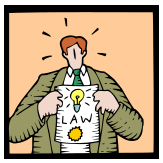
e-MANTSHI

A KZNJETCOM Newsletter

November 2014: Issue 104

Welcome to the hundredth and fourth 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. A *Maintenance Amendment Bill* has been introduced into Parliament on the 5th of November 2014. The aim of the *Maintenance Amendment Bill,* 2014, is to amend the Maintenance Act, 1998 (Act No. 99 of 1998), in order to improve the maintenance system pending the finalisation by the South African Law Reform Commission of the review of the Act. The Bill seeks to—
(a) further regulate the lodging of complaints relating to maintenance and the jurisdiction of maintenance courts;
(b) further regulate the investigation of maintenance complaints;
(c) further regulate the securing of witnesses for purposes of a maintenance enquiry;
(d) further regulate maintenance enquiries in order to make provision for the granting of interim maintenance orders;
(e) further regulate the making of maintenance orders;
(f) further regulate the making of maintenance orders by consent;
(g) further regulate the circumstances in which maintenance orders may be granted by default;
(h) further regulate the granting of cost orders;

(i) regulate the effect a maintenance order made by a maintenance court has on a maintenance order made by another court;
(j) further regulate the transfer of maintenance orders;
(k) regulate the reporting of a maintenance defaulter to any business which has as its object the granting of credit or is involved in the credit rating of persons;
(l) further regulate the attachment of emoluments;
(m) increase the penalties for certain offences;
(n) create certain new offences;
(o) further regulate the conversion of criminal proceedings into maintenance enquiries; and
(p) provide for matters connected therewith.
The bill can be accessed at http://db3sqepoi5n3s.cloudfront.net/files/b_16-2014_maintenance.pdf

2. The Minister of Justice and Correctional Services intends introducing the Criminal Law (Sexual Offences and Related Matters) Amendment Amendment Bill, 2014, in the National Assembly shortly. The Bill seeks to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), so as to ensure that children of certain ages are not held criminally liable for engaging in consensual sexual acts with each other; to give presiding officers a discretion in order to decide in individual cases whether the particulars of children should be included in the National Register for Sex Offenders or not; to provide for a procedure in terms of which certain persons may apply for the removal of their particulars from the National Register for Sex Offenders; and to provide for matters connected therewith.
A copy of the Bill can be found on the website of the Parliamentary Monitoring Group at http://db3sqepoi5n3s.cloudfront.net/files/140930draft.pdf .

Recent Court Cases

1. S V MODISENYANE 2014(2) SACR 453 (GP)

If the mechanical recording of a court record cannot be reconstructed and the accused had been imprisoned the conviction can be set aside.

The accused was sentenced in a magistrates' court to 24 months' imprisonment after having been convicted of assault with intent to do grievous bodily harm. The matter

was to be sent on automatic review but it was discovered that it was only the magistrate's microphone that had been working during the course of the trial and that only the judgment on the merits and sentence could be transcribed and none of the evidence. Faced with this situation, a reviewing judge had directed that the matter be sent back to the magistrates' court and that the judgment on sentence be made available to the accused and the prosecutor to indicate whether they were satisfied with the manner in which the proceedings had been recorded in the judgment. This however proved impossible as the prosecutor had in the interim passed away. The matter was then again sent on review.

Held, that the court was not in a position to judge how the accused's rights were explained to him after the state's case, and the court could not be satisfied that there had been proper assistance to the unrepresented accused. (Paragraph [12] at 455*c*.)

Held, further, that it was not possible to make an order that the clerk of the court reconstruct the record with the best available secondary evidence, as the magistrate had already indicated that she was unable to assist in the reconstruction of the record; the prosecutor had died; and the accused had in all probability already been released on parole or was due to be released soon. To make an order that the clerk of the court reconstruct the record could cause a delay in the release of the accused on parole or, if he had already been released, the order would be an exercise in futility. (Paragraphs [20]–[21] at 456*c*–*d*.)

Held, further, that the proceedings had to be set aside but that it would be unfair to order a retrial after the accused had already served about one year of his sentence. (Paragraph [23] at 456*g*.)

2. S V ESSOP 2014 (2) SACR 495 (KZP)

Precision in drafting charge-sheets, especially in cases of fraud are very important.

The appellant was charged in a regional magistrates' court with 69 counts of fraud involving an amount of R837 000 and was convicted on all counts and sentenced to five years' imprisonment. On appeal he challenged his conviction and contended, inter alia, that the charge-sheet was defective in that it did not make the necessary allegation of prejudice. The allegation against the appellant was that he, as a shipping manager, authorised cheque requisitions to be made by his employer in respect of freight charges, documentation charges and value-added tax payable on imported goods. He had allegedly misrepresented to his employer that it was indebted to Overseas Freight Carriers (OFC) and induced his employer to draw cheques in favour of OFC whereas in fact he was the sole proprietor of OFC and his employer did not owe OFC any money. The state applied on appeal to B amend the charge-sheet to correct this deficiency, even though at the conclusion of the state's case at the trial it had pertinently been brought to its attention in the appellant's

application for discharge that the charge-sheet was defective, but it had proceeded with the trial without applying for an amendment.

Held, that in terms of s 35(3)*(a)* of the Constitution every accused person had the right to a fair trial which included the right to be informed of the charge with sufficient detail to answer it. Any infringement was not to be considered in the abstract but by having regard to the circumstances of each case. (Paragraph [39] at 514*c*.)

Held, further, that in a trial on a charge of fraud a mere inference that the accused's conduct caused prejudice was not sufficient since that inference would violate the accused person's constitutional rights in terms of s 35(3)*(a)*. (Paragraph [42] at 515*e*.)

Held, further, that the charge-sheet in the present matter did not even once suggest that the appellant's conduct caused prejudice to his employer, either actual or potential. Had it done so it is conceivable that he might have advanced evidence to disprove such fact. Despite having made certain admissions, the appellant pertinently placed in issue that the presentation of a cheque requisition was an authorisation and that such presentations were without the knowledge of his employer. He specifically denied that he had made a misrepresentation to his employer and denied that he had acted wrongfully or unlawfully. The risk of being prejudiced was real for the appellant if the element of prejudice was allowed to be inferred, as the appellant no longer had the opportunity to adduce evidence to rebut the fact that his employer did not suffer any prejudice. (Paragraph [43] at 516*c*–*f*.)

Held, further, that the purpose of a properly formulated charge-sheet was to bring awareness and clarity as to what the state intended proving. When the accused had to infer from facts, he had to make a deduction which created uncertainty. The law reports were testament to the fact that courts, at times, draw the wrong inferences from facts proved before them. An accused should not have to figure out what challenges he faced, he should be informed. (Paragraph [44] at 516*f*–*g*.)

Held, further, that to allow an amendment in the circumstances of the case would lead to an injustice as the state had had ample opportunity to cure the defect and had elected not to do so. The proceedings should not be validated by allowing an amendment that would cause real or potential prejudice, as envisaged by s 86(4) of the Criminal Procedure Act 51 of 1977, to the appellant. (Paragraph [55] at 520*f*–*g*.) Appeal allowed.

3. S V NKOSI 2014 (2) SACR 525 (GP)

A conviction on sexual assault (under section 5 Act 32 of 2007) was a competent verdict on a charge of attempted rape

The appellant, a 29-year-old first offender, was convicted in a regional court of attempted rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) and was sentenced to 10 years' imprisonment. The charge-sheet indicated that the charge was in terms of s 3 and used the wording applicable to that section but the charge that was read to the appellant used the wording of s 5, namely 'sexual violation' as opposed to 'sexual penetration' in s 3. The evidence was to the effect that the appellant had come to the home of the complainant at night and had asked for water. Whilst she was outside getting the water, he turned on the television and turned the volume of the radio up loud and when she returned he grabbed her, throttled her and hit her on the mouth. Some of her teeth were broken as a result of the blow. He pushed her outside but she resisted the attack. They fell on the stones outside and he was on top of her with his knee on her stomach. He grabbed her breasts and her left breast was hurt. He tried to pull down her skirt and it tore in the process. She managed to get hold of stones and hit the appellant on his hands and he then ran away.

Held, that every element of the offence of sexual assault as contemplated in s 5 of the Act, read with s 1, was proven by the complainant's evidence. The court a quo had misdirected itself by finding the appellant guilty on the offence of attempted rape but a contravention of s 5 was a competent verdict on a charge under s 3. (Paragraphs [15] at 531*e* and [17] at 531*g*.)

Held, further, that the aggravating circumstances were that the appellant had H shown no remorse for the sexual assault on the complainant and had misled a vulnerable woman to trust him and then assaulted her in front of her 6-year-old child. This kind of violence against vulnerable victims was a common occurrence and had to be stopped by the court imposing a sentence that sent a clear message to society that such offences would not be tolerated. The sentence was accordingly adjusted to one of five years' imprisonment. (Paragraphs [23] at 532*i* and 533*b* and [24] at 533*d*.)

4. S V VAN STADEN 2014(2) SACR 533 (WCC)

The refusal by a judge to have an indictment translated is not appealable.

The appellants and a number of co-accused were served with an indictment charging them with racketeering, money-laundering, fraud and forgery. The indictment was in Afrikaans and at the pre-trial conference they requested it to be translated into English. This was refused. They then applied for leave to appeal against this decision and leave to appeal was granted and the matter came before the present court.

Held, that the mere fact that leave to appeal had been granted did not mean that the decision of the judge in the pre-trial conference was therefore appealable. The jurisdiction issue as to appealability had to be decided by the court as the court of

appeal. (Paragraph [4] at 535*e*.)

Held, further, that in criminal proceedings a presiding officer was not functus officio until after conviction and only became so at the point when the accused was sentenced. (Paragraph [7] at 536*c*.)

Held, further, that, in terms of s 316(1)*(a)* of the Criminal Procedure Act 51 of 1977 read with the provisions of ss 316B, 318 and 319 of the CPA, it was clear that, without a conviction, the CPA did not afford an accused a right of appeal. (Paragraph [9] at 536*f*.)

Held, further, that the refusal of the request to have the indictment translated could be reconsidered by the judge presiding at any subsequent pre-trial conference or the judge who presided at the trial. The ruling did not dispose of any part of the issues to be decided at the trial and merely embodied directions or rulings against which no appeal lay. The decisions were accordingly merely interlocutory rulings and were therefore not subject to an appeal. The appeal was accordingly dismissed. (Paragraphs [11] at 536*j*–537*a*; [15] at 537*g*–*h* and [17] at 538*a*.)

From The Legal Journals

Okpaluba,C

"Delay in delivering judgment or a case of "washing" judicial "dirty linen in public"? Reflections on *Myaka v S*"

2013 Journal for Juridical Science 38(2):106-127

Okpaluba,C

"Problems and challenges of the judicial office: matters arising from *Bula v Minister of Home Affairs*"

(2014) 131 The South African Law Journal

Watney, M

"The clock turned back for the admissibility of extra curial hearsay admissions against a co-accused in criminal cases : *S v Litako* 2014 3 All SA 138 (SCA)"

TSAR 2014 . 4

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

Contributions from the Law School

Battered women and the requirement of proportionality in South African law

Introduction

Various construals inform the question of whether proportionality should form a necessary requirement of private defence. These include both the liberal aspiration to neutrality but also constitutional norms. It is necessary to consider each of these in turn to establish whether proportionality continues to operate in the South African law of private defence particularly with reference to the specific scenarios faced by abused women.

Liberal aspiration to neutrality

Private defence is considered a preeminent liberal right: it exists prior to the formulation of the liberal state and its persistence within the liberal state functions as a condition of the states legitimacy (Sepinwall "Defense of other s and Defenseless 'Others'" (2005) *Yale Journal of Law and Feminism* 328 at 350) Private defence preeminently liberal in another sense too, since the contours of this right and especially the proportionality requirement are defined by liberals cherished aspiration to neutrality. Such an obligation to neutrality requires that the state refrain from using moral values to guide government action. Thus where an individual assumes the state's role, she must abstain from allowing moral assessments of her attacker's worth to stipulate her response. The proportionality requirement encompasses this neural restriction insofar as it requires that a defenders use of force not be greater

than the force she faced (Sepinwall *supra* at 350). In this manner, the doctrine requires that a defender use mathematics rather than morals to determine a suitable response (Sepinwall *supra* at 350).

The requirement that a defenders use of force be proportionate admits of various construals. This requirement encompasses that only equal force may be used in response to a threat. Such formulations are problematic since they suggest that the degree of force is quantifiable, despite the fact that it's generally a normative enquiry as opposed to a mathematical one. The fact that proportionality determinations are informed by moral assessments can be problematic since not only do they run foul of the liberal commitment to neutrality, but because they are not always accurate, and do not always operate uniformly in battered woman cases (Sepinwall *supra* at 358-359). For instance consider the disparate treatment that men and women receive under proportionality requirement. While the differences in size are often taken into account in cases where one man defends himself against another man, these differences are often discounted in cases where it is a woman defending herself against the man (Beecher-Monas "Symposium on Integrating Responses to Domestic Violence: Competing Conceptions of Equality in the Law of Evidence" (2001) *Loyola of Los Angeles Law Review* 81 at 105) One possible problem with the proportionality requirement is that it is indeterminate: even on the facially value-neutral construction of proportionality as equivalency, it is still unclear what elements ought to figure in the proportionality determination (Sepinwall *supra* at 361). This becomes evident where the normative dimension of the proportionality enquiry is made explicit in various jurisdictions requirements of reasonableness. Theorists have challenged the objective standard of reasonableness on grounds that it is based on a male stereotype which is insensitive to the different experiences and perspectives of battered woman, following American approach would prove problematic. For instance attempts by feminists to judge the reasonableness of a woman's act of self-help in a gender-neutral individualized manner have proved problematic. The reasonable person should be placed in the position of the actor, in order to determine in terms of all the circumstances of the actor, including her history as an abused woman, the reasonableness of her belief in using deadly force. Expert testimony establishing this has proved problematic not only because such an enquiry is inconsistent with the theory of justification, which necessarily assumes that any person who performs the same act under the same external circumstances has done the right thing but because by including certain psychological traits of the individual in the circumstances, private defence has moved closer to the realm of excuses (Rosen "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who kill" (1986) *American University Law Review* 11 at 41-42). It is a fact that psychological symptoms associated with battered woman syndrome do seriously impair the cognitive abilities of battered women and whey they do, South African courts correctly deal with the matter in sentencing. While it may be a true proposition that the symptoms associated with the syndrome are a "normal response to the trauma of repeated battering, it does not follow from this fact that persons suffering

from these symptoms are reasonable"(Kazan "Reasonableness, Gender Difference and Self-Defense Law" (1997) *Manitoba Law Journal* 549 at 560-561).

It is important to note that the fact that the abused woman is suffering from a mental illness does not denote that all of her perceptions are unreasonable. The claim that symptoms associated with the syndrome are consistent with a mental disorder does not by itself resolve the issue of whether the woman suffering from the syndrome can form reasonable beliefs about imminent danger and the need for defensive force. A possible reply to this question depends upon whether the abused woman suffering from symptoms consistent with the syndrome can satisfy the condition necessary for the formulation of a reasonable belief. It could be said that reasonable belief is formed and held on the basis of ordinarily reliable violence as acquired by unimpaired perception and evaluated through normally sound reasoning and judgment (Schopp, Sturgis and Sullivan "Battered Woman Syndrome, Expert Testimony, and the Distinction between Justification and Excuse" (1994) *University of Illinois Law Review* 45 at 92). Such a consideration would suggest that a diagnosis of battered woman's syndrome is inconsistent with both ordinary and legal accounts of reasonable belief- symptoms of the syndrome may interfere with a battered woman's ability to exercise judgment and form reasonable belief. If women suffering from the syndrome are incapable of reasoning in a way that informs our ordinary conception of reasonableness, then it follows that attempting to characterize such women as reasonable invokes a different standard of reasonableness for a battered woman (Kazan *supra* at 562). It is submitted that such subjectivized standard of private defence which have developed in American law. As well as the increasing subjectivization of the traditional objective test in South African law, does little to inform the proportionality requirement, but merely leads to the total collapse of such standards since in terms of the particularizing standard every characteristic of the accused must be taken into account to satisfy the voluntary act requirement, it would mean that the abused woman couldn't help doing as she did. This standard is functionally equivalent to a purely subjective standard (Heller "Beyond the Reasonable Man? A Sympathetic but critical assessment of the use of subjective standard of Reasonableness in Self-Defense and Provocation cases" (1998) *American Journal of Criminal Law* 13 at 94-95).

Proportionality thus becomes redundant: the use of force is proportionate if it aligns with an antecedent judgment about how much force she ought to have used. The proportionality requirement does not enlighten us as to whether the defenders use of force was proportionate or equivalent. To the force she faced. It merely demonstrates whether she used an amount of force warranted by her interests (normative enquiry). Such an approach also threatens to undermine the principals which sustain the law of private defence (Kazan *supra* at 563). In *Engelbrecht* 2005 (2) SACR 41 (W) the accused only had to demonstrate that her subjective perception of fear was grounded in facts about her situation. A claim of justifiable private defence did not require that the defender be correct in her perception. However, it is critical that the

actor shows more than just an honest belief in the need of private defence. Thus the claim by syndrome advocates that battered women's psychologically impaired perception should count as reasonable effectively asks the alleged assailant to bear the risk of the woman's perceived fear. This distributes the risks between the two parties unequally, making the battered woman's fear of the measure of her alleged assailant's security and exposing the alleged assailant to unreasonable private defence. Such a result conflicts with the idea that society should ensure that its members are protected against harm that may be inflicted to them as a result of another person's unreasonable perceptions of fear and danger (Kazan *supra* at 563-564).

One alternative to overcome such indeterminacy is to dispense with it altogether. Imminence and necessity should be sufficient to justify private defence. This could have benefits for battered women since the cost of the victims relative harm ought to be borne by the individual who would attack her and not imposed on her by limiting her ability to defend herself. In terms of the liberal theory, the court should treat threats to elements constitutive of oneself with special consideration because of the premium that liberalism places on an individual's autonomy and because of the necessary connection between autonomy and self-authorship (Fletcher "Domination I the Theory of Justification and Excuse" (1996) *University of Pittsburgh Law Review* 553 at 860).

If private defence were based wholly upon the rationale of individual's autonomy which requires an individual to take reasonable measures then retreat must be the means available for warding off an attack wherever possible. As a rule there is no duty to retreat in South African law. Protecting the legal order is not limited to preventing wrongful acts but comprises protecting all of society's legitimate interests including those of the assailant. The theory of forfeiture of rights I no longer accepted, and the assailant does not lose all of his rights in a situation of private defence (Kremnitzer and Ghanayim "Twenty-five years of George P. Fletcher's Rethinking Criminal Law: Proportionality and the Aggressor's Culpability in Private Defense" (2004) *University of Tulsa Law Review* 875 at 882-883).

Private defence requires an unlawful attack, and it places the protection of autonomy of the abused woman and the protection of the legal infringement of the autonomy of the attacker. Necessity does not require an unlawful attack and places the protection of the defenders autonomy against the infringement of the victim's autonomy and injury to the legal order. If the victim has to relinquish a legitimate interest (to save the interest of greater value), then this indicates that the legal order does not provide complete protection for autonomous spheres (Kremnitzer and Ghanayim *supra* at 892). If protecting the legal order meant absolute prevention from infringement of autonomy, then the defence of justifiable necessity would not be recognized as a defence to criminal liability. On the other hand, harming a vital interest for the sake of preventing unlawful harm to a minor interest disrupt the legal order, as it expresses contempt for the vital interest. The rationale of protecting the legal order thus

requires proportionality in private defence (Kremnitzer and Ghanayim *supra*). It would thus appear that private defence is founded upon two rationales: protecting the autonomy, which does not require proportionality, and protecting the legal order, which requires proportionality. It is submitted that in South African law, private defence requires proportionality (Kremnitzer and Ghanayim *supra* 892-893). This approach would be consistent with the universal view of proportionality requirement as founding American law and South African law.

Proportionality and constitutional considerations

The demand for proportionality can also be based on constitutional considerations. The more important a fundamental right, the more comprehensive the protection of that right (*S v Walters* at par [28].) The abused woman's right to defend herself derives from the states duty to protect legitimate interest of individuals cannot be unlimited. Since the abuser is the one who unlawfully endangers the interests of the victim, and the victim is merely warding off the assault, the unlawful attack is a consideration that weights against the assailant. However, a consideration to the assailants detriment does not translate into a total abandonment of proportionality that grants the victim an unlimited right to protect her interests. Private defence thus requires proportionality in the sense that the harm caused must not be disproportional to the harm prevented. When we are considering endangering the abusers life, we are concerned with preventing harm to the life or physical or sexual integrity of the victim. The demand for proportionality thus derives from the reasonableness requirements (Ashworth "*Principles of Criminal Law* 4th ed (2003) 142). Moreover, private defence is intended to preserve the legal order by granting every individual the right to ward off unlawful attacks (Kremnitzer and Ghanayim *supra* (n 1241) 899).

Is there still a requirement of proportionality in South African law?

On the basis of the aforementioned discussion, proportionality should form an integral part of the requirements for private defence. The test can be set out as follows: must the defence be necessary but also the means used by the accused for the purpose of averting the attack must be reasonable in the circumstances (Burchell and Hunt *South African Criminal Law and Procedure General Principles of Criminal Law* Vol I (1970) 277; *S v Van Wyk* 1967 (1) SA 488 (A) at 499). This is in accordance with the autonomy theory. While it should be noted that South African law does not directly require that the defensive act be proportionate to the attack, it is qualified in the following manner: reliance on private defence may fail in cases of extreme disproportionality (Reddi *supra* at 271, discussing *S v Van Wyk* at 498 B). Furthermore, it is to be tested objectively: would an "ordinary, intelligent and prudent person in the accused's situation react to establish if the private defence was reasonable?" (*S v Motleleni* 1976 (1) SA 403 (A) 36.

However, it is this author's submission that unlike the above formulation, not all characteristics of the accused should be taken into account. Only those "characteristics which have the most (or direct) bearing on the accused's situation should be considered It is submitted that Burchell and Hunt are incorrect in their assumption that "no single test is satisfactory and therefore all the factors must be taken into account in deciding whether in the circumstances of the particular case, the means used by the accused were reasonable and hence justified." (Burchell and Hunt *South African Criminal Law And Procedure* 2 ed Vol 1 at 278). The current objective test for private-defence is not totally devoid of subjective considerations and does take an abused woman's situation into account. For the purposes of this enquiry these factors will include the battered victim's actual history of abuse (including physical force exerted by the initial aggressor at the time or any prior displays of force, physical or psychological made by the initial aggressor as well as the prior conduct of the abused woman and the relative size and strength of the parties as well as other contextual factors (Dutton *supra* n 1225) Furthermore, notice should be taken of the potential risks to the abused women in not acting as she did, and whether less drastic options were available to her at the time. I doing this, assessment must be made of the possibility that the initial aggressor would in fact have been stopped by a show of physical force no greater than exerted by him (Reddi "Battered Woman Syndrome: Some reflections on the utility of this 'syndrome' to the South African women who kill their abusers" (2005) *South African Journal of Criminal Justice* 259 at 271. Therefore, if these avenues were available but were not resorted to, the abused woman's conduct would be deemed unlawful and her defence will fail (Schopp, Sturgis and Sullivan *supra* at 71-72. If the abused woman exceeds the bounds of reasonable private defence, and kills her abuser, she may be found guilty of homicide despite the fact that the killing was intentional (Burchell and Hunt supra at 279). But where the excess is immoderate, a verdict of murder will be returned (Burchell and Hunt *supra* at 278).

Conclusion

On the basis of a discussion of the various construals that inform the question of whether proportionality should form a necessary requirement for self-defence, including (i) the liberal aspiration to neutrality, (ii) constitutional norms, it is submitted that proportionality should form an integral part of the requirements for self-defence. The test can be set out as follows: not only must the defence be necessary but also the means used by the accused for the purpose of averting the attack must be reasonable in the circumstances. This is in accordance with the autonomy theory. Therefore, would an "ordinary, intelligent and prudent person in the accused's situation would react to establish if the self-defence claim was justifiable. However, it is submitted that **not all** the characteristics of the accused should be taken into account. Only those "characteristics which have the most (or direct) bearing on the accused's situation" should be considered.

Samantha Goosen
School of Law
University of KwaZulu-Natal
Pietermaritzburg

Matters of Interest to Magistrates

(This cartoon appeared in *The Mercury* newspaper on the 1st of December 2014)

A Last Thought

" [11] There is a fundamental difference between the role and functions of a prosecutor as opposed to those of a magistrate or a judge. The judiciary is held to the highest standards of independence and impartiality because they are the decision-makers in an adversarial judicial system. Prosecutors neither make the final decision on whether to acquit or convict, nor on whether evidence is admissible or not. Their function is to place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime. Their role excludes any notion of winning or losing. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings. "

Porritt & another v The NDPP & others (978/13) [2014] ZASCA 168 (21 October 2014).