

LAW SOCIETY OF SOUTH AFRICA**18 September 2003****DRAFT SUPERIOR COURTS BILL, 2003**

- 1) We think that the draft Act is a move in the right direction in the sense that it appears as if it will make the Act and the Courts more "user-friendly".
- 2) The draft Act states categorically that the new Act should be read in conjunction with Chapter 8 of the Constitution, which contains the founding provisions of the structure of the superior Courts, the jurisdiction of those Courts and for the appointment of judicial officers of those Courts. This confirms the legislative basis of our present democracy.
- 3) The corresponding legislation of the former TBVC States, relating to Courts and the structure thereof, caused a lot of frustration. The bill and the proposed new seats of the various divisions of the High Court will, to our mind, do away with these frustrations and will also promote the interests of the general public, in the sense that access to a Court closer to "home" will be possible, especially litigants coming from outlying rural areas. These provisions however, are a cause of concern to many others, as will be seen later herein, and the LSSA, representing 41 the attorneys, cannot take a position on the seats of the courts.
- 4) The bill, when same attains legislative power, will also result in the Rules of the various Courts being revisited. We expect that the exercise of harmonizing the Rules of the High and Lower Courts will also receive urgent attention in due course.

We would like to offer the following technical comments

- 1) Ad Section 4(2)(b) : We deem it unnecessary that provision be made for the appointment of more than one Deputy Judges President, in spite of the fact that any one Division of the High Court may have more than one seat.
- 2) Ad Section 4(4)(a) : This section should be amended to provide for consultation with representatives of the organized Legal Profession so as to determine the area under jurisdiction of any one Division and also as to where seats for any particular Division will be located. It appears as if local custom and the needs of the public will have to be taken into account.
- 3) Ad Section 10(2) and Section 11(5): We are perturbed by the cost implications of de novo hearings in circumstances where there is no judgment to which a majority of Judges agree. We propose that in like circumstances, the fact that there is no majority judgment, must be regarded as a finding of absolution of the instance in civil matters and discharge in criminal matters.
- 4) Ad Section 16(1): We suggest that suspension of the operation and execution of a decision as referred to herein, should only apply to matters where an Appeal has been lodged. Experience has taught that Applications for Leave are often lodged while the Applicant does not have reasonable prospect of success. The application procedure is then drawn out with the sole object of frustrating the right of the Respondent to execute the order a quo. The mere fact that an adverse or special cost order can be decreed, will not compensate the Respondent for any loss suffered due to the delay. Another mechanism must be introduced to cater for those matters in which there is a bona fide Application for Leave to Appeal. In that regard we suggest some form of security to be furnished by Applicants for Leave to Appeal, where such an Application relates to a judgment sounding in money.
- 5) Ad Section 22: We would suggest that the following sentence be inserted after Sub-section (b):

"...provided that if the last day on which a party may enter an appearance to defend in terms of this section, falls on a Saturday, Sunday or Public Holiday, the time allowed for entering an appearance will only expire on the first Court day following on such Saturday , Sunday, or Public Holiday..."
- 6) Ad Section 32, 33,34 and 42 : We are of the opinion that the matters referred to herein should be provided for

in the Rules and not in the Act itself.

7) Ad Section 46(1): The reference to "Section 11 A" in the last sentence should be a reference to "Section 12(3)".

The Law Society of South Africa Council has received the memorandum from its Labour Law Committee as quoted herein, and the Law Society supports the content and conclusion of the memorandum.

1) The Superior Courts Bill has been published for comment. This Memorandum deals with the proposals contained in Clause 12 of the Bill relating to the Labour Court and labour matters.

2) In essence the proposal is to dispense with the existing Labour Court as provided for in the Labour Relations Act and to make provision for labour matters to be dealt with by the High Court.

3) It is worth considering the motivation contained in the explanatory memorandum published at the time that the Labour Relations Act No 66 of 1995 was published.

4) The Memorandum dealt with the problems of the then present system and the proposals which were contained in the Act as to how the system was to be improved.

5) The difficulty was said to be that the Dispute Resolution Processes did not function effectively. The excessive work load of the then Industrial Court was a factor in the failure of the system and it was stated specifically that:-
"There are fundamental problems with the Court system for the

adjudication of Labour matters. The Industrial Court is positioned outside the hierarchy of the Judiciary It lacks status. It does not provide a career path for its Members or its Administrative Staff They have no security of tenure and their remuneration bears no relation to either market related or judicially related packages."

6) It must be emphasized and taken into account that this was the motivation for the creation of the Labour Court and that the Labour Relations Act No 66 of 1995 addressed all these issues.

7) The Memorandum continues to state;-

"The draft 941 proposes the establishment of a Labour Court with National Jurisdiction. A Judge of the Labour Court must be legally qualified but need not be a Judge of the Supreme Court Experienced Advocates, Attorneys and Academics will be eligible for appointments. The appointments will be made by the Judge President of the Labour Court in consultation with Nedlac. The Labour Court will perform a variety of functions both as a Court of Appeal and a Court of First Instance. The emphasis in the Draft 941 on conciliation as the primary means of dispute resolution is echoed in this section. The Labour Court is entitled to decline to hear a matter unless it is reasonably satisfied that the dispute has been referred to conciliation and that the parties have attempted to resolve the dispute."

8) The Labour Relations Act embodies the sentiments:-

8.1 Section 151 establishes the Labour Court as a Court of law and equity It is said to be a Superior Court with the authority, inherent powers and standing equal to that of a Provincial Division of the Supreme Court. It is also a Court of Record.

8.2 Section 154 of the Act deals with the Tenure remuneration in terms of conditions of employment to Labour Court Judges.

8.3 Section 155 of the Act provides for the appointment of officers of the Labour Court.

9) The establishment of the Labour Court was to address certain specific concerns as per the explanatory memorandum including:

9.1 That the then Industrial Court was situated outside the hierarchy of the Judiciary and lacked status and did not

provide for a career path for its members or admin staff and that they had no security of Tenure.

9.2 That it was needed to properly establish and maintain a Labour Court in order to obviate delays and provide for proper dispute resolution.

10) It is a fact that in the appointment of Judges and Officers of the Labour Court and in the provision of facilities required to enable the Labour Court to function effectively, the sentiments expressed in the explanatory memorandum and embodied in the Labour Relations Act have been largely ignored. It is this that has created the problem and not the establishment of the specialized court.

11) Tenure of Judges has not been adequately addressed, the Court has suffered from inadequate funding and has not been given the assistance that it required and was provided for in the Labour Relations Act. Somewhat startlingly these are now reasons advanced for the Bills' proposed intention to abolish the Labour Court as a separate specialist Court and to incorporate its functions in the High Court.

12) It is submitted that had the Labour Court received adequate funding and adequate assistance as envisaged in the explanatory Memorandum and as provided for in the Act it would have succeeded.

13) It is questionable as to whether the provisions of the Superior Court's Bill will in any way address the problems which were adequately addressed in the explanatory Memorandum in the Labour Relations Act and that they have been acted upon.

14) It is accordingly proposed that the Labour Court be given the proper recognition that it is afforded in the Labour Relations Act and that in compliance with the Act, proper appointments are made and proper funding is provided and the Court be afforded the status provided for in the Labour Relations Act, is recognized. The provisions in the proposed Bill relating to the Labour Court can be removed from that Bill.

15) As far as the jurisdictional problems regarding appeals are concerned it is not unreasonable to amalgamate the Labour Appeal Court with the Supreme Court of Appeals as provided for in the Bill.

16) It is the concern of the Law Society of South Africa's Standing Committee on Labour Law that the specialist nature of the Labour Court and the specific nature of the disputes that it is required to resolve will be detrimentally diluted by its abolishment and its functions being transferred to the High Court.

17) The High Court of necessity and correctly so functions on a more formalized basis and the extension of this approach to labour disputes will not address the difficulties and problems that the Labour Relations Act addressed. There is no guarantee that labour matters being dealt with in the High Court; nor that the appointment of staff and specialist Judges as detailed in the proposed Bill will result in labour matters being dealt with any more expeditiously. The fact remains that labour disputes are different and are required to be dealt with differently.

18) The fact that the provisions of the Labour Relations Act No 66 of 1995 have been largely ignored and that the Court has not received adequate funding as a specialist court, suggests that this might well be repeated where labour matter as simply incorporated into all other matters dealt with by High Courts.

19) It is therefore the proposal of the Law Society of South Africa that the real issues, namely the appointment and tenure of Judges and the proper funding and functioning of the Labour Court be addressed. It is not necessary to abolish the Labour Court as a specialist court in order to achieve this.

20) The proposals to abolish the Labour Court ignore the merits of a specialist Court and do not take into account the integrated dispute resolution structures contained in the Labour Relations Act of which include Labour Court as an integral part.

21) As far as the Labour Appeal Court is concerned the proposed incorporation of the Labour Appeal Court into the Supreme Court of Appeals is both proper and desirable given the Constitutional conundrum that its existence has caused."

The LSSA has also received a submission from the Attorneys' Association of Brits, a town situated approximately 50kms from Pretoria.

Again, the view is that of the Brits Attorneys' Association and not of the LSSA.

"We confirm that we have noted the contents of the interim report regarding the rationalization of the areas of jurisdiction of the High Courts in the Republic of South Africa dated 2 October 2002. It is necessary that we as the Society of Attorneys of Brits (Madibeng) should bring the possible consequences of the incorporation of Brits (Madibeng) district within the Mafikeng's jurisdiction to your attention. We wish to reiterate that the reasons are based on pure grounds of expediency, proximity, cost effectiveness and at the end that the ends of justice must not be defeated by a political map. We wish to specify the following grounds for the consideration that Brits / Madibeng should be under the jurisdiction of Pretoria Tswane.

1) The Brits Magisterial area's boundary is as near as approximately fifteen kilometers from the Pretoria High Court. It includes the area very near the Lanseria Airport and the surrounding area around the Hartesbeestpoort Dam. The area stretches further to the western side to approximately thirty-five kilometers from Rustenburg. In the light of this proximity to Pretoria and the Gauteng areas, it was in terms of the interim constitution of the RSA a so-called "affected area".

2) Under the previous government, it was an identified area for the development of industrial development as it was adjacent to the Republic of Bophuthatswana consequence hereof, many companies are situated in Brits.

3) The cost to drive from Brits to Mafikeng, approximately two-hundred and fifty kilometers, in comparison to the travelling costs to Pretoria approximately fifty-two kilometers from the inside of Brits to the High Court 'is self-explanatory. We are not authorized to speak on behalf of the CDI District's people, but we are of the opinion that the courts will become more inaccessible for the poor as a consequence of such a step.

4) As there is no collective organization or non-governmental organization, which may represent the people specifically regarding this issue, we, as attorneys, are aware of the needs and frustrations of our clients in this area.

5) It is our humble submission that a hard and fast rule that the High Court's boundaries must at all costs be the same as the Provinces is not fair and equitable towards the people of specifically this area.

6) This proximity argument was applied by the Task Team regarding Umtata and Grahamstown.

7) It is our suggestion that as an alternative, the Mafikeng and Pretoria courts should have concurrent jurisdiction.

8) In order to avoid artificial schemes to contract to exclude jurisdiction of the court or to consent to other courts, it is our submission that you should reconsider this possibility.

9) We suggest that a consultation process be initiated with other role players and representatives of the area before a final decision is made. We shall appreciate it if we can be informed of such a meeting. We can also facilitate such an arrangement.

In the last instance, we shall appreciate it if you can convey this to the Honorable Minister of Justice and Constitutional Development as well as the Honorable Chief

Justice A Chaskalson.

In the last instance a delegation of this society would like to meet you to discuss these aspects. If possible, it should be expedient if you could hold an inspection in logo and we invite you formally to Brits to hold such a meeting."

We also include the submissions by the Mpumalanga Attorneys Council which it attached hereto.

We thank the Portfolio Committee for the opportunity to submit this submission and if we could provide further information please do not hesitate to contact us.

Yours sincerely

ARNO BOTHA

DIRECTOR: PROFESSIONAL AFFAIRS

SUBMISSION IN RESPECT OF THE DRAFT OF THE SUPERIOR COURTS BILL

I write to you in my capacity as Chairperson of the Mpumalanga Circle of the Law Society of the Northern Provinces (incorporated as the Law Society of the Transvaal). The Circle is as such properly constituted in terms of the provisions of Section 69(j) of the Attorneys Act 53 of 1979.

The Council of the Mpumalanga Circle (Mpumalanga Attorneys Council) has noted with appreciation and expectation, the fact that the Draft of the Superior Courts Bill provides for a High Court to be established for Mpumalanga. We welcome the proposal, especially as Mpumalanga is the only Province in South Africa that does not have a High Court within its boundaries.

We appreciate the fact that the establishment of a High Court within our Province, will require substantial expenditure, and for that reason accept that it will probably not happen immediately.

It came to the attention of the Mpumalanga Attorneys Council that some individuals and organizations within the organized profession, and mainly from the Pretoria region, are now requesting that the Minister should consider granting concurrent jurisdiction for the High Courts situated in Northern Gauteng (Pretoria) and Mpumalanga.

The Mpumalanga Attorneys Council discussed the matter at its meeting of 16 September 2003, and from the discussion it would seem that there are divided views within the Province. Although this makes a submission from our side very difficult, if not impossible, I undertook to put the two views to you for onward transmission to the Committee considering the implementation of the Bill.

It is generally accepted by all attorneys within Mpumalanga, that the seat of a High Court within the Province will be Nelspruit. It would be impractical from a logistical and cost point of view, not to have the Court situated in the same city as the legislator. Nelspruit is also the capital of Mpumalanga and has an existing infrastructure of legal practitioners on which to build a High Court practice. The views expressed hereinafter, are therefore based on the expectation that the seat of the Court will be in Nelspruit.

A. The Highveld Region of Mpumalanga

The attorneys from Standerton, Witbank and Middelburg, are in favour of establishing concurrent jurisdiction for the Mpumalanga and Northern Gauteng

(Pretoria) High Courts. Their arguments are mainly the following:

1. The Highveld Region is, generally speaking, situated closer to Pretoria than to Nelspruit. It would therefore be

more convenient for practitioners practicing within these towns, to operate in a High Court situated in Pretoria than in Nelspruit.

2. All practitioners within this area, already have established relationships with Pretoria correspondents and advocates, and it would cause disruption for them to build up new relationships with attorneys and advocates in Nelspruit.
3. Nelspruit does not at present have a sufficient number of advocates to serve a High Court of any proportions, and a new bar will have to be established for that purpose.
4. Colleagues in the said areas do not believe that access to justice will be improved by forcing litigants from these areas to institute legal proceedings in Nelspruit, as the longer distance would increase the costs of litigation. Also, the Court (both the Bench and staff component) in Nelspruit will be much smaller than that in Pretoria, with only a small number of advocates and correspondents to choose from, all of which might negatively affect the delivery of legal services to the public.

B. The Lowveld Region of Mpumalanga

Attorneys from this region, including White River, Barberton and Nelspruit, are against the provision of concurrent jurisdiction for the Mpumalanga and Northern Gauteng (Pretoria) High Courts. The following arguments have been put forward in support of this submission:

1. It must be accepted that the establishment of a High Court for Mpumalanga, will have tremendous cost implications, not only in establishing the Court, but also to ensure its smooth and continued functioning. In order to make this viable, it is imperative that as many cases as possible be dealt with by that Court, as this would enable the authorities to establish a big enough and viable Bench, supported by a competent and qualified staff component in order to ensure the proper functioning of the Court. If concurrent jurisdiction is allowed, as a result whereof a substantial number of practitioners within the Province may decide not to support the Mpumalanga Court, but rather to refer their litigation to Pretoria, it would mean that the viability of the Mpumalanga Court could be seriously jeopardized.
2. It is furthermore submitted that Nelspruit already has an infrastructure of approximately 40 firms of attorneys who would easily enough be able to restructure themselves in order to support a High Court practice.
3. Once the decision is made to establish a High Court in Mpumalanga upon certain date, it is submitted that a number of advocates and Supreme Court specialists would open offices in Nelspruit, either on a full time or part time basis. Nelspruit has an international airport, which would furthermore facilitate the movement of practitioners and advocates to and from Nelspruit.
4. It is also submitted that the argument by Highveld practitioners that they are closer to Pretoria than to Nelspruit, should not carry much weight. Most of the work to be carried out at the seat of the Court, is at present done by correspondents in Pretoria, who could easily be replaced by correspondents in Nelspruit. Although it is admitted that for some extreme areas in Mpumalanga, it would be a lot further to travel to Nelspruit than to Pretoria, it is certainly not the case in all instances. It must be remembered that at present all litigants from Mpumalanga, including the Lowveld area (which is the longest distance from Pretoria), have to travel to Pretoria, and if this is taken into consideration, we believe that an overall saving would still be achieved by situating the Court in Nelspruit. To allow concurrent jurisdiction might jeopardize the viability of such a Court, as has already previously been argued. The argument that the establishment of a High Court in Nelspruit, would cause the loss of employment opportunities or income for the legal profession in Pretoria, cannot hold sway if it is viewed from a broader perspective. Any employment opportunities lost in Pretoria (which is in any event disputed as they will still have a High Court), will become new employment opportunities at the seat of the Mpumalanga Court and the income generated by expanding the legal services provided in the Province, will directly benefit the people in the Province. In not allowing concurrent jurisdiction, these employment opportunities will be enhanced even further as a more viable and busy High Court practice will be created at the seat of the Mpumalanga Court. The advantages of this will benefit not only the legal profession in Mpumalanga, but also the supporting industries.
6. It will also improve access to justice for many people if a viable High Court could be established inside the province. It is submitted that by not allowing concurrent jurisdiction, the position of those people living on the

Highveld would not be materially affected, as the will still have to institute their actions in a Court situated in a distant location. The fear is that, should concurrent jurisdiction be allowed, the establishment of the Court might not be financially viable, which would leave a large part of the population with more than 300 kilometers to travel to their nearest High Court, which is situated in a different province.

The above are only some of the arguments put forward in relation to the different points of view within Mpumalanga, and whereas this Council is bound to serve the profession in the whole of Mpumalanga, it is clearly difficult for it to take a firm stance in favour of either of the viewpoints.

It is therefore respectfully submitted that the Committee carefully consider the arguments put forward by the various parties in this respect (also those from outside the Province, who stand to be affected by the establishment of the Mpumalanga High Court) and to make its decision in the best interests of all concerned, but mainly in the interest of the public in Mpumalanga. What must however be reiterated, is that the profession Mpumalanga would welcome the establishment of its own High Court as soon as it may be reasonably and financially possible.

Yours faithfully

D BENNETT

CHAIRPERSON