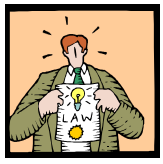
# e-MANTSHI

A KZNJETCOM Newsletter

**August 2010**: **Issue 55**

Welcome to the Fifty Fifth 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 *Jurisdiction of Regional Courts Amendment Act* 31 of 2008 came into operation on 9 August 2010.The proclamation to this effect was published in Government Gazette no 33448 dated 6 August 2010.

2**.** A National Policy Framework on Child Justice has been published for public comments in terms of s 93(2)(b) of the *Child Justice Act, 2008*, 75 of 2008. The Policy was published in Government Gazette no 33461 dated 13 August 2010.

Comments on the National Policy Framework on Child Justice, are requested to be submitted by 1 October 2010 and may be addressed to:

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## Recent Court Cases

### 1. National Director of Public Prosecutions v King 2010(2) SACR 146 (SCA)

**Discovery in a criminal trial is always a compromise. Fairness doesn't mean that an accused could unilaterally demand the most favourable treatment.**

Police dockets normally consist of three sections. Section A contains witness statements, expert reports and documentary evidence; section B contains internal reports and memoranda; and section C contains the investigation diary. An accused is entitled to see those contents of the docket that are relevant for the exercise of the right to a fair trial. *In casu* the respondent, who was facing some 322 counts, mostly of a commercial nature, sought— and was granted—an order in the High Court compelling the appellant to provide him with a full description of each and every document to which the State had denied him access, being documents in sections B and C of the docket, as well as a statement of the precise basis upon which access had been denied. The question to be decided on appeal was whether or not an accused was entitled to such a 'motivated index' in order to satisfy himself in advance that his trial would be fair.

*Held* (per Harms DP; Nugent JA, Mlambo JA, Malan JA and Majiedt AJA concurring), that while constitutions called for a generous interpretation in order to give full effect to the fundamental rights and freedoms they created, this did not mean that any meaning, however wishful, could be attached to a right such as the right to a fair trial. The question was whether the right being asserted was a right that was reasonably required for a fair trial. There was no such thing as perfect justice; discovery in a criminal case must always be a compromise. Fairness in a trial did not mean that an accused could unilaterally demand the most favourable treatment; it also required fairness to the public, represented by the State. The fair trial right did not mean a predilection for technical niceties and ingenious legal stratagems; neither should it encourage preliminary litigation, a pervasive feature of 'white collar' criminal cases which the courts, within the confines of fairness, should actively discourage. (Paragraphs [4]-[5] at 151d-152c.)

*Held,* further, that a document might be relevant to the prosecution without being relevant to the accused's guilt or defence. For example, opinions by prosecutors, notes on legal research, and copies of judgments, were clearly relevant to the prosecution, but they were not relevant for the purpose of making full answer and defence. Most of the material covered by litigation privilege in criminal cases would, in any event, not be discoverable because it was not germane to the conduct of the trial. As for the argument that 'the mere ipse dixit' of the State was not sufficient to justify the withholding of 'relevant documents', it was trite that if documents were relevant they had to be discovered. However, the present matter was about the respondent's right to a motivated index that would enable him, without having

established any prima facie facts, to audit sections B and C of the docket. Certainly, an accused need not be satisfied with the say-so of the prosecution, but the initial decision remained that of the prosecution, and if this were shown to be wrong during the trial, a court might order more. (Paragraphs [30]-[32] at 159h- 60g.)

*Held*, further, regarding the argument that the respondent was entitled to access the information in the docket by virtue of the constitutional right of access to State-held information, that once the Promotion of Access to Information Act 2 of 2000 (the Act) had come into operation, an applicant for access to information had to base his case on the Act, and could not rely on s 32(1) of the Constitution, *simpliciter.* Apart from certain formalities required by the Act, with which the respondent had not complied, at a substantive level s 7 provided inter alia that the Act did not apply to records requested for the purpose of criminal or civil proceedings, if access to the record were provided for 'in any other law'. 'Other law' in this context included the rules relating to discovery, disclosure and privilege. In other words, if access to information were requested for the purpose of criminal proceedings, the right thereto had to be sought elsewhere than in the Act; once court proceedings had commenced, the rules of discovery took over. (Paragraphs [36]-[39] at l6l i-162 i.)

*Held* (per Nugent JA; Harms DP, Mlambo JA, Malan JA and Majiedt AJA concurring), that the only purpose that would be served by the production of the list the respondent required, and evidently the purpose for which it was required, was to enable him to satisfy himself, as a precondition to his being tried, that his trial would be fair. The right to a fair trial did not go that far; it entitled the respondent to be tried fairly in fact, not to be satisfied that the trial would be fair. The prosecution was not called upon, as a precondition to prosecuting, to satisfy an accused person that his or her trial would be fair. If that were to be required, there might be very few criminal trials at all. (Paragraphs [57] and [58] at 168f-h.)
Appeal upheld. Order granted in the court a quo set aside

**2. S v Olivier 2010 (2) SACR 178 (SCA)**

**If submissions made on behalf of an accused on sentence is disputed by the prosecutor it is open to accused's representative to reassess the situation and consider adducing oral evidence**

The appellant pleaded guilty in a regional court to six counts of fraud, was duly convicted, and was sentenced to seven years' imprisonment, of which three were conditionally suspended. During the course of sentencing proceedings, counsel for the appellant led no oral evidence, but made submissions from the bar, remarking that if the prosecutor was 'not in agreement' with any of these submissions, she could 'just indicate and then we will consider whether it's necessary to call evidence to [prove] our allegations'. The prosecutor challenged some of the submissions during the course of her address on sentence. Appealing against sentence to the High Court, the appellant argued that the facts set forth in the address on sentence ought to have been accepted as proved facts by the trial court; and that the trial

court ought to have indicated in advance which of these facts it did not accept before drawing an adverse inference against the appellant in the absence of testimony from him. This appeal having failed, the appellant approached the Supreme Court of Appeal.

*Held*, that during the sentencing phase as much information as possible regarding the perpetrator, the circumstances of the offence, and the victims, was to be placed before the court. Material factual averments ought, as a general rule, to be proved on oath. Minor and uncontentious issues could readily be disposed of in oral argument, but any ex parte averments by the defence which were at variance with the State's information ought to be unequivocally disputed. An accused or his or her legal representative should be alerted timeously about disputed facts, so as to enable them to adduce oral evidence if necessary. The practice, whereby prosecutors sometimes permitted defence averments that were at variance with information in the docket to remain unchallenged, was to be deprecated. (Paragraphs [8]-[11] at 182d—183e.)

*Held*, further, that during the course of her address the prosecutor had unequivocally taken issue with some of the defence's factual averments, and these disputed averments had not been taken into account in the appellant's favour by the magistrate in his judgment on sentence. When it became evident during the prosecutor's address that some of the material factual averments advanced on the appellant's behalf were being challenged by the prosecutor, it had been open to the appellant's counsel to reassess the situation and to consider adducing oral evidence. By not doing so, counsel took a calculated risk that the trial court might not accept the unattested disputed allegations. Under the circumstances, there was no misdirection by the trial court and no basis on which to find that the appellant's trial had been unfair. (Paragraphs [12] and [16] at 183g-184a and 185b-d.)

*Held*, further, concerning the appropriateness of the sentence, that the appellant had defrauded poor people, abusing their trust and leaving at least one of the complainants penniless. Although he was a first offender, with fixed employment and two dependants, and despite his plea of guilty, which indicated a measure of remorse, the sentence imposed by the trial court did not induce a sense of shock. Indeed, it bordered on the lenient. The aggravating and mitigating factors had been properly balanced and the cumulative effect had been ameliorated by taking the six counts together for purposes of sentence. There were, accordingly, no grounds to interfere with sentence. (Paragraphs [17]-[25] at 185e-l87b.)
Appeal dismissed.

### 3. S v De Koker 2010 (2) SACR 196 (WCC)

**If an accused enters into a plea and sentence agreement with the state the *lis* between himself and the state is settled once and for all.**

The appellant, assisted by his legal representative, entered into a plea and sentence agreement in terms of s 105A of the Criminal Procedure Act 51 of 1977 (the CPA) with regard to three charges: robbery with aggravating circumstances; rape, involving the infliction of grievous bodily harm; and murder, after having committed rape and robbery with aggravating circumstances. Under the minimum-sentence provisions of the Criminal Law Amendment Act 105 of 1997, the first charge attracted a minimum sentence of 15 years' imprisonment, and the second and third charges each attracted life imprisonment, unless substantial and compelling circumstances justified the imposition of lesser sentences. The appellant pleaded guilty to all three charges and confirmed in writing that no substantial and compelling circumstances existed. The trial court, having satisfied itself that the agreement was correct and fair, and that the contemplated sentences were appropriate, then convicted the appellant and imposed the prescribed minimum sentences on him. Subsequently, the appellant invoked s 309(1)(a)(ii) of the CPA, which provided that a person sentenced to life imprisonment by a regional court in terms of s 51(1) of Act 105 of 1997 could note an appeal to the High Court without having to obtain leave to do so. In his appeal, against sentence only, the appellant contended essentially that the sentences to which he had previously given his agreement now appeared shockingly inappropriate; and that another court might well reach a different conclusion as to a fitting sentence.

*Held*, that while para (ii) of the proviso to s 309(1) (a) of the CPA conferred on a person convicted and sentenced to life imprisonment by a regional court the right to appeal to the relevant High Court against sentence, it did not follow that the appeal could not become perempted. There was no clearer case of peremption than where an accused concluded a plea and sentence agreement with the State, confirmed the agreement before court, and was duly convicted and sentenced in accordance with the agreement. By following the process created by s 105A of the CPA, the appellant had settled the *lis* between himself and the State once and for all. (Paragraph [23] at 204f-205b.)

*Held*, further, that even if the right to appeal had not been perempted, there was no reason whatsoever for the court to interfere with the regional magistrate's decision. The magistrate had followed the procedure prescribed in s 105A of the CPA; he had asked the defence whether they had anything to add to what had been stated in the written agreement; he had explained the implications of the minimum-sentence provisions; and the parties were agreed that there were no substantial and compelling circumstances justifying the imposition of lesser sentences. Even though the appellant was relatively young at the time of the offences, he already had four relevant previous convictions and, having regard to the brutal and callous nature of the crimes, the effective sentence of life imprisonment was the only appropriate one under the circumstances. (Paragraphs [24]-[26] at 205d-i.)
Appeal dismissed.

## From The Legal Journals

**Rossouw, J**

"Written acknowledgment of debt – is it a credit agreement in terms of the National Credit Act ?"

**De Rebus August 2010**

**Flemming, H C J**

"Drafting contracts under the National Credit Act."

**De Rebus August 2010**

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

## Contributions from the Law School

### THE CENTRE FOR CRIMINAL JUSTICE – ENSURING ACCESS TO JUSTICE

*The rationale and early activities of the Centre for Criminal Justice*

The Centre for Criminal Justice at the University of KwaZulu-Natal was founded against the background of internecine black-on-black violence amongst members of various political parties. It was in this context that more than twenty thousand people died in South Africa as victims of political violence in the final years of apartheid. About three thousand of those deaths occurred in the Pietermaritzburg region. A small number of the perpetrators were prosecuted and even fewer convicted. The failure of the justice system to cope with politically-related crime became of concern for many lawyers. In response, the late Prof AS Mathews proposed establishing a special research unit within the University.

Having received approval from the University structures, the Centre for Criminal Justice ('CCJ') started operating in February 1990 in Pietermaritzburg, with staff seconded from the Law School, with the primary objective of furthering human rights

through the law. While the original vision for CCJ was to conduct research into various aspects of the criminal justice system, especially in relation to the protection of human rights and the containment of violence, this plan was dealt a huge blow by the untimely death of Prof Mathews in July 1993.

The initial work of the Centre was to establish a documentation facility and database to facilitate research into, and report on, the failures of the criminal justice system, in order to respond to gross violations of human rights. The context for such research was the climate of political violence and conflict that was prevalent in KwaZulu-Natal, and indeed the rest of the country. The founding of the Centre for Criminal Justice occurred at a time of extensive politically-based violence between followers of the African National Congress (ANC) and the Inkatha Freedom Party (IFP). Members of the ANC accused the police of being complicit in these acts of violence. It was also a time when political and social change and the transition from apartheid to a democratic dispensation was a real possibility.

The CCJ's underlying mission at this juncture was to contribute towards changing the criminal justice system from one which had been used as an instrument of carrying out oppressive policies, to one which would be finally based on a human rights culture in a new democratic order. The Centre's focus was to study the vexed problem of violence and to gear its work towards formulating solutions and tabling proposals for the improvement of policing as a function of the criminal justice system as well as the challenges which a changing society will present to the system of criminal justice. This context was critical to the role the CCJ played during Professor Mathews' time and the role that the CCJ has played since.

At this time the decision was taken to focus primarily on one major aspect of the criminal justice system, the policing of conflict. Policing was chosen because there was widespread dissatisfaction with it, and because it was the community's first point of contact with the criminal justice system. Furthermore, serious failures in policing are likely to adversely affect the entire criminal justice system. In the first year of its existence, the Centre produced two reports on the policing of conflict in the greater Pietermaritzburg region. These reports were based on detailed case studies. The studies disclosed a number of serious problems in policing of which the following aspects were important:

- much of the policing of the conflict between the belligerent groups was partisan and police conduct differed remarkably depending on whether a favoured or disfavoured group was involved;
- police involvement in the conflict sometimes took on a criminal nature, either in the active sense, by commission (joining in the attacks) or in the negative sense, by omission (failing to assist victims of attacks);
- police investigation was often ineffective and unprofessional; and
- the police force was understaffed and racist attitudes among its members were very common.

The Centre resolved to take a constructive and remedial approach, and to seek solutions to problems that had been identified, inter alia by means of conferences. To this end research papers produced by the CCJ were presented at conferences and published in academic journals both locally and internationally, and conferences were hosted by CCJ. CCJ's conferences on 'Policing in the New South Africa', the first in 1991 and the second in 1992, attracted international participants and brought together political parties, interest groups, the police, leading scholars, and other parties within the legal system. The papers presented at the first conference were published in a book by the University of Florida Press. Furthermore, equally high-profile conferences on 'Women under the Criminal Justice System' and 'Reform of SA Prosecution Services' were organised and hosted by the CCJ in 1993. The success of these conferences, which owed much to the work, reputation and international stature of Professor Mathews, undoubtedly contributed to change in the relevant areas of the criminal justice system.

However, Prof Mathews' vision that future conferences should serve to be springboards to change and reform, leading to broad community programmes involving community representatives and community members, was not be realised in his lifetime. After his death, the Centre experienced a period of uncertainty resulting in some researchers leaving the organisation. Academic research was no longer at the foreground of CCJ's activities. The implementation of Mathews' vision by new staff members followed the guiding notion and understanding that the CCJ's projects and research activities should have a community focus and promote community involvement. Consequently CCJ focused on a Community Policing project through workshops aimed at helping, preparing and assisting communities to set up structures which were to deal with matters pertaining to the functioning of the criminal justice system; prepare communities for participation and involvement in community-policing forums to be established under the new Police Act; and to help bringing matters of governance closer to ordinary citizens.

The Plessislaer police station was one of those that benefited a great deal from this project. The police training was aimed at improving the quality of service rendered by the police to the communities they serve, as well as to prepare the police for effective participation in the community policing forums. In this period CCJ developed a strong network with organisations working on policing in KwaZulu-Natal. Together with IDASA, NADEL and other organisations, CCJ established a forum on community policing in KZN in 1996. In addition, CCJ through several consultative meetings and workshops with members of the community and other role-players identified the deficiencies of the criminal justice system in relation to issues affecting women. For example, it was identified that women were reluctant to report crimes like domestic violence because of police insensitivity. Community service centres (previously known as 'charge offices') provided little or no privacy, where personal information very often had to be disclosed in front of members of the public. The situation was traumatic for women and children who had suffered violence.

*A new focus: the Community Outreach programme*

The Centre for Criminal Justice was invited by the Plessislaer Station Commander to conduct training workshops for police officers at the police station on victim support in 1996. A strong symbiotic working relationship developed with the staff of the police station. This was a significant milestone for the Centre, and was probably one of the first agreements of such nature between a research institution and the police. The result was a more victim-sensitive approach in dealing with rape, sexual abuse and domestic violence at the Plessislaer Police Station, allowing complainants to report crimes in a private, sympathetic and accessible way.

Using the CCJ's community involvement and the pilot Victim Advice Office/Outreach Centre at Plessislaer, the turn-around strategy for the CCJ was developed in 1997 by the new director, Ms Kubayi, focusing on building a different, more efficient and productive structure, in order to implement what became known as the Community Outreach Programme. All community projects of the CCJ were integrated into this programme. The core element of this programme involved the establishment of the Victim Advice Offices based at institutions of criminal justice. Through the programme the CCJ aimed to narrow the gap between the institutions of criminal justice and communities and to make such institutions more accessible. Funding and enhanced access to the community flowed from the success of the relationship established at the Plessislaer police station. As a result the number of Victim Advice Offices, also known as Outreach Centres, has grown to fourteen. The Outreach Centres are presently spread throughout the interior of KwaZulu Natal, in areas identified on the basis of both need and the possibility of collaboration with the community and authorities. The offices serve areas of fifty square kilometres or more and in some instances the offices have been the only facility available to meet diverse community demands. These centres are populated by specially trained staff, who are qualified paralegals.

The main objectives of the programme are:

- To assist communities to access justice through the victim advice offices;
- To draw on the interaction with the advice offices for purposes of research that will reveal the extent of access to justice for rural women and communities as a whole;
- To collect information and statistics on incidences of violence against women;
- To monitor the implementation of laws, particularly those that affect women and children, as well as the activities of criminal justice agencies**.**

One of the lessons learnt at the beginning of the programme was that it is not easy for an organisation offering victim-support services to indigent communities to only stay focused on a single set of objectives and an exclusive target group. The advice offices, with minimum funding and resources, are expected to provide advice and assistance on a multiplicity of issues. Initially the new focus of the Centres was access to justice for women and children, especially the victims of rape, sexual assault and other forms of abuse. It soon became apparent that the facilitation of access to other services was unavoidable and necessary, and with the passage of time, support also ceased to be confined to women and children only.

*The programme's rationale and functioning*

The programme's activities focus on:

1. Providing knowledge of legal and human rights to members of the community;
2. Responding flexibly to identified needs; and
3. Making support services easily accessible

The Centre believes that secondary victimization can be prevented when women are empowered with knowledge of their constitutional rights and the manner in which to enforce them and seek redress in the criminal justice system. The central premise is that women, children and communities are better protected when they are provided with specific information on issues such as:

- available legal and social support services;
- human rights and relevant legislation; and
- how to access their legal entitlements.

Flexibility is important because each community is uniquely composed and has its own social dynamics. To achieve this offices are run by local women trained in paralegal skills, chosen from the community within which the offices are based. Knowledge of relevant aspects of the local situation is important and key contacts equally so.

The concept of accessibility and identity has been critical to the CCJ. The offices are located at courts and police stations for easy access and near to other justice services, making applications easier (for court orders, police escorts, affidavits, etc). Training venues for workshops are within communities for facilitation of attendance, and access. The offices are situated close enough to follow up on cases with the police or courts and to provide physical and psychological support as and when necessary. The CCJ has sought to ameliorate the charge office environment for victims of crime, which did not afford victims dignity and privacy. The support centre offices epitomise an environment where community members receive the best possible care in times of crisis. The conditions within the support offices are designed to provide optimum comfort and support to a person suffering the trauma of abuse and violence.

The main components of the implementation strategy of the Community Outreach programme are:

*(i) direct legal services*

The Outreach Centres serve as a point of contact for members of the public, to access the criminal justice system. Members of the public are assisted to make initial contact with the legal system and are supported while the legal process unfolds. Instead of reporting cases of abuse, rape and other forms of violence at the police charge office, victims report in a more humane,

sensitive and comforting Outreach Centre environment. The intervention of the CCJ has had a positive impact and greatly relieved victims of abuse of the very traumatic experience of reporting a grave matter in an insensitive charge office environment.

Coordinators assist court officers and complainants, particularly young child witnesses. Court officers rely on the coordinators to ensure that complainants and witnesses know when they have to attend court proceedings. Information about statutes and documentation required for the case is shared with court officers.

People seeking assistance are advised on the correct action to take and assisted to report the matter to the police. Assistance is also given in the form of support during the investigation and trial. If clients are threatened or intimidated by the perpetrators an application is made for a restraining order or protection order to stop the perpetrator from harming clients and their families. In matters that are beyond the scope of the Centre's services people are referred to and/or connected to appropriate institutions.

Counselling is a very important aspect of dealing with people who are in distress. Coordinators provide basic counselling before taking statements. They are trained in trauma counselling for victims of crime and have also been called upon to provide counselling to people who have lost their loved ones, for instance, in car accidents or murders. The fourteen support centres handle an average of nine thousand cases per year.

*(ii) support services*

The work of the Victim Advice Office was extended beyond the ambit of the criminal justice system to include social justice, as the facilitation of other services was unavoidable and necessary. Labour issues, retrenchment and administration of estates can be very intimidating processes for people who are illiterate and who do not understand the bureaucratic procedures involved. Paralegals help people solve or address problems they may encounter with state departments and private sector companies. These paralegals have acquired considerable expertise in these areas, which is very useful when bringing relief to destitute families.

The advocacy role the CCJ's advice offices play sets them up as a watchdog over the implementation of government services and private sector engagement and thus keeps a watch on corruption.

*(iii) community education*

Education is provided through community workshops that are conducted within communities on a wide range of topics pertaining to legal and human rights issues and access to the criminal justice system. Paralegals have been trained to carry out this activity. To design a workshop, they assess the specific needs of each targeted community, based on either the regularity with which they must deal with a certain issue or emerging trends. The

workshops inform the community about both the risk factors and possible solutions to any problem, especially in terms of preventing victimization. Experts may be brought in, depending on the complexity of the issue.

Paralegals are invited to community forums and *imbizos*, to present and promote the work of the advice centres and to share information about pertinent issues such as child abuse. This offers an opportunity to complement and influence both traditional and formal methods of governance, especially with regard to cooperation and accountability. In the past two years paralegals have been invited several times to make submissions on how certain policy decisions affect their communities.

*(iv) accessible statutory publications*

Statutes with accompanying flyers and posters have been provided in accessible language and format, with interpretation of governing statutes by the CCJ to support the education project. Paralegals have been given intensive training on the use of these materials and are frequently called upon by police, court officials and members of other organizations and agencies to explain the meaning and application of the law.

*The Community Outreach programme's achievements and benefits*

The programme has proved to be highly successful as an intervention that facilitates access to justice. The achievements of the programme are based on the involvement of paralegals working within institutions of the criminal justice systems. This role has been executed exceedingly well and the CCJ has gained significantly from the insights of paralegals.

Evaluations conducted over the years indicate the positive contribution being made by the Centre is promoting a human rights culture in community life. There has been an increase in demand by members of the community for the programme services, and those relating to social justice issues. Through the CCJ's advice offices, community members gain confidence to expose and pursue incidents of violence. The successful outcomes achieved in many cases have encouraged members of the community to take action against abuse and to pursue matters of human rights violations within the police, which was not the case previously. The support given by paralegals to community members helps bridge the gap between ordinary citizens and legal authorities.

The Outreach programme has been of extraordinary benefit to communities. Although it has as its target group the more vulnerable in society, that is, women and children, it has in fact come to serve entire communities. This is an invaluable service to communities that are sorely lacking in resources and services.

The objective for the establishment of the outreach programme has been largely realised. Access to the criminal justice system is now a reality, made possible by involving paralegals at local level, who have close ties with communities and institutions of authority.

Paralegals have played a major role in the success of the programme; the following are some of their contributions to the programme.

- They introduced mediation in their case work to find solutions that are simple, practical and acceptable to the parties concerned. This is vital for community members who cannot afford the time and expense of protracted negotiations and litigation. These solutions frequently involve a compromise between customary law and national legislation without derogating from the authority of national legislation.

- They used their own initiative in meeting and dealing with challenges that they encounter on a daily basis in a largely unsupervised environment where the community advice offices are based.

- Their comprehensive grasp of and sensitivity of traditional customary practices, underlying family and cultural disputes and difficulties that prevent clients from accessing justice, to hard core cases of domestic violence, maintenance, labour disputes, criminal acts, rape, physical and sexual abuse, fraud in the devolution of estates, pensions, child care and foster care grants.

- Their skill in mediating domestic violence, which is demonstrated by their high rate of success in reconciling the parties and providing counseling to enable them to re-establish harmonious family relationships.

- Their meticulous follow-up of clients' cases, both those that have been referred to formal institutions and cases resolved at the Support Centre. The most notable example of these cases are those of domestic violence and violations of children's rights. The coordinators do a follow-up either by contacting the client or paying a home visit in order to ensure that the matter has been resolved and that the client has not been intimidated not to return to the advice offices for further assistance.

- Paralegals assist community members to overcome institutional and structural obstacles in accessing rights. This requires good relations with the justice institutions that provide those services to members of the public. Collaboration with relevant institutions on cases presented at the centres has been the most vital aspect of delivering services to members of the community.

Thus the vision Prof AS Mathews had for the CCJ, of bringing access to the criminal justice system within reach of ordinary South Africans, particularly disadvantaged citizens living in rural areas, continues to find expression in the work it carries out. The Outreach Support Centres continue to provide valuable services to the communities they serve, thus increasing access to justice.

**Winnie Kubayi,** ***Director of the Centre for Criminal Justice, University of KwaZulu Natal***
**and**
**Shannon Hoctor,** ***University of KwaZulu-Natal***

## Matters of Interest to Magistrates

### Strong support for legal independence at think-tank

The Law Society of South Africa (LSSA) held an important think-tank earlier this year on the independence of the judiciary and the legal profession (see 2010 (May) *DR* 10).

The members of the panel were retired Constitutional Court (CC) Judge Yvonne Mokgoro; Chairperson of the National Press Club, Yusuf Abramjee; Professor Pierre de Vos of the University of Cape Town's department of Public Law; and Mohamed Husain, President of the Commonwealth Lawyers Association (CLA). Session facilitator Judge Dennis Davis of the Western Cape High Court raised a number of issues with the panelists.

First to address the delegates was Justice Mokgoro. She spoke about whether the Constitution guarantees the independence of the judiciary and the legal profession. She said that the court's independence is determined by what the reality of the court's independence is.

She said if the relationship between the courts, the judiciary, the legislature and the executive is such that there is respect from the other arms of government of the role and function of the courts, as well as trust, then maybe we can talk about guarantees, but experience has shown that that is not always the case. She said that although the Constitution protects an independent judiciary, the legal profession, in a collective and individual capacity, has a duty to ensure that the interests of society are protected by protecting the independence of the courts.

Professor de Vos gave his views on the recent threats to the independence of the judiciary and the legal profession. He started by defining what independence of the judiciary means and highlighted that it does not mean a judge who is anti-government. He said the CC says that independence is about two things; institutional independence, and the intangible aspect focusing on the legitimacy, integrity and ability of judges to make decisions without fear, favour and prejudice, in an impartial manner.

He said one of the biggest threats to the intangible aspect of the independence of the judiciary was everything that surrounded the case involving the President. He says during this case between Jacob Zuma and the National Prosecuting Authority (NPA), words were said which eroded the legitimacy and integrity of the courts and their ability to act without fear, favour and prejudice.

He said another issue that was traumatic was the conflict between the judges of the CC, and the Judge President of the Western Cape, John Hlophe. In this case one of

the institutions which was supposed to be at the forefront of ensuring the independence of the judiciary, the Judicial Service Commission (JSC), made a decision not to decide whether the 11 judges of the court had made a legitimate complaint against the judge president. This, he said, was the darkest day of the judiciary.

Professor de Vos said another threat was the way the previous National Director of Public Prosecutions was fired because he acted without fear, favour and prejudice, and the way in which the new national director was appointed.

He also highlighted the non-transformation of the judiciary as being a threat to the independence of the judiciary and the legal profession because, if we are going to have an all-white male judiciary it will not have the same kind of legitimacy. It would not be able to withstand the politicians in the same way a judiciary that is transformed both in terms of race and gender would.

He concluded by saying that there is a lot that still needs to be done to ensure that in the long-term the institutional independence of the judicial system and that of the judiciary is reinforced.

Mr Husain spoke about the Commonwealth perspective on the independence of the judiciary and also the question of judicial accountability which, he said, was the flip side of the coin of independence, in which regard he referred to the Latimer House Principles.

He said that there are a number of pronouncements on judicial independence and the perspective of lawyers in a number of Commonwealth documents such as the Harare Declaration of 1991, the Millbrook Declaration of 1995 as well as the Latimer House Guidelines.

The CLA was one of the sponsors and participants of the colloquium that produced the guidelines in 1998. Eventually it resulted in the adoption of the Latimer House Principles. The principles were accepted by the Commonwealth Heads of Government and all 53 countries of the Commonwealth have committed themselves to those principles.

These principles talk about the independence of the judiciary; an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. To secure these aims the principles state that judicial appointments should be made and requirements met on the basis of clearly defined criteria and by a publicly declared process, starting with the appointment of judges to the Bench.

Mr Husain said the guidelines also talk about a culture of judicial education and training stating that judicial training should be done by judges for judges. They also talk about the development of a judicial code of ethics and conduct, and also stress the accountability of judges. He added that ‘of course an independent and courageous Bench is only possible if we, the group here from whom the Bench is drawn; lawyers in general, exemplifies and displays those sorts of qualities.’

A debate on the transformation issue then ensued between the members of the panel. Professor de Vos said the main problem is the fact that in people's hearts there has not been transformation of the legal profession. He said: 'We live in South Africa where everything is about race so it is very easy for people to use race as a way of dividing the legal profession. There is fundamental introspection needed from the whole legal profession, from both sides.'

Mr Husain added that at the end of the day the issue is not about a white view or a black view. He said the profession needs to put well-established, entrenched, international legal principles and democratic principles up. Justice Mokgoro agreed to this and added that colour should not be put to the voice and until the legal profession speaks with one voice we will always question the transformation of the profession.

Questions from the floor were then taken. *De Rebus* Editorial Committee Chairperson, Krish Govender, who is also the LSSA's representative on the JSC, said that the JSC has taken certain important steps with regard to putting things right and improving on the past which will be seen in the near future.

He then spoke on the topic of the independence of the judiciary and the legal profession and stated that South Africa has about 20 000 attorneys and probably 5 000 advocates and about 500 judges or so. They are so small in relation to the 50 million people in this country and they could not themselves protect, uphold or defend successfully the independence of the judiciary and the legal profession. He said that this is in the hands of the people and if the profession talks 'top down' as it has been doing with good intentions and in good spirit, it would be talking to the converted.

He said there may be a few exceptions, but the profession is not going to get anywhere if it does not work out how it will get this message to the masses of the people, and if we do not start taking this message from the bottom up we are doomed.

He concluded by saying that the profession should take the understanding of the Bill of Rights to the schools, from the pre-primary levels to the highest levels. This he said, the profession has failed to do.

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**A Last Thought**

"Therapeutic jurisprudence focuses on 'humanising the law and concerning itself with the human, emotional and psychological side of law and the legal process' , yet, without purporting to be a form of judicial or quasi-judicial therapy or covert paternalism . It follows a problem solving approach, encompassing, inter alia, legal procedure and legal roles……..

In exercising his/her legal role in sentencing, a judicial officer's choice of the way in which the matter is handled will influence the attitude of the offender. Better compliance can be attained by clarifying the conditions formulated when correctional supervision is imposed through direct dialogue, as well as by promoting cognitive self-charge when the offender is allowed to make suggestions in this regard to indicate particular weaknesses or harmful patterns that should be addressed."

From "*Therapeutic Jurisprudence*:*Judicial officers and the victim's welfare – S v M 2007(2) SACR 60 (W)"* by Annette van der Merwe 2010 SACJ 98