Comments by Judges of the Constitutional Court on proposed 17th Amendment to the Constitution and the draft Superior Courts Bill to be discussed with the Justice Portfolio Committee on Tuesday 20 March 2012 at 10:00 at the Constitutional Court

A. Introduction

1. We have considered both these draft Bills and comment on them below. We will refer to the 17th Amendment as the proposed constitutional amendments and to the draft Superior Courts Bill as the proposed Superior Courts Bill.

2. The overall effect of the constitutional amendments is to be welcomed, in that they:
   a. affirm the Chief Justice's role as head of the judicial authority (thereby removing the spectre of ministerial oversight the preceding draft created);
   b. clarify the position of this Court as the apex court in all matters; and
   c. make appropriate amendments to the position of other courts.

3. The proposed Superior Courts Bill is also to be welcomed. The nature of the rationalisation undertaken is in our view overdue.

B. Consultation

4. Consultation is an issue in relation to provisions of both the proposed constitutional amendments and the draft Superior Courts Bill.

5. There are two views in this Court about whether in relation to the provisions mentioned in paragraph 7 the Chief Justice should be obliged to consult with the heads of Court, whether the heads of Court should be obliged by law to consult with the judges in their courts in matters concerning those courts and whether the Chief Justice as head of the Judiciary should consult with the members of this Court in relation to regulations, rules and other matters concerning the Constitutional Court.

6. The one view is that specifying consultation in each of these areas would amount to over-regulation. The process of consultation is an important one and heads of Court are by and large adopting the practice of consulting already. It is of importance according to this view that the culture of consultation should be carefully nurtured and developed rather than enforced.

7. Supporters of the second view say that it is the first time that the Chief Justice's leadership role is to be formalised and it is therefore better to be clear about what kind of leadership is constitutionally envisaged. The principle should be one of consultative leadership. This principle is in accordance with the position of the Chief Justice being the first among equals, the tradition of leadership in the judiciary in the past, the practice in relation to issues affecting the judiciary in heads of court meetings since the advent of the Constitution, and the fundamental values of accountability, responsiveness and openness set out in the Constitution. The second view is based on the understanding that there is not a uniform practice of consultation that exists at present.

8. We now refer to the provisions separately.

   a. The fact that the Chief Justice has, in terms of section 165(6), responsibility "over" (rather than "for") norms and standards for judicial functions might suggest that the Chief Justice should exercise that authority in consultation with all affected courts. Those who prefer consultation would obviously suggest that this consultation requirement be made plain and stated in so many words.

   b. Clause 8 of the proposed constitutional amendment effectively requires the Chief Justice to consult in fora that include the lower court when that court is involved

and that includes the heads of Superior Courts when the affairs concerning these courts are the subject of directives or protocols issued by him. The members of this Court who believe that consultation should not be over-regulated for are happy with this formulation. Those of us who require consultation to be spelled out think that this consultation requirement is somewhat defective because:

i. The Heads of Court are not required to consult with their courts before they make appropriate informed input at the consultation by the Chief Justice in his capacity as the head of the judiciary when matters concerning the High Court are in issue; and

ii. The Chief Justice as head of this Court is not obliged to consult members of this Court before issuing directives or protocols concerning or involving the work of this Court.

c. As far as clause 29 of the proposed Superior Courts Bill that deals with rule-making for the Constitutional Court is concerned, the one view is that no consultation with the members of this Court should be provided for, while the other view is that this should be specified.

d. Clause 30 of the proposed Superior Courts Bill raises the same consultation issue as that related to the Constitutional Court.

e. The consultation issue also arises in Clause 49 of the proposed Superior Courts Bill which obliges the Minister to make regulations on the advice of the Chief Justice.

9. We now deal with other matters and concern ourselves first with the proposed constitutional amendments and then with the proposed Superior Courts Bill in relation to all the courts, the Constitutional Court, the Supreme Court of Appeal and the High Court separately.

C. Proposed constitutional amendments

10. We think that the section concerning the jurisdiction of the Constitutional Court should not make a distinction between constitutional matters and other matters. It should make it quite plain that this Court is the highest court in all matters. The distinction between constitutional matters and other matters that are not constitutional does not have to be made when one is concerned with jurisdiction. The distinction might become an issue when we look at the proposals in relation to how section 167(6) is to be amended. (See paragraph 13 below). We must emphasise however that the distinction has nothing to do with jurisdiction. We would suggest that the issue of jurisdiction should be dealt with separately and should not be concerned with how matters are to be brought to this Court (whether directly or on appeal) or the circumstances when we should hear it. This is dealt with in section 167(6) at the moment, continues to be dealt with in the proposed amendment and is rightly dealt with there. The Constitution should make clear that this Court is the final court as well as the final court of appeal in all matters.

11. If the Constitutional Court has overall jurisdiction, it is not necessary for the Court to decide whether a matter is a constitutional matter or not. The distinction in section 167(3)(c) is no longer necessary.

12. We have three comments on section 175(1). While we do not think it is strictly necessary to stipulate in so many words that an acting Judge of this Court should not be appointable as Acting Deputy Chief Justice, we believe it will be as well to spell it out. Secondly, we think that provision should be made for an Acting Deputy President in the

Supreme Court of Appeal, as well as for the Deputy President of the Supreme Court of Appeal to act as the President of that Court in the absence of the President.

13. We note that the provisions relating to the standardising of the judges' conditions of service of all judges including the judges of this Court has now fallen away. We wish however to draw to the attention of the Portfolio Committee that we approved of the rationalisation, subject only to the condition that the new regime should not apply to or be binding on existing members of this Court.

14. The amendment proposed in relation to section 167(6) would empower this Court to grant direct access only in constitutional matters. We have some doubt as to whether this limitation of our jurisdiction is justified. Perhaps the best provision would be for this Court to have the power grant direct access when it is in the interests of justice to do so.

D. <u>The proposed draft Superior Courts Bill</u>

<u>All courts</u>

15. There are two concerns that arise from clause 8:

a. The first is clause 8(4)(a) which provides:

"Any function or any power in terms of this section, vesting in the Chief Justice or any other head of court may be delegated to any other judicial officer."

The concern here is that relatively junior judges may be appointed to bypass the Deputy Heads of Court. We understand though that this may sometimes happen. We would like some discussion on how this section may be tightened up.

b. The second matter of concern is clause 8(7) which authorises the Chief Justice to "designate any judge to assist him or her in his or her judicial leadership functions."

We wonder whether this is perhaps not too wide a power that warrants some discussion and tightening up.

16. We agree with the Supreme Court of Appeal that clause 9(3) creates the impression that judges are not entitled to any recreation or vacation. We suggest however that the addition of the word "main" before the word "purpose" might well resolve this issue.

17. Clause 11 of the Bill says nothing about remuneration but clause 14(2)(b) of the Constitutional Court Complementary Act does make provision for the determination of remuneration in the following terms:

"(b) The remuneration and other terms and conditions of service of a person appointed in terms of paragraph (*a*) shall be as determined, either generally or in any specific case, by the President of the Court in consultation with the accounting officer referred to in section 15 (3)."

We believe there should be a similar provision concerning the Constitutional Court and the Supreme Court of Appeal. As far as the High Court is concerned we believe that the Head of each court, alternatively a representative of the Heads of Court, should be able to determine remuneration in consultation with the accounting officer.

18. There is a conflict between clause 21(3)(b) and clause 28. The former permits attachments to found jurisdiction "regardless where in the Republic the property or person (obviously the property that is attached) is situated". While the latter prevents attachments to found jurisdiction altogether "against a person who is resident in the

Republic". This needs attention. We would imagine that since processes of court are valid and operational throughout the Republic, section 21(3)(b) would be wholly unnecessary.

19. To explain our next issue it is necessary to set out clause 39 and 42(2) of the Bill:

"39. (1) The Constitutional Court and, in connection with any civil proceedings pending before it, any Division, may order that the evidence of a person be taken by means of interrogatories if—
(a) in the case of the Constitutional Court, the court deems it in the interests of the administration of justice; or
(b) in the case of a Division, that person resides or is for the time being outside the area of jurisdiction of the court."

"42. (2) The civil process of a Division runs throughout the Republic and may be served or executed within the jurisdiction of any Division."

20. We will make the following recommendations:
    a. This Court should have the power to make the order when it is in the interests of justice to do so. The administration of justice should not come into it specifically because it is already included in the interests of justice evaluation.
    b. It is difficult to see why it is necessary for the High Court to have the power when somebody is merely outside the area of its jurisdiction. This is because the processes of the High Court according to section 42(2) would apply throughout the country. Anyone in South Africa can be subpoenaed to appear before the High Court. Usually interrogatories or commissions are resorted to when the witnesses are outside the country or when they are sick in hospital or something like that.
    c. We would suggest that the interests of justice requirement would be appropriate for High Court interrogatories too.
    d. The interests of justice requirement will be consistent with the test adopted in leave to appeal and direct access.

21. We welcome the provisions in the Bill concerning electronic service of documents in clause 44.

22. Apart from the consultation issue raised earlier, we have no problems with clause 49 on the basis of our assumption that the words "on the advice of" means that he Minister has no choice but to enact those regulations that the Chief Justice advises him to. Of course they would be able to talk about it and exchange views but, ultimately, the position of the Chief Justice on the content of the Regulations would prevail. If we are wrong about this, the clause may need alteration or clarification.

<u>The Constitutional Court</u>

23. Clause 15(2) obliges the Minister to appoint counsel at the request of the Chief Justice in cases concerning challenges concerning the validity of legislation. In most of these cases, we think that the people who require counsel will be acting against the government. It is in the circumstances worrying that the section may be open to an interpretation that the Minister may choose counsel. We think that the section should make it clear that this Court has the power to utilise its budget to pay Counsel not in the limited circumstances postulated in the clause but whenever the interests of justice require.

24. Clauses 17 and 18 of the Bill do not deal with the Constitutional Court at all. In the circumstances clause 18 which provides for the suspension of court orders pending appeal does not expressly refer to the Constitutional Court. We would recommend that the clause make clear that suspension occurs when there are appeals or applications for leave regardless of the court from or to which the appeals are prosecuted.

The Supreme Court of Appeal

25. Clauses 5 and 7 *may* be contradictory. The one providing for the seat of the Supreme Court of Appeal being in Bloemfontein or any other place that might be determined by the President of that Court while the other provides for the existence of Circuit Courts. We note that the Supreme Court of Appeal is opposed to the establishment of the two circuits. We think the circuit idea is not necessarily a bad one. We think that the two clauses must be properly reconciled.

26. Clause 16(2)(d) of the Bill provides:
"Judges considering the matter may order that the question whether the appeal should be dismissed on the grounds set out in paragraph (a) be argued before them at a place and time appointed, and may, whether or not they have so ordered:
(i) Order that the appeal be dismissed ....; or
(ii) Order that the appeal proceed in the ordinary course."

We cannot understand how judges could at the same time set the issue whether the appeal is academic down for argument and order that the appeal be dismissed.

The High Court

27. We think our colleagues in the Supreme Court of Appeal are right when they make the point in relation to clause 18 that High Court applications for leave to appeal considered by judges in chambers would save a lot time and energy.

28. Clause 23 authorises the Registrar to grant default judgment in a High Court in the manner and in the circumstances prescribed in the rules. This section in our view authorises a rule that gives the Registrar the power to evict a person from her home or to grant a money judgment which will necessarily result in an eviction. Our jurisprudence in this regard is plain and we would suggest that the Bill itself, to be consistent with the Constitution should contain the appropriate limitation.

29. The way in which clause 30 applies to the High Court could raise some difficulty if recourse is had to the Rules Board legislation. That legislation requires the approval of the Minister. Clause 30 quite rightly does not. We would trust that the Rules Board legislation will be amended and aligned with this document.

Thank you.

Judges of the Constitutional Court
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