



HELENSUZMAN
FOUNDATION

For attention: Mr M Mokulubete
Per email: MMokulubete@justice.gov.za
The Department of Justice and Constitutional Development

15 June 2022

Dear Mr Mokulubete

Submission in response to the Lower Courts Draft Bill, 2022 [B XX – 2022]

Please find attached the submission by the Helen Suzman Foundation for your consideration.

We would like to confirm our interest in making oral representations to the Department at a later convenient date.

Should you have any queries, it would be appreciated if you could contact Chelsea Ramsden (email: chelsea@hsf.org.za)

Yours sincerely

Nicole Fritz

Director

Director: Nicole Fritz

Trustees: Nick Binedell • Cecily Carmona • Max du Plessis • Cora Hoexter • Nick Jonsson • Daniel Jowell • Kalim Rajab • Gary Ralfe • Phila Zulu

Patrons: Prof. Thuli Madonsela • Lord Robin Renwick



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**SUBMISSION TO THE DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

in respect of

LOWER COURTS DRAFT BILL, 2022

made by

THE HELEN SUZMAN FOUNDATION

15 JUNE 2022

Director: Nicole Fritz

Trustees: Nick Binedell • Cecily Carmona • Max du Plessis • Cora Hoexter • Nick Jonsson • Daniel Jowell • Kalim Rajab • Gary Ralfe • Phila Zulu

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Table of Contents

Introduction	3
Part A: Comments Regarding the Overall Purpose and Scheme of the Bill	4
Part B: Comments Regarding Specific Aspects of the Bill	5
<i>SECTION 4: JUDICIAL OFFICERS OF REGIONAL COURTS & SECTION 6: JUDICIAL OFFICERS OF DISTRICT COURTS</i>	5
<i>SECTION 7: ESTABLISHMENT, POWERS AND FUNCTIONS OF MUNICIPAL COURTS</i>	6
<i>SECTION 8: MANAGEMENT OF JUDICIAL AND ADMINISTRATIVE FUNCTIONS</i>	6
<i>SECTION 75: PROPERTY EXEMPT FROM EXECUTION</i>	7
<i>SECTION 111: CONTEMPT OF COURT PROCEEDINGS</i>	8
<i>SECTION 148: FINANCIAL ACCOUNTABILITY</i>	9
Part C: Comments to Note on Specific Sections of the Bill	10
<i>SECTION 1: DEFINITIONS</i>	10
<i>SECTION 131: FAILURE TO COMPLY WITH JUDGMENT OR ORDER OF COURT OR RENT INTERDICT</i>	10
<i>SECTION 132: OFFENCE BY GARNISHEE</i>	11
<i>SECTION 134: OFFENCES RELATING TO JUDGMENTS, EMOLUMENTS, ATTACHMENT ORDERS AND INSTALMENT ORDERS</i>	11
<i>SECTION 135: OFFENCES RELATING TO EXECUTION</i>	11
Conclusion	11

Introduction

1. The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions to the Department of Justice and Constitutional Development (“Department”) on the Lower Courts Bill, 2022 (“the Bill”). The HSF sees this engagement as a way of fostering critical yet constructive dialogue between civil society and government.
2. The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability. The HSF’s interest in participating in these proceedings centres on our commitment to our constitutional obligations of achieving equality and advancing human rights and freedoms. Central to our work is the defence of the rule of law.
3. The Judiciary’s independence, credibility and integrity are central to our constitutional democracy. Section 165 of the Constitution vests judicial authority in the courts and provides for the independence of the courts.¹ Section 166(d) makes clear that the Magistrates’ Courts form part of the court structure vested with judicial authority. The Judiciary, and the courts, are the guardians of the Constitution and must uphold the rule of law.
4. The HSF would like to draw the Department’s attention to the fact that we have also made submissions on the Magistrates Bill, 2022.
5. In part A of this submission, the HSF will provide comments of a general nature on the overall purpose and scheme of the Bill. Part B will provide comments on certain

¹ Section 165(2) provides that “[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”.

specific sections contained therein. Finally, Part C will draw the Department's attention to sections that HSF notes that the Department should consider.

Part A: Comments Regarding the Overall Purpose and Scheme of the Bill

6. The objects of the Bill are set out in section 2. Significantly, the Bill intends to 'renew and align the legislative framework for those courts with the needs and requirements of the modern South African society'. It is worth noting that access to justice is a struggle many South Africans face.
7. Section 2(2) indicates that the desire of the Department is for the Lower Courts to form an integral part of the Judiciary and that its management of judicial functions must fall within the competence of the Superior Courts. This is a significant step in subsuming the Lower Courts within a single and unified Judiciary and removing its administration from the Department.²
8. Post-democracy, the Lower Courts, previously Magistrates' Courts, fell within the domain and control of the Department. Steps have already been taken to ensure a greater level of independence, for example, by removing the appointment, discipline and removal of magistrates from the complete control of the Minister through the creation of the Magistrates' Commission ("Commission").³
9. This Bill is the next step in creating a more independent set of Lower Courts.
10. Overall, the HSF would like to commend the Department on many inclusions within the Bill that will significantly assist South Africans in gaining access to justice. Of

² Unrevised Hansard, 'Vote No 27' Mini Plenary – National Assembly (12 May 2022) <<https://www.parliament.gov.za/storage/app/media/Docs/hansard/dd2e1f78-8a30-4a4f-a078-cc022bf27c5c.pdf>> ("Vote 27"), 39-41.

³ *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) (*Van Rooyen*) para 79; 'Twenty Year Review: South Africa 1994-2014' (2014) *Department of Planning, Monitoring and Evaluation* <<https://www.dpme.gov.za/news/Documents/20%20Year%20Review.pdf>> ("Twenty Year Review"), para 2.1.

considerable importance, the HSF mentions the inclusion of not only electronic means of filing and hearings but the addition of audio-visual links and the possibility of the use of intermediaries in instances where people are vulnerable.⁴

11. In addition, the provision for mediation is an essential step in allowing South Africans to access justice where it would previously have been beyond their means.

Part B: Comments Regarding Specific Aspects of the Bill

Section 4: Judicial Officers of Regional Courts & Section 6: Judicial Officers of District Courts

12. Section 4 regulates judicial officers in the Regional Courts. Similarly, section 6 regulates the judicial officers in the District Courts. The HSF takes no issue with the substance of these sections. The HSF endorses the advisory role and power assigned to the Commission.

13. However, the HSF would like to point out that section 4 makes no provision for the appointment of a Regional Court President, as head of the court, despite providing that Regional Courts must comprise one.⁵ This is unlike section 6, which includes the process of appointing a District Court President. Section 6(4)(a) provides the Minister, on the advice of the Commission, with the power to appoint a District Court President if the relevant District Court consists of more than one magistrate.

14. Furthermore, section 4 is at odds with section 6 in that there is no provision for appointing senior magistrates to the Regional Courts, contrary to the position in the District Courts. The Bill fails to explain or provide a reason for why a Regional Court should not have a complement of senior magistrates if needed.

⁴ The HSF would like to commend the inclusion of sections 48, 50, 111, 121 and the entirety of Chapter 7.

⁵ Lower Courts Bill section 4(2).

15. These omissions in section 4 leave open the process of appointing a Regional Court President and senior magistrates and may open up the Bill to potential litigation in the future.
16. Finally, and as discussed under Part C of this submission, using the words “judicial officer” versus “magistrate” may lead to confusion. Both are defined similarly in section 1 of the Bill, and there is no explanation for the reason for including both within the Bill.

Section 7: Establishment, Powers and Functions of Municipal Courts

17. The HSF notes the creation of Municipal Courts within the structure of the Bill. We are aware that Municipal Courts existed before the publishing of the Bill but commend the Department on bringing the Municipal Courts within the legislative framework of the Bill and, consequently, the Lower Courts.
18. The HSF notes that the Municipal Courts will be governed by an agreement between the Minister and the relevant Municipal Council. The HSF suggests that the Bill should make it peremptory, rather than optional, for the matters referred to in section 7(2)(a)-(d) to be determined by such an agreement.
19. This will ensure that the Municipal Courts will be staffed by persons with the training and the necessary knowledge and understanding of the law and its application.

Section 8: Management of Judicial and Administrative Functions

20. Section 8(2) provides that the head of the court is responsible for the ‘management of the judicial functions’. Whilst not objectionable, the HSF suggests that reference be

made to section 8(4)(c) of the Superior Courts Act⁶ to bring the Bill and Superior Courts Act into alignment.

21. Section 8(4)(c) of the Superior Courts Act provides that ‘the Judge President of a Division is also responsible for the coordination of the judicial functions of all Magistrates’ Courts falling within the jurisdiction of that Division’.

22. Therefore, it would be advisable to create a subsection within section 8 of the Bill recognising the duty of coordination between the relevant Judge President and the head of the court.

Section 75: Property Exempt from Execution

23. Section 75 provides for property exempt from execution by the sheriff or deputy sheriff. In the previous Act, the Magistrates Courts Act (“Old Act”),⁷ this section was regulated by section 67, which provided a list of property to be exempt from seizure, sale or attachment.

24. The current replacement section does not provide a list. It merely provides that ‘[t]he sheriff or a deputy sheriff may not seize in the execution of any process such belongings of a debtor as prescribed’.

25. The Bill fails to provide where such items or property will be prescribed. The Bill does not make provision for regulations to be made, where one would ordinarily assume that such a list may be provided.

26. The omission of a prescribed list may open up the Bill to potential litigation in the future.

⁶ 10 of 2013.

⁷ 32 of 1944.

Section 111: Contempt of Court Proceedings

27. Section 111 provides for contempt of court proceedings within the civil sphere. The HSF acknowledges that contempt of court in civil proceedings is provided for within the law and jurisprudence of the Republic of South Africa.
28. However, the HSF objects particularly to section 111(6). This subsection provides that if a person is still in contempt, after having been found in contempt and serving a period of imprisonment, he or she may be sent back for a further term of imprisonment. This would amount to double jeopardy - where a person has been found guilty and sentenced for the same offence more than once. A typical example is a failure to pay maintenance. The question arises as to whether a person can be convicted continuously for the same act.
29. The HSF suggests that this subsection is neither constitutional nor lawful and will open up the Bill to potential litigation in the future.
30. In addition, if a person remains in contempt after serving a period of imprisonment, section 111(7)(c) provides the possibility of a person being prosecuted and found guilty of contempt in terms of section 131. Section 131 provides for the offence of criminal contempt of court and carries with it the possibility of a period of 12 months' imprisonment. In this instance, a person can be sent back to prison on a criminal offence after already having served a period of imprisonment for a non-criminal offence based on the same act and court order.
31. As with section 111(6), the HSF believes that section 111(7)(c) is not constitutional nor lawful and will therefore open up the Bill to potential litigation in the future.

Section 148: Financial Accountability

32. Section 148(1) makes provision for the Chief Justice to determine the necessary budget for the Lower Courts, after consultation with the other heads of court, and then to request the Minister to request these funds from Parliament.
33. A similar provision is provided for the budget of the Superior Courts in the Superior Courts Act.⁸ However, as appears from the Judicial Service Commission interviews for the position of Chief Justice, held in February 2022, this section has not yet been relied upon or utilised.⁹
34. In terms of the current administrative structure, the Magistrates Courts, or Lower Courts as they have been termed in the Lower Courts Bill, fall within the administration of the Department and not the Office of the Chief Justice (“OCJ”).¹⁰ The OCJ was established as a new National Department in 2010, by Presidential proclamation.¹¹ The OCJ, under the leadership of the Chief Justice, is responsible for the support and administration of the Superior Courts.¹²
35. The OCJ currently has a separate budget from that of the Lower Courts. The Department administers the Lower Courts’ budget.¹³ Section 148(2) places the responsibility of accounting for the ‘money received and paid out’ for the Lower

⁸ Superior Courts Act (n 6) section 54(1).

⁹ Chief Justice Interviews: JSC Interview of Justice Dunstan Mlambo – Judges Matter (Feb 2022) (10 February 2022) <<https://www.youtube.com/watch?v=uUAvbN2MbMw>> at 1:38:54 and 4:49:31; JSC Interview of Justice Mandisa Maya – Judges Matter (Feb 2022) (9 February 2022) <<https://www.youtube.com/watch?v=medfs6HuxMY>> at 1:38:40; Chief Justice Interviews: JSC Interview of Justice Mbyuseli Madlanga – Judges Matter (9 February 2022) <<https://www.youtube.com/watch?v=9Towqd7Omgc>> at 3:02:30 and 3:05:35; Chief Justice Interviews: JSC Interview of Justice Raymond Zondo – Judges Matter (11 February 2022) <<https://www.youtube.com/watch?v=VcEt0X8teZQ>> at 1:54:35.

¹⁰ Vote No 27’ (n 2) 39-40.

¹¹ Judicial Matters Amendment Act (66/2008): Commencement of Sections 10, 13, 14, 15 and 16 of the Act – GG 335500, No. R 45, 2010, (23 August 2010).

¹² The Establishment of the Office of the Chief Justice 2010 – 2013, *Office of the Chief Justice of the Republic of South Africa*, <<https://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf>> at para 5.

¹³ Vote 27 (n 2) 6 and 40.

Courts on the Secretary-General, who is the accounting officer of the OCJ. This creates confusion, as the OCJ (which has a separate budget) is to account for the Lower Courts' budget (which is part of the Department's budget).

36. Presently, neither the Bill nor the Magistrates Bill provides an explanation as to how this arrangement will work or how one department will administer and account for the budget of a separate government department.

37. Therefore, although the Lower and Superior Courts are provided with much-needed budgetary independence on paper, this is still not the case in practice. If the Judiciary is to be a genuinely independent third arm of the state, both the Lower and Superior Courts' budget and resources need to be actively administered by the Chief Justice and other members of the Judiciary with the support of the OCJ.

Part C: Comments to Note on Specific Sections of the Bill

Section 1: Definitions

38. Section 1 provides for the definitions applicable in the Bill. The HSF queries the purpose of defining both "judicial officer" and "magistrate". Both terms are very similarly defined.

39. The Bill does not provide an explanation or reason for including both terms within the legislative instrument when both refer to judicial officers in the Lower Courts.

Section 131: Failure to Comply with Judgment or Order of Court or Rent Interdict

40. The HSF notes that section 131 increases the imprisonment term to twelve months compared to the previous term of six months.¹⁴

¹⁴ Old Act (n 7) section 106.

Section 132: Offence by Garnishee

41. The HSF notes that the reference to the amount of fine as R300 has been removed from the Bill and which necessarily entails that the amount of the fine would now be discretionary.¹⁵

Section 134: Offences Relating to Judgments, Emoluments, Attachment Orders and Instalment Orders

42. The HSF notes that section 134(2) no longer provides for a term of imprisonment of three years.¹⁶ The term of imprisonment to be imposed has now been left blank and, therefore, would necessarily entail the exercise of discretion in the imposition of an imprisonment term.

Section 135: Offences Relating to Execution

43. The HSF notes that the reference to the amount of fine as R500 in section 135(d) has been removed from the Bill and which necessarily entails that the amount of the fine would now be discretionary.¹⁷

Conclusion

44. The HSF welcomes the opportunity to engage with the Department in this regard. The HSF's comments are made with the idea of enhancing the credibility, integrity and independence of the Judiciary and the magistracy in particular.

45. The HSF suggests that this submission be read in unison with the HSF's submission on the Magistrates Bill, 2022, with particular regard to the recommendation that a comprehensive study of the feasibility of unification of the magistracy and the

¹⁵ Ibid section 106A.

¹⁶ Ibid section 106C.

¹⁷ Ibid section 107.

superior court system under the OCJ be conducted to best secure the independence of the Judiciary.

46. The HSF commends the Department on introducing legislation that will assist in securing the Lower Courts' independence and provide increased access to justice for the people of South Africa. However, to avoid future litigation on the Bill, the HSF recommends that its submissions, as contained above, be fully considered.