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VOLUME III

BOOK 2

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(I) 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) "The concept of civil circuits, when one starts with it in principle, it ought to work in the same way as a criminal circuit. The major difficulties are the logistical ones which flow from the fact that..,civil work involves the filing of pleadings and notices and so on..,and far more record-keeping and administration than the prosecution which is in effect managed by the Attorney General's office..,in the relevant areas."

(2) "I have given thought to that problem and I think there would be grave difficulties in trying to constitute regional civil registries in South Africa. Put bluntly, I think all of us here today are probably aware of the ease with which files go astray in the Registrar's office in Cape Town, Durban, Johannesburg and Pretoria. I rather suspect that going out to even reasonably large centres, going up to Empangeni or Richards Bay, or going out to Middelburg or Nelspruit or Pietersburg, I, I think the risk would be substantially enhanced of matters going astray."

(3) "Obviously in the long run, if you're going to have a regular system of Civil Circuits, one would hope to move towards the stage where the whole administration of that circuit could take place in the centre where the Circuit Court sat. That isn't feasible at present, but it would be feasible, for example, in regard to Mmabatho, which one would expect to be one of the busier centres, for such a Circuit Court, if that were the route the Commission were to adopt."

(4) "There are differing views within the different Bars around the country, on this aspect **[the desirability or otherwise of Specialist Courts]**. So I hesitate to express a collective view. The views in favour of specialist Courts almost invariably come from those who have tended to specialise in those fields themselves and have endured the frustration of appearing before a judicial officer who, not only doesn't know anything about it, but seems to have very little ability or inclination to acquire knowledge on it."

(5) "Firstly I am firmly of the view that the strength, the merit of the Roman Dutch law, call it South African law, system traced back over several thousand years is its general application of legal principle. Notwithstanding the

impression one occasionally gets, we have still not adopted the English precedent, case-by-case approach to the development of the law, with all the erratic shifts and changes and the lack of relationship between one area of the law and another which that implies. We have, I think, if I may be parochial, done considerably better by saying, we are a legal system of broad principle and we develop within the framework of those broad principles. They are principles which my travels and discussions at international conferences and elsewhere indicate are ultimately the principles which underlie all developed systems of jurisprudence. It is amazing, when one discusses with foreign Lawyers and you work your way through things, and the way they get to it, the solution they arrive at by statute, judicial decision or otherwise, how closely it bears a resemblance to what evolves from the principles of the Roman and Roman Dutch law, and I think we lose that the moment we start saying, Judge so-and-so is an intellectual property Judge, Judge X is a common law Judge, Judge Y is a criminal law Judge, Judge Z will do maritime matters and so on and so forth. Of course the maritime law internationally is the classic example of those broad principles applied on the scale of the whole world. That's the first reason I'm against it."

(6) "The second reason I'm against it is that I believe that overall we are a country which has vast potential, but limited skilled resources at this point. It's a product of our history and a product of the failure to develop those resources in years past, which I think we all hope is going to be remedied. But the end result is we need to conserve and use our resources as best we can, and to put people, to take Judges away to seat them in special courts, which almost invariably end up with exactly the problems we've been discussing this morning, with outlying Courts, that they don't quite have a full Roll, they're not as busy as the ordinary Courts and without using those Judges' services in those Courts, is just wasteful of talent. Durban is, to the best of my knowledge, the third or fourth largest centre for maritime litigation in the world…Nonetheless, there is not enough work here to provide, to keep one Judge busy as an Admiralty Judge all the time…No doubt if we did have one Judge here we could almost eliminate delays in Admiralty cases in Natal, but it would be to be detriment of other litigants, because the Judge would not be available to do other work. So that's the second reason I think it's a bad use of resources."

(7) "And the third reason is that I think it makes the judicial job less attractive to those who have been trained and brought up in the wide range of the law. And certainly this is an advantage I have seen in discussions for example, my colleagues or counterparts in London, they have narrow specialities, they are quite amazed that you can have a practitioner who, just taking my own practice, this year I appeared in income tax cases, I appeared in labour cases, I have appeared in civil cases, (that's rarely, I accept) in criminal cases, administrative law issues, will cases, across the whole panoply of the law. And I think that's

a better, it is one of the drawbacks, frankly, in attracting some of your top practitioners to the bench, that they fear a life of boredom."

(8) "It is a problem and I think we need to attract people of quality to the bench. So those are my three reasons why I'm actually hostile to any fragmentation. I would much prefer, where there are special needs, to have two things: First of all I believe that Judges President with reasonable sensitivity are alive to those of the Judges who have special skills."

(9) "I think the other thing that obviously has to be addressed, and here I'm concerned particularly with the family law area. I think there's no doubt that from a worldwide point of view, there is a need to approach family disputes in a different way, to try and tone down the adversarial impact, the parties are usually hostile enough themselves without the need for an adversarial legal system in conjunction. But I think that is better done by training the Judges in a sensitivity to those matters. Something which can be done."

(10) "We have no history of judicial training, but everywhere around the world judicial training is undertaken, it undoubtedly promotes greater sensitivity, understanding and awareness and is increasingly accepted. The old days of people saying, well I was ready to go on the bench, I don't need any more help as to how to do the job. All over the world people are seeing the benefits of training, that they can be assisted to do their jobs better, even down to the art of writing judgments. Where the Canadian Supreme Court Judges were all of the older school declined to be trained in how to do that, but all the younger Judges regard that as the most valuable aspect of the judicial training on appointment."

(11) "What happens when you have six Judges who are sitting in a Commercial Court in Johannesburg, they are happily doing commercial work, most or all of the time, which perhaps lots of their colleagues would prefer to do rather than knocking around crime and doing personal injuries cases and so on, which are not as exhilarating frankly. What happens when Judge A is duly and properly elevated to the Appellate Division and Judges X and Y would both like to go to the Commercial Court. X gets it and Y doesn't. I can see room for a great deal of tension."

(12) "That is not how the Commercial Court works in London. Appointments, whilst they are all Judges of the Queen's Bench Division, the Judges who sit in the Commercial Court are appointed as members of the Commercial Court and they are appointed from the Commercial Bar. And you must understand, because of the size in London where there are 7½ thousand Barristers, you

have a very distinct body. There is a Commercial Bar Association. The Commercial Bar is in fact a separate member of the International Bar Association, which is the biggest international body of Bars around the world. It has only 800 members. So 6,700 of the Barristers are not doing commercial work by and large."

(13) "Perhaps this is an appropriate stage for me to go on Mr Chairman to the Commercial Court and to those suggestions.

Largely, for the sort of reasons I've been canvassing, I do not believe that the notion of a statutory Commercial Court in South Africa is workable. I think the figure given by the Judge President of the Transvaal is in the two years since this experiment started they've handled about 50 cases on that basis.

CHAIRMAN: It's not working efficiently I'm told.

MR WALLIS SC: It's certainly not working efficiently. But that is not entirely to be laid at the door of the litigants or their legal advisers."

(14) "Notwithstanding the proud hopes of the system. I have recently been involved in a major case set down for a month, involving millions of Rand, a construction contract case, which right from the outset we were told by the Judge President, was to be dealt with as a commercial case, don't worry we will always have a Judge allocated. Well pressure of work was such that the Judge never arrived and we had this interlocutory application and that interlocutory application, its the case I mentioned earlier, of an acting Judge to deal with an exception, the particulars were vague and embarrassing. One was told, well you'd better set down an application to compel the supply of further particulars for trial in the ordinary Motion Court. You'd better deal with applications for further discovery in the Ordinary Motion Court. And the problems that generates is every time you do it in a major case, a new Judge has to familiarise himself with the papers. Even if they were all of the best quality, it takes time, very difficult, you end up having reserved judgments, where things might be dealt with more summarily. We never got this Judge allocated. Eventually the case settled."

(15) "I question how many Judges can, in proper commercial court cases, would be kept fully busy, even in Johannesburg. But that it would only be a handful, at most the JP has 6 there out of 53. Now, the benefits seems to me limited and the impoverishment of the Bench overall seems to me catastrophic, particularly bearing in mind our system of elevation to Appeal Courts."

(16) "A grave danger for the Appellate Division to acquire as a Judge someone who

says, look, all I have done for the last 30 years of my life is a fairly narrow range of commercial cases. That is the expertise I bring. Sorry, crime I know nothing of, defamation - I can't help you, administrative law is a closed book to me, intellectual property is intellectual to somebody else's property. That's, you actually take bright and talented people and then by making them very narrowly focussed you make them unfit for the appointment to the Appellate Division. That can't be right."

(17) "I think the better method is to evolve appropriate rules for the management of Commercial Court cases, or what will be broadly regarded as Commercial Court cases; and, far more importantly, one needs to re-visit the proposals which were rejected by Judge Galgut some number of years ago, because of the overwhelming opposition they met with from the members of the Bench as it was then constituted."

(18) "The members of the Commission have available to them, as I understand it, Lord Woolf's first report; 1 brought it back, for the Rules Board, I may say, which didn't have it. I have read it. If one looks at Lord Woolf's analysis, one looks at his solutions to it, they are very largely the solutions which were put up by Bars, including the Natal Bar and I think the GCB to Judge Galgut."

(19) "The greater judicial role which was suggested to Judge Galgut by the Bars, at the time I think perhaps in a narrower context of presiding at Rule 37 conferences and pre-trial conferences. That really the case management system, as it's called in Australia, which is a doctored Lord Woolf's fast track, multi- track case management system. They are all variations on the self-same theme. From my point of view, and I believe the Bars', we remain committed to that procedure as the best way of managing cases of getting irrelevancies out of the way."

(20) "And I'd like here to respond particularly to what Mr Maluleke said to me about the elitism. We see no particular reason why Commercial Court should be blessed with such benefits of management or commercial cases and not the ordinary cases. In one sense, and I'm not saying its a good thing, businesses are better capable of bearing delays than the person who is a quadriplegic."

(21) "I would like to see the breadwinner who has lost a limb being able to get into Court because the case is properly and firmly managed from an early stage, and firm management in those cases can more readily be given because very often the practitioners who are appearing in them, for the plaintiff, may be novices, may be a little inexperienced, may not have the logistical backup which would happen and the hoary old guard of the insurance company's lawyers sets out

resolutely to raise the drawbridge and hold them off."

(22) "I'm not sure that's the right approach and I believe that proper case management would stop that where it's improper, would stop the abuses of our pleading system, such as denying that a collision occurred to force somebody to give evidence, refusing to agree or make any tender as to what the proper quantum of damages is. A Judge, who could say to people up front, look, I'm directing you the insurance company, put in now a sealed expression of your views, one as to the likelihood of apportionment and the degree of it, and two the proper quantum. And I'm going to bear that in mind when it comes to an award of costs at the end of the case. I think that might be a salutary inducement to settling cases timeously. It's that kind of thing which can be done and which benefits the ordinary litigant."

(23) "Now, may I go the witness statements. The underlying theory of exchanging witness statements was that it avoids trial by ambush and surprise. In principle, that is acceptable, though I have some qualifications where you are bringing a case or defending a case where questions of fraud arise. Because there, by giving warning to the other side who, may we presume for this purpose, is guilty of fraud, you merely compound the fraud. So that is one potential drawback."

(24) "The system, when it was instituted in the early 1980's in England, by consent, had a great advantage. The parties agreed to it and they put up fairly clear, simple statements, in fact not what we would properly regard as a witness statement, but rather more a witness summary. That was taken up by the Rules Board and then in 1986 they acquired the power to order disclosure of witness statements, then in 1992 it became standard that you had to exchange witness statements, and then one got to the stage now where it is more or less, or perhaps in the majority of cases, say 70 %, more or less routine for the Judge to say , well the witness statement will stand as the evidence in chief."

(25) "That has had two major problems. In regard to the latter one, it is grossly unfair to witnesses. They get no opportunity to get the feel of the witness box before they are confronted with hostile cross-examination. Quite frankly it is putting witnesses in the situation of a police cell interrogation. Bang. They don't prepare their witness statements, their lawyers do. They read them over with the eye of a layman and the first question that gets put is, why did you lie in page three, line 5. What do mean did I lie? Well, you said this, look at the letter over there, you were lying. Utterly unfair, but it happens, in that situation."

(26) "That's the one side. The other side of that, and in an endeavour to meet that, is, what you have is, well, Judges are going to insist we put up witness statements, they're going to be exposed to cross-examination, you're not going to be able to lead anything in addition to this statement. Well, we've got to make the statements as complete and as thorough as possible."

(27) "And, if I may then return to the article [**in "Counsel", the Journal of the Bar of England and Wales Nov/Dec 1994 issue**] :

'The current practice with witness statements thus has the following drawbacks. First it gives a significant edge of advantage to the well financed litigant over the legally aided client of a small High Street practice. Secondly, if the statements stand as evidence in chief the ascertainment of the truth is made considerably more difficult. The Judge no longer observes the witness telling his own story in his own words. Thirdly, the cost of trial preparation has been greatly increased…The twenty thousand word statement may take only two minutes to verify, but it then takes a fortnight to be challenged in cross-examination…"

(28) "I have done cases where we have flown witnesses in from all over the world and sat flexible hours. Sat at 8 o'clock in the morning on the basis that you've got to get the 1 o'clock plane back to Geneva. That was sitting in Heathrow. It can be done provided everybody is willing to do it."

(29) "That is the real flaw of the system, there is no management to do it and there is no ethos to do it. But I don't believe we are going to solve those sort of problems by setting up some independent Commercial Court, we need the rules, we need training, we need change of attitude and…

CHAIRMAN: Co-operation.

MR WALLIS SC: Yes. Once that is done then, and, the important changes I see it in the managed approach is that the Judge is enable to overcome the lack of co-operation. That's the key to it working. The ability of the Judge to overcome the lack of co-operation and the willingness of the Judge to do so."

(30) "For the ordinary citizen, the cases in which they are most likely to encounter the Courts are crime and family related matters. In terms of society and its goals, crime is one of the major problems of our societies, having a massive detrimental effect on all our communities and if one was to identify one other single social problem, it is the breakdown and damage to family life, the disruptive effects in the community and the family of divorce proceedings, custody battles, financial battles. It is the plight of the divorced mother caring

for children, and it's predominantly that side of the equation hence I stress it, who gets a sort of slightly inadequate maintenance settlement and then struggles on and on getting poorer and poorer while husband recovers. It is the abused child and that sort of situation."

(31) "Those problems, I would say, are the closest links with the law, and to treat those problems as well as, oh that's alright they can be dealt with a lower Court level, we in the Supreme Court are really here to deal with the more arcane principles, give me a Bill of Exchange and its crossing anytime. As Lawyers intellectually, that is so. As Judges dispensing a system of justice and we are tending to look for a broader range of skills from our Judges now, an empathy and human sympathy for people and an ability to deal with people, because our Courts have become too aloof. That is wrong. And I would put those matters at the Supreme Court."

(32) "It should be at the highest level. My concern about any kind of separate Division, merely reiterates what I have said before: Where are you going to get the Judges who will say, all I will do is family law for the rest of my life, and you lose the cross-pollination, that's important."

(33) "**MR MALULEKE:** One little point. The experience at least from Bophuthatswana where I partly practise, was that the role played by Black Divorce Courts. It was to keep the cost of divorces to the minimum and when people in Bophuthatswana were then made to have their divorce cases in the Supreme Court, it became increasingly unaffordable. Would you have any thoughts about what can really be done to make such Courts more accessible, presuming you have a family Court at the same level as the Supreme Court?

(34) "**MR WALLIS SC:** I'd proceed with diffidence…I know little of them, but I have had cause to discuss them with Mr Pincus, who is the Chairman of the Family Law Association. I know they believe that possibly there is still a role for those Courts for those who would like to choose a perhaps less expensive route. I'm unhappy about that. I'm unhappy about a two tier matrimonial system, which, I must be quite blunt, in this country would become, they would remain largely Black Divorce Courts and the Supreme Court will be a more White Court and a privileged Court, I don't like that. Because I don't believe we should be saying to the poorer members of our community, your family problems are less important than the person who lives in Houghton and who has got to fight about whether the wife gets a Mercedes Benz or a BMW or something of that sort. I exaggerate obviously there. I think that is why I suggested special procedures in matrimonial matters."

(35) "I see no reason why, if you want a divorce, there should not be a standard form which can be completed without legal assistance, which can be completed with the assistance of a Counsellor, if you have that benefit, the Family Advocate could, usefully provide…or indeed you could train the staff in the Registrar's office, it is not beyond the wit of human beings to able to write out a name, address, the other party's name, to attach a photo copy of a marriage certificate, to find out the names of the children and so on, and to set out in summary form, such simple things as, I want a divorce, my wife should have the custody of the children, or I will have the custody of the children, this that and the other."

(36) "There is indeed much to suggest that matrimonial procedures could in certain cases not even involve appearances in Court. More or less like the Registries in England where, provided the two year of five year period has elapsed, I think it is two years. I would have little difficulty with that. Bluntly, appearances in Court are nothing but routine, it is rare indeed for a Judge to pick up anything in one of those cases. I would much rather see something where you had to put up a detailed statement signed by both parties saying, this is what we are doing about the custody of our children, this is what we have agreed about the matrimonial property consequences, signed by both parties. Well, that's as good as you get before a Judge, why shouldn't the Registrar issue an Order X months after time and so on and so forth. And it does serve the purpose, which is a modern purpose and a valuable one, of lowering the heat of matrimonial conflict."

(37) "**MR MALULEKE:** The next point, and this may fall outside the ambit of this Commission. There is a matter which has been prepared for the Constitutional Court which is basically based on customary unions. A lot of injustice is seen to emanate from that area. Where would you place, call them disputes or divorces or whatever?"

(38) "**MR WALLIS SC:** I would place those within the Family Court. It is not only customary unions, but one is particularly aware of, having practised in Durban, of unregistered religious marriages. According to Hindu and Muslim rights, it's a major problem here…,those are sufficiently closely related to the conventional family concept of our law. They are families within their own communities and that must be accepted as part of the diversity of this country."

(39) "And…again that's where a wise Judge President can have a range of skills. A wise Judge President knows he's got a, he's got cases involving custody of children, that's not the case you send down to a commercial specialist. When he's told he's got Katz and Katz before him which went to the Appellate Division on how many millions Mr Katz must give Mrs Katz. Maybe a

commercial Lawyer is the right person to send there. It, I'm a great believer in, and I think that's part of the developed case management notion which Lord Woolf has in mind of horses for courses in terms of judicial office."

(II) 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 Cape Town on 8 January 1996 some of the points made by the learned Judge were the following :-

(1) "**CHAIRMAN:** …For the record may we invite you briefly to tell us the essential mechanisms involved in the Cape Rule 37 techniques which represents a modest but real step in the direction of caseflow management.

FARLAM J: There are basically two points. The first is, there is provision for the Rule 37 conference, the one held after the close of pleadings, to be presided over by a Judge. He sits in chambers - he normally sits in this court as a matter of fact - but it is notionally sitting in chambers and he does not come robed or anything of that kind. But before that, and this is the second part, the parties have to fill in a questionnaire. They are obliged to discover, they are obliged to request further particulars for trial and to respond to such requests automatically without request being filed for that within a certain period after the close of pleadings. They are supposed to have done all those things before the meeting is held over which the Judge presides. Both attorneys have to fill in a questionnaire and the rule requires that the form should be filled in by the attorney who is actually handling the case. And also it is regarded as desirable - it does not always happen in practice, but it is regarded as desirable - that that attorney should attend the conference himself or herself."

(2) "The Judge then considers the matter. The parties are invited to say whether there are any directions that they require to be given by the Judge and the Judge can very often then and there, if there has not been compliance with the requirements in respect of discovery or the filing of requests for further particulars or the filing of a response thereto, to order that it be done and to fix time limits for them and then to provide normally that the case may not be enrolled for trial until that has been complied with.

The Judge can sometimes postpone the conference for a date in the future on the clear basis that everything that has not been done yet must be done before the resumed conference."

(3) "The Judge can also deal with matters like separating issues. An order can be made under Rule 33(4)…for the separation of issues at that stage already. The question of amendments to pleadings must be dealt with before the close of the conference. Very often the Judge is able to suggest ways of shortening proceedings which the parties had not thought of. Very often the parties

themselves make suggestions, sometimes both of them, sometimes one of them and the suggestions are adopted at the conference. But sometimes the Judge is able to, because he has a different perspective sometimes, is able to make a suggestion which both parties accept. The one that comes to mind is separation of issues."

(4) "It is also not unheard of for the Judge even to suggest a possible basis for settling the case. The attorneys sometimes get up and say very candidly that they are very close to settling the matter, but there is a certain problem and the Judge then informally will give an indication as to how he thinks the problem can be dealt with which is acceptable and the case is settled then and there."

(5) "…our impression…is that the system does encourage settlements, that more cases are being settled; more cases are being settled earlier than would otherwise be the case. One of the reasons is - some attorney friends of mine say that they like the system because it enables them to come face with their opponents. So often they have been trying to get hold of their opponent to see if they cannot settle the matter and because the attorneys who are handling the matter are encouraged to be at the conference themselves, they get an opportunity and very often cases are settled in the passage outside while they are waiting for the conference to take place. So more cases are being settled, more cases are being settled earlier and that has the important knock-on effect also that it means that delays are being reduced and other cases which cannot be settled are able to come up for hearing earlier."

(III) THE HON MR JUSTICE G. FRIEDMAN, JUDGE PRESIDENT OF THE CAPE OF GOOD HOPE PROVINCIAL DIVISION

In the course of his oral 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) "My own view is that the Family Court should be a division of the Supreme Court. I think that there are improvements that can be brought about the procedures which it follows. When I say that what I mean is that I do not believe that it is necessary for a Judge in the Family Division or a presiding officer, if it is a magistrate, to sit and hear unopposed divorce cases unless there are complications, for example, with regard to the children.

In this Division we hear approximately 250 unopposed divorce cases per week, about 1 000 per month, and it is really a matter of putting a rubber stamp on the procedure and it is totally, in my view, unnecessary for a judicial officer to preside at a hearing like that. It can be done, as it is in England, on affidavit."

(2) "Having said that I believe that there is room for a Family Division of the Supreme Court because there are a number of cases which come before this Court, and I am sure similar cases come before other Divisions in the Supreme Court, where questions of custody and property rights are heavily contested, and these cases can go on for several days. I think there is room for an expert Court dealing with family matters to deal with that type of case.

There is also - and this brings me onto something that I wanted to mention in regard to the question of litigants in person - we find in this Division that there is an increase in the number of litigants appearing in divorce cases in person. One sees advertisements in the newspaper, which the Law Society is not able to control, that people offer their services to assist people to obtain what they term a "cheap divorce". They charge these people an amount of about R600, I believe, which is somewhat less than half what they pay if they went through the normal procedures - unless they qualify for Legal Aid."

(3) "…the position with this Rule 37 procedure was roughly as follows. What happened was that it was as a result of a very democratic process of discussions which took place here in the CPD. I called a meeting initially of the Bar and the attorneys' profession, as well as all the various branches which they have in this area. The present Rule 37 procedure was thrashed out at a joint meeting of the Judges and the profession.

We had a further meeting after the initial period of two years was about to expire with the profession and the unanimous feeling was that the Rule 37

procedure should be continued because it was working successfully, but at the same time it was felt that it could be improved upon. We are at present working out suggestions for improving the present procedure which we will again put before the profession when we have formulated them. Hopefully we will be able to come up with suggestions which will be put to the Rules Board which will make the Rule 37 procedure even more effective than it is at the moment. That roughly is what the situation is."

(4) "The main thrust of the question of case flow management involves, I feel, from what has been written and what we have gleaned from other countries, is that there has to be a far more hands-on policy on the part of the judiciary. This culture of involvement of the judiciary in the running of cases, must be accepted by the profession. These are fundamental principles. Because if you are going to have a system of case flow management it is no good having a system which does not involve the Judge in the running of the case. When I say the running of the case, I mean the progress of the case. Because the present system in this country is such that the litigants and their legal advisers control the pace of litigation."

(5) "We have referred in our memorandum to certain articles which appeared in the Australian Law Journal in September and October 1995. These are articles written by Judge Ipp. These are not the only articles that he has written. He has done a lot of work on case flow management in Western Australia, and a number of his proposals have been implemented there. I feel that if the Commission were to embark upon a wider investigation, as I suggest, it might well be necessary for the Commission to go to Australia as one of the places where a system of case flow management is working effectively, to see exactly how it all works.

In these articles what Judge Ipp has done is to indicate the need for reforms to be made to the adversarial system such as we have in operation in this country. I know these are long articles. Perhaps I could just direct your attention to certain pages…"

(6) "If you have regard to the report of the Woolf Commission gentlemen, you will see that a very important aspect of that report is the manner in which he approaches the question of discovery. Because discovery can overburden the proceedings. It can put a litigant, who is not wealthy, into a very disadvantageous position because he could be flooded with documentation which is not really relevant and with the aid of the photostat machine these days it is very simple for a practitioner to just roll off documents and flood his opponent with unnecessary documentation. That is why Lord Woolf has suggested that a curtailment should be placed on the question of discovery."

(7) "In England Lord Woolf has suggested that a deposition should be taken from the witness and that should stand as the evidence in chief. It not only cuts down on the time taken in court, but it also makes the case which the plaintiff is intending to bring clearer, so that the defence knows what case it has to meet so that you do not have these games going on where people keep their evidence, as far as possible, up their sleeves and do not reveal it until the last minute, all of which leads to more expansive and more expensive litigation."

(8) "Then in Part II he *[Mr Justice Ipp]* deals on page 790 with the question of reform of the pre-trial case management and its basic models, and he refers on page 790, over to page 792 to the various permutations that you can have in a case management system. There are two basic models he points out on page 790. He says:

> *"These two models are first, management involving continuous control by a Judge who personally monitors each case on an ad hoc basis, and, secondly, management where control is exercised by requiring the parties to report to the Court often in the form of a Master or Registrar, at a few fixed strategically determined intervals or occurrences, sometimes called 'milestones'…"*

which is basically what we are trying to achieve in this Division."

(9) "The first one which involves continuous control by the Judge is employed in certain States in America where when a case comes in, when someone files a summons, that summons is immediately referred to a Judge who from that moment onwards controls the course of the litigation. That is, I would suggest, not the type of case management that we could possibly employ here because it involves too much time and it involves a certain amount of specialisation which we are not in a position, I do not think, to introduce here. I think that it is far better if we follow the second system of the Judge intervening at certain milestones and the parties being required and the litigants being required at certain stages in the proceedings to do certain things and for the Judge to exercise overall control over the progress of the litigation at those milestones."

(10) This brings me onto another topic under this same globular heading of Access to Justice, and that is the question of ADR, Alternative Dispute Resolution.

It would seem from our investigation that the leaders in this field are the United States, State Courts and Federal Courts. The Federal Judicial Centre published a special issue in December 1994 on Alternative Dispute Resolution, and it deals in a fairly succinct form in a 26-page document with the various forms of Alternative Dispute Resolution."

(11) "On page 801 Judge Ipp deals with the question of mediation. Mediation is important. It is well-documented in the United States because they feel that a great deal of litigation - we all know it, it happens here too - they say that 90 % of litigation in the United States is settled at trial or just before trial."

(12) "That is our experience too. Because if it were not so we would not be able to function. But the problem is that these cases are settled at too late a stage. If they could be sent to mediation at an earlier stage then many of these cases would be settled without having to incur the costs of a full-scale trial eventually or even involving the procedures which lead up to a full-scale trial even if it is settled on the morning of the case. That's why alternative dispute resolution is so important."

(13) "A number of these Courts in United States have what they call Court annexed systems of alternative dispute resolution. In other words, the Court has available to it a list of neutrals to whom it can refer cases where the parties agree to go to mediation. I think that the problem, certainly in this country, is that litigants are not aware of the fact that they can go to mediation. That is the one problem. And even if they are aware there are no proper structures in this country yet to which they can go. The result is that cases are settled really by the legal practitioners themselves and that happens at too late a stage in most cases. That is why, when one is considering access to justice one cannot leave out a consideration of the whole question of alternative dispute resolution."

(14) "To return to the article by Judge Ipp. He deals on page 805 with the trial Judge's powers to limit the length of trials. That is important I think. I would suggest that you have regard to what he says at the foot of page 805, the paragraph headed, "The Trial Judge's Powers to Limit the Length of Trials" through to page 810."

(15) "**MR MALULEKE:** Judge, may I just interrupt you. Is there an indication in that journal on those articles about what the costs are or what the implications would be costwise. If you have a panel of neutrals, for instance, it would normally be people in private practice who would be available to mediate, what are the costs to a litigant, implicationwise?

FRIEDMAN JP: Certainly, that is a very good question, with respect, Mr Maluleke. Of course there is a cost involved. There are costs involved in mediation because mediators would not spend of their time without being paid for it. But the costs involved are minimal compare to the alternative, which is to go the Supreme court in a full scale trial. Because if mediation is employed at an early stage, it would obviate all the additional costs over a long period of time with attorneys and counsel and witnesses being involved, expert witnesses,

so the alternative dispute resolution, although it involves a cost structure, certainly has a tremendous advantage over the full scale trial, if it can avoid that."

(16) "As far as establishing a Commercial Court is concerned, we do not feel that it is necessary for us to introduce a Commercial Court in Cape Town.

LEON J: I have been told it is not working very well in Johannesburg."

(17) "**FRIEDMAN JP:** But whether it is or is not functioning and how it is functioning, I am not prepared to comment on. All I can say is I have read the rules that apply to it and as far as we are concerned it is not practical to introduce such a system in Cape Town in the CPD. The reason is a logistic one. We have at the moment 24 permanent Judges in this Division and we have had an extra one since the beginning of last year to cope with the additional criminal work which we have here. But 10 Judges are engaged daily in criminal trials in this Division which leaves you with 15 Judges to deal with the rest of the work. Two of those are permanently engaged in the motion court every week, so that is 10 criminal, two in the motion court, that is 12. So that half the complement of the Bench is already involved."

(18) "Then we have the Income Tax Court coming here three times a year which we have to assign a Judge to. Then we have Water Court sittings. So if we were to introduce a Commercial Court in this Division I would have to allocate the work which would be identified as Commercial Court work to, say, five Judges. It cannot work if you have less than five I do not think. Then one would not have enough Judges to deal with the ordinary run-of-the-mill work."

(19) "We feel that the system that is in operation here works sufficiently well. If a case is identified as being required to be dealt with urgently, the practitioners know that they can approach me and I will make whatever arrangements are necessary to have the case expedited, whether it be a commercial case or any other kind of case. One of the main objections, both from the judiciary and the practitioners in this Division to the establishment of a separate Commercial Court, is that there is no reason why a commercial case should receive preference over a case of personal injuries where the person is desperately awaiting an outcome so that he can carry on with his life after he has been injured. So unless one can devise a system whereby Commercial Courts are not given preference timewise over cases in which the community is involved on a personal level, it would be unfair. You could only do that, we feel, if you have a large Bench like you have in the Transvaal where you have over 55 Judges, and to allocate five of them to a Commercial Court does not interfere with the rest of the work and does not give commercial cases priority over cases

which are as deserving."

(20) "As far as the second aspect of the terms of reference of the Commission is concerned, namely the question of civil circuit courts…We have such a system in the CPD. At least twice a year a Judge is sent down to the Southern Cape Circuit Division, where approximately 30 cases are disposed of over a period of two to three weeks. Most of them are settled there, but those which have to be heard are heard and witnesses are in the area, they do not have to come to Cape Town. We do it regularly there because that is where the bulk of the work is."

(21) "But if there is a civil case in any other Circuit Division we will send a Judge to that Division. We do it on an ad hoc basis and it…works well. We do not need to change the rules for that. And of course the Judge on circuit, to whatever circuit town he goes, does the unopposed divorces. I do not know whether that happens in the other Divisions."

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

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

(1) "I appear before you in my capacity as the Vice-President of the Law Society of the Cape of Good Hope, to which I shall refer, for the sake of brevity, simply as the Law Society…The Law Society was established in 1883 and is in terms of the Attorneys Act of 1979 the governing and disciplinary body of all the practising attorneys within the geographical area of what used to be the Province of the Cape of Good Hope, that is to say, the present provinces of the Western Cape, Eastern Cape and Northern Cape.

The nearly 3 000 members of the Law Society have expressed the democratic wish to remain constituted as the Law Society of the Cape of Good Hope and not to split into three separate provincial bodies. The Law Society is a fully democratic and representative body which gives due recognition to and makes provision on an affirmative basis for participation in its affairs by the non-statutory Black Lawyers' Association, the BLA, and the National Association of Democratic Lawyers, Nadel. In general, therefore, I speak for all the practising attorney in all three of the Cape Provinces."

(2) "**CHAIRMAN:** …As you are no doubt aware the Association of Law Societies has confined their submission to this Commission to a single plea for the establishment of a Family Court at Supreme Court level, either as a Division of the Supreme Court or, if a separate entity, then an entity with the status equivalent to that of the Supreme Court."

(3) "**MR STEYN:** ….May I just add as well that I am a Council member of the Association of Law Societies. That is somewhat of a mixed signal, if I may say. Because the Association of Law Societies was the main proponent for the Family Court system for taking divorce matters to magistrates' courts, on the basis that if a magistrate can marry people why can he not divorce them. What is so important about status in that respect? I think the solution on the structural side - I agree that that is a structural one - if that will be the creation of specialist court, and perhaps we can combine both in the process - maintain a Family Court in the Supreme Court but also give jurisdiction to Family Courts in the magistrate's court to hear unopposed matters or matters where the parties agree to be heard by that court. I think a party must have the right to demand to go to the Supreme Court. But there should be a cost element connected with that. Because we have seen so often in matrimonial matters that justice is denied in the Supreme Court because of the cost of running a divorce

trial here. Procedure is not tailored to deal with divorce matters."

(4) "**CHAIRMAN:** The Judge President yesterday advanced the argument that really unopposed divorces were a waste of time and money and he made a plea for the adoption of the English system for which there is much to be said, perhaps.

MR STEYN: Mr Chairman, I respectfully submit that he is correct. I personally support that and so does the Law Society of the Cape of Good Hope. Unopposed divorces can be done on a motion basis, with papers, with affidavits - "File for Divorce" as they say on TV."

(5) "**MR STEYN:** Mr Chairman, I will then commence with my address on the existing court structures.

MR MALULEKE: Mr Steyn, could I just take you back to this point. I think it might help if we dispose of it perhaps at this stage. The question of the Family Court. I think it is generally common cause that one of the problems the public has in access to courts is the cost factor. And getting divorced in the Supreme Court is a very costly affair. But we have, as a function of this Commission, to make recommendations on rationalising the courts. There is what is called the Black Divorce Courts. Two points arise. The majority of the population in this country find themselves obviously in those courts. And the cost factor is so phenomenal. The difference is almost tenfold sometimes to get divorced in a Supreme Court or in a Black Divorce Court. What would you say the view of the Law Society is in relation to rationalising those courts and the Family Court concept as is envisaged by the Law Society?"

(8) "**MR STEYN:** Mr Maluleke, that is why I said earlier that our view is that we should combine the desire of the Judges and the Association of Law Societies to have a Family Court system in the Supreme Court with a Family Court system in the magistrates' courts. We submit that the ….(intervention).

CHAIRMAN: Two tier.

MR STEYN: Two tier. We submit that the Black Divorce Courts should be taken up in the magisterial Family Court system. It is a system that works, the Black Divorce Court system, it works well, and that is why it survived even under the name of Black Divorce Courts because it is serving the public and serving it well. So do not throw the baby out with the bathwater but keep in there but take it up in a new system, rationalise it somewhat, but not in a manner that will increase costs. The access must be there, the low cost system must be maintained, but there should be a rationalisation. In other words, all people should be treated equally. Black people should not have their own divorce court and white people other divorce courts. That makes no sense

under our new dispensation. But I believe that white people and coloured people and Indian people should have access to the same simple facility that black people have under the Black Divorce Court system."

(9) "**MR MALULEKE:** …One last aspect. There is unclarity insofar as where do you dissolve customary marriages. The Black Divorce Court as it stands seems to have no jurisdiction about that and no court indeed seems to have jurisdiction. Do you know if the Association of Law Societies is going to be heard on this point or maybe Nadel or BLA?

MR STEYN: Mr Maluleke, I do not know but I thought about this…,that is something to be addressed by Parliament. The law is not clear and an Act will have to be promulgated by Parliament to remedy that problem."

(10) "As far as the Family Court is concerned, I think…it is important to have easy access to that court, to keep the costs low, and to have the two-tier structure in the Supreme Court and the magistrate's court. Maintaining the present divorce system in the Supreme Court makes no sense. It is too costly and it denies access to justice to litigants, as can be seen from the growing number of people who appear before the court in person. They want to save costs, but more often than not they come out in the end having lost more than they gained in that they are not aware of the pitfalls along the way."

(11) "As far as the Commercial Court is concerned. We can have a Commercial Court if the need for that has been identified. The problem with the Commercial Court in Johannesburg is that it is based on agreement between the litigants. The litigants have to agree to go into the commercial lane. Where you have a recalcitrant defendant he does not agree to anything, so he would rather dig in his heels and say I am not agreeing to that because I would prefer, without saying that, to stick in the common law or normal lane because that takes much longer and gives me more time to get my money together."

(12) "A problem with the specialist courts as well is, should they have specialist Judges or should they be served by the common pool of Judges? You have before you a submission by my colleague, Mr Roger Field, who also practices in the admiralty field. He calls for the establishment of a specialist panel of admiralty Judges in the Cape. I have addressed that problem to our Judge President, who has pointed out to me that the difficulty is that out of 24 Judges it is simply not possible to dedicate one or two Judges simply to that type of work. If we have the money then obviously that would be nice to have. If we do not have the money we must find some other solution and then the common pool of Judges will simply have to serve all the courts. I do not necessarily think that is a bad thing, providing that a Judge with experience in a field is employed by the Judge President to hear a case related to that field. That is

normally done. So, in fact, the system works quite well in that regard."

(13) "The Judge President here has a problem in getting the consent of capable senior practitioners, counsel and attorneys, to act as Judges in the division simply because most of them do not want to leave their practices for three months on an end, do not feel comfortable in many instances in dealing with reviews, dealing with motion court work and dealing with criminal work. If, on the other hand, one should approach a senior practitioner and say Mr or Mrs X, you are divorce or Family Court practitioner, are you available to do a divorce court matter for one or two days next week or the week after that, you would find that the practitioner would willingly agree to that and that would improve access to justice."

(14) "The question then is: how does one approach that? We believe that there should be a pool of ad hoc Judges to be constituted by the Judicial Service Commission because in our view acting Judges and ad hoc Judges are Judges of the Supreme Court. They should be tested by the same measures, according to which permanent Judges are appointed and it would be a good thing to have a pool from which they could be appointed. For example, litigants could agree on the appointed or nomination of a certain Judge. If they disagree it will simply be left to the Judge President to appoint a person from that pool who is suitably qualified to do the type of work concerned."

(15) "On that basis as well, the cost of that could be borne by the litigants. If they agree to the appointment of an ad hoc Judge one could make it part of the costs in the cause, the payment of the fees of that ad hoc Judge. If they disagree, but a party feels so strongly about hearing a case quickly, that party should be saddled with the cost of appointing an ad hoc Judge."

(16) "In my view it will not be that expensive in the total context of the cost of litigation and the claims concerned to appoint an ad hoc Judge and I think that we will find that many parties would prefer to follow that route in order to get to court quicker and to have a matter sorted out, in particular in divorce matters, for example, under the present dispensation."

(17) "Then as far as sub-category (1)(d) is concerned *[of the Commission's Terms of Reference]* there is one aspect remaining for me to address, and that is that a citizen of the country should be entitled to institute an action in his local court wherever the defendant may be or wherever the cause of action has arisen. In other words, improve access in that manner and not force a litigant to go to a division far away from where he does his business or lives but to bring it closer to him. We do not have a problem with that recommendation and as a Law

Society we are in favour of that."

(18) "**CHAIRMAN:** Reverting to your suggestion that the time has now come that criminal work should be removed from the provincial divisions and be given to an extended regional court. At the moment, I am not sure, I think there are probably about 140 regional court magistrates in the country. If the regional court was to be saddled with the criminal work presently done by the Supreme Court then of course what we now know as the regional court would have to be vastly extended. What do you foresee in this connection? Where would the extra workforce come from? From the attorneys and advocates?

MR STEYN: Mr Chairman, yes. The regional court would have to be restructured in my view to give it improved status, to make it the criminal court of the Republic of South Africa. There are many practitioners who are suitably skilled in criminal work and who, I believe, would welcome an appointment to such a position."

(V) ADV D. BOSMAN A FULL-TIME MEDIATOR OF STELLENBOSCH

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

(1) "Ek het twee grade, een in drama en ek het 'n LLB. Ek het in 1978 begin by die landdroshof, daar gepraktiseer tot 1979 met landdrosrang. Toe het ek my leerklerkskap gedoen by mnr. Steyn se firma, Silberbauers. Sedert 1982 was ek 'n prokureur in die Paarl. In 1986 het ek by die Kaapse Balie begin praktiseer tot 1992. Toe het ek bedank by die Balie en sedertdien praktiseer ek voltyds as 'n mediator in Stellenbosch."

(2) "Eerstens wil ek net op rekord plaas wat mediasie is. My submissie is dat mediasie vind plaas wanneer 'n gemeenskaplik aanvaarde derde persoon, die mediator, die partye help om self, en dit is die sleutelwoord, om self 'n vreedsame skikking vir hulle dispuut te bewerkstellig. Dit behels dus 'n proses waartydens die partye, direk met mekaar, weer eens sleutelwoord, kommunikeer en met mekaar saamwerk om die dispuut tussen hulle vreedsaam op te los. Die mediator, synde 'n neutrale waarnemer, se funksie is bloot om die skikking tussen die partye te fasiliteer. Sy funksie is nie om 'n afdwingbare bevel uit te vaardig nie. Die partye kan egter van hom verlang om, indien hulle nie daarin sou slaag om tot 'n skikking te kom nie, 'n oplossing te beveel."

(3) "Ek glo, met respek, dat enige dispuut kan geskik word mits sinvolle kommunikasie tussen die partye herstel en gehandhaaf word. Litigasie, synde 'n proses wat direkte kommunikasie tussen die partye ontmoedig, en wat tot gevolg het dat die partye hulle in wederstrydige posisies ingrawe, maak dit, naamlik 'n direkte kommunikasie onmoontlik. Daarom is dit my submissie en propageer ek 'n stelsel in die sivielereg analoog aan die nuwe Arbeidswetgewing wat voor ons deur lê, waarin daar in elke geval van 'n dispuut eers 'n daadwerklike en 'n opregte poging tot mediasie sal plaasvind alvorens die partye hulle wend tot litigasie."

(4) "My submissie is dat indien dit vanweë die regstelsel of die regsmeganika kom dat in so 'n geval, indien dit later sou blyk dat dit was onbillik gewees van daardie ander party, of selfs hulle sou kom "and they merely paid lip service to the whole concept of mediation", hulle gaan net deur die mosies maar hulle wend geen daadwerklike poging om werklik te probeer skik nie, dat dit ook tot die kennis van die verhoorhof gebring sou word en dat in die lig daarvan dat daar 'n kostebevel…(tussenbeide).

VOORSITTER: 'n Gepaste kostebevel.

ADV BOSMAN: ‘n Gepaste kostebevel. En as hulle dit sou weet dan sal hulle twee keer dink voor hulle so ‘n rammetjie-uit nek is.”

(5) “Ek wil verder gaan, en dit is ‘n baie eenvoudige en ‘n prakiese beginpunt. Die huidige Regshulpstelsel. My ervaring in die praktyk is daar word meedoënloos Regshulplitigasie gevoer sonder dat die partye ooit op ‘n stadium kom wat hulle nodig het om te probeer skik want iemand anderste betaal mos hulle rekening. Weliswaar is daar die sertifikaat wat nou gegee moet word, met daardie konsep of daardie aspek kan vervang word deur ‘n sertifikaat deur ‘n mediator wat sal sê ek het die partye gehad vir mediasie, hulle het gekom, ons het so en so en so gemaak, dit is my voorstel, ek stel voor daar word Regshulp gegee of daar word nie Regshulp gegee nie.

Ek stel daarom voor dat die Regshulpstelsel aangepas wat ten einde daarvoor voorsiening te maak dat alle aansoeke om Regshulp allereers in mediasie deurloop en dat eers dan Regshulp gegee word as die mediator dit aanbeveel.”

(6) “Wat ek wil sê hierso is, dit is belangrik om te let dat daar ‘n wesenlike verskil is tussen mediasie en skikkingsonderhandeling. Heelparty regspraktisyns, prokureurs en advokate verkeer onder die indruk dat hulle mediasie toepas terwyl hulle inderdaad skikkingsonderhandelings toepas…Mediasie is die kliënte praat self en hulle besluit self en die mediator is ‘n neutrale derde. Trouens, ek wil sover gaan deur te sê dat dit sou eerder tot die partye se nadeel wees dat regsverteenwoordigers teenwoordig is tydens ‘n mediasie proses, want dit is my ervaring in die praktyk. Want as jy jou weer kom kry het die twee prokureurs die gesprek heeltemal oorgeneem en die ouens wat eintlik moet praat sit daarso en hulle sê nie ‘n dooie woord nie.”

(7) “**MR MALULEKE:** Can I disturb you? Take a typical motor vehicle collision claim. You have got a completely illiterate plaintiff and a skilled claims manager of an insurance company and you bring them together to mediate an amount of damages of half a million rand and you leave out the attorneys, how would you deal with that?

ADV BOSMAN: First of all, if half a million rand is the figure, one must assume that that is the figure that the one illiterate party had in mind all along. And that’s very important to realise. With mediation it is not the rights of the parties, it is the needs of the parties which is important. Often the rights and the needs are the same, but quite often they are not. If the one party has already established in his mind that he wants half a million for his damages, then the closest he gets to half a million, if he gets R100 000 less than half a million and he is happy with it then as far as he is concerned his rights and his needs coincide.”

(8) "My slotgedagte is doodeenvoudig wat baie belangrik is, is dat mediasie nou sy regmatige plek in die regsstelsel sal handhaaf. My submissie is dat die plek van mediasie is heel in die begin, nie aan die einde, soos wat dit nou bestaan nie, nie op 'n stadium wanneer die partye se geld op is of wanneer die hofrolle te vol is, maar heel in die begin."

(9) "Hoekom sê ek dit? Die basis van mediasie is die herstel van kommunikasie. In die geval van 'n egskeiding, daardie twee partye was op 'n stadium lief genoeg gewees vir mekaar om met mekaar te trou. In die geval van 'n vennootskap, daardie twee persone het mekaar genoeg vertrou om saam in besigheid te gaan. Die een het gegee, die ander een het van sy kant gegee. Nou is daar struwelinge, nou breek die kommunikasie af as gevolg van die een of ander faktor. Instede van op daardie stadium elkeen na sy eie prokureur toe te hardloop wat dadelik vir hulle sal sê luister, ek het nou jou saak, jy praat nie meer met daardie man nie, of jy praat nie meer met jou vrou nie. As sy vir jou iets te sê het laat sy dit vir my sê. Dadelik word die kommunikasie tussen die partye gebreek. Hulle dryf al hoe verder van mekaar af weg, en na twee, drie jaar is hulle op die hof se trappies of voor die hof se deur en dan moet hulle skik. Dan is dit nie 'n mediasie nie, dan is dit 'n gedwonge skikking. My submissie is dat heel in die begin, wanneer die kommunikasie pas afgebreek is, dat hulle dan blootgestel word aan mediasie, en die eerste ding wat die mediator sal doen is om hulle kommunikasie te herstel, uit te vind presies wat is eintlik die rede. Wat is eintlik die rede vir hierdie dispuut tussen jou en jou vennoot of tussen jou en jou werkgewer of tussen jou en jou vrou of wat ook al en dit dan aanspreek voordat die ouens te kwaad raak vir mekaar. Dan is jou kanse baie beter om die dispuut op te los en natuurlik jy spaar al daardie jare se regskostes en prokureur en kliëntfooie."

(10) "Met ander woorde, in antwoord op die Regter-president se voorstel wat hy na verwys "Court controlled ADR" is dit my submissie dat goed, dit is beter as niks, maar ek sou verkies dat dit op 'n baie vroeër geleentheid is voordat die kommunikasie heeltemal verbreek is en voordat daar te veel regskoste alreeds aangegaan is, en daarom staan ek voor dat die professie van mediators 'n derde been sou vorm van ons hele regsmeganika."

(11) "Dan met verwysing na die Regter-president se stelling wat betref onbetwiste egskeidings op stukke afgehandel kan word. Ek stem daar volmondig saam. Des te meer as jy daaraan dink dat jy kan deur middel van mediasie, jy kan 'n uur of 'n uur en 'n half, twee-uur se mediasie kan jy deurgaan, dan het jy 'n skikkingsakte tussen die partye. 'n Dagvaarding met 'n getekende skikkingsakte voorgelê in kamers. Ek meen, wat kan verkeerd gaan? Daar is geen manier hoe dit enigsins tot enige nadeel kan wees van enige party en daarso sou dit by uitnemendheid baie koste kan spaar want jy het maar 'n uurtarief en jy kan vir onder R1 000 klaarkom met 'n egskeiding. Daar is geen

rede hoekom onbetwiste egskeidings duisende rande moet kos nie."

(12) "Ek wil ook dit sê dat daar moet opgelet word dat arbitrasie alleen is nie die oplossing nie. Arbitrasie bly in wese litigasie. Die arbiter gee uitspraak en hy besluit wat die beste vir die partye is. Een van die partye sal altyd ongelukkig wees en bly steeds 'n duur proses. Trouens, partykeer is arbitrasie nog duurder as litigasie want hulle moet nog die arbiter ook betaal. Die enigste oplossing wat my betref, met respek, is mediasie, of dan wel enige van die ander modules van alternatiewe dispuutresolusie. Hierdie modelle sal die partye selfs kan aanpas om by hulle onderskeie behoeftes en persoonlikhede te pas. So word verseker dat die partye beheer behou oor hulle dispuut en gevolglik oor beheer oor die omvang van die koste daarvan. Hulle is self vir hulle oplossings verantwoordelik en natuurlik ook vir die gevolge daarvan."

(VI) MR ATTORNEY A. HUISHAMEN OF SPRINGBOK IN THE NORTHERN CAPE

In the course of his oral submissions to the Commission at Springbok on 11 March 1996 some of the points made by Mr Huishamen were the following :-

(1) "Om terug te kom na een van die vorige vrae van een van die kommissielede is die familiehof; en een van die vorige sprekers het dit wel klaar genoem. Ons dink dit is baie belangrik, en ons dink dat hoe vinniger dit Springbok toe kan kom des te beter sal dit vir die mense wees omdat jy soveel gevalle het. Wat in Springbok gebeur, gebeur in die res van die land, maar net die feit dat die familiehof ingestel is weerspieël die behoefte dat daar 'n daadwerklike behoefte is en in Springbok is daar ook 'n daadwerlike behoefte daaraan."

(2) "Verlede jaar het een van ons landdroste wat vir 'n maand lank Pretoria toe gegaan vir 'n kursus en toe hy terugkom van die kursus van familiehof, voel hulle sy kwalifikasies is vir Springbok te hoog en hulle verplaas hom onmiddellik na Kaapstad landdroshof en hy sit nou in Kaapstad landdroshof. So ja, ons het al 'n landdros wat 'n kursus gedoen het en toe hy hier kom toe moet hy Kaapstad landdroshof toe gaan."

(3) "So ons het die gevalle met dringende aansoeke, met Reël 43-aansoeke waarmee ons te doen het, dat die mense eerder bereid is om by familie te gaan geld leen dat die saak maar net so vinnig as moontlik in die hof kom. Maar ons wat hier praktiseer voel dit is verkeerd. Dit moet nie so nodig wees dat 'n mens nou nog by ander mense moet geld leen nie, veral hier waar die Regshulpraad ter sprake kom nie. Ons probleem met die Regshulpraad is dat hulle vir jou sê: Jy kan die persoon verdedig, maar dan moet jy hom in Springbok verdedig. Nou het ons die geval, my persoonlike ondervinding, ek moes verlede jaar gaan na Hof 32, die streekhof in Kaapstad, dit is die hof vir seksuele misdrywe omdat daar 'n agtjarige dogtertjie ter sprake was wat getuienis moes afgelê het op hierdie geslotebaan televisie, en ek het geen magtiging om daarnatoe te gaan nie."

(4) "Die streekhof hier sê hy hoor dit nie aan nie, hy verplaas dit oor Kaapstad toe, maar ons het al klomp getuienis aangehoor. Ek kan my nie onttrek van die saak nie maar ek mag ook nie Kaapstad toe gaan nie. So, wat 'n mens toe maar gedoen het, ons het lank met die Regshulpraad onderhandel en na verskeie vertoë en na etlike fakse en telefoongesprekke het hulle uiteindelik toestemming gegee, nadat ek vir 'n nominale bedrag bereid was om Kaapstad toe te gaan omdat ek gevoel het dit is net nodig, dit gaan nie oor geld nie, dit gaan oor die mense. Maar dit kan nie so aangaan nie. Die behoefte aan die familiehof is

daadwerklik."

(5) "**MR MALULEKE:** One of the submissions from the counsel from Gauteng was that…the traditional Black Divorce Courts virtually have about three divisions and they sit on circuits in various areas and the family court should really be adapted to that. What you need to do, is that you take those Black Divorce Courts and you change them into family courts. Would you have any comments on that?"

(6) "**MR HUISHAMEN:** Well, I personally would certainly welcome that because I am of the opinion, if you can defend somebody on a murder charge or a rape charge, I think it would be fit to take them to a divorce court and if you can convert this family court to include divorces, certainly. Normally, before you reach an agreement you are busy with that case for three to five months about the ins and the outs, especially if it is a defended matter. By the time you get to court you know just about everything about this couple, and I cannot see why we cannot handle divorces in Springbok or if not the regional court, then definitely in the family court, yes. I would welcome it."

(VII) THE HON MR JUSTICE CF. 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 Eloff JP were the following :-

(1) "May I just say that the Commercial Court I established myself by a practice direction, and it has got a limited application because I have not got the power to set up a court. But what I did was to issue a Practice Direction about three, four years ago to the effect that if two parties to a case agree that that case should be designated a commercial case, then that will take place, and the case is then assigned to a Judge who lives with the case and carries the case through. Certain procedures are adopted in terms of that Practice Direction. In the nature of things those are commercial cases, and complicated cases, and that is why they are dealt with in that particular way."

(2) "Experience has shown that a large number of cases should be dealt with as they are in a London court as commercial court matters but the one party finds it is convenient to drag his heels, and not to consent to the matter being identified as a commercial case and that goes on. In London, I had spent a week in London examining that court and its functions and sat on the High Court on invitation of the Senior Commercial Court Judge, and he found that with their Order 73…matters are disposed of very expeditiously and the thing is given teeth so that even the reluctant litigant can come before the commercial court."

(VIII) MR ATTORNEY O.D. HART OF VENN, NEMETH AND HART, WITH WHOSE SUBMISSION THE PIETERMARITZBURG LEGAL CIRCLE ASSOCIATED ITSELF

In the course of his oral submissions made to the Commission at Durban on 30 March 1996 some of the points made by Mr Hart were the following :-

(1) "I firstly cover the question of a Circuit Civil Court in Natal. Mr Commissioner, I am of the view that a Circuit Civil Court will not be necessary. Apart from the expense of setting up such a Court, it seems to me that for civil matters one may well find oneself in a position of going out to a circuit with five or six matters on the roll, all of which are settled, and a Circuit Judge sitting there with nothing to do. The situation where the Civil Judges are concentrated in Durban and Pietermaritzburg is that if matters are settled the Judge is then in a position to help out in other Courts and to reduce the backlog. I do not see the necessity for Civil Circuit Courts in Natal, particularly as I do not believe there is any place which is more than three hours' travel from either Maritzburg or Durban."

(2) "On the question of access, I believe that there must be - or we believe that there must be improved periods of time in which a matter is brought to trial. We believe that justice delayed is justice denied and that it is wrong that the public should need to wait inordinately long periods for trial dates to be allocated and, with respect, this is simply not acceptable.

CHAIRMAN: Could you give us, perhaps, some idea of the average waiting time at the moment in Maritzburg?"

(3) "**MR HART:** Yes, I will. I have recently arranged to have a survey done of Pietermaritzburg and, taking matters which were set down in June and July last year on the trial roll - not when summons had been issued, actually placed on the awaiting trial roll in June and July last year, and my survey shows that those matters, on average, are taking between 9 and 10 months for trial dates to be allocated and those are matters where two to three days have been requested. If they are longer than that - five days and anything beyond five days - it could be a lot longer. I can't give you the exact times, but a lot longer than that."

(4) "**MR MALULEKE:** Sorry, could I disturb you, Mr Hart. When you say between 9 and 10 months, are you meaning the date when the trial date is actually allocated or the actual date of hearing? There is normally three to four months from the date…(intervention)

MR HART: No, no, from the date on which it's placed on the awaiting trial roll until the date of trial."

(5) "I don't know the position in Durban but, as I think I've said, that it's probably longer - in Durban it's probably longer. Mr Chairman, in my view delay feeds on delay and the more delay you have results in parties to litigation making no effort to have matters resolved. They know they are going to be set down a long time in the future. They don't apply their minds to the matters and they just do not get settled. If pressure is placed on litigants by knowing that matters are going to be set down shortly they all apply their minds to the matters and they have those matters resolved quicker and more efficiently, in the interests of justice."

(6) "**LEON J:** May I just interrupt again to ask you whether any of this is due to delaying tactics on the part of defendants?

MR HART: Most certainly."

(7) "Mr Commissioner, it seems to us that perhaps the Bench could take a more managerial control of trials.

CHAIRMAN: Do you support the idea of case management?

MR HART: Case management, I do. And if it is thought that that is not a Judge - a responsibility for Judges, then it seems to us that maybe there should be legally-qualified registrars or the like, with management experience, with executive powers, to jog along cases and see that they get to court and to spend time in things like rule 37 conferences. Because, if that is done, the parties will have to apply their minds to things properly and early and, in our view, that will reduce the time delays in litigation.

As a thought, we suggest that the Judge President in the Natal Provincial Division might consider having more communication with practitioners and the Bar in the form of communications as to practice in the division. Sometimes we are told that practice has changed and we don't know about it and it leads to confusion and perhaps wasted costs…"

(8) "**MR MALULEKE:** Actually in other jurisdictions there are committees, which are permanent committees, which liaise between the professions in the local area and the Judge President on matters of practice like you have referred to. You would be aware of that?

MR HART: Yes, we don't have one like that in Natal, not with the Judge

President, a liaison committee, but I think that idea has great merit."

(9) "Mr Commissioner, on the question of specialisation, it is our view that the Courts, like advocates and attorneys and other professions, will probably in the future tend to become more specialised and to need more specialised knowledge and that, because of the general trend towards specialisation, litigants may require more specialised knowledge in the courts, that there should be a movement towards specialised courts in this country. Again, I don't presume to suggest what courts, specialised courts, should be set up, but just to ask the Commission to consider the principle that the following might be appropriate: a Family Court, a Commercial Court similar to what is now being used in the Transvaal Provincial Division, and things like a Labour Court or a Tax Court."

(10) "**LEON J:** Have you any views about whether there may be merit,…having regard to these specialist Courts, in having a specialist Constitutional Court in the Provincial Divisions.

MR HART: Judge, I believe that to have great merit, as one of the specialist courts within the Provincial Division."

(11) "Mr Commissioner, finally, it seems to us…that there should be a move by the Department of Justice towards computerisation in the Supreme Courts and that the Courts should all have proper up-to-date law retrieval systems, as are being done elsewhere in the world."

(IX) 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 Mr Dickson, SC, were the following :-

(1) "**CHAIRMAN:** Do the Pietermaritzburg Bar share the concern expressed by Mr Hart at the length of waiting time for civil trials in Pietermaritzburg?

MR DICKSON: Yes, we do, Mr Chairman, and I think that the frustration is this, that Mr Hart has accurately given the waiting time for two- or three-day trials and may I just say that practitioners are being asked to accurately assess the time for which trials are set down and the reason for that is that we don't have a running roll. So a time is allocated for a trial and it ought to finish within that time. If a bad estimate is given, it may result in the trial merely being adjourned and a new day having to be applied for in the future, because it would run part heard."

(2) "We're not saying that the kinds of considerations applied by the Senior Judge or the Judge President or whoever is on duty and instructing the registrar in relation to set down is wrong. What we're saying is that perhaps Mr Hart's case management would speed things up and give proper allocation to trials on the merits."

(3) "I don't have any complaint in the way in which the Judge President has constructed his roll system, but it just - it has slack periods and then it has long delays and it's very difficult - I'm just throwing the problem to the Commission - perhaps the Commission has heard representations elsewhere in the country - to get to the best answer. It may be the roll system, the running roll system.

LEON J: Well, the answer may be the case management system.

MR DICKSON: Or the case management system.

LEON J: Yes, that may be the best answer in the end.

MR DICKSON: Yes."

(4) "**MR DICKSON:** As far as the Commercial Court Division of the Supreme Court, there is no difference between the opinions of Durban and Pietermaritzburg and we support Durban in the creation of a Commercial Court, probably to be based in Durban and, in fact, it makes good sense to

create it in Durban, provided it did not become a court of exclusive commercial jurisdiction, so that one could still present commercial cases in Pietermaritzburg, but we see the advantages of specialised courts and, in particular, a Commercial Court and we feel that Durban is big enough to have such a Court."

(5) "**CHAIRMAN:** One of the criticisms levelled against the Commercial Court in the Witwatersrand Local Division is that thus far it is dependent on the consent of both sides and many people have suggested that it's not really an improvement unless recourse to it is obligatory.

MR DICKSON: Yes.

CHAIRMAN: Have you any views on that?

MR DICKSON: Mr Chairman, I certainly don't believe that it should be a matter of choice. If it's a commercial matter and there's a Commercial Court, I believe that the plaintiff should make a decision and if he wishes to take it to a Commercial Court, that should be the place it goes."

(6) "**LEON J:** Do you have any views on a point made by Mr Hart with regard to other specialist courts? And the point that I raised with him, namely whether there shouldn't be in the Provincial Divisions a Constitutional Court, or Constitutional Division I should say, having regard to the very likely increase in constitutional cases when the final Constitution is written…?

MR DICKSON: Yes, Mr Chairman, I think that it has so many obvious advantages it would be hard to argue against the specialisation of Judges within a division and certainly Judges with constitutional - special training or experience would be a great asset and if - one doesn't have to formalise it into a Constitutional Division of the Provincial Division, but it would certainly be a great advantage to litigants if they knew that the Judges they were presenting a case to had an expertise in the matter of the case…"

(X) 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 Midrand on 9 April 1996 some of the points made by Eloff JP were the following:-

(1) "I felt the need to do something for Johannesburg what was being done for London for the London Commercial Court. The London Commercial Court was established at the turn of the century to cater specifically for what was termed "commercial cases of some complexity." The merchants and tradesmen and everybody were dissatisfied with what was going on and I just took it upon myself to start investigating this."

(2) "I set up a small informal Commission with myself as the self-appointed Chairman, members of the Johannesburg Bar, Attorneys Association, the Law Society and some judges and we had exploratory discussions and I found support for this. I also touched the other Judges President and the Chief Justice on this and they thought it was an idea which was well worth exploring. The Law Society was to such an extent supportive of this that they arranged for me to fly to London to explore, to examine the workings of the Commercial Court there."

(3) "I went to London, I had discussions with the President of the Commercial Court, I was in fact invited to sit on the High Court in the Commercial Court and to see its workings. When I returned I decided to take the plunge and set up a Commercial Court."

(4) "I have not, of course, the statutory power to set up a court as such but I did the next best thing and that was to issue a Practice Direction which in terms amounted to this that if two parties to a civil suit in Johannesburg wished their case to be dealt with as a commercial case they could join and ask me to do that."

(5) "The Practice Direction I issued then was discussed by the Minister of Justice in Parliament, he also supported the idea strongly and the original Practice Direction was altered later on, various procedures were provided and one important element in the set up of the Commercial Court was that once the Judge President designates a case as a commercial case a judge is assigned to the case and he lives with that case and all the little procedural hiccups which occur as the case proceeds is dealt with by him. The judges who are designated to this court are known to be judges who have had considerable experience in

commercial matters and can deal quickly with these cases."

(6) "Apropos something mentioned by Judge Flemming, I was concerned when I set up this court or arranged for this court by the Practice Direction about the danger of setting up a judicial elite."

(7) "This problem I discussed when I was in London with Lord Steyn, an expatriate South African who practised in the Commercial Court extensively, I asked him whether one does not create the danger that you create a judicial elite and he said no, it has not been the experience in London. The fact is that certain judges are known to have expertise in intellectual property matters, expropriation matters, criminal matters and all sorts of matters and they do not become elites because of this."

(8) "The motivation was to cater for Johannesburg being the commercial centre in Southern Africa, the problem was to cater for that litigating problem in the same way as the London Commercial Court caters for cases of that sort in London."

(9) "The problem about the informal way in which this court was set up is that there are many persons, litigants, who prefer not to co-operate in having their case assigned or becoming commercial cases. The defendant who wants to drag his heels and gain as much time is not going to do that and that is why it needs statutory foundation so that as in London the case can be designated a commercial case, whether or not both parties like it."

(10) "**CHAIRMAN**: The Commission has obtained statistics as to the volume of undefended divorces heard annually in the various divisions and it is a staggering figure. For example in the year 1995 there were almost 32,000 cases heard by the Supreme Court and of these approximately 30,000 were undefended. Now there have been suggestions, notably from the Judge President of the Cape of Good Hope Provincial Division, that for a judge to sit for hours every week listening to undefended divorce cases is not a productive use of judicial manpower. What is your reaction to the suggestion that the time has arrived for the adjudication of undefended divorces in a lower court, a tribunal not necessarily manned by magistrates or magistrates only, but manned by representative of the Side Bar or the Bar if they are interested?"

(11) "**ELOFF JP**: Well this is a matter that has been discussed at various levels and has been for many years. The strongest reason urged why divorces should be dealt with by the Superior Courts is that divorce is said to be a matter of

status and consequently that should be dealt with by a Superior Court."

(12) "That point of approach is no longer held as strongly as it used to be but practical realities I think dictate that there should be a departure from the present system. You mentioned the figures, at present in Pretoria unopposed divorces are heard on Fridays, an average 150 to 180 unopposed cases on a Friday to be heard by three judges. So every judge has to go through 45/50 and sometimes 60 divorces on a single day."

(13) "I have done that myself very often. It is tiring but what worries me about that is the impression it creates on the public and on everybody. One is left to feel, you have to go through this with some rapidity otherwise you do not get through your work so perhaps three minutes per divorce and the impression that gains or might be created that it is something like a sausage machine. It is very tiring work, I would rather spend a day in a most complicated income tax dispute requiring reservation of judgment rather than sit for an hour in the divorce court. It is really tiring work."

(14) "In Johannesburg it is a little worse. In Johannesburg divorces are heard on Thursdays and Fridays, on average 200 cases per week - unopposed divorces. What adds to the problem is that increasingly parties appear in person so the judge has the load of playing counsel and putting the litigant through his or her paces. All judges complain of the work, it is really tiring work."

(15) "In Great Britain when parties divorce they do not even have to come before a court, they go to the Registrar and sign a document and they are divorced. So I think that South Africa would be keeping in pace with modern thinking if it were to jettison the idea of the Supreme Court being vested with sole jurisdiction to hear divorce cases and to assign that task to another tribunal, not a lower tribunal, it should be an excellent tribunal which has got more time and can deal with this with greater dignity and free the Superior Courts of the task of doing that, yes certainly."

(16) "You may have to make special provision for cases where children are involved because experience tells one that sometimes parties, when they settle a case it does involve horse-trading: I will pay less maintenance if you withdraw your defence and that sort of thing but special arrangements may have to be made. Even then, after you have heard 35 divorces, even the skilled and experienced and attentive judges may miss some horse-trading which comes in the 40 th case before you."

(17) "**CHAIRMAN**: Yes, I think the notion is that in such an eventuality the Supreme Court would retain concurrent jurisdiction and that the other tribunal would obviously have the power to refer meritorious cases for adjudication to the Supreme Court.

ELOFF JP: Yes, some cases would become complicated because of section 7 claims. There is just this danger though. I am aware that when there was talk of the family division there was created in Johannesburg an association called the Association of Divorce Lawyers under the Chairmanship of a gentleman called Gundelfinger and they set their face strongly against cases being heard in those courts. So there is going to be sales resistance by the profession against that."

(18) "The argument is why should divorces, divorce litigants, why should they have third grade treatment whilst a man who sues for a debt comes before the Superior Court so account will have to be taken of the circumstances. When the draft bill for providing for the Family Division was put up the original text provided that parties may only come to the Supreme Court for good reasons shown. This Association then went to see the then Minister of Justice and prevailed upon him to drop that clause and he did so."

(19) "**CHAIRMAN**: Now in explaining to us what you had done in regard to the Commercial Court you will recall that you used the vivid phrase that once a case has been designated a commercial case, a particular judge is assigned to it and he then lives with that piece of litigation. Very broadly, what is your reaction to the notion of, not merely in relation to a Commercial Court but generally speaking in civil litigation, the notion of court management as a regular feature of civil litigation?"

(20) "**ELOFF JP**: Yes that is a popular idea of Judge Ipp of Western Australia, and I have given this some thought. Yes, court management; but within limits. The difficulty is you have to deal in Transvaal with numbers, large numbers of cases. It is an idea which the Cape likes of having some sort of court management in the sense that every case has to have a judge presiding over it pre-trial. That is just not on as far as Transvaal is concerned because of the numbers."

(21) "I mentioned earlier that we set down in Johannesburg 28 cases per day. If you have to have a judge presiding over a pre-trial minute of that you have to have a bench of 20 judges presiding over nothing but pre-trial conferences and I can assure you that some of these cases are quite complicated. For a judge to exercise a meaningful role over a pre-trial conference with a court file this thick, and complicated issues, is going to require an hour to deal with this.

That sort of court management is not practicable."

(22) "The next best thing is something which occurs in the Commercial Court but also in other cases where a matter is somewhat complicated. The parties approach me as Judge President or any Judge President and ask him to make special arrangements, I can give you a case in point. There was a very complicated case running into several millions involving the importation of Teak from the East and it was complicated and the pleadings bundle looked like this so the parties came to see me, I assigned a judge to this case and there were about four or five times when they had to come before him on all sorts of procedural wrangles and because of his understanding of the case, because he had been - I use the phrase living with the case - he understands it and he could quite rapidly resolve any disputes as they arose. But that, because of practical reasons can only occur in regard to certain particular cases."

(23) "Another sort of case that lends itself to that treatment is expropriation cases and I have done this quite often. When an expropriation case is pending then I call in the parties or they come to see me, I designate a judge to the case and he takes part in the pre-trial management of the case. But the sort of Judge Ipp idea will not work in Johannesburg."

(24) "**CHAIRMAN**: Of course on the North American continent something much in vogue is the technique of Alternate Dispute Resolution, either as a completely voluntary option or in some jurisdictions annexed as a procedure annexed to the court as part of the litigation process. Briefly your ideas on that subject as a device for saving time and money?"

(25) "**ELOFF JP**: That has happened and with some success. The question is who shall take the initiative and at what stage and how? I am aware of a very complicated engineering dispute which was threatening to go on for years and the parties themselves then agreed for the appointment of a senior advocate from Natal to sit as the mediator."

(26) "There is, in Johannesburg, this body that takes on these cases; but what is required is that somebody should take the initiative of invoking these people. Question, should not the judge do that? Yes, but at the stage when a case comes before a judge the parties are ready and the costs are incurred and it is a little late then to do it."

(27) "Possibly some procedure could be invoked whereby cases could be identified at an early stage which call for mediation. In the United States, you refer to

that, I have knowledge for instance of Denver, Colorado there they have got what they call a Court Manager and he, with computers, picks up cases which call for that sort of treatment and designates that."

(28) "It is a complicated matter, I simply do not know how one identifies in good time what cases are of that sort, not every case lends itself to mediation. I think the initiative should come from the parties themselves but often the lawyers would prefer to have a good and a healthy fight in court rather than submit to mediation."

(29) "**MR MALULEKE**: Would you still argue for the retention of the eight kilometre radius, particularly in a small province like Gauteng? It seems to me silly that an attorney in Springs must get an attorney in Johannesburg to file documents or *vise versa* or even Pretoria North, I am not too certain and it seems to work hardship on the litigant, it is costly and it introduces very unnecessary things. What are your views about it?"

(30) "**ELOFF JP**: I think that serious consideration should be given to an alteration of that because new means of communication render the old distance of eight miles which was perhaps fixed when you had to go by horseback, renders that obsolete. People communicate by fax these days and we have already, Judge Flemming can lend support to that, the extent to which communication by the Registrar goes now by - Judge Flemming can enlarge on that, with the use of the computer and all the other means it is no longer important whether a man is two kilometres from the seat of the court or 15."

(31) "The practice with the smaller divisions is that they do not have a continuous roll, I know it is the position at Kimberley and at Bloemfontein, they have very few Superior Court cases and usually those cases are given a date, this case is going to be heard from 12 to 14 April. Then the parties come and they come to court on the 12th and the case goes on, comes 14 April the case is not finished and is postponed to another date."

(32) "The continuous roll system is a very valuable one and it has meant, you must think of the benefits for the entire litigating community, not only the few people there, it has meant that the waiting time has been reduced. In Transvaal the waiting time has been reduced, it was once 14 months and it is now down to six months and Judge Flemming tells me that in Johannesburg we may soon have a waiting time of five months only, perhaps he can deal with that. So it means that … (pause) - Judge Flemming tells met it is already so in Johannesburg the waiting time, from the time you wait to get a date until you heard is five months."

(33) “That means that the entire litigating public has the advantage of a speedy hearing and none of the attendant disadvantages of witnesses disappearing or being dead or so on and so forth which serves a large section of the litigating community. It may be that one or two litigants will then have to wait a day for their case but that has to be offset and seen against the greater benefit to the large litigating public.”

(34) “I strongly believe, and I have lived with this for many years, in the continuous roll system, provided you have adequate judicial manpower to take care of that. In Johannesburg we try to have eight judges all the time to hear civil trials, in Pretoria we deal with seven. What needs to be done is that the judicial complement should be increased so that perhaps nine to ten judges are hearing civil trials in Johannesburg.”

(XI) THE HON MR JUSTICE H.C.J. FLEMMING, DEPUTY JUDGE PRESIDENT OF THE WITWATERSRAND LOCAL DIVISION

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) "When we come to the Family Courts it is the similar situation. Your court, if we use the word court in any correct sense of the word, comes in as a decision maker. But when you come to the family you need lots of things outside decision making for which the court is not suited."

(2) "So what you need, and we started that with the Family Advocate, is the case coming to court but saying before we come to resolve it and deciding who is right and who is wrong, first explore that venue."

(3) "I think that experience is shown that when the people talk about the Family Court they use the same name and they talk about completely different things, completely different ways of doing it but the substance of it all is, I believe, that the court should not work in isolation, there must be a bridge building to more constructive methods."

(4) "The second point is this that in the interests of accessibility of justice and for the reasons which the Judge President has mentioned, it seems to me that the time has come for magistrates, each in his own district, to deal with unopposed divorces. What one attaches to that is another form of bridge building, and that is similar to a defendant in the magistrates court saying I now want to go to the Supreme Court. Allow any of the two parties to transfer the matter to the Supreme Court. Let them start there and once they are convinced that at trial they have not settled, they have not sorted things out and they need something other than the magistrate, then let them come."

(5) "**MR MALULEKE**: … I thought you might want to give us your views on how the Family Court system, as you envisage it, will assist in bringing the costs down and making it more accessible to John Citizen?"

(6) "**FLEMMING DJP**: I think the whole issue of costs is a difficult topic on its own. I think one generality which one can make is that your way to eliminate costs is to eliminate work. You must cut down on the work which is necessary. To put the negative side of it, if work has to be done, the person who is going to do it is going to charge a fee for it so whether you have the Supreme Court

or those who go for status, they want the family court with judges and with all the high trappings for their own status, if it is going to be an attorney who says I want R1 500,00 or R2 000,00 for a divorce in this court, he is going to say the same in the other court."

(7) "**MR MALULEKE**; Some of the complaints that we have received are why must it cost so much less to get a divorce in the Black Divorce Courts and sometimes two to three times more in the Supreme Court on unopposed divorces."

(8) "**FLEMMING DJP**: What I want to say about that court is that also has a sort of a circuit idea, it sits in this area at that time, sits in that area at that time, it is not good enough. You must have the local area where they file an affidavit with the magistrate and say I want a divorce, here it is and if there is a problem they can transfer it to that court or the Supreme Court. That is the only way you are going to get down fees is to minimise the work so that it is locally done, it is cheaply done, almost informally done, quickly done and within the area and if there is a problem, you go to court."

(9) "Let me deal with an other feature which is again in common with various features and that is the institutionalising of matters, of processes, of reactions, of responses. This affects mainly ADR, Family Courts, Commercial Court, this underlying principle."

(10) "The file which I happen to have here is a file which I was given at the Durban Legal Forum and the contents refers to the section where I attended, *inter alia*, on ADR. As much as I am in favour of ADR, as much as its advantages are, as much as I support the idea, to an equal extent there is reason not to come with legislation to say that a court can force you to ADR."

(11) "You cannot have parties come to court to say I want a resolution of the case, I want the law applied to the correct view of the facts and say I am not going to do it, you go to somebody else, he will do it in some fashion undefined, not applying the law to the facts but talking to you and then coming to some sort of decision. You cannot deprive parties of the right, that is the second reason why you cannot entitle a court to say you must go to Alternative Dispute Resolution."

(12) The third reason is this, when you go to a negotiation, talking things out, settling things, you need confidence in the man who presides, you must be able to choose that man. Once you institutionalise it and the Minister or whoever

makes appointments to say the following will be ADR people, you are forcing them to somebody and you cut at the whole basis of ADR and that is confidence in a man going between me and my wife."

(13) "There is a fourth reason which I think came very much to the fore during this legal forum. There is one association of ADR people who, with their membership, tend to select, to control, look at the quality, the experience or the whatever of the appointees and it is more or less a professional section, charge fees for it and then do the work. Some time after that I spoke to one of the associations or mediators which was presented in Durban, in Vosloorus and they have a lot of youngsters which they trained for ADR in their community. They seem to be doing wonderful work but if you have a select few which do ADR you ignore or do you deny the existence of the need and the existence of ADR elsewhere? ADR is everywhere, if I have trouble with a colleague or a friend or a wife I go to somebody we trust and ADR must not be brought down to a narrow circle, it is a process which is inherent in society which must be encouraged everywhere."

(14) "Similarly that goes for the Family Court. I respect the work which social workers and other people doing constructive work do, mediators, reconciliators but that again includes clergymen, friends, headmasters of schools and the point is you need the right person for the right situation, not a short list of appointees. When you come to the Family Court there again you cannot have a situation of the court saying you have come to me for a decision, go to somebody else, he will do something else for your case. It must essentially be, the court must have a bridge to say look go to that, I will call somebody in, I will consult somebody, but forcing people is dangerous."

(15) "Coming to the Commercial Court, you would have seen on the memorandum that I am in favour of the continued existence of the Commercial Court on the informal basis. If the people involved with that can work out the product which is wanted, we use it. But the situation is this, it is no good trying to keep up with the Joneses and say the London people have a Commercial Court, therefore, we also have one. Birmingham's works, therefore, we also want one. The London court, more specifically than the others, really originated about a century ago at the realisation of the need for expedition, the need for judicial intervention, let me stop there."

(16) "That embryonic idea, that realisation, the Englishmen never developed properly. It took the Canadians, the Americans, the Australians and Hong Kong to say we need something more of the same, call it fast lanes if you want to give it a name. We do fast lane without giving it a name and I am certain that I will give you facts and figures to show that we perhaps do better than the

Cape with all the names."

(17) "On the bench it has become a cliquish business, at the moment I do not even know who all the Commercial Court judges are but it does not work satisfactorily."

(18) "What has happened in fact is that whereas in the beginning there was a number of cases to come on, the figure has just sloped, and sloped and sloped and now there is, it went out with a fizzle. The rules originally were as one wants it, judicial intervention, special attention, exchange of witnesses statements, because it was so unattractive I believe that is the reason, the exchange of witness statements was abandoned."

(19) "Then all special rules were abandoned and it is now according to the ordinary rules of the court which means it is simply another case but with a special court…The fact is that the public do not want it. If defendants do not want to consent, why must they be forced"?

(20) "This is one of those rare cases where one can put the product on the market and see what the response is. It has been put on the market, the fact that the people do not want the consent shows that they do not want it. Now on what basis must people now be forced and then, in addition, it is not because of necessarily the complicated nature, the largeness of the amount or whatever the jurisdiction is and then I find that the dispute about the main lease with the lessee goes to the Commercial Court but I sit in Motion court with the same lease on the same grounds of dispute between the lessee and sub-lessee. So I decide the same issue, not in the Commercial Court. Again my statement is not against the Commercial Court, it is its operation. If we can develop it or if those involved with it can develop it into an acceptable product by all means yes, I am always in favour of experimenting and going forward, looking for solutions. But to force people, institutionalising it, no."

(XII) THE HON MR JUSTICE P.E. STREICHER OF THE TRANSVAAL PROVINCIAL DIVISION

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

(1) "Mr Chairman, I just wanted to add a few words in respect of the Commercial Court and that I do in my capacity as one of the judges of the Commercial Court. The establishment of a Commercial Court was criticised by Judge Flemming, he said that the rules in that court are the ordinary rules of the court and he said that it merely created an elite and caused dissatisfaction. The Commercial Court may have certain disadvantages but on the other hand it is a necessity."

(2) "The attorneys and the advocates wanted a Commercial Court and in my view, the Judge President had no choice but to accede to their request to establish that facility. Judge Flemming said that he had no objection and that he was actually in favour, as I understood him, of retaining the Commercial Court on an informal basis."

(3) "That is the problem with the Commercial Court, it is under utilised at the moment that is so but one of the reasons at least is that the parties can only come to the Commercial Court with the consent of the other party.

CHAIRMAN: So you suggest it ought to be made compulsory?

STREICHER J: It should be made compulsory and I can see no reason why it should not be made compulsory and for a party to object to that."

(4) "**CHAIRMAN**: Just to assist the Commission could you give us a few practical illustrations from your own experience of the sort of civil trial which is designated a commercial case?

STREICHER J: Well there is a very broad definition of matters that can be designated commercial matters. It will be matters involving a substantial amount or an important principle. Only those matter will be designated commercial matters.

CHAIRMAN: And a matter of some complexity?

STREICHER J: Yes, complexity - that is complexity, a substantial amount and an important principal maybe."

(5) "**CHAIRMAN**: Have you observed a disinclination on the part of certain defendants

to submit to the ministrations of the Commercial Court?

STREICHER J: Oh definitely and that is both the advocates and the attorneys I am sure will tell you that that is the problem, that you have difficulty in getting the other party to consent. In many cases you have defendants who are not that keen to have their matter heard and if that is the case then they will be reluctant to consent to the jurisdiction of the Commercial Court."

(6) "**CHAIRMAN**: In a nutshell what do you see as the obvious advantages of the Commercial Court?

STREICHER J: Well the advantages are and that is what the attorneys wanted, they wanted a pool of judges, they wanted to have certainty - that is the attorneys and the advocates, they wanted to have certainties that their matters would be heard by one of those judges; they wanted the advantage of one judge dealing in so far as possible with the particular case, that is right through from the time that the pleadings are closed …(intervenes)

CHAIRMAN: Shepherding it through.

STREICHER J: Yes. I may add to this, the rules have been changed and it is correct that unless the parties approach the judge to whom the matter has been allocated for directions, the ordinary rules of court will apply. But there is provision in the Practice Direction for the parties to apply for directions and by that provision, flexibility is built into the whole procedure and that is an advantage to the parties."

(7) "**CHAIRMAN**: And in your experience is the hearing substantially expedited?

STREICHER J: I think the hearing is expedited by the fact that the judge was involved right from the start, he becomes involved at a very early stage. He certainly, unlike other civil trials where you get the file on the morning of the trial, you will have the file long before the time, the parties can be called in, you can make suggestions to them as to how to curtail the duration of the trial and that is certainly an advantage."

(8) "**CHAIRMAN**: Judge Flemming rather suggested that the requirement of the device of exchanging witness statements, that it be discarded.

STREICHER J: Yes that is so, at one stage the Practice Direction made provision for the exchange of witnesses statements and it provided that the designated judge could order the parties to exchange witnesses statements. The advocates and the attorneys objected and they thought that that was a reason for parties being reluctant to come to the Commercial Court and from then onwards the rules were changed and they now provide that where the parties object, the judge will not order them to exchange witnesses statements."

(9) "**CHAIRMAN**: I have a question which was put earlier to the Judge President of the Transvaal. It relates to the question of undefended divorces and whether the time has not arrived that that work should be taken away from the Supreme Court and be dealt with by another tribunal on the basis of concurrent jurisdiction with the Supreme Court and referrals if necessary?"

(10) "**STREICHER J**: Yes I agree with the Judge President. The process in the Supreme Court is not a very dignified one and one can just imagine if a judge has to do say 40 divorces, undefended divorces on Thursday and 50 and more on Friday, it cannot be done in a very dignified fashion and the problem is as I see it that litigants, many litigants' only contact with the Supreme Court is through the divorce court and that is the impression that is left with them."

(11) "It cannot do the Supreme Court any good. I think many of them leave that court disillusioned with the Supreme Court, they have to pay a very substantial amount to have legal representation in that court and they cannot possibly be satisfied with what is happening in that court."

(12) "**CHAIRMAN**: Do I understand from your answer that you, therefore, think that perhaps the time is right that these undefended divorces should be adjudicated upon in another tribunal?

STREICHER J: I think so Mr Chairman, before another tribunal who may be able to give more of its time to specific cases and can do it in a more dignified manner."

(XIII) THE HON MR JUSTICE J.F. MYBURGH OF THE TRANSVAAL PROVINCIAL DIVISION

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) "Mr Chairman may I begin by dealing with the Commercial Court of which I am a member and just to say this that when the attorneys and advocates requested the Judge President to consider the creation of a Commercial Court, one of the reasons that we supported that was that we saw arbitration as a real threat to the Supreme Court unless the Judge President agreed and you are aware possibly that there is now an arbitration facility been established in Sandton."

(2) "At that stage that was merely a threat, it has now come into operation and the fact is that this is one answer to arbitration, to be able to say to practitioners and their clients that there is this specialist court consisting of judges acceptable to the practitioners to deal with commercial matters."

(3) "**CHAIRMAN**: Before you leave the topic of the Commercial Court, as you see it what are the merits and demerits of an exchange of witness statements? I know that in England there has been a lot of criticism because this has developed into a mammoth industry, producing very elaborate statements and there is a feeling in some quarters that perhaps summaries would suffice. What are your own feelings on the subject?"

(4) "**MYBURGH J**: Can I just tell you first of all about the development in England? Their Commercial Court is about 100 years old and it arose not because of any dissatisfaction with procedure, but with the quality of the bench. That was the beginning of it, it was believed that many of the judges were unable to do justice to the cause."

(5) "A great advantage of the witness statement is that it allows the parties to get to grips with the true dispute between them prior to doing so in court and the emphasis in the London Commercial Court is to arrive at the truth as soon as possible. In other words after 100 years of experience they said we are not concerned with defences or points, we are concerned with what will put an end to the litigation in the interests of justice and that is how the witness statement tradition grew in England."

(6) "In South Africa there has been resistance to that where we still have this idea of an adversarial system where you are entitled to hold your cards to the chest until the witness goes into the witness box and then starts putting his points and quoting cases to him."

(7) "I think one of the difficulties is this industry of making witness statements and the reason for that industry is that the lawyers have to be very, very careful of what goes into the witness statements because their clients are going to be cross-examined on the content of those statements. So the element of surprise goes and of course another experience they have had in England is that the witness gets cross-examined on the *minutiae* of the statement, so it is undoubtedly that that is a danger."

(8) "**CHAIRMAN**: And I suppose that the production of these witness statements can involve a tremendous escalation in costs, I think that has been the English experience as well?

MYBURGH J: I must immediately say that we always accepted that there would be an escalation in cost in the preparation of a Commercial Court case but there should be a saving in the trial costs and ultimately the English experience has been that there has been a saving."

(9) "We were also told that foreign litigants are using the London Commercial Court to the extent that 60% of their cases involves litigation between parties, neither of whom is an English resident and I include, obviously, corporations. In other words foreigners come to London, to their Commercial Court and consent to the jurisdiction. That system has been so successful."

(10) "Our experience in our Commercial Court has been this and each judge has had his own way of dealing with it but it has saved evidence-in-chief. The way I have run the Commercial Court when I have sat, is that the witness merely confirms his written statement. His counsel asks him if he wants to add anything to it and he does and then the cross-examination starts and, of course, the cross-examination in the hands of an experienced advocate is very pointed because he knows exactly what points he wants to make, he makes the points and he gets on with it. So the trial, not only are more disputes able to be settled if the case as a whole is not settled, but the trial goes much quicker than it would in the normal course."

(11) "**CHAIRMAN**: There has been some criticism of using the witness statement to stand as testimony-in-chief on the basis that it may do the witness a disservice. It may be unfair to him because he is, as it were, thrown in at the

deep end before he has had an opportunity of acclimatising, becoming accustomed to the unfriendly atmosphere of the courtroom. What is your experience in that regard?"

(12) "**MYBURGH J**: What I have done there is to let the witness read his statement and by the time he has read his statement onto record, he is relaxed and he feels more at home. That deals with the problem so that he does not suddenly start with cross-examination."

(13) "One of the difficulties that the practitioners in this type of work [family law disputes] encounter is the urgent application which is usually about children: either interim access or interim custody."

(14) "At the moment in Johannesburg, and I assume throughout South Africa, the way it works is that that a case goes onto the ordinary roll and in Johannesburg there is an urgent judge who does nothing else but urgent cases for that week."

(15) "But, nevertheless, he can be faced with anything between 25 and 50 urgent matters for that week, many of which are opposed and one of their concerns and I think it is a valid concern is that before that judge dealing with all that work, that is just another case that he has to deal with and he or she just physically cannot devote the attention required to that sort of case, with the best will in the world, simply because of the pressure of work."

(16) "What they seek, one of the reasons why they want speciality or specialisation, is that they would go to a court which is sympathetic to that cause, namely the cause of the children and spend time and have time to deal with it.

CHAIRMAN: With perhaps the necessary social service backup?

MYBURGH J: Yes and very often what happens in that urgent court is crucial to the future because somebody wins some interim rights and they very often cement into permanent rights simply by delay and of course another problem with children is that the parent who has access for that time, has the opportunity to develop a relationship with the child or children to the prejudice of the other party."

(17) "**CHAIRMAN**: It can be critical for the future?

MYBURGH J: Absolutely critical to the future and I merely support their view that to that extent the present system is unsatisfactory."

(XIV) ADV P.R. VAN ROOYEN, SC, OF THE PRETORIA BAR ON BEHALF BOTH OF THE PRETORIA BAR AND THE PRETORIA ATTORNEYS ASSOCIATION

In the course of his oral submissions to the Commission at Midrand on 10 April 1996 some of the points made by Mr van Rooyen, SC, were the following :-

(1) "Then there is a third major contact point and that is, that goes for all communities, and that is in the field of matrimonial matters, divorces just simply are extremely high in number and as far as matrimonial matters, where my learned friend Mr Bertelsmann will elaborate on a bit, it seems to be that we are satisfied, also showing our objectivity, that matrimonial matters should be taken to the people."

(2) "They should not be forced to travel long distances to come to, for example, Pretoria in order to obtain an unopposed divorce. Obviously it takes away from our work but fair is fair and we, therefore, associate ourselves with the idea that in restructuring provision should be made for matrimonial matters being taken closer to the people and in a forum where more time and more dignity can be applied."

(3) "Basically speaking it boils down to this that these family matters, which also include maintenance, should be adjudicated upon in an expert forum as a division of the Supreme Court, or with the same status as the Supreme Court, being brought closer to the people but where time and attention can be given to quality and to make use of a multi-disciplinary approach and I feel I have said more than enough now, my learned friend will expand on it."

(XV) ADV E. BERTELSMANN, SC, OF THE PRETORIA BAR ON BEHALF BOTH OF THE PRETORIA BAR AND THE PRETORIA ATTORNEYS ASSOCIATION

In the course of his oral submissions to the Commission at Midrand on 10 April 1996 some of the points made by Mr Bertelsmann, SC, were the following :-

(1) "As far as the third question is concerned, the question of the Family Court, in our written submission we envisaged or we accepted, as a given fact, that a Family Court would be instituted and more or less along the lines of the suggested amendment to the Magistrates Court Act on a Magistrates Court level. Having had the opportunity of reconsidering, we are in favour of the establishment of a Family Court but as a division of the Supreme Court on a circuit basis and into which court should be integrated the existing Black Divorce Courts."

(2) "Now we say that we would submit that this should be a division of the Supreme Court because of a number of considerations:

(a) it is and remains a status matter - a divorce or
(b) if it is not a divorce, a family issue is a serious matter which should be dealt with by a court of the status of a Supreme Court
(c) particularly divorces, but also other family issues require in our times more often than not, a multi-disciplinary approach."

(3) "We go along with the submission which is being made by the Association of Family Law Practitioners that these courts should be manned by specialists drawn, whether from the bench of the Black Divorce Courts or the attorneys profession or the advocacy but certainly from the ranks of those who have a penchant for family litigation, have an interest therein and are specialists therein."

(4) "We are, and to a certain extent this is possibly also a personal conviction, against the suggestion that undefended divorces should be dealt with by the lower judiciary or by the magistrates court. Undefended divorces can very easily develop into defended divorces. I think experience in the divorce courts teaches that undefended divorces very often, in settlement agreements and other issues, maintenance and so on, raise problems which are just as deserving of the attention, the knowledge and the expertise of a specialised bench…"

(5) "If a court of specialists is created then the problems which arise in undefended divorce actions in which an objectionable agreement can slip through because

it becomes part of the run of the mill of 70 undefended divorces in every court on a Friday morning, can be obviated."

(6) "**MR MALULEKE:** There is one point I would like to get your view on. Generally in the Black Divorce Courts a litigant can ask the registrar of the court to assist him or her to draw a summons, that service was available and is still being done. What would you as a member of the Bar, as a professional, what would your reaction be if the new Family Courts would have that type of provision?"

(7) "**MR BERTELSMANN:** In the first instance as far as the continued existence of the Black Divorce Court is concerned we believe that the argument that it might be unconstitutional may probably have merit, so we are in favour of the integration."

(8) "As far as the provision of the services is concerned and the availability of service from the side of the Registrar, we would suggest that once these courts are integrated and provision is made for all sectors of the community in Family Courts, that if that kind of service were to be provided by the Registrar, then the President of that court, the Judge President should make very certain that the staff which is available is duly trained and proficient and able to do so. We presume that once you have a specialist court of this nature it would develop its own rules and practice and procedure as time goes by."

(9) "The point which I omitted was the question of maintenance which you raised with my learned colleague, Mr van Rooyen. Once family matters are referred to a specialist court, all matters associated therewith should be dealt with by that court and so should maintenance."

(10) "**MR MALULEKE:** Would you from the Pretoria Bar be amenable to this Commission recommending that for instance the eight kilometre be done away with so that an attorney in Warmbaths can directly issue processes in the TPD say for instance instead of him becoming half an attorney and depending on his colleague in Pretoria?"

(11) "**MR BERTELSMANN:** Well we have looked at various ways and means in which costs could be curtailed, *inter alia* particularly this aspect but we looked at it against the broader background of the involvement of electronics and the arrival of the electronic age in the forensic process and yes we are of the view that the strict adherence to the eight kilometre radius may have become outmoded in the day of the fax and E-Mail and the computer and similar

electronic advances. We are in favour thereof that generally speaking service, possibly even the exchange of pleadings and, if the necessary infrastructure is there and the office of the Registrar, possibly even delivery can in appropriate cases and should in appropriate cases be done by way of fax or by way of other electronic devices."

(12) "We have one concern which was raised during our deliberation and that is that the litigant who litigates in person may be at a decided disadvantage because he may not have access to a PC or he may not possess a PC and in that case it might possibly be necessary to revert back to the alternative of the eight kilometre radius so that he has an address where one is certain that he does receive service. But generally speaking and there where legal representatives are involved, we would say yes as far as possible if electronics can be employed to increase the speed with which litigation is disposed of and lowers the cost thereof, we would be in favour thereof."

(13) "**MR BERTELSMANN:** In our submission we have recommended that civil circuit courts be introduced. We believe that such a system should be as flexible as possible. Frankly, personally I doubt whether the administrative problems which might arise would be so very serious. If there is a need for a Civil Circuit Court sitting in Standerton, to issue process from Standerton or from the nearest other centre where such process could or should be issued, should not present us with insurmountable problems. Obviously to ensure that the necessary infrastructure is there some administrative steps would have to be taken but that should be easy and we would be in favour of the institution of Civil Circuit Courts wherever there is a proven need for such a circuit court to sit and that need should be established in close co-operation with and under the continued control of the Judge President."

(14) "We are a little concerned about forcing litigants into the Commercial Court who would prefer to go somewhere else but if Johannesburg and the practitioners who are active in that court are satisfied with that submission, well we would not be directly affected necessarily but we would prefer a Commercial Court on a voluntary basis as we have it at the moment rather than with a statutory and forced basis. But in principle we are in favour of the existence of a Commercial Court and we would hope that the voluntary participation therein and the use thereof would provide a sufficient basis and justification for its existence."

(XVI) MR ATTORNEY C.P. FOURIE ON BEHALF OF THE PRETORIA ATTORNEYS ASSOCIATION

In the course of his oral submissions to the commission at Midrand on 10 April 1996 some of the points made by Mr Fourie were the following :-

(1) "I personally do not practise in the area of family law but my colleague, Mr Ehlers does and he advises me that the average cost of an unopposed divorce in the Supreme Court in Pretoria at the moment would be between R1 500,00 and R2 500,00 for an unopposed divorce, depending on the amount of work to be done and he also advises me that although an unopposed divorce takes two or three minutes I think the Judge President said yesterday, there is obviously behind the scenes a lot of work to be done, especially where children are involved, assets are to be divided, the Family Advocate that is involved and the drawing of whatever settlement agreement is then reached. So that in Pretoria is the situation and that would include disbursements, that would include counsel's fees."

(2) "Could I just add, Mr Chairman, from the Attorneys Association side we are also, in general, in agreement that one can look at the eight kilometre radius and particularly for the same reasons that Advocate Bertelsmann has advanced that we are living in the electronic age and distances are not that important anymore as it has been in the past."

(3) "We are, however, concerned about the practical implications thereof. I talk about possible disputes that may arise regarding the sending of pleadings via E-Mail or telefax and the fact that it might easily be denied that it has been received, etcetera, etcetera. So I think coupled with the abolition of the eight kilometre radius one will also have to look at practical implications as far as the rules are concerned; and safeguards so that disputes in that regard do not get out of hand. But in general I agree that one can look at the eight kilometre radius."

(4) "The second aspect I would just like to touch on very briefly is the question of the Commercial Court. I have had the privilege of listening to the Honourable Judge President yesterday and we are in full agreement with what he said, except that we want to caution as the Commercial Court and I did not have the privilege of listening to the oral representations of the Deputy Judge President but as far as his written submissions are concerned we are in agreement therewith that one should guard against the creation of specialist courts."

(5) "There is just one further aspect as far as costs is concerned and I think it has been touched on by various of the submissions and that is the one-third allowance to correspondents. We as attorneys are of the opinion that as far as the one-third allowance may still be in existence, I think it has by mere practice almost been done away with but we are of the opinion, and we are in agreement with the submissions in this regard, that that should be done away with entirely."

(6) "There was a question earlier as to the functioning of the Maintenance Court in the Magistrates court. We are of the opinion that it is in fact totally inadequate and we are also of the opinion that that should be incorporated or integrated in the whole new Family Court structure."

(7) "**CHAIRMAN:** Just in a nutshell what are the main criticisms you would level against the Maintenance Court at the moment?

MR FOURIE: I think they are burdened to a very large extent, I think the matters do not get any or very little attention and I think at the end of the day it is really a situation where the things are just run through without being properly considered. Mr Ehlers adds that the fact that there are also no cost orders being made in the Maintenance Court also has a very serious affect on the whole situation."

(8) "**MR MALULEKE:** Do I understand this correctly, does Mr Ehlers say that it would improve the situation if cost orders were made, particularly where one of the parties is represented by an attorney?

MR FOURIE: Yes, it would improve the representation."

(XVII) 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 Mr van der Linde were the following :-

(1) "The first is the question of a Family Court. In principle the Johannesburg Bar is in favour of the notion of specialisation. It does not adhere to the traditionally supported notion that an appointed judge is automatically qualified best to adjudicate in all matters that society brings before him. That being the principle, the question arises as to whether family matters ought to be addressed as an adjunct of the Magistrates Court or whether there ought to be a separate Family Court and if so, what the relationship ought to be between the separate Family Court and the Supreme Court."

(2) "We are opposed to a Family Court being an adjunct to the Magistrates Court for the very reason that we have advanced, that is that we believe in specialisation of courts. If for the reason of specialisation of courts there ought to be created a Family Court, because not all judges are qualified also to hear or best qualified to hear family matters, the same would apply to the magistrates. So for the same reason that the notion disqualifies the magistrates court as being the appropriate court within which to hear family matters."

(3) "It then leaves the option, as we see it, of the a Court - we submit that this court ought to deal as a specialist court not only with divorces but with all matters related to family, whether it be family in the traditional senses or whether it be a single parent family or even family in a loose relationship, we use the word not only in necessarily recognised by law relationships or certainly not recognised as a marriage by law, but other relationships between parties. That would deal with maintenance, with access, with custody, pendente lite or otherwise."

(4) "Now of course one has to be practical and we suggest that as far as the relationship with the Supreme Court is concerned the following ought to apply: now we are trying to steer away from words and rather make submissions on notions and concepts, whether one calls it a division at the Supreme Court is not really important, the importance is what does it do and where does it stand in status."

(5) "So the following submissions we make in regard to its relationship with the Supreme Court: we say firstly it will have its own needs and, therefore, it will

require to be able to make its own rules of practice and procedure and to this extent it will be and ought to be independent of the Supreme Court."

(6) "Yet on the other hand we say that notionally and ultimately the guardian of the boni mores of society must be the institution of the Supreme Court, whether one calls it the High Court or the Supreme Court, but the institution of the Supreme Court must ultimately be the guardian of the boni mores of society and because that is so, there ought to lie an appeal from the Family Court as of right to the Supreme Court."

(7) "I also submit that there ought to be concurrent jurisdiction with the Supreme Court as court of first instance. Now later on I will make submissions contrary to the notion of concurrent jurisdiction but it is warranted in this case on my submission because, if I may put it very baldly, you get divorces and divorces. Some divorces involve matters property which probably would find those litigants wanting to bring their disputes before a person or a judicial officer who is not qualified primarily to hear matters matrimonial but is qualified rather to hear matters property so that there is concurrent jurisdiction and one envisages the larger commercial divorces opting for that route."

(8) "So in conclusion, we propose the creation of such a court; we propose that a practical way to approach it would be to convert what is now known or called by some as the Black Divorce Court, as the fundamental strut of the Family Court, to start there; it has already well trained and well received judicial officers; it has a flexibility and accessibility and credibility of procedure; it is low in cost and the submission is, therefore, that the starting point would be a conversion of the present Black Divorce Court."

(9) "As far as the Commercial Court is concerned the argument will simply be that there is a need for it and that the practical way to go about it is the statutory creation of a Commercial Court jurisdiction for the Supreme Court as is, for example, the case with Admiralty Court jurisdiction."

(10) "The Supreme Court, when it sits as a court of Admiralty, sits in the exercise of its jurisdiction confirmed by that Act and it is a practical way, it retains the Commercial Court as an integral part of the Supreme Court. That such a statute ought also to make provision for the power of a Judge President in the division in which the court will sit to make rules that govern the proceedings of the Commercial Court."

(11) "I have made the submission that from a practical point of view the approach

ought to be to by statute create a Commercial Court jurisdiction for the Supreme Court of South Africa or the High Court of South Africa."

(12) "That Act ought to provide that the Judge President of the particular division will have authority and power to make the rules necessary for the conduct of cases in the Supreme Court, sitting in the exercise of its Commercial Court jurisdiction."

(13) "The jurisdictional provisions must provide, we submit for the following: firstly for a consent to jurisdiction without attachment, there would have to be something said about attachment and that you could come to that court without having to attach to found or confirmed jurisdiction; secondly that one would have to make provision for concurrent jurisdiction with the High Court or the Supreme Court in commercial matters so that the plaintiff decides whether he wants to go to the one or the other and thirdly one would have to make provision for the Judge President of that particular division to define the category of cases that would be described as commercial matters or commercial cases."

(14) "We know that there were problems with the pilot project but we submit the following: firstly the creation of a Commercial Court will not involve great cost, the structures are in place; secondly if it flops it is a nice to have; thirdly if it succeeds you will have a court in which complex commercial disputes will be heard instead of in arbitration tribunals."

(15) "It will, therefore, give the litigant a fairer choice because he will be having his case heard by one of a panel of specialist judges and he will have all the advantages of not having to pay for his room, for his recording, for his judge; he will have an appeal. More important, and it is with respect a sound principle, that the structures of the court ought to provide sufficiently also for the large commercial matters to run through courts of first instance and, ultimately, through courts of appeal. If you do not do that, if you shut the doors of the courts of the land to the complex commercial matters, inevitably the standard with respect of your adjudication at appeal court level will be affected."

(XVIII) ADV M. KLEIN ON BEHALF OF THE INDEPENDENT ASSOCIATION OF ADVOCATES OF SOUTH AFRICA

In the course of his oral submissions to the Commission at Midrand on 10 April 1996 some of the points made by Mr Klein were the following :-

(1) "We also support the idea of a Family Court on a circuit basis. We also say that the costs of divorces is not excessive if taking into account all the work that is done behind the scenes as previous speakers have said today. It would be better if we have a Family Court who is also to be a court with its own jurisdiction, a court on its own."

(2) "At ground level there are so many family quarrels and when it comes to getting children over weekends, etcetera that we feel that the Family Court should be in each town so that there could be a judge available, even over weekends for cases where the parent is refused access to his or her child and we feel that this will also be of benefit to the justice in this country."

(3) "We have also proposed that a separate Insolvency Court be enacted. We feel that the magistrates, they sit with interrogations in insolvency matters for hours on end. The magistrate in the end does not even give a verdict on what he has heard. He merely recommends certain things to the Master of the Supreme Court. The estates are drowned from all the expenses. In 90 % of the cases your liquidators do not have law degrees, which makes it very difficult in the sense that they can have interrogations where it is not necessary to have interrogations. The Insolvency Court should also include the application for sequestration."

(XIX) ADV B.K. PINCUS, SC, ON BEHALF OF THE ASSOCIATION OF FAMILY LAWYERS

In the course of his oral submissions to the Commission at Midrand on 10 April 1996 some of the points made by Mr Pincus, SC, were the following :-

(1) "We believe it essential that there be a Family Court established. We believe that there should be a Family Court being a division of the Supreme Court and that there should be a Family Court replacing the existing Black Divorce Court and which should be opened up to members of all race, colour or creed. That Family Court would replace the Black Divorce Court and then there would be a family division of the Supreme Court."

(2) "We propose that that family division should consist perhaps of three or four judges chosen because they are agreeable to sit there. There is a perception amongst certain of our judges that it is a field of, may I put it, lower law. They are adverse to sitting in family matters. So it would have to be judges who would be agreeable to it in our view and judges having the right personality to deal with matters of a family nature."

(3) Regretfully we are to the view that certain judges who are allocated to family matters just do not have the right type of personality to deal with matters of a family kind, they approach it in a commercial context, they apply commercial tests to a family matter which we find most unsuitable and I can give you many examples of that from practice."

(4) "So we believe there should be a family division of the Supreme court and a Family Court replacing the existing Black Divorce Court. Now the question that would arise is what happens if a summons is issued out of that, if I may call it, a lower court? Well we would propose that there be a provision in the rules that a party can apply to the Supreme Court to have the matter transferred as a matter of convenience."

(5) "What we further propose, and this is really getting to the nub of it and distinguishing it between commercial matters, is that we believe that the Supreme Court rules should be suitably amended for a family division because what one finds in practice is that one needs a more inquisitorial system in family matters."

(6) "I can tell you that there are certain judges, for example in the WLD, who are

already applying that inquisitorial system, for example a particular judge is telephoned and told that the parties are fighting about holiday access to the children. He calls the parties over together with the attorneys or perhaps with counsel and he thrashes it out in his chambers and the matter can take five to 10 minutes to thrash it out and we say that the rules should be suitably amended to provide for that inquisitorial system to try and resolve the problems between the parties. So we would propose that."

(7) "We are very much opposed to the magistrates courts dealing with divorces at any level. We are of the view that it is only skilled people who can deal with the complexities of family matters and one must bear in mind that sometimes they are very complex, sometimes they involve difficult matters of commerce and besides that they are normally very emotional involving children."

(8) "**CHAIRMAN:** I would like you to assist the Commission in the following regard. There are many views as to what a Family Court should comprehend but the traditional view, the conventional view is that it is a tribunal with a social welfare backup, lots of people with welfare expertise. Now what do you contemplate, how would this work, how widely do you cast the net, in what centres would the Family Court sit, what backup would it have?

(9) "**MR PINCUS:** Mr Chairman we are in favour of retaining the office of the Family Advocate but Mr Gundelfinger will be dealing with that aspect. We believe that that should work closely hand in hand with the Family Court. We believe that that family division of the Supreme Court should go on circuit to the rural areas."

(10) "**CHAIRMAN:** And would the Family Court judge also despatch maintenance applications?

MR PINCUS: Yes Mr Chairman, maintenance, custody - both interim and permanent and all matters ancillary to matrimonial.

CHAIRMAN: And the source from which judicial appointments would be made to the Family Court, what do you envisage there Mr Pincus?

MR PINCUS: The Judicial Services Commission - to follow the same procedures that have been applied by the Judicial Services Commission."

(11) "**CHAIRMAN:** Is it your view that undefended divorces should also be heard by the Family Court?

MR PINCUS: Mr Chairman the answer to that really is this that they only become undefended normally after a period of time and so we make the point that a summons can be issued out of either of the jurisdictions and then, when they become settled, will be dealt with as an unopposed matter as I said.

CHAIRMAN: An unopposed matter where?

MR PINCUS: In the same court in which the summons was issued. In other words if the attorney chooses the old Black Divorce Court then it will be - and no one has made an application to move it from that court, then it will be dealt with in that court and the same applying to the family division of the Supreme Court if that was the chosen forum."

(12) **CHAIRMAN:** What suggestions do you make as regards the integration of the Black Divorce Court?

MR PINCUS: Mr Chairman, Mr Helman is going to be dealing with that…In a nutshell what he will be proposing is that the name be changed to a Family Court, that it be opened up to all races and that it also goes on circuit from time to time as it does already as I understand the position."

(13) "**MR MALULEKE:** Just one or two points. The appeal from the Family Court where does this go to in your submission?

MR PINCUS: It is our view that either from the Family Court, the old Black Divorce Court or from the family division of the Supreme Court it should go as of right to the Intermediate Appeal Court, as of right. From there, with leave of the Chief Justice on fact and law."

(14) "Traditionally the old Black Divorce Court is a much cheaper procedure than the family division of the Supreme Court and of course a judge would not be hearing the matter, it would be the President of that court who hears the matter and at the end of the day the only real distinction that we can see is one of cost.

CHAIRMAN: So your plea is for the continued existence of the Black Divorce Court thrown open to all race groups but over and apart from that, the creation of a family division within the Supreme Court?

MR PINCUS: That in a nutshell is it Mr Chairman."

(15) "**MR MALULEKE:** Just finally, I am trying to get the reasoning, why would you need the two court structures which clearly seem to have the same powers and same status in relation to appeals, why would you need the two structures

to run parallel?

MR PINCUS: The only answer that I can think of is the question of the costs, it is only a cost matter."

(16) "**MR MALULEKE:** I know that, I am trying to find out from a litigant's point of view who tries to explain to himself that why the two systems running parallel?

MR PINCUS: Well the only answer that I can give you is that it will cost the litigant a lot less to do it in the lower forum if I could use that term."

(17) **MR JAPPIE:** On a point of procedure, what do you suggest do we retain the system where the plaintiff in an undefended divorce is still called upon to come and give his evidence in court or can that be disposed of?

MR PINCUS: No we would suggest that that must be retained because by and large you are dealing with children, the court as the upper guardian must be satisfied that the welfare of the children are being properly catered for so whilst it might be unopposed, there are still questions that a court has to consider in a family context.

MR JAPPIE: So even though the matter is unopposed and all issues have been settled and even though there may be an agreement you suggest that the litigant or the plaintiff, whatever, is still called upon to come and give his evidence and then the judge decides?

MR PINCUS: Yes, for that reason."

(XX) MR ATTORNEY S.D. HELMAN OF JOHANNESBURG

In the course of his oral submissions to the Commission at Midrand on 10 April 1996 some of the points made by Mr Helman were the following :-

(1) "The Family Court with an all-embracing jurisdiction is a necessity. In answer to a question which you put to a previous member, all-embracing means everything to do with a family including adoptions. We have the Childrens Court in the Magistrates Court, we have the Child Welfare Commissioners who deals with the adoptions. Frequently, or not frequently but too often these land up in the Supreme Court. I think a Family Court would be a better forum for adjudication in matters of this nature or it should fall within the ambit of the Family Court."

(2) "You addressed a question regarding maintenance - much as I am against the putting into effect the Magistrates Court Amendment Act of 1993 I think that because of the nature of our population and where there are existing magistrates courts one cannot take away the maintenance courts from the magistrates court. In the larger centres these courts are an abysmal failure, they are inadequately staffed both in number and I am sorry to say, quality."

(3) "I know that in Johannesburg I recently had an incident where it took three months to get a date for the hearing of a maintenance enquiry and this was after some months to get the summons served on the respondent so this poor woman, with four children, has gone without maintenance for the better part of 15 months before she can get a hearing in court because the ex-husband was avoiding service and they insisted on a personal service. By the time they got service there was still an additional three months before she could get a hearing and then what happens at the hearing, it is handled by a Maintenance Officer, not by a judicial officer, they try and resolve the matter, if they cannot it has to be postponed for a hearing in the Maintenance Court for an enquiry in terms I think of section 11 and that can take another two to three months."

(4) "**CHAIRMAN:** Now the Maintenance Officer here in Johannesburg, what qualifications would he hold?

MR HELMAN: Mr Chairman to the best of my knowledge they are drawn from the pool of prosecutors. You will find one month they are in the Maintenance Court, some time later they are now prosecuting in the Traffic Court or in one of the other courts. This is part of the failure of that system in so far as it relates to its attachment to the magistrates court."

(5) "Instead of the Family court being part of the magistrates court, the Maintenance Court of the magistrates court should be part of the Family Court, putting the shoe on the other foot. I am sorry I have digressed but that relates to the all-embracing jurisdiction of the Family Court."

(6) "I feel, however, that a separate specialist Family Court should be created within the Supreme Court and that brings me to question number (iii) should it be an independent court with a status equivalent? It should be independent in as much as it must have its own rules. The rules of the family division of the Supreme Court should simplify the procedure in that court; should take into consideration all the aspects required including certain criminal jurisdiction and the cost structure should be such as to make it more affordable for perhaps the less well-heeled litigant."

(7) "It must still be a division of the Supreme Court because there are many attorneys who have not applied for or have qualified for appearance in the Supreme Court so they will still have to use the offices of counsel. There are certain litigants who feel that the Supreme Court, being what it is, would give them better justice than they may feel they would receive in as Mr Pincus describes it, the lower court."

(8) "**CHAIRMAN:** Do you see the Family Court as having a fairly elaborate infrastructure, a backup of welfare services?

MR HELMAN: Mr Chairman in that regard I am going to address this at a later stage but I will, whilst I am at it, I will deal with it. The Office of the Family Advocate does emanate from your report from 1983. It took them nearly 10/12 years to implement."

(9) "I feel, however, that the necessity of having to refer every matter to the Family Advocate is generating more work for the Family Advocate than might necessarily be required. The court is the upper guardian of the children, my personal feeling is that if the court, after having heard evidence, feels that the report of a family advocate or a welfare officer is required, the court would then refer it. In other words it would not necessarily be automatic, it would be at the instance of the court. The perception is sometimes that the court is delegating its authority as upper guardian to the Family Advocate and to the social worker."

(10) "I address now the Black Divorce Court. These at the moment serve a purpose, a very useful purpose and have done since the introduction in 1929 of the Administration Amendment Act. At the moment it is unfortunate that there

are only three courts serving the whole of the country. They are coping but they could cope better if they had more personnel."

(11) "I am against the so-called lower court of even the magistrates court dealing with only unopposed divorces. One never knows beforehand when one issues a summons whether the matter is going to be opposed or unopposed, it is only once the summons is served that you know whether there is opposition and, if so, to what extent and in what regard. So it is difficult to determine beforehand whether it is opposed or unopposed."

(12) "If one were to say allocate, as is proposed, that the magistrates courts only deal with unopposed divorces how does one know it is going to be an unopposed divorce? You have got to issue the summons out of a forum, which forum is that summons going to be issued out of? If it is out of the magistrates family court and it is opposed, what happens? That is why I think it is essential to retain the existing "lower" divorce court on a par or concurrently with the family division of the Supreme Court."

(13) "I could mention there were the Commissioners Courts which were essentially for members of the black population. They were abolished in 1984 by the Abolition of the Black Courts Act. This has left a void. Those litigants now have to go to either the magistrates court or the Supreme Court. Customary Law is left hanging in the air, it is beyond the jurisdiction of the magistrates court so members who wish to litigate with regard to customary law, particularly customary unions and custody, have to go the Supreme Court, people who can least afford it because most of the people who still subscribe to the customary union are people in the rural areas, they cannot afford to go the Supreme Court."

(14) "**CHAIRMAN:** And what solution to that problem would you like to see?

MR HELMAN: That must be incorporated in the Family Court. All aspects relating to the family, including customary law because the customary union is a family unit, therefore, family law applies. Whether it is statutory, common or customary it is still family law and that court should have the jurisdiction to adjudicate anything in that regard."

(15) "What I wanted to also stress is that the magistrates court has an association with criminal law, to incorporate the Family Court into the magistrates court will, I think, give the wrong impression. It should be an independent, autonomous court. The simplest solution is to relieve the existing so called Black Divorce Courts as they are presently constituted, change the name, do

away with the unconstitutional restrictions and let there be revision of the rules, appointment of additional officers and re-assessment of the territorial jurisdiction. That will solve a lot of problems."

(16) "**MR MALULEKE:** …I personally am, I am still a little worried about having these two courts running. As an attorney, as a practising attorney with great experience in divorce matters, can you find any justification for the differentiation in the legal costs for getting an unopposed divorce in the Family Court which you say and in the family division which you propose, why should there be a difference, particularly if an attorney is going to appear in both courts?"

(17) "**MR HELMAN:** What you say is perfectly correct in the context of the larger centres. Take it to the rural areas, you will not have the family division of the Supreme Court going on circuit to the same venues that the Family Court would go."

(18) "It would serve more of the rural areas and the distinction in having the two courts is that first of all to appear in the family division of the Supreme Court you either have to be an advocate or an attorney admitted to appear in the Supreme Court. To appear, if you need a legal representative in the Family Court, the lower court, you just have to be an attorney or you can appear yourself…"

(19) "This brings into question the system of inquisitorial aspect of the proceedings in those courts. I think that a lot of good will be done when you have the inquisitorial system, it would cut out a lot of unnecessary legalese and formalities, it would get to the nitty gritty of the matter and generally speaking I am sure that the litigants would be satisfied with whatever outcome there was. But there is a necessity for the two tiers so to speak because they are serving different communities and they are serving different levels of the communities."

(20) "**CHAIRMAN:** And they must have different cost structures?

MR HELMAN: Oh there is no question about it. The existing rules of the Black Divorce Court make provision that the clerk of the court must assist any litigant, there is no question of a means test, any litigant who requests his assistance to draw up his pleadings. He is not a legally trained person but through his experience he draws up pleadings which are sufficiently adequate to bring the issues before the court. The court itself, through an inquisitorial approach, can get to the bottom of whatever is in dispute and deal with that."

(21) "**MR MALULEKE:** I thank you particularly for helping us with the question of the customary law or customary unions and do I understand you that the Supreme Court family division, in your proposal, would have no jurisdiction to hear these dissolution of customary laws or would it have the inherent Supreme Court jurisdiction?

MR HELMAN: Being a Family Court it would have that jurisdiction because it is also a family matter."

(22) "One point I forgot to raise which may be of some assistance. If you have a matter coming from the Family Court in which the parties may be dissatisfied or one of the parties is dissatisfied with the outcome, I raise the query perhaps an appeal should lie from that court to the family division of the Supreme Court because that would then maintain the purpose of keeping the cost of litigation in those courts down. From the family division it could then follow the normal appeal procedure but it is just a thought that came to my mind possibly that the family division of the Supreme Court could also act as an appeal court to the family court."

(23) "**MR MALULEKE:** Lastly, in the Rules of the Supreme Court somewhere I saw that there was an attempt to fix even a tariff for counsel to take a final divorce order. Do you think that it might assist if say for instance an attempt was made to create some sort of tariff and build it into the rules relating to say Family Courts and the family division?"

(24) **MR HELMAN:** I think it is essential that there must be some tariff, particularly with regard to the question of costs against the unsuccessful party.

MR MALULEKE: Party and party costs?

MR HELMAN: Party and party costs. Just as a matter of interest, instructions to issue summons in the Black Divorce Court is R30,00; the stamp on a summons in the Black Divorce Court is R1,00 as opposed to R70,00 in the Supreme Court; the Sheriff's charges are on different scales; a postponement in the Black Divorce Court, the maximum you can claim as between party and party is R7,00; you are entitled to R10,00 an hour for attending court while the matter is in session."

(25) "**MR MALULEKE:** Does anyone know anything about Muslim marriages, where they would fit in, in this scenario?

MR HELMAN: I think if I am not mistaken in my recommendations or

whatever they also form part of Family Law and they would be referred to the Family Court."

(XXI) MR ATTORNEY B. GUNDELFINGER ON BEHALF OF THE ASSOCIATION OF FAMILY LAWYERS

In the course of his oral submissions to the Commission at Midrand on 10 April 1996 some of the points made by Mr Gundelfinger were the following :-

(1) "I will really address the Commission in my capacity as the Vice-President of the Association of Family Lawyers and also in my private capacity…I am also a Fellow of the International Academy of Matrimonial Lawyers. I have been in practice for my own account since 1 April 1975 and since 1982 I have only taken, only accepted divorce and related matters which takes up 90 % of my practice and I also am an expert in criminal law and for this reason I would say 10 % of my practice are criminal matters which I attend to."

(2) "My proposals are that the current system remains save that…as stated by Mr Helman, the Black Divorce Court as presently constituted should be referred to as the Family Court and that there should be a division in the Supreme Court, a family division in the Supreme Court. I do not want to regurgitate, Mr Helman is the Treasurer of the Association of Family Lawyers and obviously we have had discussions and I concur with what he says.

CHAIRMAN: Do you broadly agree with the broad thrust of his submissions?

MR GUNDELFINGER: Absolutely."

(3) "In my opinion the Family Advocate's office should be decentralised to make it more effective and autonomous. I believe that the Family Advocate's office should be retained and it plays a very important role with regard to access and custody. Certain judges harness the assistance of the Family Advocate. Certain judges detest Family Advocate and are really not interested in what they have to say."

(4) "The point is that very often what happens with contentious matters, particularly relating to access and custody, is that the Family Advocate who has a social worker working with him or her, will investigate the matter fully and then prepare a report. This report, in my view, should be *prima facie* evidence. Also what the Family Advocate frequently does is he refers to psychologists and social workers."

(5) "The problem at the moment which the Family Advocate has, is that the social

workers are seconded to them by the Department of Social Welfare, they have no say in who should be working in this particular department. They themselves cannot advertise the post for people that are interested in access and custody and family law and I believe that is something that needs to be addressed urgently."

(6) "**MR MALULEKE:** With your experience in divorce matters, clearly in the Supreme Court you might help us here…We heard this morning that in Pretoria they estimate that an unopposed divorce matter will cost between R1 500,00 to R2 000,00. What is your experience in Johannesburg, an unopposed divorce matter on the average, I am not talking party and party, I am talking about what a divorce client would have to pay his or her attorney?"

(7) "**MR GUNDELFINGER:** Well in the Supreme Court with your counsel's disbursement it could be anything between R3 000,00 and R5 000,00. But now we must also remember attorneys also have the right of admission in the Supreme Court so that figure could be reduced because of the fact that an attorney might decide that he is not going to employ the services of counsel."

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

In the course of his further oral submissions to the Commission at Midrand on 10 April 1996 some of the points made by Eloff JP (by way of rejoinder) were the following:-

(1) "Could I start off by dealing with something with which you have just dealt and that is the question of the Family Advocate. I could say that in my experience the Family Advocate plays a very important role in litigation. I have frequent contact with the Family Advocate, I meet as I mentioned earlier I meet with the representatives of the Bar, Side Bar and so on and also the Family Advocate."

(2) They are skilled persons who have the backup services that Mr Gundelfinger spoke of and so often they help to facilitate settlements or to query settlements which is also important, sometimes there is a settlement which involves a bit of horse-trading and the Family Advocate picks that up. They are very independent. It is unfortunately a fact as Mr Gundelfinger said that one or two judges are not happy at the idea but that is a passing phase; and it is very rare that that still occurs."

(3) "I myself have, over the past years, frequently sat in divorce matters and the WLD where children are involved or some problem or access or that sort is involved it has been invaluable to have had the professional assistance of the Family Advocate. Since that system has been invoked, numerous cases have been settled because parties respect the view of the Family Advocate and it has been of great importance in coming to an amicable settlement."

(4) "I now pass on to a few words about the Commercial Court. May I just recap and deal with certain important functions and advantages of the Commercial Court and these advantages were spelt out to me when in London as I mentioned earlier I spoke to judges who had served on the Commercial Court and with advocates who had practised there and also with the Senior Commercial Court Judge in London."

(5) The first and important thing is that the judges who serve there are known to be men who have had considerable experience in their practices of commercial matters. Now theoretically any judge should be equipped to deal with a commercial matter but it goes so much quicker if you do not have to explain to a judge what a charter party or a bill of lading or demurrage is or if he can interpret a balance sheet or if he is familiar with business practices in certain matters. It so greatly assists and the duration of the trial is cut down very

substantially."

(6) "It is also the London experience, if the judge who is on the Commercial Court is known to have had a very considerable commercial experience, whether at the Bar or his years on the bench, parties accept that he is an interventionist. It is very often necessary for a judge to be an interventionist, and to say to counsel now this second defence of yours, is it really worthwhile and they accept it."

(7) "The third feature is the one which I mentioned earlier that very often the commercial disputes are very complicated or perhaps lawyers make them so and when the matter comes to trial you have a pleadings like this and if the Commercial Court judge is assigned to the case at the close of pleadings and has quite an understanding of the pleadings, any interlocutory matters are dealt with expeditiously, he knows what the case is about, he can on short notice sit on an interlocutory application, when there is an application for leave to amend or an exception or an objection."

(8) "I can mention one case where there was a very big action in the WLD involving several millions of rands, it was a very complicated case and before the case came to trial there were about three or four interlocutory applications, I assigned this case to a particular judge and he dealt with all of these really expeditiously and then he also presided over a sort of pretrial conference and the actual hearing time was reduced from a potential two months to three weeks."

(9) "As far as the litigant is concerned, the advantage is that many litigants who are involved in a commercial dispute sometimes resort to arbitration. They resort to arbitration because then they know who the arbiter is. They fear, and let us spell it out with plain language, they fear that if they take their chances in court the case might come before a judge who is not that familiar with commercial matters, it can be long and drawn out and there is some uncertainty. Therefore, they resort to arbitration."

(10) "If they resort to arbitration it costs them an enormous amount, they have to pay the arbitrator, they have to pay for the venue, they have to pay for the cost of preparing a record and there is no appeal and it is for that reason that it is a very good next best thing to have a Commercial Court when it is known who the judges are and it is known that those are the judges who have commercial experience and can deal rapidly and expeditiously with the cases that come before them."

(11) "May I just then respond to a point that was made that the Commercial Court in Johannesburg started off with a flourish and then did not attract all that much custom. I think there was, I gave one reason already and that is that certain parties would prefer not to have their case stamped or labelled a commercial case, they prefer to fight in the old system and gain time."

(12) "Another, I think more practical reason, is the following: when I created the Commercial Court in Johannesburg with a Practice Direction the rules of procedure which I then agreed upon were those which the Bar and the Side Bar agreed upon in discussions with me and they were fairly simple rules. But thereafter some rules were added, I think I myself was party to additional rules. I issued a varied Practice Direction which added further new rules including one which gave the right to the commercial court judge to require the parties to exchange witness statements."

(13) "That was a mistake, with hindsight I can say that now, and several senior counsel have come to see me and tell me that that is the reason why they would rather not use that avenue because they firmly believe that it is not in the interest of their client to do so. Whether that is the correct attitude I do not know, it is not for me to decide."

(14) "I believe that in time to come we will follow what is done in Great Britain and that is to require, perhaps make it obligatory in most cases, for a short summary of the statements of witnesses to be produced. However, that is the reality, there was that sale resistance to the use of the Commercial Court largely because parties were concerned about the novelty of having to exchange witnesses statements."

(15) "In consequence of that I issued a new Practice Direction, the copy of which you have before you which again adopts the simpler procedure and only opens the door of the parties exchanging witnesses statements if they all agree. I altogether agree with Advocate Van der Linde who says that the way of dealing with this is perhaps to do it on a basis similar to that appertaining to Admiralty Courts where a case can be designated a commercial case and then special rules applicable to the commercial courts apply."

(16) "In London the Commercial Court has a practice of sitting every Friday dealing with what we might term interlocutory matters and it is then that most of the hiccups in a case are dealt with and disposed of and that is a very important part of a case and perhaps some sort of procedure can be adopted in the Commercial Court in South Africa."

(17) "I think that there is a real need for that court, given statutory foundation. It will be in the public interest, particularly having regard to the fact that Johannesburg is already the commercial centre of Southern Africa and is likely to increase playing that role. It is just possible that also, as in the London Commercial Court, the parties there will very often be foreign corporations who find it to their advantage to litigate in the Commercial Court in Johannesburg. So much for the Commercial Court."

(18) "I should mention that it has been mentioned by Judge Flemming that judges going on circuit could hear divorces and proposed notions. With respect, that is just not on. In these days judges going on circuit have such full programmes they can hardly cope. They are loaded, they start the morning very often at 08:00 and sit through to 20:00, Judge Curlewis just recently finished the eastern circuits and he finished 70 cases in a short space of two months and to do that he had to start in the mornings at 08:00 and sometimes sit through it until 20:00."

(19) "At present the Supreme Court Act provides that judges may be seconded from one division to the other…I recommend that this Commission should recommend an amendment of the Supreme Court Act to provide that when two Judges President agree, the judge can be - and they can agree orally, it will vest the judge who is then seconded with jurisdiction to serve in another division. And that may overcome the difficulty I have mentioned earlier that very often the TPD has a log jam and you need a judge from the WLD and if that can be done by one JP ringing the other it will certainly go far to alleviate the position."

(XXIII) PROFESSOR M. KATZ ON BEHALF OF THE S.A. LAW COMMISSION'S PROJECT COMMITTEE ON THE REVIEW OF THE LAW OF INSOLVENCY

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

(1) "We have prepared a short memorandum which has been handed in. Sorry that it was only given this morning. That really sets out the essence of our approach to it. I may just mention that Zulman J is a member of this project team. In fact, Mr Pereira points out I omitted to mention he is the Chairman of the project team. He is in the United States at the moment and he apologises for his inability to be here today. I faxed this to him and he fully supports it."

(2) "Chairman, with your permission we could just go through this brief memorandum. We say that before one can formulate any specific proposal for the establishment of a specialist insolvency court it is necessary to examine the environmental factors. These include need, availability of resources, accessibility, distinction between judicial and administrative functions, purpose and recognition of the relevant substantive law."

(3) "So that on need based on volume, I think that there is a significant volume and therefore a need for a specialist insolvency court. The availability of resources it self-evident, I do not think that I can add to what is set out in paragraph 3."

(4) "Accessibility: a suggestion was made at our project committee and elsewhere that the analogy of the special tax court is something that could be looked at. With respect Chairman, honourable members, that would be an inappropriate analogy. The Special Income Tax Court is an appeal court and accessibility to cope with urgency is not a factor there. In insolvency work urgency is often an acute factor and therefore accessibility is fundamental so that the analogy of this Special Income Tax Court would, with respect, be inappropriate here and we say that this needs a permanent court. That is at the top of page 3, this court must have permanence."

(5) "The purpose of a specialist insolvency court are those normally achieved by specialisation including the benefits of high levels of skills, high levels of experience, the attainment of speed and the development of the law."

(6) "One of the likely recommendations from the project that we are working on is a so-called single Bankruptcy Act. That at the moment bankruptcy is dealt

with in a multiplicity of statues. There is the Insolvency Act relating to individuals, the Companies Act to most companies, the Banks Act relating to banks and the Insurance Act relating to insurance companies; and this has given rise to, particularly in the context of the insurance companies, some unfortunate consequences also of the curatorship of banks. One of our recommendations is likely to be a single bank Bankruptcy Act dealing with all aspects of bankruptcy and shall we say that is also a relevant factor in the establishment of a specialist insolvency court."

(7) Our proposal would be that in those provincial divisions where a Commercial Court exists or is established there should be established as a part of that court a specialist bankruptcy court. Now Zulman J did ask me to mention while we are talking about this that at the moment the pilot project of the Commercial Court in the Transvaal a serious limitation of that is that it requires the consent of both parties. Now the proposal that we make here that this should be a part of that Commercial Court naturally depends on that limitation being eliminated."

(8) "And we say in those provincial divisions where the volume of commercial work does not justify a Commercial Court so too would there be little purpose served in establishing a bankruptcy court. In those divisions where a Commercial Court is established the separate insolvency court could be formed as a part of the Commercial Court."

(9) And finally we say Chairman, honourable members, in addition to the aforegoing suggestion the distinction should be made between judicial and administrative functions along the lines set out in paragraph 5 above and that does appear from the materials that we handed in on the English courts and the chancery division. Apparently there many of the routine applications are handled by the Registrar. It never comes before a judge."

(10) "Chairman, one last point if I may, at the moment there is an unfortunate occurrence and that is the so-called section 417 interrogations, the inquiries, under the Companies Act. Now the objective of that could be very useful. In practice unfortunately I think that it is recognised that this has become prone to abuse … And we say that that is one of the functions that could be handled by the specialist insolvency court. That would remove we believe, with respect, a large part of the factors that currently give rise to the abuse and some of the Constitutional challenges that have been made would lose some of their impetus."

(11) "**ADV JAPPIE**: Just one question Professor, is it your suggestion that where

a Commercial Court is established the insolvency or bankruptcy court should then become a division of that court or should it be a separate court altogether, I just want to get clarity on that.

PROFESSOR KATZ: With respect, we believe it should be a part of the Commercial Court."

(12) **ADV JAPPIE**: Just one more question. The problem of interrogations, right now of course it is being done in the magistrate's court normally before a magistrate. Are you then suggesting that interrogations likewise be done by the insolvency court?

PROFESSOR KATZ: With respect, no that is not our suggestion. That we say can remain as is.

(XXIV) MR ATTORNEY L.F PEREIRA ON BEHALF OF AIPSA

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

(1) "I am the official spokesman for the Association of Insolvency Practitioners of South Africa known by the abbreviated name of AIPSA. That is a voluntary association which is in the process of asking for statutory recognition …(intervenes) AIPSA has 250 insolvency practitioners as members. These are persons who take appointments as trustees, liquidators, curators, receivers for creditors *et cetera*. Approximately 98% of all the insolvency practitioners in South Africa belong to AIPSA."

(2) "I am an attorney by profession. I am still on the roll of attorneys although I do very little legal work, I am a full-time insolvency practitioner. I practise with others in Sandton at the moment. I was admitted in 1954 as an attorney and since then I have practised as a specialist insolvency attorney. In about 1986 I decided to change course and become a full-time insolvency practitioner which I have done since then. I am the Deputy-Chairman of AIPSA. I am a council member of INSOL International which is the governing body of insolvency internationally. I am a member of the American Bankruptcy Institute. I am a member of the Association of Insolvency Practitioners of Europe."

(3) "Now Mr Chairman, generally speaking AIPSA supports the memorandum of Professor Katz. One aspect I would like to emphasise and that is the importance of insolvency to commerce, to all aspects of business activity in South Africa. Estates are becoming bigger and bigger and more and more substantial. The amounts involved are becoming larger."

(4) "The point I am trying to make is two-fold of points rather, the one is that insolvency for commerce, industry, the banking sector has become very, very important and number two, it is becoming more and more complex, more and more specialised for various reasons. That brings me to our fundamental approach is that insolvency law is a specialised subject that it is desirable that insolvency matters should be dealt with by judges who specialise in insolvency. That is judges experienced in insolvency and knowledgeable as to insolvency law."

(5) "To demonstrate the complexity I make reference to a liquidation in South Africa which is know as CET Trading SA (Pty) Limited. This was a company

formed to export motor components and to take advantage of the government's export allowance. Unfortunately the company was formed and run by a dishonest person who in the process committed a fraud involving the government to the extent of some R600 000 000. After our appointment as liquidators we found dummy companies in Jersey. We had to bring urgent applications to attach monies in Jersey. We found components in Rotterdam and in Germany…So eventually we ended up with litigations, Sir, in Jersey, in Rotterdam, in Den Haag, in Switzerland and in Germany and we are still busy with that litigation. Now that illustrates the complexity of the matter."

(6) "In Insolvency Law, Sir, everything is urgent. The minute the liquidator is appointed he takes the place of the directors. He immediately has to start making decisions with or without the consent of anybody. That is his job. He closes the business, carries on with the business, insures the assets, defends litigation instituted and to enable him to carry out his duties he needs immediate access to the courts and that is why it is so important to have - I go further of course, I say dedicated judges, to have dedicated judges who you can approach even at night, over the weekends to obtain urgent orders to protect the assets of the estate, Sir."

(7) "In Europe for instance, I was going to make the point later on, as an alternative in Europe where I have experience in Switzerland, in Holland, in France and Germany, I believe the same applies to most of the rest of Europe, they do not have dedicated courts sir, they have dedicated judges."

(8) "It appears to me that those judges are singled out as judges that wish to practice or wish to be involved in insolvency matters and so they become identified and what we appreciate about that system is once that judge is appointed to a matter he remains with that estate until it is completed and he is accessible at very short notice, for instance, for the interrogation of witnesses or for the attachment of assets *et cetera*."

(9) "And that was an alternative I was going to propose to the proposals set out herein that instead of creating specialist courts, I would say that is first prize, but if that is not possible in the present court system that certain judges could be identified. It is so that in every system such as the WLD there are judges who whilst at the bar specialised in insolvency and they would make the best judges. And that is the problem we have up to now is, and I say this with all due respects, is lack of accessibility and lack of experience on the part of the judges."

(10) "**CHAIRMAN**: And you say the alternative is that one judge would shepherd

the whole case through from beginning to end?
MR PEREIRA: Yes sir, including the conduct of inquiries if the judge - if the enquiry is substantial enough such as a Tollgate matter. The smaller matters there are the other sections of the Companies Act and the Insolvency Act and those inquiries can be conducted before the presiding officers, the magistrate or before the Master."

(11) "The way the Sec 417 inquiries are conducted is not satisfactory sir, it is not satisfactory at all. It is not conducted in a judicial atmosphere and in a judicial manner.

CHAIRMAN: Well just in a nutshell how would you summarise the present defects? What criticisms would you level against the way in which a sec 417 inquiry is done?

MR PEREIRA: I would level the following criticism and again the Assistant Master is sitting here, I say I do it with all respect sir, that I feel that in too many instances the Master allows sec 417 inquiries to be conducted when in my opinion they are not justified."

(12) "My second complaint is this. Normally the attorney acting for the estate and even my colleagues the insolvency practitioners they nominate certain advocates who we see frequently appear as commissioners, frequently appear and in my many years of experience I have come to the conclusion that that just does not work, just does not work."

(13) "**CHAIRMAN**: Before you develop the argument just to help us again, why does it not work?
MR PEREIRA: Sir, I do not have the statistics in front of me, perhaps Mr Stuart can talk on the statistics, but my own experience is that very few of these inquiries produce sufficient assets to justify the costs. That is my personal view."

(14) "And another problem we have sir is these commissioners do not have sufficient powers, they do not have powers to arrest the witnesses who do not arrive or bring the documents, matters must be referred back to the judge."

(15) "So what I say Sir, we as the people at the coal face who deal with these matters actually we would like to see either specialised insolvency courts with specialised judges or generally in the judicial system identified insolvency judges who once they hear the first matter, let us say the application for liquidation, then this matter is delegated to them. That has obvious advantages.

The judge gets to know the matter."

(16) "It is easier for him to make a decision and as happens I know in the United States, Sir, there the judge not only plays a role as judge but also he plays a guiding influence in the whole development of the estate and a sounding board for the committee of creditors and the liquidators. It is a whole team that works together in particular in the - I am not talking about the run of the mill estates, I am talking about the bigger estates.

CHAIRMAN: Now is the suggestion that the ordinary run of the mill unopposed sequestrations would also be dealt with by this court? I suppose it is logical if you have a specialist insolvency court that it should deal with everything. But of course many of the matters would present no particular difficulty, it would be almost a matter of rote not so?

MR PEREIRA: About 80% of the matters I would call routine matters, it may even be higher than that, 90%. It is that 10% of the very big involved complex substantial matters need special attention."

(17) "I point out there is selection right at the present moment. At the present moment voluntary liquidations you do not have to go to court, you file special resolutions with the Registrar. But you also have voluntary creditors resolutions. In other words, you could liquidate very substantial companies by passing the appropriate resolutions filing the appropriate statement of affairs and registering that with the Registrar. That company then is in liquidation. I want to support what Professor Katz says that with unopposed matters somebody such as the Registrars deal with them."

(18) "Now if one would look at the Witwatersrand Local Division roll of insolvency matters I would say that about 90% of the insolvency matters are … plain sailing and there is no reason why the Registrar should not grant those orders because they are practically administrative of nature. You can grant the orders and if they become opposed you can pass them onto the judge as is done now in the WLD. Default matters even for substantial amounts are granted by the Registrar. We have no problem with that Sir. We have no problem with that at all."

(19) "**CHAIRMAN**: Mr Pereira, do you support Professor Katz's proposal that ideally the specialist insolvency court should be a division of the Commercial Court?
MR PEREIRA: Yes Sir, as I say, that would be first prize Sir. I know for a fact as Professor Katz has said, that is the way it is done in Canada and in England and they have massive volumes and so by experience and over a period

of time they have come to the conclusion obviously this is the best way to attend to insolvency matters."

(20) "I go to all these international conferences, normally I go to them with Zulman J. The United Nations itself through UNESCO and through its further subsidiary body called UNSITRAL are at the moment busy trying to persuade the rest of the world to adopt a uniform international insolvency law and to give each other access to assets in the various countries to such an extent that the judges would talk to each other, that the Masters would talk - that is already happening between England and America at the moment in the Maxwell and other estates."

(21) "And that indicates how complex this is becoming. Now I have no doubt that very soon there will be an international uniform cross-border insolvency set of laws and the judges will be phoning each other, faxing each other and in all the countries that I have experience in there are specialist judges and therefore only for that reason it is important that we have in South Africa specialised insolvency judges who are experienced that they can communicate with otherwise this is not going to work as far as South Africa is concerned."

(XXV) DR E.M. DE LA REY ON BEHALF OF THE SA LAW COMMISSION'S PROJECT COMMITTEE IN THE REVIEW OF THE LAW OF INSOLVENCY

In the course of her oral submissions to the Commission at Midrand on 11 April 1996 some of the points made by Dr de la Rey were the following;-

(1) "I have a doctorate in Company Law. I used to practise as an insolvency practitioner in Pretoria. After that I joined the University of South Africa where I specialised in Insolvency Law. I was an associate professor there before leaving and joining the Financial Services Board. I also in 1988 published a book on Insolvency, the 8th edition of Mars, The Law of Insolvency in South Africa. Since then I have also co-authored two other student works on Insolvency."

(2) Mr Chairman, the one thing I think that one does not always realise is the necessity for a grasp of accounting principles and especially complex accounting principles in insolvency. And that is also one reason why one should have dedicated judges so that they can have the chance to improve their grasp of accountancy. Because it is very difficult for a person with absolutely no accountancy background to deal with complex insolvency matters. The other thing is that I think if we had dedicated insolvency courts it would facilitate our re-entry into the global commercial village because participants in international trade are used to the systems in their own court in their own countries where they have these specialised courts and then they would expect it here too…"

(XXVI) **ADV M.B CRONJE ON BEHALF OF THE SA LAW COMMISSION'S PROJECT COMMITTEE ON THE REVIEW OF THE LAW OF INSOLVENCY**

(1) "I was not scheduled to speak but I would just like to mention two things with your permission, the first one is another member of our project committee Mr Nico Coertze could not be present today. He supports the general views expressed here. His suggestion that perhaps there should be an introduction of the specialised court on a pilot basis in the bigger centres."

(2) "Then the other thing I would like to mention is that the Deputy-Master, Mr Joel Stuart, handed me some statistics on interrogations held in the Master Pretoria's Office…

CHAIRMAN: Thank you, would it be convenient for the Commission to hear Mr Stuart now?"

(XXVII) MR J. STUART, DEPUTY-MASTER OF THE TRANSVAAL PROVINCIAL DIVISION (INTERVENING)

(1) "Mr Chairman, I have a few statistics concerning interrogations for the year 01-07-94 to 30-06-95. The Pretoria Master's Office on its own held 429 interrogations. These included interrogations in terms of section 65 of the Insolvency Act, sections 415 and 417 of the Companies Act; as well as section 152 of the Insolvency Act. There were in total 429 interrogations Mr Chairman. The hours that we spent on those interrogations which applies solely to the Master's Office in Pretoria was 1 397 hours."

(2) "**CHAIRMAN**: And how many officials of your office, give us a rough idea?

MR STUART: We had two presiding officers. And we issued 950 subpoenas. Mr Chairman, insofar as Mr Pereira pointed out the 417 and 418 inquiries are conducted at random, I must, with respect, take issue with Mr Pereira there. The 417 inquiries before they are consented to those applications are very, very comprehensive and each application is judged on its merits in that any person who feels aggrieved obviously can take the Master on review when he does consent to a 417 inquiry."

(3) " The 417 inquiries that are held in the Master's office are few and far between and many of them are not consented to…the reasons advanced to hold a 417 inquiry must be comprehensive and it has to be very detailed before the Master does consent to a 417."

(4) "As far as the commissioners are concerned Mr Chairman, it is true that where the Master does consent to a 418 inquiry the commissioners who preside thereat are on many occasions the same …

CHAIRMAN: When you say the same you mean the same people are appointed time and time again?

MR STUART: Exactly Mr Chairman, they would be attorneys who are clued up on insolvencies, senior counsel and for that reason we would appoint those commissioners just as Mr Pereira pointed out that in the insolvency courts they wish to have dedicated judges."

(5) "I have been with the Department of Justice Mr Chairman for 25 years of which I have been for the past five years the Deputy Master of the Supreme Court in the Transvaal.

CHAIRMAN: Yes, broadly speaking what are you views on the desirability or otherwise of a specialised insolvency court?

MR STUART: I would support that Mr Chairman.

MR MALULEKE: Mr Stuart, you would also support the view that such a specialised court should ideally be in the WLD or in Johannesburg because of the volume of work, the pilot project?

MR STUART: Yes, I would support that too."

(6) "**MR MALULEKE**: Would you consider that the fact that Johannesburg has not got for the moment its own Master it would be advisable then to have a Master or much more workable to have a master in Johannesburg?

MR STUART: Mr Chairman, most probably it would be more practical, yes."

(7) "**MR MALULEKE**: Thank you, I do not know if anyone of the other members want to add to that point because it is one of the issues.

CHAIRMAN: We would appreciate other opinions on this point.

MR PEREIRA: Mr Chairman, it is quite obvious that there should be a Master's Office in Johannesburg. In fact, we have been lobbying for the Master's Office for many years. In understood, not officially, Sir, unofficially, I understood some time ago, about two years ago that we could expect the creating of a Master's office in Johannesburg but perhaps with the manpower situation it has become difficult, I do not know."

(8) "**DR DE LA REY**: …I would just like to elaborate on Mr Pereira's point of a Master's Office for Johannesburg. The same applies of course to Durban and Port Elizabeth. It is totally artificial that you do not have Master's Offices in your most important commercial centres in the areas."

(XXVIII) MR R. MANDELSTAM, A SENIOR MAGISTRATE IN JOHANNESBURG

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

(1) "Mr Chairman, I am a senior magistrate employed at the Johannesburg Magistrate's Office. I am the section head of the civil section where I have been section head for the last five years. As far as the question being addressed now by the commission, the particular work concerned done at the Magistrate's Office falls under my supervision at that Magistrate's Office of Johannesburg. I would like to mention to the Commission that as far as interrogations and other work relating to insolvencies, I am required to allocate two magistrates on a full time basis to attend to this work.

CHAIRMAN: On a daily basis?

MR MANDELSTAM: On a daily basis."

(2) "There is a substantial amount of administrative work also of course…there are the accounts that lie for inspection *et cetera*, *et cetera*. The judicial work, I mean the inquiries, the interrogations, the requests for the issue of subpoenas *et cetera*. Meeting, yes meetings. I repeat it requires two dedicated magistrates to do this work. I find that you cannot just allocate anyone to attend to these tasks. Thank you."

(3) "**CHAIRMAN:** And you would support the plea for a Master's Office in Johannesburg?

MR MANDELSTAM: I have actually written representations to my department to this effect a long time ago, Chairman, and nothing has happened as yet. I am convinced it is essential."

(4) "I have been a senior magistrate at Johannesburg for the past ten years and the head of the particular section for the last six years. The section comprises approximately 20 magistrates and 30 clerks. Under my jurisdiction in the section falls the civil section dealing with civil trials and like matters, also the section dealing with insolvency and estates and the administrative control of the small claims court in Johannesburg."

(5) "The second aspect that I would like to mention here is the question of the family courts."

(6) "I was a member of the implementation committee of the senior civil courts which…(intervenes)

CHAIRMAN: That is the 1993 Amendment Act?

MR MANDELSTAM: Amendment Act. That is a departmental committee that was formed to lay the ground work for the implementation of the particular court."

(7) The court, as you know, has not come off the ground. I doubt very much with the present jurisdiction of R100 000 in the Magistrate's Court whether that court will ever get off the ground. That is a personal concern that I have.

(8) "In this regard I may mention what I am going to say in due course about the Family Court is I personally do not aspire for an appointment in that court. If anything I would aspire for an appointment in the senior civil courts."

(9) "What I am concerned about is I understand that there is a suggestion that matters such as children's court, family violence, maintenance and all that should be allocated to the Family Courts. To me that sounds like an ideal that simply will not work in practice. I do not from my experience from the implementation committee of the senior civil court I do not see that it will be viable to have a family court in every town in a country, especially not the small "platteland" towns."

(10) "Now I have also had the opportunity serve previously in small towns such as Port Shepstone and there are matters such as the family violence which has not been on the statute book that long, those interdicts are often required now and not in due course. So access to the person who will grant that needs to be readily available at the particular town. This may be 19:00 or 20:00 tonight."

(11) "Maintenance inquires, those applicants do not always have the financial means to say travel to the nearest big town to first of all lodge the application, secondly to attend the hearing. I am convinced that you must have that facility available five days a week at the town where the applicant stays. The same applies to children's court inquiries. I have seen the necessity to open a children's court inquiry immediately. You cannot wait for a court to arrive on circuit *et cetera* for these applications."

(12) "The magistrates in the country have, and I say this in my personal capacity and in no other capacity, have had not a fair deal in my opinion in the past. In

Johannesburg for example where we deal I think with involved civil matters I have had the misfortune of losing by resignation always the best people, the best magistrates. The go to the bar, they go to the side bar. The main reason they leave are two things Mr Chairman, it is salary and working conditions."

(13) "**CHAIRMAN:** Mr Mandelstam, in the light of your considerable experience what practical steps do you think would be feasible in order to alleviate the present position? Just take for example maintenance court or children's inquiries.

MR MANDELSTAM: Mr Chairman, the magistrates throughout the country are attending to those matters at present and I say so without hesitation so satisfactorily and adequately. I do not think any change is needed there. There are people in the bigger centres such as Johannesburg and I will use terms used earlier this morning before the Commission as well, dedicated, who will attend only to maintenance or who will attend only to children's court inquiries."

(14) In the smaller towns the magistrates there also attend to it and have so attended to it over many years very satisfactorily. I cannot see that it is first of all workable to remove that work from the magistrates because I repeat it is essential that those applicants and litigants have immediate access and not access in due course when a circuit court sits…it cannot work Mr Chairman."

(15) "Divorce I have no difficulty, it can work on a circuit court basis. I do not believe that one has ever experienced a divorce which needs to be granted like now immediately. That can wait if needs be until tomorrow or the day after tomorrow. But a children's court, a family violence interdict, a maintenance inquiry often cannot, and more often than not cannot. Thank you. I do support the suggestion that the Black Divorce Court will have to go, I do not think there could be any possible debate on that matter. I cannot for the life of me see that an experienced magistrate cannot attend to an uncontested divorce."

(16) "The magistrate who chooses at the moment in the magistrate's court the civil side of matters as his career has no real career…(intervenes)

CHAIRMAN: It is a dead end.

MR MANDELSTAM: The civil section has become a dead end."

(17) "I do believe that the senior civil courts and the Family Courts presented an opening there. The criminal court magistrates have the regional court to aspire

to as promotion. The civil magistrate has none at the moment and I would not want to get myself into difficulty but I would prefer to see the better qualified magistrate or the better type of magistrate, qualified I do not of necessity mean academic qualifications, who has the ability rather to land in the civil side of the magistracy than of necessity always in the criminal side."

(18) "**CHAIRMAN:** Do I understand your plea correctly that you advocate the speedy implementation of the 1993 Act?

MR MANDELSTAM: It is essential Mr Chairman. If it does not happen I will speak now in terms of practicalities to the Commission, I had a magistrate at Johannesburg who has a Master's degree. He is a very competent person. He resigned last month where after discussion with me, he is at the Bar in Johannesburg now doing his pupillage, one of the main reasons the he resigned is that he came to the conclusion that there is at present with the increased jurisdiction of the magistrate's court little hope of the implementation of the senior civil courts and that he is in a dead end."

(19) **CHAIRMAN:** The name "Family Courts" in the 1993 Act is actually a bit of a misnomer.

MR MANDELSTAM: I think so.

CHAIRMAN: That court, as you appreciate, will be a court for undefended divorces.

MR MANDELSTAM: Indeed Sir.

CHAIRMAN: And you see that as its appropriate function?

MR MANDELSTAM: I can see none other there."

(20) "**CHAIRMAN:** You have made the point to tag on other functions to that would not work.

MR MANDELSTAM: Because of the inaccessibility or immediate accessibility of certain of these functions which I believe is being considered in some venues and centres should be added to the court. A family court, yes, should have all these other things, children's court *et cetera*. But I think one must also think in terms of practicalities there, and not only theory."

(21) "If I may use the example…my home town is Smithfield in the Free State. If the lady staying there in a shack has a maintenance complaint and that now has

to be attended by the family court which I have little doubt will then have its centre in Bloemfontein and perhaps attend Smithfield from time to time."

(22) "She now has to lay a complaint there. There is no train from Smithfield to Bloemfontein and has never been. I do not even know if the bus service still operates. She will somehow now have to get to Bloemfontein to get her maintenance matter heard. It is logistically just impossible probably. If she now at 20:00 is being battered by her husband, she needs a family violence interdict she has no access to the court in practical terms."

(23) "**MR MALULEKE:** You told us that you have some experience in country magistrate's like in Port Shepstone *et cetera*. One of the matters we heard was that there was in other jurisdictions, particularly in the former call them TBVC states, there had been no increase implemented from the R20 000 to R100 000. Some are even still at the R5 000 level. And the reasons that were given were that the magistrates had very little training, unlike those in the Republic of South Africa so far in the past."

(24) "**MR MANDELSTAM:** Mr Chairman, this is a matter of great concern to me. I do not refer now to the TBVC states, I do not really have knowledge about that. But it is my opinion that you cannot take a man from an attorney's practice or from a practice as an advocate and just put him on the bench and expect him now to hear matters, additional training is required."

(25) "The Department at present supplies the following civil training to a magistrate. There is an introductory civil course which is presented by the Training College in Pretoria, Justice College as we call it. And then there is what they call an Advanced Civil Seminar. These courses are both approximately one month each. The magistrate is lucky if he manages during his career to attend one of these courses."

(26) "The advanced course, that is the course I would prefer to see a magistrate with some civil experience to attend. It is an excellent course. I for the first time in my life attended the course last year.

CHAIRMAN: After how many years in the department?

MR MANDELSTAM: 20 years Mr Chairman, in excess of 20 years. It is an excellent course but it is a one-month course and my prospects of attending a refresher course in the future taken on average is I would say nil. Much has to be done in this regard."

(30) "I do not think one can stop studying if you are on a bench, I do not care which bench. You cannot stop studying the day you leave university. I think you need to study virtually every day of your life thereafter. What we do in Johannesburg we have an internal training where we try - not only try and train each other but we do train each other."

(31) "I foresee that at least every second year judicial officers should attend continuing legal training by competent persons who can train you on these matters. New Acts are promulgated after you have left university which you must now apply. You are left to hand books and to commonsense and reading law."

(32) "In Johannesburg you have the advantage often of discussing the matter with your colleagues as the judges often have. But you know, there are magistrates in the "platteland" who is the only magistrate in the town. He does not even have the advantage often of discussing a problem with a colleague and getting a second opinion or bouncing a ball of a wall. He can possibly do so by telephone but even in a long conversation over a telephone one cannot really resolve this. For those people also continuing training is essential."

(XXIX) MR ATTORNEY C.H. COHEN 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 Cohen were the following :-

(1) "Mr Chairman, for the past 32 years I have practised as an attorney in Johannesburg. I practise on my - well until five years ago I was in partnership but recently I practise on my own."

(2) "I am very involved in Alternative Dispute Resolution. I made a decision a while ago to go into this which I have done very deeply. Not only do I mediate and arbitrate but I am involved in training. I train approximately 400 candidate attorneys a year that attend the ALS Schools in Johannesburg and Pretoria. I have trained groups of attorneys, advocates, family advocates and the like."

(3) "When I came here today I came to make certain submissions regarding section 2 of the Arbitration Act which prohibits a reference to arbitration in matrimonial cause and of course status matters."

(4) "Mr Chairman, members of the Commission, section 2 of the Arbitration Act prohibits arbitration in respect of matrimonial causes. Now the South African textbook writers…accept that because this section is in keeping with the common law it is sacrosanct. It is not criticised. It is not expanded. It is accepted as an end in itself and then so be it."

(5) "If, however, divorcing spouses choose to privatise the resolution of their matrimonial dispute then it is my respectful submission that they should be afforded the opportunity of doing so, in which event section 2 would have to be rescinded or amended to allow for this possibility. In interpreting section 2 the courts have taken a narrow and apparently unyielding approach in upholding this section."

(6) "Basic to this entire submission Sir is the suggestion that the spouses be afforded freedom of choice. Why choose arbitration? Freedom to select an arbitrator in enjoying the confidence of the spouses will to some have more appeal than having thrust upon them a judge over whom they have no such choice. That the arbitrator is selected rather than imposed could lead to a greater willingness to abide by his or her award."

(7) "With the indulgence of the Commission I beg leave to deviate slightly in order to raise before the Commission the issues of divorce mediation…Unless mediation becomes court annexed the chances are, and again I say this from my own personal very deep personal involvement in this, the chances are that mediation as a mechanism for resolving matrimonial disputes is going to take many years before it has any meaningful impact on the general community."

(8) "That it has a positive contribution to make in matrimonial dispute resolution is beyond doubt. Not only are costs substantially reduced and time saved but it is suggested the preservation of the post-divorce parenting relationship has a far greater chance of happening in the interests of the children than is the case in the aftermath of an acrimoniously fought divorce action even if settled prior to trial. The costs are determined by the rate charged by the mediator if in private practice as well as the number of hourly sessions held."

(9) "The key to promoting the use of mediation is education. This in turn requires funding without which little visible progress is possible as events over the past five years have shown. I would say that one of the big mistakes that has been made Sir is to aim the appeal at the legal profession. The legal profession is conservative. The legal profession is traditional and of course when one legitimately asks what is in it for me there are more fees to be generated in litigation than mediation."

(10) "The greatest single factor in successful mediation is confidentiality. Usually this creates an atmosphere of trust and open communication. In the result mediators are appraised of all the issues and their nuances; and would therefore seem to be well suited to adjudicate upon those issues upon which the spouses are unable to agree."

(11) "**CHAIRMAN:** Are you a supporter of the notion of some form of Family Court division?

MR COHEN: Yes.

CHAIRMAN: Well, could you just give us the framework of your ideas? What would you consider to be a workable ideal in our country bearing in mind the scarce manpower, huge country?"

(12) "**MR COHEN:** Mr Chairman, I am the wrong person to ask that. I am not rules and regulations orientated. I understand what the problem and where everyone is coming from. I have not sat down for myself and said look my ideal of a family court is this. All I can say is that as a person orientated

person the judge who presides over that court must be somebody who understands empathy in the family sense. It cannot be anyone."

(13) "Now that does not mean the judge must cry every time there is a sad story to tell. Not at all. But it has to be a people's person. A people's person must sit in that court however that court is structure, whatever is finally resolved. That I would have no hesitation in saying. And I say that knowing that there are just some situations where you have got to crack the whip and that is it. I do understand that. And the presiding officer would have to be a mixture of a person's person and a whip cracker where necessary."

(14) "But you know, the idea of it being a civil servant or a step for the advancement in the civil service, that certainly does not appeal to me at all because I do not believe if it is going to be on a promotion step by step and that is the ultimate prize, I think the wrong people will preside over those courts."

(XXX) 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) "I believe we should have family courts because there is a demand for it. Nevertheless they could be part of the unified rules with their own chapter."

(2) "Individuals in undefended divorces are sometimes as traumatised as defended divorces. To shunt them to a lower court is not acceptable. Family Court should be a part of the Supreme Court."

(3) "Flemming J indicated that once a judge tries to give advice from the bench he loses his status as an independent judge by coming down into the fray. Here I disagree with him. The judge must participate in the social aspects of divorce. He is the upper guardian of minors and his responsibility should be taken seriously. There should be a new court as part of the Supreme Court.

(XXXI) MR ATTORNEY C.K. PETTY ON BEHALF OF THE LAW SOCIETY OF TRANSVAAL AND THE ASSOCIATION OF 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) "I am a Council member of the Law Society of the Transvaal and what I say today I have been mandated to say on behalf of that council. There are also certain aspects which I will deal with later where I have been mandated to speak on behalf of the Association of Law Societies who have not been represented here previously."

(2) "Mr Chairman, gentlemen, one of the potential specialist courts which received a lot of attention in the past and which is being subject of legislation which has not yet come into being is the question of Family Courts. And with your permission I would like to address you fairly extensively as far as that is concerned. And in this regard may I say that I am mandated to speak on behalf of the Association of Law Societies."

(3) "Insofar as the position of the Association of Law Societies is concerned there may be some confusion in your the Commission's mind inasmuch as you have two written submissions before you. May I ask you to ignore the first submission."

(4) "It is the view of both the ALS and the Law Society of the Transvaal that matrimonial matters should be simplified and that they should as far as is possible be brought close to the people."

(5) "Now inasmuch as the vast majority of matrimonial matters are undefended or become undefended because the parties arrive at a settlement, the Transvaal Law Society and the ALS feel that it is not possible to justify the enormous cost and inconvenience of forcing people who are in the process of getting divorced to travel great distances to get to the seats of the courts in Pretoria and Johannesburg and also to incur enormous cost in doing this. And the cost relates not only to the question of the fact that they in most cases have to use two attorneys, obviously is an expensive matter, but also that there are enormous travelling costs."

(6) "Mr Chairman, it is very difficult to explain to a person who is probably going through one of the most traumatic experiences of his life who comes to Pretoria all the way for instance form Klerksdorp or Ventersdorp or some outlying

distance at enormous cost, enormous inconvenience, gets into court and his divorce or her divorce is finished in three minutes."

(7) "You see dissatisfaction on the faces of the people. You see surprise on the faces of the people and also the whole atmosphere with the greatest of respect to divorce courts is not conductive to dignity of dissolving a marriage. To have 100 people sitting in court and they go through like a sausage machine does not create in our view a good impression."

(8) "It is our view Mr Chairman that a special family court structure should be established and if that structure cannot be established at the moment, that an office of the Registrar of the Supreme Court should be instituted at each and every magistrate's court in the country and that that Registrar be allowed only to deal with matrimonial matters. The idea would be to have a Family Court established and that that Family Court would then have a Registrar's office at each and every magistrate's court."

(9) "And that that Registrar would then be mandated to issue summonses, to exchange pleadings and where necessary to assist litigants in the preparation of documentation."

(10) "It is our view that the Black Divorce Court should be dissolved and that the Black Divorce Court should be incorporated into these structures."

(11) "We feel that this Family Court with its Registrars at each and every magistrate's court should have simplified rules, that these rules should be written in language which is easily understood and that the rules should be easy to comply with."

(12) "And then in view of the fact that most divorces are either settled or unopposed it is our view and it is our submission that unopposed divorces or divorces which are opposed and which become settled should be able to be dealt with in the magistrate's court."

(13) "Now this is broadly speaking what is envisaged in the Magistrate's Court Amendment Act 20 of…(intervenes)

CHAIRMAN: 120.

MR PETTY: I am sorry, 1993. It is our view that it is not necessary for

unopposed divorces to create special courts and that magistrates who are properly trained magistrates can deal with these matters expeditiously and cheaply."

(14) "We are fully aware Mr Chairman that once you grant this sort of jurisdiction to magistrates that you are giving the magistrates jurisdiction to change people's status. You are also giving the magistrates jurisdiction to deal with questions of maintenance and you are giving the magistrate jurisdiction to deal with the question of custody of children. Now these are things which have always fallen outside of the jurisdiction of the magistrate's court and traditionally all matters of status vest in the Supreme Court. But Mr Chairman times have changed and I think the needs of the community have changed and perhaps our system should move forward to meet those changes."

(15) "**CHAIRMAN:** May I just ask you this Mr Petty, the merit of what we call the second ALS proposal is the two-tier system…The matter of unopposed divorces, or divorces that become unopposed, is a tremendous problem which requires prompt solution…Perhaps you could deal at some stage with the possibility not merely of putting into effect Act 120 of 1993 but of a modified pilot scheme, an integral part of which is using the Black Divorce Courts personnel and expertise as part of the pilot project."

(16) "**MR PETTY:** Mr Chairman, with your permission may I deal with the questions that you have raised now?

CHAIRMAN: Certainly."

(17) "**MR PETTY:** In the first place the question of the costs. It is quite clear that if our proposal comes into being that unopposed and undefended divorces are dealt with in the magistrate's court, the cost structure which applies now would have to be radically changed and to bring it into line with what would happen on the ground. The Supreme Court's cost structure would certainly never apply if the magistrate's court were to deal with the divorces."

(18) "Insofar as the Black Divorce Court is concerned, we are fully aware that this serves a very useful purpose. The only reason why we suggested that it should be abolished is to avoid a duplicity. And it was our view that if one could structure the proceedings in the magistrate's court in an appropriate way that it would be then unnecessary to have two courts."

(19) "And insofar as the suggestion goes that there should be a trial project, we

would agree with that. I think we learnt a very valuable lesson at the time of the institution of the small claims court. The small claims court was not simply brought in nationwide overnight, it was brought in with a trial project and then that trial project expanded gradually until we have now reached the stage that virtually the whole country is covered by small claims courts. And our view would be that a trial project would in fact be absolutely ideal."

(20) "To revert back to the question of granting magistrates authority to deal with maintenance and custody matters I do not think maintenance is a problem.

CHAIRMAN: Well, would you pause there for a moment. Down the years there has been a certain amount of criticism of maintenance courts. There is a good deal of consumer dissatisfaction and we have had complaints, I am not suggesting that they are representative, to the following effect, well they put a man there in the maintenance court who is about to retire or does not get on with his colleagues, a man who is not really dedicated. Maintenance is important work."

(21) "**MR PETTY:** Mr Chairman there is no doubt…that there are deficiencies in the present system in certain instances. I think that that one must accept. But I do not think that it is possible to have all maintenance matters dealt with in the Supreme Court.

CHAIRMAN: I am not suggesting that, I merely putting to you that if a pilot scheme like this is put into operation, one of the aspects that may have to be jacked up a bit and an area in which greater efficiency must be ensured is the matter of maintenance."

(22) "**MR PETTY:** Yes Mr Chairman…It is going to entail an enormous amount of training and making sure that there is or there are adequate people who can do the work. And I think that in this regard the Family Advocate can play a major role. The Family Advocate is here today. That when we decided to make this proposal we discussed the matter with the Family Advocate in Pretoria. And we were informed and maybe this can be confirmed today that if magistrates throughout the country were give jurisdiction to deal with unopposed divorces the family advocates office would in fact not have difficulty in servicing that."

(23) "**CHAIRMAN:** The description in Act 120 of 1993 of a family court and a family court magistrate is a trifle misleading because his essential, his only function will be divorces. In fact Mr Petty it is significant to notice that Act 120 of 1993 does nothing to amend the provisions of the 1963 Maintenance Act. So attention will have to be given to that.

MR PETTY: It is clear Mr Chairman with respect that if our proposal is adopted that the 1993 Amendment Act is going to have to be changed in significant respects."

(24) "**CHAIRMAN:** Yes, and your suggestion is that throughout the Supreme Court would retain a concurrent jurisdiction?

MR PETTY: Yes. It is our view that immediately a matter become opposed that it should then fall outside of the jurisdiction of the magistrate until of course it becomes settled in which case it could revert back. But that all defended trials should go to the Supreme Court or if it is established, a family division of the Supreme Court, and that they should be dealt with there. And it is also our view that if people elect to litigate in matrimonial matters in a Supreme Court, or if a family division is established, they should have the right to do that."

(25) "**MR MALULEKE:** …you have the situation that presently the Black Divorce Courts hear opposed divorces cheaply. Now you are saying no, no, no, this must no longer be the case. If they want to have an opposed divorce then they must pay the penalty. They must now go the expensive family division in the Supreme Court. I do not know, I do think that that might be a problem in the framework of your proposal."

(26) "**MR PETTY:** I see that what you say is certainly a problem that I must say that I had not thought of, that it would then take away the possibility of having an opposed divorce in a cheap way…A possible solution may be the right of election, but I do not know, Mr Maluleke, how many or what percentage of divorces in Black Divorce Courts are actually opposed to the end.

MR MALULEKE: All of them. Mr Helman yesterday said nearly as much. But my experience also say in fact it is so difficult to draw a line when the divorce becomes opposed, it is not always very clear. But Mr Helman indicated, and he has been practising there for 30 years, that all those opposed divorces are finalised there."

(27) "**MR PETTY:** …Mr Chairman, the only real reason for us proposing that the Black Divorce Courts should disappear was to avoid having two courts dealing with the same thing. It may be that in the project if it is going to go by the way of trial project that they could run together for a while an see how the thing sorts itself out."

(28) "**MR MALULEKE:** Can I put an idea, maybe we might later be able to come

back to it, you might be able to assist us. I am a little concerned about making the litigant out there feel that his matrimonial matters are now being down-graded because as I understand it the Black Divorce Courts are a creature which is neither having the Supreme Court status nor does it have the magistrate's court status, I think it is somewhere in between. And the conceptions can become very, very important."

(29) "**MR PETTY:** Yes and I think that if a magistrate is dealing with say six divorces one day a week as opposed to 140 divorces he can create a situation in that court which would meet Mr Maluleke's problem and in fact not create the impression that matters have been down-graded at all. And in fact the impression could be created with proper care that the status of divorce matters has actually been increased. I do not think that that is a problem."

(30) "**MR MALULEKE:** Sir, I am moving to a point where I want that presiding officer, that tribunal to have the capacity if possible to deal with opposed divorces. Look, then they run with the more intricate divorce either because of the large estate or because of the issue or because of the money that the litigants have got can go to the family division of the Supreme Court. That is fair, I have got no difficulty with that. But then if you have that Family Court presiding officer you build his capacity or her capacity to such an extent that he can also deal with opposed divorces, call them simple opposed divorces, I do not know."

(31) "**MR PETTY:** Mr Chairman, I think that that is obviously the way this thing will evolve. But as you have correctly said that this is a matter that requires in our view urgent attention. And if we want to get to the point that Mr Maluleke has mentioned it is going to be a lengthy process."

(32) "And that I think that inevitably we will reach that point but in the short term I submit that we must find quick solutions and that the solution that we have suggested in the short term is a viable one. It is one that will be in the interests of the public and it is one that will certainly not reduce the status of divorce proceedings. It may well be that for a time that the Black Divorce Court and the magistrate's court structure that I have suggested must become parallel until such time as we reach the stage of development where the magistrates can in fact hear the divorce matters that Mr Maluleke has referred to."

(33) "**MR MALULEKE:** Paragraph 5 at page 3 [**of the ALS Memorandum**] I think you touch on the question of what sort of qualifications one should look at in qualifying the people to preside in the family courts or whatever we call it, whether it is a hybrid between the Black Divorce Court and the magistrate's

or whatever…Would you want to say anything about what qualifications we should look at?"

(34) "**MR PETTY:** Mr Chairman, I think that the ALS's recommendation in that regard was that people should have LLB degrees and I think that the thinking behind that was that the court would not be incorporated into the magistrate's court structure as I have suggested at the moment. It is our view at the moment that it would not be necessary to create extra judicial offices and that in the short term whilst the only matters that are dealt with are unopposed or undefended matters, that these could be dealt with by the existing magistrate's court, by the existing magistrates obviously appropriately trained…

CHAIRMAN: May I just jog your memory. The second ALS proposal submitted that unopposed divorce matters should be heard by "the duly qualified magistrate" but the ALS added that within the ALS consensus had not yet been achieved on the question "whether the LLB qualification should or should not be a sine qua non with the appointment to the bench of a family court."

(35) "**MR PETTY:** I think it follows at the moment Mr Chairman that if this thing is going to be implemented in the short term that the idea of having LLB qualifications and people that are qualified cannot apply. It may well apply in the future in Mr Maluleke's scenario that it will hear opposed divorces and will in fact become a separate type of court. But I do not think that in the present time that that would be feasible."

(36) "Mr Chairman, then if I may move on to the question of the commercial courts. You have seen the joint submissions which the Transvaal Law Society and the Johannesburg Bar have made in this regard. And the Transvaal Law Society in summary supports the view that the commercial court should be placed on an independent statutory basis and that, at least at this stage, matters which fall within the area of jurisdiction of the Johannesburg court is should compulsory - commercial matters should be compulsory for them to be dealt with in the commercial court.

CHAIRMAN: It will not depend upon the consent of the defendant?

MR PETTY: No, I think that that has been the weakness in the commercial court that the defendant who wishes to thwart the right of a plaintiff can actually do so by simply not consenting and then the whole procedure must go through the Supreme Court."

(37) "It is also our view, Mr Chairman, that this court must have separate rules and

that they must certainly not be the rules that are applicable to the Supreme Court. And that these rules must be flexible and they must allow the commercial court to deal with matters in a way that meet the individual needs of cases. And that that would then make the commercial court a viable proposition."

(38) "We also feel, Mr Chairman, that there should be a proviso which would allow people who wish to litigate in that court to consent to the jurisdiction of that Court…If somebody in Cape Town has a commercial matter and the parties agree that they wish to be subject to the jurisdiction of that commercial court with all of its expertise they should be allowed to consent to it irrespective of the fact that that court would normally not have jurisdiction."

(39) "Then another aspect which we would like to deal with is the question of the rules of court. In the rationalisation process it seems to us that attention should be given to the rules of court. There is at the moment confusion - or not confusion but differences in the rules between the magistrate's court and the Supreme Court. That magistrates court's jurisdiction has now been substantially increased and we feel that if it is possible there should be uniform rules that apply to the proceedings in the magistrate's court and proceedings in the Supreme Court."

(40) "There is in our view no reason for even differences in the numbering of the rules. In the magistrate's court we have rules that are identical to the rule in the Supreme Court but they just have a different number and we do not see the reason for that. It makes practice difficult for certain people."

(41) "**CHAIRMAN:** In your Society's view is this a matter of some urgency?

MR PETTY: It is our view that this is a matter of urgency and it is also our view that apart from the fact that there was not a rules board for a substantial period of time that the rules board notoriously works slowly and that I do not know whether this is a matter that has go priority on their agenda or not. And it is our view that if the Commission were to make a recommendation in this regard it may expedite something that we think is essential."

(42) **CHAIRMAN:** Yesterday we had a powerful plea for the establishment as division of the commercial court of a specialist insolvency court. Would you like to say a few words about that?"

(43) "**MR PETTY:** Mr Chairman, you have placed me in a position where I really

do not know what to say to you. The Transvaal Law Society has not adopted a view on this. I know that the matter was discussed at the level of the Association of Law Societies because it was regarded as being a matter that was of national interest. Mr Olivier from the Association of Law Societies was to have addressed you. The reason why he did not was that the Association of Law Societies which represents the four old provinces of South Africa did not have a uniform view on this. So I am sitting in the situation where I do not know what the view is and I myself are not an insolvency practitioner so I do not really know."

(XXXII) ADV G.J. VAN ZYL, ACTING CHIEF FAMILY ADVOCATE

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

(1) "Ek is - ek meen dit is vroeg 1991, by die gesinsadvokaat en later daardie jaar is ek aangestel as die hoof van die Pretoria kantoor en sedert 1 September 1995 is ek waarnemende hoofgesinsadvokaat. Ons wag 'n aanstelling af."

(2) "Mag ek dan nou net sê dat, ter inleiding, ervaar ek waar ek ookal kom dat daar geweldig druk bestaan vir die koms van 'n gesinshof."

(3) "Trouens, mense is oor die algemeen matig teleurgestel dat die gesinshof nog nie gekom het nie en wanneer ek praat van 'n gesinshof, dan verwys ek eintlik nie na 'n egskeidingshof nie, maar 'n geïntegreerde gesinshof. Ek kry informeel heelwat klagtes oor goed soos onderhoud, aannemings, egskeidings in besonder, na-egskeidingsprobleme, die bietjie ontoeganklikheid wat ervaar word met betrekking tot die hof."

(4) "Die tweede algemene dingetjie wat ek wil sê, is dat ek meen dat die gesinsadvokaat as 'n struktuur onontbeerlik is vir die suksesvolle gesinshof. Ek dink dat die gesinsadvokaat die noodwendige voorloper kan wees van 'n suksesvolle gesinshof … die gesinsadvokaat het, meen ek, uiteindelik prominensie begin gee aan die maatskaplike komponent wat u verslag tien jaar gelede alreeds geïdentifiseer het as 'n belangrike faktor … Daardie maatskaplike komponent het nou eens vir altyd binne die regstruktuur 'n kanaal gevind om sy prominensie te geniet wat hy lankal verdien, en dit was nie in die verlede so nie."

(5) "So ek het reeds vir u nou gesê dat die gesinsadvokaat is in beginsel ten gunste van 'n geïntegreerde gesinshof om aspekte van kinderhof, onderhoud en al daardie soorte goed in te sluit. Omdat baie van die probleme ontstaan buite egskeiding *per se*. Dit ontstaan na die egskeiding verleen is, of dit ontstaan in aanverwante aspekte soos onderhoud, wat 'n uiters, uiters belangrike faktor is."

(6) "Ek meen dat onderhoud miskien tot nou toe in meeste landdroskantore amper bietjie van 'n stiefkind was. Die publiek ervaar dit as sulks."

(7) "Ek dink die knelpunt is primêr die styl waarin dit hanteer word. Ek meen dat

as onderhoudsbeamptes in mediasie opgelei word, hulle baie van hierdie sake suksesvol buite die hof om kan skik, maar my ervaring van die onderhoudshowe is dat hulle probeer goeie werk doen, maar omstandighede is teen hulle. Daar is te veel sake. Die volume is te veel, die mense is dikwels onopgelei. Tot nou toe is die Kommissie bewus van die feit dat onderhoudswerk, en in beginsel sekerlik in 'n mate siviele werk, in 'n landdroskantoor nooit die prominensie geniet het wat die strafreg geniet het nie."

(8) "As die gesinshowe sou kom, en sou daar aan daardie hof 'n bepaalde status verleen word en die onderhoudshof kan daarby geïnkorporeer word, sal dit onmiddellik hierdie probleem, meen ek, oplos.

VOORSITTER: Wat stel u in die vooruitsig? U het die belangrikheid genoem van mediasie as 'n hulpmiddel.

MNR VAN ZYL: Ek meen dat onderhoudsbeamptes wat die eerste aanmelding van onderhoud hanteer in bepaalde tegnieke opgelei kan word om byvoorbaat, in plaas daarvan om op 'n dringende karakter die ding te hanteer, deur die samewerking van die partye die saak op te los. Die gesinsadvokaat se ervaring is, mnr die Voorsitter, dat selfs uiters moeilike sake wat op sigwaarde eintlik onoplosbaar blyk te wees, met behoorlike hantering wel opgelos kan word. Maar dan moet die klimaat daarvoor ryp wees."

(9) "Die gesinsadvokaat, het ek reeds vir u gesê, meen ek het 'n struktuur geskep vir die maatskaplike komponent om volle erkenning te kry. Maar ons het oor die afgelope paar jaar begin probleme ervaar met hierdie komponent spesifiek. Die gesinsadvokaat funksioneer, mnr die Voorsitter, op die veronderstelling dat ons in 'n gelyke vennootskap bestaan met die maatskaplike werker. Daar is nie iets soos 'n kortbroek- en 'n langbroekvennoot nie. Die een is nie meer belangrik as die ander nie. Maar die beskikbaarheid van maatskaplike werkers is 'n probleem."

(10) "Miskien moet ek net vir u sê wat ons ervaar as die probleme, en die eerste is dat die Departement van Welsyn skynbaar met sy rasionalisasie probleme ervaar om poste beskikbaar te stel. Daar is druk op die Departement. Ek het baie simpatie met hulle probleem. Hulle het eenvoudig nie beskikbare mense om geredelik te kan beskikbaar maak nie."

(11) "U weet, in die gesinasdvokaatafdeling werk on op die oomblik landwyd met ongeveer 18 maatskaplike werkers voltyds by ons."

(12) “Op die oomblik is daar 22 gesinsadvokate…in Pretoria is daar vyf gesinsadvokate. Dit sluit my nou in…In Johannesburg is daar vier. In Bloemfontein is daar twee. In Kaapstad is daar drie op die oomblik, een pos is vakant, en in Durban is daar vier. In Port Elizabeth is daar twee.”

(13) “Nou die maatskaplike werkers is nie gesekondeer aan Departement van Justisie nie. Hulle sit bloot by ons kantore op ‘n vergelykbare basis as wat die proefbeampte by die landdroshof sit. Maar ons het 18 maatskaplike werkers landwyd op die oomblik wat beskikbaar gestel is om vir ons te help. Ons doen op die oomblik meer as 4 000 formele ondersoeke per jaar. Ons sien in die omgewing van 29 000 dagvaardings persoonlik na.”

(14) “Miskien moet ek net vir die Kommisie kortliks sê die funksies van die gesinsadvokaat, en die eerste belangrike ding is die moniteringsfunksie. Ons moniteer alle hofstukke waarby kinders betrokke is. Daarmee bedoel ek dat ons *prima facie* op die stukke probeer vasstel of die reëlings rondom die kinders in orde is.”

(15) “Dan doen ons evaluasies van gesinne, om aan die hof ingevolge die Wet ‘n bepaalse aanbeveling te maak, en hierby ingesluit is ons primêre doel mediasie.”

(16) “Mnr die Voorsitter, die benadering van die gesinsadvokaat is ‘n multi-dissiplinêre span. Ons werk multi-dissiplinêr, waar ons in sekere opsigte selfs probeer om interdissiplinêr ‘n bietjie te werk … Maar dit is altyd ‘n span wat bestaan uit die maatskaplike werker, wat ons noem die gesinsraadgewer en die gesinsadvokaat.’

(17) “En daardie span se eerste en belangrikste oogmerk is om te probeer bemiddel, om die saak tot ‘n oplossing te probeer bring. Wanneer dit nou nie slaag nie, dan om te evalueer, ten einde aan die hof ‘n voorstel te kan maak oor waar die kinders behoort te bly, of wat ookal die dispuut op daardie bepaalde punt dan is.”

(18) “Die tweede aspek rondom die maatskaplike aspek wat kommer wek, is dat ons toenemend ‘n bietjie van die vrywilligers verloor. Ek wil nie vir my graag uitspreek oor die redes daarvoor nie, ek dink daar is baie redes daarvoor. Maar dat daar op die oomblik so ‘n bietjie van ‘n klem weg is van die kinders se belang na ander aspekte in die totale landsituasie, is tog duidelik … Die kwessie van geweld, die kwessie van misdaad, die kwessie van finansies. Al daardie aspekte het sekerlik nou al bygedra.”

(19) “Die ander aspek is die Kommissie van bewus, en dit is die kwessie dat die funksie van die gesinshof, of die maatskaplike werker se inset in daardie hof in alle waarskynlikheid nie primêre gesinsorg sal wees nie … mnr die Voorsitter, ons is daaroor uiters bekommerd. Maar weer eens word daardie beleid, aanvaar ek, op regeringsvalk gevorm. Ek noem hierdie aspek aan die Kommissie in die hoop dat dit dalk gemeld kan word as ‘n baie belangrike aspek om promininsie te verleen aan die sukses van ‘n gesinshof, want as gesinsake nie meer in ‘n land as primêr gesien word nie, dan het ons probleme. Dit lyk vir my die rigting waarin sake beweeg.”

(20) “Ek is nie onrealisties oor die behoefte vir skoon water en sanitasie en behuising nie, maar gesinsake is tog seker die hoeksteen van ‘n gemeenskap, en ons gemeenskap het probleme. As ‘n mens net kyk na die egskeidings statistiek en die geweldsyfer en jeugmisdaad, dan is ons tog sekerlik nie op die regter pad nie.

VOORSITTER: Nou hoe vergelyk hierdie situasie met die posisie elders in die wêreld waar daar gesinshowe bestaan? Wat is die beskouing aldaar?

MNR VAN ZYL: Dit lyk vir my, mnr die Voorsitter, asof, en ek sê dit met die grootste respek, in Suid-Afrika op die oomblik finansies die grootste probleem is.

VOORSITTER: Ja. Ons is ‘n arm land.”

(21) “**MNR VAN ZYL:** En daarby aangesluit is hierdie sprake wat voortdurend maar opduik dat subsidies aan privaat maatskaplike instansies inderdaad ingekort gaan word. Ek weet dat sekere van die privaat instansies in Pretoria se kantore al gesluit is en die werkers uigedeel aan die ander, omdat hulle die kantore nie meer kon bedryf nie. Dit is ook ‘n bron van kommer.”

(22) “Wanneer ek met maatskaplike instansies praat, is een van die groot kommers wat hulle uitspreek, dat finansies hulle groot probeem is. U weet, soos wat die ekonomie agteruitgaan, kry die mense swaarder en swaarder. Daarom word hulle bydraes aan die kerke al hoe minder en minder. Baie van die kerkinstellings wat privaatinstellings subsidieer, soos die Christelike Maatskaplike Raad, die Ondersteuningsraad van die Hervormde Kerk, die Vroue Katolieke Bond van die Katolieke Kerk, kan nie meer ‘n maatskaplike werker vir ‘n bepaalde gemeente in diens hou nie.”

(23) “Ek kan maar vir die Kommissie sê dat die Christelike Maatskaplike Raad een van die sterk arms is waarop ons op die oomblik steun om in die plattelandse

gebiede ons werk gedoen te kry, en daar is duidelik op hulle kantoor ernstige druk sover dit finansies aanbetref."

(24) "Die ander aspek wat ek vir die Kommissie wil sê, is dat ons in 'n verleentheid is as 'n gesinsadvokaatafdeling, deurdat ons op die oomblik nie formeel dienste lewer aan die swart egskkeidingshowe nie, nie wetlik nie … die wet maak nie daarvoor voorsiening nie, die Wet op Bemiddeling nie."

(25) "Ons het egter seker meer as 'n jaar gelede al begin ernstig praat en op 'n informele wyse ons hulp aangebied aan die kommissarisse van die swart egskeidingshowe. As 'n *amicus curiae* diens. Op 'n informele basis en met die goedkeuring van die kliënte. Hulle wil dit graag hê, dit is nooit 'n probleem nie."

(26) "En ons het inderdaad bymekaargekom en 'n strategiese plan opgestel van hoe om hierdie ding landwyd te infaseer en ons ervaring was dat on Achilleshiel bly die indentifisering van maatskaplike instellings en spesifieke werkers om op te lei."

(27) "U weet, ek was persoonlik in Noord-Transvaal, Pietersburg. Ek het daar verskeie maatskaplike werkers van die Departement van Welsyn opgelei, maar in die plattelandse gebiede is daar so 'n skokkende situasie van armoede, dat dit in 'n mate half onsinnig raak om met die mense te praat oor egskeiding terwyl hulle vyf kilometer moet loop om water te gaan haal, terwyl hulle werklik nie akkommodasie het wat geskik is vir mense om in te woon nie."

(28) "Daar is 'n massa mense versprei oor 'n groot gebied, sonder dat ek maklik instansies of persone kon identifiseer, professionele maatskaplike werkers, om in daardie gebiede hulp te verleen vir egskeidingsituasies. U weet, 'n vrou wat ingevolge swart reg en gebruik getroud is, het dieselfde probleme as wat enige ander persoon het wat getroud is. Daardie kinders het dieselfde ervaring van skeiding, van huwelikskonflik, van gesinsgeweld as wat enige ander kind het."

(29) "Die uitgangspunt van die gesinsadvokaat is deurlopend om by wyse van 'n bemiddelingspan die beste moontlike span vir 'n gesin daar te stel. Ons meen dat egskeiding en sake rondom kinders nou verwant is aan taal en kultuur. En daarom het ons van die begin af probeer om sover as moontlik mense in 'n span bymekaar te sit om 'n bepaalde gesin van hulp te wees wat op taal- en kultuurverband met hulle kan versoen."

(30) "En daarmee het ons gevind, is dit bitter moeilik om maatskaplike werkers

landwyd te identifiseer. U weet, in die blanke gemeenskap is dit tog duidelik dat daar is ‘n sterk infrastruktuur van georganiseerde maatskaplike instandsies soos die CMR en Ondersteuningsraad en ander. Ek moet vir u sê, ons ervaring dui daarop dat dit moeilik is om sulke instansies in die plattelandse gemeenskappe onder swart mense te identifiseer.”

(31) “Maar tweedens dink ek sal daar weer ‘n baie ernstige opleidingsoefening gedoen moet word dwarsdeur die land. U weet, adv Bosman het vyf jaar gelede met die implementering van die gesinsadvokaat landwyd gegaan en in letterlik elke dorp amper gesprekke gevoer met instansies en die funksie van die kantoor van die gesinsadvokaat bekendgestel en mense opgelei. Ek was by verskeie van daardie opleidingsessies betrokke en ek vermoed dat die oplossing sal wees om ‘n vergelykbare oefening deur te gaan, maar gemik op ‘n skepping van ‘n infrastruktuur om veral swart gemeenskappe te bedien.”

(32) “Ek noem dit as ‘n probleem, omdat die Departement van Welsyn in streke funskioneer en finansieële implikasies veroorsaak dat ‘n maatskaplike werker van die departement van ‘n bepaalde streek nie in ander streke kan gaan werk nie. Ek het begrip vir die frustrasie, maar dat dit nie oorbrug kan word nie, verstom my. Wat beteken dat ek kan op die oomblik nie op ‘n vrymoedige basis ‘n ervare maatskaplike werker van my kantoor Pietersburg toe neem en gaan opleiding doen nie, want dan werk sy in ‘n ander streek as wat sy nou werk. En dat eise sover dit reis en verblyf aanbetref byvoorbeeld het ‘n probleem.”

(33) “Ons het baie ervare swart advokate in diens, wat meer toegang het, meer ervaring, taal- en kultuuraanpasbaar is om alles te begin doen. Maar dan moet ons die wetlike aspekte regkry en ons moet hierdie soort van burokrastiese rompslomp begin oorbrug en begin met ‘n oefening. Ek meen dat as ons hierdie oefening nie betyds doen nie, gaan die gesinshof nie slaag nie.”

(34) “Ons is trouens angstig om hierdie kritiek van ontslae te raak dat ons in ‘n groot mate op die oomblik gesien word as synde diens te lewer vir ‘n wit elite groep en die groot massa van die gemeenskap in die land word in ‘n mate ongediens gelaat.”

(35) “Miskien moet ek net op hierdie punt byvoeg dat die behoefte soos ons dit sien is nie noodwendig om ‘n gesinshof aan alke klein dorpie te hê nie. Ek het dit hier in paragraaf 6 net sommer tersydelings genoem. Ons ervaring dui daarop dat as dit reg gedoen word, kan ‘n mens vanuit ‘n bepaalde sentrale kantoor by wyse van afstandbeheer, as jy wil, redelik suksesvol sake hanteer.”

(36) "U weet, my kollega in Kaapstad doen die hele Kaapse plattelandse gebied op rondgang vanuit Kaapstad self.

VOORSITTER: Wie is u kollega?

MNR VAN ZYL: Hester Fouchè. Maar sy het die situasie so onder beheer omdat sy 'n sterk maatskaplike komponent in elke dorp op gelei het."

(37) "**VOORSITTER**: Nou as u praat van elke dorp, kan u vir ons naasteby 'n aanduiding gee hoe groot die dorpe in Wes-Kaapland is wat sy bedien, dit sal nou nie elke gehuggie wees nie.

MNR VAN ZYL: Nee, nee. Dit is hoofsaaklik waar die rondgaande howe sit, mnr die Voorsitter. Maar u is bewus van die feit … (tussenbei)

VOORSITTER: Plekke soos George, Worcester … (tussenbei)

MNR VAN ZYL: Sekerlik."

(38) "Ons Bloemfonteinse kantoor werk op 'n vergelykbare basis, gereeld in De Aar, Upington en Kimberley, selfs ander plekke, afhangend van waar die hof sit. So die punt wat ek wil maak, is dat mens kan die dienste uitbrei na selfs klein plekke toe, as jy weer eens 'n sterk maatskaplike komponent het. As jy dit nie het nie, het jy eintlk nie 'n begin om 'n basis te vorm nie."

(39) "Ons het agteroorgebuig om opleidingsessie aan te bied, selfs vir klein groepe, waar dit ookal is, op 'n dag of twee dae basis … So 'n opleidingsessie is hoofsaaklik gekonsentreer op die juridiese aspekte. Die Wet op Bemiddeling, hoe die wet funksioneer, en wat die oogmerke van die wet is. U weet, die funksies van die gesinsadvokaat. Dit sal elementêr 'n bietjie bewysreg insluit om te probeer bepaal wat is feite in dispuut en wat is nie … So dit is hoofsaaklik maar n praktiese gerigte opleidingsessie om die maatskaplike werker in te lyf in die juridiese aspekte van 'n saak binne die Wet op Egskeiding wat sy dan sal hanteer."

(40) "Die mense is angstig om opgelei te word en daar is uiters bekwame mense gereed om dit te doen. Maar die punt is dat die Achilleshiel bly eenvoudig dat ons het nog nie daardie struktuur by die swart gemeenskappe nie. Dit is my groot kommer."

(41) "Ons het heelwat sielkundiges wat gratis dienste aan die kantoor lewer op 'n vrywillige basis, maar weer eens weet ek in Pretoria maar van enkeles wat

spesialiseer in swart sake. Daar is in Soshanguve ‘n dame met die naam van Gladys Maluleke, sy is ‘n sielkundige. By Vista is daar ‘n vrou, en dink sy is ‘n professor, Queenie Mokoena. In Witbank is daar by die Highveld Centre vir persoonsontwikkeling is daar ‘n swart sielkundige wat al vir ons werk gelewer het, baie professionele werk. Maar daardie infrastruktuur moet nog geskep word om hierdie dienste volledig uit te brei na veral swart gemeenskappe wat uit die gesinshof uiteindelik van grond af kom.”

(42) Ek het reeds daarop gewys in paragraaf 5 van my kort memorandum, dat sou die gesinshowe kom, die kapasiteit van die gesinsadokaat versigtig na gekyk sal moet word. Ek kan vir u sê dat op die oomblik sukkel ons om die werkslading te hanteer.

(43) “Miskien moet ek ongevraag twee voorstelle maak wat ek persoonlik dink is oplossings. Die een probleem wat die gesinsadvokaat tans ervaar, mnr die Voorsitter, is dat die wet ‘n verpligting plaas om te ondersoek bloot as ‘n party vra. Ek noem dit, omdat by geleentheid, met die grootste respek, kry ons effens belaglike versoeke vir ondersoeke.”

(44) “Ek meen dat een oplossing om hierdie volume werk ‘n bietjie te selekteer is om miskien aan die gesinsadvokaat ‘n diskresie te gee of hy gaan ondersoek of nie. Dit is die een moontlikheid.”

(45) “Die ander aspek, en dié het ek in die praktyk al probeer toets, is dat mense moet betaal vir dienste. Maar ons moenie onrealisties wees nie. Dit is ‘n onsensitiewe tyd, veral nou, meen ek, om te praat oor geld waar almal swaarkry. En aspekte rondom kinders is emosioneel belaai, en dit kan die verkeerde beeld skep as ‘n mens onsensitief sê mense moet begin betaal. Maar ek dink die houding behoort te wees dat mense wat dit kan bekostig, moet betaal.”

(46) “Mnr die Voorsitter, akkommodasie van die gesinsadvokaat is nie perfek nie. Trouens, ons geboue is nie gebruikersvriendelik nie, ons het nie eenrigtingspieëls om met kinders te werk nie. Die geboue is nie ingerig as ‘n tipe van gemaklike atmosfeer vir kinders nie. In daardie opsig skiet ons landwyd ernstig tekort. In meeste van die gevalle, behalwe Johannesburg, sit ons nie in die hooggeregshofgebou nie.”

(47) “Die ideale toedrag van sake sou wees dat die gesindadvokaat toeganklik en by die gesinshof sal sit. As ek die Paleis van Justisie kan gebruik as ‘n voorbeeld, sou daardie drie ou howe op grondvloer kan omskep word in gesinshowe, en

die gesinsadvokaat kan daar op die eerste vloer van die Paleis sit, dan sou dit die ideale situasie wees. Dan kan ‘n regter met vrymoedigheid vra, kom gou hof toe, want dan is jy beskikbaar. Terwyl tans in Johannesburg, behalwe vir Johannesburg, is ons nie so geleë dat ons op kort kennisgewing maklik kan bywoon nie.”

(48) “**VOORSITTER**: U weet, een van die voorstelle voor hierdie Kommissie is dat wat ookal uiteindelik gebeur met ‘n gesinshof in die geykte sin van die woord, ‘n gesinshof met ‘n behoorlike maatskaplike onderbou, is daar ‘n dringende behoefte aan goedkoop vinnige beregting van onbestrede egskeidings. Nou een van die gedagtes wat ons vandag bepreek het, was die moontlikheid van ‘n loodsprojek by ‘n paar van die groter landdroshofkantore, miskien met inlywing van die swart egskeidingshowe. Nou gestel daar word so, daar kom so ‘n loodsprojek, sou die gesinsadvokaat maklik daarby inskakel?

MNR VAN ZYL: Ons is gereed om so ‘n loodsprojek vandag al te akkommodeer in Johannesburg.”

(49) “Maar die gesinsadvokaatafdeling is minstens gereed om met ‘n loodsprojek te kan begin. Ons sou vandag in Johannesburg kan kom met ‘n loodsprojek om die ondersteuning te bied vir ‘n gesinshof, ook wat swart sake aanbetref, sonder enige twyfel.”

(50) “Maar in die Transvaalse platteland is een van die groot probleme om mense te identifiseer om die maatskaplike funksie te vervul. Dit is een ding. In Johannesburg het ons nie daardie probleem nie.”

(51) “In die Kaapse platteland, weens die feit dat die gesinsadvokaat in Kaapstad reeds met behulp en ondersteuning van maatskaplike instansies dwarsdeur die platteland werk, kan ons daar dit ook hanteer, in George, byvoorbeeld. Die moontlikheid om dit in Durban of Pietermaritzburg te begin is ook nie uitgesluit nie. Die Durbankantoor bedien Pietermaritzburg op ‘n twee dae ‘n week basis, met ‘n - ek moet nou bysê, ‘n bietjie van ‘n druk op die maatskaplike komponent weer eens, maar daar kan ons dit ook doen as dit moet.”

(52) “**VOORSITTER**: Laat ons ‘n oomblikkie kyk, neem nou byvoorbeeld Mpumalanga, hoe sou dit gesteld wees met sê nou maar Nelspruit, Middelburg, Lydenburg?

MNR VAN ZYL: Ek het op ‘n stadium ‘n bietjie statistiek probeer byhou deur dagvaardings te selekteer uit die gebiede uit waar hulle kom. Ons kry baie dagvaardings vir egskeiding uit die omgewing van Pietersburg. Ons kry baie

uit Secunda. Ons kry ‘n redelike hoeveelheid uit Nelspruit uit. En dan kry ons baie hier uit die omgewing van Vereeniging, Klerksdorp, Potch.

(53) “Ek kan in alle eerlikheid sê dat as ‘n gesinshof vandag in Nelspruit moet begin, sal ons hom nie kan bedien ten volle nie. U weet, om ‘n advokaat beskikbaar te stel … (tussenbei)

VOORSITTER: Dit dui - ekskuus tog, dit dui miskien weer op die noodsaaklikheid van begin met ‘n loodsprojek.

MNR VAN ZYL: O ja. Ek het in my eie gemoed min twyfel dat so ‘n gesinshof kan nie begin anders as by wyse van ‘n loodsprojek nie.”