EDITORIAL

All's well that ends well...or is it? Because somewhere underneath the great hype about the greatest celebrations set to hit the planet, amidst the haze of euphoria about our over-achievements as human beings, awaits a feeling of emptiness for all those brave enough to admit it. Whether or not we, and more specifically those of us in the coal face of justice, have lived up to the judicial expectations of a century, remains but one of a whole range of uncomfortable questions.

But far be it from this last-of-an-era editorial to join in any chorus of woes about what we have failed to achieve. The social injustices that we as judicial officers have witnessed first-hand are not about to disappear in the smoke of the fireworks of the eve of the Big Switch. Neither are we going to even pretend that the New Beginning is going to introduce a second breath and recuperated zest to judicial decision-making. Maybe our strength to survive the next big round is to be mindful of the many failures, ours and those of others, and the reasons why we have allowed the indiscretions and blind justice syndrome of the past to become the unfinished business of tomorrow. And perhaps the only strategy to regain dignity (always considered to be such an indispensable part of our judicial toolbox), is stop to be silent observers when justice and the law drift apart.

From an LRG-perspective, I look back at the last couple of years in great awe. I am grateful that enough momentum and importance have been given to social context training, enough at least to ensure that judicial education will never quite be the same again. I tip my hat at the many magistrates who have been so supportive of this new wave, and wish every colleague the best of luck this century has to offer. May your paths be paved with wisdom and patience, and may a spirit of understanding become our greatest virtue in our role to help in the healing of this land.

Francois Botha

Voting for Judges?

(The Director of LRG, Prof Christina Murray, comments from the North, where she is bound to return from sabbatical soon...)

After 11 months of our year in Madison, Wisconsin, life in the US still seems strange. We see so many American movies in South Africa and so many American companies are franchised in South Africa, that America appears familiar at first. We recognise Macdonald's and Kentucky Fried Chicken; we drink Coke and Sprite; we wear Levi's and hanker after Nike gear. But the movies don't tell us that in summer the mosquitoes are relentless, keeping us indoors although the temperatures are in the high 30s and 40s, making insect repellant an essential. And the movies can't properly convey the cold in winter. After just four months of summer, temperatures plunge, and we find ourselves back in scarves and polar fleece. The children play soccer indoors and it is dark by 4.30 p.m. Nor do the movies often convey the size of this country – almost 6 million sq. kilometers with huge expanses of open land, forest and desert. (South Africa is a mere 750 000 sq. kilometers!)

But for South African lawyers the strangest thing about Wisconsin – and about most other states in the USA – is probably that all judicial officers are elected. The right to elect judges is entrenched in Wisconsin's State Constitution and held dear by Wisconsin's citizens. Of course, judges don't stand for election every year. 'Circuit' court judges (who are like our magistrates) have 6-year terms and Supreme Court judges hold office for 12 years.

Americans claim that judicial elections are good because they give citizens a say over who their judges are and ensure that judges are accountable. South Africans may worry about this: is it a good thing for a judge who might have to hand down a decision protecting a member of an unpopular minority, to have to appeal to the majority to retain his or her job? Won't judges make popular decisions as elections draw near so that they don't lose their positions? A Californian judge has put the problem very starkly: I'm afraid the era of retaining judges on the basis of their character, without tallying up their votes, is a thing of the

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past. There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time.[1]
All judges must make unpopular decisions sometimes. The challenge to the independence and fairness of judges posed by judicial elections is a serious issue that Americans do not talk about very much.

But a related issue that is debated is campaigning. To be elected, prospective judges can't just stand for election; they need to run a campaign to persuade voters to choose them. Running an election campaign is expensive and that means that candidates need to raise funds. In the past, Wisconsin had a reputation for clean, low-cost elections where special-interest influence was minimized and public faith in the process maximized.

This year one of the positions on the seven-person Wisconsin State Supreme Court was vacant. There were two contenders – the incumbent and an attorney from a city called Green Bay. The election campaign disturbed many people as it became personal and, at times, vitriolic. The records of both candidates were scrutinised in advertising campaigns. That included having the parents of a child who had been sexually abused complain emotionally in a TV ad about the sentence the offender had been given. Newspaper headlines reflected the tension: 'Reasons to reject Rose: dishonest campaign, lack of qualifications', 'Rose tiff cost state $35 000' and 'Court rivals take off gloves', are examples. Other judges endorsed one or other of the candidates, raising fears that the bench would inevitably be divided after the election. Voters were phoned by an anti-abortion group in an attempt to swing the vote in favour of the pro-life candidate. Abrahamson, the incumbent seeking re-election, was criticised harshly for opposing state laws that allowed prison officials to continue to detain sex offenders after their sentences were complete. Local police publicly supported one or another candidate.

This was hardly a 'clean' election. And recently large amounts of money have been put into judicial election campaigns. Most of the money comes from lawyers, lobbyists and business people – from people who have the power to influence judges. One concern that is raised when candidates rely so heavily on donations from a very small, very wealthy layer of society, is whether the public is likely to retain faith in the judiciary's ability to view legal problems from the perspective of the non-wealthy.

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1. Justice Otto Kaus quoted in Steven P Croley 'The majoritarian Difficulty: Elective Judiciaries and the Rule of Law' (1995) 62 University of Chicago Law Review 689 at 694.

TOWARDS JUSTICE IN THE NEW MILLENNIUM by Ynze de Jong

With the millennium approaching, the recent information session held in Pretoria on the imminent Justice computerisation tender has been an eagerly awaited event. The core idea is to move to a more modern manner of managing our courts in the future. For the purpose of the tender the Justice System includes the criminal justice system, the civil justice system and SAPS. While no overt reference is made to the Department of Correctional Services, it is obvious that the entire Justice Cluster will ultimately be affected. The goal of this session was to improve the current outdated paper based system and implemented a "best practices fully integrated system".

The current problems experienced by the Department of Justice in the context of the tender were defined as a paper-based system experiencing overload. The problem with the present system is that it is slow throughout, information is duplicated, while appropriate information is not gathered or disseminated to the correct role-players. As a frustrated ex-prosecutor, I could not agree more. It would appear that this is affecting both the length of time required to finalise trials, as well as bolstering the awaiting trial prisoner population with the obvious financial implications for the State.

The Department of Justice has already completed an in-depth "as-is" analysis. Dare I hope that some of you were given a meaningful opportunity to contribute to this process!!

The proposed timelines for implementation are extremely tight, which I feel is beneficial as it will focus the minds of the various players. The idea is that by 18 February 1999 teams will have been identified to run a pilot project in two courts, Johannesburg being one at this stage. The courts selected are the busiest and currently pose the largest problems. There would then be a structured roll-out to the other courts nation-wide. The pilot here is meant to demonstrate what is possible and inform the National Tender at a later stage. It is currently envisaged that the pilot project will run for some six months.

The ultimate (long overdue!) idea is that the Justice System must be able to communicate with the other relevant Departments. There does not seem to be a plan to capture old documents as yet, which would be a massive undertaking. An archiving system for future use was however discussed.

What I particularly like is that emphasis a re-engineering processes rather than the recreation of old existing inefficiencies. So there you have it: there might still be some monumental mistakes to be made, but it is clear that the future of the Department of Justice is digital.

Happy millennium to you all.

ABOLISH THE AGE-OLD 'HUE AND CRY' RULE IN OUR LAW

Esther Steyn, Lecturer: Law Faculty, UCT

It is time that the medieval rule that governs the admissibility of previous consistent statements by sexual complainants be abolished. Many rape victims have been prejudiced through the application of this rule because they haven't raised a complaint, shortly after they were raped. As we all know, the complaint serves as a rebuttal of any suspicion of untruthfulness of the complainant's statement. There is no longer a sound basis for retaining this rule that serves as an exception to the general rule of admissibility in our law. This is particularly true since the cautionary rule in sexual offence cases has now been abolished.

The importance of the previous consistent statement given by a complainant in a sexual offence case is described by many scholars as relevant to the establishment of the consistency of the witness and not as corroboration of the complainant's testimony. (See Schmidt *Bewysreg* (1989) at 385; Hoffmann and Zeffertt *The South African Law of Evidence* (1988) at 118-120.) To be admissible, the following requirements should be met: the statement must have been made voluntarily and it must have been made within a reasonable time after commission of the sexual offence.

Although the 'hue and cry' rule no longer applies in the original form in which it was introduced to the law of evidence, it is still applied by our courts today. Proponents of the rule claim that the rule favours rape victims in that it strengthens the testimony of the complainant. This argument can, however, not be supported because not all rape victims respond in the same way after being raped. It appears that the rule is also based on another myth, namely that the natural reaction of any sexual complainant is to immediately tell someone about the rape or the sexual offence. The truth, however, is that most victims are in most instances too embarrassed to tell anyone, let alone to do so spontaneously and early, as is required by the rule. (See J Temkin *Rape and the Legal Process* (1987) at 145146) The admissibility requirements do not consider the unpredictability of human behaviour. Many victims will not have a hysterical or tearful response after being raped. Rather they will have a controlled reaction in which they mask their feelings and appear to be calm and composed. So the perception that a recent complaint may favour the credibility of a rape victim is quite unjustified.

What makes this rule even more controversial is that, although the recent complaint cannot be used as corroboration of the complainant's testimony, the absence or lateness of such a statement can be used by the defence to cast doubt on the credibility of the rape victim. The South African courts have held that lateness of a complaint about the rape may be considered as an adverse factor in determining the trustworthiness of a complainant (*S v De Villiers en 'n Ander* 1999 (1) SACR 297 (O)).

Looking at other jurisdictions, it becomes apparent that rape victims have had to bear the risk of appearing untruthful if they did not complain about the rape shortly after it occurred. In *Kilby v The Queen* [1973] 129 CLR 460 Barwick CJ in the High Court of Australia said the following:

'It would no doubt be proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of a rape and in determining *whether to believe* her, they could *take into account* that she had made *no complaint at the earliest reasonable opportunity*. Indeed in my opinion, such a direction would not only be proper but, depending of course on the particular circumstances of the case, ought as a general rule be given (At465).'

Ultimately, if one considers the concept of corroboration as applied in our law of evidence, then one cannot but be convinced by the earlier view expressed by Chief Justice Hiemstra in *S v M* 1980 (1) SA 586 (BH) that there is no ground of admissibility in our law such as 'consistency', and that the rule in essence is nothing other than 'admissible self-corroboration'. Scholars, like Van der Merwe, support the view of Hiemstra CJ regarding the proposition that consistency is not a recognised ground for admissibility in the law of evidence. Van der Merwe maintains, however, that consistency is to be distinguished from self-corroboration. (See S E van der Merwe 'Die Toelatingsgrond en Bewyswaarde van Klagtes in Seksmisdade' 1980 *Obiter* 86 at 92.) In support of his argument he states that the previous consistent statement made by the victim cannot be considered as corroboration of the victim's testimony because it does not emanate from an independent source. But this is exactly why the complaint should not be considered as admissible evidence in our law. I am convinced that to prove that something is consistent with something else said or done, is nothing other than to look for support for the statement of the complainant. Once considered as "support' for the credibility of the complainant's statement, it can be nothing but corroboration of the complainant's testimony.

It is suggested that South Africa should follow in the footsteps of other countries, for example Canada, that have abrogated the rule by introducing legislation that had as its aim an improvement of the treatment meted out to sexual complainants in court. Finally, it should be recognised that the rule allowing the admission of previous consistent statements has now become superfluous in the light of the abandonment of the cautionary rule, hence this plea for its abolition. Abandoning it will lead not only to improved treatment of victims of rape but also to a criminal justice system that is more sensitive to the needs of victims generally.

NEWS FROM THE MARKETING DEPARTMEN

Dear Magistrates

Juta & Co. Ltd takes pleasure in announcing that the eagerly awaited second edition of *Boberg's Law of Persons and the Family*, by Belinda van Heerden, Alfred Cockrell and Raylene Keightley will be available from January 2000. Since the first edition of this work appeared in 1977, the law of persons and the family has seen significant changes. Justice O'Reagan, on previewing the new edition, commented that "despite rewriting to deal with changes, both in the socioeconomic context of the law since 1977, as well as changes to the law itself, the new edition maintains the crisp clear style of the first edition and that – like its predecessor – the text betrays no fear of expressing firm opinions."

This new edition contains in-depth discussion, by some of South Africa's leading law academics, on every facet of the law of persons and the family, including topics such as:

- the concept of "the best interests of the child"
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"This new updated edition encapsulates the latest developments in this important area of our law, thus making it indispensable to students and practitioners alike. The second edition of **Boberg's Law of Persons and the Family** *is an indispensable reference work which is a welcome and necessary addition to the library of all lawyers."*

Advocate B K Pincus SC,
President of the Association of Family Lawyers,
Advocate of the High Court and Member of the Cape Bar

Boberg's Law of Persons and the Family, ISBN 0 7021 5116 5 and 1088 pages, is priced at R675,00.

The sixth edition of **Hahlo's South African Company Law through the Cases – A Source Book** has recently been published. The work was first published in 1958 and this sixth edition now bears testimony to its place as a classic in South African legal literature. The current team of editors, JT Pretorius, PA Delport, Michele Havenga and Maria Vermaas, are all experts in mercantile law and have published extensively in this field, both as authors or co-authors of textbooks and as contributors of numerous articles to legal journals.

This edition offers a systematic overview of company law, with its informed selection of cases and materials covering every aspect of the field. Each topic is dealt with through an introductory text, followed by extracts from a wide-ranging selection of writings and then by case extracts. While retaining the spirit of the previous editions, greater emphasis is placed on the developments in South African case law.

Dynamic developments in company law have taken place since the publication of the previous edition. Two examples of these developments are the change to the common-law rules relating to dividends and the modification of the capital-maintenance rule. The sixth edition of **Hahlo**, incorporates these changes and is also the first work on company law to cover the recent amendments to the Companies Act of 1973.

The book is priced at R245,00, with ISBN 0 7021 5142 4 and 680 pages.

OF JUTA LAW & PROFESSIONAL PUBLISHERS

The Bill of Rights Handbook, third edition, will be available in early January 2000. This highly successful textbook, originally commissioned for use by candidate attorneys and students of the Law Society's Schools for Legal Practice, has established itself as an indispensable reference work and guide to all aspects of Bill of Rights law and practice. The authors of the **Handbook** make up the formidable team of Johan de Waal, Iain Currie and Gerhard Erasmus. The **Handbook** has been updated to incorporate developments in the law up to November 1999. The chapters dealing with the structure of Bill of Rights litigation, application of the Bill of Rights, justiciability and remedies have been substantially revised. The ISBN of the third edition is 0 7021 5145 9 and the price is still to be announced.

Once again, we are extending a special pre-publication offer to all new subscribers to **Juta's Statutes of South Africa**. We are offering next year's edition, (updated to 31 December 1999) at the current edition price of R1 495,00. In addition, new subscribers will receive a full set of the current edition, absolutely free.

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The Marketing Department
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JUTA
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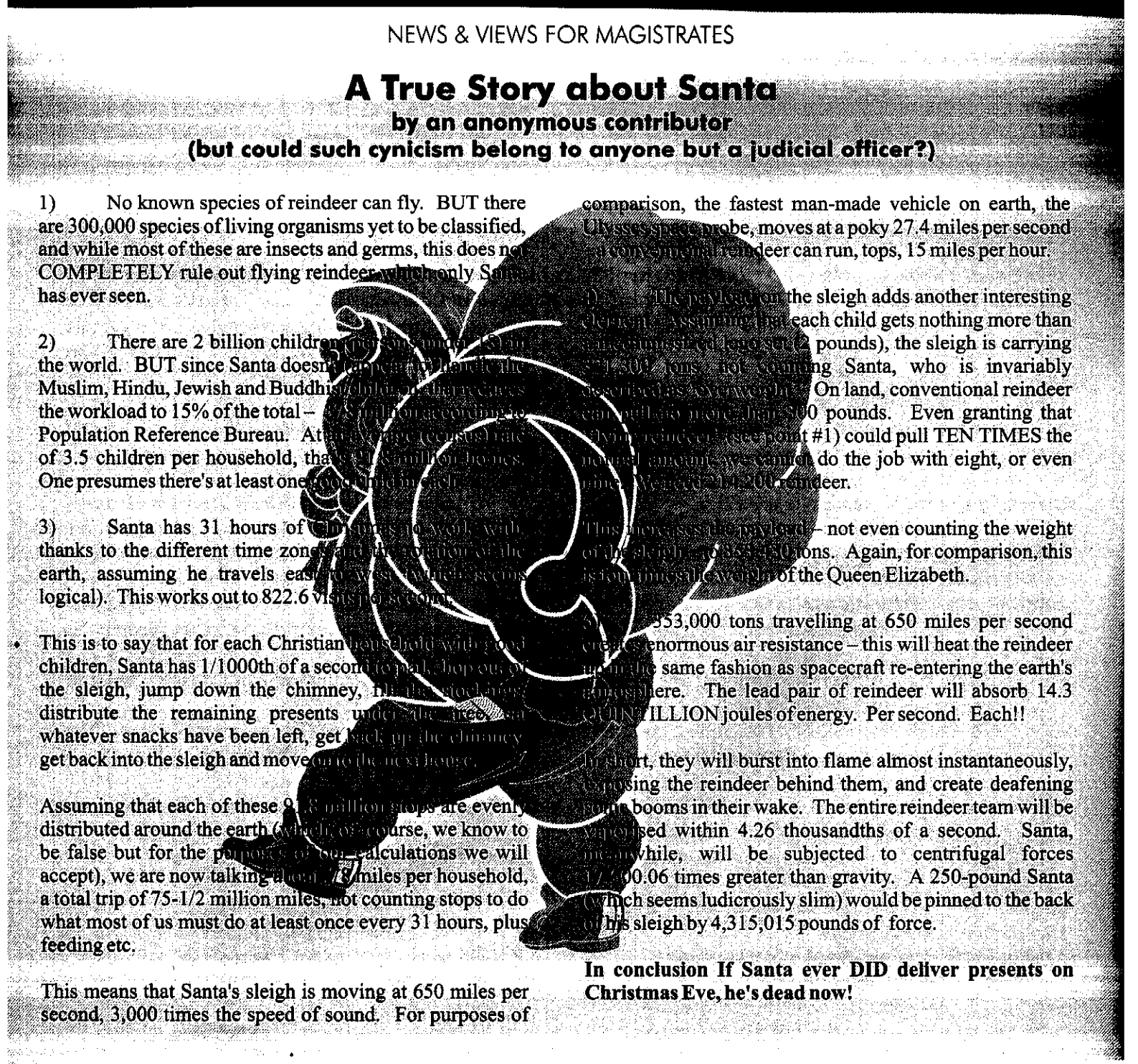
A True Story about Santa

by an anonymous contributor

(but could such cynicism belong to anyone but a judicial officer?)



1) No known species of reindeer can fly. BUT there are 300,000 species of living organisms yet to be classified, and while most of these are insects and germs, this does not COMPLETELY rule out flying reindeer which only Santa has ever seen.

2) There are 2 billion children (persons under 18) in the world. BUT since Santa doesn't (supposedly) recognize the Muslim, Hindu, Jewish and Buddhist children, this reduces the workload to 15% of the total – 378 million according to Population Reference Bureau. At an average (census) rate of 3.5 children per household, that's 91.8 million houses. One presumes there's at least one good child in each.

3) Santa has 31 hours of Christmas to work with, thanks to the different time zones and the rotation of the earth, assuming he travels east to west (which seems logical). This works out to 822.6 visits per second.

- This is to say that for each Christian household with good children, Santa has 1/1000th of a second to park, hop out of the sleigh, jump down the chimney, fill the stockings, distribute the remaining presents under the tree, eat whatever snacks have been left, get back up the chimney, get back into the sleigh and move on to the next house.

Assuming that each of these 91.8 million stops are evenly distributed around the earth (which, of course, we know to be false but for the purposes of our calculations we will accept), we are now talking about 1.2 miles per household, a total trip of 75-1/2 million miles, not counting stops to do what most of us must do at least once every 31 hours, plus feeding etc.

This means that Santa's sleigh is moving at 650 miles per second, 3,000 times the speed of sound. For purposes of comparison, the fastest man-made vehicle on earth, the Ulysses space probe, moves at a poky 27.4 miles per second. A conventional reindeer can run, tops, 15 miles per hour.

The payload on the sleigh adds another interesting element. Assuming that each child gets nothing more than a medium sized lego set (2 pounds), the sleigh is carrying 321,300 tons, not counting Santa, who is invariably described as "overweight." On land, conventional reindeer can pull no more than 300 pounds. Even granting that flying reindeer (see point #1) could pull TEN TIMES the normal amount, we cannot do the job with eight, or even nine. We need 214,200 reindeer.

This means 353,000 tons travelling at 650 miles per second creates enormous air resistance – this will heat the reindeer in the same fashion as spacecraft re-entering the earth's atmosphere. The lead pair of reindeer will absorb 14.3 QUINTILLION joules of energy. Per second. Each!!

In short, they will burst into flame almost instantaneously, exposing the reindeer behind them, and create deafening sonic booms in their wake. The entire reindeer team will be vaporised within 4.26 thousandths of a second. Santa, meanwhile, will be subjected to centrifugal forces 17,500.06 times greater than gravity. A 250-pound Santa (which seems ludicrously slim) would be pinned to the back of his sleigh by 4,315,015 pounds of force.

In conclusion If Santa ever DID deliver presents on Christmas Eve, he's dead now!

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What are the solutions? The election of state judges is firmly entrenched in the US. In all but 12 of the 50 states most judges are elected. Even in the 12 exceptions, lower court judges are usually elected. A small number of states has followed an American Bar Association recommendation and does not have competitive elections when an incumbent's term expires. Instead, in subsequent elections voters are simply asked whether or not the incumbent should be retained. Only if the answer is 'no' can a new candidate be considered.

Problems in campaign costs and funding could be reduced if election campaigns were publicly funded. This year an independent Commission appointed by the Wisconsin Supreme Court recommended full public financing for Wisconsin Supreme Court elections. A poll showed that over 76% of voters support the idea. But the recent Wisconsin State budget does not include the necessary funding.

Of course, not all American judges are elected. The President nominates Federal (ie national) judges and the national Senate must confirm their appointment. Senate hearings for US Supreme Court seats are famously controversial – remember Justice Clarence Thomas' appointment. But most judicial matters are not heard by Federal judges. In fact, it is estimated that judges in state courts hear 98% of cases. This means that most people in the US have their cases tried by popularly-elected judges.

Should we elect magistrates? It would certainly give magistrates greater legitimacy and may help to close the gap between court and community. But it might also subject magistrates to enormous pressure when they make difficult decisions. It would almost certainly make it more difficult to use community service as an alternative to prison even for first offenders. What would it mean for decisions about household violence in deeply traditional societies? Would magistrates be compelled by their desire to remain popular (and be reelected) to impose longer prison sentences? And do South African magistrates want to campaign for their jobs?

COURT BY SURPRISE!

This issue: Bushbuckridge Magistrate's Court

by Bruce Langa

Magistrate Bushbuckridge, officially known as Mapulaneng is a relatively busy office situated in the developing town of Bushbuckridge east of the Northern Province. It is situated ± 300 km from the provincial capital Pietersburg and ±98 km from the Mpumalanga capital Nelspruit. While the place is developing into a busy town it also has a lot of natural beauty to offer.

Well, the office accommodation is a pre-war (can't remember which war) structure though rumour has it that it is actually much more ancient than it's said to be. As a matter of fact palaeontologists may be forgiven for showing interest in the premises.

The structure is a u-shaped design with the courthouse as the centrepiece. The main entrance is an arch and foyer reminiscent of some past uncertain era probably Volk or Kruger. The offices are adorned on the inside with trappings such as cast iron fireplaces with mantelpieces and shelves as well as hat/coat hooks on the walls. The building has wooden floors with a peculiar smell, and these floors are so useful more especially in announcing impending visits (usually unholy ones) by your boss, inspectors, even palaeontologists.

The courtroom which also has a wooden floor, furthermore sports a wooden dividing barrier in the gallery which I am told was erected in those days to curb miscegenation. I wonder how this was a possibility unless it was volk version of night court.

Crime is very rampant in this district and one comes across every conceivable (and inconceivable) crime, including an occasional bigamy though I still have yet to come across a person charged with blasphemy. Bigamy, however, appears to be an unnecessary previous conviction as concubinage and polygamy are not so foreign in these parts. Stock theft is also not uncommon in this area, but what is more common is the phenomena where owners of livestock always suffer acute amnesia come time to identify cattle involved in car collisions. I still have to see one such animal that is not a *res*.

Speaking of livestock brings to mind a recent experience I had of the periodical court when I was startled in my office by this stray but stately goat which majestically strutted into and across my office with the intention to commit an act unknown to the State. Upon seeing me, the goat, with one eye trained on me and the other at the opposite door, shuffled in one spot for seconds in panic and then zoomed out the exit releasing at the same time a wail in C flat. I was just happy it was a stray goat, and not a bullet or some blundering robber. That is how rural it gets sometimes.

While the courtroom is generally perceived as a gloomy and sombre joint (and correctly so) it also has it's moments as well as characters who frequent it. One such character is a former court orderly who once asked to call a policeman Botha said in a loud voice "Sergeant Botha, Sergeant Botha, Botha, Sergeant" and understandably no one responded. Then there was a presiding officer who would say to an accused person in address " You are drifting along the Zambezi River and you will soon meet with the dangerous Victoria Falls" and in such circumstances the case invariably had an unhappy ending for the accused person. What about the attorney who in giving the accused's explanation of plea went something like "Accused's plea is in accordance with my instructions. He denies all the allegations against him as contained in the Charge Sheet including that he is a black male aged 56 years and that his identity number is unknown to the State" – No comment except to say that a breathalyser was the only option.

To be continued..... in the next millennium.

To the Ed.

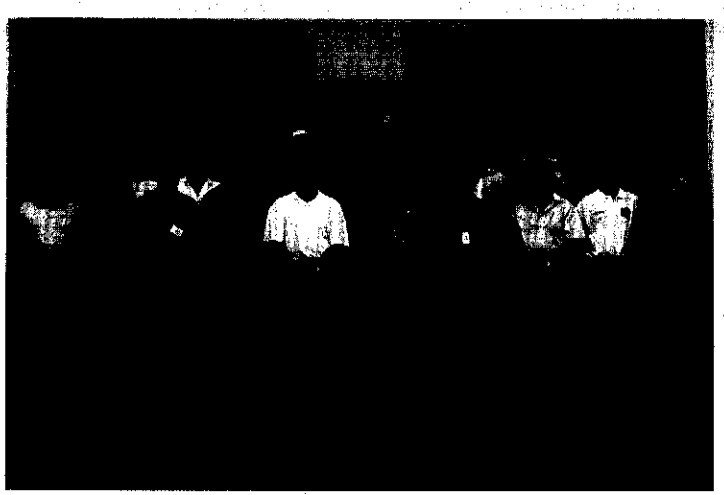
The views expressed in the article are not necessarily those of the author (if you figure out what I mean) and any reference to names, if any, may or may not be fictitious and publication is at editor's lamentable risk.

BOOK REVIEW

Looking for a good book to read? Try *How the Garcia Girls lost their Accents* by Julia Alvarez (published by Penguin in 1992). It is about a Spanish family with four daughters that moved to the US from the Dominican Republic. Why should a South African read this book? For a sensitive description of the misunderstandings, expectations and disappointments that the meeting of the cultures brings. These are misunderstandings, expectations and disappointments that South Africa is full of. Through the writer's sensitive and often hilarious descriptions of the Garcia family's new life (including the agony of an awkward teenager trying to explain in front of her mother and in faulty English to a rough US police officer what the man who had accosted her on the way home from school had actually done and the plotting of three of the sisters to break up their younger sibling's relationship with a domineering and traditionally patriarchal Dominican cousin) we can become wiser about our own cultural differences.

Congratulations !

To the following magistrates, with their appointments, and may festive best wishes add to their celebrations! The newest and latest in the elitist category of Chief Magistrates:
Renuka Subban (Verulam) and Simeon George (Mitchells Plain).
And the new Senior Magistrates:
Ms N E Denge (Brakpan), Mr M J Doralingo (Goodwood), Mr P A Koen, M B Mtebele, D Nair and Ms N Nduna (all Johannesburg!), Mr L Madikizela (Kempton Park), Ms J F Van Schalkwyk (Mitchells Plain), Ms M Froneman (Nigel), Mr K A Mahumani (Nylstroom), Mr C E Schutte (Port Elizabeth), Ms J J Ikaneng (Rustenburg), Ms A M Kgoele (Upington), and Mr M M Dimbaza (Wynberg). Well done, all of you!



The end of a very successful recent conference at Gazebo Game Lodge, near Malelane. Featured here are the executive committee and provincial secretaries of Joasa and members of the sub-committee on Judicial Training (Magistrates Commission). Special guests Jody Kollapen and Prof Cheryl Loots, Judge Hakan Friman (Sweden), as well as LRG staff members and Justice College guests and panellists are amused by a brilliant photographer.

The editor and staff at LRG would like to wish all our readers the very best over the festive season.

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