

BOPHUTHATSWANA MAGISTRATES' COURTS

STRUCTURE AND FUNCTIONS

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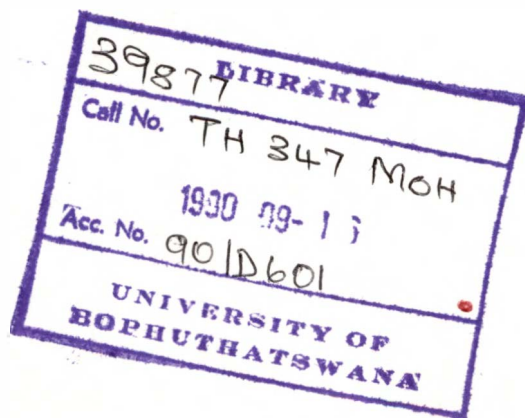


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		<u>PAGE:</u>
CILSA	Comparative and International Law Journal of Southern Africa	29, 30
SALJ	South African Law Journal	25, 45

CHAPTER I

"Let any opposed man who
has a cause, come into the
presence of statue of me, the
king of justice" Annet.

GENERAL INTRODUCTION

The office of the Magistrate originated early during the Roman Law era and it developed through the ages until the present office of the magistrate as understood today. Eversince the inception of this office, the magistrate was not only charged with the function to execute the judicial, but also the administrative functions.

PROBLEM AREA DEFINED

Various Commissions have been appointed in South Africa to enquire into the possible separation of judicial functions from the administrative functions. The need for this office to be conferred with the concept of the independence of the judiciary, has likewise been highly desired. In Bophuthatswana, no commission has yet been appointed in this regard.

OBJECTIVE

The aim of this research project will be to establish whether a separation of judicial function from the administrative function is desirable or advisable under these existing conditions where the magistrate perform both judicial and administrative functions. Some recommendations will be formulated in an attempt to bring an answer to the possible separation of judicial functions from the administrative duties.

In order to arrive at the possible correct conclusion, and to be able to

formulate recommendations, the following aspects will have to be discussed:

- (a) the origin and the development of a magistrate office in Southern Africa. This aspect will be traced from the early Roman Law era through to the Roman-Dutch era, at the Cape Colony and the Boer Republics. In addition to this, an investigation will be made as to how the Magistracy in Bophuthatswana, as inherited from South Africa, was to be structured at the periods of pre-independence and post-independence.
- (b) The existing structure and the jurisdiction of the magistrates' court;
- (c) the functions of this court will be discussed and where appropriate evidence by means of statistics will be invoked.

The direct interview was conducted with Senior Magistrates at the magistrates' courts at Molopo and Ditsobotla districts. Their views are also included in this research project.

METHOD

This research project will be divided into chapters. At the end of each chapter an evaluation will be made, followed by a conclusion wherein the identified query in regard to a magistrates' court is highlighted.

At the end the recommendations and possible solutions will be offered. The main conclusion will complete the topic.

CHAPTER II

The structure and functions of Magistrates' Courts in Bophuthatswana cannot be understood apart from their history. The historical survey of the origin and the development of the Bophuthatswana Magistrates' Court is therefore very significant.

The genesis of the magistracy may be traced centuries back to the biblical times.⁽¹⁾ During this period the judges were commanded to judge with righteousness and to be impartial.^(2a)

The Code of Hamorabi, the oldest example of Egyptian wisdom, the wise-sayings of Ptah-hotep refers to the judiciary.^(2b)

It was during the Roman times, later in history that the office of magistracy was to be somehow properly founded. In 509 to 27 B.C. Rome was declared a Republic.⁽³⁾ During this period the judicial functions which hitherto had been performed by the King, were transformed to the praetor.⁽⁴⁾ This officer was appointed by the popular assembly (comitia centuriata) for a period of a year.⁽⁵⁾ Although he was vested with full authority (imperium), he was subjected to the authority and power of the Consuls.⁽⁶⁾

According/...

1. J G FERREIRA: *Strafprosesreg in die Laer Howe*, 2ed. 1979. 1.
- 2a. Deuteronomy: Chapter VI Verse xiv - *New World Translation Bible*. 1981 ed.
- 2b. J B PRITCHARD: *Archaeology and the Old Testament*, Princeton University Press 3ed. 1968 210, 230, 233.
3. D H VAN ZYL: *Geskiedenis van die Romeins-Hollandse Reg*, 1979; 14; and see generally PAUL WARMELO: *THRHR* 1965, et seq.
4. **Praetor**, according to VOET, was a name broadly given to all magistrates - even to the Military Prefects. When the Consuls were away on war, the praetor took the place of Consuls in administration - **vide The Selective Voet - BEING THE COMMENTARY ON THE PANDECTS OF JOHANNES VOET** - translated by PERCIVAL GAYE Vol 1 (Books i - iv) - 184 Section 1.
5. D H VAN ZYL: *History and Principles of Roman Private Law*, 1983 pp 17-18. See generally W J HOSTEN et alii: *Introduction to South African Law and Legal Theory*, 1977; pp 134, 141.
6. *Op cit* n. 5. 16.

According to D H Van Zyl⁽⁷⁾ the main function of the praetor was to administer civil law and justice by virtue of his *iurisdictio* (i.e. power to administer justice). The latter had empowered the praetor to issue edicts or *ius edicta* which was one of the primary sources of law during the Republican period.⁽⁸⁾

In addition to the administration of justice, the praetor had to execute functions of an administrative nature. For instance the praetor was an official to regulate Consumer affairs at the market place by means of the *aediles curules* which included the actions of *actio redhibitoria* and *actio quanti minoris*.⁽⁹⁾

The Roman times praetor may not be equated with the present concept of magistracy as we understand it today. J C Ferreira notes correctly when he states that:

"Die magistratus moet nie met ons hedendaagse magistraat verwar word nie".⁽¹⁰⁾

This observation is confirmed by the meaning of the word "praetor" itself. According to Hemeschorf:

"the word *prae-ire*, meaning 'to go ahead' in the sense that he provided guidance to the persons who wished to institute an action".⁽¹¹⁾

During/...

7. Op cit n.5. 18.

8. Ibid.

9. D.H. VAN ZYL: *Geskiedenis van die Romeins-Hollandse Reg* - 1979; 20-21
Vide also KASER MAX: *Roman Private Law*, Third ed. 1980 Section 2.II;
41 VI; 80 II. 3.a.

10. FERREIRA: *supra* n.1.P.1.

11. Op cit 18.

During the periods of the Principate and the Dominate, the office of the praetorship was completely abolished.⁽¹²⁾ The praetorian law was codified, and the monarch once more assumed absolute power⁽¹³⁾ in that he performed both administrative and judicial functions.

In Holland during the birth of Roman-Dutch law, the Board of Schepenen was charged with the administrative and judicial functions. The board was presided over by the bailiff or schout as the representative of the sovereign.⁽¹⁴⁾

In the Frankish empire at this very same period the board of magistrates, called the Vroedschap, were the administrators of justice and other civil duties.⁽¹⁵⁾

In 1652 the Cape Colony was occupied by the Dutch East India Company under the Directorship of Jan van Riebeeck.⁽¹⁶⁾ Roman-Dutch law was transported from Europe, Holland, to the Cape Colony.⁽¹⁷⁾

For the first four years of the Batavian Occupation of this colony, the Council of Justice exercised all three branches

of/...

12. D H VAN ZYL: *supra* n.5 pp. 18. See generally *Die Landdros* Vol 15 No. 1 1980. J A VAN DAM pp 50-53 *Die Landdros*, J W TRENGOVE Pinetown.
13. *Ibid.* A J BOESEKER: *Jan van Riebeeck en sy gesin*, Tafelberg (1974) 46 *et seq.*
14. A F S MAASDORP (Translator) - *The Introduction to Dutch Jurisprudence of Hugo Grotius* 3rd ed. 1903 p (i) *et seq.*
15. *Supra*, 1878 ed. p V. See generally HAHLO AND KAHN *The South African Legal System and its Background*, 1968 Juta, with regard to the Early Germanic Period. 354 - 357.
16. G E DEVENISH: "The Cape of Good Hope 1652-1969. Our Legal Heritage, 1982. H F MOLLET: *et ali* ed. p 33 *vide* generally W J HOSTEN: *Introduction to South African Law and Legal Theory* pp 186-7. See generally E C GODEË MOLSBERGEN, *Jan van Riebeeck en sy Tyd*, 1968 Van Schaik 80-4.
17. DEVENISH: n.16.

of Government, namely the Executive, Legislative and Judiciary.⁽¹⁸⁾ Later on in 1656 the Council of Justice was to administer justice only.

As the Cape Colony became populated, it became necessary to create district courts. The latter had to have as their chief objective, to decide cases in which small amounts were involved.⁽²⁰⁾ The college of Landdrost and Heemraden were established to man the district courts. This was in 1685.⁽²¹⁾ Initially the Landdrost did not have any Criminal jurisdiction.⁽²²⁾ Only the Council of Justice at the Cape Proper could exercise the Criminal jurisdiction.⁽²³⁾ With the passing on of time, the Landdrost was conferred with the Criminal and also the Civil jurisdiction, which was very circumscribed.⁽²⁴⁾

In addition to the judicial functions, the Landdrost and Heemraden had to perform administrative functions. For an example, the Landdrost was charged with the responsibilities to settle the boundary disputes and he had to maintain law and order in the Cape Colony districts.⁽²⁵⁾ As observes J C Ferreira:

"Vanaf 1685 tot 1827 het die landdrost met sy heemrade feitlik elke aspek van die gemeenskaplike lewe beheers".⁽²⁶⁾

Now/...

18. Op cit n. 16. 38.
19. Ibid.
20. Ibid. See generally VISAGIE, Regspleging en Reg aan die Kaap Van 1652-1806, Juta., 1969 41-6.
21. FERREIRA, n.1.1. See generally VISAGIE n.20, 53.
22. Ibid. 23. Ibid. 24. Ibid.
25. Op cit 9. It should be remembered that in execution of administrative functions and minor judicial functions, the Board of Heemraden and Landdrost was assisted by the Field Cornetts - vide generally **The Archives Year Book For South African History, 1954 II - VAN RENSBURG J I J**, pp 302-303. Landdrost and Heemraden had jurisdiction with regard to water disputes as well. Vide VISAGIE n. 20.55.
26. Op cit. II vide generally **South African Archives Yearbook 1940 II 1682-1827 et seq.**

Now this quotation is a clear indication of the wide scope of functions which the Landdrost had to perform.

In 1795 the British occupied the Cape Colony.⁽²⁷⁾ The college of the Landdrost and Heemraden was recognised. This is confirmed by the fact that the Landdrost's jurisdiction was increased.⁽²⁸⁾

In 1806 the Cape Colony, after a very brief period, usually referred to as the Batavian Interlude, was repossessed by the British.⁽²⁹⁾ Important developments as far as the judiciary was concerned, took place during this period.

In 1823 the recommendations of the two-men Commission of Bigge and Colebrook were given effect in the first and second Charters of Justice in that the Council of Justice, which had hitherto administered justice, was replaced by the Supreme Court.⁽³⁰⁾ The concept of the independence of the judiciary was introduced.⁽³¹⁾ The college of Landdrost and Heemraden was replaced by the resident magistrate.⁽³²⁾

Henceforth/...

27. DEVENISH: n.14. See generally H GILIOME and R ELPHICK: 'n Samelewing in Wording: Suid-Afrika 1652-1820, Longman 1982. 226-253.
28. Ibid.
29. Vide n. 27. 51.
30. Supra n. 25.32.
31. Op cit n. 6 53. The concept of the independence of the judiciary meant that the judges were to hold office *quandieu se bene gesserint*.
32. DEVENISH: n.1 54. The commission had however acknowledged the relief that the college or board of Heemraden and the Landdrost had brought to the Council of Justice in the administration of justice - vide P J VENTER, supra n. 23 at p 221. Furthermore the inspectors of the board marvelled at administration of this board. At page 81 of P J VENTER, referred to above, this was said of the board of Heemraden for instance: "A body of men whom even the Heads of Government had invariably respected, and who, though fallible as men, can court the strictest scrutiny as to the integrity of their public administration". After the abolition of this college, an observation is made that chaos resulted. Traffic was not properly controlled and some of the administrative functions were not properly executed - vide pp 228 - 232.

Henceforth the courts were to sit with the doors open to the public.⁽³³⁾ Although many changes which were brought were beneficial even to the office of the resident magistrate, this office was not blessed with the concept of the independence of the judiciary. The resident magistrate remained the civil servant.⁽³⁴⁾

Prior to 1830 the resident magistrate had administered justice according to common law only.⁽³⁵⁾ From 1830 to 1877 the British officials annexed the so-called Bantu-territories.⁽³⁶⁾ These territories were to form part of the Cape Colony and they were to be governed according to the Native customs and laws. This was based on the decision of the English decision of Campbell v Hall in which it was held 'that the laws of a conquered country continue in force, until altered by the conqueror.'⁽³⁷⁾

As G M B Whitfield correctly observes:

"The Natives of South Africa surely had....a claim to the recognition of their own laws and customs, particularly as it is now an explicit part of British colony to retain indigenous institutions in Africa and even to avoid tampering with them where it is not strictly necessary to do so in the interest of law and order".⁽³⁸⁾

The/...

33. HOSTEN: n. 16. 197.
34. Ibid. Prior to the Colonial Period, both Criminal and Civil cases were heard by the Chiefs and Headmen. Vide MACLEAN B: A Compendium of Kafir Laws and Customs, State Library 62-65. See generally I SCHAPER: A Handbook of Tswana Law and Custom, Frank Cossa (1970) 35-52; 257 et seq.
35. Ibid.
36. N J J OLIVIER: Artikel II(I) van die Bantoeadministrasiewet 38 van 1927. De Jure 1976 at 284.
37. Op cit 285.
38. G M B WHITFIELD: South African Native Law, 2ed. 1948 Juta p. 5. See generally N J J OLIVIER n.36. See also A C MYBURGH et al: Indigenous Criminal Law in Bophuthatswana, Van Schaik (1980) 15 et seq; E J KRIGE, The Social System of the Zulus, Shooter and Shooter, 2ed (1981) 217 - 232. I SCHAPER: The Khoisan Peoples of South Africa, Routledge and Kegan Paul (1965) 149 -155; 336 - 346.

The effect of this claim was to be that Commissions were to be constituted to look into the need and the desirability of the recognition of Native Law.

After the recommendations of various Commissions, the 1883 Commission on Native Laws and Customs in particular, the native law and customs were to be applicable to the annexed native territories "unless such manifested injustice or repugnant to the settled principles and policy of natural equity."⁽³⁹⁾ The resident magistrate was charged with the duty to administer native customary law only where the parties before the court were the natives.⁽⁴⁰⁾ At this point it will be noticed that in addition to administration of justice according to Common Law, the resident magistrate had to administer customary law.⁽⁴¹⁾

In 1836 there was a great trek by a group of dissatisfied Afrikaners who would not subdue to the British administration, into the interior of South Africa.⁽⁴²⁾ As observes J D Ferreira:

"Reeds toe die trekkers nog op pad was, het hulle n hof gestig waarin Heemrade sessie gehad het".⁽⁴³⁾

This shows that the office of "magistracy" or Landdrost was preserved/...

39. See generally Cape of Good Hope Government Commission on Native Laws and Customs, January 1883 - G4 - 83. P.

40. Ibid. See COLONEL MACLEAN: Compendium of Kafir Laws and Customs, 30 State Library (1968) 62 - 65 with regard to the Judicial custom.

41. H ROGERS: Union of South Africa - Native Administration in the Union of South Africa - 1949 ed. P A LININGTON (ed) 200 - 201.

42. C F J MULLER et al (ed): Five Hundred Years, a History of South Africa, 1969 ed. Academica pp 124; 137.

43. FERREIRA, p 11.

44. Op cit 12. Vide generally E H BROOKES: A History of Natal 55, 165 - 6.

45. Ibid.

46. Ibid.

preserved. In Natal the office of "magistracy" was established.⁽⁴⁴⁾ It was only where the high amount of money was involved that the Heemraden sat with the Magistrate.⁽⁴⁵⁾ Although the term "magistracy" was used, a person who occupied the office of magistracy, had remained known as a landdrost.⁽⁴⁶⁾ As states Venter:

"Die kolleges van landdros en heemrade neem 'n ereplek in, in sowel die administratiewe- as die algemene geskiedenis van Suid-Afrika. Hulle het gedurende bykans anderhalwe eeu onder die Kompanjie en in die ou Kolonie dienste bewys wat onmiskenbaar is, en hulle bestaan nog as regterlike liggame op die trek en is in die Republiek voortgesit. Ondanks hul swakhede en terkortkomings het hulle op dappere en eerlike manier hul man gestaan, self nog stand gehou voor en onder 'n vreemde bestuur, om uiteindelik afgeleef te swig vir sy oormag, maar om gedeeltelik weer tot verhaal te kom onder hulle eie mense wat ook die land moes verlaat".⁽⁴⁷⁾

Between the periods 1846 to 1854 the Boer Republics of the Republiek van Zuid-Afrika (Transvaal), Republiek van Oranje Vrystaat and Natal were annexed by the British officials.⁽⁴⁸⁾

The college of Landdrost and Heemraden that had hitherto been in existence in these territories, was abolished and completely replaced by a resident magistrate. A resident magistrate had exactly the same jurisdiction in criminal, civil and administrative matters like its defunct forrunner, namely the college of Landdrost and Heemraden.⁽⁴⁹⁾ In all these territories 'Native Law' was recognised and enforceable by the courts.

Thus/...

47. Quoted by J C FERREIRA, *supra* at 13.

48. FERREIRA, p 15.

49. *Ibid.* For an example of administrative duties, see Department of Justice (RSA) Kode Boedels.

Thus prior to the Union of South Africa, several governments adopted widely divergent policies with regard to the question of recognition of Native Law and Custom in the Cape and also in the other parts of the 'Colony'.^(50a) Each of the four colonies had its own department of Native Affairs. The administrative systems differed in the various colonies as far as 'district Native administration' was concerned. In the Transkeian Territories, a Chief Magistrate, district magistrates and magistrates, who were officers of Native Affairs Department, and in the Cape Province magistrates of the Department of Justice, and 'sergeants' of the Native Affairs Department, were entrusted with the administration of Native Affairs. In the Transvaal and to a certain extent the Orange Free State, magistrates of the Department of Justice (ex officio Native Commissioners) were entrusted with these functions. Natal employed the services of district Native Commissioners as well as district magistrates of the Justice Department. The services of chiefs and headmen were also employed in administering district affairs.^(50b)

In 1910 the Union of South Africa was formed.⁽⁵¹⁾ The former Boer Republics, Natal and the Cape Colony, became the four provinces of the Union. In 1917 the Magistrates' Courts

Act/...

- 50a. ROGERS: n.41 200 - 202 and WHITFIELD 1 - 8. Vide generally Law No. 4 of 1885 (Transvaal): The Transvaal Administration of Estates Proclamation No. 28 of 1902; Law No. 26 of 1899 (Orange Free State).
- 50b. Ibid 4 - 5. See generally Law No. 4 of 1885 (Transvaal); The Transvaal Administration of Estates Proclamation No. 28 of 1902; Law No. 26 of 1899 (Orange Free State).
51. H R HAHLO and KAHN: *The Union of South Africa, The Development of its Laws and Constitution* 1969, 118.

Act was enacted.⁽⁵²⁾ The chief objective of this Act was to consolidate the different laws which related to the magistrates' courts in four provinces.⁽⁵³⁾ After twenty-three years the Magistrates Court Act 32 of 1944 was passed. It replaced the 1917 Act.⁽⁵⁴⁾ Hitherto the Magistrate were to be governed by the 1944 Act through the Union in the execution of their duties. However, the title was not to be stamped out. As note J G Ferreira:

"In 1957 is erkenning aan die ampstitel 'landdros' verleen."⁽⁵⁵⁾

In some latter amendments of the 1944 Act, the word 'landdros' is used in the alternative to the title of a magistrate.⁽⁵⁶⁾

During the Union of South Africa G M B Whitfield noted:

"there were discrepancies and variety of conditions as regard to the application of the 'Native' law."⁽⁵⁷⁾

This is confirmed by the fact that each of the four provinces had different codes as far as the application of the Native law was concerned.⁽⁵⁸⁾ In 1911 the House of Assembly Select Committee on Native Affairs of the Union recommended

"that registration should be introduced which admits the recognition by Courts of laws of the Natives and also their customs as had been already embodied in laws in operation at certain parts of the Union".⁽⁵⁹⁾

This/...

52. Act No. 32. See generally FERREIRA, 16.

53. Ibid.

54. Ibid. ROGERS n. 41 6

55. Op cit. 7.

56. Op cit. 8.

57. Op cit. 9.

58. Op cit. 10.

59. Op cit. 11.

This recommendation had prompted the passing by Parliament of the Native Administration Act No. 38 of 1927.⁽⁶⁰⁾

This Act provided for the establishment of Native Commissioner Courts.⁽⁶¹⁾ Section 11 of this Act is very important for it provides for the administration of justice according to customary law except where such customary law has been repealed or modified; or it is opposed to the principles of public policy or natural justice.⁽⁶²⁾

The Native Commissioners were charged with the duty to control over and with supervision of the "Natives", collection of rates, and to hold meetings with the chiefs, headmen and the people within his district.⁽⁶³⁾

In addition to these pure judicial functions, the Commissioner was thus charged with quite a voluminous task of administrative functions. In the district at which his office was situated, he had to execute functions which were usually performed by the local authority or some government agencies. For instance the Commissioner had to deal with, to quote but a few, matters such as registration of births and deaths, marriages, registration of vehicles and dogs, social welfare services, agricultural affairs, the tribal affairs, Conservation/...

60. Ibid.

61. On the judicial system for the Africans - vide Summary of the Report on the Commission for the Socio-Economic Development of the Bantu Areas within the Union of South Africa U.G. 61/1955 - 68.

62. For the interpretation of Section 11 of Act 38 of 1927 see *Umvo v Umvo* 1953 (1) S.A. 195(A); *Minister of Justice in re: Yako v Beyi* 1948(2) S.A. 388 (A).

63. ROGERS: n.14. 9-10.

tion of nature, etc. (64)

The Commissioner executed quasi-judicial functions as well. For an example, the administration and distribution of a deceased Black estate. (65a)

The Commissioner was to become, in the light of the declared policy of the Department of Bantu Affairs and Development, 'the Father of the People'. (65b) The Commissioners' offices in conjunction with the Magistrates' Courts were to become the basis on which Bophuthatswana Lower Courts were to be founded. Thus Bophuthatswana Magistrates' Courts were to be saddled with more duties (judicial and otherwise) than their South African counterparts.

CONCLUSION

We have seen how the office of the magistrate originated and was shaped during the Roman times and the Roman-Dutch law era. It should be noted that throughout these periods the magistrate office had been controlled by either the monarch

or/.....

64. Departement van Bantoe Administrasie en Ontwikkeling Kode Inspeksie van Kommissies. The divergence of functions exercised by the 'Native Commissioner' (later Bantu Affairs Commissioner) is also evidenced by the multiplicity of proclamations ensued by the Department - vide B.A. 77 Proclamation and Government Notices: Department of Bantu Administration and Development.
- 65a. G.N.R. 34 of 7 January 1966. See generally for a discussion of this Legislation A J KERR: **The Customary Law of Immovable property and of Succession.** (Rhodes) 2nd 1976 222 et seq. See also Department of Co-operation and Development Code Estates 15 et seq for a discussion of the various procedures followed on distribution and administration of Deceased Estates.
- 65b. Department of Bantu administration and Development Code Commissioner 15 et seq.

or some politicians. For instance during the Romans times the praetor had served as a substitute for the consuls when they would be away on the battlefield. The praetor was appointed the consuls who were in fact politicians. During the Frankish Empire the bailiff or scout was the representative of a monarch although he was a magistrate. It will be shown later on, that through the ages up to our present time, the magistrate was to remain a civil servant, something which caused some dissatisfaction presently.

At the Cape Colony the office of the landdrost or magistracy was to be further developed. As it has been shown the college or the Board of Landdrost and Heemraden were assisted by some officials in the execution of their functions, namely the Field Cornetts, and are called "Waterwagters" and resident justice of peace. Later on this board together with its assistants were disestablished. What then followed was that the new office of the resident magistrate was to perform all the functions hitherto performed by the board of Landdrost and Heemraden together with their assistant officials. The resident magistrate was to perform all these functions alone. This was to be the position up until our present time. This, as it could be imagined, was to burden the magistrate with work, and dissatisfaction, as it will be shown later on, ensued.

Over and above, the resident magistrate had not only to administer justice according to common law, but also according

to/...

to customary law where the issue of custom was involved.^(65c)

This was to be the situation until our present time. What was perhaps overlooked, was the fact that the growth of population and relatively sudden rise of great urban centres increased the work of the Magistrates' Court beyond what the typical office of the praetor or the resident magistrate during the heyday of Cape of Good Hope as a half-way Station, was able to carry. The shift of rural agricultural to urban industrial society has called for an increasing development of administrative agencies, quasi-administrative functions and at this nuclear age, the need for law as a means to redress and balance the interest of individuals in the market place and the rate of crime has tremendously increased.^(65d) Will our present magistrate structure as inherited from the Cape Colony be able to cope with all these needs? Could there have been a solution to relieve a magistrate in the execution of his functions since the disestablishment of the college of Landdrost and Heemraden? During the heyday of the Union of South Africa the Commissioners' Courts, as we have seen, were established. However, the Commissioners' Courts were not here to stay.

As it shall be seen in the succeeding chapter, these courts were disestablished in Bophuthatswana. The structure of the Bophuthatswana Magistrates' Courts will be sketched to show how the functions which were performed by the Commissioner, were accommodated.

65c. Vide n. 57 supra.

65d. Vide Hoexter Commission Recommendations, Fifth and Final Report, RP 78/1983 Part II pp 275 - 276.

CHAPTER III

BOPHUTHATSWANA MAGISTRATES' COURTS:

ESTABLISHMENT AND STRUCTURE

I. INTRODUCTION

The Magistrates' Courts which were in existence on the sixteenth of December of 1977 (the date of coming into operation of the Bophuthatswana Constitution Act No. 18 of 1977) remained in existence and in operation in accordance with their existing constitution and jurisdiction until altered or disestablished in terms of an Act of the Bophuthatswana Parliament.⁽⁶⁶⁾

A brief excursion to 1971 when the territory of Bophuthatswana was declared self-governing, will help in showing exactly the nature of the Courts which were to be recognised by the Constitution.

2. ESTABLISHMENT OF COURTS AND JURISDICTION

THE BANTU HOMELANDS ACT 21 OF 1971 declared the present territory which was to have a quasi-Legislative body. In terms of section 14(1) of this Act the Magistrates' Courts which were established in terms of the Magistrates' Court Act 32 of 1944 in this territory were to remain in existence. This section reads as follows:

"-(1) Notwithstanding anything in this Act contained, every lawfully constituted court having jurisdiction to hear criminal or civil cases of whatever nature or scope or having power of review or of hearing appeals from inferior courts in any area for which a legislative assembly has been established, on the date on which the first executive council is constituted for such area, shall be and remain functioning in accordance with its existing constitution and jurisdiction until altered or disestablished by the authority having power to do so"..

On/.....

66. Section 93.

On the whole then Bophuthatswana was to inherit the concept of the office of Magistracy from the Republic of South Africa, as this concept was originated, developed and refined over the ages in history. (67)

The Commissioners' Courts were to form a component of Bophuthatswana Structure of Courts. This was in terms of Section 14(2) of the Act which reads as follows:

"The State President may by proclamation in the Gazette provide that any magistrate's court established in terms of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), or any Bantu affairs commissioner's court established in terms of the Bantu Administration Act, 1927 (Act No. 38 of 1927), in any portion of an area for which a legislative assembly has been established shall with effect from the date mentioned in such proclamation be transferred to the Government of the area concerned".

In 1973 the Bophuthatswana National Assembly enacted the Bophuthatswana Magistrates' Courts Act 10 of 1973. (68) In pursuance to the provisions of this Act, twelve magisterial districts were established. (69)

In addition to these twelve magisterial districts, two regional divisions were established (70) which were to be proportionally distributed over the twelve magisterial districts.

The /.....

67. Vide Chapter II.
68. The Legislative power was conferred on the Bophuthatswana National Assembly in 1971 in terms of section 30 (1) of The Bantu Homelands Act No. 21 of 1971.
69. Viz. Tlhaping-Tlharo (Mathibestad); Ganyesa (Ganyesa); Molopo (Mmabatho); Ditsobotla (Itsoseng); Taung (Taung); Lehurutse (Lehurutse); Mankwe (Mankwe); Bafokeng (Phokeng); Odi (Ga-Rankuwa); Moretele (Themba); Thaba 'Nchu (Selo-sesha); Madikwe (Madikwe) -
70. For the purpose of regional divisions, bophuthatswana districts are divided into two main areas, namely Bophuthatswana West comprising of Molopo; Lehurutse, Ditsobotla; Ganyesa; Taung and Thaba-Nchu districts; Bophuthatswana East comprising of Odi; Moretele; Bafokeng; Madikwe; Themba and Mankwe. Vide Leidraad vir Toegewese Blanke Personeel, Deel III, Inligting oor Bophuthatswana - Departement van Bantoe Administrasie en Ontwikkeling.

The Bophuthatswana Magistrates Courts Act 10 of 1973 disestablished the Bantu Commissioners' Courts. This was as the result of some purported 'amount of confusion which was brought about by two types of courts operating side by side, namely the Commissioners' Courts and the Magistrates' Courts.⁽⁷¹⁾

Now, in the result, the structure of the Bophuthatswana Magistrates' Courts was to be as follows: Each court was to be:⁽⁷²⁾

- (a) a Magistrates' Court to execute the provisions of the Magistrates' Courts Act 32 of 1944.
- (b) a Bantu Affairs Commissioners' Court. It was then to execute the provisions of the Bantu Administration Act No.38 of 1927.
- (c) a Childrens: Court in terms of the Childrens' Act 33 of 1960; and
- (d) a Maintenance Court to execute the provisions of the Maintenance Act No 23 of 1963.

This Magistrates' Court structure was then to differ remarkably from the South African Magistrates' Court structure which by then was not charged with the responsibility to administer justice according to the Bantu Administration Act. Save if such a court served as a Court of Appeal. This then indicates that the Courts in Bophuthatswana had more functions to perform being taxed with the functions which previously were administered by the Commissioners' Courts.

When/....

71. Vide Debates of the Bophuthatswana Legislative Assembly, Second Session Volume II, 22 March to 5 April, 1973 MONTSHIWA 449 Minute No. 110.

72. Vide n. 70.

When Bophuthatswana became independent and thus a sovereign state in 1977, the Courts' structure referred to above, was to be retained. This was in terms of Section 93 of the Constitution of Bophuthatswana.

This then meant that the Magistrates' Court Act No. 32 of 1944 and the Criminal Procedure Act No. 51 of 1977 as well as the Bantu Administration Act No. 38 of 1927 were to be applicable in Bophuthatswana in addition to some other Legislations. However, any Legislation which was to be in conflict with chapter two of the Constitution (i.e. the Declaration of the Rights of Man) was to be repealed.⁽⁷³⁾

In 1979 the Bophuthatswana National Assembly enacted the Bophuthatswana Traditional Courts Act No. 29 of 1979. This Act repealed Section 12 and 20 of Act No. 38 of 1927 but the whole of the Act remained intact.

The preamble to the Traditional Courts Act No. 29 of 1979 states that the objective of this Act is 'to provide for the conferment and assignment of jurisdiction to tribal and community authorities regarding the administration of justice'. The schedule to the Act enumerates a number of matters over which the tribal courts have no jurisdiction. These courts have an original and exclusive jurisdiction only with regard to the enlisted matters.⁽⁷⁴⁾

The establishment of these courts however, did not that much,
relieve/...

73. Section 7 of the Bophuthatswana Constitution Act No. 18 of 1977.

74. Sections 5(1) and 7 of the Bophuthatswana Traditional Courts Act 29 of 1979. See generally C PRETORIUS, *Traditional Courts in Bophuthatswana Symposium for Chiefs and Headmen, Mafikeng 1980* 1 sqq with regard to the various procedures followed in such courts.

relieve the magistrate of the various duties involved in the administration of justice, especially those administrative and quasi judicial duties which, prior to 1973, were performed by the Commissioners' Courts.⁽⁷⁵⁾ As far as such duties were concerned, the Magistrates office was a confirmation of the Commissioners' office.

In terms of Section 7 of Act 29 of 1979 the jurisdiction of the Traditional Courts in both civil and criminal matters is limited. Furthermore, certain matters which usually could be tried by any inferior Court of law may not be tried by a Traditional court. For instance, this Court may not try faction fighting, stock theft, extortion, perjury, child stealing, abortion, abduction, sodomy, bestiality, robbery, rape, public violence and seduction.⁽⁷⁶⁾ All these offences are tried by a Magistrates' Court. Moreover, even in the matters over which these courts have a jurisdiction, the Magistrate Court may hear and determine any appeal from these courts as if it was a court of first instance.⁽⁷⁷⁾ This constitutes an judicial additional duty on the shoulders of the magistrate.

CONCLUSION

In this chapter it has been seen how the Bophuthatswana
Magistrates' /...

75. Vide Departement van Bantoe-Administrasie en Ontwikkeling Kode Inspeksie van Bantoesakekommissariskantoor on files D2/6/1/1 reference No. 1/74; B.A. 77 Proclamation and Government Notices: Department of Co-operation and Development, 1 sqq.

76. Bophuthatswana Traditional Courts Act 29 of 1979, Schedule I.

77. Section 67 of the Bophuthatswana Constitution Act confers the court with the discretion to apply customary law in all the issues where proceedings involve tribal customs followed by persons in Bophuthatswana provided however that such tribal custom is not contrary to public policy or opposed to the principles of natural justice.

Magistrate Courts' structure is constituted. The difference between these courts and their South African counterpart lies in the fact that the functions which, prior to 1973, were executed by the Commissioners' Court, are now being executed by the Magistrates' Court. Before this transfer of duties from the Commissioners' Courts, there was already an outcry about the load of work of the magistrate which had caused some concern.⁽⁷⁸⁾ What then is the magnitude of concern when the Magistrates' Court also has to execute the functions of the disestablished court of the Commissioner? A positive answer to this question would show an appreciation of the plight of a magistrate in Bophuthatswana.

At this point it becomes highly ironical if one observes that a mere agrarian society of the Cape of Good Hope had a landdrost who was assisted by field cornets and some other officials in the proper administration of justice. How much more does the twentieth century magistrate need some aid from some officials in the administration of justice? The response to this question will be forthcoming having surveyed exactly the functions of the magistrate in Bophuthatswana in the succeeding chapter.

78. Vide LANSDOWN COMMISSION on the Penal and Prison Reform in South Africa, 1947 U.G. 47/47 p. . See also Part A of the HOEXTER COMMISSION RP 78/1983 @ p 258.

CHAPTER IV

APPOINTMENT OF MAGISTRATES

INTRODUCTION

In Bophuthatswana as in the Republic of South Africa, magistrates are officials of the Department of Justice. They are appointed by the Minister of Justice who is a politician. On this point it shows how the tradition which originated as far back as the Roman times, has been retained.⁽⁷⁹⁾ The District Magistrates are required to be in possession of at least the Public Service Law Diploma or an equivalent legal qualification.⁽⁸⁰⁾ Regional Magistrates must at least have passed an L.L.B. degree or Public Service Senior Law Examination or an equivalent examination.⁽⁸¹⁾ In 1984 there were two officers studying for L.L.B. degree, one for B. Proc.; 23 for B. Juris; two for Dip. Legum and 12 for Dip. Juris.⁽⁸²⁾

Provision is made for the establishment of Regional Division Appointment Advisory Board to determine from time to time the suitability of magistrates for appointment as presiding officers of the Regional divisions.⁽⁸³⁾

The service conditions of the Magistrates are determined and dictated by the Public Service. Magistrates are transferred without their consent like all public servants, and they could be dismissed by the Public Service.⁽⁸⁴⁾

The/...

79. Vide Chapter I.

80. Sections 9 (1)(a) and 10 of Act 32 of 1944.

81. Section 9 (1)(b) of the Act referred to above.

82. Department of Justice Annual Report for the 1984 Calander Year p 19.

83. Section 9(b) of Act 32 of 1944.

84. Section 18 of the Bophuthatswana Public Service Act 4 of 1972.

The Conditions of Service of Magistrates have perhaps not given credibility to their office. This point is observed by Sidney Kentridge⁽⁸⁵⁾ who states that the position of magistrates as public servants make them vulnerable to government pressures. He states for instance that it was revealed that for many years there has been in existence a departmental circular which urged the magistrates to be cautious and restrained in making adverse comments in their judgments about police witnesses. In short, Kentridge advocates that this will ensure the independence of the judiciary with regard to the Magistrate Court, which up to the present has been enjoyed by the Supreme Court for over a century, since 1827.

CONCLUSION

Having identified serious defects in the magistracy office which are also observed by Kentridge, the question is now - what could be done? A look at the Hoexter Commission Recommendations will give some idea. This will be discussed later on.

85. S. KENTRIDGE: "Telling the Truth About the Judiciary", 8 SALJ (1971) 654.

CHAPTER V

THE FUNCTIONS OF THE MAGISTRATE : JUDICIAL FUNCTIONS

1. JURISDICTION

The jurisdiction of the Bophuthatswana magistrates' court as far as the administration of justice is concerned, is the same as the jurisdiction of their South African counterparts. For instance in South Africa a magistrates' court have not jurisdiction to pronounce upon the validity of a proclamation of the State President.⁽⁸⁶⁾ A proclamation of the President of Bophuthatswana is excluded from the jurisdiction of a magistrates' court.⁽⁸⁷⁾

II. CIVIL JURISDICTION

The civil jurisdiction of this Court encompasses all persons who resides or carries on a business within its area of jurisdiction.⁽⁸⁸⁾

The monetary jurisdiction of this court is Three Thousand Rand (R3 000,00), for all the actions arising out of a liquid document or a mortgage bond.⁽⁸⁹⁾

Any claim or value based on a hire-purchase agreement may not exceed Four Thousand Rand (R4 000,00) and any other claim or the value of the matter in dispute, should not exceed One Thousand Five Hundred Rand (R1 500,00).⁽⁹⁰⁾

The magistrates' court are empowered to entertain any action
or/...

86. M WIECHERS: *Administrative Law* 1985 ed 269.

87. *Ibid.* With regard to a similar situation in the Republic of South Africa - see WIECHERS n. 86 at 269.

88. Section 28 (1) of Act 32 of 1944.

89. *Op cit.* S. 28 (1) (b).

90. Section 28 (1) (c).

or proceedings otherwise beyond their jurisdiction, if the parties consent in writing thereto.⁽⁹¹⁾

The magistrate has no jurisdiction in matters in which the validity or interpretation of a will or other testamentary document is in question, or the status of a person with regard to his mental capacity is involved, or in which a specific performance without alternative payment in terms of section 46 (1) (c) of the Magistrates' Court Act 32 of 1944,⁽⁹²⁾ or it is sought a decree of perpetual silence.

APPEALS IN CIVIL CASES

All appeals against any decision of a magistrates' court in civil proceedings, lie to the General Division of the Supreme Court. However, if before the hearing is commenced, the parties lodge in writing that the decision of the court shall be final, an appeal may not be noted.⁽⁹³⁾

111. CRIMINAL JURISDICTION

A magistrate tries all the offences committed within his area of jurisdiction. He may not however try an offence of treason, murder or rape.⁽⁹⁴⁾ The court of a regional division however, has jurisdiction over all offences except treason and murder.⁽⁹⁵⁾

The punitive jurisdiction of the magistrates' court is limited.

The/...

91. Section 45 of Act 32 of 1944.

92. As made applicable in Bophuthatswana in terms of section 93 of the Constitution Act 18 of 1977.

93. Section 82 of Act 32 of 1944.

94. Section 89 (1).

95. Section 89 (2).

The court may punish an offender by imposing an imprisonment sentence not exceeding a period of twelve months where a court is not a regional division.⁽⁹⁶⁾ A regional division on the other hand, may not impose an imprisonment period exceeding ten years.⁽⁹⁷⁾

A fine to be imposed by a magistrates' court other than a regional court, may not exceed One Thousand Rand (R1 000,00).⁽⁹⁸⁾

The regional division on the other hand may impose a fine not exceeding Ten Thousand Rand (R10 000,00).⁽⁹⁹⁾ A magistrate may impose corporeal punishment by a cane only.⁽¹⁰⁰⁾ In terms of section 92 of Act 32 of 1944 a magistrate's jurisdiction may exceed its prescribed jurisdiction in traffic offences. For instance, a magistrate may impose punishment where a person has been convicted of culpable homicide arising out of driving a vehicle in contravention of a traffic ordinance.⁽¹⁰¹⁾

IV. REVIEW OF CRIMINAL AND CIVIL CASES

In terms of section 60 of The Constitution Act 18 of 1977, the General Division of the Supreme Court has power to review the proceedings of all the lower courts. Both Civil and Criminal cases from the Magistrates' Court may be brought on/...

96. Section 92 (1)(a).

97. Section 92 (1)(b).

98. Ibid. Vide generally HIEMSTRA n. 102 infra, p 62.

99. Ibid. Vide generally HIEMSTRA n. 102 infra p 63.

100. Section 92 (1)(c).

101. Section 92 (1)(c) and (d).

on review in terms of section 6 (1) of the Bophuthatswana Supreme Court Act 32 of 1982.⁽¹⁰²⁾

As far as automatic review is concerned, Bophuthatswana's approach is different from the South African set-up.

Any sentence or suspended sentence which is put into operation by a magistrate who has not been a presiding officer for a period of seven years or longer, is subject to an automatic review.⁽¹⁰³⁾ In South Africa an automatic review in the circumstances similar to Bophuthatswana, is not applicable where a suspended sentence is put into operation.⁽¹⁰⁴⁾

APPELLATE AND REVIEW JURISDICTION WITH REGARD TO THE BOPHUTHATSWANA TRADITIONAL COURTS

All appeals from the traditional courts or their administrative deputies in both criminal and civil cases, lie to the magistrate of the district concerned.⁽¹⁰⁵⁾

At this point J C Bekker's observation is appropriate. He states that

"The nature and scope of a magistrates' court jurisdiction in appeals from courts of Chief's and Headmen have taken shape in judgments handed down by different Bantu Appeal Courts from time to time".⁽¹⁰⁶⁾

The effect of this observation in Bophuthatswana is that
only/...

102. For further discussion and information on this point see V G HIEMSTRA: Introduction to South African Criminal Procedure (1977) 156 et seq.

103. Section 20 of Act 20 of 1980 as amends section 302 of R.S.A. Criminal Procedure Act 51 of 1977.

104. Section 302 supra.

105. Section 9 of the Traditional Courts Act.

106. J C BEKKER: "Judicial System of Transkei" CILSA 1978 Vol. XI 33.

only Bantu Appeal Courts (BAC) decisions up to 1973 form a precedent system in that they are not merely persuasive but they are an authority for the magistrates' courts in entertaining the appeals from the traditional courts. Furthermore any Bantu Appeal Court decision will not be binding on Bophuthatswana courts if it goes against the spirit of the Constitution.⁽¹⁰⁷⁾

The principle that only judgment may be appealed against, applies in respect of the decisions of the traditional courts.⁽¹⁰⁸⁾ Any party to the proceedings cannot lose his right of appeal to the magistrates' court only by reason of having satisfied or offered or attempted to satisfy the judgment of the tribal court.⁽¹⁰⁹⁾

J C Bekker indicates how an appeal from the traditional court should be entertained. He states:⁽¹¹⁰⁾

"On appeal it cannot be tried as a case in the first instance on a new ground. In recording the evidence *de novo* the magistrate is required to proceed as if it were a case of first instance based on the claim preferred in the Chief's court. It is erroneous to convert the case into one based on an entirely new ground of action. The issue before the magistrates' court must be the same as that before the Chief's court, but that is not to say that the same claim as laid before the Chief's court cannot be adjudicated upon by the magistrates' court on grounds different from those on which the Chief founded his judgment".

A/...

107. *S v Marwane* 1981 (3) S.A. 588 (A). See also section 7 to the Constitution of Bophuthatswana, Act 18 of 1977.

108. Rule 26 (1) of the Rules relating to Tribal Courts; subordinate bodies and related bodies with judicial functions Bophuthatswana Government Gazette No. 17 of February 1982.

109. *Ibid.*

110. J C BEKKER, n. 106 34.

A magistrates court, in addition to being an appeal court, has a power to review judgment, proceedings or sentence of of the tribal court.

FUNCTIONS OTHER THAN JUDICIAL⁽¹¹¹⁾

In the foregoing paragraphs pure judicial functions of a magistrate were discussed. At this point the quasi-judicial and the administrative functions of a magistrate will be sketched.

QUASI-JUDICIAL FUNCTIONS⁽¹¹²⁾

The functions have some of the legal attributes denoted and connoted by the legal term but not all of them. For instance the ruling on the mootpoint, unlike in judicial proceedings, is resolved by an administrative action, the character of which is determined by the Minister's free choice. There is never a dispute on the question of law.⁽¹¹³⁾ The distribution and administration of estates can serve as example of such duties.^(113a)

ADMINISTRATIVE FUNCTIONS

In three regions, namely Moretele, Molopo and Odi, the magistrates no longer perform the functions of administrative nature save those functions which relates to staffing, such as keeping a roll, staff-leaves and some other similar petty work. All the administrative functions which in nature/...

111. Section 9 of the Traditional Courts Act 29 of 1979.

112. Vide Table C for the statistics on quasi-judicial functions as collected from the Molopo Magistrate Court and representing the Bophuthatswana Magistrate's Courts in urban areas.

113. Peri-urban Areas Health Board v Administrator TVL 1961 (3) S.A. 669 at 674.

113a. Supra discussed. Vide generally Kode Inspeksie van Kommissaris-kantoor n. 75.

nature relates to the Department of Internal Affairs have been transferred.

In the other nine (9) Magistrates district courts, the magistrates are still charged with the execution of the administrative functions.

CONCLUSION

Having surveyed the duties of the magistrate in general some questions may be posed.

1. Has the transfer of the administrative functions from the courts in the three regions relieved the Magistrate of the burden of administrative work?
2. If the answer could be positive then, is there a need that the remaining nine (9) regions should follow suit?
3. Is there a desire for a fully-fledged separation of duties in Bophuthatswana that ultimately the magistrate should be left with the judicial function only. If the answer may not be in the negative, then how could this desire be actualized and realized?

Before responding to any of these questions, statistical evidence is desirable and absolutely necessary.

This evidence is dealt with in the next chapter.

CHAPTER VI

1. INTRODUCTION

In this chapter the statistical evidence will be considered in determining how far the magistrate may or may not be said to be burdened with work. The statistics were collected from Molopo Magistrate district court which has its seat at Mmabatho, and from Ditsobotla Magistrate district court which seats at Itsoseng which is a rural area. For the purpose of this research project, Molopo Court represents the three Magistrates' courts where administrative agency functions, which on the 23rd August 1982, were transferred to the department of Interior. The Ditsobotla court represents the rest of nine (9) courts where the administrative agency is still being performed by a magistrate in addition to the judicial functions.

2. STATISTICS FROM MOLOPO AND DITSOBOTLA DISTRICT COURTS

1984 STATISTICS ON MOLOPO DISTRICT COURT FOR 1984 - FILE 2/1 OF 1984:

TABLE A

CRIMINAL MATTERS

Criminal cases withdrawn	3 238
Criminal cases finally disposed of	1 794
Time spent on criminal cases	3 034 Hrs
Admission of guilt	6 257
Time spent	450 Hrs
Suspended Sentence imposed	295
Suspended sentence put into operation	5



TABLE B./...

TABLE B

CIVIL MATTERS

Civil applications dealt with	56
Number of civil matters dealt with	8
Number of default judgment and judgment by consent	591
Number of civil cases recorded	1 973
Time spent on civil work	600 Hrs

TABLE C

QUASI-JUDICIAL (TIME SPENT ON)

Estate enquiries	116 Hrs
Maintenance enquiries	922 Hrs
Enquiries under public service Act	11 Hrs
Elections and registration of votes	30 Hrs
Matters relating to aliens	8 Hrs
Eviction by Town Managers	20 Hrs
Traditional authorities	2 Hrs
Confessions	123 Hrs
Bail	139 Hrs
Disputes and Complaints	55 Hrs
Mental patients	102 Hrs
Witnesses in Court	62 Hrs
Meetings	110 Hrs
Attesting of documents	39 Hrs
<u>Overtime worked</u>	<u>207 Hrs</u>

This office, since the separation of administrative functions, which relate to the departments of Internal Affairs, as was reflected in August 1982, does not do such functions any more. But is this office relieved of the burden of work as an exemplary Magistrate Court in an Urban Area? A look at statistical calculations will determine.

ITSOSENG/...

ITSOSENG MAGISTRATE COURT 1984 STATISTICS

TABLE D

CRIMINAL MATTERS (MAIN COURT)

Cases with evidence	1 434
Cases without evidence	1 539
Number of recorded cases	2 376
Time spent	791 Hrs

TABLE E

PERIODIC COURT AT ATAMELANG ON CRIMINAL MATTERS

Cases with evidence	738
Cases without evidence	723
Number of cases recorded	784
Number of cases recorded	84
Time spent	160 Hrs

TABLE F

CIVIL MATTERS

Number of civil applications	398
Number of civil trials	1
Number of Judgment and judgment by consent	390
Number of civil cases recorded	456
Time spent	140 Hrs

TABLE G

QUASI-JUDICIAL FUNCTIONS (TIME SPENT)

Number of inquests dealt with	79 Hrs
Time spent	59 Hrs
Number of Childrens' Court enquiries	8 Hrs
Number of adopted children dealt with	1 Hr
Estate enquiries	18 Hrs

Election/...

Table G Continues/....

Election and registration of Voters	70 Hrs
Matters relating to Aliens	453 Hrs
Cases relating to eviction by Township Managers	32 Hrs
Traditional authorities	350 Hrs
Confessions	4 Hrs
Disputes and Complaints	50 Hrs
Mental patients	25 Hrs
Administrative functions	25 Hrs
Attesting of documents	445 Hrs
Overtime spent on quasi-judicial functions	36 Hrs

TABLE H

PURE ADMINISTRATIVE FUNCTIONS

Number of births reported	1 704
Number of deaths registered	679
Number of citizenship certificates issued	158
Number of passports and travel documents issued	5 119
Number of endorsements and travel documents issued	973

NOTE: Time spent on administrative functions are included in the hours spent on quasi-judicial. It must also be noted that the time spent on these functions cannot be calculated with much precision, because they are done before or after court. It is easy to determine

Some arithmetic calculations will afford us a probable estimation in understanding how far a magistrate may be said to be burdened with work in Bophuthatswana.

CALCULATIONS

The working days of a Magistrate per year may be represented in this formula:

$$(a) \quad a - (b + c + d) = e$$

a = 365 days in a year

b = Saturdays in a year

c =/...

Calculations Continues/....

- c = Sundays in a year
- d = 9 Public holidays in a year
- e = Court days in a year

This formula variables comes to:

$$365 - (52 + 52 + 9) = 252 \quad \text{court days per year.}$$

- (b) We have 252 court days per year.
- (c) Having determined the court days per year, we continue to do some calculations in an attempt to determine the probable time spend by each magistrate on some work on the following basis:
 - (i) per year
 - (ii) average work per day.
- (d) At the maximum, a Magistrate spends five (5) hours on the bench daily.
- (e) Calculations on the Judicial Functions of a Magistrate at Molopo where there are 3 Magistrates:

- (i) Time spent on Criminal cases 3 304 Hrs
- (ii) Time spent on Civil cases 600 Hrs
- (iii) On the average each Magistrate spends 1860 Hours per annum
- (iv) Each Magistrate spends 7 Hours 04 Minutes on the maximum average per day. (It should be remembered that at this court Magistrates spend 5 Hours on the bench a day).
- (v) Then the overtime on average per day per Magistrate, comes to 2 Hours and 2 Minutes.

(f) Calculations of Quasi-Judicial Functions At Molopo:

- Hours spend on all quasi-judicial matters 1 946 Hrs p.a.
- (i) Each Magistrate spends 648 Hours p.a. on quasi-judicial functions.
- (ii) Each Magistrate spends an average 2 Hours 51 Mimutes per day on quasi-judicial functions.
- (iii) As per 1984 Statistics, Magistrates spent 270 Hours overtime in 1984 alone on quasi-judicial functions.
- (iv) Now on a 7-hour working period, it would therefore show that if a Magistrate spends the maximum of 5 hours on the bench per day,

plus/...

plus 7 hours per day on the bench in only a 7-hour working period per day, there is theoretically overtime of 5 hours per day spend on quasi-judicial functions only.

(g) Calculations on the Judicial Functions at Ditsobotla Magistrate Court where there are only two (2) Magistrates:

- (i) Time spent by both Magistrates on Criminal cases 3 891 Hrs p.a.
- (ii) This means that each Magistrate presided over 1 945 Hrs p.a.
- (iii) On the average then each Magistrate spent 7 Hours 75 Minutes per day.

It must be remembered that Magistrates on the maximum, spend 5 Hours only on the bench per day. It could then be said that the time referred to at (iii) indicates that the Magistrate works an overtime of probably 2 Hours 75 Minutes per day on Criminal cases.

- (iv) Time spent on Civil trials 140 Hrs p.a.
- (v) Therefore each Magistrate spends 70 Hours p.a. in 6 335 civil cases.
- (vi) Due to some infrequency of civil trials at this court, an average time and cases heard by each magistrate per day, may give an absolutely distorted statistical figure. However, the Senior Magistrate pointed out that a time limit of 2,50 Hours on the average is spent on civil trials.

(h) Calculations on Quasi-Judicial and Administrative Functions at the Ditsobotla Magistrate Court:

- (i) This court dealt with 53 416 quasi-judicial matters and 8 633 pure administrative functions and 1 896 Hours were spent thereon in 1984.
- (ii) This means that each Magistrate spent 948 Hours on 31 021.5 matters on both quasi-judicial and administrative matters.
- (iii) Each Magistrate spends 3 Hours 7 Minutes on more or less 212 quasi-judicial matters. It must be borne in mind that an overtime of 36 Hours p.a. were noted in 1984.

(iv)/...

- (iv) As far as administrative functions are concerned, 34.3 cases were handled per magistrate for probably not less than 3 Hours per day.

What is striking about this court on the basis of probably evidence by statistics, is that the Ditsobotla Magistrates' Court spends more time on quasi-judicial functions than on the 9994 pure judicial cases. On about 62 043 administrative functions, a magistrate at this court spends 3 hours of 7 duty hours a day (please note an overtime of 360 hours p.a. which are noted at (iii) above). It seems then that if 3 hours are taken away from 7 hours, only 4 hours are spend on bench work and some minor clerical office work.

Magistrate court time is spent travelling to Atamelang for a Periodic Court and also for attending some tribal authorities' meetings.

The 1961 Southern Rhodesian Report on the Administration of Justice, having directed itself to this similar plight of a Magistrate outlined above, had recommended that a magistrate should only spend 90 hours a month on the bench. This comes to a maximum of 3 hours per day.

The onerous task of a Magistrate was observed as far back as 1940 by the Lansdown Commission:⁽¹¹⁶⁾ This is what the Commission had to say:

"Met verloop van tyd het die steeds toenemende pligte van die magistraat hom agter sy lessenaar vasgepen en sy vryheid om onder die mense van sy distrik rond te gaan, beperk".

It/...

116. Report of the Commission appointed to inquire into and report on Administrative and Judicial Functions in Native Affairs and Districts Courts. Dept. C.S.R. 22 - 1961 p. 38.

It must be remembered that a magistrate is not confined to sitting on the bench only. He requires time to consider his judgments and in defended cases he is expected to do more than merely record a verdict of guilty; and reasons must be given for the judgment. If an appeal is noted, he must prepare written reasons. Precedents have to be considered, some clerical works, such as signing warrants of committal to prison is necessary, and he must keep abreast of the law by reading the latest law reports and annotating statutes. This is the position of a magistrate at both Molopo and Ditsobotla District Courts and in all Magistrates' Courts in Bophuthatswana.

Has Molopo, where the administrative functions are now being done by the Department of Justice, not been burdened with work? Evaluation on the basis of statistics on this point, will help.

It has been shown at (e)(iv) that a magistrate at this court works 2 hours 2 minutes on estimation per day and 270 hours have been recorded as overtime on quasi-judicial functions. Now this goes to show that not even at the court where there is a transfer of some duties, there is a relief.

CONCLUSION:

We have seen how the two types of courts which were contrasted, namely Molopo and Ditsobotla Magistrates' Courts are in the same position as far as the burden occasioned by the administration of justice, is concerned.

The evidence given by means of statistics indicating the
burden/...

burden of a Magistrate should not be regarded as an exact indication of the volume of the work that a magistrate performs at various levels or time. For instance a simple criminal trial may be disposed of within a space of a few minutes. But it happens that a complicated criminal case involving several accused, keeps a single Magistrate Court busy for months. It should also be noted that some of the time a magistrate spends in the administrative and clerical work cannot be noted with any amount of precision. For instance, signing of a Maintenance Order may take him a few minutes. He also needs to spend time with the Inspector on his periodical visits to explain this or that concerning his court. Time spend on these occasions is usually not noted, although a Magistrate is usually highly involved.

How then can the courts in general in Bophuthatswana be relieved of this burden? The **Hoexter Commission** recommendations at this point are highly relevant and appropriate. In the succeeding chapter a glance at this Commission's report is crucial.

CHAPTER VII

INTRODUCTION

Before we embark on the recommendations of the Hoexter Commission, the quotation extracted from Roscoe⁽¹¹⁸⁾ Pound is crucial and very relevant. Pound states that:

"Legal Institutions are not made of whole cloth. They are fashioned by adeptation and limitation of institutions and familiar to those who make constitutions and draft legislations. Nor do they grow to a local pattern. But after they have been set up to different patterns or have grown up to no pattern, there comes a time when systematic confusion brings about friction and waste and men set them to bring institutions into order of reason".

Does the effect of this quotation not relate directly to Bophuthatswana? Has time not already arrived that the Magistrates' Court should sever ties with the distant history which is accountable for their unsatisfactory structure and functions? If the response to these questions should not be in the negative, then how is the satisfactory results to be realized and achieved? The following recommendations from the Hoexter Commission are important:

SEPARATION OF FUNCTIONS

The Commission recommends that the Magistrates' Court should be divorced from the administrative functions as soon as possible.⁽¹¹⁹⁾ The government is charged with the responsibility to decide how this separation is to be effected.⁽¹²⁰⁾

It/...

118. ROSCOE POUND: *Organisation of Courts* - 1979 ed 1.

119. Fifth and Final report of The Hoexter Commission RP 78/1983 Volume I Part 11. 329.

120. *Ibid.*

It is recommended that all the administrative functions must be performed by a resident magistrate.⁽¹²¹⁾ The latter is defined as an officer who would be in charge of a magistrates' office in every magisterial district and whose functions would be mainly of administrative nature.⁽¹²²⁾

In addition to the performance of pure administrative functions, the commission recommends that the resident magistrate must perform certain circumscribed judicial functions which are of criminal nature. These functions are the following. The magistrate may:

1. not impose a fine exceeding the amount permissible in respect of admission of guilt.⁽¹²³⁾
2. He will be charged with a limited jurisdiction to postpone criminal cases, fix bail in an unopposed bail application, but only cases in which an alleged offence is not enlisted in Part II or III of the second Schedule to the Criminal Procedure Act No. 51 of 1977.⁽¹²⁴⁾
3. He may confirm admissions of guilt and may hear petty criminal cases.⁽¹²⁵⁾

By the common title of a magistrate, a magistrate will be charged with the judicial functions only according to the following rank:⁽¹²⁶⁾

1./...

121. Op cit. 328.

122. Ibid.

123. P. 44 PART II

124. Ibid

125. P. 43 PART II

126. P. 44 PART II.

1. there is to be a District Magistrate who will be a person solely acting as a judicial officer in the district;
2. a Chief Magistrate who will be in charge of a number of District Magistrates;
3. a Regional Magistrate who will act solely as a judicial officer in regional court;
4. a Chief Regional Magistrate who will be in charge of regional divisions (at present known as Regional Court President).

INDEPENDENCE OF THE JUDICIARY

It has been seen above how a dissatisfaction was voiced by a leading South African lawyer on the lack of judiciary independence by the Magistrates' Courts.

The commission recommends that the independence of the judiciary must be secured by statute.⁽¹²⁷⁾ The Commission further states that the absence of the independence of the Magistrates' Court is manifestly clear from the following few points:⁽¹²⁸⁾

1. The Magistrates as public servants are transferred without their consent, and on the dislocation and financial hardships this entail the office concerned. On this point the Commission states that a Magistrate may be manipulated through such transfer and thus this will detract the image of independent and efficient administration of justice.⁽¹²⁹⁾

127. Op cit. 42

128. Op cit. 74.

129. P. 75 of PART II.

2. Like all public servants, Magistrates are liable to a possible departmental inquiry by the executive and to being found guilty of "misconduct". The latter are defined in terms of section 17 of the Public Service Act No. 54 of 1957 and the "misconduct" among other things, includes disobeying a lawful order given by a person having authority to give it. A finding of guilty of "misconduct" by the executive, may lead to discharge.

This section corresponds substantially to section 18 of the Bophuthatswana Public Service Commission Act No. 4 of 1972.⁽¹³⁰⁾

The Commission asserts that 'the absolute prerequisite for independence and manifestly unbiased administration of justice is the independence of judicial office.'⁽¹³¹⁾

The Commission further recommends that the following statutory safeguards for the independence of the Magistrates' Court are necessary:

1. Security of tenure and remuneration;
2. Protection against transfer;
3. qualified immunity from liability; and
4. punishment of contempt of court.

In 1941 the Lansdown Commission had hinted briefly to the need that the magistrate's load of work must be seriously considered for this officer was burdened with work.⁽¹³²⁾ This

recommendation/...

130. P. 93 PART III of the Report.

131. This corresponds with Kentridge suggestion.

132. Vide n. supra.

recommendation was not heeded however.

In Southern Rhodesia a Commission was appointed with reference to, amongst other things, the need for separation of judicial functions from administrative duties. This was in 1961. Just like the Hoexter Commission this Commission had made a sincere appeal for an immediate separation of functions. The Memorandum that was prepared by the Magistrates' Association⁽¹³³⁾ was presented to this Commission and the need for the independence of the judiciary as far as the Magistrates' Courts are concerned was noted.

The reason for the independence of the Magistrates' Court was vouched for in the same language and manner as in the Hoexter Commission.

CONCLUSION

In Southern Africa every country that inherited the office of the Magistracy from the Cape Colony, has seriously considered the separation of duties and the need that the Magistrate Court should enjoy the status of the independence of the judiciary. And of course two Southern countries, namely South African and the then Southern Rhodesia, appointed/.....

133. Vide. Southern Rhodesia Memorandum. Prepared by the Magistrates' Association. Item No. 1/4/1961. Pp. 2 - 3. Reference is made to this Commission because the then Southern Rhodesia and South Africa have both inherited the office of Magistracy from the Cape of Good Hope where a Magistrate had to perform both judicial and administrative functions.

appointed the Commissions to this very end as we have seen. Should Bophuthatswana, which in turn has inherited the office of Magistracy as we have seen in the proceeding chapter, not consider the same?

GENERAL MAIN CONCLUSION

The origin and the development of the Bophuthatswana magistrates' office has been discussed. It has been shown how these courts were expected to carry out both judicial and administrative functions.

In the Cape Colony the Board of Landdrost and Heemraden were assisted by field courts and some other officials in the administration of both judicial and administrative functions. As the result of the recommendations of the Bigge and Colebrook Commission in 1823 which were contained in the first and second charters of justice the Board of Landdrost and Heemraden was abolished. The resident magistrate replaced this Board. This official was to perform both judicial and administrative functions.

After the annexation of the Native territories by the Britons the administration of justice according to native law and custom that was executed by the chiefs and headmen, was to be executed by the resident magistrate.

The Bantu Administration Act 38 of 1927 established the Bantu Commissioners' courts who henceforth were charged with the responsibility to administer justice to native people according to native law and custom and these commissioners were to perform the quasi-judicial and the administrative functions as discussed above. Thus the resident magistrate was to administer justice according to common law only.

Bophuthatswana inherited from the Republic of South Africa the magistracy office.

However, the Commissioners' courts were disestablished. This was to structurize the magistrates' court differently from their South African counterparts. The magistrate in Bophuthatswana in addition to the execution of functions of its South African counterparts had also to perform the functions that were performed by the defunct office of the commissioners' court.

It should be remembered that as far back as 1941 the Landsdown Commission had recommended the separation of the judicial function from the administrative duties which were performed by a magistrate. This shows the concern that was expressed about the dichotomy of the function of a magistrate. Now with the need to relieve the load of a magistrate, a magistrate in Bophuthatswana was further burdened with another dimension of work, namely to perform the functions of the disestablished Commissioners' court.

In 1983 as we have seen the Hoexter Commission recommended the separation of duties for the South African magistrates' court even where the commissioners' courts were still in existence. If this was recommended for South Africa what more about Bophuthatswana where a magistrate performs the functions of the defunct commissioners' court in addition to the duties similar to those of his South African counterpart?

Having invoked the evidence by means of statistics in the discussion an attempt was made to clearly show how it may be said that magistrates'



are overburdened with work in Bophuthatswana.

So if the Hoexter Commission recommendations should be relevant for South African Magistrates' Courts what more about Bophuthatswana Magistrates' court? To respond to this question in negative will surely be to lack the sense of appreciation of the dilemma in which a magistrate finds himself in Bophuthatswana.

The lack of the independence of the judiciary by the magistrates' court has caused some concern. As far back as 1823 the Supreme Court was clothed with this concept and the magistrates' court was excluded. The implications of the absence of this concept at the magistrates' court has been discussed. As shown by the Hoexter Commission this concept forms the cornerstone of the proper administration of justice. In Bophuthatswana where a rule of law is upheld and espoused the need for the independence of the judiciary as far as the magistrates' courts are concerned cannot be over emphasised.

Some concern has been expressed that to implement the Hoexter Commission recommendations in Bophuthatswana along the lines indicated above will be costly. But how does one weigh this concern against the need of our magistrates' in dispensing justice? A primary concern of every state should be the administration of justice of unchallengeable quality. Economic concern in carrying out the recommendations of the Hoexter Commission, placing magistrates' courts in Bophuthatswana on the same par with its Southern African counterpart, should take second place to the overriding principle of proper justice.