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JUSTICE PORTFOLIO COMMITTEE

9 March 1999

SUPERIOR COURTS BILL: HEARING; CRIMINAL PROCEDURE AMENDMENT BILL [B7-99]: BRIEFING

Documents handed out:

Memorandum on Superior Courts Bill submitted by the judges of the Witwatersrand Local Division
Letter from Deputy Judge President of the Supreme Court H C J Flemming to the director-General:
Justice submitted by Judge Flemming

[Letter of support for Superior Courts Bill by Office of the Premier of the Northern Cape Province](#)
[Comments on the Criminal Procedure Amendment Bill as summarised by State Law Advisor Mr J de Lange](#)

SUMMARY

The Committee heard the submission on the Superior Courts Draft Bill. Deputy Judge President of the Supreme Court (Johannesburg), Judge H C J Flemming submitted, according to Chairperson de Lange, "thought provoking and insightful" comments and recommendations on the Superior Courts Draft Bill. His major focus revolved around the issue of a unitary High Court system as opposed to a system of several provincial High Courts of similar juridical status. For practical reasons Judge Flemming argued strongly for a single High Court with different provincial divisions instead of distinct provincial bodies of jurisdiction. From his point of view it was crucial to implement a flexible system where both cases and judges would be transferable.

Furthermore, he approved of the proposal for concurrent jurisdiction.

The committee was led through the summary of submissions on the Criminal Procedure Amendment Bill.

MINUTES

The Chair, Mr de Lange (ANC) opened the meeting, and welcomed Judge Flemming, Deputy Judge President of the Supreme Court from Johannesburg.

Superior Courts Draft Bill

Judge Flemming started his submission by pointing out that under the current situation Johannesburg could not manage the workload and would therefore welcome a reallocation of magisterial districts, which would shift realms of magisterial responsibility away from Johannesburg. He minutely explained how the Johannesburg branch was unable to expand any further as the spatial possibilities were already fully made use of. However, he conceded, the proposals put forth in the Superior Courts Draft Bill concerning the reallocation of magisterial districts were impractical and some of them not workable. One problem was the drawing of lines between the magisterial districts. As elaborated by other parties' submissions earlier this week [see for example the submission of the Johannesburg Attorneys Association on 3 March] the proposal of putting Sandton and Randburg under the jurisdiction of Pretoria might cause excessive difficulties for poor people to appear in court since they would have to travel all the way to Pretoria. Generally, he argued, with cases of civil jurisdiction it was often difficult to clear the question of which court was responsible in the particular matter. He cited the example of a traffic accident where the parties were able to decide to take the case either to the court in whose district the accident happened or to the court in whose district the car was registered or to the court in whose district either the accused or the accuser lived. A possible solution to the matter was as Judge Flemming proposed to consider cases concurrently.

Of primary importance for Judge Flemming was the question of a unitary High Court. It was sometimes necessary to have a single national court considering a particular case from both concerned sides, for which a unitary High Court was essential rather than a pattern of High Courts reminiscent of the federalist structure. Judge Flemming made a strong case for having one single High Court, which was arranged into various divisions instead of several superior courts. Having a single High Court System, it would be possible to allocate cases to the responsible divisions and to transfer cases where necessary (with the consent of the parties). In a system of several Superior Courts on the provincial level, however, judges might have to be transferred which was very impractical. "Transfer of the cases rather than of the judges, is the practical and least expensive way." Also with a unitary High Court system, the transferred cases would not have to be entirely newly considered. Instead the division the case was transferred to, would continue the work the former division had already completed or achieved. By contrast, with a system of several High Courts of similar status transferred cases would have to be newly considered all over which was very impractical. Furthermore, during the time the act would be implemented old cases would have to be considered according to the old division of magisterial district, while new cases would have to be allocated according to the newly implemented division of magisterial districts which would cause a lot of confusion or even chaos.

Apart from that, the transfer of cases to other courts in a system of several high courts with similar status involved a jurisdictional dilemma which Flemming himself would not want to overstress, but which some judges might express as such: "when I do not have the jurisdiction to handle this case, I do not have the jurisdiction to transfer it to another court."

The Chair De Lange agreed that justice was a national competence, but at the same time should not necessarily be made a federal issue. He approved of the idea of a High Court with different divisions rather than of several provincial High Courts that would be of similar status. In the case of a unitary High Court, he pointed out however, one would have to reconsider the matters of appointment and issue of finances. The issue of implementing full benches or not in the several divisions of a unitary High Court would also have to be considered. In either case the transfer of cases and of judges would have to become more flexible.

Mr de Lange welcomed Judge Flemming's distinction between cases of civil and criminal jurisdiction so as to emphasise the possibility to consider those cases and their allocation to particular magisterial districts separately.

Mr Hofmeyr conceded that Judge Flemming's comprehensive submission had changed some of his own ideas on the issue. However, he wondered, if the practice of considering transferred cases with a continuation of the former division's achieved work instead of considering them entirely new would not implicate other unintended consequences.

Furthermore he was concerned that if cases were considered concurrently, parties might be tempted to 'go foreign shopping', i.e. to take their case wherever they would find it to lead to the quickest or least expensive success.

Judge Flemming highlighted that such a practice existed already and often had positive repercussions on the workloads of courts as it naturally outbalanced their number of cases. However, he conceded, it was mostly the attorneys, not the accused or accusers themselves who decided on the issue of where to take the case. Therefore the benefit that might arise from this practice would be with the attorneys rather than the clients themselves. Obviously, foreign shopping created a problem for poor people who could not afford the high travel expenses related to it.

Chair de Lange thanked Judge Flemming for his thought provoking contribution.

Criminal Procedure Amendment Bill

Mr J de Lange (Law Advisor) summed up the different views and comments on the Criminal Procedure Amendment Bill as stated in Comments on the Criminal Procedure Amendment Bill, 1999.

The meeting was adjourned.

The Committee agreed to meet again on Monday, 15 March at 10 a.m.

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