

THE MARITIME LAW ASSOCIATION OF SOUTH AFRICA

Affiliated to the Association of Law Societies of SA
Member of the Comité Maritime International



From the office of the President

The Chairperson: Ms Fatima Chohan-Kota MP
c/o The Secretary: Ms Phumelele Sibisi
Portfolio Committee on Justice and Constitutional
Development
Parliament of South Africa
P O Box 15
Cape Town 8000

Also per e-mail: psibisi@parliament.gov.za

Andrew J Pike
1st Floor, The House
5 Bellevue Road
Kloof 3610
PO Box 261, Westville, 3630
Durban
Phone : +27-31-7640972
Fax : +27-31-7641385
e-mail : andrewp@acubed.co.za

27 June 2006

Dear Ms Chohan-Kota

CONSTITUTION 14TH AMENDMENT BILL AND SUPERIOR COURTS BILL

I write to you on behalf of the Maritime Law Association of South Africa, an association of approximately 250 members who are mostly lawyers, in private practice and employed as legal advisors by companies. We also have some commercial members whose work requires them to engage periodically with maritime lawyers. Our members engage predominantly in areas of international and local trade and transport, with an emphasis on maritime legal aspects thereof, but also all peripheral legal aspects. In the wider scheme of things, we also comment upon and, where necessary, propose amendments to aspects of trade and transport law enacted in South Africa such as the Carriage of Goods by Sea Act, the Sea Transport Documents Act, the Merchant Shipping Act, the Admiralty Jurisdiction Regulation Act and other legislation which pertains to our professional work.

Our Executive Committee has recently had cause to consider the Constitution 14th Amendment Bill (as published in the *Government Gazette* on 14 December 2005) ("the CFAB") and the Superior Courts Bill (19 October 2005 draft) ("the SCB"). These pieces of proposed legislation envisage far-reaching and in some instances long-overdue changes to the structure of our courts, and they raise fundamental questions for the administration of justice in South Africa. Unfortunately, they also raise the spectre, in certain respects, of undue and dangerous control of the courts by the executive. For all these reasons we believe that it is important that we address you on the proposed legislation.

In that regard we have considered the very detailed submissions (dated 19 May 2006) on the proposed legislation prepared and submitted to you by the General Council of the Bar of South Africa, and we associate ourselves with those submissions. For the reasons therein set out we urge that your Committee ensure a reconsideration of these Bills. They have the potential to very seriously damage the administration of justice in South Africa and to undermine its credibility in international commerce.

In the latter regard, I mention that the legal work that engages our members, in whatever form - whether litigation or advising clients or drafting contracts, almost invariably has a foreign element. Very often the clients are foreign and they pay hard currency to the local lawyers. It goes without saying that the maritime law industry is an important exporter of services. It is the experience of our members that foreign clients have until now had great confidence in the South African legal system and in the courts. They know that they can rely on the courts to dispense independent and consistent justice in all disputes. For this reason they are happy to keep trading here. However, should this perception of our legal system change, then certainly they will lose the confidence that they have and undoubtedly foreign investment and foreign trade would suffer.

The principal issues that give us the greatest concern are the following:

1. The constitution of the Chief Justice as head of "the judicial authority", as if there was such a thing, and the constitutionalisation of the judicial/administrative distinction in the functioning of the courts (section 1 of the CFAB);
2. The central regulation of the judiciary and the centralised administration of the courts envisaged by sections 11, 12 and 13 of the SCB and the proposed section 165(6) of the Constitution (section 1 of the CFAB);
3. The appointment by the President of Judges President and Deputy Judges President after consultation with the Chief Justice and the Minister (section 9(b) of the CFAB), rather than the current position that such appointments are made on the advice of the Judicial Services Commission;
4. The requirement that all appeals, even if only on issues of fact, must be dealt with by the SCA thereby abolishing full bench appeals (section 26(1) of the SCB);
5. The curbing of the courts' powers to interdict the coming into effect of legislation, even if it is *prima facie* unconstitutional and irreparable harm will otherwise be suffered (section 7(b) of the CFAB);
6. The appointment by the President of Acting Judges in the positions of Deputy Chief Justice, judge of the Constitutional Court, Deputy President of the SCA and Deputy Judge President of a Division of the High Court, after consultation with the Chief Justice, rather than with the concurrence of the Chief Justice (section 10 of the CFAB);
7. The power of the Minister, rather than an independent Rules Board, to make rules for the functioning of the courts (chapter 7 of the SCB); and
8. Generally, the attempt in the proposed legislation to increasingly place the functioning of the courts under the control of the executive.

We urge you and your committee in your role as the representatives of the people and having separate powers and responsibilities to those of the executive to ensure that the iniquitous aspects of the proposals go no further. We of course welcome certain parts of the proposals and urge that these be enacted as soon as practical. We have in mind, for example, the rationalisation of the High Court divisions and the constitution of the Constitutional Court as the apex court.

Yours sincerely,

ANDREW PIKE
PRESIDENT, MARITIME LAW ASSOCIATION

Copies to:

1. Mr Norman Arendse SC
Chairperson of the General Council of the Bar of South Africa
P O Box 2260
Johannesburg 2000
gcb@cis.co.za
2. The Executive Director
Law Society of South Africa
P O Box 36626
Menlo Park 0102
arno@lssa.org.za
3. Mr J De Lange MP
Deputy Minister of Justice and Constitutional Development.
Private Bag X395
Pretoria 0001
jdelange@justice.gov.za
4. Mr M Simelane
Director-General of Justice and Constitutional Development
Private Bag X81
Pretoria 0001
c/o webmaster@justice.gov.za