MAGISTERS

Independence of a single judiciary?

Commentary on *Van Rooyen v the State* CC No. 21/01

by K.M. Nqadala
Regional Court President, Kimberley

The judgment of the Constitutional Court in *Van Rooyen* has shown the thinking, position and sentiments of the apex court on issues of independence of the judiciary, separation of powers as well as on the single judiciary.

The first disturbing aspect of the judgment is the time lapse of nine months between the hearing of the matter and the delivery of judgment. This is so unlike our Constitutional Court which should note that the legal axiom of 'justice delayed...' applies at all levels.

The second disturbing aspect of the judgment is its decision to accord less form and/or degree of independence to the lower courts, than it would generally accept in relation to the superior courts. It is shocking that the Constitutional Court accepted enthusiastically the dictum of the Canadian Supreme Court in *Valente v The Queen* (1986) 24 DLR (4) 161 (SCC) that 'it would not be feasible, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence ... which may have to be applied to a variety of tribunals. The...provisions in Canada governing matters...on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety.' In relation to this dictum, the Constitutional Court appears to have endeared itself with the differentiation of judicial independence (on a more formalistic way – i.e. differentiation according to the levels of hierarchy) than with the expressed ratio of differentiation (on a more substantive way - i.e. the differentiation based on the kind of cases which a particular court can hear.)

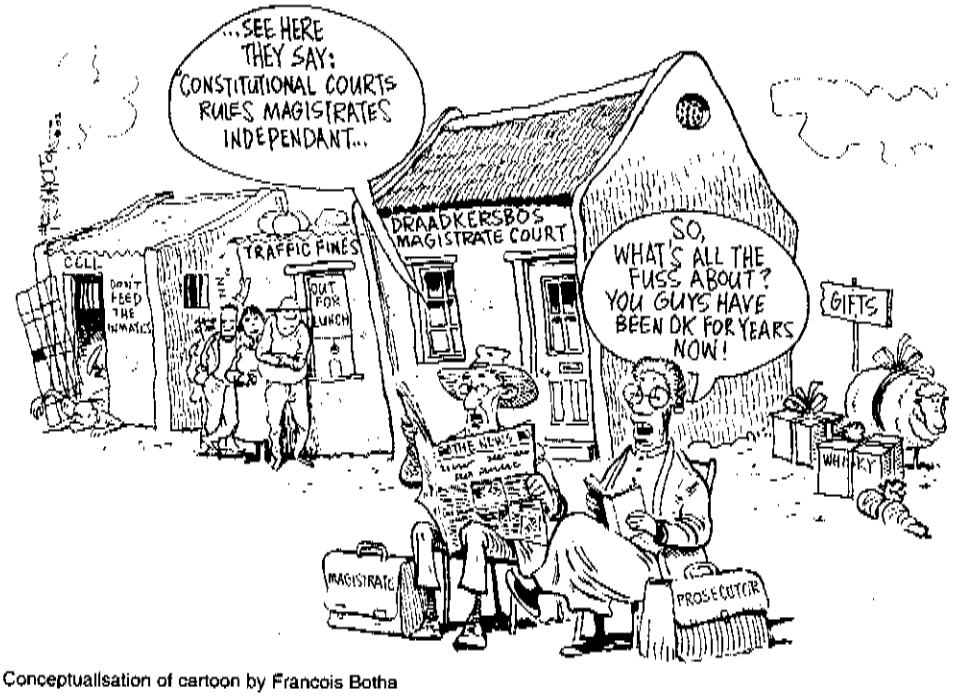
The mistake which the Constitutional Court made was to place too much emphasis on the different tiers of the courts, and with that bureaucratic thinking ended up comprising the independence of the judiciary in general, and that of the lower courts in particular. This preoccupation has also dealt a very heavy blow for a single judiciary.

The misdirection was compounded by the selective references to certain sections of the Constitution, failure to consider international law as well as selective reference and consideration of foreign law.

The Constitutional Court pretended on the one hand to have regard to the 'core protection' or 'basic protection' given to all courts by the Constitution. On the other hand it subjugated such protection and independence to a possibility of protection by the higher courts.

The Constitutional Court appears to have deliberately side stepped the fact that what is protected is the judiciary. Section 165(1) of the Constitution vests the judicial authority in the courts. It is therefore not the independence of the various tiers of courts (and this giving rise to different forms of independence) that section 165(2) protects. The word 'courts' should be construed as a single entity, hence the use of the word judiciary in section 96(2) of the Interim Constitution. The categorisation of the courts in section 166 of the Constitution, as the basis of the differentiation is flawed. The categorisation does not club the Superior Courts together vis-à-vis lower courts, as the spirit of the judgment suggests.

The issue is whether there is such core protection or not, i.e. whether from the objective stand point of a reasonable and informed person the court will be perceived as enjoying the essential conditions of independence – the test in the Canadian case of *R v Généreux* (1992) 1 SCR 259. I have serious doubt that a well informed, thoughtful and objective observer, who is neither hyper-sensitive, cynical nor suspicious, would change his/her perceptions of a lower court, which does not enjoy the essential conditions of independence, only



Conceptualisation of cartoon by Francois Botha

Continued from page 1

because of the higher court's protection responsibility towards the lower courts. If anything he/she could continue to see the lower court as not independent.

The effect of the judgment in according a lesser form of independence to the magistracy, subjecting the magistracy to a measure of administrative control by the executive on pure administrative functions and leaving the magistracy to the uncertain, expensive, uncoordinated and disorganised judicial review option has effectively amounted to a partial deprivation of the judicial independence to the magistracy. It has made the magistracy now vulnerable to abuse, effectively reduced their status from that of office bearers to something akin to public servants, and effectively pushed them to negotiations and protest actions against the other arms of Government as the better way of emancipating itself from executive infringement.

A special judicial review mechanism to deal with any Act or measure which has the effect of infringing judicial independence needs to be set up, in order to dissuade the magistracy from following the industrial or other judicially unethical route.

We need to applaud and commend the positive and salutary statements/principles laid down by the Constitutional Court that the 'constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution means that all courts are entitled to and have the basic protection that is required', that the courts in which judicial officers 'hold office must exhibit institutional independence', that 'the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent', that 'institutional judicial independence itself is a constitutional principle and norm that goes beyond and lies outside the Bill of Rights', and that 'judicial independence is not subject to limitations.'

The biggest problem appears not to have been on laying down principles of judicial independence, but on either the application of those principles, or the qualifications made when it relates to the magistracy or the unjustified distinctions given to the different tiers of court. The Constitutional Court ruled as if it was able to behave like a big brother, who was to keep watch for actual infringement. As the tone of the judgment shows, far from the Constitutional Court relating to the magistracy as brothers, one would be excused to infer a step-brother/sister kind of treatment.

What would you do?

By **Anashri Pillay**
Law Faculty, University of CapeTown

The accused was convicted of three offences. One of these was 'murder while acting pursuant to a common purpose' committed when he was 16 years old. As the offence is listed in Part I of Schedule 2 of the Criminal Law Amendment Act (the Act), the court a quo applied ss 51(1) and 51(3) dealing with minimum sentencing. Section 51(1) of the Act provides: 'Notwithstanding any other law but subject to ss (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.'

Subsection (3)(a) allows a court to deviate from the minimum sentence if it 'is satisfied that substantial and compelling circumstances exist' justifying a lesser sentence. Subsection (3)(b) deals with children over 16 but below 18 years of age at the time of the commission of the offence. That subsection simply provides that if a court decides to impose a prescribed sentence in respect of such an individual, 'it shall enter the reasons for its decision on the record of the proceedings'. The accused in this case fell within the ambit of this subsection. The Judge in the court a quo had considered the youthfulness of the offender but had concluded that no substantial and compelling circumstances for the imposition of a lesser sentence existed and, following s 51(1) read with s 51(3)(a), he imposed a sentence of life imprisonment. No constitutional arguments were made or taken into account before the lower court.

What do you think? Would an appeal against the sentence of life imprisonment succeed? *Answer on page 6.*

Deterrence before Commission

By
JUDY NAIDOO
Regional Court Magistrate, Cape Town

On the Regional Court Bench I am increasingly faced with sentencing people in terms of the so-called Minimum Sentences Act. This obliges me to impose minimum sentences for certain specified serious offences in the absence of substantial and compelling circumstances which justify the imposition of a lesser sentence.

In promulgating this Act, the Legislature had good intentions in attempting to bring uniformity in sentencing. With regard to the interests of the community, certain serious offences require a severe sentence.

However, do long terms of imprisonment fulfil the main purposes of punishment? What about prevention, reformation, retribution and deterrence (individual and general). Perhaps the first three are addressed but what concerns me is the deterrence aspect of sentencing.

In most cases we have to sentence first offenders who have been convicted of offences in terms of the Act. The first time most of them hear about the sentences which the judicial officer is obliged to impose is when they appear in court. In most instances their reactions are of shock at the severe sentence they are facing.

This suggests that had they known of this prior to the commission of the offence, some would have been deterred from committing same. At the sentencing stage it is too late for deterrence, with regard to the individual.

The sentences imposed, except in high-profile cases, are never reported in the media. Therefore the public awareness of them is very limited. Except for the immediate relatives and friends of the relevant parties, no one else hears of the sentence imposed. This is a serious shortcoming in the general deterrence aspect of the sentence.

If the Minimum Sentences Act were more widely publicised it would go a long way towards ensuring both individual and general deterrence in the actual commission of offences. Our legislature, despite its good intentions has not done this. Active steps should be taken towards making the contents of the Act known to the community at large.

Our prisons are becoming overcrowded as more people are sentenced to longer terms of imprisonment. I would like to hear from other judicial officers, via *News and Views*, whether you agree with this or not. If you do agree, please suggest ways in which such publication can be achieved in the area of jurisdiction in which you preside.

'Impartiality is one thing, indifference is another'

ETHICAL QUESTIONS FOR MAGISTRATES

By ***JANE FRANCO***
Law Faculty, University of Cape Town

Is it appropriate for a magistrate to:

- Be a member of or participate in an organisation that advocates an end to violence against women?
- March against domestic violence or rape?
- Educate communities about domestic violence and other forms of abuse of women and children?

These questions pose difficult dilemmas for most magistrates. They were discussed in February in a workshop on domestic violence. There are no simple answers and the responses from participants were varied. Some felt that such activities would compromise judicial impartiality, while others felt that there is a duty on magistrates to educate communities and speak out on issues such as domestic violence.

Magistrates must accept that domestic violence is a serious social evil as the preamble to The Domestic Violence Act 116 of 1998 states. But, many worry that participating in activities advocating awareness of domestic violence will impact on their ability to remain impartial in such cases. Or, equally importantly, they fear that the community will perceive them to be partial and biased in domestic violence cases.

In essence there are two conflicting principles: magistrates must be sensitive to the issues of the community in which they work, yet they must never compromise their ability to remain impartial. Judicial officers have to perform a balancing act in their approach to these questions. The following principles should be considered:

The ivory tower syndrome

A magistrate who is withdrawn from his or her community 'faces the risk that [he or she] will find it increasingly difficult to perform one of the prime functions of a [magistrate] which is to measure the standards of that community.'[1] The issue of domestic violence is a serious and prevalent one in South Africa. For a magistrate to cocoon herself in an ivory tower, avoiding direct contact with the community about the issue, creates the danger that she is unable to measure the standards, needs and views of the community in respect of such issues. Surely the community will have less faith in the magistrate who appears indifferent than the one who attempts at least to make herself aware of the issues in the community. 'Impartiality is one thing, indifference is another. A [magistrate] may show alertness to the problems of our days without putting his impartiality into jeopardy.'[2]

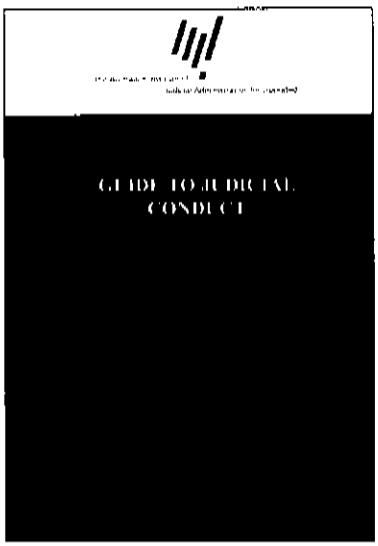
Setting boundaries – can this be done?

It is a generally accepted view that the role of a magistrate includes a duty to participate in education of the community.[3] Whether this includes activities such as participating in social welfare organisations, speaking at functions, or publishing is debatable, and there are conflicting authorities. For example, in *R v Milne and Erleigh* it was held that, "The mere fact that a judge holds strong views on what he considers to be an evil of society does not, disqualify him from sitting in a case in which some of those evils may be brought to light.'[4] In this case the court held further that, although the duty of a judge, 'is to administer the law as it exists he may in administering it express his strong disapproval of it.'[5] This view has merit if one is to accept the doctrine of separation of powers of the judiciary, legislature and the executive.

A different approach was taken by the Court of Cassation in Belgium. The court ruled that a magistrate who was presiding over a child molestation case concerning a paedophile must be removed from the case as he was unable to maintain his duty to remain impartial. The court based its finding on the fact that the magistrate had attended a fund-raising event for the parents of the victims.[6] It could be argued that the decisions differed based on the facts. In *Milne*'s case, the judge under review had expressed his views on the evils of capitalism in various publications. However, I feel that it would be artificial to create such a distinction, and in *Milne* the court did not seem to do so in its ratio decideni.

Although these principles may raise more questions than answers, one thing is sure – magistrates must be aware of the ethical principles and debates surrounding any decision to take part in community education or activities. These principles and debates are being explored by LRG.

Your comments or views on ethical issues are most welcome. Please contact Jane Franco, University of Cape Town
Ph: (021) 6503776
Email: efranco@law.uct.ac.za



The Australian Guide to Judicial Conduct

Notes

1 *Commentaries on Judicial Conduct*, Canadian Judicial Council, Les Editions Yvon Blais Inc, 1991, at 6.
2 Page 46
3 Page 44
4 *R v Milne and Erleigh* 1951 (1) SA 1 (A) at 12
5 Page 12
5 Referred to in Dato' Param Cumaraswamy, *The United Nations Basic Principles and the Work of the U.N. Special Rapporteur on the Independence of Judges and Lawyers - Notes for an Address to the International Commission of Jurists*, July 1998

MOGALE CITY – NOW

Mogale City is the new name for Krugersdorp, Magaliesberg and smaller towns – Munsieville, Kagiso, Azaadville and the smallholding communities of Muldersdrift.[1] Nevertheless many in the individual towns still use the old names as Mogale City refers to such a large area.

Mr Johnny Baloyi is the first black senior magistrate and head of office ever to be appointed in Krugerdsorp – a stronghold of the previous right wing order. He was transferred there as an ordinary magistrate in 1999 when Magistrate Mornay du Plessis was acting head of office.

Johnny kept to himself and seldom went to tea. One day Mornay approached him. 'I saw your CV. You know there's a post here. I am applying and I want you to apply.' Johnny was not interested but Mornay encouraged him. He applied and they were both shortlisted for an interview on 14 March 2002. Mornay's interview was at 08h00, Johnny's at 08h30. They met in the corridor and wished each other good luck. When the answer came from the Magistrates' Commission, Mornay took the call. He immediately phoned Johnny on his cell. 'Congratulations! You've made it!' Johnny was overwhelmed by his behaviour, 'more so because he's a white person'. It was a historic moment for Krugersdorp and for Johnny.

Court personnel were predominantly Afrikaans speaking. Johnny's knowledge of Afrikaans helped him settle in and the community of Krugersdorp accepted him readily. He encourages all magistrates to meet over tea. However, this has been difficult for those unfamiliar with Afrikaans. Now court personnel are willing to speak English to make others welcome. (We have no doubt the other 9 official languages are on their way.)

Senior Magistrate and head of Krugersdorp Court, Johnny Baloyi, flanked by his predecessors, T.J. Vorster (left) and J.J. Pienaar (right). This is not a man with a chip on his shoulder.

Johnny has attended a number of LRG's training workshops including the LRG/Justice College intensive course in 2000. He has a Masters Degree in H.R. Management, and skills such as performance management and appraisals have helped him give meaning to his aspiration 'to be soft on people and hard on performance'.

There is the sense of transformation. An example involved magistrate William James Botha who presided over an assault case involving racism. He pronounced in his judgment, which found the accused guilty, 'It is a sorry state of affairs that after 8 years of democratic rule people still don't understand that racism is unacceptable!' He attempted to explain to the accused that his attitude should change. There was the reaction from the gallery, the sense that people were feeling – yes, justice has been done!

Some of the old magistrates left after 1994 but there are those and many other court personnel who have remained e.g. Pine (Gesina) Jansen van Vuuren, administrative supervisor, has been there for 30 years.

Mrs Engela Van Der Merwe, Senior Public Prosecutor

Perilous prosecution moments

Clearly the court has had its difficult moments. Examples in prosecution were explained by the senior public prosecutor Mrs Engela Van der Merwe. In a serious case such as hijacking, which would attract minimum sentencing, in the event of a guilty verdict, a prosecutor asked for bail. This was set without any proof of exceptional circumstances. Similarly, in a gruesome murder case, the accused was granted bail, despite Engela's instructions to the prosecutor. There were times she felt frustrated to the point that she'd 'had it'. However Johnny encouraged her and reminded her that everyone has to go through a bad patch. So she kept going. Engela assures us that the quality of prosecution has been much better since 2000 as a result of screening of candidates and more stringent course requirements.

She is satisfied that things are going well and that the only thing that needs attention is police work. This she has tackled by keeping dockets with prosecutors until trial and not returning them to police. Instead she has developed a form for prosecutors to make out for subpoenas and only these are given to police.

COURT B

Krugersdorp Magi Mogale (

By CHARLES DUGMOR and PAULA

With thanks to the following people for th Ebrahim and Fawzieh Dadoo; Son

KRUGERSDORP – THEN

The Dadoo legacy

Krugersdorp, though a mere 'dorp' has set the stage for historic moments of triumph. Munsieville is Archbishop Desmond Tutu's home and Kagiso was home to Dr. Rev Frank Chikane.

Yusuf Dadoo was born in Krugersdorp in 1909. He refused to continue with his father's business and became a doctor and activist alongside Gandhi.

Yusuf, Ebrahim, Amina and Julie were the children of Hajee Mohamed Mamoojee Dadoo who arrived in South Africa in 1896 from Western India, in the wake of the first Indian immigrants who arrived in the 1860s as indentured labourers on the sugar fields. The working and living conditions of the Indians at the time could only be compared to slavery.[2] Yet, Mohamed Dadoo opened up a business in the centre of Krugersdorp's CBD in 1901. He twice tested the legality of the Gold Laws when the Krugersdorp Council challenged the sale of land to an Asian. In *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530, Dadoo triumphed when Innes C.J. declared: 'a registered company is a legal persona distinct from the members who compose it'. This apparent legalistic reasoning was based on a liberal jurisprudence and Innes C.J. declared 'it is a wholesome rule of our law, which requires a strict construc-

Above: Dado Commissione Krugersdorp operational a these years.

Right: Fawzie Ebrahim Dad of their store.

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tion to be placed upon statutory provisions, which interfere with elementary rights.' Ebrahim and his wife Fawzieh, operate Dadoo's to this day in Commissioner Street, Krugersdrop.

President Kruger's dorp

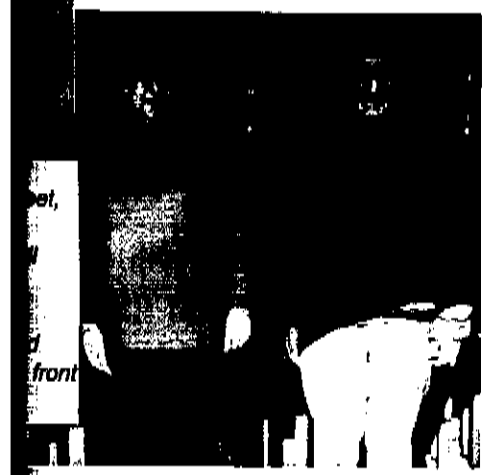
Krugersdorp in the 1890s, under President Kruger's Transvaal Republic, was a violent mining town. It was filled with dingy bars and drunken miners whose street brawling, gambling and vice earned the town its infamous reputation as the 'Duiwel's Dorp'. The 'law' in these parts under the 'Vierkleur' was the local 'landdrost', the Voortrekker's equivalent of a magistrate. Punishment was generally harsh but it was far worse for black men and women. For example In 1899 a black horse thief (black person not black horse) got six months hard labour and 50 lashings.

The Star reported that by 1982, only two white men had been sentenced to death in the whole of the Transvaal Republic. Yet, during the first five years of Krugersdorp's existence, newspapers recorded a number of cases in this town alone when black men were convicted of murder and sentenced to death.

In 1890 it was reported that 'Hans, a Basotho' had murdered 'September' at Krugersdorp by 'battering in his skull with a pick-axe handle'. Hans was tried by Judge De Korte, sentenced to death and transported to Pretoria 'under a strong guard' where he was to be hanged. Only a week later 'boy, Tom' was brought from Krugersdorp to Johannesburg to be tried for murder (local landdrosts could not try capital offences). In April 'two Zulu murderers Magaleni and Sigendi escaped from Krugersdorp's jail and a massive reward of fifty pounds was offered for their recapture. Thus, in a four month period alone, four black men where arrested in Krugersdorp for murder and it seems likely that all four were found guilty and sentenced to death. A key factor was the all-white jury that decided on the guilt of the accused.

There is no apparent evidence of any white accused person associated with Krugersdorp who was sentenced to death. The only exceptions were the ringleaders of the Jameson Raid of 1896 who were captured at Krugersdorp. Their death sentence for treason was later commuted to life imprisonment and they only served a short part of their prison sentences.

Judicial bias was particularly blatant in Krugersdorp when it came to assault cases, depending upon the race of the perpetrator and the race of the victim. For example a 'Cape boy' assaulted a 'farmer' called 'Vermaak' at Randfontein in 1892 pleaded guilty under provocation of insult as the farmer had referred to him as 'outa'. The accused was sentenced to 25 lashes without the option of a fine. White men who assaulted black men were treated differently. Mr. Thompson was arrested for kicking a black man and setting his dogs on the victim, defended himself and claimed that he was only 'removing a loafing native'. He was fined five pounds. This was in 1903 when British justice ruled over Krugersdorp and the Transvaal. In the same year a farmer at Luipaardsvlei who tied his servant to a wagon and flogged him for 'insubordination' was also fined just five pounds by the British Assistant Resident Magistrate. Yet when a 'native coachmen' struck a 'Jewish cabdriver Legum' on his shoulders with a whip, in Ockerse street, Krugersdorp, after a collision, he was sentenced to two months' hard labour. British 'fairplay' was nowhere to be seen and apart from largely abandoning corporal punishment, the British magistrate in the early 1900s was no less biased against black accused than his Dutch-speaking counterpart of the 1890s.



The old Court in Commissioner Street

Discrimination by any other name

Black accused were often objectified with names like 'September' or 'Sixpence', robbing them of their humanity in criminal records. The ethnicity of the black accused was often given in court reports in newspapers, so that a 'Basotho' or a 'Zulu' would be guilty of a certain crime but it is rare to see reference to a 'Boer' or 'Englishman' or 'German' in reference to a white person accused of a crime. The term 'native' (or worse) would be used on its own to refer to a black person whereas white people who almost always given the dignity of a surname.

'A dozen dusky damsels'

Black women also suffered at the hands of the landdrost. In 1899, twelve Black women referred to in newspapers as 'A Dozen Dusky Damsels' were arrested for brewing sorghum beer illicitly. They were convicted and sentenced to twelve months hard labour, some with babies on their backs.

They were given 'short intervals' every now and then to 'attend to their piccaninies', as the newspaper put it. Many black women made a living brewing and selling illicit liquor in Krugersdorp throughout its history, living in the Old Location, then in Munsieville. They used it to help their children, just as the twelve women breaking stones in President Street over a hundred years ago, guilty only of trying to make some money to feed their children.

Notes

1 From *The West Rand, the Gateway to the Cradle of Humankind*, Westour, p 9 (undated)
2 From *Dr Yusuf Mohamed Dadoo: His speeches, articles and correspondence with Mahatma Gandhi*, Madiba Publishers, Durban, UWC Historical and Cultural Centre, Bellville, 1991 p 16
3 *Star*, 8th July, 1892, 'Hanging Is Abolished'.
4 *Star*, 1st February, 1890, 'Local and General'
5 *Star*, 11th February, 1890, 'Another Krugersdorp Murder'.
6 *Star*, 5th April, 1890, 'Local and General'.
7 *Star*, 6th September, 1892, 'The Revolt of Colour'.
8 *The Standard*, Krugersdorp, 9th May, 1903.
9 *The Standard*, Krugersdorp, 19th March, 1903, 'Flogging a Native'.
10 *The Standard*, Krugersdorp, 12th March, 1904, 'The Black in His Place'.
11 *The Standard*, Krugersdorp, 4th February, 1899.

Child smacking v public opinion

ELIZABETH DENGE
Senior Magistrate,
Head of Office, Brakpan

Section 10 of the Schools Act makes corporal punishment a crime, but what is your child saying about corporal punishment or smacking in the domestic situation? I think this question reminds a lot of parents about what their children tell them these days: 'You do not have to give me lashes. I am a human being. I have my rights as a child.' Others say 'this is child abuse. I will report you to the police. The school taught us to report this.'

There is no total ban on corporal punishment in South Africa. Parents are still allowed under common law to subject their children to moderate and reasonable chastisement. In *R v Scheepers* 1915 AD 337 it was held that the child must never get injured as a result of the beating. The child must not be subjected to great pain. The court will interfere with the parent's discretion if the chastisement is not moderate and reasonable. In this case the parent may be convicted of assaulting the child.

It is anticipated that we may see a total ban of corporal punishment of children. The fact that we have a ban on corporal punishment in public life is because corporal punishment is aimed at causing pain. It is susceptible to abuse and qualifies as cruel, inhuman and degrading punishment as prohibited by the Constitution. In *S v Williams* the court declared corporal punishment unconstitutional on the ground that it violates dignity and it violates the right not to be treated or punished in a cruel, inhuman or degrading way.

The ban on corporal punishment in public life, but not private life, is anomalous.

- *S v Williams* prohibits it for juvenile offenders;
- the Abolition of Corporal Punishment Act 33 of 1997 prohibits corporal punishment in schools;
- the Correctional Services Amendment Act 79 of 1996 deletes provisions for corporal punishment in prisons

However corporal punishment continues in private life despite its susceptibility to abuse.

Despite a possible future ban, it is feared that parents will continue to disregard the law. The fact that smacking is based on Biblical text or religious belief will make it very difficult for parents to do away with their strongly held beliefs. *Christian Education South Africa v Minister of Education and the Government of the Republic of South Africa* deals with corporal punishment in Christian Schools and demonstrates the strong religious belief protected by Section 15 (1) of the Constitution – the right to freedom of religion.

Children must be treated as equals. We cannot continue to expose them to the risk of potential harm. There is no justification for limitation of their rights protected in the Constitution.

What would you do? (from page 2)

The answer!

The Witwatersrand Local Division set aside the sentence of life imprisonment and sentenced the appellant to 18 years imprisonment. The court found that the Judge in the court a quo had erred in a number of respects. Most importantly, the Judge had failed to take into account s 28 of the Constitution, which deals with children's rights. No constitutional arguments were made before either of the courts. However, the appeal court found that, by virtue of s 39 of the Constitution, all courts were bound to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation or developing the common law. In addition, s 39(2)(b) placed an obligation on courts to consider international law when interpreting the Bill of Rights. The court found that a child's right not to be detained in s 28(1)(g) must be interpreted to include the right not to be sentenced to a term of imprisonment as a form of punishment except as a measure of last resort and then only to the shortest possible period. The court found that the principles of 'last resort', 'shortest possible period of time' and proportionality contained in the United Nations Convention on the Rights of the Child (to which South Africa is a party) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) are all directly applicable to the sentencing of juvenile offenders in South Africa.

From *S v Nkosi* 2002 (1) SA 494 (W)

From the South African Handbook of Education for Peace by the Quaker Peace Centre, Cape Town (1992 edition) p10

THE MAGISTRACY – UNCHAINED? INDEPENDENT?

Comment on the Van Rooyen case by
EDDIE HUMPHREYS,
Magistrate, Hammanskraal

'Greetings! I am pleased to see that we are different. May we together become greater than the sum of both of us.'[1]

'Whenever a litigant brings his suit to court, he usually gets taken to the cleaners.'[2]

'Should a judge have to base his judgment on the letter of the law, the chances are only one out of twenty-six that he will pick the right letter.'[3]

I do not know how any of the ten litigants have reacted to the judgment of the Constitutional Court. Certainly none of them can say the Court took them to the cleaners.

The unanimous judgment of the Court, delivered by the Honourable Chief Justice Chaskalson, reveals that the Court contextualised the juridical position of the magistracy.

Can one say that the judges attempted to 'change places' with the magistracy?

The issues were raised in the Pretoria Regional Court, considered by some people to be the bastion of conservative, white, Afrikaner, male thinking. Perhaps another myth is under threat?

From the magistrate's point of view, an important outcome of this judgment is that magistrates are no longer civil servants, but Public Office Bearers. Although a step in the right direction, there is room and a need for more independence.

As the late Chief Justice Mohamed said, magistrates are at the 'coal face' of justice where 'The continuous struggle for the legitimacy and efficacy of the instruments of justice is substantially lost or won...'

Notes

1 Vulcan greeting in Star Trek, from *Ideological Virgins and Other Myths* by Joanne Fedler and Ilze Olkers, Justice College Pretoria and Law Race and Gender Research Unit, UCT, 2001 p95
2 *Law Life and Laughter Encore*, E. Khan (Juta & Co 1999), p203. relates legal maxims credited to Judge Fogbound, a character created by Joel Mervis, editor of the Sunday Times
3 op cit

Summary of *Van Rooyen and Two Others v the State and Six Others* (CC) No. 21/01

by EDDIE HUMPHREYS

The concerns of the applicants were whether the lower courts measured up to the level of judicial independence prescribed by Section 165 of the Constitution.

Principles under the spotlight:

- What is the content of the doctrine of separation of powers?
- Do magistrates have judicial independence?
- Does the existence and functioning of the Magistrates' Commission, a body established in terms of the Magistrates Act, have any bearing upon judicial independence? If so, to what degree?

Laws under scrutiny were:

- eighteen provisions of the Magistrates Act, 90 of 1993
- five provisions of the Magistrates' Courts Act 32 of 1944
- fourteen regulations under the Regulations for Judicial Officers in the lower courts
- the Complaints Procedure Regulations and
- the Code of Conduct

The Pretoria High Court decided that the provisions in the two Acts and the regulations were inconsistent with the Constitution. It found that the magistrates courts are not as judicially independent of executive and legislative interference as they are required to be by law and our Constitution. Section 172(2) of the Constitution requires that the order made by the High Court be confirmed by the Constitutional Court to be of full legal force and effect.

The Constitutional Court upheld the constitutionality of many of the provisions of the two Acts and the regulations. Section 13(4) of Act 90 of 1993, sections 9(4) and 12(2)(b) of Act 32 of 1944 were declared to be inconsistent with the Constitution and the order of invalidity of the High Court was confirmed.

Judicial independence:

Various aspects concerning the appointment, removal, conditions of service, salary determination, pension benefits and discipline of judges and magistrates were evaluated. The Constitutional Court decided that there were many differences between the Judicial Service Commission and the Magistrates' Commission but that these differences were permissible under our Constitution. One of the major differences is that the Minister of Justice and political appointees feature prominently in the Magistrates' Commission.

Constitutional protection required by section 165 of Act 108 of 1996 was adequate. The judgment states: 'Nor does this mean that the lower courts have, or are entitled to have their independence protected in the same way as the higher courts. The Constitution and the existing legislation kept in force by the Constitution treat higher courts differently to lower courts. Whilst particular provisions of existing legislation dealing with magistrates' courts can be examined for consistency with the Constitution, the mere fact that they are different to the provisions of the Constitution that protect the independence of Judges is not in itself a reason for holding them to be unconstitutional'. [21]

In addition 'the "most rigorous and elaborate conditions of judicial independence"[2] need not be applied to all courts, and it is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system.' [26]

In the view of the Judges, magistrates courts are independent and impartial and the core values of judicial independence accorded to all courts by the South African Constitution meant that all courts are entitled to and do have the basic protection that is required.

Note

1 *Van Rooyen and Others vs The State and Others* 2001(4) SA 396 (T) also 2001(9) BCLR 915 (T)
2 *De Lange v Smuts* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 6

Commemorating Women's Day, August 9th, with Mmakgabo Mmapula Helen Sibidi

Mmakgabo Mmapula Helen Sebidi is an exceptionally talented artist, and acknowledges 'I learnt everything from my grandmother. When she died I felt quite naked.' Helen's grandmother had encouraged and protected her work. Her whole family and community also cared for her. This prevented her from 'doing anything bad'. Helen says 'I knew I had a father and all fathers were mine. All mothers and fathers looked after me. It is hard work to bring up a child. Every child is yours. Where does the future come from if the neighbour's children are not mine?'

Helen migrated from the deep rural area of Marapyane to Johannesburg 'to extend myself, not drop myself'. In Johannesburg people stopped and stared at her walk. She was told 'your steps are completely different, your movements are completely different. Your footsteps and movements are alive!' This freshness is visible in her works of art, be they representational or abstract, sculpture or painting.

At present Helen is creating works for the World Summit.

Helen Sebidi (extreme right) at 13 years with friends.

***Right:** Twin Mother, 1986. (This was prompted by the memory of her mother's girl twins who died at 6 months. The hand of the twin on her mother's back is visible on the shoulder in this photograph.)*
***Far right:** The Step of an African Man, 1987.*

Congratulations to Magistrate Tandazwa Ndita from Mt Frere who has been offered a Fellowship at Georgetown University Law Center in the Leadership and Advocacy for Women in Africa (LAWA) Program. She was selected as a Fellow. (No doubt Tandazwa will sensitise them to fellows, language and gender.) This full scholorship runs from mid-July 2002 to December 2003. We wish Tandazwa an exciting and fruitful time.

Congratulations to Cagney Musi who was elected as the new National President of Joasa and inaugurated on 20 July 2002.

Apologies and correction

In our May edition we incorrectly gave the impression that Magistrate Elizabeth Mosese's intervention described on page 4 arose from a rape trial. In fact it was for a bail application. Our apologies to Elizabeth and all those who questioned jurisdiction.

Tribute to Ishmael Mgiba, by Willie Wilken

Ishmael Mgiba

Mr Ishmael Mgiba, Regional court interpreter, Nelspruit, passed away on 28 May 2002. He joined the Department of Justice in 1982. He was friendly, highly intelligent and an outstanding interpreter who spoke 11 languages. He had the ability to speak like an Afrikaner, an Englishman, a Shangaan, Swazi, Zulu etc, without an accent. Ishmael always said goodbye as 'Ek maak nou spore'. Only this time it is final with no return. We cherish his memory as a dear friend.

Tribute to Vincent Lugaju, Regional Court President, Port Elizabeth by K.M. Nqadala

Vincent was a giant in judicial circles and a symbol of someone who has really achieved greatness. He was a judicial officer with a strong passion for transformation and equity. He made a mark in the Transkei judiciary. He fought judicial and administrative battles in the Western Cape and Eastern Cape regional divisions. Because he could not stop for death, death was kind to stop him. To his wife, children, colleagues and friends, it is better to have loved and lost him than never to have loved him at all. May your soul rest in peace Dlamini!

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Tel: (021) 650 3914 *Fax:* (021) 650 5647 *Email:* lrg@law.uct.ac.za *Website:* www.uct.ac.za/depts/lrgru/lrg.htm
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