FREEDOM UNDER LAW

A REVIEW OF THE CONSTITUTIONAL COURT'S JURISDICTION AND OPERATING PRACTICES IN LIGHT OF ITS INCREASED WORKLOAD AND CONSEQUENTIAL DELAYS.

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EXECUTIVE SUMMARY

This paper arises from growing concern about the functioning of the Constitutional Court. The Court is overburdened and unable to dispose of its workload within reasonable timeframes. The average period between hearing and judgment has more than doubled over the past decade; applications for leave to appeal remain undecided for months; and the Court's rate of delivering judgments has fallen significantly below the judiciary's own targets.

The disclosure, in early 2024, that certain retired justices had been enlisted to assist the Court in processing applications for leave to appeal shone a spotlight on these issues. Although the proposal was abandoned, it drew attention to the deeper structural causes of the Court's difficulties.

Freedom Under Law has prepared this paper to prompt discussion about how best to restore the Constitutional Court's institutional effectiveness, and protect its constitutional role as the apex guardian of the rule of law.

The paper identifies two interrelated dimensions of the Court's current crisis.

First, the problem of volume: the number of new applications filed annually has more than tripled since 2010. The Court now receives close to 400 applications a year – the majority of which are routine appeals raising no constitutional issues, and no important and arguable questions of law.

Second, the problem of process: the Court continues to apply procedures developed for a much smaller caseload. Simply by way of example, every application for leave to appeal must be considered by all 11 Justices, and disposed of by a minimum quorum of eight.

This combination of factors has produced a serious dilemma. The Court's increased general jurisdiction, coupled with its inability to process routine applications efficiently, has begun to undermine its constitutional function. In particular, its attention to cases of genuine constitutional importance is delayed, and public confidence in its efficiency and accessibility is being eroded.

A further source of inefficiency lies in the indeterminate manner in which the Court applies its 'interests of justice' test for leave to appeal. As originally conceptualised, the test was intended to function as a *filter*, ensuring that only cases of real importance reach the Court. In practice, however, it is applied in an open-ended manner, which results in the Court hearing cases it should not. This further entrenches unpredictability. Because litigants and practitioners cannot reliably anticipate when leave will be granted, applications are often filed speculatively, further increasing the Court's load. A more rule-based approach – in which certain factors operate as presumptive bars, subject

to clearly-defined exceptions – would enhance clarity, reduce meritless applications, and advance the rule of law by making criteria more transparent.

A comparative analysis of apex courts in other jurisdictions – particularly Germany, Canada, Australia, the United States, the United Kingdom, Singapore and India – reveals that the Constitutional Court's difficulties are partly the result of institutional design, rather than unavoidable circumstance. Most other apex courts have features that are absent in South Africa: smaller panels for determining preliminary matters; screening mechanisms staffed by trained legal officers; extensive professional support; and strict rules regarding the form of applications, keeping them within manageable limits. This allows other courts to process thousands of filings a year, while maintaining shorter turnaround times.

This paper identifies a spectrum of short-, medium- and long-term interventions. In the short term, practical and procedural reforms could be implemented without constitutional amendment. These include amending the Court's rules to impose page limits, adopting a more rule-based approach to the "interests-of-justice" test, and providing more reasoned refusals of applications for leave to appeal; thereby enhancing clarity and predictability, for both litigants and practitioners.

Medium-term interventions might involve introducing assessment panels of fewer judges to deal with new applications – though this may require constitutional amendment.

In the long term, more fundamental structural reforms could be considered, such as reverting to a 'German model' with separate chambers for constitutional and general matters, merging the Constitutional Court and the Supreme Court of Appeal into a single apex court, or curtailing the Court's jurisdiction through constitutional amendment. Structural changes of that nature would seek to address the root causes of inefficiency by redesigning the Court's institutional framework to better manage its caseload and preserve its constitutional role.

The Court's ability to protect the rule of law depends not only on the substance of its judgments but on its capacity to decide cases promptly, predictably and transparently. The comparative evidence shows that this can be achieved through deliberate institutional design rather than necessitating constitutional overhaul. Whatever the approach, the time has come for a coherent programme of reform – one that preserves the Court's authority, restores its efficiency, and ensures that it can continue to discharge the constitutional role envisaged for it.

1. INTRODUCTION

The Constitutional Court is overwhelmed. A statistical analysis of its caseload and output suggests that it is overburdened and undercapacitated.[1] The efficiency of its adjudicative processes and the quality of its decisions have been the subject of public concern for some time,[2] and have become a regular subject of questioning in Judicial Service Commission interviews.[3]

In early 2024, former Chief Justice Zondo reported that certain retired Justices of the Constitutional Court (the Court or CC) were providing a 'service' to assist the Court to manage its increased workload by reading applications for leave to appeal and preparing a draft memorandum. The former Chief Justice explained that retired Justices Yacoob and Froneman had 'rendered' the service. It was intended that the provision of this service would rotate among the retired Justices of the Court, but that the Chief Justice had 'struggled to find retired justices … who were available'.[4]

The then-Chief Justice explained that the programme:

> *'was initiated in order to address the backlog of new applications to the Constitutional Court which arose as a result of a huge increase in such applications after the expansion of the jurisdiction of the Constitutional Court some years ago. The expansion of the jurisdiction was not accompanied by any increase in the human resources necessary to deal with such an increase in the workload of the Court."*[5]

Several civil society organisations, including Freedom Under Law, raised concerns about this scheme. These included whether it was permissible for anyone other than a serving member of the Court to fulfil the core judicial function of advising on what cases the Court should hear. Appointing a retired justice to perform this 'service', when their constitutionally prescribed tenure as a member of the court had expired, appeared to circumvent constitutional constraints on the extension of tenure of members of the Court. It was also troubling that the measure became known only through media reports, and that there had been a lack of consultation and transparency.

Ultimately, the former Chief Justice abandoned the scheme. However, in doing so he raised several issues that reflect on the functioning of the Court and point to the need for institutional reform. In particular, Chief Justice Zondo's statement:

- attributed the backlog of cases to 'a huge increase in matters that are brought to the Constitutional Court since the expansion of the Court's jurisdiction about ten years ago';
- indicated that it is 'quite common for justices of apex courts around the world to have experienced lawyers giving them support', including, in some instances, support 'by judges of other courts';

- suggested that 'experienced lawyers' could be employed to address backlog issues, by 'provid[ing] support … including the preparation of memoranda in new applications'.
- proposed that the Constitution should be amended to provide that the Court would not have to sit *en banc* when deciding applications for leave to appeal to the Constitutional Court.

Chief Justice Zondo thus directly raised the issue of the Court's efficiency and functioning in light of its institutional structure. However, the judiciary and the Department of Justice have largely fallen silent on the issue, despite extensive public commentary regarding backlogs at the Court.[6] Save for posing pointed questions to candidates in Judicial Service Commission interviews regarding the efficiency of the Court and their suggestions for improving it,[7] there has been little or no meaningful attempt to take the issue forward.

It is now more than 30 years since the Court was established, and a decade since its jurisdiction was significantly expanded. The former Chief Justice's proposals ought to have prompted a critical re-evaluation of the Court's functioning, and careful consideration of measures to improve its efficiency – and ultimately, its output.

The purpose of this paper is to *begin* such a discussion. It critically considers how the Court approaches its appellate function and the procedures it adopts. And it makes proposals for structural, compositional, procedural, administrative and even jurisprudential interventions to enable and assist the Court to fulfil its constitutional mandate.

This paper does not address every challenge facing the Court. For example, much has been written publicly about the composition of the Court and the appointment of its judges, including, but not limited to, the long delays in filling vacancies and the plethora of acting judges. Judicial appointments plainly have implications for the Court's institutional effectiveness – for example, its capacity to manage complex caseloads, deliberate efficiently, and produce timely judgments. And to be sure, the expansion of the Court's jurisdiction demands a broader reflection on the appointment process. When the Court was originally conceived, primarily as a specialist constitutional tribunal, the emphasis in appointments naturally fell on judges with expertise in constitutional adjudication and public law. As the Court has increasingly assumed the role of a general apex court, hearing appeals that raise complex questions of private law, commercial law, administrative law and procedure, the demands placed on the Court have broadened correspondingly. There can be no question that ensuring that the Court collectively reflects a suitable breadth of legal experience is an important institutional consideration in the long-term functioning of the apex court.

But this paper's focus is different. Its concern is not with the appointment process or the Court's composition; its focus is on the Court's institutional design, its processes, and its procedures. The paper's purpose is ultimately to identify constructive structural and procedural reforms that may assist the Court to function more efficiently – however it happens to be composed.

The paper is structured broadly as follows.

Part 2 contextualises the Court's functioning, by describing its powers and composition against the backdrop of the country's broader judicial hierarchy.

Part 3 sets out the Court's current procedures for processing cases – procedures, we suggest, which may have become too cumbersome and unwieldy to deal with the Court's current burden, with reference to statistics on the Court's output.

Part 4 describes the well-documented inefficiencies plaguing the Court.

In Part 5, we conduct a comparative analysis of the functioning of apex courts in other jurisdictions.

Part 6 focuses on the Court's 'interests of justice' test, the measure by which the Court decides whether to hear appeals that fall within its jurisdiction – and its implications for the rule of law. It explains that the imprecision and open-endedness of this test has created three problems: a) an opaque and inconsistent leave-to-appeal jurisprudence; b) a Court that hears cases that it should not; and c) an undisciplined profession that uses the Constitutional Court as a last-ditch hope for unmeritorious cases.

Part 7 then sets out a range of possible solutions, including restoring the Court's original jurisdiction, limiting it to constitutional matters; expanding the judicial complement of the Court and amending the quorum requirements; introducing assessment panels or a special unit to deal with new applications; increasing the staffing complement of judicial chambers; and potential amendments to the Court's rules, to ensure consistency with the broader legal framework and to increase efficiency.

Freedom Under Law extends its grateful thanks to advocates Michael Mbikiwa and Andrew Molver for their extensive work on this report and to Nicholas Herd for the initial research.

2. THE POWERS AND COMPOSITION OF THE CONSTITUTIONAL COURT: A CONTEXTUAL ANALYSIS

The Constitutional Court, the 'highest court of the Republic',[8] sits at the summit of the judicial hierarchy.

Matters come to the Constitutional Court in one of a number of ways. In terms of section 167(6) of the Constitution, a person may bring a matter directly to the Constitutional Court when it is in the interests of justice to do so. Section 167(5), read with section 172(2)(a), provides that the Constitutional Court must confirm any order of invalidity made by another Court. In terms of section 167(4) the Court has exclusive jurisdiction in respect of certain categories of cases, including the question of whether the President or Parliament has failed to fulfil a constitutional obligation. Lastly, the Court has appellate jurisdiction to entertain applications for leave to appeal.

Although the focus of this paper is primarily on the Court's appellate jurisdiction, it is important to say something briefly about its *exclusive* jurisdiction. That is because if the Court were to be persuaded to adopt an approach to exclusive jurisdiction that is too permissive, the result would be a further burden on the Court, for it would be faced with a deluge of cases that it has no discretion to refuse to hear.

The Court has thus far held firm on the limits of its exclusive jurisdiction. For example, in the context of exclusive jurisdiction over the constitutional obligations of the President, the Constitutional Court has repeatedly, and rightly, emphasised that the phrase '*constitutional obligation*' in section 167(4)(e) must be given a 'narrow meaning'[9] so as not to 'negate or improperly attenuate',[10] but instead rather to 'give full recognition to'[11] the jurisdiction of the High Courts and SCA to determine whether conduct of the President is constitutionally valid. Most recently, the Court refused an application by Jacob Zuma and his uMkhonto we Sizwe political party in which the applicants sought to invoke the Court's exclusive jurisdiction to challenge the President's decision to place a Minister on leave while a commission of inquiry investigated serious allegations implicating that Minister.[12] The Court endorsed the narrow construction of section 167(4)(e) and held that the application did not engage its exclusive jurisdiction, because it did not concern a President-specific constitutional obligation. It also held that no case had been made out for direct access.

Turning to the Constitutional Court's appellate jurisdiction, and in order properly to contextualise the challenges facing the Court, it is necessary to consider the judicial hierarchy as a whole.

The High Court comprises nine divisions, some with two or more seats, with one division in each province.[13] At the end of 2022 the South African judiciary consisted of approximately 250 superior court and over 2 000 lower court judicial officers,[14] adjudicating disputes for a population of roughly 60 million people,[15] as well as juristic persons and organs of state.

Appeals against a decision of the High Court given by a single judge, at first instance, lie either to a full court of that Division or the SCA.[16] Judges granting leave to appeal must direct that the appeal be heard by a full court, unless they consider that:

- The decision under appeal 'involves a question of law importance, whether because of its general application or otherwise', or where a decision by the SCA is necessary to resolve a difference of opinion; or
- The administration of justice 'generally or in the particular case' requires consideration by the SCA.[17]

A decision given by a bench of more than one judge, including in a full bench appeal, is appealed to the SCA[18] (subject to circumstances in which orders of constitutional invalidity are heard by the CC directly).[19]

Under the Interim Constitution,[20] the Constitutional Court had the final say over 'all matters relating to the interpretation, protection and enforcement of the provisions of [the Interim] Constitution'.[21] This constitutional jurisdiction was to the exclusion of the Appellate Division,[22] (notionally) the highest court in all non-constitutional matters.[23]

This approach was not inevitable. There was considerable debate as to whether there should instead be a single court of appeal, but with a chamber to deal with constitutional matters of compelling importance, and a general chamber to deal with all other matters. This was proposed by Chief Justice Corbett and supported by the General Council of the Bar and others.[24] However, the creation of a separate Constitutional Court prevailed – largely due to 'scepticism and distrust' of the Appellate Division's apartheid-era judges,[25] and the need for a specialist and more representative court tasked with the 'interpretation and enforcement of a future democratic constitution'.[26] What appears to have been the first articulation of this was the address in 1990 to the Convocation of the University of Cape Town by the then-Oxford Regius Professor of Civil Law, Prof A.M. Honoré. Comparing the recent steps to free South Africa with the *Constitutio Antoniniana*, he called for a new court, modelled on the German constitutional court, able to focus entirely on constitutional matters.

However, the establishment of two courts with divided authority produced complications. In addition, the Constitutional Court – dealing with a significantly lower workload than the SCA – began to develop an expansive interpretation of its jurisdiction by according a wide interpretation to 'constitutional matters'.[27]

Initially, the Interim Constitution's split of appellate authority was carried over into the final Constitution: the Constitutional Court remained composed of 11 judges and continued to enjoy constitutional competence only.[28] However, following the Constitution Seventeenth Amendment Act in 2012, the Court (while still consisting of 11 judges) formally enjoys an extended jurisdiction over 'constitutional matters'[29] and 'any matter raising an arguable point of law of general public importance which ought to be considered by [the] Court'.[30] As a result, the Constitutional Court effectively became an apex court of general jurisdiction. However, the expansion of the Court's jurisdiction was not accompanied by an increase in resources, or any fundamental shift in its functioning, to deal with any resultant increase in workload.

How the amendment has impacted the work of the Court, and what changes to the Court's structure and working practices may still be required, are issues to which we turn in the remainder of this analysis.

3. CURRENT PROCEDURE FOR DECIDING CASES AT THE CONSTITUTIONAL COURT

One of the primary reasons given for the Court's struggles with its increased workload is the number of applications for leave to appeal with which it must deal. Accordingly, it is necessary to understand how the Court currently considers and decides such applications.

It does so in a number of stages.[31] First, applications for leave to appeal are filed electronically at the General Office.[32] After the office has confirmed that the application is formally compliant with the Court's rules and practice directions, it allocates a case number and saves the digital documents to a matter-specific folder on the court's server, which is accessible by all court staff. The Chief Justice's chambers is notified of the filing and logs the matter on a master spreadsheet to which a duty-cycle applies,[33] automatically allocating the matter to a Justice and their chambers for consideration.[34]

Once allocated, and following checks by the duty chambers,[35] the responsible Justice produces and circulates a new application memorandum. The memorandum will typically recommend one of the following outcomes:

- Dismissal by way of an order, with a brief explanation.
- Directions for the filing of further documents.[36]
- Allocation of the matter to a writing Justice for the preparation of a judgment without oral hearing.[37]
- Setting the matter down for a hearing, which involves issuing directions to regulate the filing of an appeal record and written submissions, and ultimately the allocation of a hearing date.

A minimum of eight Justices must decide how to treat every new application,[38] with the view of the majority being determinative. As we shall see, this quorum requirement has been central to discussions of the Court's challenges with its workload.

Once the Court has decided how to deal with a new application, the duty chambers prepares the applicable document, which is then reviewed internally by the chambers of one of the senior Justices (the Chief Justice, Deputy Chief Justice, or one of the most senior judges) before being issued by the General Office.[39] If the matter is set down for oral argument, it proceeds to hearing with written submissions filed according to the set-down directions and oral argument before the Court sitting *en banc*.[40] After the hearing the Justices engage in extensive deliberation, in a highly collaborative process in which each Justice is invited to comment on the drafts of the writing Justice(s), and which may ultimately result in one or more written judgments.[41]

This multi-stage, collaborative and *en banc* decision-making process – which applies to all applications for leave to appeal – may have been appropriate when the Court considered fewer applications. But as we elaborate upon below, in circumstances where the Court's caseload has ballooned, these processes appear to hinder rather than enhance the Court's output.

4. PROBLEMS FACING THE CONSTITUTIONAL COURT

The worsening position

This paper's principal concern is the Constitutional Court's inefficiency, which has worsened over time and which manifests in long delays in decision-making.[42] Ally and Boonzaier report that a study of judgment processing times between 2010 and 2024 reveals that the average time between the Court hearing a case and delivering judgment has increased considerably, to the extent that it 'almost exactly doubled' between 2010 and 2021.[43] It has remained relatively constant since 2021, with the Court taking on average about 210 days from hearing to hand-down.[44]

The same study shows that the Court's caseload more than tripled during the same period:

> *'The Court received well over three times as many applications in 2021 as it did in 2010. In 2010, 118 applications were filed. In 2021, the number had risen to 393. Most of this increase is attributable to the steady upward trend between 2012 and 2017 (134 new applications versus 339). It plateaued from 2017 to 2019, before dropping in 2020 – no doubt as a result of the Covid-19 pandemic. It then rebounded in 2021. In line with the Court's increased caseload, the number of cases dismissed in chambers increased in all years from 2012 to 2021 (excepting, again, the decline in 2020).'*[45]

The increased time taken by the Court to deliver its judgments corresponds closely with the increase in the Court's caseload over the same period. This would suggest that the Court's preliminary task of processing new applications is a key driver of the delays in the delivery of fully reasoned judgments.

Interestingly, the number of cases in which the Court has set matters down for hearing and given written judgment has reduced substantially since 2022. Ally and Boonzaier point out that the reduction in the number of cases heard by the Court may be the result of a deliberate effort to reduce its workload, by being more selective about the new applications it chooses to hear, possibly in recognition of its capacity constraints.[46]

However, despite reducing the number of hearings and written judgments, the Court has *not* shown any improvement in its hand-down times. This is despite the number of new applications received annually having remained relatively constant. The implication is that while the Court has become more effective at reducing the number of matters in which leave to appeal is granted, it remains bogged down by the processing of applications for leave to appeal.

This reflects in the increasing sluggishness with which new applications are being processed in chambers. According to research conducted by Ally, in 2012 the average time taken to decide a case in chambers was 33 days; whereas at least half of the petitions filed in 2024 were pending for six months or more[47] – this in circumstances in which the bulk of those petitions would ultimately be dismissed by way of a one-line order.

If one combines this delay with the average time it takes from the hearing of argument to the delivery of judgment, litigants can easily expect to wait a year and a half, from the time they apply for leave to appeal, to the time when their application is finally determined in a written judgment. And that reflects the *average* time; at the outer limit, the situation is dire. At the time of writing, according to the 'caseflow summary' on the Court's website,[48] one judgment had been outstanding for a period of 18 months since being argued (and three years since the application for leave to appeal had been delivered);[49] others had been outstanding for well over a year since argument;[50] and for yet others, the one-year mark was soon approaching.[51] In a number of the Court's most recent judgments, it has taken close to a year from the date of argument to deliver a *unanimous* decision.[52]

The impact on the Court's performance is also evident in the judiciary's annual reports, which reveal that during the 2022-2023 reporting period, the Court only finalised 55% of matters, failing to reach its target of 70%.[53] It also only managed to deliver 18% of judgments within three months of the decision being reserved, falling well short of the target of 70%.[54]

Inefficiency challenges

Broadly speaking, there are two manifestations of the efficiency challenges confronting the Court. The first is the slow pace at which the Court is handing down decisions, despite hearing fewer matters. The second is the sluggishness with which it is processing petitions.

What both problems appear to have in common is that they are the product, at least in part, of the marked increase in the number of petitions being received by the Court following the expansion of its jurisdiction through the Seventeenth Amendment. Indeed, recent data shows that the Court is inundated with mainly generalist appeals, as opposed to matters raising issues of special constitutional or public importance.[55] As explained further below, the volumes confronting the Court are the product not merely of its widened jurisdiction, but also of a concerning trend – arguably sustained by the indeterminacy of the interests of justice test for leave to appeal – to treat the Court not only as one of final instance in *all* matters (regardless of whether its focused jurisdiction has been invoked), but also as a last resort for appeals that are, for example, interlocutory in nature, moot, perempted, subject to *res judicata,* or otherwise lacking in merit.

But the challenges confronting the Court are clearly not only volume-based. If that were the case, the notable reduction in the number of hearings would have resulted in improved hand-down times and processing of petitions, which it has not. The problem is therefore clearly one of both volume and efficiency.

Various potential causes of the Court's inefficiency have been identified. They include: insufficient or diminished judicial capacity; the Court disposing of all matters in all respects *en banc*; and matters before the Court growing more complex, with a greater body of jurisprudence to consider.[56] Concerns have also been raised about whether judicial appointments to the Court have been up to the necessary standard, a problem which has been exacerbated by long delays in filling permanent vacancies – it has been a decade since the Court last had a full complement of permanent judges.[57]

The consequence

The implication of the challenges confronting the Court is that the determination of matters falling within the Court's specialist jurisdiction are being delayed, at least in part, by appeals that range from overly ambitious to entirely unmeritorious, in the hope of engaging the Court's expanded general jurisdiction, or of being granted leave to appeal under the capacious interests of justice test. The Court's ineffective management of its caseload under its expanded jurisdiction has compromised its ability to discharge its specialist constitutional function.[58] It is therefore not merely the Court's efficiency and output that are at stake, but its very ability to fulfil the function envisaged in the Constitution. This gives the dilemma an existential dimension. As with other apex courts around the world, it is essential that any approach to addressing the Court's challenges commences from an appreciation of the role it is *meant* to be playing in our constitutional scheme. Indeed, it has been reasoned that 'the process of selecting cases is one of the main ways by which a top-level court defines its role in the constitutional system and sets its agenda'.[59]

5. INTERESTS OF JUSTICE AND THE RULE OF LAW

Introduction

As foreshadowed in section 2, when the Constitutional Court acts as an appellate court, its filter is a test of the 'interests of justice'. In this section of the paper, we suggest that the manner in which the Court has approached the application of this test is itself a reason for the inefficiencies it is currently facing. We do so by considering the test, and then explaining how a more rule-based approach would strengthen the rule of law and enhance the Court's efficiency.

The interests of justice test

Section 167(6) of the Constitution provides for appeals directly from any other court 'when it is in the interests of justice and with leave of the Constitutional Court'.

The Constitutional Court applies a two-stage approach to deciding whether to grant leave to appeal. First, it asks whether the appeal engages its jurisdiction. Second, if so, it asks whether it is in the interests of justice for the Court to hear the appeal. Therefore, even when the Court's jurisdiction was limited to constitutional matters and issues connected with decisions on constitutional matters, a finding that a matter raised a constitutional issue was not decisive.[60] Leave can always be refused if it is not in the interests of justice that the Court should hear the appeal.[61] The purpose of the requirement, the Court explains, is to 'ensure that the Court does not entertain any and every application for leave to appeal brought to it'.[62]

The seventeenth amendment of the Constitution extended the Court's jurisdiction beyond only constitutional matters to include '**any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court**'.[63] In *Paulsen*, the Court described this jurisdictional basis as being contingent on three elements, namely: (i) that the matter raises an arguable point of law; (ii) that the arguable point of law must be one of general public importance; and (iii) that the arguable point of law is one that 'ought to be considered' by the Constitutional Court, which it equated to the interests of justice enquiry.[64]

The language of section 167(3)(b)(ii) mirrors that of Practice Direction 3.32 of the United Kingdom Supreme Court, which provides as follows:

> *'Permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground. The Appeal Panel gives brief reasons for refusing permission to appeal. The reasons given for refusing permission to appeal should not be regarded as having any value as a precedent.'*

Although section 167(3)(b)(ii) omits the words 'at that time', the same principle is arguably implied in the words 'ought to be considered' in section 167(3)(b)(ii). To invoke the Court's jurisdiction on this basis, the matter must be one that raises an arguable point of law of general public importance which ought to be considered by the Constitutional Court *at that time*. This recognises that there may be matters that raise arguable points of law of general public importance but which are *not* appropriate for the Court to consider at that time.

Notionally, therefore, the interests of justice test ought to be a mechanism by which the Court decides it will not hear matters, even though they engage its jurisdiction. It is not only a basis on which litigants can invoke the Court's jurisdiction, but equally a basis on which the Court can confine its jurisdiction. In the light of the Court's expanded jurisdiction, the test ought to be even more strictly applied to this end than before. Indeed, in *Afriforum*, the Court appeared to recognise that this should be so in the context of mootness when Zondo CJ held as follows: [65]

> *'In my view, there are no sound reasons for this Court to entertain this matter despite it being moot. The fact that the High Court and the Supreme Court of Appeal in this matter gave conflicting decisions does not on its own carry much weight. It may have been different if we were dealing with conflicting decisions of different courts in different matters raising the same issue. In this regard I wish to point out that at some stage in the past this Court may have been more inclined to entertain matters even if they were moot. This Court's workload has increased substantially since its jurisdiction was expanded by the 17th Constitution Amendment in 2013. This does not mean that this Court will never entertain a matter that is moot if there are proper grounds justifying that it should entertain a moot matter. However, it means that in the future this Court is likely to be less inclined than it would have been before to entertain such matters. This Court will, generally speaking, rather wait for another matter that will not be moot before it may pronounce on an issue. This is something practitioners should bear in mind when advising litigants in matters that have become moot. It is not in the interests of justice for this Court to grant leave to appeal and determine the appeal.'*
>
> *[Emphasis added.]*

Whether the interests of justice have been suitably engaged is determined through a multifactorial enquiry in which no particular factor is determinative. The factors are numerous. Among others, they include:

- prospects of success;
- the importance of and public interest in the issues raised;[66]
- whether the appeal involves disputes of fact;[67]
- whether remittal to another court for further evidence is necessary;
- whether the issues have been ventilated before the lower courts, and if not:
  - whether the appeal entails both constitutional and non-constitutional issues;
  - the saving in time and costs of allowing a direct appeal;[68]
  - whether the matter involves the development of the common law;[69]
- whether the appeal is against an interim or interlocutory order;[70]
- whether a challenge is abstract;[71]
- whether a matter is moot;[72]
- whether the appellant intends to raise constitutional issues on appeal for the first time.[73]

In some cases the Court treats a particular factor as though it is essentially decisive of the interests of justice enquiry, without explaining how it weighs in the balance with other factors. In other cases, the same factor is not decisive. This gives rise to a legitimate perception that the factors are applied haphazardly, inconsistently, and unpredictably.

In its application of the interests of justice test, the Court has eschewed rule-based reasoning in favour of the exercise of a case- and fact-specific discretion. It says that it determines whether it is in the interests of justice to grant leave to appeal '**through a careful and balanced weighing up of all relevant factors**',[74] and that while '**[t]he considerations could be varied and are often case-specific**', they are '**informed by the broad requirement of whether by hearing the case the interests of justice will be advanced**'.[75] In practice, it is simply not possible to know how much each factor will count in a particular case. As a result of the indeterminacy of the Court's interests of justice assessment, it is entirely unpredictable whether a matter will be granted leave to appeal.

It has been suggested that this indeterminacy benefits the Court, and that it provides '**a powerful mechanism that could be used to ensure that the Court is not overwhelmed with cases**'.[76] There is some merit in that argument. The interests of-justice test *is* a mechanism by which the Court can, and should, limit its caseload. Indeed, of late the Court appears to have leveraged the inherent flexibility in the interests of justice enquiry to reduce the number of cases that it hears.[77]

On the other hand, however, the flexibility of the Court's approach is arguably one of the reasons so many cases are being brought in the first place. This is because the Court's open-textured, multi-factorial approach, and the variedness of its application, creates unpredictability among litigants and practitioners as to when matters will be granted leave to appeal.[78] Not only does this indeterminacy detract from legal certainty; it means that litigants, and the practitioners advising them, approach the Court not when their matters are necessarily of special public or constitutional concern, but as a speculative final roll of the dice.[79]

Rule-based reasoning and the rule of law

It is important to acknowledge the attractiveness of a test such as the interests of justice. Its self-avowed aim is to achieve justice in every case. In the leave to appeal context, its aim is to ensure that no undeserving case is heard, and that no deserving case is refused leave. As Unterhalter AJA asked in *TWK*,[80] 'Who would not want decisions to be taken in the interests of justice?'

But the rule of law depends on laws being intelligible, clear and predictable.[81] No discretion should be so unconstrained and unfettered as to be potentially arbitrary.[82] As Bingham explains, the rule of law has instrumental importance by enabling compliance, facilitating the exercise of obligations, and promoting commercial and other activity.[83] The application of a rule, the outcome of which no one can reliably predict, undermines those objectives.

These were precisely the considerations that motivated Unterhalter AJA in *TWK*. He cautioned that our Constitution is founded on the rule of law, and the rule of law requires that 'the law is ascertainable and meets reasonable standards of certainty'. Courts should be cautious to adopt standards 'so porous that a litigant cannot be advised, with any reasonable probability, as to the decision that a court is likely to make'.[84]

Justice Unterhalter's critique of the interests of justice test adverts to a tension between two forms of legal reasoning – described by Frederick Schauer as "rule-based" and "particularistic" decision-making.[85]

- Rule-based decision-making involves entrenching a prescriptive generalisation as providing sufficient reason for a decision. That is, even if following the rule achieves the 'wrong' result in a particular case (having regard to the underlying reasons for the rule, or according to some 'all-things-considered' result), rule-based decision-making says that the existence of the rule is a sufficient reason for a decision. In other words, the rule is what Joseph Raz calls an 'exclusionary reason'.[86]

- Particularistic decision-making involves using generalisations as mere guides, or rules of thumb, but treating them as offering no independent reasons for decision when they produce results different to those produced by directly applying the justifications underlying the rules.

Take a simple example. The law lays down a rule that you may only drive when you turn 18. The reason for the rule is that in general, it is around the age of 18 that one has the necessary maturity, coordination and responsibility to be trusted behind the wheel of a dangerous vehicle. This applies as a rule: the law does not ask if a particular 16-year-old happens to have those qualities. It simply asks whether she is 18. If she is not, she may not lawfully drive.

A particularistic approach to the same question would ask of each driver whether they possess the qualities necessary to drive. Their age might serve as a guide, or a rule of thumb; but ultimately, the decision whether each person may lawfully drive would require an enquiry into their maturity, their co-ordination, and their responsibility.

In this context, the particularistic approach might well serve the purpose of ensuring the 'right' outcome is achieved in each case. But it does so at great cost. It is an intensely time-consuming and resource-intensive process. Those undertaking the assessment must be highly skilled and capacitated. And no aspirant driver would know, *ex ante*, whether or not they qualify to drive.

The approach that Unterhalter AJA adopted in *TWK* was rule-based. The rule he applied was that a matter will only be appealable when the *Zweni* factors are satisfied.[87] He also applied a further sub-rule: that the dismissal of an exception is never appealable, save where it concerns the court's jurisdiction. He explained that the rule has a sound rationale – it ensures that appeal courts only hear matters that are final, which in turn allows for the orderly use of the capacity of an appeal court to hear appeals that warrant its attention. It also prevents piecemeal litigation. But he advocated for an approach to appealability that would not entail an enquiry, in every case, as to whether these ends were met. Instead, his approach was to apply a rule, which, importantly, 'provides criteria so that litigants can determine, with tolerable certainty, whether a matter is appealable'.[88] That rule, which ought to remain at the heart of the test for appealability, and which ought not to be entirely subsumed by a free-floating interests-of-justice standard, is the *Zweni* test.

To be clear, rule-based reasoning and particularistic reasoning are two points on a continuum. A legal test may have features that are partly rule-based, and partly particularistic.[89] We do not suggest that rule-based reasoning should be *entirely* absent from the Court's interests of-justice jurisprudence. Nor do we claim that the Court ought to be at any particular place on the continuum; to be sure, there must be *some* discretion. The exercise of deciding which cases to hear does not lend itself to a *strictly* rule-based approach, not least because many of the factors the court must consider are not of a kind that will be dispositive. And it is inevitable that the approach must be multifactorial and involve some balancing.

In the next section of the paper, we present a catalogue of the different options available in the architecture and design of apex courts in other jurisdictions. This comparative analysis allows us, in the further sections of the paper, to make recommendations for how the South African Constitutional Court might look to addressing its current challenges.

6. APEX COURTS IN OTHER JURISDICTIONS – A SUMMARY

A detailed review of apex courts in other jurisdictions – Germany, Canada, the United States, Singapore, Australia, India and the United Kingdom – is attached to this paper as 'Appendix 1'. This section sets out a summary of the key conclusions that emerge from the detailed review.

In essence, the institutional challenges confronting our Constitutional Court are not unique. Apex courts globally have had to balance two often competing imperatives: the need to ensure that the country's highest court speaks with finality and coherence on questions of law; and the need to avoid overwhelming the court with cases that divert it from its primary role. The manner in which other jurisdictions have managed this tension offers potentially valuable lessons for South Africa.

In Germany, 16 Justices are divided into two eight-member Senates, each of which is further sub-divided into three-judge Chambers. The Chambers decide the majority of cases. Only where the Chamber is not unanimous, or where a matter raises a question of constitutional principle, is the case referred to the full Senate. The German Court is assisted by a large and highly qualified professional staff complement: each Justice has four clerks, and the institution as a whole employs nearly 300 people. This professionalised administrative infrastructure enables a sophisticated filtering process, in which legal officers screen new applications before any judge sees them. The result is a court that deals with thousands of filings annually.

The Supreme Court of Canada is a single general apex court of nine Justices who sit in variable panels of between three and seven judges, depending on the nature of the case. The Court grants leave to appeal in only a small fraction of cases – it receives more than 500 applications a year, but grants leave in roughly 30. Each Justice has several clerks, and the Court is assisted by a substantial staff complement of 250 employees.

The High Court of Australia, consisting of seven Justices, combines constitutional and general appellate jurisdiction. Applications for special leave are generally decided on the papers, sometimes by small panels, and may be dismissed without oral hearing. The High Court's practice of sitting in panels of five or seven for appeals, rather than *en banc*, contributes to steady and predictable output. Most special leave applications are refused within nine months of filing, and judgments in appeal matters are typically delivered within six months of hearing.

The United States Supreme Court, although formally an *en banc* court of nine, employs an elaborate system of internal screening. Each year it receives between 5 000 and 7 000 petitions for *certiorari,* and grants fewer than 2%. The process is largely managed by the so-called 'cert pool', in which

clerks across participating chambers collaborate to prepare joint memoranda assessing whether each case warrants review. This illustrates that effective control of a court's caseload can depend less on the number of judges than on a well-organised professional support system.

The United Kingdom Supreme Court consists of 11 Justices and hears appeals from the entire United Kingdom on issues of general public importance. Ordinarily it sits in panels of five, seven or nine judges. Applications for permission to appeal are decided on the papers. The Court's Rules set detailed procedural requirements, including word and page limits, and its registry plays a structured gatekeeping role in ensuring compliance and efficiency.

Singapore's Supreme Court comprises the Court of Appeal and an Appellate Division of the High Court. Each is composed of smaller benches that hear different categories of appeals. The structure allows for summary dismissal of matters, or referral to higher panels when necessary. Procedural rules govern the allocation of cases and the composition of panels. The system reflects a formalised and transparent method of case selection and progression, aimed at ensuring expedition and consistency within a single apex framework.

India's Supreme Court is composed of 34 judges sitting in multiple benches and exercising original, appellate and advisory jurisdiction. The Court sits in panels of one, two, or no fewer than five Justices, depending on the nature of the case. Each Justice is allocated has five law clerks, and the Registry has more than 3 000 posts.

From these various models, several lessons emerge.

First, the practice of the South African Constitutional Court of sitting *en banc* for all matters – including routine petitions for leave to appeal – is comparatively cumbersome.

Second, the efficiency of the Court could potentially be improved by turning the process of screening or selecting cases for hearing into a professionalised and institutionalised function, supported by legal officers, registrars or judicial clerks, so that initial threshold questions are not left to the judges alone. This would allow judicial attention to be focused on the relatively small number of matters that truly warrant it.

Third, adequate professional support is essential to the efficient functioning of an apex court.

Fourth, procedural discipline is critical. Court rules and directives should set detailed standards for applications for leave to appeal – including word limits, prescribed formats, and clear statements of the criteria for granting leave. These ease the court's administrative burden by requiring tighter and more focused applications, and at the same time promote transparency and predictability for litigants.

7. EVALUATING POSSIBLE SOLUTIONS

A range of potential solutions has been proposed by academics, jurists and other commentators. Some involve fundamental structural reform; others involve changes of a more administrative nature, which could be implemented regardless of which (if any) structural changes are implemented. Some solutions (such as the importance of leadership, and the need for the judicial appointments process to be strengthened) are relevant to any proposals that may be adopted, although their application may vary.

Reversion to the 'German model'

As noted in the introduction, in the Constitution-drafting process a German-style model was mooted (though ultimately not implemented) in which the apex court consists of two chambers, one dealing with constitutional matters and one with general matters. The proposal, in a memorandum penned by former Chief Justice Corbett, contemplated that when an appeal was lodged, and it appeared to the Chief Justice that it raised 'a constitutional issue which may be decisive of the appeal', it would be heard by the constitutional chamber. All other appeals would be heard by the general chamber.[90] The proposal contemplated judges sitting in both chambers, and the Chief Justice arranging the hearing of matters by the constitutional chamber.[91]

Implementing this proposal would require consideration of the optimal size of such a court. As set out above, the German Constitutional Court – on which this model is based – comprises 16 judges, divided into two chambers of eight judges each. There seems no reason not to follow the same approach.

An advantage of this proposal is that arguably, it would reduce the reliance on interpretation to resolve jurisdictional debates, since the Court would always have jurisdiction to hear the appeal; the only question being which chamber would do so. However, this option would require consideration of whether the SCA would continue to operate as an intermediate appellate court, or whether the CC and SCA should merger into a single apex Court. We consider this issue below.

Merging the CC and the SCA

While the creation of a single apex court may initially have been rejected, a merger of the CC and SCA has been mooted for some time,[92] including, on occasion, in interviews at the JSC. Judges confronted with this question have expressed mixed views as to its desirability.

It has been argued that the main task of an apex court is to settle major questions for legal certainty and to dispense justice on a principled and general basis, rather than to resolve the minutiae of disputes *inter partes*.[93] It may be felt that merging the two courts would eliminate the opportunity for correction of the High Courts by an intermediate appellate court, and potentially inundate the merged court with cases.

However, these concerns could be mitigated by expanding the use of full bench appeals in the High Court. As was explained in section 1, the Superior Courts Act provides extremely wide latitude for appeals to be granted to the SCA rather than a full court (for example, 'a question of law of importance'). An amendment to the Act, restricting the circumstances under which an appeal would not be heard by a full bench of the High Court, might avoid the apex court being swamped by appeals that could better be dealt with by full benches of the High Court.

Curtailing the Court's jurisdiction through a Constitutional amendment

It might logically be expected that the expansion of the Court's jurisdiction ushered in by the Seventeenth Amendment would have been a major contributing factor to the Court's increased workload, and therefore that reducing the scope of the CC's jurisdiction would moderate the workload. However, some commentators have expressed caution regarding this solution.[94] Ally and Boonzaier argue that:

> *'While there was indeed an increase in new applications received between 2013 and 2014, immediately after the Amendment's enactment, a slightly larger increase had in fact taken place in the previous year, i.e. between 2012 and 2013. And so it is far from clear that the initial increase is attributable to the Amendment. In any event, the Court's workload has remained largely under its control, both before and after the Amendment. After all, the purpose of the jurisdictional change was merely consolidatory. It sought to regularise and make more transparent what was already happening: namely that the Court, despite its nominal restriction to 'constitutional matters', had read this so broadly that it was able to hear almost any matter it chose to. Under its new jurisdiction, the Court hears only those cases that it deems to raise an 'arguable point of law of general public importance which ought to be considered by [it]'. Its diet of cases (though no longer limited, even nominally, by subject matter) thus remains within its discretion.*[95]

The key takeout is that the Court's expanded jurisdiction is not necessarily the central reason for its increased caseload. As was the position before the Seventeenth Amendment, the Court retains a measure of control over which matters it chooses to take on.

However, the fact remains that prior to the Amendment, the CC had jurisdiction only over 'constitutional matters … and issues connected to constitutional matters', requiring the Court to bring even an expansive reading of its jurisdiction within the definition of a 'constitutional matter'. Since the amendment, the discipline of even this limitation on the Court's jurisdiction is absent.

A restriction of the Court's jurisdiction could be achieved through a constitutional amendment, but also through the Court adopting a more restrictive interpretation of what constitutes a question of law, or matter of 'general public importance', in its own jurisprudence.

New application screening unit

Inspired in large part by the German model, a unit of trained and legally qualified personnel could be embedded within the General Office of the Constitutional Court to screen new applications and prepare a screening memorandum for each application, and to review documents such as orders and directions before they are issued.[96] A screening memorandum for submission to the assessment panel allocated to the matter would summarise the application and relevant documents; evaluate the application; and make recommendations in respect of matters such as any non-compliance with the Rules, jurisdiction, the granting of leave, remedy, costs, procedure, and whether the matter should be disposed by a judgment without a hearing or set down for hearing. Such a memorandum would assist the Justices in quickly distinguishing between meritorious and unmeritorious applications.

In considering this option, care must of course be taken not to 'cut and paste' from other jurisdictions. What works well in the German legal system and legal culture will not inevitably be suitable in the South African context; and it may be asked whether, in practice, this option would amount to more than a variation on existing registry practice in checking for documentary compliance. What further detracts from this option is that it would probably require the allocation of additional resources to the Court. In the current circumstances – in which the Court is already the best resourced in the country – that is likely to be met with some resistance.

It has been suggested that section 167(2) might lend itself to a more flexible interpretation that does not require a minimum of eight judges to decide *not* to hear a matter.[97] But so far, it has not been interpreted that way.[98]

It will be recalled that one of the concerns with the initial 'retired justices' scheme was that it constituted an unlawful delegation of judicial authority. It is necessary to consider, therefore, whether a screening unit would be subject to the same criticism. The screening of new applications by trained professionals would probably not amount to a delegation; but if it did, it is likely that the delegation would be permissible. A screening unit would not exercise delegated powers, since

delegation involves the exercise of power by a person other than the designated functionary. The screening unit itself exercises no judicial power; it is merely involved in the adjudicative process, assisting the Justices through memoranda. That is an ancillary administrative support function, currently rendered by the law clerks to the justices. The memoranda would have no effective legal status, and would be entirely subsumed by the decision-making of the justices. Deciding the cases that reach the Court would still be done by the Justices themselves.

For the functioning of the screening unit to involve a delegation of judicial authority, the unit's members would have to wield judicial power in some way. Under the Court's current working arrangements, law clerks are charged with reviewing and drawing up memoranda in respect of new applications. Introducing a screening unit would simply entail the re-allocation of primary responsibility for reviewing and drawing up such memoranda to the unit of trained lawyers.

Even if the assistance rendered involved the exercise of some delegated judicial authority, the ultimate decision would formally be made by the Justices as a collective. Thus, the Justices retain control over the performance of the judicial function at the Court, assume responsibility for the decisions in those matters in which they participate, and must sign off on the order, directions or judgment issued.[99]

Assessment panels of fewer judges

Under this model, which presupposes that the current structure of the CC is retained, it would fall to preliminary assessment panels consisting of Justices to assess new applications on the papers.[100] Assessment panels should be confined to ruling on compliance with the Rules, jurisdiction, and leave (under the interests of justice standard). It would be desirable to empower judicial assessment panels to dismiss matters unanimously,[101] with any dissent triggering automatic referral for *en banc* consideration.

Assessment panels should be competent to:

- Dismiss applications: for non-compliance with the Rules (i.e., refusing condonation where sought); for a lack of jurisdiction; and, in terms of the interests of justice, by refusing leave.
- Case-manage a matter, including directing the parties to file further documents such as affidavits or written submissions to address certain points or answer stated questions.
- In constitutional matters, make any interim order that is just and equitable to provide effective relief, provided that any such interim order is subject to *en banc* quashing, variation or substitution.

Assessment panels should also be empowered to set matters down for hearing.

The adoption of this assessment panel model would require a constitutional amendment.[102] Such an amendment would either establish and empower assessment panels itself, or contemplate a statute doing so. As the system would be authorised either by the Constitution or by statute with constitutional imprimatur, there would be no transmission of judicial authority. The assessment panel system would function substantially as the SCA functions, with the safeguard of the unanimity requirement triggering a referral to a greater number of Justices. An advantage this approach holds over the establishment of a new screening unit is that it could conceivably be adopted without additional resources having to be allocated to the Court.

Expanding the Court, setting quorums, and utilising panels

Expanding the Court and establishing fixed quorums would require a constitutional amendment, given that section 167(1) requires 11 Justices and section 167(2) sets the minimum number of judges required to hear a matter at eight.

Research indicates that judicial vacancies and absenteeism (or even deliberate failure by the Chief Justice to seek to fill vacancies, as happened during the term of Mogoeng CJ)[103] and the resultant reliance on acting Justices, or the Court operating below full strength,[104] are likely to be a major contributing factor to inefficiency. A logical response is to increase the number of Justices on the Court to 15,[105] and to set the quorum of the Court so that nine or 11 Justices must participate in any decision to set a matter down for hearing, and in the adjudication of a matter leading to the delivery of a judgment (with or without a hearing). At least three Justices should participate in the assessment of a matter and be unanimous for the matter to be dismissed at the assessment-screening stage. These numbers would ensure that an odd number of Justices adjudicate each matter and prevent any deadlocks.[106]

This proposal could be combined with the proposal to make use of judicial assessment panels. However, the use of panels does potentially raise concerns about the coherence of jurisprudence.[107] The CC has highlighted the importance of respect for precedent as essential for the rule of law, and the importance of an apex court being 'especially cautious as far as adherence to or deviation from its own previous decisions is concerned'.[108]

The function of an apex court is to engender certainty and provide a final answer to legal questions. That function is undermined when multiple decisionmakers within the judicial hierarchy may render multiple conflicting decisions.[109] Even with a single *en banc* panel, at times the Court has been criticised for improperly departing from its own precedent.[110] Splitting the CC into smaller panels runs the risk of divergent and incoherent apex court jurisprudence, undermining the rule of law and legal certainty.

As a result, the stability and predictability of the law could be threatened by the introduction of a dispositive panel system,[111] especially if constituent panels were to continue to diverge or conflict in attempting to resolve an initial divergence or conflict (as illustrated by the recent inconsistency in the SCA's jurisprudence on the test for the appealability of court orders).

Increasing the staff complement of each Justice's chambers

A further option involves increasing the number of law clerks/researchers in each Chambers.[112] Currently, each ordinary Justice has two local law clerks or researchers assigned to their chambers at any given time. This could be increased to three per Justice. And whereas the Chief Justice and Deputy Chief Justice currently each have three local law clerks/researchers assigned to their Chambers, this could be increased to four. However, although it is evident from the comparative analysis in section 5 that this increase would be consistent with the approach in other jurisdictions, it is debatable whether the Court's current caseload warrants additional resourcing of this nature.

Practical solutions to deal with the interests of justice test

Rule-based reasoning

It is an open question whether the CC has not swung too far in the direction of particularism in the application of the interests of justice test for leave to appeal. A greater degree of rule-based reasoning in this decision-making may well serve key aspects of the rule of law: consistency, clarity, transparency and institutional efficiency. It seems that certain factors should be dispositive in a leave to appeal assessment; or if not entirely dispositive then pivotal, unless the existence of a specific exception can be shown.

To take just one example: mootness. The current approach to mootness is that the Court will entertain an appeal that is moot if it is in the interests of justice to do so.[113] In determining whether it *is* in the interests of justice, the Court will consider a range of factors; including the importance of the issue, the complexity of the issue, the fullness or otherwise of the argument advanced, and prospects of success. The Court's discretion is open-ended. Although it always refers to the laundry list of factors it has previously articulated, it essentially asks itself afresh, in every case, what the interests of justice require.

The Court might instead adopt an approach to mootness which says that where a matter is moot (i.e. where it will have no practical effect on the parties, and where there is no longer an existing or live controversy between the parties), it is *not* appealable as a general matter. It is *only* appealable if one of a set of specific exceptions to this rule is present – say (i) the lower court judgment establishes precedent on an important issue; or (ii) despite the mootness of the dispute, the existence of the lower court judgment causes irreparable harm of some kind.

An approach of this kind does not require wholesale abandonment of the interests of justice test. Instead, in these particular rule-based contexts, the interests of justice becomes a label for a tapestry of rules and exceptions that have general application. Those rules and exceptions can be developed like any other; they would not bind the Court inflexibly. But they *would* set a default expectation, providing practitioners and litigants with clearer guidance.

Reasoned refusals

In the vast majority of cases, the Constitutional Court refuses applications for leave to appeal without a reasoned judgment. That is to be expected of an apex court. It is also a function of how the Court operates: it generally writes judgments in matters that are argued; and it sets matters down for argument if a sufficient number of judges think the appeal is worth hearing. However, this has a number of implications for the clarity, consistency and transparency of the Court's approach to the interests of justice test.

First, it means the bulk of the 'jurisprudence' regarding the application of the interests of justice test exists only in clerks' memos. The profession and the public are largely kept in the dark as to the precise manner in which the interests of justice test is applied day to day.

Second, because most cases in which reasoned judgments are given are cases in which leave to appeal is *granted*, the Court has developed a somewhat permissive jurisprudence on leave to appeal. That is largely an accident of the practical manner in which the court decides whether to hear matters and deliver judgments.

Third, in those cases where leave to appeal is *refused*, and a reasoned judgment is written, this generally has nothing to do with the illustrative nature of the case for the interests of justice test. This means that the jurisprudence is not only largely permissive, but also randomly selected.

The upshot is that the interests of justice jurisprudence is lacking in coherence. This likely impacts processing times and produces variable outcomes. Moreover, it means that the public – and more particularly, legal practitioners – are none the wiser when it comes to when the interests of justice warrant the dismissal of a petition. This only serves to entrench the endemic practice of treating the Court simply as one of final instance, regardless of whether the matter is one that the Court ought to hear.

Any solution to this issue should ideally address both facets of the problem: it must establish a consistent and coherent basis against which the Court can process applications for leave to appeal, and against which the profession can responsibly determine whether to bring applications for leave to appeal in the first place. While the former will help the Court improve the efficiency with which it can process petitions, only the latter will truly aid in reducing the volumes. The answer lies, at least in part, in giving greater clarity and consistency to the application of the interests of justice

test. As noted by Ally, '[d]eveloping coherent principles that can guide litigants as to when the Court will (or will not) entertain matters is undoubtedly necessary'.[114]

This can be achieved in different ways. Potentially the most impactful of these would be the development of a more coherent jurisprudence on the application of the interests of justice test through the writing of judgments where leave to appeal is refused, but only where the case establishes a particularly useful principle to guide future cases. This is because 'the reasons given for refusing petitions for leave (if they are systematically published) may assist in building up an understanding of what the criteria are'.[115] With the benefit of that cataloguing, the Court would be aided in its processing of petitions, thus improving turnaround times, while litigants would better be able to gauge when applications for leave to appeal should be brought.[116]

Determining the optimal extent of any such reasons requires balancing. Too little detail, and the Court and petitioners remain none the wiser. Too much, and the Court compounds its current burden, both by increasing its workload[117] and by limiting the flexibility required to manage its caseload.[118]

Historically, the Court has granted one-line orders refusing leave to appeal by stating, for example, that the appeal lacked prospects, or that it was not in the interests of justice to hear at this stage. Encouragingly, more recently the Court appears to have begun giving brief reasons as part of its orders refusing applications for leave to appeal. Two recent examples are the following:

> *'The Constitutional Court has considered the application for condonation and the application for leave to appeal and has concluded that, although it is not in the interests of justice to grant leave to appeal, the delay in bringing the application for leave to appeal is minimal, the explanation for the delay is adequate and there is no prejudice to the respondents. Consequently, condonation is granted, but leave to appeal must be refused with costs on the basis that it is not in the interests of justice to grant leave to appeal as the application has been brought in medias res and lacks reasonable prospects of success.'*

> *'The Constitutional Court has considered the application for leave to appeal and the application for leave to file a replying affidavit. It has concluded that no case has been made out for the filing of a replying affidavit. It has also concluded that the application for leave to appeal should be dismissed with costs for the following reasons. Firstly, the question whether interim relief should be granted is moot and nothing warrants the Court's exercise of a discretion to entertain this question despite the mootness. Secondly, it is not in the interests of justice for this Court to pre-empt the decision of the Competition Appeal Court on the declaratory relief as that relief is yet to be determined by that Court in Part B of the notice of motion. Consequently, leave to file a replying affidavit must be refused and leave to appeal must be refused with costs.'*

If orders such as these could occasionally be supplemented with more comprehensive judgments on the application of the interests of justice test, in time the Court would come to develop a clearer, more coherent and more consistent jurisprudence on the matter. What is more, by better understanding the circumstances in which leave to appeal ought to be granted, petitioners would be encouraged to shape their petitions in a way that alerts the Court more directly to the reasons that may exist for granting leave to appeal.[119]

Importantly, this should not lead to a practice of giving reasons *only* when leave is refused, and not when it is *granted*, as the United Kingdom Supreme Court has been prone to do. While the Supreme Court routinely gives reasons for refusing leave to appeal – applying a similar test to that under section 167(3)(b)(ii)[120] – it has been criticised for not furnishing reasons for granting leave to appeal.[121] A combination of both would be optimal.

Rules or practice directives

This brings us to a further practical intervention: the issuing of rules or practice directives aimed at giving greater clarity to the form and content of applications for leave to appeal, and the criteria against which they will be assessed.

The Rules of the Supreme Court of the United States are a good reference point. Rule 10 sets out 'Considerations Governing Review on *Certiorari*',[122] and emphasises the types of compelling reasons for which leave may be granted. Rule 14 then spells out – over some four pages – the 'Content of a Petition for a Writ of *Certiorari*', beginning with what the writ should contain and in what order. First among these requirements is that stipulated in rule 14.1(a), which provides as follows:

> *'The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.'*

Additionally, rule 33 stipulates that a writ of *certiorari* has a 9 000-word limit. In combination, these features of the Rules of the Supreme Court both focus the minds of the litigants who seek leave to appeal to that court, and help ease the court's task of assessing those applications.[123]

In comparison, the South African Constitutional Court's rules are glaringly lacking. They were last updated in December 2003, long before the Seventeenth Amendment, and are out of touch with the CC's increased caseload and current pressures. For instance, they impose no limits on the

length of petitions, let alone answering and replying papers. The same goes for amicus intervention applications and written submissions. Unless this is addressed in the Court's matter-specific directions, which it often is not, parties are free to choose for themselves how long their papers should be. This stands in contrast even to the SCA's rules, which are far more disciplining of the profession – the most obvious examples being the 30-page limit on petitions and answers, and the even stricter limit on replies.[124]

The crisis confronting the Court is therefore also one of rule-making. The Court itself has highlighted that rules serve to 'secure the inexpensive and expeditious completion of litigation and … to further the administration of justice'.[125] That is precisely why additional rules are required here.

As a general matter, the Rules should be amended to ensure consistency with the Constitution, the Superior Courts Act, and the Court's practices; to incorporate (and thereby consolidate) existing practice directives; and to promote efficiency.[126]

However, the solution does not end with making rules. Enforcing them is equally critical. The Court does not have a good track record in that respect either. Take the rule prescribing size 14 font for written submissions. It was introduced more than 15 years ago, but one would battle to find a practitioner against whom it has been enforced. In contrast, the registrar of the SCA routinely refuses to accept non-compliant pages – forcing litigants to rectify their non-compliance before their papers are accepted.

'Negative rules' and disciplining the profession

While rules of this nature would help petitioners better understand the circumstances in which it is appropriate to seek leave to appeal to the Court, and the manner in which to do so, further measures may be required to discipline the legal profession to conduct itself in accordance with that understanding.

It has been noted that the Court has managed to mitigate the vagueness of the interests of justice test 'by identifying negative rules that exclude certain types of matters from the Court's jurisdiction'.[127] But impetus is needed for the profession to take shared responsibility for observing these rules in order to help manage the Court's load. As recently highlighted by Lord Sales of the United Kingdom Supreme Court, speaking extra-curially, the strength of the common law tradition lies in the fact that it is 'not built on simple commands from the courts in the form of judgments in particular cases, but on a strong autonomous legal tradition to which both judges and lawyers contributed'.[128] This tradition promises to be particularly profound when it facilitates a shared understanding between the courts and lawyers about the role to be played by the courts, and when that understanding translates into an awareness among lawyers of the cases they bring before it.

One manner in which to discipline parties from making unmeritorious applications for leave of appeal is through appropriate costs orders. A recent study has shown that petitions that have been dismissed for not engaging the Court's jurisdiction tend to attract the most cost awards.[129] However, the problem with relying on cost orders alone to fulfil that function is that for many litigants, the impact of an adverse cost order for being refused leave to appeal is minor compared with the prospect of reversing the outcome and the costs incurred until that point. A further inadequacy is that it does little to discipline the profession, who bear an ethical responsibility to help preserve the Court's capacity to address the types of matters that it ought to be hearing.[130]

As these interventions create greater certainty for the application of the interests of justice test, they ought to facilitate the ease with which the Court considers petitions and reduce the frequency with which they are being brought.

Limiting filings

The Rules of the CC should also regulate the format and volume of documents filed.[131] There are currently no effective page limits for applications, resulting in frequent filing of unnecessarily lengthy documents.

Imposing a page limit on applications for leave to appeal – somewhere between 10 and 20 pages - would seem appropriate. The issues in a matter should have crystallised even further by the time an appeal reaches the Constitutional Court than in the SCA, and they should be capable of concise articulation. Prescribing their format and content would go a long way towards addressing the Court's present challenges. So too would imposing similar limits on other filings.

While limits have previously been established in practice directives, at the time of writing it appears that these are not enforced, resulting in sometimes extremely lengthy applications being filed with the Court. Specific limits could be introduced for the body of affidavits and to restrict the use of annexures. These limits should be set in the Court's rules, rather than leaving them to be regulated through practice directives.

8. CONCLUSION

There is little doubt that the Constitutional Court cannot continue as it is currently; if it does, the crisis presented by its burgeoning workload will surely only worsen. The retired justices scheme illustrated the gravity of the problem, but was clearly not the right way to address it.

This paper has identified a range of potential solutions. These range from constitutional amendments to facilitate fewer Justices deciding leave to appeal applications, which would require Parliament to take up the issue, to more practical interventions that can be adopted immediately by the CC itself.

For example, if the CC's jurisprudence were to swing in favour of more rule-based decision-making for leave to appeal, the whole system could be streamlined, because there will be more certainty for litigants, and the practitioners advising them, about what cases will and will not be entertained by the CC. And by providing reasoned judgments when leave to appeal is refused, the CC will be able to signal which cases are not deserving of its appellate attention. Together with these measures, the CC could immediately implement rules requiring certificates to be filed by counsel with leave to appeal applications, and restricting the number of pages allowed for such applications.

In the short term these measures may increase the CC's workload, by requiring it to generate reasoned judgments on selected applications for leave to appeal that are refused, and to publish revised rules for the Court. But in the long term, the benefits for the system are potentially significant. If the CC uses more rule-based reasoning to guide those who approach it for judicial redress and requires practitioners to abide by those rules, the system as a whole, and the rule of law, will be the ultimate beneficiaries.

APPENDIX 1: A DETAILED REVIEW OF APEX COURTS IN OTHER JURISDICTIONS

Constitutional Court of Germany

Composition

The Court consists of 16 Justices elected to non-renewable terms of twelve years; but subject to a retirement age of 68 years.[132]

Structure, Competence and Powers

The Court is split into two divisions called 'Senates' each consisting of eight Justices.[133] The Senates are further sub-divided into 'Chambers' – which are panels consisting of three Justices.[134]

Most of the decisions of the Court are rendered by the Chambers.[135] A Chamber may dismiss an application without reasons or may grant the relief sought. Chamber decisions must be unanimous. If not, the Senate decides the matter.

Only one of the two Senates can declare an Act of Parliament void or incompatible with the Constitution. A simple majority is dispositive. Where there is a tie in a Senate, no binding decision is rendered.[136] In rare cases in which one Senate intends to deviate from precedent of the other Senate, the Plenary – all 16 Justices – decides a case.[137]

Procedure

Applications lodged with the Court are screened at a preliminary stage by trained legal officers.[138] If competent and bearing prospects of success, the application is entered into the Register of Proceedings and referred to the relevant Senate. If clearly inadmissible or clearly lacking prospects of success, the applicant is informed, with reasons being given.

Within the Senate or a Chamber,[139] there is a designated 'reporting Justice' for the case in accordance with the Court's internal allocation of competences. The reporting Justice, assisted by law clerks, prepares a comprehensive report setting out the case, providing legal analysis and offering a draft decision.

Statistics for 2024[140]

There were 4 640 new cases opened in the Court in 2024. 4 890 cases were disposed of, 4 539 of those by Chambers. 2 189 cases remained pending at the end of the year; 8 178 applications were recorded in the General Register.[141]

Administration and Staffing

The Justices and the Court are supported by more than 290 staff.[142] Each Justice is assisted by four judicial clerks;[143] and one or two secretaries.[144] Unlike the ordinary courts, the Federal Constitutional Court is not subject to supervision by a ministry, and has autonomy concerning its administration and internal organisation.[145] The Court's budget is set by the Bundestag (approximately €41 million in 2024).[146]

Supreme Court of Canada

Composition

The Court consists of nine Justices, holding office until retirement or on reaching the age of 75 years.[147]

Structure, Competence, Powers and Procedure

The Court, sitting as a minimum of three Justices, decides applications for leave to appeal by granting, referring for hearing or dismissing such applications.[148] For other questions, such as the merits, the quorum is five Justices;[149] but most matters are heard by panels of seven or nine Justices.[150]

The Court has ultimate appellate civil and criminal jurisdiction and is therefore a Court of final instance.[151] It deals with appeals against lower court decisions if leave is applied for and granted;[152] appeals 'as of right', which do not require leave; and questions referred to the Court for an advisory opinion by the Governor in Council.[153]

Statistics

Most applications for leave to appeal are decided based on written submissions. In 2024, the Court considered 526 applications for leave to appeal and 17 notices of appeal as of right.[154] Of the applications for leave to appeal, the Court granted leave in only 35 cases. The Court does not give reasons for its decisions on applications for leave to appeal.[155] The Court delivered 50 judgments in 2024, 38% of which were unanimous. The average time taken from the hearing of the appeal to judgment was 6.4 months.[156]

Administration and Staffing[157]

The Court staff comprises around 250 employees. The nine Justices are supported by 27 law clerks,[158] and each Justice is further assisted by a 'judicial executive assistant' and a 'court attendant'. The Chief Justice has an executive legal officer and chief of staff, and a deputy executive legal officer is attached to their office.

Supreme Court of the United States

Composition

The Supreme Court of the United States consists of a Chief Justice and eight associate Justices.[159]

Structure, Competence, Powers and Procedure

The Court has a constitutionally specified original jurisdiction, and a default appellate jurisdiction over questions of federal constitutional and federal law.[160]

Six Justices constitute a quorum, and an even split affirms the decision below without creating precedent.[161] In terms of the Court's internal rules,[162] four of the nine Justices must vote to grant *certiorari* (leave to appeal), while five of the nine Justices must vote to grant a stay (i.e. an interdict) pending the disposition of the matter.

By default, the law clerks of each chamber sift through all of the petitions filed with the Court to ascertain which should be granted and which should be dismissed, and write a memorandum to their Justice accordingly.[163] However, in practice, several of the Justices have their law clerks participate in an internal scheme known as the 'cert pool':[164] In terms of this practice, petitions are analysed and a memorandum is drawn up collectively by all the law clerks of the participating chambers and submitted to the participating Justices. To ease the Court's workload, ensure fairness and enable the efficient disposition of matters, the parties may not file briefs (written submissions) exceeding 50 pages.[165]

Statistics[166]

Each year, approximately 5 000 to 7 000 new cases are received by the Court. The Court sits *en banc* for hearings. It hears around 80 cases a year, and disposes of around 100 cases on the papers (i.e. without a hearing).

Administration and Staffing:

Each Justice is permitted three to four law clerks per year.[167]

Court of Appeal and Appellate Division of the High Court: Supreme Court of Singapore

Structure and Composition

The Court of Appeal is situated within the overarching structure of the Singapore Supreme Court, which also consists of a High Court and an Appellate Division of the High Court.[168] The Court of Appeal consists of the Chief Justice and three other Justices of appeal; while the Appellate Division of the High Court consists of four judges.[169]

The Chief Registrar of the Supreme Court is the head of its Registry and manages the cases pending before it. The Registry consists of a Deputy Chief Registrar, Senior Assistant Registrars, Divisional Registrars, Deputy Divisional Registrars and Assistant Registrars. The Court of Appeal and Appellate Division of the High Court are assisted by approximately eight Registrars and numerous Assistant Registrars.[170]

Registrar positions are judicial, with each registrar holding concurrent appointments as District Judges or Magistrates. Registrars assist the Supreme Court by performing a host of judicial functions.[171]

Competence and Powers

Both the Court of Appeal and the Appellate Division of the High Court have circumscribed civil jurisdiction and all the powers of the court from which the appeal emanates.[172] Only the Court of Appeal has criminal jurisdiction.[173]

Procedure

The Court of Appeal and the Appellate Division of the High Court:

- must sit with three or more judges in uneven number,[174] save for specified exceptions such as in adjudicating certain interlocutory applications or issuing interim orders or directions;[175]
- may dispose of matters without oral hearings except where provided otherwise in the court's rules;[176]
- provided that it allows the parties to make representations on the question, may summarily dismiss applications *mero motu* if it concludes that: (1) its jurisdiction is not engaged; (2) the matter is in all respects *res judicata*; or (3) the rules prescribe;[177] and
- in criminal appeals, the Court of Appeal must sit with three or more judges in uneven number,[178] but may sit as a single judge in specified instances.[179]

An appeal against a decision of the Appellate Division requires the permission of the Court of Appeal in the exercise of its discretion, but such permission may only be given 'if the appeal will raise a point of law of public importance'.[180]

Statistics

In 2021,[181] the Appellate Division received 138 appeals, clearing 59; and 103 applications, clearing 80. The Court of Appeal received 72 appeals, clearing 168; and 132 applications, clearing 128.

In 2022[182] the Appellate Division received 121 appeals, clearing 114; and 94 applications, clearing 89. The Court of Appeal received 59 appeals, clearing 71; and 50 applications, clearing 67.

In 2023,[183] the Appellate Division received 138 appeals, clearing 123. The Court of Appeal received 56 appeals, clearing 67; and 82 applications, clearing 75.

We presume that where a greater number of cases was cleared than received, this was due to the resolution of matters outstanding from previous cycles.

High Court of Australia

Composition

The Court consists of the Chief Justice and six other Justices,[184] each appointed until the age of 70.[185]

Structure, Competence, Powers and Procedure

The Court has appellate jurisdiction 'to hear and determine appeals from all judgments, decrees, orders, and sentences' of any federal or State Supreme Court.[186]

Although the quorum of the 'full court' is two Justices,[187] constitutional cases and cases of major public importance are usually heard by all seven Justices, and other appeals are usually heard by five or seven Justices.[188]

Leave or special leave is required for an appeal to be heard. Where an applicant is represented, such applications are considered by all seven Justices on the basis of written submissions.[189] Applications relating to the 'conduct of a cause or matter' can be disposed of in chambers by a single Justice.[190]

Statistics

The 2023-24 Annual Report of the High Court describes the work and caseload of the court:

> *In 2023-24, the Full Court decided 323 special leave applications and 10 applications for removal. The Full Court decided 40 appeals, 3 cases involving applications for constitutional writs, 2 cases stated and 2 cases removed.'*[191]

It explained further that 98% of applications for leave or special leave to appeal were decided within nine months of filing,[192] and that 53% of the 40 appeals decided by the Court were completed within nine months of filing. In 95% of cases judgment was delivered within six months of the hearing, and in 28% of cases judgment was delivered in three months.[193]

Administration and Staffing

The High Court has approximately 75 full-time employees supporting the Chief Justice and Justices.[194] Each Justice appoints two law clerks ('associates') to their chambers each year.[195]

Supreme Court of India

Composition

The Court consists of the Chief Justice and 33 other Justices,[196] all of whom must retire at the age of 65.[197]

Structure, Competence and Procedure

The Supreme Court has original, appellate and advisory jurisdiction.[198] It has exclusive original jurisdiction between the different spheres of government and in respect of the enforcement of fundamental rights. Under a certificate of the High Court, the Court hears matters involving a substantial question of law of general importance that ought to be decided by the Court. Upon granting special leave, it may hear appeals against the decisions of any court or tribunal in India.

The Court sits in panels or 'benches' as follows:

- A single Justice to rule on a range of procedural, interlocutory or interim relief applications.[199]
- Two Justices for the adjudication of 'every cause, appeal or matter'.[200]
- No fewer than five Justices if the matter raises a substantial question of law as to the interpretation of the Constitution.[201]

Statistics [202]

By the end of 2021, 1 633 new cases were added to the Court's docket. The Court disposed of 2 561 matters, and there were 18 292 cases pending.

By the end of 2022, 5 835 new cases were added to the Court's docket. The Court disposed of 5 149 matters, and there were 23 724 cases pending.

By the end of 2023, 3 803 new cases were added to the Court's docket. The Court disposed of 6 559 matters, and there were 20 968 cases pending.

From 1 January to August 2024, 4 153 new cases were added to the Court's docket. The Court had disposed of 2 253 matters, with 22 868 cases pending.

Administration and Staffing

The Supreme Court Registry is headed by a Secretary General (equivalent in rank to a Secretary to the Government) who is a judicial officer (District and Sessions Judge).[203] The Registry has 10 Registrars, 7 Officers on Special Duty and 16 Additional Registrars, assisted by Deputy Registrars and other staff. The Registrars are mostly of the rank of Additional District and Sessions Judge.[204] In total, the Registry has 3 077 posts, of which 1 251 are non-clerical.[205]

Each Justice is entitled to five law clerks.[206]

UK Supreme Court

Composition

The UK Supreme Court consists of the President, Deputy President and ten other Justices who must retire at the age of 75.[207] In addition to its permanent members, the Court maintains a 'supplementary panel', consisting of eligible retired Justices, which is drawn on when additional Justices are required to form a panel for a hearing. Members of the supplementary panel do not form part of the membership of the Court, and only perform judicial functions at the request of the President of the Court.[208]

Structure, Competence and Procedure

The Supreme Court has jurisdiction to decide appeals on arguable points of law of the greatest public moment for the UK as a whole in civil matters, and for England, Wales and Northern Ireland in criminal matters.[209] It also has jurisdiction over devolution matters.[210]

Permission to appeal must be obtained from either the court that issued the judgment or order sought to be appealed, or from the UK Supreme Court itself.[211] The Court generally sits in panels of five Justices, but may sit in panels of seven, nine or 11.[212]

Statistics[213]

For the period 2020-2021, 217 permissions to appeal were lodged with the Court, along with seven appeals as of right, 42 appeals, and 133 procedural applications. There were no devolution references.

For the period 2021-2022, 211 permissions to appeal were lodged, with nine appeals as of right, 31 appeals, two devolution references, and 76 procedural applications.

For the period 2022-2023, 153 permissions to appeal were lodged, with two appeals as of right, 70 appeals, two devolution references, and 116 procedural applications.

For the period 2023-2024, 185 permissions to appeal were lodged, with seven appeals as of right, 27 appeals, one devolution reference, and 138 procedural applications.

For the period 2024-2025, 177 permissions to appeal were lodged, with four appeals as of right, 59 appeals, one devolution reference, and 240. procedural applications.

For the same period (2024-2025), the Court decided 170 permissions to appeal, held 61 appeal hearings, and gave 43 judgments.[214]

Administration and Staffing

The Court appoints up to 11 Judicial Assistants each year to support the Justices.[215] Judicial assistants support the Justices *inter alia* by conducting legal research, drafting memoranda summarising applications for permission to appeal, drafting press summaries of judgments, and generally assisting the Justices in their work.

As of 31 March 2025, the Court employed 57 staff, including ten Judicial Assistants (JAs) on one-year fixed-term contracts.[216] The head of the Court's administration is the Chief Executive, who works with the UK Supreme Court (UKSC) Board and Management Board, which consider the strategic and the day-to-day administrative direction of the Court respectively.[217]

Conclusion

Most of the apex courts surveyed have a large support component, both in terms of clerks and other assistants working directly for the judges and in terms of the staffing complement of the courts generally. In many instances, these are qualified legal personnel or trained professionals.

The majority of the apex courts consist of more judicial officers than their South African counterpart. Most make use of single-judge processes or small panels to decide procedural, interlocutory or preliminary points. In Germany, notably, a screening process conducted by legal professionals precedes judicial decision-making.

ENDNOTES

1 Ally and Boonzaier 'The Constitutional Court's Efficiency: Statistics from the Mogoeng Era, 2010-2021' (2022) 12 CCR 317.

2 Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762; Brickhill 'Precedent and the Constitutional Court' (2010) 3 CCR 79; Tsele "Coercing Virtue' in the Constitutional Court: Neutral Principles, Rationality and the Nkandla Problem' (2016) 8 CCR 193; Boonzaier 'A Decision to Undo' (2018) 135 SALJ 642 at 675–677; Ally and Boonzaier 'The Constitutional Court's Efficiency: Statistics from the Mogoeng Era, 2010–2021' (2022) 12 CCR 317; Mafora 'Whose Constitutional Jurisdiction Is It Anyway? Courts of a Similar Status to the High Court and Other Tribunals' (2023) 13 CCR 327. At least two Constitutional Court Justices have accepted that a previous decision misstated the law through a lack of care. See *Jacobs v S* [2019] ZACC 4 at paras 97–101 and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15 at para 112.

3 See the JSC interviews of Chief Justice Zondo, Deputy Chief Justice Maya, Justice Madlanga and Judge President Mlambo for the position of Chief Justice in February 2022: Judges Matter 'Chief Justice Interview Transcripts' (February 2022) (available at: https://www.judgesmatter.co.za/interviews/chief-justice-interviews/chief-justice-interview-transcripts/), as well as the JSC interview of Deputy Chief Justice Maya for the position of Chief Justice in May 2024: Judges Matter 'Chief Justice Interview: JSC Interview of Justice MML Maya – Judges Matter (May 2024)' (22 May 2024) (available at https://www.youtube.com/watch?v=jDmG8vxeqoM&t=4s). See also the JSC interview of Judge President Mlambo for the position of Deputy Chief Justice in July 2025 (available at https://www.youtube.com/watch?v=2koTQnqlmRo).

4 For a full explanation of the programme by the (then) Chief Justice, see Chief Justice Zondo 'Final Decision on the Programme Involving the Use of the Services of Retired Justices of the Constitutional Court to Support the Serving Justices' (13 March 2024) (available at: https://www.concourt.org.za/images/Programme_involving_the_use_of_the_services_of_retired_Justices_at_the_Constitutional_Court.pdf) (*Statement by Chief Justice on Discontinuation of Retired Justice Programme at Constitutional Court*).

5 *Ibid*.

6 See Ally and Boonzaier 2022 supra. See also, merely as examples:

- https://www.judgesmatter.co.za/opinions/constitutional-court-where-are-the-judgments/
- https://groundup.org.za/article/constitutional-court-sitting-on-seven-late-judgments/
- https://www.dailymaverick.co.za/article/2024-09-05-constitutional-court-woes-must-top-chief-justice-mayas-agenda/

7 *Supra* note 3.

8 Section 167(3)(a) of the Constitution of the Republic of South Africa, 1996.

9 *President of the Republic of South Africa v South African Rugby Football Union and Others* 1999 (2) SA 14 at para 25.

10 *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at paras 19 and 253.

11 Von Abo at para 36.

12 *Zuma and Another v President of the Republic of South Africa and Others* (CCT 206/25) [2025] ZACC 21 (3 October 2025).

13 Superior Courts Act 10 of 2013, s 6(1).

14 *Annual Judiciary Report 2021/2022*, available at https://www.judiciary.org.za/index.php/documents/judiciary-annual-reports# at 56-7, Tables 20-1.

15 Statistics South Africa 'Statistical Release – P0302 – Mid-year Population Estimates 2022' available at https://www.statssa.gov.za/publications/P0302/P03022022.pdf at vii and 18-9.

16 Superior Courts Act, s 16(1)(a)(i).

17 Superior Courts Act, s 17(6)(a).

18 Superior Courts Act, s 16(1)(a)(ii)) and (b).

19 Superior Courts Act, s 15(1).

20 Constitution of the Republic of South Africa Act 200 of 1993.

21 Section 98(2) of the Interim Constitution. The Court consisted of 'a President and 10 other judges' (Section 98(1)).

22 The Appellate Division of the Supreme Court was the apex court prior to 27 April 1994, and under the final Constitution would be succeeded by the Supreme Court of Appeal. See section 168 of the Constitution.

23 Hoexter 'Structure of the Courts' in Hoexter and Olivier (eds) *The Judiciary in South Africa* (2014) at 15; Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 SAJHR 509.

24 See Sebastian Seedorf, 'Jurisdiction' *Constitutional Law of South Africa* OS 06-08 Ch4 pp. 4-5.

25 Hoexter 'Structure of the Courts' *supra* note 25 at 11 and 15.

26 Hoexter 'Structure of the Courts' *supra* note 25 at 11.

27 The continued wrestling with this question, even after 2000, is reflected for instance in *S v Boesak* 2001(1) SA 912 (CC) at 917-8.

28 Section 167(3) of the Constitution prior to the Seventeenth Amendment empowered the Court to decide: 'only constitutional matters and issues connected with decisions on constitutional matters'. See *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* (CCT 61/14) [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (24 March 2015) at para 13.

29 Section 167(3)(b)(i) of the Constitution stipulates that a 'constitutional matter … includes any issue involving the interpretation, protection or enforcement of the Constitution'. Naturally, those matters within the Court's exclusive section 167(4) jurisdiction and cases for confirmation pursuant to sections 167(5) and 172(2)(a) are constitutional matters, making section 167(3)(b)(i) the mainstay of the Court's constitutional jurisdiction. See *Paulsen v Slipknot Investments* (ibid.) at para 13.

30 Section 167(3)(b)(ii) of the Constitution.

31 See, generally, Corder and Brickhill 'The Constitutional Court' in Hoexter and Olivier (eds) *The Judiciary in South Africa* (2014) 365 at 371-2.

32 Currently, litigants file by sending process as email attachments to a designated email address administered by General Office personnel. However, there is a rollout of digital case management platforms underway in all courts, including the Constitutional Court.

33 This cycle is determined by the Chief Justice. The cycle involves allocating each matter to a Justice down the list on a master spreadsheet.

34 The allocated Justice and their chambers attend to and consider all filings in a matter (i.e. not only the main application, but also any interlocutory or related process).

35 Such checks might include whether the matter is urgent or not; whether the judgment/s being appealed against or implicated are included as annexures; missing pages or parts of documents; compliance with

the Rules (especially regarding the time of filing), and whether condonation has been sought; and whether opposing papers have been received and properly filed.

36 For example, a further affidavit or written submissions addressing a particular point or answering a set of questions.

37 The writing Justice in such an instance is typically the Justice responsible for the new application memorandum.

38 Section 167(2) of the Constitution. See O'Regan 'A Forum for Reason: Reflections on the Role and Work of the Constitutional Court' (2012) 28 SAJHR 116 at 122.

39 Such 'documents' are: (1) orders; (2) directions; and (3) letters in the name of the Registrar at the instance of the Chief Justice, Deputy Chief Justice or Judges.

40 Section 167(2) of the Constitution.

41 Section 167(2) of the Constitution; Ally and Boonzaier 2022 *supra* at 326-7.

42 See, generally, Ally and Boonzaier 2022 *supra*.

43 N Ally and L Boonzaier, 'The Constitutional Court's efficiency: An update from 2022–2024', Constitutional Court Review conference paper: 30 Years of the Constitutional Court (University of Johannesburg, 24 July 2025), at 2.

44 Ally and Boonzaier 2025 *supra* at 4 (figure 1).

45 Ally and Boonzaier 2022 *supra* at 330.

46 Ally and Boonzaier 2025 *supra* at 11.

47 N Ally 'A Snapshot of the Constitutional Court's Docket – January to July 2024' PER / PELL 2024 (27). At the time the article was published, not all petitions filed in 2024 had been processed, which is why the position was stated in these terms.

48 See https://www.concourt.org.za/index.php/caseload/caseflow-summary/caseflow-summary-2024.

49 The case is *Zolani Godloza and Another v The State* (CCT306/22), heard on 7 March 2024, and in which the application for leave to appeal was filed on 24 October 2022.

50 For example, *Reynolds Maleka v Timothy Boyce N.O. and Others* (CCT175/23), heard on 12 September 2024, and in which the application for leave to appeal was filed on 19 June 2023.

51 For example:

- *Golden Core Trade and Invest (Pty) Limited v Merafong City Local Municipality and Another* (CCT296/23), heard on 7 November 2024, and in which the application for leave to appeal was filed on 27 October 2023; and
- *Municipal Employees Pension Fund v City of Johannesburg Metropolitan Municipality and Others* (CCT274/23), heard on 19 November 2024, and in which the application for leave to appeal was filed on 10 October 2023.

52 See for example:

- *Shepstone and Wylie Attorneys v De Witt N.O. and Others* [2025] ZACC 14 (1 August 2025), which was heard on 22 August 2024 and delivered on 1 August 2025; and
- *Van Wyk and Others v Minister of Employment and Labour***;** *Commission for Gender Equality and Another v Minister of Employment and Labour and Others* (CCT 308/23) [2025] ZACC 20 (3 October 2025), which was heard on 5 November 2024 and delivered 11 months later, on 3 October 2025.

53 Annual Judiciary Report 2022/23, p. 27. Available at https://www.judiciary.org.za/index.php/documents/judiciary-annual-reports.

54 *Ibid*., p. 41. The three-month period is seemingly derived from the Judiciary's norms and standards, which require that '[s]ave in exceptional cases where it is not possible to do so, every effort shall be made to hand down judgments no later than 3 months after the last hearing' *Norms and Standards for the Performance of Judicial Functions* (2014), section 5.2.6.

55 Ally *supra* at 3.

56 See generally Powell 'Judicial Independence and the Office of the Chief Justice' (2019) 9 *Constitutional Court Review* 497.

57 See generally Freedom Under Law, *Serving the Judiciary? A review of the Activities of the South African Judicial Service Commission 2009 – 2022* (available at https://www.freedomunderlaw.org/wp-content/uploads/2023/01/FUL11_20012023-pages.pdf).

58 Khaitan has observed a similar problem with the same consequences at the Indian Supreme Court, noting that '[t]he impact of the expanding appellate docket of the SC on its constitutional watchdog function has been devastating' (Khaitan 'The Indian Supreme Court's identity crisis: A constitutional court or a court of appeals' (2020) 4 Indian Law Review 1 at 2).

59 Le Sueur 'Panning for Gold: Choosing Cases for Top-level Courts' in Le Sueur (ed), *Building the UK's New Supreme Court: National and Comparative Perspectives* (2004) at 274.

60 *S v Boesak* 2001 (1) SA 912 (CC) para 12.

61 *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC).

62 *Ibid* para 30.

63 Section 167(3)(b)(ii) of the Constitution.

64 *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd supra* note 63 paras 16 and 17. This arguably creates some duplication; the interests of justice are considered both for purposes of determining whether the Court's jurisdiction is engaged, and whether leave to appeal should be granted. On the importance of keeping the enquiries distinct, see E Cohen 'The Jurisdiction of the Constitutional Court' (2021) 11 Constitutional Court Review 433.

65 *Minister of Tourism v Afriforum NPC* 2023 (6) BCLR 752 (CC) para 27.

66 See for example *Wilkinson and Another v Crawford NO and Others* 2021 (4) SA 323 (CC) para 30.

67 *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* 2021 (5) SA 425 (CC).

68 *MEC for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC) at paras [30]–[32]

69 See *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

70 See for example *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2023 (1) SA 353 (CC).

71 *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (5) SA 317 (CC) para 13.

72 See for example *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC).

73 *Mbatha v University of Zululand* 2014 (2) BCLR 123 (CC) para 222; *Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd* 2019 (7) BCLR 850 (CC).

74 *Magajane v Chairperson, North West Gambling Board and Others* 2006 (5) SA 250 (CC) para 29.

75 *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* 2005 (4) SA 319 (CC) para 19.

76 E Cohen 'The Jurisdiction of the Constitutional Court' (2021) 11 Constitutional Court Review 433 at 474.

77 Ally and Boonzaier 2025 *supra* at 11.

78 Le Sueur 'Panning for Gold: Choosing Cases for Top-level Courts' in Le Sueur (ed), *Building the UK's New Supreme Court: National and Comparative Perspectives* (2004) at 288. With reference to the (then anticipated) remodelling of the case selection processes in the United Kingdom, Le Sueur noted that 'a little more precision could be useful to both the court and would-be appellants', and that 'greater clarity about the criteria for leave is likely to help appellants and their lawyers make properly informed judgments about the likelihood of success in seeking leave'.

79 Ally notes that it is apparent from a perusal of the lower court judgments against which leave are sought that this is the approach taken by many litigants (Ally *supra* at 12).

80 *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* (2023 (5) SA 163 (SCA) para 20.

81 T Bingham *The Rule of Law* (2011, Penguin) at 3.

82 Ibid at 67.

83 Ibid at 48.

84 *TWK* para 20.

85 F Schauer (1991), 'Rules and the Rule of Law', Harvard Journal of Law and Public Policy, 14, pp. 645-94.

86 J Raz (1999) *Practical Reason and Norms* (2ed, Oxford Academic).

87 However, see Davis AJA's criticism in *Competition Commission of South Africa v Bank of America Merrill Lynch International and Others* [2024] 1 CPLR 1 (CAC) of *TWK*'s failure to follow the binding Constitutional Court precedent in *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and Others* (2023) (1) SA 353 (CC). The SCA itself has not followed *TWK* in subsequent cases. This was made clear in the recent sequel to Lebashe I: *Lebashe Investment Group (Pty) Ltd and Others v United Democratic Movement and Another* [2025] ZASCA 29 (28 March 2025) para 2.

88 *TWK* para 21.

89 For example, where a decision-maker seeks to make the best all-things-considered decision in a particular case (making it particularistic), but in doing so takes into account, as one of the all-things-to-be-considered, the inherent value of having a predictable rule. Schauer describes this as 'rule-sensitive particularism'.

90 *Memorandum Submitted on behalf of the Judiciary of South Africa on the Chapter on the Administration of Justice in the Draft Interim Constitution,* para 6(c). Available at https://www.nationalarchives.gov.za/sites/default/files/ITEM_NEG-0021-0007-_-099_0.pdf.

91 *Ibid*., paras 6(c) and (f).

92 See Pierre de Vos 'Should the SCA and the Constitutional Court be merged?' 22 June 2008 (available at https://constitutionallyspeaking.co.za/should-the-sca-and-the-constitutional-court-be-merged/).

93 In *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13 at para 39, the Court pronounced:

'[T]his being the highest Court in the Republic which is charged with upholding the Constitution, and deciding points of law of general public importance, this Court must not be saddled with the responsibility of resolving factual disputes where disputes of that kind have been determined by lower courts. Deciding factual disputes is ordinarily not the role of apex courts. *Ordinarily an apex court declares the law that must be followed and applied by the other courts.* Factual disputes must be determined by the lower courts and when cases come to this Court on appeal, they are adjudicated on the facts as found by the lower courts. Of course, this principle does not apply to matters that come directly to this Court.'

94 See E Cohen 'The Jurisdiction of the Constitutional Court' (2021) 11 CCR 433 at 474.

95 Ally and Boonzaier 2022 *supra* at 332-3.

96 Law clerks could be incentivised by the prospect of promotion to the screening unit. Former clerks appointed to the unit could mentor and guide incumbent clerks, and would be well placed to review orders and directions based on experience gained during their clerkships.

97 Ally and Boonzaier 2022 *supra* at 330 fn 65.

98 If the Court were to adopt this interpretation, there would be little risk that decisions taken pursuant to its decision would be invalidated, given that the ultimate arbiter of whether the interpretation is correct would be the same Court that implemented it.

99 This more than satisfies the 'control' requirement for any delegation, and is the ultimate backstop on the exercise of authority by a law clerk or trained personnel within the screening unit. See *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance* [2023] ZACC 31 at paras 76, 90 and 99.

100 This is similar to the Chambers model employed by the German Constitutional Court.

101 This is to enhance efficiency, by obviating the need for *en banc* consensus in the disposition of every single new application, by enabling the judicial sifting-out of unmeritorious matters. However, a unanimity requirement provides a check and balance on any assessment panel injudiciously dismissing a matter by a simple majority.

102 *Inter alia***,** this is because of the eight-Justice quorum imposed by section 167(2) of the Constitution.

103 See Ally and Boonzaier 2022 *supra* at 334-9.

104 Acting Justices are likely to work less efficiently than a permanently appointed Justice, as Acting Justices would need to learn how the Court's systems work, what its practices oblige, and perhaps even the jurisprudence particular to the Court's jurisdiction and leave tests. By contrast, there is only a once-off adaptation for a permanently appointed Justice.

105 It may be noted that this is apparently the maximum number that the Court building can accommodate currently. See JSC interview of Deputy Chief Justice Maya for the position of Chief Justice in May 2024: Judges Matter 'Chief Justice Interview: JSC Interview of Justice MML Maya – Judges Matter (May 2024)' (22 May 2024) (available at https://www.youtube.com/watch?v=jDmG8vxeqoM&t=4s).

106 As happened in *Jacobs v S* [2019] ZACC 4 and *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* [2019] ZACC 41.

107 See Jeremy Gauntlett, 'The Sounds of Silence' *TSAR* 2011 vol 2 226 at p 228.

108 *Gcaba v Minister for Safety and Security* [2009] ZACC 26 at para 62.

109 *Van der Walt v Metcash Trading Limited* [2002] ZACC 4 at para 20.

110 Brickhill 'Precedent and the Constitutional Court' *supra***;** Herd and Murcott 'The Uncertain Constitutional Duty to Internally Investigate and Remedy State Impropriety' (2023) 34 *STELL LR* 27 at 46 and 49. See the judgment of Rogers J in *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance* [2023] ZACC 31 at paras 283-4.

111 Difficult questions arise from such a model. Which panel would have the authority to finally pronounce on the point? If the answer to that question is the highest court sitting *en banc*, then an internal appellate division is effectively created within the apex court itself – opening the floodgates for applications for *en banc* consideration, burdening the apex court with an increased caseload and returning it to the functional equivalent of the *status quo***.** There is also the prospect of applications for *en banc* consideration being followed by rescission applications of *en banc* orders and judgments.

112 See Statement by Chief Justice on Discontinuation of Retired Justice Programme at Constitutional Court at para 11. On the vital role that law clerks play within the Court, see Corder and Brickhill *supra* at 369-374.

113 See for example *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 11; *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) at para 32.

114 Ally *supra* at 13.

115 Le Sueur *supra* at 287.

116 Cohen has noted that 'it would assist litigants considerably if the main factors for granting leave to appeal were codified in the Court's rules or in a single judgment' (E Cohen 'The Jurisdiction of the Constitutional Court' (2021) 11 Constitutional Court Review 433).

117 The Constitutional Court has indicated that burdening the Supreme Court of Appeal with the obligation to give fully reasoned judgments in applications for leave to appeal 'would defeat the purpose of the requirement that 'leave' be obtained' and that '[s]uch matters can and should be disposed of summarily' *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para 15.

118 A measure of such flexibility has been given to the United Kingdom Supreme Court bv the statement, in Practice Direction 3.32, that '[t]he reasons given for refusing permission to appeal should not be regarded as having any value as a precedent'.

119 Dickson, 'The processing of appeals in the House of Lords' 2007 Law Quarterly Review 571 at 588.

120 Practice Direction 3.32 of the United Kingdom Supreme Court reads as follows:

"Permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground. The Appeal Panel gives brief reasons for refusing permission to appeal. The reasons given for refusing permission to appeal should not be regarded as having any value as a precedent.'

121 IM Rautenbach and S Heleba 'The jurisdiction of the Constitutional Court in non-constitutional matters in terms of the Constitution Seventeenth Amendment Act of 2012' (203) Journal of South African Law/ Tydsfrik vir die Suid-Afrikaanse Reg 405. It was noted there that the lack of reasons for granting leave to appeal meant that 'admitted cases considered by the supreme court are not always useful in trying to understand the application of the test by the court'.

122 Rule 10 reads as follows:

'Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.'

123 Cohen has pointed out that '[i]f the Court were to make these rules clear and accessible, then pleadings could be drafted accordingly, reducing the number of applications or the time it takes to process whether leave to appeal should be granted' (Cohen *supra* at 479).

124 Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, rule 6(5)(b)(iii).

125 *Eke v Parsons* 2016 (3) SA 37 (CC) para 40, quoting from *Kgobane and Another v Minister of Justice and Another* 1969 (3) SA 365 (A).

126 See Cohen 'The Jurisdiction of the Constitutional Court' *supra* at 473.

127 L Loxton 'The Dangerous Powers of South Africa's "Super Appellate Court"' (2023) 13 Constitutional Court Review 291.

128 Lord Sales 'Certainty and Flexibility in the Law: Insights from English Law', Address to LLM Students, Cambridge University, 16 June 2025 https://supremecourt.uk/uploads/speech_lord_sales_16062025_d3e182b62d.pdf.

129 Ally *supra* at 11.

130 Section 60.1 of the Code of Conduct published under section 36(1) of the Legal Practice Act 28 of 2014 stipulates that '[a] legal practitioner shall not abuse or permit abuse of the process of court or tribunal and shall act in a manner that shall promote and advance efficiency of the legal process'.

131 See Cohen 'The Jurisdiction of the Constitutional Court' *supra* at 474.

132 Bundesverfassungsgericht (Federal Constitutional Court of Germany) Annual Report 2024 (German Constitutional Court 2023 Annual Report) (available at: https://www.bundesverfassungsgericht.de/EN/Media/AnnualReports/annualreports_node.html at page 10.

133 German Constitutional Court 2024 Annual Report at 6 and 10. The First Senate presided over by the Court's President and the Second Senate presided over by the Vice-President. The First Senate primarily adjudicates matters implicating fundamental rights, while the Second Senate adjudicates disputes between organs or spheres of government.

134 German Constitutional Court 2024 Annual Report at 6.

135 German Constitutional Court 2024 Annual Report at 6 and 46.

136 German Constitutional Court 2024 Annual Report at 11.

137 German Constitutional Court 2024 Annual Report at 6.

138 German Constitutional Court 2024 Annual Report at 19 and 59.

139 German Constitutional Court 2024 Annual Report at 50.

140 German Constitutional Court 2024 Annual Report at 46-9.

141 German Constitutional Court 2024 Annual Report at 61.

142 German Constitutional Court 2024 Annual Report at 18. The judicial administration consists of the two Senate registries, court officers with legal training, the General Register, and senior legal officers who are fully qualified lawyers and authorised signatories of the Court.

143 German Constitutional Court 2024 Annual Report at 18. The President of the Court is entitled to five law clerks. Each law clerk is 'qualified' by virtue of gaining relevant professional experience at ordinary courts, public authorities, law firms or universities.

144 German Constitutional Court 2024 Annual Report at 19.

145 German Constitutional Court 2024 Annual Report at 6.

146 German Constitutional Court 2024 Annual Report at 6.

147 Supreme Court of Canada Website 'Meet our Judges' (available at: https://www.scc-csc.ca/judges-juges/about-apropos-eng.aspx).

148 Section 43 of the Supreme Court of Canada Act, 1985 (SCC Act). The Court will grant leave if it is clear that a hearing on the question of leave is unnecessary, or if the matter raises an important question or point that the Court ought to decide.

149 Section 25 of the SCC Act.

150 Supreme Court of Canada Website 'Role of the Court' (available at: https://www.scc-csc.ca/court-cour/role-eng.aspx).

151 Sections 35 and 52 of the SCC Act.

152 This leave to appeal mechanism gives the Court a measure of control over its docket and caseload. See Supreme Court of Canada website 'Judicial work' (available at: https://www.scc-csc.ca/about-apropos/work-travail/judicial-judiciaire/).

153 See 'Supreme Court of Canada: 2024 Year in Review' (available at: https://www.scc-csc.ca/about-apropos/work-travail/review-retro/2024/).

154 Supreme Court of Canada: Year in Review 2024 at p34.

155 Supreme Court of Canada: Year in Review 2024 at p11.

156 Supreme Court of Canada: Year in Review 2024 at p35.

157 Supreme Court of Canada Website 'Administration of the Court' (available at: https://www.scc-csc.ca/about-apropos/registrar-registraire/admin/).

158 Supreme Court of Canada Website 'Law Clerk Program' (https://www.scc-csc.ca/about-apropos/registrar-registraire/jobs-emplois/lcp-paj/).

159 Section 1 of Title 28 (US Code).

160 Section 2 of article 3 of the Constitution of the United States of America (US Constitution).

161 Sections 1 and 2109 of Title 28 (US Code). See US Courts website 'Supreme Court Procedures' (available at: https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1).

162 US Courts Website 'Supreme Court Procedures' *supra***.**

163 Mauro 'Roberts Dips Toe Into Cert Pool'. Law.com 21 October 2005 (available at: https://www.law.com/almID/900005545924/); Rehnquist, *The Supreme Court* (2nd ed, 2001) New York: Knopf at 22438.

164 See Liptak 'A Second Justice Opts Out of a Longtime Custom: The 'Cert. Pool' NYTimes 25 September 2005 (available at: https://www.nytimes.com/2008/09/26/washington/26memo.html. Liptak 'Gorsuch, in Sign of Independence, Is Out of Supreme Court's Clerical Pool' NYTimes 1 May 2017 (available at: https://www.nytimes.com/2017/05/01/us/politics/gorsuch-supreme-court-labor-pool-clerks.html).

165 US Courts Website 'Supreme Court Procedures' (available at: https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1).

166 US Supreme Court Website 'The Supreme Court at Work' (available at: https://www.supremecourt.gov/about/courtatwork.aspx).

167 US Courts Website 'Supreme Court Procedures' *supra***.**

168 See section 3 of the Singaporean Supreme Court of Judicature Act 1969 (SCJA); Singapore Courts 'Guide on Court Reporting' (available at: https://www.judiciary.gov.sg/news-and-resources/media-guide).

169 Singapore Courts 'Role and Structure of the Supreme Court' (available at: https://www.judiciary.gov.sg/who-we-are/about-singapore-courts).

170 Singapore Courts 'Role and Structure of the Supreme Court' (available at: https://www.judiciary.gov.sg/who-we-are/about-singapore-courts).

171 *Ibid*. These functions include: 'hearing, deciding and issuing judgments on a wide range of civil matters, including interlocutory applications… bankruptcy applications, examination of judgment debtor, taxation, enforcement matters and *ex parte* matters'; as well as conducting 'pre-trial conferences and case management conferences for all Supreme Court matters' and 'developing systemic enhancements in court procedures and processes through establishing best practices, bespoke guidelines and customised workflows'.

172 Sections 31, 49 and 53 of the SCJA.

173 Sections 31, 49 and 60D of the SCJA.

174 Sections 32 and 50 of the SCJA.

175 Some interlocutory applications may be decided by one or more judges, with the option for a full panel hearing only if the interlocutory application was decided by one judge. Sections 40 and 58 of the SCJA allow panels of one or two judges to issue interim orders and directions; but where the court sits as a single judge, there is an option for variation or setting aside. See the Seventh Schedule to the SCJA.

176 Section 37 of the SCJA.

177 Section 38 of the SCJA.

178 Section 50 of the SCJA.

179 Section 60E of the SCJA allows for the Court of Appeal to sit as a single judge in certain criminal matters specified in the Tenth Schedule to the SCJA, such as applications permission to apply for a review of an earlier decision, unopposed motions for relief or remedy and to give permission to withdraw motions or applications with the consent of all parties.

180 Section 47 of the SCJA.

181 Singapore Courts 'Caseload Statistics 2021' (available at: https://www.judiciary.gov.sg/who-we-are/statistics/caseload-statistics-2021).

182 Singapore Courts 'Caseload Statistics 2022' (available at: https://www.judiciary.gov.sg/who-we-are/statistics/caseload-statistics-2022).

183 Singapore Courts 'Caseload Statistics 2023' (available at: https://www.judiciary.gov.sg/who-we-are/statistics/caseload-statistics-2023).

184 Section 5 of the High Court of Australia Act 1979.

185 Section 72 of the Constitution of Australia.

186 Section 73 of the Constitution of Australia.

187 Section 15 of the Australian Judiciary Act 1903. In terms of section 21 of the Australian Judiciary Act 1903, the concurrence of at least three Justices is needed for the Court to render a decision on a question affecting the constitutional powers of the Commonwealth when it sits without its full complement of seven Justices.

188 High Court of Australia 2023-24 Annual Report at 35. In terms of section 21 of the Australian Judiciary Act 1903, appeals against judgments of State Supreme Courts require adjudication by three Justices.

189 High Court of Australia 2023-24 Annual Report at 35.

190 Section 16 of the Australian Judiciary Act 1903.

191 High Court of Australia 2023-24 Annual Report at 4.

192 High Court of Australia 2023-24 Annual Report at 14.

193 High Court of Australia 2023-24 Annual Report at 16.

194 High Court of Australia 'Employment' (available at: https://www.hcourt.gov.au/employment).

195 High Court of Australia 'Applying for an Associateship with a Justice of the High Court' (available at: https://www.hcourt.gov.au/about/employment/applying-associateship-justice-high-court).

196 *Indian Judiciary: Annual Report 2023-24* (Volume 1: Supreme Court) at 48.

197 *Indian Judiciary: Annual Report 2023-24* (Volume 1: Supreme Court) at 47.

198 Supreme Court of India 'Jurisdiction' (available at: https://www.sci.gov.in/jurisdiction/).

199 Section I - 1 of Chapter IV of the *Supreme Court of India Handbook on Practice and Procedure and Office Procedure* (2017).

200 Section II (i) of Chapter IV of the *Supreme Court of India Handbook on Practice and Procedure and Office Procedure* (2017).

201 Section III of Chapter IV of the *Supreme Court of India Handbook on Practice and Procedure and Office Procedure* (2017).

202 Indian Judiciary: Annual Report 2023-24 (Volume 1: Supreme Court) at 114. These figures do not include letter-petitions or admission applications received by the Court.

203 Indian Judiciary: Annual Report 2023-24 (Volume 1: Supreme Court) at 97.

204 Indian Judiciary: Annual Report 2023-24 (Volume 1: Supreme Court) at 96-7.

205 Indian Judiciary: Annual Report 2023-24 (Volume 1: Supreme Court) at 98.

206 Indian Judiciary: Annual Report 2023-24 (Volume 1: Supreme Court) at 223.

207 The Supreme Court and Judicial Committee of the Privy Council Annual Report 2022-2023 (available at: https://www.jcpc.uk/uploads/annual_report_2022_2023_c6ad4e7ea5.pdf) at 5. See section 23 of the UK Constitutional Reform Act 2005.

208 UK Supreme Court website 'Supplementary Panel' (available at: https://www.supremecourt.uk/about/supplementary-panel.html). See section 39 of the UK Constitutional Reform Act 2005.

209 UK Supreme Court website 'Role of the Supreme Court' (available at: https://www.supremecourt.uk/about-the-court/role-of-the-supreme-court).

210 A Guide to Bringing a Case to The Supreme Court (available at: https://supremecourt.uk/how-to-appeal/guide-to-bring-a-case-to-uksc).

211 *Ibid***.**

212 The Supreme Court and Judicial Committee of the Privy Council Annual Report 2024-2025 (available at: https://supremecourt.uk/uploads/The_Supreme_Court_Annual_Report_and_Accounts_2024_25_ec4ecbe2e5.pdf) at 31.

213 *Ibid*., at 28.

214 The Supreme Court and Judicial Committee of the Privy Council Annual Report 2024-2025 *supra* at 10.

215 UK Supreme Court Website 'Judicial Assistant Recruitment' (available at: https://supremecourt.uk/working-for-us/ja-recruitment).

216 The Supreme Court and Judicial Committee of the Privy Council Annual Report 2024-2025 *supra* at 76.

217 *Ibid*., at 105.