e-MANTSHI

A KZNJETCOM Newsletter

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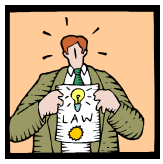
Welcome to the sixty seventh issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Gerhard Van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), with the approval of the Minister of Justice and Constitutional Development, amended the Magistrates Courts rules with effect from 2 September 2011.The notice to this effect was published in Government Gazette no 34479 dated 29 July 2011.The rules that have been amended are Rules 5 ,13, 55 and 56.

Rule 5(3) has been amended as follows :(The underlined expressions are insertions into the rules):

> "(3) (a) (i) Every summons shall be signed by an attorney acting for the plaintiff and shall bear the attorney's physical address, which address shall, in places where there are three or more attorneys or firms of attorneys practising independently of one another, be within15 kilometres of the court house, the attorney's postal address, and, where available the attorney's facsimilie address and electronic mail address: Provided that the State Attorney may appoint the office of the registrar or clerk of the civil court as its address for service.
>
> (ii) If no attorney is acting for the plaintiff, the summons shall be signed by the plaintiff, who shall in addition append a physical address.

> which address shall. in places where there are three or more attorneys or firms of attorneys practising independently of one another, be within 15 kilometres of the courthouse at which plaintiff will accept service of all subsequent documents and notices in the suit, the plaintiff's postal address and, where available, plaintiff's facsimile address and electronic mail address.

(iii) After subparagraph (i) or (ii) has been complied with, the summons shall be signed and issued by the registrar or clerk of the court and shall bear the date of issue by the registrar or clerk as well as the case number allocated thereto."

Rule 56 of the Rules has been amended as follows:(Expressions in bold type in brackets indicate omissions from the existing rules).

56. (1) Application to the court for an order of [**arrest *tanquam suspectus de fuga*,**] an interdict or attachment or for a *mandament van spolia* shall be made in terms of rule 55.
(2) Every application referred to in subrule (1) shall be accompanied by an affidavit stating the facts upon which the application is made and the nature of the order applied for.
(3) The court may, before granting an order upon an application referred to in subrule (1), require the applicant to give security for any damages which may be caused by such order and may require such additional evidence as it may think fit.
[(4) An order made ex *parte* for the arrest *tanquam suspectus* de *fuga* of a person shall call upon the respondent to show cause against it at a time stated in the order, which shall be the first court day after service.]
[(5) The return day of an order made *ex parte* for arrest *tanquam suspectus* de *fuga* may be anticipated by the respondent upon 12 hours' notice to the applicant.]
(4) Unless otherwise ordered by a court, an order for [**the arrest *tanquam suspectus de fuga* of a person or**] the attachment of goods shall *ipso facto* be discharged upon security being given by the respondent to the sheriff for the amount to which the order relates, together with costs.
(5) The security contemplated in subrule (6) may be given to abide the result of the action instituted or to be instituted; and may be assigned by the respondent to part only of the order and shall in that event operate to discharge the order as to that part only."

Recent Court Cases

1. S v Fynn 2011(2) SACR 178 (KZP)

A written notice to appear in court must clearly disclose the particulars of the offence with which an accused is charged.

It is an essential prerequisite that any charge referred to in a criminal summons, written notice or other formal statement, must, on its face, be clear and sustainable to the extent that, were the accused to have opted not to pay the admission of guilt fine but to proceed to trial, he or she would have been able to plead to that charge as it stood in the summons, notice or other formal statement, as the case may be. (Paragraph [11] at 181f–g.)

Where an accused person has signed an admission of guilt based on a written notice in terms of s 57(1)(b) of the Criminal Procedure Act 51 of 1977, which does not disclose the offence with which he is charged but merely reflects the name of the offence, the deemed conviction of the accused in terms of s 57(6), and the sentence in the form of admission of guilt fine, cannot stand and should be set aside. (Paragraphs [13]–[14] at 182b–d.)

2. S v Mitchell 2011(2) SACR 182 (ECP)

An Appellate/reviewing tribunal should be slow to interfere with measures a lower court considered necessary to protect itself from conduct disrupting or interfering with the proper functioning of the court.

An appellate tribunal (and a reviewing court) should be slow to interfere with the measures which a lower court considers necessary in 'self-protection and in order to secure the decorum of its own proceedings', such as utilising contempt of court proceedings in terms of s 108 of the Magistrates' Courts Act 32 of 1944. It is clear from the answers provided by the magistrate, that this was not an isolated event, and might have been necessary to act as a deterrent for similar matters in future. The effectiveness of a conviction for contempt of court, in circumstances where the accused has misbehaved in a manner which interferes with the proper functioning of the court, might be diminished if the matter is referred for investigation by the Director of Public Prosecutions. It was necessary to act against the accused to protect the reputation and dignity of the court and the orderliness of its proceedings. (Paragraph [9] read with paras [8] and [5] at 185*g*–186*a*, 184*i*–185*b* and 185*e*–*f*.)

Section 108(2) of the Act makes it incumbent on a magistrate to, without delay, make a statement, certified as true, of the grounds and reasons for the proceedings,

submit it to a reviewing judge and furnish the accused with a copy thereof. The reasons why the statement ought to be furnished to the accused are twofold — to confirm that the facts stated are correct, and to give an accused an opportunity, although belatedly, to express his or her remorse. The latter fact might impact on the sentence imposed and provide an opportunity for a recalcitrant accused to mend his ways, as has happened in the instant matter: The record of the proceedings, and the statement, were only forwarded to the review judge two weeks later, and the accused was only provided with this statement approximately two months after the sentence was imposed; in reply he wrote a letter to the magistrate, expressing his remorse, and resolving not to do so again. For a first offender a suspended sentence would have been appropriate, but here the accused has been in prison for some time due to the delay in submitting the record — this had to be taken into account. (Paragraphs [12]–[15] and [19] at 186*e–j* and 187*d–e*.)

3. S v Makhaye 2011(2) SACR 173 (KZD)

An over-emphasis of an accused's previous conviction can constitute a misdirection in sentencing proceedings.

The appellant was convicted in a regional court of theft of a motor vehicle and sentenced to five years' imprisonment. He appealed against both conviction and sentence. Regarding the former, the court found that the magistrate had correctly rejected the appellant's version. His presence near the stolen vehicle, with its registration plates in his possession, a mere six days after the theft, and his failure to provide a satisfactory explanation, justified the negative inferences that had been drawn against him. Regarding sentence, however, there were grounds for interference.

Held, that the magistrate had paid particular attention to the appellant's previous conviction, for an offence described as 'possession of housebreaking and car theft implements and not being able to justify such possession'. This had been committed on 15 October 1998, and sentence of a fine, alternatively imprisonment, had been imposed on 1 October 1999. The present offence had been committed in April 2008, almost 10 years after the previous one. Contrary to the magistrate's view that the previous sentence had not deterred the appellant, it seemed to have done precisely that: he had not been convicted of any crime for almost nine years after its imposition. The trial court's over-emphasis on the previous conviction was inappropriate, and constituted a material misdirection warranting interference. (Paragraphs [8] and [10] at 175*i–j* and 177*b–d*.)

Held, further, bearing in mind that it had not been proved that the appellant was the actual thief, and given his personal circumstances — he was gainfully employed and responsible for supporting a large extended family — the trial court ought to have considered other sentencing options. The fact remained, though, that he had been convicted of a serious offence; accordingly, the sentence must serve as a sufficient deterrent, while allowing him to rehabilitate himself. A suitable sentence would thus be one that was subject to the provisions of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977. (Paragraphs [10]–[12] at 177*e–j*.)

Appeal against conviction dismissed. Appeal against sentence upheld. Sentence of five years' imprisonment, of which one year conditionally suspended, imposed, subject to the provisions of s 276(1)*(i)* of Act 51 of 1977.

4. S v Mdantile 2011(2) SACR 142 (FB)

The procedure for special review cases coming to the High Court from a magistrates' court is laid down in s 304(2)(a) of the CPA —The subsection requires that a High Court order be embodied in a formal judgment, signed by another concurring judge, and delivered in open court.

The accused had been convicted in a district court on his plea of guilty on a charge of fraud. It appeared from the record that he had gained access to a railway station platform, not by purchasing a ticket for travelling by train, but by bribing a security official with R20 to allow him onto the platform. The accused had then boarded a train and was soon confronted by a ticket examiner — who demanded to see a ticket that he was unable to produce. The trial magistrate convicted the accused of fraud and sentenced him. The control magistrate of the district court, however, had reservations about the conviction — he was of the opinion that no misrepresentation by the accused had been proved, and that the element of prejudice had not been established — and referred the matter for special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977. The acting judge, to whom the review was allocated, dealt with it by making an order in the form of a memorandum, not a judgment delivered in open court and signed by a concurring judge.

Held, that the procedure for dealing with special cases, which came to the High Court from the magistrates' court in terms of s 304(4) of Act 51 of 1977, was laid down in s 304(2)*(a)* the CPA. An order of a High Court in a special review should be embodied in a formal judgment — not an informal memorandum, signed by a concurring judge, and be delivered in an open court. (Paragraphs [6] and [8] at 145*a–b* and 145*d–e*.)

Held, further, that the mere fact that there was no sufficient evidence, or proof, of an oral statement by means of which the accused actually made a false representation to the ticket examiner, did not mean that he was wrongly charged with fraud. If the deceiver candidly intended to defraud, as in this instance, and his behaviour or actions were consistent with his pervasive design, it became immaterial whether the false representation was manifested to a specific representee by way of an explicit or implicit distortion of the truth — sometimes called positive misrepresentation, or negative misrepresentation, respectively. In giving the R20 to the security guard, and in causing the security gate to be opened, the accused represented to the world that he had a valid ticket, knowing, at the time, that that representation was a false representation which he made with the intention of inducing Transnet Ltd to act upon it through its employees by conveying him to his destination at its expense, to its detriment. On the facts, it must therefore be accepted that the conduct of the accused implicitly boiled down to false representation. (Paragraphs [31] and [34] at 149*h–i* and 150*d–f*.)

Held, further, that the evidence compelled the conclusion that the intention of the accused was fraudulent. He embarked on a series of acts of deception designed to defraud Transnet Ltd. His real intention was to pay absolutely nothing to Transnet. He forked out R20 and gave it to the security guard at the gate, and not the cashier in the ticket-sales office. The purpose of handing the money to the security guard was not to buy a ticket at all, but to gain access to the platform, and eventually to the train. Moreover, it was clear and obvious that he did not expect the insufficient cash to find its way into the unintended coffers of Spoornet. It was difficult to accept that, in these circumstances, it could be said that fraud was not proven merely because there was no proof of any positive false representation and prejudice to the ticket examiner. (Paragraphs [41] and [42] at 151*j*–152*d*.) Conviction and sentence confirmed.

From The Legal Journals

Moorcroft, J

" The presence of witnesses in court"

De Rebus August 2011

Coertse, N

" Previous convictions for offences against children: The second register"

De Rebus August 2011

Roestoff, M and Smit, A

"Non-compliance with time periods – Should the debt review procedure lapse once a reasonable time has expired? – *Pelzer v Nedbank Limited* "

THRHR 2011 501

Renke, S

"Aspects of incidental credit in terms of the National Credit Act 34 of 2005 "

THRHR 2011 464

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

Contributions from the Law School

The application of 'battered woman syndrome' to objective test in private defence

It is generally accepted that unlawfulness is tested objectively in South African law. The test is "what the fictitious reasonable man, in the position of the accused and in light of all the circumstances would have done" (*S v Motleleni* 1976 (1) SA 403 (A)). It is also generally accepted that the person acting in self-defence may not benefit from prior knowledge that he has of his attacker. In other words, what the reasonable person would not have had (Burchell and Hunt *South African Criminal Law and Procedure* 2ed (1983) Vol I:331.)

Two reasons can be advanced for this. First, reasonableness must be facially natural. This is to avoid protecting an individual or groups interests at the expense of another (Unikel "Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence" (1992) *North Western Law Review* 329-330).

Second, the emphasis is placed on the act and not on the person who acted in self-defence. Objectivity of the self-defensive act does raise an important question. If the person's act was not reasonable could they have acted otherwise? This point is critical since South African law only punishes voluntary acts (Heller "Beyond the Reasonable Man? A Sympathetic but critical assessment of the use of subjective standards of Reasonableness in Self-Defense and Provocation Cases" (1998) *American Journal of Criminal Law* 1 at 12). This point is pertinent in battered woman cases. Most notably where she claims to be suffering from battered woman syndrome and can't control her actions. This syndrome is characterized by learned helplessness. That is, repeated battering diminish the woman's motivation to respond and she becomes passive (Walker *The Battered Woman Syndrome* (1984) 49-50).

The traditional objective test has been criticized for not taking the battered woman's experience into account. Battered women appear calm during and after the killing. They generally use a weapon to strike the victim in stealth. Furthermore, the method of killing may be influenced by gender specific norms. For instance, their superior physical strength and training is more likely to make men use their fists when angry. Women act with stealth. The reason? Smaller size, lesser physical strength and lack of physical training in fighting with their hands (Yeo "The Role of Gender in the Law of Provocation" (1997) *Criminal Law Journal* 431 at 453). For this reason, the courts are more willing to take into account the context in which the abused woman kills her abuser. This has regard to her experiences as well as the impact of the abuse upon her.

In *S v Engelbrecht* (2005) (92) SACR 41 (W) the court held that the reasonable woman must not be forgotten in the analysis and deserves to be as much

part of the objective standard of a reasonable person as does the reasonable man. There is compelling justification for focusing on the specific form which the abuse may have over time and in particular circumstances. Focus should also be on the impact of abuse upon the psyche, make-up and entire world view of an abused woman (at par [343]). While the court was correct in stating that the "reasonable woman" should not be forgotten in the analysis, what was objectionable was Satchwell J's statement that the focus should be on the impact the abuse may have over time upon her psyche, make up and entire world view. The terms "psyche" and entire world view tend to relate to the issue of culpability. Any issue relating to culpability is dealt with in terms of putative self defence.

Putative self defence is subjectively assessed. Therefore, from her perspective "she would have honestly believed her life was in danger but objectively viewed, it was not (*S v De Oliviera* 1993 (2) SACR 59 (A) 163I-J). If this is what Satchwell J had in mind, it was not expressly stated. No mention is made at any point in the judgment of this defence. It appears as if the Engelbrecht case has developed what is termed in American law "reasonable battered woman standard." This standard denotes what would a reasonable battered woman do in the position of the accused (Heller supra at 57).While it may be difficult to establish which subjective factors should be taken into consideration, judges and defence counsel are expected to operate within the parameters set by the law. Most notably, that objective elements in criminal liability are objectively assessed in terms of *actus reus.* Subjective or mental elements are transferred to the enquiry regarding *mens rea* (state of mind) of the accused (Snyman "The Normative Concept of Mens Rea- A New Development in Germany" (1979) *International and Comparative Law Quarterly* 211 at 212). This distinction remains important since altering self-defence to accommodate the actor's personal psychology has important implications. It undermines the notion of self-defence as a justification. The reason is that justification defences operate on the basis of the accused's act being the morally preferred option (Burke Rational Actors, Self-Defense and Duress: making sense not Syndromes out of the Battered Woman" (2002) *North Carolina Law Review* 211 at 242) but is unable to work in practice for other reasons as well.

First, in non-confrontational killings, expert testimony explaining how battered woman's syndrome affects individual perception is used. However, viewing the Engelbrecht case, one would have no meaningful way to determine whether her belief in the imminence of danger was reasonable. This would be the case, even if viewed from her distorted perspective (Goldman "The Hazards of Subjective Self-Defense and the merits of Partial Excuse" (1994) *Case Western Reserve Law Review* 185 200-201). In light of the three distinct phases of the domestic violence cycle, the cycle theory itself seems to require knowledge of where the abused woman's allegedly defensive use of force fell within the cycle. It also requires how each distinct phase typically lasted before one can determine the reasonableness of the perception of imminent harm. Therefore, if the abuser becomes contrite and apologetic immediately before he fell asleep intoxicated, it would follow from the cycle theory of violence that there was no imminent threat of harm. It would also follow that no reasonable belief otherwise existed- until the contrition phase was complete and the tension building phase was under way (Burke supra at 142).

Second, even if the court were to disregard the source of perceptions as subjective psychological phenomenon, the actual effect of the syndrome on an actor's perception must be considered. It is true that the abused woman may feel afraid and isolated may respond more intensely when acting in self-defence. She may also respond more quickly to perceived danger or overestimate the danger. This could lead to her initial extreme responses to the abuse becoming over-generalized. Therefore, occurring in situations where there is no objective danger. The end result: an extremely hyper vigilant and anxious-guarded woman. Just as society does not allow a person to claims self-defence simply because she is extremely nervous or cowardly, it should not allow, a battered woman to do so simply because she is hyper vigilant (Goldman supra at 201).

Third, the need to particularize the objective test will have certain consequences. If taken to its logical conclusion, it ultimately collapses into a purely subjective standard. Such a standard cannot satisfy the voluntary act requirement unless all the actors characteristics are taken into account. If every characteristic is taken into account, the battered woman would not be able to help acting as she did (Heller supra at 94-95). This would be functionally the same as a purely subjective standard.

One possible solution to this dilemma is to argue that constitutional norms could at least provide a broad-based "principle" on which to draw such a distinction. The concept of unlawfulness hinges on the legal convictions of the community. It has not only found favour with South African courts, but requires a judge not to impose his own subjective preferences onto the case. Rather he must seek the solution in the sentiments of "all enlightened individuals in society" or the "legal convictions of the community's lawmakers"(Flack The South African Criminal Law under analysis in our Constitutional Dispensation: Are we looking for an 'Excuse? An Exposition of *S v Goliath* 1972 (3) SA 1(A)" (1999) *Responsa Meridiana* 78 at 82). The enquiry into reasonableness in the context of unlawfulness can accommodate only the generic facts or the physical act. This is assessed in terms of the constitutional rights, where the "reasonable man" test has become increasingly subjectivized. This is done to take into account a number of the personal qualities of the accused. Although there is a need for flexibility in the area of the justification grounds and this makes objectivity more elusive, there are has to be clear limits. Judges are expected to make value judgments in this context all the time. This is so when assessing the extent to which an accused's conduct falls within the limits of self-defence. The realm of objectivity is in the recognition of pre-existing limits. The use of discretion in applying such pre-existing rules is well-established. However, it needs to be established if it is adequately countenanced (Flack supra at 94). It is submitted that it is not. The concept fails to be objectivised sufficiently. Furthermore, judges are granted too much discretion in this respect.

The ***Engelbrecht*** case is a clear example of such unfettered discretion. While the Constitution does not establish a hierarchy of rights, judges and academics have acknowledged that some rights are more foundational. Some constituting a core of rights from which others are derived.

The right to life is antecedent to all other rights in the Constitution (*S v Makwanyane* 1995 (6) BCLR 605 (CC) at par [326]). Surely the abuser's right to his life supercedes the abused woman's right to dignity or bodily integrity. While it could be stated that all three rights are of great importance, from an objective standpoint, (Makwanyane at par [97]) these rights have limitations and to meet constitutional muster. They must also be linked closely to their purpose. As Ally and Viljoen have noted "the use of violence especially lethal force, can only be justified if it is necessary (that is, if it is the only means to avoid death or grievous bodily harm)"(Homicide in defence of property in an age of Constitutionalism" (2003) *South African Journal of Criminal Justice* 121 at 133). Perhaps from the abused woman's position (in accordance with the test set out in *Engelbrecht)* she was correct to kill her abuser. But it is submitted, that she had no way of knowing whether her abuser would have killed her at that very moment. Indeed the abuse had been going on for some time. Therefore, there was less restrictive means of extricating herself from her situation. She could have called the police or left. An abused woman is not expected to flee her home, in terms of the Constitution. However, is submitted that the abuser's life takes precedence over the accused's right to remain in her home.

Satchwell J in *Engelbrecht* did not correctly identify whether the limitation on the accused's rights were justifiable. The court also failed to take cognizance of established precedent. Interpretation or development of the common-law requires that the court must promote the spirit, purport and, objects of the Bill of Rights. It is meant to adapt or correct applicable the applicable law to reflect common law, not to change it in its entirety (Ally and Viljoen supra). Proponents of "battered woman syndrome" attempt to introduce such evidence (including the *Engelbrecht* case) to explain the circumstances that may have impacted upon the woman's conduct. However, South African courts already do this to a limited extent as a matter of course. Various factors are taken into account. These include the nature of the harm threatened, the genders of the parties, the means that were at the accused's disposal, and their relative strengths. These are factors which the court would consider in assessing whether the killing was a reasonable response to the harm threatened. It is submitted that since no single profile of a battered woman exists, it would be inadvisable to expect the court to go to the point of assessing whether the killing was a reasonable response for a battered woman (Reddi "Battered woman syndrome: Some reflections on the utility of this 'syndrome' to South African Women who kill their abusers" (2005) *South African Journal of Criminal Justice* 259 at 273).

To keep the South African law of self-defence firmly rooted as a justification defence, objectivity needs to be maintained. The American standard of a reasonable battered woman should not be adopted for the reasons noted.

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Matters of Interest to Magistrates

ANNUAL GENERAL CONFERENCE OF THE SOUTH AFRICAN CHAPTER:
OF THE INTERNATIONAL ASSOCIATION OF WOMEN JUDGES
ON FRIDAY 13 AUGUST 2011

KEYNOTE ADDRESS BY DEPUTY CHIEF JUSTICE DIKGANG MOSENEKE

ACCESS TO EDUCATION AND TRAINING: PATHWAY TO DECENT WORK FOR WOMEN

Introduction and salutations

Madam Justice BC Mocumie, President of the South African Chapter: International Association of Women Judges, fellow judges and other distinguished guests; it is a remarkable privilege to be part of this annual general conference of the South African Chapter of the International Association of Women Judges. I would like to thank you for your kind invitation to me to share this occasion with everybody here present.

It is not fortuitous that this conference is taking place during the National Women's Month. It is right and proper that we all pause to consider what women are in our private lives, in communities and within our nation. They are truly special. We owe to them our very lives, our up-bringing and all the wonderful values that make life worth living. The female sense of survival is indeed legendary. Our mothers and sisters have an amazing ability to soak up a lot of pain and to emerge the other side as worthy human beings.

Those who know me will tell you that my hero of all times is my mother. I am thankful that she is alive and this very month she will be turning 86 years of age. I am grateful that her brain is still as clear as a bell. She taught me all manners I have. A firm respect for others. She spared no moment to remind me that my life is in my hands and my dignity is my responsibility. I had to wash my underwear, clean my bedroom, wash dirty dishes and she still expected me to produce A grades at school.

When everything else fails, I retreat to her modest home in Mabopane and she always knows what to say to restore my challenged if not shattered world. In every year of the ten years on Robben Island, she strained every sinew in her body and every emotion in her soul in order to pay me a visit. She kept hope alive. She was a source of strength in the darkest hour. The rest is history and here am I - a proud product of a gender activist.

Well this sentimental introduction is meant to point to something very fundamental. The gendered relations in this and virtually all other societies has been a matter of remarkable inequity and unfairness. For reasons that are despicable, various societies have dealt a very unfair hand to women. This has happened notwithstanding the obvious human worth and right to equality with, if not superiority over men. We men, personally or institutionally find ways to exclude women from private and public power. These exclusionary arrangements result in the least training and experience. We create false dependence through the unequal distribution of skills and economic goods. Patriarchy is indeed more entrenched and much more wide-spread, perhaps much more debilitating than colonial racism.

This exclusion and inequality is worsened by the violent indignity, of endemic rape, domestic violence, human trafficking and religious or cultural repression of women.

It is so that no society can truly advance and claim to be free whilst at least half of it is a victim debilitating patriarchy. This brings me to what I really want to share with you in line with the theme of this annual general conference which is ”Access to education and training as a pathway to decent work for women”.

My remarks will be focused on the seminal importance of judicial education and training as an important part of validating all judges, but in particular, women judges.

Every significant stakeholder in the judicial process and the administration of justice in this country seem to accept that systematic, well-resourced and effective judicial education for the entire judiciary is as necessary as it is overdue. This realisation is neither new nor exclusive to our country. Virtually every democracy in the world, which has entrenched the rule of law and separation of powers and strives for judicial independence and social justice, has found it proper, within the context of its national objectives and specific priorities, to fashion an institution suited to train further its judiciary.

Our search for context and national objectives starts with the Constitution. It is the supreme law of our land and establishes an open society based on democratic principles, social justice and fundamental human rights. This it does in order to heal the divisions of our troubled past, to afford every citizen equal protection by the law and in the end to improve the quality of life of all citizens.

Our new constitutional enterprise carves out a new and substantially enhanced role for our courts. The Constitution itself requires courts of suitable jurisdiction to review the exercise of all public power and to exact compliance by all with constitutional dictates. A court must when deciding a constitutional matter declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Again, competent courts must enforce rights conferred by the Bill of Rights and in doing so must consider international law and may consider foreign law. Even when interpreting the common law, customary and legislation, courts must do so through the lenses of the Constitution and its normative value grid.

In most jurisdictions courts do not enforce socio-economic rights. However, our Constitution, in recognition of the persisting social injustice spawned by our unequal past and the indivisibility of rights, makes a different choice. Our notion of fundamental rights carries the novel and salutary feature that it extends to socio-economic rights. Our Constitution commits to pursue social equity. For these reasons the government has a duty to fulfil, protect and uphold these rights and courts are commanded to give effect to these rights.

It is no exaggeration to say that the role of the courts is now as expansive as the Constitution is ubiquitous. This enhanced public duty has important implications for the judicial function, which now occurs within an articulated normative plane and a society in transition. The judiciary is duty bound to give effect to the transformative design of the Constitution. It must discard the worst of our jurisprudential past whilst preserving those parts well-suited to our new societal ideals. However, important as it is, social context sensitivity is not in itself sufficient. It is not an adequate substitute for the quintessential attributes of a good judicial officer. Beyond integrity, fairness and impartiality judges must be competent, must be efficient and must be effective. They need not be nor are they infallible. But as a bare minimum, judges must possess the tools to dispense justice.

It may be argued that in a diverse society in transition the judicial task requires an even more nuanced and competent response. However, our Constitution does not specify the level of competence or practical experience required for an appointment to judicial office. Section 174 of the Constitution requires only that an appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. In practice the burden of quality assurance rests on the Judicial Services Commission on whose advice judges are appointed.

A further relevant consideration is that the Constitution highlights the need for the judiciary to reflect broadly the racial and gender composition of South Africa. The inventible consequence of this implied appointment yardstick is that appointments are no longer drawn only from the ranks of silks practicing at the bar. In these circumstances systematic and customized judicial instruction is indicated and would be of great benefit to the bench and society alike.

Access to justice is bound to be illusionary without judicial probity and competence and effectiveness. Powerful constitutional and social imperatives permit no debate on whether or not judicial education is necessary. It is a crucial means towards equal justice for all. Whatever suited the past, in this country and other jurisdictions, today it is well settled that a judiciary worthy of the name cannot execute its task properly without a conscious, well-planned and well-resourced judicial education programme which offers lifelong learning for those charged with so important a public task. In conclusion, it bears repetition that our transition to constitutional democracy has raised sharp legitimacy, competence and effectiveness questions, which render judicial education not only desirable but urgent.

The objectives of judicial education

But what is judicial education? A precise definition would diminish the inherently wide scope of what judges and magistrates, once appointed to judicial office, may or ought to learn about the society they serve and the nature of judicial function. Even away from definitions, the traditional preoccupation of judicial training tend to reinforce first impartiality; and integrity; which would include aspects of judicial independence, ethics, judging skill, bias, even-handedness; second competence; which emphasizes judgment writing and delivery, conducting a hearing, evidence and procedure, interpretation of legislative instruments, special or new areas of the law or legislation, fact finding and the exercise of discretion; third; efficiency; which would include computer skills, electronic and manual research skills, case flow management, delay reduction, court administration, documentation and archiving and fourth effectiveness; which implies judicial industry and preparedness at hearing, timely judgment delivery, proper formulation of court orders and adaptability.

We learn more about the nature of judicial education by looking at its objectives. That is so because judicial training is a means to an end. Its intermediate purpose is to foster a high standard of judicial performance and its ultimate objective is to ensure a fair and efficient administration of justice. Put simply its end object is to provide justice for all.

Background

Since the inception of our Constitution there have been several important debates on and research into appropriate judicial education for our country. I record only the very recent background. During his term, Chief Justice Chaskalson assisted by Justice Kriegler and other stakeholders formulated an impressive and comprehensive judicial education proposal. The Department of Justice and Constitutional Development (DOJ) did not support the proposal. Even so during the terms of Mahomed CJ and Chaskalson CJ much was achieved on the induction and orientation of newly appointed judges. These training programmes were usually funded by external donors and were possible only when donor funds were availed. On the other hand magistrates were trained at the Justice College funded and managed by the DOJ.

In early 2006, leaders of the judiciary and the executive had a discussion on the principle, which should underpin judicial education and the fate of the Justice College in Pretoria. The discussion assumed a significant form when in October 2005, in a letter to the Chief Justice; the Minister adopted the following stance:

“The faculty for the training of the whole of the judiciary will be independent. This means that this faculty shall be separated from the structure in which the other faculties are allocated and shall be managed independently in all material aspects. The location thereof shall also be decided by the judiciary, and

The separation of the faculty of judicial training from the faculty for the training of civil servants requires also that the budget be allocated accordingly to either faculty. This will require that a mechanism be found for the accounting of the budget allocated to be done in terms of the Public Finance Management Act.

These changes will necessitate that I revisit the Justice College, its structure and its operations and transform it into an institution that will enable the Department to provide the training necessary for prosecutors, civil servants and the staff of the Master's office and the office of the State Attorney".

On 31 October 2005, the Chief Justice convened a meeting of the Interim Advisory Committee on Judicial Education on which are represented several judges, the Judicial Service Commission, the Justice Ministry, the Director General of Justice, the General Council of the Bar, the Law Society of South Africa, the National Prosecuting Authority, the Magistrate's Commission, magistrates' organisations (JOASA, ARMSA and LCMC), the Justice College, Society of Law Deans of South Africa. The meeting welcomed the attitude of the Minister and appointed a steering committee, chaired by me, to formulate a plan of action towards the establishment of a judicial education body.

The steering committee met on 10 February 2006 and adopted several far-reaching proposals on the establishment of a judicial education body. The substance of the proposals is set out in what follows now.

Features of the judicial education body

The name

The judicial education body for South Africa is known as the South African Judicial Education Institute (SAJEI).

Legislative framework

The Institute has been brought into being by national legislation and not by ad hoc or administrative arrangements between the judiciary and the executive arm of government. Its mandate carries the force of national legislation consistent with our broader constitutional framework and other applicable law.

Target group and beneficiaries

The target group and beneficiaries of the training offered by the Institute are judges, aspirant judges, military judges, magistrates and aspirant magistrates. The training makes provision for the orientation and training of newly appointed judicial officers and continuing judicial education for appropriate categories of judges in active service. Orientation training will be compulsory for all newly appointed judicial officers. Similarly, any judge or magistrate who is elevated to a higher court or a position requiring new or additional leadership skills should submit to compulsory

training suited to the new appointment. In principle the education programme of the Institute should reach all judges on an elective or minimum attendance basis.

Whilst the main thrust of the Institute should be the domestic junior and senior judiciary, it should, subject to appropriate financial arrangements, have the power to train judicial officers of neighbouring territories and other countries on the African continent and elsewhere, at their request.

In most Commonwealth and other democracies the training task of their judicial education institutes or academies includes judicial support staff. That appears to be so because in those jurisdictions the judiciary itself appoint, manages and remunerates its staff out of the national budget allocation to the judiciary through the Chief Justice. However, in our case support staff to the courts is employed by the DOJ. It is therefore appropriate to explain that there are historical and practical reasons for excluding support staff from the target group of the new Institute. We have cause to believe that the Ministry has formulated comprehensive plans to train staff other than judicial officers.

Functional and curricula independence

The legislative framework creating the Institute provides for an independent body, controlled and managed by the judiciary in a manner that ensures functional and curricula independence, as well as direct budgetary accountability under the Public Finance Management Act and other legislation regulating management of public funds. The reality, as you will realise in a moment, is a little different.

Source of funding

The primary duty of funding the activities of the Institute rests with Parliament. An annual budget of the Institute is voted for and allocated by Parliament and provision is made for an accounting officer of the Institute who shall, as required by law, account to the national treasury. Ideally the Institute accounts to Parliament for the proper and lawful use of money allocated to it. The one wrinkle and the biggest challenge to the Institute is the statutory provision that appoints the DG as the accounting officer of the Institute. This means that the funds of the Institute, so voted by Parliament, are under the custody and control of the DG. The Institute is yet to succeed in accessing the voted funds in order to implement its project.

Location, corporate identity and culture

The Institute is required to choose its location, develop a campus appropriate to its public mandate and in time cultivate an identity as well as its own culture. That would be a culture best suited to advance the characteristics the Constitution envisages for the judiciary and the people it serves.

Composition and powers of governing council

The legislative framework provides for a governing council of the Institute, which consists of a majority of judges and magistrates. All other stakeholders appropriately are presented on the governing council. The council assumes the ultimate responsibility for the management of the Institute, which includes the power to appoint the Chief Executive Officer and the senior executive management of the Institute and all committees which are necessary, to achieve the authorized objectives of the Institute. The first chief executive stayed in office for a month only. That in itself is a long story.

Importantly, the governing council is vested with the power to appoint a faculty board, which shall have the competence and power to formulate and direct all education and training of the Institute. The faculty board must from time to time decide the mode, content and level of tuition. The faculty board shall appoint appropriately qualified persons or bodies, whether full time or ad hoc, to conduct the training and education.

In conjunction with the faculty board, the governing council must create a research capability on matters relevant to the formulation of dynamic and customized judicial education programmes. When appropriate, the board must develop techniques or tools to receive feedback from users of the justice system and to measure the impact of judicial education the Institute offers.

Executive management

There shall be an executive management of the Institute made up of the CEO, senior management and staff on whom the day-to-day administration of the Institute shall vest. The executive management shall be appointed by and be answerable to the governing council.

Centre of excellence

The Institute must strive to achieve the highest possible standard in judicial education subject to the values and broader objectives of our Constitution. To this end, the Institute must build close ties and cooperation with regional and international judicial education institutes and other related bodies in democratic jurisdictions.

It is crucial to emphasize that until the Institute is established and functional, external donor funds will remain helpful, however, the primary responsibility of providing financial support for training of newly appointed judges must squarely fall on the fiscus. It bears repetition that a task so important to the well being of our state and its people cannot be left to the uncertainty of donor funding.

Special programme to accelerate training of women

During the term of Minister B Mabandla a special programme to accelerate the training of women who seek to be eligible for appointment as judges was established. She made it then known that her Ministry has secured the funding necessary for this programme. Judge President Ngoepe led the team, which was charged with the implementation of this programme. Once the Institute has been established, a programme such as this one will ordinarily be implemented in-house. It is however clear that there is no reason why the programme should not proceed. If anything, it should be supported and funded as currently planned.

Conclusion

As we have seen, the Institute has not commenced delivering live lectures. The Justice College continues to train magistrates until the Institute is in a position to integrate the College fully into its operations. A mechanism is yet to be found on how to resolve the dilemma of the DG being the accounting officer of the Institute, on the one hand, and the Institute being operationally independent and effective, on the other. Until we find a solution, our operations will stay stalled.

These birth pains, I am confident, we will overcome. An urgent indaba between the judiciary and the executive should resolve these matters soon. We can't wait any longer before we impart and receive effective continuing judicial education.

An indispensible part of our constitutional project is to empower and to liberate women. It remains true although trite that when you train a woman you train the nation. Within the judiciary there is a dire need for a far greater level of gender transformation. We sorely need more female judges and magistrates and more female judicial leaders. We must take urgent steps at all levels of entry and training to ensure a larger and more equitable representation of females in the judiciary.

The way we dispense justice must respond to the gendered nature of a variety of challenges in society. And the best source of validation and respect is competence which is an indispensible ingredient for a good judge. Access to justice, particularly by the marginalised, requires imaginative, sensitive, committed and competent judges. We need judges who are needs driven and who are determined to vindicate rights of aggrieved litigants impartially and without fear or favour. That deep instinct of fairness which seems to abound in women would be a great asset to our judiciary. We must continue to transform until there is a better life for all.

Thank you for listening and God Bless.

A Last Thought

"As far as Magistrates' Courts are concerned, it is appreciated that it is the intention to establish one judiciary. However, despite this desire on behalf of the Government, various Courts and tribunals are established in terms of legislation which does not contribute to the establishment of a single judiciary. The policy of the Government to establish a single judiciary is therefore undermined by its own legislation in establishing various tribunals and Courts with different status;

1.6 Furthermore, it cannot be denied that the Magistrate's Court is still considered to be a "lower ranking" court. See section 29(1)(a) through to (g) of the Magistrates' Courts Act. Other examples are the following

1.6.1 a Magistrate's Court is excluded from determining *inter alia* the validity of a will;

1.6.2 a Magistrate's Court does not have inherent jurisdiction;

1.6.3 a Magistrate's Court cannot decide on the constitutionality of legislation.

1.7 It is therefore apparent that the Government considers the Magistrate's Court to be a "lower ranking" court. It is therefore only logical that the administration and function of the Magistrate's Court should be separated from the administration of the High Court, the Supreme Court of Appeal and the Constitutional Court.

1.8 The LSSA is accordingly of the view that section 10(4)(b) of the Constitutional Amendment Bill should not be introduced and the appointment, transfer and other matters relating to Magistrates, should remain as it is."

Submission of the Law Societies of South Africa (LSSA) to the Parliament portfolio Committee on the Constitution 17th Amendment Bill