

e-MANTSHI

A KZNJETCOM Newsletter

November 2009: Issue 46

Welcome to the forty 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> .

Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. Guidelines for compensation under Section 137(5) of the *Firearms Control Act, 2000 (Act No. 60 of 2000)* have been published in Government Gazette No. 32701 dated 10 November 2009 by the Minister of Police. These are:

1. I, Emmanuel Nkosinathi Mthethwa, Minister of Police, hereby, with the approval of the Minister of Finance, establish under section 137(5) of the Firearms Control Act, 2000 (Act No. 60 of 2000), the following guidelines for compensation of persons whose firearms have been surrendered or forfeited, other than those referred to in sections 134, 135 and 136 of the Act.

2. These guidelines are not applicable to firearms which have been voluntary surrendered for destruction to the South African Police Service in the period between 1 July 2004 and 30 June 2009-

(a) by the lawful owners of such firearms, in accordance with Regulation 94 of the Firearms Control Regulations, 2004; and

(b) by virtue of a choice made by the person involved to have the firearm destroyed and not to sell, donate or otherwise dispose of the firearm involved.

3. These guidelines shall apply to firearms referred to in section 149(3) of the Firearms Control Act, 2000. Notwithstanding paragraph 2 above, I hereby determine that if the Registrar decides that a particular firearm needs to be kept by the South African Police Service for forensic and other training, research or heritage reasons; and will therefore not be destroyed, that the owner whose firearm was voluntarily surrendered for destruction must be compensated in accordance with these guidelines. In such a case the Registrar must notify the person concerned of the intention not to destroy the firearm and provide the person with the prescribed application form for compensation. Any application for compensation pursuant to a notification by the Registrar, as referred to in this paragraph, must be submitted to the Registrar within 30 working days from the date of notification by the Registrar.

4. I will appoint a Panel of at least three independent valuers. The Registrar must have the firearms in respect of applications where the applicant is not satisfied with the flat rate valued by the Panel. Such applicant for compensation shall be entitled to compensation in accordance with the valuation determined by the Panel, subject to the maximum amount of compensation determined in these guidelines for the relevant category of firearm. The costs incurred to obtain such valuation must be deducted from the compensation payable to the applicant.

5. Taking into account the -

(a) Financial constraints on the State and its ability to meet actual and anticipated claims for compensation; and

(b) interests of persons who have applied or may in future apply for compensation,

6. I hereby determine that the flat rate and the maximum amount of compensation paid in respect of a particular firearm may not exceed the following:

(a) In the case of a handgun (pistol or revolver) - R 600.00;

(b) in the case of a rifle (combination, single shot, semi-automatic/fully automatic); shotgun (combination, single shot, semi-automatic or automatic), or of any other firearm not mentioned above - Flat rate - R 1 200.00.

7. The maximum amount of compensation which may be paid in respect of any firearm, irrespective of an evaluation by the Panel, shall be the following:

(a) In the case of a handgun (pistol or revolver) - R 1 000.00;

(b) in the case of a rifle (combination, single shot, semi-automatic/fully automatic); shotgun (combination, single shot, semi-automatic or fully automatic), or of any other firearm not mentioned above - R 2 000.00.

8. In the case where compensation is to be paid, such payment must be effected from the allocated budget of the Department of Police.

9. The payment must be effected within 90 (ninety) working days from the date of determination by the Registrar of the amount of compensation, or within the same period after an appeal has been upheld.

2. A draft Repeal of the *Black Administration Act and Amendment of Certain Laws Amendment Bill, 2009*, as presented to the Speaker of the National Assembly by the Portfolio Committee on Justice and Constitutional Development, was published for comment. The bill was published in Government Gazette No 32652. The proposed amendment reads as follows:

1. Amendment of section 1 of Act 28 of 2005, as amended by section 1 of Act 8 of 2006, section 1 of Act 13 of 2007 and section 1 of Act 7 of 2008.— Section 1 (3) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act. No 28 of 2005, is hereby amended by the substitution in subsection (3) for paragraph (a) of the following paragraph:

"(a)

[30 December 2009] 30 December 2010; or".



Recent Court Cases

1. Centre for Child Law v Minister of Justice and Constitutional Development and Others 2009 (2) SACR 477 CC

Children should not be imprisoned except as a measure of last resort and then only for the shortest appropriate period of time.

While the Bill of Rights (s 28) in the Constitution of the Republic of South Africa, 1996, envisages that detention of child offenders may be appropriate, it mitigates the circumstances. Detention must be a last, not a first, or even intermediate, resort and when the child is detained, detention must be ‘only for the shortest appropriate period of time’. The principles of ‘last resort’ and ‘shortest appropriate period’ bear not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed. If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time. In short, s 28(1) (g) requires an individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that minimum sentencing entails. The injunction that the child may be detained only for the shortest ‘appropriate’ period of time relates to the child and to the offence he or she has committed. It requires an individually appropriate sentence. It does not import a supervening, legislatively imposed determination of what would be ‘appropriate’ under a minimum sentencing system. (Paragraphs [31]—[32] at 491e—j.)

The minimum sentencing regime in respect of children aged 16 and 17 under s 51 of the Criminal Law Amendment Act 105 of 1977 (the CLAA), as amended by s 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007 (the Amendment Act), ensures that consistently heavier sentences are imposed for specified classes of offences listed in the Schedules to the CLAA. It does this in three ways: First, it orientates the sentencing officer at the start of the sentencing process away from options other than incarceration. Second, it de-individuates sentencing by prescribing as a starting point the period for which incarceration is appropriate. Third, even when not imposed, the prescribed sentences conduce to longer and heavier sentences by weighing on the discretion. The first two elements go against the direct injunctions of the children’s rights provision (of the Constitution). Those rights do not apply indifferently to children by category. A child’s interests are not capable of legislative determination by group. The children’s rights provision thus applies to each child in his or her individual circumstances. This is no less so in the sentencing process than anywhere else. The conclusion is therefore unavoidable that the Amendment Act limits the rights in s 28 of the Constitution. (Paragraphs ([45]—[49] at 495a—h.)

It is plain that the Bill of Rights in the Constitution amply embodies the internationally accepted principles relating to the sentencing of child offenders. Its provisions merely need to be given their intended effect. This leads to the conclusion that no maintainable justification has been advanced for including 16 and 17-year-olds in the minimum sentencing regime introduced by the Amendment Act. Legislation cannot take away the right of 16 and 17-year-olds to be detained only as a last resort, and for the shortest appropriate period of time, without reasons being provided that specifically relate to this group and explain the need to change the constitutional disposition applying to them. It must follow that the limitation is inconsistent with s 28(l) (g) of the Constitution and is unconstitutional and must be so declared.

The court accordingly confirmed the declaration of invalidity made by the North Gauteng High Court of s 51(1), C (2) and (6) of the Criminal Law Amendment Act 105 of 1977, as amended by s 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007. The court also made certain orders dealing with how sentences imposed upon 16 and 17-year-old offenders in terms of the legislation in question should be dealt with. (Paragraph [78] at 504c—e and 504g—i.)

2. Minister of Safety and Security v Howard 2009 (2) SACR 536 (GSJ)

The Minister of Police can claim for compensation for patrimonial loss which is suffered if the police have to investigate a false complaint.

South African law recognises a claim at the instance of the Minister of Police against any individual (including the respondent in this case) who, by causing a false report to be made to the police that a crime has been committed, causes the police to suffer monetary loss as a result of its having to spend time, effort and resources in investigating the content of the false report in the belief that the report was a genuine one. (At 547a—c.)

3. A S v Vorster NO and Others 2009 (4) SA 108 (SECLD)

If a parent withdraws her consent to an adoption an unequivocal verbal withdrawal is sufficient.

The applicant asked the High Court to set aside an order granted by the first respondent, a commissioner of child welfare, made under s 18 of the Child Care Act 74 of 1983, for the adoption of her illegitimate daughter by the third and fourth respondents, a married couple. The remaining respondents were all cited in their official capacities as commissioners of child welfare.

The applicant alleged that her consent to the adoption was never lawfully obtained since the applicable procedures set out in the Act were not complied with. The salient common-cause facts were that, when the child was approximately two months old, the applicant appeared before the eighth respondent at the children's court and signed a consent to adoption in the requisite form (Form 12 of the Regulations to the Act published under Government Notice R26 121 in Government Gazette 1054) in which she consented to the adoption of the child and was informed that she could withdraw her consent 'in writing before any commissioner of child welfare at any time during a period of up to 60 days after having given this consent'. After expiry of that 60-day period she contacted the seventh respondent and told her that she wanted to proceed with the adoption, and the child was placed with the third and fourth respondents the same day. After unsuccessfully attempting to have the order rescinded, the applicant then instituted her High Court review application.

Held, that it emerged clearly from the social worker's report on which the first respondent had relied in making the order that although the applicant had not withdrawn her consent to the adoption in writing as prescribed by reg 19, she did in

fact withdraw her consent. This had resulted in the return of the child to her, after which she had fully exercised her parental rights over the child. For the court to close its eyes to an unequivocal verbal withdrawal of consent in circumstances such as the present would be to elevate form far beyond substance. It appeared also from the affidavits filed by fifth and sixth respondents that there was no misunderstanding in that regard and that applicant had clearly conveyed to them the withdrawal of her consent. (At 115C—E.)

Held, further, that the social workers had erred in not making the requisite arrangements for the formal withdrawal of applicant's consent. Once a parent who had put his or her child up for adoption had within the 60-day period unequivocally indicated his or her desire not to proceed with the adoption and had had custody of the child restored to him or her, adoption process was over. If the parent again decided to put the child up A for adoption, the statutory procedure for consent, including a further 60-day period within which to reconsider that decision, had to be followed once more. Only in this way could the interests of the parent and child be adequately safeguarded. (At 115F—I.)

Held, further, that since the applicant had withdrawn her consent within the 60-day period afforded to her, the adoption order had been wrongly B granted. (At 115I—J.)

Held, further, that it was clear from the Act and the Constitution that even where an adoption order had been irregularly obtained in the absence of the requisite parental consent, it should not be set aside unless it was in the best interests of the child to do so. (At 117C—E and 120C—D.)

Held, accordingly, that it was not in the best interests of the child for the adoption order to be set aside. (At 12211J.) Application dismissed.

4. S v Lottering 2009 (2) SACR 560 (ECG)

<p>When imposing a suspended sentence care must be taken that the sentence is not unenforceable within the period of suspension.</p>

The accused had been convicted of fraud in a regional magistrates' court and sentenced to correctional supervision and three years' imprisonment, wholly suspended for three years on condition, inter alia, that she compensated the complainant in the amount of R139 977 in instalments of R1500 per month with effect from 30 November 2008. In a special review the regional magistrate pointed out that he had miscalculated the monthly instalments. The instalments should have been in the region of R4000 per month.

Held, that an amendment of the condition of suspension by the court of review, increasing the amount of the instalments, would amount to an increase in sentence. (At 561j—562b.)

Held, further, that the sentence in its present form was not enforceable. The condition of suspension was clearly intended to ensure compliance by the accused with the order that she compensate the complainant fully. After expiry of the three-year period of suspension, however, the accused would be at liberty to stop paying without thereby breaching the condition of suspension, and the complainant and the State would then be left without a remedy to enforce payment of the balance owing. (At 562b—c.)

Held, further, that the condition of suspension had to be set aside and the matter remitted to the regional magistrate for the condition to be reconsidered, after the accused had been afforded an opportunity to make representations on the repayment of the amount. (At 562d—e.)

Corrigendum: e-Mantshi issue 45

The reference to **S v Zenzile 2009 (2) SACR 361 SCA** should read **S v Zenzile 2009 (2) SACR 407 WCC**



From The Legal Journals

Curlewis, L

“Drunken driving on appeal – The Minister of Safety and Security v Tyulu 2009 (5) SA 85(SCA)”

2009 November De Rebus

Stadler, S

“ NCA: Debt review process in the Magistrate’s Court”

2009 November De Rebus

Otto, J M

“Over – indebtedness and applications for debt review in terms of the National Credit Act: Consumers Beware! Firstrand Ltd v Olivier.”

2009 SA MercLJ 272

Van der Bijl, C

“ Sim Card swapping, mobile phone banking fraud and RICA 70 of 2002”

2009 SA MercLJ 159

Godfrey, S

“The legal profession: Transformation and skills”

2009 SALJ 91

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



Contributions from the Law School

The application of *dolus eventualis* to specific crimes

It is generally assumed in criminal law that in respect of crimes requiring intent, the intent may take the form of either *dolus directus* (direct intent), *dolus indirectus* (indirect intent) or *dolus eventualis* (Snyman *Criminal Law* 5ed (2008) 183). Furthermore, it is generally assumed that the rule that intent may consist of either *dolus directus*, *dolus indirectus* or *dolus eventualis* (for definitions of these terms see Burchell *Principles of Criminal Law* 3ed (2005) 461) applies to all crimes that require intent, irrespective whether their origin lies in the common law or in a statutory enactment. The sole possible exception to this rule is where a statute expressly requires intent of a particular kind (Burchell, Burchell and Milton *South African Criminal Law and Procedure Vol 1: General Principles* 2ed (1983) 139). The scope of the application of *dolus eventualis* has, however, been called into question by certain cases, such that a brief examination of the concept in this regard may be useful.

Dolus eventualis is applied to crimes with a formal definition as well as crimes with a material definition (Burchell 462). However, *dolus eventualis* is almost invariably applied in the case of murder (Skeen ‘Criminal Law’ *LAWSA Vol 6* (2ed) (2004) para 89). Apart from murder, *dolus eventualis* has been held to be a sufficient form of intention in respect of, *inter alia*, the following crimes (in each case a single example is cited from the case law): attempted murder (*S v Ferreira* 1994 (1) SACR 200 (C)); assault with intent to commit murder (*S v Tissen* 1979 (4) SA 293 (T)); assault with intent to do grievous bodily harm (*S v Erasmus* 2005 (2) SACR 658 (SCA)); assault (*S v Kritzinger* 1973 (1) SA 596 (C)); rape (*S v J* 1989 (1) SA 525 (A)); sodomy or indecent assault (*R v H* 1962 (1) SA 278 (SR)); *crimen injuria* (*S v Steenberg* 1999 (1) SACR 594 (N)); abduction (*R v Churchill* 1959 (2) SA 575 (A)); abortion (*R v Chitate* 1968 (2) PH H337 (R)); theft (*S v De Ruiter* 2004 (1) SACR 332 (W));

receiving stolen goods knowing them to be stolen (*R v Markins Motors* 1959 (3) SA 508 (A)); malicious injury to property (*S v Pitje* 2005 JDR 0191 (T), although Preller J comments (at 6) that '[o]nly in the clearest of cases could that form of intent suffice for the purposes of the present crime'); cruelty to animals (*S v Sibeko* 1951 (2) SA 41 (E)); ill treatment of a child (*S v Maree* 1990 (3) SA 365 (C)); terrorism (*S v J* 1988 (1) SA 85 (N)); fraud (*S v Nzimande* 2007 (2) SACR 391 (SCA)); bribery (*S v Deal Enterprises* 1978 (3) SA 302 (W)); reckless driving (*R v Ellis* 1959 (4) SA 497 (SR)); treason (*S v Banda* 1990 (3) SA 466 (BG)); failure to pay maintenance (*S v Magagula* 2001 (2) SACR 123 (T)); robbery (*S v Vilakasi* 1999 (2) SACR 393 (N)); drugs offences (*S v Idahoso* 1999 (1) SACR 221 (W)); arson (*S v Tshabalala* 2005 JDR 1196 (T)); escaping from custody (*S v Faya* 2002 JDR 0701 (T)) and contempt of court (*S v Moila* 2005 (2) SACR 517 (T)).

However, despite this wide application of *dolus eventualis* by the courts, in two Appellate Division decisions heard in 1989, *Minister of Law and Order v Pavlicev* 1989 (3) SA 679 (A) and *S v Nel* 1989 (4) SA 845 (A), it was held that *dolus eventualis* was insufficient, and that only direct intent sufficed as the *mens rea* form for the particular offence. Both of these decisions involved the provisions of s54 of the notorious Internal Security Act 74 of 1982 (since repealed), although *Pavlicev* was a case of subversion, whereas *Nel* was a case of sabotage. In both cases the State sought to prove the offence on the basis of *dolus eventualis*, and in both cases the court refused to countenance such a view, insisting on direct intention for both offences.

Snyman criticizes these judgments, pointing out that the wording of the erstwhile s54 setting out the intention required was clear and unequivocal; the phrase in question 'with intent to', which is almost invariably interpreted as meaning direct intention or *dolus eventualis*, unless there are special reasons for departing from the ordinary meaning of the word (Snyman '*Dolus eventualis* in the offences of terrorism, subversion and sabotage' (1990) 107 *SALJ* 365 at 368). It is submitted by Snyman that in respect of s54 no such special reasons exist and consequently the ordinary meaning of the word in law, which includes *dolus eventualis*, must be applied (*ibid*). Snyman proceeds to analyse the reasoning of the courts in *Pavlicev* and *Nel* in some detail. *Inter alia* the issue of whether *dolus eventualis* suffices for additional intent crimes is canvassed, and answered in the affirmative (*ibid* 369-370). He further points out that on policy grounds it is difficult to reconcile the finding of the court that *dolus eventualis* is insufficient for a conviction of subversion or sabotage with the rule that *dolus eventualis* suffices for a conviction of murder, probably the most serious of all crimes (*ibid* 372-3). In contrast, Cowling ('Recent Cases: *Minister of Law & Order v Pavlicev* 1989 (3) SA 679 (A), *S v Nel* 1989 (4) SA 845 (A)' (1990) 1 *SACJ* 112 welcomes the limitation of the form of intention required for 'political' crimes such as terrorism, subversion and sabotage to direct intention, on policy grounds. Maré ('*Minister of Law & Order v Pavlicev* 1989 (3) SA 679 (A): Aspects of the offence of subversion' (1991) 4 *SACJ* 107) supports this view in respect of subversion which restricts the 'vague and wide-ranging' ambit of the offence, although she observes that '...in principle there is no reason why *dolus eventualis* should not be sufficient for the additional intention required for subversion...' (at 112).

The question of the sufficiency of *dolus eventualis* as a *mens rea* form also arose in relation to the crime of theft, at approximately the same time, in the case of *S v Aitken* 1988 (4) SA 394 (C). Van den Heever J expressed grave doubt as to the applicability of *dolus eventualis* in respect of theft, referring to such a proposition as a 'novel concept' (at 400F-G). Thus the judge appears to be advocating that differentiated requirements exist in respect of forms of *mens rea* for differing crimes for which intention is required (Sloth-Nielsen 'Recent Cases: *S v Aitken* 1988 (4) SA 394 (C)' (1989) 2 SACJ 109 at 111). The suggestion that *dolus eventualis* may not be a sufficient form of *mens rea* for theft has however been criticized as 'unnecessary' (*ibid* 114) and 'startling' (Maré 'Recent Cases: *S v Aitken* 1988 (4) SA 394 (C)' (1989) 2 SACJ 114 at 115). As Maré observes, '...[i]t has always been accepted that where intention is an element of a crime, intention in any of its forms will suffice, and that it is therefore immaterial whether an accused has acted with *dolus directus*, *dolus indirectus* or *dolus eventualis*...' (*ibid*). There seems to be no reason to distinguish theft from other crimes in this regard (*ibid* 118). Maré (*ibid*) and Sloth-Nielsen (at 113) therefore agree that *dolus eventualis* is a sufficient form of *mens rea* for theft, and that *dolus eventualis* may relate to any of the elements of the crime of theft.

It may therefore be concluded that the authors are correct in emphasizing that *dolus eventualis* is sufficient for the purposes of theft, as well as for crimes such as subversion and sabotage (for present purposes see the crimes contained in the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, which repealed the Internal Security act 74 of 1982). The form of intention should thus play no part in the limitation of liability (although it may be relevant with regard to sentence). Snyman cannot be faulted, it is submitted, when he states the following:

'One is here at the crux of the issue – the question whether *dolus directus* and *dolus eventualis* really constitute different types of intent, and whether it is at all feasible to distinguish between offences requiring only *dolus directus* and offences requiring either *dolus directus* or *dolus eventualis*. It is submitted that the answers to both these questions are negative, and that this applies to both common-law and statutory offences. It is trite law that intent should not be confused with motive or desire. Once one recognizes this crucial distinction, it becomes conceptually difficult, to say the least, to argue that certain crimes require only a certain type of intent (for example *dolus directus*), whereas for other crimes any type of intent – thus also *dolus eventualis* – is sufficient. To know or foresee that a certain act may have a certain result and nevertheless to proceed with the act must, at least for the purposes of criminal law, be regarded as tantamount to intending that result...' ((1990) SALJ 371).

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Matters of Interest to Magistrates



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18 November 2009: **Thou Shall Not (Just Shoot to) Kill**

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In the last few weeks in South Africa, exponents and antagonists of a proposed 'shoot to kill' policy have been provided with ample ammunition. On the one hand, enforcing the case for those in favour of a hardline approach, Pretoria police officer, Captain Charl Scheepers, was shot dead in the line of duty while attempting to arrest a suspect. It is alleged that a security guard shot Scheepers twice in the stomach after the officer demanded that he surrender. A few weeks later, two separate attacks on law enforcement officers took place. One involved the multiple stabbing of a student constable on a train by robbers who wanted her service pistol, which she was not carrying. In the other incident, robbers stabbed a traffic officer outside her home in the Western Cape. While the first case involved an officer on active duty, the latter two were not on duty at the time they were attacked. The relevance of pointing this out is to put the murder of police personnel into perspective. Despite the relatively high figures, only a small percentage of such murders occur in the line of duty. When advocating for the use of lethal force within the scope of active duty, this fact must be borne in mind.

Meanwhile, enforcing the case for those against the "shoot to kill" policy, police in Pretoria were involved in a wrongful killing incident, where lethal force was used on what was thought to be a group of hijackers. One passenger died. As it turned out, it was a case of mistaken identity. At the time of the shooting, the police involved in the shooting believed that the vehicle fitted the description of a wanted vehicle in the area. Of interest, however, is the fact that no bullets were fired at the police, no sirens had been activated to warn the suspects, no less than thirteen shots were fired by the police and no weapons were found on the alleged hijackers. This implies

that the police did not see any weapons to justify the use of live ammunition. Their intention was however clear in this instance: shoot to kill.

Police are in fact permitted to use lethal force in certain circumstances as set out in the much talked about section 49(2) of the Criminal Procedure Act (CPA). A police officer acting in self-defence or to prevent a serious violent offence directed at another person, can shoot to kill. The resort to force should be proportionate to the harm threatened or the crime alleged to have occurred.

The phrase 'shoot to kill' implies the absence of any intention to arrest the person shot, as the aim is to end life. The purpose of arrest is to bring the suspect to justice. When one shoots to kill, the intention is not to arrest the suspect, but rather to arrest the alleged criminal activity. Apart from circumventing the criminal justice system, 'shoot to kill' is a policy that places the police in a position that runs contrary to the Constitution, where the right to life is upheld as the most significant right. Subject to the common law defences of self-defence/private defence or defence of another, whose criteria have in essence been entrenched into the current section 49 of the CPA, it is unconstitutional to take life deliberately, let alone enact legislation to that effect, and no amount of 'legal wordsmithing' in terms of amending the current section 49 can elude that constitutional principle. An amendment to existing law would have to be added as section 49(3), and justify the killing of a suspected offender on the basis of a combination of factors such as: -the suspect's criminal record,

- the nature of violent crimes previously committed, and
- any history of resistance of arrest or escape from lawful custody.

A new shoot to kill directive has to withstand the specific ruling of the Constitutional Court which explained the meaning of and upheld the right to life in the case of *State v Makwanyane*. In other words, it would only survive if the court reinterprets the right to life, which is highly unlikely.

One is therefore left to ponder whether politicians are simply not stating the obvious reality that is already in practice. Is a call for 'shoot to kill' legislation no more than a misunderstanding and misinterpretation of section 49(2) of the Criminal Procedure Act? Writing in the African National Congress's weekly newsletter, and in the context of the Scheepers murder, President Jacob Zuma acknowledged that "[a]s it stands, section 49 does allow the police to use even deadly force in order to effect an arrest or to prevent the commission of a crime." He went on further: "In practice, however, the lack of a clear directive compels policemen to err on the side of caution...Given the violent nature of crime in our country we need the law to err on the side of the police and not criminals." The issue at hand therefore is not about whether or not the police can use lethal force, or when they can do so. That is clearly endorsed by the current benchmarks of proportionality and reasonableness within section 49, as acknowledged by the president. The media, through whom public opinion is expressed, may be to blame for admittedly focusing more on comments about amending section 49, while paying little or no attention to the government's comments to strengthen the Independent Complaints Directorate, the police

watchdog, to ensure that the proposed changes to section 49 are not abused. As a result, 'shoot to kill' is becoming a policy essentially formulated by the media for sensational purposes, considering that the executive acknowledges and respects the requirements of section 49.

'Shoot to kill' can therefore be viewed as the media's fascination with reporting only one perspective of events and political opinions, combined with negligent political utterances of the past that lacked an accurate appreciation of the current criminal procedure laws of South Africa.

The executive is however not blameless and the President's comments above were probably made after much careful consideration. In the run-up to the 2009 South African general elections, Susan Shabangu, former deputy Safety and Security Minister, stated: *"You must kill the bastards if they threaten you or the community. You must not worry about the regulations - that is my responsibility...Your responsibility is to serve and protect...I want no warning shots. You have one shot and it must be a kill shot."*

One would have to wait and see the proposed amendments to section 49, combined with the oversight mechanisms to prevent abuses of such amendments. In the meantime, thou shall not just shoot to kill.



A Last Thought

Human beings suffer,
 'They torture one another,
 'They get hurt and get hard.
 No poem or play or song
 Can fully right a wrong
 Inflicted and endured.

The innocent in gaols
 Beat on their bars together.
 A hunger-striker's father
 Stands in the graveyard dumb.
 The police widow in veils
 Faints at the funeral home.

History says, don't hope
On this side of the grave.
But then, once in a lifetime
The longed-for tidal wave
Of justice can rise up,
And hope and history rhyme.

So hope for a great sea-change
On the far side of revenge.
Believe that further shore
Is reachable from here.
Believe in miracles
And cures and healing wells.

—Seamus Heaney (from “*The Cure at Troy*,” 1990)