

**MEDIA STATEMENT BY THE SOUTH AFRICAN LAW COMMISSION
CONCERNING ITS INVESTIGATION INTO THE JURISDICTION OF
MAGISTRATES' COURTS IN CONSTITUTIONAL MATTERS (PROJECT 111):
DISCUSSION PAPER 75**

14 April 1998

The South African Law Commission has published its Discussion Paper 75 on the *Jurisdiction of Magistrates' Courts in Constitutional Matters* for general information and comment. On 22 May 1997, the Minister of Justice asked the Law Commission to include in its programme for investigation the need for remedial legislative proposals, which are not in conflict with the other provisions of the Constitution, providing for appropriate instances where Magistrates' Courts should have jurisdiction in constitutional matters. On 8 December 1997, the Commission received from the Minister of Justice a request that its investigation commissioned earlier by him be widened. Commissioner JJ Gauntlett SC was asked by the Commission to undertake the investigation on its behalf. It arises in the following circumstances:

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

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

- No similar provision is to be found in the Constitution of the Republic of South Africa Act, 1996. Section 170 of the Constitution provides as follows:

magistrates' courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not inquire into or rule on the constitutionality of any legislation or any conduct of the President.

It would seem that the main inquiries which arise in this investigation, are these:

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

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

(c) If it is considered that Magistrates' Courts lack jurisdiction in respect of constitutional matters, how is the situation to be remedied ?

(d) Is it desirable that Magistrates' Courts retain their current jurisdiction in terms of section 110 of the Magistrates' Courts Act, 1944 in relation to what its heading describes as a "plea of ultra vires" ?

The following preliminary recommendations are made in the Discussion Paper:

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

* in section 72 of the Constitution that Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not rule on the constitutional validity of any Act of Parliament, any legislation passed by the legislature of a province after 27 April 1994, or any conduct of the President;

* in section 172 of the Constitution that -

- The Full Bench of a High Court of competent jurisdiction must confirm any order of constitutional invalidity made by a Magistrates' Court or another court of a status lower than a High Court, before that order has any force.
- Subsections 2(b), (c) and (d) of section 172 apply with the necessary changes to an order of constitutional invalidity made by a Magistrates' Court or another court of a status lower than a High

Court, and to any referral of, appeal against, or application for the confirmation of, such order, to the Full Bench of a High Court of competent jurisdiction.

* in section 110 of the Magistrates' Courts Act, 1944 that-

- No magistrate's court shall be competent to rule on the constitutional validity or validity for any other reason of any Act of Parliament, any legislation passed by the legislature of a province after 27 April 1994, or any conduct of the President, and every magistrate's court shall assume that any such Act, legislation or conduct is valid.
- Subject to subsection (1), every magistrate's court shall be competent to rule on the constitutional validity or for any other reason of:

(a) any administrative action, including any executive action and any statutory proclamation, regulation, order, bye-law or other legislation; but no magistrate's court shall review and set aside or correct any administrative action or make any order directing an organ of state to legislate, decide or correct defects in any administrative action or in any state of affairs resulting from administrative action; and

(b) any rule of the common law, customary law and customary international law".

The issues mentioned above and other options for the improvement of the law need to be debated thoroughly. Based on the outcome a report containing the Commission's final recommendations and legislation in respect of the constitutional jurisdiction of Magistrates' Courts will be prepared and presented to the Minister of Justice. The comments of all parties who feel that they have an interest in this topic or who may be affected by the type of measures discussed in this paper are therefore of vital importance to the Commission. All respondents are invited to indicate whether there are any other issues and/or options that they feel should be explored. **All interested parties likely to be affected by possible legislation should participate in this debate.**

It would be appreciated if written comments or suggestions could reach the Commission by 15 June 1998 at the address given below.

The Discussion Paper is obtainable free of charge from the Commission on request. **However, this document is available on the Internet** under "The South African Law Commission" at-

www.law.wits.ac.za/salc/salc.html

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ISSUED BY THE SECRETARY, SA LAW COMMISSION, PRETORIA

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