

## **6. RECOMMENDATIONS AND OBSERVATIONS IN CONNECTION THEREWITH**

### **6.1 OBSERVATIONS**

- 6.1.1 The measures which will be recommended to address the recess system are neither drastic nor alien to the legal world, but have been **implemented** in other foreign jurisdictions some years ago, namely:
- a restructuring of the High Court into a **separate criminal** and civil Bench within the same Court,
  - the implementation of **partial staggering**, and
  - the creation of a **new tier of criminal judge** in the High Court who will require a shorter recess.
- 6.1.2 According to section 176(3) of the Constitution (Act 108 of 1996), “[t]he salaries, allowances and benefits of judges may not be reduced.” The measures proposed in this report, however, do **not affect** the **existing rights** and privileges of the present High Court judges; if anything, they should merely provide the judges with **greater flexibility** in the planning of their work and holiday schedules.
- 6.1.3 There is no reason why the **existing recess system** cannot be **abolished**.

In terms of Regulation 2(1), promulgated in terms of section 13 of the Judges’ Remuneration and Conditions of Employment Act, 2001, a judge is entitled to a recess which “*shall not exceed a total of 14 weeks a year*”. Moreover, in terms of regulation 2(2), “[t]he **Judge President** ... shall prior to the commencement of

*the Administrative recesses, **determine** how many and which judges are to perform the functions in his or her divisions during the recess”.*

In terms of Rule 2, the periods between the terms shall be **vacations**, during which the ordinary business of the court shall be suspended, but at least one judge shall be available on such days to perform **such duties as the Judge President shall direct**.

- 6.1.4 The **Rules** regarding the times and dates (not the total period) of the recesses can be **changed**<sup>1</sup>. In terms of section 43(2)(b) of the Supreme Court Act, 1959, the **Judge President** may make rules for regulating the proceedings of that division with reference, *inter alia*, to the times for the holding of courts.<sup>2</sup>

The **Rules Board for Courts of Law Act, 1985**<sup>3</sup> came into operation during 1987. 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.”*

The President may, after consultation by the Minister with the

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<sup>1</sup> “2(1) Administrative recesses in any provincial or local division shall not exceed a total of **14 weeks** a year. 2(2)The **Judge President** concerned shall prior to the commencement of the Administrative recesses, **determine** how many and which judges are to perform the functions in his or her divisions during the recess.

<sup>2</sup> The Judge President of the Natal Provincial Division recently amended Rule 2 of the rules governing that division in terms of the said section. See page 57 *supra*.

<sup>3</sup> Act 107 of 1985

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**.<sup>4</sup>

6.1.5 It is a fact that each judge is presently entitled to an administrative recess of **fourteen weeks per year**<sup>5</sup>, a period which was negotiated as part of an improved package for judges in 1989, along with an increased remuneration. Judges are also entitled to **three and a half months' long leave** after four years of service<sup>6</sup>.

The Judge President is empowered to decide how active the judges will be during the recesses.

6.1.6 There is **no reason** why the recesses should be **fixed** and why the whole bench should go on vacation at the same time. Elsewhere, where circumstances have demanded it, foreign

<sup>4</sup> Section 13(1)(a), Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001).

<sup>5</sup> No opinion is expressed on the length of this recess, as any debate on the merits of these periods would simply delay any practical or urgently required reform, which this report seeks to achieve.

<sup>6</sup> The President has, under Section 13 of the Judge's Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001), made the following regulations:

*"2(1) Administrative recesses in any provincial or local division shall not exceed a total of **14 weeks** a year.*

*2(2) The **Judge President** concerned shall prior to the commencement of the Administrative recesses, **determine** how many and which judges are to perform the functions in his or her divisions during the recess.*

*3(1) The Minister may.... on the recommendation of the Judge President concerned grant leave to a judge for a period of **3½ months** for every period of 4 years' actual service ... or for a shorter period and subject to such conditions as the Minister may in any particular case deem fit.*

*4. If a ... judge waives in writing his or her right to unreduced remuneration in terms of section 176(3) of the Constitution of the Republic of South Africa, 1996 [Act No 108 of 1996], the Minister may in terms of regulation 3 and on the recommendation of the Chief Justice, the President of the Supreme Court of Appeal or the judge president concerned, grant such ... judge **additional leave on half pay** for a period not exceeding **one and a half months**.*

*5. If in exceptional circumstances the Minister is satisfied that **leave for which no provision has been made** in these regulations should be granted in a specific case, he or she may, on the recommendation of the Chief Justice, the President of the Supreme Court of Appeal or the judge president concerned, grant such leave on such conditions as he or she may deem necessary, whether it be leave with full remuneration or leave with reduced or no remuneration, provided that the ... judge concerned has, in the case of leave with reduced remuneration or leave without remuneration, in writing waived his or her right to unreduced remuneration...*

*6.If, according to a certificate of a medical practitioner, it appears that owing to illness a ... judge cannot perform his or her duties for a specified period the Minister may grant the judge **sick leave** for that period."*

jurisdictions have successfully **staggered** their recesses (either in whole or in part) and referred to these as 'variable recesses'. By allowing judges to take their leave at any time throughout the year, while maintaining a core bench, a Judge President will be able to ensure the **continuous criminal session** of the Courts.

6.1.7 Experience has shown that it is extremely difficult to convene courts during the so-called December/January '**festive**' period, when most people are either preparing to take their annual vacation or are already on vacation. Traditionally, there has also always been a '**closed period**' over Christmas and New Year, during which no court is in session (except for urgent matters). Thus, there are cogent arguments in favour of **maintaining** a 'closed' period during the festive season (during which the normal business of the courts will be suspended), while implementing a **partially staggered** system of recesses (and continuously open criminal courts) during the rest of the year.

6.1.8 If courts are closed for a period of **three weeks** over the festive period, the remaining recess entitlement could be spread during the course of the year. The **criminal courts** would therefore effectively be closed for only **15 court days**, which translates into a loss of only **1020<sup>7</sup> court days**, as opposed to the current 4624 days<sup>8</sup> which are currently being lost due to recesses.

6.1.9 Historically in South Africa, since the Charter of Justice, 1828, and until the latter half of the twentieth century, criminal cases were to '**continue by adjournment, as the case may**

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<sup>7</sup> Assuming that there would remain 68 criminal divisions across the country, as there are presently,  $68 \times 15 = 1020$ . (See the table of courts on p52 *supra*)

<sup>8</sup> 68 criminal divisions multiplied by approximately 68 recess (court) days = 4624 days.

**require**'. This practice was abolished when the terms were also made applicable to criminal work; there is no reason, however, why this practice should not now be revived. New South Wales has a similar provision<sup>9</sup>.

What is being proposed, therefore, is nothing more than a return to the earliest system where criminal sessions were stipulated *"to be continued by adjournment, **as the case may require, until the whole of the criminal business is disposed of...**"*

- 6.1.10 A staggered recess system will allow for the **continuous criminal session** of the High Court while at the same time giving the judges **greater flexibility** in the planning of their work and leisure schedules.
- 6.1.11 **Retaining the existing complement** of judges, while simply spreading their vacation periods over the full year, will not give more 'judge days'. In the CPD, for instance, current resources could provide either 12 criminal divisions sitting for 8,5 months (as they presently do), for instance, or 9 criminal divisions sitting for 12 months<sup>10</sup>.
- 6.1.12 A continuous criminal session, albeit reduced in size, will still have certain **advantages** over the current 'block' recess periods system:
- **roll planning** will be easier as there will be a constant (predictable) number of courts sitting throughout the year;
  - with only one annual **winding down** period, before the

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<sup>9</sup> See Appendix 'G', p.10

<sup>10</sup> If 12 judges each take 14 weeks' vacation, for instance, that leaves us with 12 judges each having 38 working weeks = 456 'judge weeks'. This could enable nine courts to remain in continuous session for 49 weeks (that is, 52 weeks less the 3-week fixed recess), which would require 9 x 49 = 441 judge weeks. (12 divisions, sitting for 49 weeks, would require 588 judge weeks.)

festive season shut-down, fewer 'winding down' days (at the end of each term) will be lost;

- **delays** in the finalisation of cases will be reduced,
- with a consequent benefit to our **overcrowded prisons**;
- administrative staff will be used more effectively and the court buildings will be utilized throughout the year.

6.1.13 It would also remove the unfortunate perception that our High Courts are unproductive and the judiciary **idle**. As stated earlier, it is the **duty** of the courts to engender **public trust** and **confidence**, which are unlikely to be achieved if there is a **perception** that the **courts** are **inaccessible** or **wasting public resources**.

Crime never shuts down and, with the possible, practical exception of the festive season, neither should the High Court.

6.1.14 An obvious improvement on the above conservative suggestion of merely **staggering the recesses** of the **existing complement** of judges, would be to stagger and **enlarge the bench**: in this way, current 'term strength' could be continued throughout the year, with obvious advantages for productivity. Employing more judges, with their current recess and remuneration packages (which appear to be Constitutionally entrenched), would, however, amount to a great increase in **costs**.

6.1.15 A third option would be to stagger the recess periods and **create a new tier of judge** who would do **only criminal trials**.

6.1.16 Undeniably, **criminal work** requires **less** judgement-preparing

and -writing **time** than civil work does. Under the present (mixed bench) system, therefore, when a High court bench goes into recess after a term during which not all judges had equal criminal and/or civil commitments, not all the judges will have equal recess work commitments. Arguably, a judge who only hears **criminal trials** would require **no more than 7 weeks' recess** per year.

- 6.1.17 A separate criminal bench will ensure a **more equal distribution** of work in the High Court. The problem, after all, is not so much to ensure that the judges have **time**, but that those who need it **have it when they need it**.
- 6.1.18 As stated above, existing rights cannot be taken away, but a **different package** could be negotiated for this proposed **new** rank of criminal judge.
- 6.1.19 A **hybrid bench** will improve the productivity of the High Court by **reducing the total recess period** of the judiciary without infringing on the rights enjoyed by the present complement of High Court judges. (There is a precedent for such a hybrid bench: the English Crown Courts, for example, consist of High Court judges, with their formal recess periods and Circuit Court judges whose recesses are staggered.)
- 6.1.20 The new rank of criminal judge should also **not** be entitled to **extended leave**, that is, 3½ months' leave after four years of service. (Spread over four years, this amounts to a further 'saving' of recess time of an effective 3½ weeks' leave per year.)
- 6.1.21 Extended leave is an extraordinary **privilege** which is not seen

in many other jurisdictions similar to our High Court. In the USA, for example, extended leave in such jurisdictions will generally only be granted on an *ad hoc* basis, **on application** to the Chief Justice, to judges who may have served on the bench for 15 years or more, and who will be utilising the time for 'judicial purposes'.

6.1.22 This new rank of 'criminal judge', with only **7 weeks' recess** per year, will dramatically affect productivity and also be extremely cost effective. Such a criminal bench will have to be built up slowly by appointing such judges as **vacancies** occur, from time to time.

6.1.23 Ultimately, under the proposed hybrid bench, some **68**<sup>11</sup> criminal judges will, together, account for a **saving** of approximately **714 weeks**<sup>12</sup> **per year (3570 days)**, in relation to the other High Court (civil) judges who will continue to enjoy their full complement of 14 weeks' and three and a half months' extended leave.

6.1.24 Thus, with:

- no increase in the current size of the Bench,
- no increased infrastructure, such as additional offices, judges' clerks, courtrooms, etc.,
- the complete phasing in of the criminal bench, that is 68 new tier 'criminal judges', as opposed to the present 68 'ordinary' judges,

**our criminal divisions will be able to be in session continuously throughout the year** (except for the three week

<sup>11</sup> The present number of criminal divisions. See the table on p 52 *supra*

<sup>12</sup> 68 criminal judges would be entitled to only 7 weeks' recess, as opposed to the 17½ weeks' recess (i.e. 14 weeks' plus 3½ weeks' extended leave) per year of the civil judges.

recess over the festive period).

- 6.1.25 As the Streatfeild report suggested<sup>13</sup>, **the time has now come** for the establishment of a **separate criminal bench**; the need for, and advantages of, such a separate criminal court will outweigh any possible disadvantages which may be caused by 'staleness' of the judges. In either event, in South Africa a **separate criminal bench already exists**, and adjudicates more than **90%** of all serious criminal trials, namely the Regional Court.
- 6.1.26 Moreover, in terms of the so-called Minimum Sentences Act<sup>14</sup>, Regional Courts can bring out a **conviction** in respect of the **most serious cases** heard in our courts – the only limitation being that, in certain limited circumstances, the matter must be referred, for sentencing, to the High Court. In fact, in terms of the said Act, the prosecuting authority could *de facto* convert the High Court into little more than a sentencing court (in respect of its criminal business), if it so wished.
- 6.1.27 A separate criminal bench will not require a doubling of **existing facilities** and can easily be accommodated within the confines of the present High Courts.
- 6.1.28 As in the United Kingdom, where the **need** arises and where the Judge President deems it **expedient**, several ('ordinary') High court judges could also be made available to do certain criminal cases of a more complex nature such as, for instance, complex commercial cases which bear a resemblance to civil work.
- 6.1.29 **Criminal work** must always be **prioritised**: that is, wherever a

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<sup>13</sup> See p78 *supra*

<sup>14</sup> Criminal Law Amendment Act, 1997 (Act 105 of 1997)

court must be closed due to the unavailability of a judge, this should be a civil court, not a criminal one.

- 6.1.30 A hybrid bench can be achieved by the **creation and gradual phasing in** of a new tier of judge who will do only criminal work and enjoy fewer recess periods. This bench can be sourced from a wide range of **criminal specialists**, including Regional Court magistrates, prosecutors at the various Offices of the Directors of Public Prosecution, academia and any private practitioner who is specialized in criminal work.
- 6.1.31 As an **interim** measure, the employment of **Regional Court magistrates**, as acting 'criminal' or 'ordinary' judges (until such time as the new rank of judge has been legislated for), would be a **practical** option.

Firstly, the appointment of Regional Magistrates can be achieved with the necessary **speed**. The Magistrates are already in the system and should be easily moved to the bench, with ordinary magistrates being found to act in the Regional Magistrate vacancies so created. It should be a relatively easy matter to find appropriate Regional Magistrates for placement in the High Court, to hear High Court criminal trials – in terms of Act 105 of 1997, they are entitled, in certain specified circumstances, to sentence accused persons to periods of **imprisonment of up to 30 years**<sup>15</sup>. The vacancies this would create at the Regional Court level could be filled with acting Regional Magistrate appointments.

- 6.1.32 The employment of **Regional Magistrates** as acting judges

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<sup>15</sup> In terms of section 51(2)(a)(iii), and the proviso thereto, of Act 105/1997, a regional magistrate shall in respect of a third or subsequent offender of an offence referred to in Part II of Schedule 2, sentence such offender to imprisonment for a period of not less than 25 years, and not more than 30 years.

would also be **cost-effective**. Although, as an acting judge, a Regional Magistrate would be entitled to the **increased salary** of a judge, in real terms the only additional expense, to the State, would be the **difference** between his current Magistrate's salary and that of a judge. The acting, or contract, Regional Magistrate appointed to fill his vacancy, would not require any additional salary.

- 6.1.33 The alternate solution of merely appointing sufficient members of the bar as acting judges, in order to keep all the courts running during the existing recesses, is both impractical and not financially viable. Across all the divisions in the country, this would require the temporary availability of some **68 advocates**. In the long term, the criminal pool of judges may naturally be drawn from a wide spectrum of legal experts (as stated in paragraph 6.1.30 above), including the bar.

## **6.2 RECOMMENDATIONS**

With reference to all the foregoing, the following recommendations are made:

- 6.2.1 The present system of recesses should be **abolished** with **immediate** effect.
- 6.2.2 A **fixed vacation** for a period of three weeks, starting on the Monday before the 24<sup>th</sup> December of each year, should be introduced.
- 6.2.3 **No hearing** or trial should be held in the **fixed vacation** unless

the Judge President otherwise orders. Where a matter is urgent or where desirable, however, judges should be **allowed** to sit during the fixed vacation (depending on the availability of counsel). These judges can have the time so spent 'reimbursed' as compensatory leave the following year.

- 6.2.4 Legislation should be passed making provision for the creation of a **rank** of judges who will deal exclusively with **criminal trials**, with the same financial advantages as the present judges but with leave of only 7 weeks per year (instead of 14 weeks) and no extended leave.
- 6.2.5 The new rank of criminal judges must be **phased in gradually**, as High court judges vacate their posts, or posts become available in other ways.
- 6.2.6 While the new rank of criminal judges will do only criminal work, the **other judges** may still opt to have a **mixed 'diet'** of both civil and criminal pool work.
- 6.2.7 It is recommended that a **variable vacation** be introduced for a period not exceeding 11 weeks in the case of High Court judges, and 4 weeks in the case of the new proposed rank of criminal judges, and regulated by the Judge President in such a way as to ensure a **continuous criminal session** throughout the year (excluding the three week fixed vacation period).
- 6.2.8 The **civil year** can continue to be divided into **terms** and **vacation periods**, while the **criminal trials** run on every business day, throughout the year, with the exception of the three week fixed vacation period. The Judge President should,

however, always have the discretion in respect of allowing civil business to continue into the vacation period. **The only proviso regarding terms and vacations should be that, at all times, the fixed number of criminal trial courts continue to run.**

- 6.2.9 A **criminal trial**, once started, should **run to conclusion**. Unless otherwise ordered, trials would generally not be set down at a time that might reasonably cause that trial to proceed during the fixed vacation period.

However, if a trial were to be set down in ordinary circumstances and not be concluded by the start of the fixed vacation, the trial should **proceed during the fixed vacation** until the accused is acquitted or found guilty<sup>16</sup>.

- 6.2.10 Until the full complement of 'criminal judges' is reached, each division must draw up its own **transitional plan**, based on the nature and quantity of its work and the size of its bench.

In the **Cape of Good Hope Provincial Division**, for instance, the following is suggested as a possibility:

- Staggering *per se* will mean that only 9 criminal divisions (instead of the usual 12 divisions which sit during term) will sit continuously throughout the year (except for the compulsory, end of year vacation).
- If, however, staggering is accompanied by the appointment of **4 acting judges** who are appointed for the criminal pool **exclusively**, then it is calculated that the Cape Division would save 103 days a year per court made

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<sup>16</sup> This is the position in New South Wales (see Appendix 'G') and was also the position in South Africa, historically.

up through the recesses (67 days) and by sitting on Fridays (36 days).

- In this way, 12 divisions could sit throughout the year and **no court days would be lost** which will mean that 1 236 (103 X 12) judge days will be gained, additional to the present allocation of 1 764 (147 X 12) days.  
This will amount to approximately a **70% improvement** in **productivity** in the criminal pool.
- Consideration should be given to the appointment of regional court magistrates as acting judges, or acting criminal trial judges, on a rotational basis. These magistrates would sit continuously.