Reporting the Courts

Netherlands institute for Southern Africa

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Reporting the Courts

A handbook for South African journalists

Kevin Ritchie
edited by Gwen Ansell

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FOREWORD

Our courts have often emphasised that it is not enough that justice be done; justice must also be seen to be done. While the responsibility to ensure that justice is done is borne by the courts, it is the media that depicts the course of justice in the public mind and thus has the power to determine whether justice is seen to be done. Judges and magistrates have little power outside of the courtroom to explain or defend their positions and are uniquely reliant on journalists to convey their decisions to the broader population.

With this power comes responsibility, not to the courts, but to the public and to our young nation as a whole to report on the work of the courts accurately and fairly but not uncritically. It is vital for the proper administration of justice that the public is correctly informed about what the courts do. While court orders must be respected, it is equally important for a healthy public discourse that the judiciary is not left unquestioned on the decisions they make. It is vital that journalists should feel free to question the decisions of judicial officers when it is necessary to do so. However, that criticism must always be founded on a full understanding of the law and a proper appreciation of the motivation for and the consequences of the decision. Without this basic knowledge, criticisms will be unconstructive and misleading and will ultimately

serve neither the courts, nor the public or the media.

The work of the media is not limited to reporting and criticising court decisions. Perhaps the greater challenge for the media is to educate people about their rights and how to enforce them. Information can be a powerful tool in building a more just society that is founded on and fosters our constitutional ideals of freedom, dignity and equality. Armed with this knowledge, our people will be in a much stronger position to take action to improve the standard of living for all South Africans.

This handbook is a welcome and timely innovation to help journalists enhance the quality of their reporting and to improve the often antagonistic relationship between the media and the courts. It is a windfall too for the courts as improved reporting can only serve to provide a fairer picture of their work and another forum through which they can assess their effectiveness. Ultimately it should be the goal of both journalists and judges to work together in the pursuit of justice and the constitutional dream of an open and democratic society where South Africa belongs to all who live in it. This book is a small step in that long journey.

Pius Langa
Chief Justice of South Africa

CHAPTER 1:
THE SOUTH AFRICAN LEGAL SYSTEM

This chapter looks at the following issues:

- What are laws?
- Where does the South African legal system come from?
- How are laws made?
- The main differences between civil and criminal law.

Introduction: what are laws and why do they exist?

Laws are rules made and enforced by the State to regulate the behaviour of people in society. They describe a person's rights and duties: what you must do, what you may do, what you may not do and what others – individuals and institutions, including the agencies of the State itself – may not do to you.

Laws are meant to create order in society, prevent confusion, enforce duties and protect rights. Crime is defined as not obeying ('breaking') the law. Criminals suffer penalties for breaking the law. Penalties can range from paying a fine or being made to do something (such as community service or attending a rehabilitation

programme) to serving a term in jail. These measures are designed to punish the offenders and to forestall informal mob justice but also to ensure that offenders do not break the law again. Detecting and punishing crime effectively and fairly discourages all society's members from law-breaking. A society that has fair rules and applies them consistently and fairly is said to be 'governed by the rule of law'.

Sometimes individuals or communities feel it is unfair that they have to obey a law that does not accord with their personal beliefs or community traditions. But South Africa is a democracy: a state that tries to serve the interests of all its people.

For democracy to work, people may have to be prepared to trade off some aspects of their individual or small group rights to give government the power to establish order for the whole national community.

For example, tradition may allow people to build a dwelling anywhere on community land that they want, provided the elders agree. But this kind of building may block, or contaminate a river that flows through that community, and whose water is needed by people outside the community. So the national law says that building has to go through a much broader decision-making process before it is allowed, so that these broader rights are also protected.

South Africa is a representative democracy. Every adult citizen is entitled to vote for representatives. By

voting, South Africans give these representatives the power to decide what laws should be made and how order and rights can be safeguarded for the whole country (policy). If people do not like these decisions, they can vote for someone with different policies at the next election.

The courts are not political, and do not decide on policy. It is the job of the courts to decide whether existing laws have been broken, and, taking into account both the law and the circumstances of a case, to decide on the most suitable penalty.

1.1 Where does our legal system come from?

South Africa has a rich legal history, including the law-making of traditional African societies, of the colonial and Commonwealth authorities, of the apartheid regime and, since 1994, of our new democracy. Our law reflects all these.

Different eras have contributed different sections, aspects and interpretations. Our legal system is drawn mainly from four distinct sources: Roman-Dutch and English law; common and customary law; statute and precedent.

The law is a continually developing system of rules. Reporters need to understand its history so they can put into context the legal changes and debates that are going on today, and make them understandable to readers.

1.1.1 Roman-Dutch and English law

Roman-Dutch law is the title we give to the modern system derived from laws developed by the Roman Empire, and completed in 534 AD. After the Roman Empire broke up, these laws fell into disuse in Europe, but were taken up again by Dutch jurists in the 1500s. Holland was developing as a major trading and colonising power, and needed a legal system that could handle complex trading and business cases. Over the next 200 years a system combining elements of existing Dutch law and the old Roman codes developed: Roman-Dutch law. When Jan van Riebeeck landed at the Cape of Good Hope in 1652 to colonise the Cape for the Dutch East India Company, he brought the Roman-Dutch legal system with him.

When Britain took over the colony in 1806, the Roman-Dutch legal principles were kept, but gradually court procedure was adapted to the requirements of English law. By 1827, courts had been established throughout the colony, using English procedures for how evidence was presented and dealt with in civil and criminal trials.

By the nineteenth century, England was the world's leading merchant and colonial power, and so English law also gave the legal system more advanced definitions and procedures for mercantile (business) law, company law, insurance and maritime law (the law around shipping and the seas).

1.1.2 Common and customary law

Common law in South Africa is largely derived from the common law brought by British settlers. We call the laws made by a parliament 'statutory law'. whereas common law derives from a 'common sense' community understanding of right and wrong. That is how the English common law began. It was written down and further developed and formalised over many centuries by the decisions (precedents) of judges in the courts in England, and was one of the sources of statutory English law. In this country, judges' decisions developed it further. The law around crimes like murder, rape, theft and treason is grounded in common law, and common law is consulted to guide judgments when there are gaps or a lack of clarity in statutory law.

Customary law is the term used for the common law developed by South Africa's many traditional communities. Unfortunately, that law was often recorded by missionaries or colonisers who consulted their own selection of elders and interpreted and formalised what they were told in accordance with their own social understanding – or what they wanted the situation to be. Then they very often pressured local leaders into following these interpretations. This happened over hundreds of years. So it is very hard to trace the customary law that is applied today back to the 'real' customs of pre-colonial South African kingdoms: much of that knowledge has not been preserved. Under

South Africa's new constitution, limited recognition has been granted to certain aspects of customary law, particularly as it relates to family, marriage, inheritance and chieftainship issues. Customary law is in the process of being made more consistent with the Constitution and in particular with the values underlying the Bill of Rights.

1.1.3 Statute

This is the law made by Parliament, and must be in the spirit of the Constitution and Bill of Rights: the country's founding documents. The Constitutional Court can declare invalid any law that goes against the letter or the spirit of the Constitution.

Because of South Africa's history, and the passing of a new constitution in 1996, we have side by side in our law books statutes that come from two very different constitutional frameworks. Apartheid, and before it colonial, law was designed to enforce racial separation, treated communities unequally and had many provisions that placed secrecy, order and the security of a minority before human rights.

The 1996 Constitution and its accompanying Bill of Rights declared three key values – human dignity, equality and freedom – to be the foundation of official practice, law-making and legal interpretation, and gave citizens new freedoms and rights. So while all legal systems are works in progress, in South Africa today

the courts face a huge challenge of – where possible – bringing old laws in line with new principles through their interpretations and rulings (precedents – *see 1.1.4 page 17*).

One big difference is the framework the new constitution creates for the media. Freedom of expression and information are guaranteed by the Constitution, and this has begun to be reflected in precedent judgments about the role and rights of the press: what information reporters can access and what can be published. This process is still going on; it is certainly not complete nor perfect. But the media do have increasing freedom to examine and comment on what those in high office do – and that includes matters relating to the law and the courts. This book provides information and guidance on these freedoms – and their limits – in the relevant sections.

Laws are initially proposed as documents called **bills**. They go through a process of discussion in Parliament and in specialist committees, and public comment is invited. When they have been hammered into a form that all parliamentary role-players can agree to, the President signs them. At this point they become **acts**, and are published in the *Government Gazette*. Sometimes

acts give the relevant minister power to make **regulations**: detailed practical instructions about how the act is to be interpreted and carried out. Provinces, towns and cities are also allowed to make local laws which apply only within the area they govern. These laws are called **ordinances** for provinces, and **by-laws** for towns and cities.

1.1.4 Precedent

Courts play a major role in developing law by deciding on legal issues. Our courts follow what is known as the doctrine of precedent. A precedent is a decision taken by a court at an earlier date on a similar case or point of interpretation. All later cases must take this earlier decision into account in decision-making.

Lawyers can, however, make arguments that the current case is not sufficiently similar to the previous case for the precedent to apply. This is how legal definitions are refined over time. If you have ever wondered what is in those heavy shopping-trolleys that lawyers wheel into court, it is mainly the law books and records detailing precedents!

There is a hierarchy of courts in South Africa (*see Chapter 2*). The decisions of higher courts bind lower courts. So a decision by the Supreme Court of Appeal in Bloemfontein binds all other courts in the country. A judgment by a High Court in a particular provincial division binds all lower courts in that division, including

itself. Courts in other provincial divisions, however, will take that High Court decision into account, but are not bound by it.

Where the decision relates to the legal implications of a clause of the Constitution or Bill of Rights, the decision of the Constitutional Court in Johannesburg binds all other courts in the country.

1.2 Making and changing laws

Laws are made by Parliament to deal with new social circumstances, technological developments, new policy thinking or other things that existing laws do not cover. Sometimes this is done through an **amendment** (change) act which amends an existing law to introduce the new considerations. Sometimes a completely new law has to be made – for example, the 2005 Protection of Constitutional Democracy against Terrorist and Related Activities Act, to give South African law additional powers to deal with crimes that involve terrorist activity.

1.2.1 The South African Law Reform Commission (SALRC)

This is the key body involved in changing the law. Its role is advisory, but its opinions are always consulted and normally respected by law-makers. Established by law in 1973 as the South African Law Commission, the commission is a body of eight senior judges, advocates,

attorneys and academics chaired by a Constitutional Court, Supreme Court of Appeal (SCA) or High Court judge. A working committee from among these commissioners, and sometimes project committees of experts, carries out the SALRC's work. A secretariat of Department of Justice employees – both state law advisers (*see 3.8*) and clerical and administrative staff – does the administrative work.

The SALRC is tasked with:

- Repealing unnecessary or obsolete (out of date) laws;
- Removing anomalies (provisions that contradict one another or are out of place with the rest of a law);
- Bringing about uniformity in South African law all over the country;
- Codifying and consolidating the law (bringing all laws dealing with a particular issue together); and
- Making justice more accessible.

Law reform proposals may come from ministries, parliamentarians, civil society or even individual private citizens. The commission itself can also initiate law reform proposals. Proposals are studied to see if they have substance and are within the SALRC's powers. If accepted, the commission then seeks permission from the Minister for Justice and Constitutional Development to include a proposal in its programme,

and decides how urgently the work must be done. It then plans research on the proposal, setting up a project committee if it requires specialist expert input.

As soon as some preliminary research has been done, an **issue paper** is published on the commission's website and announced in the media, and public comment is invited.

Once public input is received and research completed, a **discussion paper** setting out the problem, the options, the legal context and the proposed draft bill is made available for comment. Sometimes the commission also organises workshops and seminars around the country.

Once this process is complete, the final **report** has to be approved by the full commission and then goes to the justice minister. If accepted, the draft bill then goes through the parliamentary process described in section 1.1.3.

1.3 Civil and criminal law

The main division in South African law is between criminal and civil law. This division reflects differences in how crimes are defined, what procedure the courts follow, how proof of a crime is determined, and the kinds of penalties imposed.

These are detailed in Chapter 4 (Criminal Procedure) and Chapter 5 (Civil Procedure). This section sets out the broad principles.

1.3.1 Criminal law

Criminal law deals with wrongdoing against the rules made by society to maintain order. Rape, murder, assault, trespass and theft are dealt with by the criminal law, because while the victim may be an individual, the criminal has disturbed society's order. The immediate purpose of the prosecution is to impose punishment for this disturbance, rather than to offer redress to the injured party. This is the first main difference between criminal and civil law. It may be an individual (called the complainant) who lays the charge at the police station, but it is the State that prosecutes the accused person. A criminal charge can be brought against anyone who breaks the law; it is both a constitutional and a common law principle that no one is above the law, including members of the police service and court officers. The correct terminology is that the person who has allegedly committed a crime is 'a suspect' until he is charged, then he is 'the accused' and, if convicted, 'a criminal' (robber, hijacker, rapist etc.).

Burden of proof

Before an accused person can be convicted (found guilty), the case against him must be proved 'beyond reasonable doubt'. This is the second main difference between criminal and civil law. It means there must be proof that the crime has

occurred and that the person accused committed it. The 'beyond reasonable doubt' part does not mean 'without any doubt whatsoever'. It means that what the legal system considers a 'reasonable person' would have no further doubts. (In England, a 'reasonable person' used to be defined by judges as 'the man on the London bus' – which illustrates the pitfalls of such definitions!)

(Note: In criminal cases the accused is said to be 'innocent until proven guilty'. But this does not necessarily mean he or she is innocent. It is merely a legal description of **how the court is supposed to treat the person** until the case is proved.)

1.3.2 Civil law

Civil law concerns private relationships between individual members of society. It deals with issues such as marriage and divorce, business deals, rent, damage to property or neglect of duties resulting in harm to somebody or something. Unlike in criminal cases, the State is not normally involved in such disputes as a party, but its services are called upon as an arbiter and interpreter of the law relating to the dispute. (The only time the State can be a party in such disputes is when, for example, government property is damaged, or it is an official body's carelessness that has caused the harm.)

Civil cases often arise out of contracts (voluntary

agreements between two parties to perform certain actions which then give rise to rights and obligations). For example, when someone decides to buy something, the buyer must hand over the money and the seller must hand over the item. Both the failure of the buyer to pay and the failure of the seller to provide an item of the promised standard could lead to a civil action.

The same facts that give rise to a criminal case may also give rise to a civil action, as when an assaulted person sues for compensation for injuries suffered.

The correct terminology is the person who feels they have been wronged is known as 'the plaintiff' and the party sued as 'the defendant'. The case can be heard by either a magistrate or a judge.

Burden of proof

In a civil case, the plaintiff normally needs only to prove the claim on a 'balance of probabilities' (that their case is probably truer than the defendant's case). But sometimes, such as in claims for monies owed, it is up to the defendant to disprove the plaintiff's claim. So the 'innocent until proven guilty' legal assumption is not universal in civil cases. And as in criminal law, civil law needs both the wrongful act and the negligence of the defendant to be proved for the

success of an action. These factors are critical in determining the blame of the defendant and the amount of compensation or damages to be awarded.

1.4 Reporting tips

- Be clear about which laws someone is accused of breaking and whether you are covering a civil or a criminal case.
- In a civil case be clear about who is bringing the case and why.
- Where a case is based on laws that pre-date democracy, you can deepen your reporting by consulting experts outside the courts on the relevance of those laws in our new constitutional and rights climate.
- Be careful in your use of words like 'proof', 'probability' and 'doubt' because these have specific meanings in the context of different types of cases.
- If your beat includes the law as well as the courts, an excellent – and neglected – source of stories is proposed new laws or changes in the law. Regularly check the SALRC website, the *Government Gazette* and media announcements of law workshops and seminars for information.

TABLE 1:
Main differences between civil and criminal law

Difference	Criminal	Civil
Case brought by	The State	An individual or organisation ('the plaintiff')
Purpose	To detect and punish offender and deter further crime on behalf of society	To decide who is at fault and fix a remedy or penalty to put things right between the two parties
Terminology	Alleged wrongdoer is 'a suspect/the accused'	Alleged wrongdoer is 'the defendant'
Legal assumption	Court must treat accused as innocent until proven guilty; state has to prove guilt	Defendant may have to disprove plaintiff's claim and prove own innocence
Burden of proof	Beyond reasonable doubt	Balance of probabilities
Bench	One judge, red robe, who can appoint two assessors in complex cases	One judge, black robe; two for a case on appeal

CHAPTER 2:
THE COURTS

This chapter lists the different types of courts and tribunals that operate in South Africa. It sets out:

- Who staffs them and presides over them;
- What the jurisdiction of each is; and
- How these different courts relate to one another.

Introduction: courts and where they sit

South Africa's legal system is made up of lower and higher courts, each with different legal powers over different geographical areas. These powers are called jurisdictions.

The two most senior courts in the country are the Constitutional Court in Johannesburg and the Supreme Court of Appeal (SCA) in Bloemfontein.

Every province has at least one High Court; Gauteng, the Eastern Cape and KwaZulu-Natal each have two or more High Courts.

(A list of the High Courts appears on page 28)

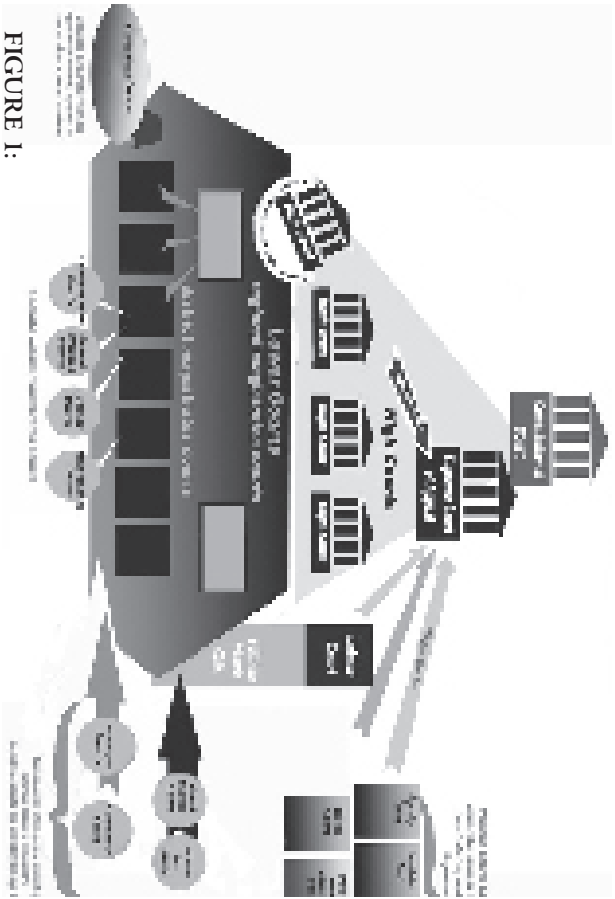


FIGURE 1: Courts in South Africa (Judy Seidman)

The courts and where they sit

High Courts:
Bophuthatswana High Court in Mmabatho
Venda High Court in Toyohandou
Transvaal High Court in Pretoria
Free State High Court in Bloemfontein
KwaZulu-Natal High Court in Pietermaritzburg
Eastern Cape High Court in Grahamstown
Transkei High Court in Umtata (Mthatha)
Ciskei High Court in Bisho
Northern Cape High Court in Kimberley
Western Cape High Court in Cape Town

Local Divisions (High Court branches):
Durban and Coast Local Division in Durban
Witwatersrand Local Division in Johannesburg
South Eastern Cape Local Division in Port Elizabeth

2.1 The Constitutional Court

The Constitutional Court is the highest court in South Africa on constitutional matters. While other courts may decide on constitutional issues the Constitutional Court has the final say on whether a legal matter is in accord or conflict with the constitution. The Constitutional Court may decide:

- What the status, power or functions of national or provincial organs of state are, when these are disputed;
- Whether a bill before Parliament or a Provincial Legislature is constitutional (at the request of the President or the Premier before they assent to the bill);
- Whether a law passed by Parliament or a Provincial Legislature complies with the provisions of the Constitution (at the request of one third of the Members of Parliament or one fifth of the Members of a Provincial Legislature);
- Whether amendments to the Constitution comply with the Constitution;
- Whether another court was consistent in finding that the conduct of the President or of a Provincial Legislature, or an Act of Parliament is inconsistent with the Constitution;
- Whether anything else done by Parliament, not relating to the validity of a law, complies with the Constitution; and
- Whether a provincial constitution, or an amendment passed by it, complies with the national Constitution.

The Constitutional Court is made up of 11 judges. Eight is the minimum number for hearing a case. It is led by the Chief Justice and the Deputy Chief Justice of South Africa. Both of them are appointed by the

President, acting with other members of the cabinet, after consulting the other parties in Parliament and the Judicial Services Commission (*see Chapter 3*). Constitutional Court judges can stay in office until they have amassed 15 years of active service, but not beyond the age of 75.

2.2 The Supreme Court of Appeal

The Supreme Court of Appeal (SCA) hears only appeals against decisions of the High Courts.

The SCA is led by a President and Deputy President of the SCA. Judges of appeal are appointed by the President using the same process of consultation as for the Chief and Deputy Chief Justice of the Constitutional Court. A panel of three to five judges of appeal hears cases. They have the jurisdiction to hear and determine an appeal against any decision of a High Court and their decisions are binding on all lower courts.

2.3 High Courts

High Courts act as courts of appeal on matters from the lower courts, or as trial courts ('courts of first instance') in cases involving large sums of money, serious crimes and potentially heavy punishments. They also hear divorce cases.

Each High Court's jurisdiction is usually limited to the geographical area that it serves, but it can happen that one or more High Courts have concurrent (equal

and simultaneous) jurisdiction over the same matter. In its own area, a High Court has jurisdiction over all people living in that area.

High Courts also have **circuit local divisions** presided over by a judge of the division, who periodically travels to outlying centres to hear cases. Except for crimes where the law sets minimum or maximum sentences, High Courts have no limits on the sentences they can impose, up to and including life imprisonment in certain cases.

High Courts are led by a Judge President who, like all other judges of the high and all lower courts, is appointed by the President off a list of names drawn up by the Judicial Services Commission. High Court judges may hold office until they have amassed 15 years of service or have reached the age of 75.

2.4 Magistrate's Courts

These are Regional and District ('ordinary') Magistrate's Courts and together they comprise the so-called lower courts. There is one Regional Court Division for every High Court and there are 370 magisterial districts. The Minister of Justice on the recommendation of the Magistrates' Commission appoints both district and regional magistrates.

2.4.1 Regional Magistrate's Courts

Each region is headed by a Regional Court President, who is the regional magistrate and administers (runs) the Regional Court, managing the court roll and assigning regional magistrates to cases. Regional magistrates wear black gowns with red collars and lapels. A Regional Court may hear (try) any criminal case except treason, but cannot pass sentences greater than 15 years imprisonment or a fine of R300 000 (fines are adjusted and set by the Minister for Justice). The Regional Court hears only criminal cases.

2.4.2 District Magistrate's Courts

District Magistrate's Courts, on the other hand, may hear both civil and criminal cases. District magistrates may be ranked as magistrates, senior magistrates or chief magistrates depending on their personal seniority and the size of their district. Ordinary magistrates wear black gowns, while chief magistrates wear gowns with red stripes down the facings. They cannot hear civil cases where the amount of money in dispute is more than R100 000 or murder, rape or treason criminal cases. District magistrates may not impose prison sentences of more than three years or fines of more than R60 000.

Each district magistrate is responsible for the administration of his/her own district, particularly the setting of spot and admission of guilt fines within the parameters laid down by the Minister of Justice. The

370 Magistrate's Courts are grouped into 13 clusters that meet to make sure that these fines are uniform (the same) across the country.

2.5 Other kinds of courts

There are many different kinds of courts and commissions that operate in some kind of relationship to the Magistrate's and High Courts.

Many of these courts do not take place in separate physical buildings. They often take place in the Magistrate's Court, which can assume different identities to hear different kinds of cases. In addition, there are other bodies which have the same status in law as courts, but do not relate to the Magistrate's and High Courts.

2.6 Courts and bodies with High Court status

2.6.1 The Land Claims Court

This court has the same status as a High Court and was set up to hear cases dealing in land rights and the restitution of land resulting from the racially based dispossessions legalised by the 1913 Land Act and subsequent apartheid laws, such as the Group Areas Act. Its aim is to restore land to uprooted communities by investigating and weighing the validity of their claims and those of later occupants, and reaching a settlement between the two parties, based, where possible, on the 'willing seller: willing buyer' principle.

2.6.2 Water courts

The provincial High Courts hear disputes over water rights in their regions. They are headed by the judge of the particular division in which the matter arises and the Supreme Court of Appeal hears appeals.

2.6.3 The Labour Court

This is a court with the same status as a High Court, set up under the 1995 Labour Relations Act. The Labour Court has national jurisdiction and sits in Johannesburg with three satellite courts in Cape Town, Durban and Port Elizabeth. It has exclusive jurisdiction over most labour matters and has concurrent (equal) jurisdiction with the High Court in constitutional matters arising from employment-related issues.

The court is led by a Judge President assisted by a Deputy Judge President. People appointed as judges of the Labour Court must have knowledge, experience and expertise in labour law as well as meeting all the other requirements for appointment as a High Court judge. Labour Court judges are paid on the same scale as High Court judges.

The Labour Court may make any appropriate order including granting urgent interim relief (ordering the halting of something undesirable), an interdict (forbidding something), an order for specific performance, a declaratory order and an award of compensation or damages.

There is also a Labour Appeal Court seated in Johannesburg which is the final court of appeal on labour issues. The Judge President and Deputy Judge President of the Labour Court hold the same positions in the Labour Appeal Court. Parties may request leave to appeal to the Labour Appeal Court against any order or judgment of the Labour Court.

2.6.4 Patent, trade mark and copyright courts

A judge of the Gauteng High Court is designated by the Gauteng Judge President as Commissioner of Patents and has the same powers, sitting in the same division, on this civil matter. The Commissioner of Patents also acts as the Copyright Tribunal and hears appeals against infringements of copyright. Appeals on these matters lie with the full bench of the provincial division concerned.

2.6.5 Office of the Family Advocate

This exists in every High Court and local division. The family advocate reports to the court and makes recommendations about the best interests of minor children during divorce actions or applications for the variation of existing divorce orders.

The Master of the High Court is the official protector of the interests of minors and other people believed to be incapable of making legally valid decisions ('legally incapacitated'). The Master administers the funds of

such people and of those who have been willed money but cannot be found ('absent heirs'), which are paid into the Guardian's Fund.

2.7 Courts and bodies with Magistrate's Court status

2.7.1 Sexual offences courts

To reflect the new constitutional climate around sexual offences and gender relations, and in anticipation of a new Sexual Offences Act (which, at time of writing, has not yet become law) regulations provided for specially built Magistrate's Courts to deal with sex crimes such as rape and paedophilia. These have audio-visual equipment and separate witness rooms and are staffed by specially trained prosecutors. The continued existence of these courts is currently under discussion.

2.7.2 Equality courts

Equality courts were created by the Promotion of Equality and Prevention of Unfair Discrimination Act to hear cases about equality and discrimination and are currently being set up. They will be based in Magistrate's Courts with an extension into the High Courts to hear appeals. Specially trained magistrates will have the power to conciliate and mediate, grant interdicts, order payment of damages or order a person to make an apology. Any person or an association,

acting on his/her own behalf or on behalf of others can bring a case to the equality court. The South African Human Rights Commission or the Commission for Gender Equality can also bring cases to the equality court.

2.7.3 Specialised commercial crimes courts

These specialised courts have opened in a couple of cities and more are planned. They are a collective effort between the National Prosecuting Authority and the Department of Justice and Constitutional Development to combat commercial crime, which includes fraud and corruption and is frequently referred to as white-collar crime. They are staffed by regional magistrates, prosecutors and SAPS Commercial Branch detectives.

2.7.4 Compensation courts

These courts decide on the value of expropriated property where the value is less than R100 000. Where the amount is bigger, the matter is heard by the High Court, to which there is also a right of appeal from the compensation court.

2.7.5 Maintenance courts

A maintenance court enforces maintenance orders: court orders compelling someone to support another person, such as a husband his divorced wife or a father his illegitimate children. Only those necessary to these

proceedings may attend. A slang term for maintenance often used in some newspapers is 'papgeld'.

Normally no information may be published which will identify, or be used to deduce the identity of, someone under the age of 18 who is involved in maintenance cases. But in both maintenance courts and children's courts (*below*), this ruling may be lifted if the court finds that publishing the information is 'fair and just and in the interests of a particular person'.

2.7.6 Children's courts

In terms of the Children's Act of 1960 (1983), a Magistrate's Court acts as the children's court for its area. These courts deal with custody, adoption matters, children in need of care, maintenance orders and temporary custody. Appeals on any of its decisions go to the High Court.

A children's court is a specially convened court to determine the interests of a child: whether the child should be adopted, fostered, placed in a children's home or industrial school or under the care of a welfare organisation. The children's court also has to decide whether a child has adequate representation and guardianship before any criminal case against that child can proceed. If the children's court finds that there are no parents or guardian, or that they are not fit or able to look after the child properly, it may order that the child be removed to a 'place of safety'.

Nobody can be present at these sittings except the legal representatives of the child or other people whose presence the court deems necessary. The commissioner of the children's court has the authority in terms of the Child Care Act 74 of 1983 to determine who may attend.

It is also the children's court commissioner who determines whether children without other guardians may speak to the press. Proceedings of children's courts are normally protected from any type of reporting which indicates the identity of the child concerned, and there is no automatic right of access to their records.

2.7.7 Family courts

One of the purposes of the family court is to provide accessibility to people who have no money for lawyers or advocates. These courts also deal with issues of domestic violence, maintenance, custody and guardianship of children. Several pilot courts have been set up in the different regions. A family advocate has a role similar to a social worker and makes sure that such things as custody arrangements for children in a divorce are satisfactory from the aspect of the child's welfare.

2.8 Courts from which appeals can be heard in the Magistrate's and High Courts

2.8.1 Small claims courts

These courts were established in 1985 to provide easier and less expensive access to the legal system for civil cases concerning small sums of money. The presiding officer or adjudicator in disputes is called the Commissioner for Small Claims, and is normally an attorney or advocate who offers his services free.

Only 'natural persons' (this means individuals, not companies) may approach the court and no cases may be heard in them against the State. The amount of money involved in the dispute may not exceed R7 000 and there is no appeal against the Commissioner's decision. But if the court exceeds its jurisdiction in hearing a matter where the amount is more the R7 000 or where gross irregularities have occurred during the proceedings, decisions may be put on review to the High Court.

2.8.2 Income tax courts

These are special courts comprising a judge and two assessors: one an accountant and the other a businessman (or a mining engineer in a mining case). They hear appeals on income tax assessments and assessments of estate duties. Appeals from this court can go either to the provincial division in which the court sits, or directly to the SCA.

However, in October 1999, the South African Revenue Service (SARS) opened a criminal courtroom in the Johannesburg Magistrate's office dedicated to prosecuting tax crimes.

The court deals only with cases involving the failure to submit tax returns or to answer questions from SARS officials, not with tax fraud. A similar SARS court has begun operating twice a week in the Roodepoort Magistrate's office.

2.8.3 Military courts

The South African National Defence Force has its own courts with jurisdiction over all offences committed in terms of the Military Disciplinary Code. They are headed by military judges. Appeals against their decisions go to the High Court.

2.8.4 Customary courts

These courts were originally set up by statute under the colonial and apartheid regimes.

They are part of the lower courts system. A chief or headman employs lesser headmen, older men and women to run smaller sections of the community. The case may be heard under a tree or in a local school. These courts will primarily hear and determine minor civil claims arising from indigenous law and custom brought by someone living within a rural headman's area of jurisdiction.

A customary court has limited powers to try and

punish a person who has committed a minor criminal offence under common law or indigenous custom, such as petty theft or trespass. Statutory law excludes most serious offences from these powers.

The customary courts are currently in transition with the Black Administration Act being repealed little by little. The provisions of the new legislation proposed by the South African Law Commission are:

- The full participation of women as councillors or presiding adjudicators (judges) must be allowed;
- Paralegals trained in both customary law and the requirements of the Bill of Rights should assist the courts;
- Traditional courts should be regarded as courts of law and given the status and respect of courts of law;
- Cases related to marriages such as divorce or separation must be heard by a family court;
- Cases relating to customary land rights should be appealable to other courts in the normal way;
- Civil cases should have a ceiling placed on their value;
- Traditional courts need to be alerted that corporal punishment is unconstitutional and therefore illegal;
- Procedures should remain informal but paralegals must keep written records that other courts can refer to in the case of appeal; and
- Revenues from fines should be used for the benefit of the community concerned.

2.8.5 Community courts

To lighten the burden of petty crimes and social disputes on the justice system, a pilot community court was set up in May 1991 at the Kyalami Metro Council in Gauteng to promote community administration and policing. The Hatfield Court in Pretoria is now regarded as the model for these courts. Their aim is to clean up the areas where they're located and they're being set up in a number of other regions. They handle such crimes as urinating in public, littering and trespassing.

Community courts are essentially district courts staffed by a small number of representatives from all levels of the district justice system, based on the same premises and integrating their approach to cases. Their jurisdiction is limited to:

- Offences related to drug or alcohol abuse;
- Offences related to municipal by-laws;
- Other petty offences.

Offenders are dealt with immediately and the emphasis is on rehabilitation. Alternative sentences such as community service are encouraged.

A 2005 study by the Legal Resources Group at the University of Cape Town found that community courts in the area had been highly effective. Community members had come to understand the concept of **restorative justice** (that justice can put right the harm done to society by crime and that the courts do not

only punish but also repair wrongs). The courts made increased use of alternative (i.e. non-prison) sentencing, such as community service.

2.8.6 Municipal courts

Courts have been established in Cape Town and Pretoria and in Kwazulu-Natal to enforce compliance with city by-laws and release resources for the criminal justice system. In December 2000, mobile courts sited on freeways during peak traffic flows (public and school holidays) were introduced to deal speedily with traffic offences. The municipality supplies administrative and infrastructure support while the Department of Justice provides the magistrates.

2.8.7 Arbitration tribunals

The 1965 Arbitration Act sets out the circumstances in which matters may be referred to arbitration bodies, and the extent to which the High Court may intervene. Currently, the arbitration tribunal most frequently covered by the media is the Commission for Conciliation, Mediation and Arbitration (CCMA), created under provisions of the 1995 Labour Relations Act. The CCMA has an office in each of South Africa's nine provinces and a national office in Johannesburg.

Its part-time and full-time commissioners, appointed for their knowledge of labour relations matters and arbitration techniques, hear labour disputes and try to

help the parties reach a settlement. The CCMA has the power to find in favour of or against parties in relation to the labour law, and to order compensation or other forms of restitution.

2.9 Reporting tips

(Note: These general points apply to all courts and all types of cases. You will find more detailed information on reporting civil and criminal cases and on certain specific rules, such as defamation, contempt and sub judice, in Chapters 4 and 8.)

- Be absolutely certain which type of court you are attending, and what rules and terminology are appropriate for that type of hearing. Some courts have the power to decide innocence or guilt; others can merely find for or against a party; some can punish; others can merely recommend actions towards a settlement ('remedies and penalties'). If you get it wrong you can compromise the truth and possibly defame those involved. If in doubt – ask someone!
- Avoid hit-and-run court reporting. Stay with a case and check that you have heard all sides. Very often a witness will give evidence in the morning and be cross-examined in the afternoon – and two very different pictures may emerge. If your deadline means that you have to hand in a story part-way through this process, make it very clear in what you write that the case is continuing and that what

you report may be contested or contradicted later. Again, be aware that you can be sued later if your reporting defames someone involved.

- Respect the rules of the different courts about what you may or may not report. These rules are in the interests of justice towards those involved (for example children or survivors of sexual assault) – but you can also be expelled from the court or even jailed for contempt if you break them.
- Make your reports understandable to ordinary readers but use your words and terms precisely so they have exactly the same meaning the legal term has. Lawyers use a specialised jargon that is understood in court by other legal professionals. Your job is to interpret their arguments and the judgment so that non-specialist readers can understand them and form an opinion about what went on. But to do this you must know exactly what is meant by the legal terms and jargon used.

CHAPTER 3:
THE PLAYERS
(Officers and officials of the court)

This chapter:

- Names the principal role-players in the court system;
- Explains how they are appointed; and
- Explains what their roles are.

Introduction

When you first begin reporting from the courts, you may be puzzled by who does what, what some of the more mysterious titles mean – and who is the best person to ask for the information you need. This chapter unravels the mystery, and also describes the work of some of the external constitutional bodies that support the work of the courts.

3.1 Judges

'Judge' is the general title we give to the presiding officers in the higher courts.

High Court judges must have many years of practical experience as lawyers before being nominated by the

Judicial Services Commission (JSC – *see page 50*) and appointed by the President. Normally they are serving senior advocates ('silks') who have previously acted as judges for short periods.

Because of the exclusion suffered by many lawyers of colour under apartheid, this has led to heated debates about how representative the judiciary (the community of judges) is, to conscious attempts to appoint a more diverse judiciary, and to allegations of tensions between long-serving and newly appointed judges from different communities.

Judges in the High Court are generally referred to as 'the bench', from past times when they did indeed sit on a bench, although now they use rather grand carved wooden chairs. Usually one judge, wearing a black gown, hears a civil case, but if the matter is on appeal, two judges will make up the bench.

One judge, wearing a red gown, hears a criminal case, unless the matter is very serious, when the judge can appoint two assessors to help. Assessors are usually advocates or retired magistrates. They sit with the judge during the case and listen to all the evidence presented to the court. At the end, they give the judge their opinion. The judge does not have to agree with the assessors' opinions, but they can be helpful in making a decision..

All judges, whether in the Constitutional Court, SCA or High Court have guaranteed salaries, allowances

FIGURE 2:
Key players (Wilson Mgobhozi, *The Star*)

1) Judge 2) Assessors 3) Stenographer 4) Defence counsel/ prosecution 5) Public gallery.

and benefits that may not be reduced. The constitution guarantees the independence of the judiciary, and protecting judges' benefits is seen as a way of protecting them from financial pressures and inducements.

But judges can be removed if the JSC finds they are incapable of carrying out their work (for example through serious mental or physical illness or injury), are grossly incompetent or guilty of gross misconduct.

Two-thirds of the National Assembly has to agree to a resolution calling for the judge to be removed. Normally judges serve until they have amassed 15 years of service or have reached the age of 75.

The Judicial Services Commission (JSC)

The JSC is a body established under the Constitution to manage the appointment, and conduct of judges. It comprises:

- The Chief Justice;
- The Judge President of the SCA;
- One Judge President nominated by the other Judges President;
- The Minister for Justice;
- Two practising advocates;
- Two practising attorneys;
- One university teacher of law;
- Six Members of Parliament (MPs) nominated by the National Assembly (of whom three must be opposition MPs);
- Four members of the National Council of Provinces (NCOP);
- Four other people nominated by the President after consultation with the leaders of all political parties; and
- The Premier and Judge President of the particular province where that province's judiciary is under discussion.

When appointments to the higher courts (High Court, SCA and Constitutional Court) have to be made, the JSC gives public notice of the vacancies that exist and calls for nominations. The names of the candidates to be interviewed are published and members of the public and professional bodies are invited to make submissions. The commission then holds public hearings. After the interviews the JSC deliberates (decides), and makes its decision in private.

As well as interviewing and shortlisting suitable candidates for the President to appoint to the higher courts, the JSC briefs the President on any matters concerning the administration of justice in the country or any matter relating to the judiciary.

3.2 Magistrates

Magistrates are the presiding officers of the lower courts. They hold law degrees, are appointed from among senior prosecutors and have passed public service examinations.

Magistrates used to be appointed by the Minister for Justice and were civil servants (State employees) subject to the same codes of conduct and departmental regulations as other civil servants.

However, since the Magistrates' Act of 1993, a Magistrates' Commission has been set up to deal with the appointment of magistrates, functioning in much the same way as the JSC for the High Court. The Magistrates' Commission is headed by a judge of the High Court, and comprises six magistrates (one regional court president, one regional magistrate, two chief magistrates, two other magistrates), Members of Parliament, Members of the NCOP, academic representatives, attorneys and advocates. The Minister for Justice is represented by the Director General of the Department of Justice.

The full commission meets four times a year. Between these full meetings, it functions through sub-committees dealing with appointments, grievances, ethics and misconduct, salaries and benefits, training and resource utilisation. The chairperson of each committee belongs, *ex officio,* to the commission's executive committee.

Magistrates' previous role as State servants under apartheid meant that they were subject to the orders of politicians. The new constitution established the principle of the **separation of powers** (that, among other things, politicians should not be able to put pressure on the fair administration of justice). So an important part of the role of the Magistrates' Commission is to develop the

independence of the lower courts in line with that already enjoyed by the High Courts. The commission has indicated that it wants to create a more diverse magistrates' bench by broadening the pool from which it makes appointments. It has already begun to appoint admitted attorneys and advocates as acting magistrates and acting regional magistrates, as is done in the High Court.

3.3 The Department of Justice

The Department of Justice has regional or provincial offices in the nine provinces of the country. The offices are run by civil servants titled 'Regional (or Provincial) Head of the Department of Justice'. Their job is to provide support services, such as human resources and building maintenance. Again, because of the principle of the separation of powers, they are forbidden from providing professional guidance, so that the integrity and objectivity of magistrates is not compromised.

3.4 Advocates

An advocate is a specialist legal practitioner working mostly in court, particularly the High Court. Sometimes the term 'counsel' is used for an advocate, sometimes the far broader term 'lawyer'. Before 1995, only advocates had the right to appear ('right of audience') in the High Court. Advocates are the people you see in the High Court making pleas on behalf of their clients and cross-examining witnesses.

Advocates have to complete an LLB degree at a South African university, do a year-long pupilage under an admitted advocate and then write the Bar exam. If they pass this exam, they will apply for admission to the High Court, after which they will work from Chambers (which are like law firm offices) on briefs (instructions) received from attorneys (*see 3.5*).

Members of the public cannot approach an advocate directly to take their case. They must first consult an attorney, who will refer their case to an advocate.

Advocates belong to Bar Associations, based in each of the High Court provincial divisions and governed by the Bar Council of South Africa. Bar Associations are responsible for the discipline of their members, but sometimes also make professional representations about policy issues.

Advocates are elevated to Senior Counsel (this is called 'taking silk' and allows them to put the letters SC after their names) after long and distinguished service. Senior Counsel is the community from which, traditionally, judges have been selected.

3.5 Attorneys

Attorneys include **conveyancers** and **notaries** who draw up and process various types of legal and contractual documents. Attorneys are the public's first port of call when seeking legal advice or help.

Attorneys protect the interests of their clients, acting

on behalf of them in legal matters outside court, drafting contracts for them and arranging representation in criminal and civil actions by linking them with an appropriate advocate.

Attorneys are legal practitioners holding a relevant law degree who have completed two years of articles of clerkship with a firm of attorneys and who have passed the side-bar exam, allowing them to apply for admission. Before 1995, attorneys could only appear in lower courts, but they can now apply for the right of audience in superior courts, including the Constitutional Court.

The professional conduct of attorneys is regulated by the Law Society of South Africa.

3.6 Prosecutors

3.6.1 The National Prosecuting Authority

The National Prosecuting Authority (NPA) institutes and conducts criminal proceedings on behalf of the state. All prosecutors work for the NPA, which is based in Pretoria and headed by the National Director of Public Prosecutions (NDPP). Assisting the NDPP are two national deputy directors. The authority is represented in the nine provinces by provincial Directors of Public Prosecutions (DPP).

Before the NPA was created, the police used to investigate complaints and prepare dockets for submission to the DPP who would then simply decide whether or not

to prosecute. The new NPA however allows the NDPP to take a far more active role in the battle against crime, especially organised crime, corruption, serious economic crime and hijacking.

3.6.2 The Scorpions

This active role has been made possible through the creation of the Directorate: Special Operations (DSO), also known as 'the Scorpions'. The Scorpions deal with organised crime by detailed, sometimes very long-term, large-scale intelligence-gathering operations that allow them to put together cases and institute prosecutions against serious organised crime. The DSO employs intelligence operatives, investigating detectives and prosecutors, and includes the Investigative Directorate on Organised Crime and Public Safety (IDSEO).

The DSO has offices in Gauteng, KwaZulu-Natal, the Eastern Cape and Cape Town. The head of the DSO, the Investigating Director, reports to one of the National Deputy Directors of Public Prosecution and liaises with other statutory crime-fighting bodies such as the Asset Forfeiture Unit, customs and revenue inspectors, forensic accountants and senior police detectives.

That is the high-profile side of prosecution activities. But it is the far less glamorous, less well publicised day-to-day prosecution work which actually keeps the criminal justice system active and effective.

3.6.3 Regional and provincial DPPs and court prosecutors

At the provincial level, the DPP receives dockets from the police based on their investigation of cases. He or she decides whether or not to prosecute and assigns cases to prosecutors in the lower courts or to State Advocates for cases to be heard in the High Courts.

Ordinary prosecutors represent the State in a criminal trial against people who are accused of a crime. Before the trial, the prosecutor works with the South African Police Services to find out all the facts about the case, and to prepare state witnesses who saw what happened or who have other information.

The prosecutor then presents all this information in court and tries to convince the judge or magistrate that the accused person is guilty. The prosecutor does this by asking the state witnesses to tell their stories. The prosecutor also cross-questions any witnesses the accused person brings to court, to try to disprove or discredit what these witnesses say.

3.7 Office of the Family Advocate

There is an Office of the Family Advocate in every High Court and local division. The family advocate reports to the court and makes recommendations about the best interests of minor children during divorce actions or applications for the variation of existing divorce orders.

3.8 State law advisers

A state law adviser is someone who is not necessarily admitted as an attorney or advocate, but who is qualified to give legal advice to ministers and government departments at a national level, and to premiers and Members of the Executive Council (MECs) at a provincial level.

State law advisers draft legislation and assist the minister or MEC in getting the resulting bill passed through Parliament or the Provincial Legislature. Some state law advisers also serve on the South African Law Reform Commission (*see Chapter 1*).

3.9 State Advocate

The State Advocate is a prosecutor who has both the appropriate legal qualification and right of audience to appear on behalf of the State in the High Court. The State Advocate works for the Director of Public Prosecutions.

3.10 State Attorney

The State Attorney does exactly what any other attorney does (*see 3.5*) except that the client is the State. The State Attorney provides legal representation for appointed and elected officials who have become involved in criminal or civil actions arising out of the performance of their duties.

3.11 Office of the Public Protector (OPP)

The Office of the Public Protector (popularly called 'the ombudsman' from its Scandinavian equivalent) is independent of government and was established to strengthen and support constitutional democracy. The Public Protector's responsibility is to investigate official actions (or inaction) that may have harmed any individual.

Investigation can follow a complaint from a member of the public, or be undertaken on the Public Protector's own initiative. Anybody can make representations to the Public Protector, but unless there are special circumstances, this must be done within two years of the harm or abuse occurring.

The office is permitted to use both informal and formal methods to investigate. These can include summoning witnesses to appear under threat of punishment (called a *sub poena*), compelling them to testify under oath and subjecting them to cross-examination. With a warrant issued by a magistrate or judge, officers of the OPP may enter buildings to investigate complaints and may seize anything relevant.

When officers have finished their investigations, the Public Protector can recommend action to the public body involved. If any evidence of a crime is found, the Public Protector may refer this to the DPP for prosecution.

The Public Protector may not enquire into the

decisions of a court of law – that is the business of the judicial appeals procedure and the SCA.

The Public Protector's brief

To investigate 'any alleged mis-administration by the State at any level of government, abuse or undue exercise of power or unfair, capricious, discourteous or otherwise improper conduct or undue delay by a person performing a public function, or improper, dishonest act or omission or corruption involving public money, improper or unlawful enrichment or receipt of any improper advantage or promise of such enrichment or advantage, which results in unlawful or improper prejudice to any other person.'

3.12 Registrars

The registrar acts as an office manager for the High Court, running all the administrative staff and setting the court roll (diary of cases). The registrar is the person who can give you information about what cases are scheduled. He or she also acts as the taxing master on bills of cost. (*See Section 5.5*) There is a registrar for every High Court division in the country.

3.13 Master of the High Court

A master of the High Court is appointed for every provincial division of the High Court of South Africa (*see Chapter 2*).

The master is responsible for administering estates (the property of people who have died or been declared insolvent (bankrupt) and trusts) and winding up companies and close corporations. The master determines and assesses estate duties and appoints impartial and capable persons as executors, trustees, curators and liquidators.

The master also looks after the interests of minors and other incapable or untraceable people. (*See Section 2.6.5*)

3.14 Clerk of the court

The clerk of the court is the lower court version of the registrar in the High Court. In criminal cases the clerk of the court enters the case on the roll and issues any order that the court might make, such as warrants for arrest. In civil matters, the clerk issues the default judgment, enters matters on the court roll and acts as a taxing master on all bills of cost. The court clerk is your best source of information about what cases are scheduled each day in the Magistrate's Courts.

3.15 Sheriff

Sheriffs are court officers. They are not civil servants, but normally external contractors awarded a tender to act as sheriff for a magisterial district. The sheriff now does the job that used to be done by a court messenger: serving (delivering) court orders for both the High and Magistrate's Courts. They may also attach (seize) the goods of a judgment debtor (a person named in a judgment as owing money). They arrange for these goods to be publicly auctioned and return the proceeds to the judgment creditor (the person owed the money) to pay the debt.

3.16 Justice Centres (Public Defenders)

The Legal Aid Board has created Justice Centres around the country where legal aid lawyers are available to defend people who have been accused of crimes, or are involved in civil cases but who are too poor to pay for lawyers themselves.

3.17 Friend of the court *(amicus curiae)*

This is not an official position, but a role outsiders can take in a court case. Sometimes a person or group not directly connected to the case applies to make a contribution to proceedings as a 'friend of the court'. This may be because they have specialist knowledge of the issue, or their interests may be affected by the outcome. The judge or magistrate has to consider, but is not obliged to accept, such an application.

3.18 Paralegals

Paralegals is a general term for those people who provide legal advice, education and support to individuals, communities or organisations, often under the auspices of a non-governmental organisation (NGO). Paralegals do not normally have academic law qualifications. They do not have the right to represent clients in any court, although many law students do this kind of work to develop their skills. Paralegals may not pretend to be lawyers, nor are they entitled to charge for their services like lawyers.

3.19 Reporting tips

- Get to know everyone working in the courts. Introduce yourself to them, greet and chat to them regularly. These are the people you need to be able to turn to for advice and help so make sure, wherever possible, that you are on good, professional terms with them.
- Get to know the first names and surnames of everyone who works in the courts, from the judge down.
- Look for the roll of cases which should be pinned up on a court notice board. This will give the names of those involved. You can distinguish criminal from civil cases because criminal cases are described as 'State v(ersus) xxx'. Sometimes you can spot a famous name on this list, or stumble across a

unique story no one else has. The roll also indicates which courtroom each case is to be heard in.

- If you cannot find the roll, the registrar or clerk of the court can provide you with information about the diary of cases – but these are busy people so approach them politely and be prepared to wait until they have time for you.
- If you attend a particular court regularly, it is worth developing a professional relationship with the important court officers (and even the seemingly more minor administrators and ushers) who have a wealth of knowledge, tips – and gossip.
- All Magistrate's Court cases are assigned a number, under which all the relevant documents are filed. Unless reporting restrictions are in force (*more on this in chapters 4, 5 and 8*) you should be able to see the file and photocopy documents. This vital 'homework' will fill in your knowledge of the case and produce better reporting. You do not have this open access to case documents in the High Court.
- Take note of the lawyers you see handling the types of cases you are assigned to (or that interest you). Make time to talk to these lawyers and add them to your contacts book. You can then phone them to find out about cases; sometimes lawyers even phone their press contacts if they want publicity for an upcoming case.
- Attorneys are usually more approachable than

advocates, whose rules of professional conduct set strict limits on the kinds of public comment they can make on cases.

- Both attorneys and advocates have a strictly confidential relationship with their clients, so anything they may tell you 'off the record' must stay that way. This is a general principle, but particularly with court reporting. If you do not respect the conventions around on/off the record, you will not only lose valuable contacts but also find yourself excluded by the rest of the legal community.
- Especially in a complex case – such as a civil case about specialised financial dealings – it is important to make contact with legal experts (involved in and outside the case) who can explain technicalities and jargon and assist your understanding.
- Remember that lawyers are employed to do their best for their client (or the State) – and this includes any communication they may have with the media. ALWAYS talk to lawyers from both sides.
- Other legal officers, such as the Public Protector, can also be a source of interesting stories about the law. So, too, can the pronouncements of Bar Councils and Law Societies.

CHAPTER 4:
CRIMINAL PROCEDURE

This chapter explains:

- The process followed to report, investigate and charge someone for a crime;
- The rules governing police conduct during this process;
- The definitions of some common crimes;
- What happens in court;
- The rights and restrictions on press coverage of investigations and court proceedings.

Introduction: what are crimes?

Crimes are defined as offences against the community, even when the victim is an individual. Breaking certain laws (*see the schedules*) is viewed by the State as posing a threat to the order, safety and security of the whole community. So the State prosecutes on the community's behalf to:

- Remove the threat to the community;
- Stop the community from taking the law into its own hands without a fair trial for the suspect;

- Punish the offender;
- Deter further crimes of this type (in more modern interpretations); and
- Reform the offender.

The prosecution must prove four separate elements for a judge to find someone guilty of a criminal offence. These elements are part of the definition of any crime. They are:

- That the act was prohibited by law (if the law permits an act, performing it is not a crime);
- That the act (*actus reus* in Latin) was actually committed (it isn't a crime to think about doing something illegal – although the charge of 'conspiracy' covers discussing and planning a crime with others);
- That the perpetrator intended (intention is called *mens rea* in Latin) to commit the act; and
- That the perpetrator knew the act was against the law.

Intention

A person cannot be convicted if it becomes clear they had no intention of committing the crime. So, for example, if a person committed a criminal act under hypnosis, while sleepwalking, while having some kind of fit or as an involuntary

physical reflex, they did not know what they were doing and there can be no crime.

The courts also interpret intention as a person foreseeing (realising) the consequences of a criminal act, but wilfully deciding to ignore them. In this case, the court will find that the accused had 'constructive intention'.

Being drunk is not accepted by the South African courts as absence of intention. It is assumed that a person can foresee the possible consequences of excessive alcohol before drinking. Often, the courts judge alcohol as an aggravating factor (something that makes the crime worse).

Children under the age of seven cannot have the intention to commit a crime because the courts believe they lack criminal capacity (do not have the ability to know right from wrong). For children between seven and 14, the prosecution is permitted to present evidence to prove that a particular child does have criminal capacity and therefore could have formed intention.

Are there acts which break the law but are not defined as crimes? Yes. Civil law deals with unlawful actions that are seen purely as conflicts between

individuals, rather than as threatening public order. Here the aim of the judgment is to decide on measures to repair the damage done to the injured party (compensation), rather than to punish the defendant. The technical term for some forms of civil wrongs is **delicts** or **torts.**

4.1 How criminal procedure works

4.1.1 Reporting and opening a docket

When a crime is committed, the victim, normally known as the complainant, reports this to the police and makes a statement (an **affidavit**) about what happened. But because criminal acts are committed against the State, the police can also act without a complainant if they believe a crime has taken place.

The police open a **docket** (assign the case a number) and investigate the matter.

4.1.2 Investigation

The police try to identify or track down suspects, and interview anybody who may have knowledge about the crime. They do not have unlimited powers to investigate. The Bill of Rights protects the rights of all citizens, including suspected criminals. Police may not detain people or search their homes or possessions or seize their possessions without the necessary permissions (**warrants**), except in certain special circumstances.

The police can ask a person suspected of having committed an offence, or who they believe will commit an offence, or who they believe has information about a crime, for their full name and address. If the person fails to give these details they can be fined R2 500 or jailed for up to three months.

When police interview suspects, they are obliged to warn them that they have the right not to answer questions or make statements, and that anything they do say may be used in any subsequent court proceedings.

At this stage, reporters must not name or identify suspects. Be aware too that police often interview people merely because they have information. Any suggestion that a person is a suspect in a crime is regarded as defamatory. It is also not generally in the public interest for a person to be identified as a suspect in a crime until that person has pleaded to the offence. ***(See 'Defamation' in Chapter 9)***

4.1.3 The rules around search and seizure

Police search to look for evidence, and seize (take away) items they consider relevant to the case.

Police may enter premises (offices, shops or warehouses) without a warrant if they believe a crime

has been committed or is about to be committed there. They may not enter a private home without obtaining the householder's permission, or a search warrant.

Police obtain the authority to arrest or search premises (arrest warrant/search warrant) by declaring their grounds under oath before a magistrate. When they conduct a search under a warrant, the law says they may use 'reasonable force' to overcome resistance and may break down doors and windows to gain access.

Police can search any person during a lawful arrest and seize any article found in their possession that they believe was used to commit a crime, or might be useful as evidence of the crime. Articles confiscated during the search must be entered in an evidence register kept at the police station.

The Police Station Commissioner may authorise an intimate body search if it is believed a person in custody has concealed (hidden) a dangerous weapon or evidence of the alleged offence in or close to their body ('about their person'). Only doctors may conduct intimate body searches and a female suspect may be searched only by a female police officer.

Police must hand over any evidence seized during a legal search to the clerk of the court. At the end of the trial, the judge or magistrate may order that the evidence is returned to its owners, or that it is **forfeited** (given to the State) or **disposed of** (sold to the public or destroyed).

Reporters have the right to attend a crime scene or follow police on a search and seizure operation, take notes, conduct interviews and take photographs. Equally, the police have rights – derived from the Criminal Procedure Act and the South African Police Services Act – to prevent reporters (or any other citizens) from 'interfering with their investigation'. This, however, allows police only to take steps to prevent reporters from obstructing police work. Taking photographs is not necessarily interfering or obstructing police. If police seize or destroy a reporter's camera or notes, that is malicious damage and the reporter or the news organisation can lay charges against the police officer responsible.

A complaint may also be made to the Independent Complaints Directorate (ICD), the body that investigates alleged police misconduct.

If any aspect of a citizen's rights around search and seizure has not been respected, that person may sue the Minister for Safety and Security in a civil case for damages. If an arrest is later found to be unlawful, then any associated search and seizure is also unlawful and the police officer who made the arrest is guilty of a crime.

4.1.4 Police use of force

Police are permitted to use 'reasonable' force to enter premises or homes to make a legal search, and to subdue and detain a person when making a legal arrest. They are not permitted to beat arrested people up or use any other force beyond what is required to render the suspect compliant. They are not permitted to use physical force or psychological torture to extract a confession from someone. If police go beyond what a court deems reasonable, this may render the arrest illegal or the confession inadmissible. Police may only use **lethal force** (kill someone) under extremely limited conditions: to defend their own life or that of other people.

4.1.5 Preparing the case

As soon as the investigating officers believe they have enough evidence to take the case to court, the docket is handed to the Director of Public Prosecutions for a decision on whether or not to prosecute the matter. If there is any doubt or disagreement, the case may be referred upwards through legal channels to the State Attorney for a decision. When police get the go-ahead, they apply to a magistrate for the necessary warrant(s) to arrest the suspects.

4.1.6 Summonses and indictments

Where the accused is not in custody and no warrant for his arrest has been issued, the clerk of the court can draw up a **summons**, informing the person of the time and place of the hearing and the nature of the charges faced, directing the person to attend the hearing. Where the hearing is to take place in the High Court, the summons is known as an **indictment**.

4.1.7 Arrest

Police may arrest anyone named in a warrant of arrest issued by a magistrate. They may also arrest without a warrant anyone who is:

- Committing or attempting to commit an offence in front of them;
- Suspected of having committed a Schedule I offence (*see Table 2*) other than escaping from custody;
- Escaping or attempting to escape from lawful custody;
- Possessing any implement of housebreaking and unable to satisfactorily explain why they have it;
- Found possessing property which is believed to be stolen;
- Found at any place by night in circumstances that suggest they have committed or are about to commit an offence;
- Suspected of being or have been in possession of stolen stock or produce;

- Suspected of making, supplying, possessing or transporting liquor or drugs or possessing or disposing of arms and ammunition;
- Wilfully obstructing police from doing their duty; or
- Suspected of being violent against a complainant at a domestic violence scene with the risk that the complainant will be hurt again.

A person who has been arrested will be taken to the police station, where he/she can be held for up to 48 hours (excluding non-court days, such as weekends or public holidays) before being brought to court.

The police are entitled to take that person's fingerprints, palm prints and footprints, as well as photographs and body samples from any part of that person's body to establish distinguishing characteristics, features or marks.

They are also allowed to check for the presence of HIV in the blood of anyone who is arrested on any charge, released on bail, or warned to appear for trial – these records are then destroyed if the accused is acquitted or, for whatever reason, the charges are withdrawn.

An arrested person is known as a suspect; a person who has been formally charged is known as the accused. The law does not permit reporters to identify by name or via a photograph, anyone who is still only a suspect.

Arrest and detention

The object of arrest is to ensure the suspect is present at a trial. To be lawful, an arrest must conform to four requirements:

- The arrest – with or without a warrant — must be allowed by law;
- The person must be physically held, handcuffed or restrained in some way;
- The arrested person must be told why he/she is being arrested and what his/her rights are; and
- The arrested person must be brought to a police station as soon as possible.

Anyone who has been arrested must be informed in a language that he/she understands that:

- The person who is arresting him/her is a police officer;
- That he/she is being arrested;
- That he/she has the right to remain silent;
- That anything he/she says will be written down and used against him/her in court;
- That he/she is allowed to consult a lawyer of his/her choice or that he/she may apply to the legal aid board to have one assigned to him/her at State expense; and

- That he/she is allowed to be released on bail.

The arrested person must sign in the arresting officer's pocket book that he/she been informed of his/her rights. Arrested and detained people all have the following pre-trial rights:

- To remain silent and be informed that they are allowed to remain silent;
- To be brought to court within 48 hours, to be charged or informed why they are being detained;
- Not to be forced to make a confession or admission that could be used against them in court; and
- To be released on bail if it won't harm the trial ('is in the interests of justice') to do so.

Children who are arrested must be:

- Brought before court within 24 hours;
- Informed of their rights and seen by a lawyer;
- Have their parents or guardians informed of the detention and visits facilitated.

All detainees have the right:

- To be informed why they are being detained;

- To be told they can choose and consult with a lawyer and to be allowed to do so; and
- To be detained in decent conditions, which do not affect their dignity.
- Once charged, people have the right to have their trial begin within a reasonable timeframe.

4.1.8 Admission of guilt

Sometimes a crime is so minor that the arresting police officer believes a court would only issue a fine. The officer may then give the accused a written notice directing them to appear in court at a specific time or admit guilt beforehand and pay an admission of guilt fine to the clerk of the court. The most common example of this is a speeding fine, where the speed is not so far over the permitted limit that the driver faces possible jail.

4.1.9 Between arrest and trial

Once an accused has been arrested, he/she must be brought before court within 48 hours (excluding non-court days).

But though reporters may be present at this first appearance they may not name or identify the suspect unless and until a plea has been entered (see section 4.4.2).

Often, the suspect is asked to plead at this first court appearance. But sometimes police use this appearance simply to request an extension of detention, because their investigations are continuing, or there may be other reasons why a plea is not entered at this stage.

Sometimes a prosecutor will decide that repeated pre-trial court appearances of suspects, simply to allow the police to continue their investigations, have gone on for an unreasonable time, and should end. If, at that stage, the prosecutor feels an adequate case has not been assembled, the judge or magistrate will order the case to be struck (removed) from the rolls. This is not an acquittal or a finding of guilt. The presiding officer is simply removing the case from the court's business for the time being. If the police eventually assemble adequate evidence, the suspects can be re-remanded and the case started afresh – or new suspects may be identified. But reporters should note that after this point the original suspects are no longer suspects and must not be referred to as such. They are ordinary, presumed innocent, citizens unless and until the police re-arrest them. Their arrest and eventual release may be reported, but avoid terminology which implies wrongdoing; it is certainly defamatory.

4.1.10 Bail

Once they appear, suspects may apply for bail. Bail is when money is paid (a **surety**) or some other guarantee given (such as giving up a passport, promising to report to the police station at regular intervals and promising not to leave the court's jurisdiction) by an accused, allowing him/her to be released from detention on condition that he/she appears in court on the date of the trial. People are normally allowed bail, unless they pose a **flight risk** (are thought likely to escape). If they do fail to turn up for trial, bail is **estreated** (broken: the conditional release is withdrawn and the person must pay the surety to the court). Bail can be granted in three ways:

- **By the police.** Police bail may only be granted before a suspect's first court appearance, by a commissioned police officer who has consulted the investigating officer. Police bail may be granted for any offence except those listed in Part II and III of Schedule 2 (*see Table 2 on page 110*). The police may not put any conditions on the bail and the bail must be paid in cash. The arrested person must be given the opportunity to phone family and friends, a lawyer, a religious counsellor or a doctor, to raise funds for the bail. The arrested person must get a receipt stating the sum paid and the time, date and place of the trial. Police bail may only be granted before the first appearance.

- **By the Director of Public Prosecutions or a Prosecutor.** This bail may be issued before the first court appearance by either, in consultation with the investigating officer in terms of Schedule 7 offences (*see Table 2 on page 110*). Conditions may be imposed on this bail.
- **By the court.** A court can release an accused on bail at any stage in the proceedings. However, this normally occurs during the accused's first appearance. A bail application is dealt with in the form of an inquiry. Those standing accused of Schedule 5 offences (*see Table 2 on page 110*) have to satisfy the court that they need not remain in custody and that they will return to face trial. Those accused of Schedule 6 (*see Table 2 on page 110*) offences must show exceptional circumstances for bail to be granted. Judges are now permitted to take 'community sensitivities' into account when making bail decisions.

If the court awards the accused bail, they are released from custody and remain free until the trial ends – unless they violate the conditions of their bail or commit other acts (such as threatening witnesses) which lead the police to request that bail is withdrawn.

If the accused are a threat to the **administration of justice**, because there is a very real fear that they will tamper with witnesses or abscond (disappear), the

prosecution may ask the magistrate to refuse bail, after which the accused will be remanded (kept) in custody until the next sitting of the court.

Where the offence is comparatively minor, the accused may be released on a warning to appear at a given date. Where this happens, the accused are said to be **released on their own recognisance** – in other words they take the responsibility themselves to appear in court when they are told to. If they don't, they are guilty of an offence and can be held in custody until the trial is over.

4.2 Types of crimes

The Criminal Procedure Act classifies offences into different schedules that have a bearing on bail applications and also the manner in which the arrest may be made. Some offences appear in more than one schedule; when the accused is charged, the prosecution states the schedule of their crime. *(See Table 2 on page 110)*

How some crimes are defined

Murder and 'manslaughter'

Newspapers often write about murder and 'manslaughter', but the term manslaughter is not used by South African courts. When a human being is unlawfully killed (there are cases where

people can be lawfully killed, for example, if self-defence can be proved), this crime is **murder** if the prosecution can prove that the killer intended their wrongful act against the victim to cause death.

There are also cases where direct intent cannot be proved, such as when someone hits another person during a fight and that person dies. The State may then be able to prove only that a reasonable person would have foreseen death resulting from this action, and that the accused did nothing to prevent this. The accused would be guilty of the lesser charge of **culpable homicide** (a killing for which they carry the blame). This is the correct term for 'manslaughter' in our courts.

Rape and indecent assault

The legal definition of **rape** in South Africa is 'unlawful sexual intercourse with a woman without her consent'. In law, sexual intercourse is defined as a man putting his penis into a woman's vagina. So penetrating a woman's mouth or anus does not count as rape. Nor does penetration using an object. And because of this definition, men cannot, in legal definition, be raped. All

these other crimes are defined as **indecent assault**. When the woman is under the legal age of sexual consent (16) any man or youth who has intercourse with her is guilty of **statutory rape** – because she is judged to be too young to understand the consequences of consenting, even if she said 'yes'. Intercourse with a close family member (such as a father having sex with his daughter) is known as **incest**, and the law does not allow consent to incest.

As it currently stands, South African rape law is based fairly directly on the old common law. This contains many assumptions common in **patriarchal** (male-dominated) societies, starting with the **cautionary rule**: that judges must look at a victim's evidence particularly carefully. Other assumptions are, for example, that a woman's previous sexual history is relevant to whether she was raped, or that women who do not raise a **hue and cry** (tell people immediately) are less likely to have been raped. (We know that many women are ashamed of what happened and do not immediately tell anyone about the rape.)

Rape and indecent assault cases often depend on proving or disproving consent, and can then boil down to the victim's word against that of

the alleged rapist. And while a victim's previous history can be brought up by the defence to make her look less credible, it is forbidden to bring evidence forward that the accused has previously raped someone. Courts are more likely to find a rapist guilty (and issue a heavier sentence) if:

- The woman was injured in other ways as well;
- The attacker was a stranger (most rapes happen between people who already know one another);
- Some other crime like robbery was committed at the same time;
- The woman fights back (which increases her chances of being severely injured or killed); and/or
- The woman is pregnant, a virgin or a mother. Some studies have suggested that conviction in SA is also more likely if the woman is white.

Indecent assault charges do not have to prove lack of consent. Such cases are easier to win, but the sentences are much lighter.

A new Sexual Offences Bill is now before

Parliament. It will remove the cautionary rule, and some of the other assumptions on which current law is based.

Domestic violence

Domestic violence (both **battery** – one partner, most often the husband, physically assaulting the other – and psychological or economic abuse and harassment) is a crime under the 1998 Domestic Violence Act, and not simply 'a domestic dispute'.

Battered partners are entitled to:

- Lay a criminal charge of assault;
- Seek a civil interdict or eviction order to get the abusive partner out of the home and keep him or her away from them; or
- Seek a protection order from the Magistrate's Court or the High Court ordering the assaults to stop.
- (The victim can also claim damages and seek a divorce under civil law.)

The court must be one close to the victim's or the abuser's home or workplace, and the law says

a Magistrate's Court can issue a protection order at any time of the day or night. An abuser who ignores interdicts or protection orders is guilty of an additional crime to the assault itself.

It does not matter whether the partners were married under civil, customary or religious law, whether they are not married at all or whether they are partners of the same sex; the crime remains the same. Children can also be victims of domestic violence; a parent or guardian seeks the remedies on their behalf.

4.3 What happens in court?

4.3.1 Rights of the accused

All accused people have the right to a fair trial, which includes:

- To be presumed innocent until they are proven guilty;
- To have enough time and space to prepare their defence;
- To be told that the State will give them a lawyer at State expense, if they cannot afford one and if not having a lawyer would end up with them being convicted unfairly;
- To have a trial begin and end without too much delay;

- Not to be tried for a crime for which they have already been tried and have either been convicted or acquitted on. This does not apply when they were acquitted on a technicality and the prosecution is bringing the case to court again with new evidence;
- To be present when the trial happens; and
- To be tried and given information in a language that they understand.

The rights of children and juveniles in the courts

A child under the age of seven is deemed to lack criminal capacity and cannot be convicted of a crime. Courts presume that children between the ages of seven and 14 are also unable to commit a crime unless the prosecution can prove otherwise.

Children under the age of 16 are believed to lack decision-making capacity around sexual matters, so anyone who has sex with a child under 16 is guilty of statutory rape, even if the child apparently consented to the activity.

Youths under the age of 18 suspected of having committed criminal offences are called 'juvenile offenders'.

Children and juveniles in court must be:

- (If convicted and sentenced) sent to a suitable centre for juveniles; and
- Be detained only as a last resort, with a place of safety and secure care the first option for their placement.

Children under the age of 18 have the right:

- To be detained separately from adults; and
- To special protection respecting their age and development needs.

Street children have the right to exactly the same treatment and safeguards as other children.

No publication of any report is allowed where the identity of the child can be deduced, unless the court decides it is 'in the interests of a particular person' and 'fair and just'. If you break this rule you can be charged with a criminal offence.

A party to the proceedings may apply for access to the records for up to a year after the

completion of the inquiry, but while outsiders are not explicitly prohibited from access, there is no express right to access.

The press can be denied these records.

If the child is transferred from the criminal (juvenile) court to the children's court, the criminal case must be postponed until the children's court comes to a decision about the child's status, guardianship and other relevant matters.

4.3.2 Pleas

When the accused is formally charged, they will be asked to formally plead. There are nine possible pleas:

- Guilty as charged; or
- Not guilty; or
- *Autrefois acquit* (that the accused has already been tried on this charge and acquitted); or
- *Autrefois convict* (that the accused has already been tried and convicted on this charge); or
- That the accused has been tried convicted and pardoned on this charge; or
- That the court does not have jurisdiction; or

- That they have been discharged from prosecution because they have turned state witness; or
- That the prosecutor has no title (reason) to prosecute; and/or
- That a court order prevents the prosecution from being started or resumed.

If the accused refuses to plead, the court will enter a plea of not guilty. Where the accused pleads guilty, the presiding officer may automatically convict and sentence if the case does not merit imprisonment or a minimal fine. If the case merits more severe punishment the judge must question the accused on each of the allegations on the charge and, once satisfied, may impose a harsher sentence.

A magistrate has the same power and the same responsibility, except where the punishment deserved is higher than a local magistrate has authority to impose. Then the case must be handed to the regional magistrate for sentencing.

If the presiding officer is not satisfied with the accused's guilt, the court will be ordered to enter a plea of not guilty and the trial will proceed on this basis. The presiding officer may refuse to accept a guilty plea where the accused is not represented by a lawyer, or illiterate (unable to read) and/or under a false impression (doesn't understand). Once a plea of not guilty has been entered, the task of the prosecution is to prove beyond a reasonable doubt that the accused is guilty as charged.

4.3.3 Process

A state prosecutor represents the prosecution (the State) in a Magistrate's Court; the state advocate fills this role in the High Court.

Cases are conducted in an **adversarial** manner: in other words the State puts its case forward by presenting evidence and the testimony of witnesses. The person accused or his representative tries to disprove this case through questioning and presenting additional evidence, and the State in turn tries to disprove the accused person's claims.

The case begins with the prosecution presenting its case before the judge or magistrate, leading evidence and calling witnesses to give evidence (testimony) about the accused's guilt. This is known as the **examination-in-chief**.

After the prosecution has led its evidence, the accused or his representative (defence counsel) will be allowed to **cross-examine** (question) each state witness to test how reliable their evidence is, and to contrast their testimony with the accused's version of events.

The prosecution will then re-examine the witness about any uncertainties raised or new facts introduced.

When the prosecutor has placed all the evidence before the court, the case for the prosecution is considered closed.

The defence can then ask the presiding officer to **discharge** the State's case. The defence presents

arguments that the State has been unable to prove guilt beyond a reasonable doubt.

The presiding officer may decide at this stage that there is 'no case to answer' or that insufficient evidence has been presented by the prosecution.

If this happens, reporters must no longer describe the person as an accused or suspect.

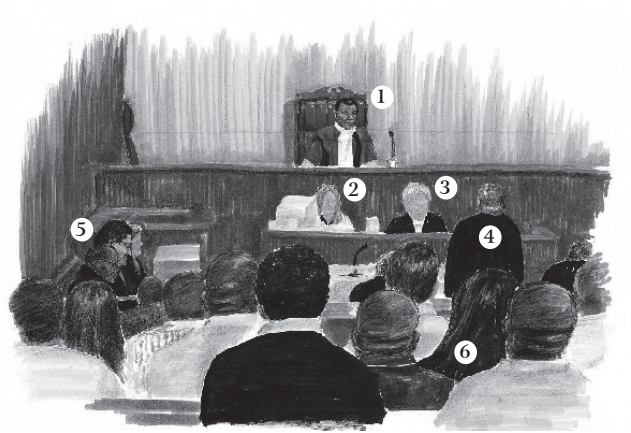
But if the court does not agree to this application, the defence will lead their own evidence to prove why the accused is not guilty.

The State will have an opportunity to cross-examine all defence witnesses after they have given their testimony, to test their reliability.

At the end of this, both the prosecution and the accused or his counsel will be given an opportunity to argue their respective cases after which the court will **retire** (the trial will be postponed) while the presiding officer considers the case and comes to a **verdict** (the decision).

(See Figure 3 on page 94)

FIGURE 3:
Court of people (Wilson Mgobhozi, *The Star*)



1) Judge 2) Stenographer 3) Registrar 4) Prosecution
5) Defence counsel 6) Public gallery.

4.3.4 Evidence

South African rules of evidence come from the days when there was a **jury system**: where a committee of 11 ordinary people with no special legal knowledge listened and decided on the case. Because the jury was non-specialist, evidence had to be **led** (presented) in a way that was clear, unambiguous and free of prejudice. So most of the rules of evidence deal with ruling out evidence that, even if relevant, could unfairly **prejudice**

(harm or influence) the court against the accused.

Evidence may be **oral** (spoken), **documentary** (papers) or **material** (a physical object). All evidence must be relevant: it must go towards proving or disproving an issue. Irrelevant evidence will not be **admitted** (allowed).

Direct evidence is the evidence of someone who has seen, heard or experienced something for themselves.

Circumstantial evidence introduces factual information that can be used to prove or infer something else – for example, if an accused lied about or cannot prove where he was at the time of the crime, that might be used to infer that he was present at the crime scene. But circumstantial evidence is only accepted where the inference drawn from it is consistent with all the other evidence led. In a criminal case it also has to be the only reasonable inference in the light of all the facts. In a civil case it also has to be the most plausible conclusion from among several conceivable ones.

Hearsay evidence is an account of a statement made by a third party who is not present in court. A court has the discretion to admit hearsay evidence. Its decision will depend on the circumstances.

Types of evidence that cannot be admitted are:

- Evidence obtained without a warrant, or through undue duress and torture (the investigating officers may find themselves liable for criminal prosecution). No evidence, confession or admission can be led in

court if it has been obtained in this or any other way that has violated the accused's human rights.

- Evidence of character. This is seen as irrelevant: even 'good' people can commit crimes; and 'bad' people do not always do so. In a criminal case the court is not permitted to hear evidence about an accused's previous convictions until after the accused has been convicted. But if the accused claims during the trial that he/she is of good character or attacks the integrity of the prosecution's witnesses the judge may lift this ban, as he will if the previous conviction is an element of the current charge.

Witnesses cannot be forced to answer questions that incriminate them or their spouses or reveal confidential interactions between them and their legal adviser. The court calls these matters **privileged** and places them off limits. The exception to this rule is where a man has beaten or raped his wife and she is the complainant in the case, or where the offence is one covered by the Child Care Act or the Maintenance Act.

Witnesses cannot refuse to answer questions that would incriminate others.

Witnesses may not be asked **leading questions** (questions that suggest the answer the prosecutor or lawyer wants). They must be encouraged to tell what they know honestly and objectively.

Journalists, priests and doctors have no special privileges on the witness stand and must answer the questions or face the court's sanction. For journalists, however, there may be professional and ethical considerations (such as protecting sources) that lead them to refuse to testify. ***(See Section 4.5)***

Witnesses must be capable of understanding the court proceedings. Mentally deficient, insane and intoxicated persons may be ruled incompetent to testify – although the courts may want to hear specialist evidence about a witness's mental state before reaching this conclusion. Presiding officers must satisfy themselves that children called to testify are capable of understanding their duty to speak the truth

4.3.5 Verdicts and sentencing

The presiding officer may **acquit** the accused who will be free to leave the court or **convict** them **as charged**, or **convict** them **of a lesser offence**. (For example, a person accused of murder may be convicted instead of culpable homicide or robbery; a person accused of rape may be convicted of indecent assault; or a person charged with robbery may be convicted of being an accessory after the fact or charged with attempted robbery.)

Where a presiding officer has convicted the accused, both the prosecution and the defence will then be given

the opportunity to argue over the possible **sentence** (punishment).

From this stage on, the media may describe the accused as a convicted person/criminal ('robber', 'rapist', etc.) and do not need to use the qualifier 'alleged'.

The prosecution will lead evidence to show **aggravating factors** (factors that should make the sentence heavier) such as the accused's previous criminal record, while the defence will look to lead **mitigating factors** to persuade the presiding officer to pass a lighter sentence. (*See Chapter 6*)

Note that if someone is acquitted, they can never be re-arrested and charged on exactly the same charge. (We often use the American phrase 'double jeopardy' for this.)

If people are dissatisfied with a criminal verdict, they may seek compensation in the civil courts (*see Chapter 5*) for example, the relatives of a murdered person may sue the alleged killer for the income they lost through the death or for compensation for their psychological distress. They would have to prove in the civil courts that the alleged murderer caused these harms. But even if they succeed, they have not proved the defendant guilty of the criminal charge of murder; they have proved only their own right to damages. Reporters must be extremely careful how they report

these matters, and not use words that suggest or imply the defendant is now guilty of the original criminal charge.

4.3.6 Appeals and reviews

At the end of a trial, a convicted person or his/her counsel may declare an intention to appeal – that is, to ask a higher court to look again at the process and the decision to decide if they were legal and appropriate. Appeals may be either against the verdict or the sentence.

Appeals pass up through the hierarchy of courts, from lower to higher. The SCA is the final decision-making body, unless the case has Constitutional implications, in which case an appeal to the Constitutional Court is allowed. (*See Chapter 7*)

4.4 Reporting laws and conventions

Four main pieces of law impact on how news organisations may cover a court case. The general law of **contempt** (disrespecting a court or court officer) and the specific instance of contempt known as ***sub judice*** (publishing forbidden types of comment while a case is going on) are dealt with here. **Defamation** (publishing comment that brings someone into disrepute) does not only relate to court cases, but very often arises as a result of how published stories about cases have been written. This is dealt with in Chapter 8. The fourth area of law

which affects the media is the law of **privacy** which may determine whether reports covering the private lives of individuals involved in court proceedings can be published.

We also look at the end of this section at what happens when reporters themselves end up in the dock for matters related to their professional work.

4.4.1 Contempt of court

Contempt can take place inside the court (*in facie curiae*) or beyond the court (*ex facie curiae*).

Inside the court

Contempt is committed in court where someone misbehaves, insults the court or its officers or refuses to obey procedure or orders issued by the presiding officer while the court is in session. One example is allowing a cell phone to ring and answering the call. When this happens, the presiding officer can immediately declare the offender guilty of contempt and punish them to preserve the dignity of the court and keep order.

Beyond the court – general contempt

Contempt beyond the court is any conduct which affects the judge's or magistrate's ability to administer justice without undue influence. This includes the publication of information

which prejudices or influences the outcome of the trial, interferes with witnesses or the presiding officer or anticipates the decision of the court. Even when the court is not sitting, any person may commit contempt by publishing reports that 'scandalise' the court by unfairly casting suspicions or bringing into contempt the administration of justice – for example, by making unjustified personal attacks on the capacity, impartiality, honesty or motives of members of the bench.

But a precedent now exists allowing people to speak more freely than was the case in the past. Through **State v Mamabolo** (2001) a new definition of contempt, in line with the Bill of Rights support of free speech, is taking shape. Russel Mamabolo, media spokesperson for the Department of Correctional Services, told a newspaper he disapproved of a judge's decision granting AWB leader Eugene Terreblanche bail to appeal against a charge while he was already serving a jail sentence on another count. He described the judge's decision as 'wrong' – and the judge convicted him of contempt.

In the Constitutional Court, Justice Kriegler found that the right to freedom of expression changed the manner in which a specific form of contempt, scandalising the court,

is defined. In future, contempt in the form of scandalising the court will be committed only if published comment is likely to 'undermine the authority of the judicial process' (destroy public faith in judges and the courts).

Comment still has to be fair, honest and balanced.

NOTE: LIABILITY. What the media may publish was historically governed by the legal principle of strict liability: that whatever the circumstances or intention, the publisher was liable if he has been negligent: if it can be proved that the necessary processes and checks were neglected. This appears to bring it into line with the recent precedents around defamation (see Chapter 8) which are beginning to consider whether the media was at fault in relation to the publication (a term that covers print and electronic media).

Prejudicial comment and actions

The test of whether something is **prejudicial** is 'whether the statement or document in issue tends to interfere with the administration of justice in a pending proceeding':

- Publishing the accused's previous convictions before or during the trial. Publishing the accused's previous convictions after conviction but before sentencing, if these have not first been disclosed by the prosecution;
- Publishing a photo of the accused before an identity parade has been held;
- In certain types of matters, mostly relating to sexual offences, identifying a suspect before he or she has pleaded. Usually you may identify a suspect once they have been charged in court or appeared in court on the charges;
- Publishing an article implying that the accused is guilty before the presiding officer has made this finding;
- Publishing intimidating comments about or threats against witnesses, parties, assessors, judges or magistrates in pending proceedings or after a case has been finalised;
- Publishing false allegations of bias against the court;
- Trying to get interviews by pretending to be a court official or showing interviewees documents that you pretend are court documents. This is known as simulating the court process;
- Obstructing court officials in the execution of

their tasks or disobeying court orders; and
- Revealing the contents of Magistrate's Court records before they are finalised or if it has been prohibited by *in camera* proceedings.

Privilege: exceptions to contempt

Everything said in open court proceedings is **privileged**, except where a presiding officer issues a specific order that certain information must not be published. Privileged means that you can publish it without fearing prosecution – so long as you publish it accurately, in context, and without putting 'spin' on it. That is why accurate note-taking in court is so important. This privilege extends to reporting requests made by a party in court for a presiding officer to **recuse** him/herself (withdraw from the case) because he or she may be biased or in some other way an unsuitable judge. Stick to the exact words used in court.

Privilege also applies to statements made about court proceedings by Members of Parliament or the Provincial Legislature in the House, or by judges sitting on an appeal or in reviews of

proceedings in lower courts – again, so long as these are published accurately and in context.

4.4.2 Sub judice

Sub judice is Latin for 'the case is under consideration'. It is a special type of contempt. The *sub judice* rule means news organisations cannot publish comment that could affect how the presiding officer determines the case. It does not prevent reporting on the facts of the case. The rule exists to ensure a free trial, as guaranteed by the Constitution. It ensures that judgment is made on the evidence, not on public opinion led by the media.

When does the *sub judice* rule apply?

Publishing information regarding a case during the police investigation and before any arrest is made is **not** *sub judice*, but if it prejudices the outcome of the investigations it could constitute the crime of **obstructing** or **defeating the ends of justice**.

A criminal case becomes *sub judice* the moment someone is arrested or when a summons or notice to appear in court is issued. Cases are *sub judice* even though the trial has started.

Civil proceedings are *sub judice* the moment a summons is issued, even if the summons has not been served.

A case remains **pending** – governed by the *sub judice* rule – until the last court of appeal has delivered its judgment or the time allowed for noting an appeal has expired. However, in practical terms the risk of a prosecution during appeal is far less.

Is the *sub judice* rule changing?

Many lawyers feel the rules do not accord with the Bill of Rights and that they may soon be modified. They date from the era of juries, whereas judges are obliged to ignore public comment and deliberate on the law as it stands. They are trained not to be swayed by extra-judicial issues like media debates. The *sub judice* rule must now be viewed in the context of the right to freedom of expression which is written into the Constitution. As Chapter 8 will show this right has already had a major impact on the rules of defamation. It is likely that a court grappling with the *sub judice* rule will adapt the rule in line with the Mamabolo decision, so that the media have more flexibility in reporting on pending matters than has been the case up to

now. Judges are likely to try to balance various different claims:

- The public interest;
- The right to free expression;
- The kind of comment or information published;
- The way sources were used; and
- The prejudice, if any, the publication could cause.

4.4.3 Journalists IN court: Section 205 and reporters as witnesses

Depending on the circumstances, it may be illegal under Section 205 of the Criminal Procedure Act for journalists to conceal their sources from a police investigation or a court. If a reporter is summoned under this section and refuses to appear, he/she is committing another form of contempt beyond the court. For journalists, this is an ethical call, based on the principle of protecting sources.

In 1999, the South African National Editors' Forum (SANEF) reached a 'Record of Understanding' on Section 205 *(see www.sanef.org.za or Reporting the Courts—A desk guide and glossary)*. Government acknowledged that maintaining law and order had to be balanced against the right to free expression. Newspapers were assured

that if *sub poenas* (orders for journalists to appear) were issued, they could refer these to the DPP who would mediate, and take into account journalists' need to protect their sources.

But photographers who had covered the August 1996 lynching and burning of a Cape Town gangster, still found themselves faced with *sub poenas* and demands from the police for film and videotapes. Court battles followed and on Press Freedom Day 2000, police, authorised by the OPP, raided several media houses and seized this material. Since then, several new drafts of Section 205 have been produced, but the matter has not yet been settled.

In late 2003, then journalist Ranjeni Munusamy refused to appear before a government commission of enquiry (the Hefer Commission), claiming she had received death threats. Munusamy argued in a court action that a journalist has a right not to be called before a commission of enquiry except as a last resort. This argument was rejected by the court.

There is no absolute ethical rule forbidding journalists from giving evidence; as Wits University professor of journalism Anton Harber points out: "They can agree to answer every question except those compromising their professional obligations." Again, though, a refusal to answer can be a form of contempt.

Journalists who find themselves facing a *sub poena* cannot report on the case concerned. However they

decide to respond, they have become a party to the case, and could be influenced (or be suspected of being influenced) by **conflict of interest** (their role in the case could bias how they report).

4.5 Reporting tips

A 1998 Media Monitoring Project survey analysed newspaper coverage of violence against women. They found that 55% of all coverage in the period they surveyed dealt with rape. Be aware that there are other, strong, hard-news court stories to be found in issues such as domestic violence.

There are also many other types of human interest stories to be found in even minor court cases. Court cases can also supply light or peculiar stories. For instance, a case of theft could become a 'light' story if the circumstances or the stolen goods are bizarre or out of the ordinary. The protagonists do not always need to be well-known people.

TABLE 2:
Scheduled offences

Schedule	Types of offences	Arrest conditions	Bail implications
1	Treason; sedition; public violence; murder; culpable homicide; rape; indecent assault; bestiality; robbery; kidnapping; child-stealing; assault causing a dangerous wound; arson; malicious injury to property; breaking or entering premises intending to commit a crime; theft; knowingly receiving stolen property; forgery and offences relating to the coinage; escaping from custody on a Schedule 1 offence; inciting or attempting to commit a Schedule 1 offence; any other offence punishable by a six-month jail term without the option of a fine.	A private person or police officer can arrest a suspect without a warrant.	
2, Part I	Any offence relating to the illegal possession, transport or supply of drugs or liquor; any offence relating to the illicit dealing in or possession of precious metals or stones (i.e. gold, platinum and diamonds); breaking or entering; theft.		Police bail may be granted.
2, Part II	Treason; sedition; murder; rape; robbery; assault, where a dangerous wound is inflicted; breaking or entering; theft; receiving stolen goods; forgery; uttering if the amount involved exceeds R200; any offence relating to the illegal dealing or		Police bail may not be given.

Schedule	Types of offences	Arrest conditions	Bail implications
2, **Part II cont.**	possession of precious metals or stones; any offence relating to the illegal possession, transport or supply of drugs; any offence relating to the coinage; and, or any conspiracy, incitement or attempt to commit any offence in this schedule.		
2, **Part III**	Sedition; public violence; murder; kidnapping; child-stealing; housebreaking; intimidation; any conspiracy, incitement or attempt to commit any of these offences; and, or treason.		Police bail may not be given.
3	Any contravention of a by-law or regulation made by or for a city, town or regional council. Any traffic offence: Driving at a speed exceeding the prescribed limit; driving a vehicle without lights or means of identification; leaving or stopping a vehicle where it may not be left or in a condition in which it may not be left; driving a vehicle at a time and place when it may not be driven; driving a defective vehicle or causing undue noise; owning or driving an unlicensed vehicle; and, or driving a vehicle without a valid licence.		Police bail may be granted.
5	Treason; murder; attempted murder involving the infliction of grievous bodily harm; rape; any offence in terms of the Drugs and Drug Trafficking Act where the value of the drug in question is worth more than R50 000, or the value of the drug is		Bail must take the form of an inquiry in court, where the applicant must satisfy the court that he does not need to remain in custody and that he will return to stand trial.

Schedule	Types of offences	Arrest conditions	Bail implications
5 cont.	worth more than R10 000 where the offence was committed by a syndicate or where the offence was committed by a law enforcement officer; any offence relating to the smuggling, dealing of ammunition, firearms, explosives or armament or the possession of automatic, semi-automatic firearms, explosives or armaments; any offence of being in possession of more than 1 000 rounds of ammunition; any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft involving amounts of more than R500 000, or R100 000 if committed by a syndicate or group in furtherance of a common purpose or conspiracy, or R10 000 if committed by a law enforcement officer, whether in conspiracy or common purpose with others or not; indecent assault on a child under the age of 16; and, or a Schedule 1 offence where the accused has been convicted of a previous Schedule 1 offence or which was committed while out on bail on a Schedule 1 offence charge.		
6	Murder when: It was planned or premeditated; the victim was a law enforcement officer or a person who was due to give material evidence to a Schedule 1 case; the victim was killed by the accused during or after the commission, or the attempted commission of rape or		Bail must take the form of an inquiry in court with the applicant showing that there are exceptional grounds for bail to be granted.

Schedule	Types of offences	Arrest conditions	Bail implications
6 cont.	robbery with aggravating circumstances; and, or the offence was committed by a person or group acting with common purpose or conspiracy. Rape when: The victim is raped more than once whether by the accused or co-perpetrators; by more than one person where the persons acted with common purpose or conspiracy; by a person who is charged with having committed two or more offences of rape; and or, by a person who knew he had HIV or Aids; where the victim is a girl under the age of 16; or a physically disabled woman or mentally ill woman; and, or where grievous bodily harm is inflicted. Robbery involving: The use by the co-accused or any co-perpetrators or participants of a firearm; the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; and, or the taking of a motor vehicle. Indecent assault on a child under 16 involving the infliction of grievous bodily harm. An offence referred to in Schedule 5 and the accused has previously been convicted of an offence in Schedules 5 or 6 or which was allegedly committed while they were released on bail in respect of a Schedule 5 or 6 offence.		

Schedule	Types of offences	Arrest conditions	Bail implications
7	Public violence; culpable homicide; bestiality; assault involving the infliction of grievous bodily harm; arson; housebreaking; malicious injury to property; robbery, other than a robbery with aggravating circumstances, where the amount involved is less than R20 000; theft, if the amount exceeds R2 000 but is less than R20 000; any offence relating to the illegal possession of drugs; any offence relating to extortion, fraud, uttering or forgery if the amount is not more than R20 000; and, or any attempt, conspiracy or incitement to commit an offence in this schedule.		Conditional bail may be authorised by the Director of Public Prosecutions or prosecutor before the accused's first appearance

CHAPTER 5:
CIVIL PROCEDURE

This chapter describes:
- The procedure of the civil court;
- The special procedures relating to divorce cases;
- How civil differs from criminal procedure; and
- The specialised terminology used.

Introduction

Civil cases take place in the same physical courts – the Magistrate's Courts and High Courts – as criminal cases. Magistrates and judges preside, and attorneys and advocates play the same kinds of roles. Certain law firms and advocates specialise in handling civil cases, as these may require a very specialised knowledge of business, contracts and finance, although many lawyers take on both types of case. Civil cases have their own distinctive procedure and terminology. It is important for reporters to grasp these differences, because referring to the defendant in a civil case as though he or she was a criminal standing trial can be defamatory.

5.1 Terminology

The aggrieved party in a civil case is known as the **plaintiff**. The person whom he is suing is known as the **defendant**. Together they are referred to as the **litigants** or **parties to the case.** The action being sought to put matters right is known as the **remedy**.

5.2 Procedure

5.2.1 Location

What court the case is heard in depends on the nature and seriousness of the action, the amount of money involved, the kind of remedy sought, and the place where the action took place or where the defendant is domiciled (his legal address).

5.2.2 Timeframe

Civil claims must be brought to court within a **prescribed period** (a timeframe set down by the law), or the claim is said to **prescribe** (the claimant loses the right to bring the action). For example, insurance claims relating to a motor accident must be made within three years of the accident.

5.2.3 Bringing a civil case

Unlike a criminal case, a civil case is launched by one individual against another. (A company or organisation may count as a legal individual for this purpose.) Any

individual who believes he has been harmed by another person's action can seek legal **redress** (compensation).

First, he needs to find out if he **has grounds** for bringing a case (if what was done to him counts as an injury in legal terms). An attorney or legal advice centre can provide this information and, if he does have a case, can help in getting the case file opened with the court.

Most civil law claims are about broken contracts. An injured party has a choice about what remedy for the broken contract he requests from the courts:

- **Specific performance** (that the person who broke the contract do what was promised in the contract);
- **Interdict** (*see Section 5.6*);
- **Damages** (that the person pay money because the plaintiff lost out when the contract was broken);
- **Cancellation and damages** (a contract can be cancelled if one person has not carried out an important part of it. Once the contract is cancelled nobody has to carry it out. The person who lost out can also sue for damages).

5.2.4 Summons

Whether the matter is heard in the Magistrate's Court or the High Court, the plaintiff will ask the sheriff to issue a **summons** which will be **served on** (delivered to) the defendant. A summons calls him to appear in court on a certain date to answer why judgment should not be given against him.

If the defendant does nothing about the summons, the plaintiff may apply for a **default judgment** (a judgment without a trial) against the defendant. If the court grants this, the plaintiff can claim against the defendant's property with a **warrant of execution**. The court will take some of the defendant's possessions and sell them to get money to pay the plaintiff.

5.2.5 Pleadings, particulars of claim and declarations

Whether the defendant is reacting to the summons or the default judgment, he must respond quickly if he intends to defend himself in court. He must respond within five days in a Magistrate's Court action and ten in a High Court action. If he lives beyond the court's jurisdiction, he has 21 days.

Where the action is taking place in the High Court, the defendant must file a **plea** (an official response or answer), either admitting or denying the plaintiff's allegations and explaining why the plaintiff should not be entitled to win against him.

The defendant is also entitled to lodge a **counter-claim** (which can be a statement that the plaintiff is actually to blame or a completely separate claim brought by the defendant against the plaintiff) to which the plaintiff in turn must plead. This happens most often in motor vehicle accident insurance cases.

The plaintiff will then respond. Together these

documents are known as **pleadings**.

The purpose of the pleadings is to set down the dispute clearly and concisely and enable the presiding officer to determine what the actual dispute is about.

The plaintiff's first pleading is known as the **particulars of claim** if the original summons had a particulars of claim (a detailed schedule of what is claimed) attached. If the original summons did not include this, the plaintiff must file a second document known as a **declaration**. If the particulars of claim or declaration do not appear to contain a proper legal basis for the claim, the defendant may file an **exception**. This is a document stating that the contents do not disclose a proper basis for the claim and asking the court to scrap the matter.

5.2.6 Discovery

After all pleadings have been exchanged, and if the court does not agree to any exception requested, the parties will ask for **discovery** (the disclosure of documents in the other party's possession which will be used in court to support that party's case). Any documents not disclosed at this stage may not be used in evidence without the special consent of the court.

Once discovery has taken place, a court date is set on the court roll and the parties go to court.

5.2.7 Settlement

The parties can negotiate their own **settlement** (agreement about blame and compensation) before the matter reaches court, without the expense of a lengthy court battle. In High Court cases, the rules actually provide that the parties must meet before the trial to **canvass** (discuss) relevant issues, among them an invitation to make an offer of settlement.

Divorce cases

Divorce and separation

A **separation** (a decision to live apart) is not the same as a divorce. A separation may be completely informal: just an agreement between the two parties. It may be formal: an attorney draws up the agreement. But the courts are not involved. However, a formal separation agreement may be useful evidence in court if the parties later decide to **divorce** (make the separation permanent).

Grounds for divorce

There are only two grounds for divorce:

- The 'irretrievable (can't be repaired) breakdown of the marriage; or
- The mental illness (for at least two years) or continuous unconsciousness (for at least six

months, supported by medical evidence) of one party.
- Infidelity (being unfaithful), desertion, drug or alcohol addiction or abuse, are examples of irretrievable breakdown. Reporters should not describe them as grounds; say 'irretrievable breakdown by reason of ...'

The same grounds for divorce that apply to civil marriages now apply to customary marriages. Couples married by Hindu or Muslim religious rites without a civil marriage are not yet considered by the law to have been legally married, so they do not need to use the courts for a divorce. The law around customary Hindu and Muslim marriages is likely to change soon.

Who is bringing the case, which of the two grounds for divorce is being cited, and the decision/settlement are the only facts news organisations are allowed to publish about a divorce case.

Settlements

A court will not allow a divorce until it is

satisfied suitable arrangements have been made for any children. Other aspects the court may rule on are:
- Access of the partner who does not have custody to the children (visitation rights);
- Maintenance (support) for the children;
- Maintenance for the partner who needs it (usually the wife); and
- Division of property.

How this last is decided depends on a number of factors, including when (because different marriage laws came into force at different times) and how the couple was married. The relevant factors are in or out of **community of property** (community of property means that the couple's assets and earnings during the marriage are merged); with or without an **ante-nuptial contract** (ANC: a contract signed before marriage about who owns what); and whether the **accrual system** (taking into account increases in the value of property over time) forms part of any contract.

These matters are complex. Reporters writing about the terms of a divorce settlement should get the details correct and if necessary consult an expert about what it all means.

5.3 Evidence and witnesses

A civil trial is conducted like a criminal trial: in an adversarial manner, with each side presenting evidence and arguments and contesting the other side's evidence and arguments. The role of the presiding officer – judge or magistrate – is to decide which side or argument is most likely or true.

And so the plaintiff will set out his case and lead evidence, using witnesses, whom the defendant will cross-examine. Then the defendant will lead her witnesses, whom the plaintiff will cross-examine. A great deal of evidence in civil cases is often documentary, which is why establishing its status through disclosure is so important.

Upon conclusion of all the evidence, both parties' lawyers or counsel will then address the court after which the presiding officer will deliver judgment.

Motion Court

Normally only civil cases where the facts are disputed have to be settled in a trial with witnesses.

In other matters, for example those which seek clarification on a question of law, where a claim is unopposed, or where the High Court rules lay down a different procedure, a party seeking

redress or relief may simply institute the process by **notice of motion** on the basis of **affidavits** (sworn statements). The aggrieved party applies to court and is therefore known as an **applicant**, while the other party is known as a **respondent**. The notice of motion is, where necessary, served on the respondent with a notice of the time and place of the hearing.

High Courts normally set aside one day a week to hear unopposed applications in what is known as **motion court**. These applications by and large concern unopposed requests for **liquidation and sequestration** orders (bankruptcy and seizure of assets), voluntary surrender, appointments of *curators bonis* (officers to look after estates or the welfare of unprotected or incapacitated people) the admission of legal officers (attorneys, conveyancers, notaries and advocates) and interdicts.

Divorce is normally an action instituted by summons. But if a divorce is uncontested, it too will be heard in the motion court.

Where it appears that there is only one interested party, the court may issue a provisional order (Rule *Nisi - nisi* is Latin for 'unless') along with a return date calling on other parties to

respond if they wish. On the return date, the court may confirm the provisional order or order its withdrawal.

Provisional orders are published in the local media to ensure that people concerned can learn about them. They may also be published in the *Government Gazette* or made public by other means where the court orders this or the law around the case requires it.

5.4 Verdicts and sentences

The presiding officer may **reserve judgment**, which means that although the case has been finalised, judgment will only be announced at a later stage – at the presiding officer's discretion.

The judge may **find in favour of** the plaintiff or **partially uphold** the plaintiff's claim or find in favour of the defendant.

Reporters should note these are not the same as finding someone guilty or innocent and must not be paraphrased as such.

The judge can also rule that the defendant gets **absolution from the instance**, which means that the plaintiff was unable to produce enough evidence

to allow the court to reach a decision. This judgment allows the plaintiff to bring the suit again when he/she has gathered sufficient evidence.

5.5 Costs

The general principle is that the party for whom the court finds (the winning or successful party) is entitled to claim his legal costs from the other party. These costs are limited to the permitted costs of the court proceedings calculated according to a specific tariff (**party-and-party costs**). The successful party will normally still have to pay his own attorney's fees for other services rendered in connection with the case, (**attorney and own-client costs**), for example, counsel's costs for an opinion before the trial. The attorney is entitled to claim attorney and own-client costs from his or her client and these are payable whatever the outcome of the case.

Both the High Court and the Magistrate's Courts have tariff guidelines for day-to-day conduct which include the scales of fees for party-and-party costs.

Small Claims Court

If the damage suffered is very small (less than R7 000), the **complainant** (the injured party) can decide to take the case to the small claims court, which is also a civil court, but with a much simpler, quicker and cheaper procedure.

The rules require that the complainant must contact the **opponent** (the person who allegedly caused the damage) by telephone and letter to try and reach a settlement before any steps are taken through the small claims court.

If the opponent refuses to listen, the complainant sends an official small claims court **letter of demand** with a full description of the claim.

The opponent has 14 days to reply. If he does not, the plaintiff asks the **clerk of the small claims court** to issue a summons. This can be given to the sheriff of the court to take to the opponent. The summons gives the opponent ten days to pay the claim. If the claim is not settled within that time, the summons also sets out a date when the opponent must appear before the small claims court.

At the trial, the **small claims commissioner**

(usually a lawyer) makes the decision. Like a judge or magistrate, the commissioner helps both sides to present their cases and explains the court procedure to both sides. The commissioner then asks all the questions. Both the complainant and the opponent can call any witnesses to support their cases. The commissioner will question the witnesses. The parties should also bring any documents relevant to the case (for example invoices, receipts, photographs, statements by other people) which could serve as evidence.

The commissioner will decide on a **balance of probabilities** (the same principle as in all civil cases) who is right.

When the commissioner has heard what he or she considers sufficient evidence to make a decision, the trial stops and judgment can be given. The commissioner does not have to listen to all the witnesses if he thinks it is not necessary.

5.6 Interdicts

Not all civil actions are about compensation. Some concern preventing harmful (or potentially harmful) acts where the harm is considered to be within the area of civil rather than criminal law.

An **interdict** is a special kind of court order telling someone to do something, or ordering them not to do something – for example, a trade union can be forbidden to allow violent industrial actions by members, and instructed to make sure this is communicated to all members, as Sattawu was in April 2006.

Applications for interdicts are made by a lawyer to the High Court on behalf of a client or as part of the relief in some cases, for instance defamation where there may be a request for a final interdict prohibiting publication of the defamatory statements.

Lawyers may also request a **temporary interdict/ interim interdict** (in other words, this is a short-term step which may be reconsidered by the court later).

If an application is made on an urgent basis a person must prove to court that:

- The case is urgent and that there is a real threat to a right of the person if the interdict is not granted;
- That there is real evidence of the threat; and
- That no other legal action will protect the person, because any other action would be too slow and damage will have already been caused by the time the court grants an order.

The court will normally grant an interim interdict, protecting the person for a short time until the other side can organise a defence to prove why the interdict should not be made **final** (permanent).

A **return date** is set for the two parties to return to court. On this return date the court decides whether the original party still needs to be protected.

If the other party breaks or ignores the interdict, he/ she will be in contempt of court and can be fined or jailed.

Temporary interdicts usually only provide a breathing space for people to get lawyers and argue the matter in court at a later date. A person can secure an interdict to prevent a newspaper from publishing a defamatory article. But if the newspaper can prove to the court that it has an arguable defence of truth and public interest, or another defamation defence such as reasonableness, the court will allow publication. The person who brought the action to court will end up having to face the unfavourable publicity – and having to pay the legal costs as well.

5.7 Reporting tips

- All the reporting points, rules and convention about criminal procedure apply to civil cases too.
- Pay close attention to what is going on and take detailed notes. It is not always clear from the content of evidence and questioning who the

injured party is, particularly if the defendant is bringing any kind of counter-claim.

- The key additional reporting point for civil cases is to

Get the terminology correct.

Is somebody a plaintiff or a complainant, a respondent or a defendant? A person ordered to pay damages has not been 'fined' (even if the effect on their bank balance is the same!). Costs are not the same as damages.

- When following divorce cases, remember that Section 12 of the Divorce Act (1979) and the Maintenance Act (1998) allow courts to restrict reporting and hold hearings *in camera* to protect any children under 18 and the right to privacy of the parties to a divorce.
- Build up good expert contacts on the most complex aspects of civil cases (such as business and contract law). If in doubt, ask about puzzling aspects before you write your story. It is no disgrace to ask questions; it is far more disgraceful to put out an incorrect story – or be sued.

CHAPTER 6: PUNISHMENTS, PENALTIES AND REMEDIES

This chapter describes:

- The principles that underlie sentencing;
- The various criminal punishments and civil penalties;
- The structure of the prison system;
- The rules governing the treatment of prisoners.

Introduction

In civil law the presiding officer is arbitrating in a dispute between parties, and decides on penalties or remedies that provide fair compensation or put the wrong right.

Criminal law, by contrast, punishes offenders on behalf of society, so that society will not take revenge via unfair, unregulated forms of mob justice. Criminal sentences have three main aims:

- Retribution (paying back society);
- Reformation (making the criminal fit to re-enter society and less likely to offend); and
- Deterrence (stopping others from committing crimes).

Courts also want to prevent the accused from committing further crimes, especially where reformation seems likely to take a long time, or the criminal appears **incorrigible** (incapable of changing). Much current research tells us that the severity of the sentence is not the main deterrent. In the words of the then President of the Constitutional Court, Justice Chaskalson, in 1995:

> **'The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime, that the State must seek to combat lawlessness.' (1995)**

When a court **sentences** (decides on punishment for) a person, it always tries to balance these elements. If the sentence over-emphasises one aspect at the expense of the others the accused person's advocate could use this lack of balance as grounds for an appeal (*see Chapter 7*).

Before passing sentence, the court will weigh up many factors relating to the specific case, such as:

- The accused's age;
- The accused's character;
- The accused's previous record;

- The accused's mental development and environment;
- The degree of temptation, and the accused's influence upon others;
- The nature of the crime;
- The severity of the crime; and
- The interests of the community.

In general, courts do not like to send young people or first offenders to jail. But each case is judged on its own **merits** (facts). The court is obliged to consider alternative forms of punishment for young people and first offenders. If it does not do so, this could also provide grounds for an appeal.

6.1 Sentences

A convicted person (now known as an **offender**) may be sentenced to:

- Imprisonment;
- Periodical imprisonment (where the person goes to jail over weekends, but can still work during the week);
- Being declared a dangerous criminal (Regional and High Court);
- Being declared a habitual criminal (Regional and High Court);
- Committal to an institution approved by law;
- A fine, with or without imprisonment as an alternative;

- Correctional supervision;
- Suspended sentence;
- Warning or caution; and/or
- Discharge.

Certain crimes have minimum sentences attached to them. These have been set under the Criminal Procedure Act Section 51. The court is not allowed to impose a lesser sentence than these, unless the accused can convince the court that special circumstances (the law calls them 'substantial and compelling circumstances') exist that justify a lesser sentence.

The new South African Constitution enshrined the right to life, and South Africa indicated it would ratify the various United Nations conventions on human rights (one of which bans the death penalty). Before 1996, the death penalty was mandatory for crimes such as murder without extenuating circumstances (circumstances that would make the judge consider a lighter penalty).

Today, life imprisonment without option of parole must be imposed for murder and rape when committed under certain circumstances.

TABLE 3:
Minimum sentences

Schedule	Statutory minimum sentence
Part I of Schedule 2 (S51(2)(a)(i)-(iii))	➢ First offender not less than 15 years; ➢ Second offender not less than 20 years; and ➢ Third or subsequent offender not less than 25 years.
Part III of Schedule 2 (S51(2)(b)(i)-(iii))	➢ First offender not less than 10 years; ➢ Second offender not less than 15 years; and ➢ Third or subsequent offender not less than 20 years.
Part IV of Schedule 2 (S51(2)(c)(i)-(iii))	➢ First offender not less than 5 years; ➢ Second offender not less than 7 years; and ➢ Third or subsequent offender not less than 10 years.

6.2 Suspended sentences

The court may sentence an offender to a period in prison but **suspend** all or part of the sentence over a certain period of time. So long as the offender does not commit a similar crime during this period, he will not have to spend time in prison.

For example, an offender sentenced to a year in prison suspended for three years, does not immediately go to prison. But if the offender is found guilty of committing the same or a similar crime in the next three years he will have to go to prison to serve the one-year sentence as well as the years of imprisonment handed down by the courts for the new crime. Sometimes a sentence may be **deferred**, rather than suspended. This means the sentence does not begin immediately, but at a set future date.

6.3 Correctional supervision ('probation')

This punishment allows the offender to serve time within the community instead of going to prison. An offender doing correctional service is known as a **probationer**.

Correctional supervision may take the form of house arrest or restriction to a magisterial district. It is usually subject to certain conditions such as compulsory visits to the community corrections office, getting and keeping a job, paying compensation to the victim, rendering community service free of charge

and/or participating in treatment programmes such as counselling for drug or alcohol abuse. These conditions depend on the nature of the offence.

Offenders may be sentenced to correctional supervision instead of imprisonment, or get correctional service as a condition of a deferred or suspended sentence, or as an alternative to a fine.

If the probationer breaches the terms of the correctional supervision, the terms of the supervision can be increased from medium to maximum (the conditions will be made stricter). The offender can be sent to jail to serve out the remainder of the sentence for committing a major violation, such as committing another offence.

6.4 Amnesty and special remission

An **amnesty** is a general pardon. A clause of the constitution gives the President the **prerogative** (special and exclusive right) to grant amnesty or **special remission** (cutting the severity or length of sentences) to offenders on special occasions or to commemorate certain events. The Department of Correctional Services has no say in how this is done or who receives it.

Amnesty can also be offered for past offences that people may have committed. In this country, amnesty has been offered to tax offenders for undetected past non-payment in the hope that they will come forward and join the tax system.

6.5 Prisons

South African prisons are classified into minimum, medium and maximum security prisons and prisoners are theoretically assigned to prisons according to their custody classification.

Just as prisons are classified according to the level of secure custody they provide, prisoners are classified according to the risk they pose. This affects their **privileges** (softening of conditions, for example, the number and frequency of visits they are allowed, or the kind of work they are assigned to).

All prisoners – like other citizens – are protected by the Constitution from 'cruel and inhuman' punishment. Guidelines on prisoners' rights and prison conditions are issued by the Department of Correctional Services (DCS), and prison conditions are also covered in the international human rights conventions South Africa has signed.

Prison officers may only use such disciplinary measures against prisoners as are needed to maintain order and security in the prison, and may not mistreat or abuse them. Abusive prison officers are subject to the discipline of their own structures, and may also be investigated by the Independent Complaints Directorate.

The punitive aspect of normal imprisonment is simply depriving offenders of their freedom; there is no legal requirement to punish them further.

6.5.1 High security prisons

DCS has introduced two higher classifications of maximum security prisons: Closed Maximum Security Unit (C-Max); and Super Maximum Security Prison (Super-Max).

C-Max has been specifically designed for prisoners whom a court has declared dangerous. Offenders are kept in harsh conditions: solitary confinement for 23 out of 24 hours and prison warders use electric shields.

The first C-Max unit was introduced at the Pretoria Maximum Security Prison. Future C-Max units will be established at Helderstroom Prison in the Western Cape and Groenpunt Maximum Prison in the Free State. Eventually every province will have its own C-Max prison.

The most dangerous and hardened prisoners who have rejected all and any attempts at rehabilitation are to be housed at the first Super-Max prison at Kokstad in KwaZulu-Natal, which will accommodate 1 400 inmates.

6.5.2 Privatised prisons

The Department of Correctional Services has also begun a joint venture with private contractors to build and run privatised prisons, known as Asset Procurement and Operating Partnership Systems (Apops).

The first Apops agreement was for a maximum

security prison in Bloemfontein, the second was at Makhado in Limpopo.

Where it has been introduced elsewhere in the world (for example in the US) prison privatisation has become a controversial human rights issue. Some private companies have used the prisons they run as sources of cheap labour with none of the normal protections on labour conditions that other workers enjoy.

6.6 Parole

Normally offenders are entitled to be released on **parole** (allowed back into society under strict conditions) when they have served more than half their sentence, if they have behaved well in prison. Judges have the authority to order that offenders serve a larger part of their prison term before they can be considered for parole, or even that certain offenders are not considered for parole at all.

Parole boards decide if offenders qualify for parole. The boards are made up of members of the community and representatives from all stakeholders in the criminal justice system, and work according to guidelines from the Minister for Justice.

A release on parole is **conditional**: if offenders break the law when they are released, or do not keep to the conditions of their parole (such as reporting to probation officers, getting a job, not leaving a certain area without permission) they will be sent back to prison to complete their sentence.

6.7 Civil penalties

6.7.1 Damages

If the plaintiff in a civil case succeeds, the defendant may have to pay damages or perform otherwise as determined by the court. If this obligation is financial, such as paying damages, this is known as the **judgment debt**.

If the defendant fails to pay up, the plaintiff may obtain a warrant known as a **writ of execution** allowing the sheriff to **attach** (seize) goods belonging to the defendant, which are then sold at public auction to raise the monies owed.

If the defendant does not have enough **executable assets** (goods that can be sold), the court may issue an **emoluments attachment order,** compelling the defendant's employers to deduct an instalment from his salary every month until such time as the judgment debt is paid. (This is often referred to as a garnishee order, but this term is not correct.)

6.7.2 Specific performance

If the civil case relates to a broken contract, the court will order the guilty person to fulfil the contract by doing what they promised ('specific performance'). The court will not order specific performance:

- If it is impossible for the guilty person to do what was promised;

- If paying money is a better way of compensating the innocent party; or
- If it would be unfair to make the guilty person carry out the contract.

If the court orders the guilty person to carry out the contract and the person ignores this order, then they will be in contempt of court and can be fined or jailed.

6.8 Reporting tips

- Reporting on what goes on in prisons is still restricted by law. Although prison authorities do sometimes grant permission for journalists to enter prisons and write stories about prisoners, this is entirely at the discretion of the prison governor. Reporters have no automatic right to cover stories inside prisons.
- As civil servants, prison officers have signed undertakings about confidential aspects of their work, and face severe penalties if they break these. Reporters should consider the ethical aspects of naming them and dealing with information they provide when writing stories.
- Developments such as privatised prisons and the use of the amnesty provision can provide interesting material for stories.

CHAPTER 7: APPEALS AND REVIEWS

This chapter explains:
- The difference between an appeal and a review;
- The possible grounds for each; and
- The court process for appeals and reviews.

Introduction

Appeals and reviews are possible from both civil and criminal cases. The party that loses a court action may ask a higher court to come to another decision.

Appeals are for a higher court to relook at the application and interpretation of the law to the facts before it. There is no automatic right to appeal; the principle is that only those cases which present (have) more important or new legal issues should go on appeal.

Reviews look at the strict legal procedures followed to establish whether there were any gross irregularities which led to a miscarriage (failure) of justice, such as the bias of the presiding officer, admission of inadmissible evidence, gross irregularities occurring during the proceedings or the court lacking the jurisdiction to hear the matter.

An appeal is restricted to what appears on the court

record of the original case, while a review allows for argument to be led proving the irregularities.

7.1 Who can appeal?

It is normally the losing party – such as a convicted offender – that appeals against a sentence or a finding. But in civil cases the winning party quite often returns to court to seek a higher award for damages. The party making the appeal is known as the **appellant**, while the party against whom the appeal is filed is known as the **respondent**.

7.2 Who hears appeals?

An appeal from a Magistrate's Court is addressed to the High Court in that province. If that appeal is unsatisfactory, a further appeal can be made to a High Court of Appeal, normally a specially constituted **full bench** (three judges sitting together) of the same High Court, or even further to the Supreme Court of Appeal itself. The last court of appeal in an issue with Constitutional implications is the Constitutional Court.

Appeals from matters in the lower (Magistrate's) courts are always possible. But a judge in the High Court must always **grant leave** (give permission) to appeal in a High Court matter. If the judge refuses leave to appeal, the person wanting to appeal must ask the SCA for permission.

7.3 Appeal court process

The appeal court does not retry the matter, but instead studies the transcript or trial record of the case along with additional written argument by the parties. Counsel (the parties' advocates) are then given the opportunity to present **oral submissions** (spoken arguments) to the court.

The parties do not have to be in court as the facts of the dispute have already been considered by the lower court. Instead, the appeal court will look to whether the trial court applied the law incorrectly to the facts, or whether it erred in determining the law.

If the appeal court agrees with the trial court, it **affirms** the original decision; if it disagrees it **reverses** the trial court's decision.

Appeal judgments may be **unanimous** (where the entire bench agrees) or there may be a **majority decision** representing the views of more than half of the bench.

The judgment explains why the court affirmed or reversed the decision of the trial court. In the case of a majority decision, there is also a **dissenting opinion** by the remaining judge on the bench explaining why they do not agree.

It is also possible to get **concurring opinions**. This happens when judges who agree with the final outcome of a majority finding, do not agree with the way in which it was reached, or judges feel it is necessary to

add their own individual points, or state their reasoning in a different way.

These differing judgments do not affect the majority ruling, but do indicate to lawyers how the law is developing and what it could be like in future. Majority decisions are critically important as they are adopted as part of the precedent (*see Chapter 1*) on which future decisions will be based.

7.4 Review

Sentences imposed by Magistrate's Courts are automatically reviewed by the relevant High Court to ensure constant control over the administration of justice in the lower courts, but there is no automatic review of Regional Court decisions.

If lower courts and public bodies such as the CCMA, the Independent Broadcasting Authority or licensing boards were to ignore their statutory duties, or be guilty of gross irregularities or clear illegality in their duties, the High Court would also have the power of review over their conduct.

7.4.1 Automatic review

Judges will automatically review all criminal cases:

- Where the accused was unrepresented (did not have a lawyer) and was sentenced to more than six months in prison or fined more than R10 000; and
- Where the accused was unrepresented and sentenced to three months in prison or fined more than R5 000 by a magistrate who had less than seven years experience.

7.5 Reporting tips

- All the rules and conventions that apply to court reporting also apply to appeals and reviews – including the *sub judice* rule.
- Reporters covering a review or appeal hearing need to be clear about which it is, since the issues at stake are distinct.
- Reporters covering an appeal against a conviction need to understand the grounds of that appeal: is it against the verdict or merely the sentence – and why?
- Be aware that during an appeal on the grounds of a judge's wrong or mistaken actions, only what is said in court is privileged. If a party talks to a reporter outside court about these matters in strong terms, and the comments are published, the news outlet may well be committing contempt of court, or liable in the law of defamation.

CHAPTER 8:
ACCESS AND ATTENDANCE

This chapter provides a summary of:
- How reporters must act in court;
- What documents and information they are permitted to see and report on; and
- At what stage in legal proceedings;
- How to deal with intimidation and harassment.

The main laws and conventions governing press coverage of the courts have already been explained in Chapter 4, section 4.5: Reporting laws and conventions. If you do not know about contempt of court or the *sub judice* rule, refer back to that section before you read further.

Note: We use the generic term 'lawyer' for both attorneys and advocates, and the generic term 'presiding officer' for judges and magistrates in chapter sections where the distinction does not affect the information given.

Introduction

Courts can be scary places for newcomers – and sometimes daunting for experienced court reporters

too. You can deal with your nervousness if you know your rights. Knowing where you are allowed to go, what you are allowed to report on, where to get information and what you may publish will help you do your job more confidently and professionally.

8.1 How to behave in court

8.1.1 Attire

It used to be compulsory to dress fairly formally for court. Dress rules have relaxed a little, but you still need to present yourself in a way that shows respect for the court, does not offend anyone and looks professional. Shorts, clothing that exposes a beach-side amount of flesh (for women *and* men) and ripped jeans and T-shirts (even if fashionably 'distressed' at enormous cost) are out. So is looking untidy and unwashed. You do not want to be mistaken for a vagrant awaiting trial. Dress 'smart casual': a neat, neutral look that will fit in with whomever you may have to talk to during the day, whether this is a gang member, a lawyer, a police officer or a judge.

8.1.2 Entering or leaving a court in session

A court is said to be **in session** once the presiding officer has come in and sat down. Enter the court quietly. Look to the bench where the presiding officer is sitting and, before you sit down, give a half bow (dip your head to

your chest once). Do the same on your way out – walk quietly to the doorway, turn and face the presiding officer, give a half bow and leave. Open and close doors slowly and quietly. Try not to enter and leave a session more than once.

If you need to file a story, do it during the court tea breaks in the morning and afternoon, or during the court lunch break. If something astounding occurs, about which you have to inform the news desk, leave slowly and quietly – you can start running once you are outside the courtroom.

8.1.3 Cell phones

Cell phones are banned from ringing in court. It is regarded as immensely disrespectful. If your cell phone rings, you risk being sentenced for contempt. If it is absolutely critical that you have your cell phone on, make sure it is on 'silent'. If you have to contact your news desk, then send an SMS but do so subtly and silently, so nobody from the bench can detect what you are doing.

8.1.4 Cameras (and cell-phone cameras)

You may photograph an individual or item inside a courtroom before the court is in session, but not once the session has begun. You may not photograph the whole courtroom – although the Constitutional Court has allowed these kinds of photographs of its own

setting. If you take pictures of, or record proceedings without permission – using either conventional or cell-phone technology – you may be charged with contempt of court.

According to Section 69 of the South African Police Service legislation no person may take a picture or draw a sketch of any person suspected of committing an offence, who is in custody, and who has not yet pleaded to the charge, without permission from the Commissioner. This applies to any witness in the case before the witness has given evidence.

Photographs of people who have pleaded, entering and leaving court are allowed.

In some cases, TV cameras and recording equipment have been allowed into courtrooms with the permission of the presiding officer. This permission must be sought before the trial begins. News organisations have sometimes had to request a court hearing to get permission to film or broadcast, so allow sufficient time.

You are now entitled to take pictures of court exhibits if you get permission from the registrar of the High Court beforehand. And news organisations may send graphic artists to a trial to make sketches while the court is in session, but (according to the South African Police Services Act) doing this with the intention of publishing the pictures requires the permission of the National or Provincial Commissioner of Police.

8.1.5 Addressing presiding officers

While in court, you are an observer not a participant, so you do not need to use the same forms of address as lawyers. You will hear lawyers address a judge as 'my Lord' or 'my Lady', a magistrate as 'your Honour' and a commissioner at the CCMA as 'Mr' or 'Madam Commissioner'.

But if you need to speak to a High Court judge outside the court or in his/her chambers, address him or her simply as 'judge'. Address magistrates and commissioners as 'Mr' or 'Mrs X'.

8.1.6 Conduct during proceedings

Whatever you hear in court – and some testimony, particularly around murder or sexual violence, can be very distressing – try not to let your emotions show. Maintain a neutral expression and body language. This will make it easier for you to interview and get information later from the representatives of parties.

You are in court to record and observe the proceedings, so do not speak to the lawyers or the presiding officer while the court is in session. If you do, you are interrupting and might be convicted for contempt of court and immediately sent to the cells!

8.2 Closed and confidential proceedings

Court proceedings can take place either in open court or *in camera*: the Latin term for a court closed to the

general public. The reason for this is to allow witnesses to be able to give evidence without being intimidated.

Cases involving minors, whether they are as accused or witnesses, are almost always *in camera*. Reporters may attend an *in camera* hearing, unless they are expressly excluded by the presiding officer. Even if they are not excluded from the proceedings, the presiding officer may still instruct them as to what may or may not be published. Ignoring this instruction will lead to contempt of court.

Witnesses are excluded from a trial until they have given evidence. They may attend the rest of the case after they have testified. This is to prevent witnesses colluding with each other or with the accused, or being influenced by what has already been said.

In camera proceedings happen for three main reasons:

8.2.1 Statutory closed court

Where the accused is a minor, the court will automatically exclude anyone who is not necessary to the trial. Only the accused, his legal representative, his parent or guardian, the prosecution and the necessary court officials (orderlies/interpreters) will be allowed in court. The 1979 Divorce Act, the 1998 Maintenance Act and the 1994 Domestic Violence Act also set out circumstances where reporting is restricted or a presiding officer may close court proceedings, particularly where the identity of minors involved needs to be protected.

The Domestic Violence Act and the Maintenance Act both prohibit the publication of information that may reveal the identity of any party to the proceedings. In the Maintenance Act this applies to persons under 18.

8.2.2 By presiding officer's ruling

In criminal proceedings, the presiding officer may rule that proceedings be held *in camera* where they believe it is in the interests of:

- State security;
- Law and order;
- Public morals;
- The constitutional right to privacy of individuals involved in cases relating to **indecency** (sex crimes);
- The administration of justice;
- The safety of a witness or witnesses.

This ruling applies only to the case in question. It does not automatically extend to an appeal on the same case.

The presiding officer also has the power to order certain witnesses to testify *in camera*.

Even where the proceedings are not *in camera*, the presiding officer may order journalists and legal officers not to reveal the identity of a witness or complainant to prevent intimidation outside court, or where the complainant is under 18 or the victim of a sexual

assault. The presiding officer may also prohibit the publication of certain other information in a criminal trial, depending on the circumstances of the case.

Where the witnesses are minors, the presiding officer may exclude all spectators except the witness, his/her parent(s) and any person 'whose presence is deemed necessary or authorised'.

The presiding official can also rule that spectators under the age of 18 be excluded from a trial.

In civil trials, the same rules apply to *in camera* proceedings as in criminal trials.

8.2.3 After application by one of the parties

One of the parties may file an application that the evidence or part of the evidence given by one or more witnesses be heard *in camera*. The presiding officer will then decide whether to allow this or not.

A complainant in a blackmail or indecency case may ask the presiding officer to hold proceedings *in camera*. If this order is granted, publishing any detail which might identify the complainant is automatically prohibited.

8.3 What information may reporters access and report?

8.3.1 General

In line with the rest of the law protecting minors, news organisations must not publish any details about the

identity of an accused or witness who is under 18. They must not even publish other information that could be used to work out the identity of a minor accused or witness.

8.3.2 Civil proceedings

Minor witnesses or minor parties to a civil proceeding may not be identified unless the presiding officer consents to this in writing.

Pre-trial, when pleadings are exchanged and discovery takes place, reporters have no right to access the pleadings. Parties may – and often do – voluntarily reveal this information to the media. But this information is not privileged. News organisations risk suits for defamation or invasion of privacy if the information damages the reputation or exposes the private life of the other party and it is published. If a lawyer for one party offers you access to that party's pleadings and you cannot balance it with information from the other party, you will produce a one-sided report which might be defamatory or prejudicial. If your news organisation publishes material from pleadings and then the case is settled out of court and withdrawn, what you have published enjoys no privilege. If it defames one of the parties, a suit against your news organisation may follow.

Divorces are held in open court. Members of the public may attend. But the media may only publish the

names of the parties, the fact that they are divorcing, the court's order at the conclusion of the proceedings and the terms of the settlement. The evidence led in the divorce action and the content of the pleadings filed in court must not be published by the media but there is no restriction on publishing information from other sources. Evidence is sometimes published in professional law reports, especially where the decision sets a precedent. The South African Divorce Act prohibition does not apply to overseas news organisations. The divorces of both Earl Spencer (in Cape Town) and Nelson Mandela were extensively reported in the overseas press, and some South African papers picked up and re-published these stories. They were breaking the law. Earl Spencer tried – and then gave up on – suing the papers concerned. And the South African Law Reform Commission has stated that Section 12 of the Divorce Act is an unreasonable restriction on media rights and free expression. But it remains the law.

8.3.3 Magistrate's Court

The records of the Magistrate's Courts are open to the public except where this is prohibited by *in camera* proceedings. **Records** mean completed proceedings. Reporters may be able to access the records of **pending** proceedings (proceedings that have not yet been completed) but they run the risk, which will be greater or smaller depending on the circumstances,

of being found in contempt of court or being sued for defamation if they publish information contained in these pending case files until that evidence has been laid in open court.

8.3.4 High Court

Court reporters do not have the right to see records of a case in a High Court. But note that in late April 2006, the High Court at Bloemfontein lifted restrictions on media access to the papers of the Schabir Shaik fraud appeal, possibly an indication that similar applications may be considered favourably in future. Permission to access the records is granted by the registrar, and is normally only granted to one of the parties in the case or to someone else whom the registrar judges has a legitimate interest in the case – for example, someone who has successfully applied to make a contribution to the case as a 'friend of the court'. The registrar may be liable for contempt of court if such documents are disclosed to anyone else while the case is pending.

8.3.5 Other types of hearing and documents

Inquests are judicial inquiries into the cause of a person's death where the death is suspected to be from unnatural causes. The presiding officer will determine who the deceased was, when the death occurred and what the probable cause was. Inquests are normally held in public. In instances where they are held *in camera*, the

normal rules apply: evidence heard *in camera* may not be reported.

The presiding officer may give interested parties or their lawyers the right to inspect any documents presented in court, if he or she believes granting access to such documents will contribute to establishing the truth. He or she may prohibit access where the documents are defamatory, or privileged, or where the identity of informers will be revealed.

Wills are not privileged documents once they have been lodged with the Master of the High Court. They are then public documents and open to the media. But if they contain any defamatory comments made by the deceased person (the testator) in the will against people who are still living and a media organisation publishes these, the risk of legal action for defamation remains.

Extra-judicial proceedings

There are many types of inquiry or hearing that are not governed by the rules and conventions of the courts, even if they appear to resemble courts in their proceedings. For example, annual general meetings of societies, council meetings, school boards, SAFA disciplinary inquiries etc. are all **extra-judicial proceedings**. These bodies make their own rules of conduct, and cannot

claim protection from media reporting by citing judicial rules such as *sub judice* – although they often try. Only bodies granted the same status as the courts **by Parliament** are protected by the framework outlined above.

8.4. Intimidation and harassment of journalists

Unfortunately not everyone involved in a court case will think your job is as important as you know it is. Some may not want you to make public what is going on in their case.

You may be prevented from obtaining information by unhelpful officials, warned off by police officers, or even verbally or physically intimidated by witnesses or the accused, their friends or families. There are also instances in which political parties or communities will threaten you.

If you are simply being blocked from gathering information you have a right to you should let your assigning editor or whoever has asked you to do the story know about the problem. They, or you, will probably be able to appeal for help to someone higher up or in charge of the court officer concerned.

If the harassment you experience is relatively minor it may be best to simply ignore it and get on with reporting.

If you feel it is more serious or anyone threatens you in what you believe to be a serious way, you should note the details just as you would for a story. Record, in your notes, or electronically, exactly what is said or done to you, your response, the date, time and place. Get the details of any witness to the incident in case you need them later on.

If you're a staff reporter or commissioned by someone let them know immediately what has happened and ask their advice. If you are freelancing you may wish to speak to a lawyer contact and get his advice. Intimidation and threats are criminal offences.

The **Freedom of Expression Institute** advises that you lay a complaint, if it is assault or c*rimen injuria*, against the person concerned at the police station nearest the court where the incident happened. You will be asked to make a statement. Keep a copy and get an undertaking from the police that they will investigate and report to you within two weeks.

If you hear nothing then put your complaint in writing and send it to the station commander and the Independent Complaints Directorate. You can go public if you are getting no response.

If your problem is with a magistrate then you will need to take your complaint to the Magisterial Commission. A complaint against a prosecutor would go to the National Prosecuting Authority. If it is a court official you could contact the magistrate in charge of

the court concerned. The matter could then go the Chief Magistrate and even on to the Department of Justice.

8.5 Reporting tips

➢ **Make contact with role-players**

Before the case begins, introduce yourself to court staff and to the clerk of the court in a Magistrate's Court, investigating officers, the prosecutor and the lawyers. Don't introduce yourself to the presiding officer; only counsel (advocates) do this.

Make sure you speak to all parties concerned. Take great care how you use what they tell you in your stories. If you are to avoid committing contempt of court, much of it will be useful only as background. Your stories must not appear to be instructing the presiding officer on the verdict. Remember, your main job is to report on what happens in court; use your conversations with lawyers only to enrich and illuminate this account, not spin it.

➢ **Research**

Prepare yourself before you get to court. Do as much research as possible, via, for example, the internet and newspaper clippings. This is one of the reasons you need to establish a good relationship with the prosecutor and the lawyers. Ask them for copies of documents such as the charge sheet and statements or pleadings that may be used (bearing in mind the need to be balanced noted

above). If you have been able to read court documents, you will find the proceedings much easier to follow.

➢ **Take good notes**

You do not need to use conventional shorthand, but it is probably the best way to record court proceeding precisely and fast. If you use a personal shorthand, make sure you can explain it to another person if asked.

- Keep a notebook with the dates it covers and your name on the cover. Record the date of each day's notes.
- Keep comprehensive notes; note details of the scene, people's appearance, the mood and the public's response to what is said. Mark these to show they are your own observations.
- Clearly identify direct quotes and get them exactly right.
- If you have copied from a charge sheet or other court documents, make it very clear where the information from the documents begins and ends, and include any reference number, date or signature to identify the document.
- If you change or add to your notes of court proceedings at a later date, mark these changes with the date when they were made.

If you ever face legal action about your reporting, these details are vital. When your notebook is full, add

the date of the last day you used it to the cover. Keep your notebooks for three years from this final date, as defamation claims can be brought up to three years after publication.

CHAPTER 9: WRITING AND CHECKING YOUR COURT REPORT

This chapter deals with:

- Developing a good process for writing an accurate, accessible court story;
- The particular implications of the defamation law for writing court stories;
- The key points of court reporting terminology; and
- The place of ethics in writing court stories, especially when dealing with sex and family crimes.

Introduction

Like all other news writing, good court reporting depends on three key factors: accuracy with the facts; care with the writing; and good team-working with your newsroom colleagues. This last may not be obvious – after all, it's your story. But you do not necessarily choose the picture that is published with your story, write the headline or decide where in your publication the story is placed. And these aspects are all very

important in ensuring that the story does not breach the very demanding protocols about court reporting. So:

- Make sure you communicate clearly with your editor about what the story is about, the status of the information you have gathered and how it needs to be handled. Don't wait to be asked; take the initiative to do this communication.
- Stay with your court story until it has been finalised on page – even if this means staying late in the office. Stay in contact with your newsroom – cell phone on! – until the paper has been printed. That way, you can spot any problems or inaccuracies that may develop as the story has to be cut to fit, captioned and headlined and answer any late questions the editor or production team may have. Do not nag, or give orders to your sub-editing colleagues, but politely call attention to anything that could cause problems. This is your responsibility: you and your news organisation will face charges for contempt or defamation – not the subs. Whether or not **due** (appropriate) **care** was taken as the story was handled could form an important part of the case.

9.1 Defamation

Defamation (publishing something that brings someone into disrepute) is a law that applies very broadly, not just to court reporting. However, there are many

opportunities to fall into defamation when writing a court story, simply because the reporting and language requirements are strict and sometimes quite complex. Very often, it is how you write a court story – the focus and words you choose and the way you sequence or juxtapose information – that renders a story defamatory. And the costs of fighting a defamation suit can ruin a news organisation, even if in the end the case is not proved.

The legal definition of defamation:
'The publication of words or behaviour concerning a person that tend to injure the good name of that person, with the intention of injuring that person and without grounds of justification.'

9.1.1 Examples of defamation

What lowers a person's reputation may be socially determined, can change over time and often relates to the circumstances of a specific case. Fifty years ago, it would have been outrageous to suggest that two people of the same sex were living together in a sexual relationship; today, 'X and his (male) partner Y' is commonly written. But if X has not told those close to him that he is gay, the newspaper has certainly breached his constitutional right to privacy and may also be

found by the courts to have defamed him. However, it may also be argued that an allegation that someone is gay may not be defamatory, given the commitment to equality made in our Constitution.

Other examples of possible defamation are:

- Suggestions that a person not convicted by the court of that particular crime is a criminal or has committed a criminal act;
- Any suggestion that a person is unfit to practise their profession;
- Any suggestion or claim that a businessperson or business is insolvent or that the financial position is precarious; and
- Any suggestion that a judge convicted and sentenced an accused out of prejudice and not on the evidence led in court. (This may be both contempt AND defamation!)

Defamation is classified as a delict. The plaintiff has to prove that:

- The claims were published (either in print or electronically);
- The claims were understood by a **third party** (someone else);
- That there was **intention** to defame (usually assumed if the information is obviously damaging);
- The allegations themselves are harmful to his or her reputation (**defamatory matter**); and

- There was no **'good or legal'** reason for publishing.

You cannot defame the dead, but if writing about a will or estate, be careful what you say about the still-living.

Publication is a key element. If your paper decided to re-publish what someone else (like a lawyer or another news organisation) said, it is still liable although it may be possible to argue privilege in defence. What lawyers say **to you**, **outside the courtroom**, is not privileged.

The court has to decide the exact meaning of the published allegations and decide whether 'right-thinking persons' (the legal phrase) would have thought less of the plaintiff as a result of hearing or reading them.

Normal media defences against defamation are:

- That the defamation was not intended (an 'honest error');
- That the information was true and in the **public interest** (Public interest means society is in someway better off by knowing these things. If something is simply true, then all you may have done is **breached** (broken into) someone's privacy);
- That the information was privileged (protected by law, e.g. made in court or in Parliament);
- That reasonable steps were taken to verify the information (*see 9.1.2*);
- That the statement was 'fair comment' (based on facts that can be checked) and in the public interest; and/or
- That the statement was not defamatory (something

no one would believe was true, like a cartoonist's depiction of a politician removing his brain before doing something stupid; something so mild people would not take it as defamatory; or a statement about a person with no reputation left to destroy, like a convicted mass-murderer).

There are problems with defending even a 'true' piece of defamation, because both 'truth' and 'harm' may be defined differently by those involved. Sometimes a news organisation's judgment of truth is based on the reliability of informants, but ethically the reporter may not be willing to name these in court.

9.1.2 The Bogoshi Judgment

Before 1999, the defence of 'sincere intention' was not open to newspapers, only to private individuals. Media houses faced 'strict liability' – publication, rather than intention, was considered. But the landmark **Bogoshi Judgment** (National Media Ltd. v Bogoshi, SCA Case 579, 96, September 1998) changed this.

The SCA ruled that a defamation suit against a newspaper could not succeed if the newspaper could prove it was acting in good faith and that it and its journalists had taken all reasonable steps to verify (prove) that what they published was true and accurate.

The Bogoshi Judgment
'The publication in the press of false and defamatory allegations of fact will not be regarded as unlawful if upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in a particular way at a particular time.'

This means:

- The burden of proof lies with the media to prove they have not been negligent. Your notebooks could be vital here, since they record what you heard in court and what other sources told you. You should also record all attempts you made to verify or check the accuracy of what you heard or were told.
- Failure to disclose your source could result in losing the case, since the court may not be able to judge whether your evidence was reliable.
- The way a story is presented or 'spun', and where it occurs in the paper, have become relevant to 'reasonableness'. The SCA conceded that 'greater **latitude** (scope) is usually allowed [for] political discussion'.

9.1.3 Other points about defamation

- If your report is one-sided you may not be able to benefit from a defence that is available in defamation law. If the press has been excluded from an *in camera* hearing, you need to find some way of balancing your story to prevent it being one-sided. Speaking to the lawyers involved can give you information about the general principles underlying the closed-door arguments. For example, a defence lawyer may tell you: "We led evidence that supported the defendant's claim that he was somewhere else at the time." So long as nothing about what was actually said or who said it, is published, including such general information in your story is legal and can help to balance your story.
- Take careful note of a presiding officer's instruction in open court concerning what evidence can and cannot be published. If you publish facts the media were instructed not to, these will not be protected by privilege in a defamation action.
- Because our court rolls are so full, it might take a year or more before a news organisation is sued. Don't assume that if nothing happens immediately, you are safe. The prescription term for defamation is three years. If nobody has sued three years after the story was first run, you can relax and discard the relevant notebook.

9.1.4 Corrections and apologies

If you have published something that turns out to be wrong, or is a defamation that you can't justify, your publication must correct it as soon as possible. This way, the news organisation can limit any damages that may be awarded against it if a future action is launched. An apology or correction shows the court that the publication acted in good faith, both in reporting and in correcting the original report. Corrections and apologies should not wait until someone threatens to take action against the offending story, because that does not suggest good faith. They must be published with 'equal prominence' to the original story.

9.2 Other things you can't publish

- The identity of a witness under 18 years of age, or any detail about the witness which may be used to work out his identity. This means Maintenance Court and Family Court reporting need particular care.
- The evidence led in a divorce action and the content of the pleadings filed in court.
- The name of a survivor of rape or indecent assault (or information that will identify them) unless that person is an adult (over 18) who has given you **informed consent** (consent based on understanding what might happen if it is published) to do so. Judges may lift this restriction in an individual case if they believe doing so is in the public interest.

- The name of a suspect combined with inferences or statements that the person is guilty of any crime. Don't provide details of the crime and report the arrest in the same sentence. To do so strongly suggests that the suspect is guilty. Don't say a person has been arrested 'for the murder of ...' Even if you slip in the word 'alleged' somewhere, this may not protect you. (*See 9.3.5*) A far safer phrase is 'in connection with the death of ...'
- The name of a suspect together with details of previous convictions. A person's previous convictions are not presented in court until after the verdict.
- Statements that could harm any future court proceedings, whether about a suspect or more generally.
- Referring to the crime or incident as if it were a proven fact before the case is finished. The crime or incident is **always alleged** (*see 9.3.5*) until it is proved in court. Thus Thandeka Piliswa was alleged to have robbed Mpho Moseneke, but Thandeka Piliswa was found guilty of robbery.

9.3 Style, grammar and terminology

9.3.1 General

- Keep your reports simple and direct. Avoid legalese and terms like 'the deceased'. It is better to say 'the dead woman', or to name her if reporting of the name

has not been banned by the court. It is your job to make court reports accessible to your readers.

- Accuracy is vital. Always make sure that before you leave court you have the first names and surnames of all the players in the trial, including the lawyers on either side or the presiding officer. Make sure you spell all names correctly. Try to obtain the ages – preferably the actual date of birth – and addresses of the accused in a criminal trial, although the style of your story may not always require you to include these (check your style guide). If you include them, report the addresses of the accused as 'addresses given as …' in case they are inaccurate. The actual street numbers of people's addresses are normally not published.
- It is wrong and may be defamatory to create the impression that a person is in jail while in fact they are still at liberty.
- Beware of buzz-words and fashionable slang. These may not be understood by everyone, or may be ambiguous. For example, the term 'gay-killer' in the US means the killer is gay, while in South Africa it means the killer murders gays.

9.3.2 Use terms precisely

- A person who has been arrested is called a **suspect**.
- A suspect who is being held by the police is called a **detainee**.

- A person who has been charged in court is called the **accused**.
- An accused who has not been released on bail is called an **awaiting trial prisoner**.
- A person who has been convicted is called an **offender** (You may use the terms robber, hijacker, etc. too, but if a case is going to appeal, these carry a small legal risk.)
- A person who has been sentenced to correctional service is called a **probationer**.
- There is no charge of **drunken driving**. The offence is driving **while under the influence of liquor or narcotic drugs**, or **while the blood alcohol percentage was not less than 0,08.**
- When a criminal trial is postponed for whatever reason, the presiding officer will either remand the accused to bail or remand the accused to custody. Remand means 'to place' so you have to tell readers where the accused was placed; you can't use 'remanded' on its own.
- Only a person can be **remanded**. A case cannot. Cases are **postponed** or **adjourned** (and include the date of the next appearance).

9.3.3 Get titles right

- Refer to presiding officers for the first time by their **title, first name and surname**. For example, Judge Thobela Rantao, or District Magistrate Thobela

Rantao. In your next reference, refer to them by their title and surname (District Magistrate Rantao). Constitutional Court judges are referred to as Justice – for example, Justice Albie Sachs and thereafter, Justice Sachs. NEVER refer to presiding officers by their surnames only, irrespective of the house style of your publication. The judiciary sees this as a mark of great disrespect.

- South Africa does not have a coroner; instead the presiding officer at an inquest is the **inquest magistrate**.

9.3.4 Detailed language points

- Note the difference between **summons** (*noun*) and **summon** (*verb*). You are **summoned** to appear in court by receiving a **summons**.
- An accused appears at a preparatory examination **of** an allegation of murder not **into** a charge of murder.
- Do not make crimes happen in court!
  'Fred Bloggs was found guilty **in the High Court yesterday** of grievously assaulting his girlfriend.'
  Do not write: 'Fred Bloggs was found guilty of grievously assaulting his girlfriend in the High Court yesterday.' The assault did not take place in the courtroom.
- If a person is charged with *crimen injuria*, explain to readers what the act was, like this:
  'Jannie van Rensburg (62) was charged with *crimen*

injuria for exposing himself to schoolchildren when he was walking past a bus stop.'

- A witness cannot corroborate or confirm evidence; instead she can give similar evidence. It is up to the presiding officer to decide whether the evidence corroborates or confirms other evidence in the trial.
- Refute means to prove something wrong so, an accused cannot refute a charge, he denies the charge.
- Rebut means to argue against something, but if in doubt, or if you think readers will not understand this fine distinction, use dispute or reject.
- A person pleads not guilty or guilty **to** a charge, not **of** it.
- A person is found guilty, convicted or acquitted **of** an offence, but **on** a charge (or charges). Thus Piesang Hoogstander was convicted **of** rape, but acquitted **on** a second charge of assault with intent to do grievous bodily harm.
- Someone is fined R1 000 or 30 days, not sentenced to a fine of R1 000. A fine is levied (taken from the person) immediately. But an accused is sentenced to a jail term of three years, because they are not immediately jailed; they may appeal and be released on bail to prepare.
- If the accused is given a **suspended sentence**, do not write 'X has been jailed for six years.' Describe

the terms of the suspension: 'X has been sentenced to a term of six years imprisonment suspended for five years.'

- **Inquests** are held to look into 'unnatural' deaths, not every death. Write 'at an inquest **on Thabo Ndaba**' not 'an inquest into the death of ...'
- Do not write that inquests, courts or anything else 'were told' or 'heard'. Courts are not living people and cannot be spoken to or hear. Write '**the inquest magistrate was told**' or '**the judge heard**'.
- If you are reporting on an ongoing trial, write 'Proceeding ...' at the end of your copy on a new line, all on its own.

9.3.5 'Alleged' and 'suspected'

Lawyers warn that the word 'alleged' (and equivalent terms like 'suspected') are not magic charms against defamation suits. They can lessen the sting of linking someone to a crime, but this may not be enough to protect the news organisation from legal action.

Independent Newspapers were found by the SCA to have defamed a Cape Town man, Mr Suliman, after they published a large full-colour photograph of his arrest at Cape Town International Airport on the front page of a daily paper.

The caption clearly labelled him only a 'suspect' in the Planet Hollywood bombing and said there was no evidence of his involvement, but the SCA found that

the way the story had been played outweighed this small precaution. The judge said:

"To say of a man that he has been arrested and detained by the police for questioning as a suspect in the commission of a serious crime is, in my view, defamatory. It remains so despite an accompanying statement that the police regard him as a suspect only because of an anonymous tip-off that he, as an associate of Pagad, might be involved in the bombing and was about to leave the country for Egypt, and that there was no evidence pointing to his involvement."

Publications need to look not only at including precautionary words, but at exactly what the story is saying, and its context and play.

And 'alleged' will do you no good at all if it is in the wrong place in the sentence.

'He was allegedly killed by Khumalo.'

is wrong. No one can be 'allegedly killed': they are either dead or they are not. The sentence should read:

'He was killed, **allegedly by** Khumalo.'

Likewise

'Police allege Khumalo was interviewed by them and told them where he had hidden the murder weapon.'

does not protect you from defaming Mr Khumalo. Being interviewed by the police is not a crime, and 'allegedly' does no good placed there. The sentence makes two claims about Mr Khumalo's possible criminality: that he confessed, and that he hid a weapon used in a killing.

You need to make clear that BOTH these claims are **moot** (subject to being disputed in court). The sentence should read:

'Police say they interviewed the man. They **claim** (or allege, but repeating the word twice is clumsy) he told them where he had **allegedly hidden** the weapon used in the killing.'

Place the word 'allegedly' or 'alleged' directly in front of the part of the sentence that imputes guilt to a suspect.

9.4 Reporting tips

This handbook is about the practical business of being a court reporter, and so we have focused on the 'what' of reporting practice much more than the 'why'. But that does not mean that **ethics** (moral principles) are irrelevant; they are important for your own and your news organisation's reputation, and to help media conduct stay in line with the spirit of the Bill of Rights. In addition, dealing ethically with the people you encounter in your court reporting will help you to build professionally useful relationships – and help you to live with your own conscience. We provide some reading on ethics in the list in Chapter 10, but here is a summary of the basic ethical principles that should guide all reporting.

9.4.1 General principles

Tell the truth

This is where it all starts. This is your job and what the public expects from you. So acting ethically is not about censorship or self-censorship. Accuracy is a vital part of truth-telling and one-sided stories are, at best, only half-truths.

Minimise harm

To do no harm at all might mean doing nothing at all, because every act has consequences and some of those consequences may be harmful! But if you think about what might happen as a result of your story appearing in the form in which you have written it, you may find there are ways of writing that reduce the harmful impact while continuing to tell as much as possible of the truth. Remember, it is not only the information in a story that has an impact on society, but the way it is presented or spun.

Stay independent

Being pressured or bribed will obviously produce untruthful stories. But so may the far subtler

'bribe' of wanting to maintain a good relationship with a source or community. The police may be valuable sources of information for you about court stories, but if a policeman abuses a suspect, it is still your job to cover that story honestly, even if it upsets your police contacts. The same principle holds true for sources you may have in the criminal fraternity, the legal profession, or anywhere else.

Have and follow a newsroom ethical process

Know who to consult when your stories hit ethical problems. If no forum exists in your newsroom for more general discussion of the ethical dilemmas all reporters encounter, you might consider starting one.

9.4.2 Reporting on sexual violence and family stories

This is an area where particular care is needed in reporting. We have already noted the need to cover all sides and to respect whatever court restrictions on naming those involved are in force. In addition:

- Be sure you have informed consent where you interview people involved in such cases and they **waive** (lift) their right not to be named. People

who are not media-savvy (or, indeed, even literate) may not realise that this means that the millions who watch your TV station news bulletin or read your paper (including neighbours and family) will know who they are. There is no need to frighten them, but tell them the relevant facts.

- Respect the dignity of people involved in these cases. Show them as human beings, not statistics, 'victims' or stereotypes ('Blonde in miniskirt raped'). Often headlines cause problems here, because they use a kind of shorthand language. This is another reason why you need to stay with your story in the newsroom until it is finalised on the page.
- Especially when reporting rape cases, be sure you deal with the evidence of the State and the defence in a similar way. Do not say, of the State's case:

  'The state alleges that X raped the woman at his home.'

  but then of the defence's case:

  'The judge heard today that X's accuser has a history of falsely claiming rape.' (This is an allegation too!)
- Inform yourself, or use expert sources, to contextualise such cases. If reporting that a woman did not resist rape, get an expert to say what this might signify and how common it is.
- Write, or liaise with newsroom colleagues to secure,

'the stories behind the stories' too. So long as they are careful to respect the *sub judice* rule, stories from family and friends can fill in a murder victim's life and provide his 'side', even if he is dead. Features on rape, domestic abuse, incest and family killings can address the nature of the crime and provide the bigger picture, humanising statistics and facts.

- Don't trivialise or romanticise. A 'sex pest' may in fact have terrified women and girls in his neighbourhood; a 'crime of passion' is still a brutal murder.
- Try to select a variety of cases from the court rolls. Do not, for example, focus exclusively on rape by strangers. This reinforces the statistically false picture that women are only raped by strangers.
- Not all crime stories are bad news. Stories where criminals are successfully caught and convicted can be handled in a way that empowers communities and crime survivors and builds faith in law enforcement.

CHAPTER 10
RESOURCES AND ADVICE

This chapter lists details of legal resource centres, the legal aid board, clinics and justice centres, university law schools, relevant websites and literature which could help you. (Note: details were correct at time of going to print)

10.1 Legal Resource Centre

http://www.lrc.org.za

National office, Constitution and Litigation Unit, Johannesburg office
Braam Fischer House, 25 Rissik Street, Johannesburg
Tel: (011) 836 9831
Fax: (011) 836 8680

Cape Town
5th Floor Greenmarket Place, 54 Shortmarket Street, Cape Town
Tel: (021) 423 8285
Fax: (021) 423 0935

Durban
71 Ecumenical Centre, 20 St Andrews Street, Durban
Tel: (031) 301 7572
Fax: (031) 304 2823

Grahamstown
116 High Street, Grahamstown
Tel: (046) 622 9230
Fax: (046) 622 3933

Pretoria
5th Floor Centenary House, Bureau Lane, Pretoria
Tel: (012) 323 7673
Fax: (012) 321 6680

10.2 Legal Aid Board

http://www.legal-aid.co.za

National office: 29 De Beer Street, Braamfontein, Johannesburg
Tel: (011) 877 2000
Fax: (011) 877 2222

10.3 Legal Aid Justice Centres

There are 58 centres and 35 satellite offices around South Africa. This national number will put you through to the centre nearest you: 0861 053 425.

10.4 Non-governmental organisations

Tshwaranang Legal Advocacy Centre (TLAC)
Braamfontein Centre, 23 Jorissen St,
Braamfontein, Johannesburg
Tel: (011) 403 4267 or 403 8230
Fax: (011) 403 4275

Lawyers for Human Rights (LHR)
http://www.lhr.org.za
LHR has seven offices around the country.
Head office: Kutlwanong Democracy Centre, 357 Visagie Street, Pretoria
Tel: (012) 320 2943
Fax: (012) 320 2949

10.5 University law schools (many also have legal aid clinics)

University of North West:
http://www.uniwest.ac.za/faculties/law

University of Cape Town:
http://www.law.uct.ac.za

University of KwaZulu-Natal, Durban:
http://www.nu.ac.za/law

University of Free State:
http://www.uovs.ac.za/law

University of Potchefstroom:
http://www.puk.ac.za/fakulteite/regte

University of Port Elizabeth:
http://www.upe.ac.za/faculties/law

University of Pretoria:
http://www.up.ac.za/academic/law

University of Johannesburg:
http://general.uj.ac.za/law

Rhodes University:
http://www.ru.ac.za/academic/faculties/law

University of South Africa:
http://www.unisa.ac.za/contents/faculties/law

University of Stellenbosch:
http://law.sun.ac.za

University of Western Cape:
http://www.uwc.ac.za/law

University of Witwatersrand:
http://www.law.wits.ac.za

- www.law.wits.ac.za/lcc takes you to the Land Claims Court website, with information on judges, judgments, rules and practice directions, as well as quick searches of recent cases.
- www.law.wits.ac.za/cals takes you to the Centre for Applied Legal Studies, which has information on human rights and social justice cases.

10.6 Other useful websites

Constitutional Court
http://www.constitutionalcourt.org.za
Read the latest judgments and find out about forthcoming hearings that will take place at the Constitutional Court.

Government information
http://www.info.gov.za
Acts, bills, documents for public comment and useful government links. Also in-depth information about South Africa's constitution and a downloadable, full text, printable version.

Supreme Court of Appeal
http://www.uovs.ac.za/fac/law/appeal/index.php
Archive of recent cases and court judgments available in summary version, as a word document or in PDF format.

National Prosecuting Authority
http://www.npa.gov.za
Information about the NPA, relevant speeches and documents regarding the organization, links to news articles written on the criminal justice system and a list of related websites.

Department of Justice and Constitutional Development
http://www.doj.gov.za
News and events, judgments, important quick links, as well as publications and other information on special projects within the department.

Judicial Officers' Association of South Africa
http://www.joasa.org.za
Information about the courts, the judiciary and the Department of Justice and Constitutional Development around the country.

South African Human Rights Commission
http://www.sahrc.org.za
Publications, legislation, events, media releases and links to useful material.

Commission on Gender Equality
http://www.cge.org.za
Publications, speeches and statements, as well as information on projects around gender, governance and development.

Child Justice: Department of Social Development
http://www.childjustice.gov.za
Documents and legislation regarding children's rights and justice.

Department of Correctional Services
http://www.dcs.gov.za
News, information, services and publications related to the DCS and its activities.

South African Law Reform Commission
http://www.doj.gov.za/salrc/index.htm
Bulletins, reports and legislation, issue and research papers and current investigations regarding the law.

Legal Brief Today
http://www.legalbrief.co.za
Comprehensive coverage of legal developments for legal professionals.

Courtroom website
http://www.Courtroom.co.za
This website bills itself as the portal to South Africa's legal community. It has articles written by mainly South African legal practitioners. It also carries some court rolls.

Legal City
http://www.legalcity.net
A legal services portal, this site has service information, discussions, tools and calculators – but you may have to register.

Organisation of South African Law Libraries
http://sunsite.wits.ac.za/osall/
Useful information and links on law librarianship, as well as judgments.

Parliamentary Monitoring Group
http://www.pmg.org.za
Free subscription service for legislation's progress through the justice and other parliamentary committees.

Independent Complaints Directorate
http://www.icd.gov.za
Documents, policies and reports, as well as media releases and other information regarding the lodging of complaints with the Directorate; links to related government and security websites.

Law Society of South Africa
http://www.lssa.org.za

General Council of the Bar of South Africa
http://www.sabar.co.za

Wits Law Clinic
http://www.law.wits.ac.za/clinic/clinicindex.htm

Commission for Conciliation, Mediation and Arbitration
http://www.ccma.org.za

Institute for Security Studies
http://www.iss.co.za/cjm/justice.html
Information, research and statistics on crime and punishment in South Africa and on the African continent.

Centre for the Study of Violence and Reconciliation
http://www.csvr.org.za
Research on crime and justice, and an excellent collection of articles.

Policy and law news
http://www.polity.org.za
Bills, Acts, budget information and many other government speeches and documents.

Paralegal Advice
http://www.paralegaladvice.org.za
This site is based on the paralegal manual produced by the Black Sash and the Education and Training Unit (February 2004).

10.7 Books, pamphlets and articles

The Human Rights Handbook for Southern African Communicators by Gwen Ansell and Ahmed Veriava (Institute for the Advancement of Journalism, Johannesburg, 2000, available free from IAJ) expands on the relationship between law, rights and constitutionality, and contains additional writing and reporting hints.

Black, White and Grey by Franz Kruger (Double Storey, Cape Town, 2004) contains a comprehensive explanation of ethics, with case studies.

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The original research on which the handbook is based was conceived by Kevin Ritchie as part of a Rhodes University School of Journalism master's programme and originally intended for the staff of the *Diamond Fields Advertiser* in Kimberley.

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The handbook's creators encourage input or comment on any inaccuracies a reader may find in the book. Every effort will be made to correct mistakes when we are alerted to them. There will also be updates for journalists on areas of law and court reporting that may change significantly from what appears in this book. You can contact either SANEF or AIP and the handbook project team through www.sanef.org.za or www.independentpublisher.org

NOTES: