FOR MAGISTERS

Magistrates *can* carry out their duty to implement the economic provisions of the Domestic Violence Act

Elizabeth R Husa
University of Michigan and LRG intern

The Preamble of the Domestic Violence Act 116 of 1998 states 'it is the intent of this Act to afford the victims of domestic violence the maximum protection from abuse the law can provide.' Magistrates, however, report a hesitancy to carry out this intent when it comes to addressing economic abuse and/or including provisions for emergency monetary relief in temporary protection orders.[1]

This hesitancy is troubling. The Domestic Violence Act does not merely recognize economic abuse or remedy it in extreme circumstances, but it includes it in the definition of the crime the act was meant to address – domestic violence.[2] Furthermore, Parliament enacted the DVA with the intent of addressing economic abuse and allowing for financial assistance. It expressed a desire to 'address the inadequacies of the Prevention of Family Violence Act 133 of 1993,[3] one of which was a failure to specifically authorize remedies for non-physical abuse in a temporary protection order.[4] Courts desiring to address this were required to apply a catchall provision, and they did so inconsistently.[5]

Parliament also enacted the DVA out of a desire to 'afford greater protection to victims of domestic violence.'[6] This can only be achieved by enabling women to leave their abusers, which often requires financial support.[7] The Constitutional Court recognized a constitutional duty to deal effectively with domestic violence in *S v Baloyi*.[8]

Despite the clear mandate from Parliament, the Constitutional Court, and the text of the DVA, magistrates report an unwillingness to apply these provisions. They cite administrative difficulties, untrustworthy applicants and a fear of imposing on the maintenance court to justify this, yet this need not be the case. Magistrates can implement the DVA fully despite administrative difficulties and without assuming the role of the maintenance court.

Magistrates face a difficult task in administering justice in domestic violence cases. Some courts are overwhelmed with complaints,[9] leaving little time to uncover the truth from the contradictory and incomplete documents before them.[10] Furthermore, some complainants come with ulterior motives,[11] and the court must discern them without hearing the respondent or a neutral third party. While magistrates cannot fix these problems, they can take steps to make the best judgment in spite of them.

First, they can improve the usefulness of the information before them by formulating a list of objective factors to assist them in deciding whether *any form* of domestic violence occurred and whether a temporary order is necessary to protect the complainant.[12] The DVA provides definitions of each type of domestic violence, and these factors can be applied to each complainant. They can also be distributed to the court clerk to assist her in taking affidavits and to other magistrates within the same court to ensure consistent rulings. If the magistrate cannot discern from the application and/or affidavit whether a criteria was met, he can ask the complainant directly.[13]

Second, magistrates can treat these provisions – and the complainants who request them – as they do any other complainant. No one is suggesting that financial support be awarded in every case, but the reasons magistrates give for not awarding it reflected preconceived biases more than the inappropriateness of the award.[14] They assumed complainants were bringing a false claim when research suggests the opposite. It suggests that most victims do not report, making those who do all the more credible.[15] It also suggests that less severe abuse, such as economic abuse, should be addressed now because it often leads to more severe abuse later.[16]

continued on page 2

Finally, magistrates need not usurp the role of a maintenance court in order to implement the DVA. The financial provisions in the DVA provide financial compensation for complainants whose need arose from an incidence of domestic violence or who suffered from economic abuse, a type of domestic violence that is defined in Section 1(ix) of the DVA. Furthermore, to include such compensation in a temporary order (*i.e.* the only order than can be issued without giving the respondent a chance to respond), the court must also establish the victim will suffer 'undue hardship' without it (s 5 (2)).This is not necessarily required in cases of economic abuse. A court may decide to serve the respondent with an order requiring that compensation for economic abuse, but allow him to appear before it takes effect if the complainant does not have an immediate need for assistance (s 5(4)).

The DVA's provisions for economic assistance are not secondary. They are central to the Act and the purposes for which it was created. By applying them unwillingly and inconsistently, courts are unnecessarily shirking their constitutional duty. They have been called to afford victims of domestic violence the 'maximum protection' under the law, and by overcoming biases and using the DVA to create guidelines for themselves, they can do exactly that.

Notes

1. L Artz 'Better Safe than Sorry: Magistrate's Views on the Domestic Violence Act' (2004) *South African Crime Quarterly* 1 at 7 . Tamara January 'Addressing Economic Oppression—Economic and Financial Remedies Contained in the Domestic Violence Act' Unpublished Paper (2004) 16.
2. Section 1(viii)(d).
3. Briefing by the Justice Portfolio Committee *Domestic Violence Bill* (22 July 1998) available at http://www.pmg.org.za.
4. South African Law Commission, *Domestic Violence* (Project 100) Discussion Paper 70 (1997) available at http://www.law.wits.ac.za/salc/salc.htm.
5. SALC (n 6) at para 4.3.21.
6. n 5)
7. SALC op cit (n 6) at para 4.4.6.
8. 2000 (1) SACR 81 (CC).
9. Better Safe than Sorry' (n 1) at 2.
10. L Artz *Magistrates & the Domestic Violence Act: Issues of Interpretation* (2003) 19.
11. *Magistrates & the DVA* (n 10) at 17.
12. Magistrates & the DVA (n 10) at 22.
13. DVA s 5.
14. *Magistrates & the DVA* (n 10) at 17.
15. *Magistrates & the DVA* (n 10) at 19.
16. *Magistrates & the DVA* (n 10) at 18.

What would you do?

By Anashri Pillay
Public Law Department, UCT

The appellant had appeared before a magistrate's court where he was convicted of the rape of a ten-year-old girl. The High Court had confirmed the conviction and sentenced the appellant. There was evidence of injuries consistent with rape and the issue on appeal was whether it was the appellant who had perpetrated the rape. One of the issues raised was that the regional magistrate had 'become a combatant on the State's behalf in extensively leading the evidence-in-chief of the complainant's mother'. However, the court found that the questioning was aimed solely at obtaining crucial information from one of the witnesses. Further, counsel for the appellant could not direct the court to any irregularities in the questions which the magistrate asked.

Another issue arose during the appeal: the court noted that there were serious problems with the defence. In some cases, the magistrate had to reformulate defence counsel's questions to make sense of them. During the trial, the accused asked to put certain documents to the court. Upon questioning him, it emerged that he had not had an opportunity to fully consult with his attorney. The magistrate then adjourned the proceedings to give the appellant this opportunity. Upon resumption of the hearing, the magistrate enquired whether state witnesses would have to be recalled and counsel for the appellant chose only to recall the mother of the complainant. This was despite the fact that the magistrate suggested that other state witnesses would need to be recalled. The new information received by counsel for the defence related to injuries the child had sustained by falling off a wall a short time after the rape. Counsel for the defence did not call any of the witnesses to this fall. The magistrate considered whether there was any relation between the fall and the rape injuries and decided that there was not. What would you do? Should the conviction have been confirmed?

Answer on page 7

The state of our Family Courts post 1994 – some solutions

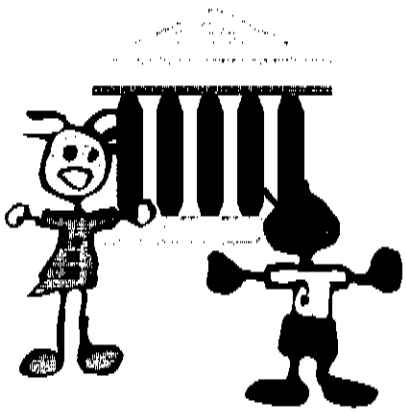
By
Elizabeth Nkhangweni Denge
Regional Magistrate, Pretoria-North

I recently attended the launch of the South African Chapter of the International Association of Women Judges (IAWJ) in Boksburg. IAWJ works towards the advancement of human rights, eliminating gender discrimination and making the courts accessible to all. While echoing the same objectives, the speakers were concerned that not enough has been done in South Africa post-1994. The question posed repeatedly was: "How can we stop the continued violations of the rights of women and children?"

Soma Naidoo, senior magistrate Durban, spoke about the gendered approach to judicial work in many courts around the country. She spoke of male magistrates seldom working in the Family Courts, and that it seems that men are consciously kept out of these courts because of their reluctance or refusal to be placed there. When men do preside in those courts, they often subject women to secondary victimization.

Thinking about those who successfully avoided the Family Courts, I asked myself "supposing they were placed in the Criminal Courts, was there a way they could avoid human rights issues?" I refer here to human rights areas where the Family and Criminal Courts intersect. In sentencing accused persons for offences committed in a domestic violence setting, surely issues pertaining to the Constitutional rights to equality; freedom and security of person, life, the rights of children and the right to have one's dignity respected and protected will sometimes be pertinent, and resultantly, will need to be given effect through our pronouncements in court.

In my quest for an answer, I interviewed Soma Naidoo; Joyce Maluleke of the Department of Justice's Gender Directorate; and Belinda Molamo, Senior Magistrate at Justice College. All three said a solution lies in training on gender issues but that some magistrates (mostly males) don't want to undergo the relevant training. Belinda spoke further of magistrates who attended the relevant sessions of seminars and ended up being disruptive. This group of magistrates is reported to have voiced that social context issues did not concern them, because, according to them, those are not issues of law.



Those attitudes triggered the following questions in me; "How else are you going to make them to attend? Being adults, you cannot compel them! If they attend, but find the subject to be outside their scope of operation, how do you now change their attitudes?"

I find nothing wrong in seeking for solutions in training. There is already compulsory capacity-building training for the newly-appointed. There is continued training for those who believe in collegiality. The big question is what do you do with the untrainables? I strongly believe that our debates on this issue must be informed by our oath of office which is loud and clear;

> ... do hereby swear/solemnly and sincerely affirm and declare that ... I will administer justice to all persons alike without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa and that I will uphold and protect the Constitution.

It is my opinion that where a magistrate strongly feels against the idea of being faithful to the oath that s/he has taken, that magistrate must remind him or herself of the debate of the 'positivists' and the 'pragmatists'. It is unthinkable that one can wish away the rights of women and children, for they are human rights! If one is not pro these right, the honourable and safest thing to do is to quit or to work towards a change of one's attitude (through training, of course).

If the state of our Family Courts is as Soma depicts, they need urgent attention, lest the public confidence in our courts gets eroded! As I was thinking through these myriad of questions, I began to think that maybe this issue should be debated under the subject 'Discipline', – discipline being the corollary of the conscious breach of the oath of office by a magistrate. I seem to find support in the work of Madame Justice Wilson.[1] She speaks of Judicial Conduct Commissions in the US who discipline judges for gender-biased behaviour such as sexist remarks to women lawyers and litigants, and inappropriate comments in rape cases. She mentions the establishment of judicially appointed Task Forces to investigate the extent to which gender bias exists in the judiciary. The scope covered by these Task Forces, their credibility and their administration is work for another article. Suffice it to say that she also reports that Task force members for New Jersey and New York who start out with no knowledge of gender bias in the courts, emerge from the data collection process convinced that the problem is real and has deeply serious implications for the administration of justice.

I suggest that South Africa adopts the same approach; disciplinary measures (where necessary), and Task Forces (judicially-appointed). Though the idea may sound confrontational to others, there does not seem to be any other way out of this problem!

In conclusion, I quote the enlightening words of Madame Justice Wilson:

> Obviously, this is not an easy role for the judge...to enter into the skin of the litigant and make his or her experience part of your experience and only when you have done that, to judge. But I think we have to do it; or at least make an earnest attempt to do it.

And the time to do something about it is now

Notes

1. Betcherman, B. 1990. *Will women judges really make a difference?* Lecture given at Osgoode Hall Law School.
2. ibid: 367

Concourt rules African customary law of inheritance unconstitutional and discriminatory

Elmarie Knoetze
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In the previous issue of *News and Views* we considered the dual nature of the South African law of succession, with specific reference to the choice of law rules. We pointed out that these rules have various shortcomings, and that these would be considered in this issue of *News and Views*. However, the Constitutional Court decision in the cases of *Bhe v The Magistrate, Khayelitsha* (Case CCT 49/03), *Shibi v Sithole* (Case CCT 69/03) and *South African Human Rights Commission v President of the Republic of South* Africa (Case CCT 50/03) now directly and significantly impacts on the recognition of the choice of law rules. In fact, in view of the decision, until future statutory regulation, these rules have become obsolete. In this issue of *News and Views* the far reaching implications of the Constitutional Court's decision in *Bhe* are considered briefly.

The three cases concerned (see July issue) involve a constitutional challenge to the rule of male primogeniture as it applies in the African customary law of succession, as well as the statutory provisions regulating the choice of law rules. In its majority decision, delivered by Langa DCJ, the Constitutional Court upheld these challenges, striking down the relevant statutory provisions (i.e. s 23 of the Black Administration Act, 38 of 1927, the Regulations for the Administration and Distribution of the Estates of Deceased Blacks, per Government Notice R200 of 1987, as well as s 1(4)(b) of the Intestate Succession Act, 81 of 1987, which excluded black estates from the ambit of the Intestate Succession Act) as well as the male primogeniture rule itself (in so far as it relates to inheritance of property), and put into place a new interim regime to govern intestate succession for black estates. The partially dissenting judgment of Ngcobo J falls outside the scope of the current discussion.

Langa DCJ held that, construed in the light of its history and context, s 23 of the Black Administration Act is an anachronistic piece of legislation which, as remnant of the policy of Apartheid, ossified "official" customary law (as contained in legislation, case law and textbooks) and caused egregious violations of the rights of Blacks. As manifestly discriminatory and in breach of the rights to equality in s 9(3) of the Constitution and dignity in s 10, it had to be struck down. The implication of the invalidity of s 23 is that it not only provides for the invalidity of the substantive law relating to succession, but also invalidates the procedures whereby the estates of black people were treated differently from the estates of white people. Therefore, in terms of this judgment the Master is no longer precluded from dealing with intestate deceased estates that were formerly governed by s 23 of the Black Administration Act, since they now fall under the terms of the judgment and not customary law.

In considering the constitutionality of the male primogeniture rule, Langa DCJ ruled that as part of a scheme underpinned by male domination, it discriminates unfairly against women and illegitimate children. Excluding women from inheritance on the grounds of gender was regarded a clear violation of s 9(3) of the Constitution as it entrenches past patterns of disadvantage among a particularly vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under the new constitutional order. The principle of male primogeniture was also regarded as violating the right of women to dignity as it implies that women are not fit or competent to own and administer property. In effect, it subjects women to a status of perpetual minority, placing them under the control of male heirs, simply by virtue of their gender.

In considering an appropriate remedy in the case, the Court considered various courses, namely (a) whether the Court should simply strike the impugned provisions down and leave it to the legislature to deal with the gap that would result as it deems fit; (b) whether to suspend the declaration of invalidity of the impugned provisions for a specified period; (c) whether the customary law rules of succession should be developed in accordance with the spirit, purport and objects of the Bill of Rights; or (d) whether to replace the impugned provisions with a modified s 1 of the Intestate Succession Act or with some other order.

Langa DCJ then held that while it would ordinarily be desirable for courts to develop the rules of customary law to reflect the living customary law and bring it in line with the Constitution, that remedy was not feasible in this matter, given the fact that the male primogeniture rule is fundamental to customary law and not replaceable on a case-by-case basis. The Court then considered it necessary to provide for an interim regime to regulate intestate succession relating to black people until the legislature is able to provide a lasting solution. As such, the Court ordered that estates that would previously have devolved in terms of the Black Administration Act and the customary rule of male primogeniture, now devolve according to the rules provided in the Intestate Succession Act, modified to make provision for polygynous unions. Currently the Intestate Succession Act provides for the inheritance by one surviving spouse only and would need to be tailored to accommodate situations where there is more than one spouse. The Court envisaged that this could be achieved by qualifying the calculation of the child's share as provided for by s 1(1)(c)(i) and 1(4)(f) of the Act. The order of the Court was made

retrospective to 27 April 1994, but would not apply to completed transfers of ownership, except where an heir had notice of a challenge to the legal validity of the statutory provisions and the customary law rule of male primogeniture.

In the final instance the Court pointed out that the order made by the Court must not be understood to mean that the relevant provisions of the Intestate Succession Act are fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way. There is, for example, nothing to prevent an agreement being concluded between the surviving spouses in a polygynous union to the effect that only one of them would inherit all the deceased's immovable property, provided that the children's interests are not affected by the agreement. Having regard to the vulnerable position in which some of the surviving family members may find themselves, care must be taken that such agreements are genuine and not the result of exploitation of the weaker members of the family by the stronger. In this regard, a special duty rests on the Master and other officials responsible for the administration of estates to ensure that no one is prejudiced in the discussions leading to the purported agreements.

Putting them on ice...

Francois Botha
UCT

There is naked fear, but also blatant desperation in the eyes of the little squirrel. He darts back to rescue his acorn, then scrambles forth in a desperate effort to duck the shooting icicles, and races to escape from being crushed by the collapsing ice mountain. He makes it (with bulging eyeballs), and rejoices as he manages to find his acorn... but then gets thumped by a huge elephant.

The opening scene from 'Ice Age', the timeless tale from 'Blue Skye Productions' (Twentieth Century Fox) is a metaphor I have used as an icebreaker in many of the workshops run under the 'Fate of the Child' Project. Participants are challenged to consider the five minute animation and ordeal of the tenacious little squirrel as a metaphor for the criminal justice system, in the way that it interacts with children. I present the animation rather shamelessly as my own perception of what has seemingly become the fate of the child in this country. Duck and dive, scramble to survive. And above all, run like hell. Yes, kids, because judging by the collective outcome of the countless judicial and academic talk-fests, the great many rituals parading as significant stamps on the timeline of churning out that ever-elusive Act, still trapped in the Child Justice Bill, your fate remains sealed. And your numbers in our jails remain virtually unchanged, if statistics of the last two years are anything to go by.

All gloom? Perhaps not...but most of the participants, especially legal practitioners attending these workshops, have opted for dark colours when they painted their metaphors, or commented on the fate of the squirrel as metaphor for the criminal justice system. However, here and there silver linings have been drawn, such as the squirrel representing a collective of individuals/organisations bold and brave enough to challenge and crack the Ice Monster. To consistently challenge decisions by those with tunnel vision, and to acknowledge the efforts of those who are prepared to open their hearts and minds to the plight of our children.

One such initiative is certainly the publication 'The Fate of the Child: Legal Decisions on Children in a New South Africa' (Sandra Burman ed, 2003), a multi-disciplinary project driven and initiated by the Socio-legal Research Unit (UCT) and funded by SANPAD. Dr Burman has described the purpose of this research project as an effort 'to bring the psychological and anthropological contexts to the attention of all those interested in legal decisions about children.'

To accomplish this, a team of anthropologists, psychologists and legal academics contributed a variety of approaches, and ultimately chapters, to this publication. My task and role was to set up a framework, to collect and consolidate ideas for training, to 'translate' contributions into a user-friendly training package, specifically aimed at legal decision-makers. Initially the design of the workshops focused on magistrates, but soon expanded to include other significant role players in the context of legal decision-making about children. The methodology

used in all of these workshops made liberal use of multi-media, and audio-visual material formed the backbone of presentations. Most exercises included role playing as well as role reversals, where simulated court scenarios were used to challenge and stimulate debate.

The project and workshops can be described as a small flicker of a flame, to help provide light, information and assistance. But in order to melt the ice we need a flame that will have to burn faster and higher. May this happen in a briefer period of time than the one alluded to in this unfortunate metaphor.

The relationship between judicial independence and judicial education

The definition of judicial independence with reference to the role and significance of the judiciary in the South African and global context

Ron Laue
Durban Magistrates Court

The term "judicial independence" is used to mean that both the constitutional institution of the judiciary [collectively] and its individual judicial officers are free from interference by other institutions and individuals. It connotes a constitutional arrangement of a separation of the judicial power from the executive and legislative powers. Although this does not define the term fully, since judicial independence has many facets and is an evolving concept in South Africa, the definition is widely accepted and is sufficient to draw out its main purpose: it is a means toward the end of giving effect to what the Constitution requires - that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

A judiciary that cannot be depended upon to decide cases impartially and without submitting to influence is not fulfilling its role and undermines public confidence. Judicial independence is important because the judiciary must protect individual rights; contribute to the stable balance of power, countering public and private corruption and dishonesty; resolving commercial disputes, address criminal problems, provide mutual, international assistance in civil and criminal matters and so on. Its importance and also its vulnerability are underscored by the constitutional injunctions that no person or organ of state may interfere with the functioning of the courts and that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness.

The linkage between judicial independence and judicial education

In recent history the lower courts in South Africa were part of the executive branch of government and functionally subject to parliamentary sovereignty and racist ideology with severe consequences for human rights. The new constitutional era has seen the introduction of measures aimed at transforming the past. The transformation process necessarily entails the realization of not only the legitimacy of the holders of judicial office, but also their capacity to deliver justice in accordance with the constitutional imperatives of upholding the rule of law and manifesting judicial independence.

It is axiomatic that only judicial officers who know the law and how to apply it can be competent in exercising the judicial function efficiently and independently. Capacity building is a process that must include ongoing judicial education and training. Knowledge of the law and its application must not be understood in the abstract sense, but in the context of the past, the present and the future. "The law", in this sense, entails an understanding of (i) what judicial independence is and what its purpose is, (ii) that the law is constantly changing; (iii) that methods of interpretation and values, which may not have previously applied, apply; (iv) that articulating reasons for judgment is aimed at establishing judicial rationality, transparency and accountability; (v) that social context in judicial decision making is a relevant factor and (vi) that the lower courts are bound to protect individuals against the abuse of administrative power, unfair discrimination, domestic abuse and violence and to adjudicate in matters pertaining to access to information; to name a few examples.

Judicial education and training can contribute to reversing trends and attitudes such as executive-mindedness, stereotyping, inability or reluctance to think independently, limited understanding or application of judicial ethics, and keeping judicial officers up to date with application of innovations in domestic legislation.

The point is perhaps best illustrated by a practical example: a certain magistrate imposing a sentence which is subject to automatic review in proceedings recorded in longhand routinely submits a brief written statement of reasons for conviction and sentence with each case. However generally in such matters, the reasons for conviction and sentence are conveyed orally in open court by magistrates and not reflected on the record. What can other judicial officers learn from such a practice? If they understood it to mean that the magistrate concerned is affirming that she is accountable to the High Court for her decisions, is seeking to justify them and is thereby asserting her independence, would they follow suit and implement such practice? If the practice had the effect of minimizing or obviating the need for judges to query the magistrate on review, would it reflect on the capacity of the magistrate concerned, showing that she is competent and efficient in the discharge of the judicial function? Could such a practice enhance a magistrate's skills in writing judgments? Individual judicial officers reading this should be able and are invited to relate from personal experience how their judicial independence is linked to judicial education.

If there is any remnant of doubt as to whether or not judicial training is permissible under the South African Constitution, section 180(a) provides:

> National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including - training programmes for judicial officers.

Pretoria Juvenile, Maintenance and Children's Court

Vanja Karth, *LRG*

The LRG team of Vanja Karth and Melanie Lue Dugmore really did catch Pretoria Court by surprise on an unannounced visit in October but the court personnel took our impromptu arrival in their stride and were most accommodating and generous with their time.

The Court building itself is intimidating to the user with hardly any signage on doors or passages making locating people extremely difficult, but we made our way down to the 'dungeons' where the Children's Court, Maintenance Section and Domestic Violence Interdict Section are located and through some trial and error, found who we were looking for. A lot of effort has been taken to make this potentially dismal basement area attractive for the public - pictures have been painted on the walls, there is a secure playground area with toys and a jungle gym and plenty of chairs to sit on.

The Pretoria Court deals with a vast geographical area including Pretoria Central, Hammanskraal, Atteridgeville, Diepsloot and Eersterus. Magistrate Snyman of the Children's Court certainly is busy. She deals with between 60 -80 cases a month, is the acting senior magistrate of the section and also deals with exhumations, mental health inquiries, estates and custody matters. She also still somehow finds the time to involve herself in community outreach programmes.

Magistrate Padayachy is based in the maintenance court and spoke with sensitivity about the needs and concerns of the women who come before him. He believes that a lack of maintenance can lead to crime and goes out of his way to try and provide the people before him with some certainty and dignity in their lives. He feels that in general, maintenance matters are seen as unimportant by many when in fact they are enormously important and there is a definite need for more courts.

Next we went upstairs to talk to Magistrate Chester Roux of the Juvenile Court. He deals with about 25 -30 cases a week most of which are charges of theft, robbery or assault and the average age of the accused is about 16-17. Magistrate Roux believes very definitely that no juvenile should be kept in prison and every effort must be made to find alternative placement for them. He is concerned too, that if magistrates keep putting juveniles in prisons, there could be a spate of civil cases opened up against the courts. He also prefers to use other options to imprisonment and says that at least 75% of all the cases at his court are diverted.

Hats off to this team of committed magistrates - their dedication to their work and more importantly, to the people who pass through their courts, is clearly evident and they deserve some recognition!

Above: Magistrate Padayachy
Left: Magistrate Chester Roux and his assessor

What would you do? (from page 2) The answer!

Although the quality of the appellant's defence was not an issue raised before the appeal court, the court found that this was something it could consider as it is one of the duties of a court in the current constitutional context to examine the fairness of the trial generally. The appeal court found that the right to legal representation, protected as part of the right to a fair trial in section 35 of the Constitution, encompasses the right to be properly defended. The appeal court found that the High Court judge erred in confirming the conviction because the proceedings before the magistrate were not in accordance with justice. Due to the fact that the magistrate had already made findings as to the credibility of witnesses, the matter could not be remitted in order to recall the relevant state witnesses. The court set aside the conviction and sentence, sent the matter back for a fresh trial and noted that it would be in the interests of justice for the appellant to be represented by different counsel, given the concerns with the competence of his legal representative. The court also pointed out that, given that the appellant had raised concerns about his defence during the trial, in open court. Whilst the court made no finding on the merits of the conviction, it noted that the new evidence pointed to the possibility of some or all of the child's injuries having been sustained in a different incident. Counsel for the defence clearly did not appreciate the significance of the new evidence and there was no reason why the magistrate could not have recalled the relevant witnesses at that stage.

There was a dissenting judgment in which it was held that the magistrate had done all he could do in the circumstances and that it was up to the appellant to dismiss his attorney if he did not feel adequately represented. The judge also found that the magistrate had not erred in finding no connection between the child's fall and the injuries sustained by her that were consistent with a rape. Further the dissenting judge found that, as it was not claimed that the quality of the defence rendered the trial unfair, this was not something the appeal court should have considered.
S v Chabedi 2004 (1) SACR 477 (W)

bitS & PIECES

Wishing all of you a fantastic festive season and hope you all get to have a break. To all of you who will be travelling, please drive carefully.

Please also remember to phone or email us with articles or snippets for the back page

Sex offenders getting younger *(The Star 8/9/2004)*

Statistics revealed by the Teddy Bear Clinic in Johannesburg reveal that 25% of sexual abuse cases are committed by child offenders. More than 250 child sexual offenders went through their rehabilitation diversion programme last year. The youngest was six years old. A social worker at NICRO said more children were coming into their programme for sexual offences and they seem to be becoming active at a younger age. She said they believed one of the main reasons children were becoming sexually active earlier was exposure to pornography and a lack of parental control.

HIV and sentencing *(news24 21/9/2004)*

Judge Kathy Satchwell ordered the immediate release of two terminally ill life-term prisoners. One of the two released by Satchwell has been struggling to have his matter finalised for the past two years and is expected only to live another six months, according to a medical report. A senior prison official had recently written a letter saying medical parole was not necessary for the prisoner who was 'in good health'. Satchwell indicated that she would send reports to Correctional Services Minister Ngconde Balfour and Justice Minister Brigitte Mabandla in the hope that 'action would be taken' against the head of the prison, the chairman of the parole board and the state attorney for 'failing to take action' where it had been medically noted that the prisoner was at death's door.

Judgement recognises women's roles *(Legalbrief. Full judgement available on request info@ebriefs.com)*

A ruling was confirmed by the Supreme Court of Appeal that it would be unconstitutional and discriminatory to undervalue the role of the housewife and mother that is traditionally conferred upon women during divorce proceedings.

The South-Easter brings magistrates closer at a recent workshop in the Western Cape

Sale in execution must be 'justifiable' *(www.concourt.gov.za)*

Courts will in future be called on to determine whether the sale in execution of houses to settle debt is justifiable, the Constitutional Court ruled in Jaftha v Schoeman and others. The appellants challenged certain provisions of the Magistrates' Courts Act which provide for execution against the immovable property of judgment debtors. This case concerned two unemployed women from a small, poverty-stricken community in the Karoo. Both were threatened with losing their homes because of their failure to pay certain debts. Both were able to buy their homes as a result of state subsidies. If people lose their homes as a result of a sale in execution, they are disqualified from acquiring future state subsidies. The appellants had approached the High Court and argued that the effect of the impugned provisions was to render them homeless, potentially permanently. They argued that the impugned sections constituted an unjustifiable limit on their right of access to adequate housing. The High Court ruled against them.

The Constitutional Court upheld the appeal against the decision of the High Court, finding that any measure which removes from people their pre-existing access to adequate housing limits the right to housing in the Constitution. The Court held that the process of execution against immovable property is unconstitutional to the extent that it allows a person's home to be sold in execution in circumstances where it is unjustifiable. The process can occur, from beginning to end, without oversight by the courts. The Court holds that an appropriate remedy would be to provide judicial oversight of the execution process so that a court can determine whether an execution order against the immovable property of a judgment debtor is justifiable in the circumstances of the case.

Losing the fight against rape *(Sunday Independent 1/10/2004)*

SA has the highest rates of r ape in the world, according to Interpol, and the highest incidence of HIV. According to the National Prosecuting Authority 50% of all cases before SA courts are for rape, except in Durban and Mdantsane, where it is 60%. National Police Commissioner Jackie Selebi says police were achieving success in combating most crimes, but not r ape. Although the Law Reform Commission estimates there are 1.7 million rapes a year, on average only 54 000 r ape survivors lay charges each year. A Medical Research Council study into conditions for rape survivors in Gauteng in 2002 found that the treatment of survivors by police and medical and court personnel was deplorable. Two researchers were so traumatised by what they witnessed that they had to go for counselling. Last year the cabinet removed Section 21 from the new Sexual Offences Bill, which would have given post-exposure prophylaxis (PEP, which is medication to prevent HIV) as well as medication to prevent STIs and pregnancy to r ape survivors. They left in Section 22, which guarantees medical care for the rapist and undertakes to rehabilitate any alcohol or narcotics addictions he might have.

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