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JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE

21 October 2003

SUPERIOR COURTS BILL; PREVENTION OF CORRUPT ACTIVITIES BILL: DELIBERATIONS

Chairperson: Adv J H de Lange (ANC)

Relevant documents:

[Superior Courts Bill \[B52-2003\]](#)

Summary of Comments on Superior Court Bill

Superior Courts Bill - working draft

[these documents should be available here on 27 October 2003]

[Prevention of Corrupt Activities Bill Working Document](#) - No 7 (October 2003)

[for document with footnotes included, email info@pmg.org.za]

[Prevention of Corrupt Activities Bill Working Document No.5 \(May 2003\)](#)

[Prevention of Corruption Bill](#): original tabled version [B19-2002]

[RAU Centre for the Study of Economic Crime \(CenSEC\): Prevention of Corrupt Activities Bill submission](#)

SUMMARY

Superior Courts Bill

The Committee agreed that there is a need for a mechanism for appointing Judges President and Deputy Judges President. It was agreed that perhaps the Constitution has to be amended as it is silent on this issue or that the matter has to be legislated for in the Bill. The Committee also agreed on specifying the seat and headquarters of a division of a High Court. There was also a debate as to whether Deputy Judges President should be appointed indefinitely or for a fixed term.

Prevention of Corrupt Activities Bill

The Committee completed reviewing the amendments to the latest draft of the Bill. The Bill will be debated in the National Assembly at the end of November 2003 and will come into operation on 27 April 2004 or possibly earlier.

MINUTES

Superior Courts Bill

The Committee commenced from Clause 4, having completed the first three clauses on 17 October 2003:

Clause 4 Constitution and Seats of High Court

This clause specifies the various divisions the High Court would have. The Chair read the clause and invited members to look at the various submissions on the clause.

The *Cape Bar Council* had submitted that 4(2)(b) might create confusion or ambiguity in regard to Section 174(6) of the Constitution. Mr J de Lange (Department legal drafter) said that the problem is the Judicial Services Commission's participation in the process. The Cape Bar Council feels that the clause seems to exclude the participation of the JSC in the process of appointing the Judges President and the Deputy Judges President. Currently if a vacancy exists, the JSC is responsible for ensuring that the position is filled.

The Chair noted that the Constitution is silent on the appointment of the Judge President and the

Deputy Judge President. He asked if the President or the JSC should make such appointments. He also asked if there is a need for a mechanism for the making of such appointments.

Ms S Camerer (DA) said that for the sake of transparency it is essential to have an appointment mechanism. She recommended that the Committee should not deviate from the current mechanism which sees the JSC actively involved in the making of such appointments.

The Chair said that the problem is where the JSC gets its authority from since the Constitution is silent on this issue. There is a need for flexibility to replace the restrictions that the judiciary has placed on itself. Some people might not want to go through the JSC process and consequently an opportunity to appoint some people might be lost. Normally the court divisions forward names of people to be appointed as the Judge President and in most cases the most senior judges are seconded. The problem with this is that the most senior judges are not necessarily the best candidates. He noted that the issue of making appointments to such positions was clearly dealt with in the interim Constitution of 1993.

The *Cape Bar Council* also asked if the headquarters of a Judge President should be specified. The Chair felt that such headquarters should be specified in the Act. Clause 4 should indicate the seat of the divisions as well as their headquarters. The jurisdiction of the divisions and their seats should also be specified.

Mr J de Lange felt that if the headquarters is specified, the other seat of a Division (i.e. in cases where a Division has more than one seat) might be undermined. One should be able to litigate in either seat of a division in cases of a division with more than one seat.

The *Eastern Cape Bench* submitted that the determination of seat areas by the Judge President in terms of Clause 4(5)(a) should be done in consultation with the Chief Justice. Also subclause (5)(b) should be deleted as it will cause practical problems such as forum shopping or appeals from the same magistrate's court being heard at different seats.

The Chair said that the issue of transferring a matter from one seat to another might have cost implications especially if proceedings have already commenced. He asked how appeals would be heard in a division with more than one seat. Would the seat that heard the matter initially also have the power to dispose of the appeal or would the appeal be heard by the main seat of the division? He warned against the danger of having different judicial systems in divisions of the High Court. He appreciated the fact that judges should be able to move freely from one seat to another and that proceedings would not be moved except in terms of Clause 25(1) of the Bill.

By way of summary the Committee agreed that the seat which would have jurisdiction in respect of a matter is the one in which the act complained about took place. It was also agreed that such seat would also hear appeals in such matters unless the Judge President directs otherwise, by way of directives tabled and approved in Parliament.

Clause 5 Circuits Courts

Mr de Lange said that judges feel that Circuit Courts still have a purpose to serve hence they are retained. The Chair said that the notice that is required in terms of Clause 5(1) when the Judge President of a division wishes to alter the boundaries of a district should be tabled and approved in Parliament.

Clause 6 Appointment, remuneration and tenure of office of judges and acting judges

Clause 6(4) envisages a situation where a judge would serve as a judge in more than one Division. The Chair said that it was desirable to have this provision. He asked if this would be a transitional arrangement. He said that if this provision is retained then the Minister should be consulted whenever a judge is asked to serve in another division since this would have cost implications.

Clause 6(5) allows the President to transfer a judge from one division to another. The Chair said that this is contrary to current JSC practice. A judge who wants to be a judge in another division has to apply and compete with others who want the same position. He was not keen to allow the transfer of judges as some of them, once transferred, seek to be taken back to their former divisions. He agreed

that judges might be transferred from any division to any of the newly established divisions. It should be indicated that this is a transitional arrangement.

The *Cape Bar Council* submitted that Deputy Judges President should not be appointed for a fixed term as this might compromise judicial independence. The Chair agreed that 6(2) might compromise judicial independence. He asked what would happen in cases where a judge's term expires before judgement has been handed down. Under normal circumstances such a judge should be able to finish his work. He asked if the person would then have to be appointed as an acting judge. He noted that this would not work with regard to Constitutional Court judges. At the same time he felt that having fixed term appointments allows for flexibility and review of employment relationships. This also gives opportunities to others to occupy such positions.

Ms Camerer felt that Deputy Judges President should be appointed for an indefinite period. If fixed term appointments were introduced, one would have discrepancies in that some appointments would be indefinite whilst others are fixed. Those who have fixed term appointments are more likely to be from previously disadvantaged groups whilst the 'old guard' have indefinite appointments. She wondered if this is desirable.

The Chair agreed that in the meantime there would be discrepancies but added that there would be uniformity once the 'old guard' retires.

Afternoon Session

Prevention of Corrupt Activities Bill

Clause 25: Authorisation by National Director, Deputy National Director or Director to institute proceedings iro certain offences

The Chair asked if Clause 16 is still relevant to this clause, taking into account the fact that some amendments have been effected to that clause.

Adv Gerhard Nel, Deputy Director of Public Prosecutions, noted that Clause 16 is still relevant to this clause, however the drafters would amend it accordingly.

Clause 26: Investigations regarding possession of property relating to corrupt activities

Adv Nel noted that the Department would appreciate it if Option 1 could be accepted as the core of this clause since it is the most preferred option out of the two.

The Chair went through the options and started with the second one. He asked if the Bill defines the meaning of a police officer mentioned in 26(2)(b) of Option 2.

Adv Nel noted that although the Bill does not necessarily define what is meant by a police officer, this concept would have the same meaning as employed in the Criminal Procedure Act.

The Chair noted that the first and second part of Option 1 require totally different things. Thus the former requires the National Director or someone authorised by him to get an order from the Court where a person, living above his means, is believed to be involved in criminal activity - even though there is no evidence for his being involved in a crime. The latter requires an investigation to be instituted in terms of the provisions of Sections 28 and 29 of the National Prosecuting Authority Act. Therefore there is no need for these two separate acts to be integrated into one clause.

Adv Nel accepted the Chair's argument noting that indeed the test in the first part of Option 1 is much higher than the one required in the second part. They would thus break this clause into two different clauses.

The Chair agreed. He noted that the test here is if there is sufficient evidence to show that the person maintains a living standard above his/her means or is in possession of property disproportionate to his/her present or past known source of income. If that is proved then secondly it must be shown that there are reasonable grounds to suspect that s/he maintains that standard by means of a corrupt activity or instrumentality. There cannot be different tests for the prosecuting authorities to bring the application and for the courts to apply in issuing such an order.

He thus proposed that 26(3)(a)(ii) and (iii) be adjusted to be in line with the above test as was done with the Interception Act, No 70 of 2002. Also 26(4) and "probably" in 26(1)(b) of Option 1 should be deleted.

The drafters were told that Clause 26(1) of Option 2 should then be retained as a new separate clause containing general powers of investigation and Option 1 as containing special powers of investigation.

The Chair asked if it would be possible to investigate serious white-collar crimes under the provisions of S28 and S29 of the National Prosecuting Authority Act.

Adv Nel believed that under such circumstances the provisions of S121 of the Prevention of Organised Crimes Act of 1998 would be applicable.

The Chair said that it seems that the Scorpions have the right only to investigate corruption activities committed in an organised fashion or if it is in terms of a proclamation of the President in specific cases such as serious civil servant-type corruption. He asked the drafters to see if it would be possible for the Scorpions to investigate white-collar corruption activities in terms of this Bill - since it deals with properties that were used as instrumentality in the commission of a crime.

Clause 27: Duty to report corrupt transactions

The Chair proposed that the provisions of 27(1) should be broken up into two provisions consisting of paragraphs and that "and presence" be substituted by "or presence".

Adv Nel felt that "and" is proper since it is possible for one to have a suspicion and at the same time to so be aware of something. He proposed that this word should be left as it is. Thus it opens this subclause to wide interpretation as far as possible: that it should be one or the other or both.

The Chair acknowledged the latter's concerns but noted that if the word "and" is used then the interpretation would not be and/or but both and if both cannot be done then this subclause would not be applicable. He thus contended that the advantage of the word "or" is that it does not matter whether both have not be done as long as one of them has been done. However in an effort to cater for both concerns, he proposed that the phrase "suspicion or presence or both" should be used instead.

He also suggested that the phrase "as prescribed in the National Instructions" be inserted after the words "in writing" in 27(3) and to insert a provision as subclause(4) requiring the police to publish the National Instructions in the Gazette. A subclause (5) must also be inserted requiring the National Instructions to be tabled in Parliament before being published in the Gazette as required in 27(4).

Clause 30: Repeal and amendment of laws

The Chair noted that only once the Committee has finished with the Bill would the department be able to clearly fix up the laws to be repealed/amended by this Bill - as mentioned in the Schedule of the Bill. He pointed to 30(2) and asked what would happen if, after this Bill has been passed, a person makes an allegation or complains about an offences committed before this Bill came into operation.

Adv Nel noted that by law those instances would have to be dealt with under the provisions of the Corruption Act of 1992, since this Bill cannot apply retrospectively.

The Chair acknowledged this. However he contended that this clause might create some problems as it only talks about proceedings instituted before and not about those instituted afterwards but which were committed before this Bill came into operation.

Adv Nel agreed that indeed this subclause would create some problems.

The Chair proposed that the drafters should either delete this subclause or rewrite it stating that "Despite subsection (1), all proceedings which were instituted in terms of the provisions of Corruption Act, 1992, shall be dealt with as if this Act has not been passed.

Adv Nel noted that although the Act of 1992 is being repealed by this Bill however its provisions would be needed in those instances as noted by the Chair. He then said that the department would thus

rewrite subclause (2) accordingly, as proposed by the Chair.

Clause 31: Short title

The Chair asked the Department if there is anything that could hold up the implementation this Bill, after being passed.

Adv Nel replied that the only thing still outstanding that could hold up its implementation is the establishment of the Registrar by the Minister of Finance, which should be done within six months of passing the Bill.

The Chair directed the Department to consult with the Minister of Finance. Also the National Instructions to be published by the police in the Government Gazette should be tabled in Parliament within three months of passing the Bill.

Mr S Swart (ACDP), seconded by Ms S Camerer (DA), proposed that this Bill should come into operation on the 27 April 2004.

The Chair agreed and added "or an earlier date determined by the President by proclamation in the Gazette".

The Committee unanimously agreed.

The meeting was adjourned.

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