

## EDITORIAL

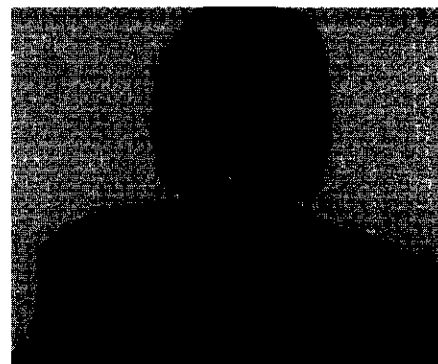
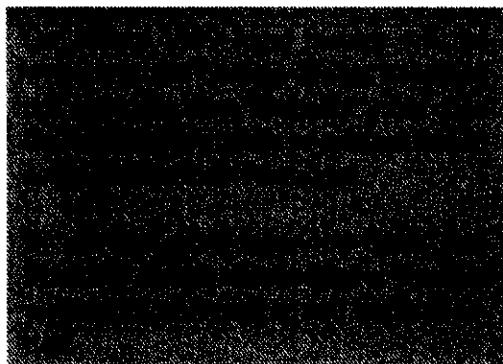
Talk about punch-drunk! Have a regional conference followed by a two week intensive training course, balanced delicately with a deadline for a new video, amidst an external evaluation, and receive this month's complimentary copy of 'How to be Proud of your most recent Nervous Break-Down'!

The up-side to this self-inflicted punishment was the 'Social Context in Judicial Decision-Making' course attended by 26 magistrates and seven Justice College lecturers, which has paved the road for a new direction in judicial education. Well done to Ilze Olckers, who designed, engineered and executed this event with more than her usual flair and proficiency. This pioneering venture is the most visible evidence of LRG's partnership with Justice College. It may also become *the* bench-mark in an empowering experience for magistrates interested in more than just the prescribed length of the erstwhile gown. To the 33 participants who have given new meaning to concepts of commitment and enthusiasm: Congratulations, and good luck in your preparation for the follow-up. (You still have to qualify for that certificate, remember...)

Finally, to everyone who reads this publication regularly without increasing levels of guilt, a gentle reminder in the words of a famous Roman Emperor: *'Nemo lexis nexis maximus altare rattibus magistratibus.'* (Roughly translated: Please send your written contributions, no matter how small, to prevent decision-makers from becoming illiterate rodents!)

FRANCOIS BOTHA

## All the President's a Woman...



**FB:** Are you ready to manage what comprises almost exclusively white males?

**GK:** My objective is to engage with magistrates' management on a participatory level. I'm thinking of an advisory and executive committee, and sub-regional committees, to promote participatory management. I don't believe that everyone who is going to disagree with me is necessarily an enemy.

**FB:** Are you equipped for what is to come?

**GK:** We must harbour no illusions about the difficulties surrounding my appointment, and that not everyone is happy with it. I came in as a black woman outsider! Yet my duties as Project Director, Legal Aid Board Justice Centre, Western Cape included extensive and diverse administration and managerial skills. I had a staff of 17 lawyers. I trained candidate attorneys, interviewed and evaluated candidates for vacant posts, filled in registers and monthly reports for the main office and seven satellite offices. I was not appointed as a regional magistrate, but as President of the Regional Court. This portfolio involves management and administration. This includes appointment of magistrates, deploying them, enhancing professionalism and discipline. I have been exposed to a spectrum of legal experience, and sat on a National Legal Aid Board that manages a budget of R400 million. I believe in

strong and effective management, but I also have a sense of community and social awareness. Perhaps it's time for an 'outsider' with fresh ideas, to be innovative and proactive. I don't need to justify my appointment – I want to rather invite you to come back in six months' time and see if I've made progress. Remember that I'm taking over at a time when the Regional Court is experiencing one of its worst crises. There are many vacancies, huge backlog of cases, low morale, and it has become a court of postponement. I have to prove myself, but I am very confident. I have the necessary vision, courage and drive to push the process forward.

**FB:** Your views on a unified judiciary?

**GK:** I subscribe to that vision, and think we should have a single hierarchy of judicial officers. Implied in this is the notion that all presiding officers be referred to as judges, who are treated equally. I also favour one single framework dealing with the affairs of judicial officers.

**FB:** Your views on the dreaded test and training?

**GK:** I don't agree there should be a test for regional magistrates, and not for judges. Many judges are appointed from academia now. I think one should appoint regional

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## YNZE DE JONG ON ACCESS AND UNMARRIED FATHERS

Among the public, there are popular assumptions about Family Law that cause confusion and frustration. Those most encountered by maintenance officers are: misconceptions that our law follows a "formula approach" to determining quantum in maintenance enquiries; and the blurring of the legal distinction between duty of support and access rights to children.

With regard to the latter, it is difficult to explain to parents using the free parental maintenance system, that access and maintenance are legally distinct concepts. In many parents' opinion, these issues are indivisible, and often conflict between the parents is played out in the juxtaposition of maintenance vs access, or vice versa. The standard litany of the maintenance system has been to advise parents aggrieved with relation to their access, that they should take the issue to another forum. This ignores the reality of the maintenance court as the site of primary service provision. Most parents first encounter the family law system by attending enquiries at a maintenance court.

Until recently, fathers of extra-marital children had no legal right to exercise access. The position has changed with the Natural Fathers of Children Born out of Wedlock Act 86/97. This Act has changed three core concerns: guardianship, custody and access. The practical steps to be taken by parents are simple. Application must be brought to the High Court requesting the relief required. When this application is filed, the Family Advocate must hold an enquiry into the merits. This would involve interviews with the relevant parties. The concerns to be addressed by the Family Advocate are specified in the Act, but they do not constitute a *numerus clausus*. They include the nature of the relationship between the biological parents; and the applicant's historical contributions toward the birth and upkeep of the child. Recently, many such applications have been brought, and the feedback is positive. It's been a pleasant surprise to witness the speed with which such applications have been concluded.

It should also be asked whether applications for access rights and for maintenance should not be heard at the same court. It is in the interest of all communities to have transparent dispute resolution mechanisms. In light of the number of fathers who claim to have been denied access to their minor children, a critical decision must be made as to whether the High Court applications for access should not be done as a freely administered process. In much the same way as maintenance defaulters are dealt with, so too should parents who misuse access as a weapon in inter-parental disputes.

## THE RUDE AWAKENING ...

When LRG introduced a two week **SOCIAL CONTEXT IN JUDICIAL DECISION-MAKING FOR MAGISTRATES** course (12-23 April 1999), in Cape Town, magistrates who wanted to go, and those who wanted to have nothing to do with it, sought to actualise their standpoints with equal passion.

It was clear that participants felt they were part of a chosen few. They came with their perceptions about self, some laid bare before their senses. We focused on the false sense of entitlement in blacks, false sense of superiority in whites, false whiter if not richer than thou outlook in indians, and perceived identity crisis of coloureds. We debated, and all was revealed before the altar of transformation. Denial was classified shameful – it is not that to me now.

There are ways of finding out who attended, but please go my way with me. I visited the refuse bins and checked on modes of transport.

At Little Scotia, bins contained bottles and cans from three residences in use. Sunday saw most of them at Little Scotia in church. Their minibus was red with a South African rugby fan as driver.

At Charlton, bins had plastic bags from Cavendish, Waterfront, and factories. They had a blue Venture with a "King among Queens" as driver.

At Penrose, the minibus was white with a "coloured" driver from the Honolulu section in Mpumalanga? I found shrunken price tags and severed gift wraps in bins.

This course said to me "You are not only a victim of discrimination, bias and prejudice. Black magistrate as you are, you are also a perpetrator".

For racism, reverse racism emerged uninvited. For racial oppression, gender oppression made an unwanted showing. For family violence, the reverse side was unwanted.

Hardly a comfort zone was un-invaded. The culture shock was massive both in class and afterwards.

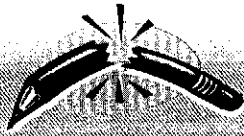
I am not sure if my JOHARI window was opened or whether I acquired the skills to see through it. But I was done away with, and replaced without consultation.

**CONTD ON PAGE 7**



Happy Birthday, Ilze Olckers from Tshifhiwa Maumela

# LETTERS TO THE 'T'



Mr T

I am a 60-year-old magistrate and have been with the Department for longer than I care to remember. I would like to retire with immediate effect and full benefits – tomorrow, if possible. If you could provide some guidelines on regulations, if any, in this regard. If I have to stay, do you know if it is possible to exchange the 'long service' watch for a more reliable carpiece?  
*Tired, North-West*

Dear Tired

How anyone could even consider retirement at the tender age of 60 is just above me. Allow me to remind you of some of the less obvious advantages to remaining in the service for a little longer. Lamenting, instead of rejoicing, upon entering the golden age

of maturity, sounds to me like ungratefulness. An age when most of your colleagues are just beginning to sound audible in judgments with that second set of artificial teeth. Yes, when the unification of the judiciary is beginning to look more like just a theoretical possibility, and the prospect of wearing wigs in court replaces the look of status with an attractive option to compensate for unavoidable hair loss. Besides, did you know that there are High Court judges, both on and off the Bench, that are more than 150 years old? Do you hear them complaining about hearing loss, or fantasies about retirement benefits? And since when has it in any event become so important to hear everything, and run the unnecessary risk of a memory crash halfway into a case.

Remember, the only real difference between us and the High Court is the

level of sophistication with which the latter has elevated the entrance into the twilight zone of a legal career, from certifiable incompetence to the illusion of legal maturity. This neat trick of associating judicial wisdom with an advanced age has become a global trend, and a fashion which you could easily swing to other advantages, than just watching movies for half price.

And finally, playing the 'tired' card is not going to impress anyone, when the new system of postponements have contributed so successfully to alleviate the overburdened court rolls. Your chances, or that of your children or grandchildren for that matter, of ever actually hearing a trial on the court roll are pretty slim!

[ Each published letter receives R50! – Editor ]

## Court in the Act

Created by Patricia Miller Text by Francois Botha



CONTD FROM PAGE 1

magistrates with proper qualifications, persons of high calibre, and ensure proper, ongoing training. I favour a comprehensive training system, not only equipping magistrates with technical legal skills, but the kind of training that LRG does. It should accommodate the fact that appointments might also include outsiders.

FB: Would you promote the appointment of regional magistrates on the basis of, for instance, gender?

GK: Absolutely. The Western Cape has 29 magistrates, four of whom are white females, and three black males. The rest are white males. What does that say for transformation?

If we go back in history, it's no secret that under the old order, resources were askew to meet the needs of a minority, and the legal profession was governed by whites. Females and blacks were excluded from professional advancement, and that has to be rectified. Anyone rejecting this notion, I'm going to have a problem with. So yes, making the courts more representative is something I will vigorously pursue.

As I leave Gadija Kahn's office, I can't help feeling that the South Easter is about to blow more than just a fresh new leaf into the strong-holds of our judiciary. And the time and place has never been better.

# NEWS FROM THE MARKET LAW & PROFESSIONAL PUBLISHERS

Dear Magistrates,

In June 1999, *Juta's Index and Annotations to the South African Criminal Law Reports 1990-1998* (ISBN 0 7021 5102 5) was published. This is a consolidation of the Index published in the half-yearly volumes of the *South African Criminal Law Reports* in 1990-98. The book contains the following: an alphabetical *Table of Cases*; *Case Annotations*, in two parts, which inform the reader whether a case has been considered, applied, discussed, explained, qualified, overruled, distinguished, criticised, doubted or merely referred to by the Court; an alphabetical list of *Regulations*, as well as a chronological list of statutes which received judicial consideration or interpretation in cases reported during 1990-98; and an Index of Cases Reported in the *South African Criminal Law Reports* in 1990-98. The latter index in particular greatly reduces the time wasted on reading case reports before discovering the reports relevant to the point being researched by enabling the reader to obtain detailed, but general information concerning the reported case. Priced at R125,00 (including VAT, but excluding postage & packaging), *Juta's Index and Annotations to the South African Criminal Law Reports 1990-1998* opens up a wealth of information to practitioners in the field of criminal law and is thus invaluable.

Part 3 of the *South African Journal of Criminal Justice* marks the 10th anniversary of the journal. This issue focused on the constitutional aspects of criminal justice and Juta has made the issue available to non-subscribers to the journal at a special price. In addition to the preface by Jonathan Burchell entitled *Criminal Law and Constitutional Rights*, the articles included in this edition are:

- On the preconditions and possibilities of criminal law theory
- An entrenched Bill of Rights best protects against law and order expediency
- Joint enterprise and accessory liability
- Fighting organised crime: comment on the Prevention of Organised Crime Act
- Sexual orientation, criminal law and the Constitution: privacy versus equality
- The presumption of innocence: what is it?
- A closer look at the presumption of innocence in our Constitution: what is an accused presumed to be innocent of?
- Proof beyond reasonable doubt
- The 'good faith' of the police and the exclusion of unconstitutionally obtained evidence
- Privatised prisons and the Constitution

The price of this special edition is R110,00 (inclusive of VAT, but excluding R10,00 for postage & packaging).

# MARKETING DEPARTMENT OF JUTA LAW & PROFESSIONAL PUBLISHERS

Finally, **Juta Insight Seminars** presents a morning seminar **Delict Beyond 2000**, which will bring legal practitioners up to date on the developments in the Law of Delict in recent years. Presented by experienced legal academics, who will lead discussion on recent developments and trends, especially the Aquilian action (including issues of 'onus of proof' and 'damages'); the impact of the Bill of Rights on the law of delict and the effect of the common law.

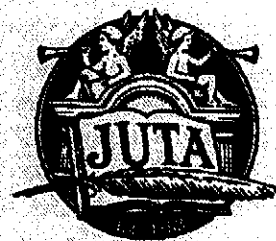
The seminar will be presented by **Professor J. van Marichell**, who has been lecturing on the law of delict for over 25 years. He is the author of *The Law of Defamation in South Africa*, *Principles of Delict* and the recently published *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum*. He is also the author of the standard text on criminal law and his research includes eighty articles in journals and chapters in books. He is a Fellow of the University of Natal.

**Prof. M. J. Midgley** is a Professor of Law, and currently Dean of the Faculty of Law at Rhodes University. He has a BSc and LLB from Rhodes, and a PhD from UCT. He is also an Honorary and ad hoc part-time CCMA Commissioner, and a panel member of IMSSA. Prof. M. J. Midgley is a prolific researcher with 70 publications to his credit, including two books, *Law of Professional Liability* and the second edition of Van der Walt and Midgley's *Delict: Principles and Cases*. He also updated the Delict section in LAWSA (First Edition (1995)).

These seminars will be presented on **8 September 1999** at the Sports Science Institute, 100 Grandstand Road, Newlands, Cape Town; and on **9 September 1999** at the BIFSA Conference Centre, Midrand, Johannesburg.

Registration is essential and you may call Lisa Helm on (021) 797 5101 or e-mail [lhelm@juta.co.za](mailto:lhelm@juta.co.za) for further details.

Regards  
The Marketing Department  
Juta Law & Professional Publishing Division



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# THE CAPACITY OF A CHILD TO BRIEF COUNSEL AND UNDERSTAND CRIMINAL PROCEEDINGS

Lee-Anne de la Hunt, Director: University of Cape Town Legal Aid

What has struck me most is the very different backgrounds and capacities of children, reinforcing the notion that it is very difficult to set a specific age for criminal capacity. One nine year old's capacity is very different from another.

Only if a child is able to understand criminal proceedings, is she or he able to properly instruct a legal representative. Like an adult client, only when a child has sufficient information and is able to place her- or himself in proper context within the proceedings is she or he able to give a legal representative adequate and meaningful instructions. A major role of the legal representative is to ensure as far as possible, that the client understands the proceedings and the roles of all the other parties involved.

Like an adult client, a child must give instructions not only relating to the putting up of a defence, but also to strategy. For example, a child may be able to decide whether or not to give evidence her- or himself. It may be that the child's instructions go beyond the one criminal case, and relates to the entire juvenile justice and welfare system relevant in the particular circumstances. Instructions should be obtained with regard to options relating to diversion, referral to children's court or sentencing options.

In order to properly represent children, and enable them to understand legal proceedings and their rights within the process, we have to assume that the legal representative has the necessary information, and is able to communicate it effectively to the child. Children have a right to representation in order to be assured of due process. They have a right to legal representation in order for them to be able to submit a defence, and to ensure that their voice is heard (even by invoking the right to remain silent). Many would agree that an unrepresented child within the juvenile justice system is at a disadvantage. A child may waive this right, and then it is up to the court to ensure that the child's rights are protected. Many children who come before juvenile court do waive the right to a legal representative. This may be due to for example: peer pressure, feeling that the lawyer is part of the system, or that lawyers are the cause of delays. Primarily a child must have trust in her or his legal representative. The lack of trust or the perception that the lawyer assigned by the Legal Aid Board does not really care about their case, has been cited by children as a reason for refusing legal aid.

A good attorney representing a child will be able to protect the child from unfair cross-examination, and will effectively cross-examine state witnesses. She or he could suggest creative sentencing options to the court, and challenge evidence that is not relevant, fair or competent. In an adversarial system, unassisted children are seldom able to use their rights to challenge or impeach a state witness.

With regard to the ethics of the profession, the Law Society does not have specific guidelines to apply when representing children. One of the differences between child and adult clients, is that children are less likely to be able to enforce their rights against their legal representatives, given a more unequal power relationship. The legal representative is accountable to the client and (as an officer of the court) to the court. Essentially, a good legal representative for children is a good communicator and should preferably be trained as such, particularly with regard to child development. In some jurisdictions, only those lawyers who are trained and selected to be on a panel are entitled to act for children. A lawyer in these circumstances should be aware of the power of persuasion that they do have and be sensitive to this. Just as with adult clients, the legal representative has to act on the client's instructions, and not in a way she or he believes is best for the client or society.

In thinking about the question of legal capacity, I was reminded of a conversation with a bright nine-year-old. Soon after I introduced myself as his lawyer I asked him what he thought lawyers did. His immediate reply was that they shouted a lot – at each other, at witnesses and the judge. Other than that he did not seem to have an idea of any aspect of the justice system, much less the Children's Court enquiry of which he was the focal point. We spoke a bit more and he asked me whether if there were fifteen people against one, whether the one would always lose. This was in response to my telling him who would be coming to court to give evidence, and who would be the parties at the enquiry and who would be represented – quite an array of people. I then told him that while I am appointed to represent his interests and to tell the court what his wishes are, at the end of the day it is the magistrate who makes the decision as to where he would be going and who would look after him. The social workers, the parents, other professionals may all give their opinion, but ultimately the responsibility is that of the magistrate. His most insightful response to this was "but what if the magistrate makes a mistake?"

CONTD ON PAGE 7

# COURT BY SURPRISE!

## This issue: Pampierstad Magistrate's Court

By ANNAH (SHANE) KGOELE, Magistrate: Pampierstad

### 'NOT A PAPER COURT BUT A REAL COURT'

Pampierstad court is an additional office to the Taung Magistrate office. It was built, and started operating, in April 1991 during the erstwhile Bophuthatswana. It is situated in the township called Pampierstad, 10km from the well known Hartswater Town.

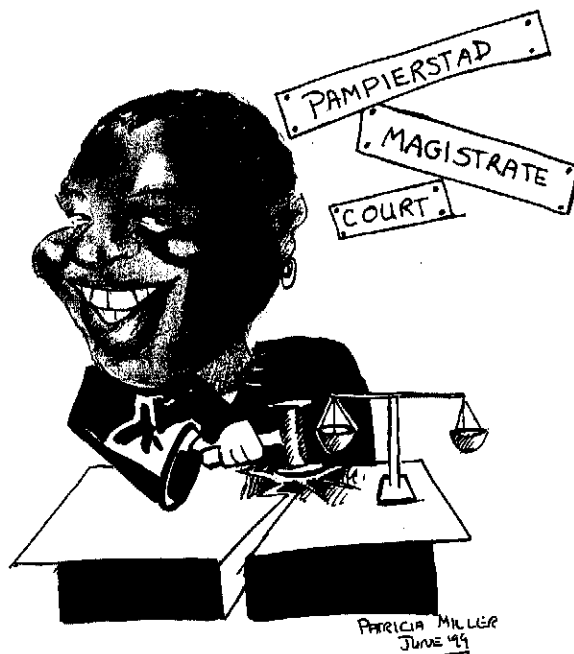
Initially it was a periodical court for the Taung Office. At that time, a four roomed home at Pampierstad Police Station was used as a court room. The Taung Magistrate staff used to go to Pampierstad on Mondays, Wednesdays and Fridays every week.

Pampierstad is named after the headman called 'Pampiri' meaning 'paper'. He was the headman of the small village which was here before the place was turned into a township. People who were living here under the headmanship of Mr Pampiri, among others Mr Tshenkeng, were forced to vacate the place to the now Itireleng village, which is about 5km from Pampierstad. This was in 1957/58. Mr Pampiri also moved to Itireleng village with his people. A township was built and named after the Headman Pampiri, hence the name Pampierstad. The locals speak Tswana.

The staff consists of: magistrates, two prosecutors, an interpreter, a clerk of the court, a maintenance officer, typist estate officer, accounts officer, two cleaners and two night watchmen.

The staff consists of blacks only, and there is no fair representation of gender.

The office is served by two police stations: Pampierstad Police Station and Kgomotso Police Station. They deliver services to the following villages: Tlapeng, Seoding, Upper and Lower Majeakgoro, Sekhing, Mocweding, Kgomotso, Losasaneng, Mamutla, Kameelpitz, Mmdithamaga, Shaleng, Madipelesa and Rietfontein. It is not only in



Johannesburg where serious crimes are committed. Pampierstad experiences this too.

There is a strong influence of diamond dealing cases, since Kimberley with its well-known 'Big Hole' is about 150km away. Even though it is a small township, more serious crimes are committed here and ultimately sent to the Regional Court or Hight Court for trial. An example is the renowned case of Mr Oupa Qozo which was transferred to Taung Regional Court. The robbery and murder cases committed here mainly arise from diamond dealings.

Words like 'Legomosha' or 'Smokolara' are usually heard when passing in the streets of Pampierstad, and they simply denote a person who is dealing in the diamond profession, whether licensed or not. Another common word 'Makgotla', refers to those people working outside the township in the mines.

So you see, this is not just a 'Paper Court but a Real Court'.

### CONTD FROM PAGE 6

Certainly a little boy who had grown in his understanding of the justice system in one conversation.

My conclusion would be that there are many children who most likely have the capacity to understand criminal justice proceedings. However, as a result of poor communication with a number of actors, including their own legal representatives, do not in fact understand the proceedings or aspects of the proceedings, and therefore are not able to properly instruct their legal representatives.

### CONTD FROM PAGE 2

Many said: "THIS COURSE SHOULD BE MADE COMPULSORY FOR ALL MAGISTRATES".

One said: "THIS COURSE MADE ME THINK ABOUT WHAT I AM THINKING".

It is the same course I am telling you about.

I say: WHAT HAVE I BEEN DOING ALL THESE YEARS AS A MAGISTRATE? God Help Me.

TSHIFHIWA MAUMELA  
Magistrate, Mutale

**KILL YOUR HUSBAND AND FRY!**

*Boucher v S* Case No: A844/98, 01/03/99 (WLD)  
(Unreported)

A 34 year old female was charged with murdering her husband, and pleaded self-defence. The court *a quo* convicted her, and sentenced her to 18 years' imprisonment, suspending three years for five years. During the appeal against the sentence, the Appeal Court accepted that there had been a history of violence inflicted on the accused by the deceased. She had obtained two interdicts against him, and had instituted an action for divorce. The Court found that the court *a quo* had misdirected itself by imposing a harsh sentence based on the incident itself. The Court held that the murder, and what happened immediately prior to the deceased's death, must be distinguished from the on-going trauma experienced by the accused resulting from her relationship with the deceased. The Court upheld the appeal, replacing the sentence with that of 10 years' imprisonment, suspending three years for five years.

**TO HAVE OR NOT TO HAVE A TV!**

*S v Francke* Case No: SS22/98, 05/05/99 (C)  
(Unreported)

The accused was arraigned on rape, attempted rape, assault GBH, and abduction. The state applied for an order to lead the evidence of a 17 year old complainant via closed circuit television, in terms of s 158 CPA (51/1977). In the first judicial pronouncement on the interpretation of s 158(3), the Court said that allowing a witness to testify outside the presence of the accused may encroach upon the latter's rights, by diminishing the forcefulness and effect of cross-examination. Adopting a strict interpretation, the Court held that a party making such application would have to comply with all the requirements set out in paragraphs (a), (b), (c), and any of the requirements set out in paragraphs (d), (e) of s 158(3).

**SENSITIVE MAGISTRATES**

*Sv Murray* 1999 (1) SACR 554 (W)

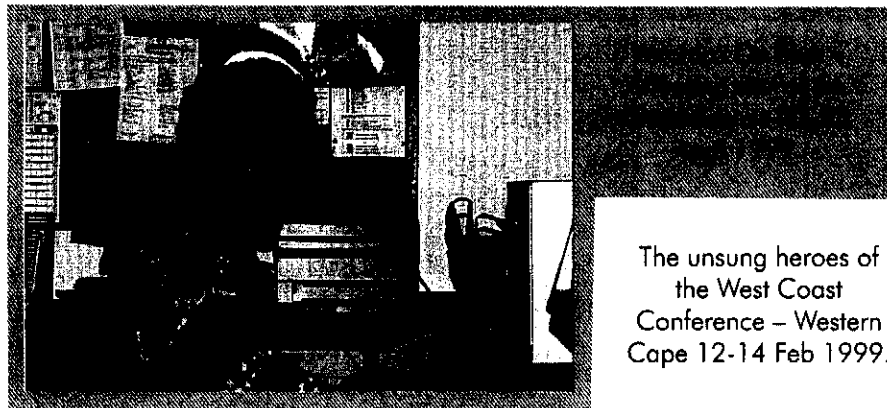
The accused appealed successfully against his conviction on contravention of s 11(1) of the Maintenance Act (23/1963), and against his sentence of three months' imprisonment, suspended for five years. He was unrepresented in the magistrate's court. The Appeal Court found: that the magistrate had been curt, short-tempered, aggressive, and intolerant with the accused; and that the magistrate had paid lip-service to the need to inform the accused of his duty to discharge the onus in terms of s 11(1). The Court said that it is important for judicial officers to have an element of sensitivity in family matters, and that accused in these matters should be treated courteously and accorded dignity.

**Congratulations**

To two of our star magistrate trainers at Verulam Court, Sophie Reddy and Judy Naidoo, who recently passed the dreaded Regional Court test!! *Well done!*

**Humbly apologetic??**

In the last issue of News & Views, it was mistakenly reported that Mr Andre Le Grange is the youngest Regional Magistrate to be appointed. This was clearly incorrect, and the mistake was soon brought to my attention. Did I say youngest? I meant the Best-looking Regional Magistrate, and any contenders for this title must please submit their entries with a photo (fully clothed, if possible) for the competition in time for the next issue. The judge's decision will be final, no late faxes this time please! *Editor*



The unsung heroes of  
the West Coast  
Conference – Western  
Cape 12-14 Feb 1999.



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