim in criminal proceedings, it is that purpose that highlights the scope of the right to be found within section 154 (3). Yet again it cannot be said that this section can be considered as being unconstitutional.

[59] Without being repetitive, I reiterate the *dicta* of Cameron J in Centre of Child Law at [29] *supra* with which I concur that 'the best Interest of the child' means that the child's interest are more important than anything else, but not that everything else is unimportant.

[60] My analysis of placing accent upon the best interest of the child in relation to the specific section is in light of the child's need for protection and nurturing both physically and psychologically. As adults, protectors and more so the upper most guardian of children, we are duty bound to do so in terms of the Constitution, which we hold onto so dearly.

<u>The child's anonymity continuing even beyond eighteen years</u>

[61] I now turn to deal with the second issue being the anonymity of the child (accused, victim, complainant and/or witness) until only age eighteen. The applicants firstly argue that one could read into the said section as inferring that it is extended beyond the age of eighteen, and that if this cannot be construed, section 154 (3) is thus unconstitutional. Whilst, the media argues that the applicants seek to overreach in their pursuit to extend the age stipulated in the statute.

[62] The long and short of this argument is that as the courts we do not have the power to change the age as stipulated in the section. That function is ascribed to the legislature. The fact that section 154 (3) provides protection until the age of eighteen as enacted by the legislature can however be declared unconstitutional as it is not just and equitable.

[63] It is evident that the legislature is specific, in its application of the protection afforded, only up to the age of eighteen. The legislature has demonstrated in the very same act, the CPA, when it sought to widen this protection. This is evident in section 153(3) and 153(4). It has also brought this to the fore in the CJA where it extends certain protection to a child above eighteen but below twenty one years of age. I agree with this argument of the media, in addition, this is borne out in the definition of a *'Child'* in the CJA.

***'"Child'*** *means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in the terms of Section 4 (2)"*

Section 4 (2) reads as follows:
*" The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public in terms of section* 97 *(4) (a)(i) (aa), in the case of a person who-*
*(a) is alleged to have committed an offence when he or she was under the age of 18 years; and*
*(b) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b),*
*direct that the matter be dealt with in terms of section 5(2)to (4)."*

[64] The applicants highlight that the court's including the Constitutional Court have time and again extended the protection of anonymity in respect of children even over the age of eighteen. See Johncom Media Investments v M and Others 2009 (4) SA 7 (CC).

[65] The aforesaid is correct, but in my view, this is initiated in cases where it is just and equitable for the Constitutional court to do so, that is protecting the child, as there is nothing available to cure the defect acting against the rights of the child. That being said the section had to then be amended and not read into, as is sought by the applicants. See J v NDPP at para [56] & [57].

[66] The reading into debate advanced by the applicants also is contrary to the applicant's argument and the premise upon which their relief is sought. Their premise as regards anonymity, in my view, is on the notion that the protection for children is not adequate, in the statutes, by way of the common law and by virtue of the Press Code. Thus the extension of the said section is sought.

[67] I am of the view that there cannot be open ended protection in favour of children, even into their adulthood. This in my view would violate the rights of other parties and the other rights of the children themselves when they are adults. For example, as a child, having been involved in a crime, either as an accused, victim, complainant or

witness, as an adult that child might seek to highlight awareness of their experience with others. This would not be possible, whether it was to bring awareness to others or purely to highlight the plight of such experience, as there would be a gag on such publication, if the protection is open ended even into adulthood. This would simply amount to stifling the adult's right of freedom of expression. This in my mind takes away an individual's right as an adult. This situation results in one right now thumping another.

[68] In applying the purposive approach in interpreting what the real purpose is of section 154 of the CPA, from the heading of the section it is gleaned that the regulation of publications in criminal proceedings is intended. In this regulation process specific persons and situations are protected. In giving credence to the language used in section 154 (3) itself, its purpose and object, in my view, was to protect the child and only the child. Not the adults, as is sought by the applicants. This in itself speaks to section 28 (2) fortifying the best interest of the child being paramount. See R (on the application of JC) v Central Criminal Court 2014 EWCA Civ 1777 at [26] & [42]

[69] In conclusion, I take cognisance of the fact that in certain instances the extension would work in favour of some rights, like the right to privacy, whilst working against others, like the right to freedom of expression. In this instance I am not convinced that the extension sought is permissible nor required by our Constitution.

Relief

(1) It is declared that the protections afforded by section 154 (3) of the Criminal Procedure Act 51 of 1977 apply to victims of crime who are under the age of 18 years;
(2) The adult extension sought falls to be dismissed for it is neither permissible nor required by the Constitution;
(3) It is directed that the order made by this Court of 21 April 2017 to protect the identity of the second applicant will remain in force during any confirmation proceedings, applications for leave to appeal and appeals arising from this judgment;
(4) Each party is to pay their own costs in respect of Part B of this application.

## From The Legal Journals

**Okpaluba, C**

"The end of the search for a fifth jurisdictional fact on arrest on reasonable suspicion: A review of contemporary developments"

**2017 SACJ 1**

**Abstract**
*The Constitutional Court has had the last word on the argument that had raged before the high courts in the last decade, but which was rejected by the Supreme Court of Appeal half a decade ago in Minister of Safety and Security v Sekhoto 2011 (5) SA 367 (SCA), to the effect that the Bill of Rights is not a fifth jurisdictional fact to the requirements of s 40(1)(b) of the Criminal Procedure Act 51 of 1977. Rather than being an additional jurisdictional fact, the Constitutional Court has held in MR v Minister of Safety and Security 2016 (2) SACR 540 (CC) (MR), that a police officer faced with the exercise of the discretion to arrest a child must not only balance the conflicting interests, but must take into consideration the constitutional requirements of the best interests of the child and the limitation regarding the detention of a child in s 28(2) and 28(1)(g) of the 1996 Constitution. Failure on the part of the police to bring these constitutional protections afforded the child to bear on the decision to arrest or not to arrest, renders such a decision unlawful and unconstitutional. While the search for a fifth jurisdictional fact may have ended at this juncture, the Constitutional Court judgment in MR marks the beginning of the infusion of s 28(2) and 28(1)(g) of the Bill of Rights into the exercise of the discretion to arrest and detain a child in the circumstances of s 40(1) of the CPA.*

**Watney, M**

"Voluntary intoxication as a criminal defence: Legal principle or public policy?"

**2017 TSAR 547**

**Abstract**

*It may be safely concluded that a broad spectrum of international communities require voluntary intoxicated perpetrators of crime to be held accountable. South Africa is no exception. It is however submitted that the challenges inherent to the Criminal Law Amendment Act are rendering the legislation wholly ineffective for its intended purpose. As a result courts are at risk of applying the principled approach followed in the Chretien case very strictly or even possibly to interfere with the principles of onus or to make covert moral assessments instead of factual assessments in order to satisfy policy considerations and public demand. As a result the defence of intoxication rarely succeeds, also in respect of cases where it should have succeeded. It is recommended that the Criminal Law Amendment Act be repealed and replaced with legislation that will hold the voluntary intoxicated perpetrator accountable in those instances where he is acquitted due to the absence of voluntary conduct or criminal capacity or intent as a result of the application of legal principles. An effective legislative arrangement will work in harmony with the legal principles of the Chretien case and create legal certainty***.***

**Jordaan, L**

“The principle of fair labelling and the definition of the crime of murder”

**2017 TSAR 569**

**Abstract**

*From the perspective of fair labelling, the current structure of South African law relating to the unlawful, intentional killing of another human being is unsatisfactory. To label a person as a murderer merely on the basis of (unlawful) intentional killing, is overbroad since it fails to reflect sufficiently the degree of culpability of the offender. As indicated above, it offends the broader principle of retributive justice, which is as significant in the context of substantive criminal law as it is in the law of sentencing.*

*It is submitted that, as with sexual offences, reform of the common law relating to homicide should also be considered, with particular focus on the grading of the criminal conduct that currently constitutes murder. In accordance with the principle of fair labelling, the crime of "murder" should be reserved for the most heinous of killings. Such an approach may require that the crime be defined also in terms of indicators relating to the reprehensibility of the conduct itself. Inevitably, a definition of this nature will require a normative assessment of the conduct by the courts. Such normative assessment, on the one hand, may undermine legal certainty, but ensures fairness to the individual offender, on the other.*

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

## Contributions from the Law School

### The books: A brief tribute to John Milton[6]

Justice can hardly be done to John Milton's enormous contribution to South African jurisprudence in the course of a brief note. His legal writings run the gamut of publications - books, chapters in books, journal articles and book reviews - in a wide variety of fields including property law, statutory interpretation, the administration of justice, delict, environmental law, human rights, legal education, and criminal law. Besides his substantial legal output, he also published an accomplished historical work, Edges of war: a history of frontier wars 1702-1878 in 1983. Given space constraints, this short tribute will focus on what are surely John Milton's premier contributions to legal literature, his book publications.

In 1971 Milton published his seminal work on statutory offences (South African Criminal Law and Procedure Volume III: Statutory Offences, assisted by Neville Fuller). This work formed part of a new series of the South African Criminal Law and Procedure volumes, which began with the ground-breaking Volume I on General Principles, authored by Exton Burchell and Peter Hunt in 1970, eschewing the practice-centred approach of the previous series of works authored by Gardiner and Lansdown for a more scientific study of the components of liability.

Volume III represents a massive contribution to South African criminal law jurisprudence. Whereas the approach of Gardiner & Lansdown was essentially casuistic, comprising, in addition to the citation of the relevant legislation, a summary of relevant dicta, Milton introduced an entirely new approach. In the course of a wide-ranging and comprehensive treatment of the most significant statutory offences, Milton utilized what may be referred to as an elementological approach (borrowing from the vocabulary of Labuschagne), involving a careful identification of the elements of each offence, and a discussion of each element. The value of this contribution is enormous, bringing clarity and consistency to this area of criminal law,

[6] This short piece, which is an extract from the chapter 'The publications' in the tribute to John Milton entitled *The exemplary scholar* (2007), edited by Hoctor and Schwikkard, seeks to acknowledge his major contribution to South African law. Sadly John Milton passed away in June 2017, in Pietermaritzburg. He retired in 2002, after a brilliant career as a legal academic and scholar at the University of Natal (Pietermaritzburg) for more than three decades.

with concomitant benefits for not only the courts, but also for both the prosecution and accused persons. The publication of a work of the breadth and quality of Volume III incontestably established Milton as one of the leading criminal lawyers in South Africa, and that in his early thirties.

Upon the death of Peter Hunt, Milton assumed responsibility for his magisterial book on common-law crimes (South African Criminal Law and Procedure Volume II: Common-law Crimes), and prepared a second edition, which appeared in 1982. Characteristically self-effacing, Milton pointed out in the preface that his approach was 'to make this edition as good a book as I can while never forgetting that it is Peter Hunt's book and not my own'. He explicitly stated that wherever his views diverged with that of Hunt, he subordinated his own views to those expressed in the first edition. As a result, it may be that Milton never received the credit he deserved for his changes to the original text. Though apart from updating the text such changes were limited in nature, they were not without significance: the definitions of culpable homicide, malicious injury to property and robbery were altered to take account of recent decisions; the discussion of the crime of rape was supplemented; and the discussion of culpable homicide was amended. The following year, 1983, saw the publication of the second edition of Volume I in the South African Criminal Law and Procedure series, where due to the untimely passing of the two original authors, John Milton and Jonathan Burchell were involved in the project. Here too Milton succeeded Hunt, taking responsibility for the introductory chapters originally compiled by Hunt. Milton rearranged the material into a clearer format, foregrounding questions of policy and criminalization, and introducing material on aspects such as the competing due process and crime control models.

In 1988 the second edition of Volume III (South African Criminal Law and Procedure Vol III: Statutory Offences) was published, co-authored with Michael Cowling. There were a number of changes in form and layout from the previous edition, most notably that in order to accommodate the legislative enthusiasm for altering the law the second edition would appear in loose-leaf format. In addition, the work was arranged in a 'modular' form, allowing for easier additions to, and revision of, the text. By virtue of this foresight, the second edition of this volume is still in use twenty years later, although virtually all the chapters have been revised, new chapters have been added, and new authors are now involved in the project. Despite the change in personnel, it cannot be doubted that Volume III remains one of the most significant aspects of Milton's legacy to criminal law jurisprudence. Like its predecessor, this volume is an invaluable source of information on statutory offences, being the only publication that seeks to cover this particular terrain in detail.

In the final, richly productive phase of his academic career, having published the second edition of Statutory Offences in 1988, Milton next, in 1990, produced a revised reprint of the second edition of Common-law Crimes, which essentially updated the text in line with recent developments in the light of recent legislation and case law.

In 1991 an entirely new project was launched, entitled Principles of Criminal Law, co-authored by Milton and Jonathan Burchell. Though intended principally as a

textbook, its topicality and simple yet authoritative exposition of the law made it an attractive volume for practitioners, and even the courts. Although very little of the material was completely new to Milton, given his authorship of the corresponding chapters in the second editions of General Principles, Common-law Crimes, and Statutory Offences, he brought a freshness of perspective to the material. This was achieved in Part One by the introduction of some new material, most notably the discussion on criminal law and apartheid in the chapter on the history of South African criminal law, and the reformulation of aspects such as criminalization. Insofar as Part Three is concerned, all the offences discussed are placed in context, with a section on the 'nature and purpose' of each offence to indicate the utility and functioning of such offence. The companion volume to this work, Cases and Materials on Criminal Law, which consisted of extracts from significant cases and other documents, appeared the following year.

Having explicitly chosen not to tamper with Hunt's text in the second edition of Common-law Crimes, Milton was faced with the same dilemma when the time came to prepare the third edition: to upgrade or to update? Happily he chose the former option this time, and to his great credit succeeded admirably in the formidable challenge he had set himself; to make 'the great book written by Peter Hunt an even better one'. The most significant addition to the text flows from the approach adopted in Principles of Criminal Law, to contextualize each crime in order to assess its rationale, and the extent to which the existence of each of these ancient prohibitions known as common-law crimes is currently justifiable. Milton conducts this assessment in a new section added to the discussion of each crime, entitled 'Definition and Place in South African Criminal Law', which contains, in his words, 'a formal definition of the crime and thereafter a consideration of the social context of the crime and a critical assessment of the purpose which it serves in a society approaching the end of the twentieth century'. Other noteworthy amendments are the expansion of the discussion of the history of the analogous English law crime, in order to assist in the understanding of development of the South African crime, and the discussion of the potential influence of the Constitution on the substantive law of crimes. In addition, the text has been reshaped and updated in the limpid prose so characteristic of Milton's writing. Drawing all these aspects together, the quality and authority of the third edition produced by Milton is manifest.

The period of rapid legal change following the transition to democracy and the introduction of the Bill of Rights necessitated, in 1997, the publication of a second edition of Principles of Criminal Law, along with its accompanying volume of Cases and Materials on Criminal Law. Apart from updating the text with the legislative changes and important cases decided since the first edition, the second edition of Principles of Criminal Law, which maintained the same basic structure as the original, stressed the importance of the introduction of the Constitution by means of such notable additions as a chapter on 'Human Rights and the Criminal Law' (which discusses the changes and potential changes in the criminal law in the wake of the Bill of Rights), an update on the important cases altering the punishment regime, and discussion of the principle of legality in the Constitution. In his discussion of the

specific crimes, Milton took the opportunity to further refine the approach that he had introduced in the first edition, and developed through the third edition of Common-law Crimes, involving an examination of the rationale of the crime in its social context, so as to assess its utility and its ideal purpose-driven ambit.

As indicated at the outset of this overview, a mere outline of book publications cannot hope to do justice to the full extent of Milton's contribution to South African law. It is impossible to quantify the impact of his writings upon the generations of students and practitioners who have benefited from his labour, and have drawn from his wisdom. Nevertheless, if this synopsis of this one aspect of Milton's published work can motivate its readers to once again delve into his writings to experience the richness of his prose, the thrust of his criticism, and even the occasional humorous touch, it will have served its purposes.

Perhaps it is appropriate to conclude by referring to the concluding words John Milton wrote in his last published note in the journal of which he was founding editor-in-chief, the South African Journal of Criminal Justice, where he is assessing the value of the Law Commission proposals on rape, a crime which he had long agitated should be reformed:

'The formulation proposed by the Law Commission probably will not have any obvious effect in diminishing the horrific tide of sexual crimes that is sweeping the country. But it should restore some dignity to the victims of these crimes and enable the criminal justice system more effectively to deal with those who perpetrate them.'

These few closing words are appropriately revealing of two defining concerns that he had eloquently expressed throughout his academic career: respect for human dignity; and the need for the law, and in particular the criminal justice system, to function as it is intended, to best serve all those to whom it belongs.

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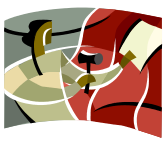

## Matters of Interest to Magistrates

### Unravelling s 103 of the Firearms Control Act

**By Sherika Maharaj**

Section 103 of the Firearms Control Act 60 of 2000 (the Act) deals with the declaration of unfitness of a convicted person to possess a firearm. In practice it is extremely important for legal practitioners practicing criminal law to be aware of these provisions and what the consequences would be for their clients. This provision only comes into play if the accused is convicted of certain criminal offences.

**Section 103(1) of the Act**

This section states that: 'Unless the court determines otherwise' a person becomes unfit to possess a firearm if convicted of an offence, which is listed in that subsection. Therefore, a person is *ex lege* (by operation of the law) automatically declared unfit to possess a firearm. The court – when making a finding – will in practice state that 'no order is made'.

It is very important to know which offences fall within this subsection. The offences listed in subs 1 are as follows –

'(*a*) unlawful possession of a firearm or ammunition;

(*b*) any crime or offence involving the unlawful use or handling of a firearm, whether the firearm was used or handled by that person or by another participant in that offence;

(*c*) any offence regarding the failure to store firearms or ammunition in accordance with the requirements of this Act;

(*d*) an offence involving the negligent handling or loss of a firearm while the firearm was in his or her possession or under his or her direct control;

(*e*) an offence involving the handling of a firearm while under the influence of any substance which has an intoxicating or narcotic effect;

(*f*) any other crime or offence in the commission of which a firearm was used, whether the firearm was used or handled by that person or by another participant in the offence;

(*g*) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine;

(*h*) any other offence under or in terms of this Act in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;

(*i*) any offence involving physical or sexual abuse occurring in a domestic relationship defined in section 1 of the Domestic Violence Act [116 of 1998];

(*j*) any offence involving the abuse of alcohol or drugs;

(*k*) any offence involving dealing in drugs;

(*l*) any offence in terms of the Domestic Violence Act … in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;

(*m*) any offence in terms of the Explosives Act [26 of 1956] in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;

(*n*) any offence involving sabotage, terrorism, public violence, arson, intimidation, rape, kidnapping or child stealing; or
(*o*) any conspiracy, incitement or attempt to commit an offence referred to above.'

**Section 103(2) of the Act**
This section applies to cases where the convicted person does not fall into the categories listed in subs 1, but falls into categories listed in sch 2 of the Act. This subsection gives the court discretion to decide whether to declare a person unfit to possess a firearm.
Schedule 2 refers to the offences of: High treason; sedition; malicious damage to property; entering premises with the intent to commit an offence under either the common law or a statutory provision; culpable homicide; and extortion.

**When is the inquiry done?**
In practice it is usually done after a conviction and the previous convictions of the accused have been proved.

**Procedure for the inquiry**
The accused can present his or her case by testifying and calling witnesses. The state will then have the same opportunity. Both parties will be given the opportunity to address the court and the court can deliver judgment.
From personal experience, however, legal practitioners merely address the court from the Bar without leading evidence in this regard. The court, after hearing the address by both defence and the state, then makes a finding in terms of s 103(1) or (2).

**Three decided cases and the court's perspective**
In *S v Lukwe* 2005 (2) SACR 578 (W), a matter that was sent on automatic review as the accused appeared in person. Borchers J dealt with the court *a quo*'s findings in declaring the accused unfit to possess a firearm in terms of the provisions of s 103(2)(*a*) of the Act. The accused was convicted of theft and received a wholly suspended sentence without the option of a fine. The court *a quo* explained to the undefended accused that he was entitled to state reasons why he should not be declared unfit to possess a firearm. The accused responded that he one day wanted to become a policeman or security officer.
The review court held as follows:
'[T]hat the wholly suspended sentence imposed upon the accused fell within the ambit of s 103(1)(*g*) of the Act, which stated that, unless the court determined otherwise, a person became unfit to possess a firearm if convicted of "any offence involving [violence, sexual abuse or] dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine".'
The court held that the inquiry had to have been conducted in terms of s 103(1) of the Act and the court, therefore, erred by not explaining to the accused that he was entitled to place before the court the fact that he was fit to possess a firearm, which

might satisfy the court. Absent to such an explanation, the accused placed before the court facts, which related to his prospective 'need' to possess a firearm and not to his 'fitness' to possess a firearm. The court held that 'fitness' and 'need' were two different concepts. The matter was referred back to the magistrate for an inquiry to be held in terms of s 103(1) of the Act.

*S v Smith* 2006 (1) SACR 307 (W) dealt with the provisions of a declaration of unfitness to possess a firearm in terms of s 103(2)(*a*) of the Act. This provision requires a court, which convicts a person of a crime mentioned in schedule 2 to the Act, and which was not a crime mentioned in s 103(1), to inquire and determine whether that person was unfit to possess a firearm. The accused pleaded guilty to a charge of theft and after sentence was passed, he was declared unfit to possess a firearm in terms of s 103(2)(*a*). The High Court held *in casu* that there were no facts on record on which the accused could realistically be declared unfit to possess a firearm. It held that the inquiry (an act of seeking information) had not occurred, and it was peremptory that such an inquiry be held. The matter was remitted to the court *a quo*, so that the necessary inquiry could be conducted. In this case the magistrate merely asked the accused to advance reasons why he should or should not be entitled to possess a firearm and the accused replied that he did not need a firearm. The court stated that what is required by the judicial officer is for him to ask relevant questions to establish whether the conduct of the accused and/or circumstances surrounding the commission of the offence merits taking away the accused rights to possess a firearm. This is especially so where the offence committed bears little or no relation to the use of firearms.

In *S v Mkhonza* 2010 (1) SACR 602 (KZP) it was held that when the Legislature vested in the courts the jurisdiction to determine that the statutory unfitness to possess a firearm imposed under s 103(1) of the Act should not apply, it did not intend the courts to adopt a supine approach. These matters are dependent entirely on whether the accused has the knowledge, means and resources to place a proper case before it, that the disqualification should not apply to them, and in all other cases for the disqualification to apply as a matter of rote. Therefore, the court makes it clear that there is an obligation on the trial court to consider – having regard to all relevant factors – whether the case is one where the statutory disqualification from possessing a firearm should remain in place, or whether it should determine otherwise. The court should have regard to any factor that bears on the issue and, if there is reason to believe that all material facts bearing on that decision are not before it, to cause those facts to be discovered and placed before it.

The court offers a legal practitioner guidance on what factors may be considered relevant. Although not comprehensive they are, *inter alia*:

- The accused's age and personal circumstances.
- The nature of any previous convictions or the absence thereof.
- The nature and seriousness of the crime for which he or she has been found guilty and the connection that the crime has with the use of a firearm.
- Whether there is any background that suggests that the accused may make use of his or her licensed firearm for the purpose of committing offences.

- Whether it is in the interest of the community that the accused be declared unfit to possess a firearm because of the fact that he or she poses a potential danger to the community.
- The period during which the accused possessed a licensed firearm and whether there is any indication of previous irresponsibility in regard to that possession and use.

The onus of satisfying the court that it should determine otherwise, rests on the accused. The burden is on a balance of probabilities.

**What happens after the court has made a determination that the person is unfit to possess a firearm in terms of subs 1 or a declaration in terms of subs 2?**

It must notify the Registrar in writing of that conviction, determination or declaration. Such notice must be accompanied by a court order for the immediate search for and seizure of –

- all competency certificates, licences, authorisations and permits issued to the relevant person in terms of this Act; [and]
- all firearms [and ammunition] in his or her possession.

Any item seized must be kept by the South African Police Service or by the National Defence Force until an appeal against conviction or sentence has been finalised or the time frame for an appeal has lapsed.

**Is the decision of the court in terms of s 103 appealable?**

Yes. In the *Mkhonza* matter the High Court dealt with an application for leave to appeal solely against the refusal to declare otherwise in terms of s 103(1) of the Act. The accused was grossly negligent in the loss of his firearm but the Supreme Court of Appeal considered that for ten years he was in responsible possession. The High Court set aside the court *a quo* decision and replaced it with a decision that meant that the accused remained fit to possess a firearm.

**Proof of declaration of unfitness**

Section 105 provides that: 'A certificate purporting to have been signed by the Registrar or by the registrar of a High Court, the clerk of a magistrates' court or the clerk of a military court, stating that the person mentioned in the certificate has become or has been declared unfit to possess a firearm, or has been convicted of a specific offence or crime, is upon production thereof by any person, *prima facie* evidence of the facts stated in that certificate.'

**Duration of the disqualification**

In terms of s 9(4) of the Act, the disqualification contemplated in s 103 ends on the expiry of a period of five years calculated from the date on which the person became or was declared unfit, or the expiry of the period for which the declaration is valid, whichever event occurs first.

**Conclusion**

It is therefore, very important for a practitioner to take full and proper instructions from the client regarding this provision due to consequences that flow therefrom.

**(Sherika Maharaj *LLB (Unisa)* is an attorney at the East London Justice Centre.** This article was first published in *De Rebus* in 2017 (July) *DR* 20.)

**A Last Thought**

In *S v Nxumalo [2014] ZANWHC 11 (2 May 2014)* the court pronounced that "*it is proper to convict a person for theft if, in a self-service shop, the person concealed articles of clothing with the intention to steal and was apprehended before reaching the till point*". The learned author CR Snyman, in his work *Criminal Law, 6th edition,* at page 490 endorsed the aforesaid view by stating that once "*X concealed the article in his clothing, it ceases to be visible to the shop owner and that exactly for this reason the shop owner, from that moment, ceases to exercise control over the article".*

**As per Revelas J in Brown v S (CA&R245/2016) [2017] ZAECGHC 89 (28 July 2017)**