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### **IS THIS JUSTICE?** a study of the Johannesburg commissioners' ('pass') courts

by

**Ramarumo Monama**

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UNIVERSITY OF THE WITWATERSRAND  
JOHANNESBURG

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June 1983

I S T H I S J U S T I C E ?

A Study of the Johannesburg Commissioners'  
('Pass') Courts

by RAMARUMO MONAMA  
B Juris (University of the North)  
Attorney of the Supreme Court of South Africa  
Research Officer, Centre for Applied Legal Studies,  
University of the Witwatersrand

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## FOREWORD

This study of the law and practice of the commissioners' courts in Johannesburg was undertaken by Mr Ramarumo Monama, a Research Officer in the Centre for Applied Legal Studies. The main findings are based upon a two-week period of observation of the procedures and practices employed in the Johannesburg Commissioners' courts in December 1982. During this period Mr Monama was assisted by Miss Nomali Tshabalala, a recent LLB graduate of the University of the Witwatersrand. Together they attended and recorded the proceedings in some 365 trials.

Since its inception in 1978 the Centre for Applied Legal Studies has sought to monitor the proceedings in the commissioners' courts, or 'pass courts' - as they are commonly known. In 1979 Mr Monama and I wrote an article for Race Relations News (41(4):2, 1979; also published in Rand Daily Mail, Tuesday 6 March 1979), based upon observations carried out by Mr Monama over a period of several months, in which we drew attention to the failure of the commissioners' courts to meet the normal fair-trial procedures required by our law. In that article we concluded that justice would not be done in the commissioners' courts until legal representation was introduced in a substantial number of cases. Since then staff members of the Centre for Applied Legal Studies have regularly observed proceedings in these courts or represented accused persons in these courts. Now, after four years of sporadic court-monitoring and a further in-depth study of the pass courts, Mr Monama reaches the same conclusion as we did in 1979: the fair-trial procedures required by our law are not employed in the Johannesburg 'pass courts' and are unlikely to be implemented.

until a system of comprehensive legal assistance is extended to these courts.

This study is directed primarily at lawyers. Law Societies, Bar councils and individual lawyers wield great influence in matters affecting the administration of justice. It should not be beyond their powers and influence to prevail upon the Government to rid South Africa of a system that harms race relations and undermines the integrity of the whole system of justice in our land.

The commissioners' (pass) courts are an integral part of our system of justice. They are criminal courts, presided over by judicial officers, that try about a third of all persons sent to trial each year. Lawyers - both practising and teaching - bear the same responsibility for the standards of justice applied by these courts as they do for the standards of justice upheld in the Supreme Court and the magistrates' courts. Lawyers cannot escape this responsibility by plunging their heads, ostrich-like, into the warm sands of commercial law and disclaiming all knowledge of what goes on in the commissioners' courts. (A type of disclaimer that has lost much of its respectability today.)

The average black South African (and 'citizen' of Transkei, Bophuthatswana, Venda and Ciskei) probably identifies 'justice' in South Africa as much with the commissioners' pass courts as with the magistrates' courts and Supreme Court. If this is so - and statistics suggest that it must be so - this is a cause for real concern. Surely we South African lawyers, the trustees of a proud legal tradition, cannot tolerate a situation in which the

average black South African's encounter with the law and its institutions follows the pattern described by Mr Monama ?

A handwritten signature in black ink, appearing to read 'John Dugard', written in a cursive style.

JOHN DUGARD

Director of the Centre for Applied Legal Studies  
University of the Witwatersrand



A     GENERAL INTRODUCTION

The pass laws have been with us for approximately 180 years. These much hated laws, which at present apply to blacks\* only, have been a principal source of friction between blacks and whites in South Africa and have probably done more harm to race relations than any other laws. During the past sixteen years three committees and one comprehensive Commission of Inquiry have investigated the influx control system in the country. These committees and the Commission are the following:

- (1)     The Inter-departmental Committee on Control Measures of 1967 (Van Rensburg Committee);
- (2)     The Departmental Committee of Inquiry into Problems and Bottle-necks experienced in the application of Control Measures and Related Matters of 1974 (Meyer Committee);
- (3)     The Departmental Committee for the Investigation of Influx Matters of 1975 (Vermeulen Committee);  
and
- (4)     The Commission of Inquiry into Legislation Affecting the Utilization of Manpower (excluding the legislation administered by the Departments of Labour and Mines) (RP 32/1979) (Riekert Commission).

\* The term 'blacks' in this study refers to Africans.

These committees and the Commission have generally called for the rationalization and not the abolition of the influx control system. South African Government spokesmen and Cabinet Ministers have told overseas audiences that the Government is doing away with the hated pass laws, which restrict the movement of blacks. Yet, despite the rhetoric, the pass laws are enforced with more rigour than in past years. Figures recently released in Parliament by the Minister of Law and Order and the Minister of Co-operation and Development show that the number of arrests for pass law offences during 1982 was 206 022 compared with 162 024 during 1981 - an increase of about 27.15%. The number of blacks tried for pass law offences during 1982 in Johannesburg's pass law courts was approximately 40 223 compared with 24 334 during 1981 - an increase of about 39.50%. (House of Assembly Debates, cols 236 - 237 (22 Feb 1983); col 115 (20 August 1981) and col 321 (9 March 1982).

What follows is a study of the pass laws and their implementation in the Johannesburg\* Commissioners' Courts. The study will also examine the impact the procedures employed in these courts have had upon the integrity of the South African legal system.

[The study does not include the Alexandra Commissioners' Courts which are on the outskirts of Johannesburg North]

The criminal jurisdiction of the Commissioner's Court is conferred by Section 9 of the Black Administration Act 38 of 1927 as amended. Section 9(1) provides that a Commissioner may hold a court:

- '(a) in respect of any offence committed by a black; or
- (b) in respect of the offence of contempt of court committed by any person in respect of a Commissioners' court.'

This section empowers the commissioner and the Commissioner's court to try all statutory contraventions of the influx control system by blacks. This provision makes it clear that, save for the offence of contempt of court, the commissioner has no jurisdiction to hear cases relating to whites, coloureds and Indians.

#### B LEGISLATIVE BACKGROUND

The right of the individual black South African to travel freely within the borders of South Africa is severely limited by a number of statutes and subordinate legislation. Although any attempt to list comprehensively the various statutes that constitute the system of influx control is bound to be incomplete, the following major statutory enactments may be identified

- (a) Blacks (Urban Areas) Consolidation Act 25 of 1945, as amended;
- (b) Curfew regulations promulgated under this Act;
- (c) Black Labour Act 67 of 1964, as amended;

- (d) Admission of Persons to the Republic Regulation Act 59 of 1972; and
- (e) Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952, as amended.

1. Restrictions on the Freedom of Movement and the Right of Residence of Blacks in Urban Areas.

(a) Blacks (Urban Areas) Consolidation Act 25 of 1945.

The Blacks (Urban Areas) Consolidation Act 25 of 1945 is designed to control the influx of blacks into prescribed areas - that is the urban areas or towns of 'white South Africa' - and to control their conduct while there. The Act has been amended over thirty-three times since it became operative on 1 June 1945. In its long title it provides for the consolidation and amendment of:

'the laws in force in the Republic, which provide for improved conditions of residence for blacks in urban areas and prescribed areas; for the better administration of black affairs in such areas; for the regulation of the ingress of blacks into and their residence in, such areas; for the procedure to deal with idle and undesirable blacks in areas outside the scheduled black and released areas [homelands] and with blacks whose presence in prescribed areas is detrimental to the maintenance of peace and order....'

Section 10(1) is one of the most important provisions in the Act it provides that:

'No black shall remain for more than seventy-two hours in a prescribed area unless he produces proof in the manner prescribed that':

- (i) he has resided in such area continuously since birth; or
- (ii) he has worked continuously in such area for the same employer for more than ten years; or
- (iii) he has lawfully resided continuously in such area for a period exceeding fifteen years; or
- (iv) she is the wife, unmarried daughter, or son under the age of eighteen years of a male falling under (i) - (iii) above;
- (v) permission has been granted for him to remain by a labour bureau.

This section, which was inserted in substantially its present form in 1952, contains a serious disqualification for blacks to remain in towns in South Africa. Any black who fails to qualify under section 10(1) and who remains for a period in excess of seventy-two hours in a prescribed area does so unlawfully.

Section 10(4) provides that:

'any [black] person who contravenes any provision of this section, or who remains in any area for a purpose other than that for which permission so to remain has been granted to him, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or in default of payment to imprisonment for a period not exceeding three months .....

In addition to the penalties prescribed in this section, the accused may be repatriated to his homeland in terms of section 14 which provides for the removal of blacks who unlawfully remain in a prescribed area.

In any criminal prosecution under this section the accused is presumed, until the contrary is proved, to be unlawfully within an urban area. In essence this means that a black person may be arrested in an urban area on arrival and once the arrest has been effected he is presumed to be guilty. This presumption relieves the state of the common-law burden of proving the case against the accused beyond a reasonable doubt.

Section 10(bis) prohibits the employment of blacks from homelands who are already in towns except under a contract of employment approved and registered by the officer of the State appointed to manage the labour bureaux. This permission is not readily granted. Illegal employment constitutes an offence punishable by a fine not exceeding R500,00 or imprisonment for a period not exceeding three months. Section 11 of the Act, a related provision, prohibits the introduction of unqualified blacks into towns for purposes of employment except where permission has been granted. Again, in any criminal prosecution under these sections the onus is on the

accused to prove his innocence. Furthermore contravention of section 11 entails an additional penalty in that any vehicle used to transport an unqualified black person into an urban area may be forfeited to the State.

(b) Curfew Regulations Promulgated under Section 31 of the Blacks (Urban Areas) Consolidation Act.

Even a black person who qualifies under section 10(1) of the Act to be in an urban area is not entitled to move freely in such area. Curfew regulations promulgated under section 31 prohibit qualified 'urban' blacks from being in a public place within an urban area during certain hours except with a permit or night pass from an employer or an officer in charge of any police station within such area.

Regulation 196 which came into effect on 1 September 1936 (Government Gazette 2374 of 7 August 1936) provides as follows for the urban area of Johannesburg:

'that from and after the first day of September, 1936, no black male or female, not being exempted...., shall, between 11.00 p.m. and 4.00 a.m. be in any public place within the area controlled by the Municipality of Johannesburg, Province of Transvaal, unless such black be in possession of a written permit signed by his employer ....'

Contravention of a curfew regulation is an offence and punishable by a fine of four rand or imprisonment for a period not exceeding one month. Curfew regulations are not applicable in any black urban residential area but only in towns and 'white suburbs'.

The curfew system was investigated by the Commission of Inquiry into Legislation Affecting the Utilization of Manpower (excluding the legislation administered by the Departments of Labour and Mines) (RP 32-1979) (herein-after referred to as the Riekert Commission) which found that:

'In so far as the night permit system can be justified at all, which the Commission strongly doubts, its success, if any, in the combating of crime or promoting the ideal of separate development certainly cannot be weighed against the price which is being paid and which will have to be paid in disturbed relations between population groups. The Commission can only come to the conclusion that section 31 of the Blacks (Urban Areas) Consolidation Act, 1945, should be repealed' (para 4.277 at 179).

Despite this powerful call to abolish night permits, the system remains in force.

(c) Regulations Governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters.

(GN R1036 Government Gazette 2096 of 14 June 1968 (Reg Gaz 976).)



These regulations control the movement of urban blacks inside their 'own' residential black urban areas.

Regulation 19(3) of Chapter 2 provides:

'No person black or white shall enter, be or remain in any black hostel without a hostel permit or permission in writing given by the hostel superintendent .....

This regulation aims at the isolation of the hostel inmates.

Regulation 47(1) of Chapter 2 reads as follows:

'Any person who contravenes or fails to comply with the provisions of regulation 19(1) or (3)... shall be guilty of an offence' ... punishable by a fine not exceeding twenty rand or imprisonment with or without hard labour for a period not exceeding two months.

2. Restrictions on the Movement of Blacks from Homelands into Urban Areas.

Various statutes and subordinate enactments prohibit both the departure of blacks from their homelands and their employment in urban areas without the authority of a permit.

- (a) Sections 10(bis) (1) and 11(1) of Act 25 of 1945.

These sections provide respectively as follows:

'No person shall take any black into his employment in a prescribed area or have such black in his employment in such area unless permission to take up employment has been granted ...'

and

'No person shall introduce into a prescribed area a black who in terms of section 10 is prohibited from remaining in that area except under permission, ....., or induce or assist such a black to enter or remain in such area, with the intention of enabling such black to be in such prescribed area contrary to the provisions of subsection (1) of that section'.

Contravention of these statutes in an offence punishable by a fine not exceeding R500,00 or imprisonment not exceeding three months. In addition any vehicle that has been used for transportation of an unqualified black person may be forfeited to the State.

In any criminal proceeding relating to these sections, the onus of proving that the accused had no intention of enabling an unqualified black to be in the prescribed area shall be on the accused.

- (b) Black Labour Regulations (National States)  
(Proc R74 Government Gazette 2029 of 29 March 1968 (Reg Gaz 934).)

These regulations came into force on the 1 April 1968 and are applicable in the homelands. They preclude a black person resident in a homeland from acquiring urban permanent rights under section 10(1)(b) of the Blacks (Urban Areas) Consolidation Act 25 of 1945.

According to the regulations every black resident of a homeland who is unemployed and who depends on employment for his livelihood shall register as a work-seeker with his tribal labour bureau. Failure to do so is an offence punishable by a fine not exceeding twenty-five rand or imprisonment for a period not exceeding fourteen days. The regulations further prohibit departure from the homelands except under an attested contract of employment. Regulation 21 provides that:

'No black shall leave and no person shall cause a black to leave the area of a tribal labour bureau for employment outside [the homelands] save when such black has been registered with that tribal labour bureau and his contract of employment has been attested as required by these regulations.'

In terms of Regulation 13(1)(d) no contract of employment may be attested by a labour bureau where a black is required to work for more than one year. This regulation is aimed at section 10(1)(b) of the Blacks (Urban Areas) Consolidation Act 25 of 1945 which gives a right of permanent residence in an urban area to a black person who has been continuously employed by one employer

in the same prescribed area for a period exceeding ten years. By requiring an employee to return to his homeland each year this regulation seeks to prevent him from qualifying on the basis of ten years of continued employment - in terms of section 10(1)(b). However, in the decision of Rikhoto v East Rand Administration Board\* 1982 (1) SA 257(W), the Witwatersrand Local Division of the Supreme Court came to a conclusion that weakens the effect of the above regulation. The Applicant was a male black domiciliary of a homeland who successfully applied for a declaratory order against the East Rand Administration Board that he was entitled to remain in the prescribed area of Germiston in terms of section 10(1)(b) of Act 25 of 1945. The Applicant alleged that he had worked continuously in the Germiston area for one employer, for more than ten years. This allegation was challenged by the Respondent because the Applicant had renewed his contract annually as required by these regulations. The court held:

'It cannot have been the intention of the Legislature that an exemption under section 10(1)(b) of Act 25 of 1945 could be earned only by workers who remain physically present and actively engaged at their place of work within the prescribed area for ten years without any interruption of any kind. Without attempting to define the continuity required by this legislation, it may be said that such continuity is not broken by temporary absence due to illness or injury, or occasional departures for some legitimate purpose unconnected with a change of work' (at 257).

\* [This decision has since been confirmed by the Appellate Division. (See Rand Daily Mail, 31 May 1983).]

In terms of the Rikhoto judgment a migrant worker domiciled in a homeland who satisfies the provisions of section 10(1)(b) of Act 25 of 1945 will now be able to obtain permanent urban residence rights. He will be able to 'own' a house either by way of the ninety-nine-year leasehold scheme or the thirty-year home ownership system. Such a person may be joined by his wife and children. In S v Yapi 1982 (1) SA 929 (C) it was held that:

'A black who qualifies to live in an area in terms of s 10(1)(a) must be accepted as lawfully resident in the area even though he is in fact not lawfully occupying any site in the area. Hence when blacks qualify in terms of s 10(1)(a) and s 10(1)(b) and when they are deemed to be legally resident within the prescribed area then likewise their wives and dependants are deemed to be legally resident within the prescribed area in terms of section 10(1)(c)' (at 929).

In Yapi's case the Appellant's husband, qualified to remain in the prescribed area of Cape Town by virtue of section 10(1)(b) of Act 25 of 1945. Notwithstanding the fact that neither the husband nor the Appellant had a lodger's permit to occupy the house in the black residential area and did not in fact occupy any house in that area, the court granted the Appellant the necessary order sought - viz permission to join her husband in Cape Town as the wife of a person with section 10(1)(b) rights. This judgment is to be welcomed for it extends the impact of the historic judgment of Komani NO v Bantu Affairs

Administration Board, Peninsula Area 1980 (4) SA 448 (A)  
where the wife of a husband who qualified in terms of s 10(1)(b) succeeded in obtaining s 10(1)(c) rights, apparently on the strength of her husband's lodger's permit.

The above judgments are to be welcomed. The plight of a migrant worker is a sad one. He is generally restricted to single sex accommodation in a hostel; to one occupation and to a specific employer. In addition he is usually restricted to the worst paid jobs and to the most dangerous occupations with the longest working hours.

(c) Admission of Persons to the Republic Regulation Act 59 of 1972.

The object of this Act is to control the admission to and deportation from the Republic of South Africa of aliens. Since the 'independence' of Transkei, Bophuthatswana, Venda and Ciskei several million former black South Africans who are linguistically or culturally linked with these 'states' have ceased to be South African nationals and are, therefore, aliens in South Africa. Such people may therefore be dealt with in terms of the provisions of the Admission of Persons to the Republic Regulation Act if they do not qualify for

residence in terms of section 10(1) of Act 25 of 1945. (The right of permanent urban residence of nationals of these 'states' is preserved by the various independence - conferring statutes. In other words, blacks who qualify for permanent residence in an urban area under section 10 of Act 25 of 1945 at the time of independence retain their right.)

Section 40 of Act 59 of 1972 grants the passport control officer extensive power of arrest without a warrant and deportation. No legal proceedings are held prior to such a deportation and there is no appeal against such a deportation. From August 1981 to December 1982 approximately 4 000 Transkeian nationals have been deported from the Western Cape in terms of this Act to their homeland without any court hearing.

This Act supplements other instruments of influx control and dispenses with the need for a court hearing, as required by section 14 of the Blacks (Urban Areas) Consolidation Act. There is every reason to believe it will be increasingly invoked in the future in order to bypass the pass court procedure.

- (d) The Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952.

This Act requires every black over the age of sixteen years to be issued with a reference book. The

Act did not in fact repeal the pass laws as the title suggests: it merely replaced all the existing pass laws with a consolidating statute, the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952. A modern day reference book contains an identity card, information about employment, personal particulars (e.g. ethnic group) of the holder and any additional information required by law, such as information relating to section 10(1) qualifications of Act 25 of 1945.

According to Professor Ellison Kahn a pass is:

'a document required for lawful movement into, out of, or within a specified area' (Handbook of Race Relations in South Africa ed Ellen Hellmann (1949) at 275).

Section 15(1)(a)(ii) of the Act provides that

'Any person being a black who has attained the age of 16 years, who ... fails or refuses to produce on demand of an authorized officer ... a reference book issued to him; ... shall be guilty of an offence' and punishable by a fine not exceeding fifty rand or imprisonment for a period not exceeding three months.

In 1975 the Appellate Division of the Supreme Court of the Republic of South Africa, the highest Court in the land, held in Ncube en 'n Ander v Zikalala 1975 (4) SA 508 (A):



'The Act does not require that a black should always carry a reference book on him. It is however clear that there is a tacit intention that a black who is requested to produce his reference book should be given a reasonable opportunity of fetching his reference book somewhere if he does not have it on him at the moment' (at 509).

The Government has rejected the suggestion that black persons who possess valid reference books, but who do not have the books with them at the time of their arrest, should be given time to report to their local police station within a certain period after being asked for such books. The Minister of Economic Affairs (for the Minister of Law and Order) told Parliament in 1976 that:

'...no legal provisions exist for such procedure, it would also be unpractical' (House of Assembly Debates col 1057 (21 May 1976)).

The wording of Section 15(1)(a)(ii) is clear. The offence envisaged by this section can be committed by black persons only.

C PRACTICAL IMPLEMENTATION

1. INTRODUCTION

(a) Commissioners.

Influx control through the courts is administered by Commissioners, appointed by the Minister of Co-operation and Development in terms of section 2 of the Black

Administration Act 38 of 1927, assisted by prosecutors appointed either by the Attorney-general in terms of section 4 of the Criminal Procedure Act 51 of 1977 or any prosecutors appointed by the Commissioner in his capacity as the judicial officer in terms of section 5(1) of the Criminal Procedure Act 51 of 1977.

According to the Black Administration Act 38 of 1927 a Commissioner is a member of the public service who has passed the civil service lower law examination or any examination determined by the Public Service Commission to be the equivalent of the civil service lower law examination. The same legal qualification is prescribed for some judicial officers in the Department of Justice but in practice higher qualifications for magistrates are recommended. Section 10(b) of the Magistrate's Court Act 32 of 1944 reads as follows:

'in recommending any person for appointment as a magistrate, the Public Service Commission may give preference to a person who holds a degree in law of a university in South Africa, or has passed the Civil Service Higher Law Examination  
... .'

Such a provision does not appear in section 2 of the Black Administration Act 38 of 1927 which deals with the appointment of Commissioners. This disparity has created suspicions that Commissioners are not as well trained in law as their counterparts in the Department of Justice.

During the 1983 Parliamentary Session, the Minister of Co-operation and Development was asked in Parliament:

'Whether ... Commissioners are required to have gained experience as prosecutors prior to their appointment; if so, what is the minimum period of experience required.'

He replied to this question in the negative. Such a practice is different from that in the Department of Justice where:

'Nearly all of them [magistrates] are former public prosecutors who have been promoted to the Magisterial bench' (Sydney Kentridge, 'Telling the Truth about the Law' (1982) 99 SALJ 648 at 654).

(b) Prosecutors

The authority to institute and to conduct a prosecution in respect of any offence in South Africa vests in the State and the Attorney-general is the officer authorized to institute prosecutions on behalf of the State. The Attorney-general normally delegates his authority to a public prosecutor. Prosecutors in the Magistrate's Courts are generally law graduates (B Proc; B Juris or LLB). On the other hand, the prosecutors in the criminal 'pass courts' of the Johannesburg Commissioners' Courts are generally without such legal qualifications. Moreover, these prosecutors are not in practice sent to the training course for public

prosecutors run by the Department of Justice. During the 1983 Parliamentary Session, the Minister of Co-operation and Development was asked whether the State Prosecutors in Courts covered by this study had completed the training course offered by the Department of Justice in Pretoria. The following reply was given:

'As and when circumstances permit, prosecutors appointed in Commissioner's courts are sent to attend the training courses offered by the Department of Justice' (House of Assembly Debates Col 1089 (25 April 1983)).

For further interesting information relating to the Johannesburg Commissioners' Courts, see House of Assembly Debates Cols 1087 - 1090 (25 April 1983)).

In particular it appears that prosecutors in these courts are normally 'promoted' from the positions of clerks and interpreters in the Department of Co-operation and Development. Their experience of the law of evidence and the law of criminal procedure is therefore inevitably limited and this may well contribute to the number of procedural irregularities that characterizes these courts.

Legal representation in the pass courts is rare. Consequently the administration of justice in these courts is left almost entirely in the hands of the Department of Co-operation and Development, which is responsible for the appointment of Commissioners, the

Department of Law and Order, whose police officers often act as interpreters, and the Commissioner who, in his capacity as a judicial officer, may designate any competent person to act as a prosecutor.

(c) Interpreters

Section 6(1) of the Magistrates' Courts Act 32 of 1944 provides that:

'Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used'.

Section 84(1) of the Criminal Procedure Act 51 of 1977 requires that a charge shall set forth the alleged offence in such manner and with such particularity as may be reasonably sufficient to inform the accused of the nature of the charge. Section (2) of Magistrates' Courts Act 32 of 1944 provides that:

'If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in the evidence or not'.

According to these enactments the charges should be interpreted properly. Yet, in practice, the interpretation of an offence relating to contravention of the seventy-two hours stipulation takes the following form:

'You were found within the prescribed area for more than seventy-two hours. Is that so?'

If the accused person's reply is 'Yes', this is interpreted as plea of guilty. The Commissioners are not fluent in African languages, and depend on the interpreters. The Commissioners have no way of knowing the accuracy of interpretation, nor whether the charges have been fairly put. Inquiries have revealed that interpreters attached to Commissioners' Courts in Market Street, Johannesburg have at least form three or standard eight education. The interpreters have a very important role to play in the pass courts but the overall impression gained is that considerations of time weigh too heavily with them. They seldom give an accused person a full account of the offence charged or explain in detail the elements of the offence. Like the other officials in these courts they seem to be determined to complete the roll as soon as possible. All too often justice is sacrificed in the interests of haste.

\* \* \* \* \*

The present study, which was undertaken at the Johannesburg Commissioners ('pass') Criminal Courts, reveals some disturbing facts about the administration of

justice in these courts. This study was undertaken during the first ten court days of December 1982, in five courts, on the third floor, 15 Market Street, Johannesburg. During this period the five courts dealt with approximately 2 380 criminal cases under the influx control laws - see Table 1 below. The full 'trials' of some 360 black accused persons were attended in the course of this study. (See Annexure A for a more comprehensive analysis of the activities of these courts.)

The total number of cases heard in these courts during the period of observation was 2 380. This figure is made up as shown in Table 1 below.

TABLE 1  
COURTS' ROLL \*FOR THE PERIOD 1 - 14 DECEMBER 1982

DATE	COURT 1 No of Cases	COURT 2 No of Cases	COURT 3 No of Cases	COURT 4 No of Cases	COURT 6 No of Cases	TOTAL NO OF CASES
1 Dec 82	21	88	-	76	55	240
2 Dec 82	15	53	-	55	39	162
3 Dec 82	7	70	8	66	29	180
6 Dec 82	17	128	14	132	65	356
7 Dec 82	9	54	-	61	26	150
8 Dec 82	11	109	8	85	48	261
9 Dec 82	9	74	17	61	35	196
10 Dec 82	14	94	5	61	58	232
13 Dec 82	15	115	45	96	66	337
14 Dec 82	10	74	14	110	58	266
<b>TOTALS</b>	<b>118</b>	<b>861</b>	<b>111</b>	<b>803</b>	<b>527</b>	<b>2380</b>

\* [Information about the roll was provided by the interpreters or the prosecutors. Generally rolls are not displayed in these courts]

II. COURTS AND CHARGES

1. COURTS

Court 1

This court deals with the violation of influx control laws by foreign blacks. Section 12(1) of the Blacks (Urban Areas) Consolidation Act 25 of 1945 provides that:

'... a black who is not a South African citizen, or who is not a former South African citizen who is a citizen of a state the territory or part of the territory of which formerly formed part of the Republic, shall not enter, be or remain in a prescribed area,...' without the written permission of the Director-General of the Department of Co-operation and Development.

Court 1 deals primarily with violations of this provision by foreign blacks. 'Foreign' blacks from the 'independent' homelands of Transkei, Bophuthatswana, Venda and Ciskei are not prosecuted in terms of this provision. (For the charge sheet of this offence see Annexure E.)

Courts 2 & 4

These courts deal with the violation of influx control laws by South African black males and citizens of the 'independent' homelands. The main offences handled in these courts are:



- (i) Contravention of the 'seventy-two hour' stipulation: see section 10(4) of Act 25 of 1945;
- (ii) Failure to produce a reference book on demand: section 15(1)(a)(ii) of Act 67 of 1952.

(For the charge sheet of these offences see Annexure D)

### Court 3

This court deals with offences relating to trespass within the black urban residential areas and the contravention of curfew regulations. (For the charge sheet of these offences see Annexure F.)

### Court 5

The above court handles inquiries relating to blacks who are deemed to be 'idle and undesirable'. This court was not included in the study, because an inquiry in terms of Section 29 of the Blacks (Urban Areas) Consolidation Act 25 of 1945 as to whether a black person is 'idle or undesirable' is not a criminal trial but an administrative enquiry. See Ramarumo Monama 'Idle and Undesirable' (1980) 97 SALJ 143.

## Court 6

This court deals with the contravention of influx control laws by South African black females and black female citizens of 'independent' homelands. This court deals with offences relating to remaining in a prescribed area for more than seventy-two hours without a permit and/or failure to produce a reference book on demand. See Annexure D. For the complete activities of this court, see Annexure B.

## 2. CHARGES

The following are the main charges in these courts:

- (1) Contravention of section 10(4) of the Black (Urban Areas) Consolidation Act 25 of 1945. This offence is generally known as remaining in a prescribed area for a period exceeding seventy-two hours without a permit.
- (2) Contravention of section 12 of the Blacks (Urban Areas) Consolidation Act 25 of 1945. This is the section used to prosecute black people from the neighbouring States, other than independent homelands, who enter the Republic without the necessary permits.
- (3) Contravention of the curfew regulations in terms of which no black person may be in any public place in Johannesburg or its surrounding suburbs between 11.00 p.m. and 4.00 a.m. without a night pass.
- (4) Contravention of Regulations relating to the control and supervision of urban black residential areas.

- (5) Contravention of section 15(1)(a)(ii) of the Blacks (Abolition of Passes and Co-ordination of Documents) Act 57 of 1952 which deals with the failure to produce a reference book on demand.

III SPECIAL FEATURES OF THE PROCEEDINGS IN THE JOHANNESBURG COMMISSIONERS' ('PASS') CRIMINAL COURTS

1. Arresting Officers and State Witnesses.

In all the cases observed there was no sign of the State witnesses or arresting officers in attendance at the proceedings. This practice can be attributed to the peculiar requirement of Section 10 (5) the Blacks (Urban Areas) Consolidation Act 25 of 1945 which places the onus on the accused to prove his innocence rather than on the State to prove the guilt of the accused beyond reasonable doubt.

Even when cases are specifically postponed to enable State witnesses to attend, they do not necessarily appear. This happened in Case No 552/1982 heard on 8 December 1982 when the arresting officer failed to attend court on the trial date despite the fact that the accused had pleaded not guilty on his first appearance and the case was postponed to enable the arresting officer to attend and to testify. This default on the part of the arresting officer was not critically commented upon by either the Commissioner or the prosecutor. The accused was however acquitted.

2. Bail.

The purpose of bail is to give effect to the presumption of innocence. The Criminal Procedure Act 51 of 1977 safeguards this personal liberty by enabling a person held on a criminal charge to regain his freedom by being released on bail pending the determination of allegations against him. The power of granting bail is normally vested in judges and magistrates and in the case of less serious offences in the police. Pass offences do not fall within the category of offences where the jurisdiction to release on bail is curtailed by the statute. Yet during the period of observation the Commissioners did not explain in any case that the accused could be released on bail - even when the case was postponed at the request of the State. It was only those accused persons with some knowledge of court procedure that requested to be released on bail. The amount of bail must obviously differ from person to person but the amount fixed must take economic realities into account and must not be so high as to create the impression that the court intended to refuse bail and achieved its purpose by intentionally fixing an amount which it knew the accused could not possibly afford. In practice the Commissioners courts fix bail so high that it is extremely difficult for most accused persons to afford

it. The amount of bail ranged between seventy rand and one hundred rand. Such an amount is excessive in view of the fact that the usual fine for such offences is about thirty rand or thirty days imprisonment. It is generally believed that in offences relating to influx control there is a policy directive not to grant bail. If this is correct then such a directive frustrates section 59 of the Criminal Procedure Act 51 of 1977 which provides that an accused person may, even before his appearance in a lower court, be released on bail by a senior police official if he deposits at a police station the sum of money determined by the police official. In practice, however, it seems that the police seldom release persons charged under the influx control laws on bail.

3. Legal Representation.

Only five accused persons were legally represented during the period of observation. One accused was represented by counsel from the Johannesburg Bar. The remaining four accused persons were represented by local attorneys. This means that only about 0.21% of the number of people charged were legally represented.

The importance of legal representation is illustrated by the case of S v Mlambo Case No 1816/82 heard in Court No 1. The accused was represented by Counsel. He

came from Mozambique and entered the Republic without the necessary permit as required by Section 12 of the Blacks (Urban Areas) Consolidation Act 25 of 1945. His trial lasted the unusually long time of about seven minutes as opposed to the usual one minute in unrepresented cases. The case was finally postponed for a period of nineteen days to enable the accused to regularise his documents and he was released on bail. Unrepresented accused persons did not receive the same treatment. From my observations I am satisfied that where the accused is represented the standard of justice is substantially higher. The absence of a lawyer in these cases means that no one outside the Department of Co-operation and Development is able to contribute to the observance of the fair-trial procedures. In 1932 the Supreme Court of the United States stressed the importance of lawyers when it declared in Powell v Alabama 287 US 45 that:

'Even the intelligent and educated layman ... requires the guiding hand of counsel' (at 69)

to secure a fair trial. Mr. Justice Sutherland warned further that:

'if that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect' (at 69).

Where an accused is unrepresented, the judicial officer should be more than usually vigilant to ensure

that the accused person receives a fair trial. In the case of the Commissioner's Court the heavy court workload makes such vigilance virtually impossible.

4. Sentence.

The heaviest sentence imposed during the observations was in Court No 1 where an accused was sentenced to a prison term of 250 days or a fine of R250.00. In addition it was ordered that, on completion of the jail term, the accused, a foreign black, was to be repatriated to his native land, Zimbabwe. It appears that this heavy sentence was the result of the accused's previous convictions and the fact that he was a foreigner.

The sentences in other courts, which deal with South African blacks and citizens from 'independent' homelands, ranged from a fine of thirty rand or thirty days imprisonment to forty-five rand or forty-five days imprisonment for being in an urban area for a period exceeding seventy-two hours without a permit; and a fine ranging from ten rand or ten days imprisonment to fifteen rand or fifteen days imprisonment for failing to produce a reference book on demand.

A disturbing feature relating to sentence is that in all cases where the accused was sentenced to imprisonment in respect of two convictions, namely for being in

an urban area for more than seventy-two hours and for failing to produce a reference book on demand, the court did not order the sentences to run concurrently. Also, the fact that the accused may have spent some time in jail already as an awaiting trial prisoner, was not mentioned as having been taken into account for purposes of sentence. This sentencing policy contrasts sharply with the practice of the Magistrates' courts where sentences are often ordered to run concurrently and courts regularly take time served awaiting trial into account in assessing sentence.

Another important point relating to sentence is illustrated by the case of S v Cecilia Tlokwe Case No 8817/82. The accused, a woman from Bloemhof, was charged with two offences: first, being in the prescribed area of Johannesburg for a period exceeding seventy-two hours without a permit, and secondly, for failing to produce a reference book on demand. The accused pleaded guilty and was not questioned in terms of section 112 of the Criminal Procedure Act 51 of 1977. She was found guilty in terms of her plea and sentenced to a fine of R110,000 or 110 days imprisonment. The sentence was unusually high because the accused had numerous previous convictions. However, it was not made clear what portion of the sentence was in respect of the first offence and what portion of the sentence was in respect of the second



offence. The absence of such an explanation is a serious matter because the jurisdiction of these courts is limited in respect of both the fine and the jail sentence they can impose.

(In terms of Section 10(4) the maximum sentence the Commissioners' Courts may impose for an offence of being in town for a period exceeding seventy-two hours without a permit is one hundred rand, or, in default of payment, imprisonment for a period of three months. The maximum sentence for an offence of failure to produce a reference book on demand is fifty rand or three months imprisonment.)

5. Designation of the Charge.

According to section 84 of the Criminal Procedure Act the accused is entitled to be informed with precision and a reasonable degree of clarity of the case against him. The offence should be mentioned by its distinctive name and should be strictly and accurately described. Yet, in practice, the procedure in these courts fails to accord with these requirements.

The putting of a charge in Courts 2, 4 and 6 took one of the following forms:

"Where is your reference book?"

"How old are you?"

"Where where you born"?

"Pass?".

"Section Ten"

"Section Fifteen"

This form of putting a charge may constitute an abridged form either of an offence relating to contravention of section 10 of the Blacks (Urban Areas) Consolidation Act 25 of 1945 or to section 15(1)(a)(ii) of the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 relating to the production of reference books. On no occasion did the prosecutors read the charge fully.

Another instructive case is S v M Koris 8914/82. Here the accused was charged with a contravention of section 10 of the Blacks (Urban Areas) Consolidation Act 25 of 1945 for being in the prescribed area for a period exceeding seventy-two hours without a permit. The second charge against her was that she failed to produce her reference book on demand. The accused pleaded guilty but claimed to be a coloured. As the offence can be

committed by blacks only, one would have expected a plea of not guilty to be entered. However this matter was not investigated by the court and she was convicted on the strength of her plea.

The above cases demonstrate that certain major elements of the crime are never mentioned or proved. This is contrary to section 84 of the Criminal Procedure Act which provides that a charge must set forth the relevant offence in such a manner, and with such particulars as may be reasonably sufficient to inform the accused person of the nature of the charge. The Females' Court was particularly interesting in this regard. In this court, after the charge was put and the accused had pleaded, the prosecutor and not the Commissioner would ask the accused person questions about where she came from, the time of her arrival, the purpose of the visit etc, along the lines of the procedure for questioning laid down in section 115 of the Criminal Procedure Act, which entitles the presiding officer and not the prosecutor to question the accused as to the nature of her defence.

One incident was particularly striking. The scene

was the Females Court. The accused was Mrs Khombisile Tshabalala (Case No 8859/82). The charges were:

- (a) Remaining in the prescribed area for more than seventy-two hours without a permit; and
- (b) Failure to produce a reference book on demand.

The accused pleaded not guilty on both charges. She was not asked to disclose the basis of her defence; neither was she questioned in terms of section 115 of Act 51 of 1977. Her reference book was produced in court. As regards the charge of failing to produce her pass on demand she was not asked where she was arrested in order to establish whether she was granted an opportunity to produce her pass as required by the decision of Ncube en 'n Ander v Zikalala 1975 (4) SA 508 (A). The arresting officer was not in court. The State, armed with the presumption that the accused had spent more than three days in the prescribed area of Johannesburg, proceeded with the trial. The accused denied that she spent more than three days in the area. She gave her evidence in chief, led by the prosecutor and was cross examined extensively by the Commissioner. Her witness, who was at all times sitting in court, was similarly led in his evidence in chief by the prosecutor and again was cross examined by the Commissioner. At one stage, when the witness was still being cross examined by the Commissioner, the latter

diverted his attention to the accused, who was in the dock, and asked her, who of the two he had to believe regarding the exact travelling costs paid. The conduct of the case, which was not atypical, shows the extent to which normal rules of evidence and procedure are departed from in the Commissioners' Courts.

6. Conduct of Court Personnel.

It is important for the administration of the criminal law, particularly where an accused person is unrepresented, that it should appear that the accused person is given a fair trial. The accused should not be left with any sense of injustice. The presiding officer should ensure that the proceedings are conducted with courtesy, restraint and impartiality. In S v Jacobs 1970 (2) PHH 152 (C) it was said that:

'While it is true that it is the function of a criminal court to determine the guilt or innocence of the accused, it performs this function in accordance with certain accepted norms of procedure. These involve, inter alia, the concepts of fairness to the accused, courtesy to the witnesses and adherence to certain civilized standards of behaviour.'

Yet in all cases observed neither the Commissioner nor the prosecutor addressed the accused as either Mr, Miss or Mrs. Even the defence witnesses were not

addressed properly. Sometimes only first names were used and sometimes only the case number . Such practices cannot be said to conform with 'civilized standards of behaviour'.

7. The Accused.

Once the charge has been put, and before the accused can be placed on his defence, the State must prove that:

- (a) that the accused was in a prescribed area; and
- (b) that the accused is a black.

The onus is on the State to show that the place where the accused was arrested falls within a prescribed area. Yet in no case was the investigating officer called to prove this element of the offence. It was simply assumed.

These offences can be committed by blacks only. Yet in practice once the accused appears to be a black African he is presumed to be such until he proves otherwise. In the unreported case of S v Petersen 15505/82 the following transpired. The prosecutor asked the accused the following question:

'Where is your reference book?'.  
The accused replied as follows,

'Ek is 'n Kleurling' ['I am a Coloured'].

The prosecutor applied for a postponement for seven days which was granted without any question by the court. Accused was not advised about bail. Case No 15058/82 was similar. Here the accused was charged with two offences - one relating to violation of the seventy-two hours restriction and the other, failure to produce a reference book. The accused pleaded that he was a coloured. Without any further investigation the matter was postponed for a period of three days. The accused was not granted bail, nor was he advised about bail.

8. Postponements.

It is often said that justice delayed is justice denied. This is the reason why the decision whether or not to postpone a criminal trial is one within the discretion of the presiding officer alone. Yet the impression given in the Commissioners' Courts is that the prosecutor has a free hand on the subject of postponements. On 1, 6 and 8 December 1982 the Females' Court handled 168 cases and in 74 cases applications for postponement were granted at the request of the prosecutor

without a single protest or question from the Commissioner. Such a figure represents 44.04% of the total cases tried in that court during these three days in question. During December 1982 about 965 cases were tried in Court 6 and some 330 cases were postponed, representing about 34.92% of the cases brought to court: see Tables 2, 3 and Annexure B below. (Generally postponements are requested and granted to enable the prosecution to complete administrative enquiries relating to the identity and record of the accused). Such a high number of postponements should be a cause of concern, particularly because the accused persons are unrepresented and their right to bail is neither explained nor respected. Usually the cases are postponed for a period of about two weeks and in most instances the accused are returned to custody and not released on bail.

9. Convictions.

To obtain an impression of the conviction rate in these courts the December 1982 statistics for the Females' Court will be used. Firstly on 1, 6 and 8 December 1982, 168 people were processed in this court. For the conviction and remand rate see Table 2 below.



TABLE 2

COURT ROLL FOR 1, 6 & 8 DECEMBER 1982

Total Roll	Acquittals	Convictions	Remands	Cases referred to other courts, cases withdrawn, etc
168	1	83	74	10
%	0.59	49.40	44.04	5.95

For the complete conviction, remand and acquittal rate see Table 3 below.

TABLE 3

COURT 6 ROLL FOR DECEMBER 1982

Total Roll	Acquittals	Convictions	Remands	(1) Cases referred to other courts (2) Cases withdrawn
965	12	555	330	67
%	1.24	57.51	34.19	6.94

The conviction and remand rate is the highest on both tables followed by the rate of withdrawals and cases referred to other courts. Less than 1.24% of all persons charged were acquitted.

Table 3 above shows that 555 people were convicted. In order to gain some idea as to how many were sent to jail and how many people paid their fines, see Table 4 below.

TABLE 4  
IMPRISONMENT AND FINE RATE FOR COURT 6 DECEMBER 1982

Total no of Convictions	Number of Persons who paid fines	Number of persons who went to jail	Cautioned or Discharged
555	219	239	97
%	39.45	43.06	17.47%

These figures should be a cause of serious concern because South Africa has one of the highest prison populations in the world. In 1976 the Viljoen Commission of Inquiry into the Penal System of the Republic of South Africa expressed its concern on this subject and recommended:

'That influx control and curfew laws should be depenalized, in other words converted into administrative or regulatory measures (backed up where necessary by criminal sanctions) as extensively as possible so as to prevent large-scale arrests, trials and convictions under these laws in criminal courts (such convictions being the main cause of over-population of the Republic's prisons by short terms prisoners).'' (para 8.3.1) (RP 78/1976).

According to the Annual Report of the Department of Justice for the period 1 July 1981 to 30 June 1982, some 221 449 sentenced prisoners were admitted into South African prisons. Of these, 117 324 were black prisoners serving sentences not exceeding four months. A fair inference is that influx control measures contributed substantially to this alarmingly high short terms prison population because the sentence for this offence is on the whole less than three months. During 1982 approximately 206 022 people were arrested for influx control offences. As most of the persons convicted were unemployed it is reasonable to assume that the majority were obliged to serve the imprisonment imposed.

10. The Impact of Ncube v Zikalala 1975(4) SA 508(A).

Ncube v Zikalala is a landmark decision. Here the Appellate Division of the Supreme Court of South Africa held that section 15(1)(a)(ii) of the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952

'does not require that a black should always carry a reference book on him. What the Act provides is that an authorised official can at any time require a black to produce his reference book to him. It is however clear that a black requested to produce his reference book should be given a reasonable opportunity of fetching his reference book somewhere if he does not have it on him at the moment' (at 509).

In the wake of this decision, during the 1976 Parliamentary Session, the Minister of Law and Order was asked the following questions relating to the production of reference books:

- '(1) Whether the South African Police arrest black persons who possess valid reference books but who do not have the books with them at the time of their arrest;
- (2) whether consideration has been given to such persons reporting to the local police station with their reference books within a certain period after being asked for such books;
- (3) whether he will make a statement on the matter.'

The following replies were given by the Minister of Economic Affairs on behalf of the Minister of Law and Order:

- '(1) Yes, such cases do occur from time to time, but these are rather the exception than the rule. Departmental directives provide that where an explanation which can readily be verified is advanced, arrest should not be resorted to.
- (2) No, except that no legal provisions exist for such procedure, it would also be unpractical.
- (3) Yes. By way of lectures the attention of members of the Force is drawn regularly to departmental directives concerning the production of identity documents and the discretion to be exercised in connection with arrests. As circumstances differ from one case to another, the action to be taken in each particular case can not be prescribed. Reasonableness is however, usually being exercised and all steps taken

to have the black appreciate that his reference book actually protects him because it proves, firstly, his identity, and secondly, whether he is legitimately in the area where he is found' (House of Assembly Debates cols 1056-1057 (21 May 1976)).

The practical impact of Ncube v Zikalala is difficult to assess for a number of reasons. First, the accused is usually unrepresented and invariably is unaware of the fact that he is entitled to be granted a reasonable opportunity to collect his reference book. Secondly, when the accused person alleges that he was arrested on the way to the shop or that his reference book is at work, there is insufficient cross examination about where he was arrested and whether he was granted an opportunity to fetch his reference book. Thirdly, such information is seldom interpreted to the Commissioner because the interpreter sifts the information. To a large extent the value of this decision therefore depends upon the willingness of the Commissioner to enforce it. Yet the present study documented forty eight cases where the decision of Ncube v Zikalala appears not to have been followed and the court itself failed to enquire into the circumstances of the accused's arrest. (This matter is discussed below.)

As a general rule, arresting officers are never called to give evidence as state witnesses. So there has been little opportunity to establish whether arresting

officers are instructed about the rule laid down in Ncube v Zikalala. However in the unreported case of S v Matome, heard on 12 January 1979 in Johannesburg, the accused is reported to have said:

'I begged the policemen - three whites and two blacks - to allow me to fetch my book from my employer's house, which was not far away, but they refused. I told them I was looking after the house of my employer, who was in Israel, with his family, but they would not listen...'  
(Rand Daily Mail 13 January 1979).

The accused alleged further that at the police station he asked to be allowed to phone the sister of his employer's wife but the policemen would not listen.

The number of arrests for pass law offences in 1982 was 206 022. About 112 646 arrests were effected by officers of the Administration Boards. This figure represents about 54.67% of the total arrests for offences relating to influx control and reference books in South Africa. It is therefore important to know whether these officers are aware of or are instructed that they have to grant an accused person an opportunity to collect his reference book as indicated by the Ncube decision.

There is one unreported decision relating to a West Rand Administration Board Inspector where 'reasonable opportunity' was in issue - namely S v Seshoka heard in June 1980. In this case the West Rand

Administration Board Inspector, Mr Adriaan van Rensburg, said under cross examination:

'I was never formally told that it was a standing rule to ask a person where his reference book was' (Rand Daily Mail 26 June 1980).

This should be a source of serious concern in view of the fact that the Administration Board officials are increasingly taking over the implementation of the influx control laws from the police force. Furthermore officials of the Administration Boards have been granted extensive powers of search and inspection by section 17 of the Black Affairs Administration Act 45 of 1971. Officials of the Soweto Community Council are also given powers of search and inspection in terms of the Community Councils Act 125 of 1977. See Annexure C which authorises an official of the community council to search dwellings in the urban black residential areas.

Any arrest for a pass law offence carried out in a manner contrary to the direction in Ncube v Zikalala constitutes a wrongful arrest. Since this historic decision only six unreported cases have been discovered where the accused person later successfully sued for wrongful arrest on the basis of Ncube's decision.

The study observed forty eight cases where the above decision appears to have been violated in that the arresting officer refused to grant the victim a reasonable opportunity to fetch his reference book from his place of residence or employment. In all these cases persons charged with failing to produce a reference book alleged that their reference books were nearby but that they were denied the opportunity to fetch their reference book by the arresting officer. This figure is disturbing because it represents about 13.18% of about 365 'trials' actually attended. Between 1977 and 1982 approximately 1.2 million black people were arrested for offences relating to influx control and reference books. It is probably fair to assume that a substantial number of such arrests were carried out in a manner contrary to Ncube's decision

11. The Commissioner and Unrepresented Accused.

From this study it is clear that legal representation is virtually non-existent in the Commissioners' Courts. The Commissioner should therefore be careful to ensure that the accused person receives a fair trial. This accords with the expectations of the Supreme Court. In S v Sebatana 1983(1) SA 809(0) it was said that:



'Experience has repeatedly taught that, particularly in the case of illiterate and untutored black accused, they may put a few irrelevant questions to the State witness, or no question at all, and then subsequently give evidence [in chief] which conflicts with that of the State witness in material respects. This may be the result of ignorance about the true nature and purpose of cross-examination, notwithstanding an explanation by the magistrate of the accused's "rights" in that connection. The presiding officer in such a case has a duty to assist the accused in presenting his defence by way of cross-examination by, for example, expressly asking him whether he agrees with each material allegation made against him by a State witness... This would at least give the accused the impression that he is being fairly treated during the trial' (at 810).

See, too, the case of S v Mngomezulu 1983(1) SA 1152(N). Most accused in the Commissioners' Courts plead guilty and it is therefore incumbent on the presiding officer to ensure that the accused understands the true nature of his plea. The Commissioner should satisfy himself on this score by a careful questioning of the accused in terms of section 112 of the Criminal Procedure Act. As the court stated in S v Mokoena 1982(3) SA 967(T):

'the Magistrate's questions should be aimed at satisfying himself that the accused understands all the elements of the charge when he pleads guilty and that his answers reveal that he actually committed the offence upon which he has pleaded guilty' (at 967).

In practice Commissioners do not question the accused as required by section 112. As pointed out above, one Commissioner left the entire questioning to

the prosecutor. The fact that the onus is on the accused - in certain instances - cannot relieve the Commissioner of this duty. As the court pointed out in S v Andrews 1982(2) SA 269(NC):

'The failure to inform properly an undefended accused of a presumption which he has to rebut can lead to the quashing of his conviction if the accused was prejudiced by that failure. There is in our law a very long established practice which for obviously very good reasons based on considerations of fairness - require that presumptions which appear in statutory provisions should be explained to an undefended accused' (at 269).

From this decision it is clear that the Commissioner should explain the charge precisely because of the complex nature of the statutory offences in question: see Annexure D. If the correct court procedure was followed in the Commissioners' Courts it would be difficult, if not impossible, for a court to deal with 65 cases in 2.5 hours. See Annexure B relating to the statistics of the Females' Court for the entire month of December 1982.

12. Children

School children who visit their parents in Johannesburg are also subjected to influx control. Approximately ten cases involving children below the age of 16 years were heard in these courts during the period of study. In some of these cases the children were

deported to their homeland residence without any notice to the parents. This was illustrated by S v Hlongwane heard on 13 December 1982 in Court 3. The accused was a 15 year old child from KwaZulu who was arrested for being in the area without a permit. Without any real investigation the matter was referred to a Childrens' Court in KwaZulu and the boy was deported to his homeland for this purpose. S v Hlongwane should be contrasted with S v Skosana (case no 15488/82) where a child who visited his mother was to be deported to Standerton, on the application of the prosecutor. Further inquiry by the Commissioner resulted in the refusal of the application because one of the parents was in the prescribed area of Alberton on the South Eastern side of Johannesburg. Surely this type of inquiry is necessary whenever young children appear before the Commissioners' Courts.

13. Automatic Review

In a leading treatise on criminal procedure and evidence, Lansdown and Campbell remark that:

'In the realm of criminal law the term review indicates the legal machinery for placing before a superior court the proceedings of an inferior court for supervision, reconsideration and correction of irregularities or illegalities which may have occurred during the hearing in the inferior court. ....When it is borne in mind that the overwhelming majority of persons standing

trial in the criminal courts of the Republic are members of the less favoured section of the community, unsophisticated, illiterate and on the whole without legal representation, it will be appreciated that the procedure of review provides a wholesome curb upon any possibly misdirected, arbitrary or despotic exercise of their functions by arbiters in the lower tribunals' (South African Criminal Law and Procedure (Formerly Gardiner and Lansdown) Vol V (1982) at 677).)

Section 302 of the Criminal Procedure Act 51 of 1977 provides that any sentence imposed by a Magistrate's Court which, in case of imprisonment exceeds a period of three months or which, in case of a fine exceeds the sum of R250,00 shall be placed automatically before a judge of the Provincial Division of the Supreme Court:

'for scrutiny to determine whether the proceedings are in accordance with justice, and for rectification of proceedings which are found to be inadequate in this respect' (South African Criminal Law and Procedure (Formerly Gardiner and Lansdown) Vol V (1982) at 683).)

The sentence which the Commissioners' Courts may impose is limited. Conviction under section 10(4) of the Blacks (Urban Areas) Consolidation Act 25 of 1945 carries the maximum penalty of a fine of one hundred rand or of imprisonment of three months. Conviction under section 15(1)(a)(ii) of the Blacks (Abolition of Passes and Coordination of Documents) Act 67 of 1952 carries a maximum fine of fifty rand or maximum jail term of three months. Consequently proceedings in the Commissioners' Courts are released from the automatic scrutiny of the Supreme Court

in terms of the provisions of sections 302-308 of the Criminal Procedure Act 51 of 1977. Accordingly in these proceedings no one outside the bureaucratic machinery of the Department of Co-operation and Development is able to assist the court in the observance of fair-trial procedures.

14. The Legal Aid Board.

In 1969 the Legal Aid Act 22 of 1969 established a Legal Aid Board to provide legal assistance to indigent persons. The scheme came into force in South Africa on 29 March 1971. The Legal Aid Board has drawn up a Consolidated Legal Aid Guide which stipulates the conditions for granting legal aid. In terms of paragraph 11 of the Consolidated Legal Aid Guide:

'legal aid shall be rendered in all cases where the assistance of a legal practitioner is normally required.'

However legal aid is excluded in criminal matters, in the following cases:

- '(a) if pro-deo defence is available, except where an attorney is instructed to assist a pro-deo advocate, provided the attorney's services cannot be dispensed with and the Director consents thereto;
- (b) in respect of offences for which admission of guilt has been determined or which can be compounded;

- (c) in respect of cases where the commission of the offence is admitted and the accused's defence or excuse is so simple that it can be advanced by the accused himself without aid;
- (d) in respect of a traffic offence or any other offence connected with the use of a motor vehicle, unless the Director approves in writing that an exception may be made on account of exceptional circumstances;
- (e) in a preparatory examination;
- (f) for the institution of a private prosecution ' (para 12.1).

None of these exceptions appears to apply to offences relating to influx control and pass laws. The two statutes which constitute the body of influx control - the Blacks (Urban Areas) Consolidation Act 25 of 1945 and the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 - are complicated and intricate statutory enactments. The former contains presumptions placing the onus on the accused to prove his innocence - (see ss 9(5) bis; 10(4) and 11) which are beyond the comprehension of the ordinary layman. Furthermore, the complex nature of the offence created by the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 is clear from the decision of Ncube v Zikalala where it was held that a black person must be granted a reasonable opportunity to produce his reference book. In the first place the ordinary person is unlikely to be acquainted with judicial decisions interpreting a statute. But even if he is informed of this ruling, a

simple peasant, who is obviously a stranger to the courts and to the procedures and techniques of litigation, may not be able to put the necessary questions to witnesses to demonstrate that he was not granted a reasonable opportunity as required by Ncube's case. Therefore the exception that legal aid will not be granted in respect of cases where the commission of the offence is admitted and the accused's defence or excuse is so simple that it can be advanced by the accused person himself without aid cannot possibly be extended to include the victims of the pass laws. It is true that most accused persons in the Commissioner's courts plead guilty, but it has been shown above that this plea is often given under a wrong impression or misapprehension of the law or the facts. In any event, according to Professor D J McQuoid-Mason:

'Legal aid officers should use this exclusion with caution because what may appear to be a simple defence or excuse to a sophisticated person may not be so to an unsophisticated applicant from the rural areas who is unfamiliar with court procedures and the technicalities of the criminal law' (An Outline of Legal Aid in South Africa (1982) at 38).

Legal aid offered by the Legal Aid Board is advertised in the Johannesburg Magistrates' Courts. However, similar advertisements have not been posted in the Commissioners' Criminal Courts in Johannesburg. This matter should be investigated by the Board in order to provide some aid to the victims of the influx control system.

## CONCLUSION

Although the present study was conducted over a period of only two weeks its general conclusions confirm the following previous studies:

John Dugard and Ramarumo Monama 'Little Justice available to Pass Offenders' Race Relations News 41:4, 1979.

Martin West 'From Influx Control to Deportation: Changing patterns of influx control in Cape Town' (1982) 81 African Affairs 463.

Munro, C 'Influx Control in Johannesburg - an adjective appraisal' (1977) 4 De Jure Ac Legibus 3.

Davis, D 'Influx Control - All Quiet on the Legal Front' (1979) 42 THRHR 317.

The study's findings also coincide with the observations of visitors to the Johannesburg Commissioners' Courts.

The conclusion that the procedures followed in these courts differ from those employed in the Magistrates' Courts must be seen as disturbing as it suggests that a lower standard of justice is maintained in the Commissioners' Courts.

Many will find the findings of this study painful and some, defensively, will ask why more time was not spent on positive aspects of race relations, such as the



extension of labour rights to blacks and the advancement of residential rights by means of the ninety-nine year leasehold scheme?

The answer to this possible criticism is threefold. First, positive developments have been frequently examined elsewhere and justly praised. Secondly, the history of any advancement is incomplete without an examination of its dark side. Thirdly, the South African judicial system enjoys considerable respect both nationally and internationally. Any attempt to tarnish this reputation must be discouraged. The need to undertake research in this area has recently been suggested by an eminent senior counsel. In an address titled 'Telling the Truth about Law' ((1982) 99 SALJ 648) Mr Sydney Kentridge SC stated:

'...it would surely be worth while to carry out some comparative research into criminal trials in the Supreme Court and the Magistrate's Courts. What is the conviction rate in the two courts? What are their respective attitudes in granting bail? How do they deal with the pleas of guilty by undefended accused? What steps do they take to ensure that undefended accused know of their rights to legal aid' (at 654).

This present study reveals the extent to which the enforcement of the influx control laws, and the procedures employed in the Commissioners' Courts undermine the general standards of criminal justice. The findings compel us to ask the question: "Is it possible

to introduce fair-trial procedures into these courts?"  
The answer is probably "No" - unless legal representation  
is introduced in a substantial number of cases either by  
voluntary organizations or by the Legal Aid Board .

ANNEXURE A: STATISTICS RELATING TO TRIALS OBSERVED

EXPLANATORY NOTES TO ANNEXURE A

1. COURT
2. DATE
3. NO OF TRIALS ATTENDED
4. NO OF ACCUSED REPRESENTED
5. HEAVIEST BAIL GRANTED
6. HEAVIEST FINE .
7. LONGEST JAIL SENTENCE
8. ANY OTHER SENTENCE
9. NO OF ACCUSED WHO FACED JOINT CHARGES UNDER S 10(1) & (4)  
OF ACT 25 OF 1945 AND S (15)(a)(ii) ACT 67 OF 1952
10. SHORTEST TIME SPENT ON INDIVIDUAL CASE
11. LONGEST TIME SPENT ON INDIVIDUAL CASE
12. SHORTEST POSTPONEMENT
13. LONGEST POSTPONEMENT
14. NO OF REMAND CASES WHERE ACCUSED HELD IN CUSTODY
15. CONVICTIONS
16. ACQUITTALS
17. WITHDRAWALS
18. CASES REFERRED TO OTHER COURTS
19. NO OF CASES WHERE ACCUSED NOT APPARENTLY GIVEN REASONABLE  
OPPORTUNITY TO PRODUCE REFERENCE BOOK - NCUBE EN 'N ANDER  
v ZIKALALA 1975(1) SA 508(A)
20. NO OF STATE WITNESSES WHO ATTENDED TRIAL
21. NO OF STATE WITNESSES REQUESTED TO ATTEND BUT FAILED TO  
ATTEND
22. NO OF CASES WHERE 'COLOURED' ACCUSED ARRESTED IN TERMS OF  
INFLUX CONTROL LAWS

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22
COURT	2 & 3	32	1	NIL	R250	250	Depart-	NIL	30	7	1	19	15	12	2	NIL	NIL	NIL	NIL	NIL	NIL	NIL
1	Dec 82					days	ation*		secs	mins	day	days	days	days	days	days	days	days	days	days	days	days
COURT	2 & 3	89	NIL	R80	R90	90	None	31	30	3.5	5	6	17	49	4	9	2	6	NIL	NIL	NIL	NIL
2	Dec 82					days			secs	mins	days	days	days	days	days	days	days	days	days	days	days	days
COURT	8 & 13	27	NIL	NIL	R30	30	None	NIL	30	2	4	4	2	16	3	7	1	NIL	NIL	1#	NIL	
3	Dec 82					days			secs	mins	days	days	days	days	days	days	days	days	days	days	days	days
COURT	3,7 & 14	127	NIL	R100	R90	90	None	37	30	4	6	14	27	78	NIL	NIL	5	16	NIL	NIL	2#	
4	Dec 82					days			secs	mins	days	days	days	days	days	days	days	days	days	days	days	days
COURT	1,6 & 8	94	NIL	R70	R140	140	None	35	30	3	1	9	74	68	1	8	3	26	NIL	NIL	1#	
6	Dec 82					days			secs	mins	day	days	days	days	days	days	days	days	days	days	days	days
TOTALS	369	1						103					135	223	10	24	21	4.8		1	3	

\* Deportation order to Zimbabwe in terms of s 14 of Act 25 of 1945.  
# Case No 552/82.  
\$ Case Nos 15505/82 & 15058/82.  
^ Case No 8914/82.

ANNEXURE B: COMMISSIONER'S COURT 6:  
OFFICIAL STATISTICS FOR DECEMBER 1982

EXPLANATORY NOTES TO ANNEXURE B

1982 DEC DATES

1. NEW CASES BEFORE COURT
2. REMANDED CASES BEFORE COURT
3. TOTAL ROLL
4. ACQUITTALS
5. CONVICTIONS
6. CAUTIONED AND DISCHARGED
7. REMANDED CASES
8. CASES WITHDRAWN
9. CASES REFERRED TO OTHER COURTS
10. PEOPLE SENT TO JAIL
11. PEOPLE WHO PAID FINES
12. HOURS IN COURT

1982 DEC 1 2 3 4 5 6 7 8 9 10 11 12  
 DATES

1	39	16	55		24	4	23	3	1	8	16	3.25
2	15	24	39	1	20	2	13	3		8	12	5.25
3	12	17	29		19	3	6	1		8	11	4.50
6	64	1	65	1	19	5	34	3	3	9	10	2.50
7	12	14	26		12	1	9	1	2	6	6	5.75
8	24	24	48		25	6	17			13	12	2.25
9	14	21	35		19	2	10	2		12	7	4.00
10	37	21	58	1	27	9	17	3	1	16	11	3.25
13	63	3	66	1	31	6	28		2	12	19	2.25
14	27	31	58	1	31	7	14	2	3	9	22	2.75
15	25	22	47		21	8	14	1		15	6	4.25
17	38	19	57	2	32	9	15	2	1	21	11	3.25
20	43	2	45		21	3	13	1	3	11	10	2.25
21	18	37	55		31	5	15	1		18	13	5.25
22	19	15	34	1	17	8	10	2	1	12	5	3.00
23	20	33	53		30	4	11	2	3	9	21	5.25
24	32	4	36		10	1	14	5		4	6	5.75
27	15	2	17		7	2	5	2		6	1	5.25
28	9	21	30		16	5	5			12	4	2.25
29	18	16	34	4	11	4	15	2	2	8	3	5.25
30	35	15	50		23	3	10	6		14	9	
31	37		37		12		18	4		8	4	
<hr/>												
	965	12	555	97	330	46	22	239	219			

SOWETO COUNCIL NP

SOWETORAAD

SERGEANT : ..... TOWNSHIP : .....

Inspect House ..... Township .....  
before 5,00 a.m. on ..... 19 .... and check for unauthorised persons  
and bring them to the Office.

Persons authorised in house :

R.T. and Dependents :

N A M E : ..... RELATIONSHIP, AGE, PRESENT OR NOT

- 1. ....
- 2. ....
- 3. ....
- 4. ....
- 5. ....
- 6. ....
- 7. ....
- 8. ....
- 9. ....
- 10. ....

Authorised Lodgers and Dependents :

N A M E : ..... RELATIONSHIP, AGE, PRESENT OR NOT

- 1. ....
- 2. ....
- 3. ....
- 4. ....
- 5. ....

.....  
TOWNSHIP MANAGER

Time of Check : .....

- Unauthorised persons found :
- 1. ....
  - 2. ....
  - 3. ....
  - 4. ....
  - 5. ....

Any other report : .....  
.....

All Police on inspection patrol to sign below :

- 1. .... 5. ....
- 2. .... 6. ....
- 3. .... 7. ....
- 4. .... 8. ....

/JH

ANNEXURE "D"

REMAINING IN PRESCRIBED AREA FOR MORE THAN 72 HOURS AND/OR FAILING  
TO PRODUCE A REFERENCE BOOK

CHARGE SHEET

CASE NO: .....

Police Station C.R. No. Investigation Office

District Place of trial Date of trial  
JOHANNESBURG JOHANNESBURG

Presiding Officer Public Prosecutor

For defence Interpreter

Fingerprints taken/not taken In custody/On bail/warned

THE STATE versus

Name	Identity No.	Race Black	Sex	Age	Nationality
------	--------------	---------------	-----	-----	-------------

(Hereinafter called the accused)

- Contravening Section 10(1) read with Section 10(4) of Act 25 of 1945 as amended, in that upon or about the ..... day of ..... 19..... and at near ..... in the said district the accused, being a Black, wrongfully and unlawfully remain for more than 72 hours in an area which in terms Section 9 bis (2) of the said Act read with Proclamation No. 134 of 1928 as amended by Proclamation No. 1 of 1944 or read with Proclamation No.236 of 1956 is deemed a Prescribed Area.
- Contravening Section 15(1)(a)(ii) of Act 67 of 1952 as amended in that upon or about the ..... day of ..... 19..... and at or near ..... in the district of Johannesburg the said accused being a Black who had attained the age of 16 years did wrongfully and unlawfully after the fixed date fail or refuse produce on demand to an authorised officer under Section 13, a reference book issued to him/her.  
Alternatively, contravening Section 15(1)(aA)(i) or (ii) of Act 67 of 1952 as amended in that upon or about the date and at the place aforesaid the said accused, being Black to whom a document referred to in Section 3(1) bis (c) had been issued, on request by an authorised officer refused to produce such document or was unable to produce such document within 5 km from the place where he/she was so requested.

Plea: ..... Date: .....

Judgement: ..... Date: .....

Sentence: .....

D.A.E: .....

PRESIDING OFFICER - ADDITIONAL COMMISSIONER  
JOHANNESBURG

/pu



ANNEXURE "E"

CHARGE SHEET

CASE NO. \_\_\_\_\_

---

Police Station	C.R. No.	Investigation Officer
_____	_____	_____
District	Place of trial	Date of trial
_____	_____	_____
Presiding Officer	Public Prosecutor	
_____	_____	
For Defence	Interpreter	
_____	_____	
Fingerprints taken/not taken	In custody/on bail/Warning	
_____	_____	

THE STATE versus

Name	Identity No.	Race	Sex	Age	Nationality
------	--------------	------	-----	-----	-------------

Hereinafter referred to as the accused.  
 That the accused being a Black who is not a South African Citizen, or who is not a former South African Citizen who is a Citizen of a state or territory which formerly formed part of the Republic of South Africa, is charged with the offence of contravening subsection (1) read with subsection (2) of Section 12 of Act 25 of 1945 as amended, in that upon or about the \_\_\_\_\_ and at \_\_\_\_\_ in the Prescribed Area of Johannesburg the said accused did wrongfully and unlawfully enter, be or remain in the said Prescribed Area without written permission of the Director General for Co-operation and Development or a person duly authorised by him.

Plea \_\_\_\_\_

Judgement \_\_\_\_\_

Sentence \_\_\_\_\_

DATE: \_\_\_\_\_

COMMISSIONER : : : JOHANNESBURG

/pm

ANNEXURE "F"

CHARGE SHEET/KLAGSTAAT  
POLICE STATION/POLISIEKANTOOR

CASE NO. / SAAK NR. .... 19...  
R.C.A./R.A.A. NO. Investigation Officer  
Ondersoekbeampte

District/Division Distrik/Afdeling	Place of Trial Plek van verhoor	Date of Trial Datum van verhoor
Fingerprints taken/not taken Vingerafdrukke geneem/nie geneem nie	In custody/on Bail/Warned In hegtenis/op Borgtog/Gewaarsku	
For Defence/Vir Verdediging	Interpreter/Tolk	

COMMISSIONER/KOMMISSARIS

PUBLIC PROSECUTOR/STAATSAANKLAER

THE STATE VERSUS/DIE STAAT TEGEN

NAME NAAM	IDENTITY NO. IDENTITEITS NR.	RACE RAS	SEX GESLAG	NATIONALITY NASIONALITEIT	AGE OUDERDOM
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(hereinafter called the accused/hierna die Beskuldigde(s) genoem)

That the said accused is guilty of contravening Regulation 19(3) read with Regulation 4, of Chapter 2 of the Regulations Promulgated in Government Notice No. 1036 dated 14th June 1968, in that upon or about the

Dat die beskuldigde skuldig is aan oortreding van Regulasie 19(3) geles met Regulasie 4 van Hoofstuk 2 van die Regulasies afgekondig by GK nr. 1036 gedateer 14 Junie 1968 deurdat op of omtrent die

..... day of .....19... the said accused, did wrongfully  
dag van .....19... genoemde beskuldigde wederegtelik

and unlawfully enter or remain in ..... a Black hostel without a hostel permit or other written permission given by the hostel superintendent or any other person authorised thereto by him.

..... n Swart tehuis betree of daarin was of bly sonder n tehuispermit of sonder skriftelike toestemming van die tehuissuperintendent of n ander persoon wat deur hom daartoe genagtig is.

Plea on/Pleit op .....  
Judgement/Uitspraak .....  
Sentence/Vormis .....  
Date/Datum .....

COMMISSIONER : JOHANNESBURG  
KOMMISSARIS