SUBMISSION TO THE COMMITTEE ON RATIONALISATION OF HIGH COURT DIVISIONS

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DGRU AND JUDGES MATTER SUBMISSION TO THE RATIONALISATION COMMITTEE

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A. Introduction

1. The Democratic Governance and Rights Unit ("**DGRU**") is an applied research unit of the Department of Public Law at the University of Cape Town. DGRU's vision is of a socially just Africa, where equality and constitutional democracy are upheld by progressive and accountable legal systems, enforced by independent and transformative judiciaries, anchored by a strong rule of law.

2. Since its founding in 2007, the DGRU has established itself as one of Africa's leading research centres in the area of judicial governance. The mission of the DGRU is to advance social justice and the rule of law across Africa by strengthening judiciaries through academic research, public advocacy for progressive reform, training, and providing free online access to legal resources. More information is available on www.dgru.uct.ac.za

3. **Judges Matter** is a project of the DGRU with a dedicated focus on monitoring judiciary in South Africa. Through applied research, monitoring and advocacy, Judges Matter ensures transparency and public accountability in the appointment of judges, their discipline for misconduct, and how the judiciary is governed and administered.
   More information is available on www.judgesmatter.co.za

4. Over several years of monitoring the South African judiciary, the DGRU and Judges Matter has made extensive comment to justice stakeholders (including the Ministry of Justice, the Office of the Chief Justice, the Judicial Service Commission, and the justice committees in Parliament) and the wider public on the severe shortage of judges. We have drawn public attention on how this shortage negatively impacts access to justice, the fulfilment of human rights and the upholding of the rule of law. In August 2023, we published in GroundUp News the article '*We are woefully short of judges*',[1] which drew attention to the issue and attracted wide-ranging debate and discussion.

[1] M. Benjamin 'We are woefully short of judges' GroundUp (5 August 2023) https://groundup.org.za/article/we-woefully-short-judges/

5. Since its establishment in 2021, we have been closely following the progress of the Committee on the Rationalisation of Areas under the Jurisdiction of the Divisions of the High Court of South Africa and Judicial Establishments (the "**High Court Rationalisation Committee"**). We were eager to receive both reports on Phase 1 (on areas under jurisdiction of the High Court) and particularly Phase 2 (judicial establishments) of the Rationalisation Committee's work. While both phases have an impact on key areas of our work, Phase 2 in particular addresses the general shortage of judges we have highlighted over the years. We therefore welcome the interim report on judicial establishments (**"the Phase 2 Interim Report"**) published on the Department of Justice's website on 13 June 2024.

6. This submission seeks to provide substantive input into the Phase 2 Interim Report, with the hope that it will assist the High Court Rationalisation Committee in its work.

7. We begin by making a brief commentary on key aspects of Rationalisation Committee's Phase 1 Report as they relate to the need for more judges in the judiciary generally. We then turn to highlighting a point about the dealing with the Phase 2 Report's key recommendations.

   In this regard, we will address the following issues:

   a. The need for comprehensive data gathering, including caseweighting
   b. A uniform policy on acting judges
   c. The continued use of recess periods
   d. The current situation in the courts and why interim measures are necessary

8. We will discuss these issues in turn under different subheadings.

B. Rationalisation Committee's recommendations and the need for more judges

9. The Rationalisation Committee's Phase 1 report conducts a comprehensive study of the different areas under the jurisdiction of the High Court divisions around South Africa. The Phase 1 Report notes the different waves of restructuring of the jurisdictional areas that have all sought to redress past injustices as they relate to

access to courts, while also ensuring that the courts are closer to the people going forward. This work is vital in realising the right of access to courts as enshrined in section 34 of the Constitution, 1996. We commend the Rationalisation Committee's work in undertaking this work in a thorough and broadly consultative process, that strived to balance the competing interests and complexity that are fraught in a process like this.

10. The Phase 1 report's recommendations have far-reaching implications for the entire judiciary, particularly the High Court divisions but we would argue that these implications reach both the Supreme Court of Appeal, the Constitutional Court, and the specialist courts. Several of the recommendations call for the establishment of new seats of the High Court.[2]

    Specifically, the Phase 1 Recommended the following:

    a) In the Eastern Cape:
       The relocation of the main seat of the division to Bhisho, alongside an increase in the areas under the jurisdiction of the Bhisho seat; a significant reduction in the areas under the jurisdiction of the Makhanda seat; an increase in the areas under the jurisdiction of the Gqeberha and Mthatha seats, including transferring the towns of Matatiele and Maluti to the Eastern Cape Division of the High Court.

    b) In the Free State:
       The establishment of a new local seat be established at Welkom, with magisterial districts divided between the main and local seats.

    c) In Gauteng:
       The establishment of a new local seat in Palm Ridge, Ekurhuleni, with magisterial districts now shared between the main seat in Pretoria and the local seats in Johannesburg and Palm Ridge.

[2] In this submission we will use 'local seat' instead of 'local division' and 'main seat' instead of 'provincial division'. Where we use 'provincial division' we refer to the 9 divisions established by Section 6(1) of the Superior Courts Act of 2013 which correspond with the 9 provinces; and each with a main seat and local seats established in terms of section 6(3)(b). The Chief Justice issued a notice (GN 148 of 28 February 2014: Renaming of Courts in terms of section 6 of the Act (GG No. 37390) adverting to 'local divisions' but these are not provided for in the enabling legislation. See M.J. Wallis 'What's in a name? A note on nomenclature' SALJ 137 (1) 25 – 31.

d) In KwaZulu-Natal:

The establishment of a new local seat in Richard's Bay, alongside a split of the magisterial districts between the main seat in Pietermaritzburg, with the local seats in Durban and Richard's Bay. In addition, the transfer of the Maluti and Matatiele areas to the jurisdiction of the Eastern Cape Division.

e) In Limpopo:

The disestablishment of the Lephalale local seat, an increase in the areas under the Thohoyandou local seat, to ensure a more equal share of magisterial districts with the Polokwane main seat of the Limpopo Division.

f) In Mpumalanga:

An increase in the areas under the jurisdiction of the Mbombela local seat, to ensure a more equal distribution with the Mbombela main seat of the Mpumalanga division.

g) In the North Cape:

The establishment of a new local seat in Upington to exercise jurisdiction over two of the five magisterial districts in the province alongside the Kimberley main seat of the Northern Cape division.

h) In the North West Province:

The establishment of a new local seat in Rustenburg, which will take over some of the areas under the jurisdiction of the Mahikeng main seat of the North West division.

i) In the Western Cape:

The permanent establishment of a local seat in Thembalethu, George, to take over the magisterial districts of the Karoo and Garden Route, and eventually the Murraysburg area.

11. Significantly, all these recommendations are likely to put pressure on the judicial establishment in each provincial division. They draw into sharp focus the need for more judges to be allocated to each division, particularly in the Gauteng,

KwaZulu-Natal, Limpopo, Mpumalanga, and Western Cape divisions. The distances between the existing main seats and the proposed new seats in these divisions are too vast to be accommodated through an arrangement where judges commute between the two courts. The workloads that these new courts will attract will also place additional pressure. We would therefore urge the Rationalisation Committee to seriously consider these factors on its recommendations relating to the project to 'right-size' the judicial establishments of the various court divisions as contained in the Phase 2 Report. These considerations are inextricably linked.

C. The need for comprehensive data collection, the case weighting system and judge hours

12. It is clear from the Phase 2 report's recommendations that there are insufficient data available to inform the final judicial establishment. We support the Rationalisation Committee's work in drawing attention to the problem of a lack of data as a key inhibitor in understanding the performance and functioning of the courts, and the judicial and supporting resources necessary to perform these functions. In this regard, we support the Rationalisation Committee recommendation that a compulsory uniform data collection is undertaken by the Office of the Chief Justice across all high court divisions.

13. We note that in the Phase 2 Report the Rationalisation Commission considers the following data sources: (i) population data from the Census, (ii) economic growth statistics, (iii) caseload data from the Judiciary Annual Reports, (iv) Submissions from the OCJ and Judges President. We submit that this is insufficient in arriving at sustainable recommendations on the judicial establishment. We would urge that the Rationalisation Committee undertaken more quantitative data collection in the form of direct consultations with Judges President and their deputies, court administrators, Department of Justice officials, and other stakeholders in the broader sector. This must be over and above the written responses received through the survey questionnaire the Rationalisation Committee issued to stakeholders.

14. Direct engagement with stakeholders is particularly essential in designing a caseweighting system that will properly consider the operations, systems, and outcomes of the South African judiciary, and yield an outcome that will accurately

reflect the work that happens in our courts.

15. We understand the limitations of time and resources on the Rationalisation Committee. As such, we do not propose that it undertake new work to invent a data collection system that has never been used in South Africa. The Magistrates Commission and the Court Administration Branch of the Department of Justice already collect extensive data on the operations of the magistrates courts. This data is currently being used by the Council for Scientific and Industrial Research (CSIR) to assist the Lower Courts Rationalisation Committee in undertaking a process similar to the process being undertaken by the Rationalisation Committee. The data from the magistrates courts is collected at the courtroom level, with individual judicial officers, heads of court, and court administrators. This data is then fed into the administrative regions in both the district and regional magistrates courts, and ultimately to the national Department. This data is used for quality assurance, to measure court performance, to determine the needs for judicial resources, and, more relevant, to determine the judicial establishment in the lower courts (which they call the 'post-establishment'). We note that the Phase 2 Report already commends the data and modelling used by the Lower Courts Rationalisation Committee and the CSIR.[3]

    We would urge the Rationalisation Committee to also note a recommendation that the OCJ utilise the same if not a similar method of data collection and modelling, which will ultimately feed into a caseweighting system.

16. In the same vein, if the data collection methods of the Magistrates Commission are utilized in the High Court, we submit that the need for individual judges to collect 'judge hours', as is recommended in the Phase 2 Report would become superfluous. That is because the data would already be collected through a comprehensive 'wall-to-wall' system that involves court administrators and the heads of the courts, among other stakeholders, with several layers of assurance for the data collected. As the Phase 2 Report acknowledges as several places, judges generally carry a heavy workload but the number of judges has hardly increased in well over a decade, nevertheless the courts still continue to deliver well on their current performance measures (as is evident from the Judiciary

[3] Interim Report of Phase 2 of the Committee on the Rationalisation of areas under the jurisdiction of the Divisions of the High Court of South Africa and Judicial Establishments (June 2024) ("Phase 2 Report") pg 18 – 21.

Annual Report).[4] It might therefore not be received well by judges to impose an additional administrative requirement that they record judge hours in the context of increased workloads and dwindling resources. We would therefore urge the Rationalisation Committee to reconsider this recommendation in light of other measures of data collection.

D. A uniform policy on acting judges

17. The DGRU and Judges Matter welcome the Phase 2 Report's recommendation on a uniform policy on acting judges. For the similar reasons of the lack of transparency, risk of patronage and abuse, and the appointment of inexperienced judges to act, Judges Matter has, for several years, advocated for thoroughgoing reforms to the system of appointment of acting judges.[5]

18. In this regard, we were encouraged by Minister Ronald Lamola's initiative to reform the process of appointing judges through the development of guidelines for acting judicial appointments ('Minister's Guidelines),[6] which we annex to this submission. The guidelines give substance to section 175 of the Constitution by providing a clear, transparent process with relevant criteria for the appointment of acting judges at all courts.

19. In relation to High Court appointments, the Minister's guidelines state that the candidate must either be an admitted attorney and advocate with a cumulative 12 years' experience as a legal practitioner, magistrate, lecturer, or government lawyer in the public administration.[7] This experience must demonstrate a thorough knowledge and experience of the substance and practice of the law (candidates for specialised courts must in addition demonstrate knowledge and experience in that specialised field).[8] In addition, the Judge President must recommend to the Minister candidates who would promote diversity and/or have demonstrated experience in promoting transformation through mentorship,

[4] See Phase 2 Report pg 40 – 46.
[5] See A. Tilley and T. Masengu 'Is the appointment of acting judges transparent?' *De Rebus*, June 2015:24; and A. Tilley and Z. Ndlebe 'Judicial Appointments in South Africa' *British Journal of American Legal Studies* Vol 10 (3) 2021: 465 ff.
[6] Ministry of Justice, 'Guideline on Appointment of Acting Judges in the Republic of South Africa' (9 June 2020) (in file with researcher) ('Minister's Guidelines').
[7] Minister's Guidelines 5.1.
[8] Minister's Guidelines 5.3.

training of black junior legal practitioners, or actively participated in the structures of the legal profession.[9]

20. The general process set out in the Minister's Guidelines is that:

    a. There must be a vacancy within the judicial establishment of that court, or there is a need to temporarily increase capacity in the court.[10]
    b. The judge president must issue a notice to the legal community (including the legal practice council, magistrates associations and other legal associations) that there is a vacancy at their court and they must recommend candidates for acting appointment.[11]
    c. The Judge President may also solicit opinions from their fellow judges in the division on the suitability of appointment of candidates nominated.[12]
    d. Six weeks prior to such an appointment being made, the Judge President must forward to the Minister three more names that is needed for any acting appointment contemplated, alongside the CV or profile of each candidate, together with motivation of why that candidate needs to be appointed.[13]
    e. The Minister must then solicit the views of the Secretary General to the Office of the Chief Justice on the financial implications of each appointment and whether there are sufficient funds for such an appointment to be made.[14]

21. Significantly, the Minister must make the acting appointment in consultation with the judge president,[15] and a candidate may not be appointed for more than four consecutive court terms (approximately a period of a year).[16]

22. This process achieves the desired result of a clear and transparent process, together with the flexibility for judges president to continue appointment acting judges to serve the needs of their courts. We would therefore urge the

[9] Minister's Guidelines 5.3 – 5.5.
[10] Minister's Guidelines 6.2.
[11] Minister's Guidelines 6.3 – 6.4.
[12] Minister's Guidelines 6.5
[13] Minister's Guidelines 6.6–6.7
[14] Minister's Guidelines 6..6(b)
[15] Minister's Guidelines 6.1.
[16] Minister's Guidelines 8.1.

Rationalisation Committee to consider this process in its final recommendations. We understand that the Minister of Justice is currently in consultation with the Judicial Service Commission and the Heads of Court forum over this process.

E. The continued use of Recess Periods

23. We note the Phase 2 Report's recommendation that recess periods be alerted be or abolished as they are a 'relic of our colonial past'. We are at this stage agnostic on the question of recess periods however, we would urge the Rationalisation Committee to provide additional reasoning to inform its recommendations on the question of recess, especially in the context of the Phase 2 Report's painstaking emphasis that judges – particularly those in Gauteng and Limpopo – are inundated with work.

24. We say this because, as we understand it, recess periods are vital period in which judges are able to be undertake important work like judgment-writing, attending judicial conferences and other training initiatives. In extremely busy divisions like Gauteng, the court is still largely in session during recess, so that it deals with applications for leave to appeal, full-court appeals, family court matters, trials of long-duration, unopposed motions, and urgent applications, among others.[17] As the Deputy Judge President in the Johannesburg local seat has repeatedly stated, within the current context of limited judicial resources, the High Court cannot currently manage all of its work within the term time allocated and it is inevitable that recess periods are used to undertake some of the work.[18]

25. We would therefore urge the Rationalisation Committee to approach the question of recess with the necessary caution, and seriously consider the perspectives of both those who see value in it in the present context, and those who would want it to be abolished.

[17] See, for example, Gauteng Division Pretoria Family Court Directive (29 March 2023). https://www.saflii.org/za/other/ZARC/2023/72.html

[18] See, Justice R. Sutherland 'Gauteng Local Division Deputy Judge President Notice to Legal Profession', 26 March 2024, and 12 March 2021.

F. The Current situation and the need for Interim measures

26. It is not an exaggeration to say that the High Court is currently facing a crisis due to an insufficient number of judges available. The Phase 2 Report sharply highlights this problem in the Gauteng, Limpopo, and Western Cape divisions where the ratio of cases per judicial officer is exceptionally high.[19] This high caseload is echoed by the large volumes of backlog cases and reserved judgments,[20] and this undoubtedly impacts on the health and wellbeing of the current cohort of permanent judges (as submitted by the OCJ).[21]

27. As can be seen from the Judge President's submission, Gauteng utilises an exceptionally high number of acting judges to carry its workload, sometimes running to nearly double its judicial establishment on some terms.[22] In a notice to the legal profession dated 29 November 2023, announcing the shutting down of the Case Management Court, Deputy Judge President Sutherland explains that, even though there are 40 judicial posts on the judicial establishment in the Johannesburg seat, there are never 40 permanent judges available to undertake judicial work, especially in the case management court. That's because several are appointed to act in various courts, or they are on long leave, they have retired, or are on leave due to ill-health. He makes an example that in Term 3 of 2023, 17 of 40 are absent, and 15 of 40 absent in Term 1 of 2024. This clearly illustrates there is an urgent need for more judges in that court. This is particularly so as we learn that the Gauteng Division in Pretoria is only issuing trial dates from the first term of 2029 – 5 years from now!

28. There is therefore a need for the Rationalisation Committee to recommend urgent interim measures to be implemented immediately while further consultations about the right size of the judiciary are undertaken.

29. We would urge the Rationalisation Committee to consider the following measures:

[19] Phase 2 Report, pg 46.
[20] Judiciary Annual Report 2021/22 pg 35 – 41
[21] Phase 2 Report, pg 25
[22] Phase 2 'Gauteng Response to Questionnaire' pg 8

The power to assign judges to different courts

30. The power to assign judges to different courts should be considered by the Rationalisation Committee in making recommendations to address the significant shortage of experienced judges in the short term, but in the longer-term, it should be used in determining what might be the best judicial establishment going into the future. The power to assign judges to different courts manifests in two main ways, namely (i) when judges president assign judges to various seats within the provincial division; and (ii) when permanent judges are appointed ('seconded') in an acting capacity across provincial boundaries.

31. The power of the Judge President to assign judges to any seat of the provincial division in terms section 6(4)(c) is a powerful measure to ensure equity in the distribution of judicial resources. In divisions with multiple seats, the Judge President's assignment of judges where there are pressures in the work helps alleviate these pressures. For example, in Gauteng, judges frequently move between Johannesburg and Pretoria to sometimes with specific areas of judicial work, i.e. senior judges are assigned to deal with special motions (i.e. complex, voluminous cases). Similarly, in the Eastern Cape, judges regularly rotate between the different seats of the division even though they may be based at one seat.

32. Similarly, the ability to temporarily second senior judges across provincial boundaries achieves two important outcomes: (i) it alleviates work pressures in divisions that are inundated with judicial work, and (ii) provides additional exposure and experience to judges who would otherwise not encounter such work in their own division. For example, the Phase 2 Report highlights that the Free State and Northern Cape divisions have relatively light workloads compared to divisions like Gauteng. The Gauteng division regularly receives complex administrative law review cases which would do not frequently arise in other divisions. These cases cannot easily be assigned to less-experienced judges. There, a scheme that would allow experienced judges from the Free State to serve a term in a complex and challenging areas of the Gauteng division's work would assist in reducing some of the pressures of that work. It would also give the Free State judge additional experience in administrative law.

33. Both of these proposals would assist in the interim, in the midst of a crisis over

judicial resources, while a final determination is made on the final judicial establishment of the High Court.

The proposal to temporarily appoint judges beyond the judicial establishment

34. Both the High Court seats in Johannesburg and Cape Town have the goodwill of senior legal practitioners who make themselves available to act as judges *pro bono*. This alleviates some of the workload pressures identified in the Phase 2 Report and the submissions by judges president. However, this is unsustainable. It also poses a risk to judicial independence. We would therefore urge a more durable, sustainable arrangement to be found while the Rationalisation Committee's recommendations are considered.

35. We believe this to be the temporary appointment of acting judges beyond the judicial establishment. This would naturally attract some cost to the Office of the Chief Justice's overall budget, which has already suffered several successive cuts, with an estimated 13% cut in 2024/25.[23] Nevertheless, we believe that this is necessary to deal with the huge backlogs in the courts, and the increasing workloads overtimes, coupled with a lack of any substantial increases in the judicial establishments over the last decade. The risk of not allocating more judges is too great to the litigating public, including those injured in motor vehicle accident and medical negligence cases, children needing financial support, and businesses at risk of insolvency.

36. We do not propose a formula for determining the exact number of additional judges to be appointed beyond the establishment but the frequency of the use of acting judges is a readily available indicator of where additional judicial resources are needed. An additional indicator would be the courts at which acting judges are assigned, versus those only permanent judges may preside. Put differently, the types of judicial work needed to be undertaken may provide insights of *where* extra resources are needed. From DJP Sutherland's notice above, it is clear that permanent judges are needed to handle Case Management Court (which, ironically, improves the efficiency with which cases get to a hearing). This

[23] National Treasury, Estimates of National Expenditure, Vote 27: Office of the Chief Justice, pg 515 ff. Available here: https://www.treasury.gov.za/documents/national%20budget/2024/ene/Vote%2027%20Office%20of%20the%20Chief%20Justice.pdf

therefore means acting judges would be most needed to handle those areas of the work which permanent judges would be letting go. A similar estimation could be applied in other divisions of the High Court.

37. We make these proposals acutely aware of the fiscal hardships South Africa is facing, however a line needs to be drawn where the continued viability of the South African judiciary is at acute risk. In our estimation, that line is not far off, and if concrete measures are not taken to alleviate the crisis of a lack of judges, we may never be able recover and will reach a point of no return. We would therefore urge the Rationalisation Committee to draw the Minister's attention to this situation.

G. Conclusion

38. Once again, we commend the Rationalisation Committee for undertaking this work with diligence and thoroughness. We hope that this submission will be useful in the further development of recommendations that will arrest a serious crisis that threatens the viability of the South African judiciary. We welcome any questions that the Rationalisation Committee may have.

H. Acknowledgments

39. This submission was made possible through the generous funding and support of the Millennium Trust. The research and writing work of Mbekezeli Benjamin is also gratefully acknowledged.

DGRU and Judges Matter

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