GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA
HUMAN RIGHTS COMMITTEE

CONFERENCE ON
THE JUSTICE BILLS
JUDICIAL INDEPENDENCE
AND
THE RESTRUCTURING OF THE COURTS

JOHANNESBURG
17 FEBRUARY 2006

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BACKGROUND

In April 2005 our committee presented to the General Council of the Bar a report on the series of Bills that had been drafted by the Ministry of Justice and Constitutional Development – collectively referred to as the Judiciary Bills. The report paid particular attention to those provisions in the Bills which impacted upon judicial independence.

The Judiciary Bills are:

- The Constitution 14th Amendment Bill
- The Superior Courts Bill
- The South African National Justice Training College Draft Bill
- The Judicial Service Commission Amendment Bill
- The Judicial Conduct Tribunals Bill

The report had been prepared by Adv. Nadine Fourie, Adv. Steven Budlender (who was then completing his pupillage) and myself. A summary of the report was published in The Advocate (Vol. 16, August 2005). The Advocate is the GCB’s official publication.

During the December 2005 recess, the Justice Ministry gazetted a revised version of the Constitution 14th Amendment Bill. Public comment was required by no later than 15 January 2006. It was evident from newspaper articles that neither the Judiciary nor the legal fraternity in general had been precognised of the revision.
Our Committee reconvened urgently. At our meeting, Nadine raised the desirability of a workshop involving key jurists. Approval was sought and obtained from the GCB Executive.

The Justice Ministry, by then, had extended the deadline for submissions to the end of February 2006. The 17th February 2006 was selected as the most suitable date to convene the conference.

Despite the extremely short notice, eminent jurists whom we requested to make presentations, agreed to attend: namely Chief Justice Pius Langa, former Chief Justice Arthur Chaskalson, Deputy President Lex Mpati of the Supreme Court of Appeal (SCA), retired Constitutional Court Justice Johann Krieger, Justice Kate O’Regan, SCA Judge Bob Nugent, Professor Cathi Albertyn, Director of the Centre for Applied Legal Studies (CALS) and Malcolm Wallis SC.

We were also able to welcome as our guests, Deputy Judge President Phineas Mojapelo of the Witwatersrand Local Division, Judges Meyer Joffe, Nigel Willis, Eberhard Bertelsman, George Maluleke, former Judge President of the Transvaal - Chris Eloff, former Deputy Judge President, Piet Schabort of the WLD, Director General for the Department of Justice and Constitutional Development, Adv. Menzi Simelane, other representatives from the Department of Justice, representatives from the State Attorney’s offices, from the Law Society of South Africa, from various law firms and from a number of NGO’s concerned with constitutional development, including Nicole Fritz of the Southern African Litigation Centre, John Kane-Berman of the Institute of Race Relations.

Unfortunately, due to the short notice, the President of the SCA, Craig Howie, Deputy Chief Justice Dikgang Moseneke, Judge President Bernard Ngoepe of the TPD, former Chief Justice Anthony Gubbay of the Zimbabwe Supreme Court and retired Justice
Richard Goldstone of the Constitutional Court and other Judges of the SCA, the Transvaal and WLD divisions were unable to attend because of their commitments. The conference was chaired by Norman Arendse SC, the Chairperson of the GCB. During the conference, floor discussions were facilitated by Adv. Ishmael Semenya SC and Adv. Vincent Maleka SC. Advocate Malcolm Wallis SC facilitated the panel discussion on the proposed restructuring of the Courts and also delivered a presentation on that subject.

It is difficult to sufficiently express our gratitude to our guest speakers. They were asked at extremely short notice to prepare presentations on topics that required careful reflection. It is with awe that we look upon the products of their labour.

IMPACT OF CONFERENCE

This was not the only conference or gathering that discussed the impact of the Justice Bills on judicial independence. Adv. George Bizos SC delivered a paper that same evening. The Heads of Court conferred on the following day.

The conference however brought together at a single forum eminent jurists who were able to reach not only members of the legal profession who attended the closed professional conference but also the public at large through the media which was invited to attend.

We believe that the media was galvanised to report on the conference by virtue of the content of the presentations and the weight that those jurists who attended and who made presentations lent to the conference. The attendance of the Director General was most welcome. It gave recognition to the openness of discussion that was crucial to the success of the conference.

We believe that the presentations made at the conference and the contributions made by delegates from the floor contributed in some measure to the announcement made
early the following week by President Mbeki that the Justice Ministry should slow down
the process, listen to the Judiciary and he commented that it has never been the
intention of Government to compromise the independence of the Judiciary.

CONTEXTUALISING THE PRESENTATIONS

Since the delegates who attended the conference had a basic knowledge of the issues
under discussion, it was unnecessary for the various presentations to identify those
provisions of the various Bills that were considered to impugn the independence of the
Courts.

In order to contextualise the presentations, I have taken the liberty of attaching an
edited version of the article that will be published in the April 2006 edition of The
Advocate. The article, entitled “Judicial Independence – impending constitutional
crisis” identifies the more controversial provisions of the Bills and provides a thumb
sketch of their content, the law at present and the basic grounds of objection. The
forthcoming edition of The Advocate will also contain a summary of the keynote
addresses delivered at the conference and some of the significant contributions from
the floor.

The electronic version of the conference also includes a copy of the Constitution 14th
Amendment Bill (as gazetted on 14 December 2005) and the most recent version of the

THE HUMAN RIGHTS COMMITTEE

The Committee is concerned with a broad spectrum of human rights issues, both local
and abroad. It initiates its own investigations and reports and also provides reports at
the request of the GCB Executive. The Committee’s objective is to inform the public of
important human rights issues and to contextualise them. Its role is primarily proactive,
although litigation may be added to its functions once the pro bono system becomes
fully operational.

The Committee has issued press releases concerning death by stoning in Nigeria, the situation in Zimbabwe and the situation in Swaziland. Articles have also been written on these subjects.

The success of the conference suggests that our Committee can play a more active role in focusing attention on significant human rights issues through organising similar conferences addressed by leading jurists and those eminently qualified on the particular subject.

The Committee not only addresses issues within South Africa, but has a mandate to consider human rights abuses generally. Naturally, we are unlikely to have any impact on issues that arise in distant regions. However, we are mindful of the role that we can play both as a resource and as a voice for those on our Continent who are victims of human rights violations.

The Human Rights Committee is a credible resource, which aside from engaging in its own initiatives, can be tapped into by NGOs who are better placed and have closer contact with communities and groups whose rights are infringed but who have no adequate access to justice.

One of the ways in which we believe our credibility can assist is through preparing brochures that explain in basic terms the content of rights and the extent of their exercise or protection. There are also areas where we believe we can work constructively both with governmental agencies and NGOs, particularly in relation to prisons, informal settlements and HIV/AIDS issues, whether from the perspective of reform or accountability and responsibility.
Our function remains to highlight the breach of fundamental human rights or the undermining of the judicial process, to act as a catalyst and to inform.

Brian Spilg SC
Convenor Human Rights Committee of the GCB
GCB HUMAN RIGHTS COMMITTEE

CONFERENCE ON
THE JUSTICE BILLS, JUDICIAL INDEPENDENCE AND THE RESTRUCTURING OF THE COURTS

17 FEBRUARY 2006

WEBBER WENTZEL AUDITORIUM
10 FRICKER ROAD
ILLOVO
JOHANNESBURG

INTRODUCTION: THE BAR, THE BENCH AND JUDICIAL INDEPENDENCE

Norman Arendse SC - Chair of the General Council of the Bar

BACKGROUND TO THE JUDICIAL BILLS

Judge Arthur Chaskalson, former Chief Justice

THE CONSTITUTIONAL IMPORTANCE OF JUDICIAL INDEPENDENCE

Presentation - Judge Johan Kriegler, former Justice of the Constitutional Court
Discussion - chaired by Vincent Maleke SC

A PERSPECTIVE FROM THE CHIEF JUSTICE

Chief Justice Pius Langa

THE JUSTICE BILLS AND ITS IMPACT ON JUDICIAL INDEPENDENCE

Presentation - Prof. Cathi Albertyn
Discussion - chaired by Ishmael Semenya SC

THE JUSTICE BILLS AND THE RESTRUCTURING OF THE COURTS

Presentation - Malcolm Wallis SC

Panel discussion (chaired by Malcolm Wallis SC) :
Judge Lex Mpati, Deputy President of the Supreme Court of Appeal
Judge Kate O=Regan, Justice of the Constitutional Court
Judge Robert Nugent, Judge of the Supreme Court of Appeal

CLOSING
OPENING REMARKS

ADV SPILG: Good morning, ladies and gentlemen, dignitaries. Unfortunately, Norman Arendse is somewhat delayed in the traffic so I’m taking over as a kind of continuity announcer until he arrives. We’d like to welcome the dignitaries we have today or who will be coming:

Chief Pius Langa will be arriving a little later to give a the keynote address. We’d like to thank and we have the privilege of having with us former Chief Justice Arthur Chaskalson. We expect the Deputy President of the SCA, Lex Mpati, to join us; Justice Kriegler is here, former Deputy Judge President of the WLD, Judge Schabort is with us; Justice O'Regan will be joining us later; Judge Nugent of the SCA will be joining us later; and also Deputy Judge President Mojapelo. I'd like to thank the other judges and justices of the various divisions who have been able to come. Thank you for joining us on this occasion.
There are a number of people who couldn't make it, there are one or two that I would like to mention: Justice Richard Goldstone sent us his best wishes; former Chief Justice of Zimbabwe, Judge Anthony Gubbay, also couldn't join us and he also sends us his best wishes. So too the President of the SCA, Craig Howie, the Deputy Chief Justice Dikgang Moseneke and Judge President Bernard Ngoepe of the TPD.

There are a few things that need to be said. I think there have been concerns about short notice, concerns about venue. The venue is fully paid. The lunch you enjoy will be not at Webber Wentzel's cost nor Old Mutual's, but at the Bar.

We also welcome the representatives of the Law Society of South Africa, so this venue not the territory of a single attorney. We welcome the Director General, Adv. Menzi Simelane, the State Attorney's representatives, the Department of Justice has two additional representatives. The Law Society of the Northern Province has a representative and we also welcome NGOs, such as Nicole Fritz of the Southern African Litigation Centre.

The short notice: We requested to run a workshop, that is the Human Rights Committee, I think it was the last week or second last week of January, when we became aware of the imminent need to submit representations. The deadline is now the end of February. We thought it appropriate to have this meeting a week before that deadline. The idea is to pool ideas, to have an understanding of the background which has prompted the current Bills and their formulation. Unfortunately it was only, I think, on the 6th February that we got the go ahead. We still don't have a budget approval yet but I think we shouldn't have too much difficult with that. So I do apologise for the short notice, it was unavoidable and we thank you for attending nonetheless.

The concept of a workshop was that of Nadine Fourie of our Committee and she is to be congratulated for having initiated the idea. We ran with it and both Nadine and Steve
Budlender have contributed enormously to this occasion being possible.

The attendance, or we hope the attendance we will see, and certainly that on the part of the judiciary, I believe is reflective of the concern we all have over the question of whether or not the series of Judicial Bills will or will not have an impact on the judiciary and of their extent.

I think I've covered everything that a continuity announcer ought to and our first guest speaker is the former Chief Justice Arthur Chaskalson. Norman Arendse will deliver a short paper. We'll interpose that at a convenient time. I hope you don't mind not standing on ceremony, I think we all know the former Chief Justice and if I may call him to give his presentation.

Thank you.
Thank you very much indeed. I've had quite a busy week, so I have half a paper and a number of notes, which means I'll probably speak longer than I should do. I'm told I have half an hour with the permission to go a little bit over, if needs be. I'll try not to go over by too much.

I think I should begin with a few preliminary comments. Without going into any detail concerning judicial independence, which will be the subject of the presentation by Justice Kriegler, it's important to note for the purposes of the history and the background, that there are two components to judicial independence:

The individual independence reflected in matters such as security of tenure, and the core requirement that no one, be it government and, as the Supreme Court of Canada has said in a judgment, approved by the Constitutional Court in de Lange v Smuts No,

"no outsider, be it government, pressure groups, individuals or even another judge, should interfere or in fact attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision."

The issue about pressure groups attempting to interfere with the way courts decide cases sometimes seems to be ignored, and perhaps something should be done about that.

Secondly, that there should be institutional independence which involves the relationship between courts and other arms of government. The degree of independence that this calls for may depend upon the powers of particular courts and their place in the judicial hierarchy, because higher courts protect lower courts and
higher courts need the greatest protection and that has been said by the Constitutional Court in the *Van Rooyen* case.

There are, in fact, four Draft Bills which can loosely be referred to as the Judiciary Bills and I think that they are what this Colloquium is about, this workshop is about. They were made public during the course of last year, and they are the Superior Courts Bill; two Bills dealing with complaints against judges and judicial ethics; and a Bill dealing with judicial education.

There is also a Constitutional Amendment relevant to the Superior Courts Bill. At present only the Constitutional Amendment and the Superior Courts Bill have been introduced into Parliament. I understand that finality has not yet been reached concerning the Department of Justice's position in regard to the other three Bills.

The Drafts of those three other Bills are in the public domain. They became known in April last year at the time of the Colloquium. I understand that they are still subject to discussions between the judiciary and the department. And whilst one cannot say what the final position of the Minister will be regarding these Bills, it's important to have regard to the major issues that have been raised in respect of the four Bills as a whole. They are a package and should be seen as such, rather than looking at each one in isolation.

It's also important I think to have regard to the context in which these Bills have been introduced, which involves a consideration of the history of the proposed legislation and that is what I'm going to focus on. I will look at the history in some detail and I will look at some of the specific provisions which have been introduced recently, as a result of the Bills. For that purpose, I will begin my remarks by going back to the Interim Constitution and I will look at the various proposals that have been made since then concerning the rationalisation of the Superior Courts, the rules of courts, the introduction of a complaint system and the formalisation of a system of judicial education. I'm going
to deal with these issues separately, but they must be seen as a whole.

But first, judicial independence. The constitutional principles which set out the basic structure of the Interim Constitution made provision for a democratic constitution in which there would be a separation of powers between the Legislature, the Executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. The constitutional principles also provided that the judiciary shall be independent and impartial and shall have the power and jurisdiction to safeguard and enforce the rights under the Constitution.

The Interim Constitution gave effect to these provisions by providing for the supremacy of the Constitution; the entrenching of the Bill of Rights, requiring courts, when deciding constitutional matters, to declare that any law or conduct that is inconsistent with the Constitution, to be invalid to the extent of that inconsistency; and making extensive provisions in Chapter 8 for the independence of the judiciary.

The powers of the court to declare laws and conduct of the Executive and Parliament to be inconsistent with the Constitution and invalid are of the greatest importance in the context of the independence of the judiciary and matters which may impinge upon it. It's because of the powers that the courts have in a constitutional state that there is a particular need for independence to be upheld strictly.

Section 165 of the present Constitution provides that the judicial authority vests in the courts, that the courts are independent and subject only to the Constitution and the law, which they must apply impartially without fear, favour or prejudice.

Then follow two provisions. First, the Constitution says: "No person or organ of state may interfere with the functioning of the courts." The word used is 'functioning'. Secondly the Constitution goes on to say that organs of state through legislative and other measures must assist and protect the courts to ensure the independence,
impartiality, dignity and accessibility and effectiveness of the courts.

Consistently with that, the Constitution made provision for a more open and transparent process for the appointment of judges and for the security of tenure of judges. In the certification proceedings there is a brief discussion of the separation of powers. The Constitutional Court held that the principle of separation of powers and checks and balances recognises the functional independence of branches of government and focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another.

It went on to hold that the separation of powers doctrine is not a fixed or rigid constitutional doctrine and that it is given expression in many forms and subject to checks and balances of many kinds. It held that the separation between the Legislature and the Executive and the checks and balances provided for in the Constitution were sufficient to meet these requirements.

One of the objections to the certification of the Constitution concerned the independence of the magistrates. In that context the court held that what was crucial to the separation of powers and the independence of the judiciary, was that the judiciary should enforce the law impartially and that it should function independently of the Legislature and the Executive.

I don't want to deal in any detail with the position of Magistrates at that time, other than to say that it was known then that the legislation dealing with magistrates did not comply with the Constitution and that steps would have to be taken to change their conditions of service, and the control which the Executive exercised over the functioning of Magistrates Courts. The Constitutional Court held that that was a matter for legislation and that the Constitution didn't have to deal directly with those details. It pointed out, however, that the legislation would be subject to constitutional control and had to be compatible with the Constitution, and went on to say that otherwise it couldn't be said
that the Magistrates Courts functioned independently of the Executive. A commitment to change the situation of magistrates and their conditions of service had been made by the government and they were engaged in a process of attending to it. It subsequently became the subject of another court decision in the Van Rooyen case, when the steps which had been taken were challenged, and the Constitutional Court held that in certain respects the law still failed to meet the requirements of the Constitution.

The emphasis as far as these particular Bills is concerned, and what the judiciary's concern about the Bills is, has related to the functional independence of the courts. There's never been any attempt by the Executive to interfere with the actual judicial decisions of the court, they have carried out the decisions though sometimes there have been problems in relation to the way that this has been done. There have been problems in some of the Provinces, but that is not relevant to this workshop. The Executive has never interfered with the aspect of judicial independence, which relates to what might be the core of judicial independence, which concerns the way cases are decided. What I want to look at is history relevant to the functional independence of the Courts.

I need to say something about rules of court before I move on to other aspects of the history. The Interim Constitution made provision for the functioning of the Constitutional Court, it had to do so because it was a new court and none of the existing legislation dealt with it. The Rules Board for Courts of Law Act applied to existing Courts, but not to the Constitutional Court. In dealing with the Constitutional Court, the Interim Constitution adopted a different approach to that taken by the Rules Board for Courts of Law. It didn't put the Constitutional Court under the Rules Board. Instead, it provided that the proceedings before the Court would be regulated by rules prescribed by the President of the Constitutional Court in consultation with the Chief Justice. It was important that there be consultation between the two Courts, because at that stage, you'll recollect, there were difficult issues concerning jurisdiction, and it was not clear which court would deal with matters first, and what would happen where there were
bifurcated matters involving constitutional and non-constitutional matters. It was felt that rules may be necessary for this.

What is important is that the making of rules of the Constitutional Court was put in the hands of the heads of the Constitutional Court and the Supreme Court of Appeal. This was regarded as important at that time, because it ensured that the Legislature and the Executive, whose legislation and conduct would be subject to constitutional review, would have no control whatever over the way the Constitutional Court functioned. And that was, and still remains, an important consideration, for the Legislature and the Executive are likely to be involved in most of the cases which come before the Constitutional Court and in many of the cases which come before the Superior Courts. It is important, particularly in a constitutional state, that the Executive should not have control over the way the court functions. It can have a say but not control.

The provisions of the Interim Constitution dealing with the functioning of the Constitutional Court were later supplemented in the Constitutional Court Complementary Act. Most of the provisions of this Act enhanced the power of the Constitutional Court. Two are of importance to the present discussion. They are sections 14 and 15. Section 14 provided that the appointments of the Registrar and other staff of the Constitutional Court should be made by the Minister at the request of and in consultation with the President of the Constitutional Court. Section 15 provided that requests for funds needed for the administration and functioning of the Constitutional Court would be determined by the President of the Court, after consultation with the Minister, and that that would be the basis of the request for funding for the Court made by the Minister in a budgetary process.

So in effect, the Constitutional Court was given an important say to be exercised with the Department over the appointment of its staff, and over matters relevant to the budgetary process. Of course, budgets are adopted by Parliament, and all bodies who derive their funding from the state are bound by its decision.
The 1996 Constitution, took the place of the Interim Constitution, and it contained two general provisions concerning the regulation and practice of courts. First, a general provision to the effect that Superior Courts had the inherent power to regulate their own practice and procedure. And secondly, a specific provision to the effect that all courts function in terms of national legislation and their rules and procedures must be provided for in terms of the national legislation. The national legislation would of course be subject to constitutional scrutiny and would have to be consistent with the Constitution. This is made clear in the *Van Rooyen* case. The rules of the Constitutional Court were kept in place. However, no specific provision was made in that Constitution for the making of new rules for the Constitutional Court.

It was later realised that there was in fact that there was no specific authority dealing with the making of new rules for the Constitutional Court. In November 1997 the Constitutional Court Complementary Act was amended and a new section 16 was introduced to authorise the President of the Constitutional Court, in consultation with the Chief Justice, to make rules for the Constitutional Court - in other words, it took over the provisions of the Interim Constitution. Such rules had to be tabled in Parliament after promulgation, but there was no requirement that Parliament should approve of the rules. The tabling was for information of Parliament, and all rules of court are in fact tabled in Parliament.

The Constitution required the courts to be rationalised. I don't want to deal with those provisions, save to say that the then Minister of Justice, Minister Omar, gave instructions to the Department of Justice to commence work on the rationalisation required by the new Constitution, and in December of 1998 a Superior Courts Bill was submitted to the judiciary by Minister Omar for their comment. Although the Bill was a draft and had not been submitted to Cabinet, I'm going to refer to it as the Omar Bill. It was contemplated that it would replace the existing Supreme Court Act and other legislation dealing with the Superior Courts.
Sections 7 and 8 of the Omar Bill extended to all courts the functional independence given to the Constitutional Court in respect of participation in the appointment of staff and in the budgetary process. It took over the same wording that appeared in the Constitutional Court Complementary Act and made those provisions applicable to all courts. So in effect, the provisions of the Omar Bill ensured that the higher judiciary would have an important say in the staffing and the settling of budgets.

A few months after the Omar Bill had been circulated for comment, and before it could be processed, there was a general election and following that election a new Minister of Justice was appointed. The new Minister decided that the legislation dealing with the rationalisation of courts should be more extensive and should address issues relating to the government's policy for a single judiciary. He convened a Colloquium in October 2000 to discuss a number of issues relating to the establishment of a single judiciary. Issues which were raised and debated at that Colloquium included -

- the transformation of the judiciary;
- the use of language in courts;
- the jurisdiction of courts, including the Constitutional Court.
- The structure and functioning of the Supreme Court of Appeal;
- the Labour Courts and other specialised courts;
- the position of magistrates and Magistrates Courts in a single judiciary.
- A possible consolidation of the functions of the Judicial Service Commission and the Magistrates Commission; and
- the structure and control of rule making bodies.

Following that Colloquium, the Department of Justice made a number of proposals which were submitted to the judiciary concerning the structure and functioning of the courts. They included a proposal that the SCA should be divided into three divisions, sitting in different parts of the country, to become more accessible to the public, and that
Full Bench appeals should be discontinued. It was accepted by the department that this would call for an increase in the numbers of the judges of the SCA, and it was suggested that that would promote transformation, as well as making that court more accessible to the general public because it would sit where it would be closer to where the cases on appeal had been decided. That was probably the most important issue arising out of the government's paper in response to the Colloquium.

The issues raised at the Colloquium and the department's response were the subject of discussion amongst Heads of Courts and members of the judiciary. There was opposition to the fragmentation of the SCA, principally on two grounds; that it would undermine the coherence of its jurisprudence, and the collegiality of a single court. To address the issue of accessibility, it was agreed that provision could be made for the SCA to hear cases at places other than Bloemfontein, but that would be left to the head of that Court to decide.

It was accepted, I think quite broadly then, that there was much to be said in the long run for a court structure in which there would be a single Apex Court with general jurisdiction, and a large Appeal Court to deal with appeals from the High Court, much along the lines of the Court of Appeal in the United Kingdom. It was felt, however, that the time was not yet appropriate for such a development and that for the time being the present structure should remain in place.

The response of the judiciary was communicated to the Minister and the Minister then established a working group, consisting of representatives of the Heads of Courts and the Department of Justice, to deal with various objections, and to consider a way forward. I was the Chair of that working group, which had a number of meetings over a fairly long period. In the light of the recommendations of the working group, the Department of Justice drafted a new Superior Courts Bill which was circulated to the judiciary for their comment. There was not complete consensus and various issues were raised by members of the judiciary.
However, a Bill based on this draft, was introduced into Parliament in August 2003 as Bill 52 of 2003 and I'll refer to this as the Maduna Bill. At the same a Bill making provision for certain amendments to the Constitution was introduced. Those amendments were directed mainly to changes relating to the creation of a single High Court of South Africa and matters relevant to provisions dealing with Labour Courts. What is of importance is that the provisions of sections 7 and 8 of the Maduna Bill dealt with the appointment of staff and the budget process in exactly the same way as the Omar Bill had done. This meant that it was still contemplated at that time that the courts would have a material part to play in the making of staff appointments and in the budgetary process. The most material difference between the Maduna Bill, and the Omar Bill concerned the position of the Labour Court, and the folding of that court into the Supreme Court of Appeal, which had been the subject of discussion amongst the Judges and had given rise to some controversy.

The Bill was referred in the ordinary way to the Parliamentary Committee. On the 18th August 2003, the Portfolio Committee called for submissions on the Maduna Bill to be made to it by the judiciary by 5 September 2003. The Bill was then held up in the Portfolio Committee for a long time. It conducted hearings on the Maduna Bill. I didn't attend those hearings and I don't know exactly what happened, but what was reported to me was that during the course of those hearings, the Chairman of the Portfolio Committee raised the issue of there being a single Apex Court which had not been provided for in the Maduna Bill or in the Constitutional Amendment which accompanied the Maduna Bill.

At some stage, and I cannot now recollect when, the judiciary was informed that substantial changes would be made to the Bills by the Portfolio Committee and that those changes would be referred to the judiciary for comment. In 2004, before any of the new provisions had been referred to the judiciary, there was another General Election, followed by the appointment of a new Minister and a new Deputy Minister of
Justice. Towards the end of that year or early in 2005, I cannot now recollect exactly when, and I haven't had the time to check old records, the four Judiciary Bills were brought to the attention of the judiciary who were asked for their comment. Two of the Bills dealt with the complaints system, one Bill dealt with education and one Bill with the Superior Courts including the making of rules of Court. There was also a proposal for a constitutional amendment.

There was a shocked response by the judiciary to these Bills because they contained provisions which had not been discussed with them, which had not been part of any of the previous legislation, and which seemed quite clearly to impinge upon the functional independence of the judiciary. The Minister then undertook to have further discussions with the judiciary on the provisions of these Bills and discussions between representatives of the judiciary and representatives of the Department of Justice took place during the second half 2005. I had retired by then and was no longer party to those discussions. In December 2005, the Minister introduced into Parliament the Constitutional Amendment Bill and an amended Superior Courts Bill.

Although some of the more egregious provisions of the earlier draft of the Superior Courts Bill had been removed, a number of objectionable provisions remain. The other three Bills have not been introduced into Parliament and I understand that the Minister is still considering her attitude in regard to them. It is, however, important to look at the drafts of those Bills because the four Bills and Constitutional amendment, have to be seen together.

There was an explanatory memorandum that accompanied the proposed constitutional amendment which is relevant to the provisions vesting the administration of Courts in the Minister, but no explanation as to why a constitutional amendment is necessary to vest this power in the Minister. Is it because it is thought that the present Constitution precludes this being done? If not, why amend the Constitution? I assume that people know what is in the Superior Courts Bill. There is simply not time to go through it in any
detail. According to the explanatory memorandum, the vesting of the administration of Courts in the Minister gives effect to the Commonwealth model of separation of powers between the Executive and the Judiciary.

Now, I must say I'm not aware of any particular Commonwealth model and in the time available to me, I've not been able to find one. None is prescribed by the Latimer House Principles and it doesn't appear from a cursory review of some of the larger Commonwealth Courts that there is indeed such a model. I've looked through the Internet at the position in Australia, Canada, Ghana, Pakistan, India and Uganda.

The legislation dealing with the Federal Court of Australia makes clear that the Federal Court is responsible for the management, the administrative affairs of the court and for that purpose it has the power to do all things that are necessary or convenient to be done, including entering into contracts, acquiring or disposing of personal property and the like, and the Registrar is appointed by the Governor-General on the nomination of the Chief Justice.

In Canada, the website of the Supreme Court of Canada deals with this topic as follows:

"Answerable directly to the Chief Justice, the Registrar is responsible for all administrative work in the Supreme Court of Canada. This includes the appointment and supervision of the Court staff, the management of the Library and Registry and the Publication of the Canada Supreme Court Reports. The Registrar and the Deputy-Registrar are appointed by the Governor-General in Council but take their instructions from the Chief Justice."

There's a Court Administration Service established to provide services to the Federal Courts of Canada. It is governed by the Court Administration Services Act of 2002. Section 22 of that Act records that the Court Administration Service was established to enhance judicial independence by placing administrative services at arms-lengths from
the Government of Canada, and by affirming the roles of the Chief Justice and Judges in the management of the Court. Again, there are detailed provisions which enable the Heads of the Courts to give instructions to court staff and an obligation upon the Court staff to carry out those instructions.

Section 125.4 of the Ghana Constitution provides that the Chief Justice shall, subject to the Constitution, be the Head of the judiciary and shall be responsible for the administration and supervision of the judiciary.

The Pakistan Supreme Court, according to its website, says that the Court, with the approval of the President, may make rules for the appointment of its staff and determine their terms and conditions of service. Such rules empower the Chief Justice to exercise the same power in respect of officers and servants of the court, as the President may exercise in respect of the central government employees.

The Constitution of India makes it clear that the appointment of officers of staff and their conditions of service are under the control of the Chief Justice.

The Ugandan Constitution provides that the judiciary shall be self-accounting and deal directly with the Ministry responsible for finance in relation to its finances.

I haven't had the time since I was asked to speak at the beginning of this week, to look at all the courts in the Commonwealth, and I don't suggest that there are not courts in the Commonwealth that are administered by government departments. I assume that this may be so, although in fact, in my limited search, I haven't yet found one, but that doesn't mean that there aren't any. But what is clear from the limited research that I've been able to do, is that some of the most respected courts and largest courts in the Commonwealth counties are vested with substantial powers to control their own administration.
JUDGE CHASKALSON: Please tell me when to stop. I can always say what my conclusion is without telling you why I’ve reached that conclusion.

ADV SPILG: Firstly, anyone wishes to take their jackets off, please do so. Secondly, there’s a concern about the air-conditioning, please let me know. Thirdly, any of the speakers - SABC wishes to record directly, if there’s any objection to that?

JUDGE CHASKALSON: No, I don’t want that, I don’t like having sound bites of my voice played over radio. He can report, but I don’t want my voice on the radio.

Alright, I might go a little bit more rapidly than I have done, let me deal now with the Rules of Court, and please just send me a note when you want me to stop, because I’m taking up time of other speakers and I don’t want to do that. But I think I can take Norman Arendse’s 15 minutes.

The Omar Bill provided that the rules of the Constitutional Court would continue to be made by the President of the Court and the Chief Justice. Subject to Section 173 of the Constitution, Rules of the Other Superior Courts are to be made in accordance with the Rules Board of Courts of Law Act. That Act sets up a Board which consists largely of members of the legal profession. The power to make the rules is vested in the Board. The rules are subject to the approval of the Minister, but the Minister can’t make any rules. All the Minister can do is to comment and withheld approval to the rules to which she objects.

You will remember that the Constitutional Court Complementary Act created a special position for the Constitutional Court. Under the Maduna Bill, as well as the Omar Bill, the head of the Court had the same powers concerning the making of rules as under the interim Constitution and the Constitutional Court Complementary Act. In the Maduna Bill the SCA was also given the power to make its own rules. The rules of the High Courts were still to be made by the Rules Board. There was logic in this because there
needed to be uniformity, and one particular court could not be empowered to make rules for all of them. The Rules Board is chaired by a judge and consists of judicial officers, legal practitioners and academics (eight in all) and one representative of the Department of Justice, and not more than three other persons appointed by the Minister.

Under the current Superior Courts Bill, the Rules for all Superior Courts are now to be made by the Minister, who will get advice from an Advisory Body, but is not bound by it. So, in fact, what has happened is that the rule making power has been taken away from the judiciary and the legal profession and has been put in the hands of the Minister.

I must say that again I tried to find out what is the practice in the other Commonwealth countries and it seems that the overwhelming practice is that the rules are made either by the courts or by a Rules Committee consisting largely of judges and practitioners. In some instances, rules have to be made with the concurrence of the Executive. The model which you now see in the Rules Board for Courts of Law Act, is very similar to the English model, where there's a Rules Committee consisting almost entirely of judges and members of the legal profession. They make the rules, which have to be approved by the Lord Chancellor, but of course, the Lord Chancellor in England is both Head of the Judiciary and a member of the Executive, so it's a peculiar office, which is in the process of being changed.

There is also another provision of the Superior Courts Bill. It's Section 66 of the Bill. This section provides:

"The Minister, after consultation with the Chief Justice, may make regulations regarding -

(a) any matter that may be necessary or expedient to prescribe regarding the administrative functions of the courts and the efficient and effective
functioning and administration of the courts, including the furnishing of periodical returns of statistics relating to any aspect of the functioning and administration of courts and the performance of judicial function;

(b) the criteria to be applied for determining the number of judges to be appointed to the Supreme Court of Appeal and to any specific General Division;

(c) a protocol to regulate any matter referred to in Section 16 in regard to which the establishment of a protocol is indicated (and I think Section 16 is one of the administrative provisions);

(d) any matter that may be necessary or expedient to prescribe regarding the functioning of the Office of the Chief Justice;

(e) periodic or absences of judicial officers from courts including recesses of the Supreme Court, especially in respect to the number of and the method of allocation of judges who may continue ordinary judicial services at the courts during any recess period;

(f) any other matter that may be necessary or expedient to prescribe in order to promote the efficient implementation of this Act."

“After consultation” means that the Minister consults but is not bound by the Chief Justice’s views. So the Minister not only has powers to makes rules, the Minister also has powers make regulation dealing with the way the courts will function.

Let me turn to the complaints system. This process started some ten years ago in 1996 as a result of the initiative of judges on the JSC. That was at the time when Minister Omar was the Minister of Justice. The judges on the Judicial Service Commission
asked for a formal complaint system to be established. There was at that time none, and the judges considered a formal system to be necessary. The JSC then requested the department to prepare a draft for its consideration. After that had been done there was consultation with the judiciary, and ultimately a formal Code of Ethics was adopted by the judiciary itself. A draft complaint system was formulated by consensus within the judiciary in which the making of complaints and the exercise of disciplinary powers would be administered by the judges. That, incidentally, is the case in almost all comparable jurisdictions that I've been able to find, though some make provision for lay representatives to be included in disciplinary panels in which judges are in the majority.

That draft document was submitted to the Judicial Service Commission in April 2000. The Judicial Service Commission approved of it, a Bill was drafted by the Department in accordance with these proposals, and it was introduced into Parliament in 2000 – I think it was in the year 2000, but I'm not entirely sure. I couldn't find the letter I had dealing with this, but it was about that time. It was then delayed by the Portfolio Committee, and it remained there until the end of 2004/2005 when a new Bill emerged from the Portfolio Committee, making provision for a different system, which contained as one of its provisions that an ethical code for judges would be adopted by a Committee consisting of judges and non-judges and that ethical code would have to be approved by Parliament. There were a large number of other objections dealing with details of the complaints system.

I turn now to Education. There has been no formal system of judicial education for judges. The judges, with the assistance of the Canada/South Africa linkage, undertook to conduct seminars for existing judges, new judges and aspirant judges. Those seminars were entirely under the control of the judges, and they had committees to deal with this. That committee pressed continually for a proper and well funded education system, and former Chief Justice Corbett, and later Justice Kriegler, undertook work in relation to that. A committee appointed by the Minister investigated systems of judicial education in many different parts of the world. They had extensive consultations and
there were delays because of the Canada side of it. But ultimately, I think it was in 2004, they presented a report which was that judicial education should be conducted by judges for judges. They proposed a structure for this to be done, and there was at that time no suggestion by the Minister or the department that the report was inconsistent with the overall vision of the evolving process of judicial independence.

Now, I don't want to say anything about education other than that there then emerged in 2004/2005, a Bill which had no relationship to the previous seven years work and the proposals which had been made, which in effect vested judicial education in an institution which was effectively under the control of the Minister. There were provisions allowing the judiciary to deal with the curriculum, but the institution itself was under the control of the Minister.

I'm not going to say anything at all about the restructuring of the courts because that's a subject of a separate session. I may say something then, if I have anything useful to contribute.

Section 175(i) of the proposed Constitutional Amendment dealing with Acting Judges of the Constitutional Court, makes provision for those appointments to be made on the recommendation of the Minister, after consulting the Chief Justice. That reverses the present position in which the concurrence of the Chief Justice is required for any such appointments. That is of some importance. The Constitutional Court sits en banc, and it's really important that the Minister should not have control over how vacancies should be filled by acting appointments. Where there has to be an acting appointment, the existing provisions of the Constitution require there to be concurrence between the Minister and the Chief Justice, and that is an important safeguard against executive intrusion into the highest Court. That's now been changed, and effectively the Minister can decide.

So, looked at overall, the judiciary Bills reduce the powers of the Chief Justice in respect
of the appointment of staff of the Constitutional Court, in respect of the budgetary process of the Constitutional Court, in respect of the appointment of acting judges, and in respect of making of rules for the Constitutional Court.

It also reverses the policy of rule making as reflected in the interim Constitution, the Constitutional Court Complementary Act, legislation which was formulated dealing with the Land Claims Court, the Labour Court and I think probably the Competition Court though I'm not sure of that. It contradicts the policy of the Maduna Bill and the Omar Bill.

In effect what has happened is that the evolving process of judicial independence essential to a constitutional state, has been stopped and reversed, and a great deal of control has now been placed in the hands of the Minister. It's been said in some of the media reports that this has got to do with transformation and there's some suggestion that the judges are blocking it. Now, one thing needs to be stressed. The Education Bill and the Complaints Bill are issues which the judges have been pressing for, for almost ten years now. There is no objection to the principle of judicial education or for a more formal system for complaints. The objection is to the way in which it is being done.

The particular provisions of the Bills to which the judiciary object have got nothing whatever to do with transformation. They have everything to do with the control which has now been taken by the Minister. And I say again, as I said earlier, it's absolutely crucial to realise that the government is involved in most cases in the Constitutional Court, it's involved in all criminal cases, and is one of the major litigants in other courts in civil cases. The steps which are proposed, in effect for the Minister to exercise greater control over the functioning of the judiciary are harmful, and I consider it essential that the evolving process of judicial independence which was carried out during the first ten years of the constitutional order should not be reversed.

It's the early incursions into check and balances which historically have been shown to open the way for later incursions to be made. Nobody knows what the future holds for
us, but once you accept you can eat into protections which are there, and that you can erode fundamental principles of the Constitution, sometime, somebody else can take it further. So any attempt to do so, no matter how small, is open to objection.

If you look at the package as a whole as it was first produced in 2004/2005, what was being said to the judges at that time was in effect that we will not interfere with the way you decide cases, but we will have control over all other aspects of your lives. What the budget will be, how it will be spent, what the court staff will do; we will control them and you will have no say or right to give them instructions. We will make your rules, we will have control over your ethical code, and we will have control over the institution in which you are to be educated. At that time the Superior Courts Bill contained provisions which have now been deleted, dealing with micro-management of the courts, involving the reporting of judges at particular hours, their having to obtain permission to leave the court, and a whole host of extraordinary provisions were in it. They've gone. There was also a provision dealing with the powers of the Chief Justice, who in terms of those provisions could control the entire judiciary. That's also gone. But what in fact it meant was that a very dangerous structure was being proposed for the structure and functioning of Courts. It was a dangerous structure, because the President appoints the Chief Justice. That Bill provided for the President also to appoint the heads of court. If the Chief Justice, and not a body of judges as is now the position, deals with matters concerning the judiciary, there would be an undesirable concentration of powers in the Chief Justice. Over the past ten years the Heads of Court have met regularly together and with the Minister. No decisions on behalf of the judiciary are taken without full consultation with all judges. But if you have one judge who has power to give instructions to all the other judges, and that judge, and the senior judges around that judge, are appointed by the President, in years to come control over the judiciary could be secured by appointing a compliant Chief Justice. I do not suggest that was the purpose of the proposal. But it was a terribly dangerous structure. Fortunately this too has been dropped.
Let me stop here. I've gone much longer than I should have done. I apologise for
that, but I think the history is very important, and that all the provisions need to be seen
in the context of that history.

ADV SPILG: I believe we've been given a very good perspective of the history which I
think informs us as to what the intent of the department is. Justice Chaskalson is
agreeable to receive questions. If there's anyone on the floor who wishes to comment or
to ask questions, please do so. Does anyone wish to raise anything? Perhaps then I
can break the ice and ask a question of my own.

The one that's been of some concern to me and I've had some advantage of seeing the
progress of various drafts that have been proposed and appear to be rejected. But
unfortunately I do not have the context to understand them fully. So perhaps I can raise
it now. There appeared at one stage to be a version containing a provision, I think it was
called “judicial administration of the judicial function” which identified a series of
functions that were seen to be those within the sole control of the courts such as the
court roll, allocation of judges and the like. And perhaps if I could ask former Chief
Justice Chaskalson to comment on what happened to that, and perhaps contextualise
that. Again, I believe it leads us to draw conclusions as to why it has been removed,
what its purpose was, and I suppose then we can form our own views. Thank you.

JUDGE CHASKALSON: I'm afraid, I can't help you. Those weren't in any of the Bills
while I was Chief Justice, or if they were, I don't remember them. I think they must have
come in, in the second half of the year when I wasn't party to the discussion. So I'm not
really in a position to say anything useful about it, I simply don't know. I don't know
whether the judiciary objected to them and they were taken out or why they were taken
out - I really can't tell you.

JUDGE KRIEGLER: In fact, could I ask, does anybody know what the current status is
on the Superior Courts Bill?
JUDGE CHASKALSON: How do you mean, status?

JUDGE KRIEGLER: I couldn't find one on the Web. I was told that the department had them all removed. The latest one that I could find was 2003. Perhaps the DG could inform us.

JUDGE CHASKALSON: Is the DG here? Well, I don't know, I'm afraid. I was given a copy for the purposes of this Colloquium, I think I got it on Tuesday or Wednesday, I can't remember, but I don't know what the status - I mean, it's in Parliament, that's all I do know.

ADV SPILG: Perhaps I can answer that. I think we are fortunate, Cathi Albertyn seems to have some copy that skipped the censor board. Oh, sorry, the DG is there. Let the DG tell you.

PROF ALBERTYN: The latest copy that I could find is on the IDASA website which I sent to you, Brian, and it is dated October 2005. But it doesn't seem to have an official status because it's just a website page that you can find if you a double Google search.

ADV SPILG: Yes, perhaps I think that's who we'd like to hear from.

ADV MTSHAULANA: Thank you for recognising me, Mr Chairman. I just wanted to make a comment if I may, Mr Chairman.

ADV SPILG: Certainly.

ADV MTSHAULANA: It was very interesting to listen to the former Chief Justice Chaskalson, especially when he dealt with the various comparative ways in which different countries deal with the management of the courts. The Canadian experience in
particular struck me as quite interesting. However, I just want to make a little comment, just based on my own involvement with the Department of Justice over the years, 2002 to a year or so ago. The former Chief Justice will remember that somewhere in 2001 we were called here, representing the judiciary, Justice Ngoepe, representing the lower judiciary and a whole lot of other people were called to the department and I was one of those people.

Then Mr Maduna basically explained, he wanted a group who would advise him on a whole lot of other things. But after the first two or three meetings the Chief Justice raised, I think correctly in my mind, the danger that he and Justice Ngoepe would be involved in meetings discussing matters relating to the administration of justice matters which may come to the courts at a later stage. And we all agreed that they may be released and that it may be in contravention of the separation of powers principle in our Constitution.

Now maybe before but especially after they left, the department made a number of presentations to us. We were a group of people really coming from the private sector, from our MD of Alexander Hobbs, Tom Pixley, Gloria, then in Transnet; a lot of other people. They made a lot of presentations on their problems and one of the problems they presented to us was the fact that up to or before Van Rooyen or before the Constitution, Magistrates had run the administration of the courts, and that the Van Rooyen decision had actually led to a big vacuum as far as management of the lower courts were concerned because the people who had been trained to that moment could now no longer run the courts. That was a challenge for the Minister and he wanted some advice as to how that problem must be resolved.

On the other hand there were lots of complaints from a number of the various Heads of Courts in the country relating to the operation of what were called regional offices. Apparently there was a regional office in every, I don't know how many regions, and each court had to go through the regional court to be in touch with Pretoria.
But there was a big outcry in the country from the courts, but also from the members of
the public that these offices were just useless and the Minister was then saying she
wants to change the way things are running, to find a structure: Do I just close the
regional offices and say everybody must communicate directly with Pretoria, or do I
substitute a new structure?

I cannot remember all the various issues that arose but what then followed was that we
had some consultants from IBM coming to make presentations, making suggestions or,
as consultants they wanted to get the job. But what they presented to us was that they
wanted to introduce what was called a Shared Service Centre concept which would
mean putting some structure between Pretoria and the courts, on the one hand, and
then they were then suggesting that the administration which had been done by the
regional offices would then be taken over by somebody who will be at the court, next to
the head of court, so that the distance between the court and Pretoria is shortened.

That then led to the introduction of what are called Court Managers at this present
moment. Now the Bill seems to be trying to make that into law or at least formalise that
situation, the manner of administration. I'm raising this issue because it is important, I
think, that one must understand that we are in this transformation, there is this need for
change and it seems to me, especially in the light of the contribution of the former Chief
Justice as to how other courts are running, that especially and on it comes this question
of administration.

We need to make more concrete alternative models to the government as to how we
think the courts must run, administered. Do we want courts that are going to be on their
own? And how do we foresee the PMFA working in relation to those courts? Will those
courts be run by people appointed in the manner the Canadians are doing, who are
appointed essentially by the Chief Justice or a nomination of the Chief Justice, who
themselves will become then the people who will account to the courts? Or do we want
the Chief Justice or the Head of Court to be the one that must account for the monies that will be used?

What is going to be the relationship between the courts and the Department of Justice? What role do we see for the Department of Justice in the administration of the courts, especially when it comes to matters of delivery of justice to the poor. Because there are lots of complaints from the public about, if I talk of the complaints we had, coming especially from the Magistrates Courts but also from some High Courts, about the fact that matters get postponed all the time, seems to be no, you're uncertain when matters are going to start.

And that reminds me that in the concept that, in the project called Yegabusa, which the Department of Justice was running with, one of the issues or one of the roles that it was envisaged this Manager or Head of Court, Manager of the Court would play would be also to be a co-ordinator between the court, the police and the prosecution, so that when the matter goes to court, there is somebody who is responsible to ensure that everything is ready. Now how do we see these things working? What model do we think will best work for our country? Thank you, Mr Chairman.

**ADV SPILG:** The former Chief Justice will respond but perhaps before he does, if we could just get clarity as to the Bill that is currently to be considered and upon which representations have to be made by the end of this month; if perhaps he can assist.

**ADV SIMELANE:** The Bills should be available on our website, certainly before the, as we understand it, the Parliamentary website. So they should be available. I'm not sure, I thought I understood Justice Kriegler to be saying he's not really aware where the process is at.

**JUDGE KRIEGLER:** I could not find it on the Departmental website. That's what I said.
**ADV SIMELANE:** Oh, okay.

**ADV SPILG:** I'm afraid I suffered from the same thing.

**ADV SIMELANE:** There should be, but I think we may have copies here that we can make available. I'll just have a look.

**ADV SPILG:** As we understand it, it's the October 9, 2005.

**ADV SIMELANE:** It should be 2005, yes. No, what we can do is see if we cannot get a copy of the version that served before Cabinet, that final version because that's the one that should have gone. In fact the gazetted version is the one that we should make available.

**CHAIRPERSON:** There are copies there. If that's the correct one, please let us know. If not, please let us know, more urgently.

**ADV SIMELANE:** We'll have a look at that and see. I don't think this should be anything that causes anybody to be particularly worried about.

**ADV SPILG:** It's just that it's changed so often that we're not sure which is the current version. If I may ask the former Chief Justice to respond.

**JUDGE CHASKALSON:** Yes, well, first of all let me say a word about the Court Managers. Incidentally I think I was there for one meeting and then after that meeting I said that I couldn't come back because it wouldn't be appropriate for me to be there, I would be willing to engage in discussions on matters affecting the judiciary but not anything else, because at that meeting I was called to they were talking about the Master, about Prosecutors, about a whole host of things that did not involve the judiciary.
As far as Court Managers are concerned, there was always a problem with court management. I think one must understand that the Department of Justice has run the courts, has always run the courts and provided the management. But there has been a convention that whatever the Head of the Court asked for, the Registrar would try to meet the requirements of the Head of Court, and would really take day to day instructions from the head concerned as to the manner in which the court would be run. If equipment was required, the Head of the Court would say to the Registrar: we need A, B and C, and the Registrar would then follow the steps necessary to try to procure A, B and C, and if there was any reason that it couldn't be done, the Registrar would report back to the Head of the Court and the Head of the Court would then, if necessary, take up the matter directly with the Minister or with the people responsible for budgeting.

When the Court Managers were introduced it was seen as a positive move because there were many problems. The Registrars would come back and say: I can't find anybody in Pretoria, or, I've asked for this but nobody replies. There were lots of delays and it wasn't a very efficient system because the needs were at the court and the power was in Pretoria, and that gap between where the power resided and the needs of the court led to incredible delays and frustration, and it was really very unsatisfactory. And we pressed at that time for authority, for greater authority to be given to the Registrars who would be able to take decisions without going back to Pretoria the whole time.

It was then decided by the Minister to introduce Court Managers. It was felt by the Department that Registrars weren't properly trained in management and that it was a different skill from theirs that was required. The Registrars were concerned with the taxing of bills and other such matters but they didn't have a great deal of knowledge about management, and in some cases it was necessary that there should be someone proficient in administration. So a system of Court Managers was introduced.

I can't remember now and I'd have to look back to see how that was dealt with in the
Maduna Bill. I think actually that it may possibly contain a provision that the Court Managers act on the instructions of the Head of the Court. I'm not sure, I'm not saying it is there. I know there was a lot of discussion around that when court managers were appointed, and ultimately a document was prepared by the department, instructing Court Managers to take their instructions from the Head of the Court. And so what would happen is that the Head of the Court would say: This is what we need and this is what I want you to do. The Court Manager, if it was within the Court Manager's authority, would do it. If it wasn't within the Court Manager's authority, the Court Manager would go higher up to seek authority. The Court Manager obviously had to comply with whatever the relevant rules and regulations required. The Head of the Court couldn't order the Court Manager to buy a Mercedes Benz for a research assistant or something like that. The Court Manager would be subject to certain external controls, but the Court Managers functioned in that way on a day to day basis, dealing directly with the Head of the Court.

As far as the postponements are concerned, it's been an ongoing issue, and it was something which I was involved in when I was still Chief Justice. We set up at that stage a series of meetings. Justice Kriegler was also engaged in that, I now recollect. The examination of causes for postponement showed that the prosecution of offences was like a chain. The chain starts with the Investigating Officer. It then moves to the forensic laboratories, it involves the State Prosecutor, it involves the Legal Aid Board, it involves defence counsel, it involves interpreters at court and other role players as well. And no one person had any control over the many role-players involved.

I wouldn't say there weren't cases where it was the fault of a particular judicial officer, but almost always the postponements resulted from a break in the chain. Either a material witness hadn't been brought, the docket wasn't available, the evidence wasn't available, an interpreter was not available and there was no counsel for the defence because the Legal Aid Board hadn't done everything etc. And that would lead to persistent postponements. A chain is as strong as its weakest link. And if any one of
those links went, the case would be postponed. The department then had a Colloquium, brought in people from outside of the country, some people came from America, it was a very useful process, dealing with how other courts deal with such situations. We then had a major meeting in Cape Town where it was agreed that the Head of the Court would meet quarterly with all the role-players in that long chain to ensure that the process works.

It was agreed records would be kept of why cases were being postponed, and that at these quarterly meetings, which would be chaired by the Judge President, the senior person from the police, the senior person from the Legal Aid Board etc. would be there. Relevant matters would be raised, and there would be an attempt to resolve them and set up structures for the future. That was the process which was adopted.

When you ask what would be the best court system, you know there are different views on this and I think from a practical point of view the courts do not have an infrastructure to administer their own affairs. You can't set up tomorrow the type of infrastructure which the Pakistan Supreme Court and other courts have, because the courts just don't have the necessary employees.

In the longer run, I think a system like the Canadian system, where there's an independent body which is established to support the provision of services, and is placed somewhere between the government and the courts, would work very well. I don't know practically how it works in Canada and I can't tell you whether it's been successful or not. But it seems to me to be a good system.

What does seem to me to be of the greatest importance, is that you shouldn't have a situation in which the Chief Justice says to the Senior Administrative Officer: I want you to do this", and the Administrative Officer says: I've got to get instructions from the Director General, you can't tell me what to do. And that's what this Bill in fact sanctions being done. I don't say it will be done that way. In my experience, certainly the
experience I've had at the Constitutional Court, I think we've been well looked after. The administration runs effectively, the senior people there have been experienced and good and the department has been supportive. Apart from a period which is not relevant, I have had no complaints in relation to what has happened. I found that whenever I wanted anything from the Department a senior person from the department would come down and speak to me and try and meet the need. But under the Constitutional Court Complementary Act I had legislative backing for this.

The philosophy at that stage was: we are here to look after you, we must provide the services you need. If you need X we must provide it if we can. I think the Constitutional Court has run very well. I'm not sure that was the same with all of my colleagues in the different High Courts, and I know of great problems which I've been told about in other courts.

But my concern is not that. Administration by the department without the heads of court having any control over what is done can work if there's goodwill on both sides. It can work if the department exercises its powers so as to meet the needs of the judiciary. My concern is really that a structure is to be put in place, which says actually: we are in control, you have no say. That's what it's telling us. Why these changes? Why must the Minister make the rules where previously the Chief Justice made rules for the Constitutional Court and the Rules Board made them for the other courts? What is the need for a constitutional amendment to vest this power in the Minister? Is it to enable her to ignore the wishes of the judiciary? What is the purpose of those changes? What is the reason for it? I just don't understand it.

I can't answer your question as to what would be the best structure, but I do think that a structure which in fact says that the Executive controls all aspects of the functioning of courts other than the way they decide their cases, is not consistent with judicial independence.
ADV SPILG: We'd like to thank the former Chief Justice for his contribution and in particular we are actually blessed to have people who have contributed so much to our law, both as practitioners and while sitting on the bench. I think it’s one of the rare occasions where a country is blessed as we are to take advantage of their wisdom and I think we should all say thanks to the former Chief Justice for attending and sharing with us his thoughts.

We proceed to the next speaker. Time will be adjusted somewhere along the line. I think we do have the luxury of time. I would like to call on former Justice Kriegler, Johann Kriegler, to give the next presentation.

What will then hopefully occur is that Adv. Vincent Maleka will act as a facilitator for a discussion around the presentation by Justice Kriegler.
Arthur Chaskalson is not an easy act to follow, particularly when the two topics or the two facets of the same topic are so closely similar. But in fact I'm grateful to Arthur because he's done the bulk of the work that I have to do in discussing the constitutional importance of judicial independence.

When we speak of judicial independence, let there be no misunderstanding. No one questions that the Judiciary is subject to the checks and balances of the Constitution. No one denies that the Executive and the Legislature have the right or rather the duty to know what the Judiciary is doing, what it is about and how it is doing it. No one denies that the Executive and the Legislature have the right and power and duty to check whether the Judiciary is indeed fulfilling its constitutional obligations. No one denies that they are to initiate remedial steps where these are indeed found to be necessary.

No one denies that the Judiciary is subject to this kind of control and that the Executive and the Legislature are duty bound to engage with the judiciary in the spirit of cooperation as commanded by Chapter 3 of our Constitution.

Nobody, nobody suggests that the Judiciary should be a power unto itself. That would be to deny the basic message of our Constitution. No one denies the right and the power and the duty of Parliament to decide how public money is spent and to see what is done with the public money that it has voted for use by the judiciary and the exercise of its constitutional duties. No one, no one that I know, disputes the right and power and duty of the Executive to determine government policy and to do whatever may be necessary to execute such policy. I say no one disputes this although there are occasionally echoes from those who, using the bench as a shield, express views on
state policy which I personally believe go beyond the limits of legitimate judicial comment, but that's a different matter.

We are speaking about independence in the constitutional context. I agree with Sir Hartley Shorecross who said more than half a century ago that the ultimate losers, when judges venture into that kind of comment on matters of political contention, the ultimate victims are the judges and through them, the administration of justice. You can't fight the political system, the best you can do is come second. So better keep quiet. That's not judicial independence, that's irresponsibility.

Let it also be perfectly clear that the judiciary, as much as the Executive and the Legislature, is bound by the commands of the Constitution. Indeed it is more bound by those commands. The Constitution requires - let me put it differently. The core values of the Constitution are in fact the ultimate sacred trust and the binding charter of the judiciary. Without those values and without the powers created by the Constitution, the judiciary has no existence. Its primary function and its essential raison d'être is to vouchsafe human dignity, equality and freedom under the law which is guaranteed by the Constitution.

When we speak of judicial independence, we speak of it as the independent custodian of the rule of law, not as the independent asserter of its own interests and rights and claims to extra S&T or bigger motor cars. Its independence is a purpose, has a purpose, it's a tool towards the ensuring of the preservation of the rule of law.

And when former Chief Justice Chaskalson highlighted, identified, pinpointed the respects in which the trend over the last decade has been towards curtailing the powers of independent functioning of the judiciary, he wasn't talking about irksome little pin-pricks for judges, he was talking about a serious consistent trend towards attrition of judicial independence which has wide and serious implications.
The judiciary needs its independence, not as an assurance of the individual power of judges but as the underwriter of the personal liberty of the individual. And I'm glad Patric raised the word, the wonder word of 'transformation' earlier. Let us not have any misunderstanding about the role of transformation and judicial independence. No sensible judicial officer in the country denies the need for transformation, real, substantial, fundamental. The judiciary, the judicial system and the administration of justice have been and are being transformed and should be transformed. Nobody denies that.

But I challenge the suggestion that because of the need of transformation, one may have to sacrifice a little bit of judicial independence here or there. Look at me. I've lived a long time in this country and that kind of talk I've heard before, that for major, social engineering policies, we have to sacrifice a little bit of liberty here, and a little bit of judicial independence there and a little bit of compromise here won't do us any harm; and that's the slippery slope. I've heard it before, I don't believe it. You do not need to impair judicial independence in the interests of transformation.

On the contrary, the rule of law is one of the fundamental value systems that you need in transformation and if you impair the mechanism for the protection of the rule of law, you are ultimately impairing the rate of success of transformation.

But let's see this in its broader context, let's look at judicial independence, constitutional judicial independence in a slightly broader context and let's be practical. I don't want to talk to you about Montesquieu and philosophy about the *trias politica*, the three pillars of state and equipoise with one another. We're not in a Politics 1 lecture, we're talking real danger at the moment.

I also don't want to talk to you about the institutional and the personal independence of judges and method of selection and security of tenure and a living, decent salary scale and living conditions and proper working conditions and financial independence. Those
are issues that can be debated at a much more detailed level. I want to talk about the broader picture.

And I want to say that we mustn't get too worried about our own particular disease at the moment because the tension between the judiciary and the other two pillars of state, the other two exercisers of state power, this tension is perennial, it's universal, it's inevitable and it's actually even beneficial. It's been with countries that recognise the division of power virtually from the outset and there are numerous examples.

To this day there are numerous examples of this tension between the Executive and the Legislature on the one hand, usually, and the judiciary on the other, the United States in the post 9/11 era of great tension and the concern about international terrorism has led to considerable tension between the judiciary and the Executive, and the Legislature with regard to the balance between state security and the rights and freedoms of the individual American.

In the United Kingdom, the Mother of Parliaments, as it's been called, the cradle of the rule of law, there has been for the last decade or more, been considerable tension between the Executive Legislature on the one hand and the judiciary on the other. In fact in the mid-90s, early 90s already there have been attempts to, or suggestions or threats, rumblings, that the powers of judicial review are to be curtailed because the judges were perceived to be interfering, illegitimately, in areas of Executive authority and paramountcy.

But we're different. South Africa is unique and that's nothing particularly original to say. But our Constitution is also unique and I'm not talking about it formally and in terms of its extent and its breadth and its vision and its recognition of socio-economic rights or the extent to which it protects individual rights and liberties through a properly justiciable Bill of Rights. I think we must look a little at our history.
In this country there's always been tension between the judiciary and the Executive or certainly since the days of Kruger and Kotze and the old Transvaal Republic. Certainly during the 50s in South Africa, the High Court of Parliament, the separate representation of voters crisis, the whole constitutional crisis was about this. The enlarging of the then Appellate Division in order to deal with certain of these problems caused great anguish and great tension in judicial circles and you didn't have to read Oliver Schreiner's letters posthumously to know how deeply the judiciary at all levels was concerned about that.

We know about this tension in this country and we have a Constitution that was drafted as a result of the negotiated revolution in which this was built in, there was a recognition of the fact that we have this kind of background and that we need to balance the centres of power and that we need to ensure that a patriot act or other executive invasions of individual liberties, as they are manifesting themselves in the United Kingdom, would not become possible in this country.

That was 15 years ago. Ten years ago, we're into the 21st century, we're into the second decade of the new South Africa, we are committed to transformation, we took over the judiciary from the old regime on the basis that it was better to retain and transform it than to start from scratch. We have done so. We have done so remarkably well, I believe, although there will always be people who say it's too fast and others who say it is too slow. But we have transformed it in terms of its composition and its mindset to a remarkable degree.

We have curiously ironically now today a judiciary that is as attuned to the new South Africa as ever you could hope to find. Let's talk bluntly. The majority of Judges President are black. They're new appointees. And these are the people that the current package of legislation does not seem to trust with the exercise of judicial power and with the performance of the transformation function. And I challenge the bona fides or the common sense behind that kind of approach.
You know, if in the United Kingdom, as I've said, the cradle of personal freedoms, the rule of law of judicial independence, if there a judiciary could get embroiled in the kind of controversy with the Executive that we have seen over the last decade there, just because the Cabinet was irked by what it saw to be judicial interference with its own functions, how much more careful must we not be? We're a new democracy, we're a democracy that comes from a tradition where the rule of law has not really been the flavour of the month ever. It's not the kind of country in which you can take chances with the public opinion.

We see in our streets in Johannesburg today, major attempts at influencing the judiciary in the exercise of its criminal jurisdiction in what should be a routine case. We see major criticism in the other case involving our former Deputy President in which quite unbridled things were said about the Judge, somehow the assessor seemed to be forgotten in the criticism. But that it's an apartheid judgment and it's a Rhodesian judgment, and not any member of the Executive or senior member of the Legislature that I have noted, got up to say: How dare you speak like this. You are speaking about the protector of the rule of law that is there to protect all of us.

On the contrary, I have seen a public statement attributed to the Director General of the Department, having the temerity to criticise a Judge in public for complaining about the support services and telling the Judge that he should confine himself to writing judgments and not get involved in such matters.

I believe that whether the DG was doing the bidding of his political master or whether he was speaking without the bidding, he should have been brought to heel there and then. We do not live in a country where judges are criticised by civil servants. That's not the kind of country in which the rule of law can be protected by the judiciary.

But then we look and we see the rationale for the constitutional amendment that the
Chief Justice dwelt on. He mentioned that it is suggested that we should hand over the control of the courts to the Department. I suggest that those who think that that's a good idea go and have a look at the WLD or the TPD High Court, see the holes in the ceiling, try to use two out of the four lifts or try to use the public lavatories, and see how well the department has cared for them up till now.

But the rationale given for this amendment of the Constitution, mark you, not just legislative interference, we're amending our Constitution in order to provide, says the objects, the Memorandum setting out the objects:

"In order to provide that the Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts."

To which my only comment can be, Ye Gods! Who the hell wrote this? It is guff, it is rubbish, it's twaddle. The Chief Justice has never been responsible for the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts. Courts don't function like that and whoever wrote this just doesn't understand how the South African judiciary functions.

The last leg of the rationale, my colleague, former colleague, has drawn attention to. Now I'm not as polite as Arthur Chaskalson, not by a long chalk. Anybody who can talk about a Commonwealth model of the separation of powers is a fool or a scoundrel. There is no such thing as a Commonwealth model of the separation of powers. In fact, the mother of parliament, Westminster system, does not recognise the separation of powers in its formal structure at all. And the excellent analysis that Arthur Chaskalson gave you shows you that it's not recognised in practice. I don't know what this Commonwealth model is. It's untrue, though, there is no model that exists in order to protect the rule of law in the Commonwealth.
Right, let’s talk about the inevitable and possibly beneficial effect of this tension between the Legislature, the Executive and the judiciary. Now Lord Acton may have overstated the corruptive potential of power, but if he did, it wasn't by much. It’s an unpalatable lesson of history which we don't have to learn all over again in South Africa, that unbridled power goes awry sooner rather than later. The separation of powers, of which the independence of the judiciary is an essential component, is the only protection against the abuse of state power. It is only by keeping in equipoise, in checks and balances, that within the spirit of Chapter 3 of the Constitution, we can ensure that we do not slip into some form of abuse of power again.

And there are so many possibilities and so many risks and dangers that can befall our country which would serve as good excuses for just taking a short-term short-cut with the rule of law. A crisis arising from one of our neighbours, a major outbreak of unrest because of an unpopular decision in a court case. I'm not going to far-fetched example, nor am I predicting anything, I'm merely pointing out that this is what happens and that's why you need to have a judiciary which is not staffed, controlled, paid, trained, selected by the Executive.

I'm not speaking in theory again, I have been there. I know what court managers are; I know what case flow management is supposed to be; I know why it hasn't got off the ground; I know what judicial education should have been five/six years ago and I know why it hasn't got off the ground. I also know why the tendency has been to take power away from the judiciary consistently over the last five, six, seven years.

I don't believe, I don't believe that the Deputy Minister's acting from innate vice, I really don't, but he has been extremely difficult, he's been extremely obstructive in the progress of judicial education. And what I, as a propounder of constitutional independence of the judiciary find most regrettable, is that although I've been involved for seven or eight years in a number of these issues, disciplinary proceedings against judges, ethical conduct of judges, education of judges, the training of judges, the
management of courts, to this day - and what are we now, the 17th February 2006 - not one single member of the Executive, whether government service or political, has engaged in debate and said you are wrong here, for this reason or for that reason.

What we do get is after the courts have adjourned in mid-December, and it's happened three times now, either the 14th or the 15th or the 7th or thereabouts of December, comes from the Department of Justice, a Bill for comment by the 15th January. I do not regard that as consultation. I do not regard that as recognition of the integrity of the constitutional bastion of liberty, the judiciary.

We have no battalions and we have no purses, that's true, but the Constitution gives us moral authority and the Constitution obliges the Executive and the Legislature to protect, promote, assist and assure the authority and the independence of the judiciary. Not with fulsome platitudes, not with pious protestations - and then they tell you if you read the preamble to the judicial Education Bill prepared by the Department of Justice, you want to say, pass the sick bag, please.

That's not what judicial independence under the Constitution is about, it's about proper respect for the role and function and position and status and standing and expertise of the judiciary. The spirit must change, the attitude must change. If the attitude changes, the actions will change and if the attitude and actions change, we will indeed be privileged to have a situation where the importance of the judiciary and its independence under our Constitution is recognised in fact, and not by mere protestations.

Thank you.

ADV MALEKE: I expected Justice Kriegler to be very passionate and emotional, but for as long as I've heard the former Chief Justice speak, I did not see him before so passionate and emotional than he was this morning when he made his presentation.
This seems to me to be a topic of some importance. My job is to try and facilitate the debates on the way the Bill is likely to affect the independence of the judiciary. I've been asked to do so, so that we can enrich the submissions the Human Rights Committee of the GCB is going to make on the Bills.

I understand that it is time to take a short break so that we can stretch our legs and resume for that enriching debate. Tea will be for 15 minutes and I've been asked to urge all of you to keep time.

**DISCUSSION**

**ADV MALEKE:** Shall we resume. In order to make the debate more meaningful, I would ask the speakers or those who want to make contributions, to specify specific provision or provisions of the Bill which raise concerns about judicial independence and why, in the view of the speaker, he or she believes that there are concerns in that regard. Because of the liveliness of the topic, we are lucky to have Justice Nugent to make an opening contribution on the subject and I'm going to give him two or three minutes to make his contribution. Bob?

**JUDGE NUGENT:** I hope you won’t mind if I take a few minutes of your time to deal with a misconception that I have often heard expressed in discussion on this issue. It relates to the 14th Constitutional Amendment Bill and in particular, the clause that provides that the Minister, shall have responsibility for the administration and the budget of the courts.

In *Van Rooyen*'s case Arthur made two very important observations about the independence of the courts and he has expanded upon them today. The first is that the concept involves a degree of institutional autonomy and is not confined to the impartiality of judges as individuals. And the second is that judicial independence is an
It is in that context that one must not allow the Superior Courts Bill to overshadow the importance of the amendment to the Constitution. Because a Constitution is a very different instrument to an ordinary statute. Its importance lies in the fact that it entrenches principles. It entrenches them now and it entrenches them for the future. And what is now sought to be entrenched is the Minister's control over the administration and the budget of the courts.

In many discussions that I have had – with judges, with lawyers, with members of the public – I have heard it said: “Well, so what? That is what we have at present so nothing will change.” And that is true. The courts are indeed administered at present by the Department of Justice and the budget is under the control of the Minister. But one must be careful not to allow the tail to wag the dog.

What we have at present was inherited a hundred years ago from England. It has not been particularly controversial because it has not created difficulties and quite frankly we have had more important priorities to deal with. But we ought not to assume that what we have today conforms with the constitutional guarantee of independent courts. And I suspect that the government itself is a little concerned that it might not be consistent with that guarantee for the administration and the budget to be under the control of the Minister because the constitutional amendment is obviously intended to ease the passage of the Superior Courts Bill.

But even if the present system does conform with the Constitution at present it does not follow that that will necessarily remain true in the future. Arthur has referred us to the direction that has been taken in Canada and in Australia and other countries in recent years. In Canada, for example, the administration and budget of the Canadian Federal Courts is under the control of a statutory body that is independent of the Executive and is controlled essentially by the judiciary. That administrative body prepares the budget
for the courts and submits it for appropriation to Parliament in the normal course with other departmental budgets.

If we are not yet ready to move to a system of that kind the question we nonetheless ought to be asking ourselves is this: Do we want now to turn our backs upon any evolution in that direction and instead entrench what we now have? I think that is the importance of that section of the 14th Amendment and I don't think it should be overlooked in the more general discussion on the details of the other Bills. I think that that is foundational to the discussion and it ought not to be overlooked. After all, we are talking about an amendment to the blueprint, upon which one imprints the detailed drawings.

Thank you.

ADV MALEKE: I believe we are pressed for time because of the commitments of some of our guest speakers, but I'd like to have two more comments. I know that George has one which affects some provisions of the Bill and I know you discussed with me privately, but I think it's important that the Human Rights Committee and our members should know about it.

ADV BIZOS: Vincent mentioned about the passion of Arthur Chaskalson. I too, having been a friend of his for a very long time, having spent a lot of time with him on the Judicial Services Commission, have never seen him as passionate as he is about these issues, because he believes that it's really a negation of the things that many of us in this country have fought for and he remembers particularly well from where we come, and he doesn't want any of those gains to be wasted. He's modest, but I don't have to follow him.

We had two previous ministers, Dullah Omar and Penuel Maduna. They sat at the hearings of the Judicial Services Commission, where some of the issues that are dealt
with in these Bills other than the one seeking to amend the Constitution were informally discussed within the Commission. And very often we thought that we had some sort of consensus on the then Bills which were either withdrawn or amended. The present Bills with the objectionable provisions and constitutional amendments have however not been discussed at the JSC.

With the appointment of our present Minister of Justice, I think, with respect, unwisely, this very important issue has been handled by to the Deputy Minister, who was for quite some time, a member of the Judicial Services Commission, of which I have been a member since its inception. The introduction of these Bills as a point in limine, which I'm sure it is not going to please him, because I think that it is well founded, he either overlooked or ignored a specific provision in the Constitution in relation as to how this sort of legislation has got to be introduced.

I will read to you the ipsissima verba of Section 16.6 of Schedule 6 of the Constitution, headed 'transitional Arrangements'. Don't be frightened by that expression, the transitional arrangements are still to take place. This is why we talk about the TPD and the Bophuthatswana High Court and that sort of thing. It's still there. And it says:

"(a) As soon as is practical after the new Constitution took effect, all courts, including their structure, composition, functioning and jurisdiction and all relevant legislation must be rationalised with a view to establishing a judicial system suited to the requirements of the Constitution.

(b) The Cabinet member responsible for the administration of justice, acting after consultation with the Services Commission, must manage the rationalisation envisaged in paragraph (a)."

I want to assure you that I have hardly ever missed a meeting of the Judicial Services Commission, these Bills in the present form have never been brought to the Judicial
Services Commission for their comment. And therefore in limine I believe that the Committee that is making these representations should take this point in order to stop them in their track.

I want another minute, Mr Chairman, if I may. The point in limine is not of permanent assistance to us. What I'm about to say, is what some of our judges on the Constitutional Court and elsewhere, are unable to say because they may be called upon to decide on the issue. You have spoken about the Bills being introduced shortly before or at the time when most of us were away on holiday. Happily, Alan Dodson, who may be known to you, counsel at the Legal Resources Centre, and our librarian, Catrin Verloren van Themaat, were not on holiday and as a matter of practice, she takes out all Bills published. We beat the deadline for representations, have made representations in relation to the unconstitutionality of particularly the two sections of one of the Bills.

We wrote to the secretary of the Parliamentary Committee to ascertain when will hearings of the Committee be held and we were told, in writing, by email, that they were not likely to be held. Now that says something. But let me tell you that the basis upon which we object particularly to two of the sections. We believe that Section 1 which tries to impose control of the courts in part, by the Executive, is unconstitutional. I will not argue the case. I have written a paper together with Alan, which is on the LRC website, which everyone has access to. We have also sent it to a number of people.

The second objection is that this removal of the jurisdiction of the court in granting interim relief where there may be prejudice and there is at least a prima facie case of irreparable harm, is unconstitutional because it is obviously an ouster clause and ouster clauses are frowned upon throughout the civilised world. And there are passages from Justice Kotze that Justice Kriegler has mentioned, and two very recent decisions, during the apartheid regime.

Thirdly, and this is the thoughtlessness of it, I don't know whether anybody objected in
the manner in which the Judicial Services Commission appoints Judges Presidents and their deputies. All of a sudden we have to have an amendment. If the courts are restructured we will have to appoint, sooner or later, seven or eight new Judges President and Deputy Judges President. With the proposed procedure, we will have to find at least four times the number of people that have to be appointed. I don’t know why this proposal is made. The relationship between the Judicial Services Commission and the President's Office has been particularly cordial and nobody has ever suggested to us what the reasons are.

And I believe that for these reasons the General Council of the Bar has to be congratulated for calling us together in order to augment the arguments that they have already put together, and put up a particularly strong case and go above the head of the Deputy Minister of Justice, who may not - I can only say, may not - have fully informed the President, the Cabinet and even the Minister of Justice of the dangerous path that we are entering into, possibly the third parliamentary executive judicial struggle, two of which we have had in the past. We can do without it. Thank you.

ADV MALEKE: On that note we will conclude this part of our discussions. There will be more than enough time later in the day to raise whatever concerns still remain, so if you still have the urge to speak, please patient, you'll speak later. If at that time you shall have been denied an opportunity to speak, let's try not to deny you the opportunity to make representations. We would then in that event, ask you to submit written presentations to the Human Rights Committee so that they should take them into account when they formulate their representations.

I believe there's going to be some slight change to the next sessions and Brian will speak on them.

ADV SPILG: I think the contributions outweigh any time constraints that we've tried to impose on ourselves. I would ask Norman Arendse to introduce the Chief Justice, who
will say a few words. There will be an opportunity for some comment but if it could be reasonably short, Cathi Albertyn has been willing to present to us a perspective and unfortunately she must leave at 12:30, so we are somewhat constrained by that. So if I can hand you over to Norman Arendse.

**ADV ARENDSE:** Good morning, everybody, and good morning, Chief Justice and the former Chief Justice and other judges. Colleagues, just to formally apologise for being late, like the Deputy Minister, I got a bit lost but I found my way, George, albeit as in the coming weeks, days.

Just coming up I read in The Argus last night, you all know about or you've read or heard about the Baby Jordan case that's running in the Cape High Court at the moment, before Judge Waglay. That case was postponed yesterday because the Court Manager gave the court interpreter off because of the Transnet strike. So after lunch they couldn't resume and the case had to be postponed until Monday. So I could have sworn that at least part of the proposed legislation is already in place and if that is not an administrative decision which impacts directly on the judicial function, then I don't know. And that is what Arthur spoke to you about. I missed it but I was going to, in my talk to you, quote extensively from what he said in his farewell speech in court last year, that that's exactly what he meant.

Judge Kriegler, as in his inimitable forthright blunt way also made the remark which I think we all can relate to, and that is that all our Judges President, bar one, are black. Our Chief Justice is black. So it's at a really awkward time politically that these proposed amendments, constitutional and other amendments are being introduced. If the Judicial Services Commission has not done their job to transform the judiciary in the 11 years or so of our democracy, then I don't know. And I think it comes as news, even a shock, to us that the Judicial Service Commission has not been consulted on these matters.

I think on a clear reading or on a plain reading of the amendments and the Bill, the
powers of the Judicial Service Commission have been watered down quite considerably. Yes, they still do play a role, but I think all of us would like to understand perhaps from the Deputy Minister at some point why the role of the JSC has been downgraded and that of the Chief Justice, where currently, I think, I speak under correction, concurrence is required and I think as lawyers, we all know what that means, there’s now a process of consultation. And as lawyers, we know there’s a huge material difference in those two words.

So I’m very happy on behalf of the General Council of the Bar and I thank Brian and his Committee for pulling this symposium together at such short notice and for all of you, in your busy schedules, to make time to come here. There’s going to be ongoing debate on this, we have to make our submissions on or before the 28th, so all contributions are to be welcomed.

It is always my pleasure to introduce the Chief Justice of the Republic of South Africa. We all know him, we all know how he got there. We all know his contribution to the struggle for human rights and justice. I understand he’s not going to make a formal speech, he’s going to make some general remarks and I think we can understand why. And then I think he’s going to allow some time for comments or questions.

Thank you. Chief Justice.
A PERSPECTIVE FROM THE CHIEF JUSTICE

Chief Justice Pius Langa

I would like to thank the General Council of the Bar firstly for putting together this gathering – it is a very important meeting - and further for inviting my predecessor Chief Justice, other judges and myself to come and shed some light on what has been going on and what we think should not go on.

[I say that this meeting is important because the proposed legislation is not a matter for the judiciary, the courts and the Department of Justice only. It is a matter for the whole legal community and indeed, the whole population of this country. That is why I was concerned at the timing of the notice for public comment. I would accordingly like to congratulate the GCB for this initiative.]

I thought that I should not comment on issues around the possible constitutionality or unconstitutionality of the provisions that are being discussed. I will just give some history of discussions that have been taking place in order to try and put things in perspective.

In my capacity as Chief Justice, it is my function to chair meetings of the Heads of Court. These are meetings that involve the President of the Supreme Court of Appeal, the Judges President of the various courts and divisions and the Chief Justice. As Heads of
Court and on the invitation of the Minister of Justice, we made submissions giving our reactions to the package of Bills, including the 14th Constitutional Amendment Bill and the Superior Courts’ Bill. This was after the Minister had retrieved the Bills from Parliament because she felt that there had not been sufficient discussion and consultation around them, in particular with the Judiciary. She accordingly brought the Bills to us and initiated a process of consultation.

The provisions were of two types. The first involved matters in respect of which urgent steps needed to be taken in order to rationalize the courts and the administration of justice. These had been kept pending for a long time and the attitude of the Judiciary had always been that they should be carried through as soon as possible. In fact I am on record as suggesting a severance between those aspects in the package that are controversial and those that are not so that legislation can go ahead on those provisions which are very important for our people.

The severance did not take place because the intention was to deal with the Bills as a package.

Related to this is the issue of the transformation of the judiciary, an issue that is often alluded to in motivations for the Bills. I would like to state this clearly and unreservedly: transformation of the Judiciary is a matter that is very close to my heart as well as to all the members of the Heads of Court. We have been at pains to make this point in the written submission made to the Minister. We have accordingly not opposed any attempt
to facilitate transformation. It must however be said that the proposals that we object to have nothing to do with transformation.

Now I just want to endorse what Bob Nugent said just now about us being an evolving society. That is how I look at the transition and the point of time at which we find ourselves today. We are an evolving society and really the question is how, as a judiciary involved in the court system, how do we evolve in the context of the notion of the doctrine of separation of powers? Do we evolve backwards or forwards? Do we entrench those aspects which make for a good, stable and exemplary democracy, or do we want to give the narrowest of meanings to the concepts of the independence of the judiciary and the separation of powers?

On my travels abroad, I meet judges in other jurisdictions. I would say there is no jurisdiction that I know of which is moving backwards. All the jurisdictions that I interact with - and these are jurisdictions we admire - are moving towards giving a wider meaning to the concept of independence than that which I think these Bills seek to achieve.

Justice Chaskalson may have mentioned this: when the Constitutional Court, as a new court, was established in 1994 in terms of the new dispensation, the Constitutional Court Complementary Act was passed. Its provisions are such that one thought that the wise heads at the time were giving a pointer to the direction which the entire court system should be moving, a direction in which we should evolve. It involved various
aspects of autonomy in running the Court. One aspect related to the appointment of senior administrative personnel for the Constitutional Court. This had to be done in consultation with the Chief Justice. In matters of the budget, the Chief Justice could not be bypassed.

There is a general perception that the Constitutional Court is more privileged than other courts. The Constitutional Court Complementary Act is, to a large measure, responsible for that. We were able to establish a number of things, including the development of a first class library. We could do things that other courts could not do. I am quite disappointed to see that the provisions in the Bills go in the opposite direction. In fact, the new proposals seek to repeal the Constitutional Court Complementary Act. So what was given in 1994 and which not only made perfect sense but has also worked outstandingly well is now been taken away. We have not been told why.

Nothing in the Complementary Act interfered with our ability, as a Court, to do work that could be described as strictly judicial. On the contrary, our ability to deal with the Court’s work was enhanced.

Let me emphasise this once more: there are provisions in the Bills, things which need to be done. We want those things to be accelerated. Both transformation and rationalisation are important, they need to happen and there is nothing which we propose in our submissions as Heads of Court which is against that.
Other aspects mentioned in that submission include the appointment of senior judges. There is a proposed change to diminish the role of the Judicial Service Commission in the appointment of Judge Presidents and Deputy Judge Presidents. I do not know the reason for the proposed change. Another worrying change, which has not been explained, relates to the appointment of acting Judges of the Constitutional Court as well as other senior Judges, where the concurrence of the Chief Justice will no longer be a pre-requisite. Again, I do not know the reason for that.

Now one last aspect I want to touch on, it must have been mentioned already. What is really happening is a proposed amendment to the Constitution. Section 165, I thought, was a very complete section. But what it does for the judiciary is to place the judicial authority of the Republic where it belongs and then it goes on to say "all the other organs of state", and those organs include the Ministry of Justice, obviously; all the other organs of state must assist the courts in achieving and exercising this independence. They must assist and support.

The proposed change to section 165 of the Constitution is, in my view, a retrogressive step. It halts the evolution of our court system as well as the natural development of the concepts of the independence of the judiciary and the courts and the application of the doctrine of separation of powers. We have contended that the proposed changes to section 165 of the Constitution are not necessary and that the section should be left as it is.
Thank you.

ADV ARENDSE: Thank you, Chief Justice. Can I just ask whose microphones are these here in front? I think the speakers were told, so we asked their consent that the proceedings would be recorded and it's purely for the purposes of informing the GCB submission to be made shortly. This is an open meeting, but we are not allowing any other microphones to be here. So can I please ask whoever has put this microphone here to please remove it and if they wish to reproduce it any form, please ask the speakers if you may do so.

Are there any questions, comments on what the Chief Justice has said? Ladies and gentlemen, colleagues? Sorry, Frank at the back.

ADV SNYCKERS: Judge President, I would think that this is not a question that would be appropriate for the Chief Justice to answer but I would like the question to become part of the debate at some point. And perhaps those such as the former Chief Justice and former Justice Kriegler would feel able, within the bounds of what would be appropriate and what they would be comfortable with, to deal with this issue and if not now, with relation to this Bill or this amendment, then at some point.

The question is going to arise: to what extent does our Constitution allow room for the doctrine that there are some amendments to our Constitution that the Constitution does not allow? And it may be that that kind of doctrine and some form of that doctrine may
be required to be infused into the debate, if there is some room for such a doctrine. I'm not sure whether this is the opportunity for comment on that point or at some later point during the debate but I do believe that that particular question and the room for that sort of doctrine ought to form part of this debate.

ADV ARENDSE: Do you want to comment?

CHIEF JUSTICE LANGA: No.

ADV ARENDSE: The Chief Justice will pass. Maybe the former Chief Justice?

JUDGE CHASKALSON: Read the Certification Judgment.

ADV ARENDSE: Frank, read the Certification Judgment, the first one, 94.2 - somewhere, 766. Brian?

ADV SPILG: The late Justice Mohamed referred to the Indian Court, the Indian Supreme Court's decision on an issue which is identical. And whilst he appeared to leave it open, he certainly explained exactly what the Indian Supreme Court had to say and that it considered that there were elements of the Constitution that could not be diminished, and one was the independence of the judiciary.

ADV BIZOS: Very briefly, I can say what the judges can't say. Firstly, during the
certification procedure the question was raised as to whether the constitutional principles were going to be dead or not. The answer, and it is recorded, was definitely not in 10 years or even 300 years, in the words of Judge Goldstone, who was not contradicted by any of the then judges here present, stood. And in any constitutional challenge which may take place if these Bills are passed in their present form would have to overcome that the constitutional principles that really encompassed the compact which this country came together with, would be violated if they were passed.

There are also quotes that Spilg has mentioned, quoted during the argument, not contradicted by other judges, by Judge Mohammed, about that there are portions of the Constitution which cannot be amended, irrespective of the majority. And also, there may also be an argument that some of the amendments that are sought to be made may require a special majority, as contained in the Constitution, which is not limited to two-thirds.

I think all these points should be made in the Memorandum so that some sanity may possibly be communicated to the person or persons that put these Bills up.

**ADV ARENDSE:** Thank you very much, George. The colleague over there?

**ADV STEWART:** Thank you, my name is Angus Stewart from the Durban Bar, I just have a very brief and straightforward question. Justice Langa, I was wondering whether the Heads of Court submission to the Minister that you spoke about, is a document that
is publicly available or that at least might be available to the GCB or the constituent Bars so that we can give consideration to it and engage in the debate, particularly with regard to the points raised by the Heads of Courts?

**CHIEF JUSTICE LANGA:** One thing I omitted to say and I think I should say it, is that there have been changes to the Bills. The submissions were not totally in vain as some changes were actually made. I think people who want them can get hold of them. But you should just remember that they were based on a changing scenario. The original versions which were presented, we found a lot that we could debate about and some of them quite alarmed us, but many of those provisions have been changed. But the core of the objections, and that relates to really what is before us now, those objections are still there. Yes, there is no reason why the submission should not be available.

I'm quite sure you don't have any further questions.

**ADV SPILG:** We have obtained those parts of the representations which are on electronic format. If the GCB can be requested, there is a pack which we gave to the presenters and included in the pack are the submissions retained in electronic format.

**ADV ARENDSE:** Can we at this point thank the Chief Justice for attending and for his invaluable contribution to the discussion; and everything of the best.

Can I call on my good friend, Ishmael Semenya, to come forward and introduce the next
speaker. Oh, Brian's introducing the speaker, Ish is chairing the session.

ADV SPILG: We'd like to thank Professor Cathi Albertyn, Director of the Centre for Applied Legal Studies, for being agreeable to give a presentation on the Justice Bills and its Impact on Judicial Independence. There will be a discussion afterwards, comments, and that will be facilitated by Ish Semenya. Thank you.
Thank very much and thank you for placing me after all those previous very distinguished speakers. I'm not sure if there's anything left to say, except maybe to agree with some of it and maybe to try and raise a few more issues and questions for discussion. I think one of the problems in this whole debate around the Judicial Bills has been the silence, really, and not being able to get the Bills and not knowing what's going on. So for those of us in civil society and for members of the profession, I think we've been quite excluded in terms of being able to participate in debates that probably correctly have been happening between the judiciary and government.

When the Bills were published the media comments were almost overstated and quite polarised and sometimes hysterical - and I'm not saying those were the comments of the people who were making them, it was the way in which it was being portrayed in the media. And there were was very little substance, it seemed, to that debate. People were talking about principle, were talking about text, but there was very little that was being said about what it was that we were trying to achieve and what it was that we were moving towards, what kind of judiciary we want to see in this country. Government wasn't telling us and the judiciary, maybe for very good reasons, wasn't telling us either.

So we can glean from constitutional court cases and we have heard this morning from the Chief Justice and the previous Chief Justice and a previous Justice of the Constitutional Court, about how our model of judicial independence is an evolving one. And I think what we have to do now, is we have to get to grips with what that model is, because it's only through having a debate about what that model is that we can really then debate the text, and whether the text is correct and whether the Superior Courts Bill and the Constitution truly are correct and fit that understanding of judicial independence.
And for that reason this kind of discussion is very welcome. I was at a similar discussion, well, not really similar, with academics and members of NGOs in Cape Town yesterday. We were also trying to grapple with how we intervene in this debate, what it is we should be saying, what is the substance that we should be getting to. So it's wonderful that we're talking here and I think we have to be as public as we can be, and we have to be as critical as we can be, and really to call upon the two branches of government that are involved as much as they can, to really articulate their vision and where they're going, and also I think for the rest of us to do that.

In relation to the two Bills and judicial independence - and I'm going to really talk mainly about the Constitutional Amendment Bill and the Superior Courts Bill, I'm not going to talk about the other two because they really aren't up for discussion yet. I think I share the view that's view been expressed and really what you're seeing here is, you're seeing an attempt to draw the lines of separation of powers in the wrong place and in a way where every decision that has to be made is being made in favour of the Executive at the expense of the judiciary.

So there's an overall pattern of incursion of judicial independence. Even if one or two of them don't seem so bad, I think Justice Kriegler was talking about the problem of the erosion, the small erosion of judicial independence. And I think that's what those Bills do and I think it's what they still do, even though the Superior Court Bill is better than it was six months ago.

I think also that we have to allow our institutions to evolve and we have to trust them. At some level one feels, does government sufficiently trust the judiciary, and that's a problem. The judiciary needs to be left alone at some level, with all the relevant checks and balances, to develop. It needs to be trusted to be involved in the selection of judges, to be involved in the administration of courts, to give the right kind of orders and not be ousted from giving particular kinds of orders. All those little incursions, to me, are a sign that we have to leave it up to the judiciary to do that, the Executive should not be
just scraping away in the way that I think, stepping back from these Bills, it's what they do.

Now judicial independence I'm sure is something we all know about because we're all lawyers and we all know, we've all read the Constitutional Court judgments, we know about individual versus institutional. I think Bob Nugent's intervention was extremely useful because I absolutely agree with him that in a way, what is most at risk in these Bills as they currently are is the institution of judicial independence and the boundaries that are being drawn around that and I want to try show that a little bit. But I want to work quite specifically, I think, with the text of the Constitutional Amendment. I also want to be fair to government. I want to try and suggest what is the positive version of what I think they might be trying to do with some of these provisions.

Let me first say about the Constitutional Amendment. We've put out a discussion document by CALS and my view is that with the exception of the technical amendments, most of them are both unnecessary and unjustified. I'm not going to go into the details of the extent to which they can be challenged, but if you were just to look at whether they were needed, many of them aren't needed, and whether they were justified, many of them I think aren't because they do chip away at the institution of the judiciary and its independence in the separation of powers.

If you just clause 1 of the Amendment which really I think is trying to do three things. It's trying to establish the Chief Justice as the head; it's trying to talk about, I think, a governance issue; and then it's trying to draw this line between the Minister's role and the Chief Justice's role. I think that's what clause 1 is trying to do.

Well, firstly, I don't believe that the Chief Justice can be head of the judicial authority because judiciary authority is something that constitutionally vests in the courts and in individual judges and I don't see how one person can be head of that. To me, that undermines the idea of judicial independence. I think the Chief Justice can be head of
the judiciary and is, but maybe that's said somewhere else in the Constitution and it's probably not necessary to state it.

I think what's trying to be done with Section 1.6.5.6, read with the Bill, and I think it's a very bad thing to give meaning to the Constitution by trying to understand the detail of the Bill, to go back and understand what the Constitution is. I mean, it's certainly one reason not to have the Constitutional Amendment. But I think it's trying to establish some kind of governance role, if you like, in the judiciary around the role of the Chief Justice in establishing some kind of set and norms and standards as to how the judiciary should behave. Is that necessary in a constitution? No. Does anybody understand what it actually means? The answer is no. I've read several submissions and everybody reads this a different way. So it really doesn't make any sense to have something like that in the Constitution and it's really capable of being read in a way that really intrudes significantly on judicial independence, and we've already heard that from the previous speakers.

Section 1.6.5.7 is the one that sort of tries to draw this line between what is the role of the Minister and the Department of Justice and the rest is left to the judiciary. I think enough has been said on this and I would very much align my ideas with what has been said by previous Chief Justice Arthur Chaskalson, the Chief Justice and also Bob Nugent on this. I think part of the problem with this whole process is this point about that we don't have a model and we're not talking about a model. And if we are moving, as I think we are moving towards the Canadian/Australian type model, which is out of the idea of the courts being partly vested in the civil service, which is really in a way an apartheid model, if we are moving to a more robust model of judicial independence in the way that the Constitutional Court itself is moving, then this provision is very problematic, because it stops that progress, as Bob Nugent pointed out and it really can't go in.

But I think even if we were in the old model, which we're not, it's nevertheless
problematic because it is so broadly drafted as to really not make very clear the division between what the judiciary is responsible for and what the administration is responsible for. So I think under any model, under the old model or under the model to which we are evolving, this is not a provision that is well enough crafted to do anything other than potentially give rise to incursions of judicial independence. I do know that some people would argue that these provisions are so badly drafted that they mean nothing, so we don't really need to worry about them. But I don't align myself with that particular set of views.

So certainly I would argue that those provisions are both unnecessary, because I think, as the Chief Justice said, the idea of judicial independence that is already within our Constitution is more than capable of constitutionally accommodating an evolving model. We don't need anything else and if anything else is being put in, why? It does raise necessary or unnecessary suspicions and I think it really does impede progress and potentially take us backwards.

I'm not going to talk about the issue of the Apex Court because I don't think that's an issue of judicial independence, I think that's an issue of the structure of the courts and the role of the Supreme Court of Appeal.

Maybe before I move on to the question of suspension, which I think is another one of those chipping away problems, I want to talk a little bit about the Superior Courts Bill, but again not a lot. But maybe just to give you a sense of the evolving model that I think is in the Bill, because if what we're going to talk is what is this evolving model, then I think it's useful to try and see what the Bill is or was trying to say. Previous versions, I think Arthur Chaskalson spoke about - not the very early version though. The April version, the first de Lange version, if you like, was extremely problematic, because it sought to control, I think, in a way, every aspect of judges lives.

It very much seemed to centralise power in the person of the Chief Justice, the Chief
Justice’s office was then run by someone called an Executive Secretary that seemed to be possibly a servant of the Minister. And although people were not saying this is what would happen today, it would certainly seem that legislatively there was a possibility that the Minister, through the Executive Secretary and a hand-picked Chief Justice, could really control the judiciary. And it was an extremely problematic Bill.

The version that you have is not as bad although it probably is not what we want in terms of our evolving model of judicial independence. That doesn't mean to say it doesn't have a few good ideas. I think issues of governance and accountability of the judiciary are things that we need to be thinking about and talking about. How should the judiciary govern itself in terms of how it operates its judicial function, the kind of standards that it sets, its norms, its conduct? I don't think that should be vested in a centralised Chief Justice, I think that leads to judicial independence problems. Maybe a more collective type of management, which is envisaged in the current Bill, which I understand is the evolving model, which is heads of court coming together, consulting, making decisions.

The Bill provides for some of those decisions to be translated into written protocols and norms and standards that are then publicly available through the regulation in the Government Gazette. I don't think that's necessarily a bad kind of idea, to have much more openness around the judicial function, with due respect obviously to the necessary independence around decision-making. But I don't think the model that we have in the current Bill melds sufficiently with the kind of evolving model that the judges are beginning to talk about.

But I would certainly hope that in the debates going forward, one would think about issues of governance. Should High Courts be run as kind of individual empires? I don't mean that rudely, I can't think of a better word. Or should there be a kind of more collective set of standards that apply across all courts? And I think, to me, is a matter for debate.
The new version of the Bill also now sets up the Executive Secretary much more under the control and direction of the Chief Justice. I know some of the judges think that this whole setting up of an executive secretary's office is a kind of over administration. But I do think we have to resolve the question within the bounds of judicial independence, about how the courts are going to administer themselves. And if the judiciary is going to be taking a greater role, which I think it should be and I think we should be moving in the direction of Canada and Australia, what then is the model? I mean, is it the Australian model, where it seems the justices have more control, or is it the Canadian model where there's an independent courts administration system, that is actually running the courts, clearly accountable to the justices themselves? So we need to be thinking about how that works.

Even though the Bill has improved in relation to the Executive Secretary's relationship to the Chief Justice and that person now runs under the control and direction of the Chief Justice, that doesn't seem to be true at the levels of Court Manager, who don't - and I might have missed the provision. But don't seem to be as accountable to the Head of Court, as the Executive Secretary is to the Chief Justice. So I think that whole level of governance and management needs to be relooked at and aligned in line with our evolving model.

Under the new Bill there does seem to be a kind of ring-fencing of the budget and finance and the Department of Justice can't actually intrude. But again, we do need to have a debate about the extent to which there is control and a say in how the budgets are set up and I don't think that's sufficiently in the Superior Courts Bill. And we know that the withholding of resources in some countries has really undermined the judiciary, particularly in developing countries. And one really does want to be able to ensure that the finances that are available to the courts are protected and that the judicial leadership is having a say in those budgets.
So when you ask me which sections undermine judicial independence and which don’t, I think it’s quite a complicated answer because I think the first discussion we have to have is, what is our model? I think the current Constitutional Amendment is a problem, I think parts of the current Bill is a problem, but I don’t know how much parts of the current Bill might be a problem until I know what the model is that we’re trying to move towards. And it seems to me that maybe we need to accelerate some of those debates about the evolving model to try and get them into - maybe delay those particular parts of the legislation - but try and use this opportunity to really try and pin down that model in a Superior Courts Bill.

Okay, very quickly, two more things.

Rules: I don’t need to repeat what has been said about rules. Rule making power should be clearly be with the judiciary and not with the Minister. At the moment actually some rule making power does seem to be with the Minister. If you look at the Equality Act, for example, that makes provisions for the rules and the process of the Equality Court to be dealt with as regulations and in fact the Department of Justice was the department who actually wrote those regulations which were about process. So it seems to me that the whole idea of rules needs to go beyond just this particular Act and there needs to be an audit maybe of other Acts, to see where, if we agree that rules should be in the hands of the judiciary, to see where other Acts don’t comply with that and to bring those Acts into line.

That being said, I also think it's important that the judiciary is fully resourced and the Rules Board is fully resourced to make rules. Because, and I say this advisedly, I suspect and I'm attributing an intention here and I'm attributing the best intention I can here, but I suspect one of the reasons why government might be taking this back is because the Rules Board has not been very active over the last few years. So maybe this is a sense, the wrong sense, the sense that I think many speakers have raised, about the sense that government needs to step in and fix things up.
And I think that's wrong because by stepping in and fixing things up, if that is the intention and I really don't know if it is or isn't, you don't realise that what you're doing is you're beginning to put those pinpricks into judicial independence and you're fundamentally undermining our judiciary. So not only does rule making power have to squarely be with the judiciary but adequate resources have to be given to allow that function to happen. Because independence is as much about the letter of the law as it is about the resources and the capacity, I suppose, to act it out.

Another area that I think is very problematic and this is again the Constitutional Amendment Bill, is the suspension of commencement. Not because I think this is going to have a huge impact, because I think there are going to be very cases where there's going to be requests to suspend the commencement of an Act, if any. And it's difficult to me and certainly some people would argue that even if this were to be taken away, there are other procedures, there are urgent applications to the Constitutional Court on the day that the Act is promulgated, etc, etc, not that that's ideal.

So it's not as if there's absolutely necessarily going to be huge harm, but there's an incredibly important principle here and it's a principle of, whose job is it to be deciding on interim relief. Is it something that the Executive should taking to themselves and ousting from courts, or is it something that the courts should do? It's another example of that little pinprick into judicial independence.

And I think there are three areas where somebody might want to stop commencement. The one is in terms of Section 80 and Section 121, which is the referral by Members of Parliament or members of a provincial legislature, of an Act straight to the Constitutional Court because they it's unconstitutional. It's a very important counter-majoritarian measure in our particular democracy and it would be really wrong to take that away by a very blanket provision, to say despite anything else in the Constitution, no court can stop the commencement of an Act. I think that's very problematic and I think there's no
justification for it.

If you were seeking the commencement, the suspension as interim relief, well, although the Constitutional Court hasn't adjudicated directly on it, if you look at the UDM case and, to some extent, the National Gambling Board case, there are criteria that could be applied in determining whether you could give interim relief. And they're very, very tight criteria, but they're criterias that have paid due deference to the Legislature and the role of the Legislature in making acts and bringing them on board.

They require that it has to be in the interests of justice, it has to be absolutely necessary to avoid irreparable harm. There must be no other less intrusive measure and it needs to be a prima facie unconstitutional act. That's a very, very tight test. The Court has spoken to a large extent and it's spoken with respect, correctly. It respects the separation of powers in this particular tricky area. And it's very worrying that government sees the need to bring into being this ouster clause. It's both unnecessary, it's certainly unjustified and to me, it's just another example of the pattern.

And I think the final example of the pattern in the Constitution Bills is the question of appointments. And again, just very quickly, the Judges President and the Deputy Judges President were being chosen the Judicial Services Commission prior to the 1996 Constitution. So it wasn't necessarily a lacuna in the 1996 Constitution because it was a practice that existed prior to that and the Judicial Services Commission had the main role. And it seems to be a very important function of the Judicial Services Commission, chaired by the Chief Justice, to be helping chose the leadership and to build the institution of the judiciary. And there seems to be absolutely no justification for that to be taken away. To the contrary, I think it undermines the leadership of the judiciary and the Judicial Services Commission.

The provision on choosing acting leadership, certainly the provision on choosing acting Constitutional Court judges completely flies in the face of the certification judgment. The
Constitutional Court was asked in the certification judgment whether the appointment for acting judges including acting Constitutional Court judges was in line with the certification principles. I think it actually adjudicated on this very point. And it found that there was an appropriate balance between the Minister and the Chief Justice, between the Executive and the judiciary, in terms of making those appointments.

Because of course, government is often the respondent in Constitutional Court cases, you don't want government to be having a say in which judge is sitting in the Constitutional Court over the next six months where you're increasingly having a court that is splitting its decision, and maybe the appointment of one acting judge is actually going to be something that sways the balance. So that idea really, I think goes against what the Constitutional Court itself has said around the appointment of acting judges.

I don't think I want to go much further. As far as I understand it, the only Bill that actually is in the public domain at the moment and is open for comment is the Constitutional Amendment Bill. And I think that's the Bill to which all of our energies should be going. But I think that our energies should be going not just in a debate that says this is against the doctrine of separation of powers and the independence of the judiciary. I think it needs to also be in terms of a substantive debate of why it's wrong and what it is that we want and where we should be moving towards. Because then it becomes a constructive debate around movement forward, rather than a stand-off and I think we need to use this opportunity to be trying to move forward, rather than standing off from each other.

Thank you.

ADV SEMENYA: I'm advised that because of the time constraints that we are to handle this session a little differently. What Prof Albertyn will welcome more is for us to put all those questions down, I'll jot them down here and within the time constraints, she will respond to those questions that she's able to. If you permit me, let me field such
questions as there are. Patric?

ADV MTSHAULANA: Thank you. Professor, I would have liked you to comment on Section 4(a) which deals with two Deputy Presidents of the Supreme Court of Appeal. I just wanted to know whether in your view, it is not an unnecessary interference with the independence of that court to have a section of the court run by the second deputy in a manner that apparently the Head of the Court, if he is not on the list proposed in Section 24 of the Supreme Court Bill, may not himself have a say in how that particular section of, say, the Labour Court or Income Tax Court, whatever. I would just like to have your views on that.

ADV SEMENYA: Any more questions?

MR BUDLENDER: Steven Budlender; just a brief comment. I know Prof Albertyn said we need to have a debate about the models of judicial independence. I just wanted to briefly say, there is a model set out in Van Rooyen and De Lange vs Smuts. And I think the concern about the current Constitutional Amendment Bill is that it will actually reverse that model. Because in De Lange vs Smuts and Van Rooyen, the court made clear that a key aspect of institutional independence is not only control over judicial functions but control over administrative functions that bear directly on such judicial functions.

But as I read the new 165(6) and (7), that is reversed now; that all administrative functions will fall under the Minister whether or not they bear directly on the judicial function. And so while I think we do need to have a debate about models, I think the model that we currently have in the Constitutional Court jurisprudence is actually being reversed by the existing Bill and I think that's a matter of some concern.

ADV SEMENYA: For my part, every other time I hear there is a discord, my intuition tells me that it's either because there are no sufficient instruments to deal with that
discord or that people are not speaking to one another or they're speaking past each other. I have been trying to ascertain which of those paradigms explain this disjuncture that exists between the judiciary and the Executive around matters that are of common cause.

I mean, if we accept as a premise that the primary responsibility of the judiciary and the Executive are in the better governance of this country, and we move from a premise that it is a shared objective, I'm trying to search for any particular reasons that explains that common sense English in written submissions by judges to, what I'm told are able and gifted politicians, can result in such discord. There ought to be another explanation for it.

PROF ALBERTYN: I'll start with Steve first. Steve, I absolutely agree with you. I think what I'm saying when I talk about models, which might be the wrong word, is how do you operationalise that idea, because there are different ways of operationalising that idea. There's the kind of independent, administrative institution model, the Canadian Administrative Services model, and there are different models of pulling it more directly under the judiciary. So, ja, I suppose it's taking that forward. I think what you're saying is clearly undisputed, that there has to be that.

And I'm not sure I can answer the question on the Deputy Judge President. My prima facie view is that's not an issue. It seems of judicial independence, it seems to be more an issue of the appropriate structuring and rationalisation of the courts and where you're going to locating the Labour Court, which I think a lot of that is related. It might be better to debate that in more detail this afternoon when I think there's a special session on that.

And sorry, may I excuse myself. It's only because I'm going to give a seminar to Pretoria High Court judges that I have to leave now.
ADV SEMENYA: This is my session, thank you. I’m advised that it is now convenient to take a lunch adjournment.

LUNCH BREAK

ADV ARENDSE: Ladies and gentlemen, if we can just resume, we're now at the last session for the day, the Justice Bills and the Restructuring of the Courts. We've got a really distinguished presenter and Panel, Malcolm Wallis, SC from the Durban Bar; Judge Kate O'Regan, Justice of the Constitutional Court; Lex Mpati, the Deputy President of the Supreme Court of Appeal, and Bob Nugent, Judge of the Supreme Court of Appeal. We're really happy to have them here today to share some thoughts and some ideas on the issue of what the Apex Court should be, what it should look like and just generally on the restructuring of the courts.

Just before the Panel or Malcolm proceeds to make a presentation and then to facilitate the Panel discussion, let me just squeeze in quickly because I was late this morning, just some thoughts on the Bar, the Bench and judicial independence and I'll be brief. Much has already been said a lot more passionately, articulately than I can ever do and thus far it's really been a successful event.
A vigilant, vigorous, vibrant and independent Bar is crucial to the pursuit of a human rights culture and justice. And again, one can't do better than to quote from the late Chief Justice Mohamed when he addressed a function where Jules Browde SC, his fiftieth year at the Jo'burg Bar was celebrated and the late Chief Justice spoke at that function and this is what he had to say about the Bar:

"The Bar has in a very fundamental sense been the engine room of Justice with its capacity to afford those gripped by conflict, the opportunity of resolving such conflict through rational adjudication before an independent judiciary. And with its ability to articulate fearlessly, the legitimate aims of the disempowered and the inarticulate, in free and visible forensic combat against equals. To define, protect and nurture the basic jurisprudential values which mediate the harshness of so many lives, to bring hope, optimism and energy to the frustrated and the angry, to maximise the opportunities for professional fulfilment and emotional ennoblement by young advocates seeking to give shape and focus to their lives through the Law and fundamentally to give the nascent civilisation which they inherit, its most defensible and sustainable vision.

The Bar has a special potential to pursue that vision effectively through the best of its professional traditions; its vast but often submerged potential for healthy idealism; its manifest capacity for rational thought and logical analysis; its rigorous standards of discipline and industry and its continuing generation of the intellectual energy which must accelerate and sustain the pursuit of competitive excellence amongst its members."

It is crucial for the country that the Bar should succeed in the realisation of this rich
potential. Its success in doing so will bring not only fulfilment and meaning to new generations of young men and women attracted by the eternal fascination of the Law, it will accelerate also the process of healing the deep wounds inflicted by the pain and the shame of our racist past. It will discipline and accelerate the crucial process of transformation domestically within the Bar itself, to reverse the grossly unacceptable racial and gender distortion within its own membership at all levels. And externally, to restore for the law, its legitimacy, relevance and living creativity in a constitutionally protected democracy enforceable before independent courts of integrity and scholarship. The Bar must remain a crucial source for recruitment to such a Bench.

The new Constitution ushered in momentous times for all of us. For the Bar it is a time for the rediscovery of its potential greatness; a time for renewal and cohesion; a time for strong leadership with a face which is optimistic and a tempo which is positive. It is not a time for dissipation and fragmentation or a time for despair, pessimism or retreat.

So today's proceedings, ladies and gentlemen, friends, colleagues, Judges, is a step in that direction. The Bar cannot remain quiet or silent in the face of what is perceived generally and what has come out strongly thus far today, is an attack on the independence of the judiciary. So I'm very happy to be part of these proceedings. I'm very happy that you've made time to attend.

Thank you very much.
Thank you, Norman. What I'd like to do in this presentation is just run briefly over the current situation where certain problems have arisen and identify those problems and to look at the proposals in the Justice Bills in regard to restructuring and primarily with a view to generating some debate and discussion, to asking some questions which I think need to be asked and answered in this process.

The Constitution vests judicial authority which may well be something different from this new aberration, the judicial authority, in the courts and it does so based on a twin peaks approach. The Constitutional Court is the highest court in all constitutional matters and the Supreme Court of Appeal is the final court of appeal in all other matters. Below that, the pre-constitutional hierarchy of the Supreme Court - renamed the High Court - and the Magistrates Courts has continued to operate and is preserved by the Constitution.

Since 1994, we've also seen three attempts to create specialist courts in the fields of Labour, Land Claims and Competition Law and of these, only the Labour Courts were designed to stand completely outside the rest of the judicial system; a design which as we know has failed. There has been relatively little interaction between the Land Claims Court and the ordinary court system, probably because the point of contact is at the SCA level and little has gone from the one to the other.

The Competition Appeal Court is a strange creature. It's an unhappy amalgam of a Court of First Instance and an Appellate Tribunal. It's Bench is drawn from the ranks of ordinary judges not with any specialist qualification beyond some interest in that type of work, and an appeal to the SCA lies from its decisions. One is tempted in those circumstances to paraphrase what A P Herbert said about the Court of Appeal in England and ask, why the Competition Appeal Court?
The level of confusion over its functions is perhaps best illustrated by an article that appeared last week in the Business Report written by Ann Crotty who is the journalist who I think has spent most time thinking about and writing about Competition issues, and in her article she bemoaned the fact that the Competition Appeal Court decides its cases on the basis of the legal arguments of the lawyers appearing before it. Oh, that all our courts would do that!

Perhaps predictably and there have been a number of 'we told you so' remarks, the system has proved, shall we say not perfect or perhaps flawed. At the Apex level, the dividing line of a constitutional matter has proved to be a completely permeable barrier through which the Constitutional Court is free to walk as it chooses because it decides what is a constitutional matter.

Even more troubling, and we touch here on sensitive ground, is the very widespread perception that there is an underlying conflict between the two institutions, with the SCA being perceived widely as the lawyers' court and the Constitutional Court as the equitable court. And this is fuelled by the marked differences of approach one sees in the judgments in cases such as Carmichele, Laugh it Off, K vs the Ministry of Safety and Security and the Pharmaceutical case.

At other levels there are significant problems in the court system. Notwithstanding its statutory aspirations as a court equivalent to the High Court, the Labour Court has completely failed to attract a stable body of judges. It is operating on a wholly unsatisfactory basis of a roster of acting judges who shuttle back and forth between practice and the Bench, between Bench and Bar. That was a practice which was condemned in relation to the old Industrial Court and outlawed by the GCB by a resolution of its Council but it's how the Labour Court is now operating. And it operates that way because it is the only way in which the Labour Court can keep going.
The LAC is in a similar plight. Judges President are reluctant to release judges to sit in that court and it suffers from a constant rotation of membership and in consequence, a relatively incoherent jurisprudence. The aim of a quick and inexpensive resolution of labour disputes has been defeated by a combination of a generous, I would say, overly generous approach to judicial review and the overlay now of two, three or in some cases, four courts between the original dispute resolution process and the CCMA and the Constitutional Court.

Commitment to fixing those problems is desirable. There are other problems we'll touch on in a moment. But it can only be achieved, I believe, if the underlying problems are properly analysed and the mechanisms of change are addressed to ensure that we not only resolve existing issues but we don't in the process of reform, create further even more intractable problems.

So let's start at the top and look at this process of reform. Proposed amendment to Section 167 of the Constitution starts by identifying the Constitutional Court as the highest court but leaves it as the Constitutional Court which is a misnomer in those circumstances, but then it falters. It continues to be the highest court in constitutional matters and that is specifically defined, and it becomes the highest court in any other matter if it decides, in the interests of justice, to grant leave to appeal. Otherwise the proposed Section 1683 says that the SCA is the final Court of Appeal if the Constitutional Court refuses leave to appeal, and presumably if nobody bothers to ask the Constitutional Court, but so be it.

Earlier, I referred to twin peaks. This re-arrangement reminds me of Hugh Grant's film, "The man who went up a hill and came down a mountain". There's an adjustment of height but there is no clarity to the resultant situation. It may be very little different from the current situation, it all depends upon how a court, the Constitutional Court decides in due course to exercise its powers to grant leave to appeal. And to make your Constitution subject to that sort of issue seems to me a singularly unclear and debatable
When will the interests of justice cause the Constitutional Court to consider contractual cases, admiralty, insurance policies, copyright, liability for pure economic loss and delict, company law, insolvency? These are the staple diet of the SCA. How are we to know, how are the parties whose disputes are there for courts to resolve, to know which are deserving of the attention of the Constitutional Court? It seems that there is a problem with the constitutional jurisdiction being dependent on the vagaries of leave to appeal. More to the point, this uncertainty, for me, points to a failure to address a wide range of practical and capacity issues of which I would just like briefly to identify two.

The first is that by leaving the existing constitutional matters jurisdiction in place, there's no consideration of why it is that every constitutional challenge to the validity of legislation and certain governmental acts, however minor they may be, however much the Minister or MEC may say, yes, I accept that that's unconstitutional, we'll try and fix it, every single one of those cases still has to receive the attention of the Constitutional Court, whilst the broad sweep of legal issues are left in a realm of uncertainty to a constitutional assessment of the impact of the interests of justice. That is vague and it is a very unsatisfactory standard.

What is certain from a practical point of view is that it is going to impose enormous burdens on the resources of the Constitutional Court in dealing with applications for leave to appeal and there is no indication of how these are to be addressed. And if there is one thing I can say from my thirty-odd years in the law it is this: that dissatisfied litigants, in other words, those who lose, will want to explore every possible route of appeal that is available to them.

My other obvious concern and I think it's an obvious concern and I want to say this with caution as a member of the Bar because I've got in hot water before over saying things which involve judges, but I don't say this with any sense of disrespect but I believe that
we cannot afford not to be honest when discussing issues of this moment. And that concern is that because of the focus of the Constitutional Court and the SCA has been such a different focus hitherto, the basis of selecting judges for the two courts has also been fundamentally different.

The perception has been that they require different skills and I think if one looks at the proceedings in the Judicial Service Commission, that is demonstrated. The paths to the two courts have generally been very different. There is one member of the Constitutional Court who has had a short spell as an acting judge in the SCA and there's one member of the SCA who's had a somewhat longer spell acting in the Constitutional Court, otherwise virtually no overlap.

If the highest court in all matters is now to be the Constitutional Court, does that not require a reconsideration of its composition? I mentioned earlier contract, admiralty, insurance, copyright, pure economic loss, company law and insolvency. We need to ask, and perhaps this calls for a substantial amount of judicial soul-searching and honesty, whether the appropriate balance of expertise, experience and skill is located in what is to be our highest court.

A fundamentally important aspect of South Africa’s current economic success, the willingness of foreigners to trade with us to invest in this country, all things which are absolutely essential to the economic transformation which must lie at the heart of an ultimately successful South Africa for all its people, is a legal system that is independent, that is accessible, that is reliable and that is predictable, and that is able to cope with the demands placed upon it.

In a process of restructuring, we dare not risk leaving unanswered and unaddressed questions which may put question marks over the standing of the judiciary and result potentially in a loss of faith in our courts. That would be an enormous blow to this country.
Turning to the next consequential change, the change to the SCA. It is very difficult to see from the Constitution 14th Amendment Bill when read with the current draft of the Superior Courts Bill, what future role is envisaged for the SCA. Its status and standing we know is to be diminished because its view is not final on anything. It is apparently to acquire the entire jurisdiction and case load of the Labour Appeal Court and resort is had to the rather clumsy expedient of a second Deputy President to assist with labour matters, a process of certifying judges to sit in labour appeals who must be a majority and there is even to be a separate role for labour cases.

This is a most unhappy amalgam. Either there is a case for separate Labour Courts and we make that case and we ensure that they can operate and we’ve tried it, it hasn't worked; or, we make the Labour Courts part of the general system. This one thing, something that is neither fish nor fowl is not a recipe for success. It looks like a rather awkward Siamese twin being attached to the SCA. Is it necessary, is it appropriate? At least five of the existing judges in the SCA have extensive experience in labour matters. Is there a real need for them to be ticketed as labour judges with the inevitable sense of division and separateness that that involves? Non-labour judges may still on this basis, have a decisive impact on the result of labour cases.

Other questions must be posed even if we don't have the time now to suggest answers. What is the impact of this going to be on a court, the SCA, which is already hugely burdened with an enormous workload? Are all the cases currently heard in the LAC really deserving of the SCA with all the expense and difficulties that that would occasion? Will this expedite or delay the disposition of labour cases? Those are the questions I don't sense an answer to.

When one moves to the level of the High Courts, these issues in regard to labour matters become magnified. You’ve got labour judges who are ticketed to deal with cases but they have an entirely different jurisdiction to the general jurisdiction of the
courts. And the lack of thought seems to me illustrated by the rather perfunctory way in which this is dealt with, or the amendment to the LRA and the Basic Conditions of Employment Act is dealt with in Schedule 4 of the Superior Courts Bill which simply says that the Labour Appeal Court means the SCA and the Labour Court means any general division of the High Court.

There is no endeavour to address the structure of the two Acts in question to see whether that works or whether it doesn't. And there is no attempt whatsoever to try and find the true reasons for the failure of the Labour Court and the LAC and indeed the LRA generally, to achieve in the words of the task team who drafted the LRA - this is close to my heart because I was involved in the process - dispute resolution processes that are cheap, accessible, quick and informal.

Moving on to other things, the High Courts are now to consist of General and Special Divisions. Competition Appeal Special Division is based in Cape Town, not clear why, its cases originate from the Competition Tribunal which sits in Johannesburg, by and large, and most of the work comes from Johannesburg. The need for this as a Special Court, bearing in mind its functions and the composition is questionable, and once again, there's no indication that there's been a conceptual re-examination of its purpose and role in a rationalised court structure. If rationalisation is to be meaningful, it surely means that the system is simplified and made more accessible, not merely that a random set of courts is agglomerated together, given new names and told to get on with it.

Legally and practically, the two will remain distinct and that is a problem we already have had many years of experience with. Because it is what happened with our admiralty jurisdiction until 1983 with the overlap and the very considerable confusion between the Supreme Court and the parochial jurisdiction and the old colonial Courts of Admiralty and the jurisdiction derived from English Admiralty Law. We solved that in 1983; I would hate to see a repetition in other fields.
The same attachment process applies to the Land Claims Special Division and curiously, the Electoral Matters Special Division which sits very rarely. Then there's the new creation of the Income Tax Special Division. Whilst anything that would improve the disposition or a disposal of income tax appeals more quickly is highly to be desired. One really fails to see how this Special Division is going to do so. Nowhere is it spelt out how these Special Divisions and the General Divisions are to interact with one another. The judges of the Special Divisions are to be drawn from the General Divisions. It appears they will continue to be members of those courts as well so that the present problems of the LAC, the Competition Appeal Court, the Income Tax Courts, in getting judges away from routine duties looks set to continue. And how a Judge President sitting somewhere that's not identified is to co-ordinate this in a court that has ten seats, is unclear.

Would it not perhaps to be more appropriate for all cases to be dealt with in each province by one Judge President who can most appropriately juggle existing judicial resources and allocate judges to general labour, competition, tax and land claims cases, as is appropriate and needful? Would this not better serve the goal of transformation? Would it not extend the range of experience of judges whose previous practical background has been limited? Do we need an extra four divisions of the High Court to add to the fifteen General Divisions once you count the local seats that are contemplated by the Act?

Would we not attract a broader range of candidates to the Bench if they were aware that the full range of judicial work would be available to them and not subject to special designation by the President; a process which might possibly be thought to have some political overtones? Is this system truly a rationalisation or does it represent additional bureaucracy rendering access to justice more difficult, more opaque and more expensive?

It seems to me these are the questions that need to be asked and the answers don't
readily emerge from the Bills. I am reminded of the plastic aeroplane kits that my parents occasionally gave me for Christmas and birthday presents. To my un-technical eyes and my clumsy fingers, this became a process of assembly which involved much smearing of glue on little bits of plastic, and they were attached together somehow or other. At the end of the day, it bore a resemblance to an aeroplane. You could see wings and a fuselage and perhaps a couple of propellers, but it never flew. That's my concern.

Thank you.

ADV ARENDSE: Thanks, Malcolm. Can I just interpose, just before you get the Panel discussion going, the Director General is here, Menzi Simelane. He'd like to say a few words. I'm not sure, it may or may not impact on the Panel discussion. Menzi?
Thank you very much, Mr Chairperson. I thought that I should make an input of a general kind really, and try at the same time to clarify quite a number of things that have come up. I won't necessarily deal with each and every item but I'm hoping that from that input you'll get an appreciation of what we're trying to do.

First, I must say that I think the inputs that we certainly have heard - well, firstly, we came here with an idea to really just take note and take lessons in what is being said and go and reflect on them, but I think after listening to the debates a lot in the morning, I felt that it would assist if we are able to share with you our thinking, obviously whether you agree with it or not is not too much of an issue, but it's important that you're aware so that when you do make input, either individually or as a group, you are able to have reflection on what we would have said.

The first thing is that I think the Bills being where they are, are still open for further change, depending on the inputs that one receives, I think we know the Parliamentary process will cover that. So they're not necessarily cast in stone. It was never the intention to communicate that view, I think everybody knows that, so that can still be changed. But what is reflected in those Bills is what we at this point in time, as the department and as the Executive believe is a reflection of the policy direction that we are taking.

From our perspective, again it is an approach that we believe, contrary to what some of the input we've heard does or says, that will give further expression to the separation of powers and I'll get into that a little bit.

There are a couple of things that maybe I should say. Firstly, I think Justice Nugent's inputs is quite refreshing because it's something different that we should consider and
as a caution which I understood the comments to be, it's worthy of consideration because, you know, we wouldn't want necessarily to entrench that which otherwise we shouldn't really entrench. So it's something to reflect upon and it will be useful to see if that particular discussion can be developed further so that it is considered.

Similarly with the model that Cathi Albertyn raised. On the question of - let me first start with the process, because clearly from the inputs, almost all of you without exception have no idea what basically happened. What happened after the Colloquium, there were two task teams set. The Minister had her own task team, the Chief Justice had his own task team and we met a couple of times to reflect on these provisions, a couple of times. I think the sentiment was very much then the same now, there was extreme dissatisfaction about quite a lot of the provisions and quite a number of them, but there was some appreciation and agreement, although not fully, on some of the provisions.

And what you see reflected and gazetted in December is what we believe, in some respects, reflects that on which at least there was general satisfaction, although not absolutely, and in some respects clearly those areas where there's complete disagreement. That's why you would have seen in the other Mail & Guardian article where I said we agree to disagree in some respects. So I'm not going to say to you we disagreed on everything or that we agreed on everything. In some areas there was some element of agreement, because we explained what exactly we are trying to do, and I'll give some examples.

You know, on Section 165, (6) and (7), the original formulation that you saw in the Colloquium obviously we did away with, but the idea there was to really draw this distinction between administrative functions and judicial functions. You'll recall that there was a Bill, I think, the Colloquium version which even had definitions of what judicial functions were, and that was the extent to which we we're trying to draw this particular distinction. The judiciary told us to remove the definitions because it was said the Bill is over-elaborate. We removed those definitions. And strangely enough, some of the
inputs that we've received, including from a JP, is that we put a definition of judicial function, obviously which we're considering right now.

So we're trying to draw that distinction and 165(6) in trying to draw this specific distinction - and you'll tell me when to stop, Chair, because I'm really trying to make you aware of some of these things and I'm going into a bit of detail - 165(6) said the Chief Justice is the Head of the judiciary and exercises final responsibility over judicial functions of all courts. That was the original formulation. The second formulation remained largely the same, although there may have been some changes to it.

And in the discussion, the task teams were told in no uncertain terms that you can't have it formulated in that way. So we said, well, really what we're trying to achieve is an environment where there are norms and standards in the judiciary. So how can we reflect that and give that expression in the legislation? We were told that it's unnecessary; we argued that we think it is necessary, we'd like to have it in there, but help us with the formulation that will give expression to that. And that formulation is what you see today. So, that's the extent to which we went on these things.

On the administration of courts, we argue quite strongly that that is the responsibility of the Executive. Staff, people that work in the courts other than judicial officers, are civil servants, they're accountable to, you know, to the Executive and as the Accounting Officer in the Department, I'm responsible for what they do, you know, from a disciplinary perspective, to carrying out their proper functions, to make sure that they give an effective service. So our approach therefore is that the administration of the courts vests in the Executive member responsible for the administration of justice.

Where does the part in the formulation that says "and budgets"? There was a debate again that said we are responsible for the budget of the judiciary, we said, no we are not responsible for the budget. We know obviously that the budget is important for the running of the courts but you are not responsible for it. We will provide, as the
Executive, the budget that should enable everybody to function properly, but we are responsible for it as accounting officer, in terms of the PFMA, I account for that expenditure. And that's what we're trying to give expression to in that particular formulation, that's why we insist that to the extent therefore that it is not clear, we want to add "and budgets for all courts".

The formulation was: The Cabinet Member responsible for the administration of justice, exercises final responsibility for the administration of all courts. Then there was a debate about whether or not it's final or not. We said, fine, we'll take away "final", if you want to say it's not final, that there's some level of administration that the Head of Court is involved in. So we took away "final". But that was the expression that we sought to give effect to.

Now, why is that important? That is important for the Executive in the sense that it's a policy issue insofar as it reflects the model that we believe South Africa takes. Whether it's a perfect Commonwealth model or not, I think that's another issue. But the fact of the matter is that that is the model that has been decided upon from a policy perspective by government.

What I think part of the debate goes to as far as the example of the Constitutional Court is being made, you must remember that the Constitutional Court Complementary Act was supposed to be really a transitional thing because the Constitutional Court came much later with obviously the interim and the final Constitution accordingly and the idea, as I understand it, is that we are trying to make sure that the idea of a Constitutional Court is not in any way - it doesn't fall between the cracks, but the idea was to just make sure that what we wanted as a Constitutional Court and the way it should function is reflected properly and doesn't fall between the cracks. That's what you have there.

The question I think that we see from the debate is whether or not that model should then be extended to the rest of the courts because currently the Chief Justice prepares
the budgets for the Constitutional Court, submit it to the Minister to obviously take to Parliament. Right now I'm sitting with the budget of the Constitutional Court as submitted.

Now, what I hear and what is sought to be proposed, as I understand it, if I understand it correctly, is that we're supposed to take the budget proposal, take it to Parliament and either on its own, I'm not sure whether we submit it as a separate thing or whether we should include it in the overall budget of the court, but then make it available to the Constitutional Court to administer. The Constitutional Court has a manager who was appointed with the agreement of the Chief Justice. That's not too much of a problem, that was done.

The question is, who is that manager accountable to? Because that person currently accounts for that expenditure. If there's an irregularity in any expenditure, who is he supposed to account to? Is it the DG as the accounting officer, do I call him and ask him that, or does the Chief Justice deal with it? If there's an audit to be done by the Auditor-General, who does the Auditor-General engage to explain expenditure and otherwise? Is it the DG as accounting officer of the department or is it the Chief Justice, because that's the budget of the Constitutional Court? These are issues that I think are being overlooked.

So when we say that currently what is happening in the Constitutional Court, that I account for their budget, I don't know how they spend it, but I have to account for it and I'm not sure that is appropriate. But so far it hasn't presented any problems, because I think it's quite well managed, that particular budget.

If there's a labour dispute, who do staff in the Constitutional Court go to, to resolve labour disputes? If they want to go to the CCMA, who do they deal with? Do they deal with the department or do they deal with Constitutional Court? So those are some of the practical issues that I think should be taken into account in this whole debate around
this thing because it goes into the system of governance. If we therefore say that the
budgets of all courts and administration should vest in the judiciary, what we're actually
saying is that the Chief Justice as the Head of the judiciary should take accountability
for the whole administration of the court, from a staffing perspective to the budget. Is
that what is being suggested? Because if it is, then let's hear it so that we can interact.

The way we understood it, is that that is not the case. If the Executive took responsibility
for that, the Executive would account. If you say that it should be the Chief Justice, are
we saying that the Chief Justice should then engage with the Auditor-General on that
type of expenditure? Should the budgets go to Parliament through the Minister, in other
words, the Minister should be the post-box for sending the budgets to Parliament, or
should the judiciary submit it directly to Treasury and engage with Treasury and
Parliament in that particular fashion?

So I think some of these issues need to be taken into account because they do have a
bearing. But what we are trying to express is the current formulation is a separation
between the two because we believe that judicial officers should really go to court, deal
with issues judicial, but in an environment that is conducive for carrying out those
functions and we take responsibility for ensuring that the environment is there.

I'm not sure if Justice Kriegler is here because I wanted to deal with the issue of - oh,
he's still here - so that I can explain it. I don't want to get into maybe the exact details
but it's a clear illustration where you get an account from a service provider that says:
Justice, you owe me 1.5 million, for argument sake, and we say: we don't owe you, we
never contracted you. You say, oh no, you did, this particular judge and we all know
now it's Justice Combrink because he came in the press, Justice Combrink said I should
fix this. We say: no, no, no, Justice Combrink has nothing to do with fixing air-
conditioners so we don't know how we could have contracted you. He says, no, well he
did, and here's proof. We say: well then, who accounts for that type of thing, you know,
because what was supposed to be fixed, Public Works was in the process of fixing.
I can appreciate ... (interjection) - I can appreciate - no, I can appreciate the fact that, no, no, no, I think we should separate issues. I can appreciate the fact that a particular judicial officer may have been particularly frustrated to say, look, these windows have been broken for six months, for a year, you know, but does it mean … (talking together)

ADV ARENDSE: Can we give the speaker a chance. Menzi, it would have been great if you could have indicated at the outset, you would gladly have been given a slot.

ADV SIMELANE: Okay, no it's fine, look, I'll stop. All I'm trying to give is an indication of some of the practical challenges that the comments and the debates are leading to and these are things that are being reflected upon by the Executive right now, to say, are we getting an argument that says we want the judicial to be completely independent, because if that is the case, for example, complete independence, a la American system, because if that is the case, the Executive would want to engage that debate to say, well, is this what we've chosen. Because there's issues of the PFMA, it has implications for the DPSA, so that it becomes a broader government debate. We've highlighted it to say it may very well be the sentiment.

So we haven't expressed a specific view, but the view that has been chosen so far which is reflected now is that it is not the American system that has been chosen. So we've chosen this model that we see, whether or not it's a perfect Commonwealth model or not is something else. But if the sentiment is that we need to move that route, then let it come out in the open, let's not speak in tongues, let's just be clear that this is what we want and the Executive will have to make that decision whether they want to do it that way or not. And then you can do away with the Minister of Justice and just have an Attorney-General. I mean, I think you know the drift that I'm talking about. So all I'm saying is that we've reflected on those types of issues, just using that as an example. So whether or not then this is an acceptable thing, I think that's something else.
Then on the other issues, I think we've noted the debate about the appropriateness, that provision of "no comments", I think nobody is opposed to deleting some of those things that are problematic, but what we are saying is that if there's a level of this type, whether it's that type of engagement, then it can be constructive. Because right now what is happening, we don't know the extent to which the views that we've been given in the task team reflect the full views of the whole judiciary or whether it's a few. But we take it for granted that everybody's on board.

So it's quite surprising then that at some point in time, some that have spoken and are not aware of some of this debate because we did have, we definitely did have them and gave those examples. In fact, some members of the judiciary have said, you are quite right, we don't want the administration of courts, that's not what we were trained to do, that's not the competency that is tested in the interviews, so we don't want to do it. But what we want is that if we want to do research, the computers must be working. If we want to work in court, everything must be in functioning order; which we agree with, that's why we've created posts of court manager for each and every single court, to say, the functions of the managers is to make sure that all the things are there; but absolutely nothing to do with judicial functions.

So we are playing around in that terrain and that's what we're hoping to do. The interaction between a Court Manager and the Head of Court will be a responsible one, that we don't believe necessarily has to be legislated for. Surely the Head of Court should be able to say to the Court Manager, I need to see the following things in court and that Court Manager would have to take that into account because it's part of creating an environment conducive for the proper functioning of that particular court. So managers would take care that these things need to be fixed and so forth.

So to the extent that there may have been an inefficiency or there is an inefficiency somewhere within government, we don't believe that necessarily justifies a complete
change in the system. You strengthen the system by making sure that the issues of the type, the inefficient type that have been given as an example are corrected, and that's where we are moving to. We may not be there right now but clearly that is, as Cathi Albertyn said, what is the vision. That is the vision, that's what all these Court Managers are doing.

So I just thought that I should explain this because I think there's some misunderstanding and I think people may also not necessarily have been properly briefed about what we are trying to do. So there's a lot more and I suppose next time, I'll give the type of opportunity because I think, you know, some of the inputs leave a lot to be desired at this level, at least. Thank you very much.

ADV WALLIS: Thank you very much, Menzi, we appreciate it. I think what we are discussing in this portion is problems which go beyond that range between the administrative and the judicial, the overall restructuring and its impact and the potential difficulties and trying to pose questions, which we hope government will take on board, have these issues really been fully and properly considered? And what I would like to do is, I'm ask to ask each of our three panellists to make a short few remarks and then let's open the matter for discussion and could we start with the Deputy President of the Supreme Court of Appeal, Lex Mpati.
Thank you, Malcolm. I realised today that it was a disadvantage not to be part of the structure that drafted our Interim Constitution and later the Final Constitution, because I hear for the first time today that the Constitutional set-up providing for the Supreme Court of Appeal and the Constitutional Court to be the two highest courts, has always been an interim arrangement.

Of course, having thought that that was never the idea from the beginning, one has developed the view that it might be desirable for there to be one Apex Court in South Africa. But with regard to the extension of the jurisdiction of the Constitutional Court, I'm going to leave that to my colleague, Bob Nugent, to give you the views of the Supreme Court of Appeal.

There was a question that was asked earlier regarding another constitutional amendment dealing with the position of the Second Deputy at the Supreme Court of Appeal. That amendment is going to be under Section 168 of the Constitution and it creates a position of the Second Deputy of the Supreme Court of Appeal. We all know how that comes about. It is because the idea is to do away with the Labour Appeal Court because of the problems that it has experienced. We all know that the Labour Appeal Court has experienced those problems, we would like to solve them, certainly, and if they are to be solved by the Labour Appeal Court becoming part of the Supreme Court of Appeal, then so be it. But the question is, is there a necessity for the position of a Second Deputy that is being envisaged by the Constitutional Amendment?

To answer that question then, I think I can do no better than to read to you a memo that was sent to the Chief Justice after we had had sight of a memorandum that was drawn up by the judges of the Labour Appeal Court and Labour Court regarding the position of the Second Deputy, and this is how the memo reads, it's a short memo:
"The Supreme Court of Appeal has no fixed or unanimous view on whether it is preferable for labour appeals to be heard by a special Appeal Court, which is the present position or whether they should be heard by the SCA. However, its unanimous and consistently held view is that if the SCA is to assume the jurisdiction of the labour appeals that is at present exercised by the Labour Appeal Court then such appeals should be dealt with by the SCA in the ordinary course and they should not be accommodated within a special chamber of the SCA, nor should they be heard by only some judges of the SCA.

A further post of Deputy President of the SCA should not be created. The present posts of President and one Deputy President are more than sufficient to deal with the work of the SCA and there is no need for a further Deputy President. The proposed creation of an unnecessary post suggests that the purpose of doing so is to accommodate the interests of the current Judge President of the Labour and Labour Appeal Courts when those courts are abolished.

Never in the history of the courts in this country has a supernumerary post been created by statute to accommodate the interests of an individual. The SCA is of the view that to do so is unacceptable and that a sole criterion for the creation of judicial posts should be the institutional requirements of the courts."

Now before the Amendment to the Superior Court Bill, the President of our Court and I went to the Portfolio Committee one or two years ago which was at that time still headed by the now Deputy Minister. We argued that position that it is not necessary for the Supreme Court of Appeal to have a Second Deputy and we suggested, because we saw that the Portfolio Committee was not really interested in what we were saying, that if it is to be so that a Second Deputy should be appointed, then there should be clarity with regard to the seniority between the two deputies.
The answer that we got from the Chairperson of the Portfolio Committee at the time, with regard to the position of Second Deputy was that Labour has had gains over the years and they are not now going to want to lose those gains. I don't know whether the gains of Labour are assured by the creation of the position of Second Deputy, but that is the position.

But what did happen was that it was then provided for that one of the deputies will be senior. Then the judges of the Labour Appeal Court and Labour Court drafted the memorandum that I talked about which culminated in our response that I've just read to you, where, to my mind, some ridiculous positions were argued, one of them being that there shouldn't be a provision with regard to seniority, seniority should only be with regard to who was appointed first. But as to the functions of the two deputies, it is discriminatory to say, for instance, that one is a Deputy: Labour.

And that memorandum culminated in what I consider to be the present position in the Bill. And it says, the proposed Section 5(2):

"(a) A Deputy President of the Supreme Court of Appeal must exercise such powers or perform such functions of the President of the Supreme Court of Appeal in terms of this and any other law as he or she may assign to him or her, and

(b) in the absence of the President of the Supreme Court of Appeal or if the Office of the President of the Supreme Court of Appeal is vacant, a Deputy President of the Supreme Court of Appeal, designated by the President, perform the functions of the President of the Supreme Court of Appeal as Acting President of the Supreme Court of Appeal.

(c) The President, after consultation with the Chief Justice and the Minister, must designate one of the Deputy Presidents of the Supreme Court of
Appeal as being mainly responsible for assisting the President of the Supreme Court of Appeal with managing appeals in regard to labour matters."

So much for discrimination, because the other Deputy Judge President is going to have nothing to do with assisting the President with regard to labour matters.

But there was a further suggestion that was absolutely ridiculous, in my view, and that was that, if for instance - and I think that is still the view of the judges of Labour Appeal Court and Labour Court, if the two Deputy Presidents are sitting together in a labour matter, then the Deputy: Labour should preside. If they sit in any other matter, of course, it will be the other Deputy who presides. Now, I've never heard of that before and with regard to protocol, if you will, in court there is certainty on the issue of seniority amongst judges. I mean, if the JP is not there, the next senior judge knows that it is he or she who bears the responsibility of taking over the functions of the Judge President.

In this instant or envisaged position, if the President of the Supreme Court of Appeal is absent or something unexpected were to happen to him, none of the two deputies will be able to take over the president’s functions, because he or she will not have been designated by the President – of the country - to take over those functions. We will have to wait for the Chief Justice to liaise with the Minister and then come back and say, okay, this one of the two of you has been designated to take over the functions of the President.

And I think I have said quite a bit and I will hand over to the next one. Thank you.

ADV WALLIS: Can I swap courts, jump between the speakers and ask Kate O'Regan to say a few things.
Yes, certainly, thank you. I just wanted to start with a couple of preliminary remarks, the first was to say that I did say to Brian Spilg when he asked me to speak today, that I didn't want to speak on issues relating to the independence of the judiciary and I didn't come this morning, just in case you didn't notice, I wasn't here because for very obvious reasons I don't want to speak on those issues.

Secondly, I would like say that I speak on my own accord, I'm not speaking on behalf of the Constitutional Court, I'm saying what I think. I only really want to talk about the issues around an Apex Court and I think it's useful to start with realising and perhaps we, on the Constitutional Court more than anybody else in the judicial system know how hard institutional change is, how difficult it is to create new institutions, how difficult it is to create new judicial institutions in an existing and functioning judiciary. And I think one needs to bear that in mind when we focus on this debate.

Secondly, in my own view, I think we should be careful with institutional design that we don't base it either on existing personalities or existing sensibilities. We should, as far as we can, try to look at the system and see what will work. But on the other hand, because of the difficulties of institutional reform we can't pretend we're in a kind of green field situation. You have got a set of cultures and institutions that are there and one has got to be realistic about how those will impact on any change that you introduce.

So the thing I really want to make a few remarks about is the issue of the desirability of an Apex Court with a general jurisdiction and I think it's important here to split two issues. The first is whether it is desirable to have an Apex Court with a general jurisdiction at all, and the second would be, what that institution should be, what the timing of the creation of that institution should be and the processes to reach that
institution.

Answering the first question, whether it's desirable we should have it at all, I start, I'm afraid in a rather dull Constitutional Court fashion with the terms of the Constitution. It is our Constitution that must answer this question most informatively and I think we need to realise that there are certain very specific characteristics about our Constitution which are not common to many other jurisdictions and which I think have a determinative impact, not only on our legal system and our broader socio-political reality, but in particular, on what the structure of our courts should look like.

Our Constitution is expressly normative. It's not a Constitution which seeks to add something on the end of a legal system, it is a Constitution which asserts that it is indeed the foundation of our legal system. And I'm not going to refer you to provisions, but any reading of the Constitution makes it quite plain. You could start with the transitional provisions if you want, there is no law that is a law unless it effectively has been created and sustained on the basis of our Constitution. The foundational values of our Constitution are the very first provision.

I don't think it was clear to all of us and I think this is something else we need to be candid about, the process of constitutional change in South Africa is not something that those of us who sat down in 1994 or 1996 when the '96 Constitution came into force, could immediately understand what its implications are. It is inevitably a human process, a work in progress and I think it has now become clear to us that ... (unclear) a Constitution which has foundational values which has to inform a legal system is a very different thing to tagging a Bill of Rights onto the end of a legal system. It has real implications for way in which we go about doing law.

Now, as lawyers we're generally pretty resistant to change. It's not the character of our profession and I think we have all found it to a greater or lesser extent a very difficult thing, to try to exactly determine how far those foundational values of the Constitution
are going to impact on our legal system and I would venture to say that we've probably got another 25 to 30 years to really be able to answer that question with any certainty. But I think the one thing that we can answer is that it is deeply unhelpful to have foundation in many lawyers minds the idea that the Constitution is something that somebody else does, preferably not them and they don't have to worry about it because they're thinking about some area of law which they don't immediate think has got anything to do with the Bill of Rights.

I think it is something which will weaken not only our legal system but our entire Constitutional order and for that reason, that fundamentally normative aspect of our Constitution and the way in which, right throughout our legal system we have space or one might call it normative gaps which effectively have to be interpreted in the eyes of the Constitution, it's unhelpful to pretend that the Constitution is something that may not affect certain areas of the law.

The reality of having a split, a two-peak system, in my view, has created a great difficulty in making sure that the Constitution really roots itself in our broader legal system and I think that therefore, in my view, it is desirable and in this I agree entirely with Carol Lewis in her Schreiner Memorial lecture, that actually we do need to have an Apex Court, not only because of the fact that we'd have an Apex Court, but because it will become clear, right down the legal system, that actually the business of doing the Constitution is the business of doing law all the time.

It doesn't mean, in my view, that one can't say that some matters have got a particular constitutional character; inevitably they do. But it's more in those areas of law where it's not so obvious, that we don't want to avoid having the constitutional impact, but I think it will be most helpful to create an Apex Court, to create a notion that the Constitution informs the business of doing law entirely.

I do think, I'm not suggesting that we couldn't maintain a distinction between
constitutional and non-constitutional matters but I think it's a very difficult task and I think the reality is that we will find that outside of certain key areas, there will be very few matters which will not have some constitutional flavour where there's a normative element in relation to the legal development in that area, where you're dealing with notions of fairness, good faith; those kind of notions, which in our legal history we've used notions of legal convictions of the community, all those areas are really when norms, social norms are injected into the legal system for very good and valid reasons, in all those areas, effectively you're talking constitutional law.

It may well be that the law doesn't change, it may well be that the way in which those normative areas have been dealt with in the past are perfectly legitimate and adequate, but fundamentally in those areas, in my view, you're talking Constitution. So I do think that it would be a good thing, I don't think it's absolutely necessary but I do think it would be a good thing were we to have a court of general jurisdiction and at the apex of our legal system.

The second set of questions it seems to me are the questions that follow on the principle and I do think it's very important that these things are debated. I think it's unfortunate in a sense that this issue has remained below the radar, I think particularly to members of the profession. I think judges have been more aware of the proposal but I think for members of the profession it stayed very below the radar. So I really do welcome the initiative of the General Council of the Bar to have a debate about it.

I think the first thing one needs to look at is the size and nature of the institution. The first thing, and here again I agree entirely with Carol Lewis and I recommend her lecture to you for those of you who haven't seen it, is that I do think the court has to be an *en banc* court. In South Africa we come from, not very long ago, from an experience of the illegitimacy of the notion of the way in which benches are selected for particular sorts of cases. That is deeply undermining the legitimacy of the legal system, it puts a presiding judge in an impossible position and quite frankly if it were to be done by drawing of lots,
it too, will be illegitimate. You could only just imagine an abortion case in which either all women or all men sat, would be a real problem and that could happen if you drew by lot and it certainly would be difficult. So I have no doubt, I'm completely convinced and if you look at the successful examples of Apex Courts round the world, nearly all of them sit en banc.

Secondly, one can have a debate about numbers, it is important in South Africa that we have a diverse court that is not only issues in relation to race and gender, which were the ones that were quite pertinently raised in the Constitution, that in my view, that is regionally representative as well, so one can't manage too small a court. It's interesting that in many large societies of this sort, take Canada for example, the need for regional representation is recognised informally in constitutional practice. It may well be that 11 is too many, but I certainly don't think we could be less than 9.

Those factors, thinking about the institution of the Court like that makes you realise that the debates, in my view, about merger of the Supreme Court of Appeal and the Constitutional Court in some large fashion where you take 20 members of the Supreme Court of Appeal and 11 members of the Constitutional Court and put them together, is really unrealistic. We certainly cannot have a 31-member court and it would be impractical. It doesn't necessarily mean, however, and I want to get to the issue of personnel and timing in a moment, but it doesn't necessarily mean, however, that some of form of injection of a large number of SCA members into the Constitutional Court wouldn't be a good thing.

The second issue is the name of the Court. Malcolm's mentioned it, Carol Lewis mentions it in her piece. You know, to me, that's probably something that we can live with. We lived for a long time with the Supreme Court which in fact had a whole lot of divisions, many of which weren't supreme, I don't really feel very concerned about the issue of title.
The third issue, perhaps one should talk to the issue of personnel and timing. I do think it is an issue and I think it's important to be candid about this, that if you are going to have a court that's a general Apex Court, it's important to draw from a wide range of skills within the profession.

My own personal view has always been that it would be appropriate to create an Apex Court at the time that there will be a series of vacancies on the Constitutional Court, which is going to happen in 2009, because of the current tenure, when four or five of us will all be going at the same time and it would have been a good moment to create an Apex Court by an injection of four or five members of the Supreme Court of Appeal. I don't think, however, that necessarily one should wait for that to happen when there is a proposal on the table.

That is once again my own view. It's a matter of distress to me that there hasn't been this exchange between the Supreme Court of Appeal and the Constitutional Court that Malcolm talked about, either in terms of acting appointments or in terms of appointments to the Constitutional Court. And I hope that that will be something that will change. In my own view I think it would be very healthy for our legal system, I think certainly speaking as a member of the Constitutional Court, it would be very valuable to have people who have had extensive experience on the Supreme Court of Appeal at the Constitutional Court. And I certainly for one, would welcome it.

I think one last thing to say about personnel, and once again I'm going to be quite candid. I think we must be very careful that this doesn't end up looking like either a racist issue or a gender issue. It is this sort of thing about which people can become quite offended, and I think people need to think very carefully about what they're saying. Six members of the Constitutional Court, as presently constituted, are people who were judges at the High Court previously and I do think we have to be very careful in that debate.
The last thing I want to say a few things about is the issue about procedure of getting to the court. The test in the proposed constitutional amendment is interest of justice. I think that is an excellent test. It's the test that the Constitutional Court has had to deal with for direct access up to now. It is true that on its face it remains a relatively empty normative provision but I think it's precisely the thing courts can take and can work a set of guidelines which lawyers will very quickly be able to understand. I don't think there are any lawyers who practice regularly before the Constitutional Court, who don't have a fair sense, particularly when they bring an application for direct access, of what cases are likely to make direct access or not.

The test was interest of justice over a period of 10 or 11 years, it's become pretty clear what cases the courts will take. And I would say even in relation to application for leave to appeal, perhaps with an exception of some of the common law issues that have recently come before the court, which I think certainly some of the lawyers were surprised the court took because they weren't sure they were constitutional matters, but generally I think that the issue there has not been so much interest of justice as what's a constitutional matter or not. I think the court has worked, you know, and I'd be happy to be contradicted by practitioners if they liked to, has worked reasonably well with that test and I think it is a test that will work well in the new Amendment.

Carol Lewis criticises it on the ground that she thinks we should have - it's in the public interest, it's a matter of great importance. Well, those are criteria that feed directly into the interests of justice test, and I should say that for myself I would hate to have either a right of appeal. There is no major Supreme Court or Apex Court that I am aware of, where you have a right of appeal in a wide range of matters, so it's just unworkable.

So whether it's ... (unclear) RI, or some application for leave to appeal system, there is no doubt that in most legal systems again, the public interest in a determination by an Apex Court of a legal issue is a key consideration, and is a key consideration in the Constitutional Court and will continue to be so.
But I think that that test will incorporate the considerations that Judge Lewis mentions in her lecture, but they will not necessarily be determined as so. At the end of the day, courts are there to do justice, and if it's justice that that particular individual is entitled to and has been denied, even if it may not be in the greater public interest, that may also be a relevant consideration for the court to hear the matter.

So my sense is, we do need to split this debate between whether we should have an Apex Court in timing and manner, ad I think we should have a discussion about both of those things and I certainly for one will be very interested to hear people's views.

Thank you.

ADV WALLIS: Thanks, Kate. Bob, you've drawn the short straw.
I must make it clear at the outset that I do not speak for the Supreme Court of Appeal. But while the views I will present are my own I don’t think they are altogether eccentric: I have naturally had many discussions with my colleagues who share many of these views to a greater or lesser extent.

The difficulty with dealing with the restructuring of the SCA is that many of the matters that have been spoken of thus far by Malcolm Wallis have an impact on the SCA and in a sense it is being caught in the middle.

At the moment the SCA is a relatively small court, it is a cohesive court, it is a collegial court, and the nature of its work means that its emphasis is on developing the law. I think it does that fairly successfully, with a fair amount of coherence, and in an administrative environment that is very efficient.

If the various proposals are implemented I think you will see a very different court emerging. It will be a much larger court, it will be fragmented, and its emphasis will shift to resolving questions of fact. Perhaps that is the right model for that court and perhaps it is not. That all depends upon the role that you want the SCA to play within the court hierarchy. And that depends in turn upon the role that is to be played by the Constitutional Court. I think one must identify the respective roles that the two senior courts are to play rather than simply tagging additional functions onto the SCA. Once the role that is to be played by the SCA is properly identified then the manner in which it should function will follow.

I was encouraged to hear Kate O'Regan’s views on how she sees a future Constitutional Court functioning because to a large extent they also reflect my own although on this I might be in the minority in the SCA. That my own views are largely in
line with those of Kate is not surprising bearing in mind that we have both read the same document. Given the nature of our constitution I do not think that the present system – two final courts each in its own domain within a single system of law - is sustainable in the long-term. It may have been necessary to allow for that initially but I don’t think it should ever have been expected to survive and that is what is now working its way through.

Malcolm Wallis has mentioned decisions of the SCA that have been found to be inconsistent with the constitution and overturned. But I think there are many petitions for leave to appeal from our court that are refused by the Constitutional Court so I don’t think we are doing too badly. The jurisprudence emerging from the SCA is indeed changing and increasingly that can be seen in its judgments. And that underscores the point that Kate was making, which is that the Constitution does not create a body of law that is separated from the remainder of the law and one cannot have two final courts in a unitary system of law.

So the question for me is not whether there should be a single final court – I have always believed that there should be – but it is rather a question of the timing and the structure of that final court and I think we should be grasping that nettle. But for the moment the question we should be asking is whether the 14th Constitutional Amendment is the right way to get there. I was interested in the Director-General’s approach to consultation. I understood him to say, “Look, we’ve decided what we want, and we’ll talk to you only about how we should do it.” I don’t think that is the right approach. And here I speak not as a judge but as a citizen. I don’t think that is the right way to go about it. I think that there ought to be proper debate on when and in what form a final court of appeal in all matters should be established. And that is not merely a judges’ issue. Judges will naturally have an interest but ultimately it is a societal issue, it is a lawyers issue, it is your clients’ issue. Judges have an important role to play in the debate – because of their experience of how the courts work – and one should draw on that experience, but it is not an issue for judges’ alone.
I do think that there ought to be discussion between our two courts on what we each see as an effective system. As far as I am aware that has yet to take place. And I think that the judges should be able to discuss amongst themselves how they see it working. But I don't think one should simply proceed in the form of this proposed amendment without first understanding its implications and how it is to work in practice. However I would have one fundamental requirement – and on this I agree entirely with Kate – which is that the Constitutional Court must continue for the foreseeable future to sit en banc. I think there are very good reasons for that. And once that occurs it seem to me that that court will simply not be able to perform the present role of the SCA. It will not be able to hear every case in insolvency, every case in contract, and every case in insurance. They will need to choose key cases that have wider social significance. And if that is to occur then one has already started defining the role of the SCA, which will be to continue the general development of the law. And if that is to be its proper role then should one be turning it into a court of factual appeal? Should one be shifting its present emphasis? Should one be making it into a larger and fragmented court?

Because another of the proposals that has not yet been mentioned is that the SCA is to have three circuits, in each of which it will be compelled to sit at least twice a year. Taken together with the incorporation of the Labour Appeal Court, which has traditionally sat in various centres around the country, we are creating an extremely fragmented court. And that will have two major consequences. One ought never underestimate the value of collegiality in a court, particularly one that is developing the law. We are all aware of what the others are doing. That awareness, and informal discussion about the various cases, all contributes to jurisprudential cohesion. I don't think that collegiality is something that we should lightly throw away. Secondly, a large and fragmented court will bring with it administrative difficulties. No studies have been done on the consequences for the administration of having courts scattered around the country. I have no principled difficulty with the concept of circuit courts. Perhaps it is a good thing that we should be closer to the public. But I think one should be cautious of
placing too much weight on the perceived benefits. Most of the cases in the SCA involve disputes between companies, and disputes with government, in which the only real interest of the parties is in the outcome. One ought not to think of the SCA as a court that is dealing in the main with individuals who would want to attend the proceedings. There ought at least to be some research to establish whether circuit courts are indeed, and if so how they should function, before simply making assumptions that might not be valid. Furthermore there ought to be flexibility if circuits are required. I don’t think one ought to compel the court to sit in three circuits twice a year irrespective of whether there are cases to be heard in that circuit. There are innumerable problems relating to the proposed circuits which we do not have time to discuss more fully here.

Apart from the fragmentation of the SCA its work will expand considerably if the proposals are introduced. There will be the labour appeals, which in my experience are largely factual. Then there will also be what are now full bench appeals – mainly appeals on fact in criminal matters that have been tried by a single judge – because the statute proposes that they should henceforth be heard by the SCA.

So we return to the question that I posed at the outset: What role do you want the SCA to play in the future? If its role is to continue to be the developments of the law then we should be cautious of simply tagging on full bench appeals and introducing circuits and so forth.

I suppose that I am really repeating what Malcolm has already said. Why are we trying to do so much for so many things at one time? There are many problems with many of the various proposals and yet we are setting about trying to deal with them all at once. Courts and the law are always in a process of evolutionary change. Why can we not find out what the problems are, find resolutions as they are called for, and then legislate for them as and when it is appropriate to do so? Should we be dealing with these numerous problems by having the government say: “That’s what we’ve decided. Your
function is only to tell us how to write the necessary legislation.” I don’t think we should be doing that.

There is one further aspect and it relates to labour appeals, which Malcolm has already talked about. I don’t know why it is thought best for the SCA to deal with labour appeals. I have been told at times that that is what Nedlac wants, and at other times that it is not what Nedlac wants. So I don’t know what the source is of the pressure for labour appeals to be heard by the SCA. But as far as the SCA is concerned – and this is the unanimous view of its judges – if it is thought best that the SCA hear those appeals then naturally we will do so. But we do not think it is right that there should be a panel of judges for particular classes of appeals. We believe that we should hear whatever appeals come before us in the ordinary manner. If the SCA is not trusted to hear these appeals then they should not be sent to us. But it is not acceptable to say that the appeals can be entrusted to only some of the judges. Whatever category I might fall in I will certainly play no part in distinguishing judges who are trusted and those who are not by having my name on a panel.

It is proposed that the panel will comprise the Judge President of the Labour Appeal Court and those judges of the Labour Appeal Court who choose to apply for appointment to the SCA and are then appointed. They have no choice but to be on the panel. Other judges of the SCA may ask to be placed on the panel and they will be placed on it if their requests are approved, but I don’t think you ought to expect a rush of judges applying to be on the panel. There is simply no reason for them to do so. They will be required to hear labour appeals in any event – because only a majority need to emanate from the panel – and quite frankly labour appeals are not considered to be the most desirable cases to sit in. Judges will not be rushing to do so. So do not expect the present judges of the SCA to be on the panel. And if they are not on the panel you need to consider the implications. It will mean that a small group of judges will in effect develop the law in that field and bind the remaining judges. I don’t think that is the way a Court of Appeal should function.
Those are some of my thoughts. Obviously I have more, because the issues are wide and complex, but I think those are the principle issues I wanted to mention.

**JUDGE MPATI:** Can I just say that Bob is correct in saying that there are some members of the Supreme Court of Appeal who don't believe that the status of the Supreme Court of Appeal should be interfered with. That is true, and I said when I was addressing you that initially, personally I thought that that position should be maintained, but one develops the idea as you go along that it might be desirable for there to be an apex, one Apex Court in the country. And we are debating these issues with those members of the Supreme Court of Appeal that are against it, but I think the majority is certainly with the ideas that Bob has given you. Thank you.

**ADV WALLIS:** You're very persuasive. We've really reached the sort of time we were aiming for but I'm sure there may be one or two questions that people might feel strongly they would like to ask, and I would like to give you the opportunity to do that before we close. George?

**ADV BIZOS:** Very briefly, I can say what the judges can't say. Firstly, during the certification procedure the question was raised as to whether the constitutional principles were going to be dead or not. The answer, and it is recorded, was definitely not in 10 years or even 300 years, in the words of Judge Goldstone, who was not contradicted by any of the other judges. And in any constitutional challenge which may take place if these Bills are passed in their present form would have to overcome that the Constitutional Principles that really encompassed the compact on the basis of which this country came together with, would be violated if they were passed.

There are also quotes that Spilg has mentioned, quoted during the argument, not contradicted by other judges, by Justice Mohammed, that there are portions of the Constitution which cannot be amended, irrespective of the majority. And also, there may
also be an argument that some of the amendments that are sought to be made may require a special majority, as contained in the Constitution, which is not limited to two-thirds.

I think all these points should be made in the Memorandum so that some sanity may possibly be communicated to the person or persons that put these Bills up.

ADV ARENDSE: Thank you very much, George. The colleague over there?

ADV WALLIS: You're very persuasive. We've really reached the sort of time we were aiming for but I'm sure there may be one or two questions that people might feel strongly they would like to ask, and I would like to give you the opportunity to do that before we close. George?

ADV BIZOS: Very briefly, when we helped to put the Constitution together in relation to the judiciary, please remember that I would say about 90% of our judges had never heard of an unfair labour practice. And about 90% spoke about landlord and tenant, master and servant, and such matters. And one of the reasons for providing for specialist courts was that we thought that we could have some influence in appointing people that did know something about the conditions under which workers were working, or how people were thrown onto the streets by landlords. And by people who didn't think that the best decision that was ever made was Graham vs Ridley, and that was the reason.

What I want to say is that to the credit of our system, and particularly the Judicial Services Commission under the leadership of the Chief Justice and his deputies, more than 50% of our judges are not the same judges to use an unfortunate expression, of the possible mindset of those that we had in 1994. And this is why I believe generally speaking the department should take into consideration that it isn't necessary anymore, having regard to the fact that 9 out of the 11 Heads Of our Courts are black.
The fact that more than 50% of the judges that have been appointed in the last 10 years were in the main, with a couple of mistakes, transformation candidates that were appointed. So that making provision for all sorts of sub-divisions of the judiciary are unnecessary.

Finally, I want to make an Appeal to our colleague from the department, and that is this: please do not regard us as adversaries. We drew a fine Constitution as a result of the input of judges, of practising lawyers, of academic lawyers, whose advice we took. And I don’t want to embarrass her but when we had a real problem about what the democratic practice was throughout the world, we would ask Kate O'Regan then an Associate Professor and others at the universities, to give us some help.

We are all interested in maintaining our Constitution as one of the best in the world. We are not saying that it should never be amended. Please take us on board in relation to what amendments are absolutely necessary, and in what manner must they be formulated. And more particularly, that will not lead to constitutional mini crises if the departments says the judges say this, the Executive say that, the will of the Executive will prevail. This is not something upon which our democracy is built.

And if you'll bear with me, Mr Chairman, there's a section that I've hardly ever heard quoted in any of the disputes that go on because it's not necessary. I am referring Section 41 and I hope that we will all bear it in mind in avoiding the sort of difficulties that we are facing.

"All spheres of government and all organs of state within each sphere must respect the constitution of status, institutions, powers and functions of government in the other spheres; not assume any power of function except those conferred on them in terms of the Constitution; exercise their powers and perform their functions in a manner that does not encroach on
the geographical, functional or institutional integrity of government in another sphere; and co-operate with another in mutual trust and good faith by fostering good relations, assisting and supporting one another, informing one another of and consulting one another on matters of common interest, and co-ordinating their actions and legislation with one another.”

Let us remember those words of the Constitution and let's try and put them into effect. I think that the Bar Council in its memorandum should offer its support to the Parliamentary Committee, to any subcommittee that may be appointed, to the Minister and the Deputy, to the department, and offer them all the assistance that we can possibly give in order to avoid what appears to be the beginnings of an unfortunate conflict between structures of government, between civil society and the government. Thank you, Mr Chairperson.

JUDGE WILLIS: My name is Nigel Willis. At the end of the day's proceedings, my views are strengthened in regards to certain issues that Pius mentioned this morning. It's quite clear that there are certain provisions in these bills that are not controversial, and in fact are urgent. For example, I'm dealing with restructuring, getting rid of Bophuthatswana High Court, Venda, giving the Southern Gauteng Division its independence, and so on. And I cannot see why we can't appeal, both the Bar and the Bench, to government to proceed with the uncontroversial issues on which we all agree and which are desperately urgent.

The controversial issues should be dealt with later, as various speakers such as Bob Nugent have mentioned, after there's been a thorough and informed debate. I think that's the easiest way to move forward, because we certainly can't carry on having, even a Transvaal Provincial Division, I think it's a disgrace, frankly, that 12 years after the new South Africa we've still got a Transvaal Provincial Division.
Where I do think the GCB could offer something really constructive, is to offer to chair a commission, to hear deliberations on these controversial issues, and to come up with concrete recommendations. I hope I’m not going to embarrass Malcolm by saying that I think he’s precisely the kind of person, not necessarily the person, but precisely the kind of person who could so excellently Chair such a commission.

You need the experience of the Bar. There's no finer way of putting together a practical proposal than if you draw on practical experience. And I cannot think of anybody better than the Bar to do that. And we've got in South Africa some hugely progressive, highly experienced advocates. I mean, Malcolm has appeared, you know, I think in just about every - I know him from the Labour Appeal Court, he's appeared in the Competition Court, he's appeared on numerous occasions in both the SCA and the Constitution. I'm sure that he will be able to - somebody like him would be able to bring to bare the independence and the expertise to make recommendations that would enable this country to move forward. Thank you.

ADV WALLIS: I think I'm going to bring this to a close before anybody else tries to impose any burdens on me. Thank you all for your attention and attending today, and I would ask Norman just to close the afternoon on the day's proceedings.
CLOSING REMARKS
Adv Norman Arendse, SC

On behalf of the General Council of the Bar and in particular, the Human Rights Committee of the GCB, thank you for making such a fascinating and informative debate and discussion possible. Arthur, to you in particular and Kate and Lex and the other judges, Bob, for making the time. Menzi, unfortunately you indicated quite late that you wanted an opportunity to speak on behalf of the department. I think it was an important few moments you had there, perhaps not long enough, but hopefully this is only the beginning of a process of a constructive engagement.

I think I'm concerned and I think a lot of us will share it in this room, is just where these bills and the 14th Amendment to the Constitution is in the process. I think we're worried that it's now in the parliamentary process, seemingly, and we're worried about time.

I think today showed that certainly the Bar, concerned members of the judiciary, lawyers generally, academics, have got a lot to offer to the Minister, the Deputy Minister and the department on this debate. And they've all indicated here today they are willing to assist in arriving at a solution to the problems we admittedly face in this country, and to do so in a way that everyone pulls in the right direction.

So again, thank you very much for attending. Brian, thank you, well done, you and your committee for organising such an excellent symposium at short notice. And Ish, Vincent, thank you for giving up of your time to chair some of the panels. Malcolm, thank you.

Thank you very much.

END OF CONFERENCE
APPENDIX 1

JUDICIAL INDEPENDENCE - Impending constitutional crisis?
Adv. B Spilg SC

The Judicial Bills

The Ministry for Justice and Constitutional Development under its Deputy Minister has presented a number of Bills which affect the judiciary.

The Constitution 14th Amendment Bill proposes fundamental amendments to the Constitution, including one to the key provision of the Constitution which entrenches and guarantees judicial independence. The new Superior Courts Bill provides for extensive intrusion by government in the functioning and control of the courts. The three remaining Bills deal with much needed reform in respect of judicial conduct and discipline and also judicial education and training - the Judicial Conduct Tribunal Bill, the South African National Justice Training College Bill and consequential amendments to the Judicial Service Commission Act 9 of 1994. See “Judicial Independence - a dummy’s guide “ (The ADVOCATE (vol 16) Aug 2005).

The Ministry made it plain that it wished to push through the Constitution Amendment Bill, 2005 (current draft published on 14 December 2005) and the Superior Courts Bill (current draft of 19 October 2005) during this year’s Parliamentary sessions.
The passage of the three other Bills, being those intimately involved with transformation has been shelved by the Deputy Minister - temporarily in the case of those dealing with judicial conduct; indefinitely in respect of judicial training.

**Consequences of CAB and SCB**

Unlike the Bills dealing with judicial conduct and training that have been shelved, the Constitution Amendment Bill and the Superior Court Bill (CAB and SCB) are little concerned with representivity on or transformation of the Bench. They are fundamentally concerned with control of the Judiciary and tethering it. This is to be achieved directly by stripping the Judiciary of control over its functional and procedural independence, including its Rule making powers. It is also to be achieved indirectly, but as effectively, by rendering the courts dependent upon the Executive.

The various proposals in these two Bills will emasculate the Judiciary of its functional independence. If these Bills are passed into law the consequence is that fair trial process, non-arbitrary procedures, non-interference by government in matters such as specific judge selection for a particular case, and an impartial judiciary can no longer be guaranteed.

The 1996 Constitution was fashioned in order to ensure constitutional democracy under the rule of law and secured by an independent Judiciary. Section 165 of the
Constitution leaves no room for misunderstanding. It is this section which the Ministry has targeted. It has also targeted other critical areas of the judicial functioning that secure fairness of process, non-arbitrariness and impartiality.

A bare decade ago, our constitutional fathers wrote into Section 165 of the Constitution provisions which ensured that only Courts could pronounce on the constitutional validity of enactments, which guaranteed judicial independence, which prohibited organs of state from interfering with the functioning of the Courts (see wording of s165(3)) and obliged Government to protect (with the concomitant obligation of respect for) “... the independence, impartiality ... and effectiveness of the Court” (s165(4)).

Judicial independence goes beyond the ability to deliver a judgment in open court. It ensures that the Judiciary has autonomy over matters which relate directly to the exercise of its judicial functions and to the public perception of a Court that dispenses justice fairly, impartially and free from political pressures. Without the courts enjoying functional autonomy, justice has no chance of being fairly dispensed. Functional independence includes administrative functions that can adversely impact on the courts ability to perform their judicial functions. The Constitution has already indicated in s165(4) that this includes any matter affecting the impartiality, dignity, accessibility, effectiveness, efficiency and functioning of the courts.

If clarity was needed as to whether our Constitution placed administrative functioning outside the control of the courts, then it was resolved by the Concourt in De Lange v
Smuts NO & Others 1998 (3) SA 785 (CC) at para [70]. The Court identified the critical features of an independent judiciary to be security of tenure, financial independence and institutional independence. Justice Ackerman described institutional independence to mean (citing R v Valente) [1985] 24 DLR (4th) 161 (SCC) at 184) “...judicial control over administrative decisions that bear directly and immediately on the exercise of the judicial function”. Accordingly, there seems to be little reason for the Ministry to amend Section 165 for purposes of clarification. It would be mischievous if the result is to amend that section in any manner inconsistent with the De Lange case.

The ramifications of tampering with a constitution is far reaching, particularly if they affect and limit the role of institutions that are established to act as a buttress between the Executive and the individual (c.f. Momoniat & Naidoo v Minister of Law and Order 1996 (2) SA 264 (W) at 270D citing Van den Heever JA in a 1950 Appellate Division case). They are well nigh impossible to undo at the best of times. They are impossible to undo when most needed - during times of government excess.

The Constitution Amendment Bill and the Superior Courts Bill materially undermine judicial independence by giving the Executive, through the responsible Minister, power to control all elements relating to the administration of justice and the budget of Courts. If the intended reach of the Minister's functions over Court administration was not sufficiently clear, it is resolved by a reading of the Superior Courts Bill which includes as part of the Minister's powers over the Court, the appointment of Judges to key positions and placing control over the Rule-making functions in the hands of the Minister.
Offending provisions

The most contentious proposals found both in the Constitution Amendment Bill and in the Superior Courts Bill and which impact on judicial independence are the following:

CONSTITUTION 14TH AMENDMENT BILL

1. Amendment to Section 165

Content
Distinguishes between an administrative function and a judicial function performed by the courts. It places the former together with the courts’ budget under the Minister’s control.

Current position
The Executive cannot interfere with the Court’s control over administrative decisions that directly affect the exercise of the judicial function (De Lange’s case). The Court’s budget is fixed directly by an Act of Parliament under the Judges’ Remuneration and Conditions of Employment Act 47 of 2001.

Objection
The amendment offends the basic tenets of judicial independence in a constitutional democracy by interfering with the exercise of judicial authority and by expressly conferring on the Minister the power to exercise “... authority over the administration and budgets of all courts”. Judicial independence is specifically acknowledged in s165 of the Constitution and underpins the Constitution itself. It is replete throughout the Bill of Rights section (e.g. ss7(1), (2), 9(1),34(1) and 36(2) - see Minister of the Interior and another v Harris and others 1952 (4) SA 769 (A) at 788H - 789D and c/f at 779H to 780B and 784D-H).

2. Section 172(3)

Content:

Precludes any Court from making an order suspending the commencement of an Act of Parliament or a Provincial Act.

Current position

The Concourt has the inherent power to provide a suitable remedy “... taking into account the interests of justice” (Section 173 read with Section 172(2) (a)).

Section 80(3) of the Constitution expressly allows the Constitutional Court to suspend the commencement of an Act of Parliament, if “... the interests of justice require this”, where one third of the National Assembly seeks an order declaring
an Act of Parliament unconstitutional. Section 121 of the Constitution also acknowledges the Concourt's power to grant a suspension order in respect of Provincial Bills.

**Objection**

The Concourt's powers to grant a suspension order are already recognised under the Constitution. Any attempt to preclude the Concourt from fashioning a suitable remedy interferes with judicial independence. Although the grant of temporary interdicts in individual cases remains, it is of little comfort if legislation is passed that significantly undermines one of the fundamental human rights provisions. The Concourt has already indicated the restrictive test to be applied if it were to grant a suspension order - see *President of the Republic of South Africa and others v United Democratic Movement and others* 2003 (1) SA 472 (CC) at para 32

3. **Section 174 and Section 175**

**Content**

President as head of the Executive to appoint Judges President, Deputy Judges President and acting appointments to those posts and also acting justices to the Concourt.
Current position

Judicial Service Commission recommends the appointments to these offices. Acting appointments are done under a system of concurrence by the court involved.

Objection

The Executive will be able to influence the most sensitive areas of judicial administration, such as selection of judges to hear specific cases and acting appointments to sensitive cases. This undermines the judicial function which can only operate in an environment where litigants enter court as equals before the law, and where the impartiality of the judge and consistency of procedural treatment is not compromised. The State is a litigant *par excelance*, from criminal to civil and constitutional cases. There are also issues of acceptance of Executive appointments to key offices and their impact on morale and leadership.

THE SUPERIOR COURTS BILL

4. Sections 2(1)(d) and 15(1)
The Minister is to exercise administrative control over Courts and authority over the Courts' budget.

Current position

As above for proposed amendment to Section 165 of the Constitution.

Objection

As before. Undermines judicial independence.

5. Sections 8(1) and 10(4)

Content

The President to control the appointment, payment and removal of Judges who act in special divisions of the High Court (i.e. competition appeals, electoral matters, income tax and land claims).

Current position

Varies. Tax Court Judges are allocated by the Judges President or Deputy Judges President. Judges of the Land Claims Court are appointed by the President on the advice of the JSC.
Objection

The Executive should not determine the composition of specialist courts. This would undermine faith in judicial independence particularly as appointments are not indefinite. It bears the risk of creating a fragmented, non-cohesive jurisprudence.

6. Sections 12(3), 13 and 16

Content

The Minister to appoint the Court’s staff.

Current position

Heads of Court manage their own Courts.

Objection

Undue influence of Executive and potential tethering of Judiciary. Impacts on effectiveness of judicial functioning.
7. **Section 40**

**Content**

Rule-making power to be stripped from Courts and placed in the Minister’s hands.

**Current position**

Section 173 of the Constitution expressly confers on the Courts the inherent power to regulate their own process.

**Objection**

Fundamentally undermines judicial independence. Rules of court secure a level playing field for litigants. Cannot expect Minister to understand the impact of Rules as to procedural law, much less its substantive law roots and potential consequences.

**Judicial independence contextualised**

There is no issue of greater significance in our legal system or in the protection and fair treatment of all citizens than the preservation of judicial independence. Our body of
jurisprudence becomes arbitrary in application if the Courts are not visibly and perceptually independent from Executive interference or control.

A fundamental objection to the proposed Bills is that they allow the Executive to interfere with the operation and functioning of the Courts. At present, we have a strong jurisprudence that identifies the reach of the judicial function. It seeks to ensure that the Judiciary enjoys an independent status and immunity from political pressures. A democratic society requires that the process of adjudication is clearly separated from the processes of Government and Parliament. The appointment of key staff and of Judges President by Government would provide the framework for arbitrary political interference.

Moreover, Judges who seek promotion to key posts may be reluctant to jeopardise their chances by giving decisions against the Executive. The appointment of Judges to decide a particular tax case or a particular land claims case and the appointment of a roster of Judges by the President as opposed to a peer group may well create perceptions of State-minded tribunals established to hear matters that principally affect State interests. It is of concern that the country’s President is to appoint Judges President and that the staff allocated to the Judge President is answerable directly to the Minister.

What guarantee is there that Allan Dershowitz’ observation of United States Judges during the Rehnquist era could not apply at some later stage here? He said in “America on Trial” at page 41 that “Chief Justice Rehnquist has rendered similar decisions, nearly always siding with claims of governmental power over individual rights.
This is especially true when rights have been claimed by weak and unpopular, even despised, minority groups”. Dershowitz continued “Despite lifetime appointments, too many judges seek popularity and acceptance by the powers that be”.

Exposing some myths

The Department has sought to downplay the significance of the amendments. Consciously or otherwise, it has also distorted their purpose.

In the main, the Department claims that the changes are part of the transformation process.

It is difficult to fathom how, when almost all the key judicial positions are representative of the majority of the population, it is now time to reduce their control over the judicial function, nor why this is transformational. The irony is that the converse is true.

It is equally difficult to understand how a line of command can properly function where the staff member who is supposed to support, for instance the Chief Justice or a Judge President, receives instructions from and is accountable to another. If the Chief Justice has a complaint, he would be required to go through the Minister. It is far preferable that administrative officers fall directly under the Judiciary and are answerable only to the Judiciary.

It is also difficult to appreciate how a rule-making function can ever be a transformation issue. The rule-making function has stood the test of time irrespective of the political dynamics at any particular stage of a country’s constitutional development.
The Department also seems to think that no constitutional challenge is possible once a constitutional amendment has been passed by 75% of the National Assembly members. That is incorrect. Schreiner JA’s concurring judgment in Harris (supra) finds stronger support within a constitutional democracy. In Premier Kwa Zulu Natal & Others v President of the Republic of South Africa & Others 1996 (1) SA 769 (CC) at paras 47 to 50, the late Ismail Mohamed DP raised the possibility that our Courts may follow the precedent of the Indian Supreme Court which held that such power as was vested in the legislature to amend the Constitution could not be employed “to the extent of destroying the basic features and structure of the Constitution”.

A Constitution is a living document capable of adaptation, without legislative interference. It is a document of permanence, the interpretation of which is moulded by and evolves with society’s mores and maturity. Section 165 of the Constitution makes it plain that the responsibility for interpreting the Constitution as a living document vests exclusively with the Courts.

In The Attorney General v Unity Dow 1994 (6) BCLR 1 (Botswana), Aguda JA at p41 said the following; “The Constitution is the supreme law of the land and it is meant to serve not only this generation but also generations yet unborn ….” See also Amissah P at p7.
Conclusion

Justice Louis Brandeis of the United States Supreme Court said some 75 years ago that "the greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well meaning but without understanding" ([Olmsted v United States](https://127.0.0.1:8008/Document/277 US 438 at 479) (1928)).

If the Ministry is well meaning then it will revise its thinking and place judicial independence as the model around which administrative and management functions must be moulded, not the other way around.

If there are rogue elements within the Ministry or the Department who wish to change the constitutional order then it is best that further dialogue involves the Cabinet as a whole and that they be directly informed by those justices in recent retirement who have served on the Concourt, and who have served only one master, the Constitution with the values it entrenches for all.

The other route will lead to a constitutional crises impacting not only on our judicial system and our constitutional values for all time but also on our ability to sustain socio economic objectives. It has been pointed out (see [Legal Affairs](https://127.0.0.1:8008/Document/Publication-Chapter/425) publication of Jan-Feb 2005 in the article by its senior editor, Nicholas Thompson entitled “Common Denominator” and also alluded to in the [McKinsey Quarterly](https://127.0.0.1:8008/Document/Number1) (2004 Number1)) that there exists a direct relationship between a developing country’s ability to attract sustainable investment funds and its legal environment: In particular the degree of independence enjoyed by its judiciary and its powers of review.

Brian Spilg SC
APPENDIX 2

THE CONSTITUTION 14TH AMENDMENT BILL OF 14 DECEMBER 2005

STAATSKOERANT, 14 DECEMBER 2005 No.28334 3

GENERAL NOTICE

NOTICE 2023 OF 2005

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

PUBLICATION OF BILL AMENDING CONSTITUTION

The Minister for Justice and Constitutional Development intends introducing the Constitution Fourteenth Amendment SI& 2005, in the National Assembly. The particulars of the proposed amendments are hereby published for public comment in accordance with section 74Q(a) of the Constitution of the Republic of South Africa, 1996. Any person wishing to comment on the proposed amendments is invited to submit written comments to the Minister for Justice and Constitutional Development. Comments should kindly be directed to the attention of Mr J A de Lange, Private Bag X 81, Pretoria 0001, by not later than 15 January 2006. (Electronic mail address: Jdelange@justice.gov.za)

GENERALEXPLANATORYNOTE:

] Words in bold type in square brackets indicate omissions from existing enactments.
Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Constitution of the Republic of South Africa, 1996, so as to regulate responsibility in respect of the judicial and administrative functions of all courts; to
provide for the conversion of the various High Courts into a single High Court of South Africa; to provide that the Constitutional Court is the highest court in all matters; to further regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal; to provide for the appointment of two Deputy Presidents to the Supreme Court of Appeal; to restrict courts from hearing a matter dealing with the suspension of or making an order suspending, the commencement of an Act of Parliament or a provincial Act; to provide for the appointment of Judges President and Deputy Judges President; to provide for the appointment of an Acting Deputy Chief Justice, an Acting Deputy President of the Supreme Court of Appeal and an Acting Deputy Judge President; and to provide for matters connected therewith.

Be it enacted by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 165 of Constitution

1. Section 165 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is amended by the addition of the following subsections:
"(6) The Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law.

(7) The Cabinet member responsible for the administration of justice exercises authority over the administration and budget of all courts.".

Amendment of section 166 of Constitution

2. Section 166 of the Constitution is amended-
   (a) by the substitution for paragraph (c) of the following paragraph:
   "(c) the [High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts]

Hkh Court of South Mica;"; and

(b) by the substitution for paragraph (e) of the following paragraph:
"(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts Hkh Court of South Mica or the Magistrates' Courts.".

Amendment of section 167 of Constitution, as amended by section 11 of Act 34 of 2001

3. Section 167 of the Constitution is amended-
   (a) by the substitution for subsection (3) of the following subsection:
   "(3) The Constitutional Court-

(a) is the highest court [in all constitutional matters] of the Republic; and
(b) may decide [only]=
(i) constitutional matters-[, and issues connected with decisions on constitutional matters;]

(aa) on appeal
(bb) directly. in accordance with subsection (6); or
(cc) referred to it as contemplated in section 172(2)(c) or in terms

of an Act of Parliament; and

(iii) in other matter, if the Constitutional Court grants leave to appeal that matter on the grounds that the interests of justice require that the matter be decided by the Constitutional Court.

[(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.]
by the substitution for subsection (5) of the following subsection:

"(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, [a] High Court of South Africa, or a court of similar status, before that order has any force.

by the substitution for paragraph (a) of subsection (6) of the following paragraph:

"(a) to bring a constitutional matter directly to the Constitutional Court; or"; and

by the addition of the following subsection:

"m The Constitutional Court makes the final decision whether a matter is a constitutional matter.".

Amendment of section 168 of Constitution, as amended by section 12 of Act 34 of 2001

4. Section 168 of the Constitution is amended-

by the substitution for subsection (1) of the following subsection:

"(1) The Supreme Court of Appeal consists of a President [, a Deputy President] and-

(a) two Deuutp Presidents of the Suexeme Court of Appeal: and
@ the number of judges of appeal determined in terms of an Act of Parliament.
and

by the substitution for subsection (3) of the following subsection:

"(3) If the Constitutional Court refuses leave to appeal in a matter referred to in section 167(3)(b)(ii), the Supreme Court of Appeal is the final Court of appeal, in that matter. It may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa [. It is the highest court of appeal except in constitutional matters], and may decide only-

(a) appeals;
(b) issues connected with appeals; and
(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.".

Substitution of section 3169 of Constitution

5. The following section is substituted for section 169 of the Constitution:
"High [Courts] Court of South Africa

169. (1) [A] High Court of South Mica may decide-
(a) any constitutional matter except a matter that-
(i) [only] the Constitutional Court [may decide] has agreed to hear
directly in terms of section 167(6Mak or
(ii) is assigned by an Act of Parliament to another court of a status similar
to [a] & High Court of South Africa; and
(b) any other matter not assigned to another court by an Act of Parliament.
@ The High Court of South Mica consists of the Divisions. with
the seats and the areas of jurisdiction, as determined in terms of an Act of Parliament,
which may-

(a) establish Divisions, with one or more seats in a Division. on the basis
of neoaauhy, subject matter, or both: and
rp! assign jurisdiction to a Division or a seat within a Division.

(3) Each Division of the Hi& Court of South Africa-
(a) has a Judge President;
fb! may have one or more Deputy Judges President: and
[e] has the number of other judges, as determined in terms of national
legislat ion.

Substitution of section 170 of Constitution

6. The following section is substituted for section 170 of the Constitution:
"Magistrates' Courts and other courts

170. Magistrates' Courts and all other courts may decide any matter
determined by an Act of Parliament, but a court of a status lower than [a] the High
Court of South Africa may not enquire into or rule on the constitutionality of any
legislation or any conduct of the President.".
Amendment of section 172 of Constitution

7. Section 172 of the Constitution is amended-
(a) by the substitution for paragraph (a) of subsection (2) of the following paragraph
"(a) The Supreme Court of Appeal, [a] & High Court of South Mica or a court
of similar status may make an order concerning the constitutional validity of
an Act of Parliament, a provincial Act or any conduct of the President, but an
order of constitutional invalidity has no force unless it is confirmed by the
Constitutional Court."; and

(b) by the addition of the following subsection:
"@ Despite any other provision of this Constitution, no court may hear a matter dealing with the suspension of, or make an order suspending, the commencement of an Act of Parliament or a provincial Act."

Substitution of section 173 of Constitution

8. The following section is substituted for section 173 of the Constitution:
"Inherent power

173. The Constitutional Court, Supreme Court of Appeal and High Court of South Africa each have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

Amendment of section 174 of Constitution, as amended by section 13 of Act 34 of 2001

9. Section 174 of the Constitution is amended by the substitution for subsection (3) of the following subsection:

"(3) The President as head of the national executive, appoints-

@ [after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints] the Chief Justice and the Deputy Chief Justice [and,] after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly; and

(bJ [after consulting the Judicial Service Commission, appoints] the President and two Deputy presidents] Presidents of the Supreme Court of Appeal after consultation with the Judicial Service Commission."; and
by the insertion of the following new subsection (9, the remaining subsections being renumbered accordingly:

"[5) The Judges President and Deputv Judyes President of the
Divisions of the Hkh Court are amminted bv the President. as head of the national executive, after consulting the Chief Justice and the Cabinet membes responsible for the actministration of iustice, in accordance with the Procedure set out in subsection (4)(a) to (c).".

Substitution of section 175 of Constitution, as amended by section 14 of Act 34 of 2001

10. The following section is substituted or section 175of the Constitution:
*Acting amointmentsof certainjudges

175. (1) The President may appoint a woman or a1 man to [be] serve as an acting
(a) Deputy Chief Justice;

(b) judge of the Constitutional Court;
(c) Deputy President of the Supreme Court of Appeal; or
(d) Deputy President of a Division of the High Court of South Africa,
if there is a vacancy in any of those respective positions, or if [a judge] the person holding; any such position is absent. [The] Any such appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting after consultation with the [concurrence of the] Chief Justice.

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.
(3) A person holding an acting position in terms of this section has the responsibilities, powers and functions of the judicial office in which the person is acting.

Amendment of section 178 of Constitution, as amended by section 2 of Act 65 of 1998 and section 16 of Act 34 of 2001

11. Section 178 of the Constitution is amended-

by the substitution for paragraph (k) of subsection (1) of the following paragraph:

"(k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that [Court] Division and the Premier of the province concerned, or an alternate designated by each of them."; and

by the substitution for subsection (7) of the following subsection:

"(7) If the Chief Justice or the President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or [the] g Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.".

Amendment of Schedule 6 to Constitution, as amended by section 3 of Act 35 of 1997,
section 5 of Act 65 of 1998 and section 20 of Act 34 of 2001

12. Schedule 6 to the Constitution is amended by the addition to item 16 of the following subitem:

"@ Anyone holding office, when the Act of Parliament referred to in section 169(2) of the new Constitution takes effect, as a Judge President, Deputy Judge President or a judge of a High Court or any court of a status similar to the High Court, becomes a Judge President, Deputy Judge President or judge of the relevant Division of the High Court of South Africa or such other court in accordance with the provisions of that Act.".
The objects of the Bill can be explained as follows:

Clause 1: Section 165 of the Constitution is amended in order to provide that the Chief
Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law. The Cabinet member responsible for the administration of justice, in turn, exercises authority over the administration and budget of all courts. In this way the Commonwealth model of the separation of powers between the Executive and Judiciary is maintained and constitutionally entrenched, with the responsibility for the judicial functions of our courts being the sole preserve of the judiciary, and the responsibility for the administrative functions of the courts being the sole preserve of the relevant Minister.
Clauses 2 and 5: Sections 166 and 169 of the Constitution are amended so as to convert the various High Courts into a single High Court of South Africa, comprising of the Divisions, with the seats and jurisdiction, as determined in terms of an Act of Parliament (the Superior Courts Bill).

Clause 3: Section 167 of the Constitution is amended so as to confirm the status of the Constitutional Court as the apex court, with jurisdiction in all constitutional matters and any other matter in which it may grant leave to appeal.

Clause 4: Section 168 of the Constitution is amended in order to provide for the appointment of a second Deputy President of the Supreme Court of Appeal. This results from the need to appoint a Deputy President of that Court who is dedicated to the management of labour appeals, following the abolition of the Labour Appeal Court (by the Superior Courts Bill).

Clause 7: An important new principle is introduced in section 172 of the Constitution, in that it provides that no court may hear a matter dealing with the suspension of, or make an order suspending, the commencement of an Act of Parliament or a provincial Act.

Clause 9 The amendment to section 174 of the Constitution provides that the President, as is the case with the judges of the Constitutional Court, will appoint the leadership (Judges President and Deputy Judges President) of the High Court of South Africa from a list of suitable candidates, submitted by the Judicial Service Commission.

Clause 10 Section 175 of the Constitution is amended in order to make provision for the appointment of acting judges in leadership positions.

Other amendments contained in the Bill are of a consequential nature.

3. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established
by section 74(3) of the Constitution, since it amends provisions of the Constitution other than section 1, section 74(1) or Chapter 2.
APPENDIX 3

THE SUPERIOR COURTS BILL OF 19 OCTOBER 2005

Draft 19 October 2005

REPUBLIC OF SOUTH AFRICA
SUPERIOR COURTS BILL

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(Working Draft)
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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 52- 2003]

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

____________ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To rationalise, consolidate and amend the laws relating to the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa; to incorporate certain specialist courts into the High Court of South Africa; to make provision for the administration of the judicial functions of all courts; to make provision for the administrative functions and budgetary aspects relating to the functioning of all courts; to make provision for the making of rules for all courts; and to provide for matters incidental thereto.

PREAMBLE
WHEREAS section 1 of the Constitution of the Republic of South Africa, 1996, provides that the supremacy of the Constitution and the rule of law form part of the founding values of the Republic;

AND WHEREAS section 165 of the Constitution provides that—

1. the judicial authority of the Republic is vested in the courts;
2. the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice;
3. no person or organ of state may interfere with the functioning of the courts;
4. organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts;
5. an order or decision by a court binds all persons to whom and all organs of state to which it applies;
6. the Chief Justice is the head of the judicial authority and exercises responsibility over the development and implementation of norms and standards for the exercise of the judicial functions of all courts; and
7. the Cabinet member responsible for the administration of justice exercises final responsibility over the administration and budget of all courts;

AND WHEREAS section 166 of the Constitution provides that the courts are—

1. the Constitutional Court;
2. the Supreme Court of Appeal;
3. the High Court of South Africa;
4. the magistrates courts; and
5. any other court established or recognised in terms of an Act of Parliament;

AND WHEREAS section 171 of the Constitution provides that all courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation;

AND WHEREAS section 180 of the Constitution provides that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution;

AND WHEREAS item 16(6)(a) of Schedule 6 to the Constitution provides that as soon as practical after the Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the Constitution;

AND NOTING that, with the advent of the new constitutional dispensation in 1994, the Republic inherited a fragmented court structure and infrastructure, which were largely derived from our colonial history and were subsequently further structured to serve the segregation objectives of the apartheid dispensation;

AND NOTING that, before the advent of the new constitutional dispensation in 1994, the lower courts were not constitutionally recognised as part of the judicial authority and were largely dealt with as an extension of the public service;

AND NOTING that, since the Constitution provides that the judicial authority is vested in all the courts, it is desirable to provide for a uniform framework for judicial management of the judicial functions of all courts, subject to the final responsibility of the Chief Justice;

AND NOTING that, since the Constitution provides that the Cabinet member responsible for the administration of justice exercises final responsibility over the administrative functions, including the
budget, of all courts, it is desirable that such administrative functions be administered through a uniform framework in respect of all courts;

AND RECOGNISING that the rationalisation envisaged by item 16(6)(a) of Schedule 6 to the Constitution is an on-going process that is likely to result in further legislative and other measures in order to establish a judicial system suited to the requirements of the Constitution,

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1

Introductory Provisions

Definitions

1. In this Act, unless the context otherwise indicates—

"Board" means the Advisory Board for Rules of Court established by section 42(1);

"business day" means a day that—
(i) is not a public holiday, Saturday, or Sunday; and

(ii) does not fall during a recess period of a Superior Court, as determined in terms of section X;

"civil case" includes any labour matter and any matter falling within the jurisdiction of a Special Division, and "civil proceeding" has a corresponding meaning;

"Commissioner" means the Commissioner for the South African Revenue Service referred to in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962);

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"Department" means the Department responsible for the administration of justice;

"Director-General" means the Director-General of the Department;

"Division" means any General or Special Division of the High Court of South Africa, and includes any seat of a Division;

"full court", in relation to any Division, means a Court consisting of three judges;

"General Division" means a General Division of the High Court referred to in section 6(1);

"head of the Court" in relation to—

(i) the Constitutional Court, means the Chief Justice;

(ii) the Supreme Court of Appeal, means the President of that Court; and

(iii) any Division of the High Court, means the Judge President of that Division;

"High Court" means the High Court of South Africa;

"Judicial Service Commission" means the Judicial Service Commission referred to in section 178 of the Constitution;

"judicial officer" means any person referred to in section 174(1) of the Constitution;

"labour matter" means any justiciable matter, excluding any criminal proceedings, arising out of the application of—

(a) the Labour Relations Act, 1995 (Act No. 66 of 1995);

(b) the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);

(c) the Unemployment Insurance Act, 1966 (Act No. 30 of 1966);

(d) the Skills Development Act, 1998 (Act No. 97 of 1998);

(e) the Employment Equity Act, 1998 (Act No. 55 of 1998);
(f) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);

(g) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993); and

(h) any other Act the administration of which has been assigned to the Cabinet member responsible for labour;

"lower court" means any court which is lower in status than the High Court and which is required to keep a record of its proceedings;

"Minister" means the Cabinet member responsible for the administration of justice;

"NEDLAC" means the National Economic Development and Labour Council established by section 2 of the National Economic, Development and Labour Council Act, 1994 (Act No 35 of 1994);

"plaintiff" includes any applicant or other party who seeks relief in civil proceedings;

"prescribed" means determined by regulation in terms of this Act;

"President" means the President of the Republic of South Africa;

"registrar" means the registrar of the Constitutional Court, the Supreme Court of Appeal or any Division of the High Court, as the case may be, and includes an assistant registrar;

"rules" means rules made under section 41;

"Special Division" means a Special Division of the High Court referred to in section 6(2);

"special member" means a special member of a Special Division referred to in section 8(3);

"Superior Court" means the Constitutional Court, the Supreme Court of Appeal and any Division of the High Court.

Objects and interpretation of Act

2. (1) The objects of this Act are—

(a) to consolidate and rationalise the laws pertaining to Superior Courts as contemplated in item 16(6) of Schedule 6 to the Constitution;

(b) to bring the structure of the Superior Courts into line with the provisions of Chapter 8 and the transformation imperatives of the Constitution;
(c) to make provision for the adjudication of matters relating to competition appeals, electoral disputes, income tax appeals, labour disputes and land claims by the Superior Courts; and

(d) to make provision for the administration of the judicial functions of all courts, including governance issues, over which the Chief Justice exercises final responsibility, and the administrative functions, including the budget of all courts, over which the Minister exercises final responsibility.

(2) This Act must be read in conjunction with Chapter 8 of the Constitution, which contains the founding provisions for the structure and jurisdiction of the Superior Courts, for the appointment of judges of the Superior Courts and matters related to the Superior Courts.

Introduction of legislation dealing with court structures

3. Draft legislation providing for the establishment of any court of law, or any tribunal contemplated in section 34 of the Constitution, may be introduced in Parliament by the Minister only.

CHAPTER 2

Structure of Superior Courts

Constitution and seat of Constitutional Court

4. (1) (a) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice of South Africa and nine other judges of the Constitutional Court.

(b) The seat of the Constitutional Court is in Johannesburg, but whenever it appears to the Chief Justice in consultation with the Minister that it is expedient to hold its sitting for the hearing of any matter at a place elsewhere than at the seat of the Court, it may hold such sitting at that place.

(2) The Deputy Chief Justice must—

(a) exercise such powers or perform such functions of the Chief Justice in terms of this or any other law as the Chief Justice may assign to him or her; and

(b) in the absence of the Chief Justice, or if the office of Chief Justice is vacant, perform the functions of the Chief Justice, as Acting Chief Justice.

Constitution and seat of Supreme Court of Appeal

5. (1) (a) The Supreme Court of Appeal consists of—

(i) the President of the Supreme Court of Appeal;

(ii) two Deputy Presidents of the Supreme Court of Appeal;

and

(iii) so many other judges as may from time to time be determined in accordance with the prescribed criteria, and approved by the President.
(b) Subject to section 9(1), the seat of the Supreme Court of Appeal is in Bloemfontein, but whenever it appears to the President of the Supreme Court of Appeal, in consultation with the Minister, that it is expedient to hold its sitting for the hearing of any matter at a place elsewhere than at the seat of the Court, it may hold such sitting at that place.

(2) A Deputy President of the Supreme Court of Appeal must—

(a) exercise such powers or perform such functions of the President of the Supreme Court of Appeal in terms of this or any other law as he or she may assign to him or her; and

(b) in the absence of the President of the Supreme Court of Appeal, or if the office of President of the Supreme Court of Appeal is vacant, a Deputy President of the Supreme Court of Appeal, designated by the President, perform the functions of the President of the Supreme Court of Appeal, as Acting President of the Supreme Court of Appeal.

(3) (a) The President, after consultation with the Chief Justice and the Minister, must designate one of the Deputy Presidents of the Supreme Court of Appeal as being mainly responsible for assisting the President of the Supreme Court of Appeal with managing appeals in regard to labour matters.

(b) The President must, before designating the Deputy President referred to in paragraph (a), also consult with NEDLAC.

**Constitution of High Court of South Africa**

6. The High Court of South Africa consists of the General and Special Divisions referred to in sections 7 and 8.

**Constitution and seats of General Divisions**

7. (1) The General Divisions of the High Court are:

   (a) Eastern Cape General Division.

   (b) Free State General Division.

   (c) KwaZulu Natal General Division.

   (d) Limpopo General Division.

   (e) Mpumalanga General Division.

   (f) Northern Cape General Division.

   (g) Northern Gauteng General Division.

   (h) North West General Division.

   (i) Southern Gauteng General Division.

   (j) Western Cape General Division.
(2) Each General Division of the High Court—

(a) has one or more seats, as set out in Schedule 1; and

(b) consists of—

(i) a Judge President and one or more Deputy Judges President, as determined by the President, each with specified headquarters within the area under the jurisdiction of that Division; and

(ii) so many other judges as may from time to time be determined in accordance with the prescribed criteria, and approved by the President.

(3) Subject to subsection (4)—

(a) the area of jurisdiction of a General Division is as set out in Schedule 1; and

(b) the area under the jurisdiction of a General Division may comprise more than one or any part of more than one province.

(4) (a) If a General Division has a main seat only, the area of original and appeal jurisdiction of that Division comprises the whole area of jurisdiction as set out in Schedule 1.

(b) If a General Division has a main seat and one or more local seats—

(i) subject to paragraph (c), the area of original jurisdiction of each seat in that Division comprises the area of jurisdiction of that seat as set out in Schedule 1;

(ii) the main seat of that Division has concurrent appeal jurisdiction over the area of jurisdiction of any local seat of that Division;

(iii) the Judge President of that Division must compile a single court roll for that Division; and

(iv) the Judge President of that Division may deploy all the judges of that Division within the Division as he or she deems fit.

(c) Notwithstanding paragraph (b)(i), but subject to section 38, in the event of any uncertainty regarding which seat in a General Division has original jurisdiction in a particular matter, such a matter may be instituted in any seat in that Division which may have original jurisdiction.

(5) (a) Notwithstanding any provision of Schedule 1, the Northern Gauteng and Southern Gauteng General Divisions have concurrent jurisdiction in respect of the magisterial district of Randburg.

(b) Paragraph (a) shall lapse two years after this subsection comes into operation.

(6) If a judge of one General Division is to be temporarily deployed in another
Subject to paragraph (b), a Deputy Judge President of a Division must—

(i) exercise the powers or perform the functions of the Judge President in terms of this or any other law as the Judge President may assign to him or her; and

(ii) in the absence of the Judge President of that Division, or if the office of the Judge President is vacant, exercise the powers or perform the functions of the Judge President, as the Acting Judge President of that Division.

(b) If more than one Deputy Judge President is appointed in respect of a Division, the President must, after consultation with the Minister and the Chief Justice, designate one Deputy Judge President, as Acting Judge President of that Division, who must perform the functions of the Judge President in the circumstances contemplated in paragraph (a)(ii).

(8) Subject to section 9(1), the main and local seats of each General Division is as set out in Schedule 1, but whenever it appears to the Judge President of a General Division that it is expedient to hold a sitting for the hearing of any matter at a place elsewhere than at the seat of the Court, he or she may, in consultation with the Minister, hold such sitting at that place.

Constitution and seats of Special Divisions

8. (1) The Special Divisions of the High Court are the—

(a) Competition Appeals Special Division, seated in Cape Town;

(b) Electoral Matters Special Division, seated in Johannesburg;

(c) Income Tax Special Division, with seats in Bloemfontein, Cape Town, Durban, Grahamstown, Johannesburg, Kimberley, Port Elizabeth and Pretoria; and

(d) Land Claims Special Division, seated in Johannesburg.

(2) A Special Division—

(a) has jurisdiction throughout the territory of the Republic; and

(b) may, whenever it appears to the Judge President concerned, in consultation with the Minister, that it is expedient to hold sittings for the hearing of any matter at a place elsewhere than a seat of the Division, hold such sitting at that place.

(3) (a) The Competition Appeals Special Division consists of three or more judges of General Divisions, as the President may from time to time determine, designated by the President after consultation with the Chief Justice and the Minister, one of whom must be designated as the Judge President.

(b) The Electoral Matters Special Division consists of—
(i) a judge of the Supreme Court of Appeal, designated by the President after consultation with the Chief Justice and the Minister, as the Judge President;

(ii) two or more judges of General Divisions, as the President may from time to time determine, designated by the President after consultation with the Chief Justice and the Minister; and

(iii) two or more special members appointed by the President on the advice of the Judicial Service Commission and in accordance with the criteria and the procedure set out in Schedule 2.

(c) The Income Tax Special Division consists of—

(i) six or more judges of General Divisions, designated by the President after consultation with the Chief Justice and the Minister, one of whom must be designated as the Judge President; and

(ii) two or more special members, appointed by the President on the advice of the Judicial Service Commission in accordance with the criteria and the procedure set out in Schedule 2.

(d) The Land Claims Special Division consists of three or more judges of General Divisions, designated by the President after consultation with the Chief Justice and the Minister, one of whom must be designated as the Judge President.

Circuit Courts

9. (1) The President of the Supreme Court of Appeal must, in consultation with the Minister, by notice in the Gazette establish at least three circuit districts for the Court, called the Northern, Central and Southern districts, for the hearing of civil or criminal appeals emanating from the areas of jurisdiction of those districts, and may from time to time by like notice add to or alter such districts.

(2) The Supreme Court of Appeal must at least twice a year and at such times and places as may be determined by the President of the Supreme Court of Appeal, hear appeals in each district referred to in subsection (1).

(3) The Judge President of a General Division may by notice in the Gazette within the area under the jurisdiction of that Division establish circuit districts for the adjudication of civil or criminal matters, and may from time to time by like notice alter the boundaries of any such district.

(4) In each circuit district of a General Division there must be held at least twice a year and at such times and places as may be determined by the Judge President concerned, a court which must be presided over by a judge of that Division.

(5) A court referred to—

(a) in subsection (1), is called a circuit court of the Supreme Court of Appeal; and

(b) in subsection (4) is called a circuit court of the Division in question.

Appointment, remuneration and tenure of office of judges, acting judges and special members
10. (1) Judges and acting judges of the Superior Courts are appointed in accordance with the provisions of the Constitution, and receive such remuneration as determined under the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001).

(2) Any—

(a) Judge President of a Special Division; and

(b) judge of a Special Division,

may be appointed or designated by the President after consultation with the Chief Justice and the Minister for such fixed period as he or she determines at the time of the appointment or designation.

(3) Any person who has been appointed as an acting judge of a Superior Court, shall be deemed to have been so appointed also in respect of any period during which he or she is necessarily engaged in connection with the disposal of any proceedings—

(a) in which he or she has participated as such a judge, including an application for leave to appeal in respect of such proceedings; and

(b) which has not yet been disposed of at the expiry of the period for which he or she was appointed.

(4) Any special member—

(a) must be appointed for such fixed term as determined by the President at the time of the appointment;

(b) must be paid such remuneration and allowances as the Minister may determine with the concurrence of the Cabinet member responsible for finance;

(c) may resign from office by tendering written notice of resignation to the President; and

(d) may on good cause shown be removed from office by the President after consultation with the Chief Justice and the Minister.

CHAPTER 3

Judicial administration of judicial functions of all courts, including governance issues and administration of administrative functions of courts, including finances of all courts

Part 1

Judicial administration of judicial functions of all courts, including governance issues

Judicial administration of judicial functions

11. (1) For the purpose of any consultation regarding any matter referred to in this section, the Chief Justice may convene any forum of judicial officers that he or she deems appropriate, but at least a third of the membership of any such forum must be women.
(2) The Chief Justice, as the head of the judicial authority as contemplated in section 165(6) of the Constitution, exercises responsibility over the development and implementation of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law.

(3) The Chief Justice must, subject to subsection (5), issue written protocols or directives, or give guidance or advice, to judicial officers—

(a) in respect of norms and standards for the performance of the judicial functions as contemplated in subsection (2); and

(b) regarding any matter affecting the—

(i) dignity;

(ii) accessibility; or

(iii) effectiveness, efficiency or functioning,

of the courts, and

each judicial officer must comply with each such directive or protocol.

(4) (a) Any function or any power in terms of this section, vesting in the Chief Justice or any other head of court, may be delegated as many times as is deemed necessary, to any other judicial officer.

(b) Subject to subsections (2) and (3), the management of the judicial functions of each court is the responsibility of the head of the court, including the head of each lower court as contemplated in section 1 of the Magistrates Act, 1993 (Act No. 90 of 1993).

(c) Subject to subsections (2) and (3), the Judge President of a General Division is also responsible for the co-ordination of the judicial functions of all lower courts falling within the jurisdiction of that Division.

(5) Any written protocol or directive in terms of subsection (3)—

(a) may only be issued by the Chief Justice, if it enjoys the majority support of a forum convened in terms of subsection (1), which forum must include all the heads of Superior Courts; and

(b) must be published in the Gazette.

Establishment and composition of Office of Chief Justice

12. (1) There is an Office of the Chief Justice comprising an Executive Secretary to the Chief Justice and the number of other personnel as determined from time to time by the Minister after consultation with the Chief Justice.

(2) The Executive Secretary and other personnel are officers in the Department.

(3) (a) The Executive Secretary is appointed by the Minister in consultation with the Chief Justice and at a post level of at least a Chief Director in the Department.
The other personnel are appointed by the Director-General in consultation with the Chief Justice or any person designated by the Chief Justice for that purpose.

**Functions of Office of the Chief Justice**

13. (1) The Executive Secretary, under the control and direction of the Chief Justice or any judge designated by the Chief Justice, must subject to section 15—

(a) develop and maintain, in the Office of the Chief Justice, the capacity to—

(i) administer the responsibility over the judicial functions falling under the Chief Justice, as contemplated in section 165 of the Constitution and this Act, including the establishing of such capacity in the Superior Courts to undertake research as the Chief Justice deems fit and the compilation of periodical statistics relating to the functioning of the courts and the performance of judicial duties by the judicial officers;

(ii) participate in the compilation of the budgets of the courts by the Department; and

(iii) properly record the recess periods of the Superior Courts, and leave periods and any other absences from courts by all judicial officers;

(b) exercise responsibility over the Secretariat of the Judicial Service Commission; and

(c) generally, perform such administrative tasks related to the judicial functions of the Chief Justice under this Act or any other law as assigned by the Chief Justice from time to time.

(2) The other personnel of the Office of the Chief Justice must, under the control and direction of the Executive Secretary, assist the Executive Secretary in the performance of the functions referred to in subsection (1).

**Access to courts, recess periods of Superior Courts and attendance at courts**

14. (1) All courts—

(a) must be open to the public every business day; and

(b) may conduct business on any Saturday, Sunday or any public holiday as may be required from time to time.

(2) Each Superior Court will recess during specified periods in—

(a) June and July;

(b) December and January; and
(c) any other period,

as may be determined by the Minister after consulting the Chief Justice and the forum referred to in section 11(1) and having regard to the workload of the courts, the public need for convenient access to the courts, and the interests of justice.

(3) The purpose of recess periods is to enable a judge of a Superior Court to do research and to attend to outstanding or prospective judicial functions as may be assigned to him or her by the head of court.

(4) During each recess period, the head of each Court must ensure that an adequate number of judges are available in that court to deal with any judicial functions that may be required, in the interests of justice, to be dealt with during that recess period.

(5) Subject to subsections (1) to (4), the head of each Superior Court is responsible to—

(a) ensure that sufficient judges of that court are available to conduct the business of the court at all times that the court is open for business;

(b) issue directions to the judges of that court with respect to their attendance at the court and absences from the court during recess periods; and

(c) approve any extraordinary absence of a judge from the court, in accordance with the regulations; and

keep a register, in the prescribed manner and form, of vacation periods allocated to, or extraordinary absence approved for, a judge of that court.

(6) The head of each lower court is responsible to—

(a) ensure that sufficient judicial officers of that court are available to conduct the business of the court at all times that the court is open for business;

(b) issue directions to the judicial officers of that court with respect to their attendance at the court and absences from the court during business days; and

(c) in consultation with the Judge President of the General Division concerned, approve any extraordinary absence of a judicial officer from the court, in accordance with the regulations; and

keep a register, in the prescribed manner and form, of every vacation period allocated to, or extraordinary absence approved for, a judicial officer of that court.

(7) Vacation leave for judges of the Superior Courts must be provided for in terms of an Act of Parliament, but such provision must at least give a judge a choice between four weeks standard annual vacation leave, or a period of three and a half months for every period of four years' actual service completed by that judge.
Administration of administrative functions of all courts, including the budgets, finances and financial accountability of all courts

Finances and accountability

15. (1) The Minister exercises authority over the administration and budget of all courts in accordance with section 165 (7) of the Constitution.

(2) Expenditure in connection with the administration and functioning of all courts envisaged in section 166 of the Constitution, and the Board, must be defrayed from moneys appropriated by Parliament for this purpose to the Departmental vote in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(3) Monies appropriated by Parliament for this purpose—

(a) constitute earmarked funds on the Departmental vote; and

(b) may not be used by the Department for any other purpose without the approval of the Chief Justice and Treasury.

(4) Whenever an amount of monies referred to in subsection (3)(a) has been budgeted for the training of judicial officers, at least thirty per cent of such amount must be allocated for the training of women.

(5) The Minister must consult with the Chief Justice on the funds required for the administration and functioning of the Courts in the manner prescribed.

(6) Subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999), the Director-General of the Department—

(a) is charged with the responsibility of accounting for money received or paid out for or on account of the administration and functioning of the Courts and the Board; and

(b) must cause the necessary accounting and other related records to be kept, which records must be audited by the Auditor-General.

Appointment of officers and staff of Superior Courts and Board

16. (1) (a) The Minister must, after consultation with the head of the Court concerned, appoint for the Constitutional Court, the Supreme Court of Appeal and each Division—

(i) a court manager; and

(ii) a registrar.

(b) The Minister may, after consultation with the head of the Court concerned, appoint in respect any Court or Division referred to in paragraph (a)—

(i) one or more assistant court managers;

(ii) one or more assistant registrars, including assistant registrars dealing specifically with labour matters; and
(iii) such other officers and staff as may be required for the administration of justice or the execution of the powers and authority of the court concerned.

(c) The Minister must, after consultation with the Chairperson of the Board, appoint a Secretary of the Board and may appoint such other officers and employees as may be required for the performance by the Board of its functions.

(d) Any person appointed in terms of paragraph (a), (b) or (c) is in the employ of the Department and is subject to the laws governing the public service.

(e) A court manager is the senior executive officer of the court where he or she has been appointed, and under the control and direction of the Director General of the Department, is responsible for the performance of the administrative functions relating to that court and exercises administrative control over the persons referred to in paragraphs (a)(ii) and (b), and performs such other functions as agreed to from time to time by the Minister and the Chief Justice.

(2) Whenever by reason of absence or incapacity any court manager, registrar or assistant registrar is unable to carry out the functions of his or her office, or if his or her office becomes vacant, the Minister may after consultation with the head of the court concerned, authorise any other competent officer of the public service to act in the place of the absent or incapacitated officer during such absence or incapacity or to act in the vacant office until the vacancy is filled.

(3) Any person appointed under subsection (1) may simultaneously hold more than one of the offices mentioned in that subsection.

(4) The Minister may delegate to an officer in the Department any of the powers vested in him or her by this section.

(5) Any of the powers or functions vested in the Minister or his or her delegate in terms of this section, must be exercised in accordance with a protocol prescribed by a regulation made under section 66.

CHAPTER 4

Manner of arriving at decisions in Superior Courts

17. (1) In accordance with section 167(2) of the Constitution, any matter before the Constitutional Court must be heard by at least eight judges.

(2) If, at any stage after a hearing has commenced, any judge of the Constitutional Court is absent or unable to perform his or her functions, or if a vacancy among the members of the court arises, and—

(a) the remaining members of the court are not less than eight in number—

(i) such hearing must continue before the remaining judges of the court; and

(ii) the decision of the majority of the remaining judges of the court shall, if that majority is also a majority of the judges of the court before whom the hearing commenced, be the decision of the court; or
(b) the remaining members of the court are fewer than eight in number, the proceedings must be stopped and commenced de novo.

(3) No judge may sit at the hearing of an appeal against a judgment or order given in a case which was heard before him or her.

Manner of arriving at decisions by Supreme Court of Appeal

18. (1) Proceedings of the Supreme Court of Appeal must ordinarily be presided over by five judges, but the President of the Supreme Court of Appeal may—

(a) direct that an appeal in a criminal or civil matter be heard before a court consisting of three judges; or

(b) whenever it appears to him or her that any matter should in view of its importance be heard before a court consisting of a larger number of judges, direct that the matter be heard before a court consisting of so many judges as he or she may determine.

(2) (a) The majority of judges hearing any labour matter in the Supreme Court of Appeal must, for the purpose of that hearing, be judges whose names appear on the list of judges referred to in section 24.

(b) The court roll of the Supreme Court of Appeal must contain a separate portion dealing with all labour matters to be heard.

(c) If, during the course of the hearing of any matter which was not dealt with as referred to in paragraph (a), it becomes apparent that the matter concerned is or may be a labour matter and the names of the majority of judges hearing that matter do not appear on the list of judges referred to in section 24, the validity of the hearing or any ensuing judgment is not affected.

(3) The judgment of the majority of the judges presiding at proceedings before the Supreme Court of Appeal shall be the judgment of the court and where there is no judgment to which a majority of such judges agree, the hearing must be adjourned and commenced de novo before a new court constituted in such manner as the President of the Supreme Court of Appeal may determine.

(4) If at any stage after the hearing of an appeal has commenced a judge of the Supreme Court of Appeal is absent or unable to perform his or her functions, or if a vacancy among the members of the Court arises—

(a) the hearing must, where the remaining judges constitute a majority of the judges before whom the hearing was commenced, proceed before the remaining judges, and the decision of a majority of the remaining judges who are in agreement shall, if that majority is also a majority of the judges before whom the hearing was commenced, be the decision of the court; or

(b) in any other case, the appeal must be heard de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges or of the one remaining judge as the decision of the Court.

(5) Two or more judges of the Supreme Court of Appeal, designated by the President of the Supreme Court of Appeal, have jurisdiction to hear and determine applications for interlocutory relief, including applications for condonation and for leave to proceed in forma pauperis, in chambers.
(6) No judge may sit at the hearing of an appeal against a judgment or order given in a case which was heard before him or her.

**Manner of arriving at decisions by General Divisions**

19. (1) (a) Save as provided for in this Act or any other law, a General Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a full court consisting of not more than three judges, as he or she may determine.

(b) For the purpose of hearing any labour matter in a General Division—

(i) the judge hearing that labour matter; or

(ii) the majority of the judges hearing that labour matter,

as the case may be, must for the purpose of that hearing be a judge or judges whose names appear on the list of judges referred to in section 24.

(c) If, during the course of the hearing of any matter by a General Division, which was not dealt with as referred to in paragraph (b), it becomes apparent that the matter concerned is or may be a labour matter and—

(i) the name of the judge hearing that matter does not appear; or

(ii) the names of the majority of judges hearing that matter do not appear, on the list referred to in section 24, the validity of the hearing or any ensuing judgment is not affected.

(d) The court roll of a General Division must contain a separate portion dealing with all labour matters to be heard.

(e) A single judge of a General Division may, in consultation with the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, at any time discontinue the hearing of any civil matter which is being heard before him or her and refer it for hearing to the full court of that Division as contemplated in paragraph (a).

(2) For the hearing of any criminal case as a court of first instance, a court of a General Division must be constituted in the manner prescribed in the applicable law relating to procedure in criminal matters.

(3) Except where it is in terms of any law required or permitted to be otherwise constituted, a court of a General Division must be constituted before two judges for the hearing of any civil or criminal appeal: Provided that the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may in the event of the judges hearing such appeal not being in agreement, at any time before a judgment is handed down in such appeal, direct that a third judge of that Division be added to hear that appeal.

(4) Save as otherwise provided for in this Act or any other law, the decision of the majority of the judges of a full court of a General Division is the decision of the court, and where the majority of the judges of any such court are not in agreement, the hearing must be adjourned and commenced de novo before a court consisting of three other judges.
(5) If at any stage during the hearing of any matter by a full court, any judge of such court is absent or unable to perform his or her functions, or if a vacancy among the members of the Court arises, that hearing must—

(a) if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges; or

(b) if the remaining judges do not constitute such a majority, or if only one judge remains, be commenced de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges or of the one remaining judge as the decision of the Court.

(6) The provisions of subsection (4) apply, with the changes required by the context, whenever in the circumstances set out in subsection (6) a hearing proceeds before two or more judges.

(7) During any recess period, one judge designated by the Judge President shall, notwithstanding anything contained in this Act or any other law, but subject to subsection (3), exercise all the powers, jurisdiction and authority of a General Division.

(8) No judge may sit at the hearing of an appeal against a judgment or order given in a case which was heard before him or her.

Manner of arriving at decisions in Competition Appeals Special Division

20. (1) The Judge President of the Competition Appeals Special Division must preside at proceedings of the Division or designate another judge of the Division to preside at particular proceedings of the Division.

(2) Subject to subsection (3), the Judge President must assign each matter before the Division to a court composed of three judges of the Division.

(3) The Judge President, or any other judge of the Division designated by the Judge President, may sit alone to consider an—

(a) appeal against a decision of an interlocutory nature, as prescribed by the rules;

(b) application concerning the determination or use of confidential information;

(c) application for leave to appeal, as prescribed by the rules;

(d) application to suspend the operation and execution of an order that is the subject of a review or appeal; or

(e) application for procedural directions.

(4) The decision of a judge sitting alone in terms of subsection (3), or of the majority of the judges hearing a particular matter, is the decision of the court.

(5) If a judge or any of the judges hearing a matter assigned in terms of subsection (2) is absent or unable to perform his or her functions, or if a vacancy among the members of the Court arises, the Judge President must—
(a) direct that the hearing of that matter proceed before the remaining judge or judges to whom that matter was assigned; or

(b) terminate the proceedings before that court and constitute another court, which may include a judge to whom the matter was originally assigned, to hear the matter de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges or of the one remaining judge as the decision of the Court.

Manner of arriving at decisions in Electoral Matters Special Division

21. (1) Subject to subsection (2), any matter before the Electoral Matters Special Division must be heard by a court composed of three judges and two special members of the Division.

(2) The Judge President, or any other judge of the Division designated by the Judge President, may sit alone to consider an appeal against a decision of an interlocutory nature, as prescribed by the rules.

(3) If, at any stage after a hearing before a court of the Division has commenced, any member of that court is absent or unable to perform his or her functions, or if a vacancy among the members of the court arises, and—

(a) the remaining members of the court are not less than three in number—

(i) such hearing must continue before the remaining members of the court; and

(ii) the decision of the majority of the remaining members of the court shall, if that majority is also a majority of the members before whom the hearing commenced, be the decision of the court; or

(b) the remaining members of the court are fewer than three in number, the proceedings must be stopped and commenced de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining members or of the one remaining member as the decision of the Court.

Manner of arriving at decisions in Income Tax Special Division

22. (1) Subject to subsections (2) and (4), the Judge President of the Income Tax Special Division must assign each matter before the Division to a court composed of a judge as presiding officer, a special member who is an accountant and a special member who is a representative of the commercial community: Provided that—

(a) in all cases relating to the business of mining such third member shall, if the Judge President of the court, the Commissioner or the appellant so desires, be a qualified mining engineer;

(b) where any such appeal relates to the valuation of immovable property, or of both movable and immovable property, such third member must, if the Judge President, the Commissioner or the appellant so desires, be a sworn appraiser who has skills or knowledge relating to the purpose for which the property is utilised; and
(c) when an appeal before the court involves a matter of law only or constitutes an application for condonation, the court consists of the Judge President or a judge of the Division assigned by the Judge President, sitting alone.

(2) Any question as to whether a matter for decision involves a matter of fact or a matter of law, as contemplated in subsection (1)(c), shall be decided by the Judge President or judge of the court sitting alone.

(3) The decision of—

(a) a judge sitting alone in terms of subsection (1)(c); or

(b) the majority of the members hearing a particular matter,

is the decision of the Court: Provided that a decision referred to in paragraph (b) must in all cases be supported by the judge in question.

(4) The Judge President of the Division may, where—

(a) the amount which is the subject of a dispute exceeds R50 million; or

(b) the Commissioner and the appellant agree thereto and have jointly applied to that Judge President,

direct that the court hearing that appeal consist of three judges of the Division and the special members contemplated in subsection (1).

(5) (a) If a special member of a court hearing a matter in terms of subsections (1) or (4) is unable to complete the proceedings in that matter, the matter must proceed before the judge or judges and the remaining special member.

(b) If the judge or both special members of a court hearing a matter in terms of subsection (1) is unable to complete the proceedings in that matter, the Judge President must terminate the proceedings before that court and constitute another court, which may include a judge or special member to whom the matter was originally assigned, to hear the matter de novo.

(c) If at any stage during the hearing of a matter in terms of subsection (4), one of the judges becomes unavailable to complete the proceedings in that matter, the hearing must proceed before the remaining judges and special members.

Manner of arriving at decisions in Land Claims Special Division

23. (1) (a) Save as otherwise provided for in this Act or the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994), a court of the Land Claims Special Division must be presided over by a single judge of the Division for the hearing of any matter, but the Judge President or, in the absence of the Judge President, the most senior available judge, may at any time direct that any matter be heard by a full court consisting of three judges.

(b) A single judge of the Division may, in consultation with the Judge President or, in the absence of the Judge President, the most senior available judge, at any time discontinue the hearing of any civil matter
which is being heard before him or her and refer it for hearing to the full court of the Division as contemplated in paragraph (a).

(2) Judges of the Land Claims Special Division must be assisted at a hearing before any court of the Division by assessors in the circumstances prescribed by, and in accordance with, the provisions of section 28 of the Restitution of Land Rights Act, 1994.

(3) In the event of an equality of votes—

(a) at a hearing where one or more members of a court of the Division are assessors, the vote of the judge, or, if there is more than one judge, the vote of the majority of the judges, shall prevail; and

(b) at any other hearing, the hearing must be adjourned and commenced before a new court constituted in such manner as the Judge President may determine.

(4) If at any stage during the hearing of any matter where three judges are presiding, any judge of the court is absent or unable to perform his or her functions, or if a vacancy among the members of the Court arises, the hearing must proceed before the remaining members of the court: Provided that such members must include at least one judge.

(5) If at any stage during the hearing of any matter an assessor who is a member of a court is unavailable to complete the hearing, the presiding judge may direct—

(a) that the hearing proceed before the remaining member or members of the court; or

(b) that the hearing shall commence de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the remaining member or members as the decision of the court.

List of judges in labour matters

24. (1) The Chief Justice must from time to time enter the names of judges of the Supreme Court of Appeal and the High Court on a list of judges for the hearing of labour matters, as contemplated in subsection (2).

(2) Any judge of the Supreme Court of Appeal or a Division of the Supreme Court may submit a written request to the Chief Justice to be placed on the list referred to in subsection (1).

(3) The name of a judge may be entered on the list referred to in subsection (1) if, after consultation with the Deputy President of the Supreme Court of Appeal referred to in section 5(3)(a), the Head of Court of the judge concerned (if applicable) and NEDLAC, the Chief Justice is satisfied that:

(a) the judge has successfully completed a prescribed training course in labour matters at a prescribed institution; or

(b) the judge, on account of—
(i) previous experience as a judge or acting judge of any court dedicated to the adjudication of labour matters; or

(ii) proven expertise in the field of labour law matters,

has suitable knowledge of, and expertise in, labour matters, to preside over the adjudication of labour matters.

(4) The Chief Justice must enter the names of the judges referred to in section 68(1) and 68(3)(c) on the list referred to in subsection (1).

(5) (a) The Minister must cause the list referred to in subsection (1), as well as any changes thereto, to be published in the Gazette.

(b) The list must first be published within six months after the date of the commencement of this section, and at least once a year thereafter.

CHAPTER 5

Orders of constitutional invalidity, appeals and settlement of conflicting decisions

Referral of order of constitutional invalidity to Constitutional Court

25. (1) (a) Whenever the Supreme Court of Appeal, a Division of the High Court or any competent court declares an Act of Parliament, a provincial Act or conduct of the President invalid as contemplated in section 172(2)(a) of the Constitution, that court must, in accordance with the applicable rules of court, refer the order of constitutional invalidity to the Constitutional Court for confirmation.

(b) Whenever any person or organ of state with a sufficient interest appeals or applies directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court, as contemplated in section 172(2)(d) of the Constitution, the court must deal with the matter in accordance with the rules.

(2) If requested by the Chief Justice to do so, the Minister must appoint counsel to present argument to the Constitutional Court in respect of any matter referred to in subsection (1).

Appeals generally

26. (1) Subject to section 25(1), the Constitution and any other law—

(a) an appeal against any decision of a court of any Division or a court of a status similar to the High Court lies, upon leave having been granted to the Supreme Court of Appeal; and

(b) an appeal against any decision of a court of a General Division on appeal to it lies to the Supreme Court of Appeal upon special leave being granted by the Supreme Court of Appeal, and the provisions of section 27 apply with the necessary changes.

(2) (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
(ii) Save under exceptional circumstances, the question whether the decision would have no practical
effect or result is to be determined without reference to any consideration of costs.

(b) If at any time prior to the hearing of an appeal the President of the Supreme Court of Appeal or the
Judge President, as the case may be, is prima facie of the view that it would be appropriate to dismiss the
appeal on the ground set out in paragraph (a), he or she must call for written representations from the
respective parties as to why the appeal should not be so dismissed.

(c) Upon receipt of the representations or, failing which, at the expiry of the time determined for their
lodging, the President of the Supreme Court of Appeal or the Judge President, as the case may be, must
refer the matter to three judges for their consideration.

(d) The judges considering the matter may order that the question whether the appeal should be
dismissed on the ground set out in paragraph (a) be argued before them at a place and time appointed,
and may, whether or not they have so ordered—

(i) order that the appeal be dismissed, with or without an order as to the
costs incurred in any of the courts below or in respect of the costs of
appeal, including the costs in respect of the preparation and lodging of
the written representations; or

(ii) order that the appeal proceed in the ordinary course.

(3) Notwithstanding any other law, no appeal lies from any judgment or order in proceedings in
connection with an application—

(a) by one spouse against the other for maintenance pendente lite;

(b) for contribution towards the costs of a pending matrimonial action;

(c) for the interim custody of a child when a matrimonial action between
his or her parents is pending or is about to be instituted; or

(d) by one parent against the other for interim access to a child when a
matrimonial action between the parents is pending or about to be
instituted.

Leave to appeal

27. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting
judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 26(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the
case, the appeal would lead to a just and prompt resolution of the real issues between
the parties.
(2) (a) Leave to appeal as contemplated in section 26(1)(a) may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.

(b) If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.

(c) An application referred to in paragraph (b) must be considered by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal and, in the case of a difference of opinion, also by the President of the Supreme Court of Appeal or any other judge of the Supreme Court of Appeal likewise designated.

(d) (i) The judges considering the application may order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.

(ii) Where an application has been so referred to the court, the court may thereupon grant or refuse it.

(e) The decision of the majority of the judges considering the application, or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.

(3) An application for special leave to appeal under section 26(1)(b) may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after the decision sought to be appealed against, or such longer period as may on good cause be allowed, and the provisions of subsection (2)(c) to (e) shall apply with the necessary changes.

(4) The power to grant leave to appeal—

(a) is not limited by reason only of the fact that the matter in dispute is incapable of being valued in money; and

(b) is subject to the provisions of any other law which specifically limits it or specifically grants or limits any right of appeal.

(5) Any leave to appeal may be granted subject to such conditions as the court concerned may determine, including a condition—

(a) limiting the issues on appeal;

(b) that the appellant pay the costs of the appeal; or

(c) that the appellant furnish security for the costs of the appeal in such an amount as the registrar may determine, and the court may fix the time within which the security is to be furnished.

(3) Subsection (2)(c), (d) and (e) apply with the necessary changes to any application to the Supreme Court of Appeal relating to an issue connected with an appeal.
Suspension of decision pending appeal

28. (1) Subject to subsections (2) and (3), and unless the court under the most exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under the most exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he, she or it will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise as contemplated in subsection (1)—

(i) the court must immediately record its reasons for doing so on the record;

(ii) the aggrieved party will have an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged, in terms the applicable rules of court, with the registrar.

Powers of court on hearing of appeals

29. The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law—

(a) dispose of an appeal without the hearing of oral argument;

(b) receive further evidence;

(c) remit the case to the court of first instance, or the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or

(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.

Settlement of conflicting decisions in civil cases
Whenever a decision on a question of law is given by a court of a Division which is in conflict with a decision on the same question of law given by a court of any other Division, the Minister may submit such conflicting decisions to the Chief Justice, who must cause the matter to be argued before the Constitutional Court or the Supreme Court of Appeal, as the case may be, in order to determine the said question of law for guidance.

CHAPTER 6

Provisions applicable to High Court only

Persons over whom and matters in relation to which General Divisions have jurisdiction

31. (1) A General Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power, subject to the direction of the Judge President concerned—

(a) to hear and determine appeals from all lower courts within its area of jurisdiction;

(b) to review the proceedings of all such courts;

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

(2) A General Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other General Division.

(3) Subject to section 26 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act No. 105 of 1983), any General Division may—

(a) issue an order for attachment of property or arrest of a person to confirm jurisdiction or order the arrest suspertctus de fuga also where the property or person concerned is outside its area of jurisdiction but within the Republic: Provided that the cause of action arose within its area of jurisdiction; and

(b) where the plaintiff is resident or domiciled within its area of jurisdiction but the cause of action arose outside its area of jurisdiction, issue an order for the attachment of property or arrest of a person to found jurisdiction regardless of where in the Republic the property or person is situated.

(4) Notwithstanding any provision in this or any other law, any contractual obligation, term or provision which is in conflict with this section is null and void and is not enforceable.

Jurisdiction of Special Divisions

32. Subject to this Act and the Constitution—

(a) the Competition Appeals Special Division—
has jurisdiction over the matters referred to in section 37 of the Competition Act, 1998 (Act No. 89 of 1998); and

(ii) is subject to such provisions as may specifically be applicable to the Division under that Act;

(b) the Electoral Matters Special Division—

(i) has jurisdiction over the matters referred to in section 20 of the Electoral Commission Act, 1996 (Act No. 51 of 1996); and

(ii) is subject to such provisions as may specifically be applicable to the Division under that Act;

(c) the Income Tax Special Division—

(i) has jurisdiction over the matters referred to in section 83 of the Income Tax Act, 1962 (Act No. 58 of 1962); and

(ii) is subject to such provisions as may specifically be applicable to the Division under that Act; and

(d) the Land Claims Special Division—

(i) has jurisdiction over the matters referred to in section 22 of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994); and

(ii) is subject to such provisions as may specifically be applicable to the Division under that Act.

Grounds for review by General Division of proceedings of lower court

33. (1) The grounds upon which the proceedings of any lower court may be brought under review before a court of a General Division are—

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) This section does not affect the provisions of any other law relating to the review of proceedings in lower courts.
Judgment by default

34. A judgment by default may be granted and entered by the registrar of a Division in the manner and in
the circumstances prescribed in the rules made in terms of section 41, and a judgment so entered is
deemed to be a judgment of a court of the Division.

Time allowed for appearance

35. The time allowed for entering an appearance to a civil summons served outside the area of
jurisdiction of the General Division in which it was issued shall be not less than—

(a) one month if the summons is to be served at a place more than 150 kilometres from
the court out of which it was issued; and

(b) two weeks in any other case.

Circumstances in which security for costs shall not be required

36. If a plaintiff in civil proceedings in a General Division resides within the Republic, but outside the area
of jurisdiction of that Division, he or she shall not by reason only of that fact be required to give security
for costs in those proceedings.

Disposal of records and execution of judgments of Circuit Courts

37. (1) Within one month after the termination of the sittings of any Circuit Court, the registrar thereof
must, subject to any directions of the presiding judge or judges, transmit all records in connection with the
proceedings in that court to the registrar of the Supreme Court of Appeal or the General Division
concerned, as the case may be, to be filed as records of that Court or Division.

(2) Any judgment, order or sentence of a Circuit Court may, subject to any applicable rules for the time
being in force, be carried into execution by means of process of the Supreme Court of Appeal or the
General Division concerned, as the case may be.

Removal of proceedings from one Division to another or from one seat to another in the same
Division

38. (1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to
the court, in consultation with the Judge President concerned, that such proceedings—

(a) should have been instituted in another Division or at another seat of
that Division; or

(b) would be more conveniently or more appropriately heard or
determined—

(i) at another seat of that Division; or

(ii) in another Division,

that court may, upon application by any party thereto and after hearing all other parties thereto, order
such proceedings to be removed to that other Division or seat, as the case may be.
(2) An order for removal under subsection (1) must be transmitted to the registrar of the court to which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question.

Prohibition on attachment to found jurisdiction or arrest where defendant resides within the Republic

39. (1) No attachment of person or property to found jurisdiction shall be ordered by a Division against a person who is resident in the Republic.

(2) No writ shall be issued out of any General Division in or in connection with civil proceedings instituted or to be instituted for the arrest of a person residing within the Republic to secure his or her appearance as a defendant in those proceedings by reason only of the fact that such person has departed or is about to depart to a place outside the jurisdiction of that Division but within the Republic.

CHAPTER 7

Rules of court

Definitions

40. In this Chapter, unless the context indicates otherwise—

"clerk of the court" means a person appointed as such in terms of section 13(1) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944);

"commissioner" means a commissioner referred to in section 57;

"committee" means a committee of the Board; and

"rule" means a rule of court as contemplated in section 171 of the Constitution.

Minister may make rules

41. (1) The Minister must, with a view to the efficient, expeditious and uniform administration of justice in the Superior Courts and the lower courts—

(i) on a regular basis review existing rules of court; and

(ii) after consideration of the advice of the Board as contemplated in section 42(6), make, amend or repeal rules for those courts regulating—

(a) the practice and procedure in connection with litigation, including the time within which and the manner in which appeals must be noted;

(b) the form, contents and use of process;

(c) the practice and procedure in connection with the service of process or other documents, including the issue of interrogatories;

(d) the practice and procedure in connection with the execution of process, including writs and warrants;
(e) the practice and procedure in connection with the reference of any matter to a referee, and the remuneration payable to any such referee;

(f) the compulsory examination by one or more registered medical practitioners of any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed and whose state of health is relevant for the determination of such damages or compensation, as well as the manner, time, place and responsibility for the cost of the examination, and the making available to the opposing party of any documentary report on the examination;

(g) the procedure at or in connection with any enquiry as to the mental state of any person, and the findings or orders which may be made or issued at any such enquiry;

(h) the appointment and admission of commissioners to take evidence and examine witnesses;

(i) the manner in which documents executed outside the Republic may be authenticated to permit of their being produced or used in any court or produced or lodged in any public office in the Republic;

(j) the appointment and admission of sworn translators;

(k) the duties of sheriffs and other officers of court;

(l) fees and costs, including the fees payable in respect of the service or execution of process (except subpoenas or warrants issued at the request of the State in criminal matters) or in respect of the summoning of persons to answer interrogatories;

(m) the manner of determining the amount of security in any case where it is required that security must be given, and the form and manner in which such security may be given;

(n) the hours during which the offices of registrars and clerks of the court must be open for official purposes;

(o) the manner of recording or noting evidence and proceedings;

(p) the custody and disposal of records or minutes of evidence and proceedings;

(q) the appointment of assessors in proceedings in lower courts;

(r) the tariff of fees chargeable by advocates, attorneys and notaries;

(s) the taxation of bills of costs and the recovery of costs; and

(t) generally any matter which may be necessary or useful to be prescribed for the proper despatch and conduct of the functions of the Superior Courts and the lower courts in civil as well as in criminal proceedings.

(2) (a) Different rules may be made in respect of—

(i) the various Superior Courts, including the various General and Special Divisions of the High Court, and the various lower courts in different magisterial districts; and

(ii) in respect of different kinds of proceedings.
The Minister may determine that any rule shall be of force for a specified period or periods only.

(3) Rules relating to any Special Division must be made after consultation with the Minister responsible for the administering of any law specifically connected with the jurisdiction of that Special Division.

(4) The power to make, amend or repeal rules under subsection (1), includes the power to make, amend or repeal rules in order to give effect to the provisions of sections 2 and 3 of the Foreign Courts Evidence Act, 1962 (Act No. 80 of 1962).

(5) The power to make, amend or repeal rules under subsection (1), includes the power to make, amend or repeal rules in relation to the application of the Admiralty Jurisdiction Regulation Act, 1983 (Act No. 105 of 1983), prescribing—

(a) the appointment of any person or body for the assessment of fees and costs, and the manner in which such fees and costs are to be assessed;

(b) measures aimed at avoiding circuitousness or multiplicity of actions;

(c) the practice and procedure for referring to arbitration any matter arising out of proceedings relating to a maritime claim, and the appointment, remuneration and powers of an arbitrator.

(6) (a) The Minister must cause every new rule and every amendment or repeal of a rule to be tabled in Parliament.

(b) No new rule or amendment or repeal of a rule commences unless—

(i) the Rules Board has been given a reasonable opportunity to comment thereon;

(ii) the Minister has considered the advice of the Rules Board;

(iii) it was tabled in Parliament; and

(iv) published in the Gazette at least one month before the day upon which such rule, amendment or repeal is determined to commence.

Establishment, composition and functions of Advisory Board for Rules of Court

42. (1) There is an Advisory Board for Rules of Courts, consisting of the following members appointed by the Minister, namely—

(a) a judge of the Constitutional Court;

(b) a judge of the Supreme Court of Appeal;

(c) a judge of the High Court;

(d) a Chief Magistrate;

(e) a Regional Court magistrate;
(f) a senior practising advocate;

(g) a senior practising attorney;

(h) a senior lecturer in law at a university in the Republic;

(i) three persons who are not ordinarily involved in the administration of justice; and

(j) an officer of the Department.

(2) The Minister must appoint the members referred to—

(a) in subsection (1)(a) to (e), in consultation with the Chief Justice; and

(b) in subsection (1)(f) to (h), after consultation with the Chief Justice and, in respect of—

(i) subsection (1)(f) and (g), after consultation with the advocates' and attorneys' professions, respectively; and

(ii) subsection (1)(h), after consultation with the deans of law.

(3) The Minister must, after consultation with the Chief Justice, designate a chairperson and a vice-chairperson of the Board from the members referred to in subsection (1)(a) to (e).

(4) The Minister may in respect of a member referred to in subsection (1)(f) to (i), appoint a person as an alternate member to act during the absence from any meeting of the Board of the member in respect of whom he or she is so appointed, in the place of that member.

(5) A member of the Board is appointed for a period of not more than three years, and any such appointment may be terminated at any time by the Minister, after consultation with the Chief Justice, if there are sound reasons for doing so.

(6) Any person whose period of office as a member of the Board has expired, may be reappointed.

(7) The functions of the Board are to advise the Minister on—

(a) the making and reviewing of rules of court, including the monetary jurisdiction limits of lower courts and the limitation of the costs of litigation; and

(b) any other matter referred to the Board by the Minister.

Meetings of Board

43. (1) Meetings of the Board must be held at the times and places determined by the chairperson or, if he or she is not available, by the vice-chairperson of the Board.

(2) The majority of the members of the Board constitute a quorum for a meeting.
If the chairperson is absent from a meeting, the vice-chairperson must act as chairperson, and if both the chairperson and the vice-chairperson are absent, the members present must elect one of their number to preside at that meeting.

The Board may regulate the proceedings at its meetings as it may think fit and must cause minutes to be kept of the proceedings.

The decision of the majority of the members of the Board is the decision of the Board.

**Committees of Board**

44. (1) The Board may establish committees consisting of—

(a) such members of the Board as may be designated by the Board; and

(b) such other persons, if any, as the Board, in consultation with the Minister, may appoint, for the period determined at the time of the appointment.

(2) The Minister may at any time extend the period of any appointment made under subsection (1)(b) or, if are sound reasons for doing so, terminate such appointment.

(3) The Board must designate a chairperson for every committee and, if the Board deems it necessary, a vice-chairperson.

(4) A committee must, subject to the directions and supervision of the Board, perform such functions of the Board as the Board may assign to it.

(5) On completion of all functions assigned to it in terms of subsection (4), a committee must submit a full report thereon to the Board, whereupon the committee automatically dissolves.

(6) The Board may at any time dissolve any committee.

(7) The provisions of section 43 apply mutatis mutandis to meetings of a committee.

**Executive committee**

45. (1) The Board may appoint an executive committee of the Board consisting of the chairperson, the vice-chairperson and such other members of the Board as may be determined by the Board.

(2) The chairperson of the Board is the chairperson of the executive committee.

(3) The executive committee is responsible for the day to day management of the functions of the Board and, in urgent and exceptional cases, it may with regard to any matter referred to in section 41(1)(a) to (t) inclusive, or any other matter entrusted to the Board, formulate and adopt a draft resolution, which becomes a decision of the Board when a document setting out that draft resolution has been submitted to all members of the Board and has been approved by the majority of such members.

(4) The Minister may in his or her discretion determine any matter which may not be dealt with under this section.

**Subcommittee on Rules for Labour Matters**
46. (1) The Board has a Subcommittee on Rules for Labour Matters, whose purpose is to make recommendations to the Board on rules of court for the Supreme Court of Appeal and the General Divisions of the High Court when they deal with labour matters.

(2) The Subcommittee referred to in subsection (1) consists of—

(a) the Deputy President of the Supreme Court of Appeal: Labour Matters, who is the chairperson of the Subcommittee;

(b) a Judge, whose name appears on the list referred to in section 24(1), as the deputy chairperson of the Subcommittee, appointed by the Minister after consultation with the Chief Justice, for the period determined at the time of the appointment;

(c) the following persons appointed by the Minister for a period of three years, acting after consultation with NEDLAC:

   (i) a senior practising advocate with knowledge, experience and expertise in labour law;

   (ii) a senior practising attorney with knowledge, experience and expertise in labour law;

(iii) a person who represents the interests of employees;

(iv) a person who represents the interests of employers; and

(v) a person who represents the interests of the State.

(3) Any person referred to in subsection (2)(b) or (c) may be re-appointed to the Subcommittee.

(4) The Subcommittee must, when necessary, submit recommendations to the Board in the form of draft rules, that is either new rules, rules amending existing rules or measures repealing existing rules, in order to regulate the conduct of proceedings in the Supreme Court of Appeal and the High Court when they deal with labour matters, including—

(a) the process by which proceedings are brought before those courts, and the form and content of that process;

(b) the period and process for noting appeals;

(c) the taxation of bills of costs;

(d) after consulting with the Cabinet member responsible for finance, the fees payable and the costs and expenses allowable in respect of the service or execution of any process of those courts, and the tariff of costs and expenses that may be allowed in respect of that service or execution; and

(e) all other matters incidental to performing the functions of the courts in question, including any matters not expressly mentioned in this
subsection that are similar to matters in respect of which the Minister may make rules in terms of section 41.

(5) Section 43 applies, with the changes required by the context, to meetings and decisions of the Subcommittee.

Reports of Board

47. The Board must submit a full report to the Minister—

(a) regarding each function of the Board or a committee, on completion thereof;

(b) annually, on the date determined by the Minister from time to time, regarding all the functions of the Board and its committees during the period determined by the Minister.

Remuneration and expenses of members of Board

48. (1) A member of the Board or a committee who is a judge of a Superior Court or a magistrate is entitled to such allowance for travelling and subsistence expenses incurred by him or her in the performance of his or her functions as such a member, as the Minister with the concurrence of the Cabinet member responsible for finance may determine.

(2) A member of the Board or of a committee, other than a judge or a magistrate, who is not subject to the provisions of the Public Service Act, 1994 (Proclamation No. 103 of 1994), is entitled to such remuneration, including reimbursement for travelling and subsistence expenses incurred by him or her in the performance of his or her functions as such a member, as the Minister with the concurrence of the Cabinet member responsible for finance may determine.

CHAPTER 8

General provisions

Part 1

Nature of courts and seals

49. (1) Every Superior Court is a court of record.

(2) Every Superior Court must have for use as occasion may require, a seal of such design as may be prescribed by the President by proclamation in the Gazette.

(3) The seal of a Superior Court must be kept in the custody of the Registrar.

Proceedings to be carried on in open court
50. Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.

More than one court may sit at the same time

51. The Supreme Court of Appeal and any Division may at any time sit in so many courts constituted in the manner provided for in this Act or any other applicable law as the available judges may allow.

Part 2

Adducing of evidence and procedural matters

Certified copies of court records admissible as evidence

52. Whenever a judgment, order or other record of any Superior Court is required to be proved or inspected or referred to in any manner, a copy of such judgment, order or other record duly certified as such by the registrar of that court under its seal shall be prima facie evidence thereof without proof of the authenticity of such registrar's signature.

Manner of securing attendance of witnesses or production of any document or thing in proceedings and penalties for failure

53. (1) A party to proceedings before any Superior Court in which the attendance of witnesses or the production of any document or thing is required may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of that court.

(2) Whenever any person subpoenaed to attend any proceedings as a witness or to produce any document or thing—

(a) fails without reasonable excuse to obey the subpoena and it appears from the return of the person who served such subpoena, or from evidence given under oath, that—

(i) the subpoena was served upon the person to whom it is directed and that his or her reasonable expenses calculated in accordance with the tariff framed under section 34(1) have been paid or offered to him or her; or

(ii) he or she is evading service; or

(b) without leave of the court fails to remain in attendance,

the court concerned may issue a warrant directing that he or she be arrested and brought before the court at a time and place stated in the warrant or as soon thereafter as possible.

(3) A person arrested under any such warrant may be detained thereunder in any prison or other place of detention or in the custody of the person who is in charge of him or her, with a view to securing his or her presence as a witness or production of any document or thing at the proceedings concerned: Provided that any judge of the court concerned may release him or her on a recognisance with or without sureties to attend as a witness or to produce any document or thing as required.
(4) Any person subpoenaed to attend any proceedings as a witness or to produce any document or thing who fails without reasonable excuse to obey such subpoena, is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months.

(5) If a person who has entered into any recognisance in terms of subsection (3) to attend such proceedings as a witness or to produce any document or thing fails without reasonable excuse so to attend or to produce such document or thing, he or she forfeits his or her recognisance and is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three months.

Manner in which witness may be dealt with on refusal to give evidence or produce documents

54. (1) Whenever any person who appears either in obedience to a subpoena or by virtue of a warrant issued under section 32 or who is present and is verbally required by the Superior Court concerned to give evidence in any proceedings—

(a) refuses to take an oath or to make an affirmation;

(b) having taken an oath or having made an affirmation, refuses to answer such questions as are put to him or her; or

(c) refuses or fails to produce any document or thing which he or she is required to produce,

without any just excuse for such refusal or failure, the Court may adjourn the proceedings for any period not exceeding eight days and may, in the meantime, by warrant commit the person so refusing or failing to prison unless he or she sooner consents to do what is required of him or her.

(2) If any person referred to in subsection (1) again refuses at the resumed hearing of the proceedings to do what is so required of him or her, the Court may again adjourn the proceedings and commit him or her for a like period and so again from time to time until such person consents to do what is required of him or her.

(3) Nothing contained in this section prevents the Court from giving judgment in any matter or otherwise disposing of the proceedings according to any other sufficient evidence taken.

(4) No person is bound to produce any document or thing not specified or otherwise sufficiently described in the subpoena unless he or she actually has it in Court.

(5) When a subpoena is issued to procure the attendance of any person as a witness or to produce any book, paper or document in any proceedings, and it appears that—

(a) he or she is unable to give any evidence or to produce any book, paper or document which would be relevant to any issue in such proceedings; or

(b) such book, paper or document could properly be produced by some other person; or

(c) to compel him or her to attend would be an abuse of the process of the court,

any judge of the court concerned may, notwithstanding anything contained in this section, after reasonable notice by the Registrar to the party who sued out the subpoena and after hearing that party in chambers if he or she appears, make an order cancelling such subpoena.
Witness fees

55. (1) The Minister may, in consultation with the Minister of Finance, from time to time by notice in the Gazette prescribe a tariff of allowances which must be paid to a witness in civil proceedings or to any person who is to accompany any such witness on account of the youth or infirmity due to old age or any other infirmity of such witness.

(2) Such notice may differentiate between persons according to—

(a) the distances which they have to travel to attend the court to which they are summoned or subpoenaed; or

(b) their professions, callings or occupations,

and may empower such officers in the service of the State as may be specified therein to order payment of allowances in accordance with a higher tariff than the tariff so prescribed in cases where payment of allowances in accordance with the prescribed tariff may cause undue hardship.

(3) Notwithstanding any other law, a Superior Court may order that no allowances or only a portion of the allowances prescribed shall be paid to any witness.

Reference of particular matters for investigation by referee

56. (1) The Constitutional Court and, in any civil proceedings, any Division may, with the consent of the parties, refer—

(a) any matter which requires extensive examination of documents or a scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or

(b) any matter which relates wholly or in part to accounts; or

(c) any other matter arising in such proceedings,

for enquiry and report to a referee appointed by the parties, and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further enquiry or report or consideration by such referee, or make such other order in regard thereto as may be necessary or desirable.

(2) Any such report or any part thereof which is adopted by the court, whether with or without modifications, shall have effect as if it were a finding by the court in the proceedings in question.

(3) Any such referee shall for the purpose of such enquiry have such powers and must conduct the enquiry in such manner as may be prescribed by a special order of the court or by the rules of the court.

(4) For the purpose of procuring the attendance of any witness (including any witness detained in custody under any law) and the production of any document or thing before a referee, an enquiry under this section shall be deemed to be civil proceedings.

(5) (a) Any person summoned to attend as a witness or to produce any document or thing before a referee and who, without sufficient cause—
(i) fails to attend at the time and place specified;

(ii) fails to remain in attendance until the conclusion of the enquiry or until he or she is excused by the referee from further attendance;

(iii) refuses to take an oath or to make an affirmation as a witness; or

(iv) having taken an oath or made an affirmation, fails to—

(aa) answer fully and satisfactorily any question put to him or her; or

(bb) produce any document or thing in his or her possession or custody, or under his or her control, which he or she was summoned to produce,

is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.

(b) Any person who, after having taken an oath or having made an affirmation, gives false evidence before a referee at an enquiry, knowing such evidence to be false or not knowing or believing it to be true, is guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

(6) Any referee shall be entitled to such remuneration as may be prescribed by the rules of court or, if no such remuneration has been so prescribed, as the court may determine and to any reasonable expenditure incurred by him or her for the purposes of the enquiry, and any such remuneration and expenditure must be taxed by the taxing master of the court and shall be costs in the cause.

Examination by interrogatories

57. (1) The Constitutional Court and, in connection with any civil proceedings pending before it, any Division may order that the evidence of a person be taken by means of interrogatories if—

(a) in the case of the Constitutional Court, the court deems it in the interests of the administration of justice; or

(b) in the case of a Division, that person resides or is for the time being outside the area of jurisdiction of the court.

(2) Whenever an order is made under subsection (1), the registrar of the court must certify that fact and transmit a copy of his or her certificate to a commissioner of the court, together with any interrogatories duly and lawfully framed which it is desired to put to the said person and the fees and the amount of the expenses payable to the said person for his or her appearance as hereinafter provided.

(3) Upon receipt of the certificate, the interrogatories and the amounts contemplated in subsection (2), the commissioner must, in respect of the person concerned—

(a) summon that person to appear before him or her;

(b) upon his or her appearance, take that person's evidence as if he or she was a witness in a civil case in the said court;
(c) put to him or her the said interrogatories, with any other questions calculated to obtain full and true answers to the said interrogatories;

(d) take down or cause to be taken down the evidence so obtained; and

(e) transmit the evidence, certified as correct, to the registrar of the court wherein the proceedings in question are pending.

(4) The commissioner must further transmit to the said registrar a certificate showing the amount paid to the person concerned in respect of the expenses of his or her appearance, and the cost of the issue and service of the process for summoning such person before him or her.

(5) Any person summoned to appear in terms of subsection (3) who without reasonable excuse fails to appear at the time and place mentioned in the summons is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.

(6) Any interrogatories taken and certified under the provisions of this section shall, subject to all lawful exceptions, be received as evidence in the proceedings concerned.

Manner of dealing with commissions rogatoire, letters of request and documents for service originating from foreign countries

58. (1) Whenever a commission rogatoire or letter of request in connection with any civil proceedings received from any State or territory or court outside the Republic, is transmitted to the registrar of a Division by the Director-General of the Department, together with a translation in English if the original is in any other language, and an intimation that the Minister considers it desirable that effect should be given thereto without requiring an application to be made to such court by the agents, if any, of the parties to the action or matter, the registrar must submit the same to a judge in chambers in order to give effect to such commission rogatoire or letter of request.

(2) Whenever a request for the service on a person in the Republic of any civil process or citation received from a state, territory or court outside the Republic, is transmitted to the registrar of a Division by the Director-General of the Department, together with a translation in English if the original is in any other language, and an intimation that the Minister considers it desirable that effect should be given thereto, the registrar must cause service of the said process or citation to be effected in accordance with the rules of court by the sheriff or a deputy-sheriff or any person specially appointed thereto by a judge of the court concerned.

(3) The registrar concerned must, after effect has been given to any such commission rogatoire, letter of request, process or citation, return all relevant documents, duly verified in accordance with the rules of court, to the Director-General of the Department for transmission.

(4) Except where the Minister directs otherwise, no fees other than disbursements shall be recovered from any state, territory or court on whose behalf any service referred to in this section has been performed.

Court may order removal of certain persons
(1) Any person who, during the sitting of any Superior Court—

(a) wilfully insults any member of the court or any officer of the court present at the sitting, or who wilfully hinders or obstructs any member of any Superior Court or any officer thereof in the exercise of his or her powers or the performance of his or her duties;

(b) wilfully interrupts the proceedings of the court or otherwise misbehaves himself or herself in the place where the sitting of the court is held; or

(c) does anything calculated improperly to influence any court in respect of any matter being or to be considered by the court,

may, by order of the court, be removed and detained in custody until the rising of the court.

(2) Removal and detention in terms of subsection (1) does not preclude the prosecution in a court of law of the person concerned on a charge of contempt of court.

Part 3

Process of Superior Courts

Scope and execution of process

60. (1) The process of the Constitutional Court, the Supreme Court of Appeal and any Special Division runs throughout the Republic, and their judgments and orders must, subject to any applicable rules of court, be executed in any area in like manner as if they were judgments or orders of the General Division or the magistrate's court having jurisdiction in such area.

(2) The civil process of a General Division runs throughout the Republic and may be served or executed within the jurisdiction of any General Division.

(3) Any warrant or other process for the execution of a judgment given or order issued against any juristic person, partnership or firm may be executed by attachment of the property or assets of such juristic person, partnership or firm.

Execution of process by sheriff

61. (1) The sheriff must, subject to the rules referred to in section 30, execute all sentences, judgments, writs, summonses, rules, orders, warrants, commands and processes of any Superior Court directed to the sheriff and must make return of the manner of execution thereof to the court and to the party at whose instance they were issued.

(2) The return of the sheriff or a deputy-sheriff of what has been done upon any process of a court, shall be prima facie evidence of the matters therein stated.

(3) The sheriff must receive and cause to be detained all persons arrested by order of the court or committed to his or her custody by any competent authority.

(4) A refusal by the sheriff or a deputy-sheriff to do any act which he or she is by law required to do, is subject to review by the court concerned on application ex parte or on notice as the circumstances may require.
Transmission of summonses, writs and other process and of notice of issue thereof

62. (1) (a) In any civil proceedings before a Superior Court, any summons, writ, warrant, rule, order, notice, document or other process of a Superior Court, or any other communication which by any law, rule of court or agreement of parties is required or directed to be served or executed upon any person, or left at the house or place of abode or business of any person, in order that such person may be affected thereby, may be transmitted by telegraph, fax, or by means of any other electronic media as may be provided for by the rules of that court.

(b) The document received or printed as a result of the transmission contemplated in paragraph (a) is of the same force and effect as if the original had been shown to or a copy thereof served or executed upon the person concerned, or left as aforesaid, as the case may be.

(2) (a) A notice sent by telegram, fax, or any other electronic media as may be authorised by the rules of the court—

(i) from any judicial or police officer, registrar, assistant registrar, sheriff, deputy-sheriff or clerk of the court; and

(ii) stating that a warrant or writ has been issued for the arrest or apprehension of any person required to appear in or to answer any civil suit, action or proceeding,

is sufficient authority to any officer authorised by law to execute any such warrant or writ for the arrest and detention of such person.

(b) A person arrested as contemplated in paragraph (a) may be detained until a sufficient time, but not exceeding 14 days, has elapsed to allow for the original warrant or writ to be delivered at the place where such person was arrested or detained, unless the discharge of such person is ordered by a judge of a Superior Court.

(c) A judge of a Superior Court may upon good cause shown order the further detention of a person referred to in paragraph (b) for a period to be stated in such order, but not exceeding 28 days from the date of the arrest of such person.

Property not liable to be seized in execution

63. The sheriff or a deputy-sheriff may not seize in execution of any process—

(a) the necessary beds and bedding and wearing apparel of the person against whom execution is levied or any member of his or her family;

(b) the necessary furniture, other than beds, and household utensils in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette;

(c) stock, tools and agricultural implements of a farmer in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette;

(d) any food or drink sufficient to meet the needs of such person and the members of his or her family for one month;
(e) tools and implements of trade in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette;

(f) professional books, documents or instruments necessarily used by the debtor in his profession in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette;

(g) such arms and ammunition as the debtor is in terms of any law, regulation or disciplinary order required to have in his or her possession as part of his or her equipment:

Provided that the Court concerned may in exceptional circumstances and on such conditions as it may determine, in its discretion increase the amount specified in paragraph (b), (c), (e) or (f).

Offences relating to execution

64. Any person who—

(a) obstructs a sheriff or deputy-sheriff in the execution of his or her duty;

(b) being aware that goods are under arrest, interdict or attachment by a Superior Court, makes away with or disposes of those goods in a manner not authorized by law, or knowingly permits those goods, if in his or her possession or under his or her control, to be made away with or disposed of in such a manner;

(c) being a judgment debtor and being required by a sheriff or deputy-sheriff to point out property to satisfy a warrant issued in execution of judgment against such person—

(i) falsely declares to that sheriff or deputy-sheriff that he or she possesses no property or insufficient property to satisfy the warrant; or

(ii) although knowing of such property neglects or refuses to point out such property or to deliver it to the sheriff or deputy-sheriff when requested to do so; or

(d) being a judgment debtor refuses or neglects to comply with any requirement of a sheriff or deputy-sheriff in regard to the delivery of documents in his or her possession or under his or her control relating to the title of the immovable property under execution,

shall be guilty of an offence and liable on conviction to a fine or in default of payment to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine.

Issuing of summons or subpoena in civil proceedings against judge

65. (1) Notwithstanding any other law, no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the Chief Justice or, in the case of the Chief Justice, with the consent of the President of the Supreme Court of Appeal.
(2) Where the issuing of a summons or subpoena against a judge to appear in a civil action has been consented to, the date upon which such judge must attend court must be determined in consultation with the relevant head of court.

Regulations

66. (1) The Minister may, after consultation with the Chief Justice, make regulations regarding—

(a) any matter that may be necessary or expedient to prescribe regarding the administrative functions of courts and the efficient and effective functioning and administration of the courts, including the furnishing of periodical returns of statistics relating to any aspect of the functioning and administration of courts and the performance of judicial functions;

(b) the criteria to be applied for determining the number of judges to be appointed to the Supreme Court of Appeal and to any specific General Division;

(c) a protocol to regulate any matter referred to in section 16, in respect of which the establishment of a protocol is indicated;

(d) any matter that may be necessary or expedient to prescribe regarding the functioning of the Office of the Chief Justice;

(e) periods of absence of judicial officers from courts, including the recesses of the Superior Courts, especially in respect of the number of, and the method of allocation of, judges who must continue ordinary judicial services at the Courts during any recess period;

(f) any other matter that may be necessary or expedient to prescribe in order to promote the efficient implementation of this Act.

(2) Any regulation made under subsection (1) must be approved by Parliament before publication thereof in the Gazette.

CHAPTER 9

Transitional provisions, amendment and repeal of laws, and commencement

Existing High Courts

67. (1) On the date of the commencement of this Act, the High Court seated in—

(a) Bisho becomes a local seat of the Eastern Cape General Division;

(b) Bloemfontein becomes the main seat of the Free State General Division;

(c) Cape Town becomes the main seat of the Western Cape General Division;

(d) Durban becomes a local seat of the KwaZulu-Natal General Division;

(e) Grahamstown becomes the main seat of the Eastern Cape General Division;
(f) Johannesburg becomes the main seat of the Southern Gauteng General Division;

(g) Kimberley becomes the main seat of the Northern Cape General Division;

(h) Mmabatho becomes the main seat of the North West General Division;

(i) Pietermaritzburg becomes the main seat of the KwaZulu-Natal General Division;

(j) Port Elizabeth becomes a local seat of the Eastern Cape General Division;

(k) Pretoria becomes the main seat of the Northern Gauteng General Division;

(l) Thohoyandou becomes a local seat of the Limpopo General Division; and

(m) Umtata becomes a local seat of the Eastern Cape General Division,

of the High Court of South Africa, and the area of jurisdiction of each of those seats is as contained in Schedule 1.

(2) (a) Notwithstanding section 7, the Northern Gauteng General Division shall also function as the Limpopo and Mpumalanga General Divisions, respectively, until a date to be determined by the President by proclamation in the Gazette.

(b) Paragraph (a) lapses two years after the commencement of this section.

(3) Any circuit court established under any law repealed by this Act and in existence immediately before the commencement of this Act, shall be deemed to have been duly established in terms of this Act as a Circuit Court of the General Division concerned.

(4) Anyone holding office as the Judge President, a Deputy Judge President or a judge of a High Court referred to in subsection (1) when this Act takes effect, becomes the Judge President, a Deputy Judge President or a judge of the General Division in question as contemplated in subsection (1).

(5) The President may, with the view to facilitate and promote the effective and efficient administration of justice in the General Divisions established in terms of this Act, after consultation with the Chief Justice and the Minister, transfer any judge of a General Division to the Limpopo, Mpumalanga or North West General Division.

Labour Court and Labour Appeal Court

68. (1) Any judge of a Superior Court who, immediately before the commencement of section 74, holds concurrent tenure of office as—

(a) Judge President of the Labour Court and the Labour Appeal Court;

(b) Deputy Judge President of the Labour Court and the Labour Appeal Court; or

(c) judge of the Labour Court or the Labour Appeal Court,

ceases to hold the latter office on the date of the commencement of section 74, and must be entered on the list of judges referred to in section 24(1).
(2) The remuneration of a judge referred to in subsection (1) is not affected on account of the discontinuation of his or her holding of an office referred to in paragraphs (a), (b) or (c) of that subsection.

(3) (a) Any person who, immediately before the commencement of section 74, holds office as a judge of the Labour Court but who is not a judge of a Superior Court ceases to hold such office on the date of the commencement of section 74.

(b) In respect of each person who ceases to hold office as contemplated in paragraph (a), a vacancy of the office of a judge shall arise in the General Division having jurisdiction where that person held that office.

(c) Any person referred to in paragraph (a) must be given the first opportunity to apply for a vacancy referred to in paragraph (b) and, should he or she be found to be a fit and proper person for appointment as a judge of a High Court, the Judicial Service Commission must advise the President that he or she be so appointed, in which event his or her name must be entered on the list referred to in section 24(1).

(4) If a person referred to in subsection (3) is not appointed as a judge of the High Court or chooses not to apply for such appointment in terms of subsection (3)(c)—

(a) he or she is entitled to the benefits determined by the President, after consultation with the Judicial Service Commission: Provided that such benefits may not be less than the benefits accruing to judges of the Land Claims Court at the expiry of their term of office, as contemplated in section 26 of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) (prior to the commencement of section 74); and

(b) any vacancy arising on account of subsection (3)(b) must be dealt with by the Judicial Service Commission in the ordinary manner.

(5) (a) Any vacancy of the office of a—

(i) judge of the Labour Appeal Court; or

(ii) judge of the Labour Court,

existing immediately before the commencement of section 74, becomes a vacancy of the office of a judge of the Supreme Court of Appeal or a General Division of the High Court, as the case may be.

(b) When considering the filling of vacancies referred to in this subsection, the Judicial Service Commission must give preference to persons with proven experience and expertise in the adjudication of labour matters.

(6) (a) If a person, other than a person referred to in subsection (4), who is or was a judge of the Labour Court is appointed as a judge of a Superior Court, whether before or after the commencement of this Act, the period of service of that person as a judge of the Labour Court is, for the purposes of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), deemed to be active service as defined in that Act.

(b) No person who received any benefits under subsection (4)(a) may be appointed as a judge of a Superior Court, unless he or she, prior to such appointment, refunds the full amount of such benefits to the Director-General of the Department.

(7) Any person who, immediately before the date of the commencement of section 74, is an officer of the Labour Court or the Labour Appeal Court must, subject to the laws governing the public service, be
transferred to an equivalent post as an officer of a Superior Court designated by the Minister after consultation with the Chief Justice.

**Transitional arrangement: Special Divisions**

69. On the date of the commencement of this Act—

(a) any court established in terms of—

(i) section 36 of the Competition Act, 1998 (Act No. 89 of 1998), becomes the Competition Appeals Special Division of the High Court;

(ii) section 18 of the Electoral Commission Act, 1996 (Act No. 51 of 1996), becomes the Electoral Matters Special Division of the High Court;

(iii) section 83(3) of the Income Tax Act, 1962 (Act No. 58 of 1962), becomes a court of the Income Tax Special Division of the High Court; and

(iv) section 22 of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994), becomes the Land Claims Special Division of the High Court;

(b) any judge holding office—

(i) as the Judge President or a judge of the court referred to in section 36 of the Competition Act, 1998, becomes the Judge President or a judge of the Competition Appeals Special Division of the High Court, for the remainder of the term, if applicable, for which he or she had been appointed to that office;

(ii) as the Chairperson or a judge of the court referred to in section 18 of the Electoral Commission Act, 1996, becomes the Judge President or a judge of the Electoral Matters Special Division of the High Court, for the remainder of the term, if applicable, for which he or she had been appointed to that office;

(iii) as the president of a court referred to in section 83(3) of the Income Tax Act, 1962, becomes a judge of the Income Tax Special Division of the High Court, for the remainder of the term for which he or she had been appointed to that office; and

(iv) as the President or a judge of the court referred to in section 22 of the Restitution of Land Rights Act, 1994, becomes the Judge President or a judge of the Land Claims Special Division of the High Court, for the remainder of the term, if applicable, for which he or she had been appointed to that office;

(c) any person, not being a judge, holding office—

(i) as a member of the court referred to in section 18 of the Electoral Commission Act, 1996, becomes a special member of the Electoral Matters Special Division of the High Court, for the remainder of the term for which he or she had been appointed to that office; and

(ii) as a member of a court referred to in section 83(3) of the Income Tax Act, 1962, becomes a special member of the Income Tax Special Division of the High Court, for the remainder of the term for which he or she had been appointed to that office; and
(d) any person holding office as the registrar or a member of the staff of any court referred to in paragraph (a), becomes a registrar or a member of the staff of the Special Division contemplated in that paragraph, for the remainder of the term, if applicable, for which he or she had been appointed to that office.

Transitional arrangement: Appeals to full bench of same Division

70. (1) Despite the provisions of sections 26 and 27 and the repeal of the Supreme Court Act, 1959 (Act No. 59 of 1959) by section 74, the provisions relating to an appeal from a judgment or order by a single judge of a General Division, to a court consisting of three judges of the same Division, as in force prior to the commencement of this Act, remain in force until a date set by the President by proclamation in the Gazette.

(2) Appeals referred to in subsection (1) that are pending on the date referred to in that subsection, must be continued and concluded in accordance with the provisions referred to in that subsection.

Existing rules and Rules Board

71. (1) The rules applicable to the Constitutional Court, Supreme Court of Appeal, various High Courts, Labour Court, Labour Appeal Court, Competition Appeal Court, Electoral Court, Income Tax courts and the Land Claims Court immediately before the commencement of this Act remain in force to the extent that they are not inconsistent with this Act, until repealed or amended in terms of section 40.

(2) On the date of the commencement of section 40—

(a) the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), ceases to exist; and

(b) the functions of any committee established under section 5 of the Rules Board for Courts of Law Act, 1985, are transferred to the Board referred to in section 40 or to such committees as may be established by that Board for the purpose of such functions.

(3) Any person holding office immediately before the date of the commencement of section 42—

(a) as a member of the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985, may be appointed by the Minister as a member of the Board under section 42(1);

(b) as a member of a committee appointed under section 5(1) of the Rules Board for Courts of Law Act, 1985, may be appointed as a member of a committee of the Board under section 44(1)(b); and

(c) as the Secretary to, or a member of staff of, the Rules Board for Courts of Law referred to in paragraph (a), continues to hold such office as the Secretary to, or a member of staff of, the Board referred to in section 40.

(4) (a) Any person who, immediately before the date of the commencement of section 46, holds office in terms of section 159(2)(c) of the Labour Relations Act, 1995 (Act No. 66 of 1995) as a member of the Rules Board for Labour Courts established in terms of section 159(1) of that Act, is deemed to have been appointed under the corresponding provision of section 46(2)(c) as a member of the Subcommittee on Rules for Labour Matters referred to in section 46(1).
(b) A person referred to in paragraph (a) holds the office referred to in that paragraph for the remainder of the term for which he or she had been appointed originally.

Pending proceedings

72. (1) Subject to section 38, proceedings pending in any court, including any court referred to in sections 68 and 69, at the commencement of this Act, must be continued and concluded as if this Act had not been passed.

(2) Proceedings must, for the purposes of this section, be deemed to be pending if, at the commencement of this Act a summons had been issued but judgment had not been passed.

(3) Subsections (1) and (2) are also applicable, with the changes required by the context, in respect of proceedings pending on the date determined in the notice contemplated in section 67(2).

References in other laws

73. Any reference in any law—

(a) to the Supreme Court Act, 1959, or a provision of the said Act, must be construed as a reference to this Act or a corresponding provision of this Act; and

(b) to a Supreme Court, a High Court, or a provincial or local division of a Supreme Court, must be construed as a reference to the High Court of South Africa or a Division referred to in this Act, as the context may require; and

(c) to the Appellate Division of a Supreme Court, must be construed as a reference to the Supreme Court of Appeal;

(d) to the Labour Court or the Labour Appeal Court, must be construed as a reference to the High Court or the Supreme Court of Appeal, respectively; and

(e) to a court referred to in—

(i) section 36 of the Competition Act, 1998 (Act No. 89 of 1998), must be construed as a reference to the Competition Appeals Special Division of the High Court;

(ii) section 18 of the Electoral Commission Act, 1996 (Act No. 51 of 1996), must be construed as a reference to the Electoral Matters Special Division of the High Court;

(iii) section 83 of the Income Tax Act, 1962 (Act No. 58 of 1962), must be construed as a reference to a court of the Income Tax Special Division of the High Court; and

(iv) section 22 of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994), must be construed as a reference to the Land Claims Special Division of the High Court.

Repeal and amendment of laws

74. (1) The laws mentioned—
(a) in Schedule 3 are hereby repealed to the extent set out in the fourth column of that Schedule;

(b) in Schedule 4 are hereby amended to the extent set out in the fourth column of that Schedule.

(2) Anything done under any provision of a law repealed or amended by subsection (1), shall be deemed to have been done under the corresponding provision of this Act.

**Short title and commencement**

75. This Act is called the Superior Courts Act, 2005, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

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**SCHEDULE 1**

*General Divisions of the High Court, seats and jurisdiction (Section 7)*

<table>
<thead>
<tr>
<th>Name of Division</th>
<th>Seat</th>
<th>Area of Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kwazulu-Natal General Division</td>
<td>Pietermaritzburg (main seat)</td>
<td>The magisterial districts of Babanango, Bergville, Camperdown, Dannhauser, Dundee, Eshowe, Estcourt, Glencoe, Impendle, Ixopo, Klip River, Kranskop, Lions River, Mataliele (Maluti), Mooi River, Mount Currie, Msinga, New Castle, New Hanover, Ngotshe, Nqutu, Paul Pietersburg, Pietermaritzburg, Polela, Richmond, Umvoti, Umzimkulu, Underberg, Utrecht, Vryheid and Weenen</td>
</tr>
<tr>
<td>Kwazulu-Natal General Division</td>
<td>Durban (local seat)</td>
<td>The magisterial districts of Alfred, Prot Shepstone, Umzinto, Eshowe, Umlazi, Umbumbulu, Durban, Pinetown, Chatsworth, Inanda, Ndedwe, Mapumulo, Lower Umfolozi, Lower Tugela, Mahlabatini, Mtunzini, Mtonjaneni, New Hanover, Nkandhla, Piet Retief, Hibis, Nongoma, Umbombo, Underberg, Utrecht, Vryheid, Weenen and Ingwavuma</td>
</tr>
<tr>
<td>Eastern Cape General Division</td>
<td>Grahamstown (main seat)</td>
<td>The magisterial districts of Aberdeen, Albert, Bathurst, Fort Beaufort, Hofmeyr, Middelburg, Somerset East, Tarka, Wodehouse, Adelaide, Alexandria, Bedford, Graaff-Reinet, Jansenville, Molteno, Sterkstroom, Venterstad, Albany, Aliwal North, Cradock, Herschell (Sterkspruit), Lady Grey, Pearston, Steynsburg and Willowmore</td>
</tr>
<tr>
<td>Eastern Cape General Division</td>
<td>Bisho (local seat)</td>
<td>The magisterial districts of Cathcart, Ntabelhembha, Stutterheim, East London, King Williams Town, Komgha, Mpopo (Seymour), Queenstown, Hewu, Keiskammahoek, Mdantsane, Middledrift, Peddie,</td>
</tr>
<tr>
<td>Division</td>
<td>Location</td>
<td>Magisterial Districts</td>
</tr>
<tr>
<td>--------------------------</td>
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<td>---------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Eastern Cape General</td>
<td>Port Elizabeth (local seat)</td>
<td>The magisterial districts of Port Elizabeth, Kirkwood, Uitenhage, Hankey, Humansdorp, Joubertina and Steytlerville</td>
</tr>
<tr>
<td>Eastern Cape General</td>
<td>Umtata (local seat)</td>
<td>The magisterial districts of Barkley East, Elliot, Bizana, Butterworth (Gcuwa), Cacadu (Lady Frere), Cala (Xalanga), Cofimvaba (St Marks), Elliottdale (Xhora), Engcobo, Flagstaff (Siphaqeni), Gatyana (Willowvale), Idutywa, Indwe, Kentani, Kwabacha (Mount Frere), Libode, Lusikisiki, Maclear, Maluti (Matatiele) Maxesibeni, Mount Fletcher, Mqanduli, Nqamakwe, Nqeleni, Qumbu, Sterkspruit (Herschell), Thabankulu, Tsolo, Tsomo, Umtata, Umzimkulu, Ugie and Umzimvubu (Port St Johns)</td>
</tr>
<tr>
<td>Limpopo General</td>
<td>Polokwane (main seat)</td>
<td>The magisterial districts of Bochum, Bolubedu, Ellisras, Giyani, Hlanganani, Letaba, Lulekani, Malamulele, Mankweng, Mapulaneng, Messina, Mhala, Mokerong, Namakgale, Naphuno, Nebo, Phalaborwa, Phalala, Pietersburg, Potgietersrus, Prakisane, Ritavi, Sekgosese, Sekhukhuneland, Seshgo, Soutpansberg, Thabazimbi, Thabamoopo, Warmbaths and Waterberg</td>
</tr>
<tr>
<td>Limpopo General</td>
<td>Thohoyandou (local seat)</td>
<td>The magisterial districts of Dzanani, Thohoyandou, Tshi独立此西, Tsitilwe, Tsiwane and Mutale</td>
</tr>
<tr>
<td>Northern Cape General</td>
<td>Kimberley (main seat)</td>
<td>The magisterial districts of Barkley West, Britstown,</td>
</tr>
<tr>
<td>Division</td>
<td>Location (main seat)</td>
<td>Magisterial Districts</td>
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<td>---------------------------------</td>
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</tr>
<tr>
<td>Northern Gauteng General Division</td>
<td>Pretoria (main seat)</td>
<td>The magisterial districts of Bronkhorstspruit, Cullinan, Pretoria, Soshanguve and Wonderboom</td>
</tr>
<tr>
<td>North West General Division</td>
<td>Mmabatho (main seat)</td>
<td>The magisterial districts of Bafokeng, Bloemhof, Brits, Christiana, Colligny, Delareyville, Ditsobotla, Ganyesa, Klerksdorp, Koster, Kudumane (Thlaping-Thlaro), Kuruman, Lehurutshe, Lichtenburg, Madikwe, Mafeking, Mankwe, Marico, Molopo (Mafikeng), Moretele, Odi, Potchefstroom, Rustenburg, Schweizer-Reneke, Swartruggens, Taung, Ventersdorp, Vryburg, Warmbaths and Wolmaranstad</td>
</tr>
<tr>
<td>Southern Gauteng General Division</td>
<td>Johannesburg (main seat)</td>
<td>The magisterial districts of Alberton, Benoni, Boksburg, Brakpan, Germiston, Heidelberg, Johannesburg, Kempton Park, Krugersdorp, Nigel, Oberholzer, Randburg, Randfontein, Roodepoort, Springs, Vanderbijlpark, Vereeniging and Westonaria</td>
</tr>
<tr>
<td>Western Cape General Division</td>
<td>Cape Town (main seat)</td>
<td>The magisterial districts of Beaufort West, Belville, Bredasdorp, Caledon, Calitzdorp, Cape, Ceres, Clanwilliam, George, Goodwood, Heidelberg, Hermanus, Hopefield, Knysna, Kuils River, Ladismith, Laingsburg, Malmesbury, Mitchells Plain, montagu, Moorreesburg, Mossel Bay, Murraysburg, Oudtshoorn, Paarl, Piketberg, Prince Albert, Riversdale, Robertson, Simonstown, Somerset West, Strand, Stellenbosch, Swellendam, Tulbagh, Uniondale, Van Rhynsdorp, Vredenburg, Vredendal, Wellington, Worcester and Wynberg</td>
</tr>
</tbody>
</table>

**SCHEDULE 2**

*Appointment of special members (Section 8(3)(b) and (c))*

**Part 1**

**Special members of Electoral Matters Special Division**

1. The President must, on the advice of the Judicial Service Commission, appoint two or more fit and proper persons, who must be South African citizens, as special members of the Electoral Matters Special Division.
2. Any special member referred to in item 1 must be appointed for a fixed term determined by the President at the time of the appointment, and may, upon the expiry of that term, be re-appointed.

3. The need for the Electoral Matters Special Division to reflect broadly the racial and gender composition of the Republic must be taken into account when appointing special members of that Division.

4. Any appointment made in terms of item 1 must be announced in the Gazette.

Part 2

Special members of Income Tax Special Division

1. The President must, in respect of each of the categories listed in item 2, on the advice of the Minister acting after consultation with the Judge President of the Income Tax Special Division and the Cabinet member responsible for finance, appoint two or more persons of good standing and with appropriate experience as special members of the Income Tax Special Division.

2. Special members of the Division must be appointed in respect of the following categories:

2.1 Accountants;

2.2 Representatives of the commercial community in general;

2.3 Representatives of the commercial community, who must be qualified mining engineers; and

2.4 Representatives of the commercial community, who must be sworn appraisers of property.

3. Any special member referred to in item 1 must be appointed for a fixed term determined by the President at the time of the appointment, and may, upon the expiry of that term, be re-appointed.

4. The need for the Income Tax Special Division to reflect broadly the racial and gender composition of the Republic must be taken into account when appointing special members of that Division.

5. Any appointment made in terms of item 1 must be announced in the Gazette.

SCHEDULE 3

Laws repealed (Section 74(1)(a))

<table>
<thead>
<tr>
<th>Item No.</th>
<th>No. and year of law</th>
<th>Short title</th>
<th>Extent of repeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Act No. 59 of 1959</td>
<td>Supreme Court Act, 1959</td>
<td>The whole</td>
</tr>
<tr>
<td>Act No.</td>
<td>Description</td>
<td>Source</td>
<td>Repealed Sections</td>
</tr>
<tr>
<td>---------</td>
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</tr>
<tr>
<td>2</td>
<td>Act No. 59 of 1959 (Venda)</td>
<td>Supreme Court Act, 1959</td>
<td>The whole</td>
</tr>
<tr>
<td>4</td>
<td>Act No. 15 of 1969</td>
<td>Establishment of the Northern Cape Division of the Supreme Court of South Africa Act, 1969</td>
<td>The whole</td>
</tr>
<tr>
<td>5</td>
<td>Act No. 15 of 1976 (Transkei)</td>
<td>Republic of Transkei Constitution Act, 1976</td>
<td>Sections 44 up to and including 53.</td>
</tr>
<tr>
<td>6</td>
<td>Act No. 18 of 1977 (Bophuthatswana)</td>
<td>Republic of Bophuthatswana Constitution Act, 1977</td>
<td>Sections 8(2), (3), and (4); 22(1)(b); 53(2); 59 up to and including 67; 78; 89(1), (2) and (3); 90(1) and (2); 91(1)(b), (c)(iii) and (d); and 93(1)(f).</td>
</tr>
<tr>
<td>7</td>
<td>Act No. 9 of 1979 (Venda)</td>
<td>Republic of Venda Constitution Act, 1979</td>
<td>Sections 42 up to and including section 52; and section 72.</td>
</tr>
<tr>
<td>8</td>
<td>Act No. 32 of 1982 (Bophuthatswana)</td>
<td>Supreme Court of Bophuthatswana Act, 1982</td>
<td>The whole</td>
</tr>
<tr>
<td>9</td>
<td>Act No. 5 of 1983 (Transkei)</td>
<td>Supreme Court Act, 1983</td>
<td>The whole</td>
</tr>
<tr>
<td>11</td>
<td>Decree No. 43 of 1990 (Ciskei)</td>
<td>Supreme Court Decree, 1990</td>
<td>The whole</td>
</tr>
</tbody>
</table>
### SCHEDULE 4

**Laws amended (Section 74(1)(b))**

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<th>Item No.</th>
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| 1        | Act No. 58 of 1962  | Income Tax Act, 1962 | 1. Amendment of section 1 by the insertion, after the definition of "taxable capital gain" of the following definition:

"'tax court' means the Income Tax Special Division of the High Court of South Africa;".

2. Amendment of section 81—

(a) by the substitution for subsection (1) of the following subsection:

"(1) Objections to any assessment made under this Act shall be made in the manner and under the terms and within the period prescribed by this Act and the rules [promulgated in terms of section 107A] of the tax court by any taxpayer who is aggrieved by any assessment in which that taxpayer has an interest."; and |
(b) by the substitution for subsection (6) of the following subsection:

"(6) Where any dispute between the Commissioner and the person aggrieved by an assessment has been resolved in accordance with the alternative dispute resolution procedures prescribed in the rules [contemplated in section 107A (2)] of the tax court, the Commissioner must alter that assessment for purposes of giving effect to that resolution."

3. Amendment of section 83—

(a) by the substitution for subsection (1) of the following subsection:

"(1) Any person entitled to object to an assessment, may, subject to the provisions of section 83A, appeal against such assessment to the tax court [established in terms of the provisions of this section] in the manner and under the terms and within the period prescribed by this Act and the rules [promulgated in terms of section 107A] of the tax court.";

(b) by the substitution for paragraph (a) of subsection (1C) of the following paragraph:

"(a) the matter is heard by the tax board contemplated in section 83A, or the tax court [contemplated in subsection (2)]; or"

(c) by the deletion of subsections (2), (3), (4), (4A), (4B), (4C), (4D), (5) and (6);

(d) by the substitution for subsection (7) of the following subsection:

"(7) [Any court established under the provisions of this Act] The tax court may hear and determine any appeal lodged under the provisions of this Act, or any other Act administered by the Commissioner which provides that the objection and appeal procedures contained in this Part shall apply[, whether or not the appellant is resident or carries on business within the area for which that court is established and whether or not the dispute arose within that area].";

(e) by the substitution for paragraph (d) of subsection (13) of the following paragraph:

"(d) hear any interlocutory application and decide on procedural matters as provided for in the rules of the tax court [contemplated in section 107A].";
(f) by the substitution for subsection (14) of the following subsection:

"(14) Any altered assessment made by the Commissioner as a result of a referral of an assessment back to the Commissioner, as contemplated in subsection (13)(a)(iii), shall be subject to objection and appeal as provided in this Part and the rules [promulgated in terms of section 107A] of the tax court.";

(g) by the substitution for subsection (19) of the following subsection:

"(19) The Judge President of the court may indicate which judgments or decisions of the court must be published for general information, in such form as does not reveal the identity of the appellant.";

(h) by the substitution for subsection (20) of the following subsection:

"(20) Notwithstanding section 15(1)(a) and (d) of the Superior Courts Act, 2005, there shall be a registrar of the tax court, who shall be appointed by the Commissioner."; and

(i) by the substitution for subsection (21) of the following subsection:

"(21) Notwithstanding section 15(1)(a) and (d) of the Superior Courts Act, 2005, a person appointed as registrar shall become an employee of the South African Revenue Service.

4. Amendment of section 83A—

(a) by the substitution for the proviso in subsection (1) of the following proviso:

"Provided that where the Commissioner, at any time prior to the hearing of such appeal, or the Chairperson of the board, at any time prior to or during the hearing of such appeal, is of the opinion that on the ground of the disputes or legal principles arising or that may arise out of such appeal, such appeal should rather be heard by the tax court, such appeal shall be set down for hearing de novo before the tax court [referred to in section 83].";

(b) by the substitution for paragraph (a) of subsection (4) of the following paragraph:

"(a) The Minister of Finance shall in consultation with the Judge-President of the [Provincial Division] General Division
of the High Court within whose area of jurisdiction the board is to sit, appoint, by notice in the Gazette, advocates and attorneys to a panel, from which a Chairperson of the board shall be nominated from time to time or as required, and such persons shall hold office for five years from the date of the relevant notice: Provided that the appointment of such a person may at any time be terminated by the said Minister for any reason which he or she considers good and sufficient.

(c) the substitution in paragraph (b) of subsection (7) for the words preceding subparagraph (i) of the following words:

"within the period prescribed in the rules [contemplated in section 107A] of the tax court, furnish the members of the board and the appellant with a written notice of the time and place of the hearing of the appeal and a dossier containing copies of—"

5. Amendment of section 86A—

(a) by the substitution for subsection (1) of the following subsection:

"(1) The appellant in a tax court or the Commissioner may in the manner hereinafter provided appeal under this section against any decision of that court to the Supreme Court of Appeal (in this section referred to as the appeal court).

(b) by the deletion of subsection (2);

(c) by the substitution for subsection (3) of the following subsection:

"(3) Any party who in terms of subsection (1) has a right to appeal against a decision of a tax court and intends to lodge an appeal against such decision under this section shall, within 21 days after the date of the notice issued by the registrar of the tax court notifying such decision or within such further period as the Judge President of that court may on good cause shown allow, lodge with the said registrar and the opposite party or his or her attorney or agent a notice of his or her intention to appeal against such decision.

(d) by the substitution for subsection (4) of the following subsection:

"(4) Any such notice of an intention to appeal shall state—

(a) [in which division of the High Court the intending appellant wishes the appeal to be heard;]"
(b) [if the intending appellant wishes the appeal to be heard by the Supreme Court of Appeal,] whether the whole or part only of the judgment is to be appealed against and if part only what part, and the contemplated grounds of the intended appeal, indicating the findings of fact or rulings of law to be appealed against; and

(c) whether, for the purposes of preparing the record on appeal, a transcript is required of the evidence at the hearing of the case by the tax court or, if only a part of such evidence is required, what part is required:"

(e) by the substitution for subsection (5) of the following subsection:

"(5) If an intending appellant wishes [his] to appeal against a decision of the tax court [to be heard by the Supreme Court of Appeal], the registrar of the tax court shall submit the notice or notices of intention to appeal lodged under subsection (3) to the Judge President of the tax court who shall, having regard to the contemplated grounds of the intended appeal or appeals as indicated in the said notice or notices, make an order granting or refusing, as he or she sees fit, leave to appeal against such decision [to the said Court], and the order so made shall be final:"

(f) by the deletion of subsections (6), (7), (8), and (9); and

(g) by the substitution in subsection (10) for the word "President", wherever it appears, of the word "Judge President".