

REPUBLIC OF SOUTH AFRICA

CONSTITUTION SEVENTEENTH AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 74(3)(a)); particulars of
proposed amendments published in Gazette No. 33216 of 21 May 2010)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 6—2011]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Constitution of the Republic of South Africa, 1996, so as to further define the role of the Chief Justice as the head of the judiciary; to change references to “Magistrates’ Courts” to “Lower Courts”; to provide for a single High Court of South Africa; to provide that the Constitutional Court is the highest court in all matters; to further regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal; to provide for the appointment of an Acting Deputy Chief Justice; to further regulate the composition and the functions of the Judicial Service Commission; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Amendment of section 165 of Constitution

1. Section 165 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is hereby amended by the addition of the following subsection: 5

“(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.”.

Amendment of section 166 of Constitution 10

2. Section 166 of the Constitution is hereby amended—

(a) by the substitution for paragraph (c) of the following paragraph:

“(c) the **[High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts]** High Court of South Africa;” 15

(b) by the substitution for paragraph (d) of the following paragraph:

“(d) the **[Magistrates’]** Lower Courts;” and

(c) by the substitution for paragraph (e) of the following paragraph:

“(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the **[High Courts]** High Court of South Africa or the **[Magistrates’]** Lower Courts.” 20

Amendment of section 167 of Constitution, as amended by section 11 of Constitution Sixth Amendment Act of 2001

3. Section 167 of the Constitution is hereby amended—

- (a) by the substitution for subsection (3) of the following subsection: 5
 “(3) The Constitutional Court—
 (a) is the highest court [**in all constitutional matters**] of the Republic; and
 (b) may decide [**only**]— 10
 (i) constitutional matters[, **and issues connected with decisions on constitutional matters**];—
 (aa) on appeal;
 (bb) directly, in accordance with subsection (6); or
 (cc) referred to it in terms of legislation contemplated in section 172(2)(c) or in terms of any other Act of Parliament; 15
 (ii) any other matter, if the Constitutional Court grants leave to appeal that matter on the grounds that the interests of justice require that the matter be decided by the Constitutional Court; and
 (c) makes the final decision whether a matter is a constitutional matter [**or whether an issue is connected with a decision on a constitutional matter**].”; 20
- (b) by the substitution for subsection (5) of the following subsection:
 “(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, [**a**] the High Court of South Africa, or a court of similar status, before that order has any force.”; 25
- (c) by the substitution in subsection (6) for paragraph (a) of the following paragraph: 30
 “(a) to bring a constitutional matter directly to the Constitutional Court; or”.

Amendment of section 168 of Constitution, as amended by section 12 of Constitution Sixth Amendment Act of 2001

4. Section 168 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection: 35

- “(3) (a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except where an Act of Parliament provides otherwise. 40
 (b) The Supreme Court of Appeal may decide only—
 (i) appeals;
 (ii) issues connected with appeals; and
 (iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.”.

Substitution of section 169 of Constitution 45

5. The following section is hereby substituted for section 169 of the Constitution:

“High [Courts] Court of South Africa

- 169. (1) [A] The High Court of South Africa may decide—**
 (a) any constitutional matter except a matter that— 50
 (i) only the Constitutional Court may decide or has agreed to hear directly in terms of section 167(6)(a); or
 (ii) is assigned by an Act of Parliament to another court of a status similar to [**a**] the High Court of South Africa; and
 (b) any other matter not assigned to another court by an Act of Parliament.
 (2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for— 55

- (a) the establishing of Divisions, with one or more seats in a Division, on the basis of geography or subject matter, or both; and
- (b) the assigning of jurisdiction to a Division or a seat within a Division.
- (3) Each Division of the High Court of South Africa—
 - (a) has a Judge President;
 - (b) may have one or more Deputy Judges President; and
 - (c) has the number of other judges determined in terms of national legislation.”.

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Substitution of section 170 of Constitution

6. The following section is hereby substituted for section 170 of the Constitution: 10

“[Magistrates’ Courts and other] Other courts

170. [Magistrates’ Courts and all other courts] All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than [a] the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.” 15

Amendment of section 172 of Constitution

7. Section 172 of the Constitution is hereby amended by the substitution in subsection (2) for paragraph (a) of the following paragraph:

“(a) The Supreme Court of Appeal, [a] the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.”. 20

Substitution of section 173 of Constitution

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8. The following section is hereby substituted for section 173 of the Constitution:

“Inherent power

173. The Constitutional Court, the Supreme Court of Appeal and the High [Courts have] Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.” 30

Substitution of section 175 of Constitution, as amended by section 14 of Constitution Sixth Amendment Act of 2001

9. The following section is hereby substituted for section 175 of the Constitution:

“[Acting] Appointment of acting judges

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175. (1) The President may appoint a woman or man to [be] serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if [a judge] the person holding such an office is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice, and an appointment as acting Deputy Chief Justice must be made from the ranks of the judges of the Constitutional Court. 40

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.”. 45

Amendment of section 178 of Constitution, as amended by section 2 of Constitution Second Amendment Act of 1998 and section 16 of Constitution Sixth Amendment Act of 2001

10. Section 178 of the Constitution is hereby amended—
- (a) by the insertion in subsection (1) after paragraph (c) of the following paragraph: 5
 “(cA) the chairperson and deputy chairperson of the committee envisaged in subsection (4)(b);”;
- (b) by the substitution in subsection (1) for paragraph (k) of the following paragraph: 10
 “(k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that [Court] Division and the Premier of the province concerned, or an alternate designated by each of them.”; and
- (c) by the substitution for subsection (4) of the following subsection: 15
 “(4) (a) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.
 (b) National legislation referred to in paragraph (a) must make provision for the Commission to be involved in the appointment, promotion and transfer of judicial officers of the Lower Courts, and for the establishment of a committee and subcommittees comprising members designated by the Commission and other co-opted members in order to facilitate that involvement.” 20

Short title and commencement

11. This Act is called the Constitution Seventeenth Amendment Act of 2011, and takes effect on a date determined by the President by proclamation in the *Gazette*. 25

**MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION
SEVENTEENTH AMENDMENT BILL, 2011**

1. SUMMARY

- 1.1 The Bill aims to amend the Constitution of the Republic of South Africa, 1996, in order to further define the role of the Chief Justice as the head of the judiciary; to change references to “Magistrates’ Courts” to “Lower Courts”; to provide for a single “High Court of South Africa”, comprising of various Divisions; to provide that the Constitutional Court is the highest (apex) Court in all matters and to regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal accordingly; to provide for the appointment of an acting Deputy Chief Justice if there is a vacancy in that office; and to further regulate the composition and functions of the Judicial Service Commission, by allowing for national legislation to extend the role of the Commission to matters pertaining to judicial officers of the Lower Courts.
- 1.2 The changes envisaged in respect of the role of the Chief Justice as the head of the judiciary, and the establishment of a single “High Court of South Africa” as opposed to the existing various High Courts, would lay the constitutional basis for the provisions of the Superior Courts Bill, 2011, that are aimed at giving effect to those changes.

2. PROVISIONS OF THE BILL

The provisions of the Bill are summarised below:

- 2.1 **Clause 1:** Section 165 of the Constitution is amended in order to provide that the Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts. In this way a Constitutional foundation would be laid for establishing an integrated system of court governance within a single judiciary.
- 2.2 **Clauses 2, 5, 7 and 8:** Sections 166, 169, 172 and 173 of the Constitution are amended so as to convert the various High Courts into a single “High Court of South Africa”, comprising of Divisions, seats and jurisdiction as determined in terms of an Act of Parliament (the Superior Courts Bill). The present High Courts would thus be rationalised into a single High Court, with each province having, at least, a Division of the High Court. In section 166 (clause 2) the reference to “Magistrates’ Courts” is also substituted by a reference to “Lower Courts”. This would make it possible, when developing new legislation regarding the establishment and structures of the lower courts, to move away from the denomination of “magistrates’ courts”, which is a relic from a bygone era. (The Magistrates’ Courts Act dates back to 1944.)
- 2.3 **Clause 3:** Section 167 of the Constitution is amended so as to confirm the status of the Constitutional Court as the apex court, with jurisdiction in all constitutional matters and any other matter in which it may grant leave to appeal. The Constitutional Court would therefore be the highest court for all matters, constitutional and non-constitutional, with the Supreme Court of Appeal as an intermediate court of appeal.
- 2.4 **Clause 4:** Section 168 of the Constitution is amended in order to provide that the Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except where an Act of Parliament provides otherwise. During the consultations with the judiciary on the Bill, it was pointed out by the latter that there might possibly be an argument that the names of the Constitutional Court and the Supreme Court of Appeal should also be changed, since the former would now be the apex and, effectively, the “Supreme” Court, whilst the latter would not necessarily be a final Court. However, the view is held that the name “Constitutional Court” has already

gained historic significance and internationally renowned jurisprudence, and that it would not be appropriate, at this stage, to tamper with the names of the Courts involved.

- 2.5 **Clause 6:** Section 170 of the Constitution is amended by deleting the reference to “Magistrates’ Courts”. This amendment is consequential to the amendment of section 166 in clause 2 (par 2.2 above).
- 2.6 **Clause 9:** Section 167 of the Constitution establishes the offices of Chief Justice and Deputy Chief Justice and section 174(3) provides for appointments to be made to those offices. It is envisaged in the Superior Courts Bill, 2011, to authorise the Deputy Chief Justice to perform the functions of the Chief Justice whenever the Chief Justice is absent or during a vacancy in that office. The amendment of section 175 of the Constitution provides that the President may appoint an acting Deputy Chief Justice from the ranks of the judges of the Constitutional Court, if there is a vacancy in that office. As in the case of the appointment of acting judges of the Constitutional Court, such an appointment must be made on the recommendation of the Minister (of Justice) acting with the concurrence of the Chief Justice. The amendment would ensure that a person is in office to perform the functions of the Chief Justice should both the Chief Justice and the Deputy Chief Justice be absent or their offices vacant.
- 2.7 **Clause 10:** Section 178 of the Constitution is amended in order to allow for national legislation to make provision for the Judicial Service Commission to be involved in the appointment, promotion and transfer of judicial officers of the Lower Courts, and for the establishment of a committee and subcommittees comprising members designated by the Commission and other co-opted members in order to facilitate that involvement. For this purpose, the chairperson and deputy chairperson of the committee in question will also be members of the Judicial Service Commission.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 3.1 During August 2003, a forerunner of this Bill (namely the Constitution of the Republic of South Africa Amendment Bill, 2003) together with the Superior Courts Bill, 2003, were introduced in Parliament and referred to the Portfolio Committee on Justice and Constitutional Development (National Assembly) for consideration. The Portfolio Committee embarked on extensive public hearings regarding the draft legislation and received substantial inputs from a wide range of interested parties.
- 3.2 Following the elections in 2004, the Constitution Amendment Bill in question was allowed to lapse but the development of the legislation continued and earlier versions of both Bills were extensively discussed at a Judicial Colloquium hosted by former Minister Mabandla during April 2005. In December 2005, a draft Constitution (Fourteenth) Amendment Bill was subsequently published in the *Gazette* with the view to the introduction and consideration thereof along with the revised Superior Courts Bill of 2003. The Portfolio Committee in question held public hearings on the Bills early in 2006, during the course of which it became clear that more consensus needed to be developed between role-players on certain aspects of the draft legislation. As a result, the Constitution (Fourteenth) Amendment Bill was not introduced and the processing of the Superior Courts Bill was put on hold pending the further development of broad policy guidelines on the transformation of the judiciary and the courts.
- 3.3 Following the elections in 2009, the Superior Courts Bill, 2003, was allowed to lapse, paving the way for the introduction of the new, revised Constitution Seventeenth Amendment Bill, 2011, and a new Superior Courts Bill, 2011, in Parliament. Both Bills result from further consultation with, particularly, the judiciary.

- 3.4 A draft version of the Bill has been published in *Gazette* No. 33216 of 21 May 2010 for public comment in accordance with section 74(5)(a) of the Constitution and, since the Bill is closely linked to the transformation envisaged by the Superior Courts Bill, 2011, the latter draft Bill was simultaneously published for public comment. In compliance with section 74(5)(b) of the Constitution, the Bill was also submitted to the provincial legislatures for their views.

4. FINANCIAL IMPLICATIONS FOR STATE

None.

5. PARLIAMENTARY PROCEDURE

- 5.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 74(3)(a) of the Constitution, since—
- (a) it amends provisions of the Constitution other than section 1, section 74(1) or Chapter 2; and
 - (b) the amendments do not—
 - (i) relate to a matter that affects the National Council of Provinces;
 - (ii) alter provincial boundaries, powers, functions or institutions; or
 - (iii) amend a provision that deals specifically with a provincial matter.
- 5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.