

SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 75

Project 111

**CONSTITUTIONAL JURISDICTION OF
MAGISTRATES' COURTS**

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973). The members of the Commission are:

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PREFACE

This discussion paper (which reflects material to hand as at 31 December 1997) has been prepared to elicit responses and to serve as a basis for the Commission's deliberations. Its contents are accordingly not to be regarded as representing any final view of the Commission. The paper is published to provide persons and bodies wishing to comment or to make suggestions relating to the constitutional jurisdiction of Magistrates' Courts to enable them to place focussed submissions before the Commission.

The Commission will assume that respondents agree to the disclosure by the Commission of any comments they make, and the attribution of comments to respondents, unless representations are marked confidential. Respondents should in any event be aware that the Commission may have to release information contained in representations to it, pursuant to the provisions of section 32 of the Constitution of the Republic of South Africa Act, 1996.

Respondents are requested to submit written comments or representations to the Commission by 15 June 1998, at the address appearing on the previous page.

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SUMMARY OF RECOMMENDATIONS

1. It is suggested that magistrates' courts should be given a constitutional jurisdiction appropriate to their position in the court structure in South Africa. They represent the primary means of access to justice for most South Africans. An exclusion of all constitutional jurisdiction would be inappropriate, more particularly in view of the interactive growth between the common law and our developing constitutional law contemplated by section 8(3) of the Constitution.
2. If this approach is supported, the extent of an appropriate constitutional jurisdiction arises. It is proposed that this encompass not only the general or "common law" aspects listed in paragraph 23 below, but the legislative areas long encompassed by section 110 of the Magistrates' Court Act.
3. It is proposed that the existing *ultra vires* jurisdiction of section 110 of the Magistrates' Courts Act be retained.
4. It is proposed that sections 170 and 172 of the Constitution and section 110 of the Magistrates' Court Act be amended in terms of the draft amendments set out in annexure F.

INTRODUCTION

The initial reference to the Law Commission

1. On 8 December 1997, the Commission received from the Minister of Justice a request that its investigation commissioned earlier by the Minister of Justice into the constitutional jurisdiction of Magistrates' Courts be widened. This request and the investigation initially commissioned arise in the following circumstances.

2. Section 103(2) of the Constitution of the Republic of South Africa Act, 1993 ("the interim Constitution") provided that

"(i) if in any proceedings before a court referred to in subsection (1), it is alleged that any law or provision of such law is invalid on the ground of its inconsistency with a provision of this Constitution and the court does not have the competency to inquire into the validity of such a law or provision, the court shall subject to the other provisions of this section, decide the matter on the assumption that the law or provision is valid".

3. No similar provision is to be found in the Constitution of the Republic of South Africa Act, 1996 ("the Constitution").

4. Section 170 of the Constitution provides that:

“[m]agistrates’ courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not inquire into or rule on the constitutionality of any legislation or any conduct of the President”.

The Minister of Justice has been advised by his Department that this means that Magistrates’ Courts may inquire into or rule into constitutional matters other than those relating to **“any legislation or any conduct of the President”**. This viewpoint was supported in a legal opinion obtained by the Department from the State Law Advisers. A copy of this opinion is attached as annexure A. It will be evident that the principal conclusion of the State Law Advisers appears to be that while no jurisdiction in respect of constitutional matters has been expressly accorded to Magistrates’ Courts by the Constitution, and while there can be no basis for contending that Magistrates’ Courts have what is termed implied jurisdiction in terms of the Magistrates’ Courts Act, 1944 in respect of the matters stipulated in paragraph 4.10 at p 8 of annexure A, Magistrates’ Courts

“in principle do have jurisdiction in constitutional matters as implied by sections 29 and 89 of the Magistrates’ Courts Act, 1944, but only to the extent that the finalisation of that case is dependent on the adjudication of a constitutional matter relevant to the case”

(Para 4.14 at p 12 of annexure A).

5. The State Law Advisers however state that they are **“not able to assist the department with a *numerus clausus* of instances where the Magistrate’s Courts would have jurisdiction in constitutional matters”**. The law advisers further agree with the

Department that section 110 of the Magistrates' Courts Act "does seem to be in conflict with the Constitution in respect of statutory regulations, and that it should be amended to reflect the position as set out in the Constitution". Section 110 of the Magistrates' Courts Act provides:

"110. Jurisdiction as to plea of *ultra vires*

No magistrate's court shall be competent to pronounce upon the validity of a provincial ordinance or an ordinance of the Legislative Assembly of the territory or of a statutory proclamation of the State President or of the Administrator of the territory, and every such court shall assume that every such ordinance or proclamation is valid; but every such court shall be competent to pronounce upon the validity of any statutory regulation, order or bye-law.

[S.110 substituted by s. 20 of Act 53 of 1970]

[N.B. S.110 has been substituted by s. 66 of the Magistrates' Courts Amendment Act 120 of 1993, a provision which will be put into operation by proclamation. See PENDLEX]."

6. As a result, on 22 May 1997, the Minister of Justice asked the Law Commission to include in its programme for investigation the need for remedial legislation in this regard.

He concluded:

"I think that you will agree that an in-depth investigation will have to be conducted in order to make meaningful legislative proposals, which are not in conflict with the other provisions of the Constitution, providing for appropriate instances where Magistrates' Courts should have jurisdiction in constitutional matters. I am of the opinion that such a comprehensive investigation which should inter alia include wide consultation with the Bench, legal [profession] and all other interested parties, as well as a comparative study of the legal position in other countries, has to be conducted by an experienced team [which] has the necessary knowledge of the provisions of the Constitution and all other Acts which could be [a]ffected".

7. This discussion paper has accordingly been prepared to serve the purposes reflected in

the first paragraph of the Preface.

The widened inquiry

8. Although the request set out in paragraph 6 had been directed to the Law Commission, the Department proceeded forthwith to prepare legislation for comment. This was in the form of the Magistrates' Courts Second Amendment Bill [B 77-97] (a copy of which is attached as annexure 2). Section 1 of this Bill proposed the substitution of section 110 of the Magistrates' Courts Act, 1944 by the following:

"Pronouncements on validity of law or conduct of President

110. (1) A court shall not be competent to pronounce on the validity of any law or conduct of the President.
- (2) If in any proceedings before a court it is alleged that -
- (a) any law or any conduct of the President is invalid on the grounds of its inconsistency with a provision of the Constitution; or
- (b) any law is invalid on any ground other than its constitutionality,

the court shall decide the matter on the assumption that such law or conduct is valid: Provided that the party which alleges that a law or conduct of the President is invalid, may adduce evidence regarding the invalidity of the law or conduct in question".

9. This was evidently thereafter referred to the Chief Justice (to whom in his separate capacity as chairperson of the Commission the initial request had been directed by the Minister to include this matter on the Commission's programme) by the Director-General: Justice on 2 July 1997. A draft response was prepared by the relevant

committee of members of the Supreme Court of Appeal, indicating with regret its conclusion that the proposed Bill was defective and unacceptable. The Commission has been much assisted by a copy of this response, which has been kindly furnished to it, and which states:

“The fundamental problem appears to be that the architects of the Bill have confused and assimilated two separate and diverging legal concepts, viz the doctrine of ultra vires on the one hand and, on the other hand, the principle of constitutional invalidity. In a certain, lay sense of the word one can say that a statute which violates a constitutional clause is ultra vires. But in legal parlance and legislative practice, a distinction has always be[en] drawn between the two concepts and each of them conforms to its own rules”.

A copy of the full draft response is attached as annexure C.

10. It will be noted both that the view expressed relating to constitutional jurisdiction in general is that in the light of section 170 of the Constitution, there can hardly be uncertainty relating to the question whether at present “constitutional jurisdiction” - in relation to any matters, it would seem - exists. Furthermore, the view is strongly advanced that the jurisdiction of the Magistrates’ Courts to pronounce upon the validity of statutory regulations, orders or by-laws (on the basis that these are ultra vires an empowering enactment) be retained. It is said that these are an important part of the jurisdiction of the Magistrates’ Courts, and the proposed abolition of this jurisdiction would be **“a step in the wrong direction”**. It has also pointed out that section 110 gives a review power to Magistrates’ Courts in respect of administrative action, and that there is nothing in section 170 of the Constitution to justify its removal.

Parliamentary action

11. Notwithstanding the referral of the matter to the Commission for investigation as described above, the matter was evidently thereafter considered by the Portfolio Committee on Justice (National Assembly). Its memorandum accompanying the Magistrates' Courts Second Amendment Bill, 1997 states as follows:

"Memorandum on the objects of the Magistrates' Courts Second Amendment Bill, 1997

1. Section 170 of the Constitution makes it clear that magistrates' courts and all other courts of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation (which includes statutory regulations, orders and bylaws) or any conduct of the President.
2. Section 110 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), provides that magistrates' courts may not pronounce upon the validity of a provincial ordinance or a statutory proclamation of the president, but that 'every such court shall be competent to pronounce upon the validity of any statutory regulation, order or by-law'.
3. It is clear that section 110 of the Magistrates' Courts Act, 1944, is inconsistent with section 170 of the Constitution insofar as enquiries relating to the constitutionality, as opposed to the general validity, of statutory regulations, orders and bylaws are concerned. Clause 1 therefore seeks to amend section 110 so as to bring it into line with section 170 of the Constitution.
4. Section 66 of the Magistrates' Courts Amendment Act, 1993 (Act No. 120 of 1993), also amended section 110 of the Magistrates' Courts Act, 1944. However, in view of the amendment envisaged by clause 1, the provisions of section 66, which have not yet been put into operation, have become redundant. Clause 2 seeks to repeal the said section 66".

A copy of the Bill "as agreed to by the Portfolio Committee on Justice (National Assembly)", B77A-97, is attached as annexure D.

12. In the Departmental letter to the Commission dated 8 December 1997 (annexure E), the following is stated:

“It should be mentioned that [the Bill] when it was introduced into Parliament as the Magistrates’ Courts Second Amendment Bill, 1997, retained the power of Magistrates’ Courts to pronounce on the general validity of statutory regulations, orders and by-laws.

The Portfolio Committee on Justice (National Assembly) for the reasons set out in its report on the Bill, deemed it appropriate to amend the Bill so as to create a mechanism in terms of which magistrate’s courts do not have the power to decide on the validity of any law, which includes statutory regulations, orders or by-laws, but that all such cases must be heard by either the Constitutional Court or the High Courts. The said committee, however, emphasized that this will only be an interim measure until the investigation by the Department, referred to in the report, has been finalised”.

Parallel to the “investigation by the Department” it appears from this letter, is that conducted by the Commission (page 2, para 4 of annexure E).

The inquiries

13. It would seem that the main inquiries which arise, listed in an appropriate sequence, are these:

- (a) Do Magistrates’ Courts at present have any jurisdiction of a constitutional nature under the Constitution, and if so, to what extent?

- (b) Is it desirable that Magistrates’ Courts have jurisdiction in respect of constitutional matters, and if so, to what extent ?

- (c) If it is considered that Magistrates' Courts lack jurisdiction in respect of constitutional matters, how is the situation to be remedied ?
- (d) Is it desirable that Magistrates' Courts retain their current jurisdiction in terms of section 110 of the Magistrates' Courts Act, 1944 in relation to what its heading describes as a "plea of ultra vires" ?
- (a) **Any constitutional jurisdiction ?**

14. This has been a matter of considerable controversy. Disparate answers have been given by, inter alia, the following decisions:

- (a) **Quozeleni v Minister of Law and Order 1994 (3) SA 625 (E) at 635C-638C** (in which Froneman, J decided that in all cases, other than those involving Acts of Parliament, Magistrates' Courts were entitled to apply the provisions of the interim Constitution).
- (b) **Mendes v Kitching 1996 (1) SA 259 (E) at 267I-268G** (in which Kroon, J held that a magistrate's court is competent to pronounce upon the alleged unconstitutionality of rules of the common law and any other laws of a non-statutory nature);
- (c) **Municipality of the City of Port Elizabeth v Prut NO 1996 (4) SA 318 (E) at**

326G-329G (in which a Full Bench of the Eastern Cape Provincial Division reversed **Port Elizabeth Municipality v Prut NO 1996 (3) SA 533 (SE) at 535F-537A**, overruled **Qozeleni** and **Mendes** and held that magistrates did not have the power to pronounce on the constitutional matters listed in section 98(2) of the interim Constitution, but that they were obliged to ensure that the fundamental rights entrenched in Chapter 3 thereof were observed in the proceedings conducted before them);

(d) **Bate v Regional Magistrate, Randburg 1996 (7) BCLR 974 (W) at 984I-988D** (in which two judges of the WLD declined to follow **Qozeleni's case**); and

(e) **S v Scholtz, unreported, CPD, 2 April 1996, case no. A956/95 at 3-5** (in which a Full Bench of the Cape Provincial Division held that in the course of exercising their jurisdiction and performing their functions under the Magistrates' Courts Act, 1944, the rules promulgated thereunder and the Criminal Procedure Act, 1977, magistrates could give decisions or rulings or make orders which impinge upon and relate to the interpretation, protection and enforcement of the provisions of the Constitution, including those relating to the fundamental rights entrenched in Chapter 3 thereof).

15. Two matters are immediately to be observed from the wording of section 170 of the Constitution. The first is the reference to "**an Act of Parliament**". The second is the provision that "**a court of a status lower than a High Court may not inquire into or**

rule on the constitutionality of any legislation or any conduct of the President”.

16. The reference to **“an Act of Parliament”** in section 170 may be contrasted with the reference to **“national legislation”** in section 171. **“National legislation”** is defined in section 239 to include **“subordinate legislation made in terms of an Act of Parliament”**. Accordingly, the use of **“an Act of Parliament”** in section 170 suggests that where jurisdiction is to be conferred on Magistrates’ Courts, that can indeed only be done by an Act of Parliament. It is not permissible to “confer” constitutional jurisdiction on Magistrates’ Courts by means of a proclamation, or regulations, or some other species of subordinate legislation made in terms of an Act of Parliament.
17. As indicated above, section 170 imposes a limitation on any Act of Parliament conferring constitutional jurisdiction: a Magistrate’s Court, being a court of a status lower than a High Court, may not inquire into or rule on the constitutionality of any legislation or any conduct of the President. The limitation is very broad, particularly as regards magistrates’ powers to rule on the constitutionality of legislation.
18. For one thing it relates to “any legislation”. “Legislation” means a statutory provision of any kind, even a by-law which regulates the keeping of chickens. For another, it not only prohibits magistrates from “ruling on” the constitutionality thereof; it also rules out “inquiries” by magistrates into its constitutionality. In other words, the limitation in section 170 is not limited to direct challenges to legislation; it extends to collateral challenges too.

19. The result is that magistrates may not inquire into the constitutionality of any legislation in the course of dealing with matters otherwise within their civil or criminal jurisdiction. For instance, if a person is charged in a Magistrate's Court with a contravention of a municipal by-law, the magistrate is precluded from entertaining a defence that the by-law is unconstitutional, whether because it impermissibly infringes a fundamental right in Chapter 2 or because in making it the municipality acted *ultra vires* the powers conferred upon it by section 156(2) of the new Constitution. That defence is quite beyond it.
20. Moreover, although section 110 of the Magistrates' Court Act, 1944, confers jurisdiction upon Magistrates' Courts to pronounce upon the validity of any statutory regulation, order or by-law, that jurisdiction does not include the power to enquire into or rule on the constitutionality of legislation of that sort. Where constitutionality (as opposed to other attacks on validity, such as vagueness) begins and ends will not always be an easy question.
21. Finally, unlike section 103 of the interim Constitution, section 170 of the new Constitution makes no provision for the referral of questions relating to the constitutionality of legislation to the relevant High Court for its decision.
22. In the result, section 170 obliges a litigant who challenges the constitutionality of a municipal by-law to incur the expense and to suffer the practical difficulties attendant upon appellate proceedings in what is often a geographically remote High Court. Raising a constitutional issue for the first time on appeal has obvious hazards: no evidence, or

inadequate evidence may have been adduced, and the result may either be to stultify the adjudication of the constitutional issue, or to oblige the appellate court either to resort to referring the matter back for evidence to be led, or to hear it itself (which is invariably a matter of great difficulty for such a court).

23. It would appear, therefore, that unless section 170 of the new Constitution is amended to deal with the problems outlined above, any Act of Parliament adopted to confer constitutional jurisdiction on the Magistrates' Courts would at present be limited in its scope to the following:

- (a) rules of common law (including common law rules relating to the conduct of proceedings in Magistrates' Courts);
- (b) rules of customary law;
- (c) rules of customary international law;
- (d) administrative action (including executive action), other than -
 - (i) conduct of the President, and
 - (ii) legislative administrative action, ie. administrative rules of general application or effect (in contrast to administrative rules or decisions which are specific in application or effect) which are

designed to endure over a period of time.

24. As regards (d)(ii) - "legislative administrative action" - it is to be noted that, as Milne JA pointed out in South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) at 12A-D, a case concerning a decision to declare a toll-road:

"The categorization of statutory powers into those which are executive or administrative, on the one hand, and those on the other hand, which when exercised give rise to delegated legislation is not always an easy one. As explained by Gardiner, J in R v Koenig 1917 CPD 225 at 241-2, laws are general commands which place general obligations on persons; whereas a special command enjoining only particular action constitutes an administrative act (see also Byers v Chinn and Another 1928 AD 322 at 329; Mabaso v West Rand Administration Board and Another 1982 (3) SA 977 (W) at 987A-B). These broad criteria, however, do not, as Gardiner J conceded (at 242), afford any precise test by which in every instance the distinction between laws, or legislative acts, and non-legislative, administrative acts can be determined. And as Baxter (op cit at 350) observes:

'The distinction between legislative and non-legislative administrative acts is often difficult or impossible to draw satisfactorily'.

(See also Wade op cit at 858-9; De Smith Judicial Review of Administrative Action 4th ed at 71-6)".

25. Accordingly, in the South African Roads Board case, the Appellate Division abandoned the categorisation of statutory powers of action or decision into executive (or administrative), on the one hand, and legislative, on the other, for the purposes of determining the applicability of the rules of natural justice. In that case the Appellate Division adopted a new broader distinction between: (a) statutory powers "**which, when exercised, affect equally members of a community at large**"; and (b) statutory powers which, "**while possibly also having a general impact, are calculated to cause particular prejudice to an individual or a group of individuals**" (the word

“**calculated**” in this context meaning no more than “**likely in the ordinary course of things**”).

26. It is respectfully suggested that these categories are, in themselves, equivocal. In particular, given the range of individuals’ life-styles, preferences and circumstances, it is difficult to imagine an exercise of governmental power which affects “**equally all members of a community at large**”. For example, the adverse impact of a universal direct tax (such as VAT) on people with a high propensity to spend relative to their level of income (the poor) will be greater than that on people with a high propensity to save (upper and upper-middle income earners).
27. In the result, the exclusion of magistrates from all inquiries into the constitutionality of all legislation presents difficult problems of definition. It is suggested that these problems further bolster the need to amend section 170 of the new Constitution, possibly to exclude only specific types of legislation from magistrates’ jurisdiction.
28. The proposed amendments to section 170 and 172 of the Constitution, and to section 110 of the Act and the Rules (set out in annexure F) are intended to achieve that result. The proposed amendment, it may be noted, would permit Magistrates’ Courts to deal with the constitutionality of pre-27 April 1994 provincial legislation for two reasons: that that legislation was adopted under the pre-democratic dispensation, and that such an approach would avoid the uncertain ambit of provincial legislation prior to 27 April 1994 (see especially in this regard the analysis in **Jones and Buckle** Civil Practice of the

Magistrates' Court (9th ed 1996) vol 1 pp 402-408 enclosed as annexure "G"). It will also be noted that the proposed amendment to section 110(2)(a) would not grant the Magistrates' Court the power of either judicial review or **mandamus**. It is submitted that these remedies are by their nature appropriate to the High Court, and that from an overall viewpoint there would be a pronounced constitutional imbalance in granting a (single) judicial officer sitting in a court at the bottom of the judicial hierarchy of these powers.

(b) What constitutional jurisdiction is desirable ?

29. It must be considered whether any real purpose is served by an approach which, in relation to Magistrates' Courts,
- (i) excludes all constitutional jurisdiction, but retains the so-called *ultra vires* jurisdiction which has applied since 1955; or
 - (ii) excludes both.
30. It is suggested that neither approach is desirable, and that the better approach would be to retain the *ultra vires* jurisdiction currently to be found in section 110 of the Magistrates' Courts Act, but to add to it a concomitant constitutional jurisdiction, i.e., to pronounce upon the constitutionality of statutory regulations, orders or by-laws, in addition to those matters of what might be termed general or common law constitutional jurisdiction listed in paragraph 23 above.

31. Two important safeguards should operate: that it would (as section 170 of the Constitution currently provides) require an Act of Parliament to vest that jurisdiction in Magistrates' Courts, and that any declaration of invalidity on constitutional grounds would not operate until confirmed by the Constitutional Court (requiring an adaptation to section 172 of the Constitution) or at least by a Full Bench of the apposite High Court.

(c) **How is this to be remedied ?**

32. Depending on the approach determined in relation to the desirability of constitutional jurisdiction, section 170 and 172 of the Constitution and section 110 of the Act and the Rules would require appropriate amendment to accommodate the foregoing proposals. Proposed amendments are set out in annexure F.

(d) **The ultra vires jurisdiction: to be retained ?**

33. It is suggested that no useful purpose would be served by depriving the Magistrates' Courts of the so-called *ultra vires* jurisdiction, exercised for nearly 50 years. Symmetry in jurisdiction would, it is suggested, be better achieved the other way: conferring a matching constitutional jurisdiction in relation to the same restricted categories of legislation. That approach would also obviate difficulties in determining in certain instances whether the contended invalidity is truly constitutional or *ultra vires* in character.

Summary

34. It is suggested that magistrates' courts should be given a constitutional jurisdiction appropriate to their position in the court structure in South Africa. They represent the

primary means of access to justice for most South Africans. An exclusion of all constitutional jurisdiction would be inappropriate, more particularly in view of the interactive growth between the common law and our developing constitutional law contemplated by section 8(3) of the Constitution.

35. If this approach is supported, the extent of an appropriate constitutional jurisdiction arises. It is proposed that this encompass not only the general or “common law” aspects listed in paragraph 23 above, but the legislative areas long encompassed by section 110 of the Magistrates’ Court Act.
36. It is proposed that the existing *ultra vires* jurisdiction of section 110 of the Magistrates’ Courts Act be retained.
37. It is proposed that sections 170 and 172 of the Constitution and section 110 of the Magistrates’ Court Act be amended in terms of the draft amendments set out in annexure F.

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FOR ATTENTION: HDW (Cape Town Parliamentary Office)

CONSIDERATION BY MAGISTRATES' COURTS OF CONSTITUTIONAL MATTERS

1. The Department of Justice (after this referred to as "the Department") requests our opinion on the question of whether any instances exist where magistrates' courts may enquire into or rule on constitutional matters, and if such instances exist, what procedure that court should follow if a constitutional issue arises before it.

2.1 The Department argues that since section 167(4) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), (after this referred to as "the Constitution") (inadvertently misquoted by the Department as section 117(4) of that Act) stipulates the list of exclusive areas of jurisdiction of the Constitutional Court, all matters absent from that list must by "necessary implication" also fall within the jurisdiction of both the High Courts and the Magistrates' Courts.

2.2 The Department further regards section 167(6)(b) of the Constitution, which provides for appeals to the Constitutional Court "from **any other court**" (emphasis supplied), as an indication that magistrates' courts may "also enquire and rule on certain constitutional matters".

3.1 Section 170 of the Constitution provides that "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 High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President".

3.2 Section 8(1) of the Constitution provides that “(t)he Bill of Rights applies to all law, and binds the legislature, the executive, the **judiciary** and all organs of state”. (emphasis supplied). Section 8 (3) in respect of the horizontal application of the Bill of rights (chapter 2 of the Constitution) provides as follows:

- (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 the common law to limit the right, provided that the limitation is in accordance with section 36(1).”

(emphasis supplied).

3.3 “Jurisdiction ... means the power vested in a court of law to adjudicate upon, determine and dispose of a matter.”, per Nienaber JA in *Ewing McDonald & Co Ltd v M & M Products* 1991 (1) SA 252 AD at 256G. Voet (quoted by D Pistorius Pollak on Jurisdiction (Second Edition) 1993 at 1) defines jurisdiction as “(t)he public power of deciding cases, both civil and criminal and putting the decisions into execution.”.

3.4 “A constitutional matter includes any issues involving the interpretation, **protection** or **enforcement** of the Constitution.”, per section 167(7) of the Constitution (emphasis supplied).

4.1 L C Steyn Die Uitleg van Wette (Vyfde uitgawe) 1981 states at 206 that “... 'n person of liggaam wat sy bevoegdheid aan 'n wet ontleen niks geldigs kan verrig waartoe hy nie by daardie wet, uitdruklik of by **wyse van verswe. bepaling**, gemagtig is nie ..” (emphasis supplied). Devenish Interpretation of Statutes 1992 states at 195 and 196 that “(t)here is a strong presumption against the interpretation of a statute that would have the effect of excluding the jurisdiction of the courts this well-recognized rule was applied in *De Wet v Deetlefs* where the court held that in order to oust the jurisdiction of a court of law it must be clear that such was the intention of the legislature, and in such cases ouster clauses should be given a ‘strict construction’.”. These two rules of legal interpretation serve as points of departure in the

adjudication of the current problem.

4.2 The Department in its interpretation of section 167(4) seems to rely on the maxim *unius inclusio est alterius exclusio*, which is also closely related to the *ex contrariis maxim*. Steyn op.cit at 50 quotes a number of cases cautioning against a rigid application of this maxim and at 51 refers to instances where “... 'n wet ander aanduidings bevat wat hierdie stelre. l weerlê, soos waar uit die wet as geheel of uit ander omstandighede blyk ...” Devenish op.cit. at 85 quotes, with approval, the court’s judgment in *Consolidated Diamond Mines of South West Africa v Administrator*, SWA 1958 (4) SA 572 A 648, that this maxim “affords ... no more than a *prima facie* indication of the legislature’s intention, the weight of which must depend on the purport of the enactment as a whole.”. The late professor E Mureinik in an article entitled “Expressio unius: exclusio alterius? South African Law Journal (Volume 104) 1987 264 states at 265 that “(i)t may help ... to recall that it is often said that the maxim is a rule not of law, but of construction (t)here are no definable operands .. upon which the maxim operates so as to point to a conclusion of law (t)he maxim ... is a convenient label for a particular pattern of reasoning, which owes its validity not to the authority of the maxim, **but to its own intrinsic cogency.**”, (emphasis supplied).

4.3 The Constitutional Court's exclusive jurisdiction in respect of certain constitutional matters is listed in section 167(4) of the Constitution. On a reading of **only** that subsection, two conclusions can be arrived at: firstly, that it either denotes that **all** other courts have jurisdiction in respect of **all** remaining constitutional matters, or, secondly, that other courts, of which three are specifically listed by name in section 166(b), (c) and (d) of the Constitution, can under no circumstances have jurisdiction in those matters (and given the fact that the Constitution is supreme (section 2 of the Constitution), any Act of Parliament (other than a constitutional amendment) endeavouring to do so, would be ultra vires) but could in **certain circumstances** have jurisdiction in respect of **some or all of the remainder** of constitutional matters.

4.4 E A Kellaway Principles of legal interpretation of statutes, contracts and wills 1995 states at 68 that “... where the purpose of the legislature is manifest, great care should be taken not to disregard it in favour of the literal meaning of words used in the provision, especially when the meaning of such provision is at issue.” LM Du Plessis The Interpretation of Statutes 1986 at

127 and 128 quotes, with approval, the court's judgment in *S v Looij* 1975 (4) SA 703 RA 705 where it held that "(t)o determine the purpose of the Legislature, it is necessary to have regard to the Act as a whole and not to focus attention on the single provision to the exclusion of all others. To treat a single provision as decisive ... might obviously result in a wholly wrong conclusion.". Kellaway op. cit. states at 330 and 331 that "(i)f something is 'necessarily implied' in an Act ... it is deemed to be expressed by the language used by the Act; that is, what is implied is deemed to be expressed although the language used does not explicitly say it In the case of enactments, what is implied arises ... from the presumed intention of the legislature and the implication is drawn with the object of giving efficacy to the provisions of an enactment in question". Van Winsen J in the judgment of *S v Van Rensburg* 1967 (2) SA 291 (C) at 294 refers to this issue stating that "(i)f ... an intention is to be ascribed to the legislature it can only be on the ground that if the [legislation] is looked at as a whole the implication arises that such must have been the intention of the legislature. This implication must be a necessary one in the sense that without it effect cannot be given to **the statute as it stands.**",(emphasis supplied).

4.5 The constitutional jurisdiction of the Supreme Court of Appeal is described in section 168(3) of the Constitution (it has none), and that of the High Courts in section 169(a). The constitutional jurisdiction of Magistrates' Courts is described in section 170 of the Constitution. Given the clear and unambiguous language conferring a measure of jurisdiction in respect of constitutional matters upon these various courts, we cannot support the first conclusion listed above in paragraph 4.3, which would imply that all constitutional matters not listed in that subsection automatically or necessarily fall within the jurisdiction of all other courts. We are also not persuaded that section 167(6)(b) adds support to the supposition that section 167(4) may as a necessary implication confer jurisdiction in constitutional matters on Magistrates' Courts, as it makes provision for appeals which may, or may not, be forthcoming, depending on the legislature's conferring constitutional jurisdiction in terms of section 170 on Magistrates' Courts and other courts. The reference in section 167(6)(b) to "any other court" therefore merely serves to keep all options open should the legislature wish to confer jurisdiction in respect of constitutional matters on courts which at the time of the adoption of the Constitution by the legislature did not have that jurisdiction or whose jurisdiction is not determined in detail by the Constitution. Section 170 of course does not exclude the possibility of an Act of Parliament (whether existing or impending) conferring such jurisdiction, subject of the limitation stated

therein. It would also be impossible, in our opinion, to argue that the Magistrates' Courts have an inherent jurisdiction to inquire into constitutional matters, in view of the fact that it is first and foremost a creature of statute (see the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), as well as the explicit provisions of section 173 of the Constitution in respect of only the Constitutional Court, the Supreme Court of Appeal and the High Courts.

4.6 Section 8 also to our mind does not **in itself** confer a general jurisdiction in respect of constitutional matters on the Magistrates' Courts. Section 8(1) serves to make the values contained in the Bill of Rights applicable to all judicial actions and decisions, and the reference in section 8(3) to "a court" serves to empower courts who have jurisdiction in respect of constitutional matters, whether that jurisdiction is conferred by the Constitution or by an "ordinary" Act of Parliament, to deal with the issue of the horizontal application of the Bill of Rights.

4.7 I M Rautenbach and EFJ Malherbe in Staatsreg (Tweede uitgawe) 1996 (the only authority currently available to us on this particular subject of the Constitution) state at 231 that "(a)lle ander howe (i.e *other than the Constitutional Court, the Supreme Court of Appeal or High Courts*) het slegs jurisdiksie oor grondwetlike aangeleenthede indien dit deur 'n parlementswet aan hulle verleen word." (insertion supplied).

4.8 This then raises the question whether an Act of Parliament exists which confers jurisdiction in respect of constitutional matters on Magistrates' Courts.

4.8.1 In respect of civil litigation, section 29 of the Magistrates' Courts Act provides for jurisdiction in respect of causes of action. That section is, however, subject to the provisions of section 46 of that Act, which determines certain instances where that court does not have jurisdiction. Of special interest is section 29(1)(g) of that Act, which states that a magistrates' court has jurisdiction in "actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister (*of Justice*) from time to time by notice in the *Gazette*," (own insertion). This indicates that in general (but subject to other provisions of that Act pertaining to jurisdiction, e.g. section 28 and 46, as well as the Constitution and other statutory measures, and subject to the amount

determined by the said Minister) no *numerus clausus* exists in respect of cause of action.

4.8.2 In respect of criminal matters, section 89 of the Magistrates' Courts Act, 1944, provides that district courts and courts of a regional division (both being Magistrates' Courts - see section 2(f) and (g) of that Act) together have jurisdiction over all offences except treason.

4.9 Given our conclusion in paragraphs 4.5, which indicated that no explicit jurisdiction in respect of constitutional matters has been given to the Magistrates' Courts, consideration must be given to rules of law (such as presumptions) or rules of construction (such as maxims) to establish whether jurisdiction has been given implicitly. It should be borne in mind that the tenets of interpretation of "ordinary" legislation apply, and not those of constitutional interpretation (inasmuch they may differ).

4.10 It is however clear that the Magistrates' Court can under no circumstances have (implied) jurisdiction in terms of the Magistrates' Court Act, 1944, in respect of constitutional matters:

1. which are the exclusive domain of the Constitutional Court (section 167(4) of the Constitution);
2. pertaining to any enquiry into or ruling on the constitutionality of any legislation or any conduct of the President (section 170 and 172(2)(a) of the Constitution);
3. which may be assigned expressly by "ordinary" legislation to a court of a status similar to a High Court (section 169(a)(ii) of the Constitution);
4. in criminal trials, any constitutional matter connected with a charge of treason (section 89 of Magistrates' Courts Act, 1944);
5. in civil trials, connected with litigation excluded by the provisions of section 46 of the Magistrates' Court Act, 1944, and beyond the jurisdiction conferred by section 29 of that Act; or
6. connected with litigation before "special" courts, e.g. the water courts (see section 40 of the Water Act, 1956 (Act No. 54 of 1956)).

4.11.1 Kellaway op. cit. (published after South Africa's becoming a constitutional state) at 332 states the following:

"It must be clearly stated that when an express provision might very properly have been

provided for in the context of a statute, for a court to insert it *by way of an implication* when it could not properly be implied from the provision would *not* be the construing of the statute, but the altering or enlarging thereof, which is not permitted, and, if permitted, *would* be 'legislating'. On the other hand, where the language used necessarily and naturally implies something more, the latter is deemed to be contained in the language so expressed a power which is a necessary intendment for an express statutory provision is implied as having been duly granted by the legislature. (By 'necessary' is here meant ... that without an *implied ancillary* power the express provision could not be carried out.) It is submitted that the test as to whether something is necessarily implied, is to question whether *that* something is properly or reasonably required, or necessary or incidental to, or ancillary to any of the provisions contained in the statute."

(original emphasis)

4.11.2 Du Plessis op.cit. states at 157 par. 58.3 that "...where an enactment expressly permits achieving a certain result, it also permits **everything necessary to achieve that result** by implication .." (emphasis supplied)

4.11.3 Steyn op.cit. states at 52 that "(w)aar 'n wet 'n bepaalde gevolg of handeling gebied of veroorloof, gebied of veroorloof hy ook ... wat redelikerwyse nodig is **om die gevolg teweeg te bring of die handling effektief te verrig ...**" (emphasis supplied).

4.11.4 G E Devenish in an article entitled "Extensive interpretation: some anomalies in the South African approach" in Tydskrif vir Hedendaagse Romeins-Hollandse Reg 1989 502 at 509 states that "(p)rovisions which are not enacted in express words may under certain circumstances be deemed to be implied by means of the process of curial interpretation. The implication sought to be drawn must ... be a reasonable and necessary one..... In effect the court has to weigh up linguistic, contextual and common-law considerations in order to determine whether judicial law-making is justified under the circumstances."

4.11.5 F J Van Heerden and A.C Crosby Interpretation of Statutes 1996 state at 29 that "(t)he interpreter may in suitable cases extend the meaning of words to give effect to the real intention of the legislature (purpose of the act)."

4.12 A number of rights contained in Chapter 2 of the Constitution are directly applicable to many cases heard in Magistrates' Courts. Section 35 of the Constitution, for example, dealing with the rights of arrested, detained and accused person, is in practise mostly applied in cases heard in Magistrates' Courts. The first appearance of accused persons, even where the actual trial is heard in the High Court, takes place in Magistrates' Courts. The implications of the horizontal operation of rights, as envisaged in section 8(3) of the Constitution, is of utmost importance in civil litigation authorised by section 29 of the Magistrates' Court Act, 1944. As can be seen in the definition of "jurisdiction" quoted above in paragraph 3.2, namely that it consists of the "power vested in a court of law to adjudicate upon, determine and dispose of a matter" (emphasis supplied), a court enjoined to consider and finalise a matter before it without having the power to adjudicate a constitutional matter pertaining to that case, would not be able to do so in many cases before it, and would therefore, in the words of Steyn, not be able "om die handeling effektief te verrig". Section 35(5) of the Constitution, which provides for the exclusion of evidence "obtained in a manner that violates **any right in the Bill of Rights** if the admission of that evidence would render the trial unfair ..." (emphasis supplied), would be rendered null and void if the Magistrates' Court could not consider this issue due to a lack of jurisdiction. The myriad of factual situations which could constitute a "manner" of obtaining evidence, would also render a reliance on *stare decisis* with improbable results.

4.13 Section 45 of the Magistrates' Courts act, 1944, provides that a magistrates' court has in general, subject to the matters beyond the jurisdiction of that court listed in section 46 of that Act, jurisdiction "...to determine **any action or proceeding otherwise beyond the jurisdiction** if the parties ... consent thereto ... ", (emphasis supplied). This would, in our opinion, entitle litigants to consent to jurisdiction of the Magistrates' Court in respect of constitutional matters where such jurisdiction was not expressly excluded (for instance by the Constitution). The argument that section 45 only contemplates an increase of the maximum amount actionable in terms of section 29 of the Magistrates' Court Act, 1944, or a mechanism to establish jurisdiction in respect of the defendant, was in our opinion feasible only during the period of time when the constitution of the day was not the supreme law of the land. That argument does not in our opinion take cognisance of the development in constitutional law. The fact that sections 29 and 45 were adopted before the commencement of the Constitution, 1996, is in our opinion neither

here nor there, as the legislature is deemed to be au fait with the current law (see Steyn *op.cit.* at 132). In addition, if litigants were able to consent to jurisdiction in a matter which otherwise would be beyond the jurisdiction of the court, and such consent extended to constitutional matters, on what basis or policy consideration could an implied jurisdiction in terms of section 29 be denied? Furthermore, when a Magistrates' Court in terms of the *stare decisis* doctrine applies a decision by the Constitutional Court or a High Court on a constitutional matter, it decides whether that constitutional issue is applicable or not to the case before it.

4.14 We are therefore of the opinion that Magistrates' Courts **in principle** do have jurisdiction in constitutional matters as implied by sections 29 and 89 of the Magistrates' Court Act, 1944, **but only to the extent that the finalisation of that case is dependent on the adjudication of a constitutional matter relevant to the case.** This conclusion is however based on a value judgment, and a court may, or not, support or reject that value judgment. The Magistrates' Court does not have an all-encompassing jurisdiction, but will in most cases be restricted to making a factual finding in respect of the applicability of a constitutional ruling by a superior court. In addition, where the Constitutional Court or a High Court has not yet pronounced on a particular aspect of Chapter 2 of the Constitution, and the provision catering for that aspect is not clear due to insufficient particularity or ambiguity, a Magistrates' court would in our opinion be able to interpret that provision of the Constitution. That interpretation would, of course, always be subject to appeal or revision by a High Court or, if provided for in terms of section 167(6)(b) of the Constitution, the Constitutional Court. We are therefore not able to assist the Department with a *numerus clausus* of instances where the Magistrates' Courts would have jurisdiction in constitutional matters.

4.15 Given that a Magistrates' Court cannot under any circumstances rule on the "constitutional validity of any legislation ..." (see section 170 of the Constitution), the question posed by the Department in paragraph 2(b) of its submission falls away, as the validity of legislation may not be raised as a defence by any litigant or accused, and a Magistrates' Court Act will have to adjudicate the case on the assumption that that legislation is constitutional. The validity of that legislation will have to be challenged when that case is taken on appeal or review before a High Court.

4.16 We would agree with the Department's opinion reflected in paragraph 4.6 of its submission that section 110 of the Magistrates' Court Act (which was amended by section 66 of the Magistrates' Court Amendment Act, 1993 (Act No. 120 of 1993), which has not yet come into operation) does seem to be in conflict with the Constitution in respect of statutory regulations, and that it should be amended to reflect the position as set out in the Constitution.

5. We would strongly suggest that the Department in consultation with the Paliamentary committees on justice consider the desirability of amending the Magistrates' Court Act, 1944, to expressly reflect the intention of the legislature in respect of that court's jurisdiction vis-~~x~~vis constitutional matters.

STATE LAW ADVISERS

RP ROSSOUW SC / WP KRULL / 1997-02-28

REPUBLIC OF SOUTH AFRICA

MAGISTRATES' COURTS SECOND AMENDMENT BILL

(As introduced)

(MINISTER OF JUSTICE)

[B 77—97]

ISBN 0 621 27273 6

No. of copies printed 3 000

GENERAL EXPLANATORY NOTE:

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

BILL

To amend the Magistrates' Courts Act, 1944, so as to further regulate the power of a magistrates' court to pronounce on the validity of legislation; to provide for the postponement of proceedings so that pleas of unconstitutionality can be heard by a High Court; to amend the Magistrates' Courts Amendment Act, 1993, so as to repeal an obsolete provision; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Substitution of section 110 of Act 32 of 1944, as substituted by section 20 of Act 53 of 1970

1. The following section is hereby substituted for section 110 of the Magistrates' Courts Act, 1944:

“Pronouncements on validity of legislation

110. (1) A court shall not be competent to pronounce on the validity of any law and a court shall assume that every law is valid.

(2) Notwithstanding subsection (1) and subject to section 170 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), a court may pronounce on the validity of any statutory regulation, order or bylaw.

(3) If in any proceedings before a court it is alleged that any law or any conduct of the President is invalid on the grounds of its inconsistency with a provision of the Constitution, the presiding officer may postpone the proceedings to enable the party who has so alleged to apply to a High Court for relief in terms of section 172 of the Constitution.”.

Repeal of section 66 of Act 120 of 1993

2. Section 66 of the Magistrates' Courts Amendment Act, 1993, is hereby repealed.

Short title

3. This Act shall be called the Magistrates' Courts Second Amendment Act, 1997.

MEMORANDUM ON THE OBJECTS OF THE MAGISTRATES' COURTS SECOND AMENDMENT BILL, 1997

1. Section 170 of the Constitution makes it clear that magistrates' courts and all other courts of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation (which includes statutory regulations, orders and bylaws) or any conduct of the President.

2. Section 110 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), provides that magistrates' courts may not pronounce upon the validity of a provincial ordinance or a statutory proclamation of the President, but that "every such court shall be competent to pronounce upon the validity of any statutory regulation, order or bye-law".

3. It is clear that section 110 of the Magistrates' Courts Act, 1944, is inconsistent with section 170 of the Constitution in so far as enquiries relating to the constitutionality, as opposed to the general validity, of statutory regulations, orders and bylaws are concerned. Clause 1 therefore seeks to amend section 110 so as to bring it into line with section 170 of the Constitution.

4. Section 66 of the Magistrates' Courts Amendment Act, 1993 (Act No. 120 of 1993), also amended section 110 of the Magistrates' Courts Act, 1944. However, in view of the amendment envisaged by clause 1, the provisions of section 66, which have not yet been put into operation, have become redundant. Clause 2 seeks to repeal the said section 66.

PARTIES CONSULTED

The following interested parties were consulted:

- * The Chief Justice
- * Judges President of the High Courts
- * Regional Representatives of the Department of Justice
- * Magistrates Commission
- * Association of Regional Magistrates of South Africa
- * Magistrates' Association of South Africa
- * General Council of the Bar
- * Black Lawyers Association
- * National Association of Democratic Lawyers

- * Association of Law Societies of the RSA
- * Legal Resources Centre
- * Lawyers for Human Rights
- * Association of Advocates
- * Black Advocates Forum
- * Independent Association of Advocates
- * Human Rights Committee
- * Independent Complaints Directorate

PARLIAMENTARY PROCESS

The Department of Justice and the State Law Advisers are of the opinion that the procedure established by section 75 of the Constitution should be followed with regard to this Bill.

**DRAFT LETTER BY THE CHIEF JUSTICE TO THE DIRECTOR GENERAL:
JUSTICE**

Your ref: 8/6 Geregs/1/1 (DDW)

Dear Sir

re: **MAGISTRATES' COURT SECOND AMENDMENT BILL, 1997**

I refer to your letter dated 2nd July and the envisaged Magistrate's Court Second Amendment Bill, 1997.

After consultation with the relevant committee of members of this Court, I advise as follows:

1. We regretfully have come to the conclusion that the proposed Bill is defective and unacceptable.
2. The fundamental problem appears to be that the architects of the Bill have confused and assimilated two separate and diverging legal concepts, viz. the doctrine of *ultra vires* on the one hand and, on the other hand, the principle of constitutional invalidity. In a certain, lay sense of the word one can say that a statute which violates a constitutional clause is *ultra vires*. But in legal parlance and legislative practice, a distinction has always be drawn between the two concepts and each of them conforms to its own rules. (See i.a. Baxter, Administrative Law, 301 *et seq.*)
3. Sec 110 of the Magistrate's Court Act 32 of 1944 deals only with the *ultra vires* question. It reads as follows:

Section 110: Jurisdiction as to plea of *ultra vires*

No magistrate's court shall be competent to pronounce upon the validity of a provincial ordinance or an ordinance of the Legislative Assembly of the territory or of a statutory proclamation of the State President or of the Administrator of the territory, and every such court shall assume that every such ordinance or proclamation is valid; but every such court shall be competent to pronounce upon the validity of any statutory regulation, order or bye-law.

Whether this provision should be retained, will be discussed presently.

4. What needs to be done, however, is to make provision for a new problem, i.e the effect of s 170 of the 1996 Constitution which reads as follows:

Magistrate's Courts and other courts

170. Magistrate's Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President. (Our underlining).

In our view, this provision deals with the problem of constitutionality, not with *ultra vires*. In order to bring the Magistrates' Courts Act in line with the 1996 Constitution, a new section in the Act is required.

A section such as the following would be acceptable:

Jurisdiction as to plea of unconstitutionality

- (1) If in any proceedings before a court it is alleged that any law or provision of such law or any conduct of the President is invalid on the ground of its inconsistency with a provision of the Constitution the court shall decide the matter on the

assumption that the law, provision or conduct is valid.

- (2) If in any proceedings referred to in subsection (1), the presiding officer is of the opinion that it is in the interest of justice to do so, he or she may postpone the proceedings to enable the party who has alleged that a relevant law or provision or conduct is invalid, to apply to a provincial or local division of the High Court for relief in terms of s 172 of the Constitution.

The section proposed above follows the wording of the clause submitted to us under cover of your letter of 2nd July, but omits, in subsection (1), the words "and the court does not have the competency to enquire into the validity of such law, provision or conduct" after the word "Constitution". We can see no reason for the inclusion of these words. They create the impression that the draftsman of the clause was uncertain as to whether the magistrate's court has/has not constitutional jurisdiction. In the light of s 170 of the Constitution, such uncertainty is unwarranted.

5. I now return to the matter of the existing s 110 of the Act and the problem relating to *ultra vires*.

Firstly, it is clear that if the principle enshrined in s 110 is to be retained, the wording will have to be changed and updated, as suggested below.

Secondly, should the jurisdiction of the magistrate's court to pronounce upon the validity of any statutory regulation order or bye-law (on the basis that it is *ultra vires* the empowering enactment) be retained?

In our view, the answer should be in the affirmative. The competency under discussion was bestowed upon magistrates' courts years ago, when the general jurisdiction of these courts were much lower than at present. On the whole, these courts have dealt with the provision in a competent manner (See the discussion of this topic in Jones and Buckle, *The Civil Practice of the Magistrates' Courts in South*, 9th ed, Erasmus and Van Loggerenberg, 1996: 402 *et seq.*)

To deprive the magistrates' courts of this jurisdiction would, in our view, be a step in the wrong direction. These courts are very important and should be made more accessible and meaningful.

The Bill proposed by your Department does away with the existing s 110. We have not been told the reason for this rather drastic step. In the heading of that Bill reference is made to the object of further regulating the plea of *ultra vires*. What the Bill in effect sets out to do is to do away with the magistrates' courts' power to entertain such a plea. As pointed out before, the basis of such a view is erroneous.

Furthermore, s 110 afforded the magistrates' courts also review powers in respect of administrative action (See Jones and Buckle 1996:402 - 404; *Majola v Ibhayi City Council* 1990(3) SA 540(E)). Why should this function be taken away? There is nothing in s 170 of the Constitution to justify such a course of conduct.

We would, therefore, contend for the retention of the magistrates' courts jurisdiction to entertain, in limited circumstances, a plea of *ultra vires*.

6. We propose a new s 110 of the Magistrates' Courts Act, reading as follows:

110 Jurisdiction as to plea of unconstitutionality

- (1) If in any proceedings before a court it is alleged that any law or provision of such law or any conduct of the President is invalid on the ground of its inconsistency with a provision of the Constitution the court shall decide the matter on the assumption that the law, provision or conduct is valid.
- (2) If in any proceedings referred to in subsection (1), the presiding officer is of the opinion that it is in the interest of justice to do so, he or she may postpone the proceedings to enable the party who has alleged that a relevant law or provision or conduct is invalid, to apply to a provincial or local division of the High Court for relief in terms of s 172 of the Constitution.

110A Jurisdiction as to plea of ultra vires

- (1) Subject to the provisions of s 170 of the Constitution of the Republic of South Africa, 1996, or any other national legislation a magistrate is competent to adjudicate upon a plea or pleading in which it is averred that
 - (a) a statutory regulation, order or bye-law, or
 - (b) any administrative actionis invalid.

- (2) If in any proceedings referred to in subsection (1), the presiding officer is of the opinion that it is in the interest of justice to do so, he or she may postpone the proceedings to enable the party who has alleged that a relevant law or provision or conduct is invalid, to apply to a provincial or local division of the High Court for relief in terms of s 172 of the Constitution.

Yours faithfully

REPUBLIC OF SOUTH AFRICA

**PORTFOLIO COMMITTEE AMENDMENTS
TO
MAGISTRATES' COURTS
SECOND AMENDMENT BILL**

[B 77—97]

(As agreed to by the Portfolio Committee on Justice (National Assembly))

[B 77A—97]

ISBN 0 621 27502 6

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AMENDMENTS AGREED TO

MAGISTRATES' COURTS SECOND AMENDMENT BILL

[B 77—97]

CLAUSE 1

Clause rejected.

NEW CLAUSE

1. That the following be a new Clause 1:

Substitution of section 110 of Act 32 of 1944, as substituted by section 20 of Act 53 of 1970

1. The following section is hereby substituted for section 110 of the Magistrates' Courts Act, 1944:

“Pronouncements on validity of law or conduct of President

110. (1) A court shall not be competent to pronounce on the validity of any law or conduct of the President.

(2) If in any proceedings before a court it is alleged that—

(a) any law or any conduct of the President is invalid on the grounds of its inconsistency with a provision of the Constitution; or

(b) any law is invalid on any ground other than its constitutionality,

the court shall decide the matter on the assumption that such law or conduct is valid:

Provided that the party which alleges that a law or conduct of the President is invalid, may adduce evidence regarding the invalidity of the law or conduct in question.”

LONG TITLE

1. On page 2, in the second line, to omit all the words after “of” up to and including “Court” in the fourth line and to substitute “any law or conduct of the President”.

REPUBLIC OF SOUTH AFRICA

MAGISTRATES' COURTS SECOND AMENDMENT BILL

(As amended by the Portfolio Committee on Justice (National Assembly))

(MINISTER OF JUSTICE)

[B 77B—97]

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BE IT ENACTED by the Parliament of the Republic of South Africa, as

follows:—

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the court shall decide the matter on the assumption that such law or conduct is valid:

Provided that the party which alleges that a law or conduct of the President is invalid, may adduce evidence regarding the invalidity of the law or conduct in question.”.

Repeal of section 66 of Act 120 of 1993

2. Section 66 of the Magistrates' Courts Amendment Act, 1993, is hereby repealed.

Short title

3. This Act shall be called the Magistrates' Courts Second Amendment Act, 1997.

**MEMORANDUM ON THE OBJECTS OF THE MAGISTRATES' COURTS SECOND
AMENDMENT BILL, 1997**

1. Section 170 of the Constitution makes it clear that magistrates' courts and all other courts of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation (which includes statutory regulations, orders and bylaws) or any conduct of the President.
2. Section 110 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), provides that magistrates' courts may not pronounce upon the validity of a provincial ordinance or a statutory proclamation of the President, but that "every such court shall be competent to pronounce upon the validity of any statutory regulation, order or bye-law".
3. It is clear that section 110 of the Magistrates' Courts Act, 1944, is inconsistent with section 170 of the Constitution in so far as enquiries relating to the constitutionality, as opposed to the general validity, of statutory regulations, orders and bylaws are concerned. Clause 1 therefore seeks to amend section 110 so as to bring it into line with section 170 of the Constitution.
4. Section 66 of the Magistrates' Courts Amendment Act, 1993 (Act No. 120 of 1993), also amended section 110 of the Magistrates' Courts Act, 1944. However, in view of the amendment envisaged by clause 1, the provisions of section 66, which have not yet been put into operation, have become redundant. Clause 2 seeks to repeal the said section 66.

PARTIES CONSULTED

The following interested parties were consulted:

- * The Chief Justice
- * Judges President of the High Courts
- * Regional Representatives of the Department of Justice
- * Magistrates Commission
- * Association of Regional Magistrates of South Africa
- * Magistrates' Association of South Africa
- * General Council of the Bar
- * Black Lawyers Association
- * National Association of Democratic Lawyers

- * Association of Law Societies of the RSA
- * Legal Resources Centre
- * Lawyers for Human Rights
- * Association of Advocates
- * Black Advocates Forum
- * Independent Association of Advocates
- * Human Rights Committee
- * Independent Complaints Directorate

PARLIAMENTARY PROCESS

The Department of Justice and the State Law Advisers are of the opinion that the procedure established by section 75 of the Constitution should be followed with regard to this Bill.

HLC

CONSIDERATION BY MAGISTRATES' COURTS OF CONSTITUTIONAL MATTERS

1. As you are aware, the State Law Advisers held the opinion that section 110 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), is inconsistent with section 170 of the Constitution in so far as enquiries relating to the constitutionality, as opposed to the general validity, of statutory regulations, orders and bylaws are concerned.

2. Section 1 of the Magistrates' Courts Second Amendment Act, 1997 (Act 80 of 1997), amends section 110 of the Magistrates' Courts Act, 1944, so as to bring it into line with the provisions of section 170 of the Constitution. It should be mentioned that the said Act, when it was introduced into Parliament as the Magistrates' Courts Second Amendment Bill, 1997, retained the power of magistrates' courts to pronounce on the general validity of statutory regulations, orders and bylaws.

3. The Portfolio Committee on Justice (National Assembly), for the reasons set out in its report on the Bill, deemed it appropriate to amend the Bill so as to create a mechanism in terms of which magistrates' courts do not have the power to decide on the validity of any law which includes statutory regulations, orders or bylaws, but that all such cases must be heard by either the Constitutional Court or the High Courts. The said Committee, however, emphasised that this will only be an interim measure until the investigation by the Department, referred to in the report, has been finalised. Copies of the report and of the Bill, as approved by Parliament on 19 November 1997, are attached for your convenience.

4. In its report the Committee recommends that "the Minister of Justice be requested to direct that the possibility that magistrates' courts may enquire into or rule on certain

constitutional matters be investigated, or, if such an investigation has already been instituted, that it be finalised urgently with a view to submitting legislation, if necessary, to Parliament at the earliest opportunity". The Law Commission, it is understood, is already investigating this issue.

5. We have been informed that the power of magistrates' courts to pronounce on the validity of subordinate legislation on the grounds of *ultra vires* does not form part of the Law Commission's investigation. We assume that the reason for this is due to the fact that magistrate's courts, prior to the enactment of the Magistrates' Courts Second Amendment Act, 1997, already had such power.

6. Since the above Amendment Act removes the existing power of magistrates' courts to pronounce on the validity of subordinate legislation on grounds of *ultra vires*, it will be appreciated if this issue could also be included in the above investigation.

7. If any further information is required, Johan Labuschagne may be contacted at telephone number (021) 455 939.

HDW

3. **Report of the Portfolio Committee on Justice on the Magistrates' Courts Second Amendment Bill (B 77- 97)** National Assembly - sec 75), dated 5 November 1997, as follows:

The Portfolio Committee on Justice, having considered the subject of the *Magistrates' Courts Second Amendment Bill (B 77 — 97)* (National Assembly - sec 75), referred to it, begs to report the Bill with amendments [B 77A - 97].

The Committee wishes to report further, as follows:

During its deliberations on the Bill, the Committee noted that section 103(2) of the *interim Constitution* provided that in cases where it was alleged that a law is invalid on the ground of its inconsistency with a provision of that Constitution, and the court was not competent to pronounce on the validity of such law, it had to decide the matter on the assumption that such law was valid. The Committee's attention was drawn to the fact that the Constitution does not contain a similar provision. However, from the provisions of section 170 of the Constitution, it is clear that magistrates' courts and all other courts of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation (which includes statutory regulations, orders and bylaws) or conduct of the President.

The Committee further noted that in terms of section 110 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), magistrates' courts have the power to pronounce on the validity of any statutory regulation, order or bylaw. However, in terms of the said section 110, such courts are not competent to pronounce on the validity of a provincial ordinance or of a statutory proclamation of the President, and every such court must consequently assume that every such ordinance or proclamation is valid.

It was brought to the Committee's attention that section 110 of the Magistrates' Courts Act, 1944, is inconsistent with the provisions of section 170 of the Constitution in so far as enquiries relating to the constitutionality, as opposed to

the general validity, of statutory regulations, orders and bylaws are concerned. The Committee noted that the Bill as introduced in Parliament purported to bring the provisions of the said section 110 in line with the provisions of section 170 of the Constitution. The Bill, however, retained the power of magistrates' courts to pronounce on the general validity of statutory regulations, orders and bylaws.

It was further brought to the Committee's attention that there is such a narrow line, if any, to draw between the concepts of "unconstitutionality" and *ultra vires*" in most cases where the validity of subordinate legislation is challenged, and that such challenges would invariably be based on both grounds of unconstitutionality and *ultra vires*. The effect thereof will be that magistrates' courts will not have the power to pronounce on the validity of such legislation in respect of the issue of constitutionality. This, in terms of the Bill before the Committee, would mean that a magistrates' court will be able to hear *ultra vires* aspects but not constitutional aspects. In the opinion of the Committee, such a situation could lead to anomalies and uncertainty. The Committee therefore deemed it appropriate to amend the Bill so as to create a mechanism in terms of which magistrates' courts do not have the power to decide on the validity of any law, which includes statutory regulations, orders or bylaws, but that all such cases must be heard by either the Constitutional Court or the High Courts. The Committee appreciates the fact that the adjudication of matters in terms of the proposed mechanism could result in higher costs for the parties concerned and that it could also cause inconvenience to parties for whom the High Court is not freely accessible, especially to parties in rural areas.

As section 170 of the Constitution does not make provision for a procedure to be followed in courts, with a status lower than that of a High Court, where the unconstitutionality of a law or conduct of the President is alleged, the Committee is of the opinion that the Bill should be promoted urgently in order to obviate the *lacuna* created by section 170. The Committee therefore recommends that the Minister of Justice be requested to direct that the possibility that magistrates' courts may enquire into or rule on certain constitutional matters be investigated,

or, if such an investigation has already been instituted, that it be finalised urgently with a view to submitting legislation, if necessary, to Parliament at the earliest opportunity.

The Committee wishes to emphasise that the mechanism it proposes, will only be an *interim* measure until the investigation by the Department, which may possibly lead to the submission to Parliament of legislation further regulating the jurisdiction of magistrates' courts, has been finalised.

BILL

1. **Proposed amendment of section 170 of the Constitution of the Republic of South Africa, 1996**

By its substitution by the following:

“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 High Court may not rule on the constitutional validity of any Act of Parliament, any legislation passed by the legislature of a province after 27 April 1994, or any conduct of the President.”

2. **Proposed amendment of section 172 of the Constitution**

By the insertion of the following provision as sub-section (3)

“(3)(a) The Full Bench of a High Court of competent jurisdiction must confirm any order of constitutional invalidity made by a Magistrates’ Court or another court of a status lower than a High Court, before that order has any force.

(b) Subsections 2(b), (c) and (d) of this section apply with the necessary changes to an order of constitutional invalidity made by a Magistrates’ Court or another court of a status lower than a High Court, and to any referral of, appeal against, or application for the confirmation of, such order, to the Full Bench of a High Court of competent jurisdiction.”

3. **Proposed amendment of section 110 of the Magistrates’ Courts Act, 1944**

By its substitution by the following:

- “(1) No magistrate’s court shall be competent to rule on the constitutional validity or validity for any other reason of any Act of Parliament, any legislation passed by the legislature of a province after 27 April 1994, or any conduct of the President, and every magistrate’s court shall assume that any such Act, legislation or conduct is valid.
- (2) Subject to subsection (1), every magistrate’s court shall be competent to rule on the constitutional validity or for any other reason of:
- (a) any administrative action, including any executive action and any statutory proclamation, regulation, order, bye-law or other legislation; but no magistrate’s court shall review and set aside or correct any administrative action or make any order directing an organ of state to legislate, decide or correct defects in any administrative action or in any state of affairs resulting from administrative action; and
 - (b) any rule of the common law, customary law and customary international law”.

4. Proposed amendment of the Magistrate’s Court Rules

By the insertion of the following new rule:

Confirmation of an order of constitutional invalidity

- “(1) No magistrate’s court shall, in any matter in respect of which the relevant organ of state is not a party, make an order of constitutional invalidity in terms of section 110 of the Act unless such organ has been notified of the proceedings by service on it of the pleading or document in which such invalidity is asserted.
- (2) The clerk of a magistrate’s court which has made an order of constitutional invalidity as contemplated in (1) above shall, within 15 days of such order, lodge a copy of such order with the registrar of the High Court having jurisdiction in

the area.

- (3) A person or organ of state entitled to do so and who desires to appeal against such order in terms of section 172(3)(b) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), read with section 172(2)(d) thereof, shall, within 21 days of the making of such order, lodge a notice of appeal with the registrar of the High Court having jurisdiction in the area and a copy thereof with the clerk of the magistrate's court which made the order, whereupon the matter shall be disposed of by the Full Bench of such High Court in accordance with directions given by the Judge President.
- (4) The appellant shall, in such notice of appeal, set forth clearly the grounds on which the appeal is brought, indicating which findings of fact and / or law are appealed against and what order it is contended ought to have been made.
- (5) A person or organ of state entitled to do so and who desires to apply for the confirmation of an order in terms of section 172(3)(b) of the Constitution, read with section 172(2)(d) thereof, shall, within 21 days of the making of such order, lodge an application for such confirmation with the registrar of the High Court having jurisdiction in the area and a copy thereof with the clerk of the magistrate's court which made the order, whereupon the matter shall be disposed of by the Full Bench of such High Court in accordance with directions given by the Judge President.
- (6) If no notice or application as contemplated in subrules (3) and (5) respectively, has been lodge within the time prescribed, the matter of the confirmation of the order of invalidity shall be disposed of by the Full Bench of the High Court having jurisdiction in the area in accordance with directions given by the Judge President."

ANNEXURE F - ADDENDUM

If the amendments set out in Annexure F are to be effected, consideration needs to be given to making consequential amendments to section 117 of the Criminal Procedure Act, 51 of 1977, and section 46(b) of the Occupational Health and Safety Act, 85 of 1993. Both of these provisions resemble section 110 of the Magistrate's Courts Act. The position of small claims courts should also be considered. At present, section 49 of the Small Claims Courts Act, 61 of 1984, is in the same terms as section 10 of the Magistrates' Courts Act.

Extract from

Jones & Buckle
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CHAPTER XVIII, DISCUSSION OF SECTIONS 110 & 111