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## GENERAL NOTICE

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### NOTICE 2023 OF 2005

#### DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

#### PUBLICATION OF BILL AMENDING CONSTITUTION

The Minister for Justice and Constitutional Development intends introducing the Constitution Fourteenth Amendment **Bill**, 2005, in the National Assembly. The particulars of the proposed amendments are hereby published for public comment in accordance with section 74(5)(a) of the Constitution of the Republic of South **Africa**, 1996. Any person wishing to comment on the proposed amendments is invited to submit written comments to the Minister for Justice and Constitutional Development. Comments should kindly be directed to the attention of Mr J A de Lange, Private Bag X 81, Pretoria 0001, by not later than 15 January 2006. (Electronic mail address: [Jdelange@justice.gov.za](mailto:Jdelange@justice.gov.za))

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#### GENERAL EXPLANATORY NOTE:

[            ] Words in bold type in square brackets indicate omissions **from** existing enactments.

\_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments.

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#### B I L L

To amend the Constitution of the Republic of South **Africa**, 1996, **so** as to regulate responsibility in respect of the judicial and administrative functions of all courts; to provide for the conversion of the various **High** Courts into a single High Court of South Africa; to provide that the Constitutional Court is the highest court in all matters; to further regulate the jurisdiction of the Constitutional Court **and** the Supreme Court of Appeal; to provide for the appointment of two Deputy Presidents to the Supreme Court of Appeal; to restrict courts **from** hearing a matter dealing with the suspension **of**, or **making an** order suspending, the commencement of **an** Act of Parliament or a provincial **Act**; to provide for the appointment of Judges President and Deputy Judges President; to provide for the appointment of an Acting Deputy Chief Justice, an Acting Deputy President of the Supreme Court of Appeal and an Acting Deputy Judge President; and to provide for matters connected therewith.

Be it enacted by the Parliament of the Republic of South Africa, **as** follows:—

#### Amendment of section 165 of Constitution

**1.** Section 165 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is amended by the addition of the following subsections:

~~"(6) The Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law.~~

~~"(7) The Cabinet member responsible for the administration of justice exercises authority over the administration and budget of all courts."~~

#### Amendment of section 166 of Constitution

2. Section 166 of the Constitution is amended—

(a) by the substitution for paragraph (c) of the following paragraph

"(c) the **[High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts] High Court of South Mica;**"; and

(b) by the substitution for paragraph (e) of the following paragraph:

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

#### Amendment of section 167 of Constitution, as amended by section 11 of Act 34 of 2001

3. Section 167 of the Constitution is amended—

(a) by the substitution for subsection (3) of the following subsection:

"(3) The Constitutional Court—

(a) is the highest ~~court~~ **[in all constitutional matters]** of the Republic; and

(b) may decide ~~[only]~~—

(i) constitutional matters—~~[, and issues connected with decisions on constitutional matters;]~~

(aa) on appeal;

~~(bb) directly in accordance with subsection (6); or~~

~~(cc) referred to it as contemplated in section 172(2)(c) or in terms of an Act of Parliament; and~~

~~(ii) any other matter, if the Constitutional Court grants leave to appeal that matter on the grounds that the interests of justice require that the matter be decided by the Constitutional Court.~~

~~[(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.]";~~

(b) by the substitution for subsection (5) of the following subsection:

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

(c) by the substitution for paragraph (a) of subsection (6) of the following paragraph:

"(a) to bring a constitutional matter directly to the Constitutional Court; or"; and

(d) by the addition of the following subsection:

"(8) The Constitutional Court makes the final decision whether a matter is a constitutional matter."

#### **Amendment of section 168 of Constitution, as amended by section 12 of Act 34 of 2001**

4. Section 168 of the Constitution is amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) The Supreme Court of Appeal consists of a President [, a **Deputy President**] and—

(a) two Deputy Presidents of the Supreme Court of Appeal: and

(b) the number of judges of appeal determined in terms of an Act of Parliament."; and

(b) by the substitution for subsection (3) of the following subsection:

"(3) **[The] If the Constitutional Court refuses leave to appeal in a matter referred to in section 167(3)(b)(ii), the Supreme Court of Appeal is the final Court of appeal, in that matter. It may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa [.** **It is the highest court of appeal except in constitutional matters], and may decide only—**

(a) appeals;

(b) **issues** connected with appeals; and

(c) **any other matter that may be referred to it in circumstances defined by an Act of Parliament."**

#### **Substitution of section 169 of Constitution**

5. The following section is substituted for section 169 of the Constitution:

**"High [Courts] Court of South Africa**

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

**Substitution of section 170 of Constitution**

6. The following section is substituted for section 170 of the Constitution:

**"Magistrates' Courts and other courts**

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

**Amendment of section 172 of Constitution**

7. Section 172 of the Constitution is amended—
- (a) by the substitution for paragraph (a) of subsection (2) of the following paragraph
- "(a) The Supreme Court of Appeal, ~~[a] the High Court of South Africa~~ or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."; and
- (b) by the addition of the following subsection:

"(3) Despite any other provision of this Constitution, no court may hear a matter dealing with the suspension of, or make an order suspending, the commencement of an Act of Parliament or a provincial Act."

### **Substitution of section 173 of Constitution**

8. The following section is substituted for section 173 of the Constitution:

#### **"Inherent power**

173. The Constitutional Court, Supreme Court of Appeal and High [Courts] Court of South Africa each have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

### **Amendment of section 174 of Constitution, as amended by section 13 of Act 34 of 2001**

9. Section 174 of the Constitution is amended—

(a) by the substitution for subsection (3) of the following subsection:

"(3) The President as head of the national executive, appoints—  
 @ [after consulting the Judicial Service Commission and the leaders of parties represented in the 'National Assembly, appoints] the Chief Justice and the Deputy Chief Justice [and,] after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly; and  
 (b) [after consulting the Judicial Service Commission, appoints] the President and two Deputy [President] Presidents of the Supreme Court of Appeal after consulting the Judicial Service Commission."; and

(b) by the insertion of the following new subsection (5), the remaining subsections being renumbered accordingly:

"(5) The Judges President and Deputy Judges President of the Divisions of the High Court are appointed by the President. as head of the national executive, after consulting the Chief Justice and the Cabinet member responsible for the administration of justice, in accordance with the Procedure set out in subsection (4)(a) to (c)."

### **Substitution of section 175 of Constitution, as amended by section 14 of Act 34 of 2001**

10. The following section is substituted for section 175 of the Constitution:

#### **"Acting appointments of certain judges**

175. (1) The President may appoint a woman or a man to [be] serve as an acting=

- (a) Deputy Chief Justice;  
 (b) judge of the Constitutional Court;  
 (c) Deputy President of the Supreme Court of Appeal; or  
 (d) Deputy Judge President of a Division of the High Court of South Africa.

if there is a vacancy in any of those respective positions, or if **[a judge]** the person holding: any such position is absent. **[The]** Any such appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting after consultation with the **[concurrence of the]** Chief Justice.

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

(3) A person holding an acting position in terms of this section has the responsibilities, powers and functions of the judicial office in which the person is acting."

**Amendment of section 178 of Constitution, as amended by section 2 of Act 65 of 1998 and section 16 of Act 34 of 2001**

11. Section 178 of the Constitution is amended—

(a) by the substitution for paragraph (k) of subsection (1) of the following paragraph:

"(k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that **[Court] Division** and the Premier of the province concerned, or an alternate designated by each of them."; and

(b) by the substitution for subsection (7) of the following subsection:

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

**Amendment of Schedule 6 to Constitution, as amended by section 3 of Act 35 of 1997, section 5 of Act 65 of 1998 and section 20 of Act 34 of 2001**

12. Schedule 6 to the Constitution is amended by the addition to item 16 of the following subitem:

"(8) Anyone holding office, when the Act of Parliament referred to in section 169(2) of the new Constitution takes effect, as a Judge President, Deputy Judge President or a judge of a High Court or any court of a status similar to the High Court, becomes a Judge President, Deputy Judge President or judge of the relevant Division of the High Court of South Africa or such other court in accordance with the provisions of that Act."

## Short title and commencement

13. This Act is called the Constitution Fourteenth Amendment Act of 2005, and comes into effect on a date set by the President by proclamation.

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## MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION FOURTEENTH AMENDMENT BILL, 2005

(Published in terms of Rule 258(3) of the Rules of the National Assembly)

### BACKGROUND.

The *Constitution of the Republic of South Africa Amendment Bill* [B 60—2003], was introduced in Parliament during September 2003, together with the *Superior Courts Bill* [B 52—2003], and referred to the Portfolio Committee on Justice and Constitutional Development (National Assembly) (the Committee) for consideration. The Committee embarked on extensive public hearings regarding the ~~draft~~ legislation and received substantial inputs from a wide range of interested parties. Before Parliament adjourned for the April 2004 elections, the Committee issued instructions to the Department of Justice and Constitutional Development regarding amendments to the **Bill**, as well as the addition of new provisions.

Following the elections in 2004, the *Superior Courts Bill* was revived by the new Parliament. However, the Constitution Amendment Bill in question was allowed to lapse, thereby necessitating the introduction of a new Constitution Amendment Bill in order to mandate the structural changes envisaged in order to rationalise the Superior Courts (the Constitutional Court, Supreme Court of Appeal and the High Courts), as well as to give effect to certain instructions of the Committee.

### OBJECTS OF THE BILL

The objects of the **Bill** can be explained as follows:

**Clause 1:** Section 165 of the Constitution is amended in order to provide that the Chief Justice is the head of the judicial authority and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts, other than the adjudication of any matter before a court of law. The Cabinet member responsible for the administration of justice, in turn, exercises authority over the administration and budget of all courts. In this way the Commonwealth model of the separation of powers between the Executive and Judiciary is maintained and constitutionally entrenched, with the responsibility for the judicial functions of our courts being the sole preserve of the judiciary, and the responsibility for the administrative functions of the courts being the sole preserve of the relevant Minister.

Clauses **2** and **5**: Sections **166** and **169** of the Constitution are amended so as to convert the various High Courts into a single "High Court of South Africa", comprising of the Divisions, with the seats and jurisdiction, as determined in terms of an Act of Parliament (the Superior Courts Bill).

Clause **3**: Section **167** of the Constitution is amended so as to confirm the status of the Constitutional Court as the apex court, with jurisdiction in all constitutional matters and any other matter in which it may grant leave to appeal.

Clause **4**: Section **168** of the Constitution is amended in order to provide for the appointment of a second Deputy President of the Supreme Court of Appeal. This results from the need to appoint a Deputy President of that Court who is dedicated to the management of labour appeals, following the abolition of the Labour Appeal Court (by the Superior Courts Bill).

Clause **7**: An important new principle is introduced in section **172** of the Constitution, in that it provides that no court may hear a matter dealing with the suspension of, or make an order suspending, the commencement of an Act of Parliament or a provincial Act.

Clause **9** The amendment to section **174** of the Constitution provides that the President, as is the case with the judges of the Constitutional Court, will appoint the leadership (Judges President and Deputy Judges President) of the High Court of South Africa from a list of suitable candidates, submitted by the Judicial Service Commission.

Clause **10**: Section 175 of the Constitution is amended in order to make provision for the appointment of acting judges in leadership positions.

Other amendments contained in the Bill are of a consequential nature.

### 3. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section **74(3)** of the Constitution, since it amends provisions of the Constitution other than section 1, section **74(1)** or Chapter **2**.

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