E-MANTSHI

A KZNJETCOM Newsletter

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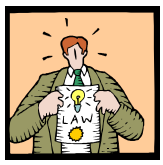
Welcome to the forty first issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and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



New Legislation

1. The *Consumer Protection Act, Act* 68 of 2008 has been published in Government Gazette No. 32186 of 29 April 2009. The Act will come into operation on a date to be determined by the President in the Gazette. The Act will also amend the *National Credit Act.* One of the amendments to that Act is the insertion of section 126A which reads as follows:

" Restrictions on certain practices relating to credit agreements

126A. (1) A person must not promote, offer to supply, supply or induce any person to accept the supply of any service that has as its dominant function -

(a) the breaching of a credit agreement; or

(b) the unauthorised transfer of any right of a credit provider under a credit agreement to a third person.

(2) Subsection (1)(b) does not apply in respect of-

(a) any negotiations, by an attorney on behalf of a consumer, with the credit provider concerned; or

(b) any action carried out by, on behalf of or with the permission of the credit provider concerned.

(3) A person who offers to supply, or supplies, any service for the express or implied purpose of-

(a) improving a consumer's credit record, credit history or credit rating; or

(b) causing a credit bureau to remove credit information from its records concerning that consumer,

may not charge a consumer, or receive any payment from the consumer, for the credit repair service until that service has been fully performed, and must

provide each consumer with a disclosure statement in the prescribed manner and form.
(4) Subsection (3) does not apply in respect of any credit repair service rendered by an attorney, or a registered credit bureau.
(5) A person who offers to supply, or supplies-
(a) any service for the express or implied purpose of investigating fees, charges or interest charged on a credit agreement; or
(b) a computer software programme originating within the Republic, which is programmed to calculate fees, charges, or interest charged on a credit agreement, for valuable consideration,
must provide each consumer of the service or software, as the case may be, with a disclosure statement in the prescribed manner and form.
(6) This section does not apply to a debt counsellor in respect of any action authorised in terms of this Act."

2. A *Prevention and Combating of Trafficking in Persons Bill* has been published in Government Gazette No. 32222 of 8 May 2009. The purpose of the Bill is to give effect to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, 2000; to combat the trafficking of persons within or across the borders of the Republic; to prevent trafficking in persons; to provide for an offence of trafficking in persons and other offences associated with trafficking in persons; to provide for measures to protect and assist victims of trafficking in persons; and to provide for matters connected therewith.

3. The *Reform of Customary Law of Succession and Regulation of Related Matters Act*, Act 11 of 2009 has been published in Government Gazette No. 32147 of 21 April 2009.The Act will only come into operation on a date to be fixed by the President in the Gazette. The purpose of the act is to modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law; and to amend certain laws in this regard; and to provide for matters connected therewith.
Section 2 of the Act
modifies the Customary Law of succession as follows

"2.(1) The estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2)
(2) In the application of the Intestate Succession Act –
(a) where the person referred to in subsection (1) is survived by a spouse, as well as a descendant, such spouse must inherit a child's portion of the intestate estate or so much of the estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of justice by notice in the Gazette, whichever is the greater;

(b) a woman, other than the spouse of the deceased, with whom he he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased;

(c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the descendant of the deceased. "

4. The *National Road Traffic Regulations* has been amended by a notice in the Government Gazette No. 32258 of 27 May 2009. Some of the amendments relate to the Registration and Management of a testing station, the length of projections from a vehicle and the prohibition of advertising on public roads. There is also now a prohibition on speed detectors, jammers and similar devices in regulation 292A and a prohibition on the use of television receivers and visual display units in motor vehicles in regulation 308B. This does however not apply to "a driver's navigational or intelligent driving aid". The duties relating to motor cycles or motor tricycles have also been amended by a new regulation 309.

5. A *Prevention of and Treatment for Substance Abuse Act*, Act 70 of 2008 has been published in Government Gazette No. 32150 dated 21 April 2009. The Act will only come into operation on a date to be determined by the President by proclamation in the Gazette. The Act will repeal the Prevention and Treatment of Drug Dependency Act, 1992 (Act 20 of 1992) when it is put into operation. The Act still makes provision in sections 33 and 35 for the enquiry to be held to determine if an "involuntary service user" should be sent to a treatment centre. An interesting aspect of the Act is that a magistrate is defined as including an additional magistrate and assistant magistrate.

6. The *State Liability Bill* 2009 has been published in Government Gazette No. 32289 dated 1 June 2009. The Bill seeks to rectify the unconstitutionality of the *State Liability Act, Act* 20 of 1957.

The Bill seeks to replace the *State Liability Act*, 1957, in order to make provisions for –

(a) procedural requirements for the institution of legal proceedings against the state;
(b) measures for enforcing the execution of final court orders against the state, including payments to be made by the state to comply with final court orders; and
(c) measures to enable the state to deal efficiently and effectively with all legal proceedings in which the state is involved.

7. The Minister of Transport has published a draft National Road Traffic Amendment Bill 2009 for public comments in Government Gazette No. 32312

dated 11 June 2009. Interested persons can submit written comments on the Bill before 13 July 2009 to masombuA@dot.gov.za . The purpose of the Bill is as follows:

To amend the National Road Traffic Act, 1996, so as to insert certain definitions and to amend others. To create for the registration and licensing of motor vehicles, manufacturers, builders, bodybuilders, importers and manufacturers of number plates. To empower the MEC to register the applicant as a manufacturer, body builder, builder, importer and manufacturer of number plates. To empower only a provincial Department of Transport or municipality to operate a driving license testing centre. To empower the CEO of RTMC to approve and register a driving license testing centre, To empower the Minister to prescribe training procedures and disqualifications of persons appointed by an authority. To impose a duty on drivers to be in physical possession of drivers licences or proof thereof when driving a motor vehicle. To empower the Driving license testing centres to issue a drivers license. To prohibit the issuance of a driving license or learners license of a person who has been convicted of using an aid material in order to pass the driving license test. To set the 1 May 2003 as the date upon which the provision of Section 18(6)(a) shall come into effect. To regulate the registration and grading of applicants as a driving school instructor and to direct how the application and registration of applicants shall be processed. To formalize the driving school industry and prohibit unregistered and ungraded driving schools and instructors from operating as such. To empower the MEC to approve applications for registration of the driving schools. To empower the MEC to prescribe regulations as to how to handle applications as a driving school instructor, To empower the MEC to suspend, cancel or deregister a driving school when suspected of contradicting this act. To empower the MEC to declare as void, documents purporting to be driving licenses issued in contravention of the Act and to empower the Inspectorate of the driving license testing centres to destroy such documents. To empower the Minister to appoint a person, authority or a body as an inspectorate of driving licence testing centre, To prohibit the use and presentation of someone's license under false pretenses. To provide for the suspension of driving licenses and the circumstances under which a license should be suspended where a person exceeds the speed limit in excess of 30 KM per hour over an applicable speed limit in an urban area, and a speed in excess of 40 KM per hour over the applicable speed limit outside an urban area or incidental matters connected therewith.

Recent Court Cases

1. S v MBHENSE 2009(1) SACR 640 (NPD)

An accused person should not only be apprised of the right to legal representation but should also be encouraged to exercise it.

The appellant, along with three co-accused, was convicted in a regional court of robbery with aggravating circumstances, and sentenced to 15 years' imprisonment in terms of s 51(2)(*a*)(i) of the Criminal Law Amendment Act 105 of 1997. He appealed against both conviction and sentence. The court found that there was no reason to interfere with the trial court's evaluation of the facts, but that two serious irregularities had occurred.

Held, that not only had the charge-sheet failed to mention that the State would be relying on the provisions of the Act, but the appellant had also not been alerted thereto at any point before conviction. It was only during sentence proceedings that the magistrate had purportedly warned the appellant of these provisions. What was required was that an accused be given sufficient notice of the State's intention to rely on the minimum sentence provisions to enable him to conduct his defence properly. *In casu* the warning had come too late to be of any use to the appellant and, accordingly, the magistrate had erred in invoking these provisions when sentencing the appellant. (At 644*e*-645*f*.)

Held, further, that the seriousness of the charge, and the appellant's youth, were such that substantial injustice was likely to result from the fact that he had been unrepresented at trial. While the record showed that he had been apprised of his right to representation, it was necessary to determine whether this had been adequately or properly communicated to him. Whenever such communication had been made to the appellant the proceedings had not been mechanically recorded, and it was necessary to rely on the magistrates' manuscript notes. None of these were couched with sufficient particularity to enable the court to make a determination of the adequacy of the explanations given to the appellant; consequently, the court could not be satisfied that the appellant's right to legal representation had been properly explained to him. In view of the seriousness of the possible consequences, the appellant should not only have been apprised of his right to legal representation, but also encouraged to exercise it. (At 645*f*-647*g*.)

Held, that the cumulative effect of these irregularities was such that the appellant had not been afforded a fair trial, and the proceedings were vitiated in their entirety. (At 648*a*.)

Appeal upheld. Conviction and sentence set aside.

2. S v VAN AARDT 2009(1) SACR 648 (SCA)

Subjective foresight in the case of *dolus eventualis* may be proved by inference.

[35] The following are the proved facts. When the appellant accosted the deceased

for the first time the deceased seemed to have been in good health. He was certainly unscathed. There is direct testimony from eyewitnesses that the appellant in full view of these witnesses slapped the deceased, pummelled him with clenched fists, attempted to strangle him, assaulted him with a stick, and kicked and trampled him with booted feet. The deceased was constantly in the presence of the appellant from the time that he first grabbed him until he ordered him from the farm. The deceased was not assaulted by anyone else but the appellant until he collapsed, mortally wounded, at the electrical pylons. There can be no doubt that the appellant inflicted all the injuries described hereinbefore and consequently caused the deceased's death.

[36] What remains is to determine whether the appellant is guilty of culpable homicide or murder with the direct form of intent or *dolus eventualis*. The appellant's counsel urged us to find that the appellant was guilty of assault, alternatively culpable homicide, if he was the one who caused the deceased's death. The thrust of his argument is that no evidence was produced to show which specific blow was fatal or what instrument was used to that end. This argument has no merit.

[37] The principle to determine what form of intent to murder an accused should be convicted of or whether only culpable homicide has been proved was expressed in these terms by Holmes JA in S v Sigwahla 1967 (4) SA 566 (A) at 570B-F:

1. The expression 'intention to kill' does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*.
2. The fact that objectively the accused ought to reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. These two different concepts never coincide.
3. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.

[39] I am in respectful agreement with the following statement by the Namibian Supreme Court in S v *Van Wyk* 1992 (1) SACR 147 (NmS) at 161*e-h*:

"The State is, from the nature of things, seldom able to offer direct evidence of the accused's state of mind at the time of assaulting the deceased and must therefore rely on inferences to be drawn from the circumstances of the assault (including its nature and duration), the nature of any weapons used and the nature, position and extent of the injuries inflicted. These must in turn be weighed up against any other

circumstances (such as the consumption of drugs or alcohol) which may indicate that the accused did not foresee the consequences of his actions. This does not involve any piecemeal assessment or process of reasoning. All the relevant facts which bear on the accused's state of mind and intention must be cumulatively assessed and a conclusion reached as to whether an inference beyond reasonable doubt can be drawn from these facts that the accused actually considered it a reasonable possibility that the deceased could die from the assault but, reckless as to such fatal possibility, embarked on or persisted with the assault.

On the medical evidence the injuries which caused death were the blows to the head. *It is not possible to link up particular fist blows or kicks with particular injuries, nor is the trier of fact required to do so. Once it is established that accused No 1 killed the deceased, and it has rightly been so found by the Court a quo, the trier of fact can look at the assault as a whole in order to determine what accused No 1's intention was*.

In a case such as the present the trier of fact is not required to enquire into the subjective state of mind of the accused as he inflected each injury. Neither principle nor common sense requires this."

3. MANONG AND ASSOCIATES (PTY) LTD v CITY MANAGER, CITY OF CAPE TOWN, AND OTHERS 2009(1) SA 644 (EqC).

A Juristic person can be unfairly discriminated against on the ground of race.

The complainant lodged a complaint against the respondents in terms of s 7(c) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, alleging that they had unfairly discriminated against it on the ground of race in not allocating it a particular civil-engineering contract (the KBD project) or its civil engineering contracts in Khayelitsha in general. The complainant contended that the respondents' policy or practice of awarding contracts to civil engineering consultants, while legitimate on the face of it, was aimed at maintaining exclusive control by a particular race group. The respondents argued, inter alia, that a juristic person could not be the victim of unfair discrimination.
Held, that a juristic person had the right to a reputation, good name and fame, the right to privacy and the right to identity. It was therefore axiomatic that a juristic person, like a natural person, could also enjoy the right to equality. Those rights were distinct from and independent of the right to dignity. (Paragraph [31] at 655B-C.)
Held, further, that the racial profile of the company could be determined by the racial profile of its controlling shareholders. As a matter of principle and public policy, a juristic person, like that of a natural person, could be discriminated against on the grounds of race. (Paragraph [34] at 656 D-E)
Held, further, that in the present matter the complainant was a professional company of civil and structural engineers and was wholly owned by professional black

shareholders. It was accordingly a disadvantaged juristic person. It was entitled to enjoy the equality rights and benefits as contained in s 9 of the Constitution. It could be a victim of discrimination based on race. (Paragraph [35] at 656F.)
(Editor's note: See *Manong v Eastern Cape Department of Roads and Transport & others* (369/08) [2009] ZASCA 50 (25 May 2009).)

From The Legal Journals

Singh, A

'*S v Zuma* 2006 2 SACR 191 (W). Admissibility of evidence'

2008 *De Jure* 658.

Otto, JM

'Verkoop van regte teen 'n diskonto en die toepas-likheid van die National Credit Act'

2009 *TSAR* 198.

Kok, A

'The potential effectiveness of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000'

2008 *Journal for Juridical Science* 42.

De Jong, M

'The newly introduced public mediation service in the Maintenance Court environment: Does it make a difference in the short term?'

2009 THRHR 274

Skelton, A

'Severing the Umbilical cord: A subtle jurisprudential shift regarding children and their primary caregivers'. (The article is a discussion of the case of S v M 2007(2) SACR 539 (CC).)

Constitutional Court review (2008) 1

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

Contributions from the Law School

Recent developments regarding the prohibition of the use of tobacco products

Cigarette smoking is addictive. It causes cancer. In the 1997 report of the World Health Organization, *Tobacco or Health: A Global Status Report*, it was estimated that tobacco products cause around three million deaths per year. Moreover, cigarette smoking has been identified as the major cause of preventable mortality in developed countries. With regard to one particular section of the population, men aged 35-69 years, more than one-third of all deaths are caused by smoking. Treating all these people is extremely costly. Hence the advent of legislative attempts to address the serious public health problem caused by smoking.

The regulation of smoking commenced in South Africa with the Tobacco Products Control Act 83 of 1993, which sought to regulate smoking in public places and to regulate the packaging, sale and advertising of tobacco products (long title of the Act). Since commencing on 1 February 1994 this Act has been significantly amended by the Tobacco Products Control Amendment Act 12 of 1999 (hereinafter 'the 1999 Act'), with two further sets of amendments, contained in the Tobacco Products Control Amendment Act 23 of 2007 (hereinafter 'the 2007 Act') and the Tobacco Products Control Amendment Act 63 of 2008 (hereinafter 'the 2008 Act'), having been assented to but having not yet commenced. This flurry of legislative activity indubitably seeks to give effect to an ever-stricter policy regarding the use of tobacco products. Some of the most significant changes and pending changes to the legislative framework relating to tobacco products are detailed below.

The 1999 Act inserted a Preamble into the Tobacco Products Act, detailing the public health context of the legislation: essentially that tobacco use is harmful to both smokers and non-smokers, warranting restrictive legislation, *inter alia* regulating the use, promotion and advertising of tobacco products. In terms of s 7 of the 2007 Act, the Preamble is replaced by a new version. The additions to and omissions from the original are revealing of the ever-stricter legislative approach. Thus it is notable that the Preamble specifically refers also to the harm caused to 'other users of tobacco products' (broadening the focus of the legislative restriction from smoking), and states that tobacco use has 'caused widespread addiction in society'. Ominously for tobacco users, the statement in the previous preamble that tobacco use 'is a widely accepted practice among adults, which makes it inappropriate to ban completely' is deleted in the new manifestation. Reference is also made in the new Preamble to 'especially' deterring the youth from using tobacco products and to protecting non-smokers from exposure to tobacco smoke. South Africa's international obligations regarding regulation of use of tobacco products are also made more explicit, with reference being made in the revised preamble to the World Health Organisation's Framework Convention on Tobacco Control.

Section 2 of the Tobacco Products Act deals with control over smoking of tobacco products. Whereas the original formulation of this section provided for the Minister to issue regulations regulating the smoking of tobacco products, the revision brought about by the 1999 Act recasts the section, providing a simple prohibition of the smoking of tobacco products in a public place, and allowing for the Minister to declare specified public places to be permissible smoking areas (or to delegate such power to a local authority). The definition of a 'public place' was extended by the 1999 Act to include an enclosed area open to the public, as well as a 'work-place' (which is separately defined, in terms of the definition added by the 1999 Act, as any area in which employees perform the duties of their employment, as well as any common area frequented by such employees, but not including any private dwelling (unless such private dwelling is used for commercial child care or schooling) or an area designated as a smoking area in terms of the prescribed requirements). The 2007 Act substitutes this formulation in its entirety, prohibiting the smoking of any tobacco product not only in a public place (the definition of which is expanded to include a 'partially enclosed area'), but also (i) in any area within a prescribed distance from a window of, ventilation inlet of, doorway to or entrance into a public place; (ii) any motor vehicle when a child under the age of 12 years is present in that vehicle; or (iii) any outdoor place prescribed by the Minister. Whilst the Minister is still empowered to permit smoking in prescribed portions of public places, the expansion of the ambit of the restriction on smoking is manifestly clear. Furthermore, the 2007 formulation of s 2 creates a series of duties: on the owner/person in control of an area where smoking is prohibited (or an employer in respect of a workplace) to ensure that no person smokes, that the prescribed signs indicating the prohibition are displayed and that no person under 18 years is present in any area where smoking is permitted. Employers bear the further duty of ensuring that employees who wish to object to exposure to tobacco smoke, or who do not wish to be so exposed, are accommodated in their choices. Moreover, ss 80-89 of the National Health Act of 2003 (which provides for health officers to be used to enforce health regulations, and that resistance to such officers can result in criminal prosecution) are rendered applicable to this section.

Section 3 of the Tobacco Products Control Act initially dealt with 'required information in respect of advertisements and packages of tobacco products', but was substituted by the 1999 Act, and now deals with 'advertising, sponsorship, promotion and required information in respect of packages of tobacco products'. The section currently prohibits advertisement of tobacco products or the use of tobacco trade marks or logos used on tobacco products for the purposes of advertising any organization or event, and places strictures on the commercial activities of manufacturers, importers, distributors or retailers of tobacco products. In addition, there are prohibitions on the sale or import for subsequent sale of any prescribed tobacco product, except under certain conditions. The Minister may however by regulations provide for exemptions for unintended consequences or the phasing out of existing sponsorship or contractual obligations. The 2008 Act revises s 3, framing the prohibitions in the existing formulation more broadly (assisted by new definitions relating to 'advertisement', 'importer' and 'promotion'), and includes new prohibitions relating to packaging or labelling (where packages or labels contribute to a false

impression as to the characteristics of a tobacco product, or where these do not conform to prescribed requirements), and new prohibitions in respect of the display of prescribed notices.

The 1999 Act introduced s 3A ('maximum yields of tar and other constituents in a tobacco product'), allowing the Minister to prescribe maximum permissible levels of tar, nicotine and other constituents which tobacco products may contain, and the maximum yield of any substance that may be obtained therefrom. The 2007 Act replaces the existing s3A with an entirely new provision dealing with 'standards for manufacturing and export of tobacco products'. The 2008 Act further extends this section to include importation of tobacco products.

Section 4 of the Tobacco Products Act provides for the prohibition of sale of tobacco products to any person under the age of 16 years, whether for his personal use or not. The 2008 Act replaces this section with a prohibition on the sale of tobacco products under the age of 18 years. In addition the revised section requires the owner or person in charge of any business to ensure that no person under the age of 18 years sells or offers for sale any tobacco product on the business premises. Further prohibitions relate to the sale of tobacco products in any health establishment or any place where a person under the age of 18 years receives education or training; the sale, supply or distribution of any tobacco product through the postal services, the internet or any other electronic media (excluding certain forms of commercial communication); and the sale or supply of any confectionary or toy resembling any tobacco product. It bears noting that the Director-General may authorize monitoring of compliance subject to the rules relating to entrapment (in s252A of the Criminal Procedure Act).

The 1999 Act inserted s 4A into the Tobacco Products Act, which prohibits free distribution and reward relating to the supply or purchase of tobacco products. The ambit of this provision is broadened by the 2008 Act, which expands the number of persons prohibited from free distribution of tobacco products to 'any person or agent acting on behalf of a manufacturer, distributor, importer or retailer', and the prohibition relating to the provision of gifts etc to rewarding attendance, and extending the events covered by the prohibition to 'any sporting, cultural, social or recreational event' and the basis of the reward to the 'the confirmation of use of a tobacco product'.

Section 5 of the Tobacco Products Control Act deals with restrictions on the use of vending-machines. The revision of this section brought about by the 1999 Act renders the proscription on the sale of tobacco products from vending machines accessible to persons under the age of 16 years more direct, along with making overt the duty imposed on the person responsible for or having control of the premises in which any vending machine is kept to ensure that no person under the age of 16 years makes use of such machine. The 2008 Act substitutes a new provision for s5, which reflects the extension of the prohibition on access to tobacco products to those under the age of 18 years, as well as imposing new prohibitions relating to the situation and use of vending machines, as well as requiring the display of prescribed notices, along with the duty to prevent underage access to the

machines.

Both the 2007 Act and the 2008 Act amend s 6 of the Tobacco Products Control Act to set out more specifically the matters in respect of which the Minister may make regulations. The 2007 Act inserts a new s6A into the Tobacco Products Control Act, allowing the Minister to exempt any tobacco product from a provision of the Act on the basis of public interest.

Lastly, the recent revisions of the Tobacco Products Control Act have significantly affected the content of the section regulating offences and penalties, s 7. The various offences created by the amended legislation have been categorized, and the amount of the fines expanded such that the lowest maximum fine is now R500, and on the other end of the scale the highest maximum fine is R1 000 000.

Space constraints dictate that the aforegoing be no more than a very brief survey of the legislation governing use of tobacco. Nevertheless, it is evident that the legislative response to this matter has gathered momentum, resulting in increasingly detailed regulation and more stringent penalties. Given the recent proliferation of legislative amendment and expansion, could there be even more of a clampdown to come?

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

Matters of Interest to Magistrates

iss today

1 June 2009: SA policing - Moving from defensive to offensive policing in South Africa

President Jacob Zuma, when announcing his new cabinet on 10 May 2009, surprised many people when he changed the name of the Department of Safety and Security to the Department of Police. While it is obvious that there is a deeper significance to this name change, it remains unclear precisely what that is.

In a *Sowetan* article of 25 May 2009, newly appointed Deputy Minister of Police Fikile Mbalula, when asked about the reasons for the name change, said that 'the police's posture must be such that they are not going to tolerate any criminal activity'. This implies that, in his view, 'safety and security' sent 'too soft' a message to criminals. In the same report, Mbalula is also quoted as saying that government will be 'taking the war to the criminals' and that the police service will show 'no mercy' to criminals.

Depicting the fight against crime as a 'war' is nothing new. In June 1999, the late Minister Steve Tshwete, already made it clear that it was the criminals that declared war against the South African public. It would appear that strong talk had become increasingly necessary to counter perceptions and accusations that the introduction of community policing and changing the police from a 'force' to a 'service' within a newly established human rights environment, had created a policing approach that was 'soft' on crime.

However, the sharp rise in especially organised and violent crime since 1994/95 suggests that more than strong talk and military-styled crime fighting police operations is necessary, if the 'war' against crime is to be won. It is equally important to identify and address possible external factors that may inhibit government's effectiveness in this regard. These include, among others, the apparent exploitation by criminals of the perceived space created by our new-found democracy and the concomitant limiting of space for policing. This situation is aggravated by

perceptions, also amongst police officials, that community policing and service oriented policing, has relegated law enforcement to a secondary function and subsequently weakened the authority of the police. It is likely that this perceived weakness can partly explain the increasing willingness of criminals to attack and aggressively confront the police.

What we currently see in South Africa is reminiscent of what the United Kingdom experienced during the eighties and nineties. It is ironic that in 1994, when the South African Police Service, with the assistance of British and other police advisors, began with the implementation of community policing, some police practitioners in Britain already described the concept as a failure. During a police and law enforcement conference held in London from 18 - 20 October 1994, the (then) Deputy Chief Constable of Kent County Constabulary, D. O'Connor, argued that community policing 'has been dented by being over-sold and by difficulties of implementation'. He attempted to find clarity regarding the police's role amidst the confusion and uncertainty which resulted from the widespread disorder and escalating crime in the United Kingdom during the early 1980's, by distinguishing between - what he termed the strategic offensive and strategic defensive postures to policing.

After the publication of the *Scarman Report* - following the 1981 riots in Brixton and elsewhere in England - and especially in view of its emphasis on the primacy of public order over law enforcement, the British police moved from the strategic offensive (law enforcement) to the strategic defensive (community policing). However, by the end of the 1980's, and contrary to expectations, community policing 'tactics' had failed to make any impact on crime and indeed crime still dominated the public agenda. The only real benefit derived from the community policing effort, seems to have been the improved legitimacy of the police.

According to O'Connor, the early 1990's in Britain saw a move back to the strategic offensive in an attempt to 'regain' the initiative. This shift was further supported by the resonance of the 'crime fighting' aspects of policing in the 1993 *White Paper on Police Reform* and the report by the *Audit Commission: Helping with Inquiries*, published soon afterwards. In essence, this meant a strategic shift in focus away from the 'community orientated approach' and community policing, in favour of what is termed 'crime focused policing'.

All indications are that South Africa now finds itself in a similar situation where critical strategic shifts need to be made. According to recent statements in the media as well as from the ANC's 2009 election manifesto, the new South African

Government wants to intensify the fight (or 'war') against crime. This will include a reorganization of the criminal justice system and a 'tougher' approach to crime and criminals. In addition, and this is implicit in the name change from Safety and Security to Police, there appears to be a subtle shift in favour of 'crime focused policing' and law enforcement.

At this point it seems appropriate to consider what O'Connor identified as a need to find some sort of balance between the two strategic extremes in terms of policing. Realizing the new ascendancy of the crime focused approach in the early nineties in Britain he proposed that the apparent contradictions between the need to make an impact on crime and the need to retain a sound relationship with communities, should be reconciled. Perhaps we should heed this call.

Johan Burger, senior researcher in the Crime, Justice and Politics Programme, Pretoria Office, Institute for Security Studies

A Last Thought

"We have set out on a quest for true humanity, and somewhere on the distant horizon we can see the glittering prize. Let us march forth with courage and determination, drawing strength from our common plight... In time we shall be in a position to bestow upon South Africa the greatest gift possible - a more human face."

- Steven Biko.

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