

**OPINION ON THE EXTENT TO WHICH CONSTITUTIONAL JURISDICTION
SHOULD BE CONFERRED TO MAGISTRATES AND OTHER COURTS**

1.

The CC Sub-committee has agreed that the Magistrates' Courts and other courts, should be given constitutional jurisdiction. This is the case may be, because all the courts are guardians of human rights in terms of Section 35 of the interim Constitution. To be able to guard these rights the courts must be able to interpret and implement the provisions of the constitution. It is also clear that the extent to which this jurisdiction is exercised differs according to different levels of courts viz Magistrates' Courts, Constitutional Court, Supreme Court etc as provided for by the Constitution. We have been instructed to give a legal opinion on the extent to which Magistrates' Courts should be granted this jurisdiction. It is our view that to be able to address this issue, one needs to understand why constitutional jurisdiction is conferred to a court and how that court is expected to exercise it.

2.

Section 4 of the interim Constitution provides that the Constitution is the supreme law of the country. Therefore any law or conduct that conflicts with it is of no force or effect in terms of section 4 of the Constitution. Guardians of this are courts. Therefore Constitutional jurisdiction is conferred to a court to ensure that all the organs of state respect the Constitution in particular the basic human rights it seeks to protect. Whether or not the organs of state respect the Constitution is a question to be determined by a court with jurisdiction to do so. The effect of this is that, if such a court, in determining such a question, decides that a state organ has not respected the Constitution i.e. violated a constitutional provision, therefore acted unconstitutional, it can invalidate such an act. Such an act can be an Act of Parliament, subordinate legislation, a decision issued by another court or acts of administrative authority. In the case of an Act of Parliament or subordinate legislation, a court with constitutional jurisdiction will declare it null and void. With decisions issued by other courts it can quash them. As regards unconstitutional conducts of administrative authority, such a court can reverse their decisions.

3.

Therefore in our opinion it would be advisable that the Subcommittee, when considering this issue, have regards to the following questions:

Should Magistrates' Courts and other courts have jurisdiction to invalidate an Act

of Parliament, provincial enactments, proclamations and regulations on the basis of unconstitutionality or whatever reason? Section 101 3(c) of the interim Constitution confers constitutional jurisdiction to Provincial or Local Divisions of the Supreme Court within their areas of jurisdiction but bars them from enquiring into the constitutionality of an Act of Parliament while Section 98(2) confers overall constitutional jurisdiction to the Constitutional Court.

This is probably the case to ensure uniformity and certainty in interpreting the constitution and implementation of Acts of Parliament, to avoid a situation where in some province(s) they are invalidated and upheld in others, therefore being implemented in one while they are not implemented in other provinces.

4.

This issue arose in the case of Qozeleni v Minister of Law and Order and Another 1994 (3) SA 625. In this case the Constitution is interpreted to bar Magistrates' Courts from enquiring into the constitutional validity of statutory enactments. The question as to whether the Magistrates' Courts have constitutional jurisdiction over conducts of non-statutory nature, (administrative authority decision) is answered in this case referring to Subsection 35(1) and 35(3). These Subsections read:

35. (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.

The conclusion in this case was that Magistrates' Courts are also courts of law. Therefore in terms of this provision they have constitutional jurisdiction over certain issues except for those that they have been expressly prohibited to test.

5.

For the above reasons, it is our opinion that a situation similar to that of Provincial and Local Divisions of the Supreme Court as provided for by Section 101(3)(c) of the Constitution should be applied to Magistrates' Courts and other courts. Uniformity, accessibility and certainty as regards this issue are decisive words in our view. The system must be accessible as possible as it can to bearers of rights it seeks to protect

as possible as it can. In our opinion this can best be achieved by proper involvement of Magistrates' Courts and other courts in constitutional matters as well. However the involvement of these courts, in our view, is subject to uniformity and certainty in application of relevant procedures.

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31 August 1995