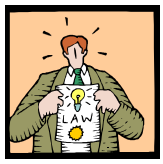
e-MANTSHI

A KZNJETCOM Newsletter

February 2010: Issue 49

Welcome to the forty ninth 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 all the 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 key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions 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. In Government Gazette no 32912 dated 28 January 2010 a draft notice no 65 of 2010 was published inviting public comments. It reads as follows:

INVITATION FOR PUBLIC COMMENTS ON DRAFT NOTICE IN TERMS OF SECTION 97(3) OF THE CHILD JUSTICE ACT, 2008

Interested persons are invited to submit written comments on the draft notice on or before **19 February 2010** to:

> The Director-General: Justice and Constitutional Development
> Private Bag X81, Pretoria, 0001; or Momentum Centre, 329 Pretorius Street (c/o Pretorius and Prinsloo Streets), Pretoria, marked for the attention of Ms T Skhosana and may be emailed or faxed to her at thskhosana@justice.gov.za, fax 0866487875.

DRAFT NOTICE

SECTION 97(3) OF THE CHILD JUSTICE ACT, 2008: DETERMINATION OF PERSONS OR CATEGORY OR CLASS OF PERSONS COMPETENT TO CONDUCT THE EVALUATION OF CRIMINAL CAPACITY OF A CHILD AND THE ALLOWANCES AND REMUNERATION

I, Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Development, acting under section 97(3) of the Child Justice Act, 2008 (Act No. 75 of 2008) ("the Act"), hereby-

(a) determine that the categories or classes of persons mentioned in paragraph1 of the Schedule are competent to conduct the evaluation of the criminal capacity of a child; and

(b) in consultation with the Minister of Finance, determine the allowances and remuneration set out in paragraph 2 of the Schedule in respect of the persons mentioned in paragraph (a) above.

J T Radebe
Minister of Justice and Constitutional Development

SCHEDULE

1. Determination of categories or classes of persons to conduct evaluation of criminal capacity

(a) The following categories or classes of persons are competent to conduct the evaluation of the criminal capacity of a child referred to in section 11 (3) of the Act:

(I) A medical practitioner who is registered as such under the Health Professions Act, 1974 (Act No. 56 of 1974), and against whose name the speciality psychiatrist is also registered;

(ii) a psychologist who is registered as a clinical psychologist under the Health Professions Act, 1974;

(iii) a criminologist who is in possession of at least a masters degree in criminology and who has four years' practical experience as a criminologist.

2. Determination of allowance and remuneration

(a) Any person referred to in paragraph 1 of this Schedule, who has been ordered by the court in terms of section 11(3) of the Act to evaluate the criminal capacity of a child and who is in the full-time employment of the State, shall not be entitled to any additional professional allowance or remuneration in connection with the evaluation.

(b A psychiatrist who has been ordered by the court in terms of section 11(3) of the Act to evaluate the criminal capacity of a child and who is not in the full or part-time employment of the State, shall be remunerated for the evaluation and preparation of the report at the rate of R550.00 per hour or part thereof.

(c) A psychologist or criminologist who has been ordered by the court in terms of section 11(3) of the Act to evaluate the criminal capacity of a child and

who is not in the full or part-time employment of the State, shall be remunerated for the evaluation and preparation of the report at the rate of R420.00 per hour or part thereof.

2. A *Protection from Harassment Bill*, 2009 has been published in Government Gazette no 32922 dated 1 February 2010.The notice reads as follows:

PUBLICATION OF EXPLANATORY SUMMARY OF THE PROTECTION FROM HARASSMENT BILL, 2010

The Minister for Justice and Constitutional Development intends introducing the Protection from Harassment Bill, 2010, in the National Assembly shortly. The explanatory summary of the Bill is hereby published in accordance with Rule 241 (c) of the Rules of the National Assembly.

The Bill is intended to make provision for the issuing of protection orders against harassment; to amend the Criminal Procedure Act, 1955, so as to provide for an increase of the amount which may be fixed by a magistrate in respect of a recognizance as security to keep the peace; to effect consequential amendments to the Criminal Procedure Act, 1977; to amend the Domestic Violence Act, 1998, so as to provide a mechanism to subpoena witnesses to attend proceedings in terms of that Act; to effect consequential amendments to the Firearms Control Act, 2000; 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://www.pmg.org.za

3. In Government Gazette no 32906 dated 29 January 2010 a *Prevention and Combating of Trafficking in Persons Bill* was published. The notice reads as follows:

PUBLICATION OF EXPLANATORY SUMMARY OF THE PROTECTION FROM HARASSMENT BILL, 2010

The Minister for Justice and Constitutional Development intends introducing the Protection from Harassment Bill, 2010, in the National Assembly shortly. The explanatory summary of the Bill is hereby published in accordance with Rule 241 (c) of the Rules of the National Assembly.

The Bill is intended to make provision for the issuing of protection orders against harassment; to amend the Criminal Procedure Act, 1955, so as to provide for an increase of the amount which may be fixed by a magistrate in respect of a recognizance as security to keep the peace; to effect consequential amendments to the Criminal Procedure Act, 1977; to amend the Domestic Violence Act, 1998, so as to provide a mechanism to subpoena witnesses to attend proceedings in terms of that Act; to effect consequential amendments to the Firearms Control Act, 2000; 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://www.pmg.org.za

4. On 5 February 2010 notices were published in Government Gazette 32916 in which the Minister of Home Affairs extended the periods under section *4(3) (a) and 4(3) (b)* of the *Recognition of Customary Marriages Act*, 1998 (Act No. 120 of 1998), for the registration of customary marriages referred to in the aforesaid sections up to 31 December 2010.

5. A Judicial *Matters Amendment Bill*, 2010 has been published for general comment**.**
1. The purpose of the *Judicial Matters Amendment Bill*, 2010 ("the Bill") is to effect amendments to various Acts, most of which are administered by the Department and which do not require individual amendment Acts. Amendments to Acts not administered by the Department have been prepared in consultation with the relevant Departments.
2. Any person wishing to comment on the Bill is invited to submit written comments to the Minister of Justice and Constitutional Development on or before 19 March 2010. Comments should be directed for the attention of S J Robbertse and -
(a) if sent by E-mail, be sent to srobbertse@justice.gov.za
(b) if faxed, be faxed to 086 648 3326

3. Some of the objects of the bill are as follows

3.1 Clauses 1 and 2 amend the Criminal Procedure Act, 1977 (Act 51 of 1977), by inserting two new sections providing, firstly, for the obtaining of handwriting specimens from accused persons by the police and, secondly, for the admissibility of evidence regarding such handwriting specimens. In the case of *S v Fraser and others* (2005) 2 All SA 209 (N), an application was brought in terms of section 37(1)*(c)*, read with section 37(3) of the Criminal Procedure Act, 1977, for an order that the accused must comply with a request to provide the police with specimens of his handwriting. Section 37 deals with the ascertainment of bodily features of a person. The Court held that handwriting is the creation of a learned ability and could therefore not be classified as a “bodily” feature or characteristic falling within the scope of section 37. The effect of the judgment is that there is currently no provision in the Criminal Procedure Act, 1977, that specifically allows for the obtaining of handwriting specimens by the police or by order of the court. Research has shown that several other jurisdictions have legislation providing for the collection of handwriting specimens by the police or by order of the court. These clauses emanate from a request by the South African Police Service.

6. A *Magistrates’ Courts Amendment Bill* has been published for general comment:

1. The objects of the *Magistrates' Courts Amendment Bill*, 2010 (the Bill), is to amend the *Magistrates' Courts Act, 1944* (Act No. 32 of 1944), so as to regulate anew the qualifications required for the appointment of a person as a magistrate, additional magistrate and magistrate of a regional division; to further regulate the inclusion of magistrates of regional divisions on the list of magistrates who may adjudicate on civil disputes; and to authorise the Minister to further regulate the conditions relating to the authorisation of a person to serve process of court or other documents on behalf of a public body; and to provide for matters connected therewith. These proposed amendments are discussed in paragraph 3, hereunder.
2. Any person wishing to comment on the Bill is invited to submit written comments to the Minister of Justice and Constitutional Development on or before 19 March 2010.
Comments should be directed for the attention of S J Robbertse and -
(a) if sent by E-mail, be sent to srobbertse@justice.gov.za
(b) if faxed, be faxed to 086 648 3326

3. Some of the Proposed Amendments are.

3.1 Clauses 1 and 2 amend sections 9(1) (*b*) and 10 of the *Magistrates' Courts Act*, 1944 (Act 32 of 1944), by abolishing the requirement that only a magistrate in possession of a LLB degree may be appointed as a regional court magistrate, and by providing that any appropriately qualified woman or man who is a fit and proper person may be appointed as a magistrate, an additional magistrate or a magistrate of a regional division. These amendments will bring the requirements for appointment as a magistrate, an additional magistrate or a magistrate of a regional division, in line with the requirements for appointment as a judge as provided for in section 174(1) of the Constitution.
3.2 The *Jurisdiction of Regional Courts Amendment Act*, 2008, amended section 12 of the Magistrates' Courts Act, 1944, to provide that only a regional court magistrate whose name appears on the list referred to in section 12(7) may adjudicate on civil disputes as provided for in section 29(1) of the Magistrates' Courts Act, 1944 (various types of civil matters) and section 29(1B) (divorce matters). Section 12(8) provides that the Magistrates Commission may only enter the name of a regional court magistrate on the list if one or more places have been appointed in terms of section 2(1)(iA) within the regional division in
respect of which the magistrate in question had been appointed for the adjudication of civil disputes and if –
(a) the head of the SA Judicial Education Institute has issued a certificate that the magistrate has successfully completed an appropriate training course in the adjudication of civil disputes;
(b) the Magistrates Commission is satisfied that, before the establishment of the Institute, the magistrate has successfully completed an appropriate training course in the adjudication of civil disputes; or
(c) the Magistrates Commission is satisfied the magistrate, on account of previous experience –
(i) as a magistrate presiding over the adjudication of civil disputes; or
(ii) as a legal practitioner with at least five years' experience in the administration of justice, has suitable knowledge of, and experience in, civil litigation matters to

preside over the adjudication of civil disputes contemplated in section 29(1) and 29(1B).Due to the conjunctive nature of the current provision, only the names of regional court magistrates who are experienced in both those areas of adjudication may be entered on the said list, thereby preventing a regional court magistrate who is suitably experienced in one or the other field of adjudication from being assigned to a regional court exercising jurisdiction only in that field. In order to broaden the pool of magistrates who can adjudicate on these matters, clause 3 amends section 12 of the *Magistrates' Courts Act*, 1944, in order to provide that the names of magistrates who are experienced in the adjudication of either civil law matters or divorce matters may be entered on the list, kept by the Magistrates Commission, of regional court magistrates who may adjudicate on civil disputes.

3.3 Section 15(2) *(a)* of the *Magistrates' Courts Act,* 1944, provides that whenever a public body has the right to prosecute privately in respect of an offence under any law, or whenever a fine imposed on conviction in respect of an offence is to be paid into the revenue of a public body, the process of the court and all other documents in the case must be served by a person authorised in writing by such public body. Section 15(2)*(b)* provides that, where it is expedient that such process shall be served in the area of jurisdiction of another public body, a person authorised by such other public body may serve the process of the court and other documents in the case. Clause 4 amends section 15 of the *Magistrates' Courts Act*, 1944, by the insertion of a new subsection (2A), which gives a discretion to the Minister of Justice and Constitutional Development to determine the conditions of the authorisation of a person to serve process of court or other documents on behalf of a public body or to determine any other matter relating to that authorisation. The purpose of the amendment is to prevent certain irregularities that are taking place regarding the service of those documents, for instance persons are not always authorised in writing, procedures for service are not adhered to and persons are serving documents on behalf of the authorised person.

4. An electronic copy of the Bill is obtainable at: http://www.pmg.org.za

Recent Court Cases

1. S v Chowe 2010(1) SACR 141 GNP

The minimum sentencing dispensation (if applicable) must be explained to an accused irrespective of whether he is legally represented or not.

The fact that the accused is legally represented at his criminal trial does not take away the need to inform the accused that the minimum sentencing dispensation

provided for in s 51 of the Criminal Law Amendment Act 105 of 1997 will be relied upon for sentencing. Section 35(3) (a) of the Constitution of the Republic of South Africa, 1996, requires that the accused must be informed of the charge with sufficient detail to answer to it. This entails, inter alia, the applicability of the minimum sentencing provisions of Act 105 of 1997. A perfunctory approach by the lower courts with regard to the minimum sentence regime is not to be countenanced. The record must speak for itself, that, right at the pleading stage, irrespective of whether such an accused person is legally represented or not, he has been informed of the applicability of the minimum sentence provisions of the Act. By so insisting we shall be ensuring that the right to a fair trial is ingrained in our criminal jurisprudence, ensuring that at all times the accused persons make informed decisions in the preparation and the conducting of their defences. (Paragraphs [22]—[23] at 149d—g)

2. S v Mapipa 2010 (1) SACR 151 ECG

Where an accused was convicted of Culpable Homicide and Driving under the influence of liquor a sentence of imprisonment can be appropriate.

The appellant had been convicted in a regional magistrate's court on charges of culpable homicide and driving under the influence of liquor in contravention of s 65(1)(a) of the National Road Traffic Act 93 of 1996 and sentenced to four years' imprisonment. In an appeal against the sentence to a High Court, it appeared that the appellant was, at the time of the collision with the deceased who was riding a motorcycle, in a 'highly inebriated state', he having before then been drinking at a pub. The appellant, driving a sedan motorcar, overtook the deceased on the left and suddenly and without any indication turned to the right in front of the motorcycle's line of travel. The sudden, unexpected and dangerous manoeuvre on the part of the driver of the sedan caused the motorcycle to crash into the right side of the sedan. After the collision the appellant had attempted to avoid responsibility by saying that his wife had been the diver of the sedan and he had persisted with this defence at his trial.

Held, after a review of comparable decided cases, that the appellant had cut across the motorcyclist's line of travel without any regard for the latter's safety. His conduct was deliberate and dangerous in the extreme. An aggravating feature was his drunkenness, his unconscionable conduct in seeking to apportion the blame for the collision onto his wife, his persistence in maintaining a false defence and his utter lack of remorse. (Paragraph [15] at 159c—e)

Held, accordingly, that there was no proper basis for interfering with the sentence imposed and the appeal had therefore to be dismissed. (Paragraph [16] at 159e)

3. S v Gora and another 2010 (1) SACR 159 WCC

The reconstruction of a lost criminal record is part of the fair trial process.

Where the record of a criminal trial has been lost and has to be reconstructed, the reconstruction process is part and parcel of the fair trial process and includes the following elements: the accused must be informed of the missing portion of the record; of the need to have the missing portion of the record reconstructed; of his right to participate in the reconstruction process; his right to legal representation in such a reconstruction process; and the right to have the reconstruction process interpreted for him should he require the services of an interpreter. The reconstruction process must give effect to the accused's right to a public trial before an ordinary court, his right to be present when being tried, as well as his right to challenge and adduce evidence. Once it becomes apparent that the record of the trial is lost, the presiding officer should direct the clerk of the court to inform all the interested parties, being the accused or his legal representative and the prosecutor, of the fact of the missing record; arrange a date for the parties to reassemble, in an open court, in order to jointly undertake the proposed reconstruction. When the reconstruction is about to commence, the magistrate is to place it on record that the parties have reassembled for purposes of the proposed reconstruction; the parties are to express their views, on record, that each aspect of reconstruction accords with their recollection of the evidence tendered at trial; and ultimately to have such reconstruction transcribed in the normal way. Once this process has been followed, none of the parties can cry foul that his rights have been trampled on. (Paragraphs [16]—[18] at 163a—f)

Where in an appeal against sentence there is no record, original or reconstructed, in respect of the sentencing proceedings and it is uncertain whether the accused or his legal counsel could have assisted the trial court in constructing a record of the sentencing proceedings, it is incumbent upon the appeal court to ensure that the values set out in the Constitution be upheld. The most important function the court on appeal is required to perform is to dispense justice. Justice is dispensed through the mechanism of a fair trial. Inasmuch as an appeal is part of the fair trial and cannot be properly adjudicated without an original record or at least a properly reconstructed record, it stands to reason that as far as their appeal against sentence is concerned the appellants cannot be given a fair trial. In these circumstances, justice would be best served if the sentences were to be set aside and the matter referred back to the trial court to sentence the appellants afresh. (Paragraphs [49] and [51]—[52] at 169h and 170a—c)

4. S v Coetzee 2010 (1) SACR 176 SCA

Indecent assault is a serious offence and in certain cases a custodial sentence is necessary even in the case of a first offender.

The appellant, a pastor in a church, had been convicted in a regional court on four counts of indecent assault committed against three females between the ages of 16 and 21 years and two counts of *crimen injuria*. He had been sentenced to an effective term of four years' imprisonment. An appeal to a High Court against the

conviction and sentence was dismissed. In a further appeal against the sentence only, the court dismissed the contentions that the regional magistrate had misdirected himself, in that he had associated the offences in this case with rape, as he had relied on authorities which dealt with rape, and, in the result, exercised his discretion as if he were sentencing a rapist. The second contention was that the magistrate had placed undue emphasis on the element of deterrence as an object of punishment, with the result that he imposed a sentence that was excessive in the circumstances of this case.

Held, further, however, that it would still be competent for the court to interfere if it were satisfied that the trial court had not exercised its discretion reasonably and imposed a sentence which was inappropriate in the circumstances. (Paragraph [17] at 181a—b)

Held, further, after considering comparative cases, that, given the personal circumstances of the appellant, namely that he was a first offender, coupled with the fact that the complainants were no longer young and immature and did not appear to have suffered permanent psychological trauma, it seemed that a custodial sentence of four years was excessively severe. The Court was accordingly at large to interfere with the sentence on the basis that it was disturbingly inappropriate. (Paragraph [26] at 1 83b)

Held, further, that the seriousness of the offences committed by the appellant could not be underestimated. He did not show remorse. He abused his position as pastor and the position of trust placed in him by the complainants and their parents. All the complainants were vulnerable and in need of counselling. (Paragraph [27] at 1 83c—d)

Held, accordingly, having regard to all the relevant factors, that a custodial sentence should be imposed, but the length of the appellant's incarceration should be left in the hands of the Commissioner of Prisons. To achieve this goal, all the counts would be taken as one for purposes of sentence and a sentence of four years' imprisonment in terms of s 276(1)(j) of the Criminal Procedure Act 51 of 1977 substituted. (Paragraph [27] at 183d—e). Appeal upheld.

From The Legal Journals

Bekker, J C & van der Merwe, A
"Indigenous legal systems and sentencing: *S v Maluleke* 2008 1 SACR 49 (T)"

De Jure 2009 239

De Villiers , W P
"DPP, Western Cape v Killian 2008 5 BCLR 496 (SCA)
Compulsion to give self-incriminating evidence – derivative use of inquiry proceedings at subsequent criminal trial".

De Jure 2009 316

Meintjes-Van der Walt, L
"Eyewitness evidence and eyewitness science: Whether the twain shall meet?"

SACJ 2009 305

Mellon, A
"Sentencing white-collar offenders: Beyond a one dimensional approach"

SACJ 2009 327

Ramosa, R
"The limits of judicial law making in the development of common law crimes: Revisiting the Mayisa decisions"

SACJ 2009 353

Bennun, M E
"S v Zuma: The implications for prosecutors' decisions"

SACJ 2009 371

Masiloane, D T & Marais, C W
"Community involvement in the criminal justice system"

SACJ 2009 391

Basdeo, V
"A constitutional perspective of police powers of search and seizure: The legal dilemma of warrantless searches and seizures"

SACJ 2009 403

De Vos, W
"Judicial discretion to exclude evidence in terms of s 35(5) of the Constitution: S v Hena 2006 2 SACR 33 (SE)"

SACJ 2009 433

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

Contributions from the Law School

Does the accused have the right to view the contents of the docket in preparation for the trial?

In the old South Africa, there was a blanket privilege attaching to the prosecution docket. The accused had no right to view the evidence against him before the trial. This changed with the decision in the well known cases of S v *Shabalala* 1995 (2) SACR 761 (CC). This case established that in order for the accused to have a fair trial, he was entitled, in certain circumstances, to view witness statements contained within the docket. The court was careful not to extend the ratio of its decision beyond witness statements, although broader obiter statements were made. It held that the jurisprudence regarding the appropriate extent of disclosure by the prosecution to the accused should develop on a case by case basis.

USA

In the United States of America, the right to disclosure from the prosecutor has evolved in a piecemeal fashion. The Supreme Court has not recognized the right of access to the state's evidence as a constitutional right. However, in the case of Brady v Maryland 373 US 83 (1963), it held that prosecutors have an obligation to disclose material, favourable evidence to the accused. There is no national or federal legislation on point. Although individual states have adopted legislation dealing with the prosecution's obligation to disclose, there is no uniformity in approach. Some states have expanded the Brady requirement in varying degrees while some have chosen not to legislate on the issue. Some states have developed rules of ethics requiring various levels of disclosure by the prosecution. Again, there is no uniformity in approach, and the American Bar Association Rules do not expand the Brady requirements.

The challenge in developing the law on this point is to balance the right of the accused to a fair trial, with the need to limit the opportunity for an accused to pick over the state's evidence at his leisure so that he can explain it away and construct an appropriate defence in court.

What has prompted many USA states to expand the obligation to disclose has been the number of cases concerning wrongful convictions which have been shown to have resulted from the prosecution withholding evidence from the accused - the DNA exoneration cases. Some states, like North Carolina, for example, have enacted legislation requiring the prosecutor to allow the accused full and unlimited access to all the evidence in the possession of both the state and the law enforcement agencies. This was to avoid the situation where evidence has not been

given to the accused because the law enforcement agency had not handed any of the favourable evidence to the prosecutor. Some states have even required that the prosecutor to devote reasonable time to finding exculpatory evidence in view of the asymmetric resources of the state and the role of the prosecutor as justice-seeker. (See, for example, Kyles v Whitley 514 US 419 (1995); Strickler v Greene 527 US 263 (1999)).

SA

The issue of so-called 'discovery' in criminal cases came before the High Court in the case of S v Rowland and another 2009 (2) SACR 450 (W). The case was a highly complex commercial fraud case, and the State's documents ran to some 80 000 pages. The court had previously ordered the prosecution to make available documentation in the case to the accused, but the accused realized that not all had been divulged. They then approached the High Court seeking an order that the State be compelled to make full disclosure, and to provide copies of the documents to them against tender of reasonable costs. The State opposed the application on two main grounds. The first was that the approach to the High Court was premature, as it should have been left to the trial court to deal with the discovery problems. The High Court rejected this argument – holding that this approach would jeopardize the accused's right to a speedy and fair trial. The second basis for the opposition to the accused's application was that its duty to disclose should be limited to relevant evidence in its possession. The High Court held that 'the question of relevance is not a consideration at this stage [of the proceedings], and the state cannot prescribe what is relevant and what is not without even knowing what the defence is' (*Rowland* case *supra* at para 14).

The High Court defined the 'docket', in its narrow sense, as a brown folder comprising three parts – section A: witness statements; section B: documentary evidence; section C: the investigation diary. The court held that the State was not entitled to circumvent its discovery obligations by limiting the accused's access to evidence by choosing to either include it or not in the docket. The court also rejected the argument that the prosecution was a separate entity to that of the State. This closed the door on the argument that if the 'State' only handed over a limited docket, the 'prosecution' would only be in possession of that information. Judge Labuschagne refused to allow 'the state [to] redefine itself and differentiate between the state and the 'prosecution'…to shrink itself into a smaller envelope of identity, namely that of the prosecution as opposed to the state…" (*Rowland* case *supra* at para 18).

The effect of the *Rowland* case appears thus to allow the accused a general right of access to the full investigative materials – whether exculpatory, mitigating or incriminating. However, it seems inconsistent with the principles endorsed in the *Shabalala* case (supra) to hold that the prosecution is always obliged to provide all the documentation in its possession. It likewise defies a commonsense approach to achieving justice in the courtroom. In the *Shabalala* case (*supra*) the court held that the prosecutor is required to exercise a discretion when considering whether to hand over witness statements contained in the docket, and that there are circumstances where the prosecutor would be justified in not doing so. Most obviously this would be

where the prosecutor has reasonable grounds to fear the intimidation of identified witnesses or destruction of evidence. It is submitted that the same considerations should apply in relation to documents other than witness statements in the police docket. Ultimately, however, as in the *Shabalala* case (*supra*), the accused would have the right to challenge an adverse decision by the prosecutor in court. The court is likely to resolve this type of dispute by balancing the potential for harm (and whether it can be mitigated) against the accuseds' right to a fair trial.

In the *Rowland case* (*supra*) this aspect was not decided because the prosecution had not specifically refused the accused's request for documentation. She simply asserted that to sift through the voluminous request would be a 'mammoth task' and made meaningless responses to some of the accuseds' requests (*Rowland* case, *supra* at para 22). The court did not therefore have to consider the situation where the prosecution had considered the request but had decided against providing the information.

The Criminal Procedure Act 51 of 1977 does not make provision for criminal discovery, but the court held that it should be amended in this regard. The court held that pending the amendment the following general procedure should be observed: The accused should address a simple letter asking for a copy of the docket to the prosecuting authority, and a copy should then be provided at the accused's expense. If the accused feels it to be necessary, he could, in the same letter (or a subsequent one), also ask the State to provide all relevant information in its possession and to indicate which, if any, of the documents are being withheld and why. The State must then give a sensible and meaningful response to the request. If the access is denied to the accused – the accused has the right to argue that his right to a fair trial is being compromised, and ultimately a court will decide on the matter.

Nicci Whitear-Nel
UKZN, PMB campus

Matters of Interest to Magistrates

Temporary non-pathological criminal incapacity.

In the recent case of *Director of Public Prosecutions, Transvaal v Venter* 2009 (1) SACR 165 (SCA) the issue of non-pathological criminal incapacity again reared its head. This is an area of law which has been dealt with in numerous cases with

varying outcomes for the accused. It would be well to revisit and refresh the memory on the principles relating to this particular defence.

Persons are responsible for their criminal conduct only if the prosecution proves, beyond reasonable doubt, that at the time the conduct was perpetrated they possessed criminal capacity or, in other words, the psychological capacities for insight and for self-control (*Burchell and Hunt, South African Criminal Law and Procedure Vol 1,* 1997, p153). The test for determining whether an accused had criminal capacity is: did the accused have the capacity to appreciate the wrongfulness of his or her conduct and the capacity to act in accordance with this appreciation?

The courts have drawn a broad distinction between pathological incapacity and non-pathological incapacity resulting from youth, intoxication, provocation or emotional stress. With regard to persons suffering from a mental illness or defect Section 78 (1) of the *Criminal Procedure Act 51 of 1977* sets out the test of capacity. I shall not be discussing pathological incapacity in this article.

In cases of non-pathological incapacity the accused need only adduce evidence of such incapacity (lay a foundation), while the prosecution has to prove capacity beyond a reasonable doubt. The principles were set out clearly by Navsa JA in *S v Eadie* 2002 (1) SACR 663 (SCA) at 666:

"*It is a well established principle that when an accused person raises a defence of temporary non-pathological criminal incapacity, the State has the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this Court that:*

1) *In discharging the onus the State is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;*

2) *An accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;*

3) *Evidence in support of such a defence must be carefully scrutinized;*

4) *It is for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period.*"

With regard to an accused's actions during the relevant period, Navsa elaborated on this point at p683 of the judgment:

"*The approach of this Court in the decisions discussed in this judgment, has been to carefully consider the accused's actions before, during and after the event. It took into account whether there was planned, goal-directed and focused behavior. In the decisions referred to a determination was made about whether an accused was truly disorientated - an indicator of temporary loss of cognitive control over one's actions and consequent involuntary behavior. This Court has repeatedly stated that a detailed recollection of events militates against a claim of loss of control over one's actions.*"

If criminal capacity is not proved the accused will be found not guilty. In *S v Wiid* 1990 (1) SACR 561 (A) the Court, in an appeal against the appellant's conviction of murder where she had shot and killed her husband with a pistol, found that there was at least a doubt whether she, at the time of the shooting, had the necessary criminal capacity and that she ought to have been given the benefit of that doubt. The conviction was accordingly set aside.

Similarly, in the well-publicised case of *S v Nursingh* 1995 (2) SACR 331 (D) the accused, a university student, shot and killed his mother, grandmother and grandfather. The defence contended that the accused 'had a personality make-up which predisposed him to a violent reaction' and that his conduct became 'so clouded by an emotional storm' that he lacked criminal capacity. Squires J found that there was a reasonable possibility that the accused's version of events, especially in relation to a history of sexual abuse by his mother, was true. He further accepted the uncontested evidence of the psychiatrist and psychologist led by the defence. The defence thus succeeded and Nursingh was acquitted on the three counts of murder.
One case in which the defence succeeded on the second leg of the criminal capacity test mentioned in the second paragraph above, is *S v Gesualdo* 1997 (2) SACR 68(W). Here the Court found that the accused, who shot and killed his business partner, was able to appreciate the wrongfulness of his conduct. However, the State failed to prove that at the time of the shooting he was able to act in accordance with his appreciation thereof. Borchers J stated at p77:
"*For many years the courts of this country and of others have accepted that a sane individual (ie. one free from mental illness), who can distinguish between right and wrong, may be subject to such mental or emotional pressures that he may not be able to control his actions. He is unable, in other words, to act in accordance with the distinction which he can draw*."

In *Eadie's* case (*supra*) the appellant, a keen hockey player, had attended a function of the Fish Hoek Hockey Club. During the course of the night he had consumed at least nine bottles of beer and two Irish coffees. In the early hours of Saturday morning while driving home with his wife he was involved in a "road rage" incident in the course of which he battered another motorist to death with a hockey stick. He was charged with one count of murder and one count of obstructing the course of justice. The latter count related to the disposal of the hockey stick in question. It was not disputed that at the time of the attack the appellant was subject to a number of stressors. He was experiencing financial difficulties, problems at work, tensions in his marriage, and was in a depressed state.
The judgment by Navsa JA constitutes the most comprehensive examination of relevant case law and legal writings of any judgment on this topic to date. The appellant's defence was rejected by the Court. Summing up, Navsa JA states at p 690 :
"*When an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and planned manoeuvre he lost his ability to control his actions. Reduced to its essence it amounts to this: the accused is claiming that*

his uncontrolled act just happens to coincide with the demise of the person who prior to that act was the object of his anger, jealousy or hatred."

Within the field of domestic violence the courts have given some recognition to the 'battered woman syndrome'. This refers to the case where a wife who has been subjected to constant physical and mental abuse eventually kills her husband. This often happens in circumstances where there is no attack either commenced or imminent and thus the recognized defence of private defence is not available to her. As the same principles apply as in any case of non-pathological incapacity the defence will succeed if the accused is found to lack criminal capacity (see *S v Wiid, supra*). More often, however, the defence fails, but the diminished responsibility of the accused is a strong mitigating factor on sentence. In *S v Potgieter* 1994 (1) SACR 61(A) the accused was convicted of murder and sentenced to 7 years' imprisonment. On appeal, Kumleben JA accepted that over a long period of time the accused's life with the deceased had been hardly bearable, that her decision to shoot him had come at a time when she was emotionally distraught and that at such time she was unable to exercise a normal degree of self-control. The case was remitted to the trial Court to sentence the appellant afresh after considering the option of correctional supervision.

In the case of *Director of Public Prosecutions, Transvaal v Venter* (*supra*), the respondent had been convicted of one count of attempted murder and two counts of murder. The murder victims were his two children, a five year old daughter and a four year old son, whom he had shot. The complainant in the attempted murder case was his wife whom he had also shot. The respondent claimed that he could not remember the incident during which he had committed the offences, and this led the Court a quo to consider the possibility that he had 'temporary non-pathological diminished criminal responsibility'. However, after hearing evidence, the Court a quo concluded that such defence could not succeed and convicted him.

It was common cause that the accused, a member of the South African Air Force, had been charged with the rape and murder of a 14 year old woman while he was posted in Burundi. He testified that, after his return home once bail had been granted in the Burundi matter, he had displayed suicidal tendencies; that his marriage had 'not been the same'; that he believed his wife had become ashamed of him; and that many of his friends had distanced themselves from him. On the day of the shootings he had consumed a quantity of alcohol and had a domestic dispute with his wife; thereafter, all he could remember was waking up in hospital and being informed of the death of his children.

In the Court a quo, the respondent had been sentenced to 8 years' imprisonment on the attempted murder count and on the two murder counts to 10 and 15 years, respectively. 5 years of the latter sentence was suspended and all three were ordered to run concurrently, giving an effective term of 10 years. The State appealed against all three sentences, contending that they were shockingly lenient.

In the Supreme Court of Appeal Mlambo JA considered the legal principles of temporary non-pathological diminished responsibility. He accepted that this was recognized in law and was especially relevant to sentence. However, he held that the Court a quo had overemphasized the effects of the Burundi episode. He found that at the time of the shootings the respondent was still in touch with reality and was

aware of what he was doing. He held, further, that the Court a quo had underplayed the seriousness of the offences, and had not dealt with the interests of society and the need for a deterrent sentence.
However, the Appeal Court unanimously agreed that there were some mitigating factors which justified a departure from the minimum sentence of life imprisonment. The sentence of 8 years' imprisonment on the attempted murder count was confirmed. However, the sentences on the two murder counts were increased to 18 years' imprisonment on each count. It was ordered that all sentences were to run concurrently. Thus, the effective sentence was increased from 10 years to 18 years.

Thus, it can be seen that everything depends on the facts of each case. Generally, the Courts have approached this defence with great caution. Where the defence is successful, acquittals result (*Wiid, Nursingh, Gesualdo, supra*). In other cases the defence fails, but the diminished capacity of the accused serves to mitigate the sentence quite substantially (*Potgieter*, *supra*. See also *S v Smith* 1990 (1) SACR 130 (A)). In still other cases the Court gives short shrift to an accused's averment of diminished responsibility and finds that the circumstances as a whole demand a stiff sentence (*Eadie, Venter*, *supra*. See also *S v Di Blasi*, 1996 (1) SACR 1 (A)).

K.R. Bruorton
Additional Magistrate, Ntuzuma

A Last Thought

"If restorative justice is to be recognised in South Africa – and in the light of the serious challenges faced by our country's criminal justice system and the perennial overcrowding of our correctional institutions there can be little doubt that its application and integration into our law is essential – then it must find application not only in respect of minor offences, but also, in appropriate circumstances, in suitable matters of a grave nature." *Per* Bertelsmann J in *S Tabethe* [2009] JOL 23082 (T).