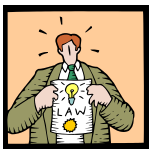
e-MANTSHI

A KZNJETCOM Newsletter

March 2014: Issue 96

Welcome to the ninety sixth 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 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 Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Trade and Industry has published a notice in the Government Gazette no 37386 of 26 February 2014 about the removal of adverse consumer credit information and information relating to paid up judgments. Regulations to that effect were published in terms of Section 171 of the *National Credit Act, 2005.* Regulation 1 and 2 state as follows:

"1. Definitions
In these Regulations any word or expression to which a meaning has been assigned in the Act bears the meaning assigned to it in the Act, unless the context indicates otherwise-
"adverse consumer credit information" for the purposes of these Regulations means —
(a) adverse classifications of consumer behaviour are subjective classifications of consumer behaviour and include classifications such as 'delinquent', 'default', 'slow paying', 'absconded' or 'not contactable;
(b) adverse classifications of enforcement action, which are classifications related to enforcement action taken by the credit provider, including classifications such as 'handed over for collection or recovery', 'legal action', or 'write-off';

(c) details and results of disputes lodged by consumers irrespective of the outcome of such disputes;
(d) adverse consumer credit information contained in the payment profile represented by means of any mark, symbol, sign or in any manner or form;
"paid up judgments" for the purposes of these Regulations means civil court judgment debts, including default judgments, where the consumer has settled the capital amount under the judgment (s).
"the Act" means the National Credit Act, 2005 (Act No. 34 of 2005).

2. Requirements, processes and timeframes for Credit Bureaus
(a) A registered credit bureau must remove:
(i) adverse consumer credit information defined in Regulation 1, as reflected on a consumer's records held by any such registered credit bureau as at the effective date of these Regulations; and
(ii) information relating to paid up judgments on an ongoing basis.
(b) A registered credit bureau must remove adverse consumer credit information and information relating to paid up judgments as contemplated in Regulation 2(a) within a period of two (2) months from the effective date of these Regulations.
(c) Before the expiry of the period of two (2) months contemplated in Regulation 2(b), a registered credit bureau may request an extension of not more than seven (7) days for the removal of adverse consumer credit information and information relating to paid up judgments.
(d) A request for an extension contemplated in Regulation 2(c) must be submitted to the National Credit Regulator at least seven (7) days before the expiry of the two (2) months period contemplated in Regulations 2(b).
(e) Within three (3) days of removing the adverse consumer credit information and information relating to paid up judgments in terms of these Regulations, a registered credit bureau must notify all other registered credit bureaus of such removal.
(f) Within three (3) days of receiving notification contemplated in Regulation 2(e), any such registered credit bureau must remove similar adverse consumer credit information and information relating to paid up judgments from its records.
(g) A registered credit bureau must not record or retain on its register adverse consumer credit information and information relating to paid up judgments if such information were removed in terms of these Regulations.
(h) A registered credit bureau must ensure that during the period contemplated in Regulation 2(b), the adverse consumer credit information and information relating to paid up judgments that ought to be removed in terms of these Regulations is not displayed or provided to credit providers, or any person requesting such information.
(i) After the two (2) months period mentioned in Regulation 2(b), a registered credit bureau must continue to remove information relating to paid up judgments within seven (7) days after receiving proof of such payment."

2. The Chief Justice of the Republic of South Africa has issued a directive in terms of section 8 of the *Superior Courts Act, 2013 (Act no 10 of 2013*) in regards to norms

and standards for the exercise of judicial functions of all courts in the country. This directive was issued and published in the Government Gazette no 37390 dated 28 February 2014. According to the Chief Justice it enjoys the majority support of the Heads of Superior Courts and Heads of Magistrates' Courts.

3. The Minister of Justice has issued a notice in Government Gazette no 37450 of 18 March 2014 in which the monetary jurisdiction of the Small Claims Court is increased with effect from 1 April 2014 to R15,000.

4. The Department of Justice and Constitutional Development invites interested parties to submit written comments on the proposed adjustment of the rate of interest provided for in section 1 of the *Prescribed Rate of Interest Act, 1975* (Act 55 of 1975)(the Act). The notice to this effect has been published in Government Gazette no 37454 dated 19 April 2014. The proposed adjustment and a note, explaining the background of the proposed adjustment, are also available on the website of the Department at the following address: http://www.justice.gov.za. The comments on the proposed adjustment must be submitted not later than 14 April 2014, marked for the attention of Ms Connie van Vuuren, to cvanvuuren@justice.gov.za

1. **BACKGROUND NOTE**

2.1 Section 1 (1) of the Act provides for the calculation of interest at a prescribed rate on an interest-bearing debt where the rate is not governed by any law, agreement or otherwise.

2.2 In terms of section 1 (2) of the Act, read with subsection (3), the Minister of Justice and Constitutional Development may from time to time, by notice in the *Gazette,* after consultation with the Minister of Finance, prescribe a rate of interest for the purposes of subsection (1).

2.3 The current rate of interest was prescribed by Government Notice No. R. 1814 of 1 October 1993 at 15,5 per cent per annum.

2.4 The current rate is no longer market-related. The proposed rate of interest is 9,0 per cent per annum. The proposed rate is calculated as follows: The South-African Reserve Bank's repo-rate, which is presently 5,5 per cent per annum, is used as basis for this calculation and a margin of 350 basis points is added to the repo-rate.

Recent Court Cases

1. MINISTER OF POLICE AND ANOTHER v DU PLESSIS 2014 (1) SACR 217 (SCA)

A Prosecutor is required to act with objectivity and protect the public interest. S/he is to pay attention to the contents of the docket and not merely to place a matter on the court roll.

The respondent was woken one night by his wife who had taken a call from a friend whose vehicle had broken down. He got into a vehicle that he was repairing for a customer- a charcoal Toyota Corolla - and drove to the deserted filling station where his friend's Hyundai panel van was parked. While the respondent was taking steps to tow the panel van the police arrived at the scene and arrested both the respondent and his friend, despite the respondent's explanation as to how he had arrived at the scene. They were taken to the police station where they were held in appalling conditions until two days later when they appeared in court together with 15 others charged with armed robbery. The matter was postponed for seven days and they were again held in disgusting conditions. The case was further postponed for an additional two days where after the charges against the respondent were withdrawn and his friend was released on bail. It appeared that on the night in question a robbery had taken place in which a panel van had been involved as well as a blue Toyota Corolla. The respondent instituted action in the high court, claiming damages for unlawful arrest and detention, and was awarded damages of RI00 000 against the first appellant, and R120 000 against the second appellant, the National Director of Public Prosecutions. The appellants appealed against this decision. The trial court had held that a cursory investigation by the police immediately after the respondent's arrest (by way of a telephone call to his wife) would have rendered his further detention unnecessary. The court held on appeal that on the evidence, by at least 09h30 the following morning it should have become clear to the police that the respondent had not been involved in the robbery. The court then turned to examine the liability of the second appellant. (Paragraph [26] at *225g.)*

Held, that the prosecutor who had handled the matter in the magistrates' court had a number of statements in the docket that showed that the respondent was merely an innocent bystander and that there was no basis for prosecuting him. A prosecutor's function was not merely to have the matter placed on the roll to then simply be postponed for further investigation. A prosecutor had to pay attention to the contents of his docket. He had to act with objectivity and protect the public interest: in the present case that had not been done. The amounts awarded by the trial court were not extravagant and the decision of the court a quo accordingly had to be upheld. (Paragraphs [32] at 227 *e* and [35] at 228e.)

2. S v NGUBENI 2014(1) SACR 266 (GSJ)

A Magistrate cannot set aside a conviction when s/he only finds out that an accused is a minor after conviction.

Victor, J:

"[1] This matter concerns the diversion of children from the criminal justice system. On 4 March 2013 the accused was convicted of theft of three Cadbury chocolate bars from Pick n Pay with a total value of R59, 97.

[2] During mitigation of sentence it was ascertained that the accused was 16 years old. The magistrate set aside his conviction and noted a plea of not guilty. The matter came by way of review and Tshabalala J made the comment on 27 May 2013 that the magistrate should have first referred the matter for review after realising the error and before reversing the verdict.

[3] At the time of commencement of the trial in the court a quo there was an error in the child's age. This fact only became known after conviction stage.

[4] In terms of the Child Justice Act No 75 of 2008 (the act) the child must attend a preliminary enquiry to assess whether the child can be diverted form the criminal justice system. The magistrate directed that the child be sent at Protea Magistrate's court for this assessment.

[5] The appropriate procedure is for this court to set aside the conviction as the step by the court a quo to change the plea to not guilty was a nullity.

[6] All the proceedings before the court a quo are set aside."

3. S v STUURMAN (140017) [2014] ZAECPEHC 17 (19 March 2014)

It is undesirable for magistrates when sentencing an accused convicted of more than one offence to impose a globular sentence wherein such offences will be treated as one for the purposes of sentence.

Tshiki J:

" [1] The accused herein pleaded guilty and was subsequently convicted of two counts which are housebreaking with intent to steal and theft as well as malicious injury to property. The presiding magistrate of Port Elizabeth sentenced the accused as follows:

"Both counts are taken together as one for purpose [of] *sic* sentence. You are sentenced to four (4) years direct imprisonment to run concurrently with the sentence that you are currently serving. With regard to sect. 103 you are declared unfit to possess a firearm."

[2] After imposing the above sentence the magistrate realised that he had exceeded the jurisdiction of the Magistrate's Court of three years imprisonment by imposing a four year term on the accused. He now requests this Court to set aside the sentence to enable him to impose a fresh competent sentence. Alternatively, that this Court should sentence the accused to three years imprisonment.

[3] I agree that the magistrate by sentencing the accused to four years imprisonment, both counts having been treated as one for the purpose of sentence, had exceeded his penal jurisdictional limit of three years imprisonment which may be imposed by the district court magistrate. This is so in terms of section 92 of the Magistrate's Court Act 32 of 1944, as amended.

[4] The powers of the review Court in terms of section 304(2) (c) (iv) are unusually wide in nature. Apart from the explicit powers of confirmation, amendment or setting aside of the sentences, as well as orders and convictions of magistrates' Courts, the reviewing Court may, where the proceedings were not in accordance with justice, impose the sentence which the magistrate's court should have imposed. (*S v Adaba; S v Ngeme; S v Van Wyk* 1992(2) SACR 325 (T)).

[5] In this case, it seems to me that the magistrate was not aware of the error that he had committed until some days after he had sentenced the accused. The record shows that the accused was sentenced on the 11th February 2014 and the letter forwarding the record for "special review" is dated the 20th February 2014.

[6] For the reasons that will appear in the paragraphs to follow the magistrate should never have imposed the sentence in excess of his jurisdiction in the first place.

[7] It seems to me that errors such as these have their genesis from the tendency by most magistrates, when sentencing the accused convicted of more than one offence, to impose a globular sentence wherein such offences will be treated as one for the purposes of sentence. This form of sentencing is not desirable and should be

discouraged especially where the accused has been convicted of different offences. In his letter accompanying the record of the proceedings the learned magistrate says: "would you please submit the enclosed records to the Honourable Judge as a special review, due to the fact that I exceeded my penal jurisdiction by sentencing the accused to four years imprisonment instead of three years which was my original intention if the [Court] sic were not taken together two years on each counts."

[8] My view is that the preferred approach is to impose a separate sentence for each count of which the accused has been convicted. Once this approach is considered there can be no errors similar to the one under discussion. In order to ameliorate the cumulative effect of those sentences on the accused which could result in the sentences being excessive, the sentencing Court should order the sentences to run concurrently. In *S v Chawasira* 1991(1) SACR 551 (ZHC) at 551 f-g Smith J held that "where an accused is convicted of two or more offences it is preferable that he should be sentenced separately for each offence, especially where, as in this case, the offences were entirely different."

[9] In a vast majority of cases no practical advantage results from imposing a globular sentence. A reasonable sentence can usually be determined by deciding upon a competent sentence for each offence and then by scaling down the sentences if the cumulative effect renders the total unreasonable.

[10] I have had to digress a little because I frequently receive review records where the sentences for several counts, sometimes unrelated, are always treated as one for the purposes of sentence. The result created by such problem will obviously be that even when on appeal or review the conviction is set aside on one or some of the offences the Court would not know which sentence has been imposed for the remaining offence(s). Whatever the position is, the practice of taking counts together for the purpose of sentence is undesirable and it should be avoided and can only be resorted to in exceptional cases. (*R v Frankfort Motors (Pty) Ltd* 1946 (OPD) 255 at 267-8; S *v Nkosi* 1965(2) SA 414(C) and *S v Leshabe*; *S v Mahlangu*; *S v Mamele* 1968(4) SA 576; S *v Setlhare* 1973(2) SA 488 (O); S *v Van Zyl* 1974(1) SA 313 (T) and *S v Van der Merwe* 1974(4) SA 523 (N). In a nutshell even where the offences were created by the same ordinance and broadly speaking, belonged to the same genus, it is preferable to impose separate sentences (*S v Van Zyl supra*).

[11] In the present case, had the magistrate decided to impose a separate sentence for each count of which the accused was convicted, this record would never have been brought to this Court for special review. I do not think that there is a need to remit the record back to the magistrate for the purposes of sentence. I am of the view that doing so would not be in the interests of justice because all the factors that were taken into account by the trial Court form part of the record herein. For that reason, I will impose the sentence which ought to have been imposed by the trial Court.

[12] In the result, I make the following order:

[12.1] The sentence imposed by the magistrate is hereby set aside and is substituted by the following sentence:

[12.1.1] In respect of count one, the accused is sentenced to undergo two years imprisonment.
[12.1.2] In respect of count two, he is sentenced to undergo 12 months imprisonment.
[12.2] Sentences are ordered to run concurrently and are antedated to the 11th February 2014."

From The Legal Journals

Hoctor, S

"The degree of foresight in *dolus eventualis* "

SACJ 2013(2) 131

Bellengere, A & Walker, S

"When the truth lies elsewhere: A comment on the admissibility of prior inconsistent statements in light of S v Mathonsi 2012 (1) SACR 335 (KZP) and S v Rathumbu 2012 (2) SACR 219 (SCA)"

SACJ 2013(2) 175

McKenzie, A

"S v Mukwevho and the elevation of a 'minimum sentencing fact' to an element of the offence of the unlawful possession of a firearm: notes"

SALJ 2014 61

Louw, A

"Children and grandparents: an overrated attachment?"

Stellenbosch Law Review 2013 618

Sinclair, M

"Seatbelt legislation in South Africa - failure to uphold the rights of children"

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

Contributions from the Law School

Dangerous Weapons Act 15 of 2013[1]

In the Constitutional Court judgment of *S v Thunzi and Mlonzi* 2010 (10) BCLR 983 (CC) the court had to deal with a consequence of constitutional transition and the problems that arose from the integration of the separate legislative regimes in the former TBVC. In this case there were two statutes in the same national territory, dealing with the same subject-matter, but one having a harsher sentencing regime. This judgment culminated in the uniform Dangerous Weapons Act 15 of 2013 that repealed the various existing statutes. In addition, the Act incorporated certain constitutional and other principles required for current policing needs with regard to the possession and carrying of dangerous weapons.

The Dangerous Weapons Act makes certain amendments to the Regulation of Gatherings Act 205 of 1993 and the Firearms Control Act 60 of 2000, making it part of a bigger framework (not relevant for discussion here): As this Act excludes firearms in the definition of a dangerous weapon, it must be read with the Firearms Control Act 60 of 2000. The Act will also have a direct impact on the Regulation of Gatherings Act 205 of 1993 as the events of Marikana illustrated.

The Dangerous Weapons Act 15 of 2013 commenced on 2 January 2014. Although the Act recognises that the constitution entrenched rights to security and the right to be free from all forms of violence on the one hand and the right to, peacefully and unarmed, assemble, demonstrate, picket and present petitions, the aim of the Act is to provide for prohibitions in respect of the possession of dangerous weapons.

Dangerous weapons are defined as any object, other than a firearm, that is capable of causing death or inflicting serious bodily harm, if it were used for an unlawful purpose (s 1), subject to certain exceptions (s 2).

[1] This is a shortened version of a Comment that appeared in the 2013 (3) *SACJ* 354-363.

The crux of the statute is contained in section 3, linking possession of such a weapon with a reasonable suspicion of intention to use it for an unlawful purpose:

'(1) Any person who is in possession of any dangerous weapon under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

(2) In determining whether a person intends to use the object as a dangerous weapon for an unlawful purpose, all relevant factors, including but not limited to, the following must be taken into account:

(a) The place and time where the person is found;

(b) the behaviour of the person, including the making of any threat or the display of intimidatory behaviour;

(c) the manner in which the object is carried or displayed;

(d) whether the possession of the object was within the context of drug dealing, gang association or any organised crime or any other criminal activity; or

(e) any other relevant factors, including any explanation the person may wish to provide for his or her possession of the object: Provided that this paragraph shall not be interpreted as an obligation on the person to explain his or her possession of the object.'

What would be regarded as a dangerous weapon? The wording of the definition in the 2013 Act is similar to the definition in its predecessor, the Dangerous Weapons Act 71 of 1968. Neither statute includes firearms. The 1968 Act defined a dangerous weapon as 'any object … which is likely to cause serious bodily injury if it were used to commit an assault' (at s 1). The 2013 Act defines it as 'any object that is capable of causing death or inflicting serious bodily harm, if it were used for an unlawful purpose' (at s 1).

Two differences may be noted: first, 'likely to cause serious bodily injury' versus 'is capable of causing death or inflicting serious bodily harm'. The 2013 statute is wider in scope and easier to prove, as it deals with the possibility of serious harm arising as opposed to the likelihood of serious harm. Two, the latter part of the 2013 definition, namely 'if it were used for an unlawful purpose', is wider than the corresponding phrase 'if it were used to commit an assault' in the 1968 Act. This amendment is also sensible, as dangerous weapons are potentially used for a variety of crimes, not only assault.

The first section of the 1968 definition, which is similar to the 2013 Act, caused a great deal of interpretative difficulty in the courts (*S v Adams* 1986 (4) SA 882 (A) at 894C-D). The court in *Adams* (at 896H) noted that 'weapon' includes both objects 'designed for use as a weapon (e.g. swords, spears, daggers, bayonets, battle axes)', as well as other objects not designed as weapons, but which are used or may be intended to be used as a weapon (see also *S v Leo* 2008 (2) SACR 198 (C) at paras [13]-[14]). In this regard, the courts interpreted a weapon to be a manageable object (*S v Zamesa* 1972 4 SA 263 (C) (not, *in casu*, burning planks, which would be unmanageable)), but the precise difference between a 'weapon' and a 'dangerous

weapon' was fraught with difficulty, especially in the context of knives (*S v Seleke* 1976 (1) SA 675 (T)). However, it was confirmed in the case of *Seleke* that a "bottelnek vol skerp punte", "die gooi van 'n ketel kookwater" and a "drie-tand-tuinvurk" all qualified as dangerous weapons (at 154-155; see in general Carnelley "Explosives, Armaments And Weaponry" in Joubert WA (founding ed) *Law of South Africa* Volume 10(1) 2ed (2008) at para [210]). An airgun was not regarded as a dangerous weapon (*S v Serame* 1976 (4) SA 830 (NC). In *Adams,* the Appellate Division commented as follows regarding the legislation:

"It was not concerned to cast the net so wide as to catch the just along with the unjust, and involve innocent persons in the toils of the criminal law by making it *prima facie* an offence to be in possession of any object whatsoever which was likely to cause serious bodily injury if it were used to commit an assault" (*supra* at 895D-E).

It is interesting to note that the predecessor of the 1968 Act, the General Law Amendment Act 54 of 1949, also criminalised the possession of a dangerous weapon (at s 10(1), unless the possessor was able to prove that such weapon is required by him for a lawful purpose. A 'dangerous weapon' was defined in s 10(3) to include the following:

'(*a*) handles with wire, chains or other heavy substances attached; (*b*) metal rods or wire exceeding a quarter inch in diameter and six inches in length; (*c*) daggers; (*d*) knives: (i) pocket knives, the blades of which can be fixed when opened; (ii) knives, including pocket knives, any blade of which exceeds three and a half inches in length; (*e*) spears, assegais and loaded or spiked sticks or any stick exceeding one inch in diameter; (*f*) knuckledusters; (*g*) sandbags; (*h*) jumpers, crowbars or hammers exceeding three pounds in weight; (*i*) axes or pickaxes; (*j*) solid rubber batons; (*k*) articles capable of releasing lachrymatory, asphyxiating, blinding, incapacitating or other harmful substances, and cartridges therefor; (*l*) any article which so closely resembles a pistol or other firearm as to be calculated to give the impression that it is a genuine firearm and which is capable, by the discharge of a cartridge (loaded or unloaded) of causing a loud report, calculated to give the impression that a genuine firearm had been discharged, and also cartridges therefor; (*m*) any other article declared by the Minister of Justice by notice in the Gazette to be a dangerous weapon for the purposes of this section.'

Notably in the *Memorandum*, the intention was clearly to include knives (*op cit* at p 5). In a *Media Statement* from the National Media Centre Corporate Communication of the South African Police Service 'South Africa ushers in the new Dangerous Weapons Act' (21 January 2014), the following examples were given of dangerous weapons: knives such as gravity knives, switchblades, swords, daggers, blackjacks, brass knuckles, ballistic knives, spears, tomahawks, knobkieries, crowbars, nunchakus and hammers.

The 2013 Act will no doubt raise similar problems of interpretation.

Two improvements were included in the new Act: first, the exclusion of lawful activities (s 2); and secondly, the inclusion of s 3, the presence of circumstances which may raise a reasonable suspicion that the person intends to use the

dangerous weapon for an unlawful purpose (s 3(1)) and the factors which may inform that intention (s 3(2)). These matters fall to be briefly discussed.

The Act does not apply to the following activities: where the dangerous weapon is possessed in pursuit of any lawful employment, duty or activity (s 2(*a*)); possession during the participation in any religious or cultural activities, or lawful sport, recreation, or entertainment (s 2(*b*)); or possession in the context of any legitimate collection, display or exhibition of weapons (s 2(*c*)).

As regards s 2(*a*), it is submitted that there is nothing in the 2013 Act to prevent a person from carrying objects for use in self-defence, for protection from criminals. This includes licensed firearms obtained for self-protection, except at public gatherings in terms of the Regulation of Gatherings Act 205 of 1993.

Moreover it seems clear that, in terms of s 2(*b*), the Act would not apply to a person who was in possession of dangerous weapons for the purpose of hunting (cf the English case of *Southwell v Chadwick* (1986) Cr App R 235, DC). Furthermore, carrying a dangerous weapon as part of a costume, to or from a fancy dress party, would also not incur liability (cf the English case of *Houghton v Chief Constable of Greater Manchester* (1987) Cr App R 319, CA). Cultural weapons carried at traditional ceremonies would also be excluded from liability. In this regard the usual balancing of rights would need to take place: in the light of ss 30-31 of the Constitution, the exercise of one's culture is protected, provided that such exercise does not conflict with the exercise of any provision of the Bill of Rights. The right to be free from all forms of violence, set out in s 12(1)(*c*) of the Constitution would clearly fall to be considered in this context.

As indicated earlier, the offence set out in s 3(1) is committed by a person in possession of a dangerous weapon 'under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose'. The list of factors set out in s 3(2) which may be taken into account in making such determination is not a *numerus clausus,* but can include the time and place found; the behaviour of the person, including threats or intimidatory behaviour; the manner of carrying or display of the object; and any context of drug dealing, gang association or any organised crime or any other criminal activity. The section also includes in such factors an explanation by such person to explain his or her possession, although there is no obligation to furnish such explanation (s 3(2)(*e*)).

In terms of s 2(1) of the 1969 Act, the onus was on the person in possession of any dangerous weapon to prove that he did not have any intention to use the object for any unlawful purpose. The 2013 Act places the onus on the state:

'Whether the suspicion can be regarded as reasonable or not must be approached in an objective manner. The circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the person intended to use that prohibited object for an unlawful purpose.' (P du Toit & G Ferreira 'The regulation of the possession of weapons at gatherings' 2013 (4) *PER* 352 at 358).

The term ‘reasonable suspicion’ appears in a number of statutory offences, including s 36 of the General Law Amendment Act 62 of 1955, s 2 of the Stock Theft Act 57 of 1959, and s 82 of the General Law Third Amendment Act 129 of 1993 (for more detailed discussion of these provisions see Hoctor, Milton & Cowling *South African Criminal Law and Procedure Vol III: Statutory Offences* 2ed (1988- , loose-leaf) at chapters J6, J2, and J5 respectively), as well as the regulation of arrest without a warrant in s 40 of the Criminal Procedure Act 51 of 1977 (see discussion in Du Toit *et al Commentary on the Criminal Procedure Act* (1987- , loose-leaf) at 5-7ff). The cases decided in point in terms of these provisions provide some guidance as to the interpretation of ‘reasonable suspicion’ in s 3 of the Dangerous Weapons Act.

A reasonable suspicion does not involve ‘certainty as to the truth’ as then it perforce becomes fact (*S v Ganyu* 1977 (4) SA 810 (RA) at 813). The suspicion must however be based on fact – a suspicion can hardly be reasonable if based on non-existent facts – and such factual basis must be present at the material time. The subjective suspicion thus must be based on grounds actually existing at the time of its formation (*S v Khumalo* 1964 (1) SA 498 (N) at 499) – if no such grounds exist which made the suspicion reasonable, then it cannot be a reasonable suspicion. The existence of such grounds is on the basis of an objective test. The reasonable person would analyse and assess the quality of the information at his or her disposal critically (*Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE). Where the relevant law enforcement officer has the opportunity to substantiate his or her suspicion, and fails to do so, such suspicion will not be reasonable (*S v Purcell-Gilpin* 1971 (3) SA 548 (RA) at 554C; *S v Miller* 1974 (2) SA 33 (RA) at 35E). The suspicion must be substantially contemporaneous with the finding in possession (*S v Reddy* 1962 (2) SA 343 (N); *S v Moodley* 1963 (1) PH H97 (N)). This does not however entail that there will be an acquittal if the suspicion existed before the finding in possession, provided that in such a case the previously-formed suspicion persists when the finding in possession occurs (*S v Naidoo* 1970 (1) SA 358 (A)). Moreover, once a reasonable suspicion has, objectively assessed, been established, the fact that additional unjustifiable factors may have been taken into account by the arresting officer is of no consequence (*S v Shakane* 1998 (2) SACR 218 (SCA) at 223f).

In each of the offences mentioned *supra* which apply a reasonable suspicion criterion, the offence further consists of the inability of the accused to give a satisfactory account of possession of the object. Although this phrase is not part of the formulation of s 3(1) of the Dangerous Weapons Act, this question may nevertheless guide the decision of the court on liability in terms of the section, given the specific inclusion of an explanation as one of the identified factors in s 3(2)(*e*).

The Dangerous Weapons Act 2013 is to be welcomed, for the following reasons. First, it resolves the problem of the constitutional anomalies that arose from not having a uniform statute on dangerous weapons, as acknowledged in the Constitutional Court judgment of *S v Thunzi and Mlonzi supra.* Secondly, certain *lacunae* in the broader legislative framework are addressed to ensure that the possession of airguns, deactivated firearms, muzzle loaded firearms and imitation

weapons with the intent to commit an offence is regarded as an offence. Thirdly, expedient factors (although not a *numerus clausus*) ware set out in the statute(s) as to what would be regarded as such an intention. Fourthly, in the Dangerous Weapons Act itself, the sharpening of the definition of a 'dangerous weapon', including the exceptions as well as the shifting of the onus to the state is welcomed. Fifthly, the reformulated offence is consistent with a number of other 'possession' offences already existing in our law, in making use of the 'reasonable suspicion' criterion.

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Matters of Interest to Magistrates

ROAR – Rights of African Refugees

ROAR, or Rights of African Refugees, is an initiative of the IPT and serves as a portal for information sharing and advocacy, and is an open and inclusive space for anyone involved, or interested, in the refugee sector. As well as providing facts, the relevant Acts and news stories, with ROAR we hope to highlight the human face behind the headlines on xenophobia and to document the stories of refugees and asylum seekers, from the struggles to the success stories of people as they try to begin a news life and uplift their communities. The ROAR website can be viewed at www.roarsa.org and we are on twitter at the handle @roarsaorg. The ROAR site also has links to the Refugee Act and the Immigration Act and an FAQ section. If you need any further information or have comments please contact Glenda Caine : glendac@iafrica.com

A Last Thought

Ethical lawyering

Speaking on ethical lawyering in a constitutional democracy, Justice Yacoob said that he disagreed with …….. as he did not believe that a lawyer is born ethical. He added that people grow, develop, change and learn with time. Justice Yacoob said that he also took that route. He said that in 1956 he was a racist, an opportunist and sexist, adding that 'all of us have the potential to change and become better and also have the potential to become ethical lawyers, however we were born. All human beings have the right and the power to change themselves.'

Justice Yacoob said that the part of the Constitution that has an impact on lawyering in a constitutional order was the Bill of Rights and Chapter 8 of the Constitution, which apply to the courts and the administration of justice.

'If we [want to practise] in accordance [with] the Bill of Rights and Chapter 8 of the Constitution, the first step for lawyers is to know and understand both documents.' He said that the Bill of Rights contains approximately 30 clauses that are simple and straightforward. He added that Chapter 8 of the Constitution was also simple and straightforward and that it was impossible for lawyers to practise in accordance with the constitutional principles if they did not understand the values and injunctions of the Bill of Rights and what Chapter 8 required. 'We must not only understand them, we need to internalise and live them,' he said.

Justice Yacoob said that living the constitutional order was the most important thing for an ethical lawyer, because if you do not embrace constitutional values in your personal life, you cannot embrace them in your practice.

He added that everyone is equal before the law and is entitled to equal protection. The first port of call for people in trouble are lawyers 'and when a person comes to you, you have to treat him with the understanding that this person is equal before the law.' He explained that this meant that you must not treat your rich clients better than your poor clients, as people can only be equal before the law if you treat them equally to begin with.

Justice Yacoob said that honesty was a given but, like in all things, honesty was often qualified as far as practising law is concerned. He said that honesty is balanced by privilege and that only a few lawyers understand the importance of the privilege of their client. 'It is not your privilege, but [that of] your clients. We need to examine what the precise balance is between honesty to the court on the one hand and privilege on the other,' he said.

Justice Yacoob said that it was obvious that lawyers cannot stand by and watch their clients tell lies in the witness box, but queried what layers should do if a client tells them that he or she (the client) was committing another murder somewhere else on the day that he or she is accused of committing the murder the lawyers are defending him or her against and that the accused would like to tell the court that he or she was somewhere else with somebody else, which is a lie. 'Do you put up with

that? Those are difficult problems that we need to deal with carefully. Honesty must be qualified with privilege', he said.

Moving on to the notion of a fair trial, Justice Yacoob said that s 25 of the Constitution has various individual provisions that ensure that an accused has a fair trial. He said that a very important ethical consideration was that all accused people deserved a fair trial, adding that the trial must be fair at all levels and it was the lawyer's duty to contribute to the fairness of a trial. 'Your object in [practising law] in a criminal case is not to get your client acquitted; that is not your mandate and your mandate is not to get the client convicted either. Your mandate is to represent the client to the best of your ability as honestly as you possibly can, bearing in mind privilege and to ensure that the client has a fair trial,' he stated.

Justice Yacoob said that in civil trials, a constitutional right is not for people to win their cases but that the purpose of adjudication, judging, and court proceedings was to reach a fair result. He added that if one contributed as a lawyer to reaching an unfair result, then that person was not acting constitutionally as a lawyer. 'The right that a person has is not to win their case, the only obligation you have, as a lawyer to your client is to ensure that those civil proceedings are fair, held before an independent tribunal and if you do that, you have done your job. If you go beyond that and win the case unfairly, that is unconstitutional conduct,' he said.

Justice Yacoob concluded by saying that every attorney, advocate, candidate attorney and legal practitioner is potentially a judge and that they needed to bear this in mind, also that they are training with that vocation in mind. 'Unless one has an independent, impartial legal system or lawyers who understand the distinction between fairness and unfairness and who treat people properly, there can never be proper judgments,' he said.

Justice Yacoob added that lawyers must be able to say that they can be a judge. He said that if lawyers become corrupt, the profession will be corrupt. 'You are contributing to judicial fairness. Those who behave unconstitutionally in court and treat the poor or blacks differently do so because this behaviour existed in the lawyers of yesterday. Behaving ethically and fairly leads to building the judiciary,' he said adding that the lawyer of today is the judge of tomorrow. The ethical lawyer of today is building an ethical judicial system. (The above article appears in the April 2014 edition of the ***De Rebus*** journal)

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