

## CHAPTER 3

# COURT SPECIALISATION IN THEORY

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### **The structure of South Africa's court system**

As long ago as September 1997, the Department of Justice (which has since become the Department of Justice and Constitutional Development) identified court specialisation as one of the key strategies for the provision of “an adequate network of accessible and service-oriented courts and other judicial and quasi-judicial institutions for all communities”.<sup>23</sup> At that time, the department's list of areas potentially in need of specialist courts included family law, sexual offences and juvenile justice. In addition (and these were not identified as forms of specialised courts) the department envisaged establishing, or at least regulating, community courts (including traditional courts) and institutions providing alternative dispute resolution services.

However, before looking at the merits or otherwise of specialisation, it is worth reviewing the current structure of South African courts, for any specialisation that occurs must take place within the parameters of this structure.<sup>24</sup>

South Africa's superior courts are the Constitutional Court of Appeal, and high courts. The Constitutional Court hears constitutional matters, while the Supreme Court of Appeal hears all appeals from the high courts except those of a constitutional nature. Together with the Constitutional Court, it has the power to regulate and develop our common law. The high courts have original jurisdiction over all matters, whether they are civil, administrative, criminal or constitutional (unless the matter in question has been assigned by an act of parliament to another court), but will generally only hear particularly serious criminal cases if on appeal from the lower courts. There are currently ten geographically defined divisions of the high court.

South Africa's lower courts are made up predominantly of the district and regional courts, which hear the vast majority of cases in South Africa. They have jurisdiction over all but the most serious administrative, civil and criminal cases. In addition, they have jurisdiction over a number of matters, including all maintenance actions, the holding of inquests, and cases arising from

the Promotion of Equality and Prevention of Unfair Discrimination Act. All are also deemed children's courts.

Magistrate's courts are themselves divided into district courts (which hear matters that are less serious and which are likely to result in less serious penalties in the case of conviction) and regional courts, which hear more serious cases. Regional courts can now also hear certain divorces. There are currently 432 magistrate's courts and approximately 1,450 magistrates in South Africa.

It would be incorrect to describe the different components of the court system in South Africa as being 'specialised' except to the extent that the distinctiveness of the functions of each of these courts reflects a certain division of labour. Nevertheless, all of these courts, with the possible exception of the Constitutional Court, have a very generalised jurisdiction. The same cannot be said of a variety of courts set up in terms of various acts, each of which are deemed to operate at a level equivalent to one of the courts described above, but with a much more narrowly defined and, therefore, specialised mandate. These courts, the remit of which is defined in key statutes, include:

- the Labour Court (at the level of a high court) and the Labour Appeal Court (at the level of the Supreme Court of Appeals) which respectively hear matters and appeals arising out of the Labour Relations Act;
- the Land Claims Court at the level of a high court, which hears matters arising out of the application of the Restitution of Land Rights Act;
- the Special Income Tax Courts, at the level of high courts, which hear income tax appeals;
- the Competition Appeal Court, which considers appeals on decisions of the Competition Tribunal;
- the Electoral Court, in which matters relating to the conduct of elections and decisions of the Independent Electoral Commission are heard (it is also a superior court);
- the Small Claims Courts, lower courts, hear low-value (less than R3,000) civil matters; there are currently about 120 such courts, most of which hear cases after hours.

Given the tightly defined remit of these courts, it would not be stretching the term to describe these courts as 'specialised' in the sense that the focus of the

work conducted in those courts is limited to a pre-determined range of issues. This specialisation is, in the case of these courts, defined in law. Furthermore, it is the laws that create the courts that also create the source of legal dispute, be that criminal, civil or administrative, over which these courts have jurisdiction. In other words, these courts have been created by the legislature with the express purpose of providing a forum for the enforcement of rights and responsibilities created in specific legislation. Thus, in some senses their very existence is predicated on the laws that they are intended to enforce.

Moreover, the *raison d'être* for these courts is to ensure that people deemed to have the appropriate skills and, as importantly, attitudes, could be employed in courts that have definite social policy objectives, such as the transformation of labour relations and the redistribution of land. The appointment of such persons was seen as so important to the realisation of these goals that special courts with distinct procedures (including appointment procedures) were regarded as necessary. This motivation for the establishment of these courts is, as we shall see, somewhat controversial. At the same time, however, it should be noted that, given the novel content of the laws (and, hence, the courts tasked with enforcing them), the building up of expertise and institutional memory and capacity can be seen as an important effect of concentrating cases in a predetermined court.

Interviews with senior members of the Department of Justice and Constitutional Development suggest that the establishment of these specialised courts is not entirely straightforward. For one, a comprehensive policy on the criteria of, or process for, the establishment of such courts does not appear to exist. It was noted more than once, however, that the judiciary is generally quite reluctant to establish such courts.<sup>25</sup>

This reluctance flows from a variety of sources, but revolves around the extent to which South Africa's system of courts is unified and forms a single coherent entity. In particular, concerns relate to the proliferation of separate courts 'equal in status to the high courts' but with different appointment and removal criteria and mechanisms, and different conditions of service. These conditions mean that judges appointed to one court of 'equal status to the high courts' may not meet the same criteria (or enjoy the same conditions of service) as judges in the high courts themselves. Apart from the potential for inter-court jealousies and prejudices, the more relevant concerns relate to whether judges in different courts are suitably inter-changeable and, therefore, suitably consistent in their decision-making. Moreover, given the intense competition for resources in the justice system, the creation of evermore specialised

courts, each with its own start-up and operating costs, can easily become a drain on existing resources if the establishment of those courts is not accompanied by additional funding.

Apart from these concerns, serious issues relating to the consistency and coherence of South Africa's jurisprudence arise when courts are established outside of the normal system. This is because no matter how narrowly their mandates are defined, there are bound to be legal disputes relating to jurisdiction over matters falling on or near the boundaries of that mandate.<sup>26</sup> Apart from this, however, there is the very real concern relating to the rules of precedence, which govern areas of law common to both the specialised and non-specialised court environments. How, for instance, are the rules of evidence in the Labour Court affected by decisions in other high courts? This issue can be difficult to manage when the law is subject to relatively frequent review as is currently the case while the courts are interpreting the constitution.

The establishment of specialised courts outside the normal court structure is therefore regarded as controversial by many within the justice system. However, this is not so much the case with specialised courts that have not been created by a specific piece of legislation and remain within the broad structure of South Africa's system of courts. The establishment of these courts, which we will later refer to as 'dedicated courts', is seen more as a specific strategy to assist with the more speedy or effective resolution of certain matters. Such matters, while handled by all courts (at the appropriate level), are handled exclusively by some courts in some jurisdictions where conditions warrant it. These courts include:

- Ordinary criminal courts specialising in certain crimes associated with the assessment, payment and collection of taxes.
- Sexual offences courts which are otherwise ordinary courts focusing on a specific set of offences in order to provide a more appropriate service to the victims of those crimes. In order to focus on the needs of the victim, the staff of these courts receive particular training. Many of these courts also have the physical infrastructure required to assist victims to provide evidence without having to confront the accused in person. Sexual offences courts exist in a number of jurisdictions, having initially been established in Wynberg in 1993. A ministerial task team has compiled a business plan for creating 20 more such courts.
- Family Court Centres concentrate a variety of legal matters associated with family life in one location, hearing divorces, maintenance hearings,

children's court matters and, in some instances, cases governed by legal and policy considerations relating to juvenile justice.

- The Specialised Commercial Crime Court in Pretoria, a replica of which is currently being established in Johannesburg, focuses on a variety of defined offences relating to commercial practices and fraudulent dealings.

The similarity between these courts and those set up in terms of particular pieces of legislation is that the rationale for both relates to the desire to address the complexities or sensitivities associated with particular legal matters. They offer an environment in which the skills of the personnel, the management systems in place, and the infrastructure available are better suited to these matters than would be the case in more generalised court environments. At the same time, however, these latter courts remain part of the standard court system. Organisationally, this means that the courts, and their personnel, are part of the standard court structure, and rules of selection, appointment, promotion and dismissal are the same as those for other courts. As a result, there is far more opportunity for interchange and career mobility for members of staff in these courts. Equally important, the standard rules of evidence and precedence apply, making the administration of justice more predictable and consistent.

These courts can, therefore, be seen as an extension of the reasonably common practice in large regional courts, of concentrating certain cases in the hands of certain prosecutors. Thus, in the Johannesburg regional court, a relatively small team of prosecutors is responsible for prosecuting all hijacking cases, while others are responsible for commercial crimes and yet others for sexual violence. These 'specialisations' are not fixed in organisational stone, but evolve as individual prosecutors develop a particular interest, as well as skills and experience in the prosecution of particular crimes. However, when there are insufficient cases of the kind a prosecutor specialises in, she is given other cases to prosecute.

## **Pros and cons of court specialisation**

Having reviewed the existence of specialised courts, and some of the concerns raised, and at the risk of some repetition, it is worth considering the case for and against court specialisation in light of the set of objectives common to courts described in chapter two.<sup>27</sup>

The most important motivations for the establishment of specialised courts relate to the possibility that these institutions might make the administration of justice more efficient. In this regard, the most important characteristics of such courts is their capacity to attract and utilise persons with appropriate expertise in the prosecution (in the case of criminal trials) and adjudication of matters in which such specialised knowledge is required for the most effective processing of cases. Indeed, even if these courts do not attract personnel with the requisite expertise, it seems plain that the experience of prosecuting and presiding over a range of similar cases will sharpen the skills of the people concerned. Thus both the prosecution and judiciary will become evermore familiar with complex factual issues, as well as with established law and procedure. This should lead to speedier and, therefore, less expensive proceedings for the state and litigants.

In addition, precisely because a court is specialised and hears a series of similar cases, consistency in decision-making (whether to prosecute, whether an accused person is guilty, what the appropriate sentence should be, etc.) will be encouraged. For obvious reasons, consistency and predictability is much valued in the administration of justice. Apart from the benefits to the quality of justice delivery, such consistency will also have the effect of encouraging the formation of a corps of specialist counsel familiar with the workings of the court and, therefore, better able to manage cases efficiently.<sup>28</sup>

Similarly, as was pointed out above, some areas of our law associated with the transformation of social relations were considered so novel that it was thought necessary to create juridical institutions that would concentrate the deciding of relevant cases in one place. This would ensure the rapid and consistent development of the case law, and also ensure that a corps of specialists—on the bench and in the legal profession—would rapidly develop the appropriate skills and experience. This would allow them to deal more expertly with those matters.

In this regard, the fact that new legislation has been passed may also mean that there is a rapid increase in the number of matters directly related to that legislation. Under these circumstances, the existence of the specialist court in which these matters are concentrated means that a burden is lifted off the generalist courts.

These benefits notwithstanding, there are also a number of risks associated with the creation of specialist courts:

- Although specialisation on the part of practitioners may increase the efficiency with which they execute their functions, it may also tend to create a degree of over-familiarity. According to both Cazalet<sup>29</sup> and Du Randt,<sup>30</sup> this can conceivably lead to a loss of perspective, so that the prejudices and prior knowledge of the actors colour their objectivity. Moreover, as was pointed out above, the lack of a general overview and experience of the law as it evolves may have negative consequences on the career mobility and general competence of staff.
- It is also conceivable that a degree of ‘cosiness’ develops between presumed adversarial role-players in a court if they become over-familiar with each other and with the cases to which they are expected to apply their minds.
- Again, as mentioned above, there is a risk that the particular area of law to which the specialist court devotes its attention, may develop in ways that are out of step with the overall development of the law. Moreover, there may be problems with the degree of consistency between specialist and generalist courts, in areas of the law that overlap. In such cases it is far from obvious that the appropriate response of the system should be to ensure that the specialist court hear the matter. But in that case, how can the generalist court ensure that it approaches the issues associated with the specialist court appropriately? More pertinently, what is to stop a specialised court developing a somewhat eccentric interpretation of rules of a more general nature?
- Seemingly trivial matters, such as the relative status and importance of presiding officers in specialist courts, can also easily become sources of discontent and difficulty.
- To the extent that a court is established to hear a predetermined and limited range of cases, motivated by existing weaknesses in the performance of the justice system, it is vulnerable to the criticism that, in setting up that court, the root causes of those weaknesses are not addressed.
- A final set of problems associated with court specialisation, but covered by neither Cazalet or Du Randt, arise from the fact that it is quite likely that the people involved in a very high proportion of cases heard in that court are likely to be the same individuals. Obviously the magistrate and prosecutor are likely to be present in many of the cases. But those cases are also likely to involve the same members of the police (in the case of criminal

courts) as well as the same members of the legal profession. If one of the key checks on the development of corrupt and unethical practices, namely the circulation of personnel, breaks down, it may become increasingly difficult to ensure the integrity of the process. Thus, if a court is dedicated to the prosecution of people caught in possession of narcotics, and is serviced by the same prosecutors, defence attorneys and police officers, it is possible that the entire court might become corrupt. Indeed, rumours that certain attorneys can facilitate the losing of dockets in drug trials do circulate in the legal profession in South Africa's main cities.

That said, it is true that this is also a risk associated with all courts operating in smaller centres, where there are simply insufficient numbers of lawyers, police officers and magistrates to ensure the adequate circulation of personnel. This may, therefore, be a risk inherent in running a criminal justice system.

Given the potential benefits, as well as the potential risks, of court specialisation, it is important to begin to determine a set of criteria in terms of which specialist courts may be set up. In doing this, however, it is important to recognise that the different ways in which specialisation is organised, gives rise to different trade-offs of risk and reward. In particular, there is an enormous difference between the statutory establishment of specialised courts 'outside' of the normal structure and system of courts, and the organisational or managerial decision to use a particular courtroom within the jurisdiction of a particular court to exclusively hear a certain set of cases. In order to distinguish these two approaches, we will call the former court specialisation, while the latter will be deemed court dedication or court reservation, in the sense that an otherwise general court is dedicated to (or reserved for) the hearing of certain matters.

There is little doubt that of the two, the statutory creation of a court outside of the normal structure of South African courts creates far more difficulties than the mere reservation of a court for the hearing of certain predetermined matters. The latter approach avoids a number of the problems and potential pitfalls identified above. These (avoided) problems include the issue of precedence and authority (since a normal court reserved for certain matters will be bound by the decisions of other courts in just the way that generalist courts are). There will also be no problems relating to overlapping jurisdictions. Since no law binds the court to a particular mandate, it will be relatively easy to allow it to hear matters that fall outside its remit. Similarly, there is no likelihood that the court will be under-utilised, because it can continue to hear all other matters in those periods when it is not fully occupied with specialised

cases. This also means that there is much less scope for officers to become 'over-specialised' and losing perspective.

Although many of the other risks mentioned may be common to specialised and dedicated courts, it seems likely that many of them are far more applicable to specialised courts than dedicated courts. Thus, although there may be differences in the appointment, promotion and remuneration policies governing the staff of a dedicated court, relative to their generalist colleagues, this is much more easily managed, as are the more subtle questions of authority and status. The mere fact that the personnel in these institutions continue to be part of a common structure means that these factors can be managed, even if personnel in dedicated courts are chosen because of their seniority and experience, or, indeed, their lack of seniority and experience. In any event, problems of moving from a dedicated court to a general one are much less fraught than might be the case for judges in specialised high courts who wish to move to the normal high courts.

This is not to say, however, that it is absolutely clear that the creation of dedicated courts is always preferable to the creation of specialised courts. There are reasons to believe that some of the advantages of court specialisation or dedication described above may be more strongly felt in specialised courts than in dedicated courts. Among the benefits that may accrue more strongly to a specialised court than to a dedicated court, one may count the following:

- Perhaps the biggest potential benefit associated with the creation of a specialised court to deal with new legislative requirements is that, in concentrating all the cases that arise from that legislation in one place, the relevant law develops much more quickly, allowing practice and precedent to emerge. This is obviously a boon if the legislature attaches a great deal of urgency to the development of this particular area of the law.
- Creating specialised courts with their own recruitment and appointment criteria and processes can ensure that the required skills are brought into the justice system more quickly and, as important, that they are appropriately targeted and employed. Thus if labour courts are to be established to help implement and enforce a new labour relations regime, the system may well benefit from the direct recruitment of legal professionals skilled in existing labour law.

That said, there are those in the criminal justice system who insist that, in relation to criminal trials at least, bringing in skills from outside of the

prosecution system may often be less efficient because these recruits will be unfamiliar with the systems and approach of the prosecution service.

- Because dedicated courts have no legally defined mandate, it is inevitable that many, if not most, cases for which they are dedicated will, in fact, be heard in other courts. This may well mean that there is a lack of consistency in decision-making across courts—a problem that is, however, inherent in the nature of justice systems.
- Setting up dedicated or specialised courts needs to be accompanied by an assessment of the potential risks run by allowing role-players to become over-familiar with each other.

## **When should specialised courts be established?**

Given the difficulties associated with assessing the pros and cons of establishing specialised and dedicated courts, it is unsurprising that the Department of Justice and Constitutional Development has not developed a set of consistent principles to use in assessing when and where to establish such courts. Despite this, senior officials readily acknowledge that there is a place for dedicated courts and, indeed, many are actively involved in setting up such courts. Finding support for specialised courts outside of the normal structure of courts was harder, although some saw the value of such courts in areas where the implementation of controversial social policies was at stake.

Although no policy document regarding the establishment of such courts is available, Advocate Pieter du Rand, a senior official in the court services division of the department set out a range of questions which had to be considered when the establishment of a specialised court was being contemplated.<sup>31</sup> This paper, delivered at a seminar on the proposal by the Department of Home Affairs to establish specialised immigration courts, proposes that the following issues need to be considered:

- The problem that gives rise to the need for a specialised court must be considered to be relatively permanent, with other, managerial, solutions to be used in the case of more temporary problems. One indicator to be considered in this regard is the passage of new legislation giving rise, or expected to give rise, to a great deal of litigation.
- Specialised courts should only be established after appropriate studies of previous court practices, or after the running of a carefully assessed and

successful pilot project. Studies of past practices should, *inter alia*, look into the consistency of previous decision-making of the courts; the extent to which there may have been some reluctance to bring cases to court; whether existing courts have a backlog of these cases; whether such delays are actually harmful to the course of justice; and whether there have been complaints about the administration of justice in a particular area of the law.

- The areas of law to be administered by the court must lend themselves to clear and consistent definition, ensuring that the issues to be covered are sufficiently ‘free-standing’ and do not overlap with other areas of the law.
- The court will have to have appropriate volumes of work, and there must be available resources for establishing such a court.
- The benefits of concentrating and centralising cases of a particular type must be offset against the potential costs of reducing access to justice to litigants who are geographically distant from the court.
- In addition, it is submitted that the benefits also need to be offset against the possible risks of corruption setting in.

Adv. du Rand identified the above issues as key guidelines to the establishment of specialised courts. He concluded by arguing that, while there were often sound reasons for establishing specialised courts, there was also a need to rationalise South Africa’s courts in order to avoid placing too many demands on a system. The system does, after all, have a range of other priorities to deal with.

## Conclusion

Using somewhat dubious grammar, South Africa’s constitution demands that “as soon as practical after the new Constitution took (sic) effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution” (Schedule 6, section 16 (6) (a)). This process has, at the time of writing, barely begun, with proposed legislation governing the nature, structure and functioning of South Africa’s courts largely still being conceptualised or researched.

It is clear that the department and its parliamentary watchdog have a clear preference for the establishment of a single, unified judiciary with clearly defined jurisdictions for the various levels in the South African court structure. In implementing this preference, it seems clear that the department and parliament will tend to steer away from proposals to set up specialised courts with mandates defined in terms of statute.

While there is plainly merit in the position adopted by the department with regard to specialised courts, there seems to be little doubt that what we have called dedicated courts are somewhat less problematic. They can deliver many of the perceived benefits of court specialisation while minimising many of the risks associated with the establishment of institutions outside of the normal court structures. That being the case, it is worth looking in some detail at a real dedicated court: the Specialised Commercial Crime Court based in Pretoria. In doing so, however, we will also see that this court has a number of further characteristics that distinguish it from other dedicated courts. In particular, the investigators of the police service and the prosecutors of the NPA have developed a very tight, integrated working methodology—a feature which other courts do not enjoy. While this is interesting in itself, it does mean that there are limits to the extent to which one might draw lessons about the functioning of such courts in general, from the functioning of this court in particular.