REFLECTIONS ON THE PROSPECTS AND CHALLENGES OF THE SOUTH AFRICAN JUDICIARY IN ACHIEVING ITS CONSTITUTIONAL OBJECTIVE

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A Research Study Submitted in Fulfilment of the Requirements for the Degree of Master of Laws in the Faculty of Law at the North-West University

(Mafikeng Campus)

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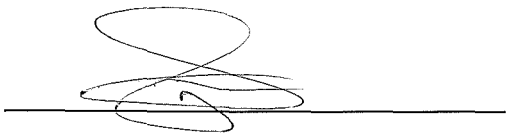
Date: June 2015

SOLEMN DECLARATION

I duly declare that this research entitled, "*Reflections on the Prospects and Challenges of the South African Judiciary in Achieving its Constitutional Objective*", for the Degree of Master of Laws at the North West University (Mafikeng Campus) hereby submitted, has not been previously tendered by me for a degree at this institution or any other University. I further declare that this research study is my own work in design, structure and execution and that all materials and sources contained herein have been acknowledged.



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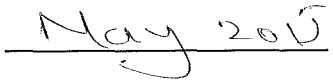

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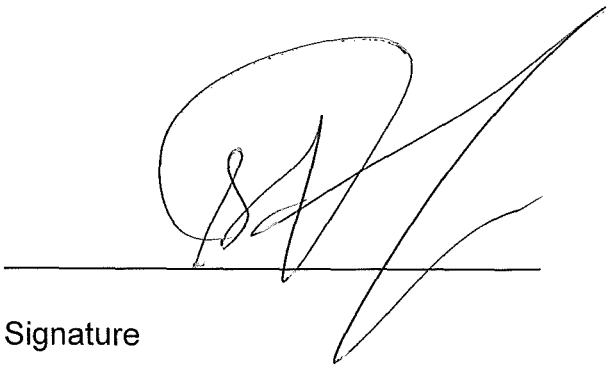
DECLARATION BY SUPERVISOR

I, Professor Samuelson Freddie Khunou, do hereby declare that this dissertation by Matodzi Rachel Makhari, for the degree of LLM, should be accepted for examination.



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May 2015

Date

ACKNOWLEDGEMENTS

I owe my sincere gratitude to the following people for their support and contribution(s) during the extension of this research study:

I would like to thank my supervisor, Professor Samuelson Freddie Khunou, for his assistance, words of encouragement, motivation, guidance and support which he selflessly provided and without which, this paper may not have materialised.

I also thank my secretary, Mrs Martie van Wyk, for assisting me with the collection of data and the outstanding typing services rendered.

To my husband, Malesela, and the children, Papi, Phathutshedzo, Tumelo and Lesego for being pillars of support and motivation.

The North-West University (Mafikeng Campus) has been generous in providing the necessary financial support.

DEDICATION

This research study is dedicated to my late parents, Masala Ananias Makhari and Mususumeli Melisa Makhari.

LIST OF ABBREVIATIONS

AIDS	Acquired Immune Deficiency Syndrome
ANC	African National Congress
CEO	Chief Executive Officer
CC	Constitutional Court
CFM	Case Flow Management
CODESA	Convention for Democratic South Africa
DA	Democratic Alliance
GG	Government Gazette
HIV	Human Immunodeficiency Virus
IFP	Inkatha Freedom Party
JSC	Judicial Service Commission
LLB	Bachelor of Law Degree
NEDLAC	National Economic Development and Labour Council
NP	National Party
NPA	National Prosecuting Authority
PAC	Pan Africanist Congress
RAF	Road Accident Fund
SABC	South African Broadcasting Corporation
SACP	South African Communist Party
SAPS	South African Police Services
SCA	Supreme Court of Appeal
SIU	Special Investigating Unit
TV	Television

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CHAPTER 1
INTRODUCTION

1.1 About the Research Study

The objective of this research study is to discuss and analyse the constitutional framework of the judiciary in South Africa. It is common knowledge that pre-colonial societies in South Africa had a judicial system. It is for this reason, amongst others, that this research study should cast light on the landscape of the pre-colonial court structures, with particular reference to the role of traditional leaders in the settlement of disputes and maintenance of law and order. The successive colonial governments also introduced a judicial system and court structure which were somehow foreign to majority of the colonised.

The colonial system of the judiciary was fundamentally different from the pre-colonial model of traditional courts. Subsequent to colonial rule, a system of apartheid was introduced in 1948. The apartheid government inherited the system of the colonial structure, albeit with some modifications and approaches. It is in this context that the research study examines and explores the terrain of both colonial and apartheid models of judicial systems. The implications of both the interim and final Constitutions[1] of the Republic of South Africa on the terrain of the judiciary are also highlighted.

It is common cause that the new constitutional dispensation accord the Constitutional Court with the power to strike down as invalid any legislation by Parliament or provincial legislation, and any pronouncement by any organ of state or the incumbent thereof, if it is contrary to the Constitution.[2] This research study

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1 *Constitution of the Republic of South Africa Act* 200 of 1993.
Constitution of the Republic of South Africa, 1996.

2 S 172 (1) of the *Constitution of the Republic of South Africa,* 1996:
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.

explores the constitutional powers and functions of the courts with a view to highlighting their mandates. Since the new constitutional dispensation, the judiciary has accomplished various successes, although there are still challenges to be addressed. This research study gives an exposition of the impediments and prospects of the judiciary in the new South Africa; various pieces of legislation with a direct or indirect influence on the judiciary are discussed. It is submitted that the judicial system should be a separate department headed by the Chief Justice with separate administrative functions from the Department of Justice and Correctional Services.[3]

The research study indicates the current situation regarding the establishment of the office of the Chief Justice of South Africa and the programmes put in place for this office to attain its institutional independence, the delay in achieving the full institutional independence being one of the issues currently raised. Benjamin[4] wrote an article expressing concern that despite the importance of judicial independence, the office of Chief Justice remains a mere executive programme after 20 years of the new constitutional dispensation.

The institutional independence of the judiciary, as mentioned above, is one of the remaining challenges, as are the delays in finalisation of cases and misconduct of judicial officers. It is in this context that this research study highlights possible solutions and recommendations towards addressing the challenges facing judicial system.

1.2 Problem Statement

The judiciary in the Republic of South Africa is in the process of transformation from the system under which it operated during the apartheid era to a new democratic dispensation. The Constitution of the Republic of South Africa requires the judiciary to conform to the democratic environment.[5] Since the inception of the interim

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3 Before 2014 it was referred to as the Department of Justice and Constitutional Development.
4 Benjamin *Mail and Guardian* 3.
5 *Ibid.*

Constitution,[6] and the subsequent adoption of the final Constitution,[7] the judiciary has been on a transformation route. The questions that remain are: whether, in its process of transformation, the judiciary has complied with its mandate to date; whether there has been any meaningful progress made; whether there are still challenges that need to be brought to the attention of the judiciary; and whether there are any tangible measures that can be introduced to assist the judiciary in conforming to its mandate, according to the South African Constitution.[8]

1.3 Literature Review

1.3.1 Background Perspective

South African courts have evolved over time to their current state, where the judiciary is independent and is supposed to be protected by all organs of state to ensure their independence, impartiality, dignity, accessibility and effectiveness. This background provides an overview of the courts' evolution and describes how they function in the administration of justice.

1.3.1.1 Pre-Colonial Era

During the pre-colonial period in South Africa, there was no formal court structure as there is today. The court system comprised of traditional leaders, who acted as a presiding judge, and the elder statesmen, being members of the court, who all actively participated in the court proceedings. The issue of separation of powers was not known because a traditional leader performed the executive, legislative and judicial functions.[9] Khunou[10] maintains that the important institutions responsible for the administration of justice were traditional courts. The traditional courts differed from one place to another.[11]

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6 *Constitution of the Republic of South Africa Act* 200 of 1993.
7 *Constitution of the Republic of South Africa*, 1996.
8 *Ibid.*
9 Collier (ed) *African Cultures and Literatures* (Amsterdam New York 2013) 311-317.
10 *Ibid.*
11 *Ibid.*

As indicated above, traditional leaders served in these courts as supreme judges and acted with the advice of their executive councils. The procedure followed was simple and flexible and those present in court saw themselves as part of the adjudication process.[12]

1.3.1.2 The Colonial Epoch

This is the era when the Dutch settlers colonised the Cape. The administration of justice started in the hands of the ships board.[13] The system of administration of justice evolved during this period and various courts were established as a formal structure. Eventually, during the early 20th century, section 95[14] of the Constitution provided for the formal structure of higher courts in the Union of South Africa.[15]

1.3.1.3 The Scope of Apartheid Regime

This period continued to have formal structure of courts, according to the Constitution.[16] The courts had the decisional independence, but such independence was not expressly provided for in the Constitution.[17] The courts could only interpret the existing law when adjudicating on matters despite the perceived unfairness or unjust consequences. There are pieces of legislation[18] that are classical examples of laws which trampled upon human rights and were not declared invalid by the South African courts due to the courts' adherence to the principle of parliamentary

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12 Collier (ed) *African Cultures and Literatures* (Amsterdam New York 2013) 311-317.

13 Hosten *et al Introduction to South African Law and Legal Theory* 339.

14 S 95 of the *Constitution of the Union of South Africa*, 1910:
There shall be a Supreme Court of South Africa consisting of a Chief Justice of South Africa, the ordinary judges of appeal, and the other judges of the several divisions of the Supreme Court of South Africa in the provinces.

15 Hosten *et al Introduction to South African Law and Legal Theory* 361.

16 *Constitution of the Republic of South Africa Act* 32 of 1961.

17 *Ibid.*

18 The *Immorality Amendment Act* 21 of 1951 made sexual relations with a person of a different race a criminal offence.
Group Areas Act 41 of 1950 passed on 27 April 1950 partitioned the country into different areas, with different areas allocated to different racial groups.
Bantu Authorities Act 68 of 1951 created separate government structures for blacks.
Black Administration Act 38 of 1927 provided separate administration of justice system to that of white people.
Reservation of Separate Amenities Act 49 of 1953 prohibited people of different races from using the same public amenities, such as restaurants, public swimming pools and rest rooms.

sovereignty.[19] Due to this principle of parliamentary sovereignty, Parliament was the supreme law-making body and once it had enacted law, courts, individuals or institutions would not easily challenge them.[20] Parliamentary sovereignty was practised during the apartheid era as previously stated. Rautenbach and Malherbe[21] best describe it as the supreme authority in the state, to which all other government institutions are subject.

1.3.1.4 New Constitutional Dispensation

When South Africa became a democratic state in 1994, the interim Constitution[22] and the final Constitution[23] guaranteed the authority and independence of the courts. As highlighted above, the Constitutional Court, according to section 172,[24] is given

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19 S 59 of the *Constitution of the Republic of South Africa Act* 32 of 1961:
1) Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace order and good government of the Republic.
2) No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament, other than an Act which repeals or amends or purports to repeal or amend the provisions of sections 108 or 118.

20 *Ibid.*

21 Rautenbach and Malherbe *Constitutional Law* 36.

22 S 96 of the *Constitution of the Republic of South Africa Act* 200 of 1993:
1) The judicial authority of the Republic shall vest in the courts established by this Constitution and any other law.
2) The judiciary shall be independent, impartial and subject only to this Constitution and the law.
3) No person and no organ of state shall interfere with judicial officers in the performance of their functions.

23 S 165 of the *Constitution of the Republic of South Africa*, 1996:
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) Organ 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.

24 S 172 of the *Constitution of the Republic of South Africa*, 1996:
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 High Court 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.

the authority to declare any law or act by, among others, an organ of state invalid if it is inconsistent with the Constitution.[25] The Constitution,[26] in its endeavour to achieve the goal of judicial independence, also provided, in section 180,[27] for the enactment of national legislation dealing with matters concerning the administration of justice that are not dealt with in the Constitution.[28] These include training programmes, procedures dealing with complaints about judicial officers, and other instruments of judicial accountability, hence the enactment of the Superior Courts Act[29] and the values provided in the norms and standards.[30]

1.3.2 Court Structure

The South African courts are divided into lower and higher courts. The lower courts include the Small Claims Court, Children's Courts, Maintenance Courts and Magistrates' Courts. The higher courts include various courts, such as the High Courts in the provinces, specialist courts with similar status to High Courts (Labour Courts, Electoral Courts, etc.), the Supreme Court of Appeal and the Constitutional Court.[31]

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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 a 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.

25 *Constitution of the Republic of South Africa*, 1996.

26 S 172 (1) of the *Constitution of the Republic of South Africa*, 1996.

27 S 180 of the *Constitution of the Republic of South Africa*, 1996:
National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including –
a) training programmes for judicial officers;
b) procedures for dealing with complaints about judicial officers; and
c) the participation of people other than judicial officers in court decisions.

28 *Constitution of the Republic of South Africa*, 1996.

29 *Superior Courts Act* 10 of 2013.

30 Gen Not 147 in GG 37390 of 28 February 2014.

31 Du Bois *et al Wille's Principles of South African Law* 121–130.

1.3.3 Non-Curial Role of the Judiciary

The South African Constitution[32] allows the judiciary to perform other functions that are non-judicial.[33] However, there is no rigidly stipulated *criterion* on the kind of duties they may perform.[34] This has imposed a number of challenges because every judge has to decide which functions are not incompatible with his or her role. Some judges, including Judge Swain, in the case of *City of Cape Town v Premier of the Western Cape and Others*[35] are of the belief that it is better for retired judges to preside in some duties, such as the chairing of Commissions of Inquiry, than to compromise the judiciary as an institution and the judge him / herself.

1.3.4 Judicial Success after the New Constitutional Dispensation

South Africa, through the judicial transformation, has attained various successes including independence in decision-making, appointment of judges reflecting the demographics of the South African population, and the promotion of effectiveness and efficiency of the courts.

1.3.5 Challenges Faced by the Judiciary

Judicial transformation in South Africa has been a complex process. There are still challenges that need to be overcome in order to fulfil the constitutional mandate. Such challenges include judicial training and development,[36] fast-tracking the process of institutional independence, speedy finalisation of complaints for alleged misconduct by judicial officers, gender consideration in appointment of judges[37] and

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32 *Constitution of the Republic of South Africa*, 1996.

33 S 86 (2) of the *Constitution of the Republic of South Africa*, 1996.
S 52 of the *Constitution of the Republic of South Africa*, 1996.
S 64 of the *Constitution of the Republic of South Africa*, 1996.
S 48 of the *Constitution of the Republic of South Africa*, 1996.

34 *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) 2000 ZACC 22; 2001 1 SA 883; 2001 1 BCLR 77.
City of Cape Town v Premier of the Western Cape and Others (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C).

35 *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) 2000 ZACC 22; 2001 1 SA 883; 2001 1 BCLR 77.

36 Hoexter and Olivier *The Judiciary in South Africa* 71 – 73.
Corder 1992 *SA Publiekreg*.

37 Hoexter and Olivier *The Judiciary in South Africa* 138 – 141.

the question of active judges presiding over Commissions of Inquiry.[38] These challenges need to be dealt with to avoid loss of public confidence in the judiciary.

1.4 Aim and Objectives of the Study

The aim of the study is to assess the judiciary and its constitutional mandate in South Africa with a focus on the challenges and prospects brought about by judicial transformation. Incidental to this main aim of the study and in order to provide context to the discussion, the landscape of traditional courts during the pre-colonial, colonial and apartheid periods are examined.

In order to achieve the above aim, the following specific objectives have been adopted for this study:

- to discuss the current judicial system under the new constitutional settlement and to highlight the extent to which the judiciary has fulfilled its constitutional mandate;
- to assess the transformational mandate of the judiciary in terms of race and gender composition;
- to assess the actual and potential impact of the challenges of the judiciary on the judiciary's mandate of delivering efficient, speedy and effective service. While this study cannot claim to provide an overall and complete assessment on this point, it will use available qualitative data to make this assessment.

1.5 Research Questions

- What are the challenges that face the judiciary in South Africa and to what extent do they affect its potential to achieve its constitutional mandate of being a judiciary that broadly reflects the racial and gender composition of South Africa and delivers justice fairly, speedily and effectively?

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[38] *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) 2000 ZACC 22; 2001 1 SA 883; 2001 1 BCLR 77.
City of Cape Town v Premier of the Western Cape and Others (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C).

- What are the causes of these challenges and how can they be resolved in both the short and the long term?

1.6 Research Methodology

The study was undertaken by way of collecting data that was assessed, evaluated and synthesised to form a comprehensive argument that unpacks the problem. The sources of data for the study include newspaper articles, publications by former and current judges of the higher courts in South Africa, and delivered speeches by the members of the executive arm of government. The study adopts a qualitative approach because data is gathered *via*, amongst others, investigation reported and unreported court cases and internet publications.

1.7 Chapter Outline

Chapter 1 deals with the aspects of the research study. It gives an exposition of the research study.

Chapter 2 deals with the historical perspective concentrating on justice systems of the judiciary during the pre-colonial, colonial and apartheid regimes, as well as the structure of the courts.

Chapter 3 explores the provisions of the new constitutional settlement and the new structure of the courts according to the final Constitution and other pieces of legislation.

Chapter 4 deals with the non-judicial function of the judiciary, with the main focus on the role of judges in Commissions of Inquiry.

Chapter 5 elaborates on the legal framework of the judiciary, explaining the laws that create and govern the judicial system.

Chapter 6 deals with the successes achieved by the judiciary, including the promotion of court's efficiency, judicial training, decisions by the courts, affirming judicial independence and the appointment of judges.

Chapter 7 deals with the challenges faced by the judiciary such as delays in finalisation of cases, misconduct by judicial officers, lack of full institutional independence, gender considerations for appointment of judges, shortcomings of the Judicial Service Commission and the role played by the active judges on Commissions of Inquiry.

Chapter 8 gives possible solutions and recommendations regarding the challenges faced by the judiciary.

Chapter 9 provides a general conclusion on all aspects raised in the research study.

CHAPTER 2
HISTORICAL PERSPECTIVES

2.1 Introduction

This chapter focuses on the evolution of the administration of justice dating back from the pre-colonial era to the period of the apartheid regime in South Africa. In the pre-colonial era the administration of justice rested with the traditional leaders. These traditional leaders performed the functions of the legislature, executive and the judiciary since there was no separation of powers. The system evolved when South Africa was colonised by Dutch and the British settlers, who brought about the more structured system of administration of justice. A structured system continued through the apartheid period, and the South African Constitution[39] then made express provision for the system of administration of justice.

2.1.1 Pre-Colonial Justice System

As indicated above, the justice system during the pre-colonial era was not the same as it is currently. As Khunou[40] stated, the institutions that were responsible for the administration of justice were traditional courts. The traditional courts in South Africa differed from one place to another; however, no separation of powers regarding the judiciary, executive and legislature existed. The elders of the communities comprised the presiding traditional leader and his councillors, who constituted the bench of the court.[41] The traditional leader was assisted by his councillors, who were elders of the community and members of the royal family.

The traditional leader could not arbitrarily take decisions but was assisted by traditional councillors, who played an important judicial and political role. Schapera made note that:

> The chief himself was not above the law. Should he commit an offence against one of his subjects, the victim can complain to

39 *Constitution of the Republic of South Africa Act* 32 of 1961.
40 Collier (ed) *African Cultures and Literatures* (Amsterdam New York 2013) 311-317.
41 *Ibid.*

> the men of *Kgotla* or to one of the chief's near relatives who will then report the matter to the chief. The latter is expected to make amends for the wrong he has done. Should he not do so, it is said that he may be tried before his own court, his senior paternal uncle acting as judge.[42]

The traditional leader was accountable to his people.[43] Khunou[44] notes that the judicial process was mainly aimed at mediation and reconciliation rather than the court finding for or against a litigant. The general court procedure was simple and flexible and those present in court were part of the adjudication process. Khunou[45] continues that the traditional leaders nominally acquired their jurisdiction because the presiding traditional leader and his councillors, who constituted the court bench, were natural components of the community and were usually elders of that community. The courts were constituted in the following structure:

> A hierarchy started at the level of the clan and close relatives were from the same clan. It was at this level where family heads in conjunction with family elders often settled family disputes. According to Holomisa, this level was then followed next by courts of sub-headmen, whose areas of jurisdictions would be the village comprising of various neighbouring clans. Third in the hierarchy would be the court of the headman whose area of jurisdiction was made up of various villages headed by sub-headmen under his authority. On top of the hierarchy was the court of traditional leader. Holomisa stated that this arrangement was officially known as the traditional authority. The last level in the hierarchy was the court of the king. The king's court was also the court of appeal. This set-up was officially called the regional authority.[46]

Khunou[47] stated that the hierarchy of courts in the administration of justice differed slightly from one tribe to another. However, the basic arrangement and formula remained the same in all tribes of pre-colonial societies. The courts of traditional leaders presided over criminal and civil matters and court buildings as we know them today did not exist. Proceedings were held under a tree or near the cattle kraal. All present were given the opportunity to participate in the proceedings including

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42 Schapera *A Handbook of Tswana Law and Custom* 84.
43 Khunou 2011 *International Journal of Humanities and Social Science* 278.
44 Collier (ed) *African Cultures and Literatures* (Amsterdam New York 2013) 311-317.
45 *Ibid.*
46 Collier (ed) *African Cultures and Literatures* (Amsterdam New York 2013) 314.
47 *Ibid.*

examination and cross examination of the parties.[48] Despite the traditional courts that were available in solving disputes within societies, Khunou[49] points out that during the pre-colonial era there was a supernatural way that societies would resolve disputes. The mechanism of supernatural approach was adopted in cases where the traditional leader and his headman did not know the perpetrator. There were various methods used to identify the perpetrator, such as ordeals, swearing of oaths and divination. It is submitted that this system of resolving disputes could be influenced by the belief in witchcraft by the pre-colonial societies. The evidence was obtained through witnesses who had knowledge by way of oral statements.

Taking of oath by witnesses was not practised.[50] Therefore there was no legal representation in traditional courts as it is known today. As Khunou[51] puts it, the traditional courts during the pre-colonial South Africa were deeply rooted and embedded in the inner systems of indigenous culture and religion of the traditional societies, and the powers, duties and obligations of traditional leaders were tried into the inner chambers of custom and culture that became synonymous with the principle of *Ubuntu*.[52] Hence Khunou[53] submitted that the procedure worked well in predominantly traditional societies with subsistence economies. The court procedure was of an inquisitorial nature that played an active role in the trial, and sometimes even before the trial started. It was not a contest of the two parties in a dispute.

The accused was examined because he or she was regarded as a source of valuable information.[54] Kriege noted that justice was always realised when parties to a dispute reconciled. He stated that:

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48 Khunou *A Legal History of Traditional Leadership in South Africa, Botswana and Lesotho* 311-317.

49 Collier (ed) *African Cultures and Literatures* (Amsterdam New York 2013) 315.

50 Van Niekerk *Principles of the Indigenous Law of Procedure and Evidence* 136.

51 Collier (ed) *African Cultures and Literatures* (Amsterdam New York 2013) 311-317.

52 Collier (ed) *African Cultures and Literatures* (Amsterdam New York 2013) 311-317.
S v Makwanyane and Another 1994 3 SA 868 (A) 225 and 308.
Milton 1995 *South African Journal of Criminal Justice* 192.

53 Collier (ed) *African Cultures and Literatures* (Amsterdam New York 2013) 311-317.

54 Van der Merwe 1981 *Accusatorial and Inquisitorial Procedure and Restricted and Free Systems of Evidence* 142-143.

> If reconciliation ensues, the court not only rejoices but watches from afar, vicariously participating in the return of the prodigal son, the wrongdoer with the beer brewed and brought to become reconciled with his father, the aggrieved party.[55]

Procedure in traditional courts was different from the current system and proceedings were not recorded. After evidence was gathered, the verdict was reached at the conclusion of all deliberations. The traditional leader, after consultation with his councillors, then pronounced judgement.[56] The judgement would centre on the principles of rehabilitating the offender, compensation of the aggrieved party, promotion of peace and reconciliation; with the objective of restoring the social equilibrium and securing the agreement of both parties in a compromise judgement.

2.2 Colonial Regime of the Judiciary

2.2.1 Dutch Colonialism

In 1652 Jan van Riebeeck, on behalf of the Dutch East India Company, established a refreshment station at the Cape. This settlement grew in size as the Cape population grew steadily. Therefore there was need for law and for the courts to regulate the conduct of the growing population. The only court that existed during this period at the Cape was modelled on the pattern of a ship's board council.[57] The commander of the ship relied on the *Artyckelbrief*, which is the document setting rules and regulations governing the service of the employees of the company. It was regarded as the company's code of discipline. After this came the highest court called *Raad van Justitie* in 1685.[58]

An appeal from the *Raad van Justitie* lay to the Governor-General-in-Council at Batavia. This *Raad van Justitie* was not composed of lawyers but laymen. The administration of justice during the first century at the Cape was somewhat

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55 Kriege 1939 *Journal of Bantu Studies* 144.
56 Collier (ed) *African Cultures and Literatures* (Amsterdam New York 2013) 311-317.
57 Hosten *et al Introduction to South African Law and Legal Theory* 339.
58 *Ibid.*

primitive.[59] The sources of law included the *Kaapse Placaaten* which emanated from the *Raad van Politie* (Governor-in-Council), works of the well-known institutional writers in the province of Holland. These writers included amongst others De Groot, Damhouder, Van Leeuwen and Carpzovius.[60] The Cape courts followed the criminal and civil procedure based on ordinances of Phillip II, which was the practice in Holland and Batavia.[61]

2.2.2 British Colonialism

During the colonial era, the British settlers had a judicial system in South Africa similar to judicial systems of various British colonies. Bennett[62] elaborates that the tribunals were run by professionals. In civil matters they catered for the British settlers, although in criminal and public law matters they catered for the entire population. During this period the judicial system and courts were segregated along racial lines.

Hosten[63] notes that in 1795, Great Britain first occupied and seized the Cape. The *Raad van Justitie* (now called court of justice) was empowered under Articles of Capitulation and a Proclamation of 24 July 1797, to administer the Roman-Dutch law in both civil and criminal matters.[64] There were lower courts of *Landdrost en Heemraden* to adjudicate on civil matters. During the period of the Batavian regime, the Cape Castle was handed over to the representatives of the Batavian Republic. Hosten further states that during the administration of justice during the Batavian rule, although of a short duration, the following changes were made:

> First, the old Raad van Justitie was replaced by a body of seven professional lawyers independent of the executive council. Secondly the office of fiscal was abolished and henceforth the prosecution of crimes was vested in a Prokureur-General. Thirdly, the courts of landdrost en heemraden were remodelled.[65]

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59 Hosten *et al Introduction to South African Law and Legal Theory* 339-340.
60 Hosten *et al Introduction to South African Law and Legal Theory* 343-345.
61 Hosten *et al Introduction to South African Law and Legal Theory* 345.
62 Bennett *Customary Law in South Africa* 135.
63 Hosten *et al Introduction to South African Law and Legal Theory* 347-348.
64 Hosten *et al Introduction to South African Law and Legal Theory* 348.
65 Hosten *et al Introduction to South African Law and Legal Theory* 349.

Between 1806 and 1927, during the second British occupation, there were changes regarding the administration of justice. In 1808 the court of criminal appeal was created at the Cape, constituted with the governor and two assessor-judges as its members.[66] There was also an introduction of circuit courts consisting of two itinerant judges. Amongst other changes was the abolition of *foribus clausis,* resulting in courts that sat with doors open to the public. Hosten[67] adds that in 1827 the first charter of justice was introduced. The old council of justice ceased to exist and was replaced by the Cape Supreme Court, consisting of Chief Justice John Wylde and two puisne judges.

All judges were sitting in Cape Town. Another judge sat as a judge of the Vice-Admiralty Court.[68] Changes during this era affected the lower courts. The *Landdrost en Heemraden* was replaced by the resident magistrates. The developments outside the Cape between 1838 and 1910, following the British occupation, saw the Cape Ordinance 12 of 1845 decreeing that the legal system of the "district of Natal" be the same system practised in the Cape Colony.[69] The legal system in Natal became similar to that of the Cape Colony, and Roman-Dutch law as modified by English procedural statutes was practised.[70]

The Voortrekker Republics[71] were also subjected to English law influence. In the Transvaal, the 1858 Constitution[72] provided for lower courts of *Landdrost en Heemraden* and *Hooge Gerechtshof* which were to have a jurisdiction in serious criminal cases and appellate status. In 1877 provision was made for the High Court, consisting of three judges, a circuit court of one judge and various landdrosts. These provisions were made towards the close of President Burger's term of office. When the British annexed the Transvaal in 1877, these provisions were put aside until the Transvaal regained its independence from Britain.[73]

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66 Hosten *et al Introduction to South African Law and Legal Theory* 349-350.
67 Hosten *et al Introduction to South African Law and Legal Theory* 350-351.
68 Hosten *et al Introduction to South African Law and Legal Theory* 352.
69 Hosten *et al Introduction to South African Law and Legal Theory* 357.
70 *Ibid.*
71 Transvaal and Free State.
72 *South Africa Act of Henry VII of 1909.*
73 Hosten *et al Introduction to South African Law and Legal Theory* 358.

A proclamation on 9 August 1881 saw Burger's plan to establish a High Court put in operation. J C Kotze was then appointed Chief Justice.[74] The Anglo-Boer war resulted in the annexation of the Boer Republic by Great Britain. The British government was content with the reshaping of the court structure. The lower court became the court of the resident magistrate and the *Landdrost's* Court was abolished. The court of the resident justice of the peace, with minor criminal jurisdiction, was instituted. The new High Court was instituted in the Orange Free State, and the superior courts instituted in the Transvaal.[75]

The superior courts were the Supreme Court in Pretoria and the High Court in Johannesburg.[76] Hosten indicates that in 1908 the four colonies of Britain, namely Cape Colony, Transvaal, Orange River Colony and Natal, decided to relinquish their sovereign rights and unity. Then the Union came into being on 31 May 1910, created by the Union of South Africa Act of 1909.[77] Section 95 of the Union of South Africa Act of 1909 provided for the Supreme Court of South Africa, consisting of a Chief Justice of South Africa and the ordinary judges of appeal and other judges of the several divisions of the Supreme Court of South Africa. The Act[78] established the appellate division of the Supreme Court, as well as the provincial and local divisions of the Supreme Court of South Africa.

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74 Hosten *et al Introduction to South African Law and Legal Theory* 358.

75 Hosten *et al Introduction to South African Law and Legal Theory* 359.

76 *Ibid.*

77 Hosten *et al Introduction to South African Law and Legal Theory* 361.

78 S 98 *of the Constitution of the Union of South Africa*, 1910:

1) The several supreme courts of the Cape of Good Hope, Natal, and the Transvaal, and the High Court of the Orange River Colony shall, on the establishment of the Union, become provincial divisions of the Supreme Court of South Africa within their respective provinces, and shall each be presided over by a judge-president.
2) The court of the eastern districts of the Cape of Good Hope, the High Court of Griqualand, the High Court of Witwatersrand, and the several circuit courts, shall become local divisions of the Supreme Court of South Africa within the respective areas of their jurisdiction as existing at the establishment of the Union.
3) The said provincial and local divisions, referred to in this Act as superior courts, shall, in addition to any original jurisdiction exercised by the corresponding courts of the Colonies at the establishment of the Union, have jurisdiction in all matters:
   a) in which the Government of the Union or a person suing or being sued on behalf of such Government is a party;
   b) In which the validity of any provincial ordinance shall come into question.
4) Unless and until Parliament shall otherwise provide, the said superior courts shall, mutatis mutandis, have the same jurisdiction in matters affecting the validity of elections of members of the House of Assembly and provincial councils as the corresponding courts of the Colonies have at the establishment of the Union in regard to parliamentary elections in such Colonies respectively.

2.2.3 *Traditional Court*

The Traditional Courts were recognised and legislation was put in place to regulate the functionaries of the courts relating to the black people who were then referred to as Bantu or natives. The Traditional and Commissioners' Courts were created. Seymour[79] elaborates on these courts in the following manner:

2.2.3.1 The Bantu Affairs Commissioner's Courts

According to Seymour,[80] these courts, called the Bantu Affairs Commissioner's Courts, were created by section 10 (1)[81] of the Black Administration Act. These courts functioned as courts of first instance and also as an appeal court. Sections 12 (4)[82] and 12 (5)[83] of the Black Administration Act provided that the Bantu Affairs Commissioner's Courts were to hear appeals from the judgement of a chief and

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79 Bekker and Coertze *Seymour's Customary Law in South Africa* 19.

80 *Ibid.*

81 S 10 (1) *Black Administration Act* 38 of 1927:
The Minister may, by notice in the Gazette, constitute courts of native commissioners for the hearing of all civil causes and matters between Native and Native only: Provided that a native commissioner's court shall have no jurisdiction in matters in which:
a) the status of a person in respect of mental capacity is sought to be affected;
b) is sought a decree of perpetual silence;
c) 'namptissement' is sought;
d) the validity or interpretation of a will or other testamentary document is in question, unless the value of the property which will be affected by the provisions of such will or document does not exceed three hundred pounds, or unless all persons whose rights may be affected by the decision of the court submit to its jurisdiction or have had an opportunity to object to its jurisdiction and have failed to do so; or
e) a decree of nullity divorce or separation in respect of a marriage is sought.

82 S 12 (4) *of the Black Administration Act* 38 of 1927:
Any party to a suit in which a native chief, headman or chief's deputy has given judgement may appeal therefrom to any court of native commissioner which would have had jurisdiction had the proceedings in the first instance been instituted in a court of native commissioner, and if the appellant has noted his appeal in the manner and within the period prescribed by regulation under sub-section (6), the execution of the judgement shall be suspended until the appeal has been decided (if it was prosecuted at the time and in the manner so prescribed) or until the expiration of the last-mentioned period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn of has lapsed: Provided that no assistant native commission shall hear an appeal under this sub-section unless no native commissioner (as distinct from an assistant native commissioner) has any judicial jurisdiction in the said area, and provided further that no such appeal shall lie in any case where the claim or the value of the matter in dispute is less than five pounds, unless the native commissioner of the court to which the appellant proposes to appeal, has certified after summary enquiry that the issue involves an important principle of law.

83 S 12 (5) of the *Black Administration Act* 38 of 1927:
The court of native commissioner may confirm, alter or set aside the judgement after hearing such evidence (which shall be duly recorded) as may be tendered by the parties to the dispute, or may be deemed desirable by the court.

headman. The parties appealing to the Bantu Affairs Commissioner's Courts could not be referred to as appellant and respondent, but rather as plaintiff and defendant as in the court of first instance,[84] to avoid confusion for a further appeal to the Bantu Appeal Court. Seymour[85] clarifies that while the Bantu Affairs Commissioner's Courts had concurrent jurisdiction with the courts of chiefs and headman, the Bantu Affairs Commissioner's Courts had the jurisdiction to hear an appeal from the court of the chief or headman.

2.2.3.2 The Bantu Appeal Court

The Bantu Appeal Court was created by section 13[86] of the Black Administration Act, as amended. Section 15[87] grants the Bantu Appeal Court the powers to review, set aside, amend or correct any order, judgement or proceeding of a Bantu Affairs Commissioner's Court but, as was expected, to exhaust all the remedies available thereof first in the lower courts before taking a matter on appeal.

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84 Bekker and Coertze *Seymour's Customary Law in South Africa* 25-26.

85 *Ibid.*

86 S 13 of the *Black Administration Act* 38 of 1927:

1) The Governor-General shall, as soon as practicable after the commencement of the Act, by proclamation in the *Gazette*, constitute one or more native appeal courts for the hearing of appeals in any proceedings from courts of native commissioners. Such proclamation shall define the area in respect of which the several appeal courts shall exercise jurisdiction.
2) A native appeal court shall consist of three members (one of whom shall be president).
3) The president shall be appointed by the Governor-General, and if not already a member of the public service of the Union shall become a member thereof and shall receive such salary as the Governor-General may determine: Provided that if the president is unable to act as such the Minister may appoint any person to act in his stead and, unless such person is a member of the public service, he may pay him such salary, not exceeding the salary paid to the president, as he may determine.
4) The members of the court other than the president shall be appointed, as required from time to time, by the Minister, and shall be selected from magistrates, native commissioners or other qualified persons.
5) The Governor-General may from time to time make rules regulating:
   a) The appointment and duties of the officers of the court, the records to be kept and the practice and procedure in the court;
   b) The mode of compelling the attendance of witnesses and assessors, and the allowances to be paid to them;
   c) The fees which may be charged by advocates and attorneys, cost as between party and party and as between attorney and client, and the taxation of costs;
   d) The fees and charges to be imposed and taken by officers of the court;
   e) The noting of appeals and the suspension of the judgement appealed against;
   f) The appearance of parties or of persons on their behalf in a native appeal court;
   g) Generally, all such other matters relating to the courts as the Governor-General may deem necessary for the purposes of this section.

87 S 15 of the *Black Administration Act* 38 of 1927.

2.2.3.3 The Bantu Divorce Court

The Bantu Divorce Court, according to Seymour,[88] has its jurisdiction and constitution in terms of section 10[89] of the Administration Amendment Act as amended by section 5[90] of the Black Administration Amendment Act and section 27[91] of the Black Laws Amendment Act. The Bantu Divorce Court had jurisdiction only to hear a divorce matter if both spouses were domiciled within the area of the court's jurisdiction, and if they were Bantu.

2.2.3.4 The Provincial and Local Divisions of the Supreme Court

The Supreme Court had the inherent jurisdiction to hear any matter as a court of first instance except in circumstances where such jurisdiction had been removed by legislation. Seymour[92] further indicates that the Supreme Court discouraged the institution of actions between Bantu before it, because the courts of Bantu Affairs Commissioner and the Bantu Divorce Courts were created to afford them with inexpensive means of litigation, and the unlimited jurisdiction of causes of action and subject matter. In respect to the Bantu, an appeal could be made from the judgement of a Bantu Divorce Court to the Supreme Court.

The Bantu could also appeal only to the appellate division from the Bantu Appeal Court if the Bantu Appeal Court consented thereto, subject to the rules of the appellate division. The provincial and local divisions of the Supreme Court, meant to cater for the British settlers, including the Magistrates' Courts and the High Courts. The white population had a separate system of courts and the research study focuses on the judicial system from the time of the Dutch and the British annexation of the colonies in the Cape, Transvaal, Natal and Orange Free State until the Union became the Republic of South Africa.

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88 Bekker and Coertze *Seymour's Customary Law in South Africa* 30-31.
89 S 10 *of the Administration Amendment Act* 9 of 1929.
90 S 5 of the *Black Administration Amendment Act* 42 of 1942.
91 S 27 of the *Black Laws Amendment Act* 56 of 1949.
92 Bekker and Coertze *Seymour's Customary Law in South Africa* 32-34.

2.3 The Apartheid Era and the Court System

2.3.1 Introduction

This research study gives an exposition of the structure of the court system under the apartheid dispensation. As Hoexter and Olivier[93] point out, the court system before apartheid was flawed and did not favour racial equality. The apartheid era judges took over the courts and were operating within a legal system that was already deeply flawed. During the apartheid era, apartheid was a legal order as indicated by Hoexter and Olivier.[94] Many laws were enacted by Parliament that imposed racial segregation on various aspects of life in South Africa. These laws were enforced by the courts.

The structure of the courts during the apartheid era was a continuation of the structure from colonial era. On 5 October 1960, the white citizens of the Union of South Africa voted in a referendum to end the British dominion and form a Republic. The new Constitution[95] replaced the Union with a Republic, and the Queen and the Governor-General with the State President elected by Parliament.[96] The new Constitution[97] came into operation in 1961, but retained the same constitutional structure. Section 94[98] of the Constitution gave provision that the judicial authority of the Republic shall be vested in a supreme court to be known as the Supreme Court of South Africa; consisting of an appellate division and such provincial and local divisions as may be prescribed by law.

Bloemfontein was the seat of the Appellate Division of the Supreme Court of South Africa. The administrative powers, functions and duties affecting the administration

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93 Hoexter and Olivier *The Judiciary in South Africa* 27.

94 Hoexter and Olivier *The Judiciary in South Africa* 26.

95 *Constitution of the Republic of South Africa Act* 32 of 1961.

96 *Ibid.*

97 *Ibid.*

98 S 94 of *Constitution of the Republic of South Africa Act* 32 of 1961:
1) The judicial authority of the Republic shall be vested in a Supreme Court to be known as the Supreme Court of South Africa and consisting of an Appellate Division and such provincial and local divisions as may be prescribed by law.
2) The said Supreme Court shall, subject to the provisions of section 59, have jurisdiction as provided in the Supreme Court Act, 1959.
3) Save as otherwise provided in the Supreme Court Act, 1959, Bloemfontein shall be the seat of the Appellate Division of the Supreme Court of South Africa.

of justice were under the control of the Minister of Justice. The Constitution[99] of the Republic of South Africa was amended several times until it was repealed by the 1983 Constitution[100] of the Republic of South Africa. The Constitution[101] remained the same, although some provisions were named differently. The judicial authority vested in the Supreme Court of South Africa did not change and the administrative functions, powers and duties remained under the control of the Minister of Justice as indicated above.

2.3.1.1 Structure of Courts under Apartheid

During the apartheid era, the courts in South Africa were structured into two main categories namely, the lower courts and the higher courts. These courts are discussed hereunder.

2.3.1.1.1 The Lower Courts

The lower courts comprised the Traditional Courts, Small Claims Court and the Magistrates' Courts. The magistracy was divided into district and regional Magistrates' Courts.

2.3.1.1.2 The Higher Courts

The higher courts consisted of the local and provincial divisions of the High Courts. Although the High Courts were not distributed according to the present South African provinces, there were higher courts throughout the country, with the Appellate Division situated in Bloemfontein as indicated above. This court dealt with appeal matters from the higher courts. The courts during the apartheid era could only interpret the law and enforce it. Parliamentary supremacy was the order of the day. This is evident by the provisions of section 59[102] of the Constitution of the Republic of South Africa 1961. The parliamentary supremacy as indicated above remained vital and no court of law could declare an act of Parliament invalid.

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99 *Constitution of the Republic of South Africa Act* 32 of 1961.
100 *Constitution of the Republic of South Africa Act* 110 of 1983.
101 *Ibid.*
102 S 59 of the *Constitution of the Republic of South Africa Act* 32 of 1961.

2.4 Conclusion

This chapter elaborated on the history of the judiciary and how it transformed through the pre-colonial period, the Dutch and British colonisation and the apartheid era. The research study has shown how the courts and court procedure evolved during the abovementioned periods and the effects this evolution had on the administration of justice.

CHAPTER 3
AN ARENA OF THE NEW CONSTITUTIONAL SETTLEMENT

3.1 Introduction

This chapter seeks to elaborate upon the provisions brought about by the 1993 and 1996 constitutional dispensation that laid the foundation for South Africa to become a democratic constitutional state. The interim and final Constitutions[103] provided for the independence of the courts and the creation of the Constitutional Court as the highest court in South Africa. The final Constitution[104] eventually brought about other courts that never existed before, including the courts such as the Equality Courts in the main stream of courts that existed before 1993. The South African court system changed in a number of ways after 1993, and this has had an impact on the judiciary.

3.2 Background

The South African government led by the National Party, whose President was F W de Klerk,[105] released political prisoners Nelson Mandela[106] and others unconditionally in 1990, paving the way to a new democratic dispensation. One of the significant innovations brought by F W de Klerk was the preparedness to consider negotiations as an alternative. In his opening address to Parliament, De Klerk made a dramatic move announcing the unbanning of the African National Congress,[107] Pan African Congress,[108] the South African Communist Party[109] and other political parties. The release of political prisoners such as Nelson Mandela and the unbanning of the political parties as indicated above warranted a new settlement

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103 *Constitution of the Republic of South Africa* Act 200 of 1993.
Constitution of the Republic of South Africa, 1996.

104 *Constitution of the Republic of South Africa*, 1996.

105 FW de Klerk is the seven and last State President of the apartheid-era in South Africa, serving from 1989-1994.

106 Nelson Mandela is the first democratic elected President of South Africa (1994–1999) affectionately known as Madiba.

107 African National Congress is the ruling political party in the Republic of South Africa.

108 Pan African Congress Party is a political party in the Republic of South Africa.

109 South African Communist Party is a political party in the Republic of South Africa.

based on political negotiations to craft a new South Africa.[110] In November 1991, twenty political parties assembled in Johannesburg to form an organisation for the multiparty conference. The multiparty conference was called Convention for a Democratic South Africa[111] and every party would be represented by 12 delegates. In December 1991 Convention for a Democratic South Africa[112] began its deliberations at the World Trade Centre near Johannesburg Airport.[113] During the year 1992 the African National Congress withdrew from the negotiations in protest and demanded full investigation into the causes of violence that was rampant during that period.

The party demanded a check on the activities of the police and security forces. In 1993 a new forum was established at Kempton Park.[114] Despite the new forum, Chief Buthelezi,[115] the leader of the Inkatha Freedom Party, refused to attend the Kempton Park negotiations. The other main players proceeded to draw up an interim Constitution.[116]

3.2.1 1993 Constitutional Settlement

3.2.1.1 The Interim Constitutional Provisions

As has been pointed out above, the South African government and existing political parties started negotiations in 1992 to bring about a new constitutional dispensation.[117] It had to find a bridge between the past of a deeply divided society and a future dispensation which would recognise human rights, democracy and peaceful co-existence of all South Africans. This can be seen from the preamble of the interim Constitution[118] of the Republic of South Africa, that is, what the

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110 Khunou *A Legal History of Traditional Leadership in South Africa, Botswana and Lesotho* 184-196.
111 CODESA – formation of a multi-party negotiation process.
112 *Ibid.*
113 Currently known as O R Tambo Airport.
114 Khunou *A Legal History of Traditional Leadership in South Africa, Botswana and Lesotho* 311-317.
115 Chief Mangosuthu Buthelezi is the leader of the Inkata Freedom Party.
116 Khunou *A Legal History of Traditional Leadership in South Africa, Botswana and Lesotho* 311-317.
117 Currie and De Waal *The New Constitutional and Administrative Law* 63.
118 *Constitution of the Republic of South Africa* Act 200 of 1993.

negotiators intended to achieve. There was an acknowledgment of South Africa's divided past, the result of policies of separate development under apartheid, and agreement that there should be a new complete order recognising equality between men and women and equality of all racial groups in South Africa. Every person in South Africa would enjoy and exercise equal rights and freedom. That necessitated a new constitutional order.[119] The major provision that was adopted, amongst others, was the supremacy of the Constitution[120] as the supreme law of the Republic of South Africa versus parliamentary supremacy as indicated in the preceding chapter. The Constitution[121] of the Republic of South Africa was then the supreme law and any law or act inconsistent with its provisions should, unless otherwise expressly stated or by necessary implication in the Constitution,[122] be of no force and effect to the extent of the inconsistency.

Another major provision was the creation of the President of the Constitutional Court according to section 97[123] of the interim Constitution of the Republic of South Africa. The President of the Constitutional Court would be the head of the newly created

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119 Preamble of the *Constitution of the Republic of South Africa* Act 200 of 1993:
In humble submission to Almighty God,
We, the people of South Africa declare that –
Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;
And whereas in order to secure the achievement of this goal, elected representatives of all people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;
And whereas it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution.

120 S 4 *of the Constitution of the Republic of South Africa* Act 200 of 1993:
1) This Constitution shall be supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.
2) This Constitution shall bid all legislative, executive and judicial organs of state at all levels of government.

121 *Constitution of the Republic of South Africa Act* 200 of 1993.

122 *Ibid.*

123 S 97 *of the Constitution of the Republic of South Africa Act* 200 of 1993:
1) There shall be a Chief Justice of the Supreme Court of South Africa, who shall, subject to section 104, be appointed by the President in consultation with the Cabinet and after consultation with the Judicial Service Commission.
2) a) There shall be a President of the Constitutional Court, who shall, subject to section 99, be appointed by the President in consultation with the Cabinet and after consultation with the Chief Justice.
b) Unless the new constitutional text provides otherwise, the President of the Constitutional Court shall hold office for a non-renewable period of seven years.

Constitutional Court, which was not there during the apartheid era. The Constitutional Court would have jurisdiction on all constitutional matters in the Republic of South Africa. The judicial authority, according to section 96,[124] was vested with the courts established by the Constitution and any other law with its independence guaranteed. The Constitutional Court and its jurisdiction were then created by section 98.[125] The creation of the Constitutional Court was a milestone

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124 S 96 *of the Constitution of the Republic of South Africa* Act 200 of 1993:

1) The judicial authority of the Republic shall vest in the courts established by this Constitution and any other law.
2) The judiciary shall be independent, impartial and subject only to this Constitution and the law.
3) No person and no organ of state shall interfere with judicial officers in the performance of their functions.

125 S 98 *of the Constitution of the Republic of South Africa Act* 200 of 1993:

1) There shall be a Constitutional Court consisting of a President and 10 other judges appointed in terms of section 99.
2) The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matter relating to the interpretation, protection and enforcement of the provisions of this Constitution, including –
   a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;
   b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;
   c) any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;
   d) any dispute over the constitutionality of any bill before Parliament or a provincial legislature, subject to subsection (9);
   e) any dispute of a constitutional nature between organs of state at any level of government;
   f) the determination of questions whether any matter falls within its jurisdiction; and
   g) the determination of any other matters as may be entrusted to it by this Constitution or any other law.
3) The Constitutional Court shall be the only court having jurisdiction over a matter referred to in subsection (2), save where otherwise provided in section 101 (3) and (6) and 103 (1) and in an Act of Parliament.
4) A decision of the Constitutional Court shall bind all persons and all legislative, executive and judicial organs of state.
5) In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.
6) Unless the Constitutional Court in the interest of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof –
   a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
   b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.
7) In the event of the Constitutional Court declaring an executive or administrative act or conduct or threatened executive or administrative act or conduct of an organ of state to

moving from parliamentary supremacy to the constitutional supremacy as demonstrated before. The interim Constitution[126] was an interim measure pending an elected constitutional assembly drawing up a final Constitution.[127] However, the 1993 constitutional provisions were enforced and regarded valid and legitimate.

3.2.2 1996 Constitutional Dispensation

The final Constitution[128] of the Republic of South Africa came into being in 1996. As indicated in the interim Constitution,[129] an elected constitutional assembly was tasked with the duty of drawing up a final Constitution.[130] The Constitution[131] was adopted by the Constitutional Assembly (National Assembly and Senate) sitting jointly with a two-third majority. The Constitutional Court had to certify that it had complied with the constitutional principles contained in schedule 4[132] of the interim

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be unconstitutional, it may order the relevant organ of state to refrain from such act of conduct, or, subject to such conditions and within such time as may be specified by it, to correct such act or conduct in accordance with this Constitution.

8) The Constitutional Court may in respect of the proceedings before it make such order as to costs as it may deem just and equitable in the circumstances.
9) The Constitutional Court shall exercise jurisdiction in any dispute referred to in subsection (2) (d) only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, who shall make such a request to the Court upon receipt of a petition by at least one-third of all the members of the National Assembly, the Senate or such provincial legislature, as the case may be, requiring him or her to do so.

126 *Constitution of the Republic of South Africa Act* 200 of 1993.
127 *Constitution of the Republic of South Africa*, 1996.
128 *Ibid.*
129 *Constitution of the Republic of South Africa Act* 200 of 1993.
130 *Constitution of the Republic of South Africa*, 1996.
131 *Ibid.*
132 Schedule 4 *of the Constitution of the Republic of South Africa Act* 200 of 1993:

I. The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of races.
II. Everyone shall enjoy universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of the this Constitution.
III. The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.
IV. The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.
V. The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

Constitution. Schedule 4[133] of the Constitution elaborates that the Constitution[134] of the Republic of South Africa will provide for the establishment of a sovereign state with a democratic system of government upholding racial and gender equality where everyone shall enjoy fundamental rights, freedom and civil liberties. The drafters of the final Constitution[135] adopted the provisions from the interim Constitution[136] with some modifications. The Bill of Rights, which is entrenched in the Constitution,[137] played a centre stage with regard to the final Constitution.[138] It was also noticed in the preamble of the Constitution[139] that the team that drafted it laid emphasis on the equality of all people, the redress of the past injustices and the rule of law.

The people of South Africa, through freely elected representatives, adopted the final Constitution[140] on 8 May 1996. They pledged that:

> We, the people of South Africa,
> Recognise the injustices of our past;
> Honour those who suffered for justice and freedom in our land;
> Respect those who have worked to build and develop our country; and
> Believe that South Africa belongs to all who live in it, united in our diversity.
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –
>
> > Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> > Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> > Improve the quality of life of all citizens and free the potential of each person; and

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VI. There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness,

VII. The judiciary shall be appropriately qualified, independent and impartial and shall have power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

133 Schedule 4 *of the Constitution of the Republic of South Africa*, 1996.

134 *Constitution of the Republic of South Africa,* 1996.

135 *Ibid.*

136 *Constitution of the Republic of South Africa* Act 200 of 1993.

137 *Constitution of the Republic of South Africa,* 1996.

138 *Ibid.*

139 Preamble *of the Constitution of the Republic of South Africa*, 1996.

140 *Constitution of the Republic of South Africa,* 1996.

> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.[141]

The administration of justice was catered for in Chapter 8[142] of the Constitution, with provisions focusing on the courts and the administration of justice. These provisions are the culmination of the evolution of the courts dating back from the pre-colonial era. The Constitution[143] made full provision as to how the courts should function and expressly guarantees their independence that should not be interfered with. Section 165[144] of the Constitution makes a clear and unambiguous mention that the judicial authority is vested in the courts. Such courts are independent subject to the Constitution[145] and the law, and must apply the law impartially without fear, favour or prejudice.

In a similar way to the interim Constitution,[146] the office of Chief Justice has been provided according to section 174 (3).[147] The final Constitution[148] became the final supreme law of the Republic of South Africa. As was demonstrated in the preceding chapter, the constitutional supremacy replaced the parliamentary supremacy of the apartheid era. Chapter 1[149] of the Constitution expressly states the supremacy of the Constitution in section 2[150] as follows:

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141 *Constitution of the Republic of South Africa,* 1996.

142 Chapter 8 *of the Constitution of the Republic of South Africa*, 1996.

143 *Constitution of the Republic of South Africa,* 1996.

144 S 165 *of the Constitution of the Republic of South Africa*, 1996:
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.

145 *Constitution of the Republic of South Africa*, 1996.

146 *Constitution of the Republic of South Africa Act* 200 of 1993.

147 S 174 (3) of the *Constitution of the Republic of South Africa*, 1996:
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 President and Deputy President of the Constitutional Court and, after consulting the Judicial Service Commission, appoints the Chief Justice and Deputy Chief Justice.

148 *Constitution of the Republic of South Africa,* 1996.

149 Chapter 1 *of the Constitution of the Republic of South Africa,* 1996.

150 S 2 *of the Constitution of the Republic of South Africa*, 1996.

> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[151]

Despite the provision that the Constitution[152] is the supreme law of the republic, there is also clear emphasis on the separation of powers of the three arms of government being the judiciary, executive and the legislature. Section 165[153] of the Constitution brought about the independence of the judiciary as compared to the times of apartheid era. The independence of the judiciary is to be respected and not to be interfered with.

As indicated in section 165 (4)[154] of the Constitution, organs of state, through legislative measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. The Constitution[155] goes further to define the organs of state in section 239[156] of the Constitution, which are not to interfere with the functioning of these courts. These organs of state include the department of state or administration in the national, provincial and local sphere of government.

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151 S 2 *of the Constitution of the Republic of South Africa*, 1996.

152 *Constitution of the Republic of South Africa,* 1996.

153 S 165 of the *Constitution of the Republic of South Africa*, 1996.

154 S 165 (4) *of the Constitution of the Republic of South Africa*, 1996.

155 Constitution of the Republic of South Africa, 1996.

156 S 239 *of the Constitution of the Republic of South Africa*, 1996:
In the Constitution, unless the context indicates otherwise –
"national legislation" includes –
a) subordinate legislation made in terms of an Act of Parliament; and
b) legislation that was in force when the Constitution took effect and that it is administered by the national government;
'organ of state' means –
a) any department of state or administration in the national, provincial or local sphere of government; or
b) any other functionary or institution
i. exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
ii. exercising a public power or performing a public function in terms of any legislation,
but does not include a court or a judicial officer;
'provincial legislation' includes –
a) subordinate legislation made in terms of a provincial Act; and
b) legislation that was in force when the Constitution took effect and that is administered by a provincial government.

3.3 Courts' Structure under the Constitutional Dispensation

During this period the structure of the courts changed with the introduction of other courts that did not exist during the apartheid era. The court system comprises the lower courts and the High Courts.

3.3.1 The Lower Courts

The lower courts in South Africa carry the bulk of cases. They are divided into the following categories:

3.3.1.1 Courts of Traditional Leaders

These courts were established by the Black Administration Act,[157] authorising the chief or headman to adjudicate on matters involving civil claims in accordance with customary law and criminal matters. Parties to a dispute may choose to appear before the courts of traditional leaders or the Magistrates' Courts. Most of the systems of Traditional Courts were abolished in 1986, but the traditional courts created by section 20[158] of the Black Administration Act were retained. In terms of

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157 *Black Administration Act* 38 of 1927.

158 S 20 *of the Black Administration Act* 38 of 1927:

1) The Minister may –
   a) by writing under his hand confer upon any Black chief or headman jurisdiction to try and punish any Black who has committed, in the area under the control of the chief or headman concerned –
      i. any offence at common law or under Black law and custom other than an offence referred to in the Third Schedule of this Act; and
      ii. any statutory offence other than an offence referred to in the Third Schedule to this Act, specified by the Minister:

   Provided that if any such offence has been committed by two or more persons any of whom is not a Black, or in relation to a person who is not a Black other property, moveable or immovable, held in trust for a Black tribe or a community or aggregation of Blacks or a Black, such offence may not be tried by a Black chief or headman:
   b) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (a), by writing under his hand confer upon a deputy of such chief jurisdiction to try and punish any Black who has committed, in the area under the control of such chief, any offence which may be tried by such chief.
2) The procedure at any trial by chief, headman or chief's deputy under this section, the punishment, the manner of execution of any sentence imposed and subject to the provisions of paragraph (b) of subsection (1) of section nine of the Black Authorities Act, 1951 (Act 68 of 1951), the appropriation of fines shall, save in so far as the Minister may prescribe otherwise by regulation made under subsection (9), be in accordance with Black law and custom: Provided that in the exercise of this jurisdiction conferred upon him or her under subsection (1) a chief, headman or chief's deputy may not inflict any

the jurisdiction of these courts, it has been recommended by the South African Law Commission that it be carefully limited and be made optional in criminal matters.[159] Traditional Courts have jurisdiction over offences under common law or indigenous law and custom. According to section 20[160] of the Black Administration Act, the Minister may, in writing confer upon a black chief or headman jurisdiction to try criminal cases and punish any black person in the area under the control of such chief or headman concerned.

The offences that the black chief or headman has jurisdiction to preside over include offence at common law or under black law and custom other than offences referred to in the Third Schedule[161] to the Black Administration Act and any statutory offence

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punishment involving death, mutilation, grievous bodily harm or imprisonment or impose a fine in excess of R100 or two head of large stock or ten head of small stock or impose corporal punishment.

3) Any jurisdiction conferred upon a chief, headmen or chief's deputy under any provision of this Act before the date of commencement of the Black Administration Amendment Act, 1955, and which at that date has not been revoked under any such provision, shall be deemed to have been conferred under and subject to the provisions of this section.
4) The Minister may at any time revoke the jurisdiction conferred upon a chief, headman or chief's deputy under any provision of this Act before or after the commencement of the Black Administration Amendment Act, 1955.
5) a) If a Black chief, headman or chief's deputy fails to recover from a person any fine imposed upon him in terms of subsection (2), or any portion of such fine, he may arrest such person or cause him to be arrested by his messengers, and shall within 48 hours after his arrest bring or cause him to be brought before the magistrates' court which has jurisdiction in the district in which the trial took place.
   b) A magistrate before whom any person is brought under paragraph (a) may, upon being satisfied that the fine was duly and lawfully imposed and is still unpaid either wholly or in part, order such person to pay the fine or the unpaid portion thereof forthwith and, if such person fails to comply with such order, sentence him to imprisonment for a period not exceeding three months.
   c) The magistrate shall issue in respect of any person sentenced to imprisonment in terms of this subsection a warrant for his detention in prison.
6) Any person who has been convicted by a Black chief, headman or chief's deputy under this section may in the manner and within the period prescribed by regulation made under subsection (9), appeal against his conviction and against any sentence which may have been imposed upon him, to the magistrate's court which has jurisdiction in the district in which the trial in question took place.

159 Du Bois *et al Wille's Principles of South African Law* 121-130.

160 *Black Administration Act* 38 of 1927.

161 *The Third Schedule of the Black Administration Act* 38 of 1927:
Offences which may not be tried by a chief, headman or chief's deputy under subsection (1) of section twenty:
Treason; *Crimen laesae majestatis;* Public violence; Sedition; Murder; Culpable homicide; Rape; Robbery; Assault with intent to do grievous bodily harm; Assault with intent to commit murder, rape or robbery; Indecent assault; Arson; Bigamy; Crimen injuria; Abortion; Adduction; Offences under any law relation to stock theft; Sodomy; Bestiality; Any offence referred to in Part 1 to 4, section 17 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; Breaking or entering any premises with intent to commit an offence either at common law or

other than an offence referred to in the Third Schedule[162] to the Act, specified by the Minister if any has been committed by two or more persons, any of whom is not black, or in relation to a person who is not black or property belonging to any person who is not black other than property, movable or immovable, held in trust for a black tribe or a community or aggregation of blacks or a black, such offence may not be tried by a black chief or headman. Upon request by any chief on whom a jurisdiction has been conferred as indicated above, the minster by writing under his hand, can confer upon a deputy of such a chief the jurisdiction to try and punish any black who has committed any offence in the area under the control of such chief.

The chief, headman or chief's deputy may not inflict any punishment involving death, mutilation, grievous bodily harm, imprisonment or impose a fine in excess of R100-00 or two head of large stock or ten head of small stock or corporal punishment. Appeals are heard in the Magistrate's Courts. These courts do enjoy considerable legitimacy in rural areas where they are significant dispute-resolution institutions. The procedure is informal and public input is welcome and their legal representation is not allowed. In recognition of the traditional courts, there is currently a Bill being considered before Parliament to affirm the recognition of the traditional justice system and its values based on restorative justice and reconciliation. The objective of the Bill, as it currently stands, is to promote social cohesion, co-existence, peace and harmony in traditional communities.

It also seeks to enhance access to justice by providing a speedier, less formal and less expensive resolution of dispute while promoting and preserving traditions, customs and cultural practices that promote nation building in line with constitutional values. The courts will have jurisdiction on certain civil and criminal disputes as provided in the Bill, excluding matters of a constitutional nature, question of nullity, divorce or separation arising out of marriage, matters resulting in custody and

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in contravention of any statute; Receiving any stolen property knowing that it has been stolen; Fraud; Forgery or uttering a forged document knowing it to be forged; Any offence under any law relating to illicit possession of or dealing in any precious metals or precious stones; Any office under nay law relation to conveyance, possession or supply of habit forming drugs or intoxicating liquor; Any office relating to the coinage; Perjury; Pretended witchcraft; Faction fighting; Man stealing; Incest; Extortion; Defeating or obstructing the course of justice; Any conspiracy, incitement or attempt to commit any of the above-mentioned offence.

161 *Ibid.*

162 *Ibid.*

guardianship of minor children, validity or effect or interpretation of a will, any matter arising out of customary law and custom where the claim or value of the property in dispute exceeds the amount determined by the Minister from time to time by notice in the *Government Gazette,* or any matter arising out of customary law and custom relating to any category of property determined by the minister from time to time by notice in the *Government Gazette*.

The order of the Traditional Court will be final but subject to procedural review. Appeal from the Traditional Courts will rest with the Magistrate's Court. The traditional leader presides over the Traditional Courts that have intimate knowledge of the local customs and indigenous law system, the parties and the circumstances under which they live.[163] The Traditional Courts Bill was introduced to the National Assembly in 2008 and was published in the *Government Gazette* on 13 December 2011.

3.3.1.2 Small Claims Courts

Small Claims Courts were established by the Small Claims Court Act.[164] These courts have jurisdiction over small amounts of money to afford individuals affordable and speedy justice. Court proceedings are simple and no legal representation is allowed. The presiding officer in these courts is a Commissioner and court sessions are held after working hours. The Commissioner's decision is final and parties cannot appeal to the High Court, although the matter is reviewable on limited grounds.[165]

These courts have jurisdiction to hear civil matters which may not exceed an amount of R15 000-00. The courts have no jurisdiction in criminal matters. The procedure followed is more inquisitorial and the Commissioners play a more active role in the proceedings than judicial officers in other courts.[166] Only natural persons are

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163 Kleyn and Viljoen *Beginner's Guide for Law Students* 193.
164 *Small Claims Court Act* 61 of 1984.
165 Du Bois *et al Wille's Principles of South African Law* 121-130.
166 Du Bois *et al Wille's Principles of South African Law* 138.
Pete *et al Civil Procedure: A Practical Guide* 37.

allowed to sue. However, juristic persons like companies and close corporations may be sued. The state may not be sued in the Small Claims Courts.[167]

3.3.1.3 Children's Courts

These courts are established in terms section 42[168] of the Children's Court Act which provides that every Magistrate's Court is a Children's Court for its area of jurisdiction and every magistrate is a commissioner of child welfare. The court is intended to determine whether a child is in need of care. An appeal from the Children's Court may be to a High Court with jurisdiction.[169]

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167 Pete *et al Civil Procedure: A Practical Guide* 37.

168 S 42 *of the Children's Court Act* 38 of 2005:

1) For the purposes of this Act, every magistrates' court, as defined in the Magistrates' Courts Act, 1944, shall be a children's court and shall have jurisdiction on any matter arising from the application of this Act for the area of its jurisdiction.
2) Every magistrate shall be a presiding officer of a children's court and every additional magistrate shall be an assistant presiding officer of a children's court for the district of which he is magistrate, additional magistrate or assistant magistrate.
3) For the purposes of this Act, the Minister for Justice and Constitutional Development may, after consultation with the head of an administrative region defined in section 1 of the Magistrates' Courts Act, 1944, appoint a magistrate or an additional magistrate as a dedicated presiding officer of the children's court, within existing resources.
4) The presiding officer of the children's court is subject to the administrative control of the head of an administrative region, defined in section 1 of the Magistrates' Courts Act, 1944.
5) The presiding officer of the children's court must perform such functions as may be assigned to him or her under this Act or any other law.
6) For purposes of giving full effect to this Act, magistrates or additional magistrates may be designated as presiding officers for one or more children's courts.
7) The Minister for Justice and Constitutional Development may, after consultation with the head of an administrative region, by notice in the *Gazette* define the area of jurisdiction of each children's court and increase or reduce the area of jurisdiction of each children's court in the relevant administrative region.
8) The children's court hearings must, as far as is practicable, be held in a room which-
   a) is furnished and designed in a manner aimed at putting children at ease;
   b) is conducive to the informality of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court;
   c) is not ordinarily used for the adjudication of criminal trials; and
   d) is accessible to disabled persons and persons with special needs.
9) A children's court sits at a place within the district or province designated by the Minister for Justice and Constitutional Development as a magistrates' court.
10) The publication of a notice referred to in subsection (7) does not affect proceedings which have been instituted but not yet completed at the time of such publication.

169 Pete *et al Civil Procedure: A Practical Guide* 441.

3.3.1.4 Maintenance Courts

Maintenance Courts are established in terms of the Maintenance Act.[170] Every Magistrate's Court is a maintenance court within its area of jurisdiction. Maintenance inquiries are held to determine various matters relating to maintenance and the court will grant the order which has the effect of a civil judgement. An appeal lies with the High Court having jurisdiction.[171] When an order to pay maintenance is made by the court, the person against whom the order has been made must comply with the court order. Failure to do so can amount to a criminal offence.

Every public prosecutor deemed to be the maintenance prosecutor will then prosecute the maintenance matters in terms of section 31[172] of Act. The maintenance officer assists the parties in a maintenance dispute to find a solution. If none is found, the matter is taken to court as an inquiry and the presiding officer will then give a maintenance order. There are also maintenance investigators who assist in investigating matters relating to maintenance. The Magistrate's Court may, after considering evidence, make the following order where no maintenance order is in force:

- Order the person who has been proved to be legally liable to maintain someone, to pay money towards that person's maintenance;
- Stipulate the manner, duration and times of payment;
- Order payment to be made to a person, officer, organisation or institution, or into an account at a financial institution. The court may order that an arrangement be made with any financial institution for payment by way of a stop order or similar facility at that institution;
- Include an order for payment of medical expenses, and an order that the person to be maintained be registered as a dependant on the liable person's medical scheme;

170 *Maintenance Act* 99 of 1998.
171 Pete *et al Civil Procedure: A Practical Guide* 441.
172 S 31 *of the Maintenance Act* 99 of 1998.
Van Zyl 2000 *Handbook of the South African Law of Maintenance* 108-109.

- If the person to be maintained is a child, order the liable person to pay to the child's mother an amount, together with interest on that amount, which in the opinion of the maintenance court the mother is entitled to recover for expenses in connection with the birth of the child and for her expenditure on the maintenance of the child from the date of the child's birth to the date of the enquiry.[173]

The Magistrate's Court may, after considering evidence, make the following order where a maintenance order is in force:

- Make an order replacing the existing order; or
- Discharge the maintenance order; or
- Make no order.[174]

3.3.1.5 District Magistrates' Courts

District Magistrates' Courts are established by the Magistrates' Court Act[175] and exist in each magisterial district as determined by the Minister. These courts are almost always based in major centres or towns in a district, although in some instances there are detached courts known as Branch Courts. Branch Courts have sessions periodically within the other parts of the same district. These courts have jurisdiction over criminal and civil matters. Such jurisdiction is limited according to the subject matter and magnitude of orders they are permitted to impose. The jurisdiction of these courts changes from time to time by means of a statute.[176] Wille[177] goes further to indicate that in criminal matters the district magistrate's court lacks jurisdiction on matters such as treason, murder and rape. In criminal matters the district magistrates' court's jurisdiction is limited to the following sentences:

Periodical imprisonment, committal to a treatment centre, a fine not exceeding the amount determined by the Minister from time to time by notice in the *Government Gazette*, correctional supervision; imprisonment from which the person may be

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173 Van Zyl 2000 *Handbook of the South African Law of Maintenance* 81.
174 *Ibid.*
175 *Magistrates' Court Act* 32 of 1944.
176 Du Bois *et al Wille's Principles of South African Law* 121-130.
177 Du Bois *et al Wille's Principles of South African Law* 138.

placed under correctional supervision in terms of section 276[178] of the Criminal Procedure Act, unless the contrary is provided by the Magistrates' Court Act[179] or any other Act. In civil matters, the district Magistrate's Court's jurisdiction is limited to cases in which the claim value does not exceed R100 000-00 where the action arises from a liquid document or credit agreement.[180] The parties to a dispute, however, may give consent to a higher jurisdiction. According to section 170[181] of the Constitution, the lower courts, district- and regional Magistrate's Courts, have no jurisdiction to enquire into or make a ruling on the constitutionality of any legislation or conduct of the President. These courts also do not have jurisdiction to hear and decide a matter on appeal or review.[182] The district Magistrates' Courts are headed by a chief magistrate in a province.

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178 Joubert *(ed) Criminal Procedure Handbook* (Juta Claremont) 44.
S 276 of the *Criminal Procedure Act* 51 of 1977:

1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely
   b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B (1);
   c) periodical imprisonment;
   d) declaration as an habitual criminal;
   e) committal to any institution established by law;
   f) a fine;
   h) correctional supervision;
   i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.
2) Save as is otherwise expressly provided by this Act, no provision thereof shall be construed-
   a) as authorizing any court to impose any sentence other than or any sentence in excess of the sentence which that court may impose in respect of any offence; or
   b) as derogating from any authority specially conferred upon any court by any law to impose any other punishment or to impose any forfeiture in addition to any other punishment.
3) Notwithstanding anything to the contrary in any law contained, other than the Criminal Law Amendment Act, 1997 (Act 105 of 1997), the provisions of subsection (1) shall not be construed as prohibiting the court-
   a) from imposing imprisonment together with correctional supervision; or
   b) from imposing the punishment referred to in subsection (1) *(h)* or *(i)* in respect of any offence, whether under the common law or a statutory provision, irrespective of whether the law in question provides for such or any other punishment: Provided that any punishment contemplated in this paragraph may not be imposed in any case where the court is obliged to impose a sentence contemplated in section 51 (1) or (2), read with section 52, of the Criminal Law Amendment Act, 1997.

179 *Magistrates' Court Act* 32 of 1944.

180 Du Bois *et al Wille's Principles of South African Law.*

181 S 170 *of the Constitution of the Republic of South Africa*, 1996.

182 Joubert *(ed) Criminal Procedure Handbook* (Juta Claremont) 44.

3.3.1.6 Regional Magistrates' Courts

The regional Magistrates' Courts established in terms section 2[183] of the Magistrates' Court Act, have jurisdiction in criminal and civil matters. Each regional Magistrates' Court has jurisdiction over a territory in which there are several magisterial districts. These courts have a higher jurisdiction than the district Magistrates' Courts and they are headed by the regional court president. The regional Magistrates' Courts have jurisdiction to try all matters like murder and rape, but excluding treason.[184] They are capable of imposing a life term of imprisonment in respect of certain statutes like section 51[185] of the Criminal Law Amendment Act, in respect of offences in schedule 2 part 1, if no substantial and compelling circumstances exist to justify a lesser sentence.

It can also impose the following sentences:

- Imprisonment not exceeding a period of 15 years;
- Periodical imprisonment;
- Declaration as a habitual criminal;
- Committal to a treatment centre;
- Correctional supervision;
- Committal to a treatment centre;
- Correctional supervision;
- Imprisonment, from which the person may be placed under correctional supervision; or
- A fine not exceeding the amount determined by the minster from time to time by notice in the *Government Gazette*.[186]

The magistrates who preside over the regional Magistrates' Courts are much more senior in rank as compared to those who preside at the district Magistrates'

183 S 2 of *Magistrates' Court Act* 32 of 1944.
184 Joubert *(ed) Criminal Procedure Handbook* (Juta Claremont) 37.
185 S 51 *of the Criminal Law Amendment Act* 105 of 1997.
186 Joubert *(ed) Criminal Procedure Handbook* (Juta Claremont) 44.

Courts. They are required to possess a higher legal qualification, which is the LLB[187] degree. Currently the regional Magistrates' Courts have jurisdiction over divorce matters.[188] Similarly to the district Magistrates' Courts, the regional Magistrates' Courts have no jurisdiction to hear and decide a matter on appeal or review.[189]

3.3.2 The Superior Courts

The hierarchy of the Superior Courts changed from the period of apartheid to the new constitutional dispensation with the creation of the Constitutional Court and others. The hierarchy of superior courts is as follows:

3.3.2.1 The High Court

There are provincial and local divisions of High Courts in many cities and towns in South Africa. These courts serve as courts of first instance, appeal courts on matters adjudicated at the lower courts and reviewing courts. They are courts of general jurisdiction. They are constituted by general judges. The Superior Courts Act,[190] which came into effect on 12 August 2013, re-aligned the High Courts with the existing provinces.[191] These changes brought about a High Court in every province, although there are still local High Court divisions in some areas like the South Gauteng local division based in Johannesburg.

The divisions of the High Court may impose the following sentences:

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187 Bachelor of Laws degree which can be conferred to law students in South Africa.

188 Du Bois *et al Wille's Principles of South African Law.*

189 Joubert *(ed) Criminal Procedure Handbook* (Juta Claremont) 37.

190 *Superior Courts Act* 10 of 2013.

191 The High Court of South Africa consists of the following divisions:
- Eastern Cape Division, with its main seat in Grahamstown.
- Free State Division, with its main seat in Bloemfontein.
- Gauteng Division, with its main seat in Pretoria.
- KwaZulu-Natal Division, with its main seat in Pietermaritzburg.
- Limpopo Division, with its main seat in Polokwane.
- Mpumalanga Division, with its main seat in Nelspruit.
- Northern Cape Division, with its main seat in Kimberley.
- North West Division, with its main seat in Mahikeng.
- Western Cape Division, with its main seat in Cape Town.

- Imprisonment, including imprisonment for life;
- Periodical imprisonment;
- Declaration as a habitual criminal;
- Committal to a treatment centre;
- A fine;
- Correctional supervision; or
- Imprisonment, from which the person may be placed under correctional supervision.[192]

The division of the High Court has jurisdiction over persons residing or present within its area of jurisdiction and the power to hear and determine appeals from the lower courts within its area of jurisdiction and to review the proceedings of all lower courts.[193] The appellant who wishes to appeal against the judgement or order of the High Court must request special leave from the court of appeal in terms section 16 (1) (b)[194] read with section 17 (3)[195] of the Superior Courts Act. The Superior Courts Act[196] made provision for the establishment of more local seats for a division in addition to the main seat. Each division of the High Court consists of the Judge President and one or more Deputy Judge Presidents. It also comprises other judges as may be determined in accordance with the prescribed criteria and approved by the President.

3.3.2.2 Specialist Superior Courts

These courts are also authorised by the Constitution in section 166 (e).[197] They have the status similar to that of the High Court. The jurisdiction of these courts is

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192 Joubert *(ed) Criminal Procedure Handbook* (Juta Claremont) 43-44.

193 Joubert *(ed) Criminal Procedure Handbook* (Juta Claremont) 414.

194 S 16 (1) (b) *of the Superior Court Act* 10 of 2013:
Subject to section 15 (1), the Constitution and any other law-
b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal.

195 S 17 (3) *of the Superior Court Act* 10 of 2013:
An application for special leave to appeal under section 16 (1) *(b)* may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after the decision sought to be appealed against, or such longer period as may on good cause be allowed, and the provisions of subsection (2) *(c)* to *(f)* shall apply with the changes required by the context.

196 *Superior Courts Act* 10 of 2013.

197 S 166 (e) *of the Constitution of the Republic of South Africa*, 1996:

restricted by the statute that created them. They enjoy the same powers as that of the High Courts. These courts are constituted by the judges of the High Court appointed by the Judicial Service Commission.[198] Some of these courts are:[199]

- Equality Courts

These courts are created by the Promotion of Equality and Prevention of Discrimination Act.[200] The courts deal with matters from anyone who alleges a violation of his or her right to equality. The ordinary High Courts and / or the lower courts function as Equality Courts if the Minister has designated a judicial officer in such capacity. Experience, training and expertise in the field of human rights and equality are requirements for the Minister to make such a designation.[201]

- Labour Courts

The Labour Court is a court that has authority, inherent powers and standing equal to that of the High Court. Before the matter is brought before the Labour Court a person must have exhausted the processes created by the Labour Relations Act[202] with the objective to resolve conflict in the workplace through conciliation, mediation and arbitration. It is a specialised court system administered by the Department of Justice. Labour Court judges go through the same process of nomination and appointment as a High Court judges, although they must also be recommended by the National Economic Development and Labour Council.[203]

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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 or the Magistrates' Courts.

198 The South African Judicial Service Commission plays an important role in the appointment of judges and also advises the Country's national government on any matters relating to the judiciary and the administration of justice. It is a body established in the Constitution of South Africa "to advise the national government on any matter relating to the judiciary or the administration of justice" and for which separate legislation has been enacted.

199 Du Bois *et al Wille's Principles of South African Law* 121-130.

200 *Promotion of Equality and Prevention of Discrimination Act* 4 of 2000.

201 Kleyn and Viljoen *Beginner's Guide for Law Students* 192.

202 *Labour Relations Act* 66 of 1995.

203 Du Bois *et al Wille's Principles of South African Law* 127.

Wille[204] suggests that it is a tripartite institution called NEDLAC with representatives of the main stakeholders in labour relations, which are government, business and labour. The court has exclusive jurisdiction in labour matters. The Labour Court procedure is similar to that of a High Court but in a simplified and streamlined manner with active judicial involvement in a case management. The court consists of Judge President, Deputy Judge President both of whom must be High Court judges, and as many other judges as the President may consider necessary. Appeals from the Labour Court go to the Labour Appeal Court, which has exclusive appeal jurisdiction over final judgement orders of the Labour Court.[205]

- Electoral Court of South Africa

This court has the power to review the procedural fairness of any decision taken by the Independent Electoral Commission and established by the Electoral Commission Act.[206] It hears appeals on the correctness of any decision taken by the Independent Electoral Commission and also investigates allegations against members of the Independent Electoral Commission.

All the abovementioned courts have been guaranteed judicial independence in terms of section 165 (2)[207] of the Constitution, subject only to the Constitution and the law.

3.3.2.3 The Supreme Court of Appeal

The Supreme Court of Appeal is located in Bloemfontein and it is the highest court regarding all non-constitutional matters. It is exclusively an appellate court. Matters start at the High Court or any court with the status of a High Court. This court hears appeals on civil, criminal, administrative and constitutional matters. There is no right of appeal to this court. The High Court or the Supreme Court of Appeal should grant leave to appeal before appearance at this court. The Supreme Court of Appeal is headed by a President and the Deputy President. It is composed of other judges

204 Du Bois *et al Wille's Principles of South African Law* 127.
205 *Ibid.*
206 *Electoral Commission Act* 51 of 1996.
207 S 165 (2) *of the Constitution of the Republic of South Africa*, 1996:
The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

who are appointed by the President of the Republic of South Africa in consultation with the Judicial Service Commission. The decisions are made by the majority votes.[208]

3.3.2.4 The Constitutional Court

The Constitutional Court was created by section 167[209] of the Constitution. It is the highest court within the Republic of South Africa with its seat in Johannesburg. It has jurisdiction in respect of all constitutional matters and issues connected with decisions on constitutional matters. Its first appearance was created in section 98[210] of the interim Constitution. It commenced its first hearing in February 1995. Matters of a constitutional nature that are presided over at the High Court can be appealed to the Supreme Court of Appeal and the Constitutional Court must confirm the order thereof. Direct access to the Constitutional Court is allowed in exceptional circumstances and must be in the interest of justice according to section 167 (6) (a)[211] of the Constitution.[212]

Direct access to the Constitutional Court can also be granted by means of an appeal with the leave of the Constitutional Court against a decision on a constitutional matter (other than an order of constitutional invalidity in terms of section 172[213] of the

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208 Du Bois *et al Wille's Principles of South African Law* 121-130.

209 S 167 *of the Constitution of the Republic of South Africa*, 1996.

210 S 98 *of the Constitution of the Republic of South Africa Act* 200 of 1993.

211 S 167 (6) (a) *of the Constitution of the Republic of South Africa*, 1996.

212 Bekker *et al Criminal Procedure Handbook* 362.

213 S 172 *of the Constitution of the Republic of South Africa*, 1996:

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 High Court 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 a validity of that Act or conduct.
   c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

Constitution), that has been given by any court including the Supreme Court of Appeal.[214] Any person with *locus standi in judico* may approach the Constitutional Court for relief. This includes juristic persons in terms of sections 38[215] and 172[216] of the Constitution, with sufficient interest in the matter to be admitted as a party, if any right entrenched in Chapter 2 of the Constitution is infringed or threatened.[217] As stated previously, the Constitutional Court has the power to strike down any act by Parliament or provincial legislature and declare it null and void to the extent of the inconsistency with the Constitution in terms of section 172 (1).[218] The Constitutional Court also has exclusive jurisdiction over disputes between organs of state in the national and provincial sphere concerning the constitutional status, powers or functions of any of the organs of state.

The court is constituted by the Chief Justice, Deputy Chief Justice and nine other judges. The court functions largely as a court of appeal and therefore considers the record of the evidence heard in the court *a quo*. The decision is made based on the majority vote.[219] The Constitutional Court has the inherent power to develop the common law. The practice of the Constitutional Court to consider applications for leave to appeal is at conferences attended by at least eight justices, unless the majority of eight justices are of the opinion that there are no reasonable prospects of

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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.

214 Bekker *et al Criminal Procedure Handbook* 363.

215 S 38 *of the Constitution of the Republic of South Africa*, 1996:
Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
a) anyone acting in their own interest;
b) anyone acting on behalf of another person who cannot act in their own name;
c) anyone acting as a member of, or in the interest of, a group or class of persons;
d) anyone acting in the public interest; and
e) an association acting in the interest of its members.

216 S 172 of the *Constitution of the Republic of South Africa*, 1996.

217 Bekker *et al Criminal Procedure Handbook* 361.

218 S 172 (1) *of the Constitution of the Republic of South Africa*, 1996:
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.

219 Du Bois *et al Wille's Principles of South African Law* 121-130.

success consistent with the Constitution,[220] such applications for leave to appeal are not refused.[221]

3.3.2.5 The Right to Appeal

The right of appeal was regulated in terms of section 309 (4) (a)[222] of the Criminal Procedure Act. This section prohibited a person who has been convicted by a lower court of an offence and undergoing imprisonment for that or any other offence from prosecuting in person an appeal relating to such conviction without a judge's certificate that there are reasonable grounds for the appeal. In 1995 in the case of *S v Ntuli,*[223] the court declared that section 309 (4) (a)[224] of the Criminal Procedure Act was unconstitutional on the grounds that it was inconsistent with the rights guaranteed by section 8[225] of the Constitution.

In 1997 in the case of *Minister of Justice v Ntuli*[226] all convicted persons, regardless of whether such person or persons were legally represented, imprisoned or not had an unlimited or absolute right of appeal to a court of a higher instance against a decision or order of a lower court.[227]

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220 *Constitution of the Republic of South Africa*, 1996.

221 Bekker *et al Criminal Procedure Handbook* 364.

222 S 309 (4) (a) *of the Criminal Procedure Act* 51 of 1977.

223 S *v Ntuli* 1996 1 SA 1207 (CC); 1996 1 SACR 94; 1996 1 BCLR 141.

224 S 309 (4) (a) *of the Criminal Procedure Act* 51 of 1977.

225 S 8 *of the Constitution of the Republic of South Africa*, 1996:
1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
   a) in order to give effect to a right in the bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
   b) may develop rules of common law to limit the right, provided that the limitation is in accordance with section 36 (1).
4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

226 *Minister of Justice v Ntuli* 1997 2 SACR 19 (CC).

227 Bekker *et al Criminal Procedure Handbook* 354.

The Criminal Procedure Act[228] was then amended by Criminal Procedure Amendment Act[229] which came into operation on 28 May 1999. The right of appeal was then limited. The Department of Justice, when amending the Criminal Procedure Act,[230] cited the backlog in hearing appeals by the already overburdened High Courts as placing too heavy a burden on state funds, causing the infringement of constitutional rights and weakening the judicial system.[231] The Criminal Procedure Act[232] was amended and provided section 309B[233] and 309C[234] for the requirement for an appeal.

In the case of *S v Steyn*[235] the applicant and *amicus curiae* had been convicted of a serious offence and sentenced to substantial terms of imprisonment in separate proceedings in a regional court. They each sought leave to appeal from the regional court to the High Court in terms of section 309B[236] of the Criminal Procedure Act. Their applications were dismissed by the lower court and the petition of the Judge President of the High Court in terms of section 309C[237] of the Criminal Procedure Act was unsuccessful. The applicant was then granted direct access to the Constitutional Court to challenge the constitutionality of the provisions of sections 309B[238] and 309C[239] of the Act, in particular whether the abovementioned sections were inconsistent with section 35 (3) (o)[240] of the final Constitution.

The applicant submitted that since the amendment of the Criminal Procedure Act,[241] the right to appeal was now conditional upon the grant either by the magistrate or on the petition. The appellant further argued that an accused person convicted by a magistrate and thereafter refused leave to appeal by such magistrate, and whose

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228 *Criminal Procedure Act* 51 of 1977.
229 *Criminal Procedure Amendment Act* 76 of 1997.
230 *Criminal Procedure Act* 51 of 1977.
231 Bekker *et al Criminal Procedure Handbook* 355.
232 *Criminal Procedure Act* 51 of 1977.
233 S 309B *of the Criminal Procedure Act* 76 of 1997.
234 S 309C *of the Criminal Procedure Act* 51 of 1977.
235 *S v Steyn* 2001 1 SACR 25 (CC).
236 S 309B *of the Criminal Procedure Act* 51 of 1977.
237 S 309C *of the Criminal Procedure Act* 51 of 1977.
238 S 309B *of the Criminal Procedure Act* 51 of 1977.
239 S 309C *of the Criminal Procedure Act* 51 of 1977.
240 S 35 (3) (o) *of the Constitution of the Republic of South Africa*, 1996:
Every accused person has a right to a fair trial, which includes the right –
o) Of appeal to, or review by, a higher court.
241 *Criminal Procedure Act* 51 of 1977.

petition was subsequently refused by a High Court, had no access to the Supreme Court of Appeal, not even by way of petition to the Chief Justice. The court accordingly held that the attenuated appeal procedure in the leave and petition procedure contained in sections 309B[242] and 309C,[243] even if supplemented by an application for leave to appeal against a High Court's refusal of leave and a petition to the Chief Justice, constituted a limitation of the rights of appeal to or review by a higher court as entrenched in section 35 (3) (o)[244] of the Constitution.

The court declared that the abovementioned sections of the Criminal Procedure Act[245] are inconsistent with the Constitution and therefore that these sections are invalid. In 2003 the unlimited right of appeal from the lower court to a higher court was again restricted by the amendment of section 309[246] reintroducing sections 309B[247] and 309C[248] of the Criminal Procedure Act with certain amendments. The amendments included that certain juvenile offenders should enjoy an unlimited right of appeal from the lower courts to High Courts and from the High Courts to the Supreme Court of Appeal, and that convicted persons other than specially provided-for juvenile offenders, have to apply for leave to appeal from the courts that tried their cases originally.[249]

However, the unlimited right of appeal was the subject of dispute in a number of cases under the new constitutional dispensation. Bekker[250] made mention that it is trite law that no right is absolute and restrictions are set by the rights of others and by the legitimate needs of society. The acceptable limitation criteria of the rights entrenched in the Bill of Rights is measured against section 36[251] of the Constitution.[252]

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242 S 309B *of the Criminal Procedure Amendment Act* 76 of 1997.

243 S 309C *of the Criminal Procedure Amendment Act* 76 of 1997.

244 S 35 (3) (o) *of the Constitution of the Republic of South Africa*, 196:
Every accused person has a right to a fair trial, which includes the right –
o) Of appeal to, or review by, a higher court.

245 *Criminal Procedure Act* 51 of 1977.

246 S 309 *of the Criminal Procedure Amendment Act* 76 of 1997.

247 S 309B *of the Criminal Procedure Amendment Act* 76 of 1997.

248 S 309C *of the Criminal Procedure Amendment Act* 76 of 1997*Ibid.*

249 Bekker *et al Criminal Procedure Handbook* 355-356.

250 *Ibid.*

251 S 36 *of the Constitution of the Republic of South Africa*, 1996:
1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic

3.4 Conclusion

This chapter demonstrated the current court system in South Africa, the court hierarchy, the Constitution[253] and its functions. The chapter also demonstrated the role played by the interim Constitution[254] and the final Constitution[255] in shaping the court system in such a manner as to achieve the objectives set out in the Constitution[256] of the Republic of South Africa as the supreme law of the land.

A further undertaking on the upcoming chapters is to elaborate the non-judicial functions by judicial officers, legislative framework of the judiciary and showcase successes brought about by the transformation of the judiciary, as well as challenges that are still part of the judiciary and which hamper its full capacity to execute its mandate to achieve the intended constitutional objective.

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society based on human dignity, equality and freedom, taking into account all relevant factors, including –
a) the nature of the right;
b) the importance of the purpose of the limitation;
c) the nature and extent of the limitation;
d) the relation between the limitation and its purpose; and
e) less restrictive means to achieve the purpose'
2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

252 Bekker *et al Criminal Procedure Handbook.*
253 *Constitution of the Republic of South Africa,* 1996.
254 *Constitution of the Republic of South Africa Act* 200 of 1993.
255 *Constitution of the Republic of South Africa*, 1996.
256 *Ibid.*

CHAPTER 4
THE NON-CURIAL ROLE OF THE JUDICIARY

4.1 Introduction

The primary objective of this chapter is to discuss the role of active and non-active judges in non-judicial matters. It also demonstrates how the involvement of active judges in non-judicial matters that have political and executive influence may taint the integrity of the concerned judges and the institution of the judiciary. The doctrine of incompatibility testing is also highlighted, with specific reference to the relevant legal authorities.

4.1.1 The Non-Curial Role of Judges

The Republic of South Africa is composed of three arms of government, namely Parliament, the executive and the judiciary. The three arms of government have different roles to play, independently of each other, and such independence is respected. As the third arm of government, the judiciary plays the role of administration of justice. It presides over the South African courts at different levels, namely the higher courts, specialised courts and lower courts. The core functions of the judiciary are, among others, to hear and determine matters in court. That is, to hear cases. However, judges and magistrates in South Africa have always been called upon to perform variety of non-judicial functions.[257]

4.1.1.1 Non-Curial Functions before Democratic Dispensation

The practice before the democratic dispensation was that judges were called upon to chair various kinds of Commissions of Inquiry. In Hoexter and Olivier, Cora Hoexter puts it clearly that:

> Before 1994 there was a notable tradition of requesting judges to undertake extra-curial functions. In a study published in 1980, Kahn estimated that nearly a quarter of the four hundred commissions of inquiry appointed since 1910 had been chaired

[257] Hoexter and Olivier *The Judiciary in South Africa* 289-293.

> by a judge; and that 15 per cent of South Africa's 102 Supreme Court judges were then either chairing or actively engaged in commissions of one kind or another, some of them full time.[258]

At times judges were assigned to do administrative work and could also be sent on political or diplomatic missions. Most notably, as indicated in Hoexter and Olivier,[259] was in 1977 when judge M T Steyn accepted appointment as Administrator-General of South West Africa, currently known as Namibia. During the period before the democratic dispensation, magistrates were actually civil servants and exercised judicial and administrative functions.[260]

4.1.1.2 Non-Curial Functions in the Democratic Dispensation

In South Africa, it is common practice that active judges do perform non-judicial functions under certain circumstances. The Judicial Service Commission Act[261] prohibits an active judge from holding any other office of profit, or to receive payment for any service unless the Minister has granted consent in writing.

The Minister should be satisfied that the granting of such consent will not:

- Adversely affect the efficiency and effectiveness of the administration of justice, including the undermining of any aspect of the administration of justice, especially the civil justice system;
- Adversely affect the image or reputation of the administration of justice in the Republic;
- In any manner undermine the legal framework which underpins the judge for life concept;
- Result in any judge engaging in any activity that is in conflict with the vocation of a judge; or
- Bring the judiciary into dispute, or have the potential to do so.

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258 Hoexter and Olivier *The Judiciary in South Africa* 289.
259 Hoexter and Olivier *The Judiciary in South Africa* 290.
260 Hoexter and Olivier *The Judiciary in South Africa* 292.
261 *Judicial Service Commission* Act 9 of 1994.

Some of the non-judicial functions are mandated to the judiciary according to section 86 (2)[262] of the Constitution where the President of the Constitutional Court (Chief Justice) must preside over the election of the State President or designate another judge to do so. Section 52[263] of the Constitution provides that the President of the Constitutional Court must preside over the election of a speaker of Parliament or designate another judge to do so. Section 64[264] provides that the President of the Constitutional Court or a judge designated thereof preside over the election of the chairperson of the National Council of Provinces.

Members of Parliament must be sworn in before they take up their positions in terms of section 48[265] of the Constitution, and the President of the Constitutional Court administers such oath of office. That includes members of the National Council of Provinces. Members of the executive, ministers and premiers can appoint judges to chair Commissions of Inquiry. However, there are no rigid rules placing criteria on matters that judicial officer should perform. Most of the non-curial functions by the

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262 S86 (2) *of the Constitution of the Republic of South Africa,* 1996.

263 S52 *of the Constitution of the Republic of South Africa*, 1996:
(1) At the first sitting after its election, or when necessary to fill a vacancy, the National Assembly must elect a Speaker and a Deputy Speaker from among its members.
(2) The President of the Constitutional Court must preside over the election of a Speaker, or designate another judge to do so. The Speaker presides over the election of a Deputy Speaker.
(3) The procedure set out in Part A of Schedule 3 applies to the election of the Speaker and the Deputy Speaker.
(4) The National Assembly may remove the Speaker or Deputy Speaker from office by resolution, a majority of the members of the Assembly must be present when the resolution is adopted.
(5) In terms of its rules and orders, the National Assembly may elect from among its members other presiding officers to assist the Speaker and the Deputy Speaker.

264 S64 *of the Constitution of the Republic of South Africa*, 1996:
(1) The National Council of Provinces must elect a Chairperson and two Deputy Chairpersons from among the delegates.
(2) The Chairperson and one of the Deputy Chairpersons are elected from among the permanent delegates for five years unless their terms as delegates expire earlier.
(3) The other Deputy Chairperson is elected for a term of one year, and must be succeeded by a delegate from another province, so that every province is represented in turn.
(4) The President of the Constitutional Court must preside over the election of the Chairperson, or designated another judge to do so. The Chairperson presides over the election of the Deputy Chairpersons.
(5) The procedure set out in Part A of Schedule 3 applies to the election of the Chairperson and the Deputy Chairpersons.
(6) The National Council of Provinces may remove the Chairperson or a Deputy Chairperson from office.

265 S48 *of the Constitution of the Republic of South Africa*, 1996:
Before members of the National Assembly begin to perform their functions in the Assembly, they must swear or affirm faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

judiciary have proved over time that they do not pose challenges. However, in some instances there are challenges that the judiciary should be concerned about in case of chairing Commissions of Inquiry. It has been proved that these challenges pose a very serious threat to the integrity of the judiciary as an institution and the judge him or herself who may be involved in the Commissions of Inquiry.

In the case of *South African Association of Personal Injury Lawyers v Heath and Others*[266] it was demonstrated when a judge can perform non-judicial functions. In this case, the President of South Africa, in March 1997, established a Special Investigating Unit by means of an Act.[267] The head of the Special Investigating Unit, who is the judge of the High Court, is the first respondent in this case. The Special Investigating Unit has extensive powers, including powers to investigate allegations of corruption, maladministration and unlawful or improper conduct which are damaging to state institutions or which may cause serious harm to the interests of the public. The unit is empowered to take proceedings to recover losses that the state may have suffered in consequence thereof. On 26 March 1999 an allegation was referred to the second respondent (Special Investigating Unit) for investigation.

The investigation was that there was a failure by attorneys acting on behalf of a person with regard to a claim for compensation from the Road Accident Fund to pay over to such a person the total net amount received in respect of compensation from the Road Accident Fund after deduction of a reasonable and/or taxed amount in respect of attorney-client costs. The appellant, a voluntary association consisting of attorneys and advocates whose practices involve personal injury litigations, contended that the investigative powers vested in the second respondent (Special Investigating Unit) by the Act[268] are highly intrusive and that the exercise of such powers against any of its attorney members would constitute an invasion of their privacy and would cause irreparable damage to their professional reputations. The appellant denied, however, that any of its members had ever acted unlawfully or improperly in connection with amounts received by them on behalf of their clients in respect of compensation from Road Accident Fund. The appellant asked for an

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266 *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) 2000 ZACC 22; 2001 1 SA 883; 2001 1 BCLR 77.

267 *Special Investigating Units and Special Tribunals Act* 74 of 1996.

268 *Ibid.*

order declaring certain provisions of the Act[269] to be inconsistent with the Constitution.[270] The appellant further asked for an order reviewing and setting aside the proclamation under which the first respondent, Willem Heath, the High Court judge, was appointed and the proclamation under which allegations concerning personal injury lawyers were referred to the second respondent (Special Investigating Unit) for investigation. The application at the High Court was dismissed by acting Judge Coetzee and with leave to appeal granted, the appellant appealed directly to the Constitutional Court against the order.

The appellant raised the following issue relevant to this research study: That section 3 (1)[271] of the Act and the appointment of the first respondent (Willem Heath) as head of the Special Investigating Unit are inconsistent with the Constitution[272] because they undermine the independence of the judiciary and the separation of powers that the Constitution[273] requires. This case is concerned with the assignment to a member of the judiciary by the executive, with the concurrence of the legislature of functions close to the "heartland" of the executive power, Justice Chaskalson said. He emphasised that the separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution,[274] and is essential to the role of the courts under the Constitution.[275]

The separation required by the Constitution[276] between the legislature and executive on the one hand, and the court on the other must be upheld otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive

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269 *Special Investigating Units and Special Tribunals Act* 74 of 1996.

270 *Constitution of the Republic of South Africa*, 1996.

271 S 3 (1) *Special Investigating Units and Special Tribunals Act* 74 of 1996:
a) The President must appoint a person who is a South African citizen and who, with due regard to his or her experience, conscientiousness and integrity, is a fit and proper person to be entrusted with the responsibilities of that office, as the head of a Special Investigating Unit established by the President.
b) If the office of Head of a Special Investigating Unit is vacant, or if the Head of such Unit is for any reason not available, the President may appoint any person meeting the requirements referred to in paragraph (a) as the Acting Head of such Unit for the period determined by the President

272 *Constitution of the Republic of South Africa*, 1996.

273 *Ibid.*

274 *Ibid.*

275 *Ibid.*

276 *Ibid.*

action measures against the Bill of Rights and other provisions of the Constitution,[277] will be undermined.[278] Justice Chaskalson stated that it is undesirable, particularly at this stage of the development of the South African jurisprudence concerning the separation of powers, to lay down rigid tests for determining whether or not the performance of a particular function by a judge is or is not incompatible with the judicial office. He further stated that:

> The fact that it may be permissible for judges to perform certain functions other than their judicial functions does not mean that any function can be vested in them by the legislature. There are limits to what is permissible. Certain functions are so far removed from the judicial function, that to permit judges to perform them would blur the separation that must be maintained between the judiciary and other branches of government. For instance, under our system a judicial officer could not be a member of a legislature or cabinet, or a functionary in government such as the Commissioner of Police. These functions are not appropriate to the central mission of the judiciary.[279]

In the case of the *City of Cape Town v Premier of the Western Cape and Others*,[280] the following questions were proposed for consideration when deciding whether or not, under the Constitution,[281] it is permissible to assign a non-judicial function to a judge:

- Would the performance of the function be more usual or appropriate in another branch of government?
- Is the subject under the control or direction of the executive?
- Would the judge be required to exercise discretion and make decisions on the grounds of policy rather than law?
- Is there a risk of judicial entanglement in matters of political controversy?
- Would the judge be involved in the process of law enforcement?

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277 *Constitution of the Republic of South Africa*, 1996.

278 *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) 2000 ZACC 22; 2001 1 SA 883; 2001 1 BCLR 77.

279 *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) 2000 ZACC 22; 2001 1 SA 883; 2001 1 BCLR 77 35.

280 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C).

281 *Constitution of the Republic of South Africa*, 1996.

– Would the function occupy the judge to such an extent that he or she is no longer able to perform his or her usual judicial functions?

The court in the abovementioned case also made the following remarks as to the criteria used to permit a judge to perform non-judicial functions:

> Ultimately the question is one calling for a judgement to be made as to whether or not the functions that a judge is expected to perform are incompatible with the judicial office and, if they are, whether there are countervailing factors that suggest that the performance of such functions by a judge, will not be harmful to the institution of the judiciary, or materially breach the lines that have to be kept between the judiciary and other branches of government in order to maintain the independence of the judiciary.[282]

4.1.2 The Non-Curial Role of Judges in Commissions of Inquiry

In South Africa, it is common that judges are appointed to chair Commissions of Inquiry. This is based on the premise that the judge is a person who possesses the necessary integrity and it is believed that judges would have the requisite skills and expertise to perform the functions so envisaged. There are current Commissions chaired by judges like the Seriti Commission of Inquiry[283] which has to inquire into allegations of fraud, corruption, impropriety or irregularity in the strategic defence procurement package, the Farlam Commission which has to investigate matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana in the North West province which took place on about Saturday 11 August to Thursday 16 August 2012 and which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested.

The role of active judges in Commissions of Inquiry seems to be the one that has concerns versus retired judges in that some judges do not recommend that this be practised. The court in the case of the *City of Cape Town v Premier of the Western*

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282 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C) 171.11.

283 Gen Not 361 in GG 35325 of 09 May 2012.

Cape and Others[284] quoted the words of Edwin Cameron before his elevation to the bench saying that:

> The use of judges to sit on Commissions of Inquiry has long been a controversial aspect of South African political life. It is often suspected that commissioners are selected to make findings and recommendations which would suit the government when judges are used in this process the discrediting effect on the judicial system is severe.[285]

Justice Chaskalson dealt with this aspect by saying that:

> In dealing with the question of judges presiding over Commissions of Inquiry, or sanctioning the issuing of search warrants, much may depend on the subject matter of the Commission and the legislation regulating the issue of warrants. In appropriate circumstances judicial officers can no doubt preside over Commissions of Inquiry without infringing the separation of powers contemplated by our Constitution. The performance of such functions ordinarily calls for the qualities and skills required for the performance of judicial functions. Independence and the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information.[286]

However the court in the case *City of Cape Town v Premier of Western Cape and Others*[287] holds a different view regarding calling on serving judges to preside over Commissions of Inquiry. The court indicated that:

> With great respect to the views of the Constitutional Court, it seems to me that at this early stage of our fledgling democracy, and with the vital object of preserving public confidence in the independence of the judiciary, active judges should as a matter of principle, not chair Commissions of Inquiry. This would eliminate the risk of judges becoming embroiled in disputes such as the present and the need to define in what circumstances a judge could "appropriately" chair a Commission of Inquiry.[288]

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284 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C).

285 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C) 189.

286 *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) 2000 ZACC 22; 2001 1 SA 883; 2001 1 BCLR 77 34.

287 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C) 187.

288 *Ibid.*

The court further indicated that the fact that presiding over Commissions of Inquiry calls for qualities and skills possessed by judges does not render the performance of such role the sole preserve of active judges. In the opinion of the court, senior members of the legal profession at the bar and side bar possess in equal measure, such qualities. In the book by Hoexter and Olivier, Hoexter argues that the extra-curial use of sitting judges cannot seriously be seen as an essential component in the fight against corruption. Judges are not the only people with integrity. The Auditor-General, Public Protector and other Chapter 9 institution leaders have a major contribution to make in this regard. When there is a need, nothing prevents the use of other respected practitioners or academics.[289]

The case of the *City of Cape Town v The Premier of the Western Cape*,[290] involved the applicant, who is the executive mayor of Cape Town,[291] as the member of Democratic Party. The respondents were the Premier of the Western Cape,[292] Mr Ebrahim Rasool,[293] Minister for Local Government and Housing in the Western Cape,[294] Honourable Justice Nathan Erasmus[295] in his capacity as the chairperson of the Commissions of Inquiry, and two members[296] of the two Commissions. The matter arose out of the conduct of one Mr Chaaban, who was investigated by the City Council. It was alleged that Mr Chaaban was approaching coalition councillors with offers of bribes to change political allegiances in the run up to the so-called "floor-crossing" window period between 1 and 15 September 2008.

During this period, councillors were entitled to change party membership and continue to hold their seat on the council as representatives of their new party as provided in schedule 6B[297] to the Constitution. It was feared that the object of Mr Chaaban's conduct was to topple the coalition by such unlawful means. Mr Chaaban was then found guilty on six counts of misconduct and the council of the

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289 Hoexter and Olivier *The Judiciary in South Africa* 296-297.

290 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C).

291 Helen Zille, Leader of the Democratic Alliance, a political party in the Republic of South Africa.

292 Mr Ebrahim Rasool.

293 ANC member.

294 Mr Qubudile Dyanatyi.

295 Judge of the Cape Provincial Division of the High Court of South Africa.

296 Mr George Papadakis, a forensic accountant and Ms Herdie Vermeulen, an attorney.

297 Schedule 6B *of the Constitution of the Republic of South Africa*, 1996.

City of Cape Town decided that the MEC (Minister of a Local Government) be requested to remove Mr Chaaban from office. The Premier responded to the matter by establishing a Commission of Inquiry into possible occurrences of maladministration, corruption, fraud or other serious malpractice in the city. The chairperson was Justice Nathan Erasmus, a judge of the Cape provincial division of the High Court. The Premier then repealed the first Commission (called the first Erasmus Commission) by way of a proclamation and established the new Commission to investigate possible occurrences of fraud, corruption, maladministration, serious malpractice and other unlawful conduct in the City of Cape Town, as well as in the George municipality. Again, the chairperson was the honourable Justice Nathan Erasmus.

The City of Cape Town joined by the Democratic Alliance in challenging the establishment of the Commission of Inquiry, raising the fact that the Premier's decision to appoint the second Erasmus Commission was vitiated on a principle of legality, as a result of bad faith and an ulterior motive on the part of the Premier. It was alleged that the Premier did not hold the honest belief that a Commission was warranted for a lawful purpose, and his intention was to use the Commission for the ulterior and improper purpose of attempting to embarrass, or discredit political opponents.

They raised the argument that the appointment of judge Erasmus as a serving judge to chair the second Erasmus Commission was incompatible with the separation of powers ordained in the Constitution[298] and therefore unlawful and invalid. The court then found that the Premier did not possess an honest belief that good reasons existed for establishing the second Erasmus Commission, and acted with ulterior motive of embarrassing political opponents. The appointment of a judge to chair the Commission was set aside as not being in accordance with the constitutional principle of legality.

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298 *Constitution of the Republic of South Africa*, 1996.

4.1.3 The Doctrine of Incompatibility Test

This doctrine has been emphasised in the case of the *City of Cape Town v Premier of the Western Cape and Others.*[299] The court eluded that before a judge accepts an appointment to chair a Commission of Inquiry, he or she should have to be satisfied, after carefully examining the subject matter of the Commission as set out in terms of reference, that the functions he or she is called upon to perform are not incompatible with his or her judicial office. The emphasis relates to the fact that the performance of such function, as alluded by the Constitutional Court in the case of *South African Association of Personal Injury Lawyers v Heath and Others,*[300] should not be harmful to the institution of the judiciary.

The judge should be satisfied that his or her participation in such a Commission is not of such a nature as to threaten public confidence in the independence or impartiality of the judge to carry out his or her judicial functions. The court held that the test is objective, in that a reasonable member of the public not trained to discover "distinctions without differences" would reasonably comprehend that the participation of the judge in the Commission would impair his or her ability to carry out judicial functions or conflict with the judge's independence or impartiality.[301]

4.2 Conclusion

This chapter has demonstrated that judicial officers, most particularly judges, participate in non-judicial functions. When so involved with these functions, careful consideration must be taken so that the independence of the judiciary, separation of powers of the three arms of government and the integrity of the judicial institution and of the particular judge concerned is not compromised. Despite these considerations, the participation of active or serving judges in Commissions of Inquiry seems to raise challenges which are dealt with effectively in a later chapter about the challenges of the judiciary.

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299 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C).

300 *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77.

301 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) [2008] ZAWCHC 52; 2008 (6) SA 345 (C) 182.

CHAPTER 5
LEGISLATIVE FRAMEWORK OF THE JUDICIARY

5.1 Introduction

The objective of this chapter is to discuss the landscape of various pieces of legislation and government policies that influence the judiciary in South Africa. These legislation and government policies are discussed hereunder.

5.1.1 Government Policies

5.1.1.1 Justice Vision 2000

Justice Vision 2000 was presented by the former Minister of Justice of the Republic of South Africa to provide for policy guidelines and framework in managing the transformation of the justice system and all relevant institutions that deliver legal and legislative services to the public and state departments. It was intended to run for a period of 5 years. The objective was that when transformation took place, it should align with the provisions of the Constitution.[302]

One of the goals that had to be achieved in the Justice Vision 2000 was to have an independent judiciary that is efficient, effective and sensitive to South African diversity. The South African court structure had to be changed and aligned with the needs of the South African people. For example, the number of courts had to be increased and courts had to be distributed in a manner such that every person would have access to justice. Court clusters in the lower courts were to be introduced to enhance the speedy flow of information.

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302 *Constitution of the Republic of South Africa*, 1996.

5.1.1.2 Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State

The discussion document on the transformation of the judicial system and the role of the judiciary was intended to continue the dialogue regarding the transformation of the judicial system in South Africa. Focus was placed on programmes of transformation to review the criminal justice system and promote a single and unified judiciary in the Republic of South Africa.

5.1.1.3 Norms and Standards

The Chief Justice of the Republic of South Africa empowered by section 8 (2)[303] of the Superior Courts Act, as head of the judiciary contemplated by section 165 (6)[304] of the Constitution, exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts. On 28 February 2014 the Chief Justice of the Republic of South Africa issued the norms and standards in the *Government Gazette*.[305] The objective of these norms and standards was to seek to achieve the enhancement of access to quality justice and ensure effective, efficient and expeditious adjudication and resolution of all disputes through courts.

5.1.1.4 The Superior Courts Bill

The Superior Courts Bill is aimed at the transformation of the courts in the Republic of South Africa. The focus includes rationalisation of the courts like the Constitutional Court, the Supreme Court of Appeal and the High Courts by amending laws to that effect.

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303 S 8 (2) *of the Superior Courts Act* 10 of 2013:
The Chief Justice, as the head of the judiciary as contemplated in section 165 (6) of the Constitution, exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

304 S 165 (6) *of the Constitution Seventeenth Amendment Act*, 2012:
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.

305 Gen Not 147 in GG 37390 of 28 February 2014.

5.1.1.5 Code of Judicial Conduct Adopted in Terms of Section 12 of the Judicial Service Commission Act 9 of 1994

The object of the code is to assist judicial officers in dealing with ethical and professional issues. The code is a guideline tool in determining any conduct that can be construed as unethical when carried out by judicial officers, who are expected to conduct themselves diligently, with self-restraint and expected to take reasonable steps to enhance the accessibility of the courts. The judicial officer is expected to act honourably in a manner befitting a judicial officer and not only in the discharge of his or her official duties. The code, however, should not be construed as absolute, precise or exhaustive.

5.1.2 Scope of Legislation

5.1.2.1 Constitution of the Republic of South Africa

Chapter 8[306] of the Constitution makes provision for the framework of the judiciary. The Constitution,[307] as the supreme law of the Republic of South Africa, should be complied with when providing for other legislative frameworks where there are issues not expressly mentioned in the Constitution.[308] Any kind of deviation from the Constitution[309] will render such legislation invalid. The Constitution[310] is the guiding law for any act that is aimed at transforming the judiciary.

5.1.2.2 Constitution Seventeenth Amendment Act 2012

The objective of this legislation[311] was to amend the laws relating to the role of the Chief Justice of the Republic of South Africa. The Chief Justice was thereby empowered and given the authority to issue norms and standards and other protocols. The Magistrates' Courts can then be referred to as the lower courts. The

306 Chapter 8 *of the Constitution of the Republic of South Africa*, 1996.
307 *Constitution of the Republic of South Africa*, 1996.
308 *Ibid.*
309 *Ibid.*
310 *Ibid.*
311 *Constitution Seventeenth Amendment Act*, 2012.

Act[312] further regulated the jurisdictions of the Supreme Court of Appeal and the Constitutional Court. The Constitutional Court became the highest court in all matters.

5.1.2.3 Renaming of High Courts Act 30 of 2008

The Act[313] provides for the renaming of the High Courts in the Republic of South Africa. It is in line with the rationalisation contemplated in item 16 (6)[314] of schedule 6 of the Constitution. The new names of the High Court are according to the province in which such a High Court is situated.

5.1.2.4 Superior Courts Act 10 of 2013

The Superior Courts Act's[315] objective is to rationalise, consolidate and amend the law relating to higher courts within the Republic of South African. According to this Act[316] each province will have a High Court situated within such province. The amendments also set out how the Constitutional Court, Supreme Court of Appeal and the High Courts are constituted. Another provision is the governance and administration of all courts in the Republic of South Africa. This includes the judicial management of judicial functions, access to courts, finances and appointments of administrative staff to the Constitutional Court, Supreme Court of Appeal and High Courts. Another provision in this Act[317] is the manner by which the courts should arrive at various decisions depending on the nature of such a court.

5.1.2.5 Judicial Service Commission Act 9 of 1994

This Act[318] deals with matters incidental to the establishment of the Judicial Service Commission. The Judicial Service Commission plays an important role in the appointment of judges. When judges are appointed, the Judicial Service

312 *Constitution Seventeenth Amendment Act*, 2012.
313 *Renaming of High Courts Act* 30 of 2008.
314 S 165 (6) *of the Constitution Seventeenth Amendment Act*, 2012.
315 *Superior Courts Act* 10 of 2013.
316 *Ibid.*
317 *Ibid.*
318 *Judicial Service Commission Act* 9 of 1994.

Commission conducts the interviews and makes recommendations to the President of the Republic of South Africa. In any other matters that are relevant to the judiciary, the Judicial Service Commission also plays a role to advise the executive arm of government for decision-making regarding the administration of justice. The Judicial Service Commission established the Judicial Conduct Committee to receive and deal with complaints about judges.

5.1.2.6 Magistrates' Courts Act 32 of 1944 as Amended

The Act[319] makes provision for the creation of a separate court structure and civil jurisdiction in adjudication of civil cases and divorce actions, and regulates the Constitution of the Regional Magistrates Appointments Advisory Board.

5.1.2.7 South African Education Institute Act 14 of 2008

The Act[320] provides for the establishment of and institute that provides for judicial officers. The objective of this Act[321] is to promote the effectiveness, efficiency and accessibility of the courts in the Republic of South Africa.

5.2 Conclusion

The abovementioned policies and legislation have played a vital role in the transformation of the judiciary and continue to regulate the activities of the judiciary, including its operations, training and appointment of judicial officers, amongst others. They represent the cornerstone legislative framework applicable to the judiciary in South Africa.

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319 *Magistrates' Courts Act* 32 of 1944 as amended.
320 *South African Education Institute Act* 14 of 2008.
321 *Ibid.*

CHAPTER 6

JUDICIAL SUCCESSES COUPLED WITH JUDICIAL TRANSFORMATION

6.1 Introduction

The judicial transformation is demonstrated in the evolution of the Constitutions[322] of the Republic of South Africa dating back to the colonial era, as has been highlighted earlier. As already indicated, the judiciary changed from what it was, to the current system, which is different. The evolution of the judiciary claimed some significant successes that are worth acknowledging. Amongst others, this chapter seeks to elaborate upon some of the successes achieved by the transformation of the judiciary.

6.1.1 Promotion of Courts' Effectiveness and Efficiency

The transformation of the judiciary, as contemplated in the final Constitution,[323] warranted that the effectiveness and efficiency of the courts should be looked at. There have been concerns about access to justice that is effective and efficient. Various stakeholders, such as the National Prosecution Authority, Department of Justice and Magistrate's Commission, in collaboration with Justice College in Pretoria, published a guide[324] for all court officials to, amongst other things, enhance the performance of the courts. The guide[325] has no legal force, but is merely a simple tool for court officials to use in their day-to-day activities. The guide is called "A Practical Guide for Court and Case Flow Management".

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322 *South Africa Act of Henry VII of* 1909.
Constitution of the Republic of South Africa Act 32 of 1961.
Constitution of the Republic of South Africa Act 110 of 1983.
Constitution of the Republic of South Africa Act 200 of 1993.
Constitution of the Republic of South Africa, 1996.

323 *Constitution of the Republic of South Africa*, 1996.

324 Justice College *A Practical Guide for Court and Case Flow Management for South African Lower Courts.*

325 *Ibid.*

The publication came about as a result of a concern regarding the backlog[326] of cases and low finalisation of cases, amongst others. Relating to the judiciary, the guide provides judicial officers guidance on how they should control their courts. The responsibility regarding accountability for the conduct of court proceedings cannot be shared. Judicial officers are expected to:

- Adhere to court hours, as prescribed by the law;
- Manage court hours;
- Hold all role players accountable in an open court for any deviations;
- Record reasons for each postponement in full;
- Maintain court diaries to ensure maximum utilisation of court hours;
- Monitor progress of cases at every stage of proceedings; and
- Manage the court and the court roll.

Despite the introduction of this guide to assist judicial officers, it appears that the challenges continued, which affected the effectiveness and efficiency of the courts. In 2012 a discussion document[327] was published on the transformation of the judicial system and the role of the judiciary in the developmental South African state. The then Minister of Justice and Constitutional Development, Mr Jeff Radebe, gave a historical background of South Africa's transition from the apartheid state to a constitutional democracy.

He explained that the transition was brought about by multi-party negotiations which were led by the ANC,[328] and part of the political settlement was the establishment of the Constitutional Court as the institution of change to champion the reform of South African jurisprudence, ensuring that the law, including legislation and common law, is aligned with the Constitution.[329] He raised the importance of the judiciary in compliance with the Constitution.[330] Section 180[331] of the Constitution makes

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326 Backlog of cases involves cases that have been on the roll for a particular period before finalisation. Timeframe differs according to whether the case is on the High Court or lower court roll.

327 Radebe *Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State II.*

328 African National Congress is a political party in the Republic of South Africa.

329 *Constitution of the Republic of South Africa*, 1996.

330 *Ibid.*

provision for other matters concerning the administration of justice on issues not dealt with in the Constitution[332] by national legislation. Hence Mr Radebe made mention of this in his speech about the significant interventions and steps geared to affirm the independence and the effectiveness of the judiciary. He stated that Bills, including the Constitution Seventh Amendment Bill[333] and the Superior Courts Bill,[334] were completed and taken to Parliament. He further indicated that the office of the Chief Justice was proclaimed as a national department in September 2010. The Superior Courts Bill,[335] in particular, was later passed to become law of South Africa on 12 August 2013.

Section 8[336] of the Superior Courts Act deals with the promotion of the effectiveness and efficiency of the courts in the Republic of South Africa. Section 8[337] read with section 165 (6)[338] of the Constitution, led to the issuing of norms and standards[339] by the Chief Justice of the Republic of South Africa. The objectives of the norms and standards[340] are: to seek to achieve the enhancement of access to quality justice for all; to affirm the dignity of all users of the court system; and to ensure the effective, efficient and expeditious adjudication and resolution of all disputes through the courts. Such objectives are to be achieved through the commitment and co-operation of all judicial officers. The norms and standards[341] are underpinned by core values such as:

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331 S 180 *of the Constitution of the Republic of South Africa*, 1996:
National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including –
a) training programmes for judicial officers;
b) procedures for dealing with complaints about judicial officers; and
c) the participation of people other than judicial officers in court decisions

332 *Constitution of the Republic of South Africa*, 1996.

333 Section 165 (6) *of the Constitution Seventeenth Amendment Act*, 2012:
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.

334 *Superior Courts Bill.*

335 *Ibid.*

336 S 8 of the *Superior Courts Act* 10 of 2013

337 *Ibid.*

338 S 165 (6) of the *Constitution Seventeenth Amendment Act, 2012.*

339 Gen Not 147 in GG 37390 of 28 February 2014.

340 *Ibid.*

341 *Ibid.*

- Independence of the judiciary and the concomitant imperatives of integrity and impartiality of all judicial officers;
- Equality and fairness;
- Accessibility;
- Transparency;
- Responsiveness; and
- Diligence.

As indicated above, the objectives of the norms and standards[342] are to provide effective, efficient and expeditious resolution of disputes. The norms are discussed hereunder:

- Judicial officers must at all times act in accordance with the core values as stated above;
- Every judicial officer must dispose of his or her cases efficiently, effectively and expeditiously;
- The heads of all courts must take all necessary initiatives to ensure a thriving normative and standardised culture of leadership and must ensure that those core values are adhered to;
- The heads of all courts should engender an open and transparent policy of communication both internally and externally. Collegiality amongst judicial officers should be fostered and encouraged;
- The head of each court should encourage judicial officers to ensure that all courts and related services should be open and accessible;
- Judicial officers should make optimal use of available resources and time and strive to prevent fruitless and wasteful expenditure at all times;
- Judicial officers should at all times be courteous and responsive to the public and accord respect to all with whom they come into contact;
- Judicial officers should strive for and adhere to a high level of competence and excellence and to this end are encouraged to participate in regular training under the Auspices of the South African Judicial Education Institute.

342 Gen Not 147 in GG 37390 of 28 February 2014.

The standards are also provided with the same objectives as indicated above regarding the norms. The standards are as follows:

- Judicial officers shall at all times strive to deliver quality justice as expeditiously as possible in all cases.
- It is noted that there is a significant difference in the manner in which courts and the Constitutional Court, the Supreme Court of Appeal and specialist courts (the Labour Courts, Labour Appeal Courts, Land Claims Court and the Competition Appeal Court) perform their work, as well as the case loads they carry and the standards set out herein which must be applied within that context. The head of each court must ensure that judicial officers are always available to handle cases.
- The head of each court will be responsible for determining the sittings of each court, subject to the directives and oversight of the Chief Justice.
- Trial courts should strive to sit for a minimum of 4.5 hours per day and all judicial officers should strictly comply with court hours, save where, for good reason, this cannot be done.
- In the event that a judicial officer should become available e.g. where the roll collapses, the judicial officer should make him or herself available to be allocated other work by the head of the court or a designated judicial officer.

The said norms and standards[343] are binding on all judicial officers and apply to all courts in the Republic of South Africa, subject to appropriate modifications or adaptations necessitated by the nature of the court or special circumstances. The norms and standards[344] incorporate the practice directives for all superior courts, regional courts, district courts and all other courts, which the Chief Justice will issue from time to time. All protocols and directives currently in operation will remain extant. The various practice directives therefore encapsulate and expand the broad outline contained in these norms and standards[345] and similarly seek to attain the objectives outlined above and as set out in section 8 (3) (b)[346] of the Superior Courts

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343 Gen Not 147 in GG 37390 of 28 February 2014.

344 *Ibid.*

345 *Ibid.*

346 S 8 (3) (b) *of the Superior Courts Act* 10 of 2013:
Regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts.

Act. In the event of a conflict between these norms and standards[347] and any practice directives, the former will prevail.[348] The provision of the norms and standards[349] is the ground-breaking tool to foster accountability by judicial officers. If it is observed properly, the South African courts will not remain the same. What is of importance is the development of the monitoring systems and that all judicial officers should fruitfully practise these norms and standards.[350]

6.1.2 Judicial Education and Training

To some extent judicial training has taken centre stage in that judicial officers realise the need for and importance of training. Some judicial officers agree that not only newly appointed judges should be trained, but that all judges, irrespective of the court they preside in, should, when necessary, receive training. The Superior Court Act[351] includes aspects relating to governance according to which some senior judges would oversee the performance of others; hence the need to train judges in various aspects related to their offices and not only in adjudicating cases in the court room. Justice Mokgoro, the former judge of the Constitutional Court, in her article about judicial appointments, gave an overview on judicial education and training. She indicated that:

> It is now largely common cause among judges themselves that the positive action referred to by Chaskalson CJ above, will include continuous education and efficiency of the bench. The need for sensitivity training, judicial accountability, how to manage judicial power and judicial function, including the efficient and expeditious delivery of judgements, how to manage the nuanced aspects of the judicial function, including the judicial temperament, are critical as part of our society's reality.
>
> Importantly, the inculcation of fierce individual independence and the importance of legal competence, proper judicial insights and effective delivery of access to justice cannot be overemphasised. In terms of section 180 of the Constitution, envisaged national legislation to deal with training programmes for judicial officers, seminars for judges and other interactions of

347 Gen Not 147 in GG 37390 of 28 February 2014.
348 *Ibid.*
349 *Ibid.*
350 *Ibid.*
351 *Superior Courts Act* 10 of 2013.

> judicial training were undertaken. In 2007 former Chief Justice Pius Langa initiated a nine-month training programme for aspirant women judges.[352]

The South African Judicial Education Institute Act[353] established the new South African judicial education institute. The institute takes charge of the training of newly appointed judges, and the programmes for continued judicial training of the institute are therefore the responsibility of the judiciary itself. The creation of this institute seems to have been welcomed; however, there is still need to create more programmes to deal with the education and training of all judges.

6.1.3 Judicial Decisions Affirming Independence of the Judiciary

During the apartheid era, the courts, although they had their independence, could not decide on the validity of parliamentary legislation or rule against any decision by organs of the state. Their part was to enforce the law as it stood, even though it was discriminatory and unfair. At that time, the Constitution[354] did not have any provision similar to that of the final Constitution,[355] which allows the Constitutional Court to strike down any legislation that is inconsistent with the Constitution.[356] There are various apartheid laws that the courts implemented despite their discriminatory nature.[357]

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352 Mokgoro *Middle Temple and South African Conference: Judicial Independence* 46.

353 *South African Judicial Education Institute Act* 14 of 2008.

354 *Constitution of the Republic of South Africa* Act 32 of 1961.
Constitution of the Republic of South Africa Act 110 of 1983.

355 *Constitution of the Republic of South Africa*, 1996.

356 *Ibid.*

357 *Black Administration Act* 38 of 1927.
The Immorality Amendment Act 21 of 1950 (made sexual relations with a person of a different race a criminal offence).
The Group Areas Act 41 of 1950 passed on 27 April 1950 (partitioned) the Country into different areas, with different areas of allocated to different racial groups).
The Prevention of Illegal Squatting Act 51 of 1951 (allowing the government to demolish black shack land slums).
Bantu Education Act 47 of 1953 (crafted a separate system of education for African students under the Department of Bantu Education").
The Reservation of Separate Amenities Act 49 of 1953 (prohibited people of different races from using the same public amenities, such as restaurants, public swimming pools and rest rooms).
The Population Registration Act 30 of 1950 (formalised racial classification and introduced and identity card for all persons over the age of eighteen, specifying their racial group).
The Bantu Authorities Act 68 of 1951 (created separate government structure for blacks. It was the first piece of legislation established to support the government's plan of separate development in Bantustans).

The provisions of the final Constitution[358] brought about change the way in which the courts are expected to interpret and enforce the law. Through court decisions, the government, for example, is able to be held responsible and accountable when it comes to delivery on its social programmes. This can be seen in the case of the *Government of the Republic of South Africa and others v Grootboom and others.*[359] The respondents in this case had been evicted from their informal homes situated on private land earmarked for formal, low-cost housing. They approached the High Court for an order that the government should provide temporary shelter or housing until they obtained permanent accommodation.

The High Court gave an order that the applicants' children were entitled to be provided with shelter by the appropriate organ or department of state, and that the applicants' children and their accompanying parents should be provided with such shelter until such time as the parents were able to shelter their own children. The appellants appealed against the High Court decision to the Constitutional Court. The argument by the respondents was based on the provision of section 26[360] of the Constitution. The respondents' argument was also based on the terms of section 28 (1) (c)[361] of the Constitution, which provides that every child has the right to basic nutrition, shelter, basic health care services and social services. The Constitutional Court granted an order setting aside the Cape of Good Hope High Court order and substituted it with the following order:

> Section 26 (2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing;

The Suppression of Communism Act 44 of 1950 banned the African Communist Party and other Political parties that the government chose to label as "communist".

358 *Constitution of the Republic of South Africa*, 1996.

359 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC).

360 S 26 *of the Constitution of the Republic of South Africa*, 1996:
1) Everyone has the right to have access to adequate housing.
2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

361 S 28 (1) (c) *of the Constitution of the Republic of South Africa*, 1996.

> The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the accelerated managed land settlement programme, to provide relief for people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations;
>
> As at the date of the launch of this application, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements.
>
> In that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.[362]

Justice Mokgoro confirmed in the *Sunday Independent*[363] that the Constitutional Court decision on *Grootboom*[364] is one of the successes that confirm the separation of powers between the other arms of government and the judiciary. She stated that:

> Another area of success for the Constitution has been its effective separation of powers between the legislature, executive and judiciary, and the court's ability to hold the government strictly to account on delivery programmes. A good example of this over the past two decades was the Constitutional Court's decision 13 years ago in the *Grootboom* case. On the occasion, the court declared government's housing programme constitutionally invalid because it failed to make provision for the most desperately poor and vulnerable.
>
> Although the government responded by saying it was doing all it could to build bricks-and-mortar houses for those in the housing queue, the Constitutional Court's view was that, that was not enough. The result of the judicially enforceable promise of access to housing as set out in the Constitution, subsequent action was taken, resulting in housing delivery becoming one of the government's priority programmes and better success stories.[365]

Another example given by Justice Mokgoro in the *Sunday Independent*[366] is the Constitutional Court case of *Minister of Health and others v Treatment Action Campaign and others.*[367] She wrote that:

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362 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC).

363 Mokgoro *The Sunday Times* 15.

364 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC).

365 Mokgoro *The Sunday Independent* 15.

366 *Ibid.*

> Another high profile example of the court's ability to hold the government to account on its social delivery programmes over the past 20 years is related to HIV/Aids at a time when Aids denial was an issue in government. A court order to the government makes antiretroviral (ARV) drugs available to pregnant mother-to-baby transmission of HIV. As a result of the Constitution's judicially enforceable promise of access to health, South Africa is reaping the benefits and now administers the biggest publicly provided ARV treatment programme anywhere in the world. More than 2 million people living with HIV and Aids are now on life-saving treatment in our country.[368]

This case of *Minister of Health and others v Treatment Action Campaign and others*[369] was brought as an application in the Pretoria High Court on 21 August 2001. The applicants were a number of associations and members of civil society concerned with the treatment of people with HIV / Aids and with the prevention of new infection. The government, in response to the pandemic, devised a programme to deal with the mother-to-child transmission of HIV at birth and identified nevirapine[370] as its drug of choice. The programme imposed restriction on the availability of nevirapine[371] in the public health sector. The applicants contended that these restrictions were unreasonable when measured against the Constitution,[372] which commands the state and all its organs to give effect to the rights guaranteed by the Bill of Rights in terms of sections 7 (2)[373] and 8 (1)[374] of the Constitution respectively.

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367 *Minister of Health and Others v Treatment Action Campaign and Others* CCT8/02 2002 ZA CC16.
Manamela 2004 *South African Public Law* 164.

368 Mokgoro *The Sunday Independent* 15.

369 *Minister of Health and Others v Treatment Action Campaign and Others* CCT8/02 2002 ZA CC16.

370 Nevirapine drug is a fast acting and potent antiretroviral drug used in a treatment of HIV/AIDS and registered in South Africa since 1998. In January 2001 it was approved by the World Health Organisation for use against mother-to-child transmission of HIV, from mother to child at birth.
Minister of Health and Others v Treatment Action Campaign and Others CCT8/02 2002 ZA CC16.

371 *Ibid.*

372 *Constitution of the Republic of South Africa*, 1996.

373 S 7 (2) *of the Constitution of the Republic of South Africa*, 1996:
The state must respect, protect, promote and fulfil the rights in the Bill of Rights

374 S 8 (1) *of the Constitution of the Republic of South Africa*, 1996:
The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

The second issue raised was the provisions of sections 27[375] and 28[376] of the Constitution. Finally, the Constitutional Court made an order replacing that of the High Court and ordered that:

- Section 27 (1)[377] and (2)[378] of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their new-born children to have access to health services to combat mother-to-child transmission of HIV.

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375 S 27 *of the Constitution of the Republic of South Africa*, 1996:
1) Everyone has the right to have access to –
   a) health care services, including reproductive health care;
   b) sufficient food and water; and
   c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
3) No one may be refused emergency medical treatment.

376 S 28 *of the Constitution of the Republic of South Africa*, 1996:
1) Every child has the right –
   a) to a name and a nationality from birth;
   b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
   c) to basic nutrition, shelter, basic health care services and social services;
   d) to be protected from maltreatment, neglect, abuse or degradation;
   e) to be protected from exploitative labour practices;
   f) not to be required or permitted to perform work or provide services that –
      i. are inappropriate for a person of that child's age; or
      ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
   g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
      i. kept separately from detained persons over the age of 18 years; and
      ii. treated in a manner, and kept in conditions, that take account of the child's age;
   h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
   i) not to be directly in armed conflict, and to be protected in times of armed conflict.
2) A child's best interests are of paramount importance in every matter concerning the child.
3) In this section "child" means a person under the age of 18 years.

377 S 27 (1) *of the Constitution of the Republic of South Africa*, 1996:
Everyone has the right to have access to –
a) Health care services, including reproductive health care;
b) sufficient food and water; and
c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

378 S 27 (2) *of the Constitution of the Republic of South Africa*, 1996:
The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

- The programme is to be realised progressively within available resources and must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.
- The policy for reducing the risk of mother-to-child transmission of HIV as formulated and implemented by government fell short of compliance with the requirements in that:

  - Doctors at public hospitals and clinics other than the research and training sites were not able to prescribe nevirapine to reduce the risk of mother-to-child transmission of HIV even where it was medically indicated and adequate facilities existed for the testing and counselling of the pregnant women concerned.
  - The policy failed to make provision for counsellors at hospitals and clinics other than at research and training sites to be trained in counselling for the use of nevirapine[379] as a means of reducing the risk of mother-to-child transmission of HIV.

Government was then ordered without delay to:

- Remove the restrictions that prevent nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.
- Permit and facilitate the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgement of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled.

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379 *Minister of Health and Others v Treatment Action Campaign and Others* CCT8/02 2002 ZA CC16.
Bilchitz 2003 *South African Journal on Human Rights* 2-4.

- Make provision, if necessary, for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of nevirapine[380] to reduce the risk of mother-to-child transmission of HIV.
- The orders made in paragraph 3 do not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV.[381]

To affirm the independence of the judiciary as one of the successes achieved to date, the point is made that the judiciary is not afraid to take on the other arms of government.

Jeffrey, in his article, wrote:

> I would argue that the impressive constitutional jurisprudence of our courts has shown a judiciary not afraid to take on other arms of government. Surely that is a hallmark of a truly independent judiciary.[382]

In the case of the *Democratic Alliance Party v the President of the Republic of South Africa and Others*,[383] the Democratic Alliance[384] made a court application to challenge the appointment of Menzi Simelane as the head of the National Prosecuting Authority of South Africa. Section 179[385] of the Constitution makes

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380 *Minister of Health and Others v Treatment Action Campaign and Others* CCT8/02 2002 ZA CC16.
Bilchitz 2003 *South African Journal on Human Rights* 2-4.

381 *Minister of Health and Others v Treatment Action Campaign and Others* CCT8/02 2002 ZA CC16.

382 Jeffrey *Mail and Guardian* 30.

383 *Democratic Alliance Party and the President of the Republic of South Africa and Others* 263/11 2011 ZA (SCA) 241.

384 *Ibid.*

385 S 179 (1) and (2) *of the Constitution of the Republic of South Africa*, 1996:
1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of –
   a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
   b) Directors of Public Prosecutions and prosecutors as determined by the Act of Parliament.

provision for a single National Prosecuting Authority in the Republic, structured in terms of an act of Parliament, and consisting of a National Director of Public Prosecutions as the head of the prosecuting authority who is appointed by the President, as head of the national executive. This section is read with sections 9[386] and 10[387] of the National Prosecuting Authority Act.

The Democratic Alliance[388] based its case on the view that Mr Simelane was not a fit and proper person within the meaning of that expression in section 9 (1) (b)[389] of the Act; alternatively when the President made the appointment he did not, as he was required to, properly interrogate Mr Simelane's fitness to hold office in the manner contemplated in the sub-section. The Democratic Alliance[390] in its founding affidavit based its argument on the fact that Mr Simelane gave evidence in 2008 in an inquiry into the fitness of Mr Vusumzi Patrick Pikoli[391] to hold the office of the National Director of Public of Prosecutions.

Mr Simelane was indicated in the Ginwala Commission of Inquiry[392] as having given misleading and untruthful evidence. The Democratic Alliance[393] indicated to the

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2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

386 S 9 *of the National Prosecuting Authority Act* 32 of 1998:
1) Any person to be appointed as National Director, Deputy National Director or Director must-
   a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic ; and
   b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.
2) Any person to be appointed as the National Director must be a South African citizen.

387 S 10 *of the National Prosecuting Authority Act* 32 of 1998:
The President must, in accordance with section 179 of the Constitution, appoint the National Director.

388 *Democratic Alliance Party and the President of the Republic of South Africa and Others* 263/11 2011 ZA (SCA) 241.

389 S 9 (1) (b) *of the National Prosecuting Authority Act* 32 of 1998:
Any person to be appointed as National Director, Deputy National Director or Director must-
b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.

390 *Democratic Alliance Party and the President of the Republic of South Africa and Others* 263/11 2011 ZA (SCA) 241.

391 Vuzi Pikoli was the former National Director of Public Prosecutions before Menzi Simelane.

392 Ginwala Commission was a Commission mandated to look into the fitness of Vuzi Pikoli, the National Director of Public Prosecution, to hold the office of the National Director of Public Prosecutions.

court that the provisions of section 179 (4)[394] of the Constitution, which requires the National Prosecuting Authority to execute its duties without fear, favour or prejudice, be considered. It was put forward that Mr Simelane's contended lack of integrity meant that the National Prosecuting Authority, through him, would not be able to meet this constitutional requirement. The Supreme Court of Appeal set aside the order of the High Court and substituted it with the following order:

> It is declared that the decision of the President of the Republic of South Africa, the first respondent, taken on Wednesday 25 November 2009, purportedly in terms of section 179 of the Constitution of the Republic of South Africa read with sections 9 and 10 of the National Prosecuting Authority Act 32 of 1998 to appoint Mr Menzi Simelane, the fourth respondent as the National Director of Public Prosecutions, is inconsistent with the Constitution and invalid. The appointment is reviewed and set aside.[395]

The Supreme Court of Appeal's order was forwarded to the Constitutional Court for confirmation, and it was so confirmed. The declaration of the appointment of Mr Simelane as inconsistent and invalid, validated the decisional independence of the judiciary. It did not matter that the appointment was made by the President of South Africa; what was of importance was the rule of law.

In a criminal case of the *State v Selebi*[396] such independence was also demonstrated. The accused, Mr Selebi, was the National Commissioner of the South African Police and head of Interpol. He was convicted of corruption in contravention of section 4 (1) (a)[397] of the Prevention and Combating of Corrupt Activities Act; read with sections 1,[398] 2,[399] 24,[400] 25[401] and 26[402] of the Prevention

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393 *Democratic Alliance Party and the President of the Republic of South Africa and Others* 263/11 2011 ZA (SCA) 241.

394 S 179 (4) *of the Constitution of the Republic of South Africa*, 1996.

395 *Democratic Alliance Party and the President of the Republic of South Africa and Others* 263/11 2011 ZA (SCA) 241.

396 *S v Selebi* (25/09) 2010 ZAGPJHC 53; SACR 209 (SCA); 2012 1 all SA 332 (SCA).

397 S 4 (1) (a) *of the Prevention and Combating of Corrupt Activities Act* 12 of 2004:
Any -
a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or for the benefit of another person.

398 S 1 *of the Prevention and Combating of Corrupt Activities Act* 12 of 2004 provides for the definitions:
Agent, agency, animal, business, dealing, foreign public official, foreign state, gambling game, game of chance, gratification, induce, judicial officer, legislative authority, listed company,

National Commissioner, National Director, official, person who is party to an employment relationship, police official, principal, private sector, property, public body, public international organisation, public officer, sporting event and valuable security.

399 S 2 *of the Prevention and Combating of Corrupt Activities Act* 12 of 2004:

1) For purposes of this Act a person is regarded as having knowledge of a fact if-
   a) that person has actual knowledge of the fact; or
   b) the court is satisfied that-
      i. the person believes that there is a reasonable possibility of the existence of that fact; and
      ii. the person has failed to obtain information to confirm the existence of that fact, and

   and "knowing" shall be construed accordingly.
2) For the purpose of this act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both -
   a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
   b) the general knowledge, skill, training and experience that he or she in fact has.
3) a) A reference in this Act to accept or agree or offer to accept any gratification, includes to-
      i. demand, ask for, seek, request, solicit, receive or obtain;
      ii. agree to demand, ask for, seek, request, solicit, receive or obtain; or
      iii. offer to demand, ask for, seek, request, solicit, receive or obtain, any gratification.
   b) A reference in this Act to give or agree or offer to give any gratification, includes to-
      i. promise, lend, grant, confer or procure;
      ii. agree to lend, grant, confer or procure; or
      iii. offer to lend, grant, confer or procure, such gratification.
4) A reference in this Act to any act, includes an omission and "acting" shall be construed accordingly.
5) A reference in this Act to any person includes a person in the private sector.

400 S 24 (2) *of the Prevention and Combating of Corrupt Activities Act* 12 of 2004:

Whenever a public officer whose duties include the detection, investigation, prosecution or punishment of offenders, is charged with an offence involving the acceptance of a gratification, arising from -

a) the arrest, detention, investigation or prosecution of any person for an alleged offence;
b) the omission to arrest, detain or prosecute any person for an alleged offence; or
c) the investigation of an alleged offence,

it is not necessary to prove that the accused person believed that an offence contemplated in paragraphs (a) to (c) or any other offence had been committed.

401 S 25 *of the Prevention and Combating of Corrupt Activities Act* 12 of 2004:

Whenever an accused person is charged with an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2, it is not a valid defence for that accused person to contend that he or she -

a) did not have the power, right or opportunity to perform or not to perform the act in relation to which the gratification was given, accepted or offered;
b) accepted or agreed or offered to accept, or gave or agreed or offered to give the gratification without intending to perform or not to perform the act in relation to which the gratification was given, accepted or offered; or
c) failed to perform or not to perform the act in relation to which the gratification was given, accepted or offered.

402 S 26 (2) – (4) *of the Prevention and Combating of Corrupt Activities Act* 12 of 2004:

2) A person convicted of an offence referred to in section 21, is liable to the punishment laid down in subsection (1) for the offence which that person attempted or conspired to commit or aided, abetted, induced, instigated, instructed, commanded, counselled or procured another person to commit.
3) In addition to any fine a court may impose in terms of subsection (1) or (2), the court may impose a fine equal to five times the value of the gratification involved in the offence.

and Combating of Corrupt Activities Act. He was sentenced to 15 years imprisonment. Mr Selebi, after being convicted by the trial court (South Gauteng High Court), appealed the judgement to the Supreme Court of Appeal. The Supreme Court of Appeal concluded that Mr Selebi had abused his position of authority and breached the trust placed in him by the position and that he be held in contravention of section 4 (1) (a) (ii).[403] His appeal was dismissed.

In 2014, the Electoral Court[404] of South Africa made a recommendation that the misconduct of the respondent (Faith Dikeledi Pansy Tlakula) had been established on a balance of probabilities and having regard to the provisions of sections 7 (3) (ii)[405] as read with section 20 (7)[406] of the Electoral Commission Act, that a

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4) Notwithstanding anything to the contrary in any law, a magistrates' court shall be competent to impose the penalty provided for in subsection (1) (a) (111), (1) (c), or (3).

403 S 4 (1) *of the Prevention and Combating of Corrupt Activities Act* 12 of 2004:
Any-
a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-
   i. that amounts to the-
      (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
      (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
   ii. that amounts to-
      (aa) the abuse of a position of authority;
      (bb) a breach of trust; or
      (cc) the violation of a legal duty or a set of rules;
   iii. design to achieve an unjustified result; or
   iv. that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to public officers.

404 The Electoral Court is a South African Court that oversees the Electoral Commission (EC) and the conduct of elections. It was established by the Electoral Commission Act, 1996 to replace a special Electoral Court which oversaw the 1994 elections, and has status similar to that of a division of the High Court. It consists of a judge of the Supreme Court of Appeal as chairperson, two High Court judges and two other members. The Electoral Court also investigates allegations against members of the Electoral Commission.

405 S 7 (3) (ii) *of the Electoral Commission Act* 51 of 1996:
A commissioner may -
a) only be removed from office by the President -
   i. on the grounds of misconduct, incapacity or incompetence;
   ii. after a finding to that effect by a committee of the National Assembly upon the recommendation of the Electoral Court; and
   iii. the adoption by a majority of the members of that Assembly of a resolution, calling for that commissioner's removal from office;

committee of the National Assembly adopted the facts, views and conclusions of the court and that it found that the respondent had committed misconduct warranting her removal from office. The applicants in this matter were registered political parties (United Democratic Movement, African Christian Democratic Party, Agang South Africa, Congress of the People and Economic Freedom Fighters).

The first respondent was Faith Dikeledi Pansy Tlakula, commissioner and chairperson of the Independent Electoral Commission. The applicants instituted the application with a view to secure the removal of Faith Dikeledi Pansy Tlakula from her office as commissioner on the grounds of her misconduct. On 26 August 2013, the Public Protector released the final report on her investigations of maladministration and corruption in the procurement of Riverside Office Park premises for the head office of the commission. The public protector found, *inter alia*, that the respondent, as CEO of the commission had, prior to her appointment as commissioner, presided over a grossly irregular process for the procurement of the commission's premises in 2009, which process was also characterised by violations of procurement legislation and prescripts.

It was found that the respondent did so despite having had an undisclosed and unmanaged conflict of interest as she had a close business relationship with Mr Thaba Mufamadi, a significant stakeholder and the successful bidder in the procurement process. The Public Protector's report further found that the respondent's improper conduct and maladministration risked impairing public confidence in the integrity and impartiality of the commission. Pansy Tlakula ultimately resigned as commissioner and chairperson of the Independent Electoral Commission. Her resignation was welcomed by many South Africans.

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b) be suspended from office by the President at any time after the start of the proceedings of the committee contemplated in paragraph (a) (ii);
c) be reappointed, but only for one further term of office.

406 S 20 (7) *of the Electoral Commission Act* 51 of 1996:
The Electoral Court may investigate any allegation of misconduct, incapacity or incompetence of a member of the Commission and make any recommendation to a committee of the National Assembly referred to in section 7 (3) (a) (ii).

6.1.4 Appointment of Judges

The appointment of judges has been a contiguous matter which has received much criticism from various quarters questioning proper application of the provisions of section 174 (2)[407] of the Constitution. The Judicial Service Commission has been challenged in court over appointments, with some claiming that its approach to transformation means white men will seldom get appointed.[408] At present there is little agreement on how transformation should take place in order to reflect broadly the racial and gender composition of South Africa as stipulated in the Constitution.[409] According to Statistics South Africa, the South African population, according to race and gender, is as follows; in 1996, 2009 and 2013:

1996:

Race	**Gender**	**Census Totals**
African / Blacks	Males	14 916 712
	Females	16 210 919
Total		31 127 631
Coloureds	Males	1 744 920
	Females	1 855 526
Total		3 600 446
Indians / Asians	Males	512 231
	Females	533 365
Total		1 045 596
Whites	Males	2 162 699
	Females	2 271 998
Total		4 434 697
Other and Unstated	Males	184 326
	Females	190 878
Total		375 204

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407 S 174 (2) *of the Constitution of the Republic of South Africa*, 1996:
The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

408 Rabkin *Financial Mail* 22.

409 *Constitution of the Republic of South Africa*, 1996.

2009:

Population group	Male		Female		Total	
	Number	% of total population	Number	% of total population	Number	% of total population
African	18 901 000	79.2	20 235 200	79.5	39 136 200	79.3
Coloured	2 137 300	9.0	2 295 800	9.0	4 433 100	9.0
Indian / Asian	635 700	2.6	643 400	2.5	1 279 100	2.6
White	2 194 700	9.2	2 277 400	9.0	4 472 100	9.1
Total	23 868 700	100.0	25 451 800	100.0	49 320 500	100.0

2013:

Population group	Male		Female		Total	
	Number	% of total population	Number	% of total population	Number	% of total population
African	20 607 800	79.8	21 676 300	79.8	42 284 100	79.8
Coloured	2 306 800	8.9	2 459 400	9.1	4 766 200	9.0
Indian / Asian	669 200	2.6	660 100	2.4	1 329 300	2.5
White	2 239 500	8.7	2 362 900	8.7	4 602 400	8.7
Total	25 823 300	100.0	27 158 700	100.0	52 982 000	100.0

The table above indicate that black (African) people are in the majority in South Africa by a huge margin. The statistics indicated below based on gender and race regarding the number of judges in the High Courts by the year 2013, gives a clear indication of the improved number of female judges and other racial groups. This is regarded as an improvement from 1994 where only one Indian male and 2 African male judges presided in these courts.

Race and gender statistics for judges:[410]

Year	White		African		Coloured		Indian	
	Male	Female	Male	Female	Male	Female	Male	Female
1994	161	2	2	-	-	-	1	-
2009	75	14	66	18	14	6	10	10
2013	66	23	73	35	15	8	12	11

410 Rabkin *Financial Mail* 22.

It is probable that the statistics could have changed between 2013 and this present moment. When analysing the statistics in a country where black (African) people are in the majority, in 1994 only 2 black (men) judges presided over the South African courts, clearly indicating that transformation was a necessity. It is submitted that for the judiciary to comply with the provisions of section 174 (2)[411] there is a need to appoint even more black (African) people and women across all races as judges, even though the statistics indicate that there has been a notable improvement.

Change does not seem to be an easy process to go through, that is the reason why many people may resist it. Despite the criticism of the Judicial Service Commission on appointments, it is evident that transformation has taken place in the South African courts system as racial and gender representivity are starting to better reflect the demographic composition of the South African population.

6.2 Conclusion

This chapter has elaborated on some of the successes brought about by the transformation of the judiciary in pursuit of compliance with the Constitution[412] of the Republic of South Africa. It has been shown how the judiciary has made court orders that are not favourable to the government, affirming the independence of the judiciary and expressing the total separation of powers of the three arms of government in that the judiciary is not in any manner influenced by the executive in its functioning. The increase in the number of judges appointed who better represent the demographics of the South African population with regard to race and gender, as stipulated in section 174 (2)[413] of the Constitution, bears testimony to a positive change, although more can still be achieved.

Judicial officers, mostly judges who were previously not trained, are now welcoming the notion that all judges, despite the court they preside in, should undergo training at some point if necessary. The provision of norms and standards within the judiciary is used as a measure to promote a court's effectiveness and efficiency,

411 S 174 (2) *of the Constitution of the Republic of South Africa*, 1996.
412 *Constitution of the Republic of South Africa*, 1996.
413 S 174 (2) *of the Constitution of the Republic of South Africa*, 1996.

which results in improved access to justice. This aspect renders the judiciary accountable and promotes the effectiveness and efficiency of the courts, thereby eliminating some aspects that could compromise the integrity of the courts.

CHAPTER 7
CHALLENGES EXPERIENCED BY THE JUDICIARY

7.1 Introduction

The previous chapter dealt with some of the noteworthy successes of the judiciary thus far. However, there are serious challenges associated with the judiciary that are worth mentioning since they affect the integrity, effectiveness and efficiency of the courts. The judiciary, as mandated by the South African Constitution,[414] must transform in a manner that is efficient, effective, gender- and race-representative in accordance with the population demographics of South Africa, and provide more access to justice. There are still aspects that pose something of a threat to the judiciary and need to be addressed in order for the judiciary to be able to achieve the required objectives. Some of these challenges are listed below.

7.1.1 Gender Considerations in Appointment of Judicial Officers

Prior to the democratic dispensation, South African women were not considered when it came to the appointment of judges. If such a woman was not white it made her practically invisible, making the situation even worse. Women had their own struggle to be noticed and considered, despite the general struggle against apartheid. A woman was considered fit to run a household. It is often said that her place is in the kitchen, barefoot and pregnant. However, women in South Africa contributed significantly to the struggle for liberation and justice, hence their march to the Union Buildings in 1956.

It is important that women should be considered – and actually given preference – to occupy judges' positions within the judiciary in accordance with the South African Constitution,[415] which holds that all persons are equal regardless of their race and gender.[416] During the apartheid era, judges were appointed from the ranks of senior advocates called senior counsel. Favour was given to white males. As a result, 160

414 *Constitution of the Republic of South Africa*, 1996.
415 *Ibid.*
416 S9 *of the Constitution of the Republic of South Africa*, 1996.

out of 165 judges were white men.[417] In terms of the Supreme Court Act[418] judges were appointed by the State President. The process of identifying potential candidates and their selection was also shrouded in secrecy.[419] It appears that political factors played a role in determining who was appointed as a judge and who was considered for promotion.

Under the new constitutional dispensation regarding the process of selection of judges, the Judicial Service Commission has formulated its own rules of procedure. When there is a vacancy in a particular court, the head of such a court informs the Judicial Service Commission and the vacancy is advertised in various media.[420] Any person can nominate a candidate, including him or herself. The nomination document states the names of the nominee and the nominator, detailed *curriculum vitae* and nominee's formal qualifications, a questionnaire prepared by the Judicial Service Commission, which is completed by the nominee, and any information that the nominee or nominator wish to disclose.[421]

The screening committee then compiles a short-list of candidates who qualify for appointment and who have the prospect of being selected. The screening committee compiling the short-list of candidates then considers a number of factors, amongst others the needs of the court where there is a vacancy, views of the head of such a court, candidates' ages, candidates' experience, as well as race and gender considerations. The short-list is then distributed to different institutions involved with the law for comment. The Judicial Service Commission subsequently conducts interviews of all shortlisted candidates. The final selection of the successful candidate(s) takes place by means of consensus or by majority vote.[422]

With the exception of the judges of the Constitutional Court, and the President and deputy President of the Supreme Court of Appeal, the President of the Republic of South Africa must appoint judges of all courts on the advice of the Judicial Service

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417 Hoexter and Olivier *The Judiciary in South Africa.*
418 *Supreme Court Act* 59 of 1959.
419 Wesson M and du Plessis M *The Transformation of the Judiciary – Fifteen Year Policy Review, South African Presidency.*
420 Olivier http://ugpa3a.gov.tn/fr/imange.php?id=749.
421 *Ibid.*
422 *Ibid.*

Commission. The Judicial Service Commission submits to the President of the Republic of South Africa a list of candidates for appointment. One name is submitted for each vacancy to the President of the Republic of South Africa and he is not given a choice to choose between candidates as he is in the case of a Constitutional Court vacancy.[423] The Judge President, who is the head of each division of the High Court, is selected and appointed in the same manner as other judges as described above.[424]

Constitutional Court judges are appointed differently from other ordinary judges. They are appointed by the President of the Republic of South Africa after consultation with the Chief Justice and leaders of the represented parties in the National Assembly. After the interviews, the Judicial Service Commission prepares a list of nominees with three names more than the number of appointments to be made. The list is submitted to the President of the Republic of South Africa for appointment.[425] When the Chief Justice and deputy Chief Justice are appointed, the President of the Republic of South Africa consults with the Judicial Service Commission and the leaders of represented parties in the National Assembly. When appointing the President and Deputy President of the Supreme Court of Appeal, the President of the Republic of South Africa consults with the Judicial Service Commission.

The President of the Republic of South Africa makes a public announcement of his preferred candidate before consulting with the Judicial Service Commission and parties concerned. The Judicial Service Commission then interviews the President's nominated candidate to determine his or her suitability. With regard to the last appointment of the Chief Justice of the Republic of South Africa, Justice Mogoeng Mogoeng, the interview by the Judicial Service Commission was broadcast on television in 2011.

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423 Olivier http://ugpa3a.gov.tn/fr/imange.php?id=749.

424 *Ibid.*

425 *Ibid.*

The struggle for women to be accorded recognition in judicial appointments has now taken centre stage. Women want the provisions of section 174 (2)[426] to be implemented. Minister Lindiwe Sisulu alluded to this in her speech at a conference in August 2014 about women, the judiciary and transformation that:

> Women make up more than a third of practitioners in the legal profession. I am informed further that there are 12 187 attorneys admitted to practice law and who are members of the law society of the Northern Province. Out of these, 7 784 are male and 4 403 are female. Universities produce a large number of female legal graduates but only a small number enter the legal profession and remain. I am advised that, of those that remain in the legal profession, a large number do not progress to swell the ranks of the High Court judiciary, despite the pioneering work of those women before them. The questions that must then be asked are: What specific challenges do women in particular face in the legal profession that constitutes a barrier to their advancement in the same way that men advance? Is government perhaps not doing enough to eliminate any barriers that may exist?[427]

According to the recent statistics, the judiciary, with regard to gender, is composed as follows:

- 71 male and 29 female Africans;
- 71 male and 21 female Whites;
- 16 male and 8 female Coloureds; and
- 12 male and 11 female Indians.

In the lower courts the number is as follows:

- 418 African males and 285 females;
- 421 white males and 233 females;
- 62 Indian males and 88 females; and
- 82 Coloured males and 61 females.[428]

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426 S172 (2) *of the Constitution of the Republic of South Africa*, 1996:
The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

427 De Rebus 2013 *Women, The Judiciary and Transformation* 185.

428 Mashao 2014 *Justice Today* 12.

Women are still not well represented at the high echelon of the judiciary, although some strides have been taken to improve the situation. What is of major concern is that after 20 years of democracy in South Africa the High Courts in the country are still male dominated. Women in the legal fraternity are pushing the gender transformation agenda motivating that the situation in the South African courts should change. It is a challenge that will not simply disappear, but it warrants that both women and men in the legal fraternity should tackle it head on until the numbers are acceptable, considering the overall South African population.

Judge Victor[429] in her address at the conference on women, the judiciary and transformation, said that it was unfortunate that 19 years into democracy the Constitutional Court still had only two female judges. She further added that at the Supreme Court of Appeal, there were seven women on the bench, while in North and South Gauteng there was a 30% record of permanent and acting female judges.[430]

In Hoexter and Olivier[431] it is indicated that very few females make it up to the judiciary. By the end of July 2013, out of the 240 judges in South Africa only 72 were women. Only two women were in leadership positions, namely the Judge President of the North West High Court and the Deputy Judge President of the Western Cape High Court. Of the 11 judges on the Constitutional Court, only two are women. Another addition was made in October 2014 when a female judge was appointed to the position of a Judge President of the Free State High Court division. There is an indication of improvement in some areas, but transformation is, however, coming at the pace of a snail. There is a need to urgently address these challenges, and more women judges be appointed to the higher courts in South Africa.

Pierre de Vos,[432] who takes gender equality seriously, indicates that the President of the Republic of South Africa, who has the final say as to who gets appointed to the Constitutional Court, should be criticised if he fails to take heed of the imperative of

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429 De Rebus 2013 *Women, The Judiciary and Transformation* 185.
430 *Ibid.*
431 Hoexter and Olivier *The Judiciary in South Africa* 173.
432 De Vos Daily Maverick.

gender transformation on the bench. De Vos[433] alluded to the fact that the President of the Republic of South Africa should be able to tell the Judicial Service Commission that compliance with section 174 (2)[434] of the Constitution must be considered when judicial officers are appointed. It is not only women who are lamenting about the small numbers of women judges. Some men, like De Vos, also see this as a very serious concern that the judiciary should make efforts to resolve.

Institutions that are tasked with appointing judges should be made up of people who are passionate about transforming the judiciary. It cannot be acceptable after 20 years of democracy for the judiciary to have taken such baby steps.[435] At the conference on women, judiciary and transformation, some challenges were highlighted by female attorneys as stumbling blocks that hinder the appointment of women as judges. These include:

- The lack of proper mentorship and equal power;
- The fact that women were not previously given the opportunity to practise because of lack of opportunity;
- The need for work in order to mentor others;
- The LLB degree not equipping them with sufficient skills; and
- The fact that women were not willing to go through the nomination process again when they were unsuccessful the first time.[436]

Other challenges faced by the judiciary in appointing women judges is the lack of support for younger female candidates who are still of child-bearing age. The work performed by judges is too involved and requires complete commitment by the said judge. Male judges do not have the same problems as women judges, who are still expected to perform their other social duties, specifically those of motherhood. When a female judge has small children, for example, her attention is also required to look after those children. The judiciary should provide some form of assistance or

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433 De Vos Daily Maverick.
434 *Constitution of the Republic of South Africa*, 1996.
435 De Vos Daily Maverick.
436 De Rebus 2013 *Women, The Judiciary and Transformation* 185.

support to encourage younger women who still have to play other family roles, to avail themselves for appointment.

During the interviews for the position of a judge of the Supreme Court of Appeal held in the week of 13 – 17 April 2015, one of the commissioners, politician Thandi Modise, asked Judge Nambitha Dambuza whether the judiciary offered women with children the support they needed. Her response was that she, at some stage had to turn down acting stints at the Constitutional Court and the Supreme Court of Appeal when her children were younger. She continued to say that there were no formal systems in place and she had to swap shifts with fellow judges in order to travel to see her children.[437]

It is important that the needs of younger female judges, most notably those with younger children, be attended to. This will encourage younger women to avail themselves for appointment. The judiciary should widen its net to attract all available women in the country to speedily narrow the gap between the number of male and female judges in the Republic of South Africa.

Another challenge relating to underrepresentation of women is that gender equality continues to be subordinate to racial equality as a concern among those engaged in the transformation of the judiciary, as Cowan[438] said. When the people of the Republic of South Africa fought apartheid, the main target was to demolish racial discrimination at all costs. Race had played a major role in oppressing those who were not regarded as white. The Bill of Rights, with the new constitutional settlement, accords equality to both race and gender. It appears some people are still more focused on addressing the race imbalance as compared to gender imbalance in most spheres. Those who are tasked with the duty to appoint judges have not as yet reached the required speed to address gender imbalance in the same vein as the racial imbalance in the judiciary in the Republic of South Africa.

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437 Narsee *Sunday Times* 6.

438 Cowan 2006 *University of Maryland Law Journal of Race, Religion, Gender and Class.*

The invisibility of women judges in the South African courts is another challenge, which is a reason why there are so few female judges. Cowan[439] argues that the small number of women judges means they are invisible and that they easily get lost in the crowd of men. This is partly because the more visible posts, such as those of Judge Presidents, Deputy Judge Presidents and heads of Professional Association Committees, are held by men. When more women are appointed in these positions, it will make them more visible to be counted.

7.1.2 Criteria for Judicial Appointments

The criteria for judicial appointments are provided in section 174 (1) and (2)[440] in the South African Constitution. The Judicial Service Commission further sets its own criteria to the Constitutional provisions. These criteria were adopted at a special meeting in September 2010.

The criteria are reflected in section 174 (1) and (2).[441] According to Malan,[442] the version as supplemented by the Judicial Service Commission asks pertinent questions such as:

- Is the proposed appointee a person of integrity?

- Is the proposed appointee a person with the necessary energy and motivation?

- Is the proposed appointee a competent person?

    - Is he or she technically competent?

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439 Cowan 2006 *University of Maryland Law Journal of Race, Religion, Gender and Class.*

440 Ss 174 (1) and (2) *of the Constitution of the Republic of South Africa*, 1996:
(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.

441 *Ibid.*

442 Malan 2014 *Re-Assessing Judicial Independence and Impartiality against the Backdrop of Judicial Appointments in South Africa* 1973.

- Does he or she have capacity to give expression to the values of the Constitution?

– Is the proposed appointee an experienced person?

- Is he or she technically experienced?
- Does he or she have suitable experience with regards to the values and needs of the Community?

– Does the proposed appointee possess appropriate potential?

– What message is given to the community at large by a particular appointment?[443]

Malan[444] holds that the challenge regarding the appointment of judges brought about the two divergent views regarding the interpretation of the provisions of the Constitution in this regard which created a lot of tension. The liberals, as he calls them, have a different opinion regarding the interpretation of section 174(1) and (2)[445] as to that of the transformationists. The liberals criticised and condemned the approach the Judicial Service Commission has adopted when it comes to interviewing independent-minded applicants. Advocate Izak Smuts SC released a document in 2013 challenging the criteria used by the Judicial Service Commission on appointment of judges.

He later resigned from the Judicial Service Commission citing that his understanding was different from the majority of the members of the Judicial Service Commission about the role of the Judicial Service Commission on basic rights, and that he no longer played an effective role. Advocate Smuts raised issues concerning the suitability of a candidate for appointment if said suitability was informed by consideration of transformation to be neither constitutionally nor legislatively mandated; and stated that the value the Judicial Service Commission attaches to the

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443 Malan 2014 *Re-Assessing Judicial Independence and Impartiality against the Backdrop of Judicial Appointments in South Africa* 1973.

444 *Ibid.*

445 Ss 174 (1) and (2) of the *Constitution of the Republic of South Africa*, 1996.

question of representivity on race and gender is a secondary factor in the whole equation when judicial appointments are considered.

Advocate Smuts argued that the imperative of section 174 (1)[446] requires that the Judicial Service Commission should establish that a candidate is properly qualified and a fit and proper person. He goes on to give his view that transformation and representivity factors to be considered by the Judicial Service Commission have created the perception that the Judicial Service Commission has taken a principled stance against the appointment of white male judges unless exceptional circumstances dictate otherwise, and he regards the approach as unlawful and unconstitutional.[447]

Johan Kruger, retired judge of the Constitutional Court, Richard Calland, retired judge of the Appellate Division, and Advocate Pall Hoffman, appeared to share the same sentiment as Advocate Smuts and they also criticised the Judicial Service Commission.[448] There was further criticism levelled against the Judicial Service Commission regarding the severe manner in which some candidates who appear before the Commission are cross-examined. Johan Kriegler laid emphasis on the technical skills, the ability to quickly grasp and deal with facts and the ability to deal with a broad field of litigation as factors to be considered.[449]

Malan cited a quotation from an article by Judge Kriegler in the *Sunday Times*, where he stated that:

> However much book-learning you have, to find your way in the civil and criminal courts with their myriad byways and hurdles you need a thorough grounding in the actual practice of the court over which you aspire to preside.[450]

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446 S174 (1) *of the Constitution of the Republic of South Africa*, 1996:
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.

447 Malan 2014 *Re-Assessing Judicial Independence and Impartiality against the Backdrop of Judicial Appointments in South Africa* 1973.

448 *Ibid.*

449 *Ibid.*

450 *Ibid.*

J J F Hefer, retired judge of the former Appellate Division, indicated that appointment of judges other than those who are suitable is neutralising the judiciary. However, the transformationists as indicated by Malan[451] are of a different view regarding the interpretation of section 174 (1) and (2).[452]

Advocate Ntsebeza SC, spokesperson of the Judicial Service Commission and champion of the transformationist camp, questioned advocate Smuts' *bona fides* in what he voiced; and commented that he was simply speaking out in support of Clive Plasket, the Eastern Cape High Court judge who was not appointed at that time, and that Smuts' criticisms were despicable and an insult to judge Willis (a white male who was recommended instead of Judge Plasket). Smuts was also labelled a person who was against transformation by the Deputy President of the Black Lawyers Association.

The Chief Justice, Mogoeng Mogoeng, the chair of the Judicial Service Commission, is of the view that consideration in section 174 (2)[453] is equally important and that the need for racial and gender consideration may, in given circumstances, override the fit and proper criteria in section 174 (1).[454]

Malan quoted him as saying that '"transformation is just as important" and that the Constitution did not require that the "best of the best" be appointed as judges.'[455]

The Judicial Service Commission is faced with a challenge to balance the provision of section 174 (2)[456] of the Constitution with the experience and qualifications the candidates should possess. It is submitted that despite 20 years of democracy in a constitutional state, these challenges will be part of the judiciary for many years to come. The main reason is that there are still a number of highly experienced and qualified white men judges occupying judges' positions, and advocates eligible for

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451 Malan 2014 *Re-Assessing Judicial Independence and Impartiality against the Backdrop of Judicial Appointments in South Africa* 1973.
452 Ss 174 (1) and (2) *of the Constitution of the Republic of South Africa*, 1996.
453 S 174 (2) *of the Constitution of the Republic of South Africa*, 1996.
454 S 174 (1) *of the Constitution of the Republic of South Africa*, 1996.
455 Malan 2014 *Re-Assessing Judicial Independence and Impartiality against the Backdrop of Judicial Appointments in South Africa* 1973.
456 S 174 (2) *of the Constitution of the Republic of South Africa*, 1996.

judicial appointments. The feeling that white men are side-lined may linger in their mist for much longer.

7.1.3 Appointment of Acting Judicial Officers

The appointment of acting judges is part of the South African judicial system for various reasons. Section 175[457] of the Constitution provides that the President may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy 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 President of the Constitutional Court. The cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court in which the acting judge will serve.

Section 97[458] of the South African Act of 1909 provided that the Governor-General in council may, during the absence, illness or other incapacity of the Chief Justice of South Africa, or of any ordinary or additional judge of appeal, appoint any other judge of the Supreme Court of South Africa to act temporarily as such Chief Justice, ordinary judge of appeal or additional judge of appeal, as the case may be.[459] It is an indication that the system of appointing acting judges did not start during the democratic dispensation but was a system practised in the South African Courts dating back. The Judges Act[460] empowered the Governor-General to appoint acting judges to provincial and local divisions under certain circumstances.

Section 10[461] of the Supreme Court Act provided for the appointment of acting judges in all divisions, thus including the Appellate Division, as well as for an acting Chief Justice.[462] Although for a short period appointing acting presiding officers can offer a solution, it may also create unintended challenges.

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457 S175 *of the Constitution of the Republic of South Africa*, 1996.
458 S 97 *of the South African Act* of 1909.
459 Hoexter and Olivier *The Judiciary in South Africa* 148.
460 *Judges Act* 41 of 1941.
461 S 10 *of the Supreme Court Act* 59 of 1959.
462 Hoexter and Olivier *The Judiciary in South Africa* 149.

The following challenges could pose a threat to the judicial system:

- Inexperienced people could find themselves on the bench of the South African courts, which could create a form of miscarriage of justice. Such acting presiding officers are drawn from various ranks such as attorneys, lower court magistrates, etc., without the requisite experience of a High Court bench, as an example. The officer would have to accumulate experience "on the job", which poses a serious danger if the person is not in at all knowledgeable in executing the required task/s.

- The flow of work may be hampered by the lack of experience of the acting judicial officer appointed. He or she may be too slow, causing a backlog of cases. The new case flow management system was introduced to promote better flow of cases in courts. Acting appointments could be counter-productive in the proper and effective flow of cases.

- Commitment to the high standard of the administration of justice may be called into question. The person appointed in an acting capacity may have found him or herself in that position because there may not have been an alternative, to put it lightly. The commitment to his or her work may be found to be wanting.

7.1.4 Delays in Finalisation of Cases

The delay in finalisation of cases can be caused by various factors. At times the prosecutors or the defence attorneys could be the cause. It becomes much more of a problem when the delay is caused by the presiding officer who is entrusted with or in charge of his or her court in which justice must be dispensed as expeditiously as possible.

Mermin in his book said:

> The problem we hear most about today is delay, it is not exactly a new problem. "Mammurabi denounced it, Shakespeare immortalised it, Hamlet, compiling his dolorous list of the burdens of men, sandwiched the 'law's delay' between the

> pangs of 'dispriz'd love' and the 'insolence of office'. English Chancery delay made *Bleak House* one of the best known edifices in English literature and made Dickens a leading law reformer. Paradoxically German court delay, scholars tell us, led Goethe to give up the law for letters, but never before has there been such a pervasive concern over the problem, coupled with concerted efforts to find solutions.[463]

The indication is that there is a concern about the delay in the finalisation of cases, which appears to be universal. In South Africa, members of the executive arm of government have also raised their concerns in various forums. Mr Jeff Radebe, the former Minister of Justice and Constitutional Development, in 2011, during his address at a conference about access to justice, made the following remark:

> Many of our people living in the rural areas complain about poor services, unnecessary postponement of cases, delays in the finalisation of cases, long distances which they must travel to courts, racism at the hands of the judicial officers and other officials in the criminal justice system. The delay in the finalisation of cases negatively impacts on access to justice. These are matters that we must address collectively if public confidence in our judicial system is to be maintained and enhanced.[464]

The President of the Republic of South Africa, Mr Jacob G Zuma, also lamented the delay in the courts to finalise cases. In his keynote address on access to justice he said:

> Some of the challenges include failure to deliver judgements in time, unreasonable delays in the finalisation of cases, unwarranted and unsubstantiated court orders and poorly considered judgements. All these have devastating effects on the lives of our people and put strain on state resources.[465]

Since 2011, when the abovementioned address was made, it would be expected that the situation should have improved. Surprisingly, the delay in finalising cases, most importantly delay to deliver judgements, is still of concern. Research was conducted

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463 Mermin *Law and the Legal System* 67.

464 Address by the Minister of Justice and Constitutional Development, Mr Jeff Radebe on the occasion of Access to Justice Conference.

465 Keynote address by the President of the Republic of South Africa, Mr Zuma on the Third Access to Justice Conference.

at Molopo[466] district court where cases were randomly picked, most of which had been postponed for judgement more than once. It is submitted that a presiding officer who has more than a year of experience on the bench, in particular at the district Magistrate's Court, should, under normal circumstances, be able to give judgement immediately without any further postponements.

The matters justiciable at the district Magistrate's Court are cases that are regarded as not complex. These are cases that are regarded as less serious as compared to murder, rape, abduction, armed robbery, which are justiciable at the regional Magistrate's Court or High Court. It is excusable for a matter mentioned above to be postponed more than once for judgement due to the complexity, at times, of the case. Cases like common assault, *crimen injuria,* ordinary robbery where the accused was not armed, shoplifting, assault with the intent to do grievous bodily harm and other cases justiciable at the district Magistrate's Court, can simply be brought to conclusion immediately.

When it becomes a tendency to postpone cases for judgement, it is an indication that there is a challenge which warrants immediate attention. What should be borne in mind by every presiding officer is that every accused person is presumed innocent until proven guilty. Hence he or she must be informed of his or her fate without unnecessary delays. The author conducted a research at the Molopo district court on matters that were postponed more than once for judgement to demonstrate that the delay in finalisation of cases still exists in some of the courts.[467]

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466 Molopo is a district court situated in Mahikeng, North West Province.

467 Cases:

1) Case no: E458/13 - Molopo
   State v Tebogo Wageng
   Charge: Assault with intent to do grievous bodily harm
   First postponement: 31 October 2013
   Second postponement: 06 December 2013
   Third postponement: 10 January 2014
   Fourth postponement: 28 February 2014
   Fifth postponement: 27 March 2014 – The accused complained about financial difficulties due to the numerous postponements
   Sixth postponement: 24 April 2014.
2) Case no: D550/13 - Molopo
   State v Gaopalelwe George
   Charge: Fraud
   First postponement: 07 March 2014
   Second postponement: 24 March 2014
   Third postponement: 25 March 2014

Fourth postponement: 25 April 2014
Fifth postponement: 5 May 2014
Sixth postponement: 08 May 2014.

3) Case no: D351/13 Molopo
State v Makie Margaret Mogapi and others
Charge: Assault with intent to do grievous bodily harm
First postponement: 10 April 2014
Second postponement: 19 May 2014 - Case finalised on 26 May 2014

4) Case no: D544/13 Molopo
State v Stephen Buti Mathebula
Charge: Assault with intent to do grievous bodily harm
First postponement: 15 April 2014
Second postponement: 06 June 2014.

5) Case no D347/12 Molopo
State v Lerato Moses Mathe
Charge: Assault with intent to do grievous bodily harm
First postponement: 12 November 2013
Second postponement: 26 November 2013
Third postponement: 09 December 2013
Fourth postponement: 13 December 2013.

6) Case no: D734/12 Molopo
State v Leburo Josias Mobitle
Charge: Assault with intent to do grievous bodily harm
First postponement: 08 November 2013
Second postponement: 26 November 2013
Third postponement: 09 December 2013
Fourth postponement: 13 December 2013.

7) Case no: D47/12 Molopo
State v Rapula Nicholas Manaqeng
Charge: Housebreaking with intent to steal and theft
First postponement: 29 May 2012
Second postponement: 11 June 2012
Third postponement: 26 June 2012.

8) Case no: D74/12 Molopo
State v Bongani Mzingoyi
Charge: Contravention of a protection order
First postponement: 30 October 2012
Second postponement: 09 November 2012.

9) Case no: D204/12 Molopo
State v Ben Moatlakgosi
Charge: Theft
First postponement: 29 January 2013
Second postponement: 26 February 2013.

10) Case no: D421/12 Molopo
State v Dumisani Menaniso
Charge: Housebreaking with intent to commit a crime unknown to the state
First postponement: 30 April 2013
Second postponement: 28 May 2013
Third postponement: 25 June 2013.

11) Case no: D557/12 Molopo
State v William Tsubane
Charge: Assault with intent to do grievous bodily harm
First postponement: 29 April 2013
Second postponement: 21 May 2013.

12) Case no: D420/12 Molopo
State v Otlhadisa Martin Maswe Sithole
Charge: Assault
First postponement: 14 January 2013
Second postponement: 28 January 2013

Other judges also raised concern about the delays in courts to finalise cases speedily. Justice Georgina Wood, the Chief Justice of the Republic of Ghana, in her address about judicial independence and sustaining the confidence of the public in the judiciary said:

> May I submit that the primary responsibility of building, enhancing, and sustaining public confidence in the judiciary rests with the judiciary? The critical virtues of trustworthiness, respect, honour, integrity etc., all of which are vital to the promotion and sustenance of public confidence, are virtues that must be worked for, toiled for and earned. They are not matters of right that can be demanded or foisted down people's throat. All members of the judiciary, and that includes that lower or junior judiciary, have the obligation to act responsibly and with candour, and comport themselves with the highest professional and ethical standards, in a manner that will win them public trust, respect and confidence. Chief Justices and the judicial council or Judicial Services Commissions must demand rendering of timely and quality decisions from members of the judicial branch of government.[468]

Justice Chaskalson also raised the concern about the delay in courts, indicating that:

> Another common complaint concerns delays in the delivery of judgements. There is no rule of thumb that fixes the time for the delivery of a judgement; cases differ, some are lengthy, others are not, some involve difficult questions of law, but in trial courts

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Third postponement: 18 February 2013
Fourth postponement: 04 March 2013.

13) Case no: D767/12 Molopo
State v Cosyginia Tololo Mthombeni
Charge: Crimen Iniuria
First postponement: 27 May 2013
Second postponement: 25 June 2013
Third postponement: 19 August 2013
Fourth postponement: 27 August 2013
Fifth postponement: 30 August 2013
Sixth postponement: 02 September 2013
Seventh postponement: 03 September 2013
Eighth postponement: 20 September 2013.

14) Case no: PT 68/13 Molopo
State v Michael Kebalepile Mothibi
Charge: Possession of Drugs
First postponement: 28 November 2013 - Accused pleaded guilty on 28 November 2013.
Second postponement: 16 January 2014
Third postponement: 17 April 2014
Fourth postponement: 19 June 2014
Fifth postponement: 06 August 2014
17 September 2014: Sentence handed down.

468 Wood "*Judicial Independence and Sustaining the Confidence of the Public in the Judiciary.*"

> these are the exceptions and not the rule. Most cases turn on the facts and legal principles that are well known.
>
> In straightforward cases much time would be saved in judgements where that is not done, every effort should be made to give the judgement promptly. Heads of court have responsibility to see that is done, and where there has been an inexcusable delay the judge concerned may have to be sanctioned under the disciplinary code.[469]

Justice Mpati,[470] the President of the Supreme Court of Appeal, also raised concern about the delay in conclusion of judgements. He indicated that some judgements had been outstanding for more than three years. He said that such conduct could only be destructive to the integrity of the judiciary, and thus of any confidence the public might have in it. When litigants are kept waiting for an inordinately long time for judgement, this amounts to "justice delayed is justice denied".[471]

The heads of the court, as described in the norms and standards[472] document, should make it their priority to monitor such delays and resolve them. Should a particular judge or judicial officer fail to deliver judgement on time, the question to be addressed is whether he or she needs further training, or if it is a matter of mere laziness amounting to a serious misconduct. There should be no room for mediocrity in the judiciary.

7.1.5 Misconduct by Judicial Officers

Judicial officers are expected to conduct themselves with a high level of integrity, and should refrain from conduct that brings the judiciary into disrepute. However, there are some judicial officers whose conduct is still unacceptable given their positions. Pannick[473] contends that "a judge may grow unfit for his office in many ways". There are some presiding officers who were found to be wanting regarding their conduct outside the court room. In the *Sunday Times* newspaper, an article

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469 Chaskalson 2011 *Judicial Independence and Sustaining the Confidence of the Public in Judiciary.*

470 Mpati "*Access to Justice Maintaining the Integrity of the Judiciary.*"

471 *Ibid.*

472 Gen Not 147 in GG 37390 of 28 February 2014.

473 Pannick *Judges* 75.

about magistrates who engaged in misconduct was published. The article explained that:

> The Sunday Times has come across shocking cases of magistrates being investigated, suspended and in some instances, removed from office for sexual harassment, drunken driving, assault, gambling, fraud, theft and even murder. The seriousness of some of the cases has raised doubts about the magistrates' ability to mete out justice and has a broader impact on the credibility of the courts. Statistics provided by the Magistrate's Commission this week reveal that 258 complaints were made against magistrates last year, whereas 222 complaints have been received in 2013 so far. Those have resulted in 28 formal investigations.[474]

Most of the judicial officers referred to in the article, mainly the magistrates, had been at odds with the rule of law. There are various cases that bear testimony to the fact that the judicial officers were on the wrong side of the law.[475] Over and above the alleged misconduct of the magistrates, some judges of the High Courts were involved in controversial cases of misconduct.

For example:

- The Judge President of the Western Cape, Judge Hlope, faces a misconduct tribunal after Constitutional Court judges Chris Jafta and Bess Nkabinde alleged

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474 Narsee *Sunday Times*.

475 Narsee *Sunday Times*:
Colleen Dumani, a magistrate from Graaff-Reinet was found guilty in 2010 for sexual assault in that among other things he was sticking his hand between the breasts of the clerk of court, stroking the cheek of an administrative clerk and tickling the back of a cleaner's neck.
Irvan Masimini, a magistrate from Queenstown was convicted of assault with intent to do grievous bodily harm. He had pulled a woman's hair and cut her chin when he hit her with a glass tumbler at a tavern.
Itumeleng Morake, a magistrate from Lichtenburg was accused of stealing two sums of R 5 000-00 and R 500-00 handed in to the clerk of court by members of the public. Mr Morake was also accused of taking R 1 173-00 from a woman to settle electricity arrears to the municipality and that he threatened a businessman "with deportation back to Bangladesh" if he did not sign an agreement in a matter before him.
Michael Masinga, a magistrate from Umlazi was convicted of attempted murder after he assaulted his wife with an axe.
Mendile Tyulu, a magistrate from Cape Town was removed from office for sexually harassing an accused who appeared before him.
Judith van Schalkwyk, a chief magistrate from Kempton Park was accused of gambling during office hours and instructing another magistrate to do her hair during working hours.
Mxolisi Matereke, a magistrate was convicted of murder and assault.

in 2008, that Hlope had sought to unduly influence them in a corruption case against President Jacob Zuma. The matter is still not yet concluded.

- Judge Motata was convicted in the regional court of Johannesburg for contravening the provisions of Section 65 (1) of the National Road Traffic Act 93 of 1996, which is driving a vehicle while under the influence of intoxicating liquor. He was sentenced to the payment of a fine of R20 000 or 12 months' imprisonment. He later lodged an appeal, which was dismissed by the High Court.

- Another example of conduct unbecoming of a judge is the failure to comply with the new regulations requiring judges to disclose their financial interests.

Benjamin wrote in the *Mail and Guardian*[476] that 16 judges will have to face the Judicial Services Commission. According to the regulations, judges have to declare their own financial interests, including their families' interests. In the past, Benjamin[477] wrote judges did not have to declare their financial interests, unlike politicians, who are required to do so. Judges who are required to declare financial interests are active judges, as well as judges who have been discharged and no longer sit on the bench but who still earn a salary and who can be called on to hear a matter or sit on a commission.

Benjamin continues:

> The Chief Justice's office said eight active judges and eight discharged judges had failed to file their declaration of interest. Mogoeng said he was taking action because he believed it was important for judges to be seen to be complying with the law and for them to be seen to be "accountable and transparent". He said there were several reasons why judges should disclose their interests, namely: to ensure that judges are free from influence of undisclosed private or business interests; to develop public confidence in the judiciary by promoting transparency;
> to develop accountability in the judiciary by permitting public access to information necessary to judge the performance of judges with regard to matters of professional conduct and to

476 Benjamin *Mail and Guardian* 7.
477 *Ibid.*

> promote a culture of openness and to ensure that judges apply the law without favour or prejudice.[478]

The misconduct of judicial officers can undermine judicial independence as contemplated by the Constitution.[479] This is one of the unintended consequences of the independence of the judiciary. Justice Mpati, the President of the Supreme Court of Appeal, when delivering his paper on the 8 July 2011, noted that:

> I have mentioned that judicial independence may be undermined and judicial integrity dented because of internal weakness. Article 7 of the Beijing statement on the independence of the judiciary provides that judges shall uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their activities. Judges are not above the law. They must avoid impropriety not only during the performance of their judicial function, but also in all other activities or conduct.[480]

Misconduct by judicial officers seems to be universal since judicial officers are human beings. As Pannick[481] points out that "there are weaknesses to which human flesh is heir". In international news, it was reported that the Lahore High Court in Pakistan has taken action against 28 judges over corruption and misconduct.[482]

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478 Benjamin *Mail and Guardian* 7.

479 *Constitution of the Republic of South Africa*, 1996.

480 Mpati "*Access to Justice Maintaining the Integrity of the Judiciary.*"

481 Pannick *Judges* 75.

482 Anon 2014 http://www.thenews.com.pk.
The administration committee of the Lahore High Court on Saturday took a strict action against judicial officers on charges of corruption and misconduct and removed two judges from service, made compulsory retirement of two others and initiated a disciplinary action against nine officers besides issuing final show cause notice to five of them. According to a notification by the Lahore High Court registrar on Saturday, the committee conducted disciplinary proceedings against many judicial officers on different allegations, including corruption, breach of code of conduct for judiciary and hold-up in disposal of cases in their respective courts. The services of AD and SJ Muhammad Bhawaz Bhatti from Pasrur were terminated by the committee. It imposed penalty of removal from services on civil judge Syed Farrukh Jussain Shamsi from Jatoi. The committee imposed major penalty of compulsory retirement from service on two AD and SJ Abdul Haseeb Sheikh OSD and Nazir Ahmad Langha, Rahimyar Khan. It imposed minor penalty of withholding two annual increments for two years on Civil Judge Muhammad Yousa Hanjra. Minor penalty of censure was imposed upon two judicial officers AD&SJ Admad Khan from Sialkot and civil judge Syeda Sarwat Mumtaz from Kasur. The Lahore High Court committee also issued final show cause notice for imposition of major penalty to five judicial officers, including two AD and SJ's Muhammd Shafiq Butt from Burewala and Riaz Ahmad Khan Toba Tek Singh and three civil judges Muhammad Saleen Sheikh from Hasilpur, Mujahid Abbas Suhail from Rahimyar Khan and Faiz Ahmad Ranajah OSD. It reinstated ex-civil judge Shahwar Armin Wagha and intiated *de novo* proceedings against nine judicial officers including District and Session Judge (D and SJ) Syed Kazim Shami from Khanewal, Muhammad Aslam Dhariwal from Silanwalim Waqar Mansoor from Bhowana, Faisal Jaim OSD, Khalid Mahmood Warraich from Sialkot and

7.1.6 Institutional Independence of the Judiciary

Institutional independence means the separation of powers of the arms of government, viz the judiciary, the executive and the legislature. In the case of the judiciary, institutional independence focuses on general conditions of service for judges as well as issues such as mode of appointment, security of tenure, adequate pay, benefits, administrative functions, etc. The judiciary in South Africa has not, as yet, attained full institutional independence. Consequently, there is an urgent need for its full institutional independence to be facilitated by the organs of state as required by the provisions of section 165 (4)[483] of the Constitution.

Many judges are of the view that the institutional independence of the judiciary is of paramount importance and cannot be ignored further.

Justice Cameron stated that:

> Institutional independence is a necessary incident of the separation of powers. It gives the judiciary insulation from the other branches of government, allows judges to do their job which is to serve as an effective check on the exercise of power. The separation of powers principle permits judges to guard themselves from being drawn into politics by declaring some disputes non-justifiable.[484]

Justice Chaskalson wrote that:

> However, in a constitutional state such as ours the judiciary is a co-equal arm of government. The question is: how is that equality to be respected? Institutional independence is directed to this issue. Like the core value of judicial independence, it is required to ensure that courts are not subject to constraints through pressure from other arms of government. The

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Muhammad Ziaul Tariq from Rawalpindi. The Lahore High Court administrative committee also instituted disciplinary proceedings against one D and SJ, two AD and SJs, a senior civil judge and five civil judges. The D and SJ is Muhammad Masroor Zaman, AS and SJ is Syed Ahsan Mahboob Bokhari from Pasrur, senior civil judge is Muhammad Kashif from Bahwalpur and civil judges are Muhammad Aslam Bhariwal from Sillanwali, Syed Hassan Abbas from Gujranwala, Muhammad Inayat Gondal from Multan, Khalid Yaqub Warraich from Isa Khele and Muhammad Saleen Sheikh from Hasilpur.

483 S 165 (4) of the *Constitution of the Republic of South Africa*, 1996:
Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of courts.

484 Cameron 2010 *Middle Temple and SA Conference Judicial Independence.*

> importance of institutional independence had been stressed by the Constitutional Court on more than one occasion. It has its roots in the rule of law, and is also addressed in the provisions of the Constitution dealing with the judiciary.[485]

In a research report written by Amy Gordon and David Bruce,[486] the authors referred to institutional independence, in the context of the judiciary, as the existence of "structures and guarantees to protect courts and judicial officers from interference by other branches of government." On 25 April 2013 the incumbent Chief Justice Mogoeng Mogoeng, in a speech about the implications of the office of the Chief Justice for constitutional democracy in South Africa, stated that:

> The judiciary in this country has, over the years, looked very much like a unit within or an extension of the Department of Justice and Constitutional Development. It had no say in any major projects intended to improve the efficiency and effectiveness of the courts, no control over the budget, very little if any say on the IT that could best serve its needs and the appointment of the limited support staff the judiciary has been assigned by the executive – to mention but some of the challenges. Yet, it is not just a national or provincial department but the third arm of the state. Unlike the NPA and Chapter 9 institutions, it has not been allowed to run its administrative affairs and this cries out for urgent and meaningful attention.
>
> The virtual non-existence of institutional independence, perceived to be in conflict with the Constitution, has also presented a whole range of practical challenges to the judiciary. Some of the challenges include the determination of court budgets without consultation with the judiciary, inadequately trained administrative staff, shortage of courtrooms and chambers for judges and magistrates, and substandard interpretation services. It is for these reasons that the judiciary has been calling for a radical paradigm shift from the current executive court administration system to one that is led by the judiciary.[487]

Chief Justice Mogoeng Mogoeng outlined that an agreement on a way to address the issues relating to the institutional independence was reached by former Chief Justice Sandile Ngcobo and the Minister of Justice and Constitutional Development Mr Jeff Radebe, in 2010. The agreements comprised three phases. Phase 1 deals

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485 Chaskalson 2011 *Judicial Independence and Sustaining the Confidence of the Public in Judiciary.*

486 Gordon and Bruce *Transformation and the Independence of the Judiciary in South Africa* 7.

487 Mogoeng "*The Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa.*"

with the establishment of the office of the Chief Justice as a national department located within the public service to support the Chief Justice as head of the judiciary and head of the Constitutional Court. Phase 2 is about the establishment of the office of the Chief Justice as an independent entity, similar to the Auditor-General. Phase 3 deals with the establishment of a structure to provide judicially based court administration.[488] The importance of institutional independence was also acknowledged by the Minster of Justice and Constitutional Development, Mr Jeff Radebe, during his address at the conference on access to justice in July 2011, where he stated that:

> The Superior Courts Bill gives substance to the Constitution Seventeenth Amendment Bill and provides, amongst others, for a comprehensive framework for the Chief Justice to issue directives and protocols for the monitoring of the performance of judicial functions in all courts. The constitutionalisation of the judicial leadership powers and functions of the Chief Justice, which he or she exercises jointly and collectively with the other senior judicial officers who are heads of the different courts, is not only consistent with the trends in established democracies worldwide, but is a furtherance and enhancement of judicial independence.
>
> The enactment of the Constitution Seventeenth Amendment Bill and the Superior Courts Bill will put us on course for the ultimate goal of administrative autonomy, which will enhance judicial independence, which is necessary for the rule of law as well as the strengthening of the accountability arrangements. We will be guided by the outcome of the ongoing research undertaken by the department and the judiciary on the appropriate court administration model that will be commensurate with our constitutional framework.[489]

From 2011, when Mr Jeff Radebe made the speech, to date, the judiciary has not as yet attained its full institutional independence. As was mentioned in Mr Radebe's speech, institutional independence is important to ensure the furtherance and enhancement of judicial independence, hence the necessity to speed up the process. The administrative autonomy of the judiciary will strengthen its accountability. On 20 July 2014 the Minister of Justice and Correctional Services, Mr

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488 Mogoeng "*The Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa.*"

489 Address by the Minister of Justice and Constitutional Development, Mr Jeff Radebe on the occasion of Access to Justice Conference.

Michael Masutha, when interviewed on SABC TV,[490] raised some challenges the department faced in fulfilling the institutional independence of the judiciary, citing questions like; since the Chief Justice is not a political office bearer:

- How will the Chief Justice account on public resources since he cannot account in Parliament or sit in cabinet?

- The Auditor-General after audit of the office of the Chief Justice, who will then account to Parliament?

He stated that the executive arm of government was still finding the balance in accounting and taking full charge of the administrative functions. The question raised by the Minister of Justice and Correctional services elaborated that the need was recognised for the complete institutional independence of the judiciary, despite the challenges faced at the time.

Benjamin[491] also contends that lack of judicial independence defeats many of the objectives behind the formation of the judiciary as a national department. She continues to quote Chief Justice Mogoeng's remarks that the institutional independence of the judiciary helps to provide reassurance that the courts were not directly or indirectly controlled by the government.

Benjamin[492] further wrote an article in the *Mail and Guardian* expressing concern that despite the importance of the judicial independence, the office of Chief Justice remains a mere executive programme after 20 years of the new constitutional dispensation. She again noted on 30 September 2014 that financial independence still eludes the Chief Justice's office. On 1 October 2014 the office of Chief Justice received about 1 486 staff members, some from courts and others from regional and national departments. A separate budget vote is expected in the 2015 / 2016 financial year, which is a very disappointing compromise for Mogoeng who

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490 South African Broadcasting Corporation.
491 Benjamin *Mail and Guardian* 3.
492 *Ibid.*

expressed a wish over the years for the office to have complete control over the budget.[493]

7.1.7 The Shortcomings of the Judicial Service Commission

One of the challenges recently raised is about the shortcomings of the Judicial Service Commission, the body that is tasked with the duty of appointing judges. There is a perception that this body is too large and the presence of political members on the commission compromises its integrity, in that the committee tends to succumb to political interests. Du Plessis[494] remarked as follows, regarding the constitution of the Judicial Service Commission:

> Smuts' bill is based on the conclusion drawn in the National Development Plan, which recognised perceptions that the commission is "too large to function effectively and is perceived to be hamstrung by political interests".[495]

The abovementioned statement comes after the General Council of the Bar, which is the influential body that represents South Africa's advocates, came out in support of the constitutional amendment to reduce the power the president and political representatives have in appointing judges.[496] Democratic Alliance's member of Parliament, Dene Smuts, tabled in Parliament a bill that would, if passed, see four political appointments and two presidential representatives dropped from the Judicial Service Commission.[497]

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493 Benjamin *Mail and Guardian* 3.
494 Du Plessis *City Press* 6.
495 *Ibid.*
496 *Ibid.*
497 Du Plessis *City Press* 6:
The current structure of the judicial service commission comprise of:
The Chief Justice;
Judge President of the Supreme Court of Appeal;
One Judge President designated by the Judges President;
Cabinet Minister responsible of the administration of justice;
Two practising advocates nominated from within the advocates profession;
Two practicing attorneys nominated from within the profession;
One teacher of law designated by teachers of law;
Six persons designated by the national assembly of which three must be members of the opposition;
Four permanent delegates of the national council of provinces; and
Four persons designated by the president.
The recommended Constitution of Judicial Service Commission after the Constitution 19th amendment bill will be comprised of:

The bill submits that the current Judicial Service Commission is very large and its membership is fairly heavily weighted in favour of politicians.[498] Du Plessis[499] quoted Dr Karen Brewer, Secretary General of the Commonwealth Magistrates and Judges Association, indicating from a research study presented to the Commonwealth Law Conference in Cape Town that the best model for a judicial appointment body is that it should have "no members of the executive or legislative whatsoever".[500] The challenge presently is that the presence of the politicians within the Judicial Service Commission creates a perception that the commission is focusing on political interests, which undermines experience and qualifications.

However, Chief Justice Mogoeng came to the defence of the Judicial Service Commission by citing that in other countries, the appointment of judges is "politicians' work".[501] Whether people are satisfied with the current constitution of the Judicial Service Commission or not, it remains a challenge that needs to be addressed, since this body is a very important one entrusted with the duty to appoint judges in South Africa.

Another challenge raised in Hoexter and Olivier[502] refers to the manner in which the Judicial Service Commission conducts interviews when considering appropriate candidates for judicial appointments. It appears there is no consistency regarding the length of the interviews. It becomes undesirable and may be procedurally unfair when some interviews are very short and others very long as it amounts to the same position so contested. An example cited in Hoexter and Olivier is that of the Eastern

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Chief Justice;
Judge President of the Supreme Court of Appeal;
One judge President;
Two practicing attorneys;
Two practicing advocates;
One teacher of law;
Justice Minister;
Four persons designated by the National Assembly;
Two persons designated by the President (only to be present when appointing ordinary judges); and
Two delegates from the National Council of Provinces – one of whom must be a member of the opposition party.
S 178 *of the Constitution of the Republic of South Africa*, 1996.

498 Du Plessis *City Press* 6.

499 *Ibid.*

500 *Ibid.*

501 *Ibid.*

502 Hoexter and Olivier *The Judiciary in South Africa.*

Cape High Court, which took 90 minutes for four candidates all together.[503] In the April 2012 interview round, an entire hour had been set aside for each interview. In 2013 the interview of Judge Clive Plasket took very long and turned into a heated discussion about race, gender and merit in the context of transformation.[504]

Olivier[505] continues that the Judicial Service Commission is losing its legitimacy among the judiciary and the legal profession, stating that:

> There is concern, particularly, about inconsistency in its questioning of candidates. Guidelines for questioning candidates are not always applied consistently, resulting in candidates receiving different treatment. There should be an attempt at least to engage intellectually with candidates about their views on constitutional values and judging. Interviews should be as similar in length, content and approach as possible to ensure an equal opportunity selection process.[506]

Some of the questions raised by the interviewing panel may be negatively construed. Questions like the age of a candidate may not appear proper in the circumstances. No person should seem to be discriminated against based on his or her age. Whether the candidate concerned may be left with two or three years to retirement should not be a criteria for appointment. Judge Thokozile Masipa, who is widely known for presiding over the Oscar Pistorius murder trial, was asked about her age by Julius Malema[507] and somewhat labelled too old for the position of Judge President in the Limpopo High Court division. Another candidate, Advocate Thembekile Malusi, was interviewed for a position on the Eastern Cape bench. He is in his forties, and was also asked questions relating to his age.

The same Julius Malema said to the candidate: "You are too young to be a judge."[508] This line of questioning does not appear to be appropriate. If one is said to be too old or too young for appointment, then where will the Judicial Service Commission get an appropriate age for proper appointments? This kind of question does not

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503 Hoexter and Olivier *The Judiciary in South Africa* 181.
504 Hoexter and Olivier *The Judiciary in South Africa* 177.
505 Olivier 2012 http://www.bdlive.co.za.
506 *Ibid.*
507 Julius Malema is the President of the Economic Freedom Fighters Party represented in the National Assembly.
508 Mashego *City Press* 11.

paint a good picture for the Judicial Service Commission, hence there should be an attempt at least to engage intellectually with candidates on constitutional values and judging. Members of the interviewing panel cannot be left to ask questions as they please, otherwise where will it stop? In the process, people's rights may simply be violated unintentionally.

7.1.8 Active Judges Presiding over Commissions of Inquiry

The debate about judges presiding over Commissions of Inquiry is not resolved as yet. Chaskalson's[509] view is that in the current system when the jurisprudence of South African law is being developed, it is not necessary to put down stringent or rigid rules detailing exactly when a serving judge can be allowed to preside over a Commission of Inquiry. However, allowing serving judges to preside on Commissions of Inquiry has its own challenges that cannot be ignored. Such challenges would be:

- The effect of the time spent by the serving judge at the Commissions of Inquiry. Commissions of Inquiry take a long time to complete, and the serving judge's part-heard[510] matters may effectively take too long to be finalised. Every judge is expected to finalise his or her cases as soon as possible and long delays may affect access to justice. The challenges will then be that when the commission is in process, other cases before that judge may not be proceeding.

- Possibility of compromising the integrity of the judge himself or herself. The issue here is that when a serving judge makes a finding in a particular Commission of Inquiry and then returns back to his or her court to preside over a matter which may have similar circumstances as the one where he or she made a finding at the Commission of Inquiry, what effect will it have on the judgement in the current case? The temptation that the judge will face is to give a judgement that may show consistency with the finding that he or she previously

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509 *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) 2000 ZACC 22; 2001 1 SA 883; 2001 1 BCLR 77.

510 Part-heard matter is a matter that is still before a presiding officer which is not as yet finalised. Evidence has already been led and it cannot be taken over by another presiding officer.

made. The integrity of that particular judge may be seen in a different light, and on its own imposes a very serious challenge.

- The entanglement of the serving judge with political matters that affect the executive. In the case of *City of Cape Town v Premier of the Western Cape and Others*,[511] the court elaborated clearly on the challenge that can be imposed by politicians who bring a matter that is political in nature but clothed differently. The judge could be tainted by the politics involved in compromising the integrity of the judge and the separation of powers of the judiciary. The challenge was articulated by the court clearly as follows:

> The challenge raised is that the appointment of a serving judge to chair the second Erasmus Commission was incompatible with the separation of powers ordained in the Constitution and therefore unlawful and invalid.[512]

The court further expressed the dissatisfaction of serving judges to chair Commissions of Inquiry when it pointed out that:

> Having found that the Premier did not possess an honest belief that good reasons existed for establishing the second Erasmus Commission and acted with the ulterior motive of embarrassing political opponents, these words assume even greater significance on the facts of this case. In this context I find the inference irresistible that one of the reasons why the Premier appointed a judge to chair the Commission was in order to cloak his ulterior motive with the neutral colours of the judicial office.[513]

It poses a great challenge when the judiciary is seen to be used by other arms of government to attain a certain goal, and that cannot be considered as acceptable. The independence of the judiciary and separation of powers of the three arms of government remain paramount as provided by the Constitution.[514] By way of example, the Seriti Commission of Inquiry serves to show the effect such a

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511 *City of Cape Town v Premier of the Western Cape and Others (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C).*

512 *City of Cape Town v Premier of the Western Cape and Others (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C)* 169.

513 *City of Cape Town v Premier of the Western Cape and Others (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C)* 176.

514 *Constitution of the Republic of South Africa*, 1996.

commission may have on a particular judge. People may start to have different perceptions, as indicated in a publication by Lawyers for Human Rights which states that:

> The Commission has been accused of perpetrating a "second agenda" and was marred by key resignations in its early days. Criticisms of judge Willie Seriti's handling of the process have bordered on accusing him of deliberate obfuscation.[515]

The court in the case of *City of Cape Town v Premier of the Western Cape and Others*[516] raised another serious and important aspect that should be considered when allowing active judges to chair Commissions of Inquiry and the effect it may have on public confidence in the independence of the judiciary. The court quoted McHugh J in the *Grallo*[517] case, where it was said:

> In determining whether incompatibility exists, the appearance of independence and impartiality is as important as its existence. It is trite to say that justice must not only be done, but be manifestly seen to be done.[518]

The same sentiments were expressed in the case of *Van Rooyen v De Kock.*[519] In this case the appellant had launched instant appeal and review proceedings in the regional Magistrate's Court against his conviction and sentence for housebreaking with intent to steal and theft. One of the grounds for review was that the magistrate, who is the first respondent, had not been properly appointed as a judicial officer as required by section 174 (7)[520] of the Constitution. Mr Thomas Frederik Hermanus van Rooyen was convicted for housebreaking with intent to steal and theft, and subsequently sentenced to six years' imprisonment.

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515 The Sereti Commission has been accused of perpetrating a "second agenda" and was marred by key resignations in its early days. Criticisms of Judge Willie Sereti's handling of the process have bordered on accusing him of deliberate obfuscation.

516 *City of Cape Town v Premier of the Western Cape and Others (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C).*

517 *Grallo v Palmer 1995 HCA 26; 1995 184 CCR 348.*

518 *Ibid.*

519 *Van Rooyen v De Kock NO and Others* 2003 2 SA 317 (T).

520 S 174 (7) *of the Constitution of the Republic of South Africa*, 1996:
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.

The appellant sought an order reviewing and setting aside the judgement of the regional magistrate. The first respondent (Mr De Kock) being the regional magistrate, retired as regional magistrate on 28 February 1994. On 23 April 1997, the first respondent (Mr De Kock) was appointed indefinitely as an acting magistrate in terms of section 9 (4)[521] of the Magistrate's Court Act. On 27 July 1998, he signed a written contract of service with the Department of Justice which contract was antedated to 1 July 1997. The appellant submitted that the proceedings during which appellant was convicted and sentenced are nullity, alternatively that such proceedings should be declared null and void as the first respondent (De Kock) was not properly appointed either in terms of the Magistrates' Court Act[522] or the Magistrates' Act.[523]

The first respondent was appointed in terms of a special contract. The appellant argued that the first respondent was appointed as a consultant, which strongly militated against the salutary principles of judicial independence as required by section 165 (1)[524] of the Constitution, to the extent that it can be said that the appellant did not have a fair trial before an ordinary court. Judge Bosielo concluded that the first respondent's appointment was in terms of and subject to the Public Service Act[525] and regulations. His tenure of contract and conditions of his employment, including salary and incidental benefits, fell within the scope of the

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521 S 9 (4) *of the Magistrate's Court Act* 32 of 1944:
a) A Magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate authorized thereto in writing by the Minister, may –
   i. whenever a magistrate, additional magistrate or assistant magistrate is for any reason unavailable to carry out the functions of his or her office; and
   ii. in consultation with the Minister or an officer in the Department of Justice an Constitutional Development designated by the Minister.
   temporality appoint any competent person in the place of the magistrate concerned..
b) An appointment in terms of paragraph (a) remains valid for the duration of the unavailability of the magistrate in question, or for a period not exceeding five consecutive court days, whichever period is the shortest.
c) Any person appointed in terms of paragraph (a) may –
   i. upon the expiry of the appointment in terms of paragraph (b); and
   ii. if the magistrate in whose place the appointment has been made, is still available, be reappointed once only in terms of paragraph (a) in the place of that magistrate.

522 *Magistrate's Court Act* 32 of 1944.

523 *Magistrate's Court Act* 90 of 1993.

524 S 165 (1) *of the Constitution of the Republic of South Africa*, 1996:
The judicial authority of the Republic is vested in the courts.

525 *Public Service Act* 103 of 1994.

Public Service Act[526] and regulations, which directly conflicted with the core principle and motion of judicial independence enshrined in the Constitution.[527] Judge Bosielo laid emphasis on the question of public confidence in courts, which should not be compromised by any dealings with the judiciary. He stated in this case that:

> To my mind, what is really at the heart of the problem is the confidence which courts, operating in an open, democratic and constitutional state, must engender and inspire in the public. Public confidence in the judiciary is crucial for the credibility and legitimacy of the entire judiciary. To my view, it is imperative that in every modern democratic society, particularly ours, which is still relatively young and nascent, that the judiciary as a whole must not only claim or purport to be seen to be truly independent. I venture to say that the attributes of judicial independence and impartiality lie at the very heart of the due process of the law.[528]

The court in its judgement in the case of the *City of Cape Town v The Premier of the Western Cape and Others*[529] referred to the Australian case of *Wilson and ORS v the Minister for Aboriginal and Torrens Strait Islander Affairs and Anor*,[530] emphasising the issue of judicial independence and compatibility with the holding of office as a judge. Although it is an Australian case, it demonstrates the importance of having regard for issues relating to public confidence in the judiciary and the independence of the judiciary. In this case, the Honourable Justice Jane Matthews was nominated by the Minster for the Aboriginal and Torres Strait Island Affairs in terms of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, to prepare a report under section 10.[531]

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526 *Public Service Act* 103 of 1994.

527 *Constitution of the Republic of South Africa*, 1996.

528 *Van Rooyen v De Kock NO and Others* 2003 2 SA 317 (T).

529 *City of Cape Town v Premier of the Western Cape and Others (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C).*

530 *Wilson and ORS v The Minister for Aboriginal and Torrens Strait Islander Affairs and Anor* 1996 189 CLR 1.

531 S 10 *of the Aboriginal and Torres Strait Islander Heritage Protection Act* 1984:

1) Where the Minister:
   a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration;
   b) is satisfied:
   i. that the area is a significant Aboriginal area; and
   ii. that it is under threat of injury or desecration;
   c) has received a report under subsection (4) in relation to the area from a person nominated by him and has considered the report and any representation attached to the report; and

The plaintiffs sought a declaration that the nomination and appointment of Justice Matthews, and her acceptance of the nomination, were incompatible with the commission as a Judge of the Federal Court of Australia and or with the proper performance of her judicial functions as a judge of that court. The question raised in this case is whether performance of the function of reporting to the Minister under section 10[532] is a function which is constitutionally compatible with the holding of office as judge, appointed under Chapter III of the Constitution.

In this case it was stated that:

> That the constitution does not absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with or appropriate to, continuing service on the bench, nor does it mean that congress may require a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not in a judicial capacity. The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the judicial branch.[533]

It was further stated that:

> The legitimacy of the judicial branch ultimately depends upon its reputation for impartiality and non-partisanships. That reputation may not be borrowed by the political branches to cloak their work in neutral colours of judicial action.[534]

Another reference was made to the Canadian case of *Ell v Alberta.*[535] The respondents in this case sought to challenge the constitutionality of legislative reforms seeking to improve the qualifications and independence of Alberta's justices of the peace. It this case it was stated that:

> Accordingly, the judiciary's role as arbiter of disputes and guardians of the constitution require that it be independent from all other bodies. A separate, but related, basis for independence is the need to uphold public confidence in the

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d) has considered such other matters as he thinks relevant;
he may make a declaration in relation to the area.

532 *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984.

533 *Wilson and ORS v The Minister for Aboriginal and Torrens Strait Islander Affairs and Anor* 1996 189 CLR 1.

534 *Ibid.*

535 *Ell v Alberta* 2003 SCC 35; 2003 1 SCR 857.

> administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it".[536]

When the judiciary does not enjoy public confidence, it becomes a challenge since its duty is to resolve disputes amongst the people of South Africa.

7.1.9 Judicial Education and Training

The judiciary appears to appreciate that it is necessary for all judicial officers at some point to receive some form of training. Hugh Corder[537] indicated that the necessity for some form of initial and continuing judicial education is more urgent than ever as new skills are now expected from the bench.[538] The judiciary is in the process of transformation, moving away from the traditional way of doing things. The new norms and standards that are in place require judicial officers to provide some form of leadership, even if they are not managing others. At the moment judicial officers are not constantly receiving training in leadership or management skills. This is a challenge in itself. People can easily acquire skills and be experts in their own field, but that does not necessarily make them better leaders or managers.

The judiciary must align itself with its changes and train the judicial officers accordingly for it to be effective and efficient. The judiciary should be able to effectively practice what it is documented in policies otherwise it will be a challenge, when there are policies in place which are not put in practice. Corder[539] indicated that in the past it could be argued that judges were kept in touch with development in the law by reading legal texts, journals and by arguments presented to them by able and ambitious counsel. However, in the present South African circumstances, where legal practice is undergoing rapid changes, it is of the utmost necessity that judicial officers receive training.[540]

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536 *Ell v Alberta* 2003 SCC 35; 2003 1 SCR 857.
537 Corder 1992 *SA Publiekreg.*
538 *Ibid.*
539 *Ibid.*
540 *Ibid.*

7.2 Conclusion

This chapter elaborated on some of the challenges that the judiciary needs to address, as these issues compromise the integrity of the judiciary. The chapter discussed the question of the delay in finalisation of cases where there are no justifiable reasons to do so. The tendency appears to be experienced in both the superior and lower courts as the research study was conducted at Molopo district court and judges of the superior courts also lament about the practice. The chapter also made mention of misconduct by judicial officers, where judges like Motata were convicted of drunken driving. Judicial officers, whether they preside at the high or lower courts, are expected to conduct themselves in an impeccable manner to avoid compromising the integrity of the courts.

Some of the shortcomings of the Judicial Service Commission, mostly around the question of appointments of judges, were detailed. The chapter also voiced the author's dissatisfaction with the low number of female judges appointed to the high courts in the Republic of South Africa. The matter regarding judges doing non-judicial work was raised, specifically that judges find themselves compromised and entangled in political issues that end up compromising the integrity of the judicial officer and the judicial institution concerned. The result, to an ordinary person who cannot differentiate matters, is a blurred vision on separation of the judiciary and the executive arm of government, thus compromising the independence and the perception of independence of the judiciary.

CHAPTER 8
POSSIBLE SOLUTIONS AND RECOMMENDATIONS

8.1 Judicial Training on Managerial Skills and Development of Monitoring Processes

As discussed previously in this paper, there is often a delay in the finalisation of court cases for one reason or another. Examples of cases that were picked randomly show that the judicial officers do postpone cases several times for judgement. It is submitted that a judicial officer who, at the very least, has many years' experience presiding over matters at the district Magistrate's Court should at least be able to finalise judgement without having to postpone the matter, because matters that are justiciable at the district Magistrate's Court are neither complex nor complicated, hence they are regarded as less serious. The judiciary should be able to put proper and effective measures to prevent the tendency of postponing cases or the delay in finalisation of cases, amongst others.

Delays in the finalisation of cases can have a very serious impact on accused persons, who are not paid any witness fee[541] and who are forced to travel time and again going to court. For the complainant in a case, it is important that his or her case be finalised promptly in order to provide them with closure. This delay can be equated to secondary victimisation of the complainant because they are subjected to an unfair delay, which exposes them to a situation in which they keep on meeting the accused person/s.

Under the current norms and standards,[542] the heads of all courts have the duty to ensure that said norms and standards[543] are adhered to. This added responsibility would require the heads of courts to be empowered with leadership and management skills. It cannot simply be assumed that every head of the court has these skills. When heads of court are empowered they will be in a better position to

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541 Witness fee is an amount of money given by the Clerk of Court to all witnesses who are subpoenaed to come to court to give evidence.

542 Gen Not 147 in GG 37390 of 28 February 2014.

543 *Ibid.*

identify strengths and weaknesses in their courts. This can be achieved through training to acquire managerial skills.

The norms and standards provide that:

- Every judicial officer must dispose of his or her cases efficiently, effectively and expeditiously; and

- The heads of all courts must take all necessary initiatives to ensure a thriving normative leadership and must ensure that these core values are adhered to.[544]

The previous Constitutions[545] of the Republic of South Africa, before 1993, did not make provisions such as those set out in sections 165 (4)[546] and 180[547] of the present-day Constitution. To ensure that the norms and standards are implemented fruitfully, the training of heads of courts on the management of those courts is imperative. It is submitted that the research that has been undertaken at Molopo[548] district court as indicated in Chapter 3 relating to the cases that were postponed several times for judgement, there is a possibility that the same might be happening in other courts in the country.

There should also be a team of officers in the office of the Judge President, who is in charge of the courts in the Province. These officers should be tasked with analysing the monthly statistics submitted in order to trace the delays in finalisation of cases. The team would look at issues such as the number of cases finalised in a particular month in each court and why cases are taking so long to be brought to finality,

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544 Gen Not 147 in GG 37390 of 28 February 2014.

545 *Constitution of the Republic of South Africa Act, 1959.*
Constitution of the Republic of South Africa Act 32 of 1961.
Constitution of the Republic of South Africa Act 110 of 1983.

546 S 165 (4) *of the Constitution of the Republic of South Africa*, 1996:
Organ 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.

547 S 180 *of the Constitution of the Republic of South Africa*, 1996:
National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including –
a) training programmes for judicial officers;
b) procedures for dealing with complaints about judicial officers; and
c) the participation of people other than judicial officers in courts decisions.

548 Molopo is a district court situated in Mahikeng, North West Province.

amongst other things. The Judge President, who is in charge of the courts in the province, may not be able to tackle this task on his or her own because he or she would still have to manage her or his own court and adjudicate on cases. A good example to analyse is the practice at the National Prosecuting Authority. In the National Prosecuting Authority there are two officials based at head office in Silverton. They collect monthly statistics from all the directors of public prosecution offices in the country. They analyse and compare statistics from all the divisions against the norms and standards, annual performance plan and performance indicators.

After analysing these statistics, the officers advise all the directors of public prosecution about the challenges encountered and successes achieved. This system assists the directors of public prosecution to monitor court performance. Every quarter, a comprehensive report is released that contains all the relevant information. The norms and standards[549] for the judiciary are well crafted on paper, after which control systems should be put in place to monitor and evaluate the process. In so doing the authority is best able to achieve its stated objectives.

Observation of the conduct displayed at times by some judicial officers makes it imperative to demand a judiciary that is independent and accountable. The norms and standards do help to promote the integrity of the courts and encourage judicial officers to double their efforts in executing their judicial functions. Therefore the need to have control systems in place cannot be emphasised enough, as indicated above. If there is an officer or officers in the office of the Judge President who will assist the Judge President to analyse statistics and help him or her to identify weaknesses according to each court, he or she will be able to know as soon as possible which measures to put into place to address performance problems.

8.2 Fast-Tracking the Process of Institutional Independence of the Judiciary

This research study has demonstrated that the institutional independence of the judiciary is very important in order to achieve better accountability for the judiciary.

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549 Gen Not 147 in GG 37390 of 28 February 2014.

Section 165[550] of the Constitution makes provision for the independence of the judiciary and the organs of state, through legislative and other measures, to assist and protect the courts and to ensure their independence, impartiality, dignity, accessibility and effectiveness. It is important that the institutional independence of the judiciary should become a reality. The executive arm of government must create the environment that brings the institutional independence to fruition. There is a direct conflict of interest for the courts when they have to beg for funding from the Ministry of Justice and Correctional Services (as it is currently known) when there is a distinct possibility that the same ministry could find itself appearing before the courts as a litigant.

There has to be a clear and separate distinction regarding how the judiciary and the Ministry of Justice and Correctional Services operate with separate budgets. The questions raised by the Minister of Justice and Correctional Services, Mr Michael Masutha, about the accountability of the resources as indicated in Chapter 5, although valid, should be addressed as a matter of urgency. When any arm of government is given state resources, there has to be accountability for those resources. The document that has been developed by the Committee on institutional models to capacitate the office of the Chief Justice made the following recommendations on court budgets:

> The Superior Courts Act provides that the Chief Justice, after consultation with the heads of court, will have responsibility for preparing the budget for the superior courts. In Phase 1, the budget thus prepared will be submitted by the Minister of Justice and Constitutional Development to Parliament in accordance with the manner prescribed for budgetary processes of departments of state. In Phase 2 once the Office of the Chief Justice becomes an independent entity similar to the Auditor-General, a different process will need to be followed.

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550 S 165 of the *Constitution of the Republic of South Africa*, 1996:
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) Organ 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.

> The budget for the OCJ, including all superior courts and judicial institutions supported by it, should now be submitted to Parliament by the OCJ's accounting officer, following a procedure similar to that followed by the Auditor-General which is set out in Schedule 9. For this purpose, and to support the request for funds, the Secretary General should also submit a report to the National Assembly annually on his or her activities, and the performance of his or her functions, including accounting for funds expended and services provided to judicial institutions.[551]

The recommendation is that the Secretary-General should be the person who accounts to Parliament with respect to the budget. This arrangement would resolve the problem raised by the Minister of Justice and Correctional Services. In a constitutional state the complete independence of the judiciary cannot continue to be seen to be compromised.

8.3 Speedy Finalisation of the Complaints for Alleged Misconduct by Judicial Officers

The delay in the finalisation of misconduct levelled against judicial officers does give a misconception that nothing happens to them despite their misconduct. The Judicial Service Commission Amendment Act[552] provided for the establishment of a judicial conduct complaint committee headed by the Chief Justice. It also introduces provisions for the enforceable code of judicial conduct. It is imperative that the judicial conduct complaints committee finalises these matters as a matter of urgency. The public will be able to see that no one is above the law. As an example, the delay in Judge President Hlope's matter has dragged on for far too long and may leave a bitter taste in the mouths of the public, who believe in the rule of law.

According to section 174 (1)[553] of the Constitution, when judges are appointed, consideration must be made of any appropriately qualified woman or man who is a fit

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551 Office of the Chief Justice *Report by the Committee on Institutional Models Capacitating the Office of the Chief Justice and Laying Foundations for Judicial Independence: The next Frontier in our Constitutional Democracy: Judicial Independence.*

552 *Judicial Service Commission Amendment Act* 20 of 2008.

553 S 174 (1) *of the Constitution of the Republic of South Africa*, 1996:

and proper person. The question of appropriately qualified may not impose much of a challenge; however, a fit and proper person can be somewhat elusive.

It is submitted that when the Constitution[554] included the requirement of a fit and proper person, the intended person is supposed to be a male or female whose conduct is beyond reproach. Judicial officers play the role of judging others and therefore should always conduct themselves with the highest degree of integrity. They cannot be expected to be heavenly angels, but their standards should be higher than those of the average person. Therefore certain types of conduct should not be acceptable at all. When a judicial officer is convicted of a crime and has exhausted all appeal processes, he or she should indeed not be allowed to continue to preside in South African courts. The example of Judge Motata that was cited in this research study in Chapter 7 serves to show that certain types of conduct are not acceptable and warrant that he should not be allowed to continue to preside in the South African courts of law.

The vexing matter is that, if a particular judicial officer is convicted of a certain crime, won't that have an undue influence in his or her decision when presiding over a similar matter that he or she has been convicted of? A question to be asked is how the ordinary person feels when his or her case is presided over by a judicial officer who has similar previous conviction. The process of removing a judge from office is provided for in terms of section 177[555] of the Constitution. That is, a judge may be removed from office through a special impeachment procedure. What is of importance to this research study is that a judge maybe removed from office only if the Judicial Service Commission finds that he or she is guilty of gross misconduct

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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.

554 *Constitution of the Republic of South Africa*, 1996.

555 S 177 *of the Constitution of the Republic of South Africa*, 1996:

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 cote 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).

and follows the required procedure thereof. The question would follow as to whether he or she had committed misconduct that would not ordinarily be considered gross enough, but which could still be considered unbecoming of a judge, and that said misconduct would have the effect to bringing the judiciary into disrepute.

It is submitted that a judge or any judicial officer in a high or lower court should be able to be removed from office due to any misconduct that affects public confidence in the judiciary. It is possible for judicial officers with integrity to exercise self-restraint and not be involved in any manner of misconduct. Currently there is no code of ethics in force for judges. All complaints are referred to the Judicial Service Commission. When laws are crafted in such a way as to be intolerant of any kind of misconduct, they may serve as a deterrent to potential perpetrators. It is submitted that the frequency of conduct unbecoming of judicial officers in the judiciary seems to be on the rise and should be curbed without further delay. Corder contend that 'the changed nature and constitutional role of the judiciary in a future South Africa will make some form of judicial discipline essential'.[556]

The laws that govern the judiciary may indicate certain kinds of misconduct that will warrant a judge to be removed from office immediately. An example of this situation would be if a judicial officer who has been convicted of a criminal offence and who has exhausted all appeal processes should be persuaded to resign or be removed from office forthwith. This approach will assist in enhancing public confidence in the judiciary. It will also be to the best interests of justice and contribute to the speedy finalisation of the complaints of misconduct against judicial officers.

8.4 Gender Consideration in Appointment of Judicial Officers

The Constitution[557] gives mandate to the judiciary to transform and align with the current democratic dispensation and move away from the previous apartheid systems and forms. The transformation needed has to include all areas such as race and gender composition of the judiciary, the effectiveness and efficiency of the judiciary, accountability and access to justice. The entire judicial system needs to

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556 Corder 1992 *SA Publiekreg.*

557 *Constitution of the Republic of South Africa*, 1996.

transform to be more representative of the population demographics of South Africa. The manner in which the judiciary conducts its business should be of a stature that enhances confidence in the South African public, who ultimately benefit by receiving sound justice.

There are divergent views regarding transformation of the judiciary based on race and gender. Some are of the view that to comply with the provisions of section 174 (1) and (2)[558] of the Constitution, a woman who may not be best qualified but who is more fit and proper than a male and who possesses the potential should be appointed. Some say that to consider a female who has potential but who is not better qualified than a male, may then compromise standards if appointed. In spite of divergent views, transformation still has to happen in the South African judiciary.[559]

The current imbalance in the South African courts must be corrected. Statistically there are more women in South Africa as compared to the number of men. If the judiciary is to create that balance according to the South African population demographics there is no escaping the fact that more women must be appointed. According to Statistics South Africa, the 2013 statistics of women versus men in South Africa are as follows:

Population group	**Male**		**Female**		**Total**	
	Number	% of total population	Number	% of total population	Number	% of total population
African	20 607 800	79.8	21 676 300	79.8	42 284 100	79.8
Coloured	2 306 800	8.9	2 459 400	9.1	4 766 200	9.0
Indian / Asian	669 200	2.6	660 100	2.4	1 329 300	2.5
White	2 239 500	8.7	2 362 900	8.7	4 602 400	8.7
Total	25 823 300	100.0	27 158 700	100.0	52 982 000	100.0

558 S174 (1) and (2) of the *Constitution of the Republic of South Africa*, 1996:
(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

559 De Rebus 2013 *Women, the Judiciary and Transformation.*
Acting Judge C P Fourie.

It is clear that there are more women (amounting to 27 158 700) as compared to men (amounting to 25 823 300). The population demographics indicate the difference of 1 335 400 more women than men and the possibility is that the difference may be even higher as these statistics are from two years ago.

However, for transformation to speed up, women must lead the process by engaging in some of the following activities:

- Proper mentorship

Women must start seriously mentoring each other. It is of no help to present good papers and raise complaints about the slow pace of transformation and not do anything about it. Forums must be created where those women who are more advanced should, on a regular basis, give lectures to aspirant female judges. Such forums must hold meetings each quarter and deal with specific topics. Each senior judge should consider taking some of the women under her wing. She should be available to guide upcoming women who have potential.

Men who are also available and prepared to mentor aspirant women judges should also be brought on board. It is submitted that there are men who are prepared to assist women to become better judicial officers. Another consideration is to approach retired judges who can also assist in proper mentorship. The transfer of skills from retired judges will benefit the judiciary immensely and is one of the considerations that is proposed. When people are mentored properly it boosts their confidence and they will be able to face their new positions with vigour. Most women will therefore be more likely to take on bigger challenges, because they will feel better equipped to face the tasks at hand.

- Total commitment by women to transformation

Those already in higher positions must demonstrate total commitment towards bringing about change. Ms Siwendu puts it in this way:

> Women need to have their own "never-never and never again" convictions and moments, like former President Nelson Mandela had when he was inaugurated. There needs to be dialogue among female attorneys to formulate convictions for

> the profession and to sound their own firm convictions of what they are going to tolerate in the name of the practice of law.[560]

– Women need to spell out their shortcomings and needs

It is important for women to acknowledge and indicate what their shortcomings and needs are. There cannot be a loud noise about assisting women to climb the professional ladder without articulating what needs to be addressed. It should be clearly indicated so that when assistance is to be given, it can be targeted to address a particular aspect. Not all women experience the same challenges, therefore their individual needs should be addressed accordingly.

– Criteria for appointment of acting judges

It is common practice in South Africa to appoint acting judges, most of whom ultimately end up appointed as judges of the High Courts. There are currently no codified criteria on how such candidates are nominated as acting judges, and the process is left to the discretion of the judge presidents. The practice seems to be that those who have not spent time as acting judges are unlikely to be appointed by the Judicial Service Commission. If the criteria are formulated to include the inputs of the Judicial Service Commission, they may be of assistance in making provision for the allowance of more women to be appointed acting judges than to leave the process at the discretion of one person.

This will be an easier and more efficient way to monitor the number of women judges who are given the opportunity to act as judges in every division of the High Court. Jansen[561] wrote about women judges who called for a firm set of criteria to be developed in order to determine who served as acting judges, so that these appointments would not take place at the whim of the High Court judge presidents. The call was made by the South African chapter of the International Association of Women Judges during their annual conference at the University of KwaZulu-Natal when they said:

> Currently anyone who has not spent time as an acting judge is unlikely to be considered a suitable candidate by the Judicial

560 De Rebus 2013 *Women, the Judiciary and Transformation.*

561 *Ibid.*

> Service Commission, but few women were afforded this opportunity. It would ensure that more women would qualify to apply for positions on the bench.[562]

– Broader pool of possible candidates

The Judicial Service Commission must cast the net wider when making judicial appointments in order to attract more women to the bench. As Olivier[563] said, the Judicial Service Commission needs to be proactive and embark on an outreach programme to encourage outstanding female candidates from academia. The Judicial Service Commission should include more academic lawyers. It is submitted that there are outstanding lawyers who are currently in institutions of higher learning, who if given an opportunity, could make a significant contribution to the judiciary. They need to be given opportunities to act as judges, and that will increase the pool of candidates from which the Judicial Service Commission can draw.

– Formal administrative system to assist female judges

The judiciary is the third arm of government. Accordingly it has to be regarded with the same level of importance afforded to Parliament. Resources that are at the disposal of Parliamentarians should also be made available to the judiciary. For example, Parliament has day-care facilities available for children, which allow women to be on a fair footing with their male colleagues. What is it that makes it difficult for the judiciary to have similar system of support, so that women can focus on their work without having to worry about their children?

The judiciary should be given enough budget to accommodate situations like this. If it is not possible to have day-care facilities then the scope of work of their personal assistants should be widened to include duties such as these. When Advocate Namawabo Msize was interviewed for a seat on the bench of Eastern Cape Division of the High Court, Chief Justice Mogoeng asked her what the judiciary could do to make life more pleasant for female judges. The mother of one responded that personal assistants needed to be given flexibility to provide judges with assistance.[564]

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562 De Rebus 2013 *Women, the Judiciary and Transformation.*

563 Olivier http://www.ugpa3a.gov.tn/fr/image.php?id=749.

564 Narsee *Sunday Times* 6.

8.5 Active Judges Presiding Over Commissions of Inquiry

The challenges faced by the judiciary around active judges having to chair Commissions of Inquiry were discussed in Chapter 7. It is submitted that the best way for the judiciary to deal with such challenges is to refrain from allowing active judges to play these roles because it could result in several problems arising, as detailed. The judge may end up being entangled in politics, thus compromising the judiciary as an institution and the judge him or herself. It may be better if retired judges are called on to preside over Commissions of Inquiry. The example of the Seriti Commission[565] of Inquiry is evidence that active judges involved in Commissions of Inquiry can have a devastating effect on the judge and the judicial institution.

The whistle blower, Hennie van Vuuren, who was subpoenaed by the Seriti Commission of Inquiry to testify, refused to give his testimony citing issues that the Commission continued to withhold documents that he and his colleagues needed to prepare for their cross-examination, and that the Commission would also not let witnesses speak to documents that they themselves had not written. Hennie van Vuuren further remarked that the Commission had lost the public interest. Two more London-based arms deal critics, Paul Holden and Andrew Feinstein, also did not testify at the Seriti Commission, citing the fact that the Commission did not have international jurisdiction.[566]

In the case of the *City of Cape Town v Premier of the Western Cape and Others*[567] the court made the following remarks:

> Having found that the Premier did not possess an honest belief that good reasons existed for establishing the second Erasmus Commission, and acted with the ulterior motive of embarrassing political opponents, these words assume even greater significance on the facts of this case. In this context I find the inference irresistible that one of the reasons why the Premier appointed a judge to chair the Commission, was in order to

565 Sereti is the judge of the Supreme Court of Appeal.

566 Evans *Mail and Guardian* 2 – 3.
Enca TV News Channel 20-10-2014.

567 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C).

> cloak his ulterior motive with the neutral colours of the judicial office.[568]

When the court makes a finding such as the one above, it gives a clear picture of how judges may find themselves used to settle political scores. This is detrimental to the judiciary as an institution. The allegations by Hennie van Vuuren, who refused to testify at the Seriti Commission, are very serious and put an indictment on the judge presiding over the Commission. The judiciary must spare its integrity by not allowing active judges to preside over Commissions of Inquiry. The author is in full agreement with the remarks made by the court in the case of *City of Cape Town v The Premier of the Western Cape and Others*[569] remarking that:

> With great respect to the views of the Constitutional Court, that judges may in "appropriate circumstances" preside over Commissions of Inquiry without infringing the separation of powers, the problem lies in deciding in any particular case whether it is "appropriate" for a judge to involve him or herself, in the particular Commission. The facts of the present case starkly illustrate the problem. As will become apparent in this judgement the City and the DA contend that the appointment of Erasmus J contravenes the guidelines laid down by the Constitutional Court in Heath's case *supra*, namely, there is a risk of judicial entanglement in matters of political controversy, the judge will be involved in the process of law enforcement and the function to be performed is more appropriate to another branch of government.[570]

It appears that it is not always easy to establish all the facts before the judge hears evidence that, to chair a particular Commission, is not appropriate. Hence it is necessary for active judges to refrain from participating and that it be left to retired judges to play such a role. South Africa cannot afford to have a judiciary tainted with controversy. It is therefore recommended that retired judges should assist with the function of presiding over Commissions of Inquiry.

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568 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C) 176.

569 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) 2008 ZAWCHC 52; 2008 6 SA 345 (C).

570 *Ibid.*

8.6 Standard Set of Questions Regarding Interviews by Judicial Service Commission

The Judicial Service Commission's panel members are responsible and mature people who are tasked with the duty of finding the best possible candidates for the position in the higher courts. However, one cannot lose sight of the fact that some questions continue to put the Judicial Service Commission in the spotlight. As indicated in the chapter dealing with the challenges facing the judiciary, some shortcomings were highlighted to try and avoid a situation where the Judicial Service Commission ending up losing the confidence of the people and the legal fraternity.

It is advised that there should be a set of standard questions put to all candidates. Questions relating to the age of a particular candidate do not seem to be relevant unless it has an impact on a person's intellectual capacity to execute his or her duties. A standard set of questions would assist panel members not to take the line of questioning further than they actually should. This will protect both the candidate and the panel members from a possible transgression of each other's rights. Olivier[571] is of the view that a standard set of questions to be put to candidates is desirable in order to increase the chances of equal opportunity and a fair outcome in interviews.

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571 Olivier http://www.ugpa3a.gov.tn/fr/image.php?id=749.

CHAPTER 9
GENERAL CONCLUSION

9.1 Historical Perspectives

This research study started by demonstrating the background of the administration of justice dating back to the pre-colonial era. This is the period when black South Africans had their own system of administering justice in a traditional way without the formal structures administration of justice that we know today. There were no court buildings or codified formal procedures, but communities could still dispense justice satisfactorily amongst themselves. Black society enjoyed and had confidence in the manner in which justice was dispensed and the objective was not necessarily to punish, but to rehabilitate the offender, reconcile the parties and restore the balance of equilibrium within those societies.

The research study proceeded to showcase the situation during the colonial era when the Dutch and the British colonised the Cape and eventually the rest of South Africa. This is the period during which more formal structures emerged in the administration of justice. Systems that were adopted in Holland were introduced in South Africa, creating formal courts and court officials. During this period of colonisation, black South Africans were catered for through their own system of administration of justice. The Black Administration Act[572] made provision for courts mainly for black people, although they could also access Magistrates' Courts. From 1948 when the apartheid government took over power, the system of racial segregation was reinforced.

Black people had access to the court system in the country, but the racial laws practised by the apartheid government created an uneasy feeling amongst black people, who did not experience fair justice. During this period a court structure was in place but the courts were fragmented. It has been shown how administration of justice by the courts evolved from pre-colonial to the apartheid era.

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572 *Black Administration Act* 38 of 1927.

9.2 Evolution of Constitutionalism

The research study also charted the evolution of the South African Constitution[573] from 1910 to the present 1996 Constitution.[574] The 1910 Constitution,[575] which was followed by the 1961 and 1983 Constitutions,[576] emphasised the question of parliamentary supremacy hence the courts could only apply the law as it stood. This resulted in many unfair and unjust laws being applied by the courts without any questioning of their legitimacy. The interim Constitution[577] came about as a result of the negotiated settlement and paved the way for the final Constitution[578] in a constitutional democratic state. The Constitution[579] became, and still is, the paramount law of the Republic of South Africa.

The final Constitution[580] guaranteed the independence of the courts by granting the judiciary the power to strike down any legislation or pronunciation by an organ of state as invalid if it is inconsistent with the Constitution.[581] The evolution of the South African Constitution[582] brought about one of the best constitutions in the world, with the Bill of Rights enshrined therein. The judicial transformation as required by the current Constitution[583] brought about various changes. These changes include the creation of the Constitutional Court, the office of the Chief Justice as a department and the re-alignment of courts within the provinces and the norms and standards[584] as a way to foster court effectiveness and efficiency.

9.3 The Non-Curial Role of the Judiciary

Judicial officers in South Africa perform functions that are non-judicial for the benefit of the country. It has been shown that judicial officers can participate in such

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573 *South Africa Act of Henry VII of* 1909.
574 *Constitution of the Republic of South Africa*, 1996.
575 *South Africa Act of Henry VII of* 1909.
576 *Constitution of the Republic of South Africa Act* 32 of 1961.
Constitution of the Republic of South Africa Act 110 of 1983.
577 *Constitution of the Republic of South Africa* Act 200 of 1993.
578 *Constitution of the Republic of South Africa*, 1996.
579 *Ibid.*
580 *Ibid.*
581 *Ibid.*
582 *Ibid.*
583 *Ibid.*
584 Gen Not 147 in GG 37390 of 28 February 2014.

activities as long as they are appropriate and do not compromise the integrity of the judiciary as an institution or the judge himself or herself. Examples that are deemed to be appropriate include, amongst others, when the Chief Justice has to swear in the President and members of the legislature, there are no rigid rules to be followed as to which non-judicial functions should or should not be undertaken by judicial officers.

The Constitutional Court gave only guidelines in the case of *South African Association of Personal Injury Lawyers v Heath and Others.*[585] Those guidelines were again used in the case of *City of Cape Town v Premier of the Western Cape.*[586] Despite the guidelines that a judicial officer should consider before taking up a non-judicial function, challenges exist in other instances which may end up compromising the integrity of the judiciary as an institution and interfering with the doctrine of separation of powers.

9.4 Legislative Framework of the Judiciary

This research study demonstrated the policies and laws that brought about the current judicial system. The ANC government realised the need to comply with the provisions of the Constitution[587] to have an independent judiciary, and accordingly created means to align the judiciary with the requirements of the Constitution.[588] The system of administration of justice was very fragmented and needed realignment. The Vision 2000 strategy, presented by Dr Dullah Omar, then Minister of Justice, paved the way for the discussion documents to be presented by his successor Mr Jeff Radebe. In this way the current system of the judiciary was eventually instituted. The Constitution[589] was amended to cater for the office of the Chief Justice, the Superior Courts Act[590] was passed to realign the High Courts in the provinces and to

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585 *South African Association of Personal Injury Lawyers v Heath and Other* (CCT27/00) 2000 ZACC 22; 2001 1 SA 883; 2001 1 BCLR 77.

586 *City of Cape Town v Premier of the Western Cape and Others* (5933/08) 2008 ZAWCHC; 2008 6 SA 345 (C).

587 *Constitution of the Republic of South Africa*, 1996.

588 *Constitution of the Republic of South Africa*, 1996.

589 *Constitution of the Republic of South Africa*, 1996.

590 *Superior Courts Act* 10 of 2013.

include governance systems for an effective and efficient judiciary. The legislative framework of the judiciary is demonstrated herein.

9.5 Judicial Successes

The South African judiciary, through its transformation, has spawned many noteworthy successes to date. Legislation has been passed to promote the effectiveness and efficiency of the courts. The Superior Courts Act[591] provided for the issuing of the norms and standards[592] by the Chief Justice. This came about as the result of the transformation of the judiciary. The independence of the courts could also be evident in the judgements that are handed down. The judgements referred to earlier, which were against the State President and government, bear testimony to the decisional independence of the judiciary.

The transformation of the judiciary in relation to the appointment of judges was also discussed. Statistics show that black South Africans are in the majority by a huge margin. However, before 1994 there were only two black male judges presiding in South African High Courts. By the year 2013, 278 judges of races other than white, 108 of whom were black, presided over the High Courts in the country. Judicial education and training has also been given a boost. Judicial officers now realise the need for and importance of training. This is another milestone achieved by the judiciary. The South African Judicial Education Institute Act[593] was passed to establish the new South African judicial education institute.

In the promotion of effectiveness and efficiency of the courts, the provision of documented norms and standards[594] is welcomed. By giving examples of decisions that the courts made against the other organs of the state, it has been shown that the judiciary does enjoy decisional independence. An example of such a decision is when the court decided against the decision of the State President in appointing the National Director of Public Prosecutions, Advocate Menzi Simelane, thereby altering the social programmes of the government.

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591 *Superior Courts Act* 10 of 2013.
592 Gen Not 147 in GG 37390 of 28 February 2014.
593 *South African Judicial Education Institute Act* 14 of 2008.
594 Gen Not 147 in GG 37390 of 28 February 2014.

9.6 Challenges Experienced by the Judiciary

It is evident from the preceding discussion that the transformation of the judiciary in South Africa is complex. This complexity has led to a number of provocative debates around the functioning of the judiciary. Since the final Constitution[595] came into effect there has been increased attention given to transformation of the judiciary. The majority of black South Africans could not wait for the judiciary to transform, although in some quarters it has been perceived as reverse racial discrimination – mostly when it comes to the appointment of judges. Transformation of the judiciary requires that there should be a balance of men and women who preside over the South African higher courts. This challenge requires urgent attention and the matter cannot take a back seat any longer.

Challenges that the judiciary is currently facing include the delay in finalisation of cases. South African people expect justice that is speedy, efficient and effective. Justice delayed is justice denied, hence judicial officers should avoid unnecessary postponements. It has been demonstrated how government officials and judges lament the issue of delays in finalisation of cases, because it affects poor and vulnerable people in South Africa most severely.

The shortcomings of the Judicial Service Commission need to be addressed. Although the office of the Chief Justice is being empowered, the need for complete institutional independence cannot be delayed any further. The Constitution[596] of the Republic of South Africa requires that the judiciary should be fully independent of any other arm of government. The role played by active judges presiding over Commissions of Inquiry has been demonstrated to pose serious challenges that should be avoided at all costs. South Africans cannot afford to have a judiciary that is tainted by allegations that judicial officers are used by politicians to achieve other means.

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595 *Constitution of the Republic of South Africa*, 1996.

596 *Ibid.*

The shortcomings involving the Judicial Service Commission, and the balancing act in appointing judges with regard to experience and qualifications versus gender and racial consideration, also needs to be addressed. The misconduct by judicial officers which tends to compromise the integrity of the judiciary has been discussed, and warrants drastic measures to curb it before it becomes chronic.

9.7 An Afterword

This research study clearly demonstrates how the South African judiciary has clearly demonstrated its decisional independence deciding against the government in many cases since the new democratic dispensation. The judicial systems to dispense justice are in place and it can be said that the judiciary is in good standing so far, despite the challenges it still faces, which were also highlighted in the study. If the judiciary can be accorded full and complete independence, South Africa can be one of the best judicial systems in the world where there is no political interference and enhanced accountability for judicial officers themselves, resulting in an excellent system where all South African people have equal access to justice.

Complete judicial independence is the cornerstone of a constitutional state. Hence it is for the good of all people that it be accorded such. Much more will then be achieved in settling all manner of disputes in the country. South Africa is a country that has overcome a seemingly insurmountable racial divide (apartheid) to become a democratic state without resorting to full-scale civil war. The achievements thus far are indication that it is possible to find a solution to the complex questions that are still vexing the judiciary.

This research study has shown that it has been a long journey for the transformation of the judiciary, which has taken place by means of constitutional evolution of the current judicial system in South Africa, which seems to be embraced by the majority of South Africans. The continuing transformation of the judiciary should be carefully crafted to ultimately fulfil its constitutional mandate and objectives in totality.

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