

**AMENDMENTS PROPOSED BY CONSTITUTION
SEVENTEENTH AMENDMENT BILL [B 6—2011]
(Including draft amendments emanating from Portfolio
Committee deliberations)**

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- _____ Words underlined with a solid line indicate insertions in existing enactments.
- Grey highlighter Headings of sections to be amended by the Bill are highlighted.
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**CHAPTER 8
COURTS AND ADMINISTRATION OF JUSTICE**

Judicial authority¹

- 165.** (1) The judicial authority of the Republic is vested in the courts.
(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

Judicial system²

- 166.** The courts are—
- (a) the Constitutional Court;
 - (b) the Supreme Court of Appeal;
 - (c) the [High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts] High Court of South Africa;

¹ See clause 1 of CAB 17th.

² See clause 2 of CAB 17th.

- (d) the [Magistrates'] Lower Courts; and
- (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the [High Courts] High Court of South Africa or the [Magistrates'] Lower Courts.

Option to omit changes in respect of magistrates' courts

Judicial system

166. The courts are—
- (a) the Constitutional Court;
 - (b) the Supreme Court of Appeal;
 - (c) the [High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts] High Court of South Africa;
 - (d) the Magistrates' Courts; and
 - (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the [High Courts] High Court of South Africa or the Magistrates' Courts.

Constitutional Court

167. (1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.

(2) A matter before the Constitutional Court must be heard by at least eight judges.

(3) The Constitutional Court—

- (a) is the highest court [in all constitutional matters] of the Republic;⁴
 - (b) may decide [only] =
 - (i) constitutional matters[, and issues connected with decisions on constitutional matters;] =
 - (aa) on appeal;
 - (bb) directly, in accordance with subsection (6); or
 - (cc) referred to it in terms of legislation contemplated in section 172(2)(c) or in terms of any other Act of Parliament;
 - (ii) any other matter, if the Constitutional Court grants leave to appeal that matter on the grounds that the interests of justice require that the matter be decided by the Constitutional Court; and
 - (c) makes the final decision whether a matter is a constitutional matter [or whether an issue is connected with a decision on a constitutional matter].
- (4) Only the Constitutional Court may—

³ See clause 3 of CAB 17th.

⁴ Note that the CAB 17th inserts the word "and" after this paragraph, without underlining it as an insertion into the existing text. It should probably be omitted.

- (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
- (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
- (c) decide applications envisaged in section 80 or 122;
- (d) decide on the constitutionality of any amendment to the Constitution;
- (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
- (f) certify a provincial constitution in terms of section 144.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, [a] the High Court of South Africa, or a court of similar status, before that order has any force.

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

- (a) to bring a constitutional matter directly to the Constitutional Court; or
- (b) to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

Supreme Court of Appeal⁵

168. (1) The Supreme Court of Appeal consists of a President, a Deputy President and the number of judges of appeal determined in terms of an Act of Parliament.

(2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.

(3) (a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except where an Act of Parliament provides otherwise.

(b) **[It is the highest court of appeal except in constitutional matters, and]** The Supreme Court of Appeal may decide only—

- [(a)] (i) appeals;
- [(b)] (ii) issues connected with appeals; and
- [(c)] (iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.

High Courts| Court of South Africa⁶

169. (1) [A] The High Court of South Africa may decide—
- (a) any constitutional matter except a matter that—

⁵ See clause 4 of Cab 17th.

⁶ See clause 5 of Cab 17th. (Note that “Court of South Africa” is not underlined in the Bill, it may be prudent to address this?)

- (i) only the Constitutional Court may decide or has agreed to hear directly in terms of section 167(6)(a); or
 - (ii) is assigned by an Act of Parliament to another court of a status similar to [a] the High Court of South Africa; and
 - (b) any other matter not assigned to another court by an Act of Parliament.
- (2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for—
- (a) the establishing of Divisions, with one or more seats in a Division on the basis of geography or subject matter, or both⁷; and
 - (b) the assigning of jurisdiction to a Division or a seat within a Division.
- (3) Each Division of the High Court of South Africa—
- (a) has a Judge President;
 - (b) may have one or more Deputy Judges President; and
 - (c) has the number of other judges determined in terms of national legislation.

Option to amend ss(2)(a):

High [Courts] Court of South Africa

169. (1) [A] The High Court of South Africa may decide—
- (a) any constitutional matter except a matter that—
 - (i) only the Constitutional Court may decide or has agreed to hear directly in terms of section 167(6)(a); or
 - (ii) is assigned by an Act of Parliament to another court of a status similar to [a] the High Court of South Africa; and
 - (b) any other matter not assigned to another court by an Act of Parliament.
- (2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for—
- (a) the establishing of Divisions, with one or more seats in a Division; and
 - (b) the assigning of jurisdiction to a Division or a seat within a Division.
- (3) Each Division of the High Court of South Africa—
- (a) has a Judge President;
 - (b) may have one or more Deputy Judges President; and
 - (c) has the number of other judges determined in terms of national legislation.

[Magistrates' Courts and other] Other courts⁸

170. [Magistrates' Courts and all other courts] All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than [a] the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

⁷ The words "on the basis of geography or subject matter, or both" should probably be deleted.

⁸ See clause 6 of CAB 17th. (Note that "Other" in the Bill is not underlined.)

*Option to retain "Magistrates' Courts":***Magistrates' Courts and other courts**

170. Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than [a] the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

Court procedures

171. All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

Powers of courts in constitutional matters⁹

172. (1) When deciding a constitutional matter within its power, a court—

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, [a] the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

Inherent power¹⁰

173. The Constitutional Court, the Supreme Court of Appeal and the High [Courts have] Court of South Africa each has the inherent power to protect and

⁹ See clause 7 of CAB 17th.

¹⁰ See clause 8 of CAB 17th.

regulate their own process, and to develop the common law¹¹, taking into account the interests of justice.

Appointment of judicial officers

174. (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

(3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.

(4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:

- (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
- (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
- (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

(5) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.

(6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.

(7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.

(8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.

[Acting] Appointment of acting judges¹²

175. (1) The President may appoint a woman or a man to [be] serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if a judge is absent. The appointment must be made on the

¹¹ There has been a suggestion to consider the inclusion of *customary law* in this section.

¹² See clause 9 of CAB 17th. (Note that "Appointment of acting" is not underlined in the Bill.)

recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice, and an appointment as acting Deputy Chief Justice must be made from the ranks of the judges of the Constitutional Court.

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.

Option re Acting Deputy Chief Justice:

Acting judges

175. (1) The President may appoint a woman or a man to [be] serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice, and an appointment as acting Deputy Chief Justice must be made from the ranks of the judges who had been appointed to the Constitutional Court in terms of section 174(4).

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.

Terms of office and remuneration

176. (1) A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.

(2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.

(3) The salaries, allowances and benefits of judges may not be reduced.

Removal

- 177.** (1) A judge may be removed from office only if—
- (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
 - (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

Judicial Service Commission¹³

¹³ See clause 10 of CAB 17th.

178. (1) There is a Judicial Service Commission consisting of—
- (a) the Chief Justice, who presides at meetings of the Commission;
 - (b) the President of the Supreme Court of Appeal;
 - (c) one Judge President designated by the Judges President;
 - (cA) the chairperson and deputy chairperson of the committee envisaged in subsection (4)(b);
 - (d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
 - (e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
 - (f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
 - (g) one teacher of law designated by teachers of law at South African universities;
 - (h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
 - (i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
 - (j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
 - (k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that [Court] Division and the Premier of the province concerned, or an alternate designated by each of them.

(2) If the number of persons nominated from within the advocates' or attorneys' profession in terms of subsection (1) (e) or (f) equals the number of vacancies to be filled, the President must appoint them. If the number of persons nominated exceeds the number of vacancies to be filled, the President, after consulting the relevant profession, must appoint sufficient of the nominees to fill the vacancies, taking into account the need to ensure that those appointed represent the profession as a whole.

(3) Members of the Commission designated by the National Council of Provinces serve until they are replaced together, or until any vacancy occurs in their number. Other members who were designated or nominated to the Commission serve until they are replaced by those who designated or nominated them.

(4) (a) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.

(b) National Legislation referred to in paragraph (a) must make provision for the Commission to be involved in the appointment, promotion and transfer of judicial officers of the Lower Courts, and for the establishment of a committee and subcommittees comprising members designated by the Commission and other co-opted members in order to facilitate that involvement.

(5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice, but when it considers any matter except the appointment of a judge, it must sit without the members designated in terms of subsection (1) (h) and (i).

(6) The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.

(7) If the Chief Justice or the President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.

(8) The President and the persons who appoint, nominate or designate the members of the Commission in terms of subsection (1) (c), (e), (f) and (g), may, in the same manner appoint, nominate or designate an alternate for each of those members, to serve on the Commission whenever the member concerned is temporarily unable to do so by reason of his or her incapacity or absence from the Republic or for any other sufficient reason.

Alternative option: Amendments re magistrates omitted

Judicial Service Commission

- 178.** (1) There is a Judicial Service Commission consisting of—
- (a) the Chief Justice, who presides at meetings of the Commission;
 - (b) the President of the Supreme Court of Appeal;
 - (c) one Judge President designated by the Judges President;
 - (d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
 - (e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
 - (f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
 - (g) one teacher of law designated by teachers of law at South African universities;
 - (h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
 - (i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
 - (j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
 - (k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that [Court] Division and the Premier of the province concerned, or an alternate designated by each of them.

(2) If the number of persons nominated from within the advocates' or attorneys' profession in terms of subsection (1) (e) or (f) equals the number of vacancies to be filled, the President must appoint them. If the number of persons nominated exceeds the number of vacancies to be filled, the President, after consulting the relevant