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## **EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

### **Constitutional Court Conference on Equality Jurisprudence**

organised by the South African Constitutional Court  
and the European Commission for Democracy through Law  
within the framework of the programme "Democracy, from the law book to real life"

Hotel Villa Via, Gordon's Bay, South Africa  
31 January to 2 February 1998

**REPORT**

## **Background**

This conference was organised by the Venice Commission and the South African Constitutional Court within the framework of the programme "Democracy, from the law book to real life", financed by Switzerland. Canada also provided financial support for the conference.

The Venice Commission invited a number of presidents and judges from different European constitutional courts to attend the conference as well as several constitutional law experts. The South African Constitutional Court invited judges in South Africa from the Constitutional Court, the Supreme Court of Appeal and selected High Courts.

The topics for the conference were proposed by the South African Constitutional Court. Reference was made to four cases dealing with equality recently decided by the South African Constitutional Court (the Hugo, Prinsloo, Harksen and Larbi-Odam cases, all decided in 1997).

The full list of participants and programme appear in Appendices 1 and 2 respectively.

## **Evaluation**

The turnout was very good and there were some 70 high level participants altogether.

The equality protection clause in the South African Constitution contains a number of interesting features. For example, the Constitution provides for the concept of unfair discrimination and there is a presumption of unfairness if discrimination has taken place on a number of specified grounds. The Constitution also provides explicitly for indirect discrimination and affirmative action. The problems facing judges in South Africa are therefore how such concepts are to be applied in practice and what are the limits of these concepts, not whether or not they are constitutionally justifiable. The presentations from Europe served to prove that similar problems occur in other jurisdictions and the European participants provided examples of how such cases had been tackled by their own courts. Nonetheless, it is clear that the challenges facing South Africa in respect of equality in the light of its history are on a much greater scale than those which judges in Europe face.

The conference also provided an opportunity for South African judges from the Constitutional Court, the Supreme Court of Appeal and several High Courts to get together.

While in South Africa Mr La Pergola, President of the Venice Commission, had meetings in Cape Town with Mr Valli Moosa, Minister for Constitutional Development, and Mr Dullah Omar, Minister of Justice, to discuss co-operation between South Africa and the Venice Commission.

**Follow up**

Transcripts of the conference will be available.

A second conference is being planned to take place in October in South Africa. The participation would be enlarged to constitutional court judges from the southern African states. The topic for this conference has yet to be chosen. European participation in this conference is also envisaged.

Venice Commission Secretariat  
Strasbourg, 11 February 1998

## **Constitutional Court Conference on Equality Jurisprudence**

31 January - 2 February 1998  
Villa Via Hotel, Gordon's Bay, South Africa

### **PROGRAMME**

#### **Saturday 31 January 1998**

Participants arrive during the day at the Villa Via at Gordon's Bay

19h 00 - Dinner

Welcome - Justice A. Chaskalson, President of the Constitutional Court of South Africa

#### **Sunday 1 February 1998**

09h 00 - 11h 00: **Modern approaches to equality jurisprudence - substantive and formal equality**

Justice P.N. Langa, Deputy President of the Constitutional Court of South Africa

Justice L. Adamovich, President of the Constitutional Court of Austria

**Principle of non-discrimination and citizenship of the European Union**

Mr A. La Pergola, President of the Venice Commission and Advocate General at the European Court of Justice in Luxemburg

Justice Claire L'Heureux-Dube, Supreme Court of Canada

11h 00 - 11h 30: Tea

11h 30 - 13h 00: **Indirect discrimination - the concept: proof and role of intent**

Justice P.J.J. Olivier, Supreme Court of Appeal of South Africa

Justice M. Melchior, President of the Court of Arbitration of Belgium

13h 00 - 14h 15: Lunch

14h 15 - 15h 40: **Conflict between equality and constitutionally protected freedoms**

Justice L. Ackerman, Constitutional Court of South Africa

Justice L. Solyom, President of the Constitutional Court of Hungary

15h 40 - 16h 00: Tea

16h 00 - 17h 30: **Affirmative action**

Justice S. Ngcobo, Cape of Good Hope High Court

Justice J. Said Pullicino, Chief Justice of Malta

**Monday 2 February 1998**

09h 00 - 11h 00: **Implementation of equality**  
**a) remedies**  
**b) specialist tribunals and the relationship between such tribunals and the courts**

Justice C. O'Regan, Constitutional Court of South Africa

Justice P. A. Müller, President of the Federal Tribunal of Switzerland

11h 00 - 11h 30: Tea

11h 30 - 12h 30: Open discussion

Concluding comments by Mahomed, Chief Justice of South Africa

**Constitutional Court Conference on Equality Jurisprudence**

Hotel Villa Via, Gordon's Bay, South Africa

31 January to 2 February 1998

**LIST OF PARTICIPANTS**

Adamovich L, President of the Constitutional Court of Austria

Tel: +43 1 53 122 415

Fax: +43 1 53 122 499

e-mail: vfgh@vfgh.gv.at

Bartole S, Prof at the University of Trieste and member of the Venice Commission for Italy

Tel: +39 40 63 51 26 (direct)

Tel: +39 40 67 63 076 (university)

Fax: +39 40 66 00 00

Beaudoin G, Canadian senator and observer to the Venice Commission

Tel: +1 613 995 61 28

Fax: +1 613 943 06 85

Booyesen W H, Judge of Durban and Coast High Court,

Private Bag X54313, Durban, 4000

Tel: 031-301-5010

Fax: 031-305-4550

Brand F D J, Judge of the Cape of Good Hope High Court,

Private Bag X9020, Cape Town, 8000

Tel: 021-480-2411

Fax: 021- 234-977

Buquicchio G, Secretary Venice Commission,

Council of Europe,

F-67075, Strasbourg, CEDEX, France

Tel: +33-3-88-41-22-05

Fax: +33-3-88-41-37-38

Chaskalson A, President of the Constitutional Court,

Private Bag X32, Braamfontein, 2017

Tel: 011-359-7425

Fax: 011-359-4063

e-mail: chaskalson@concourt.org.za

Du Plessis B R, Judge of the Transvaal High Court,

Private Bag X67, Pretoria,0001

Tel: 012-315-7711

Didcott J, Judge of the Constitutional Court,  
Private Bag X32, Braamfontein, 2017  
Tel: 011- 359-7445  
Fax: 011- 403-8743  
E - mail didcott @ concourt.org.za

Eksteen J P G, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098

Endzins A, Acting Chairman of the Constitutional Court of Latvia  
and member of the Venice Commission  
Tel: +371 708 71 52  
Fax: +371 708 71 27  
+371 708 71 00

Farlam I G, Judge of the Cape of Good Hope High Court,  
Private Bag XI9020, Cape Town, 8000  
Tel: 021-480-2411  
Fax: 021-230-412

Friedman G, Judge-President Cape of Good Hope High Court,  
Private Bag X9020, Cape Town, 8000  
Tel: 021-480-2411  
Fax: 021-230-412

Froneman J C, Judge of the Labour and Labour Appeal Court,  
Private Bag X52, Johannesburg, 2000  
Tel: 011-4039-890  
Fax: 011-403-9325

Gildenhuys A, Judge of the Land Claims Court,  
Private Bag X10060, Randburg, 2125  
Tel: 011-781-2291/7/8  
Fax: 011-781-2217

Gonzalez Campos J D, Member of the Constitutional Tribunal of Spain  
Tel: +34 1 544 43 45  
Fax: +34 1 543 93 36

Grosskopf F H, Judge of the Supreme Court of Appeal, P O Box 258, Bloemfontein,  
9300  
Tel: 051-447-6029  
Fax: 051-447-8098

Harms L T C, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098

Hefer J J F, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-4476-029  
Fax: 051-447-8098

Heher J A, Judge of the Witwatersrand High Court,  
Private Bag X7, Johannesburg, 2000  
Tel: 011-332-8000  
Fax: 011-336-6183

Howie C T, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-4476029  
Fax: 051-447-8098

Joffe M M, Judge of the Witwatersrand High Court,  
Private Bag X7, Johannesburg, 2000  
Tel: 011-332-8000  
Fax: 011-336-6183

Khumalo J A M, Judge of the High Court of Bophuthatswana  
Private Bag X2010, Mmabatho, 2735  
Tel: 0140-875-360  
Fax: 0140-21908

Kriek J J, Judge-President of the Northern Cape High Court,  
Private Bag X5043, Kimberley, 8300  
Tel: 0531-31441  
Fax: 0531-811-320

Kriegler J C, Judge of the Constitutional Court,  
Private Bag X32, Braamfontein, 2017  
Tel: 011-359-7409  
Fax: 011-403-9130  
e-mail: [kriegler@concourt.org.za](mailto:kriegler@concourt.org.za)

La Pergola A, President of the Venice Commission and Advocate General at the  
European Court of Justice in Luxemburg  
Tel: +352 430 321 33  
+352 430 322 34  
Fax: +352 430 328 00

Langa P N, Deputy-President of the Constitutional Court,  
Private Bag X32, Braamfontein, 2017  
Tel: 011-359-7446  
Fax: 011-403-8743  
e-mail: langa@concourt.org.za

L'Heureux-Dube C, Judge of the Supreme Court of Canada, Ottawa,  
Ontario K1A OJ1  
Tel: (613) 996 - 9218  
Fax: (613) 952 - 188  
E - mail: dubec@scc-cse.9c.ca

Lichtenberg E K W, Judge-President of the Free State High Court,  
Private Bag X20612, Bloemfontein, 9300  
Tel: 051-4478-837  
Fax: 051-437-041

Madala T H, Judge of the Constitutional Court,  
Private Bag X32, Braamfontein, 2017  
Tel: 011-359-7443  
Fax: 011-4038888  
e-mail: madala@concourt.org.za

Mahomed I, Chief Justice, Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 011-403-8883

Malinverni G, Professor of Constitutional Law at the University of Geneva  
and member of the Venice Commission  
Tel: +41 22 705 85 30  
Fax: +41 22 705 85 36

Marais R M, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-4476-029  
Fax: 051-447-8098

Maruste R, Chief Justice of the Supreme Court of Estonia  
Tel: +372 7 44 14 11  
Fax: +372 7 44 14 33

Melchior M, President of the Court of Arbitration of Belgium  
Tel: + 32 2 500 1271 (direct) or 1211 (secretary)  
Fax: + 32 2 500 1201

Melunsky L S, Judge of the South-Eastern High Court,  
Private Bag X1, Port Elizabeth, 6000  
Tel: 041-557-181  
Fax: 041-551-591

Mokgoro Y, Judge of the Constitutional Court,  
Private Bag X32, Braamfontein, 2017  
Tel: 011-359-7416  
Fax: 011-403-8896  
e-mail: mokgoro@concourt.org.za

Mpati L, Judge of the Eastern Cape High Court  
Private Bag X1011, Grahamstown, 6140  
Tel: 0461-29-333  
Fax: 0461-312-374

Mthiyane K K, Judge of the Durban and Coast High Court  
Private Bag X54314, Durban, 4000  
Tel: 031-301-5010  
Fax: 031-305-4550

Müller P A, President of the Federal Tribunal of Switzerland  
Tel: +41 21 318 91 11  
Fax: 41 21 233 37 00

Navsa M S, Judge of the Witwatersrand High Court,  
Private Bag X7, Johannesburg, 200  
Tel: 011-332-8000  
Fax: 011-33606183

Ngcobo S S, Judge of the Cape of Good Hope High Court,  
Private Bag X19020, Cape Town, 8000  
Tel: 021-480-2411  
Fax: 021-230-412

Nienaber P M, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098

Nugent R W, Judge of the Witwatersrand High Court,  
Private Bag X7, Johannesburg, 2000  
Tel: 011-332-8000  
Fax: 011-336-6183

Olivier P J J, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098

O'Regan C M E, Judge of the Constitutional Court,  
Private Bag X32, Braamfontein, 2017  
Tel: 011-359-7415  
Fax: 011-403-8898  
e-mail: o'regan@concourt.org.za

Plewman C, Judge of the Supreme Court of Appeal  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098

Said Pullicino, Chief Justice of the Constitutional Court of Malta  
and member of the Venice Commission  
Tel: +356 22 44 34  
Fax: +356 24 04 58

Satchwell K, Judge of the Witwatersrand High Court,  
Private Bag X7, Johannesburg, 2000  
Tel: 011-332-8000  
Fax: 011-336-6183

Schutz E P, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098

Scott D G, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098

Smalberger J W, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098

Solyom L, President of the Constitutional Court of Hungary, Budapest  
Tel: +34 1 212 1167/1168/1169  
Fax: + 34 1 212 1171

Streicher P E, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098

Tshabalala V E M, Judge of the High Court of Ciskei  
Private Bag X0004, Bisho, 5605  
Tel: 0401-992-956  
Fax: 0401-92317

Traverso J H M, Judge of the Cape of Good Hope High Court,  
Private Bag X9020, Cape Town, 8000  
Tel: 021-480-2411  
Fax: 021-230-412

Van Coller A P, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098

Van Zyl D, Judge of the Transkei High Court,  
Private Bag X5017, Umtata, 5100  
Tel: 0471-23-709  
Fax: 0471-22-323

Vivier W, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098

Wagner B, Secretary General of the Constitutional Court of Austria

Ward, Sir Alan, Lord Justice of Appeal, Royal Courts of Justice,  
Strand, London WC2A 2LL, United Kingdom  
Tel: + 44-171-936-6761

Yacoob Z M, Judge of the Constitutional Court,  
Private Bag X32, Braamfontein, 2017  
Tel: 011-359-7436  
Fax: 011-403-6520  
e-mail: yacoob@concourt.org.za

Zietsman N W, Judge-President, Eastern Cape High Court  
Private Bag X1011, Grahamstown, 6140  
Tel: 0461-29-333  
Fax: 0461-312-3174

Zulman R H, Judge of the Supreme Court of Appeal,  
P O Box 258, Bloemfontein, 9300  
Tel: 051-447-6029  
Fax: 051-447-8098