SECOND INTERIM REPORT

EXTRACTS FROM ORAL SUBMISSIONS

(I) **THE HON. MR. JUSTICE N.W. ZIETSMAN, JUDGE PRESIDENT OF THE EASTERN CAPE DIVISION.**

In the course of his oral submissions to the Commission at Grahamstown on 2 October 1995 some of the points made by the learned Judge President were the following:-

(1) "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 in the same province, 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. Pickard J suggests three of four courts, each having five or six judges and each with full appeal jurisdiction. It is questionable, we submit, whether a court of five or six judges would really be a viable court. For a full bench appeal from the decision of a single judge a court of three judges is required. This would leave two or three judges to deal with the rest of the work that has to be done, namely civil and criminal trials, motion court work, other appeals and civil and criminal circuits. Full bench appeals in such a small court would presumably have to be heard at a time when some of the other courts are not sitting. This could perhaps be arranged but we question whether a court of five or six judges is really a satisfactory supreme court. Rather than three or four such small independent courts we propose a stronger central court for this region."

(2) "… we fully agree that there should be a local division in Umtata, but as far as appeals are concerned we feel that they should come to the centre to Grahamstown, that you should not have more than one court of appeal within the Eastern Cape.

LEON J: One court of appeal in the Eastern Cape?

ZIETSMAN JP: We say there should be only one court of appeal so that one is not faced with possible conflicting decisions given by courts of appeal in the same province, perhaps the one declaring an Act passed by the regional parliament to be valid and the other one saying it is invalid. I think, we feel there should be only one court."

(3) "**MR MALULEKE**: Judge Zietsman, on these matters or appeals, you say all
the appeals must by centralised. In your view what is to be done about the

costs? Are you not eventually goint to, are you not going penalise people in Umtata, say for instance, or the Transkei, cost-wise to bring appeals to Grahamstown? Have you thought about that?

ZIETSMAN JP: I cannot really see that an appeal for example from, shall we say from a Lusikisiki court to Umtata, the cost of taking an appeal from a decision, shall we say in a Lusikisiki court to the Umtata supreme court, I cannot see that that would really cost less than bringing the same appeal to Grahamstown."

(II) **THE HON. MR. JUSTICE D.D.V. KANNEMEYER**

In the course of his oral submissions to the Commission at Grahamstown on 2 October 1995 some of the points made by Mr. Justice Kannemeyer were the following:-

(1) "As far as people are concerned the Judge President was asked about people with an appeal from Lusikisiki say to Grahamstown. It has been my experience, and I think my colleagues will agree with me, that very seldom does one see an appellant in court, even when the appeal comes from as near as Port Elizabeth or even Port Alfred. Normally they are represented by an advocate and he is instructed by an attorney who will report the result to the person concerned. Occasionally, admittedly, one has with cases particularly of some great interest you have the parties in court, but not often. I have found also on circuits that less and less people come to court merely because they are interested, not because they have an interest but merely that they are curious should I say and in the old Transkei it was a great occasion. The tribesmen used to come to listen to the circuit court, but in the urban areas by and large people do not have time, unless they are unemployed, which unfortunately there are many. People do not have time just to come and sit in court to see what is happening."

(III) **THE HON MR JUSTICE T M MULLINS**

In the course of his oral submissions to the Commission at Grahamstown on 2 October 1995 some of the points made by Mr. Justice Mullins were the following:-

(1) "**MR MALULEKE**: What will it cost the ordinary person making an appeal in a criminal case at Bizana from a magistrate to be heard there in Grahamstown in terms of your submission?

MULLINS J: Bizana, as I understand it, is in the Transkei.

MR MALULEKE: Yes.

MULLINS J: I gather there is a suggestion, I have not given thought to it myself but I gather there is a suggestion that the Transkei should retain appellate jurisdiction for magistrate's courts as it has at the moment. So an appeal from the magistrate in Bizana would go to the Transkei local division. It would have appellate jurisdiction. There has been a suggestion I believe also that Port Elizabeth as a local division should receive appellate jurisdiction from magistrate's courts. So that the difficulty from magistrate's courts, in my view, would not arise, but the final court of appeal for the province as a full bench appeal should remain at the seat of the court."

(2) "**MR MALULEKE**: … If the Transkei now has a full bench appeal and we move it, say we agree with the submissions, the Commission, and we move it here to Grahamstown, does it not eventually cost the little person from Bizana a lot more than if he appealed to the Transkei? I think it is, to Umtata.?

MULLINS J: It would not cost him any more, as I have said, to appeal from the magistrate's court because he would go to Umtata. 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 conflict of decisions. I mentioned that the question of having more than one final court of appeal in a province, 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. May I also mention, a number of full bench appeals in that type of situation from the small litigant who perhaps has been convicted of a small offence in Bizana is unlikely to be of any great number. There are hardly likely to be any large number of full bench appeals of that nature."

(IV) **THE HON MR JUSTICE J W JONES**

In the course of his oral submissions to the Commission at Grahamstown on 2 October 1995 some of the points made by Mr Justice Jones were the following:-

(1) "There has been a question asked about the cost of bringing appeals as far away as Grahamstown if the appellant should live in Bizana or Flagstaff. I do not know that the cost will really be markedly more. The costs of appeal are the costs of the preparation of the record, the costs of the legal practitioner to argue the appeal and wherever that appeal is argued those costs will remain constant. It might cost more if the appellant himself wishes to travel to hear his appeal being heard, but that happens very, very rarely."

(V) **ADV L J ROBERTS, SC, ATTORNEY-GENERAL OF THE EASTERN CAPE**

In the course of his oral submissions to the Commission at Grahamstown on 2 October 1995 some of the points made by the Attorney-General were the following:-

(1) "So there is concurrent jurisdiction of attorneys-general in the Transvaal. The one has jurisdiction for everything but the Witwatersrand local division and the other has exclusive jurisdiction over the Witwatersrand local division. That has worked in practice. When it started up I understand the appeals were all argued in Pretoria. That did not create any problems because the staff merely went across to Pretoria on the days when they had appeals and they argued it in Pretoria, but I gather that since that time the appeals have been moved to Johannesburg, so they do not even have that inconvenience to contend with. Now if this model is applied to Transkei, and I submit that there is every reason why it should work, then if the criminal appeals are argued say in Grahamstown, Bisho or wherever, somewhere outside Transkei, the matter could be quite simply rationalised by keeping Transkei appeals for one particular day. In other words you would not intersperse them with the normal five or six criminal appeals on the roll on a given day, you would bundle them together so that one person could come from Transkei to come and do the appeals, which would be every now and again and that would be much easier. If on the other hand the appeals were to be argued in Umtata then *cadit quaestio*. It would run as it does in Johannesburg at the moment, no problems."

(2) "There is one other point that I would like to touch on which arose from the questions today, which is not in my memorandum, and that is about bringing, about the costs to the small man if appeals are heard here instead of there or attorney A instead of B. There are a couple of points there that I would like to highlight. The first is that, let us take - I think the example was mentioned of somebody who is prosecuted in Bizana in the magistrate's court and wishes to appeal. Now as it stands at the moment that person has to go to Umtata to argue his appeal or to have it argued by counsel on his behalf. If that person loses his appeal and wishes to appeal further there is no appeal as the law stands at present to the full bench of the Transkei general division or Transkei provincial division, that appeal has to go to the appellate division in Bloemfontein."

(3) "From a criminal point of view the only time you can have a full bench appeal is from a conviction before a judge and if it is not one of the cases that is

destined for the appellate division it goes to a full bench. So in the Bizana scenario the man who wants to pursue his appeal would have to have counsel, at the moment argue it on his behalf in Umtata and if he wants to go further, if he is not satisfied and he gets the necessary leave, he has to go Bloemfontein. The costs of whether he has his appeal argued in Umtata or for example in Grahamstown or Bisho, are very difficult to quantify because it would depend on where his counsel came from. If he was going to Grahamstown and his attorney in Bizana contacted Grahamstown counsel then I would imagine the costs would be very much the same, there would be no extra cost. There would just be that certain inconvenience if he wished to come and hear his appeal being argued, to be physically present for argument. My experience is that hardly ever happens. The number of appeals that go further after two judges have heard a criminal appeal from the magistrate's court are very, very few indeed. In our division if there are two or three a year it is very many. The vast majority of cases that go to Bloemfontein are from supreme court convictions."

(4) "Now there is another imponderable here which can make the whole speculation even more difficult and that is the right of audience of attorneys, because if the man from Bizana is being represented by an attorney from Bizana and if he decides (the attorney that is) himself to conduct the appeal then obviously it is going to cost more for him to go to say Grahamstown than it does to Umtata. That is a fact, but there are so many imponderables here that I cannot even begin to work out an exercise in how the whole situation works. Sir that is all I have to say."

(VI) **ADV G D VAN SCHALKWYK, SC, ON BEHALF OF THE ADVOCATES AND ATTORNEYS LIAISON COMMITTEE FOR THE EASTERN CAPE**

In the course of his oral submissions to the Commission at Grahamstown on 2 October 1995 some of the points made by Adv van Schalkwyk, SC, were the following:-

(1) "Mr Chairman, as I have indicated, the question of what the appellate jurisdiction of the, especially the various local divisions should be, is really a separate issue. Before dealing with that, however, there are a further, a few matters in regard to appeals I think that clarity should be obtained on. That for the litigant in the magistrate's court who appeals against either a civil or a criminal judgment, it matters not to him other than travel now, but on a question of legal costs whether that appeal is made to a local division or to the central seat of the court. The same record has to be typed, the same record has to be perused by the attorney at the seat of the court and counsel has to be briefed to argue the matter. It does not make it any cheaper to have four divisions or four seats of the supreme court if you like, than to have one hearing appeals. That cost is constant."

(2) "If we take again our man in Lusikisiki, whether his attorney briefs, having lost his case in the magistrate's court in Lusikisiki, he briefs his colleague in Umtata who in turn briefs counsel to argue the matter in Umtata, or if by choice he briefs his colleague in Grahamstown who briefs counsel here, from a cost point of view there cannot conceivably be any difference. Those appeals, any further appeal can only be to the appellate division, having been heard by two judges already in the either local or centralised division. So your only further appeal would be to the appellate division. The only litigant who will score, as it were, would be the one who is resident in the magisterial district of the Court itself. For instance, by way of example, a Grahamstown litigant would only have to instruct his Grahamstown attorney who would in turn instruct someone in Bloemfontein. The minute he goes, and that is common throughout the country, the minute he, the appellant is situated outside of Grahamstown, he briefs his local attorney, and for argument's sake Stutterheim, who briefs his Grahamstown correspondent who takes it through the appeal, he is then the attorney of the court *a quo* to Bloemfontein, and you have three sets of attorneys. The Eastern Cape does not differ from anywhere else and as I say, the only litigants who would be in privileged positions are those who live within the magisterial area of the particular supreme court."

(3) "As regards full bench appeals, those would be appeals from the decisions of

single judges, again it follows the same route as Grahamstown, that if it is only the man who is, the litigant who is resident within the district of the court who is at an advantage, and in any event, on the statistics of this court the kind of matter involved, this is not an enormous burden that people bear in regard to full bench appeals and in any event, it is throughout the Cape Province, the Free State, the position pertains that full bench appeals lie to a full bench sitting at the seat of the court in Bloemfontein or Cape Town or wherever, Pietermaritzburg in the case of Natal."

(4) "Mr Chairman, returning to this question of jurisdiction, in the submissions by the liaison committee at page 5 there are two alternate proposals. Proposal A is that there be a provincial division in Grahamstown, which should have sole appellate jurisdiction in respect of the whole of the Eastern Cape Province. The second proposal is that the division in Grahamstown should have sole appellate jurisdiction in respect of the whole of the Eastern Province in so far 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 criminals appeals from the lower courts within its area of jurisdiction. Those are the suggestions made in the memorandum as regards appellate jurisdiction."

(5) "It also appears elsewhere, one that I personally suggest, would recommend that you consider, and that is that once a seat of the court, if that argument is accepted that a court should have a seat and not be the recipient of some roving ambassador's attentions, 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 demand or the need for particular appeals (a particular appeal I stress), or particular types of appeal to be heard at venues other than the seat of the Court. The Chief Justice has that in regard to Bloemfontein, it has not been often used, but to give the Judge President that flexibility."

(6) "One has high profile appeals. There are people who want to go and listen to the morbid saga of whatever it was all about. 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, of the particular 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 and this again then links up with the argument as to why there should be a single seat with a single 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 interests of the litigants for the appeal to be heard."

(VII) **THE HON MR JUSTICE B de V PICKARD, JUDGE PRESIDENT OF THE CISKEI SUPREME COURT**

In the course of his oral submissions to the Commission at East London on 4 October 1995 some of the points made by the learned Judge President were the following:-

(1) "**PICKARD JP**: I wish now, Mr Chairman, gentlemen, to deal shortly with the question of appeals. Irrespective of whether there is a central seat of the court or not, this is a huge province and we have been through all this and I do not want to burden you with it again, but the suggestions have been glibly put that cost of appeals do not increase because appeals have to go to a particular centre a long way off. I do not underwrite that."

(2) "Let us first talk about magistrate 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, that is the present situation. I think the probabilities are pretty clear that in the very near future he will be able to argue his own appeal in Umtata or Grahamstown, which makes it a little more difficult for him, but assuming he - my problem with that is it creates a monopoly for the Grahamstown advocates, if an advocate has to be briefed, and I will have something to say about the empowerment of the black people towards the end of my address - but if he uses counsel in Lusikisiki to defend him or 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. That is as far as magistrate's court appeals are concerned.

(3) "As far as full court appeals are concerned it is even worse, because in a full court appeal where it is an appeal from a judgment of a single judge, that presupposes in the present dispensation that he will have been represented by an advocate and I make bold to say more likely than not an advocate of the seat where the matter was heard. Full Court appeals more than any I submit should be heard in the same venue - I say venue as opposed to division - in the same venue as where the matter initially emanated from. An Umtata appeal, 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 not true, it is simply not true. I submit that with the size of this province appeals, all appeals, should be heard from the area of jurisdiction, in the area of jurisdiction from where they emanate."

(4) "Now let me make this clear. Much has been said about the system of precedents and suggestions have been made that the court in Umtata may make a decision in a certain fashion and that the court in Grahamstown may make a contrary finding in another case on the same point. That is simply not true. We know the system of precedents, this whole Commission knows that. Once a full court decision has been made it has been made and unless it is clearly wrong it will be followed, but if you look at my submissions I say that in a full court appeal certainly it should never occur that three judges based in that venue hear it. I know Beck J indicated, at least so Zietsman J says, and I presume he is right because we would have had the same difficulty, Beck J suggests that, at least Zietsman J suggests that Beck J said he could not hear them because his contingent of judges is too small to have three judges sitting on one bench and keep his other courts going."

(5) "Full court appeals - and we do not have them, we have an appeal court with which I shall deal, or we had a proper appeal court, no full court appeals until recently - I challenge Zietsman J to show us how many full court appeals he hears in a year. Let us say 20, 30, I do not care what the figure is, but if you, they cannot be so many that you cannot hear them by way of sessions in the various courts. 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, or in the court roll at the beginning of the year it can be determined if necessary, but he can say I have four 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, or the second, first two weeks of August or whatever it is, 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. That is my suggestion, that is how I have it."

(6) "In fact I said it should not even be left to the Judge President's discretion, it should be entrenched in the law, in the Act, that full court appeals in a case of this nature will be heard from not more than one judge from each venue, because it is important to me that if I in Bisho have full court appeals that I

have possibly a judge from Grahamstown and a judge from let us say Umtata, if not also one from Port Elizabeth, but we should, a full court appeal should be a representative bench of the whole province."

(7) "In fact, the suggestion of having full court appeals heard in Umtata as a provincial division on its own, which is the Umtata proposal, is to me entirely unacceptable, with the greatest of respect to the Transkei and Umtata …"

(VIII) **ADV T D PILLAY OF THE BISHO BAR ON BEHALF OF THE BORDER BRANCH OF NADEL**

In the course of his oral submissions to the Commission at East London on 4 October 1995 some of the points made by Adv Pillay were the following:-

(1) "I come to the difficult part of my presentation. Sorry for the long introduction, but I am going to place before you a proposed structure of what we believe the court should be, and this must obviously be seen in the light of what we have been saying up to now, and yes, as I have said before, you will obviously have questions to ask me about it and I am, hopefully will be able to defend the position and advance it. May I with respect hand up copies of the proposed diagram? I have made several copies."

(2) "**CHAIRMAN**: Thank you. This will be marked EXHIBIT C [Appendix " "].

MR PILLAY: Thank you. (Pause) I intend obviously to go through it and explain it as best I can, but maybe I should allow the shock that it presents and evokes in many people to simmer down so that they can in fact be rational, look at this because if we do so in a state of shock or emotion it might blur the distinction …. May I start at the bottom and say that the four particular blocks represent four local divisions. We envisage one provincial division for the province. The four local divisions we style as Port Elizabeth local division, Grahamstown, Bisho and Umtata."

(3) "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 magistrate's courts in terms of section 103 of the constitution; motion court, that is unopposed and opposed applications; civil and criminal trials as well as applications and full bench appeals. You will see a reference to two judges under full bench, in fact it is an error, it should be three judges.

LEON J: Oh, I was going to ask you about that. That should be three judges, not two judges?

MR PILLAY: Three judges, Mr Commissioner, it is a mistake."

(4) "**LEON J**: What I am not very clear about, is there, is a full bench appeal

from the local division to the full bench with three judges.

MR PILLAY: No, no.

LEON J: Then there is another court sitting above it called the Eastern Cape provincial division which has also three judges. Does that contemplate a further appeal from the full bench of three judges to three judges in Eastern Cape provincial division?

MR PILLAY: Yes.

LEON J: Then a further appeal to the appellate division or the constitutional court?

MR PILLAY: Yes.

LEON J: So in other words you are now having one, two, three appeals?

MR PILLAY: Yes."

(5) "**LEON J**: You have an appeal from the court to a full bench, then so that the Eastern Cape provincial division becomes a kind of an intermediate court of appeal?

MR PILLAY: No.

LEON J: Is that not what you have in mind?

MR PILLAY: No, it is not an intermediate court of appeal, it is in fact the highest court in the province. If you look at it from that point of view it is the highest court in the province.

CHAIRMAN: In which a bench consisting of three judges sits in an appeal upon a judgment of three judges?

LEON J: Yes, this is the problem that I have with this. You have already got an appeal to three judges. Now you are contemplating further appeal to another three judges."

(6) "**MR PILLAY**: Now the reason for that is simply this: Pickard J's proposals, if I understand them correctly, takes the provincial division and puts it down

in where we would have the full bench division.

LEON J: Yes.

MR PILLAY: That has very many attractive features, but we say approach it from a different point of view, and the different point of view is this: Try as far as it is practically achievable, make each local division self-contained. In other words appeals from a judge, a single judge, goes to your full bench in the local division. Appeals from a magistrate or applications from a magistrate will go to your full bench. Many arguments will be advanced, and I think of them readily myself. Cost factor, why do you introduce a second tier of appeal? Why not? The immediate answer is, why not? You say costs? What are the costs? A litigant only litigates as much as he wants to litigate."

(7) "**LEON J**: No, it is not only that. There is another problem I think. The other problem is that normally if you, you go from one to two or one to three when you go on appeal, or you may go from three to five. Here you are going from three to three. That may create a problem.

MR PILLAY: Yes. Mr Commissioner, we are not really married to a number of judges. That is a matter that can be worked out on the basis of the importance of the matter. For example it may be that this is a constitutional matter involving a piece of provincial legislation which has to be struck down on the basis of unconstitutionality. The Judge President together with the deputy Judge President of the local division may say uh-uh, this is a matter of very grave importance, I am constituting a five-bench provincial division."

(8) **LEON J**: Are you saying that what we do here or recommend here should not necessarily be the same in other parts in South Africa?

MR PILLAY: Absolutely, absolutely. You have got to … (Intervenes)

CHAIRMAN: Without doing an injustice to you, Mr Pillay, would it be wrong to suggest that this EXHIBIT C, rather than being in amplification of NADEL's written submissions, represents a revolutionary departure from it, or is that pitching the argument too high? I am not saying you are not entitled to do so, I just want to know for the record.

MR PILLAY: Yes. You are quite right, Mr Commissioner. It is a departure from the submissions that we have made. In our written submissions which takes us from the full bench directly to the appellate or to the constitutional court. We are now introducing in oral submission a variation of that particular proposition and it is with this next leg of the appeal procedure. Revolutionary? Maybe, but if we have to be revolutionaries in order to bring about what the

Constitution envisages, then so be it, we must propose it."

(9) "We say that if you make the local divisions as self-contained as possible, we are particularly mindful of the detrimental effect of that type of mentality or that type of practice. Now what is the detrimental or drawback or disadvantage of that? Is that we do not allow for a commingling of judges which procures so much benefit, they mix on a social level, they impart knowledge, they part - everybody who practices at the bar knows that when you go into the tea-room you learn more law in the tea-room than you do when you sit in your chambers. So the advantage of that particular situation we are very mindful of, and we have a problem and we recognise it, but we say that the way you can deal with it is this, is that the provincial division from whence the appeal comes from the local division comprises of however many judges, three, five, whatever. One of the judges of that provincial division must come from the local division where the appeal emanates, because he imparts a peculiar type of knowledge to that group of erudite gentlemen, then ladies, I am told we must be sensitive to these things. The other thing is of course that at that level he now mixes with the other judges who are drawn from the other local divisions, from the remaining local divisions."

(10) "… So what we are saying then is that the benefit accrues at that level. The provincial division is only an appellate court, nothing more. It is our understanding, and we may be wrong, but even the Eastern Cape provincial division does not sit as a court of first instance. If it does, if it does then it must change, because we are now giving it local division status and those judges that sit there will also have the opportunity to participate like every other judge in the entire provincial division of the province to participate at provincial level. So that is the step that we say is the one that must be introduced.

LEON J: You have in mind that your final court of appeal for the province will be drawn from the ranks of all the judges sitting in the local division?

MR PILLAY: Yes."

(11) "**LEON J**: No, I just want to understand the argument. So really it will work like the provincial division courts of appeal do at the moment when they sit as a court of appeal, and each judge in turn takes on that kind of duty?

MR PILLAY: Yes.

LEON J: I understand.

MR PILLAY: It is not radical, it is not revolutionary, it is in fact just a different way of approaching the particular problem because of the … (intervenes)

LEON J: Well you are introducing an extra court, that is really what you are doing, an extra layer of appeal, that is really what you are doing."

(IX) **MR W K JURGENS, SC, ATTORNEY-GENERAL OF THE CISKEI**

In the course of his oral submissions to the Commission at East London on 4 October 1995 some of the points made by Mr Jurgens, SC, were the following:-

(1) "The fifth submission I have made, after we have said now that there should be a court at Bisho, the court at Bisho should have increased area of jurisdiction, we make the fifth point that the court at Bisho should also have appeal and review jurisdiction, and by doing so, sir, we do not wish to enter into the arguments of where the seat of the supreme court should be, whether there should be a seat of the supreme court, etcetera. We just say that for the interest, in the interest and on behalf of the good people of our area we ask that reviews and appeals be disposed of locally."

(X) **ADV R D CLAASSEN, SC, ON BEHALF OF THE SOCIETY OF ADVOCATES IN CISKEI**

In the course of his oral submissions to the Commission at East London on 4 October 1995 some of the points made by Adv Claassen, SC, were the following:-

(1) "The submission was made in Grahamstown that people do not attend, appellants do not attend their appeals. Having come from the Transvaal Provincial Division myself previously, that was certainly my experience there. When I came to this province, what was then the Republic of Ciskei, as an acting judge for three and a half years as well as a practitioner here for almost two years now, my experience here was exactly the opposite. Appellants do attend appeals and the only conclusion I can draw from that is the fact that the court is close to them."

(2) "In all other venues the courts are far from appellants, it is costly for them to travel and all those sort of things and therefore they do attend, and we have seen the Bisho court for appeals and other matters packed to capacity. So my submission to this Commission is that it is essential that all venues should have appeal jurisdiction. And it is not surprising that a court like Grahamstown does not have the experience, because it is too far from the people whence the appeals arise."

(3) "The second thing regarding appeals, we are faced presumably in the near future with the fact that attorneys will have rights of audience in all courts. Practice experience is the most important learning school. Attorneys who are situated far away from courts cannot gain that experience. They will be and are entitled to, as anybody else, any other lawyer, to appointments on the bench etcetera. If they are far from appeal courts they cannot get exposure, they cannot get experience. It is important for us in our view that these people must have an opportunity to appear themselves in these courts, not only as courts of first instance but also in courts of appeal."

(4) "It obviously reflects on the costs of litigation as well. If this attorney cannot do his, has to go from Umtata to Grahamstown he would have to consider appointing another counsel or attorney or whatever the case may be to represent, to take his case and if he can do it in Umtata obviously he will do it himself. The same in the Border area, the same in Grahamstown, Port Elizabeth, all these places. So we say it is important that all courts should have appeal jurisdiction. This goes for a full bench of two or three judges."

(5) "Again comment was made about four mini courts or the impression was gained some little courts way out in the bundu. That is not what we are talking about here. We are talking about fully fledged local divisions at least with full jurisdiction over all matters arising from that specific jurisdiction and any conflict of judgments have to be dealt with as they are dealt with in Natal, as they are in Transvaal, where there have been conflicting full bench and other judgments which have to be dealt with at a higher venue, at a higher court. So I fail to see the problem in granting all venues full appellate jurisdiction in all matters, which as I say, includes three-bench matters."

(XI) **ADV A J DICKSON, SC, ON BEHALF OF CIRCLE NO 12 OF THE KING WILLIAM'S TOWN ATTORNEYS ASSOCIATION**

In the course of his oral submissions to the Commission at East London on 4 October 1995 some of the points made by Adv Dickson, SC, were the following:-

(1) "The King William's Town attorneys refer to the representations of the Border Nadel Branch, which we submit were ably presented by Mr Pillay yesterday, and they wish to record their empathy, their sympathy and support for those submissions. There is one aspect … (intervenes)

CHAIRMAN: The empathy and sympathy I take it in the light of what you have said to Leon J, does not extend to the double tier system of appeals?

MR DICKSON: No, Mr Chairman, I must hasten to add that we are excluding our support from the proposal put forward in the organogram. That is too specific for us and we do not want to become that specific, and we also find that there are difficulties with the double bite at the cherry on appeal as it were …"

(2) "**MR MALULEKE**: Lastly, also the question of appeals, you have no particular views as to whether say if Bisho was a local division it should have only the capacity to hear appeals from the magistrate or even appeals from a single judge?

MR DICKSON: Mr Commissioner, I think that really goes outside the detailed submissions we make, but if I am asked for an answer, I think that the, what we say is that there should be appeals heard from the magistrate's court in Bisho, that much is certain. If the Commission feels that Bisho should be the provincial division then obviously Bisho must hear all the appeals, all the full bench appeals as well."

(XII) **ADV L S KALIMASHE, SENIOR LEGAL ADVISER TO THE PREMIER OF THE EASTERN CAPE PROVINCE**

In the course of his oral submissions to the Commission at East London on 5 October 1995 some of the points made by Adv Kalimashe were the following:-

(1) "Lastly I make reference to page 4 of the written submissions on behalf of the premier. Page 4, there are paragraphs there numbered 1 to 6. What is really meant there by four courts is that a single provincial division should sit permanently in four towns, that the judges of each place, each place of the habitual residence of the judges, such judges should do all the work emanating from each one of those places."

(XIII) **ADV L MPATI ON BEHALF OF THE PORT ELIZABETH REGION OF NADEL**

In the course of his oral submissions to the Commission at East London on 5 October 1995 some of the points made by Adv Mpati were the following:-

(1) "Firstly, it was pleasing to read in the newspapers and confirmed by my learned colleague, Mr Kalimashe, before me that the document headed "Submissions of the Government of the Province of the Eastern Cape" in fact does not contain the position taken by the government of the province, and I will leave that there. But be that as it may, I read the argument in this document to be that there should either be three or four independent supreme courts with all jurisdiction, territorial jurisdiction aside, which a provincial division of the supreme court as is presently known, has. 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. Later the document talks of the importance of avoiding a single court dictating the law for the the whole province. Well, Mr Chairman and learned commissioners, I find this to be a remarkable submission. In our view it actually says that certainty in the law should be thrown out the window because if you want certainty you will be allowing one court to dictate the law of the province to the other courts within the province. In our respectful view, to have four 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."

(2) "Then I think it is appropriate to, because I understand that the question of appeals and attendant costs have been raised time and again. We do not believe that distances play any part here. If for example the court were to, there were to be a court in Bisho with appeal jurisdiction and there is an appeal emanating from the magistrate's court in Queenstown, which is some 200 kilometres away, we do not believe that the attorney in Queenstown will drive all the way to Bisho to come and see to it that the record is properly paginated, etcetera. The practice has been, and I believe that it will always be, to instruct a correspondent to deal with that kind of function. So there will always be, unless an appellant is within the locality of the court, there will always be the additional costs of a correspondent. So distances do not play a part with respect. The only question that may arise is whether or not an appellant from an outlying area would like to be present. It is not necessary for an appellant or a respondent to attend appeal proceedings, and if he wants to then surely he should bear the consequences, but it is not necessary."

(3) "**MR MALULEKE**: … Are you saying all appeals should be centralised, whether from the inferior courts or from the single judge? Must these be centralised at a seat of the provincial division in the whole province?

MR MPATI: That is our main submission, but if that submission … (intervenes)

MR MALULEKE: Having said that, you are saying it will cost the person who appeals from the magistrate's court in Umtata virtually the same as it would cost him now today?

MR MPATI: No, no, no, I am not, I think I have made the distinction that the only people who will be advantaged are the people for instance who live in Umtata if Umtata would have appeal status, but those who are in Umzimkulu for instance will have to bear those extra costs and my respectful view is why the difference?"

(4) "**MR MALULEKE**: Are you not amenable to this other proposal by other people here that appeals from the inferior courts could … go to the local division and appeals from the single judge might very well go to the provincial, to the seat of the provincial division and that this, one of the major points as I see it, is the question of costs, from the inferior courts?

MR MPATI: That is an alternative submission or proposal that we make.

CHAIRMAN: That is your proposal B?

MR MPATI: That is proposal B, that is an alternative proposal, but our main proposal is proposal A."

(XIV) **THE HON MR JUSTICE W H HEATH OF THE CISKEI SUPREME COURT**

In the course of his oral submissions to the Commission at East London on 5 October 1995 some of the points made by Mr Justice Heath were the following:-

(1) "Mr Chairman, finally, I have been in this area and I have been serving the Bisho court for eight years and I have got to know the people very well. I am referring now to the black people. In fact, I do not only know them on court level but I have lots of contact with them on other levels, community work and other work, and the one thing that is important to them is that they must have a court first of all, obviously, but they have always found attendance at court a very important thing in their life, obviously when they are involved in a case. That is why when Advocate Claassen said to you yesterday that we have appellants attending appeals that is very true, they do. Even motion court where they are not required to be, I am not talking about divorces, we very often have a very full court, and of course where there are relatives involved in criminal or civil cases they try to be there. The further the court is away the more difficult it becomes for the litigant himself but also those interested parties to attend the court."

(XV) **THE HON MR JUSTICE C E L BECK, JUDGE PRESIDENT OF THE TRANSKEI SUPREME COURT**

In the course of his oral submissions to the Commission at Umtata on 18 October 1995 some of the points made by the learned Judge President were the following:-

(1) "The question of appellate jurisdiction seems to be giving rise to some differences of opinion among other people who have made submissions to the Commission. 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 distances 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 who come more particularly from the eastern portions of the Transkei, the Bizana areas, the Maluti areas, that part of the country to have to travel beyond the Kei River to go to another court to have their appeals heard. It would inevitably increase the costs."

(2) 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 as it were 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."

(3) "We do propose … that when full bench appeals are heard at this venue for example it should - the bench should consist of one judge from the Umtata court and two judges from other venues, other court venues in the region. 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."

(4) "**MR MALULEKE**: … The submissions that we heard in relation to appeals were, one, that hearing appeals say in Grahamstown or at another seat of the provincial division, be it Grahamstown or Bisho or whatever it is, will not necessarily increase the costs of litigants from the Transkei greatly … Two, it was also submitted that at any event people show such little interest in attending court to hear appeals that even if appeals are heard at a great distance from where the people are, people do not attend court at any event. I would like to

get your opinions on this, you might assist us. The cost aspect, I know that you might have practised very long ago but I think you would assist this Commission, the cost aspect and the interest of the public in hearing appeals or where the appeals are being heard."

(5) "**BECK JP**: To turn to the second of the two questions first, whatever the situation might be in other parts, I can tell you that from our experience here it is by no means infrequent that the litigants themselves do come to court and do attend the hearing of the appeal. This is particularly true of the rural community; when a litigant from the rural community is involved in a matter it is the exception for him not to be at the court, he usually is at the court. The first question I think that the normal tendency would always be for the litigant to stay with the legal advisers who represented him at the trial. And that would mean that he would then have to send those legal representatives to wherever the appeal is to be heard, or else - and it may also involve the question of two sets of attorneys, a set of attorneys locally and then another one at the seat of the court where the appeal is to be heard. So I think the likelihood is that costs will be increased …"

(6) "I would rather see the State perhaps put to the little bit of extra expense to send, dealing with full bench apppeals for example, judges from another venue to come here for a day or two to participate in full bench appeals rather than force the litigants to go far beyond the borders of the old Transkei in order to have their cases resolved. Does that sufficiently assist?

MR MALULEKE: Thank you."

(7) "Gentlemen, provided all appeals which arise locally, whether they arise from the magistrates court or from the local supreme court, provided all those appeals are disposed of in Umtata, we really have no particular objection to another court venue being styled the seat of the court or the judicial capital or the provincial division …"

(XVI) **ADV N K DUKADA OF THE UMTATA BAR ON BEHALF OF THE SOCIETY OF ADVOCATES OF UMTATA AND ALSO ON BEHALF OF THE TRANSKEI BRANCH OF NADEL**

In the course of his oral submissions to the Commission at Umtata on 18 October 1995 some of the points made by Adv Dukada were the following:-

(1) "We also support the view of the Judge President that Transkei should be a full bench. It should have a full bench status. And though the chief justice has mentioned, differently to our approach that there should be a single judge in the event of a judicial capital to appeals and two other judges be drawn … from other divisions. We in principle are not opposed to that though ideally we would appreciate for the sake of speedy justice that all judges in an appeal to the full bench should be drawn locally because we anticipate that there could be some administrative problems in securing prompt attendance of those two judges."

(XVII) **ADV C D H O NEL, SC, ATTORNEY-GENERAL OF THE TRANSKEI**

In the course of his oral submissions to the Commission at Umtata on 18 October 1995 some of the points made by the Attorney-General were the following:-

(1) "In the past, talking about the full bench, in the past we have been having judges from Zimbabwe which was quite remote and I want to associate myself with what Mr Dukada said here that speed is of the essence here. If a full bench could be speedily constituted then that would dispense with the problem, Mr Commissioner, that we have experienced where we could simply not constitute a full bench here at short notice. And if we are promised that this type of problem will not manifest and present itself then I would not have any problem with having judges exchanged from the rest of the Eastern Cape."

(XVIII) **MR ATTORNEY M MAJEKE OF UMTATA**

In the course of his oral submissions to the Commission at Umtata on 18 October 1995 some of the points made by Mr Majeke were the following:-

(1) "The people from this area mainly are rural people. They normally take a very keen interest in their cases. They want to be present when their appeals are being held and they also want their attorneys to be present when their appeal is being prosecuted. So now if Grahamstown is say for example designated as the appellate seat what is going to happen is that they would have to travel with their attorneys from Umtata as far as Grahamstown and it is going to be highly expensive for them to do that because they normally insist that their attorneys should be there."

(XIX) **MR M J D WALLIS, SC, CHAIRMAN OF THE GENERAL BAR COUNCIL OF SOUTH AFRICA**

In the course of his oral submissions to the Commission at Durban on 28 November 1995 some of the points made by Mr Wallis, SC, were the following:-

(1) " … there is the very real problem of perception amongst the litigants. They just cannot believe that they get as fair a hearing when they go to the full bench as when they go to the Appellate Division. Time and again you will have the litigant saying, but look you know, the fellow who got it wrong last time, he's sitting in the tearoom with these chaps, he meets them in the corridor; how do I know that he's not, how do I know the judge presiding doesn't say to him, "Oh Bob, we've got an appeal from one of yours", "Ah yes, but you know X or Y which is off the record, how do I know that's not happening in the corridors?"

(2) "One can't send them [appeals from a single judge] all up to Bloemfontein. There are a huge number of reasons for that, but two will suffice. One is the massive cost to the litigant, the other is that one would then have to constitute an Appellate Division of 40 Judges instead of the 18 or so we have there at the moment, with its consequent costs."

(3) "The only possible resort must, can then be, to an intermediate appellate jurisdiction. And that is the resort which most jurisdictions have. To winnow the top, the most difficult, the cases of the broadest public importance go to your highest court, but otherwise the right of appeal generally to be exercised at a lower level. And one sees that this is very firmly controlled, either by the first Appeal Court or by the highest Appeal Court."

(4) "In South Africa the immediate question is, well, can we afford to constitute a Court of Appeal such as they have in England, and our terse answer is certainly not at this stage."

(5) "We are attracted by a submission which I think has been put, was intended to be put before the Commission, by a combination of the Bars of the Free State,

the North-West and the Northern Cape."

(6) "In effect they draw attention to the way in which circuit Appellate Courts sit in the United States. The United States is divided into a number of circuits. Eleven or thirteen, I can't recall. Thirteen circuits. This is the Federal Bench, obviously. And so you have had a trial before a Federal District Judge, you appealed it to the Circuit Appeal Court in your circuit, the first, second, third, through to the thirteenth circuits. And those courts operate peripatetically. The judges of those courts will have chambers, in the towns where they were, because they were usually District Judges, or where they are appointed. They will have their own chambers in the Courthouse where they sit locally but they will go on circuit to hear appeals."

(7) "The proposal, broadly, which seems to find favour, and I think its origin is the Chief Justice in some proposals he put up to the Constitutional Assembly Theme Committee V, but it seems to be a very sensible approach, would be a court which was constituted, presided over by a judge of the Appellate Division and the remaining members coming from Provincial Divisions, but not the Division where the appeal flows from. In that sense it would operate very much as the court of Criminal Appeal does in England, where you get one Lord Justice of Appeal and two, one or two judges from the Queen's Bench Division sitting."

(8) "It has other benefits to it, indirect spin-offs, because it gives an opportunity to see people in appellate work with an AD judge, so it is helpful in terms of determining who should go on upwards to the Appellate Division and the higher courts. So it has a beneficial spin-off in that regard. We would have thought that if one constituted three or four courts on that basis, probably three for South Africa as a whole, that will be satisfactory."

(9) "I think one would have to look at the fact that that would involve an additional burden on Appellate Division judges in terms of reading and records and the question of when they would sit. When would those courts sit? Are you going to deal with it if you constitute that by saying, look, if we're going to have three intermediate courts of appeal we will have to increase the strength of the Appellate Division by three, so that you can, during ordinary court time, release a judge to preside over an intermediate appellate court?"

(10) "To try and remove from the Appellate Division during its term, even one judge or one or two judges, to do other duties, places stress on that court. There is no doubt about that. And, to ask those judges who do their preparatory work in reading between the court terms, to take chunks, fairly large chunks, out of their time, not only to become familiar with other records but to go and sit and preside and collect all the judges together, is very difficult."

(11) "The other element you have got to look at is how are you going to establish a Registry for such appeals. My suggestion at a practical level, and I may have overlooked things, so it is merely a suggestion, would be to have a single central registry servicing all three courts, but with separate lists. And then at least, having one place where things can be filed, lodged and so on.'

(12) "I would be hesitant to suggest that the Chief Justice should have to play any role in it. He is already overburdened, all I think he would want to know about those courts is when are they sitting and which of his judges are being removed to sit in them. Beyond that I think it is too onerous to expect him to do it."

(13) "**MR MALULEKE**: At this point we are dealing with appeals. I don't seem to have heard what you had to say about the leave to appeal."

(14) "**MR WALLIS**: … In regard to leave to appeal, there are, as we point out, constitutional difficulties which are raised in regard to requiring leave, at least the first time around, in criminal matters, as to whether a fetter as subjective as the judge's opinion as to reasonable prospects of success on appeal is a limitation, a legitimate limitation on the constitutional right of appeal. It's a highly debatable question."

(15) "And we have the somewhat eccentric position in South Africa that's become more eccentric, that if you are convicted of murder and sent to jail for 15 years by the Regional Magistrate in Thabazimbi, assuming there is one there, you have every right to go and demand that two judges read the record and listen to whatever you have to say about why you shouldn't be in jail. But if you are tried by a judge and two assessors, legally represented and everything else in the supreme court and you are convicted of murder and sent to jail for 8 years, you have got to say to the judge, well look, would you mind if I went and chatted to somebody else about this, it seems utterly incongruous."

(16) "It becomes more incongruous with the extension of the magistrates' court civil jurisdiction, for exactly the same thing. For a judgment of R99 999.99, you can go and talk to two judges about it, and say, I don't think I should have to pay it. Tip over into the magic six figures and the fellow who said you do have to pay it is the one you have got to ask if I can go and ask somebody else. It is very, very incongruous situation and unsatisfactory."

(17) "I'm a little worried about the managerial side of simply giving everybody at least one appeal. For two reasons. One is, every litigant who has lost, immediately wants to lodge a notice of appeal, it may take quite a while before wiser counsels suggest that you should abide where you are, and that gives a lot of administrative clutter …"

(18) "The unfettered right of appeal is abused by the unscrupulous litigant. The big financial organisation to stave things off, the crook to stay ejectment or everything else, I mean, I think all of us have had the experience of being told by a magistrate or a wise judge, look, why don't you just settle and give him six months to vacate the premises, because if we fight the case out and I give an ejectment order, he'll lodge a notice of appeal and he'll get six months anyway. We've all had that experience, and its true, I mean it can't be avoided entirely but it is abused, it is used oppressively."

(19) "You have cases, I'm frankly terrified, in personal injuries cases when I see appeals on quantum. Because there you have someone who is possibly legally aided, they desperately need the money, they are a paraplegic and they have been given an award of say, half a million rand, after a long trial which has taken place three years after the accident while they have battled by. And then the insurance company gets leave to appeal. Gets leave to appeal on whether the apportionment should be for 40/60 instead of 60/40. The pressure brought to bear on that plaintiff litigant is overwhelming, to say look, give me 300 and I'll go away. I mean, let's forget the 400. It is just massive pressure on people who cannot possibly resist and you get these cases."

(20) "So it is a very unsatisfactory situation. And it can only be ameliorated by going to an intermediate court and getting there fairly quickly, which you don't do in the appellate division at the moment. Eighteen months to two years, if you are lucky."

(21) "Those are the factors about an unfettered right of appeal. On the other side I have the constitutional problems, I have the problem of Judge Reluctant, a Judge Reluctant can vary from Judge Arrogant, with all due respect, who thinks he is too clever, or Judge Reluctant who frankly would rather, if he can possibly avoid it, not have what he said exposed to some senior colleagues' eyes, because they may not like it. There are all sorts of reasons."

(22) "… so my inclination is, notwithstanding the problems I foresee, if you can set up an intermediate court of appeal, which can hear appeals relatively expeditiously, and I would say that not more than six months after judgment, then I would be inclined, notwithstanding my reservations, to give an unfettered right of appeal."

(23) "Perhaps one could think about some provisions which empowered courts to make interim orders and that sort of thing, motor accident cases, which are the ones which particularly worry me; they, personal injury claims worry me enormously, because of the delay in people getting the money, because that delay is prejudicial and can never be remedied by costs."

(24) "**CHAIRMAN**: Of course, your one big problem in relation to an unfettered right of appeal is being swamped and drowned in a sea of criminal appeals which have no merit whatsoever."

(25) "**MR WALLIS**: I'm alive to that problem … it can only be remedied, to some extent, in conjunction with the Attorney General. In part by, as I said earlier, changing the face of the criminal work that is undertaken in the supreme court. Putting a lot of those unmeritorious cases … where they belong in a tribunal which can deal with them, namely the regional court. They would never be in the supreme court were it not …for the fact that there was a potential for the death penalty. And getting a better balance of work in the supreme court and letting the appeals of that type be dealt with, rather more summarily as they are in the provincial division. I think one must accept that the further up the pyramid you go the more elaborate the preparation becomes, the more elaborate the procedures become, the more costly it becomes."

(26) "… there are two sides to the right of appeal. Very difficult. My inclination would be if you can establish something which gives a reasonably quick appeal,

to give at least one bite.”

(XX) **THE HON MR JUSTICE G FRIEDMAN, JUDGE PRESIDENT OF THE CAPE OF GOOD HOPE PROVINCIAL DIVISION, ON BEHALF OF THE JUDGES OF HIS BENCH**

In the course of his submissions to the Commission at Cape Town on 8 January 1996 some of the points made by the learned Judge President were the following:-

(1) "I will pass on to deal with the fourth paragraph of the memorandum which is the intermediate court of appeal."

(2) "You will recall, Mr Chairman, that this idea of a criminal court of appeal between the provincial divisions and the appellate division was introduced by the Chief Justice some four or five years ago when it was becoming apparent that the workload of the appellate division was too heavy and the thoughts of the Chief Justice were that there should be established a court between the supreme court and the AD to deal with criminal appeals; and that this court would be composed of an AD judge who would preside and two provincial judges nominated by the Judge President of the particular court from which the appeal emanated. I think the idea was that this court would be an itinerant court - it would go round to the various divisions and would not have a permanent seat."

(3) "In our memorandum we have given you the figures of the number of full bench appeals which are heard.

CHAIRMAN: About 20 a year or something?

FRIEDMAN JP: About 20 a year. And the way in which these appeals are dealt with in this division is as follows: What we do is, after each long recess, that is after the mid-year recess and after the year-end recess, we set these appeals down in the first week of the term so that they do not interfere with the normal running of the courts when it gets onto trial work in the rest of the term."

(4) "I found at quite an early stage that to try and intersperse full bench appeals in the ordinary course was disruptive and it was difficult to give the judges who were to hear these appeals sufficient time to read their records, having regard to the workload which they normally have to carry. This procedure works very efficiently because it means that the Judges have time during the recess to read

their records for the full bench appeals."

(5) "Having said that, we feel that if the Commission should decide to recommend the introduction of an intermediate court between the supreme court and the appellate division, this court should not be limited to criminal appeals. It should be a court with criminal and civil appellate jurisdiction."

(6) "We feel that such a court should be a permanent court - when I say a permanent court it should have permanent judges sitting on it with a permanent infrastructure of its own."

(7) "Basically the reason why we have advanced this view is that experience has shown, as I mentioned briefly a moment ago, that 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 division judge, to sit because firstly the recess periods, the terms, do not coincide. The terms of the appellate division are shorter, of necessity, than those of the 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."

(8) "For these reasons we suggest that if the Commission sees it fit to recommend such a court it should be a permanent court with its own headquarters, although it does not necessarily have to sit in one area."

(9) "In other words, you could have, for example, one court of appeal dealing with appeals from the CPD and the NPD and the Eastern Cape, in other words, coastal divisions. Then you can have another one dealing with the appeals from the Transvaal Provincial Division and the courts in the north. Or you could have three separate, call them circuits if you like. Say for example you had an intermediate court of appeal for the coastal area and it had its headquarters in Cape Town or Durban or wherever. What I am saying is, it does not necessarily need to sit there always. It can go around to the Eastern Cape or to Durban or to Cape Town and sit in these various courts."

(XXI) **MR ATTORNEY M T STEYN ON BEHALF OF THE LAW SOCIETY OF THE CAPE OF GOOD HOPE**

In the course of his submissions to the Commission at Cape Town on 9 January 1996 some of the points made by Mr Steyn were the following:-

(1) "And the submission that we make to you is the same submission that we made to Theme Committee 5. But we differ a bit from what is said in chapter 6. We have submitted that the existing supreme court should be recouched as the High Court of Justice of the Republic of South Africa. Above that we should have the Court of Appeal, which takes the place of the existing full bench. The Court of Appeal should really be a circuit court and we had in mind three circuits of appeal for the Republic of South Africa serving areas with similar interest. One, for example serving the Western Cape, Eastern Cape and Natal, the coastal division, the others serving, for example the Northern Cape, the North-West Province and the Orange Free State and the last one serving Gauteng, Mpumalanga and the Northern Province as it is called now, I think Northern Transvaal. So that this court would then have a seat, a head office in a centre but would move to existing supreme court facilities in other centres in order to hear appeals."

(2) "**LEON J**: You are talking about an intermediate court of appeal.

MR STEYN: Judge Leon, we would like to call it the Court of Appeal. It is an intermediate one as far as the existing structure is concerned."

(3) "There has often been talk of an intermediate court of appeal. We submit that that shows there is a need for such a court. Furthermore, litigants seem to form the impression that justice is not actually seen to be done where they appear before one judge who goes out and has tea with his colleagues, he gives a judgment against the litigant and tomorrow they appeal to the judges who sat around having tea with him. We have been told that people would like to have a separate court of appeal that is not so closely connected with the court in which the matter was heard. That to us makes sense."

(4) "**MR MALULEKE**: In that scenario, what do you do with leave to appeal? If you had that intermediate court of appeal, would appeals be automatic or would you still want to keep the principle that leave to appeal must be obtained?

MR STEYN: We submit that with a structure where you have a trial, for example, in the magistrate's court, there would be an automatic appeal to the high court. From the high court there should be an automatic appeal to the Court of Appeal. But the Court of Appeal should be the final arbiter of fact. There could be an appeal from that court to what we would call the Supreme Court, whether you add the words "of Appeal" or not. But that appeal would only be with leave of that final court and that court would only decide matters of law and not of fact. So that is automatic appeal up to the Court of Appeal and then with leave to the Supreme Court."

(XXII) **THE HON MR JUSTICE M M CORBETT, CHIEF JUSTICE OF SOUTH AFRICA**

In the course of his oral submissions to the Commission at Bloemfontein on 16 March 1996, some of the points made by the learned Chief Justice were the following:-

(1) "**CORBETT CJ**: Mr Chair, Members of the Commission, I would like to address the Commission on the question of the Intermediate Court of Appeal. As Members of the Commission know a written submission has been submitted to the Commission by me. It is actually a document that was drawn up on my behalf and accepted by me. I think that it, I hope the original draftsman will not mind if I say a little diffuse, and indeed since that document was put in I have modified my views, and in this I am supported by my colleagues on the Appellate Division on certain aspects of the proposals in that written submission."

(2) "I will say more about the current workload later in my evidence but suffice to say that at that stage even, [during or about 1990/1991] it struck me that the workload of the Appellate Division was becoming excessive. One of the quite significant components of that work, was appeals in what I will call minor criminal matters."

(3) "These appeals constituted something like 25% of the total number of appeals heard by the Appellate Division each year. 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. It struck me that it was not appropriate that the time and expertise of the Appellate Division should be taken up to such a large extent with the hearing and disposal of such minor appeals."

(4) "At the same time it was evident to me that the work of the Appellate Division, quite apart from these minor criminal appeals, was on the increase; and of course the size of the Appellate Division as far as the Judges were concerned was ever on the increase."

(5) "It is for those reasons and against that background that I put forward a proposal regarding the creation of a Court of Criminal Appeal. My idea was, as far as the structure of this Court was concerned, that there should be probably two circuits, one circuit which would cater for the work emanating from the Transvaal Provincial Division and the Witwatersrand Local Division, which I may say, on my then estimate, constituted about 70% of this work …"

(6) "This proposal subsequently underwent a modification as a result of a discussion I had with the Judges President, and the idea was then to include not only these minor criminal appeals which I have been talking about but also all criminal appeals which were then done by the Full Bench of the Provincial Division. It was on that sort of modified basis that the proposal was taken further. It was discussed all round, and eventually the then Minister of Justice referred the proposal to the Law Commission. The Law Commission investigated the matter, and reported in favour of the creation of such a court and, I think, drew up or produced draft legislation to implement the idea."

(7) "That is the history. The current proposal which I will come to in more detail in a moment arises from a much more comprehensive view of the workload of the Appellate Division and the needs of the administration of justice generally and the court's structure generally."

(8) "In this connection I would like to make brief reference to certain statistics … What I have set out to do is to try to get some analysis of the current position as far as the work of the Appellate Division was concerned."

(9) "Now just to give an overview of the statistics, might I say that at present, although it varies from year to year, the Appellate Division handles about 240 appeals a year and also between 400 and 500 applications for leave to appeal."

(10) "The problem in handling appeals is not only the number of the 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, and just to give you some idea of the length of records, I have taken out the statistics firstly for 1995, and you will see there that there were some 35 cases where the record was 6 to 10 volumes, 14 cases of 11 to 15 volumes, 6 cases of 16 to 20 volumes and 3 cases where it was over 21 volumes rising, Mr

Chair, you will no doubt recall, to 106 in one particular instance."

(11) "Then the next analysis under B is the average number of volumes read by Judges in each term. Now I have excluded Judges 1, 2 and 3, that is myself and the two next senior Judges. We always get slightly less than the others for fairly obvious reasons. In case the reasons are not obvious, one is because number 1 carries a big administrative load and numbers 2 and 3 generally also preside and usually write the judgments in the more difficult cases."

(12) "Now there you will see the average number of volumes read by Judges in that year was 74 for the first term, 46 for the second term, 96 for the third term and 48 for the fourth term. I might just explain … to hearers who are not familiar with the court terms, the first term is what we call a long term, it is a month and a half, the second term is a short term of a month, the third term also a long term, a month and a half and the fourth term a term of a month."

(13) "It must be appreciated that of course this amount of reading, and you get some idea of what it involves by taking the average volume as containing 100 pages, this amount of reading is a tremendous burden, and as you see over the year it amounted to 264 volumes which is really tremendous. Of course that has to be done in the court recesses between each term. I can assure Members of the Commission that the Judges of the Appellate Division spend just about the whole of their court recesses reading these records."

(14) "Then on the next page there I give the statistics in regard to the current year, it includes the first term that we are sitting in now, and the second term, the roll for which has been drawn up. You will see there again the number of volumes of length, and in fact there are 7 cases with more than 20 volumes rising to 41 volumes, 32 volumes and 52 volumes. There you get the average numbers, and then, and this is a rather bleak picture, is the long cases awaiting a hearing. You will see that there are no less than 14 of between 15 and 20 volumes, and another 13 of more than 20 volumes rising to, in one case, to 206 volumes. Anyway, I think that should be sufficient to realise that there is this tremendous reading load."

(15) "As I see it the work of the Appellate Division is only likely to increase in the future, and so the question is what are the real remedies? There seemed to be

just two alternatives, the one is to go on increasing the number of Judges in the Appellate Division, the number of court-rooms, the general facilities to absorb work. The other is to introduce an intermediate court of appeal."

(16) "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."

(17) "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."

(18) "So the solution that I favour is the creation of an Intermediate Court of Appeal. Of course in this connection there have been two important developments in the sense that the Constitutional Assembly, which is charged with the task of formulating the new Constitution, has had certain seminars and meetings on the question of a chapter dealing with the administration of justice and the Court, two of which I have attended, and it seems fairly clear that the general thinking, at any rate, is in the direction of (a) giving the Appellate Division a constitutional jurisdiction which it has not hitherto had, and (b) accepting the principle that an Intermediate Court of Appeal be created. I think this is a further reason why one should give serious consideration to such a court and to its composition and structures."

(19) "Next, how do I visualise this intermediate court? Obviously it will be a court dealing with both civil and criminal matters. Contrary to the view I have expressed hitherto and in the memorandum before the Commission, I have come to the conclusion that should be a separate institution, and should no longer be created *ad hoc* in the way that I have described earlier."

(20) "I am convinced by what I have read from some of the Judges President and from discussions I have had that particularly with a court of this size … the difficulties of co-ordinating with the running and the work of the Provincial Divisions rules out an *ad hoc* arrangement."

(21) "Thirdly I think, the court should be localised, in other words have a headquarters in a particular locality but at the same time be mobile and sit in different centres according to demand. I think it would be very advantageous to the system generally if by moving about it could, as it were, bring justice to the people rather than causing litigants and the legal representatives involved to travel long distances."

(22) "Fourthly, I think it should basically consist of, what I have termed, two circuits, possibly three but at the moment I would favour two, each circuit having a demarcated territorial jurisdiction."

(23) "For example, and I just quote these by way of example … one could have one circuit consisting of or having jurisdiction in the four provinces that now constitute what used to be the Transvaal. As I have said earlier at the moment according to my rough estimate, the TPD and the WLD together generate probably two-thirds to 70% of the Appellate Division's work. Another circuit comprehending the rest of the country, with headquarters possibly in a place like Cape Town or Durban, but again, and in this case probably more importantly, being mobile and sitting in different centres of jurisdiction."

(24) "This is somewhat similar, in a small way, to the American system of the Federal Courts of Appeals where, as members of the Commission probably know, I think there are something like eleven circuits which cover the whole of the United States and they group various states together and each court has a local jurisdiction in those states."

(25) "This court … would hear all appeals from Provincial Divisions, Local Divisions, generally speaking, with a further appeal to the Appellate Division but only with the leave of the Appellate Division, and then it would only be given on a substantial point or points of law."

(26) "In other words the Appellate Division would no longer be called upon to adjudicate on appeal on factual issues. I said "in general" because I think it would be advisable to have some form of leap-frogging system, again only with leave of the Appellate Division, where there was an important question of law, where it was obvious from the start that the appeal related to an important question of law which would reach the Appellate Division in due course ultimately."

(27) "The consequence of this would be that the work of the Appellate Division would change fundamentally both as to volume and to some extent as to type or quality. In due course, as the cases work through the system, I think it would be possible for the present size of the Appellate Division, which is a Chief Justice and 17 Judges of Appeal, to be reduced and being freed of cases with long and complicated factual issues, the Members of the Appellate Division would be able to concentrate on the law and have more time to devote to general reading in the law and so on."

(28) "I visualise that the circuits of the Intermediate Appeal Court, that the Court would sit with three Judges. It would be a panel of three. I tried to do some sort of a rough estimate as to the number of Judges that might be required. These are figures that I cannot really, I have no basis for justifying them other than just a gut feeling; but I would have thought that, to begin with at any rate, the northern circuit might consist of 8 to 10 Judges and the southern circuit from 4 to 6 Judges."

(29) "The introduction of a three-tier system undoubtedly does import in some instances extra costs, and I am talking about extra costs not necessarily to the State, which of course it will, but really extra costs to a litigating party. This may be so in a number of cases but I think in the vast majority it would not be so, firstly because of the leap-frogging arrangement, and secondly, because leave to appeal from the intermediate court to the Appellate Division will not be granted all that readily. It will have to be a substantial point of law involved."

(30) "Just one final point, and that is that if as seems to be envisaged the Appellate Division is to have a constitutional role, that will obviously add very considerably to its present workload. It seems to me that the creation in those circumstances of an intermediate court is almost an imperative corollary."

(31) "It of course at the same time raises the question as to whether the intermediate court should also have a constitutional jurisdiction. I have a little difficulty with that because it then means that potentially if a case went right through the whole system, you would have a four-tier system in regard to, with the ultimate appeal being to the Constitutional Court. But I have not thought this through, and I think that probably some similar system of leap-frogging would obviate

that."

(32) "It may be in fact that in the circumstances it would be advisable to exclude the intermediate court from constitutional jurisdiction but there are always difficulties about that because of the fact that in cases very often there are constitutional issues and other issues, and sorting them out and deciding how they are dealt with separately is already becoming a bit of a problem under our present system."

(33) "This intermediate court will of course absorb all the appellate work, and would take over the present Full Bench appeals, Full Courts. The Full Courts would disappear as I said and those appeals would be a large segment of the work of the intermediate court. Thank you, Mr Chairman."

(34) "**CHAIRMAN**: Judge Corbett, may I just ask, the question of leave to appeal from the Intermediate Court of Appeal to the AD, do you envisage that that application should be made to the AD itself?

CORBETT CJ: Yes."

(35) "**LEON J**: With regard to the workload in criminal cases, do you think that the abolition of the death sentence or the declaring of the death sentence as being unconstitutional, which has been done, and presumably will continue as far as I know but I am not sure about the final Constitution, might not reduce significantly the number of criminal appeals?

CORBETT CJ: It will, I suppose, reduce the number of criminal appeals in the sense that the automatic right of appeal presumably will fall away or should fall away but of course there still will be a large number of criminal appeals in what used to be capital cases on the question of verdict and also against sentence."

(36) "**LEON J**: The other matter I wanted to put to you, which I do very tentatively because it is only information that has come to my notice very recently, I understand that the Johannesburg Bar is in the process of setting up an Arbitration Centre in Sandton. I am told by a senior member of the Natal Bar it is expected that similar centres will be set up in the large cities within the

next three years. It is anticipated, so I am told, that more and more cases will go to arbitration, and that in many contracts provision for arbitration will be made. If this correct, and I express this view very tentatively of course, it would seem to follow that the work of the Provincial Divisions in civil cases will be reduced. I know this is only very tentative but if this was so, and if we were now to recommend the creation of an Intermediate Court of Appeal, might we not perhaps possibly be jumping the gun?

(37) "**CORBETT CJ**: I personally do not think so, I have had discussions, just informal discussions, with some of the leading personalities who have been involved in the creation of this Mediation Centre in the Gauteng area. I asked what sort of proportion of civil litigation would go in that direction, and without giving any sort of figures or anything like that, the indication was that it would be quite a small proportion. Obviously it will, even a small proportion will reduce the work. On the other hand I can foresee in the next 10, 15, 20 years our economy burgeoning to such an extent that I can only see the overall *quantum* of particularly civil work increasing at a very rapid rate. So I do not think it will materially affect the proposition that an Intermediate Court of Appeal is desirable."

(38) "**LEON J**: The last matter, if I may just raise this with you, Chief Justice, and it is a matter about which I do not know a great deal, so I do so with some hesitation but from what I have read it would seem at the moment that the Constitutional Court seems to be in some cases acting as a Court of original jurisdiction. I do not know if this is correct or not, where cases go direct to the Constitutional Court either by them being, by the court assuming jurisdiction or matters being referred to it by some other court and this court is in its infancy, so I do not know what procedures are being laid down. Could this have any impact on your proposal also?

(39) "**CORBETT CJ**: I cannot … speak with much authority as to the position in the Constitutional Court. Of course there would be a large number of referrals, I imagine, in cases where the issue was really within the exclusive jurisdiction of the Constitutional Court as for example the validity of an Act of Parliament or a provision in an Act of Parliament. But that of course would start, I imagine, in the Provincial Division and then be referred. I do not think, assuming the Appellate Division is given a constitutional jurisdiction, I still think that despite these referrals taking place, there would be a large segment of that constitutional work which would come to the Appellate Division possibly on its way through to the Constitutional Court ultimately. The trouble is, and if I may just add this point, that it is not infrequent that the case involves both non-constitutional and constitutional issues. So at any rate as far as the non-constitutional issue is concerned that still has to come *via* the ordinary route."

(40) "**MR MALULEKE**: Mr Justice Corbett, can I get back to one point I wish to find out? If we were to propose the establishment of these intermediate courts of appeal in both civil matters and criminal matters, would you still insist that the leave to appeal from a single judge to the intermediate court be obtained, or would you give the litigant an automatic right of appeal in civil matters?

CORBETT CJ: I have given that matter some thought. I am not quite sure what the answer is. I think on balance I am at the moment inclined to require leave on the same sort of basis as is at present the system, namely that your original application would be to the trial court, and on a trial court refusing, then a petition … or an application to the court of appeal."

(41) "What sways me in that regard is this … let me just point out that until relatively recently, I suppose the middle eighties or early eighties, there was a right of appeal in civil matters to the Appellate Division from the Provincial Divisions without leave in virtually every case except in interlocutory matters and things like that. One did apprehend that it 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 to bear on the other litigant.

(42) "This was particularly evident I thought in a lot of these MVA claims where the insurance company found it convenient to lodge an appeal, and in that way put pressure on the appellant. So those sorts of abuses I think are eliminated by requiring leave, and of course you get the odd, apart from sort of tactical defendant, you do get the odd crank who brings actions. To allow that type of person an unlimited right of appeal I think is dangerous. So on balance I am inclined to favour the retention of a leave system"

(43) "**CORBETT CJ**: I think perhaps I did not emphasise sufficiently before that I visualise as part of the procedure of this Intermediate Court of Appeal what I have called a leap-frogging procedure. In other words not every case that today would come before the Appellate Division would necessarily come before the Intermediate Court of Appeal."

(44) "If a case clearly depends entirely upon a substantial point of law, then the leap-frogging procedure would come into operation. If the case involves fact and law, then it seems appropriate to me that that should go to the intermediate Court which would then give its decision on both fact and law."

(45) "But if the necessary leave were to be granted, that could then go to the Appellate Division on the question of law only, and then the Appellate Division would take as accepted and the parties would have proceed on that basis, that the findings of fact of the Intermediate Court would be final."

(46) "Then I just want to make this point on the merits … of an Intermediate Court or the Full Bench procedure, and that is this: That the members of the Intermediate Court would be specially chosen for the skill and expertise and experience which they have in adjudicating cases; and one would not necessarily find the same skill or degree of skill in a Full Bench composition, particularly in a smaller division."

(47) "My colleague, Judge Harms, is *au fait* with the proposals that we are in the process of trying to formulate for improving the state of the records, if I may put it that way … and if the Commission would like to hear briefly his ideas on the subject, he would be happy to address the Commission."

(XXIII) **THE HON MR JUSTICE L T C HARMS OF THE APPELLATE DIVISION**

In the course of his oral submissions to the Commission at Bloemfontein on 16 March 1996, some of the points made by Harms JA were the following:-

(1) "**HARMS JA**: Thank you, Mr Chair, Members of the Commission. I do not wish to bore you with the details of what I am in the process of proposing but the rules will, to reduce the reading work and to reduce costs, on my proposal involve, *inter alia*, the following: That an application for leave to appeal shall not be accompanied by the record or portions of the record or travel into extraneous matters. This is simply an application for leave to appeal which is not included in the reading matter referred to in the statistics by the Chief Justice. As you, Mr Chair, will know, these applications for leave to appeal consist nowadays normally of the whole record of the proceedings in the court below. We wish to exclude that as a matter of rule."

(2) "Another aspect is that records shall not contain argument and opening addresses. I had this term a record with 100 pages of opening address in the record, formal documents, discovery affidavits, duplicates and documents not proved or admitted. But to give this prohibition some teeth, I am proposing that the registrar shall, *mero motu*, disallow these costs also between attorney and own client of any such documents. In other words that it will not be necessary for the court every time to make that type of order."

(3) "A further suggestion, and this we have from the English Court of Appeal, is to make allowance for a core bundle of documents which, if the nature of the appeal allows it, must be prepared and the core bundle will contain the material documents of the case in a proper, preferably chronological, sequence. I think that is probably one of the most difficult parts of reading records, to find the documents in any sensible order."

(4) "Then if a decision on appeal is likely to turn exclusively on a question of law, the appellant shall within ten days of noting the appeal request the respondent's consent to submit that question in the form of a special case; and the respondent must respond within ten days, and either agree or state its reasons for not agreeing. The request and the respondent's response shall form part of the record. The purpose of this is to enable the Court to make a special order

of costs if either of the parties was unreasonable in this regard."

(5) "Then further we wish to place another duty upon the attorneys involved. Whenever the decision of a matter on appeal is likely to turn exclusively on part of the record, the appellant shall within ten days request consent to omit the unnecessary parts and once again the same procedure will follow. The respondent shall have ten days to agree or state its reason for not agreeing, and the request and the response shall form part of the record; and the Court may make a special order as to costs."

(6) "As far as heads of argument are concerned, we believe our work will be easier if we can require counsel to prepare a chronology in every appeal. And then we wish to limit, actually it is my wish, the length of heads of argument. We note that the English Court of Appeal has a limit, I think, of ten pages on heads of arguments. To give you an idea of the unnecessary elaboration we experience: This term two cases were set down for the same day. They dealt with the same facts and the same section of the Income Tax Act. In the one case the appellant's heads ran to 16 pages; in the other the appellant's heads amounted to 174 pages, plus annexures … That is more or less, in a very abbreviated form, the direction in which our thinking is going at the moment."

(7) "May I be allowed to add one or two remarks to what the Chief Justice has said? My understanding is that appeals from the Land Claims Court will be automatic appeals to the Appellate Division. My information from a member of that court is that those cases will be extremely difficult cases, more or less in the nature of expropriation cases, plus discretions involved. They will place a tremendous extra load upon the Appellate Division."

(8) "Then obviously another aspect which relates to the death penalty is all the old death penalty cases will probably be remitted to the courts of first instance and may come back, and there are a tremendous number of them."

(9) "Could I just then, as far as the arbitration matters are concerned, offer a personal opinion. A party who is prepared to enter into an arbitration agreement, is not a party who would have appealed. It is inherent in an arbitration agreement that you are abandoning the right of appeal in advance. It is only those very willing defendants who agree to arbitration, so I do not believe that it will in the end have a material effect upon the workload. Thank

you.”

(XXIV) **THE HON MR JUSTICE C F ELOFF, JUDGE PRESIDENT OF THE TRANSVAAL PROVINCIAL DIVISION**

In the course of his oral submissions to the Commission at Bloemfontein on 16 March 1996, some of the points made by the learned Judge President were the following:-

(1) "**ELOFF JP**: Before I come to my main thesis, may I, before I forget it, touch on a matter mentioned by a Member and that concerns the question whether there should be a requirement of leave to appeal in civil matters also."

(2) "I strongly urge that that should be so because experience has shown that if you do not set that requirement, it opens the door for a large number of litigants who drag their heels and seek to gain time by appealing. I can assure you that in the division with which I have been connected for 23 years there are a large number of defendants who are sued and against whom summary judgment is sought, only if summary judgment is granted they ask for leave to appeal. It is refused most of the time, but if that requirement were not set, they would lodge an appeal, gain another nine months, and in that way frustrate the rights of the creditor."

(3) "You also have defendants who have spurious defences, or no defence at all, but who enter an appearance solely for the purpose of delay, gaining time by abusing the process of the court. The only safeguard to ensure that that does not happen is to require leave to appeal to be granted."

(4) "I can demonstrate that by mentioning to you that in the division over which I preside, the numbers of applications for leave to appeal by that sort of litigant are numerous, persons against whom summary judgment is entered, persons who put up a spurious defence: The suretyship had not been completed when he signed it. It is found to be untrue, but he appeals and gains time. It is not an undue hardship. The application for leave to appeal is dealt with expeditiously; and there is the added safeguard that, should the Judge refuse leave to appeal, then the remedy exists of another tribunal granting leave."

(5) "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. But I mention that out of order, forgive me for presenting my case in this way."

(6) "Coming to the main thesis with which you are concerned, I want first of all to recommend that caution should be exercised in deciding whether or not to establish an intermediate court of appeal because we are dealing with a number of unknown factors and problems which cannot at this stage be evaluated."

(7) "Some of those have been mentioned, and may I just call to your attention and emphasise, Chairperson, that the main rationale, the main reason why it is thought that there should be an Intermediate Court of Appeal is that the Court of Appeal, the Appellate Division in Bloemfontein should be relieved of dealing with factual issues and should be free to deal only with points of law and points of principle and that the workload should be reduced."

(8) "So what we are concerned with is the number of appeals. Might I, for want of a better term, simply refer to them generally as factual appeals. The question which we have to consider is how many factual appeals are likely to reach the Appellate Division at this stage?"

(9) "Reference was made to the death sentence cases, and you were informed by the Chief Justice that the Department is in the process of planning legislation which will probably, if accepted and becomes law, mean that the trial Judges who heard, imposed the death sentence will be charged with the function of again considering an appropriate sentence in the light of the fact that the death sentence is no longer a competent sentence."

(10) "Inevitably the sentence will probably be one of imprisonment. It is not as though all those cases are necessarily going to go to the Appellate Division because, as I understand the law, the free right of appeal without leave was confined to death sentence cases. Consequently, if a Judge in a particular case has again to consider the sentence, and he imposes say 20 years imprisonment, then that accused needs leave to appeal before the matter reaches the Appellate Division, and if the prospects are not adequate, then the matter will not go to the Appellate Division."

(11) "I need hardly emphasise that leave to appeal will not very easily be granted because sentence is discretionary and the court, in assessing the probabilities of success, will take into account that there is not that strong likelihood that an appeal will be successful."

(12) "Secondly, reference was made to the question of arbitration, Johannesburg, and whether that will not limit the number of cases actually fought and cases which may ultimately land up in Bloemfontein. Here is another unknown quantity. My own assessment is that that will not take care of the mainstream of litigation. Arbitration, neither here nor in London has had that effect, and it will be a few select cases."

(13) "In the Witwatersrand Local Division 35 000 actions are entered per year. You have only to make a few little calculations to realise that a very small percentage of those can be coped with by arbitration. So the mainstream of litigation will still ensue but it is still guess-work whether that will bring about an effectual limitation on the number of cases which will ultimately land up in the superior courts and then ultimately possibly in the Appellate Division."

(14) "So too the Land Claims Court cases. One does not at this stage know what that is going to entail. My information is that the Land Claims Court will only probably start its session in April of this year. The proceedings are likely to be protracted. They would probably take the form of … expropriation proceedings, fixing values and the like. These things are necessarily complicated but it is not likely that any of those appeals would reach the Appellate Division within two or three years. Also this is a transitory arrangement because I believe the Land Claims Court was set up for, I think, five years and that will pass. So I raise for consideration whether one needs make legislation, recommend legislation which will have a permanent effect to deal with a transitory matter such as that."

(15) "I recognise, with great respect, the views expressed by the Chief Justice that it is advisable that the Judges of Appeal should be left to deal with matters of principle … but one has also to bear in mind what the consequence of the establishment of such a court is going to be on the Provincial Divisions. Various alternatives were mooted, one suggestion by the Chief Justice is that this Court should now hear appeals on all decisions of Judges, civil, criminal,

also then of single Judges in civil matters. Now he mentions also that 66% to 70% of those emanate from the division of which I am Judge President."

(16) "If that is implemented and if the Courts have to sit in either in Johannesburg or Pretoria to cater for that sort of thing, it is going to mean that a new burden is going to be cast on the division which I administer. It is going to mean the need probably to have as many as four to six additional Judges appointed. So it may be to the advantage of the Appellate Division but equally important too is the functioning of the Provincial Divisions which carry an enormous workload, and are overworked and would create the need too in these difficult times of finding additional Judges."

(17) "Chairperson, one has to bear in mind that for this type of responsible work you need Senior Judges. I need hardly stress that it is in this time very difficult to find suitable judicial material, so while it may serve the purposes of the Appellate Division, it is going to operate to the detriment of the Provincial Divisions. I suggest that it is best to let matters lie as they are for the time being and first see what the needs are, how things develop."

(18) "Turning then to the suggestion that also decisions in civil matters should be dealt with by an Intermediate Court of Appeal, there is a distinct advantage in retaining the present system whereby in civil matters the appeal is to a Full Bench, and that is the element of flexibility which my be wanting if you have a Court of Appeal."

(19) "It is very often necessary that an appeal should be heard within a matter of days after the decision was given. An instance such as that arose in the Witwatersrand Local Division last year where the Judge gave a decision in a Motion Court matter, it concerned a very important commercial practice, issue, and needed to be dealt with expeditiously. The Judge gave his order, I think, on a Tuesday; on Thursday he granted leave to appeal and I set up a Full Bench to hear the matter the next week."

(20) "Another instance that I can give you. There was a strike in Transvaal two years ago. The employer's organisation contended that the strike was illegal. It brought an application to have the strike declared illegal. It came before a single Judge who upheld a point of law, and struck the matter off the roll. The parties wanted to have leave to appeal, that strike was costing the country R20

million a day. The Judge gave leave to appeal. The parties approached me, mentioning the difficulties from every party's point of view; and the appeal was heard ten days later. That sort of flexibility occurs where the nerve system and the control over appeals of that sort lies and remains with the Provincial Division."

(21) "So summarising my thesis, Chairperson, my main view is that this Commission should not recommend statutory measures now. It should first wait and see what developments are, first get updated clarity on figures, statistics, needs and the like. It is unfortunate that in the meantime the Appellate Division will be burdened and hopfully Judge Harms's idea of cutting down the records will serve a useful purpose. It certainly is a problem with which we are also concerned in the Provincial Division. In hearing the Full Bench appeals we get burdened with records which contain a great deal of unimportant matter."

(22) "(a) I recommend that we should first wait and see. (b) Secondly, if there is to be an Intermediate Court of Appeal, then I strongly recommend, Chairperson, it should be a court dealing with criminal matters only, and (c) Thirdly, may I emphasise the importance of leave to appeal. Thank you."

(23) "**CHAIRMAN**: … can it be said that the present system of full court appeals works smoothly and successfully?

ELOFF JP: It works smoothly and successfully. The odd case where the record is a long one, I am notified of that, I make timeous arrangements for those Judges to be given the record, to be given heads of argument, and that is a problem. Chairperson, however, what needs to be done is that my judicial complement should be increased. I am taking steps in regard to that because the ideal position will be, where a Full Bench has to sit on a matter of some complexity and involving a lot of reading, that those Judges should be given time. In the present system that is not always possible but I am hopeful that my complement will be increased so that I can allow those Judges the luxury of adequate time for reading."

(XXV) **THE HON MR JUSTICE C E L BECK, JUDGE PRESIDENT OF THE TRANSKEI SUPREME COURT**

In the course of his oral submissions to the Commission at Bloemfontein on 16 March 1996, some of the points made by the learned Judge President were the following:-

(1) "**BECK JP**: There is only one little point that I wanted to make and I can make it very briefly."

(2) "I just wanted to make the point that Umtata has had the benefit, or the Transkeians had the benefit, of having all appeals heard in Umtata for 20 years now; and it is an impoverished area. If any appeals were to be directed to centres further away such as Grahamstown or Port Elizabeth or Cape Town or wherever this circuit is going to sit if it is not going to sit in Umtata, it will be a matter that will be deeply resented."

(3) "May I just make then finally one comment upon the observations made by Judge Eloff? I take the point immediately that in a large division like the Transvaal where you have a wide spread of expertise amongst the Judges of your Bench, it is very much easier to have a Full Bench appeal and have it mounted before Judges who have the necessary expertise than would be the case if you had an intermediate court. The opposite of course is true of a small division such as the Transkei where you do not have that spread of expertise, and in a small division like that it would be beneficial to have an intermediate court which would probably handle the appeals better than we could. Thank you, that is really all I wanted to say."

(XXVI) **THE HON MR JUSTICE N ZIETSMAN, JUDGE PRESIDENT OF THE EASTERN CAPE DIVISION**

In the course of his oral submissions to the Commission at Bloemfontein on 16 March 1996, some of the points made by the learned Judge President were the following:-

(1) "**ZIETSMAN JP**: I thank you, Mr Chair, just very briefly the view of the Eastern Cape generally. We had quite serious problems with the original suggestions by the Chief Justice but these have now been changed, and we have no serious problems with his later suggestion. We in the Eastern Cape generally are in favour of Intermediate Courts of Appeal. We feel generally that in particular the Appellate Division Judges should not have to read lengthy records dealing with factual disputes. We feel that Judges who have reached that position should not have to spend most of their time wading through lengthy records and worrying about points of fact. We feel that those Judges should be able to concentrate on the legal issues and settle the difficult legal points."

(2) We are against the idea of continually increasing the size of the Appellate Division. We feel that this can cause problems which should not arise. We would favour a small Appellate Division eventually dealing, as I say, purely with important points of law and dealing with matters that would go to that court purely after leave of that court has been obtained."

(3) "As far as the number of Judges that would be required for the intermediate courts, 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 of 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."

(4) "**CHAIRMAN**: Would you like tentatively to suggest figures in this connection, Judge Zietsman?

ZIETSMAN JP: Just to give you just very brief figures, obviously we have one of the smallest courts and in 1994 our Full Bench Appeals, we had 9 civil and two criminal Full Bench Appeals; and in the year 1995 we had 12 civil and

6 criminal. Now I do not know how the figures of the other divisions would compare, and I do not know how many of these Full Bench Appeals eventually went to the Appellate Division anyway but if the present numbers of the Appellate Division are 18, including the Chief Justice, then I think certainly a greater number of Judges would be required first of all because I think the Intermediate Court of Appeal would have more work to handle, and secondly, because it appears that the Appellate Division is really not able to handle the amount of work it has at the moment."

(5) "Then just the final point, in the Eastern Cape, as I understand also in the Transvaal and probably everywhere else, the principle of appeals to the Full Bench has worked very well. There has been no problem as far as that is concerned but I do think or I have certainly heard that there is a sort of a layman's perception that this should not happen, that … (intervenes)

CHAIRMAN: The hob-nobbing in the tea-room?

ZIETSMAN JP: Yes, that appeals should not be heard by the Judges who meet, have daily contact with the Judge against whom the appeal is brought. In actual fact in practice this is no problem at all but there is just perhaps this layman's perception that this should not happen. I think that is all I wish to suggest."

(XXVII) **THE HON MR JUSTICE I G FARLAM OF THE CAPE OF GOOD HOPE PROVINCIAL DIVISION**

In the course of his oral submissions to the Commission at Bloemfontein on 16 March 1996, some of the points made by Farlam J were the following:-

(1) "**FARLAM J**: There are a few points that I want to make, the first is, we have prepared a memorandum, the Judge President and I, which we have distributed, I think, and Members of the Commission have it.

CHAIRMAN: Yes, thank you.

FARLAM J: A good deal of what is said in the memorandum has in fact been said already by the Chief Justice and it is not necessary to repeat it."

(2) "Points I would like to stress though, and that is despite the remarks by Judge Eloff, we remain convinced that an Intermediate Court should be set up as a matter of priority, and we say that because it appears from what the Chief Justice has said, and the statistics that we have obtained, that the position in the Appellate Division at the moment appears to be intolerable. The Appellate Division appears to have an unmanageable workload."

(3) "… the Appellate Division as now constituted is in fact too big and even if we are to wait two years, if the work continues and nothing is done in the interim, presumably on an *ad hoc* basis, more Judges of Appeal will have to be appointed. What we should really be aiming for, we would respectfully suggest, is the opposite. A scaling down of the size for the Appellate Division to, the suggestion is made, a number of approximately 10 or 11."

(4) "The further difficulty is that within the two year period the new Constitutional jurisdiction is going to come into the Appellate Division. Perhaps not many cases from a volume point of view, but as the Chief Justice pointed out in his memorandum, complex matters are going to require careful consideration, detailed argument in respect also of comparative material. That is going to make further inroads into the Appellate Division's time. And so the basic point I want to make is that something must be done about the problem as a matter of high priority."

(5) "The only way that Full Bench appeals can be dealt with in the Cape, the Judge President tried another approach which did not work, is to allocate all the Full Bench appeals to the Judges at the beginning of the recess so they can read them during the recess and then they are all set down to be dealt with by a number of courts or Full Benches in the first week of term."

(6) "That is the only way that the Judge President has found it is possible for Full Bench appeals to get the attention that they deserve, because 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."

(7) "Now one of the points we make is that experience shows that it is not easy in a busy Provincial Division for Judges to combine detailed consideration of appeal cases with the ordinary first instance work that has to be done from day to day.

LEON J: In Natal that problem was overcome many years ago by the same system as you are using in the Cape now by having these appeals heard at the beginning of term and giving the Judges the opportunity of reading the records during the … (inaudible).

FARLAM J: I would be interested to hear from Judge Broome how it works in practice in Natal … (intervenes).

LEON J: I do not know whether that is still the position. Judge Broome will be able to know because he is much more up to date on this than I am …"

(8) "**FARLAM J**: Yes, we have a problem in the Cape, and I would suspect it is a problem that other Divisions are either having or going to have, and that is that we cannot arrange our roll the way the Appellate Division does where an attempt is made to dispose of all matters of this term by the end of this term. Because very often Judges sit right up to the end of the last day of term. They are unable to deal with reserved judgments as they reserve them, because they go virtually straight into the next case."

(9) "So that the recesses are used for the writing, that is why we call them recesses for the writing of reserved judgments, and also for preparing for the work for the new term. Now, there is a limit to the amount of reading that you can do for Full Bench appeals in the first day of next term if you have also got four or

five or six reserved judgments to write which could not be done normally in term time because, (a) you were hearing other cases and, (b) you were in any event preparing appeals for the following Friday."

(10) "So the system that you have outlined that you also have in Natal, which we also have in the Cape, only takes you so far and the situation has almost been reached where it is, I would not say breaking down yet, but clearly that is something which is foreseeable in the not too distant future."

(XXVIII) **THE HON MR JUSTICE E K W LICHTENBERG, JUDGE PRESIDENT OF THE ORANGE FREE STATE PROVINCIAL DIVISION**

In the course of his oral submissions to the Commission at Bloemfontein on 16 March 1996, some of the points made by the learned Judge President were the following:-

(1) "**LICHTENBERG JP**: Thank you Mr Chairman, members of the Commission. As I have said in my memorandum to the Commission I have absolutely nothing to add to it and would not be likely to have to address the Commission. Having been invited to do so, I would just point out that my memorandum is dated 6 March and what I have said in it was therefore said without having had the advantage of listening to what has been submitted this morning."

(2) "I am, however, glad to see that my recommendation is practically entirely on all fours with what the learned Chief Justice has set out this morning. In other words, there is an absolute need for an Intermediate Court of Appeal. It must be constituted as soon as possible. It has to be done because of the unmanageable workload of the AD and the figures that the learned Chief Justice has given this morning are incontrovertible."

(3) "I was glad to hear this morning that the Chief Justice has now taken a very firm stand that the Intermediate Court of Appeal should not be an *ad hoc* court of appeal, but a separate court of appeal consisting of separate appointees *qua* that court only."

(4) "As far as the cost factor is concerned, Mr Justice Farlam has dealt with that, to my mind, admirably. It is also to be off-set, if it costs a lot of money, by the fact that if you do not have it you have to have so many extra acting Judges in the Provincial Divisions which also costs a lot of money."

(XXIX) **THE HON MR JUSTICE R M MARAIS OF THE APPELLATE DIVISION**

In the course of his oral submissions to the Commission at Bloemfontein on 16 March 1996, some of the points made by Marais JA were the following:-

(1) "**MARAIS JA**: … as I see it the question really is, put aside what the future may show and look at the existing situation. Is there a case to be made for this Court, not just a case but in fact a pressing case to be made for the institution of this court?"

(2) "I think it is of critical importance that that court [the court at the apex of the system] does not grow too large. With great respect I consider it is already too large."

(3) "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, it also of course means that one has to search for personnel for a court like that and the bigger the Court gets the more difficult it may be to find appropriate personnel for that court."

(4) "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) "I appreciate that there are cases in which the law is so inextricably intertwined with subtle questions of fact that you will never reach a stage where the Appellate Division will never have to decide a question of fact, that is a pipe dream, but at least one can eliminate a great deal of work which is really just

fact-finding work, and which that Court should not be doing."

(6) "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."

(7) "But one would have to temper one's estimate by the consideration that in that court the proposal is that only three Judges sit, whereas in the Appellate Division in many of the cases, if not most of the cases, five Judges sit. So obviously you can do with fewer people in the Intermediate Court than you can do in the Appellate Division."

(8) "On the question whether or not the Intermediate Court should be an *ad hoc* court as was originally proposed or a permanent court as is now proposed, I too share the view that it should be a permanent court and if I may just add an observation of my own as to why I believe that to be so, I think that what one may call the ethos of the court and the *esprit de corps* that exists amongst the members of the court is an intangible thing, but it is very important, and I do not see how that kind of ethos and that kind of *esprit de corps* can develop when you have itinerant courts composed of *ad hoc* constituted personnel."

(9) "On the question of whether or not the existing system of dealing with Full Bench appeals is satisfactory. Opinions obviously differ in regard to that. My own opinion is that it is not really satisfactory for the reasons that others have mentioned. I agree with Mr Justice Farlam that it really is not desirable that Judges whose work is primarily work, first instance work, should really have to cope with this kind of appellate work and may I remind the Commission that the duties of a Judge of first instance also comprehend such things as reading fairly large volumes of reviews which come from the Magistrates Court."

(10) Then there is the problem in the smaller divisions, in the Full Bench system, of assembling appropriate courts to suit particular cases. In a big division where there is a bigger spread of expertise available in regard to specialised fields of the law it does not present such a problem, but in the smaller divisions it may not be easy to put together a court where at least one of the members of the court has special expertise in the particular field that arises."

(XXX) **THE HON MR JUSTICE B de V PICKARD, JUDGE PRESIDENT OF THE CISKEI SUPREME COURT**

In the course of his oral submissions to the Commission at Bloemfontein on 16 March 1996, some of the points made by the learned Judge President were the following:-

(1) "**PICKARD JP**: Thank you Mr Chairman. May I before I make any real suggestions to this Commission, and I will be very brief, just deal with some matters that have been raised with which I am not altogether happy."

(2) "First of all in the written submissions I saw before I came here and also in some of the oral representations this morning, it has been suggested that there may be a perception that full court appeals and Judges hob-nobbing in the tea-room makes the validity or the acceptability of such decisions less acceptable in the public view."

(3) "Now, first of all, I have never heard that perception raised. Secondly, I do not believe that it creates any problem in the functioning of the courts. The fact that Judges may know each other well, have frequent contact would, with respect, apply to many Judges of the Provincial Divisions in regard to Judges of the Appellate Division, then there would be less tea drinking, but associations we will have, we all come from a fraternity of lawyers where we got to know each other and I think the public has learned to live, and certainly the Judges have learned to live with the fact that we can divorce our minds from those issues."

(4) "Another matter that I have discovered in the discussions … is that on the question of leave to appeal there seems to be a vast difference in approach between Judges and Judges; and it seems to me possibly even between Divisions and Divisions."

(5) "I do not want to make much of this, but it seems to me that a lot of the problems that the Appellate Division presently experiences may result from an unnecessary granting of leave to appeal in many instances. At the end of the day refusal of leave to appeal is in any event subject to a decision on petition to the Chief Justice, and frankly I personally … have often gained the

impression that leave is sometimes granted too easily. That is a matter which can be addressed in another fashion, namely by consultation between possibly Judges generally and the Appeal Court Judges in order to determine some policy which is probably better described than a mere reasonable prospect of success with very little meat around the bone. I do not want to take that any further."

(6) "The third issue that I mention in passing is that I must associate myself also with Judge Beck of the Transkei Division who says that he has some difficulty that all these years appeals were heard in Umtata, and any effort to move that out of Umtata creates unhappiness for the people in Umtata. I must associate myself with that because that applies also to my area of jurisdiction."

(7) "… it may be accepted Mr Chair that we agree whole-heartedly with the principle that the Appellate Division should be as small as is necessary and possible, taking into account all the other considerations, and that it should not be burdened with having to read lengthy records on factual issues. I have no difficulty with that and I think that is common cause with everybody I have heard today."

(8) "The difficulty is this, however, is the answer in alleviating that problem one of creating another court? All that that in my respectful view does is to create some lesser Appeal Court to take away that portion of the work that the AD should not be doing, and in return for that in order to justify that, removing full courts from the Provincial Division, full court appeals from the Provincial Divisions. In order to do that Judges have to be appointed."

(9) "Either one appoints more Judges to the AD which is not advisable or one must make Provincial Judges available to do that work, and I do not think it can ever be suggested that the Intermediate Appeal Court will be constituted of anything but Judges drawn from the Provincial Divisions."

(10) "Whether they are drawn on a permanent basis, whether they are drawn with status A or status B, the people who are going to have to do the work are going to be senior Judges from the Provincial Divisions. Once that happens and that work is done by those people, a shortage of manpower must of necessity occur in the Provincial Divisions. The work is there, it has to be done."

(11) "Now what concerns me most is why we should create with respect a new court for that purpose. We have heard and my experience is that full court appeals have worked rather well. Some Divisions have raised the difficulty about reading of records which I shall deal with, but it has never been suggested that the Provincial Division full courts are not up to the job in terms of quality. I have never heard that suggestion made by anybody."

(12) "It seems to me that rather than to create an Intermediate Court one should follow Mr Justice Eloff's suggestion and say let us see what the future holds in terms of workload so that we do not create a monster which we may later on have difficulty in destroying."

(13) "I have another problem with Intermediate Court. Taking into account the increased jurisdiction of Magistrates Courts, we have heard them all mentioned in terms of criminal, of civil jurisdiction, we look at the increased Regional Court jurisdictions, we look at all the other Family Courts and all those issues that have been raised which may possibly reduce the workload of the Provincial Divisions, one comes to the conclusion that in the process save for very important matters there is one distinct possibility, namely that the Provincial Divisions will become less and less and less courts of first instance, and by all logical predictions, will then become more and more and more Courts of Appeal …"

(14) "The sound approach would be to wait and see, but as a matter of some urgency to alleviate the Appellate Division by rather giving the full court of the Provincial Divisions that final jurisdiction which has been envisaged for the Intermediary Courts."

(XXXI) **THE HON MR JUSTICE J J BROOME, DEPUTY JUDGE PRESIDENT OF THE NATAL PROVINCIAL DIVISION**

In the course of his oral submissions to the Commission at Bloemfontein on 16 March 1996, some of the points made by the learned Deputy Judge President were the following:-

(1) "**BROOM DJP**: Thank you Mr Chair. At the outset may I say that our Judge President apologises for not being here today. I think that you are aware that circumstances beyond his control prevent him from being here.

CHAIRMAN: We wish him better health."

(2) "**BROOME DJP**: Thank you, I will convey that to him. Just a few observations that I would like to make. The first is the one that appears common cause and that is that we entirely agree that the work of the AD should be confined to important questions of law, and therefore that there should be fewer Judges ultimately in the Appeal Court, that at present it is too big."

(3) "Secondly, I would like to think that in the short term their work will not increase at the rate at which it has increased in the past. I say this with particular reference to criminal cases. The abolition of the death sentence has removed that large block of matters, and I would like to think that the practice in Natal is to virtually exclude appeals to the Appellate Division in the so-called factual appeals. I cannot think of one criminal case this last year in respect of which leave to the Appellate Division has been granted."

(4) "The third matter relates to Full Bench appeals. I was asked to deal with the Natal practice. 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. Six Judges are allocated to that duty, but during that period ordinary unopposed motions are dealt with by one of the Judges each day and on two of the days opposed motions are dealt with and on two of the days each week the ordinary two Judge criminal appeals are dealt with. But that affords the Judges concerned the opportunity to read the record during the preceding recesses."

(5) "This however, is not sufficient time to enable all the three Judge appeals to be dealt with, and I estimate two or three a month follow thereafter sneaked in here and there throughout the year. Now these do make things difficult to adjust the roll, because at that time we only have five Judges on full court duty. So these three Judge appeals held, which have to be heard during the course of the year do create problems."

(6) "Now on this matter of three Judge appeals I was very interested to hear what Mr Justice Pickard had to say and I endorse his sentiments whole-heartedly. I resent this perception of an appellant starting off as an odds on outsider because of some local bias. That just does not happen."

(7) "The fourth matter I would mention is that it seems to me that whichever way one looks at the whole set-up, this creation of an Intermediate Court of Appeal or the jacking up of the present three Judge system, elevating it to a virtual final court of appeal, whatever ultimately happens it is all going to take time and I think it will take years to implement."

(8) "So the question arises as to what is to be done in the meantime, and here I am in complete sympathy and agreement with the Chief Justice and with Mr Justice Harms on the absurd length of appeal records, but I wish to say this, that in my opinion to a great extent we have only ourselves to blame."

(9) "… when did a Judge last at the end of a trial say, thank you very much, I enter judgment for the plaintiff, but Mr So and So for the plaintiff you handed in a bundle of documents of 100 pages. You have referred to two pages of those documents; no costs for that bundle. Costs is the magic medicine that we just do not exploit enough. When did a Judge in a trial matter or a motion matter deprive a party of costs because a bundle of papers is not in chronological order?"

(10) "So I view with great enthusiasm the suggestions made by Mr Justice Harms on an amendment to the rules to deal with records in particular. My only request here is that any amendment follow through to an amendment in the rules of the Provincial Divisions as well, because already there is a disparity in the requirements of the AD and the requirements of the Provincial Divisions and the quality of records that that Appeal Court gets are not quite the quality we

get, and I would like to see more uniformity."

(XXXII) **ADV A J DICKSON, SC, ON BEHALF OF THE PIETERMARITZBURG BAR**

In the course of his oral submissions to the Commission at Durban on 30 March 1996 some of the points made by Adv Dickson, SC, were the following:-

(1) "… 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 if those practicalities were ironed out then, of course, appellate jurisdiction for Durban would be a very good idea."

(2) "It would mean litigants would be able to bring their appeals - that is from the Durban area - would be able to bring their appeals to Durban without the … disadvantages of two attorneys."

(3) "**LEON J**: Well, now, if Durban and Coast Local Division were to get appellate jurisdiction that would, presumably, assist greatly in the trial position in Pietermaritzburg, would it not?

MR DICKSON: Yes, it would, because there would be less appeals in Pietermaritzburg.

LEON J: That's right. There would be fewer appeals in Pietermaritzburg.

MR DICKSON: Yes.

LEON J: And therefore there'd be more time available for trials, one would assume.

MR DICKSON: Yes, except that if the appeal roll is five long or ten long, two Judges sit for that day. I don't know if I make my point clear.

LEON J: No, you do make your point.

MR DICKSON: And they're out of the trial roll anyway. If they sit for two appeals, they're out of the trial roll."

(4) "**CHAIRMAN**: More judges would have to sit in Durban and therefore the available number or pool for civil trials in Maritzburg would be proportionately less.

MR DICKSON: That is correct, Mr Chairman. I think what it boils down to is this. If I was a litigant, I would prefer my appeal to be heard closer to my home and if one takes the interests of the litigants as the primary concern, or the most important concern, then nothing can be said against having appellate jurisdiction in the Durban and Coast Local Division for the areas that it serves, but for practitioners and Judges I think it would probably be the worst thing that could happen. In fact, if I was a practitioner in Durban, that was the last thing that I would argue for."

(5) "**CHAIRMAN**: I'm sorry to interrupt you … You said if you were a practitioner in Durban, it's the very last thing you would wish.

MR DICKSON: Yes.

CHAIRMAN: Could you just briefly indicate your reasons?

MR DICKSON: Well, Mr Chairman, I'm a trial lawyer. I don't spend much time in the Appeal Court and it's of great concern to me to know that trials are being delayed or otherwise or being dealt with as quickly as possible, and if I knew that three or two Judges in Durban at any given time were to be taken out of the trial roll system, I would be concerned that the delays would start backing up on the trial roll. Of course the problem could be solved by the appointment of an additional two or three Judges in Durban. And not being taken away from Pietermaritzburg, of course. New Judges. That would solve the problem.

CHAIRMAN: Thank you."

(XXXIII) **THE HON MR JUSTICE H C J FLEMMING, DEPUTY JUDGE PRESIDENT OF THE WITWATERSRAND LOCAL DIVISION OF THE SUPREME COURT**

In the course of his oral submissions to the Commission at Midrand on 9 April 1996 some of the points made by Flemming DJP were the following:-

(1) "If a person is appointed to the Appellate Division it is part of his work to do also factual appeals and also the boring work as we all have to do, the unattractive work. As far as the place of sitting is concerned, if that is the problem there is no reason why the AD cannot at the moment send three of the judges up to Johannesburg or Pretoria for two months and to Cape Town for a month, we do not need a new structure for that. So from the point of view of the AD getting rid of what they do not like to do, I do not think there is really support or reason in substance except the preference to change the address. I find it unjustifiable."

(2) "But let me come back now to the full bench feature. Is this new Appeal Court going to sit like the AD for 16/18 weeks of a year or like the Provincial Divisions, for 40/42 weeks a year? I believe it is going to have that slower tempo of the Appellate Division which will be its status, we cannot afford it. Is it going to have the workload where our JP has introduced certain great effectiveness by asking you to have two, sometimes, full bench decisions on one day or is it going to be the workload of the AD which, for their finality, I think one needs more time. We will lose a lot of effectiveness if it is going to be the slower tempo of setting cases down."

(3) " But more importantly we have the adaptability and the efficacy of what I will call informality and administrative handling of the matter which we are going to lose. I will mention only one case, it is a matter which Judge Streicher on my right here heard, I think Friday this week will be two weeks ago involving a few million rand. That matter, an appeal was noted and the JP got together a full bench which hears that matter on 15 April. The JP has done that on various occasions where there is for instance a decision which makes the work of the Attorney-General impossible, within a week there is a full bench and the matter is set right."

(4) " Conflicting decisions are dealt with expeditiously. Parties appealing come to

the court within, it is a variable time, but let me say for argument's sake three months, if they appeal now it is probably next term, the JP says four months. It is much more acceptable to the parties than anything else. Now we lose a lot, we gain really little except that the AD judges feel that they are now only doing what they - excuse me for putting it in such a harsh way - but doing what they would like to do. You have changed the address of the problem but you have advanced no step further. This is really a proposal that I cannot support and if one goes into more detail about it, it gives all the more reason to say no thank you."

(XXXIV) **THE HON MR JUSTICE J F MYBURGH OF THE TRANSVAAL PROVINCIAL DIVISION OF THE SUPREME COURT**

In the course of his oral submissions to the Commission at Midrand on 9 April 1996 some of the points made by Myburgh J were the following:-

(1) "**MYBURGH J**: The next thing I would like to deal with on behalf of the Johannesburg judges is the question of the Intermediate Appeal Court.

CHAIRMAN: Before you address the Commission on that could you in a few words indicate what is your view, and perhaps the view of the Johannesburg judges, on whether the full bench appeals, whether that system has worked efficiently and whether it is fair to the judges who sit in the full court appeals?

MYBURGH J: Can I say immediately that these are my personal views, these are not views that have been canvassed and my own experience?

CHAIRMAN: Yes certainly."

(2) "**MYBURGH J**: I think that the present system of full bench appeals is entirely unsatisfactory. 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."

(3) "Well it works in this way that in your term you might have for example Tuesdays and Thursdays off between three sets of appeals in that week. You can sit on a Monday in a full bench appeal, Wednesday and Friday and the days you have off are Tuesday and Thursday but in the weeks preceding that your roll can be that you are in court every day and sometimes you are in court every day and sometimes you are not. Sometimes the civil trial roll collapses and of course you make the most of that by dealing with that. But once you are a full bench appeal judge sitting as a trial court for most of your life, you have to fit in those appeals as best you can."

(4) "Now it is not a great disadvantage if you are allocated the appeals and your

roll before a long vacation because you simply use part of your long vacation to prepare all your appeals. But the disadvantage is that, unlike in the Appellate Division, we do not get our heads of argument with the appeal so very often you are preparing that appeal, whether it is full bench or another does not matter for the moment, without heads so you do not know whether the matter is going to be settled or not, what the true issues are, is it an appeal on fact or on law, you really read that record cold except for the judgment and the notice of appeal."

(5) "**CHAIRMAN**: In practice when do counsels' heads arrive on your desk?

MYBURGH J: Well they usually arrive in accordance with the rules but that is very often just a couple of weeks before the appeal and you cannot leave it until then because you look at your roll and you see that in those two weeks you might be running a motion court, for example, or you might be in other appeals before you get to the full bench appeals and one of the items, one of the aspects of work that I do are labour appeals and in any one term I could have labour appeals which exceed 25 volumes, 30 volume labour appeal is common. So you can be sitting with that plus a full bench appeal of another 25 volumes."

(6) " There is simply not enough time allocated in the allocation of our roll to the preparation of full bench appeals I believe and I think that is a disadvantage of the present full bench system."

(7) "In regard to the Intermediate Appeal Court suggestion neither I nor any of my colleagues, except for the Judge President, have seen the Appellate Division's memorandum or the Chief Justice's memorandum. I believe, and so do my colleagues, that we should be given that memorandum and we should be asked to comment on it."

(8) "I think that the Transvaal judges would probably have many different views, I am not suggesting there is going to be one view at the end of the day but they are all views that I think the Commission should have, it is a matter of vital importance to the bench and, of course, to the administration of justice. Just in regard to Judge Friedman's views, if there is to be such a court I would wholeheartedly support the idea that it is a fulltime court and that that becomes the job of those judges. I think it would be impossible to fit into an ordinary judge's life to sit as an Intermediate Appeal Court."

(XXXV) **ADV W H G VAN DER LINDE ON BEHALF OF THE JOHANNESBURG BAR**

In the course of his oral submissions to the Commission at Midrand on 10 April 1996 some of the points made by Adv van der Linde were the following:-

(1) "As regards the Intermediate Courts of Appeal we support the notion of a permanent court in the GCB proposals and as argued by Mr Wallis in the transcript that we have read. We support the notion that it ought to be permanent judges but I suggest that that is really a function of manpower."

(2) "We do not know whether you can really afford to take judges away from the Provincial and Local Divisions and, if necessary, from the Appellate Division to staff permanent courts of appeal and if you cannot, then the answer we suggest is to make sure that your appeal judges do not sit on appeals coming from their own provinces."

(3) "That is the fundamental issue raised by Mr Wallis, the perception that although it is an appeal by a different court, it is still by judicial officers from the same bench and it is that perception which is addressed, if not by the appointment of permanent judges, then by a mechanism whereby the judges of appeal do not hear appeals from their own divisions."

(4) "**MR MALULEKE**: On this very point, before we pass because it might slip my mind, I would be very keen to hear what your views are on leave to appeal in the event of this Intermediate Court of Appeal being introduced?

MR VAN DER LINDE: Yes that is actually a point that I made a note of but did not raise. The submission that we make is that there ought to be an appeal as of right. The reason why we make that submission, it does not logically hang together, I know, but if you are going to forfeit your second appeal on leave, that is your appeal to the Appellate Division except in exceptional circumstances, then you ought to have at least one appeal but one as of right.

MR MALULEKE: Both civil and criminal matters?

MR VAN DER LINDE: Both civil and criminal, yes."

(XXXVI) **THE HON MR JUSTICE C F ELOFF, JUDGE PRESIDENT OF THE TRANSVAAL PROVINCIAL DIVISION, BY WAY OF REJOINDER**

By way of rejoinder, some of the points made by the learned Judge President at Midrand on 10 April 1996 were the following:-

(1) "From time to time in the course of the discussions on the Intermediate Court of Appeal and in other context to the question of leave to appeal, Advocate van der Linde suggested that if the Intermediate Court is there then there should be a right of appeal to that court without asking for leave; and he justified it on the basis that since litigants were deprived of the right of appeal to the Appellate Division, they should then have the right of appealing without leave."

(2) "I strongly oppose that. Experience has shown that the right of appeal is very often abused, it is abused by persons convicted of criminal offences just for a day in the sun. It is very often abused by persons who appeal against, say, a summary judgment finding, just to delay the evil day."

(3) "The system of granting, of requiring leave to appeal is a salutary one, it serves as a sieve, it serves as some sort of restriction on appeals which come on and there is always the safety valve that if the court *a quo* refuses leave it can be granted by a further body; but it is just not on to grant, to do away with an obligation of requiring leave to appeal in any appellate tribunal."

(4) "Judge Myburgh, in addressing you on the Intermediate Court of Appeal, said that he had certain views and other judges had other views about them. On Saturday a week I am arranging a meeting of all the Transvaal Judges, we do that once a quarter and I regret that when we were at Bloemfontein I did not have that opportunity of conferring with all the judges. You will understand with a division of 56 judges it is not possible on short notice. So with your leave I shall raise this as the item under discussion on that occasion and I shall report back to you. There clearly will be a divergence of opinion but you may wish to know how many judges are in favour of this, that or the other system.

CHAIRMAN: That would be of distinct value to the Commission and we shall be grateful in due course to receive a memorandum from you incorporating the possibly divergent views."

(XXXVII) **MR ATTORNEY R E CHALOM OF JOHANNESBURG**

In the course of his oral submissions to the Commission at Midrand on 11 April 1996 some of the points made by Mr Chalom were the following:-

(1) "Where there are numerous little courts with their own sphere of interest the court system will never be powerful and we will never have democracy. Fragmentation is unacceptable and undesirable. Rather there should be one unified set of rules of all courts with special chapters for specialised courts. Strengthen the courts, do not divide and rule them. The suggestion of an Intermediate Appellate Division was shot down by Flemming J. I agree with him. If there is a necessity to extend the Appellate Division then do so, but do not fragment it."

(2) "The idea of appellate judges only making decisions on questions of law seems to be an excuse for them to avoid the responsibility to make public statements on social, political and legal policy as will be enforced by the courts."

(XXXVIII) **MR ATTORNEY C K PETTY OF PRETORIA, A COUNCIL MEMBER OF THE TRANSVAAL LAW SOCIETY**

In the course of his oral submissions to the Commission at Midrand on 12 April 1996 some of the points made by Mr Petty were the following:-

(1) "Insofar as the other aspect on the questionnaire is concerned, relating to the Intermediate Appeal Court, in this regard also I am mandated by the ALS as well. And if I may deal with it briefly the ALS and the Transvaal Law Society's answers to the questions in the questionnaire are all in the affirmative. In other words, we support the idea of the court. We support what has been suggested by the questions. The ALS has specifically asked me to put to you that they feel that the name of the court should be called a Court of Appeal and that the judges should be elevated to that court from the existing Supreme Court judges."

(XII) **MR ATTORNEY A TUGENDHAFT OF JOHANNESBURG**

In the course of his oral submissions to the Commission at Midrand on 15 April 1996 some of the points made by Mr Tugendhaft were the following:-

(1) "I personally would be against an Intermediate Court if that is going to just create another tier. I would greatly support the establishment of another Appeal Court, not an Intermediate Appeal Court, but another Appeal Court which could alleviate the burden of the Appellate Division to hear matters where there are only factual issues in dispute; but that should then be the final court, there should be no right of leave to appeal to an Appellate Division and that court should not hear appeals where the main substance of the appeal is a legal issue. I would far prefer that to go directly to the Appellate Division so that we do not have another Intermediate Court delaying the proceedings."

(2) "**CHAIRMAN**: May I ask you to give the Commission your impressions about how the system of appeals from a single judge to the full court in the Witwatersrand Local Division, you are a Johannesburg attorney, how well or indifferently that is working at the moment?

MR TUGENDHAFT: I think it works well except it is much too slow and I think there again it would be quite helpful to know in advance from parties if you were to lose in the full bench, would you want to go and appeal to the Appellate Division and maybe in that instance could the case not go directly from the single judge to the Appellate Division instead of having to once again go through this intermediate stage. Often we have those kind of matters where the matter is of great importance to one or both of the litigants and they intend to exhaust all their remedies and yet we have this intermediate stage which really seems quite purposeless.

CHAIRMAN: So you would advocate a leapfrog system there?

MR TUGENDHAFT: Correct, where it is the intention of the party ultimately to go there."

(XL) **THE HON MR JUSTICE K VAN DIJKHORST OF THE TRANSVAAL PROVINCIAL DIVISION**

In the course of his oral submissions to the Commission at Midrand on 16 April 1996 some of the points made by van Dijkhorst J were the following:-

(1) "Die intermediêre appèl: Die huidige sisteem van volhowe werk en die pad na die appèlhof is oop. Waarom moet mens 'n intermediêre hof instel? My eerste vraag is: Is die appèlhof oorwerk? Dit moet die appèlhof beantwoord, maar as ons so praat met ons kollegas wat op die appèlhof sit is dat hy nie meer werk as ons nie. Hulle werk baie minder as ons."

(2) "My siening is dat daar 'n tydelike probleem was by die appèlhof met die doodsvonisse. Daar was geweldig baie werk met die doodsvonnisse wat die appèlhof uit die aard van die saak moes doen. Hulle moes elke doodsvonnis kontroleer en dit is nou weg. So die statistiek is daar nie betroubaar nie, en my siening is ook dat die oplossing daar in die hande van die hoofregter self is, want sake wat na hom opkom, baie van hulle, kan hy terugstuur en sê: Doen dit in die volhof; en dit gebeur dikwels, veral sake wat te doen het met feite en basies kan hy eintlik die regswerk uithaal en dit daar laat doen en die feitlike sake kan hy deurstuur - met uitsonderings. Ek weet daar is sekere gevalle wat hy nie kan terugstuur nie maar die grootste gros werk kan hy beheer deur dit terug te stuur en dit op volhof vlak te laat doen."

(3) "Is daar bedenkings oor die samestelling van die volbank? Ek dink nie daar is bedenkings oor die samestelling van die volbank in die groot sentra nie want ons het so baie mense en ons samestelling op ons volbank wissel tot so 'n groot mate dat ek nie dink daar 'n groot klagte kan wees nie …"

(4) "Ek het gedink daar is miskien 'n klagte by die kleiner afdelings waar die gedagte miskien is dat die mense nou saam tee drink en hier het ek nou voor regter A gekom en nou moet regter B, C of D die saak aanhoor. Maar ek kan u verseker dat wat ons betref, ten minste in my tyd, daar nooit die geval was dat jy 'n kollega bevoordeel het omdat hy 'n kollega is, wat op die saak gesit het nie."

(5) “Ons volhof se probleem is dat ons nie voldoende leestyd en voorbereidingstyd kry nie. Dit word maar net ingegooi soos enige ander appèl. Daar is natuurlik volhowe - ek sit môre op een - wat glad nie ingewikkeld is nie. Ons moet net eenvoudig basies beoordeel of in die omstandighede van die geval die vonnis van agtien jaar te hoog is. Nou as ‘n mens ‘n bietjie ondervinding het dan is jou gevoel vir jou of agtien jaar te hoog is of nie te hoog is nie. Dit sal ons môre beslis, dit is baie maklik, maar dit is ‘n volbank. Dus het jy nie baie voorbereiding nie, jy moet die stukke deurlees en klaar.”

(6) “Aan die ander kant is daar partykeer wel moeilike goed en jou probleem is dat jy nie tyd het om die uitspraak behoorlik uit te werk en te formuleer nie. Die resultaat is reg, daar is nie twyfel oor nie, maar jy sal dit graag meer en beter formuleer omdat dit juis ‘n volbank is wat al die ander regters bind.

(7) “Oor die Intermediêre Appèlhof wil ek dit sê: Daar is ongelukkigheid by die regters oor die ideé, in Pretoria en in Johannesburg in die wandelgange. Dit is nie op ‘n konferensie bespreek waar ek by was nie. Die ongelukkigheid was dat ons siening altyd was dat die Hooggeregshof is ‘n Hooggeregshof van Suid-Afrika met verskillende komponente, met ander woorde, ‘n komponent van ‘n appèlregter, ‘n komponent van ‘n regter-president en ‘n regter in die Hooggeregshof, maar dit is almal regters van die Hooggeregshof en dit is ook altyd weerspieël in die verskil in salarisse. Daar was ‘n baie klein aanpassing, verskil in salaris tussen ‘n regter en ‘n regter-president, minimaal, amper soos op ‘n universiteit tussen die dekaan en die professor, en tussen ‘n regter en ‘n appèlregter. Dit was nooit verskriklik hoog nie.”

(8) “Nou met die gedagte van nog ‘n intermediêre appèlhof wat ‘n bestaande struktuur word is die gedagte van die regters: Ons word nou nog laer afgedwing in ‘n hiërargie. ‘n Hiërargie word geskep van ‘n konstitusionele hof en ‘n appèlhof en ‘n regter-president en ‘n adjunk regter-president en dan ‘n intermediêre hof nog binne met ‘n intermediêre appèlhof regter-president en sy regters. Uiteindelik land ons op die vlak waartoe ons begin het, ‘n landdros of ‘n senior landdros was. En dit gee ‘n ongemaklike gevoel af, mnr die voorsitter. Ek wil dit net terloops noem, noem dit maar *capitis diminutio* vir dié van u wat Latyn nog onthou.”