

3. OVERVIEW OF THE RECESS SYSTEM

3.1. THE DETRIMENTAL EFFECTS OF THE RECESS SYSTEM

Recesses militate against the concept of **speedy justice**, which has been a basic tenet of our justice system in both the pre- and post-Constitutional eras.

Historically, as has been shown above, our whole legal system developed in consideration of "*how efficiency, justice and humanity could best be promoted*"¹ and the necessity to hold courts "*as frequently as the wants of the inhabitants required.*"²

Since the advent of the **Constitution**, sections 35(1)(d) and 35(1)(e) of Act 108 of 1996 have entrenched an accused person's right to be brought before an ordinary court and to be informed of the charge against him or her **within a reasonable time**. This 'reasonable time' should be no later than 48 hours after arrest, or the first court day thereafter. Section 35(3)(d) of the same Act confers the right to have a trial begin and conclude without unreasonable delay.

On the other hand, the **Criminal Procedure Act**, 1977 provides, in section 342A(2), a host of considerations to determine whether or not a **delay** is **unreasonable**, and steps which may be taken to deal with undue delays.

Besides our own legal system, the concept of speedy justice is echoed throughout **international legal systems** and instruments³.

¹ Addenda to the Report and Minutes of Evidence of the Committee of the Legislative Council on the Judicial Establishment, Cape Town: Saul Solomon, 1846, p. 5.

² Preamble to the Better Administration of Justice Bill, 1855, see page 14 *supra*.

³ The right to be tried without undue delay or within reasonable time is protected in the International Bill of Human Rights by article 14(2)(c) of the International covenant of Civil and Political Rights, and is also

Apart from the actual **loss** of some **4624 court days**⁴ during the recess periods, there are **other consequences** to the recess system.

Recesses undermine the **efficient operation** of the courts and, as such, impact on how efficiently **public funds** are expended.

Additionally, recesses cause a **delay** in real time of some three and a half months per year and contribute to the **awaiting-trial period** of approximately **one and a half years**, from the date of the first district court appearance to the start of the High Court trial⁵.

The so-called **Minimum Sentences Act, 1997**⁶ causes a **delay** from conviction to enrolment in the High Court of 227 days, and, from **crime to sentence**, of **677 days**⁷. This unfortunate piece of legislation has been the subject of scrutiny by both the judiciary and the National Director of Public Prosecutions. Representations to **amend** the legislation in order to obviate the need for cases to be referred to the High Court for sentencing, are presently under consideration and will hopefully be successful.

An **audit** of the **New South Wales** court system described the effects of **delays**, as follows:

- a] **evidence** dissipates or deteriorates; witnesses' memories fade with time, and witnesses may die or go missing;
- b] **gaols** become overcrowded, with detainees on remand awaiting trial for lengthy periods of time;
- c] [delays] cause **anxiety** for the victims of crime, the persons accused of crime and close family members of both the victims and the accused;

contained in the regional human rights instruments in article 7(1)(d) of the African Charter on Human and Peoples' Rights, articles 5(3) and 6(1) of the European Convention on Human Rights, and article 8(1) of the American Convention on Human Rights.

⁴ 68 criminal divisions are closed for, on average, 68 court days, amounting to 4624 court days nationally.

⁵ See Appendix 'C'

⁶ Criminal Law Amendment Act, 1997 (Act 105 of 1997)

⁷ See Appendix 'D'

- d] the **deterrent effect** of the criminal justice system becomes undermined;
- e] **community respect** for the justice system becomes eroded;
- f] delay has a **compounding effect**; for example, delay can be used, in some instances by some parties, to postpone a hearing which would be detrimental to the interests of that party; this may reinforce the power of the financially stronger party – the one better able to withstand the financial consequences of delay;
- g] court **resources** are wasted;
- h] witnesses, juries and other participants in the system are **inconvenienced**.⁸

These factors become even more serious in the **South African context** when seen against

- overcrowded prisons,
- backlogs and cycle times,
- community respect and vigilantism,
- new cases exceeding the rate of cases disposed of,
- crime rates which have doubled, with no corresponding increase in the number of prosecutors and courts.

Can we honestly **justify** a loss, through an outdated recess system, of **4624 court days** per year?

1. 'overcrowded prisons'

The **detention cycle time**, or the average length of time unsentenced prisoners remain incarcerated until the finalisation of their trials, **rose** considerably in South Africa between 1996 and early 2002.

In June 1996, the average unsentenced prisoner spent **76 days**⁹ in custody – by February 2002, this had increased to **139 custody days**.

⁸ Introduction to the report on an audit by the New South Wales Government into court waiting times, 1999.

⁹ Tough Choices: Prioritising criminal justice policies, Martin Schönsteich, ISS Paper 56, May 2002. These figures include unsentenced prisoners who are awaiting trial in all the courts, that is, district, regional and High Courts.

This means that, on average, accused persons (who are awaiting trial at the lower court) are imprisoned for four and a half months awaiting the finalisation of their trial. Most High Court accused spend approximately **553 days** from first appearance in the district court, to sentence in the High Court¹⁰.

Such **delays** involving **unsentenced prisoners** place a considerable **financial burden** on the department of correctional services. A prisoner costs the department some **R111 per day**. Multiplied over an average of 139 custody days, this comes to R15 429 per average unsentenced prisoner. It costs hundreds of millions of Rand to construct a reasonably sized prison in South Africa, and another R40 515 a year for every prisoner detained there. The country's 55 000 unsentenced prisoners cost the department of correctional services **R2, 23 billion** a year.

By the end of February 2003, South African prisons, with a capacity for 110 924 prisoners, were housing some **188 307 prisoners**, of whom 130 449 were sentenced prisoners and 57 858 were awaiting-trial prisoners. While the number of sentenced prisoners is too high, the number of **awaiting-trial prisoners** is extraordinarily high.

Number of awaiting trial ('AWT') prisoners, per Court, per province, as at 29 September 2003:

COURT	-	(ABBREVIATION)	AWT PRISONERS
Circuit Court	-	(C/C)	115
Magistrates Court	-	(M/C)	29 849
Regional Court	-	(R/C)	19 132
Supreme Court/High Court	-	(S/C)	747
TOTAL			49 843

PROVINCE	AWT	TOTAL per PROVINCE
M/C Eastern Cape	4 600	
R/C Eastern Cape	1 006	
S/C Eastern Cape	107	5 713

¹⁰ See Appendix 'A'

PROVINCE	AWT	TOTAL per PROVINCE
C/C Free State	5	
M/C Free State	1 933	
R/C Free State	1 038	
S/C Free State	<u>39</u>	3 015
C/C Gauteng	10	
M/C Gauteng	6 186	
R/C Gauteng	10 250	
S/C Gauteng	<u>368</u>	16 814
C/C Kwazulu-Natal	45	
M/C Kwazulu-Natal	7 254	
R/C Kwazulu-Natal	2 535	
S/C Kwazulu-Natal	<u>117</u>	9 951
C/C Limpopo	7	
M/C Limpopo	550	
R/C Limpopo	<u>179</u>	736
C/C Mpumalanga	20	
M/C Mpumalanga	1 369	
R/C Mpumalanga	973	
S/C Mpumalanga	<u>1</u>	2 363
C/C North West	18	
M/C North West	1 134	
R/C North West	871	
S/C North West	<u>26</u>	2 049
C/C Northern Cape	7	
M/C Northern Cape	791	
R/C Northern Cape	346	
S/C Northern Cape	<u>14</u>	1 158
C/C Western Cape	3	
M/C Western Cape	6 032	
R/C Western Cape	1 934	
S/C Western Cape	<u>75</u>	8 044
GRAND TOTAL		49 843

Between June 1994 and December 2001, the number of **unsentenced** prisoners in South African prisons **increased** by a massive **183%**. Over the same period, the number of **sentenced** prisoners increased by **50%**. According to the Department of Correctional Services, **overcrowding** has an “**adverse effect** on offenders, staff and the safe custody of prisoners”¹¹.

Overcrowding exacerbates tension, hostility and aggression between prisoners, and between prisoners and prison personnel. The Annual Report of the Department of Correctional Services, 1 January 2000 to 31

¹¹ Footnote 39 to the Department’s presentation to the Select Committee on Security and Constitutional Affairs, Cape Town, 7 June 2000.

March 2001, reports that during 2000/1, **2 361 assaults** by prisoners on prisoners were recorded by the department (up from 2 271 in 1999/2000), and **619 assaults** by prison personnel on prisoners (up from 559 during the previous period). High overcrowding levels also impede the department's ability to **rehabilitate** prisoners.

One of the unfortunate solutions for overcrowding is the **early release** of prisoners. Between 30 April 1984 and 13 October 2000, there were 19 **amnesties** and **burstings**. The largest of these were in May 1986 (25 045 reduction in prisoners), December 1990 (18 054 reduction) and June 1994 (16 386 reduction). The last was in October 2000 (1 732 reduction). There was one release of awaiting-trial prisoners with unpaid bail up to R 1000 in September 2000 (6901 reduction).

2. 'backlogs and cycle times'

As at June 2003, in the district courts, there were **15 356** cases (12%) on the court roll which were older than 6 months, out of a total of 131 275 such cases.

At the Regional Court, **15 076 cases** (36%) on the roll are older than 6 months, out of a total of **42 081 cases**.

Cases **waiting** to be heard in the High Court **remain** on the lower court rolls for extended periods as they struggle to get through the High Court **bottleneck**.

3. 'community respect for the justice system becomes eroded'

Recesses are not in line with the **working patterns** of most public and private sector working organisations and, accordingly, create the unfortunate perception that the High Courts are **unproductive** and the judiciary **idle**.

One way for the communities to regain confidence in the criminal justice system would be for criminals to be prosecuted and convicted without **undue delay**. This would also encourage more people to report crime and testify against criminals, and reduce acts of vigilantism¹².

4. Court resources are wasted

Court buildings

It is unarguable that recesses do not permit the **optimal use** of court facilities. At a conservative estimate, **68** High Courtrooms, with excellent facilities, are unused for some **three and a half months** per year¹³.

The fact that the Department of Justice has had to allocate **R271 million** to the construction of court buildings during the year 2002/2003, and has allocated a further **R229 million** for the year 2003/2004, highlights this waste of resources.

Judiciary and support staff

A serious problem in the high court is not so much to ensure that the judges have time, but that they have it when they need it.

The fixed recess system creates this problem rather than addresses it. The recess system causes an **unequal distribution of work** by granting time indiscriminately to all judges at the same time, whether or not they either want it or need it, **at that time**.

It is a well-known fact that judges involved in **criminal trials** require considerably **less time** (outside the allotted time for the hearing of the trial) to write judgments than judges who find themselves mainly in the **'civil pool'**.

¹² Institute for Security Studies, Paper 56, May 2002.

¹³ This figure refers only to the present number of criminal divisions and excludes the civil courtrooms that are unused due to the recess periods.

One controversial aspect of the recess periods has been the employment of **Judges' secretaries** during the recess. These administrative support staff are not entitled to recess periods. At present, however, there is some uncertainty whether secretaries are obliged to complete leave forms for leave taken during recess periods.

Having a continuous criminal court roll, with staggered recess periods, should go some way towards ensuring that all the administrative staff (including interpreters) are able to be more efficiently redeployed in the High Court when not required by their own judge.

5. Efficient court management

If all the courts were open throughout the year, more efficient roll-planning and **continuity** would be achieved. It would be easier to place long trials, for example, and court rolls would be unaffected by **disruptions** caused by winding-down periods and recesses. There would be continuous access to justice.

Lord Beeching stated: "*a **peak in court loading** ... is bound to follow a **shut-down** of two months' duration, with consequent disturbances to listing for months thereafter and a recurrent danger that each peak, in turn, may cause a permanent extension of average delay time.*"¹⁴

Finally:

All the evils of the recess system, as listed above, can be addressed by a system which allows for the **continuous criminal sessions** of the High Court.

¹⁴ Report of the Royal Commission on Assizes and Quarter Sessions, 1966 – 1969, chaired by Lord Beeching, paragraph 423.

3.2. THE HIGH COURT OF SOUTH AFRICA: TERMS, RECESSES AND OPTIMAL USE OF RESOURCES

3.2.1 RULES OF COURT

History of the Rules of Court:

Initially, in the Charter, **extensive powers** were given to the **judges** to enable them to establish the rules necessary for improving the course of judicial proceedings. The judges were authorized to frame rules, orders and regulations -

*"Touching and concerning the **time** and **place** of holding the Supreme Court; and touching the **forms** and **manner** of proceedings to be observed in the Supreme and circuit courts respectively; and the **practice** and **pleadings** upon all actions, suits and other matters, both civil and criminal, indictments and information to be therein brought; the appointing of commissioners to take bail and examine witnesses; the examination of witnesses *de bene esse* and allowing the same as evidence; the proceedings of the sheriff and other ministerial officers of the said courts respectively; the process of the courts and the mode of executing the same; the summoning, impaneling and challenging of jurors; the admission of barristers, advocates, attorneys, solicitors and proctors in the said courts respectively; and touching and concerning all such other matters and things necessary for the **proper conduct** and dispatch of business in the said Supreme and circuit courts respectively."*¹⁵

The judges were free to revoke, alter, amend or renew all such rules, orders and regulations. These powers were subject to a number of important provisions, *inter alia*, that the rules 'had to be framed so as to **promote economy and expedition in the dispatch of the business of the courts** and with reference to the corresponding rules and forms in use in the Courts at Westminster'¹⁶.

¹⁵ Section 47 of the Charter of Justice

¹⁶ Fine, *op.cit.*, par. 2.3.3, p.36.

Later, several skirmishes between the legislature and the judiciary eventually led¹⁷ to **legislative changes** to the judges' previously enjoyed authority to regulate the business of the Supreme and circuit courts.

Ordinance No. 32 of 1846 provided that all future rules had to be enacted by Ordinance before they could take effect. The Ordinance further provided that the Legislative Council could itself, initiate, alter, amend or revoke any such rule, order or regulation pertaining to the business of the Supreme and circuit courts.

On 4 June 1856, however, Act No. 26 of 1856 was promulgated, which reaffirmed the **judges' authority** to frame rules in terms of section 46 of the Charter of Justice. The judges were henceforth required to place the rules before the Governor for approval or disallowance. Once the rules had been approved by the Governor, who was required to act on the advice of the Executive Council, they had to be promulgated in the Government Gazette before they be of any force or effect. After proclamation, the rules had to be tabled in **Parliament**. If they were not confirmed by an Act, during the session in which they had been laid before both Houses, they were to cease to have any force or effect.

Prior to the introduction of the Uniform Rules in 1965, every division of the Supreme Court of South Africa had its own set of **rules**. These rules were repealed by rule 71, save to the extent indicated in the schedule to the rule. The rules which were not repealed related to 'local' matters such as the **time** for the holding of courts and the **placing on the roll** of actions for hearing.

The Rules were made by the **Chief Justice**, in consultation with the

¹⁷ In 1844, as a result of several skirmishes between the legislature and the judiciary, the Charter was amended in such a way so as to subordinate the judiciary to the legislature and the Cape Legislative Council was empowered to alter the Charter. The Legislative Council immediately decided to exercise greater control over the judges' authority to establish the rules of court.

Judges President, with the approval of the State President, in terms of section 43(2)(a) of the Supreme Court Act, 1959¹⁸.

In terms of the **Rules Board for Courts of Law Act, 1985**¹⁹, which came into operation during 1987, a Rules Board for Courts of Law was established which has the power to make, amend or repeal rules for the High Court (and the lower courts), subject to the approval of the Minister. In terms of **section 6** of the Act,

*“the [Rules] Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court and the lower courts, from time to time on a regular basis review existing **rules of court** and, subject to the approval of the Minister, **make, amend or repeal** rules for the Supreme Court and the lower courts regulating –
(1) generally **any matter** which may be necessary or useful to be prescribed for the proper despatch and conduct of the functions of the Supreme Court and the lower courts in civil as well as in criminal proceedings.”*

In terms of the Act, Rules must be made so as to promote the “**efficient, expeditious and uniform administration of justice** in the Supreme Court and the lower courts”, an echo of the corresponding exhortation to the Judges in the Charter of Justice.

The President may, after consultation by the Minister with the Chief Justice, the president of the Supreme Court of Appeal and the judges president of the respective High Courts, make **regulations, inter alia**, as to arrangements regarding administrative recesses.²⁰

Although the judges’ extensive power to establish the rules of court was, therefore, first drastically diminished and subsequently somewhat restored, it never again became **absolute**.

¹⁸ Act 59 of 1959

¹⁹ Act No. 107 of 1985

²⁰ Section 13(1)(a), Judges’ Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001).

In terms of s 43(2)(b) of the Act, the **Judge President** of a provincial division may make rules for regulating the proceedings of that division or of any local division within the area of jurisdiction of the provincial division. The Judges President of the various provincial divisions have in terms of their powers under that subsection amended the pre-1965 rules which still apply in their divisions and made new rules where necessary²¹.

It is at least implicit from all the Rules of Court, that normal business will not be conducted during the **recess periods**²². In almost all the Rules²³, however, it is clear that the Judge President of a given division has the supervening authority to direct which court(s) shall sit during recess for the hearing of which business²⁴.

While there is some degree of variance between the High Courts²⁵ in the exact dates of the various recess periods, each court is in recess for roughly **14 weeks** each year, comprising a winter vacation of approximately **5 weeks**, a summer vacation of approximately **6 weeks**, an April vacation of approximately 1 week and an October vacation of

²¹ Superior Court Practice, p. C2-1, Erasmus, Juta & Co., Ltd.

²² Provision is variously made for the hearing of provisional cases, applications, summonses for civil imprisonment, applications for judgement, certain criminal appeals and reviews and other like matters during recess, and/or any further business which the Judge President may direct.

²³ See also Regulation 2(2) of the regulations promulgated in terms of section 13 of the Judges' Remuneration and Terms of Employment Act, 2001 (Act 47 of 2001).

²⁴ Rule 8(4) of the Northern Cape Rules, for instance, states that the Judge President may authorize any departure from the Rules which he deems expedient.

²⁵ Court calendar 2003: Recesses 1 and 5 should be regarded as one recess.

SEAT OF COURT	RECESS 1	RECESS 2	RECESS 3	RECESS 4	RECESS 5
Western Cape	01/01–26/01	29/03–06/04	21/06–27/07	27/09–12/10	13/12–31/12
Witwatersrand	01/01-26/01	12/04-28/04	28/06-03/08	27/09-05/10	06/12-31/12
Pretoria	01/01-26/01	12/04-28/04	28/06-03/08	27/09-05/10	06/12-31/12
Bisho	01/01-26/01	05/04-21/04	28/06-27/07	27/09-12/10	13/12-31/12
Bloemfontein	01/01-19/01	29/03-21/04	21/06-20/07	27/09-12/10	16/12-31/12
Mmabathu	01/01-31/01	01/04-15/04	01/07-31/07	01/10-15/10	16/12-31/12
Kimberley	01/01-28/01	29/03-13/04	28/06-27/07	27/09-12/10	13/12-31/12
Durban	01/01-02/02	01/04-14/04	01/07-31/07	01/10-14/10	16/12-31/12
Pietermaritzburg	01/01-02/02	01/04-14/04	01/07-31/07	01/10-14/10	16/12-31/12
Grahamstown	01/01-26/01	05/04-21/04	28/06-27/07	27/09-12/10	13/12-31/12
Port Elizabeth	01/01-26/01	05/04-21/04	28/06-27/07	27/09-12/10	13/12-31/12
Umtata	01/01-19/01	05/04-21/04	28/06-20/07	27/09-12/10	13/12-31/12
Venda	01/01-26/01	12/04-28/04	28/06-03/08	27/09-05/10	06/12-31/12

approximately 2 weeks.

When these roughly fourteen weeks (translated into an average of **68** court days, across the divisions) are multiplied by the total number of criminal divisions (i.e. **68**) which are usually in session during term in all the High Courts, it can be seen that the **recess system per se** is responsible for the **loss**, on average, of some **4 624 court days per year**.²⁶

DIVISION	NUMBER OF COURT DAYS DURING TERM EXCL PUBLIC HOLIDAYS PER COURT PER YEAR	NUMBER OF COURT DAYS DURING RECESS EXCL PUBLIC HOLIDAYS PER COURT PER YEAR	NUMBER OF PUBLIC HOLIDAYS [COURT DAYS] DURING RECESS PER COURT PER YEAR	NUMBER OF CRIMINAL DIVISIONS	NUMBER OF DAYS DURING TERM MADE AVAILABLE FOR CRIMINAL TRIALS PER COURT PER YEAR
CAPE PROVINCIAL DIVISION	183	67	4	12 courts	Mon – Thurs [147]
WITWATERS-RAND LOCAL DIVISION	180	70	6	12 courts	Mon – Fri [180]
TRANSVAAL PROVINCIAL DIVISION	180	70	6	8 courts	Mon – Fri [180]
CISKEI HIGH COURT	184	66	4	3 courts	Mon – Fri [184]
ORANGE FREE STATE PROVINCIAL DIVISION	185	65	3	3 courts	Mon – Fri [185]
BOPHUTHATS-WANA HIGH COURT	174	76	3	4 courts	Mon – Fri [174]
NORTHERN CAPE DIVISION	181	69	4	3 courts	Mon – Fri [181]
DURBAN	176	74	3	4 courts	Mon – Fri [176]
PIETER-MARITZBURG	176	74	3	6 courts	Mon – Fri [176]
GRAHAMS-TOWN	184	66	4	3 courts	Mon – Fri [184]
PORT- ELIZABETH	184	66	4	2 courts	Mon – Fri [184]
UMTATA, TRANSKEI	194	56	4	6 courts	Mon – Fri [194]
VENDA HIGH COURT	180	70	6	2 courts	Mon, Wed & Fri [107]
TOTAL	2 361	889	54	68	2 252

In addition to the above, **36 court days** are lost in the Cape Provincial Division annually by not sitting on Fridays and **73 days** are lost annually

²⁶ This does not take into account the skeleton vacation courts which perform a limited amount of work and are not material to the overall picture.

in Venda High Court by not sitting on Tuesdays and Thursdays.

Whereas, in the lower courts, a special effort was made to contain the burgeoning backlogs with **Saturday courts** and **additional courts**²⁷, the High courts have unfortunately not played a meaningful role in this exercise.

The recesses have generally been left largely intact and some **68 courtrooms** stand empty and unused for approximately **3 months** of each year.

Although the Judges President have the discretion to allow **criminal trials** and **appeals** to be conducted within the recesses, this discretion is exercised very sparingly and then, only in certain *ad hoc* situations, which do not materially ameliorate the situation.

Some Judges President do, on occasion, allow **limited criminal business** during the long recesses. Thus, at the Witwatersrand Local Division, 2 or 3 criminal courts, on average, sit per day during the recess periods. During the 2003 June/July recess, at the Cape Provincial Division, 8 court sittings were held for the hearing of 2 minimum sentences per week while, at the Natal Provincial Division, two courts sat for the hearing of criminal trials.

There is a greater degree of relaxation in the no-business rule when it comes to the hearing of criminal **appeals**. Thus, in the **NPD**, appeals are

²⁷ iafrica.com – 29 October 2002, quoting the National Director of Public Prosecutions: The total number of new cases heard in South Africa's courts almost doubled during 2001. New cases in district courts increased from 49 040 in March 2001 to 88 465 in November while, in the regional courts, the number rose from 4 280 to 7 715. The High Courts heard 288 cases in November 2001, compared with 183 in March. Despite the rise in the number of new cases, there was no corresponding rise in backlogs due to the Saturday and additional courts established in the lower courts, which disposed of 14 884 cases between February 2001 and December 2001. Cape Times, 12 August 2002: Between January and September 2002, there had been 3 027 Saturday and additional court sittings, which translated into 10 153 extra court days. Between January 2002 and March 2003, 27 570 cases had been finalised by Saturday and additional courts.

heard on **every Tuesday during recess**²⁸ and, in the **OPD**, the Rules²⁹ state that criminal appeals and reviews may be set down for hearing during vacation periods upon the instructions of the **Judge President**; in practice, however, this rarely happens.

From time to time, some Judges President direct that *ad hoc* **appeal courts** be held during the recess. Thus, during the June/July 2003 recess, at the Witwatersrand Local Division, some **70 appeals** were enrolled for hearing in 15 appeal courts.

As a general rule, therefore, it can be stated that criminal courts or appeals are not heard during the recesses in any material sense.

As was seen previously, this (practically) complete shut-down of criminal work between the terms is a relatively **new feature** of our High Court business, with the **TPD**, for instance, only introducing it as late as the **1990's**.³⁰

There has, however, always been a traditionally '**closed period**' of approximately **two weeks** over the Christmas period, in all the divisions, during which no business (neither criminal nor civil) is conducted³¹. This falls within the end of the year recess period and remains a feature of the modern High Court calendar.

3.2.2 FURTHER DAYS 'LOST' AND DELAYS:

Besides the formal 'shut-down' during the recess periods, further days

²⁸ Rule 2(5) of the Rules regulating the conduct of the proceedings of the Natal Provincial Division of the Supreme Court of South Africa.

²⁹ Rule 2(2) of the Orange Free State rules.

³⁰ As has been stated previously, however, such 'shut-downs' may, in fact, have existed in practice, merely due to there being a limited volume of criminal work.

³¹ Again, this restriction is subject to the proviso that the Judge President or judge on duty, as the case may be, may direct that urgent business may be heard during that period.

are lost, in varying degrees, due to other factors **related** to the recess periods, as shall be seen hereunder.

In dealing with these factors, not only do the **Rules vary** from division to division but, often, so also does the **practice** at a particular division vary from the relevant Rules pertaining to that division.

3.2.2.1 Winding-down periods:

Of all the provincial and local Rules, only the **CPD Rules** make provision for a formal so-called '**winding-down**' period. Thus, Rule 3(5) stipulates that no 'defended actions, special cases and other cases not specially provided for' may be set down for hearing on any day during the **last seven days of term**, unless the Judge President directs otherwise.

In practice, this is confined to a ban on the placing of **new** cases and, often, partly-heard matters are enrolled for hearing during the last week of term³².

At all the **other divisions**, while there is no formal winding-down period stipulated in the Rules, the **practice** is to set only part-heard cases down during the last week of term.

This winding-down period causes further **disruption** in the rolls, as invariably, days are not utilized in anticipation of the long break in proceedings.

3.2.2.2 Full bench appeals

At the **Cape** Provincial Division, in addition to the days lost through the recesses and the winding-down periods, criminal trials are effectively delayed for a further **two weeks** per year when only full bench appeals

³² It has also happened that the Judge President has, by special concession, allowed the placing of new minimum sentence matters during the last week of term.

are heard³³. This amounts to a total 'loss' (or delay) of a further **120** court days per year.

At the **Natal** Provincial Division, full bench appeals are likewise heard twice a year, that is, during the second week in February and the second week of August, while, in the other divisions which hear appeals full bench appeals³⁴, these are fitted in during the term in various ways which do not impact on the ordinary business of the criminal trial courts.

At the **Orange Free State** Provincial Division, ordinary appeals are usually heard on Mondays. After a recess, however, during the first week of term, no appeals are heard, although extra appeals are allowed to be heard on the Monday, Tuesday and Wednesday of the last week of term in order to **compensate** for this loss in court time.

3.2.2.3 Delays caused by not having a calendar

Yet another consequence of the recess system, is the fact that **calendars** are published each year to announce the dates of the terms for the coming year.

In practice, **uncertainty** about the court dates for the coming year leads to difficulties in the **placement** of matters and, often, cases have to remain on the lower court rolls for extended periods of time in anticipation of the High Court calendars for the next year. This bottleneck at the lower courts impacts negatively on their productivity and, on occasion, has also led to matters being **struck from the roll** by the lower Court magistrate³⁵.

This unfortunate consequence is avoided in some divisions, such as the

³³ The first week of term after each long recess.

³⁴ Neither Port Elizabeth nor the Durban and Coast Local Divisions hear any appeals.

³⁵ In the Cape Provincial Division.

Transvaal (and the Witwatersrand) and Venda, where calendars are published for up to **four years in advance**.

The Rules of the Eastern³⁶ and Northern Cape provincial divisions, respectively, **stipulate a date** by which the court calendar must be published (by notice in the Gazette) each year.

At the Natal Provincial Division, there has traditionally been calendar certainty in that the **same fixed dates** have applied each year. By notice dated 27 August 2003, however, Rule 2 of the rules regulating the conduct of proceedings in that division in regard to Sittings of the Court and Vacations has been **changed**.

In terms of the amended rule, the dates of the ensuing year's terms shall be published by notice in the Government Gazette not later than **30 September** of each year. The rest of the year shall be recess, save during the period 24 December to 2 January, and on Good Friday, during which period no courts shall sit.

³⁶ According to rule 2(1) of the Eastern Cape Division rules, the calendar must be published by no later than 31 October of each year, while the corresponding rule in the Northern Cape makes the deadline for that calendar 30 September.