

## EDITORIAL

May I assume that by now everyone is really happy with an awesome eight percent that we managed to squeeze out of that dry old lemon better known as the Justice Autobank.

I remain a bit confused about the whole process: what is all this talk about the unification of the judiciary. Surely all the constitutional red lights and dreadful consequences of a percentage-linked salary will caution us to rather remain loyal members of the bureaucracy and of an impotent judicial organ?

(But at least we have the assurance, that if one should consider alternative sources of income, and assets are frozen, the two-month back-pay will be safe. The taxperson would have taken care of that.)

And speaking of frozen assets: LRG recently had a focus-day workshop with Western Cape Regional Magistrates in celebration of National Women's Day (9 August, or have you all forgotten so soon?). Thanks to the superb co-operation of the new Western Cape Regional President, Gadija Kahn, the turn-out was exceptional, and the level of debate and participation beyond any expectations. A very interesting theme emerged, and this is something that has been with me since my first effort to avoid eye-contact in court; namely the whole stress issue (better known in tea rooms as the 'cowboys-don't-cry' phenomena). Among the panellists was a clinical psychologist (and ex-prosecutor) with some interesting observations of the magistrates and their (in)ability to deal with the after-effects of their daily chores. In general, we pondered upon why our profession sucks and why we will eventually all end up in mental institutions if some form of supportive assistance is not forthcoming. Magistrates' own responsibility or that of their employer? Let us not wait too long for some DIY kit on stress control, together with surprise addendi to the Code as to what exactly qualifies as special leave... LRG is working on some ideas around assistance, and also hope to articulate and contribute something to this debate.

Until next issue: keep up the good work, ethics and don't forget to submit your life story, some embarrassing moment(s) in court, together with the most recent results of your latest disciplinary hearings, to come in line for our annual prize-giving!

FRANCOIS BOTHA

## A Single, please? Reflections on the plans for a New Judiciary

by Francois Botha

Just when you thought the whole debate around a single judiciary was just another excuse for another fictitious task team with a vague mission in never-never land, along comes a White Paper, with backing from some of the most appropriate corners of the judicial ring. Why is it necessary for the introduction and suggestion of this incestuous kind of relationship between these two worlds, where many still feel that it is a matter of never the 'twain shall meet? Is it the financial

aspirations and administrative frustrations of the district court officials that have finally been translated into these eloquently articulated ambitions of Policy Unit of the Department of Justice? Or is it more than just a reconditioning of a tired old machine that has been firing on separate cylinders for too long?

In a recent press release (2 September 1999), JOASA made no bones about the fact that the organisation strives for a 'single judiciary, under a Chief Justice, in which all judicial officers should endeavour to unite and maximise their efforts in serving the public with justice. That is what the Constitution demands of us.' The last count showed that 900 of approximately 1200 magistrates (including regional magistrates) have joined this organisation, adding substantial muscle to the bargaining power to achieve this goal. And as the President of JOASA, Mr Ralinga in his comments suggests, it is 'necessary that the public perceptions be changed. Judges should not be seen as living in ivory towers, whereas magistrates are left in the doldrums!'

So if everyone seems to agree that both in terms of the guidelines of the Constitution (s 165 (1), Act 108 of 1996), and in terms of common sense ('in principle' seems to be the buzzword) the courts should be united under one umbrella, what seems to be the hold-up? Some suggest it might be resistance from the judges themselves, where the enthusiastic



fanfares of a single judiciary suggested visions of great political correctness but had little to show as evidence of a consultative process. It might just be that the adjustments to judges' salaries and haven of other administrative benefits will be under siege by loading a financial burden to the tune of an extra 1200 judicial officers. It is further suggested that the recent investigations into the allegations of fraud allegedly involving magistrates are not exactly helping either. Not that we live in a perfect world, as a full-scale investigation into the Motor-Vehicle Accident Fund-scam, allegedly involving some high-profile Cape Town lawyers, suggests.

How keen is the Department of Justice to see this miracle-in-the-making happen within our natural lifetimes? The severing of the administrative tie has to happen sooner or later, but many seem to think rather much later, given the practical considerations and in particular the lack of resources that are necessary to make this initiative a reality. But in some ways the process has already started, if the suggestions in the White Paper with regard to access to justice, for example, are to be used as a barometer for some of the initiatives already in place (See the report on the new branch-court in Nyanga on p 6). The expression of the most recent salary adjustments as a percentage of that of a judge is probably the more bold declaration of a no-return approach. We all know,  
**CONTD ON PAGE 6**

**MAGISTRATES REMEMBER... THE SHORT COURSE****ECSTASY AND AGONY**

The weeks of hard work, the tension, the anxiety, the numerous and often desperate telephone calls from Pinetown to Pretoria, from Montagu to Mutale and Pampierstad to Potch were soon to be over. The long awaited (and sometimes dreaded, I might add) weekend was drawing closer 22-25 July 1999. That unpleasant word which caused elevated blood pressure, monstrous migraines and a near heart attack or two hung over us all like a cloud – EXAMINATION.

But not even that could take away the great excitement we felt at the prospect of the joyful reunion that awaited us on 22 July 1999.

And joyful it was – loud, wild, incoherent (mostly incoherent), as we took over the Wimpy at the airport. Never had Cape Town seen such a sight – luggage everywhere and twenty or more teenagers in adult bodies, laughing, talking, hugging, kissing and generally making complete fools of themselves in their excitement.

Finally we arrived in Hermanus, for another loud, excited reunion with those who arrived earlier. Then off to dinner with the gallant Greeks we walked. The mood was reminiscent of Theresa's in Kalk Bay, Marco's in Cape Town and the tavern in Langa, during April 1999. Greek dancing had even Zorba green with envy, but the crowning glory of the evening was the exhilarating experience of smashing plates on the floor. (Some of us actually knew what to do with them!)

Friday morning dawned and almost reluctantly, but with great anticipation we settled down to listen to the tales of the brave and determined efforts of this amazing bunch of ambassadors of change. The external evaluators were moved, fascinated and desperately trying to believe that these were the high spirited plate-smashers of the previous night.

But alas? It seemed the high spirits went down with the plates. Friday evening saw a rather jaded gathering in Stanford and not even a superb African dinner at an equally superb venue could restore the 'partyus'. We consoled ourselves that with the exam behind us, Saturday's celebratory dinner would be a loud and vibrant event.

The dreaded exam did eventually arrive and soon passed. Reactions ranged from calm acceptance to utter shock, the latter of which lasted well into the night. The celebratory dinner in the Cave was pleasant but the lacklustre group was too spent and exhausted to muster the intended energy to set the placid Hermanus night on fire. A quiet and cosy drink in the local pub soon dissolved into a chat circle and turned out to be surprisingly pleasant.

The high energy and reckless abandon of the short course in April may have been missing, but in its place was born a deep, warm and abiding bond of new found understanding, respect and friendship which quietly enveloped the lives of this historic group and which promises to endure through the difficult journey that each has undertaken in search of their Holy Grail – fair and equal justice for all.

Soma Naidoo  
Magistrate, Durban

**THE IMPORTANCE OF SOCIAL CONTEXT ISSUES  
IN JUDICIAL DECISION-MAKING**

As perceived by a 'WAMM' (White Afrikaner Male Magistrate)

Despite my realisation of the importance of social context issues and the role other disciplines had to play I wasn't certain what to expect from the course on social context in judicial decision-making. I must admit, the thought crossed my mind that, being a white Afrikaner male magistrate, I might find myself caught in the crossfire and would be ready to defend my viewpoints. MY perception about the Law, Race and Gender Research Unit was also influenced by a feeling of bias and of preconceived ideas about what was to follow.

How wrong I was.

Not only about the Law, Race and Gender Unit, but also about the manner in which the course would be presented. This was far from the male bashing exercise I expected where the male dominance was to be criticised. The course was rather designed to pave the way for a better future for the magistracy. People who are specialists in their fields were used as facilitators and lecturers which added to the professionalism and credibility of the information that was shared. Law, Race and Gender strive to, and must I add succeeded, in bringing to light the importance of social context issues in our decision-making.

There will always be resistance to change. We might be afraid to leave our comfort zones or to change the status quo due to various reasons. It might be motivated by fear of the unknown, suspicion, criticism, dim future with regard to a rational one of not exactly knowing how and what will change. I have taken all of the above as well as other factors into consideration and I am positive that there is a future for me and my fellow white Afrikaner male colleagues as part and parcel of the magistracy.

Magistrates as triers of fact cannot fulfil the task of decision-making with only the knowledge of the law and legal principles alone. Cognisance has to be taken of the importance of other disciplines as they influence our decision-making. The law should not be seen in isolation but can only function within the social context in which the rule of law is manifested. The influences and role of other disciplines on our decision-making in our courts are therefore of utmost importance.

The attendance of the Social Context course to me was an eye opener. Magistrates should learn to explore ourselves more as individuals but also to learn to understand others. Reconstruction and transformation of the magistracy is of utmost importance. We must try to avoid stereotyping and must be aware of cultural inequivalence. The awareness of vulnerable groups and their rights should be protected, and a victim-orientated approach promoted.

In conclusion it should be emphasised that fair and equal justice should be delivered to all people in accordance with the rule of law and the constitution. Social context awareness and training should be the tool within which this goal is manifested. It is my submission that magistrates must ensure that the dignity of the court and court structures be kept in place but at the same token try to ensure the faith of the people be restored in our courts and judicial system.

To forget your past is to deny ones' existence, to harbour negative feelings or thoughts towards the future is to deny progress. The future of the magistracy depends on our present actions and attitudes.

J.G. Norval  
Magistrate, Burgersdorp

# THE IMPORTANCE OF CONSIDERING SOCIO-ECONOMIC REALITIES OF PARTIES IN JUDICIAL DECISION-MAKING

Waheeda Amien, Researcher: Law, Race and Gender Research Unit

Socio-economic based judicial decision-making refers to decisions that should be made by the judiciary, which take into account all the relevant socio-economic facts relating to the parties involved, so that the decisions are adapted to the specific circumstances in which the parties live. In order for this to happen, judicial officers need *inter alia* knowledge and an understanding of cultural, social, economic, and demographic information, to appreciate the perspectives of others, as well as their differing circumstances.

It has been found that one of the factors which causes bias to seep into the judgements and sentences of judicial decision-makers, is an ignorance of the socio-economic realities of parties who appear before them. This has the unfortunate consequence of unfair and unequal justice being rendered in the courts.

Generally, law students are taught that the legal framework within which to form a judicial decision, would be to consider the facts of the case, and the law relating to that particular case for example, common law, legislation, case law etcetera. These would therefore constitute the main criteria in judicial decision-making. However, it becomes problematic when these are the only criteria which are considered, and the socio-economic realities of the parties are ignored. This is because every judgement (civil or criminal) and sentence that is handed down, inevitably has socio-economic consequences for the individual who appears before the court, as well as her or his relatives, and any other people connected to that individual who may be affected by the judicial decision. Also, in light of the heterogeneous nature of our country, and the vast disparities in the social and economic situations of South African people, it would be unfair for a court to render similar treatment to two people who appear in similar civil matters or may be charged with the same type of crime, but who have dissimilar socio-economic life experiences. For example, the reality of a black rural farmworker is vastly different from that of a white urban middle-class person.

Another area where the socio-economic realities of parties are ignored to a very large extent is in the case of women. Women suffer specific gendered-type harms – these are an array of injuries which happen overwhelmingly to women such as, domestic violence, rape, sexual harassment, medical injuries with regard to women's reproductive capacities, pornography, vilification and sexualisation of women in the media, etcetera. Other harms which superficially appear to be gender-neutral, also impact negatively on women much more than they do on men, for example, patrimonial consequences of divorce. All of these harms require a specific gendered approach to the award of damages and compensation. In order for this to happen, the courts need to recognise and understand that most South African women, and more specifically black women, experience different socio-economic realities

from those of men. It is an accepted fact that black women suffer triple oppression, by virtue of their gender, race and class. The last category relates to the fact that the majority of the population resides in the rural areas where poverty is most acute. Most of the households in these areas are singularly headed by black women who live below the breadline, and have to walk long distances just to get water and wood because they live in abject conditions without the basic necessities of running water and electricity.

With regard to women in general, damage awards and compensation have thus far failed to take into account the value of multi-functional tasks performed by women in the home. Although some men do perform domestic duties, it is largely women who bear this burden, including those who have paid work outside of the home. This is because the notion of work that has value has been attributed to work done out of the home, for which one gets a paid salary. This type of work is regarded as a form of 'economic loss'. On the other hand, domestic work performed in the home has not been given the same type of value and is considered a form of 'noneconomic loss'. This being so, despite the fact that 'unpaid labour' in the home subsidises both male paid labour and employers. It gives the former the opportunity to go out and have full-time work, and allows the latter to lower the wage bill of their employees, so that they don't have to pay them more to employ a domestic employee to perform the domestic functions of the partner at home. However, studies that have been done in other countries such as Australia, United Kingdom and Malaysia, have shown that there is indeed considerable value attached to domestic work performed in the home, amounting to about a few thousand rands per week in terms of the average wage market. Furthermore, because domestic work is multi-functional in nature, women tend to work an average of 24.3 hours a day, without any leave from this type of work throughout the year. In light of these studies, many jurisdictions throughout the world are now beginning to realise the value of 'unpaid' work in the home, and have begun to give cognisance to it in the types of awards that are made to women.

In conclusion, it is an indisputable fact that judicial decision-makers have a very human role to play, because their decisions have a fundamental impact on the lives of those who appear before them. They also significantly affect the lives of people they may never meet, for example, the children of parties who appear in court. It is suggested that judicial decision-makers also have a creative role to play, and that within the legal framework which they ordinarily work, they also have the discretion and the scope to take into account the social and economic factors of all the parties involved. In certain instances, they can even change stereotypes and prejudices which are still very vivid and prevalent in South African society.

# NEWS FROM THE LAW REPORT

The Constitutional Court has in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) upheld the constitutional validity of the bail provisions of s 60(4)–(9) of the Criminal Procedure Act 51 of 1997 (the CPA). The Constitutional Court's judgment sets out important principles which have to be borne in mind by all courts in bail applications. Section 35(1)(f) of the Constitution, in its context, makes three things plain. The first is that the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences and may for that reason be detained in custody. The Constitution itself places a limitation on the right to liberty protected by s 12 of the Constitution. The second is that, notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody subject to reasonable conditions. The third basic proposition is that the criterion for release is whether the interests of justice permit it. Section 35(1)(f) postulates a judicial evaluation of different factors that make up the criterion of the interests of justice, and the basic objective traditionally ascribed to the institution of bail, namely to maximise personal liberty, 'fits snugly into the normative system of the Bill of Rights'. (See para [6] of the judgment.) Paragraph [10] of the judgment mentions an important matter, namely that, even if the prosecution concedes bail, the court must still make up its own mind about it.

The Court, in paras [41]–[43] emphasised the need to read all the subsections of s 60 together. If that were done, it becomes clear that s 60(4) of the CPA was not a mandatory injunction to a magistrate or Judge to conclude that something is or is not in the interests of justice. Section 60(4)–(9) are not intended as deeming provisions at all: what they do is list the potential factors for and against the grant of bail to which a court must pay regard. The courts are told that, if they find one or more of the factors listed in s 60(4)(a)–(d) to have been established, a finding that continued detention is in the interests of justice will be justified. Put differently, judicial officers are pointed towards categories of factual findings that could ground a conclusion that bail should be refused. By like token a court is not told to accord decisive weight to the one or other or all

the personal factors mentioned in subsection (9). In short, the Legislature was providing guidelines as to what are factors for, and what are factors against, the grant of bail. Whether and to what extent any one or more of such pros or cons are found to exist and what weight each should be afforded is left to the good judgment of the presiding judicial officer. Such guidelines are no interference by the Legislature in the exercise of the judiciary's adjudicative function.

Another important matter dealt with by the Court was the meaning and effect of the 'exceptional circumstances' referred to in s 60(11)(a) of the CPA, which makes it plain that a formal onus rests on a detainee to 'satisfy the court'. This means that detainees have to adduce evidence – they cannot simply put relevant factors before the court informally. Furthermore, and this is of crucial importance, such applicants for bail have to satisfy the court that 'exceptional circumstances' exist. To the extent, therefore, that the test for bail established by s 60(11)(a) is more rigorous than that contemplated by s 35(1)(f) of the Constitution, it limits the detainee's constitutional right, but it is a justifiable limitation. Section 60(11)(a) of the CPA does not contain an outright ban on bail in relation to certain offences, but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each case affords flexibility that diminishes the overall impact of the provision. What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted. An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent. In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond, and generically different from, those enumerated in ss (4)–(9). The evaluation is to be done judicially, which means that a court looks at substance, not form. Although the inclusion of the requirement of 'exceptional circumstances' in s 60(11)(a) limits the right enshrined in s 35(1)(f), it

# EDITORS

by David Fisher, Senior Law Reports Editor

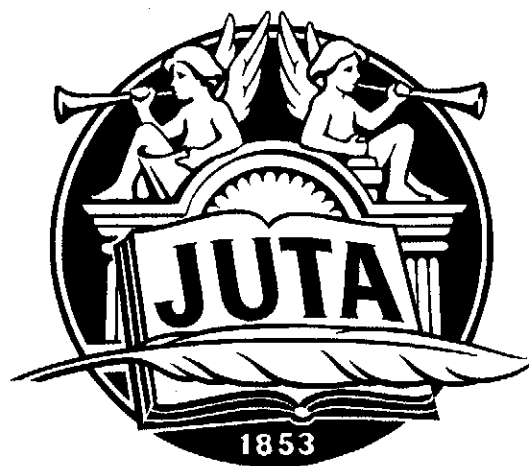
is a limitation which is reasonable and justifiable in terms of s 36 of the Constitution in the current circumstances in South Africa.

There is much of importance in the Constitutional Court's judgment – too much to be dealt with adequately in an article of this nature. Two or three hours spent reading the judgment carefully will bear fruit – and perhaps save much time anxiously considering what the "new bail law" really means.

A reading of the Law Reports reveals that eviction proceedings in terms of the Extension of Security of Tenure Act 62 of 1997 give magistrates' courts much difficulty. *De Kock v Juggels and Another* 1999 (4) SA 43 (LCC) gives useful guidance on a number of matters concerned with these eviction claims. First, the use of application proceedings to bring about such an eviction is justified by s 17(3) and (4) of the Act. (See para [8] of the judgment.) What is of interest, and importance, is that in terms of s 17(4) of the Act, until appropriate Rules of Court have been made for magistrates' courts, the rules of procedure applicable in a High Court apply to eviction proceedings in terms of the Act in magistrates' courts. (See para [8] of judgment.) The *Juggels* case emphasises the need for all the matters referred to in s 9(2) of the Act to be proved before an eviction order can be granted. (See also *De Villiers v Msimango* 1999 (4) SA 59 (LCC) at para [10].) Once a court has decided that an eviction order can be granted, the court is, in terms of s 12(1) and (2), required, firstly, to determine a 'just and equitable date on which the occupier shall vacate the land'. Secondly, the court must then determine a 'date on which an eviction order may be carried out if the occupier has not vacated the land' on the first date mentioned.

Finally, a case which will be published in the November 1999 issue of the *South African Law Reports* about the validity of wills and other testamentary documents has some importance for magistrates' offices. Where a testator cannot sign a will him/herself, the thumbprint or mark made by the testator has to be certified by a commissioner of oaths in terms of s 2(1)(a)(v) of the Wills Act 7 of 1953. The commissioner has to certify that he has satisfied him/herself as to the identity of the testator

and that the will signed by means of a thumbprint or mark was indeed the will of the testator. In *O'Connor v The Master and Another* (Northern Cape Division) an employee in a magistrate's office so certified the will in question, but did not identify himself as a commissioner of oaths. The Court held that s 2(1)(a)(v) of the Wills Act had not been complied. Fortunately, the Court held that the will could be accepted in terms of s 2(3) of the Act. However, what is of importance for magistrates' offices is, firstly, that officials making such certificates on wills **must** be commissioners of oaths; and, secondly, that they should identify themselves as such in signing the certificate. Schedule 1 to the Wills Act provides a specimen of a certificate to be used in such circumstances. It may well be helpful for magistrates to inquire from their staff members who are commissioners of oaths whether they are aware of the requirements of the Wills Act and to ensure that only such commissioners of oaths undertake the responsibility of signing such certificates. This might well be a matter for some in-house training in magistrates' offices.



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# WHERE'S MR T?

**Press Stop:** Mr T will not be featured in this issue, due to 'the unfortunate consequences and combination of a high-stress job and low remuneration'. As to the question of when he will resume duties again, go ask someone who actually cares (Ed).

The following submissions have been received on frequently asked questions in Parliament, which is stated below. The customary R50 will be awarded to any (publishable) contribution(s) that could be considered as remotely amusing, without damaging the already strained image of the profession (in which the ones below so spectacularly succeeded).

## You know it's time to quit your job as a magistrate when...

1. The requisition for a telephone in your most oft-frequented restroom has finally been approved.
2. High Court judges refer to you as 'old so-and-so' in their judgements when dealing with your automatic review cases.

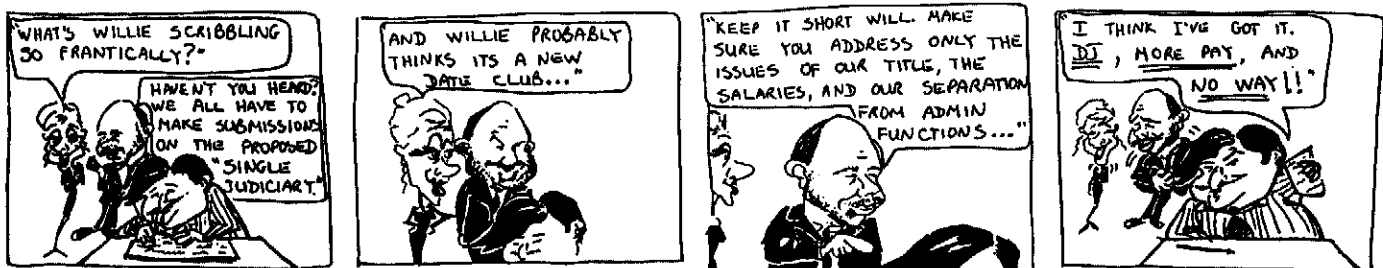
3. The prosecutor reminds you (in court) to buy milk before you adjourn.
4. Your office furniture is hunted by antique dealers.
5. The office has been declared a National Monument, but only when your court is in session.
6. You start phoning attorneys to remind them of a case on the relevant day.
7. You start phoning accused persons to remind them...
8. Attorneys phone you to remind you of a case on the relevant day.
9. Accused persons start phoning you...
10. The local telephone directory reminds you of the list of cases you had to recuse yourself from.
11. Accused persons address you by your first name in court.

## And this issue's winner...

12. You pick the colour scheme of your clothes for the day in accordance with the cover of the 3rd edition of Hiemstra.

# Court in the Act

Created by Patricia Miller Text by Francois Botha



## CONTD FROM PAGE 1 . . . . .

however, that no matter how well the intentions, one (small) linkage-manifestation still 'don't make no unification' (even if the disparities in salaries are substantially minimised).

What is needed then, to make this happen in practice, and the unification more than just a gesture of financial goodwill? Numerous inputs from magistrates around the country lead to only one conclusion: and that the time for action and effective removal from the previous tarnished image of the 'lower court' official rubber-stamping bureaucratic ideas must be buried, and that a single judiciary is the only way of achieving this ideal. One of Cape Town's most senior regional magistrate's, Mr A B Kotze, supports the notion of a single judiciary, but is adamant when he advocates a high degree of specialisation as

a potential way of ensuring that the new system will be effective.

Even from the more progressive legal circles similar sentiments are expressed. Mr Vincent Saldanha, of NADEL, has no illusions that the days of having an A and a B type of justice should be numbered. He feels that magistrates and judges fulfil the same judicial function and of equal consequence, and can also not see any justification for different titles. As far as the objection is concerned that judges might be offended if a matter (particularly of contentious nature) is reported in the media without a clear distinction, Mr Saldanha seems to agree with the argument that this vocational hazard 'cuts both ways'. Not all high court

# COURT BY SURPRISE!

## This issue: Nyanga Magistrate's Court

The Editor's strong provincial bias will this time hopefully be forgiven for this issue's spotlight on a very exciting new justice endeavour. By the time you read this, and assuming you are reading this on 13 October 1999, the new branch court in Nyanga (on the outskirts of Cape Town) will just have been inaugurated.

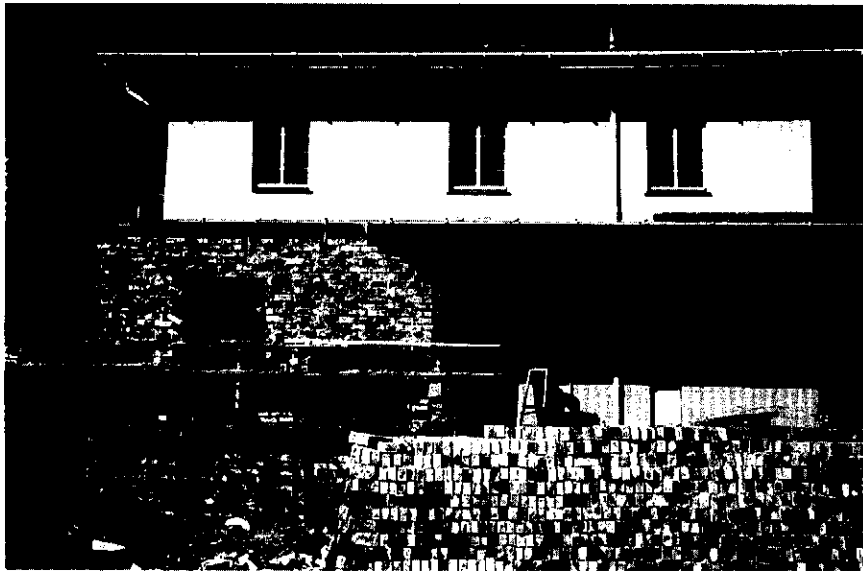
What makes this a truly innovative but also much-needed and long overdue project is the fact that this is the first 'ordinary' court in a black township in the Western Cape. It is a branch magistrates' court of Wynberg, and now forms part of a newly demarcated

magisterial jurisdiction, previously part of the Mitchells Plain Magistrate's Court. It consists of two courts; a criminal court, and a maintenance section. The further good news for the many disillusioned victims of maintenance defaulters is that this particular section will also be opened to the public on Saturdays. This affords indigent members of the community who had problems in the past accessing justice, and is a welcome indication from the Department of Justice (and more specifically the

Western Cape's Regional Office) that it is prepared to do more than just have urgent meetings around the inability of the system to meet the demands of its community members.

Other developments are that another range of 'firsts' have been initiated by the Regional Department, namely a Municipal court (Cape Town), and a Tax Court (Bellville). The former is to be funded by the Municipality of Cape Town, and will hear traffic matters and by-laws. It also has the blessing of the Director of Prosecutions of the

Western Cape, who is supplying the prosecutors and training, and the project seems to be designed and almost guaranteed to remove a substantial case burden from the Cape Town Magistrates' Court roll. The other court of specialisation, the Tax Court, is to be funded by the South African Revenue Service. Both these initiatives are quite profound and visible efforts of bringing justice to the people, and hopefully the beginning of a process that will see more streamlining in the future.



judgments have necessarily been inspirational to the profession!

Other tempestuous waters in the realm of this debate remain the topic of training. This seems to be an area that is well-recognised by the authors of the White Paper, who emphasise the need for 'initial' as well as 'continuing' training for 'every judicial officer' (at least with regard to 'human rights and other constitutional issues'). LRG's chief consultant, Ms Ilze Olckers does not spare the rod when she has the final say:

'I cannot support the unification process enough. No longer would there be excuses for magistrates who are not worth their judicial salt, caricatured by both judges and the

professions. No longer would there be excuses for judges; out of touch with the realities of life in the new South Africa and caught in the grip of their own unconscious baggage and stereotypes on the one hand, and their own inflated sense of importance on the other. What do the judges stand for when they will not claim the judicial officers at the coal face of justice delivery in our society as their brothers and sisters? Let us not simplify or devalue the adjudication of law in the 'lower courts'; and by the same token let us not inflate and exaggerate the level of legal argument in the 'higher courts'.

# Cases

## **P.W. Botha v The State (8 August 1999, CPD)**

The appellant, a former Prime Minister, successfully appealed against a fine of R10 000 or 12 months' imprisonment (as well as a suspended period of imprisonment) for contravening sections 39(e)(i) of the Promotion of National Unity and Reconciliation Act, No 34 of 1995. It was held that the trial court erred by not dealing with what has been referred to as 'technical defences', and that the issuing of a notice to appear was indeed *ultra vires*. The court held that this is a matter that goes directly to the element of unlawfulness, an essential element of the crime with which the appellant was charged. Selikowitz, J also observed that the Court is 'mindful of the fact that there will be many who may consider that it is unjust', but although the 'TRC was established to perform a noble and invaluable task', it remained a 'statutory body clothed only with the powers that the legislature has given it'. The Court concluded with a reminder of the judicial oath, and concluded that 'the sane Constitution which obliges the appellant to obey the law of the land like every other citizen, also affords him the same protection that it affords every other citizen.'

## **Maslela, Frank Sekola v The State (16 March 1999, WLD)**

The appellant is a 34 year old male who was convicted of raping a 70 year old woman. He appealed against a sentence of 5 years' imprisonment of which 2 years were suspended. Claassen J found that the magistrate misdirected himself 'with regard to the allegation that the complainant was not injured'. Referring to it as a 'heinous crime which offends against the privacy and physical integrity of a complainant's body', and considering the advanced age and internal injuries of the complaint, the appeal was dismissed and a 'proper sentence' of 8 years' imprisonment imposed.

## **The State v Zitha and 2 Others (10 June 1999, WLD)**

The three accused were convicted in the regional court on two counts of robbery and rape. The complainant in the latter charge was at the relevant time under the age of 16, and she was raped by all three accused, and twice by accused no 1. The central question for consideration was whether the 'substantial and compelling

circumstances' referred to in section 52 (3) of the Criminal Law Amendment Act 105 of 1997 (that came into operation on 1 May 1998) exist in this matter, that would justify the imposition of a lesser sentence than life imprisonment. Goldstein, J considered the judgements of *S v Mthembu and Another* (22 October 1998), and *S v Mofokeng and Another* (1 March 1999). Neither youth (the one accused being either 18 years or 4 and a half months short of 18 years) or a clean record made it as 'compelling and substantial circumstances', and with regard to the rape charge all three accused received a sentence of life imprisonment. Goldstein, J. Felt that 'the word must go out to the cities and to the suburbs, to the towns and to the townships, and to the countryside that Parliament has directed the courts to punish the perpetrators of gang rape and child rape as heavily and severely as the law will allow in the absence of substantial and compelling circumstances dictating otherwise, and the courts will not shrink from their duty of carrying out this directive however painful it may be to do so.'

## **Oscar Award**

This issue's special mention plus a huge bunch of flowers is awarded to magistrate Thandaza Ndita, Magistrate Mount Frere, for her starlight and debut performance in a TV documentary, entitled 'A Woman's Place'. The focus of the programme was entirely on Ms Ndita, her home, office and above all, her brave initiatives and efforts to raise constitutional awareness on specifically gender equality among traditional leaders in her area. Five stars for Thandaza!



**HAPPINESS IS ..... Hermanus after the exam**

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