

COMMENTS ON THE SUPERIOR COURTS BILL, 2003

Introduction

All references to "the Act" are to the Supreme Court Act 59 of 1959.

Clause 2 ("labour matter")

1. In a column "*Labour Pains*" by Prof A van Niekerk of Witwatersrand University's School of Law published in the *Mail and Guardian* of 29 August to 4 September, 2003, he records "*some anomalies*" regarding the definition of "*labour matter*". He cites the Defence Special Tribunal Act 81 of 1998 as an example which confers powers on the labour court but the administration of which, contrary to paragraph (h) of the definition of "*labour matter*", vests in the Minister of Defence. Paragraph (h) of that definition may have to be reformulated - alternatively a complete list of all Acts which refer to the labour court may have to be detailed.

Clause 2(1)(b)

2. The labour court (and its predecessor the industrial court) was established as a court of law and equity (section 151(1) of the Labour Relations Act 66 of 1995). Neither clause 2(1)(b) specifically nor the Bill in general provide "*for the adjudication of labour matters*" on an equity basis. This apparent oversight may need to be considered and provided for in the Bill.

Clauses 3(1)(b) and 3(3)(b)

3. These sub-clauses are based on section 4(2) of the Act. There does not appear to be any merit in omitting the necessity for an application for these Courts to sit "*elsewhere*". We suggest that the words "*it appears*" in clause 3(1)(b) should be substituted with "*on application made*"; and that the words "*it appears that*" should be inserted after the words "*Chief Justice*". Clause 3(3)(b) should be similarly reformulated.

Clause 3(3)(a)

4. The number of "*other judges*" of the Supreme Court of Appeal should, in terms of section 168(1) of the Constitution, be "*determined*" in the Bill and not by the President.

Clause 3(4)(a)(iii)

5. How is the consultation between the Judicial Service Commission and NEDLAC proposed in terms of this sub-clause to occur? Are there to be joint meetings? The blandly stated consultation provision seems to us to ignore the significant logistical difficulties in an effective consultative process between two quite large and broadly constituted bodies. (If the provision is to be retained - in which regard see our comments in relation to clause 12.3 of the Bill below - we propose that the clause should be supplemented to make express provision for a procedural mechanism for the consultation.)

Clause 4(2)(b)

6. This clause is based on section 3(2) of the Act.

7. The President is presumably empowered by this clause to determine:

7.1 whether the position(s) of a Deputy Judge(s) President is (are) required in a specific Division;

7.2 the number of other judges required in each Division,

but is not empowered to appoint individual Deputy Judges President and other judges other than as provided in section 174(6) of the Constitution, ie on the advice of the Judicial Services Commission.

8. Any possibility of confusion or ambiguity in this respect should be eliminated.

9. It is not clear if the "*specified headquarters within the area of jurisdiction of that Division*" refer to Judges President and/or Deputy Judges President. It is also not clear how and when such headquarters would be specified. In either or both events it is not apparent why this need be provided for in the Bill. If the "*specified headquarters*" are intended to refer to each Division, this could be more conveniently done in detail in clause 4(1) of the Bill.

Clause 4(5):

10. The term "*seat area*" appears to be an unnecessary formulation of the term *local division*".

Clause 6(2)

11. It is not apparent why Deputy Judges President should not be appointed indefinitely (i.e., for the remainder of the appointees' tenure as judges). It is undesirable that the tenure of a Deputy Judge President should be determinable by the President (and thus that the President could appoint a judge to such a position for a fixed period of a few years, with the judge being eligible to reapply at the end thereof). No such limitation applies to the appointments of the Deputy Chief Justice or the Deputy Presidents of the Supreme Court of Appeal.

12. The position of Deputy Judge President carries important responsibilities. The incumbent stands to occupy the position of Judge President in the latter's absence. The incumbent of the position of Deputy Judge President also ordinarily plays an important role in the allocation of cases. Moreover, the position is a substantive rank in the judicial hierarchy with an attendant establishment remuneration above that of a *puisne* judge. It is undesirable that the incumbent's tenure could be terminated by a political office bearer potentially for politically related reasons. This would also be inconsistent with judicial independence – indispensable facets of which are institutional independence, security of tenure and financial security (see **De Lange v Smuts NO and Others** 1998 (3) SA 785 (CC) at par [67]-[73]; **Freedom of Expression Institute and Others v President, Ordinary Court Martial and Others** 1999 (2) SA 471 (C) at 481H-483E; **Van Rooyen and Others v The State and Others** 2002 (5) SA 246 (CC) at par [19]-[32]).

Clause 6(3)

13. This clause is based on section 10(6) of the Act which refers to all judicial appointments and not merely "*acting*" appointments. There does not seem to be any merit or advantage in limiting this clause to "*acting*" judges.

14. A previous draft of this Bill contained a clause 6(7) modelled on section 11 of the Act. Its omission from this draft has not been explained.

Clause 7(1)

15. The need for a "*court manager*" and "*assistant court manager*" is not evident. How will their functions be distinguished from those of the Registrar? It is also noted that no provision has been made for managers or registrars at "*seat areas*". That would appear to be an oversight. (See the comments in respect of clause 25(1) of the Bill below.)

Clause 7(2)

16. The absence of any provision for research assistants for the High Court is curious. There are currently five research assistants on the establishment of the Cape High Court. They fulfil a valuable role and it would be unfortunate if their posts were to fall away by reason of the absence of an

express provision for them in line with that made in respect of the Constitutional Court and the Supreme Court of Appeal.

Clauses 9, 10 and 11 (headings)

17. The choice of the word "*decisions*" in the headings of these clauses, instead of using in each case the formulation of "*Constitution of ...*" as per sections 12 and 13 of the Act, is questionable.

Clause 11(1)(b)

18. We suggest that reference to the "*full court*" in terms of this provision should be qualified as being permitted "*after consultation with the Judge President or a Deputy Judge President*".

Clause 11(5)

19. This provision (like section 17(1) of the existing Act) does not read sensibly. We suggest that the presumed intention might better be conveyed as follows (the words to be inserted have been underlined; the words to be deleted have been struck through):

"Save as otherwise provided in this Act or any other law, the decision of the majority of the judges of the full court of a Division shall be the decision of the Court and where ~~the decision of there is no~~ decision in which a majority of the judges of any such court ~~are not in agreement~~ concur, the hearing must be adjourned and commenced de novo before a court consisting of three other judges."

Clauses 12(1) and (2) read with clause 46(7)(c)(ii)

20. It is difficult to reconcile the reference to "*the majority of judges*" with the situation where a labour matter is heard before a single judge (clause 11(1)(a) of the Bill).

21. More particularly, it is not clear what will occur if that single judge's name does not appear on the clause 12(3) panel of judges. Clause 46(7)(c)(ii) seems to imply if that judge is not on the panel the matter has to commence *de novo*.

22. If this is the intention, litigants in such labour matters could be severely prejudiced. There would inevitably be a delay in obtaining a second trial date and there would be significant cost and other implications which do not seem to have been considered.

23. It might thus be advisable to amplify clauses 12(1) and (2) to include matters being heard by a single judge and by a court comprising two or more judges, and to make it clear that clause 12(2) also applies to a matter being heard by a single judge.

Clause 12(3)

24. We have concerns about the appointment of judges to hear certain matters by a body other than the Judicial Service Commission. It seems undesirable in principle that a body representative of potential litigants in a particular area of law should have a say in the selection of judges to hear their matters. (NEDLAC has itself been a party to cases in the labour court: see (1999) 20 ILJ 151 (LC).) In our view, a reasonable compromise would be to provide that the panel of judges to hear labour matters be constituted by the Judicial Service Commission, which for the purpose of its deliberations on appointments to such panel could incorporate three representatives of NEDLAC on an *ad hoc* basis.

25. Clause 12(3)(a)(iv) would read better if it commenced (rather than ended with) the reference to the Judge President.

Clause 13(1)(a)

26. What are "*the applicable rules of court*"? It seems "*the applicable rules*" should be deleted and substituted by "*rules of the Constitutional Court*". (The clause would appear to have been taken over from section 8(1)(a) of the Constitutional Court Complementary Act 13 of 1995, where the word "*rules*" was defined as meaning the Constitutional Court Rules. The same definition does not, however, appear – for obvious reasons – in the Bill.)

Clause 13(1)(b)

27. The words "*of that Court*" should be added at the end of this clause; while the word "*Constitutional*" should ideally be added between the words "*the*" and "*Court*" in the last line of the clause. (Again the clause would appear to have been taken over from a section of the Constitutional Court Complementary Act (section 8(1)(b)), where the word "*Court*" was defined as meaning the Constitutional Court. This definition does not appear in the Bill.)

Clauses 14 (1)(a) and (b)

28. The rationale for appeals against decisions in labour matters being heard only by the Supreme Court of Appeal is not apparent. Not all labour appeals would – having regard to the criteria in clause 15(5) – warrant the attention of the Supreme Court of Appeal. Clause 12(1) envisages that a labour matter could serve before three judges in a Division. Why should there be no provision for an appeal to a full court?

Clause 14(1)(d)

29. The expression "*court of a status similar to the High Court*" is unnecessarily vague. The fact that the expression appears to be lifted directly from the Constitution (see sections 166(e) and 169(a)(ii)) does not warrant a perpetuation of the inherent vagueness. The courts considered by the legislature to be of similar status to the High Court should be listed. The list would be short and would not render the provision unwieldy.

Clause 14(2)(b)–(d)

30. This issue will arise more often than not when the appeal is being considered by the judges allocated to hear it. The senior judge in such a case should also have the power (even if exercised only after consultation with the President or the Judge President) reserved by these clauses only to the President of the SCA and the Judges President of the Divisions.

Clause 15(1)(a)(i)

31. "*Real prospect*" should be replaced by "*reasonable prospect*". In the absence of a legislative intention to alter the long-established test for success in applications for leave to appeal, the existing terminology should not be changed. The unnecessary reformulation of established concepts can cause uncertainty and unnecessary litigation.

Clause 15(1)(c)

32. We appreciate that the language of this clause has been borrowed from judgments of high authority (**Zweni v Minister of Law and Order** 1993 (1) SA 534 (A) at 531D-E; **Smith v Kwanonqubela Town Council** 1999 (4) SA 947 (SCA) para 16). However, those cases in turn quoted from the judgment of Colman J in **Swartzberg v Barclays National Bank Ltd** 1975 (3) SA 515 (W) at 518B, where the learned Judge was dealing only with appeals from orders in provisional sentence and other interlocutory proceedings.

33. In an ordinary application or action for final relief there may be several "*real issues*" between the parties. The court may determine one such issue (eg a special defence of prescription) in advance

of others. Such appeals have in the past certainly been allowed in appropriate cases.

34. We believe it would be preferable, in the circumstances, to replace the words after the comma with the following: "..., *the balance of convenience favours the granting of leave to appeal*". This is a flexible test which would allow all relevant factors to be taken into account. This was, in fact, the broad test stated in the **Zweni** case immediately before reference was made to Colman J's *dictum*.

Clause 15(2)(e)

35. There is a difficulty with the proviso in this clause. How is the application contemplated by the proviso to be formulated if no reasons have been given for the refusal of leave to appeal? Consideration might also be given to whether or not there is a way of preventing this further referral option being abused by unsuccessful applicants or respondents in applications to the SCA for leave to appeal.

Clause 15(5)(a)

36. These provisions are too limited. Matters other than '*questions of law*' (such as those of far-reaching financial, environmental, or social significance) can render cases important enough to warrant the attention of the Supreme Court of Appeal. We believe the existing test in section 20(2) (a) of the Act is satisfactory and has presented no difficulty in practice.

Clauses 16(2)(a)(i) – (iv) and 16(2)(b)

37. This provision refers to orders which currently are not appealable. The wording of these provisions seems to assume that such orders are appealable. There is no apparent intention to make appealable orders which are currently not appealable. The purpose or necessity of sub-clause (2) is therefore not apparent. It will merely invite disputes as to whether its effect is to render such orders appealable.

Clause 19

38. How is the jurisdiction of the "*seat areas*" to be defined?

Clause 19(1)

39. Why is a Division's power to deal with the matters in (a), (b) and (c) "*subject to the direction of the Judge President concerned*"? This is not currently the position in section 19(1)(a) of the Act. This qualification seems to us to be a dangerous fetter on the court's jurisdiction and may also give rise to procedural point-taking. (For example, the duty judge might hear an urgent application for a review or declaratory order. The respondent might take the point that the Judge President has not given any direction to that effect.)

Clause 19(3)

40. The concept of arrest of a natural person to found or confirm jurisdiction is arguably inconsistent with modern law. There is some authority suggesting that this is a primitive relic from medieval times, quite inconsistent with modern international commercial practice. Most Western countries have not retained this procedure, instead having moved to "*long arm jurisdiction*". There must also be considerable doubt as to whether such arrests are constitutionally sustainable in the light of section 12 of the 1996 Constitution, which protects the freedom and security of the person. (See **Himelsein v Super Rich CC and Another** 1998 (1) SA 929 (C) at 936B-C, **Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others** 1995 (4) SA 631 (CC) at par [14], and **Alliance Corporation Ltd v Blogg: In re Alliance Corporation Ltd v Blogg and Others** [1999] 3 All SA 262 (W) at 267g-268c.)

Clause 20

41. We query the need for this provision. Although it is a repetition of section 24 of the Act, that does not afford sufficient reason for its retention. There are well-established principles under the common law determining the review powers of superior courts in respect of proceedings in inferior courts. Allowing such reviews to be governed by the common law promotes flexibility and allows a potential for common law development which unnecessary codification might inhibit. We consider that the provisions of clause 19 of the Bill make adequate provision.

Clause 22 read with clause 33(1)

42. In the Act the definition of a civil summons includes "*any rule nisi, notice of motion*". An appropriate definition is also required in the Bill.

43. A Division should be given the discretion to dispense with or condone non-compliance with these time-limits.

44. In this clause (and clause 15(2)(b)) reference is made to a "*month*" and "*weeks*". In clause 33(1) reference is made to "*eight days*". Section 27 of the Act also refers to days. The calculation of days in terms of that section has been computed differently to the method provided for in the Rules of Court. This would presumably explain why clauses 15(2)(b) and 22 do not refer to days.

45. The problem however persists in the current formulation of section 33(1). The reference there to "*eight days*" could conveniently be changed to "*two weeks*".

46. Alternatively, "*days*" should be defined in the Bill as "*court days*" as defined in Supreme Court Rule 1.

Clause 25(2)

47. The words "*may hear*" should, we suggest, be replaced with "*shall hear*".

Clause 36(1)

48. The SCA also has the power to hear evidence (see clause 17(b)). Provision should be made for it also to have the power to obtain such evidence on commission.

Clause 36(2)

49. The Bill does not define "*commissioner*" and makes no provision for the manner in which the commissioner is to be appointed.

50. The difficulty could be removed if the words "*appointed in terms of the applicable rules*" were inserted after the words "*a commissioner of the court*". (The same interpretative problems arise in respect of section 32(2) of the Act, of which this clause is effectively a repetition.)

Clause 41(1)(a)

51. The words after "*transmitted*" (in the sixth line) should be deleted and replaced by the words "*in the manner provided by the rules of that Court*".

Clause 46(7)

52. The transitional provision in clause 46(7)(c) strikes us as impractical and may give rise to considerable delay and injustice. A case that has run for several weeks and that only requires a little further evidence may have to stand adjourned for months. The new judge may be called upon to

make credibility findings without having seen the witnesses. We suggest that provision be made for cases where evidence has been led to continue to completion as if the Bill had not commenced.

53. Clause 47(7) does not address part-heard applications on motion without oral evidence. Such matters should also be able to run to completion without being affected by the Bill.

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