

**COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON
THE CONSTITUTION SEVENTEENTH AMENDMENT BILL (B6-2011)
AND THE SUPERIOR COURTS BILL (B7-2011)**

The comments of the Law Society of South Africa (LSSA) regarding the two Bills are as follows:

1 CONSTITUTION SEVENTEENTH AMENDMENT BILL:

- 1.1 Since 1994 it has been confirmed that the restriction of the jurisdiction of the Constitutional Court to matters on merit only, was justified.
- 1.2 Establishing the Constitutional Court as the Apex Court, even in respect of matters on merit not related to constitutional issues, is not warranted.
- 1.3 The LSSA is of the view that the judicial system provides adequately for matters on merit to be decided and that the Constitutional Court should not be established as the Apex Court, in respect of matters on merit only;
- 1.4 The LSSA is therefore not in favour of the amendment introduced in section 3 of the Constitution Seventeenth Amendment Bill and suggests that section 167 of the Constitution should not be amended as envisaged in section 3 of the Amendment Bill;
- 1.5 As far as Magistrates' Courts are concerned, it is appreciated that it is the intention to establish one judiciary. However, despite this desire on behalf of the Government, various Courts and tribunals are established in terms of legislation which does not contribute to the establishment of a single judiciary. The policy of the Government to establish a single judiciary is therefore undermined by its own legislation in establishing various tribunals and Courts with different status;
- 1.6 Furthermore, it cannot be denied that the Magistrate's Court is still considered to be a "lower ranking" court. See section 29(1)(a) through to (g) of the Magistrates' Courts Act. Other examples are the following:

- 1.6.1 a Magistrate's Court is excluded from determining *inter alia* the validity of a will;
 - 1.6.2 a Magistrate's Court does not have inherent jurisdiction;
 - 1.6.3 a Magistrate's Court cannot decide on the constitutionality of legislation.
- 1.7 It is therefore apparent that the Government considers the Magistrate's Court to be a "lower ranking" court. It is therefore only logical that the administration and function of the Magistrate's Court should be separated from the administration of the High Court, the Supreme Court of Appeal and the Constitutional Court.
- 1.8 The LSSA is accordingly of the view that section 10(4)(b) of the Constitutional Amendment Bill should not be introduced and the appointment, transfer and other matters relating to Magistrates, should remain as it is.

2 SUPERIOR COURTS BILL:

The LSSA supports the Superior Courts Bill, subject to the following reservations:

- 2.1 Section 18 of the Bill deals with the suspension of a judgment where an appeal is noted. There is controversy surrounding the suspension of a judgment only in the case where application is made for rescission or review of a judgment and not in the case of an appeal against a judgment. In this regard, reference is made to *United Reflective Converters (Pty) Ltd vs Levine 1988(4) 460 WLD*. The Rules Board for Courts of Law is at present investigating the provisions of the Common Law, the provisions of Rule 49(11) and the judgment in the *United Reflective* case. It appears that section 18 of the Bill is only confirming the Common Law as far as appeals are concerned. The LSSA supports an amendment which will also suspend a judgment in the case where there is an application for a rescission or a review of a judgment. However, the question of rescission or review of a judgment cannot, without certain conditions, just be introduced in section 18 of the Bill.
- 2.2 In the case of *Vilvanathan and Another vs Louw NO 2010(5) 17 WCC*, the court confirms that, in terms of the Common Law, a judgment cannot be rescinded in the High Court purely by consent of the plaintiff. Section 36 of the Magistrates' Courts Act was amended in 2003 to provide for a rescission of a judgment purely on consent of the plaintiff. There is

no reason why the position should be different in the High Court. There is an application pending before the High Court, where the Department of Justice and Constitutional Development is a respondent, to declare the rule of the Common Law to be unconstitutional on the basis that there is no equality in law in respect of a rescission of judgment by consent before the Magistrate's Court and the High Court. There is now an opportunity to attend to this problem. However, with reference to page 30E of the case of *Vilvanathan*, it cannot be accepted without reservation that the amendment to the Magistrate's Court Act to introduce section 36 was properly considered. It is suggested that it is now the time, before the Bill is finalised, to consider the judgment of *Vilvanathan* against the concerns raised on page 30(E). Should those objections be considered to be irrelevant, then it is suggested that the Bill must contain a provision similar to that of section 36 of the Magistrate's Court Act. However, if the criticism as set out on page 30E of *Vilvanathan* is considered to have merit, then the Bill should not contain provisions relating to a consent to a rescission of judgment and the provisions of section 36 of the Magistrate's Court Act must be researched and, if found to be problematic, that section must be amended accordingly.