

Mr President

We, the undersigned, appointed by you as members of the Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court, have the honour to submit to you this Second Interim Report.

.....
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Pretoria May 1997

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Durban May 1997

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INTRODUCTION

THE SCHEME OF THE SECOND INTERIM REPORT

- (A) This report deals successively with two separate issues affecting the appellate jurisdiction of the High Courts.
- (B) PART I of the Report deals with the question whether the appellate jurisdiction presently exercised by the Full Court of the High Court should be retained and expanded or whether the system of Full Court appeals should be scrapped and replaced by an intermediate appeal court.
- (C) Except for the Witwatersrand Local Division no local division has appellate jurisdiction either (1) in respect of the judgment or order given by a single judge within its area of jurisdiction or (2) in respect of the judgment or order of an inferior court within its area of jurisdiction. PART II of the Report deals with the following two questions :-
 - (1) If Full Court appeals are to be retained , should they be heard not only by the Full Court of the provincial division but also , in the case of an appeal against the judgment or order of a local division , by a Full Court of the local division sitting at the seat of the local division ?
 - (2) Should appeals against the judgment or order of an inferior court be heard not only by a two-judge court sitting at the seat of the provincial division but also , in the case of a judgment or order of an inferior court within the area or jurisdiction of the local division , by a two-judge court at the seat of the local division ?
- (D) This Report consists of three volumes.

- (E) Parts I and II of the Report are contained in VOLUME I. The Commission's recommendations in regard to PART I are set forth in Chapter 15 at pages 58 to 60. The Commission's recommendations in regard to PART II are set forth in Chapters 5 and 6 at pages 75 and 76.

- (F) VOLUME II consists of Appendices containing copies of memoranda and letters to which reference is made in VOLUME I.

- (G) VOLUME III contains extracts from oral representations made by interested parties during public sittings of the Commission which are relevant to the questions considered in PARTS I and II of VOLUME I.

PART I

CHAPTER 1

1. THE HIERARCHY OF COURTS IN OUR SYSTEM AND THE COURTS AT THE APEX OF THE JUDICIAL PYRAMID

- 1.1 In what follows reference will be made to the Constitution of the Republic of South Africa , 1996 (Act 108 of 1996) as “the new Constitution”.
- 1.2 Under the new Constitution (see subitem 16(2) of Schedule 6) the Appellate Division of the Supreme Court of South Africa becomes the Supreme Court of Appeal and a provincial or local division of the Supreme Court of South Africa (including a Supreme Court of a homeland or a general division of such a court) becomes a High Court (see subitem 16(4) of Schedule 6 of the new Constitution).
- 1.3 In terms of sec 166 of the new Constitution the courts are -
- (a) the Constitutional Court ;
 - (b) the Supreme Court of Appeal ;
 - (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 ;
 - (d) the Magistrates’ Courts ; and
 - (e) any other court established or recognised in terms of any Act of Parliament , including any court of a status similar to either the High Courts or the Magistrates’ Courts.

- 1.4 In terms of sec 167(3) of the new Constitution the Constitutional Court is the highest court in all constitutional matters. It decides only on constitutional matters and issues connected with decisions on constitutional matters ; and it makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
- 1.5 In terms of sec 168(3) of the new Constitution the Supreme Court of Appeal may decide appeals in any matter. Except in constitutional matters it is the highest court of appeal.

CHAPTER 2

2. THE SCOPE OF PART I OF THE REPORT

2.1 The Supreme Court of Appeal is beset by a number of grave problems. These are described in chapters 3 to 6 below. It is accepted by nearly all interested parties that the only effective solution to these problems lies in a system in which the Supreme Court of Appeal will itself control strictly both the number and the nature of the appeals which reach it.

2.2 It is a precondition of this solution that the tier of appellate courts placed at the level immediately below the Supreme Court of Appeal must, in the great majority of cases, function as the final court of appeal. In the hierarchy of our courts as now structured the tier of appellate courts immediately below the Supreme Court of Appeal is the Full Court (a three-judge Bench) constituted in the provincial divisions of the High Court.

2.3 In **PART I** of this Report the Commission considers :

(a) **whether the Full Court should be invested with an enlarged appellate jurisdiction to make it the primary appellate court from which any further appeal to the Supreme Court of Appeal will lie only with leave of the latter ,**

OR

(b) **whether the structure of Full Court appeals should be scrapped and be replaced by some form of intermediate appeal court functioning on a level above the High Court but below the Supreme Court of Appeal.**

AND IF THE SOLUTION SHOULD BE (b)

(c) **whether such intermediate appeal court should function on an ad hoc basis or whether it should be established as a permanent court with its own permanently appointed judges and its own separate administrative**

infrastructure.

CHAPTER 3

3. SYNOPSIS OF THE PROBLEMS IN THE SUPREME COURT OF APPEAL

The Supreme Court of Appeal experiences three main problems. They may be summarised as follows :-

- 3.1 The workload of the Supreme Court of Appeal is so heavy that the existing complement of 18 judges (the Chief Justice and 17 permanent Judges of Appeal) has great difficulty in coping with it.
- 3.2 Many of the appeals heard by the Supreme Court of Appeal involve factual disputes and/or relatively trivial legal issues and are therefore cases inappropriate for adjudication by a court of last resort. This situation detracts from the status of the court and represents an injudicious and uneconomic use of scarce manpower.
- 3.3 The disproportionately large number of judges on its Bench renders the Supreme Court of Appeal top-heavy and unwieldy in functioning as a court of last resort.

CHAPTER 4

4. THE EXCESSIVE CASELOAD CARRIED BY THE SUPREME COURT OF APPEAL

4.1 The Supreme Court of Appeal annually disposes of some 240 appeals and between 400 to 500 applications for leave to appeal.

4.2 Addressing the Commission at a public hearing in Bloemfontein on 16 March 1996 (“the Bloemfontein sitting”) the then Chief Justice , Corbett CJ , said :-

“The problem in handling appeals is not only the number of appeals but the complexity of the appeals and the length of the records of the case. It has been my experience over the last 20 odd years that I have been on the Appellate Division that the length of records has increased tremendously over that period...”

4.3 On average a Judge of Appeal annually has to read some 260 volumes (each volume averaging 100 pages). This reading has to be done during court recesses between the four terms , and it absorbs almost the entire recess period.

4.4 Despite the unremitting labours of the Judges of Appeal the Supreme Court of Appeal has a depressing backlog of pending appeals. While in the year ending 30 June 1992 320 civil and 395 criminal appeals were ripe for hearing , the court disposed only of 93 civil and 150 criminal appeals. In the year ending 30 June 1993 there were ripe for hearing 348 civil and 378 criminal appeals , whereof the court disposed only of 90 civil and 163 criminal appeals. In the year ending 30 June 1994 there were ripe for hearing 331 civil and 364 criminal appeals. Of these the court disposed of only 98 civil and 141 criminal appeals.

- 4.5 The problems of the Supreme Court of Appeal are not of recent origin. They received attention sixteen years ago in the Third Interim Report (April 1981) of the Commission of Inquiry into the Structure and Functioning of the Courts (“the earlier Commission”). The earlier Commission reported that the Judges of Appeal (then numbering fourteen) were snowed under by juridically inconsequential but time-consuming work. It recommended a modified appellate structure designed to lighten the workload of the court.
- 4.6 Most of the reforms recommended by the earlier Commission were embodied in the Appeals Amendment Act No 105 of 1982. These reforms imported the requirement of leave to appeal in civil proceedings initiated in the Supreme Court, and an extension of the appellate jurisdiction of the provincial divisions in respect of judgments of a single judge.
- 4.7 Time has shown that these reforms did not go far enough. It is clear that under the current system Full Courts, with their limited jurisdictional ambit, are not an effective dyke to prevent a flood of appeals reaching the Supreme Court of Appeal. The volume of appeals dealt with by the Full Court is too small.

CHAPTER 5

5. THE SUPREME COURT OF APPEAL HAS TO HEAR MANY APPEALS WHICH DO NOT MERIT THE ATTENTION OF A COURT OF LAST RESORT

- 5.1 Appeals involving minor criminal matters constitute approximately one quarter of the appeals annually heard by the Supreme Court of Appeal. Describing this component of the court's caseload Corbett CJ remarked at the Bloemfontein sitting :-

“When I talk about “minor criminal appeals” , I have in mind appeals in matters very often , in fact usually , originating from the Magistrate’s Court dealing with questions of verdict or sometimes only sentence in drunken driving matters , drug offences , theft and the like.”

- 5.2 Many appeals coming before the Supreme Court of Appeal hinge on disputes of fact. In the course of his oral submissions made to the Commission on 16 March 1996 at the Bloemfontein sitting , Marais JA observed :-

“Many of those cases , as you have already heard , involve very lengthy records and those records are read , not so much because they need to be read to understand the law points that arise in them , but because they have to be read in order to decide whether the factual decisions made in the courts below are correct or not , and it does seem inappropriate that that court , which is at the apex of the pyramid , should have to concern itself to an undue extent with that kind of enquiry.”

- 5.3 In Appendix “AA” in VOLUME II of this Report there is to be found a blank copy of a questionnaire dealing with various facets of appeals coming before the Supreme Court of Appeal. During May 1996 , and at the request of the Commission , members of the bench of the Supreme Court of Appeal undertook , for a limited period of time , to complete the questionnaire at the time of delivery of judgment in the Supreme Court of Appeal.

- 5.4 The Commission has received from the Registrar of the Supreme Court of Appeal questionnaires completed in respect of a total sample of 102 appeals (being 78 civil and 24 criminal appeals) in which the Supreme Court of Appeal gave judgment during the period 23 May 1996 to 27 May 1997. The Commission records its thanks to those Judges of Appeal who undertook the completion of the said questionnaires.
- 5.5 While the sample of cases reflected in the completed questionnaires may be too meagre and the time-span involved too brief to invest the responses in the questionnaires with substantial statistical significance, two features are here worthy of mention. First, in two-thirds of the criminal appeals the matter hinged completely or largely on issues of fact. Second, in almost one-half of the civil appeals the Judges of Appeal concerned considered either that the court below had granted leave to appeal injudiciously and/or that the appeal should have come before the Full Court rather than the Supreme Court of Appeal.

CHAPTER 6

6. THE SUPREME COURT OF APPEAL IS TOP-HEAVY

6.1 In 1947 there were (including the Chief Justice) six permanent Judges of Appeal. By 1967 the number had grown to ten. In the year 1977 the court numbered twelve. By 1987 there were fourteen Judges of Appeal. There are now eighteen permanent Judges of Appeal.

6.2 Of the size of the court Corbett CJ had this to say at the Bloemfontein sitting :-

“Just increasing the capacity of the Appellate Division to deal with appeals , has several disadvantages. It increases the administrative load tremendously , and a lot of that administrative load of necessity devolves upon the Chief Justice. Making up the roll for a term’s work , depending on whether it is a long term or a short term involves four to six days solid work. Secondly it has the disadvantage that the court then becomes very top-heavy and unwieldy. This lack of cohesion can , I think , cause real problems in formulating legal policy , giving legal direction to the development of the law. Literally one can reach the stage where it will be very difficult for the left hand to know what the right hand is doing.”

6.3 Developing the same theme Marais JA remarked :-

“I think it is of critical importance that that court does not grow too large. With great respect , I consider it is already too large. The reasons are obvious. When three courts a day sit in the Appellate Division , as is almost invariably the case , it is quite conceivable that a court is doing something which another court is undoing , each unbeknown to the other. It is very difficult to get consistency out of the highest court where there are so many potential courts which can be assembled to deal with the matter , and where there are so many individuals on the court...”

6.4 It is clear that in the situation described in 6.3 above both the maintenance of internal uniformity of decisions and the preservation of doctrinal coherence within the Supreme Court of Appeal are imperilled.

- 6.5 In Washington DC the Commission had the benefit of discussions with an eminent jurist who has done much research into courts in the United States , England and Germany. **Professor Daniel John Meador**¹ is the co-author (with Jordana Simone Bernstein) of “Appellate Courts in the United States” (1994) in which the following is said at pp 15/16 :-

“The view is widely held among American Judges and lawyers that a court of last resort should have at least five but no more than nine judges. This position is taken in the American Bar Association’s Standards of Judicial Administration , a comprehensive statement of the features of court structure and process deemed optimal by the nation’s largest organization of lawyers and judges. Five is thought to be the minimum number needed to provide an appropriate balance of perspectives and judicial judgments for a tribunal that is authoritatively enunciating the law of an entire jurisdiction ; nine is considered the maximum number that can participate meaningfully in a genuinely collegial decision. This attitude about size is based on the belief that a court of last resort should always sit en banc...when deciding a case on the merits...”

- 6.6 The Commission considers that if the recommendations set forth in Chapter 15 in PART I of this Report are accepted and put into effect it will be possible within a few years to reduce very substantially the number of Judges of Appeal and thus to ensure that within the Supreme Court of Appeal doctrinal coherence is effectively maintained and legal policy is evenly developed.

¹*James Monroe Professor of Law at the University of Virginia. He has been involved in many projects to improve the administration of justice and he served as Director of the Appellate Justice Project of the National Center for State Courts (1972-74). He is a member of the Board of Directors of the State Justice Institute.*

CHAPTER 7

7. A SURVEY OF THE WAY IN WHICH THE DEBATE BEFORE THE COMMISSION REGARDING THE POSSIBLE CREATION OF AN INTERMEDIATE APPEAL COURT DEVELOPED AND A SUMMARY OF THE THRUST OF THE MAIN SUBMISSIONS MADE BY THE VARIOUS INTERESTED PARTIES FROM TIME TO TIME

- 7.1 The debate which forms the background to the Commission's Findings and Recommendations in PART I of this Report was a protracted one in the course of which some of the interested parties modified their original ideas and reframed their submissions. It is necessary to trace the various stages of the debate.
- 7.2 During 1994 , Corbett , CJ , submitted to the Department of Justice a memorandum proposing the establishment of a court of criminal appeal.
- 7.3 The proposal was investigated by the SA Law Commission. In a report submitted to the Minister of Justice on 27 July 1994 the Law Commission recommended that effect be given to this proposal. The Commission's recommendation was that the court of criminal appeal should sit in two separate courts. It should consist of a bench of at least three members , the presiding judge being a member of the Appellate Division , and the other two members being appointed ad hoc by the Chief Justice from a panel of five senior provincial judges.
- 7.4 When negotiations for a new Constitution began in 1996 it was proposed to the Theme Committee 5 that an intermediate court of appeal should have a civil as well as a criminal jurisdiction. Corbett CJ supported this proposal.
- 7.5 In a memorandum to the Commission dated 12 December 1995 ("the North-West Memorandum") the Bar of North-West Province , the Northern Cape Bar and the Free

State Bar jointly submitted proposals for the establishment of an intermediate appeal court for the provinces of North-West , Northern Cape and the Free State. A copy of the North-West Memorandum is Appendix “A” in VOLUME II of this Report.

- 7.6 The North-West Memorandum urged the abolition of appeals to the Full Court. In the place thereof it proposed an intermediate appeal court having both criminal and civil jurisdiction. This should have a bench of three presided over by a Judge of Appeal. The two other members would be appointed ad hoc :-

“Preferably although not necessarily from the two remaining provinces ; that is , not from the province in which the case originated.”

- 7.7 In a memorandum to the Commission dated 21 December 1995 (“the first Friedman Memorandum”) the Judge President of the Cape Provincial Division said , inter alia :-

“Should the decision be made to establish an intermediate court of appeal , it should be a permanent court with its own infrastructure. It does not , however , have to sit in one place. It could , furthermore , be divided into two or more Divisions with provinces being grouped together for purposes of determining the jurisdiction of a Division.”

- 7.8 The concluding paragraph of the first Friedman Memorandum read as follows :-

“The idea of an AD judge presiding with two provincial judges in what will amount to an ad hoc court , is not supported. It is not practicable , having regard to the fact that the terms of the AD and the provincial Divisions differ , and because of the inevitable problems that will arise in constituting such a court to deal with matters requiring expertise in a particular field. The logistics involved in ensuring that ad hoc provincial judges have sufficient time to read records and to prepare for sittings and thereafter to write judgments , would add to the impracticality of such a system.”

A copy of the relevant excerpt from the first Friedman Memorandum is Appendix “B” in VOLUME II of this Report.

- 7.9 On 22 January 1996 Corbett CJ submitted to the Commission a draft memorandum on intermediate courts of appeal (“the CJ’s Memorandum”) prepared on his behalf by

Olivier JA. In a covering letter Corbett CJ pointed out :-

“We may wish in the end to modify or amplify the views expressed in the memorandum when we give evidence , but it is at least a basis for our submissions.”

A copy of the CJ’s Memorandum is Appendix “C” in VOLUME II of this Report.

7.10 On the strength of the statistics already quoted in paragraph 4.4 above the CJ’s Memorandum stated that :-

“...the workload of the Appellate Division is becoming unmanageable.”

It proceeded to say :-

“A further far-reaching development took place in 1995. Theme Committee 5 proposed and the Constitutional Assembly decided that the Appeal Court should also be given constitutional jurisdiction. This means that in principle all constitutional matters (save for exceptional cases) will come to the Appellate Division. From the AD there is a possibility of appeal in these matters to the Constitutional Court. The implications are clear : many new cases , which have hitherto not come before the AD , will now be on our roll ; these cases involve difficult and involved questions of law , requiring considerable research into foreign legal (and political) systems.”

7.11 By means of a circular dated 16 February 1996 the Commission invited all interested parties to a public sitting of the Commission on 16 March 1996 (“the Bloemfontein sitting”) at which oral representations by the Chief Justice and other interested parties would be heard in regard to the desirability or otherwise of establishing an intermediate appeal court. The circular enclosed a copy of the CJ’s Memorandum , an excerpt from the first Friedman Memorandum ; and other relevant written submissions received by the Commission on the subject.

7.12 At the Bloemfontein sitting Corbett CJ and several other judges addressed the Commission. Extracts from the oral submissions received by the Commission on this occasion are to be found in VOLUME III of this Report. In the course of his address Corbett CJ proposed the creation of an intermediate appeal court manned by its own permanently appointed judges to deal with both civil and criminal appeals. Having its

headquarters at a particular place it would nevertheless sit in two or three circuits in panels of three judges. It would replace the system of Full Court appeals. An appeal to the intermediate appeal court would require leave of the court a quo. An appeal from the intermediate appeal court to the Appellate Division would lie only with leave of the latter granted on substantial points of law.

7.13.1 At the Bloemfontein sitting the following judges made oral submissions in support of the establishment of a permanent intermediate court of appeal : Marais JA ; Lichtenberg JP ; Zietsman JP ; and Farlam J.

7.13.2 In his address to the Commission Beck JP explained that it would cause deep resentment in the Transkei should Umtata not be included in a circuit of the proposed intermediate court. Broome DJP warned that either the creation of an intermediate court or the conversion of the Full Courts into a primary appellate tribunal would take years to achieve. The immediate remedy lay in the drastic curtailment of the absurd length of appeal records.

Pickard letter is to be found in Appendix “E” in VOLUME II of this Report.

- 7.14 The Judge President of the Cape Provincial Division was unable to attend the Bloemfontein sitting but a memorandum by him dated 14 March 1996 (“the second Friedman Memorandum”) was handed in by Farlam J. It expressed the view that the CJ’s Memorandum had made out :-

“An unanswerable case for the establishment of appeal courts situated between the present provincial divisions and the AD , which will be essential if the workload of the AD is to be reduced to manageable proportions.”

- 7.15 The second Friedman Memorandum set forth useful statistics regarding the number of Full Court appeals respectively heard in the various divisions of the Supreme Court during the years 1994 and 1995 ; and it also reflected a breakdown of the various types of appeals reaching the Appellate Division during the years respectively ending on 30 June 1994 and 30 June 1995. A copy of the second Friedman Memorandum is to be found in Appendix “F” in VOLUME II of this Report.

- 7.16 Upon the analysis of such statistical data the second Friedman Memorandum suggested (in paragraph 8) :-

“...that there should be at least two intermediate appeal courts , one for appeals from the TPD and WLD and one for appeals coming from the remaining divisions. On this basis it would probably be necessary for the intermediate court dealing with appeals from the TPD and WLD to have seven judges and the other court to have five judges.”

- 7.17 Paragraph 12 of the second Friedman Memorandum read as follows :-

“Appeals should not lie as of right to the intermediate court of appeal. The leave of the court a quo or of the intermediate court, granted after considering a petition, should be required. An appeal to the AD should only be allowed from a decision of an intermediate court of appeal with the special leave of the Chief Justice granted after considering a petition.”

7.18 At the request of Eloff JP a transcript of the proceedings at the Bloemfontein sitting was thereafter made available to every judge of the Transvaal Provincial Division. On 20 April 1996 the subject of a possible intermediate appeal court was discussed at a meeting attended by Eloff JP, his two Deputy Judges President, and 27 puisne judges of the Transvaal Bench. On 23 April 1996 Eloff JP sent to the Commission a letter (“the Eloff letter”) advising that the general (but not unanimous) view of the Transvaal Judges was that no convincing case for the establishment of an intermediate appeal court had been made out. A copy of the Eloff letter is to be found in Appendix “G” in VOLUME II of this Report.

7.19 Appended to the Eloff letter was an undated memorandum prepared by Nugent J (“the Nugent Memorandum”) which was said to articulate clearly the views of the majority of the Transvaal Judges. A copy of the Nugent Memorandum is to be found in Appendix “H” in VOLUME II of this Report. What the Nugent Memorandum proposes is an expanded system of Full Court appeals operating as follows :-

- (a) *Judges of each division will be competent to sit in any division simply by arrangement between the respective Judges President.***
- (b) *A single judge of any division will be bound by the decision of a Full Court of any division. A Full Court of any division will be bound by the decision of any other Full Court unless it considers the latter clearly wrong.***
- (c) *Appeals from Magistrates Courts will be heard by two judges of the division concerned. Any further appeal will be to the Full Court.***
- (d) *Appeals from a decision of a single judge will be to the Full Court of the division concerned.***
- (e) *Appeals to the Full Court will be allowed only with leave of the court a quo, or with the leave of two judges of the division concerned,***

granted on petition to that division.

(f) A Full Court of the division concerned will be constituted by the relevant Judge President but , where appropriate , may include judges of other divisions. Whether appeals are heard on an ad hoc basis , or in a series in particular terms , will be a matter for the discretion of the relevant Judge President.

(g) Appeals to the Appellate Division will be permitted only with leave of that court granted upon petition to it.

7.20 During May 1996 the Commission circulated to all interested parties copies of (a) the transcript of the oral submissions made by Corbett CJ at the Bloemfontein sitting ; (b) the Second Friedman Memorandum ; (c) the Eloff letter ; and (d) the Nugent Memorandum. The circular invited interested parties to submit their comments thereon to the Commission by 30 August 1996.

7.21 In response to the circular described in 7.20 above the Commission received written submissions from four different Attorneys-General , two Judges President ; the ALS ; NADEL ; the North-West Bar ; and the Cape Bar Council.

7.22 In separate letters received from (1) the Attorney-General of the Free State (dated 22 May 1996) ; (2) the Attorney-General of the Eastern Cape (dated 28 August 1996) ; (3) the Attorney-General of the Transkei (dated 30 August 1996) ; (4) a member of the staff of the Attorney-General of the Cape Provincial Division (dated 11 September 1996) each such letter expressed support for the proposals in the Nugent Memorandum.

7.23 In memorandum dated 1 July 1996 the Chairman of the North-West Bar made submissions additional to those earlier made in the North-West Memorandum. In his later memorandum (a copy of which is to be found in Appendix "J" in VOLUME II of this Report) support is re-affirmed for the establishment of intermediate appeal courts sitting in three circuits , one of which would serve the provinces of the North-West , the Northern Cape and the Free State. One of the factors stressed in the memorandum is the following :-

“The fewer the links between the court of first instance and the court with appellate jurisdiction , the greater is the public confidence in the justice system.”

7.24 In a memorandum to the Commission dated 4 July 1996 (“the Cape Bar Memorandum”) the Cape Bar Council said that there were two possibilities : either to adjust and expand the present system of Full Court appeals or to establish a separate court with its own permanent judges and its own separate administrative infrastructure. A copy of the Cape Bar Memorandum is to be found in Appendix “K” to VOLUME II of this Report. In advocating the adoption of the second solution the following submissions were advanced in the Cape Bar Memorandum :-

“ 3.1.1 *We believe that a Court of Appeal , staffed by a fixed complement of Judges , is better able to fulfil its function than is one which is assembled from time to time from different Judges of the Provincial Divisions , even if such Courts were to be presided over by a Judge of the Appellate Division (which in any event is now no longer regarded as an option).*

3.1.2 *The most important consideration for this is , in our view , the quality of the Bench of the IAC. It will , as we understand what is envisaged , take over the role of the present Appellate Division in many respects and will - probably even more than is the case under the present system - be the final forum. In those circumstances we do not believe that it should be seen in part as a training-ground for less experienced Judges sitting with their more experienced brethren (a view put forward favouring the other system).*

3.1.3 *It is our view that the Judges of the IAC should be appointed in much the same way as those of the Appellate Division are at present - by regard to their merit in the Divisions in which they serve. Such an appointment must , in other words, be a reflection of excellence , frequently perhaps an intermediate stage to appointment to the Appellate Division.”*

7.25 In a memorandum dated 5 August 1996 (“the ALS Memorandum”) the Association of Law Societies made detailed submissions on the subject. A copy of the ALS Memorandum is to be found in Appendix “L” in VOLUME II of this Report. First reciting the proposals made by the ALS on 16 February 1995 to the Theme Committee 5 of the Constitutional Assembly , the ALS Memorandum proceeded to make the

following submissions :-

- “
- 7.1 *The ALS repeats its proposal to Theme Committee 5 that three appeal circuits should be established for the Republic of South Africa ;*
 - 7.2 *The ALS further repeats its proposal that the first circuit of the Appeal Court should serve the provinces of Gauteng , the Northern Province and Mpumalanga ;*
 - 7.3 *The second circuit of the Appeal Court should serve the Western Cape , Eastern Cape and Natal ;*
 - 7.4 *The third circuit should serve the Northern Cape , Free State and North West ;*
 - 7.5 *Each circuit should have an administrative headquarters ;*
 - 7.6 *All appeals should be heard by it in the court buildings of the Provincial and Local Divisions of the High Court within its area of jurisdiction and from where the appeals originate. In other words , the Appeal Court should conduct its activities on a circuit court basis - taking the court to the people rather than making the people travel long distances to the court ;*
 - 7.7 *The judges of the Appeal Court should be appointed from the ranks of the judges of the High Court and should constitute a judicial body separate and independent from the judges of the High Court ;*
 - 7.8 *Each circuit of the Appeal Court should be headed by a Judge President of Appeal and a Deputy Judge President of Appeal.”*

7.26 In paragraph 8 of the ALS Memorandum it is further submitted that the new court should hear both civil and criminal appeals ; that there should be an appeal as of right to the court ; and that an appeal from this court to the Supreme Court of Appeal should lie with leave of latter but granted only in respect of issues of law.

7.27 In a further memorandum dated 21 August 1996 by the Judge President of the Cape Provincial Division (“the third Friedman Memorandum”) it is said that the Appellate Division is overburdened mainly because it hears :-

“...all appeals from decisions of two judge courts , most of which are decisions on appeals from the magistrates’ court.”

It proceeds to point out that the test for determining whether an appeal from the decision of a single judge should be heard by the Full Court or the Appellate Division (namely , whether the questions of law and fact and other considerations involved in the appeal are of such a nature that the appeal requires the attention of the Appellate Division) does not apply when the appeal is one from a two-judge court , which , apart from hearing appeals from magistrates courts also sits in certain matters as a court of first instance. A copy of the third Friedman Memorandum is to be found in Appendix “M” in VOLUME II of this Report.

7.28 Paragraphs (E) to (H) of the third Friedman Memorandum read as follows :-

- “
- (E) *I still believe that the solution proposed in an earlier memorandum , namely that all appeals , save those complying with the above test , should be heard by an Intermediate Appeal Court (IAC) , is the ideal solution.*
 - (F) *There are , however , practical considerations which may militate against the establishment of such a court , especially in the short term. Firstly there is the possible difficulty of finding suitable personnel to staff such a court. Difficulties encountered recently in establishing a Labour Appeal Court illustrate the reason for this concern. An IAC which is destined to hear , in the main , factual appeals is not likely to attract judges of the calibre required for a court which , in respect of the cases coming before it , is to take the place of the Appellate Division.*
 - (G) *A second problem is that related to the cost involved in establishing the infrastructures required for such a court - at least in the long term. Ideally , each division of the IAC should have its own headquarters , which would includes judges’ chambers , a registry with the necessary staff as well as library facilities. It is extremely doubtful whether the country’s financial resources will be adequate to provide for this expense in the short term.*
 - (H) *It seems , therefore , that until it is possible to establish an IAC , the only solution to the problem of reducing the workload of the Appellate Division and providing for it to deal only with cases which really require its attention in accordance with the above test , lies in providing for appeals which do not meet this*

test to be dealt with at Provincial level.”

- 7.29 In a letter dated 26 August 1996 the Judge President of the Bophuthatswana Supreme Court , the Hon Mr Justice M.W. Friedman , wrote as follows to the Commission :-

“The Judges of this Division support the establishment of an Intermediate Court of Appeal manned by its own Judges , appointed permanently , to handle both civil and criminal appeals. This would replace the system of Full Court Appeals in the Provincial Divisions.

In regard to its structure and operation the Judges of this Division favour the submissions made by Corbett CJ.”

- 7.30 In a memorandum (“the Nadel Memorandum”) dated 30 August 1996 prepared by its Legal Education Research and Training Project , the National Association of Democratic Lawyers (NADEL) expressed the view that it would be inappropriate to insert an additional tier into the court hierarchy by creating an intermediate court to deal with appeals from provincial divisions , and from which new court appeals would lie to the Appellate Division only with leave of that court in matters deciding questions of law , principle or policy. A copy of the Nadel Memorandum is to be found in Appendix “N” in VOLUME II of this Report.

- 7.31 In support of the above view the Nadel Memorandum advanced the following submissions and counter-proposals :-

“Such a proposal would ensure that the Appellate Division became overly specialised and remote from the dispensation of justice , and would additionally introduce an element of greater inaccessibility and additional costs in appeals lying from the Provincial and Local Divisions. A further extremely negative effect of the proposal would be to prevent the exposure of Judges of the Provincial and Local Division to the hearing of appeals. This would result in a de facto perception of a lower level of justice being dispensed in the Provincial and Local Divisions , with a more specialised and higher level of justice afforded by the Intermediate Appeal Court. This , in Nadel’s view , would be substantially contrary to the principles that all judicial officers be exposed to opportunities of gaining relevant experience in all areas of the law and suggest an inequality in the dispensing of justice and expertise , contrary to principles requiring the equal application of justice. Establishing a further separate tier in the hierarchy of Courts would be contrary to the requirement that justice be accessible.

Inasmuch as constraints of capacity may limit the effective and expeditious functioning of the Appellate Division as constituted , Nadel would suggest that further thought be given to increasing the personnel and infrastructure of the Appellate Division. This would further facilitate the opportunity of enabling further appointments to the Bench of the Appellate Division in terms of the glaring necessity of addressing the inadequate representation of the previously marginalised and disenfranchised sectors of the South African population on that Bench.”

7.32 On 27 September 1996 Corbett CJ submitted to the Commission a further memorandum (“the AD Memorandum”) , a copy of which is to be found in Appendix “O” in VOLUME II of this report. The AD Memorandum recorded that , having had occasion to study the various memoranda and the evidence presented to the Commission on the questions of an intermediate court of appeal , the Judges of Appeal :-

- (a) remained committed to the ideal of an intermediate court of appeal as proposed by the Chief Justice in his representations and evidence to the Commission ;**
- (b) recognised , however “ that the concept , form and composition of such a court have proved to be somewhat controversial and that this suggestion may not find favour as an immediate solution to the problem” ;**
- (c) consequently , and as an interim measure , had two alternative proposals , each of which had its supporters among the judges of the Appellate Division , to place before the Commission.**

7.33 The first alternative is based essentially on the Nugent Memorandum. The second alternative proposal revives Corbett CJ’ initial suggestion of an intermediate court of appeal (as endorsed by the Law Commission) but expanded to embrace civil jurisdiction and to combine it with the proposal in the Nugent Memorandum. The AD Memorandum points out that the adoption of either of its two alternative proposals would require amendments to the Supreme Court Act , No 59 of 1959 ; the Criminal Procedure Act No 51 of 1977 ; the Water Act No 54 of 1956 ; the Income Tax Act No 58 of 1962 ; the Restitution of Land Rights Act No 22 of 1994 ; and the Rules of Court. The first alternative proposal , however , would not require major amendments

to the Supreme Court Act and the Criminal Procedure Act ; and , unlike the second alternative proposal , it would not affect the present court structure at all.

7.34 The AD Memorandum describes its first alternative proposal in the following terms :-

- “
1. ***The AD should not be concerned with matters which do not properly belong to its domain.***
 2. ***The decision as to which cases are to be heard by the AD should be that of the AD.***
 3. ***The full court will be the primary court of appeal in relation to all appeals , civil or criminal , and whether they emanate from the decision of a single judge or two judges.***
 4. ***The AD may , on application to it and by its consent , allow leapfrogging , i.e. hear a case in stead of the full court.***
 5. ***An appeal to the full court from a decision of a single judge or two judges , sitting as a court of first instance , will require leave from the court a quo. On refusal of such leave , an aggrieved party may petition the Chief Justice , as is the case at present. The judges of the AD will then determine , if leave is granted , whether the appeal should be heard by the AD itself or by a full court.***
 6. ***As a rule an aggrieved party is restricted to one appeal only , with leave. A second appeal to the AD should be allowed only in exceptional cases. The current position is that appeals from the full court (sitting on appeal from a single judge) can only take place with special leave granted by the AD. It is proposed that this principle be extended to cover cases emanating from the magistrate’s courts. In other words , an appeal from the provincial (or local) division , sitting as a court appeal from a magistrate’s court , will only be permitted with special leave of the AD.***
 7. ***These principles should be made applicable to all instances including those which , at present , have been held to fall outside the rules , such as an application for leave to appeal against the refusal of condonation in a criminal matter (see , for instance , S v Gopal 1993(2) SACR 584(A)).”***

7.35 The AD Memorandum summarises the main features of its second alternative proposal as follows :-

- “
1. ***The creation of an intermediate court of appeal , presided over by a judge of the AD (or , by arrangement with the Chief Justice , a Judge President or a Deputy Judge President (?) , sitting with two members from any of the provincial divisions for a session at a time , which would correspond to the sessions of the AD.***
 2. ***All appointments to this court will be ad hoc , by arrangement between the Chief Justice and the various Judges President , for a session at a time. The judges will not necessarily be from one and the same division , or from the division from which the appeal emanates.***
 3. ***Subject to paragraphs 4 and 5 below , this court will be the final court of appeal in all matters criminal and civil.***
 4. ***In general a further appeal to the AD will be permitted only on important matters of law , with leave of the AD itself.***
 5. ***Provision will be made , with leave of the AD itself , for a leapfrogging procedure (on the recommendation of the court of first instance , the first court of appeal or on the application by the parties to the AD).***
 6. ***An appeal to this court from a decision of a single judge or two judges , sitting as a court of first instance , will require leave from the court a quo. On the refusal of such leave , an aggrieved party may petition the Chief Justice , as is the case at present. The judges of the AD will then determine , if leave is granted , whether the appeal should be heard by the AD itself or by the court.***
 7. ***The court will sit in different circuits , at the seat of the various provincial divisions concerned , depending on the volume of work.***
 8. ***The administrative arrangements for the sitting of the court will be the responsibility of the provincial division where the court will be in session ; but in all other respects (e.g. the handling of the appeal cases and their records , the drawing up of the court rolls , the allocation of cases to the roll , the determination of circuit sessions) the administration will be left***

to the registrar of the AD and the Chief Justice , acting in conjunction with the Judges President concerned.

9. Different circuits may sit at the same time , depending on the volume of work at each circuit centre.

10. The judges of the provincial division appointed by arrangement between the Chief Justice and the Judges President , will be relieved of all other duties during such session and will be given the same time as the AD judges to prepare for the forthcoming session.”

7.36 On 30 October 1996 , and by way of a circular to which a copy of the AD Memorandum was appended , the Commission requested all interested parties to submit to the Commission by not later than 15 December 1996 their written views and comments on the first and second alternative proposals contained in the AD Memorandum.

7.37 In response to its circular of 30 October 1996 the Commission received submissions from nine judges ; from the General Council of the Bar (to whose memorandum there were appended submissions made to the GCB by five different constituent Bar Councils) ; and from the Association of Law Societies.

7.38 In a letter to the Commission dated 13 December 1996 the Judge President of the Natal Provincial Division , the Hon Mr Justice J.A. Howard intimated that , substantially for the reasons set out in the Nugent Memorandum , he favoured the first alternative proposal in the AD Memorandum. Howard JP went on to add that for the same reasons he opposed the second alternative proposal :-

“...and more particularly because I consider that it would present an administrative nightmare for the Chief Justice and the Judges President.”

7.39 In a memorandum to the Commission dated 13 December 1996 (“the fourth Friedman Memorandum”) the Judge President of the Cape Provincial Division informed the Commission that , subject to the qualifications mentioned in the third Friedman Memorandum , he supported the first alternative proposal in the AD Memorandum.

The qualifications in question will be dealt with later in this Report. A copy of the fourth Friedman Memorandum is to be found in Appendix “P” in VOLUME II of this Report.

7.40 Paragraph (E) of the fourth Friedman Memorandum reads as follows :-

“I am as strongly opposed to the second alternative proposal as I was to the Chief Justice’s initial suggestion from which he has since departed. I set out my reasons for such opposition in the final paragraph of section 4 of my memorandum dated 21 December 1995. [This is the paragraph in the first Friedman Memorandum already quoted in 7.8 above.]”

7.41 Paragraph (G) of the fourth Friedman Memorandum reads as follows :-

“I am likewise opposed to Nugent J’s suggestion that judges in the provincial divisions should be transferable by arrangement between the respective JP’s. Apart from the fact that the terms of the provincial divisions , broadly speaking , coincide , all the objections applicable to an ad hoc court comprising an AD judge and two provincial judges , apply with equal force to Nugent J’s transferability principle.”

7.42 In a letter to the Commission dated 19 November 1996 the Judge President of the Northern Cape Division , the Hon Mr Justice J.J. Kriek , stated that he was firmly in favour of the first alternative proposal advanced in the AD Memorandum. Kriek JP voiced the following practical objection to the second alternative proposal in the light of domestic procedures in the Northern Cape Division :-

“If full bench appeals become ripe for hearing after the mid-term conference at which trial dates are allocated , they can invariably be accommodated on dates which become available as the result of cases being removed from the trial list. The result is that full bench appeals are heard reasonably expeditiously. This will not be the case if the second alternative scheme is to be implemented , because then appeals from all the Divisions will be competing for dates , and , at least in respect of this Division , I will want to know at least three terms in advance if the services of one of my Judges will be required.”

7.43 Kriek JP concluded his letter by remarking :-

“My overall feeling is that because of logistical problems , the operation of the scheme [the second alternative] will be cumbersome , will result in undue delays , will disrupt the work of the Provincial Divisions from which Judges will

be drawn , and will generally be extremely difficult to manage.”

7.44 On 28 November 1996 the Acting Judge President of the Orange Free State Provincial Division , the Hon Mr Justice A.P. van Coller , wrote a letter to the Commission stating that in his view the first alternative proposal in the AD Memorandum was clearly to be preferred “as an interim and also as a possible permanent measure.”

7.45 In his letter van Coller AJP pointed out that the intermediate court of appeal envisaged in the second alternative proposal would burden a number of Judges of Appeal not only with factual appeals but also with the inconvenience of travel to cities other than Bloemfontein. In his view the second alternative proposal as a permanent expedient would represent :-

“...a further and unfortunate step in the erosion of the status of the Supreme Court. Supreme Court Judges will be deprived of the benefits gained from participation in Full Bench appeals. There will also be other disadvantages...dealt with by Flemming DJP in his memorandum...I am in respectful agreement with most of the views expressed by Flemming DJP.”

7.46 On 27 November 1996 the Deputy Judge President of the Witwatersrand Local Division , the Hon Mr Justice H.C.J. Flemming , addressed to the Commission a comprehensive memorandum (“the Flemming Memorandum”) a copy of which is to be found in Appendix “Q” in VOLUME II of this Report.

7.47 The Flemming Memorandum raised as criticisms of the second alternative proposal in the AD Memorandum the following :-

7.47.1 No valid argument existed for wresting Full Court appeals from the provincial divisions.

7.47.2 No justification existed for making an AD judge a roving gypsy.

7.47.3 For judges in the provincial division Full Court appeals meant welcome variety in their work. They were not seen as burdens.

7.47.4 Full Court appeals are important in the training of judges in the

provincial divisions :-

“From handling a court and the practitioners who appear , to knowledge of the law , to greater consistency e.g. about sentencing. Jointly dealing with a matter is where sound practices and traditions of the court are cemented or altered...”

7.47.5 The suggestion put forward in the AD Memorandum that the second alternative proposal “would give more judges from the provincial divisions exposure to and experience of appeal work at a higher level” was unfounded. Only a select few would be appointed to the intermediate appeal court.

7.47.6 The suggestion in the AD Memorandum that circuit sittings would enhance accessibility and expedite work was unsound :-

(i) *“Access is more a matter of where the legal adviser is rather than where the court building is in which the adviser has to execute the instruction.”*

(ii) *“Because the terms of the Supreme Court are longer , there is in practically each term a period where the Provincial Division resumes hearings before the AD does. Earlier dates are therefore possible...when the need arises full benches are assembled to deal with a matter. Sometimes within a week or two. If the Supreme Court loses its jurisdiction to hear such appeals , that can not be done.”*

7.47.7 Productivity in new and unfamiliar surroundings suffered :-

“One may mention the elementary level known to Transvaal judges : using a colleague’s chambers but requiring undue time to know where to find a specific index or handbook or telephone directory.”

7.47.8 Sound administration required integrated administration. The split administration involved in the second alternative proposal was undesirable.

7.47.9 Time lost in avoidable travel , the expense thereof , the lack of suitable

facilities all rendered the second alternative more costly , less effective and too cumbersome.

7.47.10 What was needed was simplification rather than complication of the appeal pattern by the introduction of a new tier.

7.47.11 *“ Keeping work in the Full Bench atmosphere (or in a large bench as the AD is) , promotes higher quality decisions and greater expedition. The intermediate court for Natal for the first term of 1998 will be stuck for the whole term with one specific AD judge who is good at Latin and two non-interchangeable Eastern Cape judges who respectively specialised in criminal work and third party work. Hardly the best background in preparing for , hearing , or writing a judgment in a medical malpractice appeal. On the first [alternative] proposal variety (and variation of judges) from week to week or even from case to case is possible and practised. If a case involving building contracts is the subject of a full bench appeal , judges can be chosen who as barristers or as judges have had experience of that type of dispute.”*

7.48 In a letter to the Commission dated 4 December 1996 the Judge President of the Bophuthatswana Supreme Court , the Hon Mr Justice M.W. Friedman , stated that he and the judges of his Division supported the second alternative proposal in the AD Memorandum “for the cogent and compelling reasons advanced in support thereof” .

7.49 On 12 December 1996 the Hon Mr Justice E.L. Goldstein of the Witwatersrand Local Division informed the Commission by letter that in his view the restriction , as a rule , of an aggrieved party to one appeal under the first alternative proposal was unacceptable. He considered preferable the second alternative. To the advantages of the latter as listed in the AD Memorandum there should be added :-

“ That the number of judges in the intermediate court may vary with fluctuations in the volume of work from time to time , and that appointments to such court being ad hoc , would not deprive the provincial divisions finally of the judicial talent involved.”

7.50 In a letter to the Commission dated 11 November 1996 the Hon Mr Justice J.D.M. Swart of the Transvaal Provincial Division lent his support to the first alternative proposal. He expressed doubt as to whether the second alternative proposal would be

really effective in reducing the Appeal Court's workload :-

“Daar mag enersyds ‘n vermindering van bloot tydrowende appèlle wees , maar andersyds sou van die Appèlafdeling verwag word om voorsitters vir die howe beskikbaar te stel. Die impak daarvan , gesien die uiteindelijke werkklas van die Appèlafdeling , skep nog ‘n onbekende faktor.”

7.51 Swart J stressed the validity of two important factors mentioned in the Nugent Memorandum :-

- “
- (a) *Die verligting van die las op die provinsiale vlak moet met verwysing na laerhowe beoordeel word op dieselfde beginselgrondslag waarop die Appèlafdeling sy probleem benader , naamlik om ontslae te raak van werk wat nie in ‘n Provinsiale of Plaaslike Afdeling tuishoort nie.*
 - (b) *Ek dink ons moet ten enemale skop teenoor die verdere inperking van kwaliteitwerk wat die [tweede] alternatiewe voorstel sal meebring en veral teen die verlaging in status op provinsiale vlak. Die metode waarop die Appèlafdeling se probleme opgelos moet word , roep mynsinsiens nie onvermydelik vir ‘n metode wat tot die verlaging van die status van ons Hof aanleiding gee nie.”*

7.52 On 11 November 1996 the Hon Mr Justice F.C.L. Roos of the Transvaal Provincial Division informed the Commission by letter that he was in complete agreement with the contents of the Nugent Memorandum :-

“...and consequently opposed to the creation of an intermediate court of appeal , be it on a temporary or permanent basis.”

7.53 In a letter dated 6 December 1996 the Hon Mr Justice M.B. Labe of the Witwatersrand

Local Division advised the Commission that he was in favour of the Nugent Memorandum :-

“...as amended by the first alternative proposal.”

7.54 To a letter to the Commission dated 13 December 1996 (“the GCB letter”) by the Chairman of the General Council of the Bar of South Africa , Mr Malcolm Wallis , SC , there were attached copies of responses to the Commission’s circular of 30 October 1996 by (a) the Johannesburg Bar ; (b) the Cape Bar ; (c) the Pretoria Bar ; (d) the Natal Bar ; and (e) the Eastern Cape Bar. A copy of the GCB letter is to be found in Appendix “R” in VOLUME II of this Report.

7.55 The GCB letter calls attention to a difference between the Johannesburg Bar and the remaining Bars on the following fundamental point :-

“ The Johannesburg Bar is content that the appeal tribunal can be constituted with judges who are members of the same Bench as the judge from whose decision an appeal lies. The other Bars are all opposed to this.

I rather suspect that this difference is a function of size. The feeling in Johannesburg is that the size of its Bench is such that the taint of undue intimacy between the judge in the court a quo and the judges hearing the appeal can be dissipated. (I am not sure whether there is any parochial element that judges in Johannesburg are better qualified to hear cases and appeals in the type of matter which is frequent litigated in Johannesburg.) The other Bars are very concerned about the appearance of undue closeness between the judge in the court a quo and the judges who preside in Full Bench Appeals. Speaking purely for myself I think that there is merit in this latter point.”

7.56 A copy of the written response of the Johannesburg Bar appended to the GCB letter is to be found in Appendix “S” in VOLUME II of this Report. The majority of the Johannesburg Bar Council favours the first alternative proposal in the AD Memorandum. One respect in which the majority does not support the Nugent Memorandum is :-

“...the suggestion that the judgment of any full bench in the country should be binding on all courts throughout the country (unless clearly wrong). Since full bench appeals will ordinarily be restricted to fact , leaving important legal issues to the AD , it is suggested that the present system of stare decisis should remain.”

7.57 A minority of the Johannesburg Bar supports the second alternative proposal in the AD Memorandum. Stressing the importance of the perception of impartiality the minority expresses the following point of view :-

“ The majority of appellants will have one appeal only , and only to three judges. Those appellants must be satisfied that their appeals are heard by a completely independent bench.”

The minority considers that the judicial exchange programme proposed in the Nugent Memorandum is impractical. As far as possible , however , so urges the minority , the bench should not consist of judges from the division whence the appeal comes. Lastly the minority argues that appeals to the intermediate court should lie as of right.

7.58 A copy of the written response of the Cape Bar which is appended to the GCB letter is to be found in Appendix “T” in VOLUME II of this Report. The Cape Bar therein states that nothing set out in the AD Memorandum has led them to change the views previously expressed by them [in the Cape Bar Memorandum dated 4 July 1996 already considered in 7.24 above]. The Cape Bar says , however :-

“ While the second [alternative] proposal [in the AD Memorandum] is a compromise it is , for the reasons put forward in our memorandum , the better solution to the problem , if it is accepted that a compromise must be reached.”

7.59 A copy of the written response of the Pretoria Bar which is appended to the GCB letter is to be found in Appendix “U” in VOLUME II of this Report. The Pretoria Bar takes the view that “the Nugent proposals present a more acceptable alternative” but suggest four amendments thereto :-

- (1) *With the possible exception of the TPD and the WLD no judges should sit in appeals which emanate from the division to which they have been appointed.*
- (2) *Where the issues are purely factual the AD should decide in what cases leave to appeal to the AD should be granted.*
- (3) *Where a point of law only is involved the court hearing the appeal should have the right to grant leave to appeal , with a right to the aggrieved party to petition the Chief Justice if such leave is refused.*
- (4) *Where a point of law is involved a further appeal to the AD should be allowed only if all factual issues have been resolved.*

- 7.60 A copy of the written response of the Society of Advocates of Natal which is appended to the GCB letter is to be found in Appendix “V” in VOLUME II of this Report. It records that the Society’s Bar Council :-

“...resolved to support the original proposal of the judges of the Appellate Division for the creation of an intermediate Appeal Court.

With regard to the two alternative interim measures proposed by the Chief Justice [the AD Memorandum] , the Council favoured the second alternative.”

- 7.61 A copy of the written response of the Eastern Cape Society of Advocates which is appended to the GCB letter is to be found in Appendix “W” in VOLUME II of this Report. It records that the Society’s Bar Council considered that the second alternative proposal :-

“...is the most practical and acceptable structure for an Intermediate Court of Appeal. The one proviso which it was felt should be added to such a proposal is that Judges from the Provincial Divisions should not be drawn from the division from which the appeal emanates.”

- 7.62 In a letter to the Commission dated 12 December 1996 the Association of Law Societies responded as follows to the circular of 30 October 1996 :-

“ The ALS finds the [second] alternative proposal as set out on pages 4 to 9 of the AD Memorandum the most acceptable , which views seem to be in accordance with the views by the ALS set out earlier [in the ALS Memorandum dated 5 August 1996 already considered in 7.25 above].”

CHAPTER 8

8. A CONSPECTUS OF THE REACTIONS TO THE AD MEMORANDUM

- 8.1 The logical analysis contained in the Nugent Memorandum proved to be a potent catalyst in the debate traced in Chapter 7. It precipitated the AD Memorandum , which represents a watershed in the whole controversy. The first alternative proposal in the AD Memorandum is based essentially on the Nugent Memorandum. The second alternative proposal significantly departs from the concept of a permanent intermediate court of appeal and harks back to the idea of an ad hoc intermediate appeal court as originally propounded by Corbett CJ.
- 8.2 At this juncture it is convenient to give an overview of the extent to which each of the alternative proposals in the AD Memorandum finds support among those interested parties who reacted to the Commission's circular dated 30 October 1996.
- 8.3 Dealing first with the formulation of the AD Memorandum itself , it should be mentioned that it does not appear therefrom how many Judges of Appeal support the first alternative and how many support the second alternative proposal.
- 8.4 Support for the first alternative proposal comes from the Judge President of Natal ; the Judge President of the Cape Provincial Division ; the Judge President of the Northern Cape Division ; the Acting Judge President of the Free State Provincial Division ; the Deputy Judge President of the Witwatersrand Local Division ; three judges of the Transvaal Provincial Division (Swart J , Roos J and Labe J) ; the majority of the Johannesburg Bar ; and the Pretoria Bar.

8.5 The second alternative proposal has the following adherents : all the judges of the Bophuthatswana Supreme Court ; Mr Justice Goldstein of the Witwatersrand Local Division ; the Association of Law Societies ; the Cape Bar ; the Natal Bar ; the Eastern Cape Bar ; and a minority of the Johannesburg Bar.

CHAPTER 9

9. **THE BROAD GUIDE-LINES ADOPTED BY THE COMMISSION IN SEEKING A SOLUTION TO THE PROBLEMS OF THE SUPREME COURT OF APPEAL**

9.1 In the hierarchy of South African courts the provincial superior courts (formerly part of the Supreme Court of South Africa and now known as “the High Courts”) have long been an important bulwark in our system of justice. They have, on the whole, functioned satisfactorily. The Commission takes the view that the structure of our superior courts should not be tampered with lightly. Any fundamental change involving a curtailment of the more significant judicial functions of our High Courts, with a resultant lowering of their status, should be considered only if a reasonable certainty exists that the change will be one for the better.

9.2 The Commission would endorse, as a cardinal principle governing the present inquiry, the following statement contained in paragraph 11 of the Nugent Memorandum :-

“There has been debate in the past relating to the creation of intermediate magistrates courts, much like the regional courts, but in the civil sphere. The present proposal [to establish an intermediate court of appeal] moves the provincial divisions in that direction. While there is much to be said for the concept of creating civil courts akin to the regional courts, it would be wasteful to achieve this by converting the most highly rewarded and able pool of judicial material towards that end. A preferable utilisation of the resource would instead be to upgrade the provincial divisions, which perhaps over time and by attrition may reduce in size, and to create below the supreme court a new civil structure of original jurisdiction to take up the less demanding work.”

9.3 In the opinion of the Commission it is important for our country that the broad structure and functioning of the system of courts should be readily grasped by the man in the street. It is desirable, in particular, that the average citizen should be able to understand to what higher court or courts an aggrieved litigant or a convicted accused person may appeal. This goal is more readily attainable in a simple rather than a

complicated hierarchy of courts. In general , so we believe , a proliferation of the courts and the fragmentation of judicial functions should , where possible , be avoided.

- 9.4 Because South Africa is a poor country its quest for improved access to justice is hampered by severe financial constraints. There are other and more pressing claims on the public purse than the establishment of new courts and the purchase of new libraries. One quarter of the nation does not have access to clean drinking water. Half the population does not enjoy basic sanitary facilities. It follows that in pondering solutions to the problems of the Supreme Court of Appeal inexpensive expedients , where practicable , should be preferred to those involving the State in very substantial capital expenditure.
- 9.5 From what has been said in Chapters 3 to 6 of this Report it is plain that the problems of the Supreme Court of Appeal are so pressing and acute that in the implementation of a workable solution time is of the essence. Accordingly the Commission should favour those measures capable of being executed speedily and easily rather than those whose accomplishment will take years.
- 9.6 In our superior courts the pace of justice is sluggish and the cost of litigation is so exorbitant as to be beyond the reach of most people. This is true not only of trial litigation but also of appeals heard in the Supreme Court of Appeal. If , therefore , most of the appeals now being heard in the Supreme Court of Appeal are to be heard in other courts , it is important that such appeals should be disposed of not only more promptly but also at less expense to the litigants concerned.
- 9.7 In weighing the cogency of the arguments aimed at the abolition of the system of Full Court appeals , it is significant that not a single interested party has levelled the slightest criticism against either (a) the quality of the judgments handed down by Full Courts during the past fifteen years or (b) the complete independence and impartiality , **objectively** viewed , which the Full Courts have displayed. The three objections against the system which have been voiced before the Commission are the following : First , the possible apprehension on the part of a lay litigant whose appeal is before the Full Court that the Full Court may be biased because it is constituted by three judges who , together with the judge a quo , are all colleagues in the same division. Second , the fact that in smaller divisions it is sometimes a matter of difficulty to

muster a three-judge Bench. Third , that in some divisions judges are not given sufficient time to prepare for Full Court appeals.

9.8 The Commission agrees with the following statements and proposals to be found in paragraphs 22 and 23 of the Nugent Memorandum :-

- “ 22. *...The appointment of judges only to particular divisions arises from historical reasons which are no longer relevant , and in any event is in reality a matter of form only. Judges of the Supreme Court ought to be able to sit in any division depending upon the needs of convenience.*”
23. *Full Courts should then be drawn from the full complement of approximately 150 judges , either for the hearing of particular appeals or for the hearing of a series of appeals during certain terms , by arrangement between the respective judges president as and when the need arises. This will provide the country as a whole with access to the full range of available judicial skills...*”

9.9 The Commission does not accept , however , the suggestion implicit in the concluding sentence (not quoted above) in paragraph 23 of the Nugent Memorandum that , if Full Courts are drawn from the whole complement of the High Court judges from all the divisions , the potential perception of bias mentioned in 9.7 above will be entirely eliminated. Unless every Full Court appeal is heard by three judges drawn from a division other than the division in which the appeal originates , then what the GCB letter describes as

“...the appearance of undue closeness”

between the court a quo and the Full Court cannot be completely dispelled.

9.10 The Supreme Court of Appeal hears on average 240 appeals annually. From paragraph 6 of the second Friedman Memorandum it appears that for the year ending 30 June 1994 it heard 271 appeals and for the year ending 30 June 1995 it heard 254 appeals. If , as is proposed , this caseload is to be selectively pruned by the Supreme Court of Appeal itself , it seems reasonable to assume that , should the Full Courts be retained and their jurisdiction expanded , more than half of the Supreme Court of Appeal's present caseload (say approximately 150 appeals) will devolve upon the Full Courts.

However , the Full Courts already dispose annually of a total in excess of 200 appeals (see the statistics for 1994 and 1995 furnished in paragraph 5 of the second Friedman Memorandum). In the opinion of the Commission the massive ad hoc relocation of judges in order to ensure that in each of more than 350 Full Court appeals the bench will be manned by peregrine judges would in practice be very difficult to accomplish.

- 9.11 The Commission accepts , however , that the difficulty sometimes experienced in smaller divisions to constitute a three-judge court can be satisfactorily solved by the interchange of judges between divisions. The Commission is firmly of the opinion , furthermore , that in **all** divisions , whether small or large , the inclusion (whenever practicable) of a peregrine judge in constituting the bench of a Full Court , will contribute materially to the consistent application and the harmonious development of our law.
- 9.12 In the view of the Commission the appearance of undue closeness between the court a quo and the Full Court is likely to be perceived only in smaller divisions. From the GCB letter it emerges that at the Johannesburg Bar the feeling is that the Bench in Johannesburg is so large that no taint of undue intimacy with the court a quo can sully its Full Court. That view of the matter appears to the Commission to be realistic.
- 9.13 The Commission accepts in principle that no appeal to a Full Court (should the system of Full Court appeals be retained) , or to an intermediate appeal court , should lie as of right. In the course of his oral submissions at the Bloemfontein sitting Corbett CJ pointed out that before the passing of the Appeals Amendment Act No 105 of 1982 , the then right of appeal which (except in interlocutory matters) lay to the Appellate Division :-

“...was a fairly fertile ground for dilatory tactics on the part of certain parties , defendants usually , to really postpone and bring a bit of pressure on the other party.”

Speaking of the Bench with which he has been associated for 23 years the Judge President of the Transvaal had the following to say at the Bloemfontein sitting :-

“I want very firmly to impress , to state that if leave to appeal is done away with in civil cases , it will mean two things : (a) a large number of recalcitrant

defendants who drag their heels will get away with it , and (b) the workload on whatever court of appeal is established , or whether it is the Full Bench , will increase very significantly ; and the cost to the State will be enormous. ”

- 9.14 Apart from the fact that an appeal as of right would place an intolerable burden on appeal courts , such a right would not , in the view of the Commission , represent sound legal policy. The problem is illumined by the following remarks of Mr Justice Schreiner :-

“Where a hierarchy of Courts exists it is perhaps natural to regard the denial of what we are accustomed to call the right of appeal from any order whatsoever made by a lower Court as , to some extent , a refusal of justice. Under an ideal system it might be expected that whatever error an inferior Court has committed would be promptly correctable by a higher Court , and so on until the highest tribunal in the pyramid had pronounced upon the matter. But history shows that it has generally been thought advisable to limit appeals in certain respects. A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. For , apart from the increased power which it would probably give the wealthier litigant to wear out his opponent , it might put a premium on delaying and obstructionist tactics.”
(See: Pretoria Garrison Institutes v Danish Variety Products (Pty.) , Limited 1948(1) SA 839(A) at 867- 8)

- 9.15.1 The Commission is firmly of the view that for the smooth and effective functioning of any system of Full Court appeals it is essential that there should be entrenched by statute the right of every judge who is required to sit in Full Court appeals to be afforded adequate time beforehand for preparation and afterwards for the writing of such Full Court judgments as may be assigned to him or her.

- 9.15.2 The way in which Full Court appeals are dealt with in Johannesburg was described to the Commission as follows by Myburgh J in the course of his oral representations at Midrand on 9 April 1996 :-

“The way the work is allocated in Johannesburg by the Judge President is you either have a civil term or a criminal term ; and within your civil term you will have a mix of work , including full bench appeals , and a full bench appeal is merely another court day in your life , but there is no specific time allocated for the preparation of a full bench appeal. ”

In this connection van Dijkhorst J tersely observed :-

“Ons volhof se probleem is dat ons nie voldoende leestyd en voorbereidingstyd kry nie. Dit word maar net ingegooi soos enige appèl.”

9.15.3 On the other hand the system followed in the Cape and in Natal affords the Judge time during Court recesses for the preparation of Full Court appeals. At the Bloemfontein sitting Farlam J explained the procedure adopted in Cape Town as follows :-

“The only way that full bench appeals can be dealt with in the Cape...is to allocate all the full bench appeals to the judges at the beginning of the recess , and then they are all set down to be dealt with by a number of...full benches in the first week of term...it is not possible to have the full bench appeals read during term time because the complement of judges that we have is fully extended.”

The Natal practice was explained thus by Broome DJP at the Bloemfontein sitting :-

“We in Pietermaritzburg set aside the first half of February and the first half of August for the almost exclusive hearing of three-judge appeals...that affords the judges concerned the opportunity to read the record during the preceding recess.”

9.16 From the nature of his work a Judge President has personal experience in the daily management of courts and the allocation of judges to courts. The Commission considers that in its assessment of the respective merits of the various appellate schemes proposed by interested parties , considerable weight must attach to the views of the Judges President as to what is , and what is not , administratively feasible.

9.17 The provision in the first alternative proposal in the AD Memorandum that the Full Court will be the primary court of appeal also in respect of the decisions of two-judge courts requires further elaboration. This need is stressed in the fourth Friedman Memorandum.

9.17.1 While the fourth Friedman Memorandum supports the first alternative

proposal in the AD Memorandum (see paragraph 7.39 in Chapter 7 above) it does so subject to certain qualifications. In paragraph (D) of the fourth Friedman Memorandum the following is said :-

“I draw attention to the fact that the qualifications referred to in my Memorandum of 21 August 1996 [the third Friedman Memorandum] have not been dealt with in the AD Memorandum. I am of the view that if the first proposal be adopted , consideration should be given to the points made in my memorandum with regard to the composition of full benches.”

- 9.17.2 Both points relate to difficulties which in practice might arise in the composition of a Full Court in an appeal to it from a two-judge court of its division.
- 9.17.3 The first point concerns appeals from magistrates courts The problem which might arise , as well as possible solutions to it , are discussed by Friedman JP in paragraphs (J) to (P) of the third Friedman Memorandum. It is there pointed out that if after a two-judge Court has disposed of an appeal from a magistrate’s court there is a further appeal to the Full Court , the following situation is possible. Two members of the Full Court hearing the further appeal may decide to allow the appeal while the third judge may conclude that the court a quo is correct and that the appeal should be dismissed , i.e. two judges of the division would then pronounce an authoritative decision at variance with the considered judgment of three judges of equal rank in the same division.
- 9.17.4 The Commission shares the view of Friedman JP that the anomaly described in 9.17.3 should be avoided. As an escape route the third Friedman Memorandum suggests two possible solutions , of which Friedman JP prefers the first. The first solution is to provide that when the Full Court hears an appeal from a two-judge bench sitting in an appeal from a magistrate the Full Court should consist not of three but of five judges. The second solution suggested is to provide for appeals from magistrates court to the High Court to be heard by a single judge.

- 9.17.5 The Commission is strongly opposed to the second solution. One of the primary functions of an appellate court is to heighten the legitimacy of judicial decisions. That an appeal from a single magistrate will be heard by a multi-judge High Court Bench (albeit only a two-judge one) lends trustworthiness to the appellate process. Two judges conferring with each other are less likely to produce an idiosyncratic result than a judge sitting alone.
- 9.17.6 While the Commission is less firmly opposed to the first solution proposed by Friedman JP it nevertheless points out that to constitute a five-judge Bench of High Court judges will impose a severe strain on the resources of all but the largest divisions of the High Court.
- 9.17.7 The Commission considers that a third possible solution merits consideration , namely , that if at any stage it becomes clear that the Full Court seized of such an appeal is unable to achieve agreement as to the result , the appeal must be re-argued before a re-constituted Full Court of three other judges. Although such a re-hearing of argument will inflate the costs of the appeal , the Commission believes that such a procedure represents the most satisfactory solution to the problem.
- 9.17.8 The second qualification relates to the problem of an appeal to the Full Court (again postulating dissent by one member of the Full Court) from a two-judge court sitting as a court of first instance (eg , to hear an exception). The third Friedman Memorandum states (in paragraph (Q)) that in such a situation :-
- “It would be inevitable that such appeals be heard by a court of five judges.”*
- 9.17.9 Also with regard to the situation described in 9.17.8 above the Commission is similarly of the opinion that the third possible solution indicated in 9.17.7 is the most satisfactory one.

9.18 Lastly the following matter requires mention. Should either the first or second alternative proposal contained in the AD Memorandum be implemented it is possible that the national complement of High Court judges may have to be substantially increased. The province of Gauteng , in particular , might require a number of new judicial appointments. Jointly the Transvaal Provincial Division and the Witwatersrand Local Division are the source of approximately 70 % of the workload of the Supreme Court of Appeal. Whether , and to what extent , the adoption of either the first or second alternative proposals is likely to necessitate the appointment of additional judges depends to some degree on the future volume of civil work in the High Court. This is a matter of uncertainty. As pointed out in the Commission's First Interim Report (Chapter 6 , paragraph 6.4) there are strong indications that in the near future the volume of High Court civil work is likely to decline substantially. The increased civil jurisdiction of the Magistrates Court may well result in a significant reduction in the number of civil trials heard in the High Court ; and it is a distinct possibility that the adjudication of undefended divorce actions will soon be removed from the jurisdiction of the High Court. The adjudication of undefended divorce actions will be dealt with in the Commission's Third and Final Report.

CHAPTER 10

10. THE COMMISSION DOES NOT RECOMMEND THE ESTABLISHMENT OF A PERMANENT INTERMEDIATE APPEAL COURT.

- 10.1 From what has already been said in this Report it is clear that various interested parties regard the creation of a permanent intermediate appeal court as the ideal solution to the problems experienced in the Supreme Court of Appeal.
- 10.2 It is no less clear , however , that support for this ideal is matched , in the case of many of its protagonists , by a clear recognition that for the foreseeable future the ideal is unrealistic and unattainable.
- 10.3 The third Friedman Memorandum lists a number of practical considerations militating against the establishment of a permanent intermediate appeal court (see paragraph 7.28 in Chapter 7 above). While all the factors there mentioned are weighty , the Commission considers that one of them , by itself , is decisive : the prohibitive costs involved. Friedman JP regards it as “extremely doubtful” whether the country’s financial resources will be adequate to provide for this expense in the short term. The Commission takes an even firmer view. A country which is unable to pay its public prosecutors a proper living wage clearly cannot possibly afford the vast capital expenditure necessarily involved in financing such a project.
- 10.4 A permanent intermediate appeal court would represent a very large project. Apart from the elaborate physical infrastructure of a court building with its own registry and law library , it must be borne in mind that a permanent intermediate court would need a large Bench. At the Bloemfontein sitting Corbett CJ estimated that between twelve to sixteen judges would be needed. That estimate may be on the conservative side.

- 10.5 On this issue the Judge President of the Eastern Cape Division said the following in the course of his oral submissions at the Bloemfontein sitting :-

“...I have some difficulty with the figure suggested by the Chief Justice this morning because I think that those intermediate courts would in fact have a bigger workload than the present Appellate Division because they would be handling all the appeals , as I see it , that the Appellate Division handles at the moment , and those courts would also deal with appeals that at the moment go to the Full Bench. ”

In the course of his address to the Commission Marais JA remarked :-

“On the question of the number of Judges that would be needed in such a court I , with respect , am inclined to doubt whether as few as the Chief Justice has suggested would be sufficient. I am inclined to agree with those who think that substantially more will be required. ”

- 10.6 Since relief for the Supreme Court of Appeal has to be secured as a matter of urgency it follows that in the present inquiry the creation of a permanent intermediate appeal court is not one of the viable options. For the sake of completeness , however , it is necessary to state the following. Even if the Commission had concluded that such a court represented a feasible option , it would nevertheless , for the reasons set forth in paragraph 12.2.4 in Chapter 12 hereunder , not have recommended the creation of a permanent intermediate court of appeal.
- 10.7 The search for a solution to the problems of the Supreme Court of Appeal therefore narrows down to a choice between making the Full Court the primary appellate court or replacing the Full Court appeal system by an intermediate appeal court functioning on a purely ad hoc basis.

CHAPTER 11

11. THE COMMISSION'S ASSESSMENT OF THE CHIEF RESPECTIVE MERITS AND DEMERITS OF THE FIRST ALTERNATIVE PROPOSAL SET FORTH IN THE AD MEMORANDUM

11.1 In the opinion of the Commission the main advantages inherent in the first alternative proposal are the following :-

- 11.1.1 The present hierarchy of the courts is preserved and the present court structure remains intact.
- 11.1.2 The hearing of appeals falling under the Full Court's expanded jurisdiction will be cheaper. The heavier legal costs involved in an appeal to the Supreme Court of Appeal will be only infrequently incurred.
- 11.1.3 Appeals falling under the Full Court's expanded jurisdiction will be disposed of at a far more rapid rate than is possible in the Supreme Court of Appeal.
- 11.1.4 Both the status and the public image of the High Courts will be enhanced. The judicial career of a High Court judge will become more attractive and the appointment of the more promising candidates for judicial office will be facilitated. Full Court appeals will provide continuing legal training for judges.

11.1.5 The cost of implementation will be negligible. Implementation will not require any elaborate administrative machinery.

11.2 In the opinion of the Commission there is only one possible disadvantage inherent in the first alternative proposal.

In smaller divisions the impartiality of Full Courts may conceivably be questioned by lay litigants. The possibility of such a suspicion being harboured may be substantially reduced by using judges from other divisions to sit in the Full Court , but for the reasons already mentioned (see paragraphs 9.9 and 9.10 in Chapter 9 above) , it cannot be entirely eliminated.

CHAPTER 12

12. THE COMMISSION'S ASSESSMENT OF THE CHIEF RESPECTIVE MERITS AND DEMERITS OF THE SECOND ALTERNATIVE PROPOSAL SET FORTH IN THE AD MEMORANDUM

12.1 In the opinion of the Commission the main advantages inherent in the second alternative proposal are the following :-

12.1.1 Although appeals in the intermediate court will be more expensive than appeals in the Full Court they will still be considerably less costly than in the Supreme Court of Appeal.

12.1.2 Although appellate litigation will be slower than it is before the Full Courts it will be quicker than it is in the case of appeals now heard by the Supreme Court of Appeal.

12.1.3 The hybrid composition of the intermediate court will give it a status superior to that of the High Courts and will promote greater rapport between the judges of the High Courts and the judges of the Supreme Court of Appeal.

12.1.4 Because of its hybrid composition of the intermediate court may be perceived to be more conspicuously independent than the Full Court.

12.2 In the opinion of the Commission the chief disadvantages inherent in the second

alternative proposal are the following :-

- 12.2.1 The absence from the Supreme Court of Appeal of those of its judges required to preside at circuits of the intermediate court will dislocate the regular work of the Supreme Court of Appeal ; and will entail for the judges so presiding on circuits the inconvenience of travel.
- 12.2.2 The absence from the High Courts of their judges required to join the circuit sittings of the intermediate court will dislocate the regular work of the High Courts ; and will entail for the High Court judges so involved the inconvenience of travel.
- 12.2.3 The burden of the managerial work involved in the functioning of the circuit sessions of the intermediate court will be immense. The Judge President of Natal considers :-

“...that it would present an administrative nightmare for the Chief Justice and the Judges President.”

The Judge President of the Northern Cape expresses the view that the operation of the intermediate court will be cumbersome :-

“...and will generally be extremely difficult to manage.”

The Commission agrees with both these forecasts. One of the intractable practical problems presented by an ad hoc intermediate appeal court was described thus by the Judge President of the Cape Provincial Division in his oral representations to the Commission at Cape Town on 8 January 1996 :-

“...it is very difficult in a provincial division which is involved for most of its time in trial work to have ad hoc judges available to sit when it suits the presiding judge , who would be an appellate judge , because firstly the recess periods , the terms , do not coincide. The terms of the Appellate Division are shorter , of necessity , than those of provincial divisions. The question then arises as to how you are going to dovetail a judge from the Appellate Division with the availability of judges from a

provincial division where the terms differ.”

- 12.2.4 The creation of an intermediate appeal court will detract significantly from the status and public image of the High Courts. It will be regarded as a capitis diminutio by the judges of the High Court and the public alike. It will consign the great majority of High Court judges to the drudgery of less interesting legal work providing little intellectual stimulation. It will make a judicial career in the High Court less attractive ; and it will make it more difficult than ever to appoint the best candidates to the High Court bench.

CHAPTER 13

13. THE COMMISSION DOES NOT RECOMMEND THE ESTABLISHMENT OF THE AD HOC INTERMEDIATE APPEAL COURT DESCRIBED IN THE SECOND ALTERNATIVE PROPOSAL OF THE AD MEMORANDUM

- 13.1 From what has been said in the preceding two Chapters it is apparent that each of the two alternative proposals set forth in the AD Memorandum is open to criticism.
- 13.2 Accepting that neither alternative represents an entirely satisfactory solution to the problems of the Supreme Court of Appeal the Commission concludes , however , that the first alternative proposal is far preferable to the second.
- 13.3 **The Commission finds not only that the merits of the first alternative proposal considerably outweigh those of the second alternative proposal , but further that the administrative complications which will inevitably follow in the wake of the second alternative proposal are such as to rule it out completely as a viable solution.**
- 13.4 The Commission concludes that in the final analysis the choice of an appropriate solution lies between :-
- (a) the Nugent Memorandum ;
 - (b) the adaptation of the Nugent Memorandum embodied in the first alternative proposal of the AD Memorandum ;
 - (c) a judicious blend of (a) and (b).

CHAPTER 14

14. THE MATERIAL DIFFERENCES BETWEEN THE NUGENT MEMORANDUM AND THE FIRST ALTERNATIVE PROPOSAL IN THE AD MEMORANDUM

14.1 In what follows , and for the sake of brevity , reference will be made to the first alternative proposal in the AD Memorandum simply as “the AD proposal”. While the AD proposal is based essentially on the Nugent Memorandum , there are certain noteworthy differences between the two. These are discussed hereunder.

14.2 An integral part of the Nugent Memorandum is the provision that Full Courts may include peregrine judges from other divisions. No such provision appears in the AD proposal.

14.2.1 The Commission has already pointed out (see paragraphs 9.9 and 9.10 in Chapter 9 above) that in the constitution of Full Courts any large-scale inter-divisional exchange of judges may create difficulties.

14.2.2 The Commission considers nevertheless that such an exchange , where it is both desirable and practicable , would represent a progressive innovation.

14.2.3 **Such an exchange would be useful in several respects :-**

14.2.3.1 It would assist smaller divisions in constituting Full Courts.

14.2.3.2 It would promote cross-pollination of judicial thought.

- 14.2.3.3 It would largely allay the suspicion of possible bias to which reference has already been made.
- 14.3 The Nugent Memorandum proposes (a) that a single judge of any division will be bound by the decision of a Full Court of any division and (b) that a Full Court of any division will be bound by the decision of any other Full Court unless it considers the latter clearly wrong. No such provision appears in the AD proposal.
- 14.3.1 The above suggestion in the Nugent Memorandum is resisted by the majority opinion of the Johannesburg Bar (see paragraph 7.56 in Chapter 7 above) on the ground that Full Court appeals will ordinarily be confined to factual issues. The Commission is not persuaded that Full Bench judgments will generally be restricted to issues of fact. However that may be, the Commission considers that whenever a Full Court does enunciate a legal principle its judgment should, in the interests of certainty, bind another Full Court unless the latter considers that the earlier judgment is plainly wrong.
- 14.3.2 In the opinion of the Commission it is desirable that as the primary appellate tribunal the Full Courts should interpret and apply the law as harmoniously as possible.
- 14.4 The AD proposal provides for a system of “leapfrogging” on application to the AD and with its consent. The Nugent Memorandum makes no provision for “leapfrogging”. The Commission endorses the necessity for a “leapfrogging” procedure. This permits the accelerated resolution of an appeal raising issues which should be dealt with directly by the Supreme Court of Appeal without the intervention of the Full Court.

14.5 Both the AD proposal and the Nugent Memorandum provide that an appeal to the Full Court requires leave of the court a quo.

14.5.1 The AD proposal , however , is that when the court a quo refuses leave the aggrieved party must petition the Chief Justice :-

“ The Judges of the AD will then determine , if leave is granted , whether the appeal should be heard by the AD itself or by a full court. ”

14.5.2 The Nugent Memorandum suggests that upon refusal of leave to appeal by the court a quo the aggrieved party must petition :-

“...two judges of the division concerned. ”

14.5.3 The Commission considers that on this point the AD proposal is to be preferred. It would reinforce the Supreme Court of Appeal’s discretionary jurisdiction effectively to control its own caseload. It would , in addition , afford the petitioner the satisfaction of knowing that the merits of a possible further appeal are to be considered at the highest level by the court of last resort itself.

CHAPTER 15

15. SUBJECT TO THE INCORPORATION THEREIN OF CERTAIN PROVISIONS OF THE NUGENT MEMORANDUM THE COMMISSION UNANIMOUSLY RECOMMENDS THE ADOPTION OF THE TERMS OF THE FIRST ALTERNATIVE PROPOSAL SET FORTH IN THE AD MEMORANDUM

The detailed recommendations made by the Commission are set forth in paragraphs 15.1 to 15.11 hereunder.

- 15.1** **The Supreme Court of Appeal will be invested with an unfettered discretionary jurisdiction to decide what appeals should be heard by it.**
- 15.2** **The Full Court of the High Court will be the primary court of appeal in relation to all appeals , civil or criminal , emanating from the decision of a single judge or two judges of the High Court.**
- 15.3** **The Supreme Court of Appeal will have a discretionary jurisdiction to authorise “leapfrogging” i.e. to order that an appeal be heard directly by the Supreme Court of Appeal without the intervention of the Full Court.**
- 15.4** **An appeal to the Full Court from a decision of a single judge , or from two judges sitting as a court of first instance , will require leave of the court a quo. On refusal of such leave an aggrieved party may petition the Chief Justice. If leave is granted the judges of the Supreme Court of Appeal will determine whether the appeal is to be heard by the Supreme Court of Appeal or by a Full Court.**

- 15.5** An appeal to the Supreme Court of Appeal will be allowed only in exceptional cases. The current requirement that appeals to the Supreme Court of Appeal from a Full Court sitting on appeal from a single judge can be heard only if special leave is granted by the Supreme Court of Appeal , will be extended to cases emanating from the magistrates courts. An appeal from a provincial or local division of the High Court sitting as a court of appeal from a magistrate's court will be permitted only with special leave of the Supreme Court of Appeal.
- 15.6** These principles will have general application including those cases which to date have been held to fall outside the rules , such as , for example , an application for leave to appeal against the refusal of condonation in a criminal matter (see : S v Gopal 1993(2) SACR 584 (A)).
- 15.7** A Full Court will be constituted by the Judge President of the division concerned but , where appropriate and practicable , it may include judges of other divisions. By an appropriate amendment of sec 3 of the Supreme Court Act specific provision will be made to enable a judge of a provincial or local division to act in any other division , in addition to the judges of that division , without the request of the Minister and simply by oral agreement between the respective Judges President concerned.
- 15.8** A single judge of any division of the High Court will be bound by the judgment of a Full Court of any division.
- 15.9** A Full Court of any division will be bound by the prior judgment of any other Full Court unless it considers that the earlier judgment is plainly wrong.

15.10 **After discussions between the Chief Justice and the Judges President of the various divisions of the High Court the Chief Justice will recommend to the Minister of Justice what statutory provisions are appropriate to ensure that a High Court judge required to sit in Full Court appeals has adequate opportunity for reading the records before a Full Court appeal and thereafter for the preparation of such judgments as may be allocated to him or her.**

15.11 **Appropriate amendments to accommodate the above recommendations should be made to the Uniform Rules of Court and to each of the following statutes : the Supreme Court Act , No 59 of 1959 ; the Criminal Procedure Act , No 51 of 1977 ; the Water Act , No 54 of 1956 ; the Income Tax Act , No 58 of 1962 ; and the Restitution of Land Rights Act , No 22 of 1994.**

PART II

CHAPTER 1

1. INTRODUCTION

1.1 A number of interested parties in the Eastern Cape Province submitted to the Commission that within the Eastern Cape Division all local divisions should be invested with appellate jurisdiction in respect of inferior courts and/or the decisions of a single judge within their respective areas of jurisdiction. One interested party in KwaZulu-Natal made a similar submission with regard to the Durban and Coast Local Division. On the other hand not a few interested parties in the Eastern Cape contended that fragmentation of the appellate jurisdiction within the province was undesirable and that all appeals should be heard by the provincial division at the seat of the court.

1.2 THE CONSTITUTION OF THE COURTS OF PROVINCIAL AND LOCAL DIVISIONS

1.2.1 Sec 13(2)(a)(ii) of the Supreme Court Act , No 59 of 1959 , (“the Act”) provides that for the hearing of an appeal against a judgment or order of a single judge the court of a provincial or local division shall consist of three judges [“a Full Court”]².

1.2.2 Sec 13(2)(a)(i) of the Act provides that for the hearing of an appeal against a judgment or order of an inferior court the court of a provincial or local division will consist of not less than two judges [“a two-judge Court”].

² *For the position of Full Court appeals in respect of Venda , Transkei , Ciskei and Bophuthatswana see sec 6 read with sec 18 of the Justice Laws Rationalisation Act , No 18 of 1996.*

1.3 THE APPELLATE JURISDICTION OF THE HIGH COURT IN RESPECT OF THE JUDGMENT OR ORDER OF A SINGLE JUDGE

1.3.1 The combined effect of sec 20 of the Act and sec 315 of the Criminal Procedure Act , No 51 of 1977 , is the following :-

1.3.1.1 The Full Court of a provincial division has appellate jurisdiction in civil or criminal proceedings in respect of the judgment or order of a single judge of that division if the court granting leave to appeal (being either the single judge himself or the Supreme Court of Appeal) is not satisfied that the appeal requires the attention of the Supreme Court of Appeal.

1.3.1.2 In the case of an appeal against a judgment or order of the WLD a Full Court of the WLD has appellate jurisdiction IF in a particular case the Judge President of the TPD has so directed. In the absence of such a direction the appeal is heard by the Full Court of the TPD.

1.4 THE APPELLATE JURISDICTION OF THE HIGH COURT IN RESPECT OF AN INFERIOR COURT WITHIN ITS AREA OF JURISDICTION

The effect of the provisions of sec 19 of the Act is the following :-

1.4.1 The WLD may hear appeals from all inferior courts and may review the proceedings of such courts in those districts within the area of jurisdiction of the WLD as the Judge President of the TPD may from time to time determine by notice in the Gazette.

- 1.4.2 Save for the WLD no other local division may exercise appellate or review jurisdiction in respect of inferior courts. Such appellate and review jurisdiction is exercised by the provincial division which has concurrent jurisdiction over the area in which the inferior court falls.

1.5 SUMMARY OF THE POSITION

The practical effect of the statutory provisions outlined above upon the appellate jurisdiction of the High Court is the following :-

- 1.5.1. An appeal from the judgment or order of a single judge is always heard by the provincial Full Court at the seat of the provincial division unless the appeal originates in the WLD and the Judge President of the TPD directs that it shall be heard by a Full Court of the WLD.
- 1.5.2 An appeal from a magistrate's court is heard by the provincial two-judge court at the seat of the provincial division unless the appeal originates in a district within the area of jurisdiction of the WLD covered by the aforementioned determination by the Judge President of the TPD , in which latter case the appeal will be heard by a two-judge court at of the WLD.

CHAPTER 2

2. FOR PURPOSES OF PART II OF THIS SECOND INTERIM REPORT THE COMMISSION MAKES TWO ASSUMPTIONS

- 2.1 In PART I of its Second Interim Report the Commission unanimously recommends that the system of Full Court appeals should be retained and that the appellate jurisdiction of the Full Court should be expanded so as to constitute it the primary court of appeal.

The recommendations set forth in Chapter 5 of PART II of this Report are based on the assumption that the system of Full Court appeals will in fact not be discarded and replaced by an intermediate court of appeal.

- 2.2 In its First Interim Report the Commission unanimously recommended (see Chapter 8 , page 93 , paragraph 8.4.10) that the Transkei High Court should be converted into a local division of the Eastern Cape Division with its own Deputy Judge President and Attorney-General ; and that it be named “the Transkei Local Division”.

The recommendations set forth in Chapter 5 of PART II of this Report are based on the assumption that in due course the Transkei High Court will in fact become the Transkei Local Division ; and that , because of the remote situation of Umtata , the Transkei Local Division will have its own resident judges.

CHAPTER 3

3. THE MAIN THEMES IN THE SUBMISSIONS MADE BY INTERESTED PARTIES IN RELATION TO THE DESIRABILITY OR OTHERWISE OF INVESTING LOCAL DIVISIONS WITH APPELLATE JURISDICTION

3.1 One of the interested parties represented before the Commission was the Advocates and Attorneys Liaison Committee of the Eastern Cape (“the AALC”). Its constituent members are the Eastern Cape Society of Advocates (representing advocates practising both in Port Elizabeth and Grahamstown) , the South Eastern Cape Attorneys Association , and the Grahamstown Attorneys Association.

3.2 In a written response by the AALC to the Commission there appears , inter alia ,the following :-

“ 6.3.1 *Practitioners from the Port Elizabeth area indicated that in their opinion , the provincial division in Grahamstown should not have the sole appellate jurisdiction in respect of the whole of the Eastern Cape Province but that the South Eastern Cape Local Division should have appellate jurisdiction in respect of both civil and criminal appeals from the inferior courts (or at the very least criminal appeals from the inferior courts) of that area of jurisdiction.*

 6.3.2 *Practitioners from other areas expressed the view that a fragmentation of the appellate jurisdiction of the Province was undesirable and would in all likelihood be practically and logistically unacceptable.*

 6.3.3 *It is believed that this is an issue which should be*

addressed by the Judge President of the Division having regard to the need therefor and the resources in the form of courts and judges which may be available to him. In this regard the alternative proposals to be considered are as follows :

Proposal A :

The Provincial Division in Grahamstown should have sole appellate jurisdiction in respect of the whole of the Eastern Cape Province.

Proposal B :

The Provincial Division in Grahamstown should have sole appellate jurisdiction in respect of the whole of the Eastern Cape Province insofar as appeals from superior courts are concerned. The South Eastern Cape Local Division should have appellate jurisdiction in respect of civil and criminal (or at the very least only criminal) appeals from the lower courts within its area of jurisdiction.”

- 3.3 Later , and at a public sitting of the Commission at Grahamstown on 2 October 1995 , oral submissions were made on behalf of the AALC by Adv G.D. van Schalkwyk , SC. Referring to the alternative proposals A and B in the earlier written response , counsel invited the Commission to consider as a possibility :-

“...that the legislation should be amended so as to allow the Judge President of the division to determine on an ad hoc basis how appeals are to be handled in his division. He can be enjoined for instance to take into account the...need for particular appeals...to be heard at venues other than the seat of the Court. The Chief Justice has that power in regard to Bloemfontein , it has not been often used , but to give the Judge President that flexibility...One has high profile appeals.... Those particular appeals where there is public interest the Judge President should be able to decree , must be heard at the seat of the interest. And lastly of course the criterion that he must take into account is the availability of judges , but I think , with respect , that it is far better to devolve that discretion onto the Judge President...because he is the man in the best position day to day to determine where the work is coming from , what kind of

work it is , how many judges do I have , and where is it in the best interests of the litigants for the appeal to be heard. ”

3.4 In the course of his oral submissions to the Commission at Umtata on 18 October 1995 the Hon Mr Justice C.E.L. Beck , the then Judge President of the Transkei High Court , emphasised the need for his Court to exercise appellate jurisdiction. He said , inter alia :-

(a) “ *Our view , and this is the view of all the judges , is that magistrates courts appeals should definitely be heard in Umtata and nowhere else. This is dictated by the distance involved , the time involved to take it to another court venue , and therefore the additional costs. We feel that it would be grossly unfair for appellants or respondents...from the eastern portions of the Transkei , the Bizana areas , the Maluti areas...to have to travel beyond the Kei River to go to another court to have their appeals heard. It would inevitably increase the costs. ”*

(b) “ *We also feel for the same reason that full bench appeals should be permitted to be heard by this court and at this venue. Once again it is because of the distances and the cost involved that we say that. We have , as you know , in the past had the facility of an appellate division which has functioned as if it were a full bench...and that has always sat in Umtata , so this is a facility that the people of this part of the country have become used to. ”*

(c) “ *We do propose...that when full bench appeals are heard at this venue...the bench should consist of one judge from the Umtata court and two judges from other venues...This in our view would promote perceptions of objectivity and it would also promote cohesion and status and , to some extent , a cross-pollination of the judicial thinking. ”*

3.5 The case for local divisions of the High Court in the Eastern Cape to exercise appellate jurisdiction was strongly pleaded by the Judge President of the Ciskei High Court. Mr Justice B. de V Pickard stressed the factor of increased costs involved in having all appeals heard at Grahamstown. Dealing with appeals from a single judge he

considered it essential that any Full Court appeal (irrespective of the venue at which it was heard) should be decided by a bench fully representative of the province as a whole. In the course of his oral representations to the Commission at East London on 4 October 1995 some of the points made by Pickard JP were the following :-

- (a) *“...this is a huge province...suggestions have been glibly put that costs of appeal do not increase because appeals have to go to a particular centre a long way off. I do not underwrite that...Let us first talk about magistrates court appeals. When an attorney appears in a magistrate’s court , let us say in Lusikisiki , it is true that he has to brief counsel whether the appeal be heard in Umtata or in Grahamstown and no extra cost is involved...but if he uses counsel in Lusikisiki to...represent him , more likely than not it will be Umtata counsel and not Grahamstown counsel. So when his appeal is heard in due course , if it is heard in Umtata that is convenient ; if it is heard in Grahamstown he either has to brief another counsel or his counsel has to travel.”*
- (b) *“As far as full court appeals are concerned it is even worse , because...where it is an appeal from a judgment of a single judge , that presupposes that he will have been represented by an advocate...An Umtata full court appeal should be heard in Umtata because , more likely than not , it will have been Umtata counsel appearing ; and to say glibly that there are lots of counsel in Grahamstown who can do it , no extra cost , is wrong. There will have been an Umtata attorney , if not the attorney of first instance , if I may call it that , then certainly the correspondent in Umtata when the initial matter was heard , and now both attorney and counsel have to go to Grahamstown , and to glibly say they can deal through Grahamstown and it will not affect cost...is simply not true. I submit that with the size of this province...all appeals should be heard...in the area of jurisdiction from where they emanate.”*
- (c) *“...if you look at my submissions [contained in his earlier written response] I say that in a full court appeal certainly it should never occur that three judges based in that venue hear it...All that needs to happen is the Deputy Judge President of Umtata will say to his JP I have a number of full court appeals...when does it suit you for me to arrange to set them down ? And the Judge President says , well , I will let you have judges for the first week in*

August , for argument’s sake...and that is as simple as that. They get set down and the Judge President sends judges from elsewhere to complement this bench for the duration of that session.”

- 3.6 In a written response to the Commission Mr Attorney Louis Schoeman of Port Elizabeth had the following to say :-

“...it is submitted that appeals emanating from Magistrates’ Courts should be heard in the Supreme Court closest to that Magistrate’s Court , and that full bench appeals should , in all cases , be heard in the Supreme Courts from which those appeals emanate. Why , for example , should the South Eastern Cape Local Division not be used as a forum for the hearing of the full bench appeals which emanate from that Court ? At present , such appeals are heard at Grahamstown. This involves a considerable increase in the costs , brought about as a result of the involvement of Grahamstown attorneys.”

- 3.7 In a written response to the Commission by the Society of Advocates of Ciskei it was submitted that every superior court should have full jurisdiction in respect of all matters originating within its area of jurisdiction. Dealing with the position of the South-Eastern Cape Local Division the following was said :-

“ It is submitted that this court’s jurisdiction should be elevated to the full extent of a Supreme Court’s jurisdiction , including full bench appeals. The experience from the former Transvaal i.e. Pretoria and Johannesburg , has shown that it is not only advisable but very effective to give all courts full jurisdiction. It is furthermore submitted that the facilities available at Port Elizabeth are such that it can quite easily accommodate any extended jurisdiction.”

- 3.8 In a written response to the Commission the King William’s Town Attorneys Association (which proposed Bisho as the seat of the Eastern Cape Division) the following submissions were made in regard to the hearing of appeals :-

“ The Local Divisions and Circuit Local Divisions would hear matters of first instance...with all Appeals being heard at the seat of the Provincial Division. Judges from all the Divisions should be allocated to the hearing of Appeals.

Reviews would also be distributed amongst Judges of all Divisions.”

3.9 The Attorney-General of Ciskei , Mr W.F. Jurgens , SC , sent to the Commission a written response which dealt inter alia with appellate jurisdiction. He wrote :-

“ We submit that it would be unfair to litigants , and contrary to the general considerations of accessibility and of inculcating a culture of respect for justice and the rule of law if litigants were to be expected to travel long distances , or to employ attorneys and advocates at a distant centralised seat of the court , where a closer alternative seat of the Supreme Court is available...each local seat of the Supreme Court should have full and equal jurisdiction. ”

3.10 Differing sharply from the views held by Pickard JP , members of the bench of the Eastern Cape Division expressed themselves firmly against multiple appellate jurisdiction within the province. At the public sitting of the Commission at Grahamstown on 2 October 1995 the Hon Mr Justice N.W. Zietsman , Judge President of the Eastern Cape , said in the course of his address :-

“ We agree that there should be one provincial division in the Eastern Cape , but we say that all appeals should be heard in that division. This would obviate conflicting appeal court decisions , dealing perhaps not only with interpretation but also with the validity of legislation passed by the regional parliament. So we say that there should be only one court with appeal jurisdiction in the Eastern Cape. ”

3.11 At the same sitting the Hon Mr Justice T.M. Mullins agreed with the Judge President that the final court of appeal for the province should remain at the seat of the court. In the course of his oral representations Mullins J remarked :-

“ If it is a question of having a full bench appeal in Umtata then one is faced with the problem of having more than one court in a province giving judgments in full bench appeals and a possibility of conflicting decisions...the difficulties and problems are self-evident. I could elaborate on that but it seems to me that for any province to have more than one court as a final court of appeal would only result in confusion and conflicting decisions and more and more problems as far as the administration of justice is concerned. ”

3.12 At its public sitting in East London on 5 October 1996 the Commission was addressed by Adv L. Mpati on behalf of the Port Elizabeth Region of the National Association of Democratic Lawyers (NADEL). Adv Mpati also expressed concern at the possibility of conflicting decisions flowing from multiple appeal courts within a single division. In the course of his oral representations he subjected to critical examination a document submitted to the Commission by the Senior Legal Adviser to the Premier of the Eastern Cape. In this connection Adv Mpati said :-

“ The document argues that the law of the province must be made by all its judges and not by a few judges of a particular place being a seat with appeal jurisdiction for the whole province...In our respectful view , to have courts all with equal status will result in an untenable situation where the laws of the province are interpreted and applied differently in the one province , depending on where one happens to be at a particular time. ”

3.13 On the other hand the spokesman for the Border Branch of NADEL , Adv T.D. Pillay (who appeared also for the Bisho Bar) saw the matter differently. He propounded an elaborate court structure for the Eastern Cape (depicted in the diagram to be found in Appendix “X” in VOLUME II of this Report). Part of his proposed structure involved the following :-

“ We say that the local division must be self-contained , in the sense that it must have full appellate jurisdiction in its area of operation. So in other words appeals and reviews from the magistrate’s court ; applications from magistrates’ courts in terms of sec 103 of the Constitution ; motion court , that is unopposed and opposed applications ; civil and criminal trials as well as applications and full bench appeals. ”

3.14 From the province of KwaZulu-Natal a solitary interested party broached , rather gingerly , the possibility that the Durban and Coast Local Division might be given jurisdiction to hear appeals from inferior courts. A written response on behalf of the Pietermaritzburg Bar by its Chairman , Adv A.J. Dickson , SC , contained the following paragraph :-

“ It is submitted that it is clearly in the interest of litigants that all appeals and reviews from the inferior courts of the Durban and Coast Local Division

jurisdictional area be dealt with and heard at the Durban Court. For litigants this would mean easier access to the appeal (in most cases) and it would probably be cheaper in that the services of two attorneys (if the appeal emanated from the Durban area) would be avoided. However we know that the administrative burden of processing the appeals is a heavy one which at present is carried by the Attorney-General's office , the Registrar's office and the Judges stationed at the Pietermaritzburg Court. It may be that to split this task between the two Courts doubles the work and does not halve it. Subject to the practical considerations being resolved and the facilities being available in Durban we see advantages to the litigant in this proposed development."

- 3.15 The practical considerations mentioned in the written response of the Pietermaritzburg Bar were further explored when at a public sitting in Durban on 30 March 1996 Adv Dickson , SC , made oral representations to the Commission. In the course of his address he said the following :-

"...we in Pietermaritzburg have no objection to there being an appellate jurisdiction formed in the Durban and Coast Local Division , subject to the practical changes that would have to be made to the Durban structures. And why we say that is that the Durban Court runs as a Trial Court ; and as long as it is appreciated that all the Judges are hearing trials and , of course , appellate jurisdiction means two or three judges out of the trial roll , which means a reduced trial roll , which means the kind of frustrations we have to live with as practitioners in Pietermaritzburg with regard to a trial roll , and of course if those practicalities were ironed out then , of course appellate jurisdiction for Durban would be a very good idea."

CHAPTER 4

4. THE BROAD GUIDE-LINES ADOPTED BY THE COMMISSION IN PART II OF THIS REPORT

- 4.1 As its point of departure the Commission accepts the principle that in order to preserve the consistent and coherent enunciation of the law by the High Court within a provincial division it is desirable , in so far as it may be practicable :-
- 4.1.1 that appeals from the judgment or order of a single judge should be heard by the provincial Full Court at the seat of the provincial division ; and
- 4.1.2 that appeals from inferior courts should be heard by a provincial two-judge court at the seat of the provincial division.
- 4.2 The Commission does not consider that the special provisions in the Act (see paragraphs 1.3 and 1.4 in Chapter 1 above) investing the Witwatersrand Local Division with appellate jurisdiction in certain circumstances , are relevant or helpful to the inquiry whether a local division in the Eastern Cape province should have appellate jurisdiction. The special provisions pertaining to the WLD were prompted by a recognition that de facto the WLD was already an independent division in all but name.
- 4.3 The Commission considers that where any departure from the principle stated in 4.1 above is sanctioned it is essential , in order to ensure efficient functioning of the courts , to provide that the Judge President shall retain an overriding discretionary power to direct where a particular pending appeal is to be heard.
- 4.4 The Commission considers that any **substantial departure** from the principle stated in 4.1 above should be sanctioned only where the circumstances of a local division are

such that the exercise of appellate jurisdiction by the local division is imperatively called for in the interests of the proper administration of justice.

- 4.5 The Commission considers that a **substantial departure** from the principle stated in 4.1 above is warranted *only* in the case of the future Transkei Local Division. The circumstances on which the Commission bases its finding are the following. The Transkei, which has approximately three and a half million inhabitants, is a very large territory. Of the 44 magisterial districts in the Eastern Cape Division no less than 28 are situated within the Transkei. The population of the Transkei is largely rural. Umtata, which is the seat of the Transkei High Court, is remote from East London, Bisho and Grahamstown. Within the Transkei roads are poor and bus-services are inadequate. Essential services are run-down; and telephone and postal services are unreliable.
- 4.6 The Commission considers, subject only to the qualification in 4.7 below, that in respect of all divisions other than the present Witwatersrand Local Division and the future Transkei Local Division, all appeals, whether from the judgment or order of a single judge or from an inferior court, should be heard at the seat of the provincial division.
- 4.7 With a view to improving access to both civil and criminal justice, however, the Commission recommends that in the case of any pending appeal emanating from the area of a local division (other than the Witwatersrand Local Division and the future Transkei Local Division), whether from an inferior court or from a decision of a single judge, the Judge President of the provincial division exercising concurrent jurisdiction over the local division in question shall have the sole discretionary power, should he or she consider it expedient in all the circumstances, to direct that the said appeal shall be heard at the seat of the local division.

CHAPTER 5

5. THE COMMISSION'S RECOMMENDATIONS IN RESPECT OF THE FUTURE TRANSKEI LOCAL DIVISION

The Commission's unanimous recommendations are set forth in paragraphs 5.1 and 5.2 hereunder.

- 5.1 A pending appeal from an inferior court falling within the area of jurisdiction of the future Transkei Local Division will be heard at Umtata *unless , after due consultation by him or her with the Deputy Judge President and (in the case of a criminal appeal) with the Attorney-General of the local division , the Judge President of the Eastern Cape Division directs that such appeal shall be heard at the seat of the provincial division.***
- 5.2 A pending appeal against the judgment or order of a single judge of the future Transkei Local Division will be heard at Umtata by a Full Court whereof at least two judges shall not be resident judges of the local division , *unless after due consultation between the Judge President of the Eastern Cape Division and the Deputy Judge President and (in the case of a criminal appeal) with the Attorney-General of the local division , the Judge President directs that the appeal shall be heard at the seat of the provincial division.***

CHAPTER 6

6. THE COMMISSION'S RECOMMENDATIONS IN RESPECT OF ALL PRESENT LOCAL DIVISIONS (SAVE THE WITWATERSRAND LOCAL DIVISION) AND ALL FUTURE LOCAL DIVISIONS OTHER THAN THE TRANSKEI LOCAL DIVISION

The Commission unanimously recommends that in the case of any pending appeal emanating from the area of jurisdiction of any local division , (other than the present Witwatersrand Local Division and the future Transkei Local Division) and whether from an inferior court or from the decision of a single judge , such appeal shall be heard at the seat of the provincial division , *unless the Judge President of the provincial division exercising concurrent jurisdiction over the local division concerned , in his or her sole discretion considers it expedient in all the circumstances to have the said appeal heard at the seat of the local division and gives such a direction.*