(XXXIII) MR ATTORNEY D.F. SHEPPARD OF ADAMS AND ADAMS IN PRETORIA ON BEHALF THE LITIGATION PARTNERS OF HIS FIRM

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

(1) "I am an attorney in the Transvaal. I have been an attorney since 1975. I am a South African Patent Agent which are now known as patent attorneys since 1971. I came to this country in 1969 and previously qualified as a British Chartered Patent Agent in 1963 and practised as such in the UK until 1969."

(2) "I practised in London initially with a small firm of patent agents of four partners who specialised in chemical patent work and then because I have a degree in chemistry I then went to the patent department of Wyeth Pharmaceuticals, it was known as John Wyeth and Brother Limited near Maidenhead in England…they are the British subsidiary of American Home Products Corporation, an enormous American organisation. And through those links I ended up doing patent work throughout the world apart from USA and Canada."

(3) "I am a member of various bodies such as the South African Institute of Intellectual Property Law who will be giving a presentation here, the Chartered Institute of Patent Agents, then in addition I am a member of the American Bar Association, a foreign member, and of the American Institute of Intellectual Property Law. I attend a number of their conferences and have built up personal relationships with many people there which has enabled me to obtain information, some of which I put in my previous letter."

(4) "I am speaking on behalf of the partners of Adams and Adams who have 36 partners mainly in Pretoria and of those we have 14 involved in litigation, of which I am one of them. And obviously quite a bit of what I say is following meetings with other of the litigation partners."

(5) "If I can now turn to my letter which I sent in to the Commission on 23 June 1995, my first point I made was about the necessity for litigants to have the right to a reasonably wide choice of legal advisers and not be inconvenienced by a substantial delay before appearing in court. And I submitted that there needed to be a pool of judges as well as a pool of appropriate legal advisers for that to happen."

(6) "To give my reasons for that I believe that although each attorney usually from counsel a limited number of counsel to decide when arguing a case, I believe it is helpful to have quite a pool of counsel from which one can select depending on the particular nature of the case concerned. Another reason for this is when there is an appeal and I have had situations where we have been unsuccessful in the lower courts and we have changed one of the counsel…"

(7) "**CHAIRMAN:** May I just seek clarity on the pool of legal advisers. I understand why that is necessary. What practical steps do you advocate to increase the size of the pool?

MR SHEPPARD: I had not so much looked at increasing the size as having courts where there is the pool."

(8) "Obviously I cannot speak for judges but I am aware…from judges that I have spoken to that there is discussion on legal points amongst the judges as well. And if there is not a pool of judges that will fall away."

(9) "And it so happens that this last week I saw a paper by Jacob J of the U.K. to the Chartered Institute of Patent Agents,…I do have a couple of full copies if you would like me to leave this with you of the total paper.

CHAIRMAN: Thank you, that would be helpful."

[A copy of the report of the proceedings of the 702nd Ordinary General Meeting of the Chartered Institute of Patent Agents held in London on 17 January 1996 which includes the address to the Institute by Mr Justice Jacob, of the Chancery Division and the senior Patents Judge, is to be found in Appendix "N" in VOLUME II of this Report]

(10) "**MR SHEPPARD:** The passage that I indicated at this time as being relevant is on page 152 where he pleads that judges…should not be allowed to be in ivory towers. He said I think one thing that has changed is the attitude of the judges as regards communication with the outside world. I think we have learnt that even though nobody would describe the law courts as an ivory tower it is not a place in which we can sit isolated."

(11) "From the many people that I speak to around the world in patent matters most countries are infamous for the long time it takes to get to court. This has been recognised in the U.K. and Mr Justice Jacob in that paper [see Appendix "N" in VOLUME II] at an earlier passage on page 151 at the top, he said next, look at British litigation: 'If the parties want a fight, if one party wants a fight,

within a short time, by world standards I believe we stand out as one of the fastest countries in the world' ."

(12) "Now I am aware in the U.K. that was not the situation a few years ago. Although he talks about being one of the fastest countries in the world, if a South African and a U.K. infringement matter, patent court matter where there would be oral evidence started on the same dates, the South African matter would get to court earlier."

(13) "I mentioned in my letter which I sent in June 1995 of this particular Stauffer Chemical Co v Safsan Marketing *[1983 BP 44]* case where the U.S.A. case started much earlier than the South African case. We got to court in I think it was nine months, maybe 12 months, something like that. Both parties wanted to get to court. There was no fooling around, we had discovery and there was large discovery very rapidly and we went to court quickly and we got a decision quickly."

(14) "And the U.S.A. legal people were very impressed. Both sides wanted to see how the witnesses stood up under cross-examination for what to us was a large matter but to them was momentarily a very small matter compared with the U.S. litigation and then they would have a better idea how to proceed in the U.S.A. And that is still the case I am glad to say. South Africa does have a very good name for speed at litigation."

(15) "There is the other factor which I deal with here about - which in fact is slightly out of place, I deal with it later when I come to the court of the Commissioner of Patents with a plea that there is not just one specialist judge in a specialist court."

(16) "The point that I make in paragraph 3.2 of the notes that I have handed to you is that this has been tried in the U.K. What they wanted to do there is they had a big backlog in the patent high court in the Strand in London and they set up a county court under one judge in North London and in effect said all small matters or matters that are not extremely big matters should go to the county court."

(17) "And people followed this at the start but they found that with just one judge there had been a large number of difficulties that they did not expect and there is some dissatisfaction with it.

CHAIRMAN: It was not a complete success?

MR SHEPPARD: I would rather say it is far from being a complete success. They are now stuck with it and it looks from what I have heard from discussions of people in London that they would like in fact to close down the county court but they cannot easily do it at this time. May be when this particular judge reaches retirement age they may take that opportunity, they may instead do something else. But just having one judge on his own has not been a success."

(18) "I am aware that the South African Institute of Intellectual Property law, of which I am a member, will be making their presentation on Monday, and all I wanted to say is that we have had a Commissioner of Patents who has been selected from a group of judges who have had experience over a considerable number of years of different patent matters and it has worked very well. And I like the idea of it not just being one judge but being one from a group of judges."

(19) "**CHAIRMAN:** May I enquire Mr Sheppard, are you in broad agreement with the proposals which will be advanced by Mr Le Roux on behalf of the Institute on Monday?

MR SHEPPARD: I would love to say yes because I am not quite sure what they are because he was away and he and I just spoke on the telephone and the answer is yes, I am in broad agreement but I do not know the detail of it."

(20) "**CHAIRMAN:** Well, if you like, we can adjourn for five minutes because it would be useful to the Commission to have your considered…(intervenes)

MR SHEPPARD: If you feel it is correct that I should at this time before he has made it then I certainly will.

CHAIRMAN: Yes perfectly sir. Then we will take a brief adjournment for ten minutes and then we shall hear Mr Sheppard further.

CHAIRMAN: Time is 11:55. After a brief adjournment we proceed with the oral representations of Mr Attorney Sheppard."

(21) **MR SHEPPARD:** Thank you for allowing me to read that. In fact, the president who wrote that is one of my partners but I did not know the detail of the content. I hesitate to say so, there is a minor mistake in it as you will see from the pages I have given you the British High Court list of judges who are specialists in intellectual property law are four in number now, there used only to be one. It is Laddie J, Aldous LJ, Lord Hoffman and Jacob J are the four. So they do have this pool of four judges…"

(22) "The other thing of course is that, as you well know Sir, there are a number of other judges who have become expert at hearing matters since that letter was done or had even done some before then. So here in South Africa we also do have more judges than the limited number specified there…but I do agree with that, that the idea of expanding it into an intellectual property court is one which I definitely favour.

CHAIRMAN: Which should ideally have its headquarters at?

MR SHEPPARD: In Pretoria because that is where all the documentation is that is served…the Patent Office is where the documentation is served and obviously can be taken by foot just two blocks away to the court."

(23) "May I now go onto the family law matters where questions were asked?

CHAIRMAN: Yes thank you.

MR SHEPPARD: And I have taken quite a bit of advice on this and submit that there should be a specialist family court with a - and I have omitted the word judge at the start, I have put presiding officer who is a judicial officer with practice in this field. I feel it important that being this particular field he should be sympathetic and be a person who has the status of a Supreme Court judge."

(24) "In any divorce people who suffer most invariably are the children, and divorces, one gets the impression that too many are rushed into possibly, not enough arrangements are made…I have of course statistically quite a number of people coming to me who are in this situation and wanting advice and it is sympathetic advice, sometimes very logical advice, but advice that they need and they cannot make the decisions themselves."

(25) "It is a presiding person who is able, from the bench, to give that sort of advice is what I am suggesting here. And I said it could be a judge, attorney, and advocate or possibly some other experienced person with knowledge of law and family matters. And I have been advised that there are such people who already become involved in divorces at sometime or another and the door should not be closed on them as the person who would preside at this."

(26) "The next question is whether it should be a division of the Supreme Court or should it be an independent court with a status equivalent to that of a Supreme Court? My belief is that it should not be a division but that it should be an independent court with the status equivalent to the Supreme Court."

(27) "Then the next question concerned whether it should operate at two levels, one for unopposed divorces and one for opposed. I believe there should only be one court and it should operate at that one level."

(28) "I am advised that the problems of a roll sometimes tend to cause divorce matters to be settled in the corridors of the court and then people have second thoughts afterwards on many things. And this is one of the factors that I would like to see avoided. I therefore believe that if there is just one roll and everyone goes along with it, contested or uncontested, the people should be coming to court better prepared and even if it is uncontested something may happen at the end or if it is contested something may happen at the end and one would get better justice I think for those concerned on both sides if there was only the one court."

(29) "Then there was a question somewhere here about the LLB and obviously a person with an LLB is good legal qualifications but…People with legal qualifications other than a LLB but sympathetic and knowledge of family law should also be considered."

(30) "Again, the next question really is who it serves. I feel that the same family court should serve everyone and it appears to me that the only way that it could do this will be some sort of circuit system."

(31) "And then the fifth question asked whether the Black Divorce Courts should be made accessible to all race groups be appropriately renamed and be expanded and remodelled into a family court of comprehensive jurisdiction. I have answered that I believe the reverse is what is needed, that the family court be expanded to take in and use the good parts of the Black Divorce Court.

CHAIRMAN: Absorb them.

MR SHEPPARD: Absorb it yes."

(32) "I had been trying to discuss this with the Dean of the Anglican Church in Pretoria who is Dr Seoke who has obviously had a lot of experience of dealing with black people under the Black Divorce Courts where he has ministered in townships."

(33) "We eventually ended up speaking this morning and he did give me a little bit of information that one of the things is that when a person marries they marry

into the community and the community is intensely interested and, in fact, not knowing that, I prepared this in advance, and such people who had been intensely interested and have become experts in matters of this type may be people who could be made use of in the general family court."

(34) "The other point was that he said there is always mediation first off. That is something which is lacking in some instances in the existing divorce procedure in the Supreme Court. And it is opening up a whole new area that maybe there has to be - might be an idea for some mediation first before it got as far as the court which would put on a different level of person to deal with it who dealt with the two levels, one by a mediator and those that were not successfully dealt with by the court. And that was an idea which I picked up from Dr Seoke this morning."

(XXXIV) MR'S ATTORNEY C. JOB, M. LE ROUX AND DR T. BURRELL ON BEHALF OF THE SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY

In the course of their oral submissions to the Commission at Midrand on 15 April 1996 some of the points respectively made by Mr Job, Mr Le Roux and Dr Burrell were the following :-

(1) "**MR JOB:** Mr Chairman, members of the Commission, thank you very much. I am the President of the Institute and I will simply make a very brief introduction and hand the submission over to Mr Le Roux. Mr Chairman, we would like to thank you sincerely on behalf of our Institute for finding us the time to appear before you today. We have prepared written heads of submission which we trust are with you. We have also prepared some supporting documentation which essentially includes relevant copies of the Intellectual Property Statutes and other statistical information and lists of cases."

(2) "I would like initially just to give some background on the Institute. It is a voluntary association which was founded in 1954, having its own constitution. Its members are practitioners in the field of intellectual property law and I believe in quantitative terms probably deal with in excess of 90 % of intellectual property litigation and matters in South Africa."

(3) "In order to qualify for fellowship of the Institute a practitioner must be an attorney of the Supreme Court and must in addition pass a series of examinations conducted under the auspices of the Patent Examinations Board or of the Institute. The examinations which normally take three years to complete, cover the entire spectrum of intellectual property law and are structured to enable a practitioner to qualify either as a patent attorney or as a trade mark practitioner."

(4) "The qualification of patent attorney is statutory in terms of the Patents Act, whilst the trade mark practitioner qualification is an institute qualification in terms of examinations that it sets."

(5) "Membership of the Institute is currently, Fellows: 91; Associate Members: 24, and student members: 73. The members of the Institute practise primarily in the Gauteng, essentially Pretoria and Johannesburg areas, but also in Midrand, Randburg, Sandton, Durban and Cape Town. I think I can say that the Institute is an acknowledged body representing not only practitioners but the interests of the owners of Intellectual Property rights in South Africa and obviously foreign

owners, which we will come to, of which there are many. Several of the members of the Institute are also members of the Minister of Trade and Industries' Advisory Committee on Patents Trade Mark Copyright and Designs."

(6) "**MR LE ROUX:** Thank you, Mr Chairman, members of the Commission. There are written heads of submission which have been placed before you…My name is Marius le Roux, I have a degree in engineering and in law.

CHAIRMAN: What branch of engineering?

MR LE ROUX: Mechanical engineering. I am a registered patent attorney and most of my work concerns patent law design law and at times copyright law. I have been in this field since 1971 and I am a partner at one of the Intellectual Property law firms which has its main office in Sandton….I am in fact the managing partner of DM Kisch Inc."

(7) "On page 2 of the written heads of submission we say that the submission of the Institute concerns only the issue of specialisation in terms of paragraph (1)(c)(i) of the Commission's terms of reference. It is the respectful submission of the Institute that a specialist court should be established which will have jurisdiction in intellectual property matters. That jurisdiction should be exclusive in the case of certain registered rights, to which I will shortly refer, and concurrent with the provincial and local divisions of the Supreme Court in the case of other matters."

(8) "At the risk of stating the obvious, if I could say that intellectual property law involves both statutory and common law. As far as statutory law is concerned it is for the most part encapsulated in four Acts. Those are the Patents Act, the Trade Marks Act, the Designs Act and the Copyright Act. There are a number of lesser known Acts which also fall within this field of law which relate, inter alia, to business names, merchandise marks, plant breeders' rights, performers' rights and others, and also the registration of copyright in Cinematograph Films Act."

(9) "On page 4 of the heads we say that of the Acts which I have mentioned by name, they are all characterised, with the exception of the Copyright Act, in that they make provision for the maintenance of registries, which are situated in Pretoria. As far as common law is concerned, intellectual property involves the Law of Unlawful Competition, Passing Off and Trade Secrets."

(10) "**CHAIRMAN:** Do you share the impression of your Institute that

approximately 90 % of intellectual property litigation occurs in Gauteng?

MR LE ROUX: Mr Chairman, perhaps not 90 % occurring in Gauteng. I think the president of the Institute alluded to the fact that at least 90 % of intellectual property law matters are dealt with by members of the Institute, by the practitioners. I am a little hesitant to try to estimate the weight of matters being heard in the various provinces, but I would certainly submit that the majority of matters, the bulk, the majority is held in Pretoria with some amount of litigation in Johannesburg as well."

(11) "I think one must distinguish between the registration of intellectual property rights and litigation that flows from those rights. I think all registration obviously takes place in Pretoria specifically, whereas litigation, I would say the substantial majority occurs in the Gauteng province."

(12) "I am still at page 4 of the written heads. I thought it would be convenient to summarise the existing jurisdictional position as far as the important intellectual property acts are concerned. If one can start with the Patents Act - the first point to be made is that the Commissioner of Patents established under the Patents Act has exclusive jurisdiction in the first instance to hear and decide any proceedings, other than criminal proceedings, under the Act. That is in terms of section 18 of the Patents Act."

(13) "We then proceed to say that the Commissioner of Patents has all the powers and jurisdiction of a single judge in a civil action before a Provincial Division of the Supreme Court and that is in terms of section 17 of the Patents Act."

(14) "The Commissioner is appointed by the Judge-President of the Transvaal Provincial Division of the Supreme Court from the members of the Transvaal Bench in terms of section 8 of the Patents Act. If I may quote that section:

> *'The Judge-President of the Transvaal Provincial Division of the Supreme Court of South Africa shall from time to time designate one or more judges or acting judges of that division as commissioner or commissioners of patents to exercise the powers and perform the duties conferred or imposed upon the Commissioner by this Act."*

(15) "On page 5 of the heads we proceed to say that proceedings before the Commissioner of Patents are heard in Pretoria, save where the Commissioner otherwise directs, and that is in terms of section 16(2) of the Patents Act on page 4 of the supporting bundle.

CHAIRMAN: As a matter of practice, in the past, has the Commissioner sat elsewhere?

MR LE ROUX: Indeed, occasionally the Commissioner of Patents has at the request of the parties agreed to sit in Johannesburg, but again, the bulk of the matters are inevitably heard in Pretoria."

(16) "Proceedings before the Commissioner of Patents are in accordance with the Rules of the Transvaal Provincial Division, that is in terms of section 19 of the Patents Act. In effect therefore, the Transvaal Provincial Division doubles as the Court of Commissioner of Patents and exercises exclusive jurisdiction in patent matters."

(17) "There is also the Registrar of Patents appointed under the Patents Act who has a wide range of powers under the Act. The Registrar may, for example, receive evidence by affidavit or *viva voce* upon oath and may award and tax costs. That is in terms of section 15 of the Patents Act."

(18) "Then finally, under the Patents Act, an appeal from a decision of the Registrar lies to the Commissioner and an appeal from a decision of the Commissioner is dealt with as an appeal against a civil order or decision of a single judge in the Supreme Court. This is in terms of section 75 and 76 of the Patents Act.

CHAIRMAN: Who is the present Registrar?

MR LE ROUX: The present Registrar is Ms Van Greunen."

(19) "The very last page of the written heads consists of a letter from the Registrar. It is marked as Annexure "A", which in principle supports the Institute's proposal for a specialist court. I may just mention that the letter is signed by Ms Van Greunen as Registrar of Patents, but of course, she is Registrar, not only of patents, but of trade marks, copyright and designs as well."

(20) "**CHAIRMAN:** I see her letterhead indicates the relevant department as being the Department of Trade and Industry.

MR LE ROUX: That is correct. That is the department under which all the registries resort, the registries concerned with intellectual property Acts.

CHAIRMAN: Is that a satisfactory arrangement as far as the Institute is concerned?"

(21) "**MR JOB:** Mr Chairman, not an easy question to answer, but I think in general terms, yes. It really is a recognition of the importance of intellectual property to the economy. This has been acknowledged certainly on many occasions. So it is very comfortably located from that point of view. When it comes to judicial functions sometimes there are difficulties, but administratively it is a comfortable arrangement."

(22) "**MR LE ROUX:** Mr Chairman, I am still on page 5 of the written heads, at the foot of the page. I would like to turn to the Trade Marks Act and deal with the existing jurisdictional position. In this case the Transvaal Provincial Division of the Supreme Court, again, has virtually exclusive jurisdiction over all matters arising under the Trade Marks Act in respect of the removal, amendment, variation or other relief affecting any entry in the Register of Trade Marks. It serves that jurisdiction with the other divisions of the Supreme Court in very limited circumstances.

CHAIRMAN: As the decided cases show?

MR LE ROUX: I will ask Mr Job to deal with that."

(23) **MR JOB:** …Under the Trade Marks Act of 1963, which is no longer in force, there was a case involving the removal of a trade mark in the Cape Provincial Division and the judge in that case held that the matter had to be heard in the Transvaal. But I would like to point out that in terms of the new Trade Marks Act of 1993 the Transvaal Provincial Division is given exclusive jurisdiction in matters pertaining to entries in the register, validity of trade marks. Unless proceedings are instituted based on infringement in another division and as part of a counter-claim in that division, there might be an attack on the trade mark, and in those specific instances it is competent to launch a counter-application in another provincial division.

CHAIRMAN: Thank you."

(24) "**MR LE ROUX:** Mr Chairman, the jurisdiction in relation to trade mark matters is dealt with under the definition of "Court" in section 2(1) of the Trade Marks Act. The Transvaal Provincial Division further has exclusive jurisdiction in appeals from all decisions of the Registrar of Trade Marks. That is in terms of section 53(1) and 53(2) of the Trade Marks Act."

(25) "In order to complete the picture under the Trade Marks Act the Registrar of Trade Marks has concurrent jurisdiction with the court in respect of several matters and here one should refer to sections 21, 24, 26 and 27 of the Trade Marks Act. These sections deal with opposition, rectification and removal or

variation of trade mark registrations on various grounds. For the purpose of these sections the Registrar has in connection with proceedings before him, all the powers and jurisdiction of a single judge in a civil action before the Transvaal Provincial Division. That is in terms of section 45 of the Trade Marks Act."

(26) "Further in connection with the Trade Marks Act, proceedings before the Registrar are in accordance with the rules of the Transvaal Provincial Division in terms of section 45(2) of the Trade Marks Act."

(27) "**CHAIRMAN:** Proceedings heard at the Trade Marks Office, do they proceed smoothly in practice?

MR LE ROUX: This is a question which I would like Mr Job to address.

MR JOB: The answer is yes. Matters are set down with relative ease. It is obviously a specialist court of sorts, dealing with these matters and it has been a very satisfactory arrangement.

CHAIRMAN: And the premises are suitable?

MR JOB: Very suitable."

(28) "**MR LE ROUX:** Then finally, Mr Chairman, the Minister, in terms of section 6(3) of the Trade Marks Act may appoint a judge or retired judge or an advocate or an attorney to exercise any power or perform any duty of the Registrar. Section 6(3) is reflected on page 15 of the bundle. To my knowledge there has been one such appointment during 1995.

CHAIRMAN: Is that an ad hoc appointment?"

(29) **MR JOB:** Mr Chairman, in fact several matters have been heard this year on this basis. The ad hoc appointment is correct, but as matters have developed this years, one retired trade mark attorney practitioner has been appointed on a few occasions and one professor of intellectual property. It was a professor at the University of South Africa."

(30) "**MR LE ROUX:** Mr Chairman, the existing jurisdictional position as far as the Designs Act is concerned - and I am on page 7 of the written heads - is that all divisions of the Supreme Court have jurisdiction under this Act in terms of the definition of "court" in section 1(1) of the Designs Act. The Registrar of Designs also has various powers under the Act, but none of the special powers

equating the Registrar to a judge as in the case of the Registrar of Trade Marks."

(31) "As far as the Copyright Act is concerned, there is no definition of court. It is submitted that any court of competent jurisdiction, including the magistrate's court, can hear matters under the Copyright Act. Indeed, because of its criminal sanctions copyright matters can conveniently be brought before a magistrate's court.

CHAIRMAN: I suppose in practice that happens very rarely?"

(32) "**MR LE ROUX:** Mr Chairman, it has been known to happen, but as far as copyright infringement is concerned, which is again the vast majority of all copyright litigious matters, because of the relatively complicated nature of copyright law these infringement matters invariably proceed before the Supreme Court."

(33) "Then lastly, on page 8 of the heads, the position under the Cinematograph Films Act is that all divisions of the Supreme Court have jurisdiction under this Act. That is again in terms of the definition of "court" in section 1(a) of the Act. The Registrar of Copyright under this Act, as in the case of the Trade Marks Act, has in connection with any proceedings before him, all the powers and jurisdiction of a single judge of a provincial division of the Supreme Court. That is in terms of section 25(1) of the Act. I may just make the point that the Cinematograph Films Act is an Act which makes provision for registration of copyright in cinematograph films. It is quite distinct from the Copyright Act itself, in the case of which there is no registration."

(34) "Mr Chairman, if I may come to the main business of the day. That is the Institute's motivation for the establishment of an Intellectual Property Court. At page 8 of the written heads, and at paragraph 5.1, we say in the first instance that it is our submission that intellectual property law is a specialised subject which requires adjudication by judges who have sound experience and knowledge in this field of law."

(35) "In the case of patent law there is an undeniable need for a judge with substantial prior experience at the bar or in practice. That patent law requires specialist attention is borne out by the fact that the Court of Commissioner of Patents exists."

(36) "In the case of design law a new Act came into force in 1995 which made substantial changes to the then existing design law and which makes provision

for the first time for functional designs in addition to the traditional ornamental or aesthetic designs.

CHAIRMAN: It is a marked departure in the law.

MR LE ROUX: It is indeed, and it has, in the case of a functional design rendered design law more technical in nature which, in our submission, makes it more suitable for adjudication in a specialist court. Our submission is that an opportunity now exists to place design law in a sphere of a specialist court to ensure that sound law is made in the interpretation of the Designs Act.

CHAIRMAN: I take it the 1995 amendment brought our law in line with foreign jurisdiction?"

(37) "**MR LE ROUX:** Yes, and no. To some extent our 1995 Act is *sui generis* and in a certain sense leads the way even internationally. Is that a fair statement, Mr Job?

MR JOB: Mr Chairman, also in trade mark law did a new Act come into force last year which itself will require exceptional skill in interpretation. The new Trade Marks Act has liberalised trade marks law in South Africa and has brought it into line with international trends.

CHAIRMAN: In a nutshell, how is the tendency reflected, very briefly?"

(38) "**MR LE ROUX:** Perhaps I will ask Mr Job to reflect on that for a moment, but I can give, say, two examples. We now have in the Trade Marks Act the concept of a well-known trade mark which can be enforced even if unregistered; we have the anti-dilution provisions which are entirely new, in the Act, and these are going to be difficult matters to deal with in the courts and especially will one need judges of exceptional experience."

(39) "**MR JOB:** Mr Chairman, if I can just elaborate very slightly, those are two very important new provisions in our Act. There are others, one of which is the extension of infringement protection in trade mark matters to similar goods and services and various others, but the essential point I wish to make is that our trade mark legislation is state of the art in the sense that it has followed the approach adopted by the European Union which was laid out in the directive of the European Union in relation to the harmonisation of trade mark law in Europe."

(40) "The consequence of this is that even in Europe some of these concepts, and particularly the concept of a well-known trade mark, the dilution concept to

which Mr Le Roux has referred, are of uncertain meaning even in that context, and in the American and other First World context…Dilution is a concept of trade mark law, involving the use of the well-known trade mark on goods or services which are completely distinct from those in respect of which the well-known trade mark is generally used."

(41) "If I could use as an example the use of the trade mark "Coca-Cola", on brief cases or on shoe laces, something which is completely out of the ordinary, where members of the public might not be confused as to origin, but there is a tarnishment and an abuse of the intellectual property right by another trader. Now the concept of dilution internationally is extremely hotly debated and it is hoped that our courts will consistently follow an approach to these matters and will also be in step with jurisprudence in other countries, particularly Europe."

(42) "**MR LE ROUX:** Mr Chairman, although trade mark law is not a technical subject, it is an esoteric field of the law and in the heads I say that it requires a feel which is not commonly found. That is part of our submission for the referral of trade mark litigation to a specialist court."

(43) "As far as Cinematograph Film Law is concerned it is of small prevalence but its ambit can be included within the jurisdiction of an Intellectual Property Court since it shares with the abovementioned fields of law, the characteristic that it involves the keeping of a registry in Pretoria."

(44) "Still at page 9 of the heads we say that the four areas of Intellectual Property Law referred to above would, in our respectful submission, form ideal subject matter for exclusive adjudication by an Intellectual Property court. This would have the following results: firstly litigants will be ensured of gaining access to a judge who is skilled and experienced in the relevant field of law and who is comfortable in dealing with the subject matter of the relevant dispute. Secondly access to court will be improved for litigants who will not have to become entangled in the opposed Motion Court and trial rolls of the relevant provincial and local divisions. The access which we, therefore, refer to is twofold - it is in the first instance access to competence and in the second instance it is the procedural access to the court."

(45) "We also say that judgments will not only be of a high standard in this field of law but will be characterized by consistency. There will be an overall improvement in the administration of justice for litigants in an important specialized field and an improvement in the efficiency with which this field of law is dealt with in the courts will result."

(46) "Also where in intellectual property matters disputes of more than one kind of right is involved, for example a patent and a design or a trade secret, litigants will be relieved of the burden of proceeding simultaneously in different courts with its concomitant difficulties. This is a matter which does crop up from time to time Mr Chairman, where more than one intellectual property right is sought to be enforced but in the one case one may be before the Commissioner of Patents and, simultaneously, one has to be before another judge, for example where there is a trade secret or a design registration involved as well."

(47) "**MR JOB:** Mr Chairman I think it is safe to say that the general experience of practitioners in our field of law at this time is that increasingly one is giving a mixed bag if I can put it that way, that the conflict involving infringement very often involves more than one area of intellectual property law."

(48) "**MR LE ROUX:** There are other areas of intellectual property law which could equally be served by an Intellectual Property Court but not necessarily exclusively so. The most important of these is copyright law which differs fundamentally from patent, design and trade mark law in that copyright is not registered and hence there is no registry. It is, nonetheless, a specialized field of law which historically and by its nature, forms part of intellectual property law."

(49) "**CHAIRMAN:** May I interrupt there, just to see how far the argument on behalf of the Institute extends. In the scenario for which you plead, assume a large copyright action were to be instituted in Cape Town, how would it be dealt with?

MR LE ROUX: Mr Chairman as the law stands at present a large copyright matter could be instituted and dealt with in Cape Town. In our proposal that action could, as an alternative…(intervenes)

CHAIRMAN: Concurrent jurisdiction?

MR LE ROUX: Indeed, be instituted in the Intellectual Property Court in Pretoria if the litigant so desired.

CHAIRMAN: By consent?

MR LE ROUX: That is not a point that we have specifically considered, whether a consent would be required as in the case of the Commercial Court in Johannesburg, but it is a distinct possibility."

(50) "It is our submission, that is on page 11, that there are areas of Common Law

which could competently be dealt with by an Intellectual Property Court. These aspects of Common Law are those which concern the law of passing off which is closely allied to trade mark infringement and it is often a concurrent cause of action in a trade mark infringement case.

CHAIRMAN: An alternative cause of action?

MR LE ROUX: Exactly."

(51) "Also the law of unlawful competition and the law of trade secrets, and we refer to these areas of the law as Non-Statutory Intellectual Property."

(52) In summary, our recommendation based on specialization would result in exclusive jurisdiction being conferred on an Intellectual Property Court in the case of patents, designs, trade marks and cinematograph films and concurrent jurisdiction with other divisions of the Supreme Court in the case of copyright and the non-statutory intellectual property which I have referred to a moment ago."

(53) "I am on page 11 of the written heads and there is a point which concerns intellectual property law which is perhaps not always fully appreciated and that is the importance of intellectual property to foreigners."

(54) "Simply put, foreign companies will not invest in South Africa if their intellectual property is not capable of protection and of vigorous enforcement in our courts. As an indication of the importance of intellectual property to foreigners we have compiled certain statistics: firstly the extent to which rights are registered in South Africa, that is on page 12 of the heads where the Commission will see that in the last five years from 1991 to 1995 a total in excess of 51,000 patent applications were filed at the Patent Office. Of these over 24,000 or 47 % were received from foreign countries. As far as trade marks are concerned in the same five years from 1991 to 1995 a total of over 66,000 trade mark applications were filed at the Trade Mark Office. Of these over 26,000 or 40 % were of foreign origin."

(55) "These statistics have been obtained with the assistance of the personnel at the Patents and Trade Marks offices and I would like to think that they are substantially correct. The prevalence of design application is not as great but there again we can accept that a substantial percentage emanates from abroad. On page 13 of the heads, in the case of cinematograph films substantially all applications for registration which are filed at the Copyright office are of foreign origin and these number in excess of 200 per annum. Those are the

registrations."

(56) "As far as litigation is concerned and we say that litigation invariably in this field has serious economic and commercial implications for the litigants, it is clear that foreigners have a strong interest in the protection of their intellectual property. In the case of patents in the years from 1990 to 1995, these are statistics to which Dr Burrell has already alluded, 51 patent judgments were handed down of which 19 or 37 % involved one or more foreign parties."

(57) "In the case of trade marks 107 trade mark judgments emanated from the Transvaal Provincial Division, the Witwatersrand Local Division and from the Registrar of Trade Marks in the same six year period. Of the 107 cases, 64 or almost 60 % involved one or more foreign parties. The percentage involving foreign parties before the Transvaal Provincial Division was 41 %, that is 19 out of 46 cases and before the Registrar it was 73 % - 45 out of 61 cases. So the point is that there is a very strong foreign flavour in the litigation in these two fields in South Africa."

(58) "As far as designs and cinematograph films are concerned the litigation has been very limited, but not so in the case of copyright as Dr Burrell has already pointed out."

(59) "Still on page 14, it could conceivably be argued against the submission of the Institute that it is elitist and that it will tend to overlook the man in the street. As to such an argument our submission is not based on elitism but on the factors which we have set out above and on the practical realities which we as practitioners have observed. Intellectual Property is a sophisticated, esoteric branch of law which is specialized as a matter of fact and which will best be served by a specialist court."

(60) "An Intellectual Property Court will not raise the cost of litigation as the same or a similar tariff of costs as in a Supreme Court will apply in an Intellectual Property Court. On that point there is already provision in the Trade Marks Act for the Supreme Court tariff to be applied. I believe there is provision for that on page 14 of the bundle in section 48. Indeed Mr Chairman, Dr Burrell reminds me that the Supreme Court tariff for all purposes apply across the field in Intellectual Property matters. Also in the case of a small litigant, litigation in a specialist court will, in our respectful submission, be more effective and there will generally be improved access to justice for all litigants in this field of law, including small litigants."

(61) "On page 14 of the heads we then come to the seat and structure of the proposed court. As far as the seat of the court is concerned it is respectfully submitted that the seat of the court should be in Pretoria in view of the fact that the relevant Registries are located there. Not only are the Registrars often cited in proceedings but they also hear matters in their respective Registries and appeals from their decisions could conveniently proceed in Pretoria."

(62) "On page 15 of the heads it has been pointed out that the Transvaal Provincial Division effectively already has exclusive jurisdiction in patent matters and in most matters under the Trade Marks Act. A further advantage attaching to the seat of the court being situated in Pretoria is more of a political nature but it will give foreign litigants who, as we have already pointed out, are an important component in Intellectual Property litigation, an opportunity of conducting proceedings in a substantial centre in South Africa as opposed to seeking out defendants in localities throughout the country. This again, in our submission, has a bearing on the image which South Africa will display to the outside world."

(62(A)) "As far as the structure of the court is concerned it is the Institute's respectful submission that an Intellectual Property Court should consist of a President permanently appointed to the position. The President should be a Judge with sound experience of Intellectual Property Law and practice. Two or possibly three other judges should be designated as being available for being assigned to the Intellectual Property Court as and when the need arises.

CHAIRMAN: They would be ad hoc appointments whereas the President would be permanent?

MR LE ROUX: That is correct Mr Chairman."

(63) "As an alternative to that structure but very much as a second choice it is submitted that the position of President could be dispensed with and judges or other suitably qualified persons could be assigned on an ad hoc basis by the Judge President of the Transvaal Provincial Division to hear matters as and when required."

(64) "**CHAIRMAN:** What does the Institute see as the manifest advantages of having a permanent President?

MR LE ROUX: Mr Chairman if I may say so quite frankly this is a subject on which there is some disagreement within the Institute and differences of opinion.

CHAIRMAN: Your personal opinion? I imagine that consistency would be a basic consideration?"

(65) "**MR LE ROUX:** That is the point, it is the question of the quality of the jurisprudence which is handed down by the courts and the consistency thereof. Mr Chairman you asked me for my personal opinion and to be brutally frank I personally prefer the alternative which I have stated here but it is the Institute's proposal that a permanent appointment be made."

(66) "**MR JOB:** Mr Chairman this is, as you will appreciate there is some unease at this end, it is a controversial issue. I can certainly speak for myself and members of my firm, we are in favour of the second alternative but the appointment of a President…(intervenes)

CHAIRMAN: Pausing there, why?

MR JOB: Well frankly we are concerned that in the event of a permanent President being appointed, that the person might not be appropriately qualified.

CHAIRMAN: You do not want to be landed with a dud?"

(67) "**MR JOB:** Thank you Mr Chairman, we are very concerned about that and it is considered in the more perhaps conservative ranks of our Institute that it would be better to extend the current system of Commissioner of Patents who is appointed ad hoc by the Judge President from normally a body of several judges who have experience in these matters, that we would rather spread the risk as it were…but in an ideal world, and I emphasize that, a permanent President would be an advantage but we are uncertain at this point as to who might fill that position."

(68) "**DR BURRELL:** Mr Chairman, I am of the dissenting school as it were really representing the view of the institute, namely that there should be a permanent President of this court. One recognises one has got to choose one's words very carefully but the problems with the existing structure and certainly in the field of patents is that there are simply less and less judges available to us who have any experience…(intervenes)

CHAIRMAN: The problem is identified in the earlier submission.

DR BURRELL: Yes I think so, really at page 10 where the reasons are set out there Mr Chairman but that is a real problem. Not weighing that problem up against the possibility of getting a dud as it were…I would nonetheless prefer to take that risk."

(69) "I as a patent attorney am one of the few patent attorneys who actually appears, not regularly but not infrequently before the court and I have been doing so well before the passing of the new Act relating to the rights of audience of attorneys before the Supreme Court and it is not always as easy as perhaps it could be appearing there and being rather the penguin dressed in the unusual colours as it were in the court itself."

(70) "**CHAIRMAN:** But do you think that is going to alter?

DR BURRELL: I think yes certainly as things progress I perceive that to be altering, to what extent and how quickly that will happen I just do not know but I do emphasize that the first choice which we have set out in our submissions here is certainly the prevailing view of the Institute."

(71) "**MR LE ROUX:** Mr Chairman, just to round off that point then and I am dealing with the alternative structure, we say that this is presently the case, that is the concept of a pool of judges with *ad hoc* appointment by the Judge President of the Transvaal Provincial Division. This is presently the case where the Judge President so assigns judges from the Transvaal Provincial Division to hear patent matters but it is not without its shortcomings."

(72) "**CHAIRMAN:** Sorry to interrupt again, just looking at the main argument namely the appointment of a permanent President - in the Institute's submission were that to happen, by whom should he be appointed?

MR LE ROUX: Mr Chairman again I must apologise, it is not something which we have addressed our minds to but possibly in consultations…(intervenes)

CHAIRMAN: Well if you would like to reflect upon the matter the Institute is free to put up a brief written submission afterwards, it may be something which requires some thought.

MR LE ROUX: As the Chairman pleases.

CHAIRMAN: Particularly in the light of the earlier question I put to you and the somewhat discordant responses.

MR LE ROUX: As the Chairman pleases, the Institute will certainly do so."

(73) **MR JOB:** At the very least Mr Chairman we would hope to be consulted as an Institute. Whoever makes the appointment, be in the Judge President or

whoever, that we would be consulted.

CHAIRMAN: Well technically it might be possible, it might be an appointment from one of the professions theoretically. If that were to be the position would the Institute, I can imagine that is vitally important for the Institute to have a right of representation. Would it have to go the route of the Judicial Service Commission or some other route?

MR JOB: Mr Chairman I think we would like to reflect on that point and revert to you as you have suggested.

CHAIRMAN: Certainly."

(74) "**MR LE ROUX:** Then on page 16 of the heads the point is made that the infrastructure of the Court of the Commissioner of Patents already exists at the Patent office in Pretoria where there is a full-time Registrar of the Court of the Commissioner of Patents. This Registrar could continue as the Registrar of the proposed Intellectual Property Court. If I may emphasize that it is our submission, I think the point has been made very forcibly already, that judges or other suitably qualified persons who are assigned to hear matters in the Intellectual Property Court should not only have a sound experience of Intellectual Property Law in practice but also of litigation in this field and this…(intervenes)

CHAIRMAN: Practical experience?"

(75) "**MR LE ROUX:** Exactly, Mr Chairman, and this is in fact the *sine qua non* of the Institute's proposal. As far as the right of audience is concerned we would submit that the right of audience before an Intellectual Property Court should be the same as that before the Supreme Court with the one proviso that in patent matters a practitioner seeking audience other than an advocate should meet the requirements set out in the Patents Act, that is in terms of the definition of "agent" in that Act."

(76) "**MR MALULEKE;** The question of right of audience, the attorneys profession, as you might know, have battled very strenuously to get right of audience in the Supreme Court. I am very curious to know about this distinction that the advocate, according to you, should have the right of audience and not the ordinary attorney who has not passed the special examinations. What is the reason for that?"

(77) "**MR LE ROUX:** Mr Commissioner may I ask Dr Burrell to answer that because he has some experience in this area?

CHAIRMAN: Certainly."

(78) "**DR BURRELL:** Thank you Mr Chairman. Well a little bit of history. Under the repealed Act, Act 37 of 1952 the attorneys did have the right of audience in the Court of the Commissioner of Patents and it did not work very well. In fact there were not many representations made by such attorneys, submissions made by such attorneys to the Court of the Commissioner of Patents. Then came the new Act, that Act that has been brought into operation now in 1979, Act 57 of 1978; and in terms of section 22 of that Act the rights of audience are confined to people who are qualified in terms of the Act, namely patent agents and patent attorneys."

(79) "Effectively almost everybody now is a patent attorney, to wit an attorney who is qualified both as a patent agent, registered as a patent agent and as an attorney. That is the one body of persons who have right of audience, and the other being advocates in the ordinary sense."

(80) "So that limitation has been brought about quite deliberately. When that Act, Act 57 of 1978 was brought into operation there was the earlier sub-section of section 22, section 22(1) which provided a grandfather clause in terms of which attorneys had a period of five years within which to qualify as patent attorneys if they wanted to be able to practise before the Court of the Commissioner of Patents and have the right of audience before the Court of the Commissioner of Patents."

(81) "As things turned out no attorney so much as attempted to obtain any of the rights of audience. It was a dead letter. The point really being that patent law has become such a specialized field now that it is almost impossible for people other than specialists in that particular field to be able to make sense, quite frankly, to the Court of the Commissioner of Patents."

(82) "**MR MALULEKE:** Well I really would like to get a more definitive reply on this, I do appreciate the historical background you have given to me but I still do not understand how a green advocate with a LLB degree with four or five months pupillage would be better qualified to appear there than an attorney who may be an attorney for 10 years and has not got the qualifications?"

(83) "**DR BURRELL:** Perhaps the answer to that is just this that whilst it is true that such green advocates can appear, they would always almost invariably be backed up by a team or at least one patent attorney who would be able to instruct him fairly comprehensively in the field of Patent Law and what all the

technical background…(intervenes)

CHAIRMAN: It might be disastrous if he were briefed by a non-patent attorney?

DR BURRELL: Precisely or, if as you say Mr Chairman, if a green or even an attorney of 10 years standing were to simply go along and appear in that court he simply, with respect, could not do it, that is the submission."

(84) "**MR MALULEKE:** On a follow up to that…I am talking now about advocates, they can become judges in this specialist court. Attorneys with similar qualifications as advocates legally, must be subjected to the discriminatory rigorous examination of three years and that is my problem that what do you think the reaction of the profession will be to this? Why must the other category of practitioners qualify by experience whereas the others must be subjected to this examination, that is what I am trying to find out?"

(85) "**DR BURRELL:** Yes well, again I must refer back I think to the historical thing here, I mean that opportunity was given when the new Act, the 1978 Act came into operation at the beginning of 1979 the five year period was there and nobody took any advantage of that grandfather provision whatsoever. One of the main reasons or one of the reasons behind the submission today before you of the Institute that there should be a specialist court relates to a very appreciable extent to patent matters."

(86) "**MR MALULEKE:** Can I make a last suggestion? Could it be contemplated that Advocates who write their Board exams possibly should also introduce a course to write a paper on Intellectual Property Law or practice to qualify to practice also in that specialist court and then you would introduce that measure of equality, do you not agree?

DR BURRELL: It is doing it the other way around as I think Mr Job whispers on the other side here, but whether you would be able to persuade the Bar to undertake that sort of examination I do not know.

CHAIRMAN: It might add three years onto an LLB."

(87) **DR BURRELL:** Exactly and it is a rigorous thing, I mean it is not as though it is a light exam, these examinations are really tough and especially when it comes to things sometimes advocates are not all that good at and that is writing patent specifications. To write a patent specification is really a very skilled thing and to interpret patent specifications but the writing of those and in addition to that some sort of technical qualification is required."

(88) "**MR JOB:** Mr Chairman could I simply add that as an Institute we would much rather see the raising of the standard of practitioners before the court as has been suggested by the Commissioner to require some additional hurdle for advocates rather than lower the entire standard of allowing all attorneys to appear. I think unequivocally we can put that point to you."

(89) "**MR LE ROUX:** Mr Chairman just to clarify one point, it is of course so that our submission is that all attorneys should have the right of audience before an Intellectual Property Court except in the case of patent matters, it is only in patent matters that we have the reservation."

(90) "**MR MALULEKE:** The proposal that a fully fledged court, specialist court with its President and perhaps two or three judges, a pool of two or three judges would be available would also be closely related to the cost aspect, by cost I mean cost to the State. If it can be shown that the cost of setting up such a court is not out of proportion with the service which it serves you may find greater sympathy possibly from Government but if it is shown that the cost is completely out of proportion would you then be in agreement that setting up such a specialist court with its own President may be placing an undue burden on the taxpayers of this country if it is out of proportion with the real service it serves in comparison with other court structures?"

(91) "**MR JOB:** Mr Commissioner broadly I would agree with that statement, perhaps that is where the second, the alternative that we have put forward comes in and that the extension, as it were, of the existing court of the Commissioner of Patents would not require the establishment of a separate court."

(92) "I would, however, point out that as far as a separate court is concerned there is already physically, the bones as it were, the skeleton of such a system, the Registrar of Patents and not the Registrar of the Supreme Court, serves as the Registrar of the Court of the Commissioner of Patents."

(93) "The infrastructure actually exists already and of course the Registrar of Patents is also the Registrar of Trade Marks so that in fact practically there would be very little administrative extension or further expansion."

(94) "**CHAIRMAN:** The Institute's proposal I take it does not involve the building of an elaborate separate physical structure?

MR JOB: Definitely not Mr Chairman, the current Transvaal Provincial Division, whatever its fate may be could well serve, there are facilities at the Patent and Trade Marks Office at the moment as well. So in effect in so far as cost is concerned the way we see it, if a permanent President were to be appointed it would really only be the cost of that President, the other judges that we have suggested in our first submission would be chosen presumably from an existing pool of judges so we see actually fairly minimal further cost involved."

(XXXV) MR I.C. PRINSLOO FROM THE JUSTICE COLLEGE IN PRETORIA ON BEHALF OF TEN LECTURERS AT THE JUSTICE COLLEGE

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

(1) "I am from Justice College. At the moment we have a vacancy, Dr van der Merwe has retired as Head of the College. I am the Director of the Private Law Training Section, we have two directorates - Private Law Training and Public Law Training."

(2) "We are mainly concerned with all the Private Law training and that entails mainly civil court training as far as functional training is concerned and Mr Burger who is assisting me is specifically tasked with the Family Court Magistrate, the candidate for the proposed Family Court as it is and the Clerks of the Courts in this connection."

(3) "We also, when the Act was amended and introduced providing then for Family Courts and Senior Civil Courts, were very excited about the whole idea of it because we were convinced that this would be a way to make the court more accessible to the people of South Africa and we acted pro-actively."

(4) "Therefore, in August 1994 already for four weeks we presented a seminar for candidate Family Court Magistrates and then the second one in the beginning of 1995 also a four week course and after that as we saw it we presented a similar course for Clerks of the Family Court."

(5) "Now at the outset we have, with the introduction and the establishment of the Magistrate's Commission, submitted to the Commission for all Magistrate seminars and courses, a syllabus for Criminal Court Magistrates, Regional Court Magistrates, Civil Court Magistrates and also pro-actively for Family Court Magistrates a syllabus which all of them the Magistrate's Commission approved."

(6) "In terms of the rules of the Commission, as you will know, it is required that a candidate Magistrate successfully completes a course at Justice College, then be appointed acting and then only be appointed as Magistrate. Though the Family Court Magistrates have not yet, or the Family Courts have not been implemented yet we acted pro-actively and introduced these two courses."

(7) "**CHAIRMAN:** What was the content of this syllabus, very briefly?

MR PRINSLOO: I have available the syllabus and I would like to present a copy to each member of the Commission…It starts off with the legal subjectivity; the classes of children; age as a factor influencing a person's status; conclusion of a marriage; void, voidable and putative marriages; consequences of a valid marriage; page 7 dissolution of marriage; the consequences of divorce; the miscellaneous matters in connection with divorce would include then the draft rules of the Family Courts; the role of the Family Advocate; on page 9 the relationship between parents and children; the Law of Evidence and, where applicable, also the other legislation which we envisage and hope will eventually be under the jurisdiction of the Family Court."

(8) "**CHAIRMAN:** Yes, of course at the moment if one looks at the terms of the Magistrate's Court Amendment Act the term Family Court and Family Magistrate is a misnomer because the task assigned to them under the contemplated legislation is simply to deal with undefended divorces, full stop."

(9) "**MR PRINSLOO:** Correct, Mr Chairman though we again pro-actively foresaw, and we have also submitted various memoranda to the Department of Justice with the hope that it would reach the Minister, arguing that the jurisdiction of the Family Court should be extended as to include all matters relating to the family and children as well as maintenance."

(10) "The motivation for that being that at the moment, and no one is to deny that in our experience, we coming from the Magistrate's Court ourselves and through all the lines, that maintenance is quite in a shambles it is handled in the Magistrate Court at the moment. As we all know prosecutors handle these matters and that is not the task of the prosecutor and, therefore, you will find that prosecutors are rather reluctant to deal with these matters properly. No matter what avenue you try to follow to do it properly it just does not work out like that in practice and, therefore, we would like to see that a proper Family Court is constituted and implemented which will deal with all family matters."

(11) "I would also like to submit to the Commission a copy of the list of Family Court Magistrates who attended the first course in 1994. You will notice Mr Chairman and members of the Commission that all the Magistrates and there I have set it out very clearly, all of them had the LLB qualification as envisaged by the Act."

(12) "You will also see that a number of them have LLM degrees in family matters. You will also notice that many of them or a number of them were attorneys,

practising attorneys who joined the department and also practising advocates who joined the department. You will also notice that their experience is vast in the Civil Court and as far as family matters are concerned. The point I would like to stress is that these people are highly qualified to deal with family matters on the magisterial level."

(13) "**CHAIRMAN:** I am interested to hear what you say about attorneys and advocates who joined the department. On the list you handed us could you just point out those candidates who were either from the attorneys profession or the advocates?"

(14) **In response to the invitation in (13) above Mr Prinsloo gave particulars of a number of candidates indicating their professional qualifications and practical experience**

(15) "**CHAIRMAN:** Now apart from court structure and names, if you wanted to put people into the field to do this work how many Magistrates and in how many Magistrates Courts throughout the country could this be done effectively and practically tomorrow?

MR PRINSLOO: Sixty-five…we envisage that the Family Court would function on the same basis as the Criminal Regional Court. At the moment so we have seven Regional Districts if you would like to call them that, depending on the volume of work. However, there might be instituted more Family Court Magistrates and we envisage, if we look at the volume of work as far as family matters is concerned, that we would be able to utilize all 65 who were trained."

(16) "**CHAIRMAN:** Now you know where you have a Family Court Presiding Officer you need a bit of social backup, social welfare backup. What are your submissions in that regard?

MR PRINSLOO: Mr Chairman all depending on what the infrastructure of the Family Advocate is at the moment, and I believe that the Family Advocate has done quite a substantial amount of work in this regard, and I would not be able to answer, the social backup would come from the Family Advocate's office and that I think we would have to hear from Mrs Bosman who I see will be giving evidence.

CHAIRMAN: No she will not be giving evidence unfortunately, we have had the benefit of listening to Mr Van Zyl."

(17) "**CHAIRMAN:** …Now let me put this to you, assume that for a start your

Family Magistrate does only undefended divorces, where would you position, where would you place such Family Court Magistrates in the country? Give us a few practical examples as to towns, obviously you would need one wherever there is a Chief Magistrate, that takes care about 12?

MR PRINSLOO: I think that would be a good starter Mr Chairman, as a trial."

(18) "**CHAIRMAN:** Do you think that perhaps, if the notion is viable, a pilot scheme might be appropriate?

MR PRINSLOO: I think and that is what we also have suggested to the Department, I would think one will have to start in Gauteng with Johannesburg and Pretoria where the need is great and then also in perhaps Queenstown which would be central to the Eastern Cape, Durban which would be rather central to KwaZulu Natal, Pietersburg I could also think of.

CHAIRMAN: Port Elizabeth?

MR PRINSLOO: Port Elizabeth, Cape Town, Bloemfontein and perhaps also Rustenburg.

CHAIRMAN: Kimberley?

MR PRINSLOO: Yes I do think that would be a good suggestion Mr Chairman."

(19) "**CHAIRMAN:** Now on your proposal, let us say we start off with a pilot project, should these courts have exclusive jurisdiction in undefended divorces or should they have jurisdiction concurrent with that of the Supreme Court?

MR PRINSLOO: I think they should have jurisdiction concurrent with the Supreme Court at this moment seeing that it is a pilot project."

(20) "**CHAIRMAN:** Now also you advocate the abolition of the Black Divorce Courts?

MR PRINSLOO: Correct Mr Chairman."

(21) "**CHAIRMAN:** Now we have had a number of submissions before this Commission, the effect of which is the following: they say the Black Divorce Courts have operated for a long time and successfully, quickly, cheaply, they say the Black Divorce Courts satisfy a definite need and the suggestion has been

that so far from abolishing the Black Divorce Courts, they ought to be used, incorporated as a nucleus into a system of Family Courts. What do you say about the feasibility of such?"

(22) **MR PRINSLOO:** I do think it is feasible in the sense that they could be incorporated and their functions be usurped by the Family Court. The whole idea about the Family Court as we envisage it is that the Clerk of the Family Court, the Family Court will operate on a regional basis and on a circuit basis having a few districts amongst them. The Clerks would be situated at each Magistrate's Court, so at B, C, D, E and F district you would have Family Court Clerks who would be able to draw up the pleadings for the litigants, the issuing officer being the Chief Family Court Clerk at, for instance, A who will keep all the records and see that the court can function on a circuit basis."

(23) "**CHAIRMAN:** How in the proposed Family Courts at magisterial level would you cure what you described as the shambles in the Maintenance Court?

MR PRINSLOO: By the Clerk of the Court dealing with the maintenance matters also and putting it on roll for the Family Court. The Clerk will also be trained where there could be settlements, we would also like to see and we I think are capable of equipping him with skills to do alternative dispute resolution matters mediation and mediate between the parties…"

(24) "**CHAIRMAN:** What about defended divorces, should the Magisterial Family Court have jurisdiction to deal with defended divorces?

MR PRINSLOO: I think that the Family Courts would be well equipped and well enough equipped to deal with it but as in intermediary provision I would suggest, therefore, that the Supreme Court has a concurrent jurisdiction or that the Family Court has a concurrent jurisdiction with the Supreme Court in order to provide for the parties who would like to be represented either in the Family Court to do it there or at their wish then to litigate in the Supreme Court."

(25) "**CHAIRMAN:** In your personal view what ought to be the minimum legal qualification of a Senior Civil Magistrate?

MR PRINSLOO: The LLB qualification as we have it at the moment as well for the Family Court, as well for the High Criminal Court or Regional Court as we know it at the moment, as it is also envisaged by the Act."

(26) "**CHAIRMAN:** …do you envisage a selection committee drawn from senior magistrates, attorneys, advocates, judges to do the selection or what mode of selection would you favour?

MR PRINSLOO: I would suggest, quite opposed to what we have in the Regional Court at the moment, the so called formal testing for six months in practice which is not satisfactory I think. It also comes from the magistrates themselves that it is not a satisfactory method of selection. I would suggest, and I think that Justice College is quite equipped to do it, that as a prerequisite that they attend a course and pass that successfully at Justice College for starters; but after that being appointed also acting in practice for at least six months…"

(27) "**CHAIRMAN:** Now I have listened with interest to what you have said about the duties you would assign to Clerks of the Court. Your scheme, would that not involve very intensive training programme for the people who are to become clerks, after all they are going to do important and responsible work such as pleadings which is a fairly specialized function?"

(28) "**MR PRINSLOO:** Indeed, I would like also Mr Chairman if you would allow that Mr Burger elaborates on this but I would like to point out that of the Clerks of the Court that we have trained and those were 19 and of the 19 - I would like all of them of course in possession of the Matric qualification, they were doing Civil Court Clerk work at the moment or either being Registrars of the Supreme Court."

(29) "**CHAIRMAN:** The suggestion has also been thrown out that perhaps if such a scheme were to be implemented, the Presiding Officers be not called Magistrates or Family Court Magistrates but perhaps Commissioners?

MR PRINSLOO: Mr Chairman yes, we are not hooked on the term Magistrate, in fact our suggestion would be in the end that all the Magistrates are called Judges, be it a Lower Court judge, a High Court judge or a Supreme Court judge like I believe we have it in the UK or at least in Canada and Australia as well…"

(30) "…the last point I would like to stress Mr Chairman, and this is that I do not think that it would be preposterous to suggest that an advocate could walk from his chambers onto the bench and immediately make a success of it, nor could an attorney. For the same matter, neither could a Magistrate walk from his office and start practising as an advocate successfully or an attorney. It takes a certain person and especially when you start specializing, it takes a certain type of person, a certain composure, a certain attitude and experience on the bench to be successful on the bench as the Chairman himself would know very well."

(31) "**MR JAPPIE:** To be appointed as a Civil Magistrate is there any training beforehand or does the appointment simply come automatically from the rank of Prosecutors?

MR PRINSLOO: No, no, they are trained specifically. At the moment for instance we are very much pressured by the Magistrate's Commission who wishes to appoint Magistrates as Civil Court Magistrates. To become, to be appointed as a Civil Court Magistrate you have to undergo and pass a course for Civil Court Magistrate successfully at Justice College.

CHAIRMAN: How long does that course last?

MR PRINSLOO: Four weeks at the moment, we have a total - perhaps I should explain it like that Mr Chairman, we have a total of six weeks of which four is allocated to Civil Court training and two weeks to Criminal Court training."

(32) **MR JAPPIE:** And a Maintenance Officer, does he receive any training?

MR PRINSLOO: At the moment no, not the Maintenance Officer. We do not do specific training aimed at the maintenance matters no, we do include a subject to which we allocate a certain amount of period dealing with maintenance matters in the Prosecutor's course."

(33) "**MR JAPPIE:** If I may just come to the thrust of what you were saying, if this Commission should recommend the establishment of a Family Court, you are saying that the department has sufficient personnel to man such a court at a Presiding Officer level, is that correct?

MR PRINSLOO: That is correct Mr Chairman yes certainly."

(34) "**MR MALULEKE:** One last point, and this would go to the efficacy or sufficiency of the Justice Training College. This Commission has heard evidence that I think in parts of the Eastern Cape, Magistrates in those former TBVC states and some homelands never really got the opportunity to benefit from the training courses at the Justice College, either because of other bureaucratic arrangements or because of the unavailability of space. Are you able to enlighten us more, are there areas in this country where you have Magistrates, senior ones at that, who have not had the benefit of any training from your College?"

(35) **MR PRINSLOO:** That is correct and it was especially the case before 1994 and mostly it was the case because of financial reasons, it was economic reasons because the former TBVC States and self-governing territories did not

have the money to send the people to Pretoria, that was the case. We countered this to a great extent, for instance we were for more or less four weeks in November in Umtata where we trained all the Magistrates in the former Transkei…(intervenes)

CHAIRMAN: How many were on the course?

MR PRINSLOO: Between 30 and 35 but it was all the Magistrates in the former Transkei and there were also a few from Ciskei included. In November we did as well a Criminal Court course in Umtata and specifically in the Private Law section which I am concerned with, we developed a course for Heads of Offices to deal specifically with the *quasi* judicial matters. That we did in November and shortly after that I believe that the Inspectorate of the Department of Justice went down to Umtata and trained them specifically on the administrative side about the nuts and the bolts, filling in the forms and accounts and whatever. In January my section went back there and we did a full five-week Civil court course."

(36) "**CHAIRMAN:** What is the numerical strength of the Justice College, of the lecturers, in round figures?

MR PRINSLOO: I would say 50 lecturers in round figures and that includes all the training, Interpreters, Civil Court, Private Law Training and Public Law Training."

(XXXVI) MR ATTORNEY A. BURGER, A LECTURER AT THE JUSTICE COLLEGE IN PRETORIA

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

(1) "I am an attorney, I am functioning now as a lecturer at Justice College and what I wish to address the Commission on is simply the, if I could put it the departmental infrastructure concerning the Clerks of the Family Court."

(2) "We envisage…that the Family Courts will function more or less in similar places or in the same places as do the Regional Criminal Courts presently."

(3) "In other words in the self-same Regional Division that existed hitherto we will possibly in all those areas also have a Family Court. It will, like the Regional Courts, operate on a circuit basis, in other words that the law will be seen to be brought to all the peoples of our country and as such our proposal is that supposing a Family Division comprises five districts to which the circuit would regularly travel, that to obviate burdening the entire Division with five paralegal Clerks, that you in fact have one graduate, one …. Clerk who controls all the District Clerks under his command."

(4) "**MR MALULEKE:** Can I disturb you Mr Burger because I might forget to get back to this point…you being an attorney, you do not see resistance from the profession that you are socialising a major area of their income that is point one. But point two also, is whether this will not impact negatively on the quality of justice you are going to get from these Family Courts or Magistrate's *cum* Family Courts if you have a high number of illiterate people unrepresented, with pleadings drawn by these Registrars, appearing for themselves. Can I perhaps hear your comments on that?"

(5) "**MR BURGER:** Mr Commissioner, with respect, on the papers annexed to the invitation seeking our presence here today is an extract, I think it comes from the Law Society, wherein accolades are in fact paid to both the President of the Black Divorce Courts as well as the Clerks in the administration of justice in those particular fields. These people are all people who are or were previously Magistrates. The Clerks are of the same calibre as those who service the Magistrate's Court currently."

(6) "Now in so far as it derogates from my profession at large, I submit that yes

unfortunately that will impact upon them but I submit and it is my firm belief that it will only be certain people, possibly in the rural areas who will in fact go to a Clerk for the drafting of pleadings. It is actually very trite that attorneys do appear, advocates do appear in divorce proceedings and whether or not people elect to make use of them or do the divorce themselves as a great amount of litigants currently do, that is for the litigant himself to choose…"

(7) "In summary, then, may I just state that I believe that the department is eminently well qualified to nominate people to man and run the Family Courts and Senior Civil Courts as we have mooted."

(8) "I have also experience in lecturing for the Association of Law Societies as do a number of my colleagues so we can gauge the ability of people to draft pleadings and I am eminently satisfied that the people whom I have lectured to and my colleagues have lectured to at Justice College, that they will do a fine job as draft-persons of the pleadings."

(XXXVII) MR ATTORNEY A TUGENDHAFT OF MOSS-MORRIS INC. OF SANDTON

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

(1) "I am the Chairman and one of the senior partners of Moss Morris Inc. It is a firm of attorneys practising in Sandton City, Sandton. We have approximately 20 partners, a number of associates and candidate attorneys and I have practised, I was admitted in 1973."

(2) "I would just like to very briefly amplify what I said in my letter to the Commission,…of 13 June 1995. In essence what I was trying to suggest was a more pro-active civil procedure in commercial matters, one in which the Commercial Court would be seized of the matter at inception, not as it is at the moment. It is a voluntary submission to the jurisdiction of the Commercial court."

(3) "I understand that in England commercial matters designated as such appear on the Commercial Court roll and it is not a matter of consent on the part of the defendant. They are automatically designated as commercial matters and then receive the attention of the Commercial Court."

(4) "That is what I was proposing here both in respect of matters which commence by way of Summons and matters which commence by way of Application. I understand the procedure at the moment is that application proceedings cannot be referred to the Commercial Court although there may have been some amendment to that, I am not quite sure but certainly that was the position until relatively recently."

(5) "So in essence I am suggesting that those matters be designated as commercial matters at inception and that a Judge is assigned those matters immediately or that particular matter immediately at the close of pleadings stage and with the help of the judicial officer who would supervise pre-trial formalities, I think one would be able to curtail the proceedings quite drastically."

(6) "**CHAIRMAN:** You want to see case management?

MR TUGENDHAFT: Case management, absolutely. I realise that one may not be able to go as far as they have gone in certain American jurisdictions

because there the Judge of course is sitting more as an umpire and he is not ultimately going to hear the case, that the case will be decided by a jury but I still think within the confines of our own system we could have much more effective case management."

(7) "For example, a number of years ago I remember being involved in a case where there were about a dozen witnesses called on really trivial issues, it took a lot of time of the court and all of that could have been curtailed I think with the intervention of a judge at the pre-trial stage where he could have clarified exactly what the issues are and effectively cut out the nonsense and that is the kind of pro-active steps that I am suggesting should be taken."

(8) "It may also be an idea, and I mention it in the letter, to have a compulsory exchange of witness statements, following on the American procedure where you do have interrogatories. You have an opportunity of canvassing witness statements in such a way that you may decide that in the case of certain witnesses you do not want to contest their evidence at all. You could be quite content to accept a witness statement, be it in affidavit form or signed, without contest instead of having to call that witness, inconvenience him and inconvenience the court and, of course, the parties."

(9) "**CHAIRMAN:** Of course in England in certain quarters the preparation of witness statements for the purpose of exchange has burgeoned into a fair industry and has resulted in chasing up costs. Some suggestions to the Commission have been that perhaps a summary of a witness statement, the exchange of summaries rather than a statement *in extenso* might be better. Have you any thoughts on that?"

(10) "**MR TUGENDHAFT:** I would tend to agree with that in the same was as we exchange at the moment expert summaries. At least one could see what the outline of that evidence is, is it going to be necessary to contest, is it going to be necessary to call that witness or can we just agree at a pre-trial conference on the evidence?"

(XXXVIII) THE HON MR JUSTICE K. VAN DIJKHORST OF THE TRANSVAAL PROVINCIAL DIVISION

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

(1) "Ek wil 'n paar woorde sê oor die gesinshof. My uitgangspunt is dat egskeidingsake hoort net by hoë uitsondering in die Hooggeregshof, by hoë uitsondering, en 'n hoë uitsondering is nie omdat daar kinders betrokke is nie. 'n Hoë uitsondering kan wees as dit ingewikkelde regspunte is of 'n verskriklike boedel waar hierdie magnate van Johannesburg nou graag in die Hooggeregshof wil baklei. Laat hulle dan daar baklei, hulle het geld om dit te doen, maar niemand anders het dit nie."

(2) "Onbestrede egskeidings - ons doen 50 of 60 per oggend. Dit is *infra dig* vir 'n regter; dit is ook *infra dig* vir 'n landdros.

VOORSITTER: En les bes is dit *infra dig* vir die gedingvoerder.

VAN DIJKHORST J: Absoluut. Die mense kom na die hof toe met hoë verwagtings, die ma en suster sit daar in die hof en sy kry nie haar kans om haar storie te vertel van begin tot end nie, want die regsgeleerdes dink dit is irrelevant, wat dit waarskynlik is. Maar die publiek hou nie daarvan nie."

(3) "'n Onbestrede egskeiding , as 'n landdros persone in die eg kan verbind, kan 'n landdros egskeidings behartig. Waarom nie? Dit is op dieselfde vlak - veral onbestrede egskeidings. Dus my siening is die plaaslike landdros moet die onbestrede egskeidings plaaslik afhandel. Dit spaar tyd, dit spaar geld en dit kos niemand iets nie."

(4) "Bestrede egskeidings kan ons op 'n bietjie hoër vlak hanteer. Ons kan dit in 'n gesinshof inbou. Normaalweg is 'n bestrede egskeiding baie keer oor kinders, soms oor die bates. Maar in elk geval hoort dit nie in die hooggeregshof nie, op daardie vlak nie. Ons het die hulp van die gesinsadvokaat wat goeie diens lewer en veral waar betwiste toesig en beheer is, en in byna 90% van die gevalle of meer word die verslag van die gesinsadvokaat gevolg; met ander woorde, het jy nie meer 'n betwiste egskeiding nie wanneer daardie gesinsadvokaat-verslag uit is. Dus dit behoort dus nie moeilik te wees nie, dit kan maklik afgehandel word in die gesinshof."

(5) "**VOORSITTER**: Sien u die gesinshof as 'n selfstandige, eie hof?

VAN DIJKHORST J: Ek sou dit kombineer met 'n senior landdroshof om mannekrag te bespaar. Daardie landdros het die bekwaamheid en hy kan dit net so goed ook hanteer - as jy nie van die gesinshof gaan maak wat sekere voorstaanders van die gesinshof van hom wil maak nie, dit wil sê alles wat op die gesin betrekking het, daar insleep nie."

(6) "Ek wil daaroor 'n paar woorde sê. Met ander woorde, as dit net egskeidings is en as dus die bestrede egskeidings op die senior landdrosvlak gedoen word en die onbestrede egskeidings op die junior landdrosvlak, met ander woorde, die gewone landdrosvlak, dan het ons nie 'n probleem daarmee nie. As ek nou praat van die senior landdrosvlak dan is dit nie die amp, seniorlanddros, nie, maar dan is dit 'n senior landdroshof waarvan ek praat."

(7) "As 'n mens nou die gedagte opvolg wat sekere voorstaanders het, dat alles wat op die gesin betrekking het in die gesinshof verhoor moet word dan vra jy jouself af: Nou wat beteken dit in die praktyk? 'n Mens moet nie akademies oor die goed dink nie. 'n Aanranding van 'n man op sy vrou sal dan daar moet plaasvind. Wat, as dit sy vrymeisie is? Dan is dit nie daar nie. Waarom die onderskeid? As jy 'n maand by haar ingetrek het, moet dit dan daar wees, of moes hy dan drie jaar by haar gebly het voordat dit in die gesinshof land, of moet hulle 'n kind hê ? Aanranding op ouers en grootouers - moet dit in die gesinshof kom? Dit is tog deel van die "extended family"."

(8) "Aanranding op kinders deur ouers, natuurlik moet dit daar kom, maar wat as die aanrander die buite-egtelike vader is? Moet dit dan daar kom? Aanranding op kinders deur familielede wat nie ouers is nie? Ooms wat met kleintjies lol, waar moet dit kom? Dit is tog seker in gesinsverband. Hulle bly gewoonlik bymekaar, dit is ons probleem."

(9) "Onderhoud vir die vrou of vir die man, onderhoud vir die kinders, misdade deur kinders, aanranding deur kinders, moord deur kinders, diefstalle en roof? As alles daar kom en al daardie sake nou weggeneem word uit die landdroshof en die streekhof, waar dit goed gedoen word op die oomblik, bloot om 'n akademiese verbeeldingsvlug te bevredig, waar kom ons? Ons skep 'n hof wat oorwerk is met 'n spesialis landdros wat ons daar sit as gesinslanddros en hy doen winkeldiefstalsakies. Ons kan dit nie doen nie."

(10) "Ons moet die gesinshof beperk tot 'n spesifieke ding, dit wil sê egskeidings

en onderhoud en toesigbeheer van kinders en dan sal die ding werk. Ons kan altyd, as ons dit ‘n tyd aan die gang het, kan ons weer na hom kyk oor vyf jaar en sê: Is daar nog dit of dat wat ook daar moet bykom?”

VOORSITTER: Dan is daar ruimte vir uitbreiding.”

(11) “**VAN DIJKHORST J**: Dan sit ons dit by, maar ons moet die ding eers in die praktyk toets soos dit is, en ek vind dit jammer dat daar voorstaanders was wat die afkondiging van die vorige wet wat die gesinshof moontlik gemaak het in die wiele gery het omdat hulle nie alles gekry het wat hulle wou gehad het in daardie wet nie. Dit sou baie meer prakties gewees het om die ding in te stel, dat ons gekyk het hoe loop hy en dan kyk waar ons hom moet uitbrei.’

(12) “**VOORSITTER**: Dink u dat daar meriete skuil in die gedagte dat hierdie onbestrede egskeidings by wyse van ‘n loodsprojek van stapel gestuur word.

VAN DIJKHORST J: Ek dink so, ons kan dit trouens en alleen in Pretoria begin of hier in Johannesburg.

VOORSITTER: Of in ‘n paar groot sentra.”

(13) “**VAN DIJKHORST J**: Ons kan trouens net op een plek, as ons dit wil monitor, en sê: Kyk, ons het nie genoeg gesinsadvokaat-ondersteuning nie. Dit is op die oomblik ons probleem, dat ons dit dan op ‘n plek doen waar ons gesinsadvokaat-ondersteuning het en kyk hoe werk dit.”

(14) “En ‘n mens moet ook met die gesinsadvokaat-ondersteuning dit sê: U weet, ‘n mens kan werk toe ry in ‘n Rolls Royce, maar jy kan ook werk toe ry in ‘n Volkswagen. Ons het reggekom voor die gesinsadvokaat in die tyd toe ons almal gepraktiseer het. Ons probleem was toe dat ons nie daardie verslae uit die beamptes van Volkswelsyn kry nie. Ons het maande gewag, maar wanneer ons uiteindelik die verslag gekry het, het ons tog reggekom.”

(15) “Nou met die gesinsadvokaat, omdat hulle behoorlik gerat is en wakker is kry ‘n mens darem die verslag baie vinnig en dit is baie handig, maar ‘n mens het nie regtig alles nodig in alle gevalle nie en op die oomblik kry ek die indruk asof hulle alles moet doen in alle gvalle, met ander woorde, asof ons besig is om hulle beperkte magte en kragte te dissipeer waar dit nie orals nodig is nie. Dit is lekker en ‘n mens kan ‘n empire bou, maar ‘n empire kos geld.”

(XXXIX) MR ATTORNEY L. VILJOEN OF PRETORIA

In the course of his oral submissions to the Commission at Midrand on 16 April 1996 some of the points made by Mr L. Viljoen were the following :-

(1) "Ek is 'n prokureur van Pretoria en ek praktiseer onder my eie naam…Ek praktiseer alreeds sedert 1982 met 'n geskiedenis van voor dit van leerklerkskap en dies meer."

(2) "Ek wil eerste handel oor die agt kilometer vereistes soos wat dit in die Hooggeregshofreëls uiteengesit word. Ek doen nie 'n beroep vir die afskaffing daarvan in sy geheel nie, maar met die ontwikkeling van tegnologie en rekenaarwetenskap is dit deesdae baie makliker vir litigante om onderling met mekaar stukke uit te ruil deur middel van die elektroniese proses."

(3) "Onder die huidige bedeling sit ons dat 'n plattelandse prokureur of 'n prokureur wat verder as agt kilometer van die hofsetel geleë is gebruik moet maak van 'n korrespondent binne 'n agt kilometer merk. Hierdie stelsel veroorsaak 'n duplikasie van werk en funksies waarvoor litigante moet betaal ongeag of hulle die saak wen of verloor."

(4) "Deur wat prokureurs betref die agt kilometer-vereiste af te stel sit ons dat ons nou rondom die setel van 'n hooggeregshof nie meer 'n agt kilometer beperking het op prokureurs nie, maar dit is wyd oop vir die hele provinsie en die gevolg is dat 'n prokureur wat in Nelspruit is kan stukke uitreik, hy kan stukke teken en hy kan sorg dat dit ter rolle geplaas word in die setel van 'n hof sonder om gebruik te maak van 'n ander prokureur as sy korrespondent, want die stelsel van om van korrespondente gebruik te maak lei onteenseglik tot verhoogde koste."

(5) "**VOORSITTER:** Nou watter verslapping gee u ter oorweging?

MNR VILJOEN: Ek vra vir die afskaffing van die agt kilometer wat prokureurs betref, dat dit wydoop kan wees sodat die prokureur wat in die platteland is nie gebonde is aan 'n agt kilometer weg van die hof af nie.

VOORSITTER: Ek dag u het ter aanvang gesê u beywer u nie vir 'n algehele afskaffing nie."

(6) "**MNR VILJOEN:** Ek sal vir u sê, daar is 'n praktiese probleem wat ek

voorsien daarmee. Ons mag ‘n litigant kry wat iewers in Messina is en nou stukke, argumentsonthalwe, in Pretoria se hooggeregshof uitreik, net om ‘n voorbeeld te noem. Dit is wel nie ‘n praktiese voorbeeld nie, maar dit is so ver weg, nou moet die repondent of verweerder verdedig en nou moet hy hom uitkry daar by daardie persoon. Dit is die probleem wat ek voorsien. Ek voorsien nie probleme tussen prokureurs en regsverteenwoordigers onderling nie, maar die leek wat in eie naam litigeer. Dit is vir hom wat ek ‘n probleem voorsien.”

(7) “Ek voorsien nie dat daardie agt kilometer noodwending die adres moet wees van ‘n prokureur soos in baie van die Hooggeregshofreëls bepaal nie. Dit kan ‘n adres wees wat dit naby en gerieflik maak vir prokureurs om te beteken. Dit is om daardie rede wat ons daarvoor vra.”

(8) “Wat daarmee saamloop is die kwessie oor die betekening van stukke. Die koste verbonde aan die betekening van stukke is somtyds astronomies hoog veral omdat respondente of verweerders nie deur die balju identifiseer kan word nie en dan lei dit tot ‘n heen en weer versending van stukke en ‘n verhoogde koste.”

(9) “My submissie is dat ‘n eiser of ‘n litigant baie makliker in staat gaan wees om sy respondent of verweerder te identifiseer en saam met ‘n bevoegde getuie vir hom te sê: Meneer, hier is jou dagvaardiging. Hy skakel al daardie kostes van betekening uit.”

(10) “In Nieu-Seeland, byvoorbeeld, verstaan ek dat hulle reëls die afgelope jaar of wat gewysig is deur tred te hou met betekening deurdat ‘n versending of transmissie van hofstukke deur middel van ‘n faks of ‘n rekenaar nou toelaatbaar is maar met die voorbehoud dat die oorspronklike stukke per geregistreerde pos gestuur word binne sewe dae na versending.”

(11) “My derde voorstel gaan oor ‘n inkorting van hofprosedure. Die voorstel wat ek daar het, het ten doel om die hofprosedure in te kort deur middel van voorverhoor-konferensies waar ‘n regter voorsit. Die eerste van hierdie voorverhoor-konferensies geskied net na die sluiting van pleitstukke en dan gebruik ‘n mens basies die uitbreiding van Hofreël 37 soos wat ons dit deesdae nog ken.”

(12) “Maar my ondervinding die afgelope 20 jaar is dat wanneer ons in ‘n hof land en die geskilpunte is basies uiteengesit, dan kom ‘n regter baiekeer na die regsverteenwoordigers en sê: Gaan skenk oorweging aan skikking. Dit het nou

al baie gebeur waar ek self betrokke is of waar ek teenwoordig was. Dan het die partye uitgegaan en dan kry ‘n mens hierdie populêre uitdrukking van: Hierdie saak is op die trappe van die hof geskik.”

(13) “My voorstel het veral ten doel waar jy die leek-litigant het want nou het hy nie presies kennis van die hofreëls nie. Nou sit hy voor ‘n regter by ‘n voorverhoorkonferensie; die geskilpunte word uitgestip; hy word nie geïntimideer deur sy opponent wat ‘n prokureur of ‘n advokaat is nie, want nou sit daar ‘n onafhanklike persoon voor hom wat sê: Gaan kyk ‘n bietjie na hierdie en ek dink miskien moet julle kyk om eerder hierdie saak te skik voordat die kostes te hoog word.”

(14) “Die voorverhoor-konferensie deel ek op in twee fases, want as daar dan nou nie geskik kan word en blootlegging en dies meer plaasvind by daardie eerste voorverhoor-konferensie nie, om oor te gaan na ‘n tweede en finale wat kort voor verhoor is.”

(15) “Daar word dan stukke voorgelê waarvan ‘n baie goeie voorbeeld is dié van deskundige getuies. ‘n Deskundige getuie word baie kere wekelank ondervra in ‘n hof terwyl daar deur middel van verslae en beëdigde verklarings voor die tyd ‘n mens al klaar die geskilpunte kon identifiseer en dan kan ‘n mens by een van hierdie twee voorverhoor-konferensies sê: Nee, maar ons erken sekere van die punte of ons erken die hele verslag. Die gevolg is dat ‘n mens nie daardie hoë koste van ‘n deskundige nodig het om twee of drie weke in ‘n hof te wees nie.”

(16) “Dit is wat my voorstelle ten doel het, dat wanneer ‘n mens kom by ‘n tweede voorverhoor dat jy ‘n klomp van jou erkennings klaar afgehandel het en ‘n mens is in staat om ‘n verhoor in enkele dae klaar te maak in plaas van weke.”

(17) “Ek steun ook die gedagte van ‘n gesinshof. Ek het nog nie vir myself uitgemaak waar daardie hof geleë moet wees nie, of dit in die Hooggeregshof moet wees en of dit in die verhoogde landdroshof se siviele afdeling moet wees nie.”

(18) “Maar ek het nou na baie van die aspekte sit en luister en ek het net tot die gevolgtrekking gekom dat in ‘n gesinshof kan ‘n mens nie alle gesinsregtelike aangeleenthede wil inpas nie, want dit is regtig ‘n groot probleem om alle aangeleenthede oor gesinsregtelike sake binne ‘n gesinshof in the pas.”

(19) "Die gesinshof sal baie goed gestruktureer moet wees oor wat hy moet doen, maar wat duidelik vasstaan is dat een van die aspekte is egskeiding, en is onbestrede egskeidings.

VOORSITTER: Onderhoud?

MNR VILJOEN: Onderhoud, meen ek ook hoort daarby, en byvoorbeeld aannemings hoort ook daar."

(20) "Maar ek het ook 'n probleem wanneer dit kom by aspekte soos gesinsgeweld. Die kriminele jurisdiksiegedeelte - ek moet sommer sê dat ek my bedenkings daaroor het want ek kan al klaar sien dat daardie hof onmiddellik uit sy nate uit gaan bars as alles daar ingepas word.

VOORSITTER: Dit gaan hom toegooi.

MNR VILJOEN: Hy sal toegegooi word, heeltemal korrek."

(21) "Ek wil net terugkom na die gesinshof. Hoewel ek voorstel dat die seëlreg R100 moet wees mag sekere litgante dalk nie in staat wees om R100 se seëls op die dagvaarding te plak om te betaal vir die inisiële proses nie…Ek kan geen rede sien waarom daardie litigant nie kan gaan na die klerk van die hof of die griffier of wat ookal die benaming sal wees van die amptenaar in daardie hof, en sê: Ek is nie in staat - amper soos 'n mens in die verlede gehad het, die *in forma pauperis* prosedure, dat so 'n litigant dit kan doen."

(22) "Ek kan ook geen rede insien waarom daar nie 'n gestandardiseerde dagvaardingvorm moet wees wat basies net voltooi hoef te wees nie en wat 'n egskeidingslitigant self kan voltooi en te laat uitreik.

(23) "**VOORSITTER:** Het u miskien persoonlike ondervinding van die swart egskedingshowe?

MNR VILJOEN: Ek het, mnr die Voorsitter.

VOORSITTER: Na u oordeel, hoe goed of hoe sleg werk daardie stelsel?

MNR VILJOEN: Daardie stelsel werk inderdaat baie goed en ek ondersteun mnr Helman se gedagtes daaroor. Inderdaat kan ek nie sien waarom 'n mens dit nie oorkoepelend kan maak nie, want dit is basies ook hoe ek dit voorstel en daardeur, veral wat egskeidings betref, kan dit geweldig kostebesparend inwerk."

(25) “Eintlik soveel meer so dat daar R8,1 miljoen is, as ek reg kan onthou, die begroting vir die Regshulpraad. Nou as ons kyk na hierdie voorstel soos wat ek dit hier formuleer dan gaan dit beteken dat ‘n litigant nie nodig gaan hê om na die die Regshulpraad te gaan vir regshulpegskeiding nie, want die prosedure is eenvoudig en hy kan dit self gaan uitreik en hy kan self die hele proses doen en op ‘n baie goedkoop en eenvoudige manier.”

(XL) MR ATTORNEY A.P BRANDMULLER OF MIDDELBURG ON BEHALF OF THE MIDDELBURG ATTORNEYS ASSOCIATION

In the course of his oral submissions to the Commission at Middelburg on 22 April 1996 some of the points made by Mr Brandmuller were the following:-

(1) "**MR JAPPIE**: We have heard proposals that a separate Family Court is desirable, what are your feelings about such a court, dealing specifically with Family Law matters?

MR BRANDMULLER: Well we believe that it is a good idea at the moment and specifically because of our accessibility problem with regard to divorces, etcetera, to Johannesburg. I mean we have to travel every time we have to do something and then we have to use counsel. If the Family Courts as we see that they are envisaged, can deal with them quickly and efficiently from an attorneys level and it brings relief quicker to our clients, we believe that would be a good idea."

(2) "**CHAIRMAN**: Just to help the Commission, in your experience, I gather you travel not infrequently to Pretoria for divorces,…if a man from Middelburg or Witbank or take an area close to you, Secunda, Hendrina, Carolina comes to you in Middelburg and you handle the whole thing, at the end of the day what does it cost that man or woman?

MR BRANDMULLER: It would cost him on an unopposed basis approximately R 2 500,00."

(3) "**JUDGE LEON**: Now supposing that that same case were heard in Middelburg by a Family Court or a Circuit Court, what do you think the costs would be?

CHAIRMAN: Without using counsel?

JUDGE LEON: Without using counsel?

MR BRANDMULLER: Well we could reduce the costs by R 1 000,00 easily."

(XLI) MR ATTORNEY D. VAN DER MERWE ON BEHALF OF THE HIGHVELD RIDGE ATTORNEYS ASSOCIATION

In the course of his oral submissions to the Commission at Middelburg on 22 April 1996 some of the points made by Mr van der Merwe were the following:-

(1) "**MR MALULEKE**: Then on divorce matters, finally, a Family Court, do you support the concept of a Family Court?

MR VAN DER MERWE: For sure.

MR MALULEKE: If this Commission were to recommend that Black Divorce Courts such as they are now, should form the basis of a Family Court to hear mainly unopposed matters, what would your view be?

MR VAN DER MERWE: Mainly unopposed? Will there be a curtailment on jurisdiction for an amount of the value of the estate?

(2) "**MR MALULEKE**: The argument would be that the Supreme Court would retain its jurisdiction to hear divorce matters, concurrent jurisdiction but the Family Court would be a court primarily for unopposed divorce matters and that the sittings, it would be based around the concept of the Black Divorce Courts such as they are now, they sit in circuit and various centres.

MR VAN DER MERWE: Well presumably there will be a seat of this court in every Magistrate's court?

MR MALULEKE: Yes.

MR VAN DER MERWE: Taking that into consideration I have got no objection to that.

MR MALULEKE: You support that?

MR VAN DER MERWE: Ja, I support that."

(XLII) ADV D.D.J. ROSSOUW OF NELSPRUIT ON BEHALF OF THE PREMIER OF THE PROVINCE OF MPUMALANGA AND ALSO ON BEHALF OF THE ASSOCIATION OF ADVOCATES OF NELSPRUIT

In the course of his oral submissions to the Commission at Nelspruit on 22 April 1996 some of the points made by Mr Rossouw were the following:-

(1) "Die Familiehof : Ons vereenselwig ons ten volle met die voorleggings van die Vereniging van Prokureursordes in the Republiek van Suid-Afrika en die Assosiasie van Familiepraktisyns wat die kwessie van die voorgestelde Familiehof aanbetref en wel vir die volgende redes: u sal onthou dat daardie voorleggings lees dat die Familiehof moet 'n spesialis afdeling van die Hooggeregshof wees en nie die Landdroshof nie, tewens dit word baie sterk uitgedruk deur die Prokureursvereniging dat die wysigings in die Landdroshof 1993 om voorsiening te maak vir hierdie Familiehof moet so gou as moontlik omgekeer word."

(2) "Nou die redes waarom ons ten gunste daarvan is, ons sê die familie vorm die hoeksteen van die samelewing om mee te begin, dit is 'n ernstige situasie, dit is nie 'n ding wat woeps waps in 'n Landdroshof kan mee gehandel word nie. Die baie belangrike punt is die Hooggeregshof is die oppervoog van die minderjariges, gaan ons daardie posisie nou wegvat en sê die Hooggeregshof is nie meer nie, want hier is nou 'n Familiehof by die Landdroshof, hy moet dit nou maar hanteer of bly die Hooggeregshof die oppervoog?

(3) "Die huwelik en die ontbinding daarvan is 'n statusaangeleentheid wat tradisioneel en om baie ander baie goeie redes in die Hooggeregshof tuis hoort. Die landdros afdeling gaan deur die geskiedenis gebuk onder 'n ewige tekort aan gekwalifiseerde en bevoegde personeel en dit spreek duidelik uit die Jaarverslae van die Direkteur-Generaal van Justisie. Ons hoef maar net te kyk hoeveel landdrosdistrikte daar is, hoeveel poste daar is wat gevul word deur gekwalifiseerde mense, hoeveel deur ongekwalifiseerde mense en ek kan vir u sê die posisie is benard in die platteland veral. Jou stedelike gebiede sal nog gekwalifiseerde mense hê maar in die platteland is dit benard."

(4) "Nou nadat ek dan gesê het dat die landdros afdeling gaan gebuk onder die tekorte om net nog meer en daarby gespesialiseerde werk na die landdroshof afdeling af te wentel is om die regspleging willens en wetens op 'n ramspoedige weg te plaas wat niks goeds inhou nie. Dit sou baie sinvoller wees om die Familiehof as 'n spesialis afdeling van die Hooggeregshof in te stel met spesiale reëls van toepassing op onverdedigde sake en wat formele verskynings onnodig sou maak."

(5) "Nou baie van die voorleggings sê vir ons verdedigde egskeidings hoort in die Hooggeregshof. Ons weet wat die posisie is tans met gewone verstekvonnise, dit gaan na die griffier toe en hy staan dit toe in die Hooggeregshof. My gedagte wat ek hier praat oor die spesiale reëls was die volgende: in elke saak waar daar kinders is, is daar 'n verslag van die gesinsadvokaat, daar is die dagvaarding wat die situasie uiteensit, die skuldoorsaak. As die eiser se getuienis in 'n onverdedigde saak by wyse van n beëdigde verklaring voor die agbare hof geplaas kan word dan is daar geen rede hoekom op daardie stukke, mits die regter tevrede is, hy nie in kamers 'n egskeidingsbevel kan toestaan nie. Is hy nie op die stukke tevrede nie kan hy bloot by wyse van 'n aantekening sê dat hy weier dit en verwys die saak na die aanhoor van getuienis toe. So dan kan 'n baie, baie groot volume van onbestrede egskeidings gaan nie meer in 'n ope hof kom nie, gaan nie advokaatsgelde verg nie, 'n hof verskyning hetsy dan deur die prokureurs soos wat hulle nou kan doen, daardie koste gaan uitgesny word en die resultaat gaan net so bevredigend indien nie nog beter wees nie. Dit is wat ek in gedagte het daar met die spesiale reëls van toepassing."

(6) "**VOORSITTER**: Wat stel u in die vooruitsig vir die provinsie Mpumalanga wat betref die Gesinshof, hoe sal dit hier werk?

MNR ROSSOUW: Die gedagte wat ek sou ondersteun is die volgende: dat en ons praat altyd oor koste, koste is altyd die nie oorwegende geval, die meeste egskeidings, by verre die meeste gaan deur die hande van die prokureurs. As 'n metode bewerk kan word dat daardie dagvaarding, hy kan nou deur die prokureur geteken word, uitgereik word by die klerk van die hof van daardie distrik, beteken kan word en dan gaan dit duidelik word as hy verdedig ja of nee dat die nodgie gesinsadvokaat verslag verkry word. Hy is nie verdedig nie, kry nou die beëdigde verklaring van die eiser en verwys dan daardie hele situasie na die Hooggeregshof van die provinsie waarin daardie landdroshof gesetel is vir voorlegging aan 'n regter in kamers. Dit is wat ek sou voorstel daar behoort - die reëls maak tans nie vir sulke dinge voorsiening nie maar dit kan tog gedoen word."

(7) "**MR MALULEKE**: Some of the submissions we have had are that the Black Divorce Courts have been providing an excellent, cheap service to the public. Is this your experience that the divorces in the Black Divorce Courts are a lot cheaper in fact than the divorces in the Supreme Courts and if that is so in your own submission for the Family Courts, what do you propose to do with the Black Divorce Courts?

MR ROSSOUW: My own theory is that the sooner we get away from ethnicity, black divorce courts, white divorce courts, the better."

(8) "**CHAIRMAN**: Well let us start at the beginning, the question to you was, was it your experience that, apart from the racial exclusivity, did the Black Divorce Courts work well, cheaply and quickly, did they perform a service?

MR ROSSOUW: Not necessarily so, my experience has been a strange one because I very seldom appeared there and if you appear there there is a little note that is handed to you with the questions down there and those are the questions you have to ask and you dare not step outside those questions and those are the answers that they want. It has been a most unsatisfactory situation as far as I am concerned."

(9) "**MR MALULEKE**: …so you would go along with the view that like the ALS, we have one Family Court which would possibly hear undefended divorces and if the matter becomes defended you would submit it to a higher court or in this instance to a judge?

MR ROSSOUW: Well my stand is on behalf of the Association of Advocates, we should have a Family Court which is a specialist court, branch of the Supreme Court and should deal only with family matters and on the basis as far as undefended matters are concerned that you do not even have an appearance unless the judge concerned on the papers put before him that he would rather refer this matter for evidence and then it gets referred to evidence and evidence is led."

(10) "**MR MALULEKE**: …the biggest problem is the cost factor. I am saying that is it not logical if you dismantle the Black Divorce Courts and you say all defended matters must then go before this specialist judge in the Family Supreme Court. You will not have solved the cost problem in the sense that that black litigant now no longer has that cheap system, he is now exposed to the expensive system so how do you correct that in your submission?"

(11) "**MR ROSSOUW**: I think the first way to correct it is for the litigant to choose carefully when he chooses attorneys or counsel for that matter but as I have said, an undefended divorce matter - what you have, you have a stamp on the summons, you have the Sheriff's fees for service of the summons, now it is undefended, what next - a fee for drawing an affidavit, you do not have a fee for the family advocate, what can that amount to, very little, if any. It cannot be R 100,00 and then it goes before the judge, it does not cost you money unless it gets referred to evidence, you do not need …(intervenes)

MR MALULEKE: I have got no problem with that, I have got a problem with defended cases, what you would do with a defended divorce case?"

(12) **MR ROSSOUW**: Well our experience is this that expensive divorce cases are usually engendered by the parties themselves not wanting to talk, not wanting to negotiate and in many instances attorneys instigating the parties not to settle. So that is something that I cannot give an answer to. It depends on the legal representatives, the cost factor is something which each individual practitioner must consider, decide and inform his client about."

(13) "**VOORSITTER**: Wat dink u van die moontlikheid van 'n Rondgaandehof vir siviele sake op 'n redelik deurlopende basis? Is dit prakties uitvoerbaar, ja of nee?

MNR ROSSOUW: Nee dit is nie prakties uitvoerbaar nie om een rede en ek is jammer, ek gaan dit weer herhaal wat ek gesê het, so 'n voorstel of 'n aanbeveling is om die werklikheid daarvan te plaas in die hande van een man wat diskresionêr sal besluit ek gaan daardie howe instel, ja of nee. Daar gaan nie iets wees wat vir hom sê jy moet dit doen nie, kom ons aanvaar dit moet uit Pretoria uit gaan, hulle het nie regters nie, dit is die maklikste verskoning onder die son, ek het nie regters nie so julle moet maar hier litigeer."

(14) "**VOORSITTER**: As daar 'n statutêre verpligting geplaas word oop 'n RP wat dan?

MNR ROSSOUW: Die vraag is of dit kan gebeur, of the uitvoerende gesag so 'n statutêre verpligitng sal plaas en dan sal dit altyd nog maar wees, dit kan ek voorsien met alle respek, dat die besluit gaan aan die Regter President oorgelaat word om hierdie dinge te reël … Praktiese oorwegings wat 'n mens daarteen instel is dat daar moet nou dokumentasie, leêrs, dit moet geskryf word, waar gaan die administratiewe funksies vervul word, gaan dit in Pretoria wees, gaan dit op Middelburg, Nelspruit, waar die hof ookal gaan sit, hoe gaan dit werk? Leêrs raak weg, dokumentasie raak weg, ek persoonlik voorsien baie probleme wat dit aanbetref en op die lang duur met alle respek, gaan dit nie goedkoper wees nie, dit gaan duurder wees want daardie regters wat kom en kom sit daar is die S en T wat aan hom betaal moet word bo en behalwe sy salaris en sy klerk, almal, dit is 'n hoër uitgawe."

(XLIII) MR ATTORNEY F. GELDENHUYS ON BEHALF OF THE NORTHERN REGION OF THE TRANSVAAL LAW SOCIETY

In the course of his oral submissions to the Commission at Pietersburg on 24 April 1996 some of the points made by Mr Geldenhuys were the following:-

(1) "**MR MALULEKE**: On a matter which does not arise from what you have submitted, it is the matter relating to Family Courts. You will know that the Attorneys' Association has made proposals that a Family Court be established and various proposals have been put before us but I would like to get the comments from your own constituency here, from your own circle.

MR GELDENHUYS: We think that a Family Court should not be introduced for this province at this point in time. We can understand the need, the dire need for that in Gauteng and to alleviate the Supreme Court bench there, but the fact of the matter is our divorces among the whites have been dealt with, and the Asians and the Coloureds, have been dealt with in Pretoria for long so that can just be transferred to our own Supreme Court to establish precedence and our black community has been served by the North Eastern Division of the Black Divorce Court and now what we are saying is that Pietersburg has been the seat in any event all along, occasionally we had to travel to Pretoria to finalise the matter when the court did not sit here on circuit but, we should say that jurisdiction must just go to our Supreme Court."

(2) "**MR MALULEKE**: And lastly on the Black Divorce Courts, a point has been made that as presently provided for it is inconsistent with the new dispensation and you are saying that those courts should be retained and possibly just remove the unconstitutional provisions about these being accessible to blacks only, is that what you are saying?

MR GELDENHUYS: No it should not be retained, that jurisdiction must be given to the Supreme Court of the Northern Province."

(3) "**MR MALULEKE**: Do you want to say something about the cost aspect?

MR GELDENHUYS: The cost aspect, I can tell you now would not escalate at all for the simple reason that at the moment in Pietersburg we are dealing with the black divorces from Phalaborwa, from wherever, everybody within the jurisdiction of the North Eastern Division of the Black Divorce Court on a correspondent basis and I can tell you also that the cost is far lower than we have in the white courts at the moment. I might be wrong but we are doing a divorce for about R 1 000,00 at the moment.

MR MALULEKE: You are talking about in the Black Divorce Court?

MR GELDENHUYS: In the Black Divorce Court but it will remain the same in the Supreme Court because nothing is going to change.

MR MOGABA: Given the fact that the attorney will have the right to appear in the Supreme Court.

MR GELDENHUYS: Yes, the right of appearance. We have been doing, advocates do not appear before the Black Divorce Courts, it is attorneys who do the work and we now have the appearance but the cost is going to remain the same."

(XLIV) THE HON MR JUSTICE M.W. FRIEDMAN, JUDGE PRESIDENT OF THE BOPHUTHATSWANA DIVISION OF THE HIGH COURT

In the course of his oral submissions to the Commission at Sun City on 18 May 1996 some of the points made by Friedman JP were the following:-

(1) "**MR MALULEKE**: One last area you might assist us with. You have a peculiar experience in the country that in your division you used to have what they call the Black Divorce Court sitting, and at some point these courts were discontinued … But I would like to hear what your comments are in regard to the possible re-introduction of the Black Divorce Court in a different form, either as a family court of some sorts, because the argument has been made that divorce matters in supreme courts are unaffordable for most people and it seems a waste of judicial material for a judge to sit here and hear 20, 30, 40 divorce cases and just rubber stamp all the time. So I would like to hear your comment about it.

JUDGE FRIEDMAN: Well firstly, an all-round figure - I would imagine we handle approximately per annum something of the order of between 1300 and 1 500 divorces."

(2) "**CHAIRMAN**: Are those unopposed divorces?

JUDGE FRIEDMAN: Yes, unopposed. I know that serious consideration is being given to the introduction of family courts. Of course, that will lessen the work of the Supreme Court. I am opposed to a Black Divorce Court in any shape or form. I do not think, with respect, that it would serve any purpose.

CHAIRMAN: Well, I think the member's suggestion was really using the Black Divorce Court shorn of the racial discrimination clause to afford immediate access to divorce justice on the part of anybody who wishes to use that court, and the question is inspired by the fact that we have had many representations about the excellent work performed by the Black Divorce Court."

(3) "**JUDGE FRIEDMAN**: Well, on that basis obviously one cannot have any objection. I do want to add one rider and this is very important when considering family courts and other courts that are going to deal with divorce, and that is the question of custody and maintenance of children. It is the most important factor and we have found this in divorce cases. I think that there seems to be a perception that if a person sits on high in a black robe and he makes pronouncements on the maintenance and custody of children and the Supreme Court is the upper guardian of minors, it does seem to have a greater

effect than if another person vested with that function would have."

(4) "But the real problem lies in so far as children are concerned and I think our experience in the Supreme Court shows the following and the judges are very concerned about this aspect, is that unfortunately people do not pay adequate and sufficient maintenance for their minor children. Husbands desert wives, they leave them alone completely and do not make adequate provision for maintenance. I think that matter must be attended to. There is also another procedure that we adopt and that is this: If assuming we are told by counsel that the defendant has withdrawn his or her defence and counterclaim, the judge invariably calls on the defendant, if the defendant is in court, to come and explain this so that the court can relate to the public. This has been a practice and procedure of our court.

CHAIRMAN: Does Mmabatho have a Family Advocate?

JUDGE FRIEDMAN: No."

(5) "**CHAIRMAN**: The Commission has heard from several quarters that maintenance courts in the magistrates' courts do not work very well.

JUDGE FRIEDMAN: Yes.

CHAIRMAN: What is your experience in this province?

JUDGE FRIEDMAN: Unfortunately there is some truth in that assertion. We have great difficulty in the Supreme Court because often there are orders made in the magistrate's court which are not in accordance with and not commensurate with the person's salary. For example, you will find a person earning something like R 2 000 or R 3 000 per month and he is ordered to pay R 100 per month per child. I do not think that court really at all times takes account of the reality of the situation."

(XLV) MR ATTORNEY C.M WEISS CHAIRMAN OF THE RUSTENBURG ATTORNEYS ASSOCIATION

In the course of his oral submissions to the Commission at Sun City on 18 May 1996 some of the points made by Mr Weiss were the following:-

(1) "Ek wil twee aspekte aanraak wat die Kommissie ook, met respek, al na verwys het…die sogenaamde familiehof of gesinshof. Dit is deesdae so dat 'n plattelandse prokureur se Hooggeregshofpraktyk bestaan seker 70% uit egskeidingsake en die stelsel van korrespondente maak 'n egskeiding duur. Dit is vir die plaaslike bevolking later net nie meer die moeite werd nie of koste-effektief nie en ons wil graag sterk betoog dat die idee van 'n swart gesinshof weer 'n keer op plaaslike vlak aangepas word. Ons is natuurlik ook … (tussenbei)

VOORSITTER: Toeganklik vir alle sektore van die bevolking, segmente.

MNR WEISS: Ja."

(2) "Dit is tog algemene kennis dat prokureurs reeds verskyningsbevoegdheid in die hooggeregshof het. So ons kan geen rede insien hoekom ons nie in Rustenburg self egskeidings moet kan afhandel nie. Uit 'n praktiese oogpunt - 'n mens wil nou nie syfers praat nie, maar kan ek nie sien hoekom egskeidings nie helfte goedkoper kan wees as dit gebeur nie.

VOORSITTER: Net om die Kommissie te help, in ronde syfers, wat sou u sê 'n gewone onbestrede egskeiding, wat jaag dit die kliënt uit die sak?

MNR WEISS: Ongeveer R 2 500, en ek dink party van my kollegas gaan oë trek en sê hoekom is ek so goedkoop, maar ek sou sê ongeveer R 2 500, waarvan nagenoeg die helfte gaan aan 'n korrespondent, aan 'n advokaat ensovoorts. Daarom sê ek 'n egskeiding kan heelwaarskynlik R 1 000 goedkoper wees as 'n mens dit plaaslik kan afhandel."

(3) "'n Ander ding wat ek graag onder u aandag wil bring … die gebrek aan 'n gesinsadvokaat-kantoor in Mmabatho. Op die oomblik is dit 'n groot gebrek en dit maak dit uiters moeilik en ons regter-president het daarna verwys dat daar aspekte is wat werklikwaar aandag verdien wat mens kundige kennis nodig het en dit is 'n groot leemte."

(4) "**VOORSITTER**: Wat is u eie ondervinding en dié van u kollegas ten aansien van die onderhoudshof? Van baie kante het ons verneem dat dit in die praktyk

nie baie lekker werk nie, dat dit dikwels ‘n landdros is wat op die punt staan om af te tree, wat dit as ‘n tydelike werk verrig.

MNR WEISS: Mnr die Voorsitter, ek stem daarmee volmondig saam, veral noudat, met die jongste uitspraak van die Reël 43 aansoek waar gesê is dat as daar onderhoudstappe in ‘n onderhoudshof aanhangig gemaak is in ‘n distrik, dan val die noodsaak van die Reël 43 aansoek weg. ‘n Mens kon darem altyd nog met groot respek die kundigheid van die Hooggeregshof gebruik om sekere dinge uit te sorteer, maar nou kan jy nie meer nie. As ek ‘n Reël 43 aansoek mee besig is en my kollega hardloop met sy kliënt onderhoudshof toe dan is ek, soos hulle in Engels sê ge”snooker”.”

(XLVI) MR ATTORNEY P. SEDILE, PRESIDENT OF THE BOPHUTHATSWANA LAW SOCIETY

In the course of his oral submissions to the Commission at Sun City on 18 May 1996 some of the points made by Mr. Sedile were the following:-

(1) "**CHAIRMAN**: In your opinion how well or how imperfectly does the Black Divorce Court function?

MR SEDILE: I am of the view that it functions okay because it is cheaper than the Supreme Court. By establishing a family court in every district will be of useful purpose because people will have easy access to the family courts and it will work out cheaper in terms of transport and the easy access to those courts.

CHAIRMAN: Well, as presently constituted, the Black Divorce Court is probably unconstitutional.

MR SEDILE: That is correct.

CHAIRMAN: If that position is cured, do you think that would provide a useful service?"

(2) "**MR SEDILE**: As it is presently it will never provide a useful service to the community, especially when you are referring to blacks. It is a problem in that court, that court's registration is in Durban. We have to send all our documents to Durban and there are two…, Mr Madela and Mr Geyser who are roaming around the whole of South Africa.

CHAIRMAN: Assuming for the moment that the personnel of the court was extended and the court was thrown open to everyone, in your opinion, how would that work?"

(3) "**MR SEDILE**: It will work out more easier than the Supreme Court because it is cheaper and a candidate attorney also appears in that court. It would make the workload easier for practitioners."

(4) "**CHAIRMAN**: Mr Sedile, I take it your practice sometimes brings you into the maintenance courts?

MR SEDILE: That is correct.

CHAIRMAN: Tell us about your experience in that court, how well does it work, how badly does it work.

MR SEDILE: The problem with the present structure of the maintenance court is that the clerks there are inexperienced, they are not legally trained. They are ordinary clerks with matric, so I am of the view that especially section 11 of the maintenance court it is not properly looked into or adjudicated into. Those areas, they form part of the court process. There needs to be an experienced person who can adjudicate well for the well-being of the minor child who is in dispute with the maintenance. So if they are properly cared for by experienced people, paralegal or people, for instance, with B-IURIS, they can serve a useful purpose or office."

(5) "**CHAIRMAN**: And in your practice, do you deal with many maintenance cases?

MR SEDILE: Yes, in my area I deal with a lot of maintenance cases, because we are having a lot of divorce cases in our area and we have a lot of, I cannot say illegal immigrants, but a lot of immigrants in our area who are normally involved in maintenance disputes."

(XLVII) MR ATTORNEY R. BRADY OF THE FIRM OF WACKS AND BRADY, KLERKSDORP, ON BEHALF OF THE GREATER KLERKSDORP ATTORNEYS ASSOCIATION

In the course of his oral submissions to the Commission at Sun City on 18 May 1996 some of the points made by Mr Brady were the following:-

(1) "As far as the maintenance issue is concerned, … perhaps I should just pass my view there. It is not so much the amount as well as the accessibility. It is the problem, generally speaking, of getting the respondent, which is of course usually the man, to make contact with him, to be able to honour his undertakings and therefore in the court process of enforcing that which is the problem. So whether it is a Supreme Court or a family court or which it is a magistrates court, I do not think is the issue.

CHAIRMAN: Having regard to the nature of the problem as you have defined it, what practical improvement would you like to suggest?"

(2) "**MR BRADY**: I practised as a public prosecutor in the 1960's and in those days many of magistrates, in fact many of the public prosecutors did not in fact even have the Civil Service Diploma. The whole B-IURIS concept came in and we have witnessed that over the last thirty years and I think we are all struggling with various initiatives through the organised profession or whatever, to upgrade it."

(3) I think it is the quality of the standard which is probably part of the solution and then there is the enforcement which is again through the police service to implement getting the warrants, to arrest the people and bring them to court. Those sort of issues I think are the practical issues which are the problem.

CHAIRMAN: You mean the present system lacks teeth."

(XLVIII) MR ATTORNEY S. VAN DER MERWE ON BEHALF OF THE MOLOPO CIRCLE OF ATTORNEYS

In the course of his oral submission to the Commission at Sun City on 18 May 1996 some of the points by Mr van der Merwe were the following:-

(1) "Mr. Chairman, the only thing I would like to say is that we do support the principle of a family court to make such matters more accessible to the people of the North-West Province.

CHAIRMAN: What do you think of the notion of using the so-called Black Divorce Courts reconstituted as the nucleus of such a service as far as undefended divorces are concerned?

MR VAN DER MERWE: Well, if it is turned into a family court we support it. The experience I personally had of the Black Divorce Courts was that, except for the Registrar being in Durban causing a bit of a delay etc, it was very effective.

CHAIRMAN: You personally have appeared in that court?

MR VAN DER MERWE: I did personally appear in that court.

CHAIRMAN: And you think it provides a useful service.

MR VAN DER MERWE: It does provide a useful service."

(XLIX) THE HON MR JUSTICE J.J KRIEK, JUDGE PRESIDENT OF THE NORTHERN CAPE DIVISION OF THE SUPREME COURT

In the course of his oral submissions to the Commission at Kimberley on 25 May 1996 some of the points made by Kriek JP were the following:-

(1) "In my written submissions last year I mentioned the problems inhibiting the institution of a circuit court system for hearing of civil matters. I will skip a bit there because I have rather changed my views about that. But then I do say on page 4 of my summary: If notwithstanding the problems I have mentioned, this Commission feels that a civil circuit ought to be instituted, then I am prepared to amend the rules regulating the conduct of proceedings in this division in the following respect - and these rules are an annexure to this document which is in your file."

(2) "Firstly, to extend the criminal circuit in Upington, that is one in each term, by one week for the hearing of civil trials with one day for motion court. This ought to cater for the trials emanating from the Gordonia, Namaqualand and Calivinia districts. If one week proves to be inadequate, the session can always be extended. To cater for the latter eventuality the safest course would be to merely provide in the rules that the period in question shall be such as may be determined by the judge-president form time to time."

(3) "I may mention that during 1995 not more than ten of the civil trials set down for hearing in Kimberley emanated from the Gordonia district and I got this figure from an attorney, the Chairman of the Attorney Circle in Upington. He phoned around and phoned me back and said that not more than ten trials in the whole of 1995 came to Kimberley from the Gordonia district."

(4) "Mr. Chairman, if I may now go to the first addendum to the document you have before you , paragraph (b) of that addendum: with regard to my proposal concerning the establishment of the civil circuit I should suggest that I add the following sub-rules to Rule (4) of the Rules of this Division, a copy of which is annexed, should the Commission decide against creating a local division in Upington. Then I set out draft rules which provide for a civil circuit in Upington and that the judge-president may also, at the request of the parties, designate any place in the Northern Cape for the hearing of a civil trial."

(5) "Now, having written that, I had a meeting this week with the Bar and the Side Bar and the attorney-general and as far as the second leg of that submission is concerned, that is the establishment of *ad hoc* circuits at the request of the parties. I have other ideas. Mr Chairman, may I hand up copies of what I

wrote after my meeting with the Bar and the Side Bar and the attorney-general?

CHAIRMAN: Yes thank you."

(6) "Now in this document which I have just handed up, I say this: I still hold the same views with regard to the Upington circuit, but as far as the proposed Rule 4 (14) (b) is concerned, an alternative suggestion has occurred to me. It may be preferable to provide that the judge-president may establish such other permanent or *ad hoc* circuits for the hearing of civil cases at such venues in the Northern Cape as may appear to him to be necessary and/or convenient.

CHAIRMAN: That puts it at its widest.

JUDGE KRIEK: Yes, then if there are three trials to be heard from Springbok, they can approach me and I will arrange a civil circuit in Springbok for the hearing of those three trials. That makes it as flexible as it possibly can be."

(7) "When the variation of the proposed Rule 4 (14) (b), which I have suggested above, is adopted, some pattern will develop over the next few years and further civil circuits can be introduced if and when they become necessary. The rule will be flexible enough to cater for the future need of the outlying areas of this province."

(8) "Even if for the foreseeable future there is only one permanent civil circuit at Upington but with the possibility of *ad hoc* circuits being arranged when it is convenient to do so, the arguments based on distance which feature prominently in the representations which I have referred to, will lose most of their significance."

(9) "In this division a conference for the setting down of civil trials is held once in every term in relation to the two ensuing terms and all matters are on the waiting trial list are accommodated at this conference. It is presided over by the judge-president. The delay between the request for the trial date and the trial itself can therefore be less than three months but not more than six months in this division."

(10) "In relation to the proposed Upington circuit I do not anticipate that the delay will be more than four months, probably less, because in the main document which I handed up and which is before you, in the rule which I propose there is also provided that such a conference for the setting down of matters will also

be held in Upington in relation to civil matters in Upington."

(11) "**CHAIRMAN**: The suggestion has been mooted … that the time has come in our country to have the business of undefended divorce actions being dealt with speedily and inexpensively and possibly not in the motion court of the Supreme Court.

JUDGE KRIEK: Mr Chairman, I am afraid I belong to the old school as far as that is concerned.

CHAIRMAN: Status?

JUDGE KRIEK: It is a matter which affects status and it is a matter which ought to be dealt with in the Supreme Court. The procedure can be simplified and made less expensive. I have no problem about that.

CHAIRMAN: But it must remain within the preserve of the Supreme Court.

JUDGE KRIEK: It must remain in the Supreme Court, yes."

(12) "**JUDGE LEON**: Do you have any views about the possible establishment of a family court?

JUDGE KRIEK: I wrote a memorandum when that proposal was first mooted and I expressed very strong views against it."

(13) "**MR MALULEKE**: Having expressed your views about family courts and undefended divorce matters, what would you propose should be done with the Black Divorce Courts in the logic of what you say?

JUDGE KRIEK: Mr Chairman, that is a difficult problem because the existing Black Divorce Court provides a much speedier and cheaper service for the people who get their divorces there. So to that extent it is a service to the black community, but in principle I am against having "racial courts".

CHAIRMAN: Well of course, as presently constituted, it is unconstitutional or probably is unconstitutional.

JUDGE KRIEK: Yes. It serves a very good purpose but nevertheless it is "unconstitutional"."

(14) "**MR MALULEKE**: Well I wanted to get your view. As I understand from what we have heard in Springbok, for instance, that possibly in this province the so-called Black Divorce Courts are not really very prevalent, but in other

areas huge numbers of people are serviced through those courts.

JUDGE KRIEK: ….apparently the southern divorce court does come to this area, but on average I think more than half of the unopposed divorces in this division are black divorces. More than half of the divorces we deal with in this court are black divorces, although the southern circuit does, I am told, visit this division."

(15) "But my view is still that divorces belong in the Supreme Court. I said that the Black Divorce Courts are a convenient service to a part of the community at present, but I am still opposed to it.

CHAIRMAN: On principle?

JUDGE KRIEK: On principle, firstly because it is constituted on a racial basis and secondly because divorces belong in the Supreme Court."

(L) MR E.M DIPICO PREMIER OF THE NORTHERN CAPE PROVINCE

In the course of his oral submissions to the Commission at Kimberley on 25 May 1996 some of the points made by the Premier of the Northern Cape were the following:-

"**CHAIRMAN**: Civil circuit courts?

MR DIPICO: Yes. Our division has been applying this system in respect of criminal matters as well as unopposed divorce matters and this has proved to be more than efficient. I have requested the judge-president … to extend the system to all cases, including civil matters, and he has indicated his enthusiasm in this regard, also indicating that he is prepared to amend the rules of the Supreme Court in order to alleviate any inconvenience that may result from the change in territorial jurisdiction. My submission in this regard is that for the system of circuit courts, for the hearing of all matters, criminal as well as civil, the administration of justice will be brought right to the doorstep of all members of different communities in the province, whether advantaged or otherwise."

(LI) MR ATTORNEY T. HORN OF KIMBERLEY ON BEHALF OF CIRCLE 16 OF THE CAPE OF GOOD HOPE LAW SOCIETY

In the course of his oral submission to the Commission at Kimberley on 25 May 1996 some of the points made by Mr Horn were the following:-

(1) "If I may then just finally touch on the Black Divorce Court which was raised by a member of the Commission, Kimberley is presently served by a circuit of the Southern Divorce Court, I think it is. Years ago it was the Central Divorce Court which is, I think, seated in Johannesburg. From personal experience I had a fairly substantial practice in the Black Divorce Court in my younger days. There has been a suggestion that proceedings in the Black Divorce Court are speedier. I do not believe they are speedier than they are in the Supreme Court. It has been suggested that they are less costly. I do not believe they are less costly. Attorneys have rights of appearance in the Supreme Court; attorneys are in fact appearing in the Supreme Court and are dealing with undefended divorces. So I believe the costs factor, if it was a factor previously, is no longer a factor."

(2) "**CHAIRMAN**: What about the tariff which is prescribed in the rules of the Black Divorce Courts?

MR HORN: My experience is that, certainly on a party and party basis the tariff is substantially lower than in the Supreme Court. I do not know if anybody has ever taxed a bill on the party and party basis, but my experience is this, as far as attorney and client fees are concerned, a divorce in the Black Divorce Court is no less costly than a divorce in the Supreme Court at the present time. That is my own experience."

(3) "A lot of the litigants in the Black Divorce Court, I recall, were "do it yourself" litigants. That is also happening in the Supreme Court. The Judge-President will bear me out. It is happening here and it is happening in other divisions. So if a litigant wants to go that route in the Supreme Court he can go that route."

(4) "So I believe the Black Divorce Court should disappear. It is totally unconstitutional. I believe divorce matters should remain in the Supreme Court. They affect status, they belong in the Supreme Court and I support the Judge-President in his submissions that they do not belong in the family court."

(5) "**MR MALULEKE**: Quite clearly, there are some variations from province

to province, particularly on this question of the Black Divorce Courts. You do not seem to have a large enough black African population in this province. So I would well imagine that the practice of Black Divorce Courts has not been so well developed here, but in areas like Gauteng and other areas certainly the perception has been that the Black Divorce Courts are less costly and less formal in terms of strict rules. The clerk of the Black Divorce Court issues, helps litigants to draft pleadings and things like those, and we have had very strong submissions to have these courts retained in some form, or form a core of family courts. Now I want to get your view that justice being a national component, would you be amenable to the view that we might have family courts in other provinces and that because of the peculiar circumstances of the Northern-Cape Province we have a different scenario where divorces continue to be heard in the Supreme Court. Would you be happy with that type of compromise?

MR HORN: I could not support that situation, Mr Chairman. I think, if you are dealing with an issue like divorce it must be the same for everybody.

CHAIRMAN: It is a national issue."

(6) "**MR HORN**: Absolutely. May I just add something in view of what was said? The Black Divorce Court still comes here on circuit, I think three times a year. Now up till quite a few years ago there was a very substantial roll during every circuit, but over the years that roll has just got less and less and we have a big black population here, a huge black population in Kimberley alone. The roll has diminished and got less and less. Those litigants have made the decision that they want to come to the Supreme Court. It is their decision. If it did cost them more they were prepared to pay that additional cost. But the roll has definitely dwindled, absolutely, there is no question about it. I can recall in my young days, the court used to sit here for two or three days, with innumerable divorces and they have just got less and less and less.

CHAIRMAN: You say it sits here three times annually, the circuit brings it here?

MR HORN: It did, and I believe it still is. I do not appear there any longer, but I believe it still sits three times per annum."

(7) "**CHAIRMAN**: Is there a Family Advocate stationed in Kimberley?

MR HORN: No, he is stationed in Bloemfontein but he comes to Kimberley every week. He is here every Friday.

CHAIRMAN: Has he an office here?

MR HORN: He has an office in the magistrate's court building and he does his inquiries in his office generally on a Thursday. The attorney-general reminds me he also has an office in this building.

CHAIRMAN: In your experience, has his office contributed materially to the improvement of the handling of, say, custody issues in the Supreme Court?

MR HORN: Yes, I think I must concede that and he is actually very prompt with his investigations and with his reports, of course, if you are a litigant you do not always agree with his report, but yes indeed, he does make a contribution."

(LII) <u>ADV J.G. VAN NIEKERK, VICE-CHAIRMAN OF THE NORTHERN CAPE SOCIETY OF ADVOCATES</u>

In the course of his oral submissions to the Commission at Kimberley on 25 May 1996 some of the points made by Mr van Niekerk were the following:-

"Ek wil net een aspek aanraak rondom die kwessie van die swart egskeidingshof wat geopper is. Ek is nie 'n outoriteit op die werkinge van die swart egskeidingshof nie, maar die punt is geopper dat dit 'n voordelige forum is vir 'n sekere deel van die bevolking omdat die klerk van daardie hof litigante dan nou behulpsaam is met die uitreiking van pleitstukke ensovoorts. Ek mag net meld dat dit my ondervinding is dat die griffier en sy personeel van die plaaslike hoggeregshof ook wat betref prosedure hulp en bystand verleen aan litigante wat daar kom en sê: Luister, kyk ek wil my eie saak hanteer, maar sê net min of meer vir my, moet hier seëls op kom? Ek hoor daar moet seëls op kom. Hoeveel seëls moet daar opkom? Waar moet ek teken, ensovoorts. Met ander woorde, hul gee nou nie regsadvies nie, maar wat die prosedure aanbetref. So dit is nie iets wat eie is aan die swart egskeidingshof nie."

(LIII) THE HON MR JUSTICE R.N. ZULMAN, JUDGE OF APPEAL

In the course of his oral submissions in regard to a specialised Insolvency Court made to the Commission at Bloemfontein on 21 August 1996 some of the points made by Zulman JA were the following :-

(1) "*In limine* I must make a point that I speak only in my capacity as Chairman of the Special Project Committee for the Review of the Insolvency Law, and in my personal capacity. I see my two colleagues from the Appeal Court are here just to see that I carry out the mandate. We had a discussion amongst the Appeal Court Judges yesterday and they have not yet formulated their views, so I do not purport to speak on their behalf at all."

(2) "In addition, I have taken the liberty of inviting Attorney Leslie Sackstein to be present. I have co-opted him onto the Project Committee for this purpose. He, as you may know, Mr Commissioner, is an attorney who practises in Bloemfontein, and of course practises countrywide, particularly specialises in the field of insolvency and has considerable experience in matters of that nature, and he will, with your leave, be addressing a few remarks to you."

(3) "As you are aware, Mr Chairman, the Project Committee submitted two memoranda to this Commission. The first was dated 26 July of last year in which we briefly set out our support for the view that there should be such a specialised Court."

(4) "We had discussed the matter in the Committee, and that Committee, …has been concerned,…for at least the past seven years with the project of revising the 1936 Insolvency Act. When I say revising, probably bringing about a major change in the Act, and certainly to attempt to consolidate provisions relating to liquidations and insolvencies into one Bankruptcy Act."

(5) "That work, I am happy to say, has reached a fairly advanced stage, and as recently as last week a draft Act has been circulated which has detailed provisions relating to various matters."

(6) "As is obvious from these memoranda, the Committee is fully supportive of the idea of a specialised Court. The detail of such a Court is of course another matter, and I want to stress at the outset that we believe that a great deal more research is necessary as to the detail."

(7) "At this stage we are in support of the principle of such a Court, and I will, with your leave in a moment, try to indicate some of the areas where we see that research could be profitably undertaken."

(8) "As you are aware, Mr Chairman, in addition to that first memorandum a more detailed memorandum was prepared dated 10 April of this year, which was submitted to the Commission. On 11 April the Commission heard evidence from three Members of the Committee, Professor Katz, Attorney Pereira, who has much experience in this field, and Dr De La Rey, the author of the latest edition of Mars on the Law of Insolvency."

(9) "I unfortunately, was not able to attend that meeting, I was in New York attending another matter dealing with Bankruptcy Law…Suffice it to say that I was party to the memoranda that were prepared. I have now read the record of the evidence that was given at the previous proceedings; and I would like to offer the following points of elaboration on what was said there."

(10) "Firstly, Mr Chairman, you raised the question of the United States' experience, and a meeting that I had attended the previous year in New Orleans in Louisiana which was a Convention of United States' Bankruptcy Judges. That is a body which consists of approximately 300 Bankruptcy Judges in the United States."

(11) "They have had a specialised Court for years, they do not know any other system. I do not think, with great respect, the system is entirely comparable. Bankruptcy is a federal matter in America and the scale of operations is very much bigger."

(12) "I was fortunate to spend a short while as actually sitting and attending the hearings of the Bankruptcy Court in New York, and spent some time with the Chief Bankruptcy Judge, Justice Lifland, who was very helpful to me. But it seemed to me that from the scale of operations and the available manpower their system is a great deal different to ours."

(13) "The English experience, in my view, is of some assistance to us in that the Court there is part of the Chancery Division; and the way, I believe one should approach the matter here, is that one should not really set up a separate Court, in the sense of a separate structure entirely, but should make the specialised Court a part of the existing Supreme Court or High Court structure. I have in mind that one should follow in that line the general idea that was followed in England."

(14) "You raised, Mr Chairman with Professor Katz, very correctly, with respect, the progress that has been made in regard to the updating of the Insolvency Act. It is very pertinent because I think some of the matter that needs to be considered would also have to be dealt with by way of legislation. Some of the shortcomings that exist in the present system may possibly be dealt with more efficiently in legislation. I have in mind the questions of interrogation and inquiries and matters of that nature, but I do not think that should allow one to depart from the general principle of considering the idea of a specialised tribunal. As I indicated earlier, the work in regard to that consolidated Act is fairly advanced, but by no means complete."

(15) "That brings me to the important matter which, I believe, is really the only matter of much substance that I wish to add today, and that is the question of the model that I believe we should follow."

(16) "It seems to me that the model that commends itself best to our system is the model that is followed in Canada. The Canadian model is to use the Commercial Court which has been set up, particularly in Toronto, under the direction of a Judge by the name of Judge Farley who is an extremely competent person. I was privileged to meet with him when I was in Canada, and he is very helpful in regard to this aspect of the matter…He met with some opposition, and he took the view somewhat boldly to start on a pilot basis with expanding the use of the Commercial Court and I understand from what he tells me, that it works very well."

(17) "The great drawback of the Commercial Court as it now is structured, amongst one or two other matters, is the problem that it requires the consent of the defendant. In my years of practice at the Bar I very rarely was privileged to act for a defendant who was in a hurry to get to Court. Delay was often the best form of defence unfortunately, but there are some people who want to resolve their disputes quickly and expeditiously."

(18) "Most of those kind of people resort to arbitration, but in England, in the Commercial Court which we tried to base it upon in London, the consent requirement is not necessary at all. You issue a writ out in the Commercial Court and the defendant has no choice as to whether he consents or he does not consent."

(19) "I believe that if one overcomes that difficulty in the Commercial Court and deals with one or two other matters of practical moment, the Commercial Court, and certainly in Johannesburg, can be adapted to take in matters relating to bankruptcy. I would earnestly request this Commission to look very

seriously at what has happened from a practical point of view in Canada."

(20) "I would suggest, speaking for myself, that if there is a decision to deal with this matter, to support the idea in principle, one should start the matter on the basis of a pilot scheme."

(21) "The question of course is where does the pilot start the journey. The obvious suggestion is that it should be in Johannesburg where the bulk of the work is, but I was interested to hear what Mr Sackstein had to tell me this morning, he thinks it should be started in Bloemfontein and he will indicate to you why briefly, but I do not think we should again get bogged down in that detail."

(22) "**CHAIRMAN:** Sorry to interrupt you, I just want to gain clarity on one point, I understand the argument of a pilot scheme. You suggest a pilot scheme as an integral part of a Commercial Court?

ZULMAN, JA: Yes."

(23) "**CHAIRMAN:** Again just to gain clarity, Judge Zulman, is the suggestion that in such a pilot scheme, all insolvency matters presently heard in the Supreme Court would be channelled to the pilot scheme?

ZULMAN, JA: Yes, yes. Of course there is a more elaborate proposal and of course this is what the American Bankruptcy Court does and as I have indicated earlier, I am not sure that we have reached that stage. That is to incorporate not only judicial functions in the Bankruptcy Court, but a great number of administrative functions."

(24) "Many of the functions that the Master's office performs, in fact all of them, are performed in the American system by the Bankruptcy Court. The clerks in that Court actually deal with what the Master deals with. Of course they deal with it, and this is the part that we do need, under the direct supervision of the Bankruptcy Judges. All of the filing and all of the appointments of liquidators and trustees are dealt with in that Court, and the control of all matters of bankruptcy are in that Court."

(25) "But again I would commend the Canadian model where I believe they do still maintain an independent office, which is not part of the Court, which deals with the administration of insolvency matters."

(26) "I would suggest, with respect to this Commission, that the Master's office

should be asked to supply this Commission with much more information, particularly in regard to the follow-up on the appointment of liquidators, the control of proceedings in regard to inquiries that are held in the Master's office, and a matter which I see in many cases being abused, and that is in regard to Section 417, inquiries under the Companies Act."

(28) "If one looks at Section 417, it is very plain in its provisions that the Court can conduct such an inquiry. "Court" of course means a Judge. In practice this is delegated by the Court to a retired practitioner or more often nowadays to an advocate in practice of some seniority."

(29) "One of the difficulties with that system is that the advocate certainly, and even the retired judicial officer, is briefed by an attorney, and although theoretically he is part of a Court, he really is in a different position, and on some occasions regrettably, I will not say in all of them, there have been abuses of the system, and I believe it is the type of matter which should come under the purview of a specialised Court."

(30) "Whether it requires necessarily the Court actually conducting these inquiries, I am not sure that one needs to go that far, but a far more direct involvement and supervision of these matters by the Court is necessary."

(31) "I think one needs to have a Judge available or a Court available to deal with urgent matters which arise from these types of inquiries. It is true under the existing system it is possible to cater for this by way of the existing structure of urgent applications and hearings in the Motion Court in Johannesburg, but I believe it would be far more efficient if you had a dedicated Court dealing only with these matters; and I believe that would engender a far greater respect for the administration of insolvency and liquidation matters."

(32) "In many of these cases there are large sums of money involved, there are matters of great complexity very often, there are often matters of international implication, and it seems to me that one should have the Courts involved in that."

(33) "**CHAIRMAN:** I see that for purposes of Section 426 of the United Kingdom Insolvency Act, South Africa became a relevant country as from 1 March of this year. What are, briefly, the practical implications for our law?

ZULMAN, JA: What that relates to is this. It is specifically in the field of cross-border insolvency that it is important. It affords a quick method of

recognition of a local insolvency practitioner, a liquidator, affords him a reciprocal recognition."

(34) "It has application to the cross-border field of insolvency and we are hoping to bring about legislation in this country where we will afford reciprocal recognition to United Kingdom practitioners, liquidators should I say."

(35) "The problem in this field is the need to act quickly because today with the easy transmission of funds, and I am not necessarily talking about contraventions of Exchange Control Regulations, but you can transfer funds by way of computers and you can move funds from one jurisdiction to another very quickly. By the time the liquidator gets appointed and recognised, the cupboard is bare and there is a need for quick recognition and this has prompted this."

(36) "Mr Chairman, unless there are any other matters, I would just in conclusion like to stress one final point, and that is that I believe that there is a need for far more detailed research into the subject of the need for specialised Courts. I think that we need to know a good deal more about models elsewhere, and as I have said earlier, particularly the Canadian model."

(37) "**CHAIRMAN:** Before you sit down, Judge Zulman, the Commission would like to express its appreciation to you for your assistance in providing it with an exhaustive list of names of overseas experts, some of whom I am happy to say we shall see. We shall, for example, in Toronto speak with Judge Farley and sit in his Court. We have also got into touch with some of the people in Australia and New York whom you have mentioned. We are indebted to you, thank you very much indeed…Judge Zulman, there will be a question or two."

(38) "**LEON, J:** Judge Zulman, I just wanted to ask you one question if I may. On the question of principle, is it part of your case that the present system is not sufficiently hands-on as far as the Court is concerned?

ZULMAN, JA: Very much so.

LEON, J: And that you believe that the only way of getting the hands-on approach properly functioning, is to have a separate Court, a Bankruptcy or Insolvency Court?

ZULMAN, JA: Yes, very much so, with respect."

(39) "I think the volume of work, certainly in the Transvaal, perhaps is the reason for it. But I think if you had a specialised division of that Court which was

dealing with that matter, I think the problem would be alleviated. I think there are Judges of competence, I do not think you need to look for new Judges…I will be guided by what Judge President Eloff has to say about this, I think the Judge President could, as he has done with the Commercial Court, deal with it on an ad hoc basis and I would think on a fairly permanent basis."

(40) "The administrative detail of this type of matter I think needs to be worked out later. But I see that is the problem, particularly in the 417 and the supervision, the misconduct of liquidators, how they behave, the general perception, one reads with some horror in the newspapers of conduct of liquidators and their appointment, how they behave subsequently, the squandering of money and the costs of a lot of these proceedings."

(LIV) MR ATTORNEY L.M. SACKSTEIN OF BLOEMFONTEIN

In the course of his oral submissions in regard to a specialised Insolvency Court made to the Commission at Bloemfontein on 21 August 1996 some of the points made by Mr Sackstein were the following :-

(1) "I am an attorney practising in Bloemfontein. I have been practising for 34 years. I have been actively involved in insolvency practice for about 25 years. I would not like to say how many estates I have dealt with, but it must run into several hundred."

(2) "Mr Chairman, I am afraid that this meeting was not drawn to my attention until the weekend when Judge Zulman spoke to me about it, so I am in no position to really give you statistics and detailed submissions which I would otherwise like to have done, had there been more time at my disposal."

(3) "However, I have been able to talk to my correspondents in England who have given me some broad suggestions in relation to how matters operate there, but more importantly I was able to speak to my brother-in-law, who is a senior Judge in Germany, and he has been able to tell me a lot about the German metod of practice which, I think, may be of some interest to you."

(4) "I think the situation in England is pretty well-known to all concerned. The Chancery Division has a sub-division which deals with bankruptcy matters and as I understand it, the attitude in England since the introduction of the new Act has been to reduce the *onus* which previously rested on the State as much as possible and to see to it that creditors, after all it is their money, involve themselves more and more in the administration of the estate."

(5) "What they do in Germany is very interesting. They have a system whereby the specialised Bankruptcy Court deals directly with the estate not only in granting the liquidation order as we know it, but also in controlling the actual administration of the estate and also it has the right to appoint a creditors' committee which certainly would be a dramatic and drastic change to our existing legislation, but it is a good idea."

(6) "The little information I have been able to glean is that this has been very successful, this separate Bankruptcy Court in Germany. So too has the use of the creditors' committee. If the creditors are unhappy about the way the liquidator is operating, that committee has direct access to the Judge in Court and they go along and they say look, this is just no good, this fellow is not

doing his work or he is doing it dishonestly or he is doing something unsatisfactory."

(7) "I can imagine the difficulties faced by senior judicial officers like Judge Eloff in the thought of having to disrupt a Court by creating a separate Bankruptcy Court. Whilst I do not want to say I am parochial, the reason I suggested to Judge Zulman earlier this morning that Bloemfontein perhaps be the cockpit for the pilot scheme is that it is relatively small, it would not be as disruptive."

(8) "The Free State is…the only province where the Side-bar deals with the administration insolvent estates almost exclusively. I know of very few instances where so-called professional liquidators deal with insolvencies in the Free State. With all due modesty let me say this, that the history of the administration of estates in the Free State is extremely satisfactory. Speaking for myself, I cannot remember an instance where a trustee or a liquidator has been removed and certainly not been prosecuted in this province."

(9) "So if one was to have a specialised Bankruptcy Court in the Free State with relatively few matters, compared of course to Johannesburg or Cape Town, you have got a fairly small pilot project which would be relatively non-disruptive to the Supreme Court as a whole in this division."

(10) "If we come back to the suggestion of a pilot scheme here, you could appoint Judge A who could deal with all the applications, he could deal with a lot of the inquiries because there are not as many here clearly as there are in other divisions, but if he found that his workload was becoming heavy, there is a Bar here, there is a series of very experienced attorneys who are insolvency practitioners who could be used to sit as commissioners in the 417 or 152 inquiries and it would not be a disruptive or problematic sort of situation that a Judge like Judge Eloff might find in a huge division like the TPD."

(11) "**CHAIRMAN:** Thank you very much indeed, Mr Sackstein. The next interested party to be heard in regard to the matter of Insolvency Courts will be the Judge President of the Transvaal, Mr Justice C.F. Eloff."

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

In the course of his oral representations in regard to a specialised Insolvency Court made to the Commission at Bloemfontein on 21 August 1996 some of the points made by Eloff JP were the following :-

(1) "I have a difficulty which I would like to mention by way of introduction of the sparsity of detail of what this Insolvency Court is to look like, what its jurisdiction is to be; because in that lies a great deal of the problem which I have with the general notion."

(2) "If it is the idea that it should be a court with exclusive jurisdiction on all these matters, it creates enormous problems and on that ground alone it should be shot down."

(3) "One thinks then of a small division like North Cape, where I think there are five Judges, is there then going to be a Judge in Kimberley who does nothing but insolvency matters? I think they have perhaps one or two a week, and is he going to twiddle his thumbs in the meantime, or is he going to, like the Judges in London of the Commercial Court, do that and other work besides criminal cases and all cases?"

(4) "If it is going to be a Court having exclusive jurisdiction, then numerous problems arise. Let me mention a few aspects, which all of you no doubt are aware of: sequestrations, liquidations, winding-up, judicial management orders occur in the division which I am Judge President every day."

(5) "They are normally dealt with by the Motion Court Judges in Johannesburg. Every week there is a new Motion Court consisting of four Judges, all of whom deal with these matters. In Pretoria there are three Judges every week. The Motion Court Judges change for obvious practical reasons. One places a Judge on a Motion Court for a given week and not again for perhaps three, four, five weeks, and then there again."

(6) "Very frequently these sequestration applications are brought as matters of urgency, sometimes at night, sometimes an hour before a sale in execution is due to take place. What do you do if that specialist Judge who, has got exclusive jurisdiction, is not available? Without knowing these things, I have some difficulty in responding to that, and I hopefully, if later on things

crystallise and perhaps Judge Zulman comes with something concrete, then I can respond to that."

(7) "Since the Supreme Court was established in 1836 in the Cape, and afterwards grew to the present system, Judges have dealt with sequestrations, liquidations, winding-up, judicial management. All that goes with it as part of their work apart from sitting in criminal cases, apart from hearing divorces, apart from hearing opposed actions and the like."

(8) "I was waiting to hear that there are glaring instances where injustices were brought about or matters which were not dealt with completely, but nothing of that sort, no."

(9) "I make bold to say that all Judges of all divisions are capable of dealing with the sort of problems which arise in relation to sequestrations, liquidations and winding-up, and are dealt with adequately. There is no need whatsoever for creation of a specialist exclusive jurisdiction in a Judge of the insolvency matters."

(10) "Judge Zulman dealt with problems which occur after a winding-up order has been granted, control over the winding-up of the estate. That sort of problem may exist, but the remedy is not to create a specialist Court. The remedy is to change the statute and to grant more extensive powers of review to any Judge and also in regard to the Section 417 hearings, if there is a shortcoming there. The remedy, I suggest, is to alter the Insolvency Law and the Companies Act; but not necessarily to create a specialist tribunal."

(11) "Reference was made to the Commercial Court which I engineered in Johannesburg and which is also being dealt with by you in another context. That is a different animal. The need for a Commercial Court to be manned by Judges who have extensive commercial experience is different from sequestrations and winding-up and liquidations which occur in vast numbers and can be dealt with perfectly adequately by any Judge."

(12) "The rationale of the establishment of the Commercial Court is that there are Judges who have dealt with commercial matters as advocates, as counsel, as Judges, and who can quickly come to grips with commercial issues, and do not have to be told what demurrage is or a bill of lading and understand banking practice and the like."

(13) "But insolvency is by and large relatively simple. Why must you have a

specialist Judge to hear whether a man should be sequestrated or not, whether a company should be wound up? That is the sort of work that is done by junior counsel in their first two years at the Bar."

(14) "Yes, certainly, in larger concerns there may be problems of the sort that Judge Zulman referred to in the Cape. Then, of course, the Judge President will, when deciding on who should preside over that case, draw on the experience of those members of his Bench who had experience in that. But again, you do not need to have a specialist Court statutorily created to cater for that."

(15) "Reference has been made to the Canadian experience, to what happened in Germany, in the United States. Those are large countries and they may well feel the need to have that sort of specialised tribunal. But what is appropriate and fitting in Toronto or in New York or whatever, is not necessarily appropriate in South Africa."

(16) "This is a relatively small country with a relatively small population of people who could be involved in the type of disputes which Judge Zulman was referring to. It is completely inappropriate to establish a Court like that. I want again to stress that, and I think the point was made, that the administrative problems involved in establishing a Court like that, whether in a large division like mine or in a smaller division, are enormous and cannot easily be addressed, and cannot be justified on the materials before you."

(17) "I suggest you approach the matter from this way. What is so special about sequestration, bankruptcy? What is more special about that than for instance administrative law? There are numerous fields of our law which are very complicated, much more complicated than sequestration matters and winding-up and liquidation and…(intervenes).

LEON, J: Admiralty.

ELOFF, JP: Admiralty is a highly specialised field, thank you.

LEON, J: Which we all had to pick up in Natal knowing nothing whatever about it when we became a Court of Admiralty, if I may interrupt, Judge."

(18) "**ELOFF, JP:** Thank you, and in the Cape you have a similar position, but a feature which arises particularly in Pretoria, Transvaal is judicial review of administrative action. That is a highly specialised field and a few people have adequate knowledge of that."

(19) "If the rationale here obtains, then we must have a specialist Court dealing also with judicial review of administrative action, we must have a specialised administrative tribunal for that. Commercial frauds are coming very, very much to the fore. They have problems of their own. Must we now have a special criminal Court dealing with commercial frauds in the field of commerce? There are numerous fields, I can mention 10, 12 matters where the law is highly specialised, but no one ever thinks of creating specialist Courts for those."

(20) "There is another matter which I also refer to, which I shall refer to in the context of Intellectual Property Law. There is no virtue in having a specialist Judge if there is not also a specialised appeal tribunal, and how, just think of the costs and the administrative problems in establishing that."

(21) "Moreover, there is a certain danger in reposing all the work in a particular individual. That Judge has sort of monopoly of the work; his own idiosyncrasies and beliefs prevail. If the work is spread amongst, in my division 56 Judges, then there is no room for those individual idiosyncrasies or hang-ups on the part of the particular person concerned."

(22) "Lastly, may I just say that what appertains in Germany, where there is security of the way in which a company is being liquidated or in other jurisdictions as well, that is nothing new. I am not aware thereof that it has ever been considered to be the function of a Judge to sit as it were and oversee the winding-up of a company. That will be strange to our concept of what the function of a Judge is. Certainly we have powers of review but if that is what is contemplated, then, as I have said earlier, the need is to change the law, and to set up some sort of official skilled in these matters to oversee the winding-up of a company."

(23) "I conclude by saying there is no justification, no need for this specialised tribunal, and lastly, if the proponents come up with some sort of idea of what exactly it embraces, I would like the opportunity of again responding to that.

CHAIRMAN: Thank you very much, Judge Eloff. We shall hear you again later in the day in regard to intellectual property matters.

ELOFF, JP: Thank you.

CHAIRMAN: Judge Zulman, Mr Sackstein, an opportunity of reply"

(LVI) THE HON MR JUSTICE R.H. ZULMAN IN REPLY

(1) "Judge President Eloff has mentioned one point which, with respect, I agree with whole-heartedly. I take his point that we do not have the detail…I think it is correct to say one needs to formulate a basis, and certainly would welcome his comments and criticism on that, but I think it is quite wrong, with great respect, to condemn the whole idea because we do not have the detail, to say well, the idea is no good because I do not know the detail."

(2) "**CHAIRMAN:** One of your pleas, if I understand correctly, is to stress the need for further research in this field?

ZULMAN, JA: Precisely, and that really embraces some of the argument that Judge President Eloff has raised about Canada, and about Germany and about England."

(3) "To simply say these are bigger countries and the problems are not the same is, with great respect, an over-simplification. It may not be so, and it may be that there is good reason why they followed this."

(4) "It also applies to the invocation of history. The argument that we have had a Supreme Court from 1836 and nobody can think of anything that we did wrong in the past, and if we did, it is not to be elevated anywhere. With respect, I do not go along with."

(5) "They had a system in Canada for many years which was the same as ours, and they thought it wise to change it. It may well be that we should investigate why. They had a system in England where they did not have specialised Courts, they decided to have a specialised Court. Not because they could not cope with the work before, but because it was not efficient. I think it would be arrogant for us to suggest that our system has been so perfect for the last century that we do not have to worry about any change. I believe there is a need for research."

(6) "As to the question of availability of Judges, I think, with respect, Judge Leon put his finger on it when he spoke about the need for hands-on approach of the Court. I think if you have a specialised body which deals with the matter, the resort to hands-on approach is easier."

(7) "It is true the Judge President allocates urgent Judges to be on duty, but in a

big division there would not simply be one bankruptcy Judge available. There would be one or two, I would think, it may be more in the Transvaal, and I think that that criticism can be dealt with. Again it is a matter of detail that requires to be worked out."

(8) "As regards the Commercial Court, with respect, I do not agree with Judge Eloff. I think the same argument applies to the Commercial Court. One would want to condemn it as well on the basis of history. Judges for a century have dealt with complicated commercial cases, have competence in those matters, and yet ….. the commercial world asked for this, and supported it whole-heartedly for a good reason, the need for specialised people to deal with the matter."

(9) "I believe it is an over-simplification to say as well, with respect, that insolvency is not complex. True, the bulk of it is non-complex. But those non-complex matters can be as equally and efficiently dealt with by Judges dealing with that type of work to relieve the other Courts of dealing with that type of matter on a routine basis."

(10) "The Bankruptcy Court could as easily conduct a daily chamber Court when they have dealt with liquidations and sequestrations as indeed they did for many years and I am not sure that they still do not do it in Durban when they dealt with, in Cape Town certainly, a daily motion roll dealing with matters of that nature, and maybe that is advisable."

(11) "I think intellectual property is a much smaller area. It is because of the vastness of the area of the Insolvency Law that I think it needs to be specially considered. It affects a great number of people and we have emphasised creditors and perhaps thought in terms of large people. But what about workers and employees who are involved in winding-ups of companies and matters affecting preferences, and matters of that nature, and the need for urgent redress? I am not sure that one should be overly complacent with the present position, and I would stress that one needs to investigate the detail."

(12) "I do not believe, Mr Chairman, that one would delay matters unduly if one were to investigate the matter further and perhaps submit it to the Law Revision Commission for fleshing it out as you say…I agree whole-heartedly that maybe the problem is the lack of detail and understanding as to what we are about. But I would urge the Commission not to simply reject the idea as of no need at all and therefore forget about it and do not do the research.

CHAIRMAN: Thank you. Mr Sackstein, would you like to add something?"

(LVII) **MR ATTORNEY L.M. SACKSTEIN IN REPLY**

(1) "There is just one point I would like to make, and that is I must take issue with Judge Eloff on this question of equating insolvency in a way with, say, admiralty or with intellectual property, why have we not got specialised Courts for those particular matters?"

(2) "Mr Chairman, the vast ambit of suffering that people have to suffer as a result of liquidations of companies and perhaps the insolvency of individuals, I am thinking in the latter instance particularly, farmers, is enormous."

(3) "I have seen it myself. More people, I would suggest, are affected by an insolvency or a winding-up than are affected by, say, a motor collision or a problem in the admiralty division. If we are going to sit back and allow the status quo to remain, I do not think that anybody is going to have a great deal of confidence in the efforts being made in this country to go ahead and improve things."

(4) "I would think that an Insolvency Court, which would of necessity have the effect of not only guiding administrators of the estate, but also assisting creditors of all kinds, can only be applauded by, for example, the outside world in saying this is a step forward."

(5) "If Judge Eloff really believes that it is going to be such a major difficulty technically, then let us face that difficulty. I think that the advantage of having such a specialised Court perhaps outweighs the administrative problems that he has laid before you. Thank you, Mr Chairman.

CHAIRMAN: Judge Eloff?

ELOFF, JP: No, thank you, there is nothing I wish to add.

CHAIRMAN: Would any person present like to make any representations in regard to the matter of a specialist Insolvency Court? Very well, then the Commission will proceed to the next topic to be debated today the desirability or otherwise of a specialist Court for intellectual property matters."

(LVIII) THE HON MR JUSTICE L.T.C. HARMS, JUDGE OF APPEAL

In the course of his oral representations in regard to a specialised Intellectual Property Court made to the Commission at Bloemfontein on 21 August 1996 some of the points made by Harms JA were the following :-

(1) "Thank you for this opportunity. You have in front of you a memorandum which is under my name and that of Judge Plewman. Just to explain the status of the memorandum, it was prepared by Judge Plewman in draft form and settled by me at the request of the Chief Justice. After it was filed, it was adopted by all the Appellate Division Judges. I have been authorised by the Chief Justice to inform you that they whole-heartedly agree with the content of the memorandum."

(2) "If I just may, without trying to sound presumptuous, give the qualifications of the authors. I think it would not be an over-statement to say that Judge Plewman is probably the most experienced intellectual property litigator in this country. He has been involved since the middle fifties in litigation and also as a Judge he has had extensive experience. He is also now the Chairman of the Statutory Advisory Committee which advises the government on these matters."

(3) "Myself, since a baby Junior, I have been involved in this type of litigation. I was the first Chairman of the Advisory Committee until Judge Plewman took over. I am at this stage the Vice-President of the Paris Convention. The Paris Convention is a convention which goes back to the previous century and regulates intellectual property except copyright. The Paris Convention is regulated by the World Intellectual Property Organisation which is an agency of the United Nations. In that context I have acted as chairman of meetings and as chairman of meetings and as the chairman of the African group."

(4) "We both have been partly responsible for the present Patents Act, we were both members of that committee which prepared that Act. We were both involved in the amendments to the Copyright Act and its present state, and myself, I had carried the responsibility for the present Trade Marks Act and the present Designs Act."

(5) "Could I say this, I do not believe that anyone in this country or in the world can claim to be an expert in intellectual property. It is such a wide field at this stage that one has to specialise. It is impossible to keep your hand on all the developments and I became acutely aware of that fact as Chairman of the Advisory Committee. I had the best qualified practitioners in the country on

the committee and we simply had to work by way of sub-committees because the Trade Mark people were not prepared to get involved in Patent matters as an example."

(6) "May I also say that we as Appeal Court Judges have no real interest in whether there is this specialist Court. In other words, we are disinterested except from the point of view that we believe what is the best interest of the judiciary and of the country."

(7) "Save for one very important aspect which was touched upon by Judge Eloff indirectly. If, for example, Judge Plewman or I had been appointed as Judges in a specialist Intellectual Property Court, I am quite certain that we would not have been qualified, assuming that we are qualified, to be on the Appeal Court."

(8) "I do not see how a specialist Judge can be appointed to the Appellate Division. What is he going to do here? In other words, you create or you place highly qualified persons in a little chamber and you limit their expertise and their qualities to that limited Court and you reduce the capability of the Appellate Division to develop the law."

(9) "In general we have in the memorandum expressed severe misgivings about specialist Courts. That is in paragraph 7 onwards. Before reading it to you, I think I should say this, and this is a worldwide phenomenon, but more in this country that intellectual property lawyers really are an incestuous group. I include myself amongst them. We are a small group of lawyers, or have been, and constantly litigating against each other. May I say that amongst the practitioners there are only a very few that are involved in litigation."

(10) "If I could then just read to you paragraph 7 onwards, I might wish to elaborate :-

> *" Then there is something to be said about the concept and desirability of a specialised Court. As far as designs and trade marks are concerned, they have never been dealt with other than by the ordinary Courts. The reported decisions suggest that they were adequately dealt with by (for purposes of this memorandum) non-specialist Judges."*

(11) "May I indicate to you while I am on this point, that whilst as far as Patent work is concerned, it is limited to Pretoria Designs and Trade Mark cases can be heard or most Trade Mark cases can be heard by any Court in the country,

and may I also add the same applies to Copyright cases."

(12) "Then we proceed:

> *" The same must be said of patent matters. With all these cases the final court has been the Appellate Division which has never been constituted on the basis of specialised appointments. We would suggest that the reported cases show that the Appellate Division has, despite this, not found intellectual property matters beyond its competence."*

(13) "May I say that I believe that the present Chief Justice *[Corbett, CJ]* is probably the Judge who has written most judgments on intellectual property, and coming from the Cape I doubt whether he had any practical experience in Patent or other related matters :-

> *" It is accordingly at least an open question whether the field is indeed so esoteric as to call for a specialist Court. The Institute believes that a specialist Court will lead to consistent judgments. We know of one point of law only that in recent memory has given rise to different judgments."*

(14) "I think I started the problem and it is a problem which goes back to a stage prior to the present Act which is a 1978 Act :-

> *" Experience in England has shown that a specialist Judge may also become an idiosyncratic Judge, someone fostering and promoting pet ideas."*

(15) "I would say (that), with all due respect, that my experience as an advocate has also given me rise to believe that, and I am prepared to concede that it also applies to myself. One does have certain ideas if you have a specialist background, and you tend to promote them :-

> *" At the time when effectively one Judge dealt with such matters in England, the standing of the court was not high. This improved when additional appointments were made but we see little prospect of three or four suitable persons being available in this country."*

(and may I add, "and required in this country." The Judge I am referring to there is Judge Lloyd Jacob who was in England the Judge who dealt with these matters in the fifties and, I believe, early sixties.)

> *" Finally there is the question of whether there are now (or likely to be)*

a sufficient number of intellectual property cases to warrant the attention of three or four permanent judges. Our experience in the Transvaal Provincial Division (as judges often designated to sit as Commissioner of Patents or chosen to deal with Trade Mark or design matters), suggests strongly that there are not enough cases to do so…"

(16) "Paragraph 9 :-

" In advancing the above submissions, we of course recognise that judicial "expertise" is a precious and desirable attribute in courts. Our experience, however, suggests that the component of wide trial experience may in fact outweigh technical expertise in any given field, as a qualification for judicial office. That would suggest that the Institute's proposal approaches the desired result by an inappropriate emphasis on the technical qualifications."

(17) " May I say as far as technical is concerned, there are two aspects of technical and the one aspect is scientific knowledge. One does need scientific knowledge to be a Patent attorney. One cannot draft a Patent specification without that technical qualification. But a technical qualification is not a requirement to decide that case, if it ever becomes a case. Because obviously the evidence that has to be led in the Court of first instance, must be led in such a manner that the Higher Court can understand it. So it is no use leading evidence in a limited manner-assuming that the Judge understands what it is all about."

(18) "Paragraph 9 (continued) :-

" In our considered view the more appropriate remedy would be for the institute members to endeavour to broaden or attempt to increase the available pool of trial lawyers with intellectual property experience and, by this means, (however slowly) to raise the level of experience of the judges who will come, in time, to man the ordinary courts of the land."

(19) "Paragraph 10 :-

" May we suggest that the Commission rather consider the abolition of the Commissioner's Court, transferring its jurisdiction to the Transvaal Provincial Division. It has its own administration, duplicating the Registrar's work."

And may I say the office of the Registrar of Patents has serious personnel problems."

(20) "Paragraph 10 (continued) :-

" Otherwise it hardly justifies its existence, save as a relic from the past. We believe that the Judge President, in allocating judges, will (as in the case of tax or water cases) continue to use his so-called expert patent judges for patent cases."

"That raises the question whether the Water Court has a right of existence. This is simply my personal point; and the reason I throw it in is that you have two sets of rules and people never know which rules to follow."

(21) "May I then add some more points on my objection to a specialist Court? As I have indicated to you or has in this memorandum, the pool of qualified persons is very limited. There are very few firms of attorneys in this field. Conflict of interest will inevitably arise which will lead to recusal and I do not say this as a matter of surmise, I know it as a fact because of experience in the Trade Mark office. The Registrar of Trade Marks is entitled to appoint a practitioner or ex-practitioner to act in his or her stead to hear cases, and it has been found that whenever a practitioner is appointed, that the likelihood of a conflict of interest or a request for a recusal is high."

(22) "May I also refer to my personal experience in Water Courts. If only one Judge does Water Court cases it really is very difficult. If you appear for a lay client who loses a case before a Judge in this field, the next time he comes there, he gets the same Judge and he loses again on merit, no problem. He gets there the third time and he sees it is the same Judge once again hearing the case. It just creates wrong impressions and perceptions."

(23) "May I say that I believe that the record of non-specialist Judges in this field on appeal may be better than that of specialist Judges and I think the point that I have made earlier that the leading Appellate Division judgments on Intellectual Property, are by non-specialist Judges."

(24) "There is a so-called specialist copyright tribunal created by the Copyright Act. This tribunal is nothing more than a Judge of the Supreme Court. It has existed at least since 1965; and in the thirty years has sat twice."

(25) "There is another problem, and that is, as I have indicated to you, that other divisions have jurisdiction in Design matters, aspects of Trade Mark and Copyright. Let us assume you have a simple copyright dispute in the Cape, your specialist Court will be presumably in Gauteng. The issue is simply the question of quantum of damages. It may be R50,00, it may be R1 000,00, it may be R5 000,00. Must, for that case, the litigants litigate in the specialist Court in the Transvaal? I do not believe that that is justified."

(26) "**CHAIRMAN:** Then of course there is also the risk of overlap. You may have a Trade Mark and passing off in the same action.

HARMS, JA: Yes, so we will have to designate passing off cases and unfair competition cases as Intellectual Property cases."

(27) "Copyright is often a criminal matter, infringement of copyright. It is dealt with in the Magistrate's Court. Must this also now go to the specialist Court? If a Magistrate can deal with it in a criminal case, I presume an ordinary Judge can deal with it in the Supreme Court. As I suggested there are cases which only justify a decision of the Small Claims Court and as you have pointed out correctly, Mr Chairman, there are problems with concurrent or other jurisdiction."

(28) "I presume that you will be referred to the United Kingdom. They have introduced a County Patent Court. The reason for that Court is that the cost of Patent litigation in the High Court was unacceptably high and for that reason a County Patent Court was introduced. The Court was very much criticised for the first few years of its existence, but it seems that at this stage it is on its feet. But there is no County Copyright Court, there is no County Trade Mark Court."

(29) "If we take a country as large as the United States, Patent infringement cases are even heard by juries, but Patent cases are federal cases and therefore, because of a conflict in appellate jurisdiction, they have recently introduced a specialist Appeal Court for all federal Patent cases."

(30) "The real reason behind this is that very few Patent cases reach the Supreme Court of the United States because they are not of constitutional importance and because one circuit in the United States is not bound by judgment of another circuit."

(31) "In other words, the Patent may be found invalid in one circuit and not in another circuit, the same Patent. For that reason, and for consistency, they have introduced this one Court. But even in the United States you do not find a specialist Intellectual Property Court. Copyright and Trade Marks are dealt with in the ordinary course of events."

(32) "Mr Chairman, lest I be misunderstood, I do not wish to suggest in any way that the Members of the Institute are not qualified to be appointed to be Judges. I believe they are highly trained, actually I know it and in my own experience

they are of the best attorneys and they are clearly suitable for appointment as Judges. I need only mention one person who is no longer with us, and that is the late Dr Jan Steyn who probably will be known to you, and to those behind me. So that is not our point."

(33) "Our real point is this, that we do not believe that there is place for a separate Court, either on principle or on practicality. We do not believe that the work, all the work of the Registrar which is administrative or deals with simple matters, justifies a separate Court."

(34) "We must consider the question of costs. As I said Patent litigation is notoriously expensive. Copyright and other cases also tend to be very, and Trade Mark cases tend to be very expensive and a specialist Court will only increase, in my view, that tendency. For the rest, I stand by what is in the memorandum.

CHAIRMAN: Thank you very much, Judge Harms. Judge Schutz, would you favour us with a few brief observations?"

(LIX) THE HON MR JUSTICE W.P. SCHUTZ, JUDGE OF APPEAL

In the course of this oral submissions in regard to a specialist Intellectual Property Court made to the Commission at Bloemfontein on 21 August 1996 some of the points made by Schutz JA were the following :-

(1) "I will speak very briefly. I would endorse what has been said both in the memorandum presented by my two colleagues and also what Judge Harms has just said. I must acknowledge at once that my experience in these fields, particularly in the fields of Patents and Trade Mark, is much less than either of the authors."

(2) "A few points I would like to emphasise. Experience at the Bar does teach you that having the same face on the Bench day in and day out and year in and year out, can be dispiriting. I think it is right that both practitioners and lay clients should have new faces to deal with at times."

(3) "Frequently emphasis is based on the sometimes technical complexity of particularly Patent cases. I think when any outsider first approaches these arcane arts or black arts, you might call them, he tends to be intimidated as I was in the beginning, but I think if a man has had experience as particularly an advocate, he has the means for overcoming his ignorance and getting on top of these things."

(4) "Another point I would like to deal with, it seems to me wrong that, for instance, copyright cases, which are sometimes small, should have to go all the way up to the Transvaal or to Gauteng as I do not suppose that all the regions could possibly support their own specialised Courts."

(5) "Another point that has been touched on and you, Mr Chairman, raised it, is that you often find more than one branch is relied upon, you might have both a Patent claim and a Trade Mark claim or a Design claim in the alternative. What I would like to add is that you frequently find a last weary alternative which is the common law of unlawful competition. I do not know whether that action is to be taken out of the hands of the Supreme Court and the Magistrate's Court and also placed before this Court. That is really all I have to add and, as I say, I support what has been said so far. Thank you."

(LX) MRS ATTORNEY E.D. DU PLESSIS, PRESIDENT OF THE LAW SOCIETY OF THE TRANSVAAL AND VICE-CHAIRPERSON OF THE STATUTORY INTELLECTUAL PROPERTY ADVISORY COMMITTEE

In the course of her oral submission in regard to a specialist Intellectual Property Court made to the Commission at Bloemfontein on 21 August 1996 some of the points made by Mrs du Plessis were the following :-

(1) "I am a member of the Institute of Intellectual Property Law. I do not have their mandate to speak on their behalf today. I think I must be one of the older members of the Institute having qualified first as a Patent agent in 1963, and as an attorney in 1965."

(2) "I practised with a firm of Patent attorneys in Pretoria since that time. My practice was interrupted for a substantial number of years when I joined the Law Faculty of UNISA and lectured in Mercantile Law and specifically also in Intellectual Property Law and eventually became an Associate Professor. I resumed my practice with the firm where I had been from the start in 1990."

(3) I am also involved in matters of general law in the sense that I am involved in the activities of the organised attorneys' profession. You have mentioned, Mr Chairman, that I am the President of the Law Society of the Transvaal. I serve on the Council of the Association of Law Societies. I am the Vice-Chairperson of the Statutory Intellectual Property Advisory Committee of which Judge Plewman is the Chairman. I am also the Chairperson of the Patent Examination Board which is a statutory body responsible for taking down the examinations that candidates have to pass in order to become Patent attorneys. I am involved also in a variety of other organisations in the field of Intellectual Property Law. I am the current President of the Association for the Protection of Intellectual Property, South African Group of the international body. In that capacity I am exposed to the latest developments in thinking in the area of Intellectual Property Law also in other countries."

(4) "I am the Chairperson also of the Association of Law Societies' standing committee on Intellectual Property matters. I do not have their mandate today. The standing committee will make a written submission and I believe we have until the end of August to supply our written submission and that will be done."

(5) "Mainly, Mr Chairman, I would like to deal with three points today. First of all the justification for the establishment of an Intellectual Property Court; secondly, the constitution of the Bench of such a Court, and thirdly, as a minor

point, the right of audience before such a Court. I would also like to respond briefly to some of the points made by Mr Justice Harms and Mr Justice Schutz, and finally, I would like to record my appreciation for the opportunity of appearing before this Commission today."

(6) "On the matter of the justification for the Intellectual Property Court proposed by the Institute, certainly the two persons who have spoken against that proposal are eminent jurists and eminent persons in the field of Intellectual Property Law. I hesitate to differ from them, but I do. In the first place what has been mentioned to justify the existence of special IP Court, if I may call it that for the sake of brevity, is the number of Intellectual Property cases before our Courts."

(7) "In the written memorandum by Judges Harms and Plewman, supported also by the other Appeal Court Judges, there is a statement that the judgments by the Registrar of Trade Marks should be….(?). I do not think that is in fact correct. I believe it is an unhealthy state of affairs where an administrative official like the Registrar of Trade Marks at present has the authority, in terms of the Trade Marks Act, to exercise a fairly extensive and substantial judicial function."

(8) "He does not only decide on simple matters such as extensions of time. He does that too, and we have no quarrel with an administrative person exercising that function; but he also has the right, for example in terms of Section 27 of the Trade Marks Act, to hear matters as an alternative to the Court of law regarding the removal of a Trade Mark from the register on the basis of non-user. There are at least two further provisions in the Trade Marks Act which, at the option of the litigator, the Registrar of Trade Marks can be requested to hear the matter like the Court of law."

(9) "In fact he is given a status in terms of the Trade Marks Act very similar to a single Judge sitting in a Supreme Court. My contention is that that is in fact not a healthy state of affairs. The principle of the separation of administrative and judicial functions I think is an accepted one in the Ministry of Justice and I believe it is one that should be supported."

(10) "**CHAIRMAN:** Before you develop that theme, as matters stand at the present, is there a measure of dissatisfaction with the standard of judgments handed down by the Registrar when he deals, for example, grants an order for expungement?"

(11) "**MRS DU PLESSIS:** A number of points of criticism. There was a time

when there was an inordinate delay in the giving of judgments. In fact the delay was so severe that the Institute of Intellectual Property Law had to step in and provide assistance to try and work through the backlog of judgments."

(12) "Mr Justice Harms has mentioned that there are personnel problems within his department. The Registrar is severely burdened. It is expected that he will become even more burdened once South Africa joins certain of the international Conventions like the Patent Co-operation Treaty to which South Africa is in the process of acceding; and a convention such as the African Regional Intellectual Property Organisation where accession is also being considered. In that case my submission is that the Registrar will have no time to deal adequately with his judicial functions."

(13) "One last point on that, Mr Chairman, and that is that the decisions by the Registrar of Trade Marks often find their way to international litigators. That is where is decisions are in fact considered. And I think that is where consistent judgments is what the Institute would like to see. Not, with respect to Judge Harms, in regard to judgments given by the Judges of the Supreme Court, but to these very important first-level judgments which have the effect of a decision by a single Judge, but given by an administrative person."

(14) "Mr Chairman, permit me one last point in regard to the Registrar of Trade Marks' position. I think he is in a much greater perilous position in regard to possible conflict. A person who has to take administrative decisions in regard to matters before him and who also has to sit in a judicial function, I think in fact is exposed to criticism for a perceived lack of impartiality."

(15) "The second point that I would like to make, Mr Chairman, is that the number of Patents, Trade Marks, Design cases filed has been discarded by most others as a relevant factor to get an indication of the need for an Intellectual Property Court."

(16) "I do not believe that that is a correct approach. The number of cases filed must of necessity also have an influence on a number of matters which come to be litigated upon and even if the proportion of matters litigated should remain the same, if your filings go up, your litigated matters should also increase in number. And certainly there has been a tremendous increase in filings over the last year or so, especially in Trade Marks where the increase in fact is counted in thousands. About 12,000 Patent applications are filed per annum and Trade Marks more than that, up to about 16,000 my information…(intervenes).

CHAIRMAN: To what do you ascribe the increased volume in the field of Trade Marks?

MRS DU PLESSIS: I think it is South Africa's acceptance into the international arena. We have become a more attractive trading partner and a more attractive partner in other respects too."

(17) "I think, Mr Chairman, that we have an opportunity here to speak in favour of an attempt to rationalise and formalise what we already have in practice in the field of Intellectual Property. Reference has been made to the Court of the Commissioner. We believe that the Court of the Commissioner has executed its functions in an admirable fashion. But at the same time there are peripheral areas where a merging of judicial functions could comfortably take place."

(18) "Judge Harms has referred to the copyright tribunal. Admittedly that tribunal has only heard very few cases, but the tribunal had very limited jurisdiction only to adjudicate on matters pertaining to copyright licences. Now, if a Court is to be established where the jurisdiction will be open, I am convinced that also from the copyright angle, many more cases will be heard before such a Court where the litigators will believe that a Judge, with experience in Intellectual Property matters, will be effectually in a better position also to hear a copyright matter, although it is in an unrelated field of the law."

(19) "There are certain basic principles which you find in each of the related Intellectual Property fields and a person well versed in one field, I think, is in a good position also to deal with a related field."

(20) "There are also other peripheral areas where a registry or a registration office is situated in Pretoria. Plant breeders' rights is a category of registered rights where registration takes place through the Department of Agriculture, but in Pretoria. Litigation in that field would be a logical part of an Intellectual Property Court's functions. The Heraldry Act has an official registry in Pretoria. As I have said, and the most important thing is that the Registrar of Trade Marks' judicial function should in fact be separated from his administrative function."

(21) "I think one should never lose sight of the fact that the exclusive jurisdiction which is proposed for the Intellectual Property Court would only be in regard to matters where there is a registration office in Pretoria. There is sound reason for promoting exclusive jurisdiction in that field simply because the Registrar, whether it is the Registrar of Patents, of Trade Marks, of Designs or of Cinematograph Films, very often have to give effect to a Court Order; and

to have the litigation in a centre remote from where the registration office is situated, I think is not a wise approach."

(22) "I have seen an argument in one of the written papers that to create an Intellectual Property Court, the seat of which will be in Gauteng, probably in Pretoria, would lead to a concentration of Court power and Court activity in Pretoria or in Gauteng."

(23) "I cannot understand why that would necessarily have such negative results. Mr Chairman, there really is no mystique about Intellectual Property Law. There is, however, a substantial amount of additional training which is required to make a practitioner proficient in that field."

(24) "The idea is not to avoid or to promote decentralisation of Intellectual Property Court hearings, but rather to promote access to the profession and access to the Courts. If a Court in Pretoria could improve the access by being a more cost-effective and a more effective judiciary, why would it be negative in a sense of leading to a concentration of power?"

(25) "I think one must bear in mind that applicants, wherever they are situated, in South Africa or in other countries, have in any case appointed a practitioner either based in Pretoria or in Johannesburg at the time when the Intellectual Property Right was registered at the Patent or Trade Marks or Designs office. So there is already a practitioner within easy reach of the seat of the Court who has had the opportunity of becoming familiar with the Intellectual Property in question. So there would not, to my mind, be any great disruption of saying to the same man, who has handled the registration, now you also handle the litigation which arises on the basis of such a registration. I cannot see that that would create any practical difficulty. To the contrary, I think it would in fact make it easier."

(26) "**CHAIRMAN:** Why do you suggest it would be more cost-effective?

MRS DU PLESSIS: Mr Chairman, I think that at the end of our deliberations it would appear that there should also be audience for Patent practitioners in the Court; that already exists, but that should be promoted in future. I think there has been a change in the profession, there has been a change in the attitude of practitioners."

(27) "It is true that Patent practitioners have not in the past made use of their right of audience in the Court of the Commissioner. It was part of a culture that

existed in our country. Attorneys never thought in terms of appearing themselves in a Court of law. Now that culture has changed and I think we will see in future that more and more Patent practitioners will make use of their right of appearance in the Commissioner's Court and eventually in an Intellectual Property Court an hopefully that will have a cost-reducing effect."

(28) "**MR MALULEKE:** Mrs Du Plessis, could I just interrupt here a while? You mention something which I thought was a little interesting. You spoke about the need to make that area of practice more accessible. You spoke about it only in one sense, about the Court being accessible. One of the criticisms which has come out from the other papers is that it has become an exclusive cartel of practitioners. Essentially you are talking about creating a special Court for 115 exclusive attorneys and maybe ten exclusive advocates. What is being done to make even that more accessible, essentially?"

(29) "**MRS DU PLESSIS:** Mr Chairman, their exclusivity has a bearing only on the qualifications that are required to practice as a Patent attorney. We have done a lot, I think, to make the profession more open to intended participants. The examinations are conducted on the basis of lectures which are given by the Institute of Intellectual Property Lawyers, lectures which are offered by them at a minimal cost to people who are interested in joining the profession. We have done away with papers written through the Patent Examination Board where equivalent qualifications can be achieved at existing educational institutions. In the past one had to either pass certain papers through the Patent Examination Board or apply for exemption. Now we have said a person who comes with a technical qualification, be it a university degree or a three- or a four-year course at a Technikon, automatically is eligible to comply with that aspect of the qualification."

(30) "But the exclusivity has only to do with qualification and training, it has to do with nothing else. I have personally witnessed how the number of student members of our Association has in fact grown from the time when I was a student member up to where we are now, where the young people in fact nearly exceed in numbers, the number of fellows, so there has been a substantial increase. The firms also, as you know, try and train people through articles and the number of candidate-attorneys in the firms has also increased considerably over the years since the time when I was a young candidate-attorney.

MR MALULEKE: Thank you."

(31) "**MRS DU PLESSIS:** I think when the Judge President of the Transvaal referred to the Commercial Court, he said many things which I thought were

very applicable to an Intellectual Property Court. He referred to the complexity of commercial issues where a suitably experienced Judge could deal relatively easily with concepts such as bills of lading and whatever. I think the same argument would apply also to the field of Intellectual Property Law where certain concepts are common to the different disciplines and a person with experience and suitable qualifications in that field would find it easier to deal with the concepts as they come up."

(32) "South Africa has become very much part of the international arena in recent years. We have ratified the package of gut agreements and instruments and one of those instruments is an agreement on Intellectual Property. It is referred to usually as the TRIPS Agreement, the longer name is the Trade Related Aspects of Intellectual Property Rights. Not only does that agreement prescribe certain minimum requirements in regard to the protection of Intellectual Property that has to be afforded, it also has a number of provisions dealing with the enforcement of Intellectual Property rights."

(33) "If South Africa has to comply with the requirements of TRIPS, I think by having a special Intellectual Property Court it would be in a better position to make sure that all of the minimum requirements in regard to remedies are in fact being applied on a regular basis by the Courts."

(34) Brief reference was made to the aspect of criminal jurisdiction in regard to copyright cases. I think the criminal aspect is a very difficult one in the copyright context and I know that training sessions had to be arranged for Magistrates and for the police to deal adequately with criminal matters in regard to copyright. I see no reason why an Intellectual Property Court would not be able to handle with greater efficiency the criminal aspect in regard to copyright infringement."

(35) "What I do know and understand and accept after having heard the other submissions here today, is that the constitution of the Bench will be the greatest problem that we will be facing in regard to such a special Court."

(36) "I know that the Institute of Intellectual Property Law has expressed a preference for a single president of the Court, a permanent appointment in the person of a single president or Judge."

(37) "I am not certain that that is the route that should be followed. I believe that a panel of designated Judges would be a more practical way of handling Intellectual Property matters. It would also fit in, I believe, with the model

which does exist in the Commercial Court."

(38) "I am not convinced that the pool from which adequately qualified and experienced Judges could be drawn is all that small. First of all the number of Intellectual Property attorneys have in fact increased. If one bears in mind that in most firms of Patent attorneys there is a very definite retirement age of 60 years, and a cut-off age of 65 certainly, I can think of a number of experienced practitioners who have recently retired from their firms; and if one can think of 5 or 6 of 7 such persons, I believe that there is in fact a pool in the field of the attorneys, the Patent attorneys, where one could look for possible appointments."

(39) "The same applies to the advocates. We have heard that the number of advocates dealing with Intellectual Property cases has in fact increased. So my contention is that if one should look at the combination of available Judges, available advocates and available Patent attorneys, there would be a pool sufficient to provide a workable and effective panel of persons to deal with Intellectual Property matters."

(40) "What I do believe, Mr Chairman, is that the model that one should derive at for an Intellectual Property Court should be a South African one which addresses the needs of the field of law in our country. I think it is a good thing to look at foreign models. Certainly the picture is not always encouraging."

(41) "There was a time when the British Single Judge County Court did not work adequately, but we need not make the same mistakes that were made in other countries."

(42) "I think, one must bear in mind that the South African registration offices are non-examining registrations. A patent application is not examined for merits in this country. For years the onus has been also on the Patent practitioner to ensure that the application, which goes forward for acceptance and grant, is an application that can stand up to scrutiny."

(43) "The right of audience in a Court will be a difficult problem to approach. I cannot think that any interested body or person would ever venture to say that the right of audience should be restricted to Patent attorneys only in regard to all matters. That would not be a fair approach, but certainly in Patent matters, in regard to Patent matters there is merit in saying that the right of audience should be restricted to Patent attorneys."

(44) "At the moment Patent attorneys or advocates have the right of audience in the Court of the Commissioner. Obviously advocates will always have the right of appearance in any branch of the Supreme Courts and that I do not think anybody will dispute. The only thing that one would have to look at is to investigate and consider whether attorneys other than Patent attorneys should be given a right of audience in regard to Patent matters where there are, and I think that is accepted, issues which are peculiar to that particular field of the law."

(45) "**MR MALULEKE:** On that point, Mrs Du Plessis, I do not quite follow. Are you saying that an attorney with an LLB degree and an advocate with an LLB degree, you would make an exception that the one can be heard without any further qualification and the one cannot be heard without further qualification?"

(46) "**MRS DU PLESSIS:** Mr Chairman, through you, the advocates have the right of audience and I do not think that we can ever remove that and I would not even think of suggesting that. But when it comes to the attorney, what I am saying that in a Patent matter perhaps there is merit in saying that the attorney should have this additional qualification, and that is, he should be a Patent attorney. But as I said at the start, I think that is possibly a very contentious aspect of the Court that will have to be addressed."

(47) "Mr Chairman, a number of points have been raised by the previous persons addressing the Commission…I think I have addressed most of them in what I had to say. The one point that was mentioned by Judge Schutz is the argument about concentration of power in the hands of a few Gauteng practitioners. I think the important thing that one should not lose sight of is something which I have mentioned and that is the owner of Intellectual Property in most cases will have briefed his attorney in Pretoria or Johannesburg long before litigation arises."

(48) "In regard to common law issues the passing-off cases, the trade secrets cases, the confidential information cases, the suggestion there is only that the Intellectual Property Court would have concurrent jurisdiction. It would, in some cases, be practical for a litigator to use an Intellectual Property Court also for that type of subject matter, but I do not believe that there is merit in advocating exclusive jurisdiction in regard to common law Intellectual Property matters."

(49) "The volume of work is already concentrated in Gauteng and not because of any reason other that that is where the registration office is situated. Because one has to have easy access to the registration office in order to do the work,

the attorneys practise close to the registration office. There have been attempts over the years to establish Patent attorney firms in other centres. We have branch offices in Cape Town and in Durban, but those branch offices cannot function effectively unless they have an address in Pretoria because one has to visit the Pretoria registry office of the Registrar of Patents, Trade Marks, Designs on a daily basis and it is simply not practical to practise as a Patent attorney elsewhere than close to the registry."

(50) "**MR MALULEKE:** You do not want to compare this to company law attorneys? I mean the Registrar of Companies is in Pretoria. What would be the problem about the one registering a Patent if I am practising as a Patent attorney in Durban? Why would I need a correspondent in Pretoria, why must it be so?"

(51) "**MRS DU PLESSIS:** I think the Patent attorney's work entails not only sending a document through to the Patent office for registration, but he has to inspect files at the Patent office. He has to carry out for example a search on behalf of his client. He can only search at the moment because the Patent office records have not yet been computerised."

(52) "He can only search by actually visiting the Patent office, searching manually through the index cards, physically drawing the files and inspecting the hard copies of the specifications inside the files. Once computerisation has been achieved, I think that position would change. At the moment it simply is not feasible to practice as a Patent attorney without having a person close to the registry to carry out certain functions. Thank you, Mr Chairman.

CHAIRMAN: Thank you very much indeed. Mr Le Roux, are you prepared to say something at this stage?"

(LXI) MR ATTORNEY M. LE ROUX, MANAGING PARTNER OF D.M. KISCH, INC., ON BEHALF OF THE SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY

In the course of his oral submissions in regard to a specialised Intellectual Property Court made to the Commission at Bloemfontein on 21 August 1996 some of the points made by Mr le Roux were the following :-

(1) "**MR LE ROUX:** I am a partner in one of the Intellectual Property firms in Johannesburg and I serve on the committee which was mandated to put the Institute's proposals to your Commission. Unfortunately we had relatively short notice and I am the only person on that committee here today representing the Institute."

(2) "**CHAIRMAN:** If at the end of your address you feel that you would like to amplify certain matters in writing having consulted with the Institute, you are free to do so, subject to the condition that such copies be made available also to the other people who have addressed the Commission today.

MR LE ROUX: As the Chairman pleases…There are just three points I would like to make."

(3) "The first is the broad approach of the Institute of Intellectual Property Law, the second is the question of jurisdiction and the third is the question of appointment to a specialist Court if it should be established."

(4) "Mr Chairman, the proposals of the Institute of Intellectual Property Law are not based on self-interest. The work that the members of the Institute do, they will continue to do irrespective of whether a special Court is established or not. The approach of the Institute is in the interest of South Africa. As a background to that statement, I can say that there is absolutely no doubt that Intellectual Property Law plays a vitally important role in the industrial world."

(5) "The recent significant clash between the United States of America and mainland China was based entirely on transgression of Intellectual Property rights."

(6) "If our country is to flourish, we believe that Intellectual Property must be nurtured and protected in this country and the establishment of an Intellectual Property Court will create a significant signal to the industrial countries that

will encourage them to initiate and continue investment in this country."

(7) "**LEON, J:** Well, are there no more pressing problems that need to be addressed before we come to an Intellectual Property Court such as the rampaging crime which is taking place in the country at the moment which seems to have spiralled out of control?"

(8) "**MR LE ROUX:** Mr Commissioner, I do agree with that point, but I believe matters like crime and other aspects of our society are separable from the issue presently before us. I would say, and continue to say that the establishment of an Intellectual Property Court will be a significant inducement to overseas companies who are on the threshold or who are perhaps considering investment in this country."

(9) "If I may move to the jurisdictional point, the point I would like to make is that the majority of Intellectual Property work consists of Patent work and Trade Mark work. In the case of Patents the Transvaal Provincial Division already has exclusive jurisdiction; and in the case of Trade Marks it has significant jurisdiction to the point of exclusivity, but not quite. That is in terms of the definition of Court in the Trade Marks Act."

(10) "So the de facto position is that the Transvaal Provincial Division is doing the greatest amount of work in the field of Patents and Trade Marks, and that, to my mind, leads to two considerations."

(11) "The first, Mr Chairman, is that, as the Court already has substantial jurisdiction in those two areas, what the Institute is asking is merely to expand the position slightly, to round it off, and you will have an Intellectual Property Court."

(12) "The second point, and this perhaps was not clearly made in our first submission, is that we are asking for exclusivity only in certain areas, and particularly where the law provides for a registry in Pretoria, not necessarily Pretoria, but at the moment it is in Pretoria."

(13) "That does not prevent a legal system whereby concurrent jurisdiction is conferred on the other divisions of the Supreme Court in whatever area that may be needed, for example, in Copyright law or Design law or any other area of law where it is considered competent to do so. So what the Institute is seeking is not an all-encompassing specialist Court with exclusive jurisdiction

in all areas of Intellectual Property Law.

CHAIRMAN: Well, just enumerate for us precisely the matters in regard to which exclusive jurisdiction would be entertained by a Specialist Court?"

(14) "**MR LE ROUX:** In our submission we referred to five current Acts which we thought would be suited for exclusive jurisdiction…Mr Chairman, those are the Patents Act, the Trade Marks Act, the Designs Act, the Registration of Cinematograph Films Act…

MRS DU PLESSIS: Only four.

MR LE ROUX: Only four, but our submission does not exclude the provision of concurrent jurisdiction in any area of the law with other divisions of the Supreme Court."

(15) "**CHAIRMAN:** And if there is overlapping between two causes of action, how would jurisdiction be determined?

MR LE ROUX: Mr Chairman, if one could take an example that happens in many cases, a Trade Mark cause of action coupled with a passing-off cause of action, what we say is that a specialist Court will have to have jurisdiction not only under the Trade Marks Act, but also under the common law to deal with the passing-off part of the action.

CHAIRMAN: In the example you have quoted, would the plaintiff be compelled to institute action in a Specialist Court?

MR LE ROUX: As we see it in terms of our proposals, yes."

(16) Mr Chairman, my last point is the question of appointment of Judges to serve on a specialist Court. In the Institute's submission we made reference to a permanent appointment, but we also referred to alternatives.

CHAIRMAN: A panel?

MR LE ROUX: As the Court pleases."

(17) "Mr Chairman, the appointment of a permanent Judge does not find favour with many members of the Institute for reasons such as those advanced by Judge Harms this morning. I believe that I am able to say that the Institute would support the notion or the concept of a pool of Judges from whom may be drawn suitable candidates to hear suitable matters. In our memorandum of

28 June, which followed our initial submission, we alluded to that possibility. Thank you, Mr Chairman.

CHAIRMAN: Mr Le Roux, the Commission wishes to thank you for your attendance here today. I repeat that if you wish to amplify them subject to the condition I have mentioned, your Institute is free to do so. Mr Justice Eloff, would it be convenient for you to say your piece at this time?"

(LXII) **THE HON MR JUSTICE C.F. ELOFF, JUDGE PRESIDENT OF THE TRANSVAAL PROVINCIAL DIVISION, BY WAY OF REPLY IN REGARD TO THE SPECIALIST INTELLECTUAL PROPERTY COURT**

(1) "**ELOFF JP:** Thank you, yes. May I begin again by placing some credentials of my own before you. When I was appointed a Judge I had very little exposure, if any, to Patent disputes, but the then Judge President saw fit to have me hear these matters and over the 23 years that I have been on the Bench I have sat over a large number of Patent disputes and presided over Full Bench Appeals from such decisions."

(2) "I say this with hesitation, but the problem with Patent disputes is that the people who practise there tend to clothe it in with an air of mystique, becomes very difficult, it is just their little preserve. It is difficult, but not necessarily in relation to the applying of the law. It is difficult to understand certain Patents, the chemistry, what makes the Patent work but…It is not necessary again that a specialist Court should be established to hear this type of case."

(3) "Any Judge is capable of hearing these disputes. It is true that in certain instances, as in my own case, I came onto this field as a novice. But by and large the Judge President, in my own case I do too, endeavours, when there is a complicated Patent dispute or Intellectual Property dispute, to assign the case to those Judges who have a lot of experience in that."

(4) "I refer to the closing remark of the previous speaker of a pool of Judges who would be assigned to hear these cases. That is exactly what happens in practice in Transvaal in the division which I administer. There is a pool of Judges who are known to have moved in that field a great deal. When a Patent matter comes up I normally endeavour to have one of those Judges preside in that case. By creating statutorily a specialist Court you are not improving on the situation at all."

(5) "On the contrary, you are going to create a large number of practical problems which presently can be avoided by maintaining the present system. In response to questions from yourself, the previous speaker said there should be exclusive jurisdiction in relation to matters dealt with under the Patents Act, Trade Marks Act, Designs Act and in relation to cinematograph films."

(6) "If that is the position then and there is a specialist Court with head quarters in Pretoria, if there is a Trade Mark dispute emanating from Kimberley or East London or Port Elizabeth, they have to come here."

(7) "Very often these matters have to be brought as matters of urgency. The man who wants to protect his Trade Mark wants to go to the Motion Court Judge rapidly in a matter of hours. Now he has got this cumbersome requirement to go to the Court which holds the exclusive jurisdiction."

(8) "Also experience shows that the moment you vest a certain tribunal with exclusive jurisdiction, you create problems. There is sometimes the problem of whether that Judge can hear that matter. We refer to the case where a person's right is founded not only on his Trade Mark, but on passing-off which is a common law remedy. You have a similar position in regard to other fields of Intellectual Property and you are going to have problems in regard to deciding whether to sue in this Court or that Court or the other Court. One should avoid that."

(9) "There is also another feature of the demand for that type of Court. In relation to Patent disputes, I have just completed the duty roster for this third term starting on October 7. There are two Patent cases set down for that, each running for two days. What am I going to do with my Patent Judge in the other nine weeks of the term?"

(10) "In regard to Trade Mark disputes, there was a substantial case, the MacDonald's dispute which went on for a week. That is a special case, and again there, may I interrupt to say, that I assigned this case to a Judge who moved in the field of Trade Marks a great deal when he was in practice at the Bar. But it will be difficult to keep occupied such a Judge fully if he has to hear Patent matters."

(11) "It is a rough guess, I did not have adequate time to give you exact figures, but I would say at the end of this year, possibly two weeks of hearing time would have been taken up by Patent cases. If on the present system a Judge who has to hear a Patent matter, which is set down for ten days, if on the second day, as very often happens, the case collapses or it is settled, then on the present system I can at once put him to use on other matters, trials, criminal cases, Motion Court. If he has got exclusive jurisdiction, presumably he does nothing but that sort of thing."

(12) "I want fully, with respect, to endorse the views put forward by Judges Plewman and Harms. They, with respect, accord with my own perception of the matter. And I particularly emphasise that there is no need at present for that type of specialist Court. If I may add to that and repeat a point I made in relation to Insolvency Court, there are numerous fields of endeavour in law

which are very complicated…We must not move into the field of specialist Courts, not at this stage. It is not required."

(13) "I want to emphasise too the dangers of a single person with his own idiosyncrasies presiding over a Court. I had the experience once of keeping a Judge with skill and experience in the Tax Court. I received a lot of criticisms because he had his own particular perceptions on particular points of law, and I found there too it was necessary to spread the work, tax work amongst the other Judges."

(14) "I would like to respond just briefly to one or two points made by Mrs Du Plessis. She spoke about the Registrar and difficulties with the judicial functions of the Registrar. There is of course a right of appeal to the Supreme Court; and that is often exercised. I try to arrange these so so that the decision can be made rapidly and again by Judges who are known to have had experience in these matters."

(15) "Mrs Du Plessis was asked whether an experienced Judge will move quicker. With respect, my experience in these matters has been that the delays are brought about by the lawyers dragging out a case, not by a Judge being more knowledgeable one than the other in the field of Intellectual Property Rights cases."

(16) "Mrs Du Plessis touched on the question of the right of audience of Patent lawyers. The point was made, and in my experience too, that over the years attorneys have had the right of audience in a Patents Court but they did not exercise it. I think even Dr Jan Steyn, who was thought of to be one of the most skilled Patent lawyers in the country, hardly ever went into Court. I have raised this with attorneys: Why do you not exercise that right? They say they have not got the time, and that is perfectly true."

(17) "Lastly, this is a small matter, but I should deal with it, Mrs Du Plessis dealt with Magistrates dealing with copyright cases and she said that a Judge should deal with that. That is just not on, Judges are busy enough with very serious crime. It will be a waste of judicial manpower for Judges to sit on these copyright prosecutions."

(18) "In summary then, I contend that there is no need for a specialist Court like this. There was no indication of any shortcoming in the system, any complaint of the quality of justice dealt, presented under the present system and I urge that this request should be refused.

CHAIRMAN: Thank you very much. What we have heard today has been of great assistance to the Commission. Just so that we miss nothing, may I enquire briefly of each of the previous speakers whether he or she would like to add something, Judge Harms?"

(LXIII) **THE HON MR JUSTICE L.T.C. HARMS, JUDGE OF APPEAL, BY WAY OF REPLY IN REGARD TO THE SPECIALIST COURT FOR INTELLECTUAL PROPERTY**

(1) "**HARMS, JA:** Thank you. I would just place some matters in proper perspective. As far as the Registrar of Trade Marks is concerned, the reason these so-called judicial functions or truly judicial functions have been entrusted to the Registrar, as is the position in the United Kingdom and I believe in most Commonwealth countries, is because the Registrar in deciding many of those cases, has to have access to the records and other cases because it often turns on a comparison between two or three or four Trade Marks. Only the Registrar will know what is the position in the other cases."

(2) "The position of the Registrar and his or her ability to decide these cases was not raised when the new Trade Marks Act, which was before Parliament in December 1993, was considered. Everyone was satisfied at that stage over a period of a number of years that the Registrar can perform these functions."

(3) "If we take 120 applications heard by the Registrar, it is not only the Registrar, there are deputies, there are delegated persons who hear these cases. Let us assume half of them are not simply formal of nature, that would mean, assuming it is a simple application, usually a very few pages, that you have to consider. Whether Trade Mark "Dive" for soap is in conflict with "Dove" for soap. I mean it does not involve paper work. Even if we refer all these cases to the Supreme Court, it will not increase the burden on the Supreme Court in any way."

(4) "Mrs Du Plessis mentioned that Plant Breeders' Rights Act or the Heraldy Act and then there was also the registration of Cinematograph Films Act. These Acts give rise to no litigation, I think it is as simple as that."

(5) "I think it is also important to note the difference between a Patent attorney or a member of the Institute's performing registration functions and litigation functions. Registration functions are obviously limited to Pretoria, but litigation functions not."

(6) "Let us take the simple example of this glass. This glass may be the subject of a registered design, it is registered in Pretoria, someone in Cape Town copies this glass, he makes 100 copies. The defendant is in Cape Town, he has not got an attorney in Pretoria. Now he must appoint an attorney in Pretoria. The plaintiff may be in Cape Town, now he must use an attorney in Cape Town to

instruct his attorney in Pretoria; and back and forward it goes. So to say that quick costs are not involved is, I submit, not correct."

(7) "Just something about TRIPS. The TRIPS Agreement is an agreement between governments. It obliges this country to comply with certain minimum requirements relating to Intellectual Property. I spent quite a part of my life in trying to get our laws to comply with TRIPS and I think know what is in TRIPS. There is nothing as far as litigation is concerned in TRIPS. It does not create new rights which are non-existent in this country. Those provisions are really for countries who have no proper Court system."

(8) "As far as accessibility to the Courts is concerned, may I say that especially in the Design field, the Designs Act was so amended to make it easier for the small businessman, for instance, to get registration for a functional design. We even considered the possibility of giving the Magistrate's Court jurisdiction for hearing Design cases, but in the end we decided against it. So I find it strange that at this stage it is considered that only the Appellate Division can do it. Thank you, that is all I wish to add.

CHAIRMAN: Thank you, Judge Harms. Judge Schutz?"

(LXIV) **THE HON MR JUSTICE W.P. SCHUTZ, JUDGE OF APPEAL, BY WAY OF REPLY IN REGARD TO THE SPECIALIST COURT FOR INTELLECTUAL PROPERTY**

(1) "**SCHUTZ, JA:** Mr Chairman, listening to Mrs Du Plessis, there is much that I agree with, for instance that the country should attempt to be internationally acceptable and place itself in such a state that it will attract investment. But I think you, Mr Chairman, and your Commissioners have listened in vain to a submission on the simple question that is before you, and that is, why do you take the existing jurisdiction away from the Supreme Court and confer it upon some other untried tribunal?"

(2) "I would also say that in past years you frequently found big foreign concerns who would initiate Patent litigation in this country because they found the Courts to function both efficiently and inexpensively and quickly, yes. The Gentiruco case, I think one of the biggest we have ever had is an example of it."

(3) "On the matter of audience, let me point out that with attorneys now having audience in the Supreme Court, an attorney could for instance appear in a Trade Marks case in the Supreme Court. It is suggested that such a matter might be transferred to the specialist tribunal where he would not have a right of audience unless he were a Patent attorney."

(4) "Also, I think hovering behind the submissions made to you, is that you would get different kinds of Judges appointed to this specialist tribunal."

(5) "Now, I agree with what Judge Harms said about skill in registration being in no way equivalent to skill in litigation. Litigation is a very special skill. What drives up costs, is unskilled litigation: people spending weeks over matters that should take a few hours. So what you want is not a person skilled in the abstrusities of Patents, but a man who is capable of making a good Judge; and you have got good Judges in the Supreme Court."

(6) "Judge Eloff has said something about the mystique that is supposed to surround these mysteries. I think it has been the experience of many of us that a breath of fresh air is introduced when the, shall we call him the unqualified Judge who has never stuck his toe into these waters before, suddenly appears in these Courts and he applies ordinary rules as to interpretation of statutes and so forth, and introduces quite healthy new tones. Well, that is all I wish to say, and I must thank you for giving me an opportunity behind the lectern again.

CHAIRMAN: Thank you, Judge. Mrs Du Plessis, by way of summation, would you like to add something, a few final words?"

(LXV) **SUMMING UP BY MRS E.D. DU PLESSIS, PRESIDENT OF THE LAW SOCIETY OF THE TRANSVAAL AND VICE-CHAIRPERSON OF THE STATUTORY INTELLECTUAL PROPERTY ADVISORY COMMITTEE**

(1) "**MRS DU PLESSIS:** One bit of information, in response to a question of one of your Commissioners. The accessibility to the profession. There are at the moment 73 candidate Patent attorneys in the Institute as against 91 full members, so the numbers have grown considerably."

(2) "The only thing, Mr Chairman, that I would like to set right is, I must have expressed myself very poorly. Certainly the TRIPS Agreement was raised only in the context of saying we are not alone in looking at the moment at our Court procedures and structures in regard to Intellectual Property matters. All of the countries have looked critically at their own enforcement procedures."

(3) "We have maintained, and in all of the addresses that I have delivered on TRIPS, I have said that our Court system at the moment complies in all respects with the minimum requirements of TRIPS. But perhaps a Special Court would have an opportunity of developing certain of the more esoteric remedies, you know, with the benefit to all. But certainly, we have at the moment a Court system, enforcement of rights totally, totally in agreement with the minimum requirements of TRIPS. No doubt about that.

CHAIRMAN: Thank you, Mrs Du Plessis. Mr Le Roux?

MR LE ROUX: Nothing further, thank you, Mr Chairman."