# THE TRANSVAAL PROVINCIAL DIVISION

In **1838**, in terms of the Natal Instructions for Magistrates, three bodies made up the hierarchy of criminal courts in the Transvaal:

- the magistrate,
- a magistrate with four to six heemraden (four to concur with the landdrost for a verdict), and
- a magistrate, heemraden and twelve jurors whose decision had to be unanimous (in respect of offences carrying punishment of death or banishment).

The Volksraad had to confirm all sentences, and could reduce them or set them aside.

Under the **Thirty-three Articles** of **April, 1844**, by which the Potchefstroom-Winburg districts declared their independence on the annexation of Natal, the Burgerraad was the court of justice.

In terms of the **1858 Grondwet**, the judicial power became vested in popularly elected landdrosten and in jurors. Every district was to have a landdrost's court, with civil jurisdiction up to 500 ryksdaalders and criminal jurisdiction up to three months' imprisonment and a fine of £7 10s.. A higher district court of landdrost and four to six heemraden had full original civil jurisdiction, tried criminal cases with jurisdiction up to three years' imprisonment and a fine of £37 10s., and acted as an intermediate appeal court. The High Court, composed of three landdrosten and twelve jurors, was the final court of appeal from the court of landdrost and heemraden; sat in criminal trials beyond the competency of that court; and heard and pronounced on charges against the executive of unworthiness.

In **March 1877**, President Burgers developed a plan for a fundamental

**change** in the **structure of the courts**. In terms of the proposed plan, the administration of justice would now be entrusted to (1) a Supreme Court consisting of a Chief Justice and two puisne Judges (all holding office for life); (2) a Circuit Court (of a single judge) for the different districts of the State; and (3) a Court of Landdrost as already existing.

Before it could be put into operation, however, the Executive Council suspended the new law and, five days later, on 12th April, Shepstone proclaimed the annexation of the Transvaal by the British[1].

Shepstone's proclamation provided that all courts were to remain in existence and either English or Dutch could be used in courts of law, at the option of suitors. The laws in force would be retained until altered by a competent legislative authority.

One month later, a **High Court of Justice**, for the Transvaal, was established, with a **single judge**[2] holding office for life subject to good behaviour. The court was to sit at **Pretoria** and such other places as were appointed by the Government. Criminal trials were to be before a judge and jury of nine, who had to bring in a unanimous verdict. In civil cases, the judge sat alone. Appeal lay to the Privy Council in civil disputes of £500 or more. The death sentence required confirmation of the Governor or Administrator.

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[1] Burgers had offered the Chief Justiceship to J.G.Kotzé, an advocate who was at that time in practice in the Eastern Districts. Kotzé indicated his acceptance of the position but failed to reach the Transvaal in time, however, and was therefore only offered the single puisne judge position then available under the British rule. It was only later, when Burgers' plan was finally put into operation during the retrocession, that he was eventually granted his originally promised status, that of Chief Justice.

[2] In terms of the Annexation Proclamation, all contracts made by the Government of the Republic with companies or individuals were guaranteed and recognized, but there arose a practical difficulty in at once carrying out President Burgers' scheme for the establishment of a Supreme Court consisting of three Judges. On assuming the government of the Transvaal, Sir Theophilus Shepstone found only 2s. 6d. in the Treasury. There was a total lack of funds to provide the necessary salaries for three Judges. It was consequently decided by the Administrator to postpone for a time the completing of President Burgers' scheme as approved by the Volksraad. Consequently, a Proclamation was issued by Sir Theophilus Shepstone on 18th May 1877, creating a High Court for the Province, as the annexed Republic was now called, consisting of one Judge (J.G.Kotzé) only. *Vide* The Administration of Justice in the South African Republic (Transvaal), 36 SALJ, 1919 p128

New rules of court were framed, based on the **Cape** provisions.

Kotzé was appointed to the Bench, where he sat alone until 1880.

A court of one judge created inevitable problems, however, such as the fact that, when he was on circuit, no one was available at the capital to hear matters. While he was on leave, an acting appointment had to be made.

In March, 1880, therefore, the High Court was enlarged[3] – now, it was to have a maximum of **three members**, one to be Chief Justice. A single judge was to have full original jurisdiction, appeal lying to the full court in which, until a third member was appointed, the judgement of the Chief Justice was to prevail.

Upon Retrocession, in 1881, Burgers' plan for the High Court was immediately put into operation. The court was to have full civil and criminal jurisdiction and to act as a general court of appeal. Criminal trials as before were to be before judge and jury of nine, to return a unanimous verdict. Civil cases were before a judge alone. A death sentence had to be confirmed by the President. Finally, Kotzé was appointed Chief Justice.

The **High Court**, initially three-judge strong, sat in **Pretoria**, the seat of government. It was a court of first instance and of appeal for the whole Republic, its decisions being final. Johannesburg had a circuit court which sat for most of the year, but had no appellate jurisdiction and was virtually debarred from entertaining applications. The quorum for the full court was two members; if they were not in agreement, the case was to be postponed to allow the third judge to be present. In vacations, a single

[3] By Order in Council of 27th November, 1878: *Locale Wetten*, p. 741.

judge, in the absence of his brethren, was competent to sit in Pretoria, appeal lying from his decision to the full court.

In civil cases, a jury of nine would be summoned if one of the parties so desired. Rules regarding the required majority, the summoning of the jury and similar matters could be made by the judges with the consent of the President. Criminal trials at the seat of the court came before a judge and a jury of nine, whose decision, as before, had to be unanimous. The judge could reserve a point of law for the consideration of the whole court.

A **circuit court** of one judge to hear both criminal and civil matters had initially to be held twice a year, from 1888 on as often as required. Appeal lay to the High Court in civil cases and in criminal cases where the presiding judge reserved a point of law.

An amending enactment of 1885 vested jurisdiction in all civil matters in a single judge sitting in Pretoria (with an appeal to the High Court, that is, the full bench), unless the parties in writing agreed to bring their suit at first instance before the High Court, whose decision would be final. This provision, however, was repealed in 1888 and replaced by the old rule that in term time, two judges were to make a quorum. This law also allowed for the appointment of **two additional puisne judges** by the State President on the advice of the Executive Council. Not more than three judges were to sit in a matter, two still being a quorum. In vacations and on circuit a single judge sat.

Rules of court were framed in 1881, to be successively by new rules in 1887 and 1899. Court officials from 1888 were enjoined to use only the Dutch language.

In 1890 a **fourth puisne Judge** was appointed to the Bench, largely necessitated by the discovery of the Gold Fields on the Witwatersrand[4] and the greatly increased legal business of the country. In 1896, the President, with the advice of the Executive Council, was empowered to appoint a **fifth puisne judge**.

The following table[5] shows the state of High Court business *in lustra* from 1877:

| | **1877** | **1882** | **1887** | **1892** | **1897** |
|---|---|---|---|---|---|
| Applications | 86 | 271 | 289 | 823 | 753 |
| Illiquid cases | 10 | 46 | 95 | 292 | 389 |
| Liquid cases | 5 | 51 | 17 | 109 | 94 |
| Civil and criminal appeals | 17 | 29 | 25 | 89 | 185 |
| Criminal trials | 19 | 15 | 57 | 247 | 387 |
| Reviews of stock theft cases | - | - | - | - | 101 |
| TOTAL | 137 | 412 | 483 | 1 560 | 1 909 |

From the **second British Annexation**, in **1900**, the whole administration of justice was reconstructed.

New superior courts were established. A **High Court of the Transvaal**, with its seat at Pretoria, was set up, composed of a judge-President and at least three puisne judges. In the Witwatersrand sat a single-judge

[4] The *Staats-Almanak*, 1899, p.143, gives a picture of High Court business for the year 1897, the following summary of which shows the importance of the Rand and the inconvenience that must have been caused by the limited jurisdiction of the circuit court:

| | Before High Court or in Chambers in Pretoria | Before the Circuit Court, Johannesburg | Before other circuit courts |
|---|---|---|---|
| Applications | 732 | 21 | - |
| Illiquid cases | 212 | 174 | 3 |
| Liquid cases | 73 | 20 | 1 |
| Civil and criminal appeals | 183 | - | 2 |
| Criminal trials | 33 | 224 | 130 |
| Reviews of stock theft cases | 101 | - | - |

[5] Condensed from the table in the *Staats-Almanak*, 1899, p. 142.

tribunal, the **Witwatersrand District Court**. Within a few months, the names were changed to the **Supreme Court of the Transvaal** (the Judge-President becoming Chief Justice) and the **Witwatersrand High Court**.

The High Court had **concurrent jurisdiction** with the Supreme Court in its area. No special judges were appointed to the High Court; it drew on the Supreme Court Bench to constitute one or more single-member divisions. Witwatersrand became a permanent court of first instance, instead of a circuit court as in the old Republic, but with the same absence of appellate and review jurisdiction and limitation on original jurisdiction as with the old circuit court.

Applications and civil trials in default were to be heard by a single judge of the Supreme Court; otherwise, the quorum in civil matters was two judges (save in vacations when it was reduced to one). The High Court was a single-member court. Appeal lay from all civil judgements of a single member in chambers to the Supreme Court, which also entertained all reviews of proceedings of an appeals from inferior courts and appeals from the High Court. From the Supreme Court a further appeal lay to the Privy Council as in the Cape, but as of right only where the matter in issue was of the value of £2,000 or more.

From 1904 onwards, the Supreme Court, in cases where its normal quorum was two judges, was enabled to sit as a divisional court of **one judge** on consent of the parties or of its own volition. Appeals would lie from it and from a single judge sitting in vacation to the Supreme Court as though from a decision of the High Court. Provision was made in 1903 for circuit courts of a single judge of the Supreme Court with original civil as well as criminal jurisdiction, but unlike the circuit courts of the other colonies, they could not entertain appeals from inferior courts.

With crime, the Supreme Court was vested with jurisdiction over the whole colony, the High Court and circuit courts over their particular areas. Trial was before a judge and jury of nine males, originally required to reach a unanimous verdict, from 1909 to reach a verdict by a majority of at least seven to two. Appeals lay to a Supreme Court bench of three judges on the customary restricted basis of a special entry of irregularity or illegality of proceedings or reservation of a question of law. There was no appeal on fact.

**The Orange Free State:**

In terms of the **1854 Grondwet**, there were two layers of courts of inferior jurisdiction: the court of landdrost, with civil jurisdiction to £37 10s. and criminal jurisdiction to three months' imprisonment; and the court of landdrost and two of the heemraden of the district[6] with double the civil jurisdiction and criminal jurisdiction to four months' imprisonment.

The superior court under the Grondwet was a circuit high court of three landdrosten (popularly known as the court of combined landdrosten). In criminal trials it was to sit with a jury. The jurors in criminal trials were to number six or more, and they alone would return the verdict.

In 1875, a qualified **superior court** was established[7] and this new court sat both at first instance and on appeal.

There was now a circuit court and a High Court with its seat at Bloemfontein, comprising a Chief Justice and to puisne judges.

[6] Appointed by the Volksraad for a term up to two years, but eligible for reappointment.
[7] Law No. 2 of 1875.

The circuit court of a single judge sat at least once a year in each district trying criminal and civil cases and hearing appeals from the inferior courts. From its decisions, appeal and review lay to the High Court.

The **High Court**, composed of all judges, had no original criminal jurisdiction but enjoyed original jurisdiction in all applications and, with consent of the parties, in all matters that could be entertained by the circuit court, as well as appellate capacity. In 1878, it took the place of the circuit court in civil matters in Bloemfontein.

During the years 1900 to 1910, a series of early enactments saw the reconstruction of the courts.

A new High Court, also with its seat at Bloemfontein, was established, consisting initially of two judges, from 1904 of a Chief Justice and no fewer than two puisne judges appointed by the Lieutenant-Governor. Circuit courts of a single judge could be established, having the full jurisdiction of the High Court.

In civil suits, the quorum of the High Court was two judges, save in vacation when it became a single judge.

Criminal trials before the High or circuit Court were heard by a judge and jury of nine, required to return a unanimous verdict.

Until 1904, civil appeals from the superior courts were heard by the Transvaal Supreme Court. Thereafter from the High Court appeals went direct to the Privy Council, the lower limit being £500 as in the Cape, the High Court itself becoming an intermediate court of civil appeal from a circuit court and a judge in chambers.

The Transvaal Supreme Court was also the court of criminal appeal from cases tried by the Orange River Colony superior courts until 1904. Thereafter its place was taken by the Orange River Colony High Court. The basis of appeal was on the same restricted footing as in the Transvaal. The execution of the death sentence required approval of the Governor after consideration of a report by the presiding judge.

The High Court and a circuit court had full review and appeal jurisdiction in respect of civil and criminal cases in magistrates' courts.