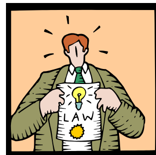
e-MANTSHI

A KZNJETCOM Newsletter

August 2014: Issue 101

Welcome to the hundredth and first 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 South African Law Reform Commission has approved the publication of a discussion paper on the practice of *ukuthwala*, for public comment. The primary aim of Project 138 is to consider the need for law reform in relation to the practice of *ukuthwala,* and to identify alternative policy and legislative responses that might regulate *ukuthwala*. The secondary aim is to review the legislative framework which currently regulates customary marriages and to enhance its alignment with international human rights obligations for the country. Under South African legislation, marriage has to be entered with free and full consent of the parties. The aim of the discussion paper is to elicit comments, which will assist the Commission in preparing the draft Bill and report. In order to get comments from parties directly affected by the practice, the SALRC will conduct workshops in the provinces with specific focus in Eastern Cape, KwaZulu-Natal because of the prevalence of *ukuthwala* in those areas.
Copies of the discussion paper are available on the SALRC's website at http://www.justice.gov.za/salrc/dpapers/dp132-Ukutwala.pdf. Further copies are available free of charge from the South African Law Reform Commission (tel: 012 622 6300).

The closing date for comments on this discussion paper is **31 October 2014**. Comments and submissions are invited from any interested person or organisation, and should be addressed to:
The Secretary
S A Law Reform Commission
Private Bag X688
PRETORIA
0001

Recent Court Cases

1. BAASDEN v MINISTER OF SAFETY AND SECURITY 2014 (2) SACR 163 (GP)

The appearance of the existence of a warrant of arrest on an electronic system does not constitute a warrant of arrest but was merely evidence that a warrant may have been issued .

The plaintiff instituted action against the defendant for damages for unlawful arrest and detention arising out of his arrest at OR Tambo Airport on 14 August 2010 on his return from a period abroad. Evidence was led that the plaintiff's passport triggered a response in a computer of the Movement Control System. This led to his arrest by a police officer who confirmed telephonically with the Garsfontein Police Station that the warrant for the plaintiff's arrest, on a charge of theft, issued in 2002, was still valid. The plaintiff was held for a period of 24 hours and was only released on bail on the intervention of two advocates. Despite the defendant claiming that the arrest was valid on the basis of the existence of a warrant of arrest, no warrant was produced at the trial and the plaintiff testified that he was never shown a copy of the warrant. A witness for the defendant testified that, in the event of a warrant going missing, another warrant had to be applied for.

Held, that the appearance of information regarding the existence of a warrant of arrest on any other document or electronic data or system did not constitute a warrant but merely evidenced that a warrant had been issued. A warrant had to exist in real terms as a document that could be exhibited when necessary, hence the need to reapply for one when the original went missing. (Paragraph [14] at *166b.)*

Held, further, that the defendant, who admitted that he bore the onus of proving the lawfulness of the arrest, led evidence about the existence of a warrant of arrest, but none had been included in the documents before the court. It was not for the court to infer the existence of a warrant of arrest or to assume that it did exist. There had been no explanation for why, not even a copy, of the warrant in question was furnished. It should have been not just a logical but the easiest thing for the defendant to access this critical detail in order to prove its case. Proof on a balance of probabilities by the defendant could not be achieved by drawing inferences in favour of his case. It had to be done on the weight of evidence presented by the defendant.
This the defendant had failed to do and he had accordingly failed to prove the lawfulness of the arrest. Judgment granted in favour of the plaintiff. (Paragraph [16] at *166e-g.)*

2. S v SELEKE 2014 (2) SACR 199 (NCK)

Where one magistrate has tried and convicted an accused, another magistrate is not entitled to proceed with the trial *de novo*.

The accused appeared in a magistrates' court in Kimberley in 1999 charged with a traffic offence. He pleaded guilty to the charge and was questioned by the magistrate in terms of section *112(l)(b)* of the Criminal Procedure Act 51 of 1977 (the CPA). After questioning, the magistrate altered the plea to one of not guilty in terms of section 113 of the CPA as she was not satisfied that he had admitted all the elements of the offence. The matter was subsequently postponed and eventually evidence was led and both parties closed their cases. The magistrate then remanded the case for the accused's mother to testify in mitigation of sentence. The accused failed to appear on the date to which the case was postponed and a warrant for his arrest was authorized. The accused's attendance in court was secured only on 16 May 2013, some 14 years later when he appeared before a different magistrate. The matter was postponed once again and when the matter came before court the magistrate ordered that the case start de novo before her as the original magistrate was not available. It appeared that that magistrate had been transferred to another district but no indication was given of any attempts to bring that magistrate to Kimberley to finalize the matter. The accused then pleaded guilty in terms of section 112 of the CPA on the same charge and he was convicted and sentenced to a fine of R4000 or four months' imprison-ment, and he was given an opportunity to pay the fine in instalments. The matter then came before a judge on automatic review.
Held, that, regard being had to section 275 of the CPA, the second proceedings before the magistrate were irregular. That magistrate was not competent to set

aside the conviction. The proceedings before the second magistrate should have been set aside but it would serve no purpose to set aside the sentence that had been imposed. To refer the matter for resentencing before the original magistrate, or any other magistrate in terms of section 275 of the CPA, would only cause hardship to the accused and no worthwhile purpose would be served. The sentence imposed was an eminently sensible one in that it had kept the accused out of prison. He had already paid almost half of the fine. The court accordingly regarded the proceedings in terms whereof the accused was sentenced by the second magistrate as proceedings in terms of section 275 of the CPA. The conviction and sentence were confirmed. (Paragraphs [15]-[17] at *204h-205b.)*

3. S v NKOSI 2014(2) SACR 212 (GP)

A court cannot impose an excessive fine on an accused so that he could serve a period of the alternative imprisonment.

Khumalo J (Tlaphi J concurring):

[1] This matter came before me on automatic review in terms of s 304 of the Criminal Procedure Act 51 of 1977 (as mended) ("the Act"). The accused was on 9 May 2013 convicted of assault with intent to do grievous bodily harm in the magistrate for the district of Nsikazi and sentenced to a fine of R5 000 (Five Thousand Rand) or 5 months imprisonment of which R3 000 (Three Thousand Rand) or 3 months imprisonment was suspended for a period of 3 years on condition accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension. The effective sentence was a fine of R2 000 (Two Thousand Rand) alternatively 2 months imprisonment. He appeared in person without legal representation.

[2] The matter was first served before my brother Matojane J and he directed a query to the Magistrate on 13 August 2013, enquiring if:

"The accused is a first offender and has shown genuine remorse. He has indicated to the court that he is unemployed and would obviously not be in a position to pay a fine that has been imposed. Shouldn't the court have imposed a wholly suspended sentence? Are we to assume that the family of the accused will be able to raise the necessary amount to pay the fine?"

[3] On 15 October 2013, the Registrar received a response from the learned magistrate stating that:

"The interest of justice, the seriousness of the offence and also the mitigating factors of the accused, one of them being that the accused pleaded guilty to the offence. This proves that the accused was remorseful about his actions. I feel that the sentence is reasonable and proper under the circumstances taking into consideration the interest of justice and the seriousness of the offence. I also feel that the accused should feel that what he did was wrong and also that he must pay for his wrong

doings, by serving part of the sentence.

[4] From the record, it appears the Accused got into a fight in the street with his girlfriend's brother who then ran into the complainant's place, a nearby tavern. The complainant, holding a pick handle, with a group of people came out and started fighting with the accused. His girlfriend's father pulled him away and took him to his house. They followed him there so he ran away to his own house. He took a rake and went back to complainant's place. Everybody ran away, when they saw him except for complainant. So he hit the complainant once or twice on the head with the rake and ran away.

[5] In mitigation he indicated that he is 29 years old, unmarried, unemployed, looking for employment and maintains himself through piece jobs that he sometimes gets from friends. He does not know how much fine he can pay because he is unemployed. It was confirmed that he is a first offender and remorseful for what he did.

[6] It is obvious that the accused could not afford a fine, let alone the fine imposed. The learned magistrate, regardless of accused's inability to pay, imposed a sentence of a fine as his aim as he indicated, was to make sure that the accused serves part of the sentence. So he knowingly imposed the imprisonment sentence with an option of a fine knowing that accused will not afford to pay the fine and in all likelihood end up in prison. The accused was therefore not offered a genuine alternative to imprisonment.

[7] Every person has a right to a just and fair process of the law and also entitled to be released from cruel and unusual punishment. The Constitution in s 12 prohibits cruel, inhuman or degrading punishment and the deprivation of any person of life, liberty, or property without due process of the law. The courts have decided that the purpose of a fine is to keep the offender out of jail and for the fine to accord with the requirements of justice it must be commensurate with the means of the offender; S 1/ Molala 1988 (2) SA 97 (T) at 98D; S v Ncobo 1988 (3) SA 954 (N) at 955F; S v Sekoboane 1997 (2) SACR 32 (T). It is therefore cruel and contrary to the interest of justice to indirectly impose incarceration through excessive fine to an indigent person. More so, the person of the offender (his ability to pay) should play an important determinative role in deciding whether or not to impose a fine.

[8] The learned magistrate overemphasised inappropriately the seriousness of the offence and the interest of justice and unfairly overlooked the personal circumstances of the accused, contrary to the triad principle of sentencing embraced in s v Zinn 1969 (2) SACR at 537 (A) that requires a balanced reflection of the three factors when determining a suitable sentence. His conduct constitutes a disturbing misdirection that warrants interference with the sentence imposed. See M v S (A45/09 [2010] ZAFSHC 12 (4 February 2010).

[9] It is trite that sentencing is within the trial court's jurisdiction to pronounce upon, however it should result in judicious pronouncements. Where the contrary has resulted due to a court's failure to exercise its jurisdiction judicially, it would be appropriate to interfere; See S v Rabie 1975 (4) SA 855 (A) at 857D-G. The court a quo's misplaced emphasise on the retributive theory with punishment being an end in

itself, and the deliberate imposition of an excessive fine (inconsiderate to accused's circumstances) to ensure alternative sentence is served amounted to an injudicious exercise of the discretion and a gross irregularity. Remittal in this instance would be inappropriate.

[10] Under the circumstances, I would make the following order:

[10.1] The sentence imposed in the court a quo is set aside and substituted with the following in its stead,

"Accused is sentenced to 5 months imprisonment wholly suspended for a period of 5 years on condition accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension."

From The Legal Journals

Van Der Bijl, C

"Corporate "assault": bullying and the aegis of criminal law (part 1)"

TSAR 2014 482

Watney, M

"Unnecessary confusion in respect of housebreaking"

TSAR 2014 606

Takombe, M O

"The rise of the machines – *understanding electronic evidence*"

De Rebus 2014

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

Contributions from Peers

ENQUIRY INTO ABUSE OF OLDER PERSONS IN TERMS OF THE OLDER PERSONS ACT, NO. 13 OF 2006

1. Definition of Older Person.

Section 1: “A person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older”

2. What is abuse?

Section 30 (2): “Any conduct or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress or is likely to cause harm or distress to an older person constitutes abuse of an older person.

(3) For the purposes of subsection (2), "abuse" includes physical, sexual, psychological and economic abuse and—

(*a*) "physical abuse" means any act or threat of physical violence towards an older person;

(*b*) "sexual abuse" means any conduct that violates the sexual integrity of an older person;

(*c*) "psychological abuse" means any pattern of degrading or humiliating conduct towards an older person, including—

(i) repeated insults, ridicule or name calling;

(ii) repeated threats to cause emotional pain; and

(iii) repeated invasion of an older person's privacy, liberty, integrity or security;

(*d*) "economic abuse" means—

(i) the deprivation of economic and financial resources to which an older person is entitled under any law;

(ii) the unreasonable deprivation of economic and financial resources which the older person requires out of necessity; or

(iii) the disposal of household effects or other property that belongs to the older person without the older person's consent.”

3. Section 27 Procedure (Family Court).

Procedure to bring alleged offender to court:

- A report of the suspected abuse of an older person (who may also suffer from abuse related injury) is made to a police official.

- The Police official must be satisfied that it is in the best interests of the older person if the alleged offender is removed from the residence of the older person.
- The Police official then issues a written notice to the alleged offender which contains the following:

- a notice to the alleged abuser to leave the residence of the older person and to refrain from entering the residence or having contact with the older person until the court hearing;
- a notice to appear at a magistrate's court on a specified date to advance reasons why s/he should not permanently be prohibited from entering the residence;
- the date must be the first court day after the issuing of the notice;
- the police official must certify that the original written notice was handed to the alleged offender and explained to him/her;
- The Police official forwards the duplicate original of the notice to the clerk of the court;
- Section 55 of the Criminal Procedure Act, Act 51 of 1977 applies to the notice.

When the alleged offender appears before the court:

- The Court must summarily inquire into the circumstances giving rise to the issue of the notice.
- After hearing the circumstances giving rise to the issuing of the notice and the alleged offender, the court may make the following orders:
  a) prohibit the alleged offender from entering the residence or having contact with the older person for a period;
  b) allow the person to enter the residence on conditions which will ensure the best interests of the older person;
  c) make an order which it deems fit.

4. Section 28/29 Procedure (Criminal Court).

The procedure to bring an alleged abuser of an older person before a Court is as follows:

- A health care worker or social worker must make an affidavit to a public prosecutor alleging that a person abuses an older person;
- The public prosecutor must obtain a report on the alleged abuse from a social worker or health care provider;
- The prosecutor must then request the clerk of the court to issue a summons for the alleged abuser to appear before a magistrate.

If a magistrate has reason to believe on the grounds contained in the affidavit that a health care provider or a social worker will be prevented from entering the residence of the older person or has been prevented from doing so s/he may, on application of

the public prosecutor, issue a warrant authorising them to enter to do their investigation.

On the return date:
- The magistrate must enquire into the correctness of the allegations in the summons issued i.t.o. section 28.
  - Rights to legal representation and legal aid must be explained to the alleged abuser.
  - The Court must determine whether the proceedings should be held *in camera* or not.
  - Evidence can be led by the prosecutor and the alleged abuser.
  - The law relating to criminal trials are applicable to the proceedings.
  - The report by the social worker or health care provider must be submitted to the magistrate.
  - The magistrate may direct that the older person be examined by a district surgeon, psychiatrist or clinical psychologist who must furnish a report.
  - The contents of this report is to be handed in and interrogated by the parties.

If a magistrate makes a finding after hearing that the allegations in the summons are correct (on a balance of probabilities) s/he may order:

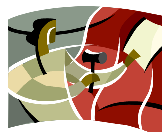
a) The person to accommodate or care for the older person on certain conditions or,

b) Prohibit the person to accommodate or care for the older person for any period not exceeding 10 years.

5. Section 24: Effect of the Act on the Domestic Violence Act, 1998.

The provisions of this Act must not be construed as limiting, amending, repealing or otherwise altering any provision of the Domestic Violence Act, 1998 (Act No. 116 of 1998), or as exempting any person from any duty or obligation imposed by that Act or prohibiting any person from complying with any provision of that Act.

Gerhard van Rooyen
Magistrate/Emlazi



Matters of Interest to Magistrates

Can South Africa's Courts Help the Fight for Social Justice?

The more the courts do to fix poverty and inequality directly, the more likely is it that people will remain poor and unequal.

For some time, an important debate has been raging between legal academics who want our courts to help the fight for social justice. It has been confined to law journals and has hardly registered in the public debate. This is a pity, since it addresses a crucial question: how can the courts help to combat poverty and inequality?

The constitutional court has gained a reputation for contributing to the quest for social justice. Perhaps the best known cases are the Grootboom judgment, in which it ruled that government needed to address the needs of the homeless, and the Treatment Action Campaign (TAC) case, where it instructed the government to provide anti-retroviral medication to prevent mothers transmitting HIV to their infants. But these are not the only social justice rulings the court has handed down – the most frequent issue on which it has intervened is evictions (including striking down a section of the law in response to a case brought by shack-dweller movement Abahlali baseMjondolo) and it has handed down judgements on education, access to water and electricity, and health care. It is common to see the court as a fighter for the poor and the weak.

Reality is more complicated: only once has the court ever told the government to take specific action, which would cost it money – the TAC case where it was told to provide the medication. Instead, it has found two ways to avoid telling the government what its policy should be.

The first is the ‘reasonableness test’. This does not judge government actions on whether they achieve greater social justice, but on whether there is a reasonable link between its stated intentions and what it does. In Grootboom, the court did not rule that everyone was entitled to a decent house: it said that it was unreasonable to exclude a class of people (those in shacks) from government housing programmes. And so it did not tell the government what its housing policy should be: it told it to come up with a more ‘reasonable’ approach.

More recently, the court has changed tack, particularly in eviction cases: its approach, where possible, has been to instruct the authorities to negotiate with the people who are demanding fairer treatment. In Johannesburg’s inner city, where people threatened with eviction because the council was ‘improving’ the area asked the court to help, it told the city to negotiate with residents and report back on progress.

It is this approach, which influential legal academics have rejected. In complex language, they accuse the court of ducking its responsibility to the poor by failing to tell the government exactly what it must do to meet their needs.

Most who hold this view want the court to adopt a ‘minimum core content’ for social and economic rights. This means that courts must ‘give content’ to the right by laying down exactly what it entails: one example was a lower court judgement finding that the 6kl of water government was providing families free of charge was too little and that the right to water meant that people should get 12kl. The court should, in this view, not leave it up to the government to decide what social and economic rights mean, it should tell it.

At first glance, it is no surprise that this is sometimes seen as the more radical option. Telling the government how to address poverty is surely more likely to ensure social justice than merely ordering it to negotiate.

In reality, it is not the approach most likely to serve the needs of the marginalised. The view that courts should decide what government policy should be is not only anti-democratic because it wants unelected judges to dictate to elected politicians. It also removes the most important weapon which poor people have – their ability to act to change the world.

‘Minimum core content’ judgements reflect the court’s opinion, not a legal principle. What legal doctrine says people have a right to 12kl of free water? Why not 9 - or 24? Human rights lawyers may cheer when a court doubles the amount of free water people should receive. But what is to stop another court deciding that the government need only provide 3kl? Once judges, not the political process, decide, there is no guarantee that their rulings will favour the poor. Since few judges have any experience of living in a shack (and the number who do will recede as formal apartheid becomes a memory), it is a strong possibility that the power will be used to restrict what the poor receive.

The people best able to decide what the poor need are, of course, the poor themselves. And if poor people cannot win political gains, which empower them, the court rulings are likely to be of little help. The only constitutional court ruling enforcing the ‘minimum core content’ – the TAC judgment – could only be implemented because activists pressed health authorities to supply the medicine. Left alone, governments can always find ways to delay implementing the right or not to bother at all.

And so courts that want to support the poor are not helping by deciding for them what they need – this deprives people of power by taking the ability to decide or act out of their hands. The court will need to give many rulings on poverty for a long time because there will still be much poverty on which to rule.

Action by the poor may be the only way to ensure lasting change. But it isn't easy for poor people to act: the power balance is stacked against them. That is why the most important contribution to social justice the court can make is to ensure that it is easier for poor people to act. And one way of doing that is to force power holders to negotiate with the poor.

This is why some legal academics have argued that the court's 'retreat' into telling the authorities to negotiate is really a step forward. It imports into the law an important principle – that the first task of a court, which takes social and economic rights seriously, is to empower people to claim rights themselves. And so, in the work of these academics, the debate is what the court needs to do to empower people, not what it should tell the government to do about poverty.

It is this second position which is most likely to offer a way out of poverty and inequality by beginning to change the power balance. The missionary zeal of those who want the court to decide what poor people should get is not only patronising – it is sure to set the fight against poverty back. The court's 'step backwards' turns out to be an important step forwards.

Steven Friedman is the Director of the Centre for the Study of Democracy at Rhodes University and the University of Johannesburg. The above article was published on the South African Civil Society Information Service website on 25 August 2014.

A Last Thought

Security clearances before appointing the National Prosecuting Authority
By Brenda Wardle

On 5 July 2014 President Jacob Zuma announced that, after careful consideration of all matters, he had decided to institute an inquiry into whether or not the National Director of Public Prosecutions (NDPP) Mxolisi Nxasana, was fit to hold office.

The President, in instituting the inquiry, was acting pursuant to the provisions of s 12(6)(*a*)(iv) of the National Prosecuting Authority Act 32 of 1998 (NPA Act). Mr Nxasana,

like his predecessors, was appointed in terms of s 179 of the Constitution, such appointment being for a period of ten years.
This will be the second inquiry, since the initial one was preceded by the Ginwala Commission of Enquiry, which had been set up to investigate whether Adv Vusi Pikoli was fit to hold office. It was the appointment of Adv Menzi Simelane as NDPP, following the Ginwala Commission, which caused the Democratic Alliance to challenge Mr Simelane's appointment in court. The Supreme Court of Appeal (SCA) declared the appointment of Mr Simelane irregular and invalid and subsequently referred the matter to the Constitutional Court for a confirmation of the declaration of invalidity.
The Constitutional Court reached conclusions on a number of issues, among others, was the fact that the 'fit and proper' requirement of an NDPP, with due regard to conscientiousness and integrity, was not a matter to be determined according to the subjective opinion of the President.
The Constitutional Court reiterated the requirement set out in the SCA that the 'fit and proper' requirement was a jurisdictional prerequisite, which ought to be determined objectively. The court further stated that the rationality requirement obliged the court to evaluate the relationship between the means and the end in the appointment process. The court also held that there had to be a nexus between each step taken in the decision-making process and the final decision itself, in order for the rationality requirement to be satisfied. The court dealt at length with the rationality requirement of both administrative actions and (by necessary implication) executive decisions and held that the doctrine of separation of powers (commonly, and very often referred to as the *trias politica* doctrine), found very little, if any applicability to the *Simelane* matter.
In the end, the Constitutional Court agreed with the SCA's finding that the appointment of Mr Simelane was unconstitutional, especially in view of the scathing attack and the recommendations of the Ginwala Commission, which were followed by the recommendations of the Public Service Commission, the latter which were reportedly ignored by the then Justice Minister, Enver Surty.
Section 12(6)(*a*) of the NPA Act proceeds thus:
'The President may provisionally suspend the National Director or Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office –
(i) for misconduct;
(ii) on account of continued ill-health;
(iii) on account of incapacity to carry out his or her duties of office efficiently; or
(iv) *on account thereof that he or she is no longer a fit and proper person to hold the office concerned'* (my emphasis).
Section 179 of the Constitution refers to a single National Prosecuting Authority (NPA) consisting of an NDPP, appointed by the President as a member of the Executive and Directors of Public Prosecutions, and prosecutors as determined by an Act of parliament (in this instance the NPA Act).

The position of Mr Nxasana, on the limited facts available, relates to him not having disclosed that he was once on trial for murder. There are also further allegations of two other assault cases against him. One would have thought, or in fact expected, that following the decision in *Simelane*, the appointment of an NDPP would have been approached with some degree of diligence and care, as the President is bound by the decision of the Constitutional Court.

Allegations of political interference and delayed action notwithstanding, it appears doubtful or perhaps even highly unlikely, especially in the light of reports of alleged recent assault charges, that Mr Nxasana would be successful in arguing that he is indeed such a fit and proper person. From a contractual breach perspective he would appear to be well within his rights to argue that he had a legitimate expectation that his contract as NDPP would have continued for the remainder of the ten-year term.

The other difficulty which arises with Mr Nxasana, is that he is alleged to have tendered information on a disciplinary infringement by the KwaZulu-Natal Law Society, yet failed to see the relevance of and mentioning the murder charge, notwithstanding the fact that it appears highly unlikely that he would be denied clearance by virtue only of a matter he was acquitted on.

There are also other worrying allegations in the media that many other incumbents at the NPA do not or did not have the requisite security clearance. This leads one to ask the question why then there would be differential treatment, given the fact that s 9 of the Constitution affirms the right to equality with equal benefit to the law.

Similar concerns have been raised around police officers who have criminal convictions, as well as some with falsified qualifications still in the employ of the South African Police Service. A few years ago there were rumours about many staff members of the South African National Defence Force who were yet to be vetted. Given the fact that these individuals are privy to classified information on a daily basis, would it be safe to ask whether or not our institutions are compromised?

The real danger here is the unscrupulous persons and even rogue operatives from within and outside our borders who operate below the radar. These people can easily gain employment and obtain whatever information they require in their field of choice, in the full knowledge that security clearance in South Africa sometimes takes as long as six years. There are many who are already aware that, even where required, vetting does not precede appointment and that, in some strange way, people appear to be assumed to qualify for clearance by being appointed provisionally while vetting takes place. This means that by the time the report comes back, the proverbial horse might have long bolted.

In an advertisement for Aspirant Prosecutor Training published earlier this year, it was categorically stated in the advertisement that:

‘Successful candidates will be subjected to a security clearance at least up to a level of Top Secret. Appointment to these posts will be provisional, pending the issuing of security clearance. If you cannot get a security clearance, your appointment will be reconsidered/possibly terminated. Fingerprints will be taken on the day of the interview.’ (www.npa.gov.za/UploadedFiles/Aspirant%20prosecutor%20training%20(recruitment%20ad)%2020June2014.pdf, accessed 7-8-2014.)

At a cursory glance, it would appear that the entry requirements for aspirant prosecutors are indeed unnecessarily onerous and might therefore be *ultra vires* the NPA Act.

The Minimum Information Security Standards Document (MISS) was approved by Cabinet as the national information security policy on 4 December 1996. Under classification, all official matters which are exempted from disclosure or which require the application of security measures, must be classified as either, 'Restricted', 'Confidential', 'Secret' or 'Top Secret'.

The problem I forsee with the advertisement for the aspirant prosecutors programme is that it refers to security clearance 'at least' up to a level of 'Top Secret', which is the highest level attainable. Is there really a need for prosecutors to pass such stringent vetting and if it is indeed justifiable, how many of them currently hold 'Top Secret' clearance? Under the definitions section of the MISS Document, 'Top Secret' is defined as a level of classification given to information that can be used by malicious/opposing/hostile elements to neutralise the objectives and functions of institutions and/or the state. It further states that 'Top Secret' classification refers to instances where the compromise of such information can lead to the discontinuance of diplomatic relations between states and can result in the declaration of war.

The establishment of the NPA by the Constitution was a critical step towards ensuring that the prosecution of crime in South Africa moved away from its oppressive nature of the past towards a discretionary but credible prosecutorial institution with sufficient checks and balances. However, the history that has marred the appointment of NDPPs has been jagged.

In terms of the MISS Document political appointees, for example, Directors General and Ambassadors, etcetera are not vetted unless the President requests that they be vetted or the relevant contract otherwise so provides. However, all other levels from the lowest to Deputy Director General level, inclusive of anyone who should have access to classified information, must be subjected to vetting. It is, after all, the President's prerogative to decide whether or not to confirm the appointment notwithstanding problems with security clearance. All eyes of course will be on the recommendations of whoever will be appointed to chair the commission of inquiry into the fitness of Mr Nxasana to hold office.

Brenda Wardle *LLB LLM (Unisa)* is a legal analyst in Johannesburg.

(The above piece appeared in the *De Rebus* of September 2014)