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### JUSTICE PORTFOLIO COMMITTEE

8 March 1999

#### SUPERIOR COURTS BILL; CRIMINAL PROCEDURE AMENDMENT ACT: HEARINGS

##### Documents distributed:

Submission to the Justice Committee by the Pretoria Bar and Pretoria Attorneys Association  
Possible Decentralisation of the Supreme Court of South Africa: Transvaal Provincial Division  
(University of South Africa, Bureau of Market Research)

[Northwest Circle Council – initial submission](#)

[Northwest Circle Council – submission dated 6 March 1999](#)

[Summary of Main Representations by the Johannesburg Bar Council](#)

[Submission of the Society of Advocates of South Africa, Witwatersrand Division \(supporting Johannesburg Bar Council submission\)](#)

[Superior Courts Bill \(draft\)](#)

[Criminal Procedure Amendment Bill \[B7-99\]](#)

##### SUMMARY

The Committee heard several submissions on the Superior Courts Bill. The Pretoria Bar submitted that the Superior Courts Bill would cause undue hardship to the Pretoria area, by changing its jurisdiction to eliminate several major communities. It would also cause hardship to the people in the area, who would now be forced to litigate in an inconvenient location. The Johannesburg Bar submitted that the jurisdictional definitions as presented in the Superior Courts Bill were equitable, and proposed a compromise plan to address Pretoria's concerns. It also argued that concurrent jurisdiction was not an adequate solution. The North West Circle Council submitted that the decision in the Superior Courts Bill to establish the High Court for the North West Province in Mmabatho was a poor decision, and proposed that it be established in Potchefstroom instead.

The Committee also heard a submission on the Criminal Procedures Amendment Act. The Judge-President of the Western Cape told the Committee that the elimination of automatic review would be a bad idea, and made a proposal for the retention of automatic review with decreased scope. This would allow for the continuation of automatic review, but at reduced cost.

##### MINUTES

###### Superior Courts Bill

###### Pretoria Bar Association

The Chair, Mr de Lange (ANC) opened the meeting, and called on Advocate van Rooyen from the Pretoria Bar.

Advocate van Rooyen introduced himself and asked MPs to note that he was present not just on behalf of Pretoria advocates, but also as a representative of the Attorneys Association. He pointed out the three submissions presented by the Pretoria Bar. The first is a market research report prepared by the University of South Africa in 1995. The second is the original submission of the Pretoria Bar and Pretoria Attorneys Association, and the third is a quick reply to the latest draft of the Superior Courts Bill.

Advocate van Rooyen said he does not want to spend much time on his case, as the Committee has already had the chance to review the documents, so he will summarise the main points. Historically speaking, Pretoria was the seat of the entire Transvaal. Its jurisdiction covers millions of people and

includes 22 circuit courts. The proposal in the Superior Courts Bill, by stripping Pretoria of much of its former jurisdiction, would be disastrous to Pretoria advocates and attorneys; and it should be remembered that Pretoria is the capital of South Africa. Additionally, the growth of affirmative action in the Pretoria Bar is dependent on the amount of work available in Pretoria.

Advocate van Rooyen said that the market research report he submitted shows the dramatic impact that this proposal would have on the Pretoria legal community. More importantly, it would reduce the availability of the courts to the people. Many areas that would be redistricted under the proposed Bill are conveniently accessible to Pretoria, with direct bus and rail links to the city. The Bill would require people who live 30km from Pretoria to attend a court 350km away.

The Chair said that all the points Advocate van Rooyen had made were well and good, but asked if he was working from the transitional perspective that the Committee must consider – there is a Constitutional requirement to rationalise the court structure, and that rationalisation involves setting up a court in each province. What is Advocate van Rooyen suggesting – that the Committee establish jurisdictions that cut across provincial boundaries?

Advocate van Rooyen replied that an elegant solution can be found, like the arrangement developed in the Eastern Cape.

The Chair said that the Eastern Cape cannot be used as an analogue because all jurisdictions concerned are in the same province. Advocate van Rooyen is saying that people from another province be included in Pretoria's jurisdiction.

Advocate van Rooyen said his proposal is to establish local courts with power of appeal and review.

The Chair asked if those courts would have concurrent jurisdiction.

Advocate van Rooyen said they would.

The Chair asked Advocate van Rooyen to give the Committee something new. The Committee has read his submissions and is not convinced that his proposals make sense. Why must there be local divisions and not a high court in these provinces?

Advocate van Rooyen answered that the people require a choice of jurisdictions in order to get the highest quality representation at the lowest cost.

The Chair asked if that could only be achieved in Pretoria.

Advocate van Rooyen said that ultimately it will be available elsewhere, but it cannot grow overnight – so this is part of an evolutionary plan.

The Chair asked what Advocate van Rooyen's other points are. He understands the point about the choice and expertise available in Pretoria. Does the advocate have any other points?

Advocate van Rooyen said it is important to understand that expertise in other areas cannot grow overnight.

The Chair asked for any new points as the Committee was running out of time allocated for this presentation.

Advocate van Rooyen said he would like to address the Sandton and Randburg issue. The Pretoria jurisdiction, which used to contain the entire Transvaal, is now truncated just to Pretoria's boundaries. He proposed three solutions to handle this situation. The first is as the Bill now stands, with Randburg as part of Pretoria, because without Randburg, Pretoria just cannot support itself. This is the absolute minimum – it is not the Committee's intention to kill off all the advocates and attorneys in Pretoria, is it? The second solution is to give Gauteng concurrent jurisdiction in civil cases, which is how the situation exists right now. This helps the people because it is cheaper to litigate in Pretoria, plus it is more convenient on a number of levels – safety, transportation, and so on. The third solution, given that

Randburg is the bone of contention, is to give Randburg the choice to have concurrent jurisdiction.

Advocate van Rooyen said these issues are a matter of life or death to the Pretoria community, and also represent a matter of great convenience or huge inconvenience to the people on the ground.

The Chair asked if MPs had any questions. He said it is very clear what the issues are. He asked if there were any figures on what choices are currently exercised in Gauteng and Pretoria, in circumstances where concurrent jurisdiction exists. When people have a choice, where do they go?

Advocate van Rooyen said he did not know the answer to that question.

Mr Hofmeyr (ANC) asked how people in Randburg exercise their choices currently.

Advocate van Rooyen said they did not know that either, but from observation there is a lot of cross-border activity, so to speak.

The Chair thanked Advocate van Rooyen for his time. He said that although he challenged his presentation it was only because the Committee had not yet made up their minds, and wanted to test the advice they were receiving from various people. The Chair then called on Mr Sutherland from the Johannesburg Bar.

### **Johannesburg Bar Association**

Mr Sutherland said he is aware of some of the debate that has taken place on the issue of Randburg, and there are a few points he would like to make. Before doing that, he would like to respond to some of Advocate van Rooyen's comments. First, it is a gross exaggeration to say that Pretoria would be fundamentally threatened by the proposed Superior Courts Bill. Second, the issue of choice is a red herring. The people will almost never benefit from it, because they do not often initiate court cases. They are almost always the defendants, so they do not have the choice of where the case is tried.

The issue of whether to give Randburg to Pretoria or leave it with Johannesburg has implications for Johannesburg in a specifically socio-political context. Mr Sutherland said that he does not need to dwell on the issue of the decline of the Johannesburg inner city, which is now almost devoid of any institutional presence. If the inner city is to be revived, it needs the support of institutions like the Johannesburg high court and legal profession.

A compromise was proposed at the last meeting of giving Pretoria and Johannesburg concurrent jurisdiction over Randburg. This is a bad idea because the Johannesburg high court, already belated in its creation, would not even have its own distinct jurisdiction. It also means the provincial government or the city council of Johannesburg could be sued in Pretoria instead of Johannesburg, which obviously does not make sense. More importantly, the whole idea of concurrent jurisdiction and "forum shopping" undermines the authority of both judicial divisions. Litigation could be pursued in one jurisdiction or the other in order to avoid case-law precedents. This sort of opportunism should not be encouraged or allowed.

A better solution would be to split the district of Randburg in a way that alleviates some of the concerns of the Pretoria community while recognises the rights of Johannesburg. The district of Randburg currently contains three business areas – Randburg, Sandton, and Midrand. Randburg and Sandton are part of the city of Johannesburg and should stay there. Midrand is more within Pretoria's orbit, and it is also one of the fastest growing business districts in South Africa. Midrand will probably soon be given its own Magisterial infrastructure, at which point Pretoria's concerns will be addressed. Until this point, concurrent jurisdiction could exist over Midrand alone.

The Chair asked Mr Sutherland to address the issue of the Arbitration Foundation. Many people feel it takes the most important civil work away from Johannesburg.

Mr Sutherland said he does not feel the Arbitration Foundation creates significant drain of civil cases. There was always a sizeable market for high-level arbitration, and that arbitration has now found a venue. He does think there exists a concern that it could cause some drain down the road.

The Chair asked if Mr Sutherland is saying there has been no impact.

Mr Sutherland said that is his impression – that the impact has been negligible. Unfortunately, lacking statistics, one must rely on impressions.

Mr Hofmeyr said he is interested in the compromise proposal that Mr Sutherland has submitted, but knows nothing about Midrand. He would like some basic statistics – population, business development, and so on.

Mr Sutherland said he could not answer that question specifically, but according to newspaper reports Midrand is the fastest growing business area in the country.

The Chair asked for more detail on the Arbitration Foundation, because it could become an important factor for the Committee to take into consideration as they debate the Bill.

Mr Sutherland said he would submit a memorandum to the Committee on that issue.

Ms Jana (ANC) said she understood it was an international trend that most matters of civil litigation were first directed towards some type of arbitration.

Mr Sutherland said he was not aware that this was a trend. In specific countries, such as Germany, many countries go to arbitration first for company-to-company disputes, but that is more a function of the legislative system in Germany, where typical litigation is very time-consuming and expensive.

The Chair thanked Mr Sutherland for his input. He then invited Mr Viviers of the North West Circle Council to address the Committee.

#### **North West Circle Council**

Mr Viviers summarised the two documents submitted by the North West Circle Council. The Superior Courts Bill, in section 4(1)(h), says that the seat of the North West High Court will be Mmabatho. The Council believes it should not be in Mmabatho but in Potchefstroom. The bulk of the economic activity of the province is in the Potchefstroom-Klerksdorp urban area, and that urban area has a high level of necessary civil infrastructure in terms of roads and public transportation. Mmabatho is not suitable because it is on the western border of the province, in an area that is not very populated. In addition, the skilled labour needed to create and support the High Court would not be available in Mmabatho.

The Chair said Mr Viviers must address a major issue that the Committee has to consider. A principle has been agreed to that provincial governments are to be given real powers to conduct their affairs. Therefore the decision was taken to place High Courts in the provincial capital, unless the province itself chooses otherwise. In this case, the North West province has decided to have the court in Mmabatho, its capital – so Mr Viviers needs to give compelling reasons for going against the wishes of the provincial government and the principles previously agreed to.

Mr Hofmeyr asked if the North West Council has engaged the provincial government in discussions on this issue.

Mr Viviers said they did not engage the government. Regarding reasons why the seat of the High Court should not be Mmabatho, Mr Viviers said he has given several. Most important of them is that economic activity is located predominantly in the Potchefstroom area.

The Chair said that just because apartheid-era businesses established themselves in Potchefstroom does not mean the court should not be in Mmabatho. The Chair needs more compelling evidence from Mr Viviers, if Mr Viviers expects the Committee to tell the provincial government that the court will not be in Mmabatho.

Mr Viviers said that centrality of economic activity in Potchefstroom indicates that that is where the litigating community is.

The Chair asked for proof of that assertion.

Mr Viviers said he cannot prove it, but it is a fact that an unskilled labourer in rural areas will not engage in High Court litigation.

The Chair asked for any statistics to support that belief.

Mr Viviers said he had none.

The Chair asked if he was expected to spend millions of rands to build a court in Potchefstroom where none exists, and move judges and build up the entire legal infrastructure, for no other reason than that economic activity is centred in the Potchefstroom area.

Mr Viviers said it would not be very expensive – the building the High Court would use has been provided by Potchefstroom University.

The Chair asked if the university was giving the building to the High Court.

Mr Viviers said it would be a lease arrangement.

The Chair asked how much it would cost.

Mr Viviers said the details had not yet been worked out.

The Chair asked what he would do with the Master's Office, the Prosecuting Authority, and so on – does Mr Viviers have a plan for dealing with these infrastructural requirements, and does he know what it would cost?

Mr Viviers said he did not.

The Chair asked Mr Viviers not to tell him it would be an inexpensive proposition if he was unable to say specifically what the cost would be. He asked Mr Viviers to continue with his other points.

Mr Viviers said that the concentration of the litigating community in Potchefstroom and nearby areas was justification for the cost of establishing the High Court there.

The Chair said that Mr Viviers had just said he had no statistics or proof of the concentration of the litigating community in Potchefstroom, other than his own beliefs. The Chair asked that Mr Viviers, lacking stronger support for this contention, not ask the Committee to consider the issue of the location of the litigating community.

Mr Viviers said he had no more to say.

The Chair asked if the North West Circle Council had any black attorneys as members.

Mr Viviers said they did not.

The Chair said he had a problem attaching much weight or significance to Mr Viviers' submissions, because he apparently only represents one part of the community.

An MP (ANC) asked what attempts are being made to form a unified group that represents the interests of all attorneys in the area.

Mr Viviers said that the North West Circle Council is on the record as having tried to get the Bophuthatswana Attorneys Association to become part of their group. They have made serious attempts to get them on board over the past several years.

The Chair asked Mr Viviers to relay to the Circle Council the fact that the Committee hoped they would continue their efforts to bring those groups together. He then introduced Judge King, from the Western Cape, to address the Criminal Procedures Amendment Bill.

**Criminal Procedures Amendment Bill**

Judge King said he had a few points to make regarding automatic review. The review system is uniquely South African, and its retention is emphatically and overwhelmingly supported by the judges. Given that it is the judges who do the work, their opinions should be given some weight.

In 1998, 200 convictions by magistrates were set aside in the course of automatic review. In 1997, 258 convictions were set aside. Judge King said that the specific numbers are not that important, but the fact that 250 people were wrongly convicted is very important. This is an important safeguard for disadvantaged people, because it applies specifically where the accused has no representation.

Judge King said that given these points, he would not be in favour of abolition of automatic review. It seems that the basis for abolishing it is cost. In this regard, he would like to make some suggestions for maintaining the system on a more limited basis, which would address the cost concerns but still keep a valuable system in place. Automatic review could be pursued only where the person is undefended, and only where the sentence imposed exceeds a certain minimum. The ambit of non-reviewable sentences could be increased based on the seniority of the magistrate. Currently, if a magistrate has tenure of less than seven years, any sentence over three months is reviewed. With magistrates of tenure greater than seven years, any sentence over six months is reviewed. A proposed change could be to change the tenure requirement from seven years to five, and change the sentencing cut-off from three months to six. This could significantly cut down on the number of reviews conducted. At the same time, it would probably not result in significantly decreased vigilance over magistrates.

The Chair asked if there were any statistics on the number of reviews that would be eliminated that way.

Judge King said unfortunately those statistics have never been tracked. One other proposal, if the Committee still felt it necessary to abolish automatic review, would be to maintain a system of spot-checking. This would be much less effective, but would at least maintain the essence of the system.

The Chair said there might be Constitutional problems with a spot-checking system.

Judge King agreed. He said he is strongly of the opinion that automatic review be kept, and that the parameters be modified to make it less expensive.

Mr Hofmeyr asked if it would be possible for a researcher to go through the court's records of automatic review cases to determine what type of cost reduction could be realised.

Judge King said he believes records are kept for five years, so it would certainly be possible to do that.

Mr Cassim (IFP) said it seems that a software programme could be developed to pull out the cases most likely to need review, based on a combination of certain factors. This programme could be designed using historical evidence of what factors contributed to convictions being overturned in the past.

Judge King said that a programme to do that would be very helpful, although it would obviously take some time to develop.

The Chair thanked Judge King for his input. The meeting was adjourned.

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