



The High Court of the Eastern Cape

By SC Rorke and A Rawjee, members of the Port Elizabeth Bar

A substantial proportion of the population in the Eastern Cape is poor. Many people live in rural areas far from lawyers, roads are poor, public transport is erratic and the legal aid system is in a state of crisis. This description is that of Froneman J in *Ngxuza & Others v Permanent-Secretary, Department of Welfare, Eastern Cape and Others* 2001 (2) SA 609 E at 621G-H. Though spoken in 2001, his description has been true throughout the Eastern Cape's long and sometimes bloody history. Vast, far flung areas with large populations of indigent people have been served through the years by a very small number of judges.

A superior court for the eastern districts of the Cape Colony was established in terms of the Eastern Districts Court Act 21 of 1864, with its seat in Grahamstown. Shortly before that, a supreme court had been set up in King William's Town with Judge Fitzpatrick (father of Sir Percy Fitzpatrick, the author of *Jock of the Bushveld*) as sole judge. The life of that court, however, was short because it was soon absorbed, in 1866, by the Eastern Districts Court at Grahamstown. The court in Grahamstown was housed in the Commercial Hall which was wholly unsuitable as a court building. The public gallery, for instance, could only be reached by a winding wooden staircase after which members of the public had to pass, bent double, through a low passage.

Many eminent judges served on the early Bench of the Eastern Districts Court. They include Judge Percival Gane whose translation of *Voet* is still extensively used in our courts today. Pre-eminent amongst the early judges was Sir John Kotzé who became Judge President in 1904. He gained notoriety, if that is the right word, when he was dismissed as the Chief Justice of the Transvaal by President Kruger for holding that the then Constitution made fundamental law against which the judiciary could test legislation – a testing right which President Kruger described as 'a principle of the devil.' The strident attacks by certain politicians on the judiciary which we have witnessed in the recent past certainly have precedent!

Much of the work done by the Eastern Districts Court was on circuit. This required judges, court staff and attendant lawyers to travel and be away from home for long periods. The circuit served

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as widely as from Humansdorp to Kokstad, including the old Transkeian territories and East Griqualand. All concerned worked long hours, sometimes into the night. There is a rich and entertaining anecdotal history from those times. At least one anecdote should be repeated here. George Randel records in his delightful book, *Bench and Bar*, that on circuit in Cala a case commenced one evening at 8 pm after what was said to be 'an unusually good dinner.' The learned judge, McGregor, looked over the collection of candles (used to light the court room) and said to Advocate Van der Riet, who was prosecuting, 'Mr Van der Riet, are there two accused or is there only one?' Van der Riet replied 'I can only see one, my Lord.'

During 1957 the status of the Eastern Districts Court was elevated to that of a provincial division and by 1963 the Bench had been increased to six in number. In 1967 the Transkei, the first of the 'independent homelands,' established its own supreme court in Mthatha and in 1981 the Ciskei created its own supreme court in Bhisho. Those courts continue today to serve as important seats of the Eastern Cape High Court, providing justice to their large rural populations.* The building which houses the High Court in Mthatha deserves special, if somewhat mischievous mention. Its design is of uncertain and surprising aesthetic. It was described by the late Theo Berrangé, an attorney who practised there, as a mix between a boudoir and a lady's hairdressing salon.

Despite strenuous opposition by Judge 'Jesse' Jennett, the Judge President in Grahamstown, a coastal division with a seat in Port Elizabeth was established in 1974 after recommendations from the Rumpff Commission. The Supreme Court sat for many years in the Magistrate's Court building in appalling and overcrowded conditions until the fine new High Court was built in Bird Street in 1989.


Despite their small numbers, the judges of the Eastern Cape have over the years rightly enjoyed a reputation for judicial excellence and indeed, when necessary, judicial activism. There has always been a significant number of them who have been elevated to appeal court Benches. It is impossible to name them all, but today Judges Jafta and Froneman serve on the Constitutional Court Bench. Judges Mpati, Mhlantla and Leach serve on the Supreme Court of Appeal Bench. All of them are former judges of the Eastern Cape High Court.

This court has been a leader in ensuring effective and meaningful access by all to the courts. Shortly after the promulgation of the interim



Eastern Cape Judge President Cecil Somyalo

Constitution, a full Bench in *Phato v Attorney-General, Eastern Cape, and Another* 1995 (1) SA 799 (E) ordered that the police were obliged to make available to accused persons copies of all relevant information contained in the police docket – a radical departure from the practice until then. An effective and pragmatic approach to the issue of representative standing was taken in *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2001 (2) SA 609 (E), a decision which recognised the extreme constraints which face illiterate and impoverished people in accessing our courts. Faced with a terminally lethargic and incompetent Department of Welfare which simply ignored a great number of judgments ordering the payment of pensions to pensioners, the Eastern Cape High Court in a line of cases handed down innovative judgments seeking to ensure compliance by the department with its orders, which ultimately culminated in *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC) in which Madala J (coincidentally another product of the Eastern Cape), speaking on behalf of the majority of the Constitutional Court, struck down section 3 of the State Liability Act 20 of 1957.

The geographical boundaries of the Eastern Cape are wide and far flung. The High Court has four seats, a situation which is less than ideal. And yet it continues effectively to serve its large population. 



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* See pages 50-52 for articles on the Mthatha and Bhisho High Courts