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JUSTICE PORTFOLIO COMMITTEE 18 January 2006 SUPERIOR COURTS BILL: BRIEFING

Chairperson: Ms F Chohan-Khota (ANC)

Documents handed out:

[Draft Constitution Fourteenth Amendment Bill, 2005](#) as of 18 December 2005

[Draft Superior Courts Bill](#) as of 19 October 2005

SUMMARY

The Department of Justice continued with a briefing on the Superior Courts Bill. Detail was provided on the procedure used to reach decisions in the Superior Courts. A list of judges would be compiled to hear labour-related cases. Relevant training would be conducted to improve judges' understanding of labour matters. Full bench appeals would gradually be withdrawn from the judicial system. The Constitutional Court would continue to hear matters of a constitutional nature. Procedures relating to the formulation of court rules were explained. The Minister had the delegated authority to make administrative rules. Transitional and general provisions of the legislation were discussed.

Members asked various questions, including why labour knowledge would be accorded special status within the High Court system, the role of NEDLAC in appointing labour judges, issues of judicial independence, the controversy around the presence of a list of labour judges, whether High Courts could also grant leave to appeal, whether Members of Parliament had representation on the Rules Board, the composition of the proposed labour-related sub-committee and the need for consent of the Chief Justice when serving summons on a judge.

MINUTES

The Chairperson reiterated the consultation process with regard to the proposed legislation. The Department would submit the Bill together with written submissions received. The Committee would continue to garner comments from interested parties during the deliberation process until the Bill was adopted. The Bill had first been tabled in 2003. Members would receive the final Committee programme on Friday.

Chapter Four: Manner of arriving at decisions in Superior Courts

Mr J De Lange (Legal Director: Department of Justice) continued with a review of the Bill by focusing on Chapter Four, dealing with the decision process within courts. The Judicial Services Commission (JSC) would compile a list of judges suitable to hear labour-related cases. An addition to the Bill was that judges could apply in writing to the JSC to be placed on the labour list. Appropriate training could remove the need for relevant training in certain cases.

Mr K Van Der Merwe (IFP) asked why judges with specialised labour knowledge should be categorised within the High Court system as opposed to other special areas that were not given the same level of status.

Mr De Lange responded that the international tendency was for labour courts and labour law to be given a distinct status. The primary intention of the proposed legislation was to incorporate labour into the legal mainstream in order to promote accessibility and uniformity. Strong interest groups were also present that had to be taken into consideration. The high volume of labour cases necessitated the

specialist tag.

Mr L Joubert (IFP) declared that the standard of the judiciary should be uniform and all judges should be able to hear labour-related cases.

The Chairperson agreed and reminded Members that most judges would complete the relevant labour training over time thereby assisting in the integration process. Mainstream courts had not been hearing significant amounts of labour cases and this anomaly had to be corrected. High Court judges had to be given exposure to labour cases to promote a unified system.

Ms S Camerer (DA) stated that a contradiction prevailed in that labour judges would continue to be isolated while undergoing incorporation into the mainstream legal system. The role of NEDLAC in the appointment of labour judges was not ideal and compromised the independence of the judiciary. Inexperienced judges were being marginalised by lawyers who requested experienced judges to hear financial cases. This practice had an adverse impact on the efficiency of the legal system.

The Chairperson declared that Members had to bear in mind the current context that required promoting labour cases within the mainstream system. Various Departments had created their own courts, which had complicated the matter. One court system was sought that operated in a structured fashion. The legislation was not intended to entrench disparities between judges.

Mr Van Der Merwe acknowledged that the merger of the system was the optimal objective but not all judges would be experts on labour matters in the short term.

Ms Camerer asserted that the presence of a list of labour judges would restrict the prerogative of a bench to appoint judges.

The Chairperson stated that such a list would disappear over time as integration progressed.

Chapter Five: Orders of constitutional invalidity, appeals and settlement of conflicting decisions.

Mr De Lange dealt with Chapter Five of the Bill that focused on appeals and leave to appeal. Full bench appeals would not be abolished in the immediate future. Changes would be introduced in a gradual manner. Orders of constitutional invalidity made by High Courts and other divisions would have to be referred to the Constitutional Court for confirmation. The powers of courts on the hearing of appeals was outlined.

Mr Joubert asked at what level leave to appeal would be granted. He asked whether High Courts could also grant appeals in addition to the Supreme Court of Appeal (SCA).

Mr De Lange responded that the general trial court granted leave to appeal. The SCA could be used as a last resort to grant appeal if leave to appeal was refused in the High Court.

Mr Van Der Merwe stated that the governing principle when applying for leave to appeal was whether another court was likely to come to a different decision. He asked whether this principle would be incorporated into Clause 26.

Mr De Lange replied that the legislation would continue to subscribe to the governing principle of likely to succeed in an appeal application.

The Chairperson added that Clause 27 was confusing in that no specific court was mentioned and asked which courts would apply the stipulated criteria.

Mr De Lange responded that Clause 27 proposed an objective test that could be practised in any court. Constitutional matters would be referred by the Chief Justice to the Constitutional Court.

Chapter Six: Provisions applicable to High Court only

Chapter Seven: Rules of Court

Chapter Six dealt with the parameters of jurisdiction of the general divisions and the special divisions.

Chapter Seven focused on the rules of court and the role of the Minister in making rules. The composition and functions of the Advisory Board for rules of court were explained. The Minister has to consult with the Board in making rules and any new rules have to be tabled in Parliament.

The Chairperson asked whether members of Parliament had representation on the Rules Board.

Mr De Lange stated that the earlier version of the Bill had included three members of Parliament on the Board but the latest draft had removed this provision.

The Chairperson was adamant that Parliament retain the right to approve changes to the rules.

Mr De Lange countered that the decision to amend the Bill had been governed by practical considerations such as potential obstacles if Parliament was not in session.

The Chairperson reiterated that the better alternative would be for Parliament to retain the right to approve rule changes through the consideration by the Committee of proposed changes.

Ms Camerer concurred and suggested that the provision in question be returned to the Bill. The Rules Board had been inactive for a lengthy period and Parliament's role in the process had to be maintained.

Mr de Lange pointed out that Clause 46 proposed the creation of a labour-related sub-committee to generate appropriate court rules for labour matters. The existing framework would be retained.

The Chairperson sought clarity on the composition of the sub-committee and how it would function.

Mr De Lange stated that the sub-committee would contain five members appointed by the Minister after consultation with NEDLAC that represented organised business, labour and the government. The sub-committee would formulate rules for labour courts.

Mr M Malahlela (ANC) asked whether the present rules of the labour court would be retained or totally new rules would be devised.

Mr De Lange responded that the bulk of rules pertaining to labour courts would remain.

Ms Camerer pointed out to Members that the judiciary had expressed reservations over the process of rule amendments at the recent colloquium. She requested that such reservations be forwarded to Members.

Chapter Eight: General Provisions

Mr De Lange continued with Chapter Eight of the Bill that dealt with general provisions such as open court proceedings and the adducing of evidence and procedural matters. The process of Superior Courts was also explained.

Ms Camerer stressed that the right of the Minister to make changes to regulations should be done in consultation with the Chief Justice.

The Chairperson declared that the Minister had the power to make regulations. She noted that the majority of clauses in Chapter Eight were gleaned from existing legislation and Members should note this when engaged in deliberation on the Bill.

Mr De Lange stated that Clause 65 was regarded as contentious in that the need for consent could be perceived in certain quarters as a constraint on the right to issue summons against judges. A problem could arise if consent was refused by the Chief Justice. Summons for civil action could only be served on a judge with the consent of the Chief Justice.

Ms Camerer asserted that the provision was intended to protect the dignity of the judiciary.

The Chairperson agreed that the dignity and status of the judiciary should be protected within certain

limits. The Constitution entrenched the right of citizens to litigate and judges should also be served summons outside of court precincts. The provision was not intended to prevent members of the public from litigating where necessary. The need for consent from the Chief Justice appeared to be an odd requirement.

Mr Van Der Merwe noted that the provision provided an opportunity for the Chief Justice to attempt to resolve a matter with the judge in question before legal action was instituted.

The Chairperson was of the opinion that the Chief Justice should merely be informed of the legal action and not required to provide consent.

Mr Joubert asked whether magistrates should receive the same level of protection.

Mr Van Der Merwe concurred and stated that a similar mechanism should be in place to protect the dignity of magistrates' courts.

The Chairperson declared that the issue would be discussed during deliberations. She suggested that Judge Presidents could fulfil the role of protecting the dignity of magistrates within their area of jurisdiction.

Chapter Nine: Transitional provisions, amendment and repeal of laws, and commencement

Mr De Lange read through the transitional provisions pertaining to the High Courts and the Labour and Labour Appeal Courts. Schedules 1-4 were also briefly outlined.

The Chairperson noted that the provisions were creating artificial vacancies within High Court divisions by requiring Labour Court judges to be High Court judges. She questioned whether this was advisable as regulations could facilitate the necessary changes.

Ms Camerer noted that the JSC complained on a regular basis for more judges to be appointed and the creation of more vacancies seemed inappropriate.

The Chairperson replied that empirical data was needed from the judiciary stating how many cases judges could handle per annum to assist in devising optimal ways of allocating judges to specific divisions.

Mr Joubert asked why magisterial districts were not used in the legislation to determine the provisions.

Mr De Lange replied that the Minister of Justice declared magisterial districts and changes could occur in future. Provincial boundaries were fixed in law and therefore used within the legislation.

The Chairperson reminded Members that the Bill would be deliberated in conjunction with relevant constitutional amendments. All written submissions received would be circulated to Members. Budget hearings would assume priority until 20 February 2006.

The meeting was adjourned.

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