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JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE

30 October 2003

SUPERIOR COURTS BILL: DELIBERATIONS

Documents handed out

[Superior Courts Bill \[B52-2003\]](#)

[Summary of Comments on Superior Courts Bill](#)

[Superior Courts Bill - working draft](#)

SUMMARY

The Chair observed that there were clear grounds for a constitutional challenge on Clause 21 (Judgment by default) and expressed surprise that nobody had raised this possibility during public hearings. He noted that it was inappropriate, notwithstanding what the rules say, for one to deem a judgement against a member of the executive. He argued that in terms of the Constitution it offends the cardinal principles of separation of powers to deem a judgement against the executive arm of government. He suggested that at the very least a judge should sign such a default judgement.

The provision in Clause 23 dealing with circumstances in which security for costs shall not be required displeased the Committee. It was noted that for the most part it only nails the poor whilst the rich get off the hook. However the Chair acknowledged that the provision is a necessary measure to deter vexatious litigants and therefore it was important to re-craft it to find a balance between these two extremes.

MINUTES

[Morning session: Minutes for this session available only on 12/11/03]

Afternoon session

Clause 20 Grounds of review of proceedings of lower courts

The Chair made reference to the Cape Bar Council's view that Clause 20 was unnecessary and wondered why they held such a position. He made the point that the provision could only be unnecessary if it were to converge with the common law, which was not the case here.

Mr Johan de Lange (Legal drafter: Department of Justice) pointed out that there was ample case law on Clause 20 such that precedent in this regard is a better guide.

The Chair acknowledged the fact that indeed there has been an impressive build-up of case law on the clause and that therefore it presented no problem when left to stand the way it is.

Clause 21 Judgment by default

The Chair expressed consternation that nobody had raised a constitutional challenge on Clause 21 noting that it is objectionable to deem a default judgement against the defendant against a member of the executive.

Mr de Lange agreed that no one had raised a constitutional challenge to the clause but made the point that the rules provide for an application to be heard in chambers.

The Chair said that there were clear grounds for a constitutional challenge noting that it was inappropriate, notwithstanding what the rules say, for one to deem a judgement against a member of

the executive. He argued that in terms of the Constitution it offends the cardinal principles of separation of powers to deem a judgement against the executive arm of government. He suggested that at the very least a judge should sign the judgement.

Mr. Landers (ANC) agreed with the Chair and suggested that the offending provision should be redrafted to correct the apparent ambiguity.

Clause 22 Time allowed for appearance

Mr de Lange observed that Clause 22 had elicited many queries and suggested that it should be relegated to the rules noting that a definition would be added to make it clearer.

The Chair said that it is important to adhere to one uniform terminology when making references to relevant days and suggested that the term 'court days' should be used throughout the Bill. He asked the drafters to incorporate the suggestion made by the Law Society of South Africa on definition of days. He also asked them to define 'court days' and a definition of what constitutes 'civil summons' as suggested by the Cape Bar Council. He explained that the reason for the retention of the clause is principally that the legislature wants people to have at least not less than ten days to decide whether they want to defend a matter or not. He however clarified that this leeway need not compromise the need for certainty over timeframes within which undefended matters could be determined.

Clause 23 Circumstances in which security for costs shall not be required

The Chair said that he has never been comfortable with this provision. He pointed out that for the most part it only nails the poor whilst the rich get off the hook. He however acknowledged the fact that the provision is a necessary measure to deter vexatious litigants and that therefore what was important is to find a balance between these two extremes. He suggested that the clause should be flagged for the present to give the Committee and the Department time to ruse over how best to craft it.

Clause 24 Disposal of records and execution of judgments of circuit courts

The Chair asked the Department to show the relevance of the clause and whether it was necessary in the manner it was crafted.

Mr de Lange doubted the utility and relevance of the clause especially at this point in time. He however noted that the same provisions are to be found in circuit court. He suggested that the provision should be addressed in the rules where it might find some relevance.

The Chair said that he was not sure that the provision would be incorporated in the rules as suggested by the Department. He proposed that the provision should be flagged to give the Department time to investigate and determine why it was introduced in the first place.

Clause 25 Removal of proceedings from one Division to another

The Chair noted that the 'convenience' alluded in 25(b) was problematic and that it has implications for jurisdiction in that the way it is crafted implies that it could be applied even where the court has no jurisdiction.

Mr de Lange noted that the provision has been like that since 1959 when the current court division did not exist.

Adv. Schmidt (DA) made the point that going by the experience in the TRC one would require the clause to deal with situations where a multiplicity of actions arises.

The Chair admitted that the clause would carry value where one sues the National Government in a scenario where the cause of action arose in a division where the court feels that it is more convenient to take the matter near the seat of power. He made the point that there would be no problem where parties reach consensus on moving the matter on the basis of convenience but where such consensus is lacking then it is imperative that the judge should be satisfied that exceptional circumstances exist to warrant such a transfer.

The Chair noted that he had no objection to the proposition made by the Supreme Court of Appeal save for 'order in chambers'. He made the point that such an order would carry serious implications especially where no consensus has been recorded and that therefore it is important for the matter to

be heard in open court. He asked the Department to incorporate suggestions by the Supreme Court save for 'order in chambers'. He said that the provision 'subject to any other law' by the Supreme Court of Appeal was most helpful in that respect.

The Chair expressed reservation at the suggested made by the Cape Bar Council that 'may' should change to 'shall'. He noted that 'shall' is problematic especially where the court encounters some jurisdictional problems.

Adv. De Lange made the point that sub-clause (2) was an empowering provision in that it vests jurisdiction on the court.

The Chair proposed that the provision should be redrafted to state that: 'upon receipt of an order the court shall proceed'. He however wondered what would become of an aggrieved party in this case.

Mr de Lange explained that this being a final court order it is appealable and that therefore all the processes for an appeal would be gone into.

Clause 26 Prohibition on attachment to found jurisdiction or arrest where defendant resides within the Republic

The Chair tasked the Department to check whether there is a difference between a 'writ', 'order' and a 'warrant' and that if there is no difference then the term 'warrant' should be used instead of 'writ'.

Chapter 7 General provisions

The Chair observed that provisions under this chapter are fairly complicated and that there was no ample time to delve into these matters.. He therefore suggested that the Committee differ further deliberations until the following week. He thanked members for their patience during what he termed "a difficult period" where the constituency week is in progress.

Mr. Landers suggested that members should be supplied with nametags to clearly identify those present during meetings, as is the case with the Australian parliament.

The Chair agreed that nametags are useful during public hearings for public information. He asked the Committee clerk to look into the possibility of introducing the nametags for members.

The meeting adjourned at this juncture.

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