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### JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE

5 November 2003

**JUDICIAL MATTERS SECOND AMENDMENT BILL: ADOPTION; CRIMINAL PROCEDURE AMENDMENT BILL: ADOPTION; SUPERIOR COURT BILL: DELIBERATIONS; ADOPTION OF PROTOCOL ON UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, PROTOCOL ON TRAFFICKING IN PERSONS, PROTOCOL ON ILLICIT FIREARMS, PROTOCOL AGAINST SMUGGLING OF MIGRANTS & PROTOCOL AND AGREEMENT ON SADC TRIBUNAL**

Chairperson: **Adv J H de Lange (ANC)**

#### Relevant documents

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

[Summary of Comments on Superior Courts Bill](#)

[Superior Courts Bill - working draft](#)

[Portfolio Committee Amendments to Judicial Matters Second Amendment Bill](#)

[Explanatory Memorandum to the Judicial Matters Second Amendment Bill](#)

[Committee Report on Judicial Matters Second Amendment Bill](#)

[Committee Report on Criminal Procedure Amendment Bill](#)

[Criminal Procedure Amendment Bill \[B57B-2003\]](#)

[NCOP Amendment to Criminal Procedure Amendment Bill](#)

Committee Reports Supplementing the UN Convention against Transnational Organized Crime:  
Protocol against trafficking in Persons, especially Women and Children (Appendix 1)  
Protocol against the smuggling of migrants by Land, Sea and Air (Appendix 2)  
Protocol on Illicit Manufacturing and trafficking in firearms (Appendix 3)  
Protocol on SADC Tribunal and Agreement amending Protocol on SADC Tribunal (Document awaited)

#### SUMMARY

The Committee effected amendments to the following Protocols before adopting them: UN Convention against Transnational Organized Crime, Protocol against trafficking in Persons, Protocol against the smuggling of migrants, Protocol on Illicit Manufacturing and Trafficking in Firearms and the Protocol on SADC Tribunal and Agreement amending Protocol on SADC Tribunal.

Before adopting the Criminal Procedure Amendment Bill the Committee considered the NCOP amendment, and noted the House's strong concerns with the manner in which the Bill was processed. The Committee effected amendments to the long title of the Judicial Matters Second Amendment Bill, and amendments were effected to Clauses 2, 23 and 27 for clarity. The Bill was adopted by the Committee, with the Democratic Alliance abstaining. Discussions on the Superior Courts Bill focused on Clause 28, which was amended to clarify the position with regard to proceedings held in open court, and the composition of the Rules Board to be established was considered under Clause 30.

#### MINUTES

##### **Protocol on SADC Tribunal and Agreement amending Protocol on SADC Tribunal**

The Chair reminded Members that the Department had raised some concern as to whether this matter would have to be passed by Parliament, or whether Parliament would simply have to note it. The Department's view was that it would only have to be noted by Parliament. It was suggested that Parliament would probably have to vote on the matter, this was double-checked, and the Department ultimately agreed with Parliament. The Chair stated that the problem was that the Protocol on SADC

Tribunal itself had not been tabled in Parliament, and the Committee could thus not vote on this matter on the previous occasion. The Chair stated that the Tribunal had now been tabled on 30 October 2003, and the Committee could thus now pass the Protocol.

**Agreement amending Protocol on SADC Tribunal**

The Chair stated that the phrase "approve the said Convention" be replaced with "to approve the said amending agreement", because this was merely the agreement amending the Protocol. The Chair noted that Members agreed with the Agreement.

**Committee Report on Protocol on SADC Tribunal**

The Chair noted that Members agreed with the Report.

He noted that all Members agreed to both the Agreement and the Protocol.

**United Nations Convention against Transnational Organized Crime**

The Chair reminded Members that the previous formulation (Point 2) stipulated that Parliament would have to approve that the Director-General of the Department was the central authority. The Committee however disagreed with this because the International Co-operation in Criminal Matters Act already provided that the Director-General would be the central authority, and Parliament would thus not be able to approve that again. He stated that the revised position now stipulated that Parliament would only confirm that the Director-General would be the central authority. The Chair noted that Members agreed with the amendment.

He proposed that the phrase "The Chief State Law Advisor, International Law, has advised that" be replaced with "The Republic of South Africa" in Point 3. The Chair suggested that the portion between brackets be deleted, because it did not have to be spelt out in a resolution. He noted that Members agreed with the amendments.

The Chair noted that the Convention was unanimously adopted by the Committee.

**Protocol against Smuggling of Migrants**

The Chair reminded Members that concern was raised in Point 2 that government could be bypassed completely, and that the institution itself could be contacted. The Committee thus requested that the Director-General of the Department of Transport be made the designated authority, and the South African Maritime Safety Authority (SAMSA) and others would then provide assistance. He stated that this had now been included in the Report.

He proposed that the words "further approve" be replaced with "in addition approve that the Director-General of the Department of Transport", as this would read better. The Chair stated that the acronyms "SAPS" and "SANDF" must be spelt out in full, because the United Nations might not be familiar with those terms.

The Chair stated that Point 3 would then also be amended by replacing "approve" with "in addition the Republic of South Africa did not recognise", and the text in brackets would be deleted.

He proposed that the phrase "in terms of Article 6 of the said Protocol" be inserted after the word "migrants" in the paragraph beginning "the Committee noted". The Chair suggested that "government respond on what action" be replaced with "respond as to the action that is being taken", as this would read better. He stated that the words "as set out under the Protocol" must be replaced with "as required under the Protocol". He requested Mr Allers, State Law Advisor, to consult Mr Neil Bell in Parliament as to how exactly this paragraph should be prefaced. The Chair noted that Members agreed.

The Chair noted that the Convention, as amended, was unanimously adopted by the Committee.

**Protocol to Prevent, Suppress and Punish Trafficking in Persons**

The Chair stated that the same amendments relating to the insertion of the phrase "the Republic of South Africa" in the previous Protocol, and "The Chief State Law Advisor, International Law, has advised that" be replaced with "The Republic of South Africa" as was done with the UN Protocol

earlier, be effected in Point 2 as well. He proposed that the text between brackets be deleted as well. The Chair noted that Members agreed to the proposed amendment.

He proposed that the phrase "in terms of Article 5 of the said Protocol" be inserted after the word "persons" in Point 3. The Chair suggested that the words "respond on what" be replaced with "respond as to the action that is being taken", and the phrase "as set out under the Protocol" must be replaced with "as required under the Protocol". The Chair noted that Members agreed with the amendments. He stated that Mr Allers would have to consult Mr Bell on the same matter relating to this Protocol.

The Chair noted that the Convention, as amended, was unanimously adopted by the Committee.

#### **Protocol against Illicit Manufacturing of and Trafficking in Firearms**

The Chair stated that Point 2 had been amended to stipulate "approve that the National Commissioner of the South African Police Service be designated to liaise with other State Parties on matters relating to the Protocol as required by Article 13(2) of the said Protocol". He stated that the previous draft referred to the "Central Firearms Register" which fell under the jurisdiction of SAPS, and this reference was deleted because SAPS would be able to handle this matter when the request was made to them. The Chair noted that Members agreed with the amendment.

The Chair stated that the same amendments relating to the insertion of the phrase "the Republic of South Africa" in the previous Protocol, and "The Chief State Law Advisor, International Law, has advised that" be replaced with "The Republic of South Africa" as was done with the UN Protocol earlier, be effected in Point 2 as well. He proposed that the text between brackets be deleted as well. The Chair noted that Members agreed to the proposed amendment.

He stated that Mr Allers would have to consult Mr Bell on the same matter relating to this Protocol, and the minor technical amendments must also be resolved.

The Chair noted that the Convention, as amended, was unanimously adopted by the Committee.

#### **Criminal Procedure Amendment Bill**

Mr Johan de Lange, Legal Drafter: Department, stated that the NCOP amendments were published in Parliament's ATC Papers (document attached).

The Chair stated that the amendment proposed was that "1 November 2003" in Clause 8 of the Bill be replaced with "1 January 2004". He stated that this amendment was being effected as a result of the comment received from the Select Committee on Security and Constitutional Development in the NCOP contained in the ATC referred to.

The Chair stated that with a Section 75 Bill such as this Bill, the National Assembly could choose to accept or reject the amendments proposed by the NCOP. NCOP was legally able to deliberate on the Bill for as long as it deemed necessary, and it could propose any date which it felt was appropriate. There was thus no pressure placed on that House to finalise this Bill, and the Committee stated expressly that it was aiming for "1 November 2003" but it would have to wait for the position of the NCOP on the matter. The Chair stated that he would explain this to the Chairperson of the NCOP Committee.

He stated the date would be amended to "1 January 2004", and noted that Members agreed. The Chair read through the Committee Report on the Bill, to which all Members agreed.

#### **Judicial Matters Second Amendment Bill**

##### **Long Title**

The Chair noted that the clause that referred to the panel that would have to be established was deleted. The reference to the capacity of an accused was also deleted.

Mr L Basset, Legal Drafter: Department, replied that this was dealt with in the resolutions.

The Chair stated that the first substantial amendment was the insertion of the words "of time" after "and to make provision for the submission of a report to Parliament containing certain particulars in

respect of accused persons whose trials have not commenced and who have been in custody for a particular".

Mr Basset responded that this insertion was proposed by the Committee.

The Chair noted that the words "and to extend maintenance orders to include maintenance orders by High Courts and Divorce Courts in certain circumstances" were replaced by the phrase "and to extend maintenance orders by including maintenance orders made by High Courts and Divorce Courts in certain circumstances", so that it would read better.

Mr Basset stated that the portion that stipulated that "to make provision regarding the exclusion of the Judicial Service Commission from the application of the Act in certain circumstances" was retained as is, even though the Committee requested the Department to insert the new provisions that dealt with the rules of procedure. He stated that these provisions were not included because they related to the extension of time within which the rules of procedure must be made, in terms of Section 79(3) of the Promotion of Access to Information Act and Section 7(4) of the Promotion of Administrative Justice Act.

He stated that draft provisions could specifically be included here, should the Committee see fit. It would stipulate "to further regulate the institution of legal proceedings in terms of the Act in a court". This would be inserted after the words "to extend the period of time within which the rules of procedure must be made", which dealt with the Promotion of Access to Information Act.

The Chair stated that this must be inserted. He noted that the word "new" had been removed from "to make new provision regarding the failure to comply with certain provisions of the Act". The word "to" has been inserted between the words "so as" in the phrase "to amend the Promotion of Administrative Justice Act, 2000, so as adapt the definition of "administrative action". The word "new" has been removed from "and to make new provision regarding pensions paid to retired judges and to surviving spouses of retired judges". The word "this" in the second last line of the long title has been replaced with "that".

Mr Basset stated that the phrase "to further regulate the institution of legal proceedings in terms of the Act in a court" would now also have to be inserted here after "and to extend the period of time within which the rules of procedure for judicial review must be made" which dealt with the Promotion of Administrative Justice Act.

The Chair noted that Members agreed with the amendments.

#### Clause 1

The Chair noted the concerns raised in this clause were dealt with in the resolution drafted by Mr Basset. The Chair noted that no further amendments were proposed to this clause.

#### Clause 2

Mr Basset informed Members that this clause has been very strictly adapted in accordance with the Committee's proposal during the previous meeting.

The Chair noted that the definition of "market value" in the old 35B(2) has been removed.

Mr Basset answered in the affirmative. He stated that the Committee suggested that it was a meaningless definition, and that it should be removed if there was no good reason for its retention. Mr Basset stated that he informed the Banking Council of South Africa that it would have to take this matter up further with the banks, and the three banks which responded had no problem with the deletion of that phrase.

The Chair agreed with its deletion, because the definition added no value. He proposed that the words "or agreements" be removed from the last portion of 35B(2)(a), because those words were not referred to anywhere else in that provision. It was already stipulated in 35B(1), and was not needed in 35B(2) as well.

Mr Basset stated that the Committee had also requested the Department to consult both the Financial Services Board (FSB) and Treasury on the latest proposed amendments. He stated that the FSB had no problems with the amendments, but he was unable to contact the appropriate official within Treasury. Mr Basset stated that he doubted whether Treasury would object to these amendments though.

The Chair stated that Treasury had approved these amendments on a previous occasion, and the letter confirming its concurrence must be forwarded to him. The Chair noted that Members agreed with the amendment.

Clauses 3 and 4

The Chair noted that no further amendments were proposed to these clauses.

Clause 5

The Chair noted that the phrase "other than the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997)" had been inserted at the beginning of 5(3), and the previous 276(3)(b)(i) was now incorporated in 276(3)(b) itself. The phrase "provides for such or any other punishment or not" has been replaced with "question provides for such or any other punishment" in 276(3)(b). The Chair noted that Members agreed to the proposed amendments.

Clause 6

Mr Basset informed Members that he had liaised with the Department of Correctional Services to address the concern that there might be a number of relatives or complainants in court, who would clog the system at the Parole Board. The Department of Correctional Services was satisfied with these amendments and it proposed that reference also be made to correctional supervision, because it was also relevant here.

He stated that "correctional supervision" has now been included in the heading, 299A(1)(f) has now been split into two portions and "immediate relative" has been included in the second portion to cover the concern raised by Members. The phrase "subject to the directives issued by the Commissioner of Correctional Services under subsection (4)" was inserted in the past few lines of 299A(1). Mr Basset stated that 299A(4) was included in line with Section 105A of the Criminal Procedure Act, which this Committee inserted in relation to plea bargaining.

The Chair asked whether the directives referred to in 299A(4) would be published.

Mr Basset answered in the negative.

The Chair stated that a clause must be inserted which would stipulate that they must be published in the Gazette, and 299A(4)(b) should state "Subject to sub section 2, directives published in sub section 1 must be published in the Government Gazette".

Ms S Camerer (DA) proposed that the relevant provision in the heading be amended to stipulate "to make provision for the complainant's right to make representations", it was really a right that was being dealt with in 299A.

The Chair stated that the provision was perfect as it currently stood, but Ms Camerer's proposal would be accommodated. The words "right of a complainant to make representations in certain matters with regard to placement on parole, on day parole, or under correctional supervision".

Mr Basset proposed that the phrase "if he or she is present" be inserted immediately after 299A(1)(f) (ii).

The Chair noted that Members agreed to the proposed amendment.

Clause 7

The Chair reminded Members that the aim of the amendments proposed in this clause was to clarify that the case had not yet commenced and the evidence has not yet been led, and did not thus refer to cases in which a plea had merely been lodged. The Chair noted that Members agreed to the proposed

amendments.

Clauses 8-22

The Chair noted that no further amendments were proposed to these clauses.

Clause 23

The Chair stated that the Department has just been asked to effect a further amendment which would make it clear that, until the rules of procedure were passed, an application could only be brought in the High Court. This was included to state:

Until the rules of procedure in terms of subsection (1)(a) come into operation, an application in terms of section 78 may only be lodged with the High Court or another court of similar status.

The Chair asked whether the "may" here should not be replaced with "must", and noted that Members agreed with the amendments.

Clause 24

The Chair noted that no further amendments were proposed to this clause.

Clause 25

The Chair stated that the provision was fine, but he had requested that the regulations be provided in terms of this provision. He stated that Regulation 3 would be inserted, which would criminalise the non-compliance with the publication of manuals.

He stated that this was necessary, because it had become common practice that institutions were not providing these manuals because the failure to provide them was not a crime. This has now been remedied. The Chair noted that Members agreed with the amendment.

Clause 26

The Chair noted that no further amendments were proposed to this clause.

Clause 27

The Chair stated that the same amendment effected to Clause 23 was inserted here in 7(4) of the Promotion of Administrative Justice Act, and would read:

Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act may only be instituted in a High Court or the Constitutional Court.

The Chair stated that it should properly state "or another court having jurisdiction", and the words "may only" must be replaced with "must". .

Mr Basset proposed that the same be done to Clause 23, which dealt with the Promotion of Access to Information Act.

The Chair agreed, and noted that Members agreed with the proposed amendments.

Clauses 29-32

The Chair noted that no further amendments were proposed to these clauses.

Clause 33

The Chair stated that "Act 28 of 2003" has now been inserted in the heading of clause, as that Act has since been allocated a number.

**Clause 34**

The Chair noted that no further amendments were proposed to this clause.

**Memorandum on the Objects of the Bill**

The Chair stated that this would have to be altered slightly.

Mr Basset replied that it has been amended (document attached), but the minor amendments proposed by the Committee today would have to be included.

The Chair read through the Motion of Desirability, to which Members agreed. He read through the Committee Report on the Bill and effected a few amendments to it, and noted that Members agreed to the amended Report and the Committee's Resolution on the Bill. He noted that Ms Camerer has abstained because no mandate had been received from the DA caucus.

The Chair noted that the Committee agreed to the Bill, as amended. He noted that Ms Camerer has abstained because no mandate had been received from the DA caucus.

## **Superior Courts Bill**

### **Chapter 7: General Provisions**

#### **Clause 27: Nature of Courts and seals**

Mr de Lange stated that this clause was identical to Section 15 of the Supreme Court Act, as well as Section 2 of the Constitutional Court Complementary Act.

The Chair noted that no concerns were raised with this clause in the public submissions.

Clause 28: Proceedings to be carried on in open court

The Chair noted what used to be Section 16 of the Supreme Court Act, and no concerns were raised with this clause in the public submissions. He sought clarity on the reason for including the remainder of the provision after the words "any Superior Court must", because it undermined the concept of openness as it grants the court discretion not to hear a matter in open court.

Mr de Lange responded that that phrase should be deleted, especially as the precise meaning of "special cases" is not clear.

The Chair questioned whether that phrase should really be deleted, because its retention might very well be important. He proposed that 28(1) be created which would stipulate "save as is otherwise provided in this Act or any other law, all proceedings in any Superior Court must be carried on in open court", and 28(2) would be created it stipulate something along the lines of "where any law provides a court with a discretion, then it may only rule that the matter not be held in open court if it is in the interests of the administration of justice to do so".

He stated that a clause would also have to be inserted to deal with instances in which no existing legislation stipulated whether a specific matter must not be held in open court, and would stipulate "in any case where no provision is made in law the court may close if it is satisfied in the interests of the administration of justice". This would allow that legislation to specify its own test, so that it did not conflict with the well-established tests already provided in the CPA.

The Chair noted that Members agreed to the proposed amendments.

#### **Clause 29: More than one court may sit at the same time**

The Chair noted that no concerns were raised with this clause in the public submissions.

#### **Clause 30: Rules of Court**

The Chair stated that this clause would have to be amended substantially to bring it in line with the decisions taken by the Committee relating to the Rules Board, because each court cannot be allowed to individually pass its own rules. The Rules Board would have to draft the rules, and Parliament would then approve those rules.

He stated that the single Rules Board would consist of a mixture of persons. The Chairperson would be appointed by the Chief Justice in consultation with the Minister. The Board would consist of one attorney, one advocate, one professor of law, one Member of Parliament from the ANC in the National Assembly and one from the opposition, three lay appointments by the President, at least one member of the Constitutional Court, the President of the Supreme Court of Appeal, the Deputy President that dealt with labour, a delegate from the Minister, one Judge President and one district and one regional court magistrate.

The Chair stated that 30(3) would have to be deleted. An entire chapter that dealt specifically with the rules of court would have to be inserted in the Bill. He stated that the various rules must be integrated into a single form, and the practice notes as well. Transitional provisions would also have to be put in place to cover the interim period, during which time the various rules would be amalgamated.

#### **Comment by Justice Ngcobo**

The Chair stated that it would not be located in the office of the Chief Justice, but a separate Rules Board would be created. The Chief Justice and the Minister would appoint its Chairperson.

Clause 31: Certified copies of court records admissible as evidence

The Chair noted that no concerns were raised with this clause in the public submissions.

Clause 32: Manner of securing attendance of witnesses or production of any document or thing in proceedings and penalties for failure

The Chair proposed that the phrase "on a recognisance in 32(3) be replaced with "on his or her recognisance", so that it would read better. The period of "three months" at the end of 32(4) must be replaced with "one year", and the same must be done at the end of 32(5).

The meeting was adjourned.

#### **Appendix 1**

##### **Second Report of the Portfolio Committee on Justice and Constitutional Development on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime:**

The Portfolio Committee on Justice and Constitutional Development, when considering the request for approval by Parliament of the **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime**, referred to it, noted that at present there is no current legislation to deal with the criminalization of the trafficking in persons in terms of article 5 of the said Protocol.

Therefore, the Committee recommends that the House approve that, Government responds as to the action that is being taken to comply with the obligations dealing with the criminalization of the trafficking in persons as required in terms of the said Protocol, within three months of the passing of this resolution.

#### **Appendix 2**

##### **Second Report of the Portfolio Committee on Justice and Constitutional Development on the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime:**

The Portfolio Committee on Justice and Constitutional Development, having considered the request for approval by Parliament of the **Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime**, referred to it, noted that at present there is no current legislation to deal with the criminalization of the smuggling of migrants in terms of article 6 of the said Protocol.

Therefore, the Committee recommends that the House approve that, Government responds as to the action that is being taken to comply with the obligations dealing with the criminalization of the smuggling of migrants as required in terms of the said Protocol, within three months of the passing of this resolution.

#### **Appendix 3**

##### **Report of the Portfolio Committee on Justice and Constitutional Development on the *Illicit***

***Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime:***

The Portfolio Committee on Justice and Constitutional Development, having considered the request for approval by Parliament of the ***Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime***, referred to it, recommends that the House -

1. approve the said Protocol in terms of Section 231(2) of the Constitution;
2. approve that the National Commissioner of the South African Police Service be designated to liaise with other States Parties on matters relating to the Protocol as required by article 13(2) of the said Protocol; and
3. approve that the Republic of South Africa, in line with her previous position, when ratifying United Nations multilateral treaties, enter a reservation against the compulsory jurisdiction of the International Court of Justice (ICJ) with regard to settlement of disputes arising out of the interpretation or application of the Protocol as provided for in article 16(3) of the Protocol. The Republic of South Africa does not recognize the compulsory jurisdiction of the ICJ as provided for in article 36 of the Statute of the ICJ.

The reservation, in line with our previous position stated above, has been formulated as follows:

*"Pending a decision by the Government of the Republic of South Africa on the compulsory jurisdiction of the International Court of Justice, the Government of the Republic does not consider itself bound by the terms of article 16(2) of the Protocol which provides for the compulsory jurisdiction of the International Court of Justice in differences arising out of the interpretation or application of the Convention. The Republic will adhere to the position that, for the submission of a particular dispute for settlement by the International Court, the consent of all the parties to the dispute is required in every individual case."*

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