

# JUDICIAL ADMINISTRATION BEYOND THE ORANGE RIVER FROM 1838 TO 1843

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## Introduction

In Southern Africa a movement known as the Great Trek commenced in 1836. It entailed that groups of people with their families (generally known as the Voortrekkers or simply the Boers) left the Cape Colony and migrated north beyond the Orange River with the purpose of establishing an independent state free from British rule. After the battles at Marikwa in November 1837 and Blood River in December 1838, the main Voortrekker movement split into two with some Boers settling in the area east of the Drakensberg (later Natal) and others settling in the area west of the Drakensberg where they established the towns of Potchefstroom and Winburg (in what would later become the Zuid-Afrikaansche Republiek – or ZAR for short – and the Orange Free State respectively). No longer a nation on the move, the needs of society changed; it now required more than mobile or emergency institutions.

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As a result, more attention was now lavished on the establishment and regulation of governmental structures, such as the Natal Volksraad in 1838. From 16 October 1840 the areas east and west of the Drakensberg were theoretically governed as one territory with an adjunct council appointed for Potchefstroom in February 1841. This adjunct council functioned as a part of the Natal Volksraad and its decisions were considered valid only after confirmation by the Natal Volksraad.<sup>1</sup> This article takes a look at the administration of justice beyond the Orange River in the years after the Great Trek until the adjunct council at Potchefstroom declared itself independent from Natal in August 1843 following the British annexation of Natal.<sup>2</sup>

## 2 The 1838 Regulations

The oldest surviving document from this period that deals exclusively with judicial administration is an undated one, with the title *Regulations and Instructions for the Judge or Magistrate and the Ways of Judicial Administration for the Common Good of Port Natal and Environs* (hereafter referred to as the 1838 Regulations).<sup>3</sup> These regulations were probably drafted simultaneously with a new, also undated, document (the *Rules and Regulations for the Board of Representatives of the People at Port*

- 1 The adjunct council consisted of twelve members and a sitting required the presence of eight members. The appointment of the council at Potchefstroom is described in the minutes of the Volksraad of 2 Feb 1841 and is published in Preller 1924: 101-108 and in *Volksraadsnotule Natal*: 81-85. The subordinate position of the Potchefstroom council met with resistance and caused considerable debate: see Art 2 of the minutes of the Natal Volksraad of 11 Oct 1841 published in Preller 1924: 155-158 and in *Volksraadsnotule Natal*: 119-121.
- 2 On 15 Jul 1842 a Boer deputation signed a treaty submitting to British authority in Natal: see *Volksraadsnotule Natal*: appendix 14/1842 at 418-419. In a Proclamation dated 12 May 1843, the governor of the Cape Colony, Sir George Napier, declared Natal to be a British colony: see *Volksraadsnotule Natal*: appendix 4/1843 at 435-438. On 7 Aug 1843 the Natal Volksraad assembled at Pietermaritzburg to ratify the treaty and to decide whether or not to adhere to the Proclamation: see the minutes of the Natal Volksraad of 7 Aug 1843 in *Volksraadsnotule Natal*: 177-178. After the members of the Volksraad were sworn in, all the members representing the adjunct council withdrew without casting any vote. Nevertheless, the assembly continued and the Volksraad ratified the treaty and acquiesced to the Proclamation with only one dissenting vote. On 3 Oct 1843 Andries Potgieter wrote a letter to the British authorities in Natal stating that the territory west of the Drakensberg was not considered to be part of the annexed territory and would remain independent: see *Volksraadsnotule Deel I*: xxiii-xxiv. The Burgerraad, meeting at Potchefstroom, and in a letter dated 10 Apr 1844, subsequently declared their independence and confirmed that they did not ratify the treaty of 1842; moreover, they stated that they did not want to negotiate with British authorities at all and expressed the desire to be left unhindered to manage their own affairs: see *Volksraadsnotule Natal*: appendix 5/1844 at 468-469. Britain officially annexed Natal in terms of the Letters Patent dated 31 May 1844: see Eybers 1918: doc 109 at 182-183. Natal became a separate British colony a year later: see the Letters Patent dated 30 Apr 1845 in Eybers 1918: doc 111 at 184-186.
- 3 A copy (and an English translation) of the 1838 Regulations was published as an addendum to the 21 Jun 1839 edition of *De Zuid-Afrikaan*; reprints are also available in *Volksraadsnotule Natal*: appendix 14/1838 at 287-288; Preller 1924: xiii-xvi; Preller 1920: 301-307; and in Preller 1938: 79-84.

*Natal and surrounding Country*) that provided for a council of twenty-four members who would act as the representatives of the general assembly and would constitute the new legislative body as a predecessor to the Volksraad.<sup>4</sup> Although most scholars<sup>5</sup> agree that both these documents were drafted only in October 1838, it is possible that they were drafted as early as May 1838 by a committee under leadership of Jacobus Boshoff<sup>6</sup> between 25 May and 4 June 1838.<sup>7</sup> This early date is first supported by the contemporary diary entries of Erasmus Smit who accompanied the Voortrekkers during the Great Trek as a preacher.<sup>8</sup> Smit mentions that Boshoff and others drafted the instructions for all the officials (“burgerambtenaren”). Boshoff indeed visited the camp of Gerhard Maritz at that time.<sup>9</sup> Secondly, in a letter published in the *Graham’s*

- 4 This document was published in *De Zuid-Afrikaan* of 21 Jun 1839 (including an English translation) and reprinted in *Volksraadsnotule Natal*: appendix 13/1838 at 285-286. Nieuwoudt 1964: 54 explains that the Volksraad and the Board of Representatives referred to the same organ of state, and that the name “Volksraad” gradually replaced the latter title.
- 5 See Preller 1924: iv; Van der Westhuizen & Van der Merwe 1976: 264; and De Wet 1958: 241-242.
- 6 Jacobus Nicolaas Boshoff was born in Swellendam in 1808. He was educated and later worked in the office of the civil commissioner at Graaff-Reinet for fourteen years. He moved to Natal in 1839 where he assumed various important positions, including that of member (and later chairman) of the Natal Volksraad and as magistrate for Pietermaritzburg: see art 6(a) of the minutes of the Natal Volksraad of 19 Jan 1841 published in *Volksraadsnotule Natal*: 76-77; art 9 of the minutes of the Natal Volksraad of 4 Aug 1841 published in *Volksraadsnotule Natal*: 109-110. As chairman of the Natal Volksraad he had to negotiate with Britain on the surrendering of Natal and was blamed by many of the inhabitants for this. After the British annexation of Natal, Boshoff remained in Natal and was appointed in various positions, including that of registrar, master of the Supreme Court, municipal councillor and member of the land commission. He was nominated as a candidate in the first presidential election of the Orange Free State in 1854 but received very few votes. In 1855 he was elected as the second president of the Orange Free State and served in this capacity until his resignation in 1859. Although his administration has been praised for its excellent and efficient civil service and internal administration, his external policies have received much criticism. He was criticised by pro-British groups for resisting Sir George Grey’s federation plans, and by pro-Boer groups for refusing unification with the ZAR. He died at Pietermaritzburg in 1881. For more on Boshoff’s life, see Anonymous 1968: 104-107. Boshoff was considered to be a “very capable administrator” and “excellent at law-making and routine work”: see Nathan 1937: 238, 247. Although Boshoff’s surname is more commonly spelled using only one “f”, I have chosen to use the double “ff” spelling throughout because that was the spelling used by himself in his letter to the *De Zuid-Afrikaan* (see n 10 *infra*).
- 7 See, also, *Volksraadsnotule Natal*: xliv-xlv where it is argued that the Board of Representatives existed and functioned by 12 Jun 1838. This argument is based on the diary entry by Erasmus Smit where he mentions that Boshoff was elected as president of the Board on that day. See Preller 1988: 142, entry of Tues 12 Jun 1838. The editors of *Volksraadsnotule Natal* point out, however, that it is possible that the Board had been constituted as early as Feb 1838, and that the document setting out its duties and responsibilities was drafted only later. The first written evidence of meetings of the Natal Volksraad dates to Mar 1839.
- 8 For Smit’s diary entries at the time, see Preller 1988: 139, entry of Friday 25 May 1838, and 141, entry of Monday 4 Jun 1838. Erasmus Smit was married to Susanna Catharina, the sister of the Voortrekker leader Gerrit (Gerhardus Marthinus) Maritz.

*Town Journal* of 23 August 1838<sup>10</sup> – and therefore prior to the traditionally believed date of the drafting of the 1838 Regulations – Boshoff’s description of the judicial administration at the time of his visit corresponds largely to the position in terms of the (until now assumed, later drafted) 1838 Regulations.<sup>11</sup> Thirdly, in his description of the case of a young Zulu warrior who was convicted of murder in August 1838, Smit’s diary refers to the Board of Representatives (“Raad van 24 Leden”). This means that the Board acted in an official capacity at least two months before the document outlining its duties and responsibilities was supposed to be drafted.<sup>12</sup> When read together, these three factors indicate that the 1838 Regulations and the document regarding the Board of Representatives were drafted not in October, but in May 1838.

The 1838 Regulations provided for separate civil and criminal jurisdiction and dealt with various related judicial matters. These are now briefly discussed.

Civil disputes regarding claims for not more than twenty *rijksdaalders*<sup>13</sup> as well as all disputes between landlords and tenants were heard by a magistrate and no appeals were possible. No written testimonies were permitted in such matters.

- 9 As is evident from his letter to *De Zuid-Afrikaan* (see n 10 *infra*). See, also, Theal 1915: 376.
- 10 The letter was reprinted in 7 Sep 1838 *De Zuid-Afrikaan* and is also available in Preller 1938: 28-34.
- 11 Boshoff’s general description stated that Maritz had the same authority and duties as the civil commissioners of the Cape and that the magistrates had jurisdiction in minor civil and criminal matters. Further, six *heemraden* had to assist the magistrate in civil matters concerning amounts of more than £7 10s and in criminal matters with possible penalties of more than £5 or one month imprisonment. No appeals were possible in the latter cases, although appeal was possible in cases concerning higher amounts and with more severe penalties. The death penalty had to be confirmed by the Board of Representatives (Boshoff referred to the *Volksraad* – which is also the term used in the 1838 Regulations), which also had jurisdiction to hear appeals and to remit sentences. The only discrepancy according to Boshoff’s description stated that in criminal cases involving possible exile, corporal punishment, hard labour of more than six months or the death penalty, the magistrate of that district would preside as judge along with a jury of twelve men, and therefore without the six *heemraden* as additionally required by the 1838 Regulations. Also, Boshoff viewed the Board’s authority to review or confirm sentences as an indication of the right to appeal in all criminal matters. Art 19 of the 1838 Regulations indeed provided that the Board (*Volksraad*) had to confirm all criminal sentences but did not refer to a general right of appeal in those cases.
- 12 See Smit’s description of the case in Preller 1988: 153, entry of Thursday 16 Aug 1838 and 157-160, entry of Friday 31 Aug 1838. The Board requested Smit to provide religious counselling to the warrior after they confirmed the accused’s death sentence.
- 13 “Rds” or *rijksdaalder*(s) (English: rix-dollar) refers to the Dutch currency unit introduced to the Cape by the Dutch East India Company at the end of the seventeenth century. Due to a shortage of coins in circulation, a paper version of the *rijksdaalder* was issued in 1782. These notes were hand-written and hand-stamped and were valued at forty-eight *stuivers* each. Due to the continuous shortage of minted money, the paper money remained in circulation even after the British occupations of the Cape of 1795 and 1806. In 1810 more *rijksdaalders* were issued with a Britannia stamp. The value of the *rijksdaalder* steadily declined until it was fixed at one shilling and sixpence from 1 Jan 1826. In 1831 it was decided to replace *rijksdaalders* with sterling promissory notes and the last date for exchanging money was 31 Mar 1841. Despite these steps, *rijksdaalders* remained in circulation after this date and was also used by the Voortrekkers. During

It is not clear whether appeals in these minor cases were prohibited to discourage litigious parties from occupying the court rolls for matters seen as trivial, or whether the nature of such cases inherently excluded appeal. Civil disputes regarding claims for more than twenty *rijksdaalders* were heard by a magistrate and six (or at least four – see below) *heemraden* within one year. Appeals were heard by a magistrate and twelve jury members, in which case consensus among two thirds of the jury was required. Magistrates had to issue and sign all summonses<sup>14</sup> and they had to keep a record of all cases heard.

The jurisdiction with regard to criminal cases was also stipulated. Cases regarding offences demanding fines of no more than ten *rijksdaalders* or imprisonment of no longer than eight days were heard by a magistrate only. More serious offences were heard by a magistrate and six<sup>15</sup> (or at least four – see below) *heemraden* who could impose sentences involving fines of up to £5 or imprisonment of one month. Those cases which could result in a sentence imposing exile or the death penalty had to be heard by a full panel consisting of a magistrate, the *heemraden* and twelve jury members. In such a case the sentence was imposed by the magistrate and the *heemraden* only if the members of the jury had unanimously found the accused guilty. All sentences had to be confirmed by the Volksraad and the Volksraad could commute or remit sentences.<sup>16</sup>

The 1838 Regulations also dealt with other matters concerning the administration of justice such as the appointment of magistrates, *heemraden* and other officials to assist the magistrate with administrative duties. *Heemraden* were appointed for a period of one year. It was not unheard of for *heemraden* to be unable, for whatever reason, to fulfil their duties. However, the only valid excuse for non-fulfilment

the early years of the ZAR, the *rijksdaalder*, as well as the British sterling system, was used until 1868 when the sterling system became the exclusive currency of the Republic. See Shaw 1956: 4-19. For purposes of this article, all references to amounts expressed in *rijksdaalders* will be written out (except in direct quotes) as the abbreviation, Rds, is not well known.

14 For an example of a summons signed by the magistrate of Pietermaritzburg, see Pretorius, Kruger & Beyers 1937: R91g/42 dated 9 Mar 1842 at 156.

15 The 1838 Regulations does not specify the number of *heemraden* required for a criminal trial, but merely stipulates that all criminal cases, where a fine of up to £5 or imprisonment of up to one month can be imposed, will be decided by the magistrate together with his *heemraden* in the same way as in civil disputes. As mentioned above, the number of *heemraden* presiding with a magistrate in civil disputes was six. One can therefore assume that the presence of all six *heemraden* were required for a criminal trial.

16 Although the Volksraad could commute or remit sentences, an exception was made in cases where the accused was a member of the Volksraad. This is illustrated by a complaint of one FM Wolluter against CV Buchner, a member of the Volksraad. The court *a quo* had convicted Buchner of assault and had ordered him to pay a fine of 10 shillings or “Rds. 6:5:2”. The original document outlining the complaint has not survived and it is therefore unclear what the basis of the complaint was. Wolluter was probably dissatisfied with the amount of the fine and deemed the original fine too lenient. The Volksraad referred the case to a jury of twenty-four members: see art 9 of the minutes of the Volksraad of 12 Aug 1840 in *Volksraadnotule Natal*: 56-57 esp n 75. There are no further references to this case and it is unclear what the jury’s decision was.

of such duties was when a person with *heemraden* status moved to another area outside the jurisdiction of the court; for all other circumstances a heavy fine of fifty *rijksdaalders* could be imposed. Nevertheless, such absences could not be allowed to interfere with or delay the execution of justice and that is why, under special circumstances, in both civil disputes and criminal hearings, the required number of six *heemraden* could be reduced to four. More importantly, the view of the majority then represented the final decision of the court.

A magistrate could appoint or dismiss persons to assist him in his duties. The official who was, arguably, of the greatest value to a magistrate in the execution of his duties, was the clerk or messenger of the court. In June 1839 the Volksraad issued instructions to H Maartens regarding his duties as messenger of the Volksraad and simultaneously as a provisional messenger for the Pietermaritzburg magistrate's court.<sup>17</sup> Six months later a (presumably permanent) messenger for the same court was appointed, although his identity is uncertain.<sup>18</sup> The remuneration of the messenger of the court was fixed at twenty-five *rijksdaalders* per month.<sup>19</sup> When a messenger of the court was threatened, assaulted or in any other way prevented from performing his duties, he could request military assistance from the nearest field-cornet. In those cases the culprits could be arrested and brought before the nearest court and could be released on bail of 1000 *rijksdaalders* until their appearance at the next court hearing. However, a messenger of the court who requested the assistance of the field-cornet unnecessarily or due to cowardice could be fined up to 100 *rijksdaalders* or even be dismissed at the discretion of the court.<sup>20</sup>

Other officials that were appointed included a pound keeper (*schutmeester*),<sup>21</sup> an *onder-schout* who was responsible for prisoners,<sup>22</sup> as well as a ward master (*wykmeester*),<sup>23</sup> an auctioneer (*venduafslager*)<sup>24</sup> and a market master (*markmeester*).<sup>25</sup> Although all these appointments had to be confirmed by the Volksraad, the magistrate usually played a role in recommending suitable persons, supervising the officials or

17 Art 13 of the minutes of the Volksraad of 29 Jun 1839 in *Volksraadsnotule Natal*: 12-14.

18 Art 13 of the minutes of the Volksraad of 3 Jan 1840 in *Volksraadsnotule Natal*: 26-28. It is not clear from the documentation if the person appointed on this occasion was IP Hammes or J Gouws.

19 Art 8 of the minutes of the Volksraad of 5 Mar 1840 in *Volksraadsnotule Natal*: 32-34.

20 Arts 4 and 5 of the minutes of the Volksraad of 13 Mar 1843 in *Volksraadsnotule Natal*: 172-173.

21 Art 13 of the minutes of the Volksraad of 3-6 Apr 1843 in *Volksraadsnotule Natal*: 173-177.

22 HJ Martens was appointed as *onder-schout* for Pietermaritzburg in 1840 upon request of magistrate Zietsman. See art 7 of the minutes of the Volksraad of 5 Mar 1840 in *Volksraadsnotule Natal*: 32-34 and appendix 9/1840 in *Volksraadsnotule Natal*: 323.

23 Art 5 of the minutes of the Volksraad of 20 Feb 1843 in *Volksraadsnotule Natal*: 171-172. Regarding the instructions for ward masters, see appendix 3/1843 in *Volksraadsnotule Natal*: 434-435.

24 Art 1 of the minutes of the Volksraad in *Volksraadsnotule Natal*: 22-23.

25 Art 3 of the minutes of the Volksraad of 13 Mar 1843 in *Volksraadsnotule Natal*: 172-173. Regarding the instructions for market masters, see appendix 22/1842 and appendix 29/1843 in *Volksraadsnotule Natal*: 431 and 465 respectively.

in drafting the instructions for the various offices. In October 1842 the Volksraad also appointed J Bodenstein as the first public prosecutor with an annual salary of 1000 *rijksdaalders* plus a quarter of all fines imposed by the courts.<sup>26</sup> The Regulations further defined the duties of field-cornets, who assisted the magistrate in executing court decisions in both civil and criminal matters. A field-cornet who did not perform his duties could be fined twenty-five *rijksdaalders* per journey.

The 1838 Regulations further provided for the appointment of jury members in certain cases, namely in appeals in civil disputes, and in criminal matters involving serious offences with the possibility of a sentence of exile or the death penalty. All citizens (“burgers”) between the ages of twenty-one and sixty without physical disabilities such as blindness or deafness were obliged to make themselves available for jury duty. Although not stated explicitly, it is assumed that “citizens” included men only as the evidence suggests that women were not allowed to vote and could not perform official duties. A magistrate had to compile an annual list of all the eligible jury members within his jurisdiction and from this list had to subpoena twenty-four persons for each court sitting that required jury members, taking into account the health and possible absence of individual members. This latter provision implies a close-knit society in which the magistrate was acquainted with the personal circumstances of the members of his local community. Refusal to comply with jury duty carried a fine of twenty-five *rijksdaalders* for each summons. A person was prohibited from sitting as a member of the jury in cases in which he had any interest or where any of the parties in a civil dispute, or the accused in a criminal case, was related to him. In addition, any of the parties in a civil dispute or the prosecutor in a criminal case could request that a maximum of three persons subpoenaed for jury duty be dismissed without giving any reasons.

The 1838 Regulations also provided for fixed charges regarding legal costs. The magistrate and the *heemraden* had to draft a tariff for legal costs, subject to approval by the Volksraad. The costs were payable by the parties to a dispute. In February 1841 the Volksraad approved such a tariff drafted by magistrate Jacob de Klerk.<sup>27</sup> The fixed tariff concerned those costs due to court officials in civil proceedings and included amounts in respect of citations, copies of documents, the recording of testimonies, judgements handed down, letters of execution and costs incurred by the messenger of the court, such as the renting of horses with regard to criminal proceedings. In another bill of costs dated January 1842, fees included those for the issuing of summons, the messenger of the court, and those incurred by four witnesses.<sup>28</sup>

26 On the appointment of the public prosecutor, see art 2 of the minutes of the Volksraad of 4-6 Oct 1842 in *Volksraadsnotule Natal*: 160-165. See, also, n 44 *infra*.

27 Art 13 of the minutes of the Volksraad of 2 Feb 1841 in *Volksraadsnotule Natal*: 81-85. On that occasion, the Volksraad gave permission for the messenger of the court to claim, in addition to his monthly allowance of twenty-five *rijksdaalders*, for any expenses incurred when renting horses in the course of his duties with regard to criminal proceedings.

28 Pretorius, Kruger & Beyers 1937: R91b/42 dated 18 Jan 1842 at 153.

Anybody who prevented a magistrate or any other official from exercising his judicial duties or who threatened or resisted such an official, could be arrested and was liable for a fine or imprisonment. In addition, anybody who insulted a magistrate or the court by way of word, deed, threat or attitude was liable for a spot fine of ten *rijksdaalders* for each transgression. Refusal to pay the fine could lead to imprisonment for a period of eight days per transgression.<sup>29</sup>

Lastly, emphasis was placed on the impartiality and good behaviour of magistrates. A magistrate was required to take an oath upon appointment. He could not preside at or sit in on civil or criminal cases where his private interests were at stake or where the parties involved were related to him. In the event of such conflict of interests one of the *heemraden* had to preside. Further, the Volksraad could dismiss a magistrate from service and charge him accordingly by way of the normal judicial processes if convinced of his intentional partiality or abuse of authority in the performance of his duties if he behaved disgracefully or committed an offense. This is illustrated by a dispute between then magistrate Zietsman of Pietermaritzburg and PJ Hames in August 1840. The Volksraad referred the dispute to a jury of twenty-four members with one of the members of the Volksraad presiding. Zietsman was suspended until the matter was finalised.<sup>30</sup> Unfortunately the outcome of the dispute is uncertain. Zietsman resigned shortly thereafter, although the circumstances suggest that he was still respected as a judicial official. He was not only officially thanked by the Volksraad for fulfilling his duties as magistrate, but also re-appointed three years later.<sup>31</sup>

### 3 The 1841 Regulations

On 8 October 1841, the Volksraad approved and accepted a document with the (translated) title *Regulations and Instructions for the Magistrates and Heemraden of the Various Divisions or Districts in the Republic of Natal* (hereafter the 1841 Regulations). Although the 1841 Regulations to a large extent confirmed the position set out in the 1838 Regulations, a few changes were incorporated.<sup>32</sup>

In civil disputes, appeals against judgements of the court of magistrate and *heemraden* were no longer heard by a magistrate and a jury, but in future would be

- 29 See, also, art 1 of the minutes of the Volksraad of 8-10 Aug 1842 in *Volksraadsnotule Natal*: 157-159 which provided that persons posing bodily danger to the magistrate or other court officials could be physically restrained or arrested or, in certain circumstances, threatened, injured or killed.
- 30 Regarding the dispute between Zietsman and Hames, see arts 1 and 2 of the minutes of the Volksraad of 11 Aug 1840 in *Volksraadsnotule Natal*: 55.
- 31 Art 1 of the minutes of the Volksraad of 3-6 Apr 1843 in *Volksraadsnotule Natal*: 173-177.
- 32 See art 2 of the minutes of the Volksraad of 8 Oct 1841 in *Volksraadsnotule Natal*: 115-116. A Dutch copy of the 1841 Regulations was published as appendix 22/1841 in *Volksraadsnotule Natal*: 380-381. I referred only to this copy and the translation of the title is therefore my own.

heard either by the Volksraad or by a court of appeal appointed by the Volksraad. This clearly impacted on the independence of the judiciary as the legislature could now interfere with decisions of the courts at the highest level.<sup>33</sup> Also, in criminal cases, appeals were no longer possible for minor offences with a maximum fine of £5 or imprisonment of up to one month. These minor offences now also included complaints by employers against their employees. A new category of punishment, namely corporal punishment for “heathens” and persons of colour, was added to these minor offences. However, an appeal was possible in the case of more serious crimes involving larger fines or longer terms of imprisonment. Although the Volksraad no longer had to confirm all sentences (with the exception of the death penalty), it still had the authority to commute or remit a sentence. Also, the minimum members of the *heemraden* for a court sitting was reduced from four to three, and the majority decision carried. In the event of a split decision, the magistrate had the determining vote. In those cases where the magistrate was unable to take part in the proceedings due to a conflict of interests or illness, one of the members of the *heemraden* would preside.

Other smaller changes meant that the tariffs of costs would in future be determined by the Volksraad and no longer by the magistrate. An interesting addition provided that any person, who, through inappropriate behaviour or in any other way, disrupted court proceedings, was now liable for a fine or imprisonment. This latter addition implies that incidents of disruptive behaviour in the courts were not unknown.<sup>34</sup>

As indicated by its title, the 1841 Regulations applied to all the magisterial districts of Natal at that time, namely Pietermaritzburg, Port Natal and Weenen.<sup>35</sup> Nevertheless, there were differences and discrepancies in the administration of justice in civil proceedings in the various districts as is evident from a suggestion made to, and the subsequent discussion thereof, in the Volksraad in January 1842. After debating the matter, the Volksraad decided that it was in favour of a uniform approach.<sup>36</sup>

33 See, also, 4 5 and 4 6 *infra*.

34 In Sep 1840 the Volksraad instructed the commandant-general to place a guard of ten men with a supervising official at each general assembly and at sittings of the court of magistrate and *heemraden* due to the occurrence from time to time of irregularities and confusion at such events. See art 25 of the minutes of the Volksraad of 29 Sep 1840 in *Volksraadsnotule Natal*: 63-65.

35 It appears that, if not all, then at least some of the 1838 Regulations (and probably the 1841 Regulations) applied also to the territory west of the Drakensberg. Articles 1-15 of an undated document containing instructions for the magistrate and *heemraden* at Potchefstroom were similar to the first fifteen articles of the 1838 Regulations: see *Volksraadsnotule Natal*: 287 n 20. This supports the view that the districts of Potchefstroom and Winburg, together forming the territory west of the Drakensberg, were subject to the same regulations regarding the administration of justice as the magisterial districts in Natal.

36 Art 4 of the minutes of the Volksraad of 7 Jan 1842 in *Volksraadsnotule Natal*: 130-132.

## 4 Other prescriptions regarding judicial administration

### 4 1 The procedure in *Pretorius v Maritz*

A letter of instruction<sup>37</sup> – dated 12 March 1840 by the acting clerk of the Volksraad to the magistrate of Pietermaritzburg – provides some insight into the court procedure of that time. The magistrate received instructions for the procedure to be followed in the case between the well-known leader Andries Pretorius<sup>38</sup> and Johannes Stephanus Maritz (the elder brother of Gerrit Maritz, another well-known Voortrekker leader who had died two years earlier in September 1838).<sup>39</sup> The prescribed procedure differed from that laid down in the 1838 Regulations. The reason for the deviation in the procedure was probably the important governmental positions of both parties. At the time, Pretorius was the commandant-general (or military leader) of the Boers and Maritz was the chairperson of the Volksraad. The dispute between Maritz and Pretorius was seen as a matter of national importance and therefore required additional measures to insure impartiality, transparency and good governance. Despite these additional measures implemented in this case, which will be pointed out below, the letter still sheds some light on the court procedure adhered to during this period and is therefore worth mentioning here.

Although the dispute was officially presented as a case of libel brought by Pretorius against Maritz,<sup>40</sup> it has been argued that the origin of the dispute was political in nature and concerned the position of Pretorius as commandant-general.<sup>41</sup>

37 See appendix 16/1840 in *Volksraadsnotule Natal*: 342-343.

38 Pretorius, after an earlier reconnaissance expedition to Natal, officially joined the Voortrekkers there in Nov 1838 when he was appointed as the military leader. It was under his command that the battle at Blood River took place a month later. Pretorius, however, also acted as representative of the Voortrekkers in later negotiations with the British, among which the Sand River Convention of 1852 in which the ZAR was declared an independent state by Britain. Pretorius died shortly after in 1853. For more on Pretorius, see Liebenberg 1972: 559-567; Nathan 1937: 45.

39 Johannes Maritz later resigned from his position as chair of the Volksraad in Mar 1840, but he remained a member of it until 1845. After the British annexation he was involved in the drafting of a constitution for Natal. He also served as magistrate for Port Natal from Apr 1841 to Mar 1842. For more on him, see Leverton 1977: 581-582. His brother, Gerrit Maritz, had been elected as the first Voortrekker leader and judge at a general assembly on 2 Dec 1836 and had been the most important judicial official during the Great Trek until his death. For more on Gerrit Maritz's life, see Thom 1947: *passim*; Thom 1976: 509-513; and Nathan 1937: 43-44. For more on Maritz's judicial career during the Great Trek, see my unpublished article on the administration of justice beyond the Orange River during the Great Trek.

40 In his statement, Pretorius accused Maritz of damaging his (Pretorius') honour and character by making the following statement in the presence of third parties: "Pretoris: Die Beeste-dief, Valschaart, onderduimsche, Hy is nu in geleegenheid gesteld om alle menschen om te haalen &c." (Pretorius: The cattle thief, deceiver, underhanded, has now been given the opportunity to convince all people etc.) Pretorius claimed an amount of £200 in damages. See appendix 17/1840 in *Volksraadsnotule Natal*: 343.

41 For more detail on the alleged facts of the dispute, see Liebenberg 1972: 559-567.

As a result, the Volksraad instructed the magistrate of Pietermaritzburg to summon a total of twenty-four “wise” persons from *all* the districts for possible appointment as jury members, of which twelve could be rejected by the parties. The magistrate had to send a letter to the parties (not a summons) requesting them to appear before him, the *heemraden*, the elected twelve jury members and the Volksraad on a specified date. Both parties would be given the opportunity to put their case to the court and to present witnesses. After all the proceedings had been carefully investigated and recorded, each party would have the opportunity to speak in his own defence. The jury then had to reach a verdict. Thereafter the magistrate had to submit the complaint of each party as well as the verdict of the jury to the Volksraad. At this point the parties, the magistrate, the *heemraden* and the jury had to leave the room while the Volksraad determined the sentence. The matter was set to be heard on 1 April 1840, but was eventually postponed indefinitely and presumably settled out of court as no further documentation on this matter could be found. Nevertheless, this dispute serves to illustrate that in special circumstances the Volksraad intervened in the judicial process and established a special court with adapted court procedures. In this case the adaptations included a prescribed procedure that differed with regard to the constitution of the jury, the requesting rather than summoning of the parties to the hearing and, importantly, the sentencing by the Volksraad rather than by the magistrate and *heemraden*.<sup>42</sup>

## 4 2 Instituting criminal proceedings

Until 1842 criminal proceedings apparently commenced with charges in writing submitted, supposedly by any individual, to the local magistrate. This is implied in a response<sup>43</sup> of the Volksraad in 1840 to the magistrate of Pietermaritzburg who had enquired on the process to be followed with regard to certain individuals sent to him by the chief commandant (*hoofdcommandant*, the title of the military commander at that time), but without the required written charges. The Volksraad responded that the individuals should be brought before the court of magistrate and *heemraden* and that witnesses should be invited to testify. Further instructions provided that those accused against whom no testimony was received, should be released.

In September 1842 the procedure of written charges by any individual was replaced when a public prosecutor was appointed for all criminal hearings in the court of magistrate and *heemraden* (in other words for all offences with the possibility of a fine of more than ten *rijksdaalders* or imprisonment of more than eight days). The person appointed at the time was J Bodenstein, who was simultaneously also

42 See art 2 of the minutes of the Volksraad of 1 Apr 1840 in *Volksraadsnotule Natal*: 38-39 esp 38 n \*; art 11 of the minutes of the Volksraad of 4 Apr 1840 in *Volksraadsnotule Natal*: 41-42; and art 26 of the minutes of the Volksraad of 17 Nov 1840 in *Volksraadsnotule Natal*: 68-70.

43 Art 1 of the minutes of the Volksraad of 5 Mar 1840 in *Volksraadsnotule Natal*: 32-34.

appointed as temporary secretary of the Volksraad.<sup>44</sup> His duties as public prosecutor included the drafting of contracts between servants and masters as well as the apprenticing of orphans. Bodenstein remained the public prosecutor until September 1844 when he was succeeded by JP Muller.<sup>45</sup>

### 4 3 Conditions for sale in execution

In April 1843 it was resolved that in cases involving amounts of more than 100 *rijksdaalders*, sale in execution could not take place before three months after a decision of the court had passed.<sup>46</sup>

### 4 4 The review of sentences

As already stated, both the 1838 and the 1841 Regulations provided that the Volksraad could commute or remit sentences. There are a number of such cases reported in the minutes of the Volksraad between 1838 and 1843 where persons convicted of crimes applied to have their sentences mitigated or set aside. Although the minutes do not provide any detail on the deliberation process or the reasons for final decisions, it is clear from the variety of these decisions that the Volksraad took into account the personal circumstances of each applicant and based its decision on the merits of a case. These wide-ranging decisions included postponement of a sentence,<sup>47</sup> commuting of a sentence to six months with additional public work,<sup>48</sup> commuting of a sentence to one month imprisonment,<sup>49</sup> setting aside of a sentence,<sup>50</sup> reducing a fine<sup>51</sup> and commuting a sentence subject to the provision of guarantees.<sup>52</sup>

44 Art 2 of the minutes of the committee of the Volksraad of 10 Sep 1842 in *Volksraadsnotule Natal*: 159-160. See, also, n 26 *supra*.

45 Art 7 of the minutes of the Volksraad of 3 Sep 1844 in *Volksraadsnotule Natal*: 190-191.

46 Art 2 of the minutes of the Volksraad of 3-6 Apr 1843 in *Volksraadsnotule Natal*: 173-177. It is submitted that this provision applied to civil claims, as fines in criminal proceedings were apparently rare. Most of the cases mentioned in the minutes of the Volksraad involved punishments such as shackling, imprisonment or hard labour. Moreover, it seems improbable that execution of sale would apply to criminal fines. See, also, the minutes of the Volksraad of 17 Jan 1842 in *Volksraadsnotule Natal*: 137-138 where the Volksraad granted a suspension of a planned execution of sale subject to certain conditions.

47 Art 2 of the minutes of the Volksraad of 7 Nov 1839 in *Volksraadsnotule Natal*: 20.

48 Art 14 of the minutes of the Volksraad of 2 Jan 1840 in *Volksraadsnotule Natal*: 25-26.

49 Art 11 of the minutes of the Volksraad of 7 Oct 1841 in *Volksraadsnotule Natal*: 113-115.

50 Art 10 of the minutes of the Volksraad of 3 Jan 1840 in *Volksraadsnotule Natal*: 26-28.

51 Art 23 of the minutes of the Volksraad of 4-6 Oct 1842 in *Volksraadsnotule Natal*: 160-165.

52 Arts 4 and 5 of the minutes of the Volksraad of 4 Oct 1841 in *Volksraadsnotule Natal*: 111. The Volksraad decided on 6 Oct 1841 that the applicants had to provide two guarantees of £100 each before 14h00 the next day. In the case of non-compliance, the sentences of the court *a quo* would stand. See art 1 of the minutes of 6 Oct 1841 in *Volksraadsnotule Natal*: 112-113. Despite the magistrate's reservations about finding persons willing to sign such guarantees, this decision was confirmed two days later: see art 1 of the minutes of the Volksraad of 8 Oct 1841 in *Volksraadsnotule Natal*: 115-116.

## 4 5 A court of appeal

As already mentioned, the 1841 Regulations amended the 1838 Regulations with regard to civil appeals in cases regarding claims of more than twenty *rijksdaalders*. Such cases would no longer be heard by a court of appeal consisting of a magistrate and twelve jury members, but by the Volksraad or by a court of appeal appointed by it. The reason for this change is not clear.<sup>53</sup>

As early as September 1840 the magistrate of Pietermaritzburg petitioned the Volksraad to establish a court of appeal consisting of five members of the Volksraad.<sup>54</sup> In April of the next year, and before the promulgation of the 1841 Regulations, it was decided that until further notice, all appeals would be heard by the Volksraad.<sup>55</sup> The first recorded civil appeal case was heard by the Volksraad two months later<sup>56</sup> and at least one more was minuted during this period.<sup>57</sup> All civil appeals had to be submitted to the Volksraad by the relevant magistrate and non-compliance resulted in dismissal.<sup>58</sup>

## 4 6 Independence of the courts

It is clear that the Volksraad indeed had certain judicial responsibilities. These included to sit as or to establish a court of appeal and to commute or remit sentences passed by a court *a quo*. Nevertheless, apart from these stipulated judicial responsibilities, the Volksraad appears reluctant to have interfered with the courts. Responding to a public petition against the taking of an oath in civil proceedings, the Volksraad for example stated that it had no jurisdiction to prescribe to the courts when declarations

53 Possible reasons for this change could have included the difficulty in arranging for a panel of twelve jury members for each sitting of the court of appeal, the reluctance of the jury members to travel such great distances and the general inconvenience jury duty caused.

54 See art 13 of the minutes of the Volksraad of 29 Sep 1840 in *Volksraadsnotule Natal*: 63-65. The Volksraad was not averse to the petition and requested the magistrate of Pietermaritzburg (Zietsman), the former magistrate of Port Natal (Roos) and the secretary of the Volksraad (Burger) to submit a proposal at the next sitting of the Volksraad.

55 Art 8 of the minutes of the Volksraad of 13 Apr 1841 in *Volksraadsnotule Natal*: 94-95.

56 Art 1 of the minutes of the Volksraad of 14 Jun 1841 in *Volksraadsnotule Natal*: 95-96. This case concerned a dispute over a farm between Philip Raath and Jurgen Potgieter.

57 Art 22 of the minutes of the Volksraad of 2-4 Jan 1843 in *Volksraadsnotule Natal*: 167-170. This case was an appeal by HC Vermaas against a Potchefstroom court order instructing him to pay an amount plus costs to Hans Grobler. The Volksraad overturned the court order and instructed the magistrate of Pietermaritzburg to send the tariff of costs to the magistrate of Potchefstroom.

58 The matter of non-compliance is illustrated by the following case. Despite being one of the highest ranking officials at the time, Andries Pretorius's request for an appeal was summarily dismissed by the Volksraad because the appeal had not been lodged by the relevant magistrate and due process had not been followed. Pretorius was, however, given permission to appeal at the next sitting of the Volksraad should it be found that the magistrate in the original case was to be blamed. See art 19 of the minutes of the Volksraad of 2-4 Jan 1843 in *Volksraadsnotule Natal*: 167-170.

had to be taken under oath.<sup>59</sup> Indeed, the Volksraad viewed the independence of the courts and the rule of law of sufficient importance to request that an officer and ten guards be assigned to keep order at each sitting of the court of magistrate and *heemraden*.<sup>60</sup>

## 4.7 Legal representation

No mention is made of attorneys or advocates during this period. The only legal representatives active at this time were the law agents who functioned as a lower branch of the legal profession.<sup>61</sup> Persons travelling without their families were not permitted to appear as law agents in the courts.<sup>62</sup> The purpose of this provision was probably to encourage law agents to settle within the area they wished to work in, rather than travelling to and from, for example, the Cape. The tariff of fees of law agents was approved only in March 1844<sup>63</sup> and it seems that law agents could charge whatever they had wanted before that time.

## 5 The law applied

During this period, Roman-Dutch law applied. Article 12 of the 1838 Regulations and article 9 of the 1841 Regulations provided that the law applicable would be Dutch civil and criminal law but only in those cases where local regulations and legislation were silent.<sup>64</sup>

The 1841 Regulations further provided that the judicial administration in both civil and criminal cases, unless otherwise prescribed, should follow the forms and practices used by the Cape courts, but only in so far as the local circumstances permitted. It is possible that the reference to these Cape forms and practices may have included regulations passed by the Dutch authorities while the Cape had still been under Batavian rule. A cursory comparison between, for example, the 1805 provisions issued by governor Janssens and what little is known about the

59 Art 18 of the minutes of the Volksraad of 2 Feb 1841 in *Volksraadsnotule Natal*: 81-85. The Volksraad was, however, adamant that no person should be compelled to take an oath if he or she did not understand the full effect thereof.

60 Art 25 of the minutes of the Volksraad of 29 Sep 1840 in *Volksraadsnotule Natal*: 63-65.

61 In the days before railways, telegraphs or a rigid legal education, and particularly in those areas with insufficient numbers of legal practitioners, persons with an interest in the law could practise as law agents without any required legal training and for a nominal fee. Whereas attorneys were required in terms of the 1829 Cape Rules of Court to serve five years of articles, no similar requirement was set for prospective law agents.

62 Art 14 of the minutes of the Volksraad of 17 Nov 1840 in *Volksraadsnotule Natal*: 68-70.

63 Art 2 of the minutes of the Volksraad of 4 Mar 1844 in *Volksraadsnotule Natal*: 183-185.

64 This was again emphasised in the Apr 1842 deed of cession in favour of the king of the Netherlands that was signed by the president and members of the Volksraad: see appendix 5/1842 in *Volksraadsnotule Natal*: 408-410. Nothing ever came of this deed of cession and Natal was shortly thereafter annexed by Britain. For an example of the direct application of Dutch law, see art 9 of the minutes of the Volksraad of 2 Jan 1840 in *Volksraadsnotule Natal*: 25-26 which provided that persons resisting a Volksraad instruction would be regarded as *oproermaakers* (seditionists or agitators) in accordance with Dutch law.

administration of justice beyond the Orange River before 1843 certainly suggests that the latter showed more than a passing resemblance to the former.<sup>65</sup>

Interestingly, the Volksraad was in possession of “de wet boek van de Vereenigde Staaten van America”, presumably a copy of the 1787 Constitution of the United States of America. The document was a gift from one “docter Tjampion” and was officially presented to the Volksraad by a Mr Croot in August 1840.<sup>66</sup> Scholars have suggested that this document influenced the constitutional development in the ZAR

65 See *Volksraadsnotule Natal*: 15 n 20 where mention is made by the editors of an 1838 instruction to similar effect referring to the ordinance of “gouverneur Janssen”: see, also, Wypkema 1939: 202 n 3. However, no such instruction has ever been found. The ordinance mentioned here referred to the provisions and instructions for the management of the outlying districts of the Cape of Good Hope issued by Governor Janssens on 23 Oct 1805 as instructed by General De Mist. Janssens had issued these instructions when the Cape was under Batavian rule, albeit a mere three months before the British arrived at the Cape for the second occupation in early Jan 1806. These instructions were very extensive (containing 328 in total) and included instructions to the magistrate, the colleges, secretaries, field-cornets, messengers and other minor officials. The instructions divided the outlying districts of the Cape of Good Hope into five districts, namely Stellenbosch, Zwelldam, Graaff-Reinet, Uitenhage and Tulbagh and established a *Kollegie van Landdrost en Heemraden* for each district. Each “Kollegie” (or college) would consist of a *landdrost* and six notable inhabitants as *heemraden*. In general, the colleges were responsible for education, the protection of property, for matters concerning the indigenous peoples and for the improvement of agriculture and stock-breeding. The colleges further had judicial authority and were subordinate to the *Raad van Justitie*. It had limited civil jurisdiction but no criminal jurisdiction. All criminal matters and appeals were heard by the *Raad van Justitie*. All court proceedings before the colleges were heard and deliberated *de plano* (extrajudicially) and orally and had to be finalised within six weeks: see Visagie 1969: 107 n 28. The instructions further provided that the *landdrost* would be appointed by the governor-general and would represent the government. The *landdrost* was subordinate to the attorney-general in all criminal matters. The *landdrost* was responsible for the welfare of his district and for that reason had to be familiar with the persons living in his district. Other duties of the *landdrost* included encouraging education; sending out military commando’s; keeping a register of all farms and plots; assisting with receiving of revenue; reporting ship wrecks; reporting and prosecuting all criminal matters that took place in his district before the *Raad van Justitie*, although he was allowed to delegate the latter duty to an advocate; seeing to the welfare of slaves; ensuring peaceful religious gatherings; and taking an official oath. Duties of the colleges included receiving revenue; approving payments from district funds; officiating as members of the marriage council; obtaining evidence on behalf of the *Raad van Justitie*; assisting at inquests; building, repairing and maintaining public roads; ensuring that measuring scales be in accordance with prescribed regulations; issuing *keuren* and ordinances regarding bakeries and butcheries; ensuring measures for fire prevention; ensuring the good treatment of persons in custody; and taking an official oath. Wypkema 1939: 201-202 is of the opinion that, in general, these instructions of Janssens were used to a great extent in Natal before 1845. For a copy of the provisions, see Eybers 1922: 81-178. For a discussion of the 1805 instructions, see Venter 1940: 29-31; Visagie 1969: 108-110; Van der Merwe 1926: 145-152. For more on Janssens, see Spies 1977: 453-455 and Van der Merwe 1926: 51-61; and on De Mist, see Murray 1972: 174-179 and Van der Merwe 1926: 7ff.

66 Art 2 of the minutes of the Volksraad of 6 Aug 1840 in *Volksraadsnotule Natal*: 49-50.

and especially the Orange Free State in later years; however, it is an open question whether it had any impact on the early Natal constitutional documents.<sup>67</sup>

## 6 Conclusion

During the period between 1838 and 1843, the administration of justice in the area beyond the Orange River was by no means sophisticated. Although the administration of justice was regulated to a certain extent, the detail of the legal processes remains unknown. It appears that the court proceedings followed certain formal requirements, but because no written law reports of the period remains, it is unclear how the courts formulated their arguments or what the reasons for their judgements were. However, the law that was applied was the law of the Cape as the people had known it during the Batavian rule and in the years thereafter. Also, both the 1838 and the 1841 Regulations stipulated that Roman-Dutch law applied, albeit always subject to local regulations and legislation.

## ABSTRACT

This article looks at the early administration of justice beyond the Orange River for the period from 1838 to 1843. During this time the areas east and west of the Drakensberg were administered as one by the Volksraad seated at Pietermaritzburg (east) and the adjunct council seated at Potchefstroom (west). Since no law reports for this period exist, not much is known about the administration of justice at the time. However, the 1838 and 1841 Regulations give some indication of the basic judicial structures and jurisdiction of the courts. Further deductions can be made from the minutes of the Volksraad during this period as well as a few additional documents that have survived. Lastly, this paper also considers the law that was applied during this period.

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67 It has been argued that the 1854 and 1858 Constitutions of the Orange Free State and the ZAR had both been influenced by the constitutions of not only the United States of America, but also that of the Netherlands and France. According to Scholtz 1937: 21-27 the 1854 Constitution of the Orange Free State, in particular, showed striking resemblances to the American Constitution. See, further, Verloren van Themaat 1954: 145-150; Thompson 1954: 52, 57-59.

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