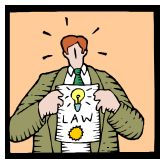
e-MANTSHI

A KZNJETCOM Newsletter

December 2010: **Issue 59**

Welcome to the Fifty Ninth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search all the issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The Minister of Trade and Industry has published proposed *Consumer Protection Regulations* in terms of the *Consumer Protection Act, Act 68 of 2008* for public comment. The notice to this effect was published in Government Gazette no 33818 dated 29 November 2010. Any comments may be sent before 31 January 2011 to cparegs@thedti.gov.za or Faxed to (012) 394 2383.

2. Section 1(3) of the *Repeal of the Black Administration Act and Amendment of Certain Laws Act, No. 28 of 2005*, has been amended by the substitution in subsection (3) for paragraph *(a)* of the following paragraph:

"(a) **[30 December 2010]** 30 December 2012; or".

The amendment was published in Government Gazette no 33838 dated 3 December 2010.The amendment has the effect that the Black Administration Act has still not been repealed in its entirety.

3.The *Magistrates' Courts Amendment Act, Act 19 of 2010* has been promulgated in Government Gazette no 33852 dated 7 December 2010.The Act amends the following sections of the

Magistrates' Courts Act, 32 of 1944:

s 1(a) substitutes s 9(1)(a) (32/1944) on 7 Dec 2010
s 1(b) deletes s 9(1)(b) (32/1944) on 7 Dec 2010
s 2 substitutes s 10 (32/1944) on 7 Dec 2010
s 3 substitutes s 12(6) (32/1944) on 7 Dec 2010
s 3 substitutes s 12(7) (32/1944) on 7 Dec 2010
s 3 substitutes s 12(8) (32/1944) on 7 Dec 2010
s 4 inserts s 15(2A) (32/1944) on 7 Dec 2010

The following section is hereby substituted for section 10 of the principal Act:

"10. Qualifications for appointment of judicial officers.—Subject to the provisions of the Magistrates Act, 1993 (Act No. 90 of 1993), any appropriately qualified woman or man who is a fit and proper person may be appointed as a magistrate, an additional magistrate or a magistrate of a regional division.".

Recent Court Cases

1. S v EB 2010 (2) SACR 524 SCA

It is possible to lead further evidence on appeal arising subsequent to imposition of sentence where exceptional and peculiar circumstances are present

The appellant was convicted in a regional court on 67 counts of fraud involving a total amount of R330 000. The frauds were all committed against her employer, a close corporation. After a correctional supervision report had been submitted, and after hearing evidence from a probation officer, the trial court sentenced the appellant to five years' imprisonment, of which two were conditionally suspended. Four months later the appellant applied for leave to appeal against the sentence and to lead further evidence which had allegedly not been available at the time sentence was imposed. The evidence in question was to the effect that the appellant's mother had died and that, consequently, the appellant's two minor children were being deprived of the necessary care and love that they needed while their mother was imprisoned. The appellant submitted that it was in the interests of the children that a non-custodial sentence be imposed. Her appeal to the High Court was dismissed, along with her application to lead further evidence, but she was granted leave to appeal to the Supreme Court of Appeal.

Held, that the court had laid down requirements that were to be complied with before it would be prepared to hear evidence on appeal: there should be a reasonable explanation of why the evidence sought to be led had not been led at the trial; there should be a prima facie likelihood of the truth of the evidence; and the evidence should be materially relevant to the outcome of the trial. Furthermore, while the general rule was that an appeal court would decide on the correctness of a judgment on the basis of facts in existence at the time it was given, this rule was not invariable, and had recently been relaxed to allow evidence that had arisen subsequent to the imposition of sentence where exceptional or peculiar circumstances were present. However, the court's more liberal approach was not to be seen as an opening of the floodgates; applications were to be carefully scrutinised to ascertain whether or not they disclosed exceptional or peculiar circumstances. (Paragraph [5] at 528e—529e.)

Held, further, regarding the likelihood of the truth of the evidence, that it was not the usual practice of the court to refer a matter back to a trial court for re-imposition of sentence where a misdirection was discovered; in the interests of saving unnecessary delay and expense, this approach should apply equally where evidence which was admitted by the State was allowed on appeal. As to the requirement of material relevance, an appeal court should allow evidence only if it was satisfied that there was at least a probability, not merely a possibility, that the evidence, if accepted, would affect the outcome. However, the evidence would not have to be decisive. (Paragraphs [7] and [8] at 530b—c and 530g—531a.)

Held, further, that the appellant's application failed to satisfy all three of the requirements. Firstly, the new evidence was not materially relevant: she had been sentenced on the basis that her mother, who was already seriously ill at that stage, would not have been able to assist in caring for the children. In any event, direct imprisonment was the only legitimate sentencing option, and the evidence the appellant sought to introduce would not result in a non-custodial sentence. Secondly, the application did not satisfy the requirement that there should be a prima facie likelihood of the truth of the evidence. There were discrepancies between the evidence of the probation officer and what the appellant claimed in her affidavit; there were also discrepancies between her allegations and the psychologist's report concerning the availability of other people who could assist in caring for the appellant's children. Thirdly, there were no exceptional or peculiar circumstances present to justify reception of the evidence. The fact that the children's grandmother could not act as a physical caregiver for them was an existing fact when sentence had been passed, not a consequence of her later death. No doubt, the children had been left in an emotional void once their mother and thereafter their grandmother, were no longer part of the household. However, their emotional needs could not trump the duty properly to punish criminal misconduct where the appropriate sentence was one of imprisonment. (Paragraphs [9]-[14] at 531b—534c.) Appeal dismissed.

2. S v Maphumulo 2010 (2) SACR 550 KZP

Evidence of identification must always be evaluated with caution and a courts judgment must demonstrate this clearly.

The two appellants were each convicted on one count of murder and four counts of attempted murder. The first appellant was also convicted of unlawful possession of a firearm and unlawful possession of ammunition. They appealed against their convictions only, arguing that the court a quo had erred in finding that they had been reliably identified as the perpetrators of these offences. It was further argued that, since bad blood existed between the family of the first appellant and that of the deceased and some of the other complainants, the court a quo should have found that the witnesses had a motive falsely to implicate the appellants. In addition, the second appellant had been identified only by a single witness, and the court a quo had failed to approach this evidence with the necessary caution.

Held, that evidence of identification must always be evaluated with caution. However, awareness of the need for caution was not in itself sufficient—the treatment of the evidence must demonstrate that caution had been applied. Such a demonstration was missing in the judgment of the court a quo. For one thing, notwithstanding the fact that both appellants were known to all three identification witnesses, only one of them had identified the second appellant; for another, the record showed that the reliability of observation of each witness had not been properly tested. In the result, the reasons given by the court a quo for accepting the identification evidence were unsatisfactory, and the court was thus at large to come to its own conclusion on the matter. (Paragraphs [13]—[20] at 554c-555g.)

Held, further, that the court a quo had been alive to the issue of bad blood between the two families, and no fault could be found with the manner in which it had been dealt with. The judgment had also taken into account the fact that the crime had been committed in broad daylight, that the witnesses had been close by, and that the single witness who had identified the second appellant had had a clear view of the assailants. However, insufficient attention had been given to the length of time during which the witnesses had been able to observe the appellants. Nevertheless, regarding the first appellant, three witnesses had testified that he was well known to them, and this testimony was unchallenged. This, together with the fact that the witnesses corroborated each other, was sufficient to remove all danger that the first appellant had been wrongly identified. (Paragraphs [21]—[23] at 555i—556g.)

Held, further, that the position was different concerning the identification of the second appellant. Only one witness had identified him as having been present, but his opportunity reliably to observe the second appellant had not been tested. Furthermore, notwithstanding the fact that this appellant was well known to the other two eyewitnesses, they had not identified him as a participant in the attack. Accordingly, reliance on the uncorroborated evidence of the single witness could cause grave injustice. (Paragraphs [24]—[28] at 556g—557h.)

Held, further, concerning the convictions for unlawful possession of a firearm and of ammunition, that the police officer who testified in this regard could not connect the names of the people he had found in unlawful possession of firearms to any of the faces of the accused in the dock. For this reason, as the first appellant's counsel had submitted, the appeal against these convictions had to succeed. (Paragraphs [29] and [30] at 557h—558c.)

First appellant's appeal against convictions for unlawful possession of a firearm and of ammunition upheld, and sentences set aside. First appellant's appeal against convictions for murder and attempted murder dismissed. Second appellant's appeal upheld; convictions and sentences set aside.

3. S v Abader 2010 (2) SACR 558 WCC

In a case where circumstantial evidence has been produced inferential reasoning can be used to make a finding.

The appellant was convicted of murder, arising from a shooting incident, and sentenced to 18 years' imprisonment. At the trial the appellant put forward an alibi defence, alleging that he had been at a social function in another suburb on the evening in question, and that he had, in any event, not had his firearm with him—he had left it in the safekeeping of a relative, A. On appeal against conviction it was argued that the forensic evidence, proving that the appellant's firearm had been used to commit the murder, ought to have been rejected; that his alibi evidence was reasonably possibly true; and that he could not have absented himself unnoticed from the function for the time necessary to commit the murder.

Held (per Davis J; Goliath J concurring), that the case was one which had to be determined upon an application of inferential reasoning. The trial court had correctly accepted the ballistics expert's evidence which proved that the appellant's firearm was the murder weapon. Only two people had had access to the firearm, the appellant and A. However, there had never been any suggestion that A had been anywhere other than at home on the night of the murder. In addition, nobody else had had access to the firearm or knew where it was. The evidence also showed that it was possible for the appellant to have absented himself from the function, commit the murder and return. While there had been a suggestion that certain witnesses had seen him at the function for the duration of the evening, none of these had been called to give evidence and, accordingly, very little, if any, weight could be placed on their versions. There was, thus, no reasonable inference to be drawn other than that it was the appellant who had used his own firearm to commit the murder. (Paragraphs [43]—[48] at 569h—57la.)
Appeal dismissed.

From The Legal Journals

Berdou, J

"The doctrine of *parate executie* or self help by creditors in present South African law"

De Rebus December 2010

Stadler, S

"Extension of debt review: Section 86(11) of the National Credit Act"

De Rebus December 2010

Campbell, J

"The *in duplum* rule: Relief for consumers of excessively priced small credit legitimised by the National Credit Act"

SA Mercantile Law Journal 2010.

Kelly-Louw, M

"Protection for homeowners against various interest rate hikes"

SA Mercantile Law Journal 2010

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from Peers

REVISITING ALICE IN THE DEBTORS COURT: FAILING TO APPEAR IN COURT IN TERMS OF SECTION 65 A (9) ACT 32 OF 1944

Many magistrates seem to be under the impression there is no difference between *Section 72 (4) of Act 51 of 1977*(or Section 55(2) or similar sections) (*Criminal Procedure Act)* and *Section 65 A (9) of Act 32 of 1944 (Magistrates Court Act*). Both these provisions deal with a person's failure to appear in court, the first in the Criminal Court and the latter in the Civil Court. The failure to distinguish between these provisions inevitably leads to debtors in the Civil Court being convicted in circumstances where they should have been acquitted.

Section 65 A (9) of the *Magistrates Court Act* reads as follows:

> "(9) Any person who –
>
> (a) is called upon to appear before a court under a notice referred to in subsection (1) or
> (8)
> (b) and who wilfully fails to appear before the court and on the date and at the time specified in the notice;
>
> a) in the case where the relevant proceedings were postponed in his or her presence to a date and time determined by a court, wilfully fails to appear before the court on that date and at that time;
>
> b) wilfully fails to remain in attendance at the relevant proceedings or at the proceedings as so postponed,
>
> shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months."

This section must be read with the provisions of Section 65 A 10 (b) and (c) which regulates the procedure to be followed in determining whether a debtor has committed the above offence. Section 65 A 10 (b) and (c) reads as follows:

> (b) "On the appearance before the court of the judgment debtor, director or officer concerned in pursuance of either his or her arrest under a warrant referred to in subsection (6) or the delivery to him or her of a notice referred to in subsection (8) (b), the court shall inform him or her -

i) that the court intends to inquire in a summary manner into his or her alleged wilful failure to appear before the court and on the date and at the time specified in a notice referred to in subsection (1) or (8) (b), or to appear, in the case where the relevant proceedings were postponed in his or her presence to a date and time determined by any court, before that court on that date and at that time, or to remain in attendance at the relevant proceedings or at the proceedings as so postponed, as the case may be;

ii) that the court, if the court so convicts him or her, may impose on him or her any penalty provided for in subsection (9); and

iii) that he or she has the right to choose and be represented by, a legal practitioner.

(c) A court before which proceedings under paragraph (b) are pending -

i) shall have due regard to the following rights, namely -

(aa) the right of an accused person to be presumed innocent, to remain silent and not to testify;

(bb) the right of an accused person to adduce and to challenge evidence; and

(cc) the right of an accused person not to be compelled to give self-incriminating evidence;

ii) may adjourn such proceedings to any date on such conditions not inconsistent with a provision of the *Criminal Procedure Act, 1977* (Act 51 of 1977), and as the court may think fit;

iii) if the court is of the opinion that it is in the interests of the administration of justice, may at any time before the judgment debtor, director or officer concerned is acquitted or convicted of an offence referred to in subsection (9) suspend such proceedings and refer the matter to the public prosecutor concerned to take a decision on the prosecution of the said judgment debtor, director or officer for such an offence."

There seems to be a lot of magistrates who would agree with the following statement of Mr B. Gagiano in a letter to *De Rebus* (1999 *De Rebus* 9)

"...Should the debtor wish to remain silent, as is his right, then the magistrate must find the debtor guilty of contempt of court and sentence the debtor accordingly. The debtor is at risk should he choose to remain silent. In any event the inquiry as to the wilful failure of the debtor to appear in court is actually for his benefit; should the debtor provide a plausible excuse to the magistrate, a prison sentence or fine can be avoided. The same goes for the jurisdiction of any courts in which the debtor is

arrested; it holds an inquiry and if the debtor wishes to remain silent, finds him guilty and then proceeds to the next matter on the roll."

Nothing can be further from the truth than the above statement. In fact any one holding to the above view is clearly causing an injustice. The simple fact of the matter is, that in the absence of any compelling evidence any debtor who remains silent during such an enquiry, **must** be acquitted.

Section 65 A 10 (a) (i) clearly states that the debtor who fails to appear in court may only be convicted upon "*proof beyond reasonable doubt."* The problem that any civil magistrate will face is the following:

The debtor can only be convicted if he willfully fails to appear before court. This must be proved beyond reasonable doubt. There is no evidentiary burden imposed on the accused to come and show that there is a reasonable possibility that his failure was not due to fault on his part. (Sec. 72 (4) Act 51 of 1977 as amended by S.v. Singo (2002 (2) SACR 160 CC)

In a civil matter there is no prosecutor involved and the attorney for the judgement creditor has no role to play in the enquiry into the debtors wilful failure to appear in court. Some magistrates try to deal with the question of proving the debtors wilful failure to appear in court by calling the Sheriff of the Court to give evidence as to how he served the notice in terms of Section 65 (A) (1) on the debtor and then think that once personal service has been proved the debtor has an evidentiary burden to come and show that there is a reasonable possibility that his failure was not due to fault on his part. I have already indicated the fallacy of this above.

To add insult to injury the question of wilfulness has not even been properly considered yet. According to *Jones and Buckle* (9th edition ACT 266B) the following must be proved beyond reasonable doubt before it can be said that a debtor was in wilful failure to appear in court.

"a) knowledge of the notice referred to in S 65 A (1) or 65 A (8) (b), as the case may be;
b) a deliberate disobedience of the notice though free to appear before court in terms thereof;

c) Mala fides"

It must be clear from this that there will be very few debtors who will ever be convicted of contravening section 65 A (9) of Act 32 of 1944 if the provisions as discussed above are properly applied and adhered to.

In the recent case of *S v Wayne du Plooy* (case DR 1946/2002) an unreported decision of the Natal Provincial Division, a magistrate had convicted a person of contravening Section 65 A (9) of Act 32 of 1944. The record of the proceedings in the magistrates court read as follows: "He/She is informed:-

3. That the Court intends to inquire in a summary manner into his/her alleged wilful failure to appear/remain in attendance at the Court on 23-7-02 at 08:30.

4. That the Court, if he/she is convicted, may impose a fine of not exceeding R20 000,00 or imprisonment for a period not exceeding three months.

5. That he/she has the right to choose and be represented by a legal practitioner.

6. That he/she has the right to be presumed innocent, to remain silent and not to testify.

7. That he/she has the right to adduce and to challenge evidence; and -

8. That he/she has the right not to be compelled to give self-incriminating evidence.

Thereafter:

Do you understand what has been explained to you?: *Yes.*

Do you wish to be represented by a legal practitioner?: *No.*

Do you wish to explain why you did not appear in Court on the date and time specified in the notice?: *I went to lawyer on 22nd and asked if I could pay and asked that date be changed. They never came back to me.*

Finding: Guilty of contravening Section 65 A (9) Act 32 of 1944, as amended."

The matter was submitted for review by the Chief Magistrate who submitted that the proceedings were not in accordance with justice as the convicting magistrate acted irregularly by:

1. Simply asking for an unsworn or unaffirmed explanation for Applicant's failure to appear;

2. Convicting the Applicant without evidence that he had wilfully failed to appear; and -

3. Concluding that Applicant's explanation amounted to an admission of wilful failure to appear.

In his judgment Booysen J (with whom Combrinck J concurred) stated the following on how a matter should be approached where a debtor has failed to appear in court:

> "Unfortunately the Act does not specify how the Court should act in having "due regard" for the rights listed. It seems to me that the Court should simply apply the procedures which are applicable to criminal proceedings. It should thus, after having complied with subsection 65 A (10) (b) ascertain whether the person requires legal representation, and if he does, act as it would in any criminal case by affording him the opportunity to obtain legal representation. It should further call upon the person to plead to the charge of contravening Section 65 A (9) explaining the person's rights in relation to pleas as it would in any criminal case.
>
> After plea the matter should proceed as any criminal case would e.g. by questioning in the event of a plea of guilty or the hearing of evidence in the event of a plea of not guilty. In the event of a plea of not guilty, the Court shall itself have to call such witnesses as are required to inquire into the matter. Such witnesses shall give evidence under oath and be subject to cross-examination. Thereafter the judgment debtor shall be entitled to apply for discharge; close his case, or give and lead evidence, and present argument as in any criminal case.
>
> Where it is apparent to such a court that the matter is complex or requires much by way of evidence, the Court should generally act in terms of Section 65 (10) (c) (iii)."

In the end the Judge set aside the conviction and sentence and remitted the matter to another magistrate to act in terms of Section 65 A (10) of act 32 of 1944.

What is very interesting in the approach by the judge in the *Du Plooy* case (supra) is that criminal proceedings has to be held without a prosecutor, but with the possibility of a legal representative. The party who has to act as investigator and prosecutor is the court. If there is going to be evidence on which a debtor can be placed on his defence, the only person who would be able to cross examination the debtor is the court.

Whether this was at all the intention of the legislature in enacting the provisions of Section 65 A (10) is open to debate. It is clear that such an approach is untenable and places civil magistrates in a very difficult position. It is suggested that the most appropriate solution at present is the provisions of Section 65 A (10) (c) (iii) which makes it possible for the court to suspend the proceedings in terms of subsection (9) and to refer the matter to the public prosecutor to take a decision on the prosecution of the judgment debtor.

The long term solution should however be that the provisions of Section 65 A (10) be amended to read the same as the provisions of Section 72 (4) of the Criminal Procedure Act, Act 51 of 1977.

To end off I want to let readers share an extract from the article by Riaan Yssel (*1999 De Rebus 22-23*) on this subject. He wrote a dialogue between Alice (the

debtor), the magistrate and the attorney (for the creditor) which illustrates the predicament caused by Sections 65 A (9) and 65 A (10) in a very pointed manner.:

“But let us presume that Alice ... is arrested and brought before the magistrate at ... on the day on which the attorney concerned deals with S 65 A applications. The magistrate explains to Alice that the court intends to inquire in a summary manner into her ‘alleged wilful failure to appear before court’ and, if the court convicts her, she can be fined or sentenced to three months’ imprisonment (s 65 A (10) (b) (i)). The court also explains her rights to her, namely that she has the right to remain silent and not to testify and that she cannot be compelled to give self-incriminating evidence (s65 A (10) (c) (i)).

Magistrate to Alice: ‘Do you understand your rights?’

Alice: ‘Yes.’

Magistrate: ‘According to the return of the sheriff the notice to appear was served on you personally. Did you receive it?’

Alice: ‘You have just explained to me that I have the right to remain silent and that I cannot be compelled to give self-incriminating evidence. I choose to remain silent.’

Magistrate to attorney: ‘You will have to satisfy the court that the notice was served personally on Alice and that her failure to attend was wilful.’

Attorney to magistrate: ‘To prove service, the deputy sheriff will have to be subpoenaed. However, the legislature has made it manifestly clear that this is a criminal matter and accordingly it is out of the hands of the judgment creditor and your worship will have to issue the necessary instructions to the clerk of the criminal court who will then have to forward the subpoena to the South African Police Services for service.’

Magistrate: ‘Before I can find her guilty of any offence I must be satisfied that her failure to attend court was wilful and how do I do that if I cannot question her?’

Attorney: ‘Can’t we proceed with the inquiry and perhaps under cross-examination the debtor will give information which will allow your worship to come to a conclusion regarding her wilfulness.’

Magistrate: ‘We cannot do that ...subs 11 specifically states that I can proceed with the inquiry into her financial position only after I have dealt with the inquiry into her alleged wilful failure.’
Attorney: ‘Why not refer the inquiry to the prosecutor in terms of s 65 A (10) (c) (iii) and then we can proceed with the s 65 A (1) inquiry and perhaps from that record the prosecutor will obtain assistance?’

Magistrate: ‘That will not help you as in terms of s 65 D you can cross-examine her only on her financial position and not regarding her failure to attend court.’

Attorney: 'In that case, your worship, you will be referring a case to the prosecutor which is impossible to investigate. Wilfulness is a state of mind and if Alice cannot be called upon to give reasons why she did not appear it will be impossible to convict her.'

Magistrate to attorney: 'Then I must find her not guilty of the contravention and proceed with the inquiry.'

Magistrate to Alice: 'I find you not guilty of the contravention of s 65 (9) (a). We will now proceed with the inquiry. What is your monthly income?'

Alice: 'I can't answer that question.'

Magistrate: 'Why not?'

Alice: 'Section 106 makes it an offence wilfully to fail to comply with a judgment and if I answer that question I will be incriminating myself. You have already told me that I cannot be compelled to give self-incriminating evidence.'

Magistrate: 'Court adjourns.'

Magistrate goes to the restroom to take an aspirin and the attorney notifies his office that, if he is needed, he will be at the club bar.

Gerhard Van Rooyen
Magistrate/Greytown

Matters of Interest to Magistrates

Court administration in shambles

I read the letter of a Sandton attorney in 2010 (Oct) *DR* 7 regarding the state of the High Court with feelings, *inter alia*, of sorrow, anger, disappointment, embarrassment, frustration, annoyance, helplessness and not an inch of surprise.

The writer quite rightfully points out the dismal state of the South Gauteng High Court in Johannesburg. Even on writing this I feel a sense of annoyance at the fact that the Justice Department apparently felt it helpful to change the name of the court from the former 'Witwatersrand Local Division' to 'South Gauteng', yet, as with so many other things in this sunny country, nobody bothers with making sure anything underneath the pretty new name actually works. I am all for the new names, but am of the opinion that far too much time, money and effort is wasted on such frivolousness while the places and institutions so aptly renamed are rife with corruption, incompetence and a seemingly total unwillingness to lift a finger to do anything. Maybe those responsible should extend their efforts past the mere names.

It is indeed not only the South Gauteng High Court that suffers from this infectious, ravaging disease, but most of the courts, including the lower courts, around the country. Although I cannot speak for many courts in other provinces, I certainly have experience in and around most of the courts in Gauteng and from what I hear from my colleagues elsewhere, the situation in other provinces is not much better.

I have to make one exception though: Roodepoort Magistrate's Court. Although it also has its problems, for the most part I can say that the civil section at the Roodepoort court is the most efficient that I have ever seen in my ten years in the business and for that I have to thank Annette Uys (who has been there for many years) and staff. Even through the public servants strike, those clerks kept going full speed and would only hesitantly leave their desks when they received real threats of violence against them.

For the rest of the courts the picture is rather dim and uninviting. By far the worst court I have ever set foot in is the Johannesburg Magistrate's Court. Not only are the staff exceedingly unpleasant, rude and unhelpful but they are also probably the laziest, most incompetent people I have ever come across. The so-called admin 'system' (system? where?) is an absolute farce. After spending a couple of hours running up and down on those slippery floors trying to establish where to go and what to do just to get a notice of motion issued or a request for default judgment submitted, one is bound to get a bit short-tempered and frustrated, which inevitably leads to further complications in trying to communicate with anybody. Not a single one of the clerks ever seems to know what one is supposed to do or to which one of the several offices, each assigned a different miniscule task, one should go. (Or quite possibly they just pretend not to know as for some inexplicable reason they actually seem to take pleasure in one's frustration and anguish.)

Never ever is anything filed in court files nor are court files placed back in their spots on filing cabinets. To obtain a default judgment one has not only to pray to every God known to man but also go for some lessons in Harry Potter magic. Chances are that one's file will go missing at least three times and one's request for default judgment will almost certainly disappear from the file at least four times before the clerk responsible for the granting of the judgment will find some little thing he can torment you further with by way of a query (usually about a document that was indeed in the file and could have been found had the clerk gone to the effort of perusing the file properly, alternatively about a complete misinterpretation of the applicable law). On average it takes about eight months to obtain default

judgment. If one is a personal friend of the responsible clerk, he can get his judgment within a week.

I have recently been told that, if I want to issue out a warrant of execution on a default judgment that had taken a year and a half to get granted, I have to wait at least another four months for the clerks to get the file back to the filing room before I can get it! Needless to say by the time the file got back to the filing room (which took more than four months) the warrant was pretty useless as the judgment debtor had taken advantage of the complete disarray at court and made for it, leaving no trails. Had the court been in less of a shambles and working properly, I would have been spared the wrath of my client who would have gotten a warrant out to the sheriff within a couple of days and probably have the entire judgment amount from the debtor before he disappeared.

What is most concerning about the Johannesburg Magistrate's Court is that nobody seems to be willing to go and look for the hungry monster that lurks somewhere in the basement! I mean, that thing keeps eating files and at some stage he is going to attack humans! Something has to be done.

Stefanie du Toit,
attorney, Sandton

(The above letter appeared in the *De Rebus* of December 2010)

A Last Thought

"Etienne Mureinik captured the essence of the Bill of Rights when he described it as a 'bridge from a culture of authority … to a culture of justification' – what he called 'a culture in which every exercise of power is expected to be justified.' The Bill of Rights, he continued 'is a compendium of values empowering citizens affected by laws or decisions to demand justification. If it is ineffective in requiring governors to account to people governed by their decisions, the remainder of the Constitution is unlikely to be very successful. The point of the Bill of Rights is consequently to spearhead the effort to bring about a culture of justification. That idea offers both a standard against which to evaluate [the Bill of Rights] and a resource with which to resolve the interpretive questions that it raises'."

Nugent J in *President of the RSA v M & G Media [2010] ZASCA 177*