

A Snapshot of the Constitutional Court's Docket – January to July 2024

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Online ISSN
1727-3781

P·E·R

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Date Submitted

22 September 2024

Date Revised

1 October 2024

Date Accepted

1 October 2024

Date Published

24 October 2024

Editor

Prof W Erlank

Journal Editor

Prof W Erlank

How to cite this contribution

Ally N et al "A Snapshot of the
Constitutional Court's Docket –
January to July 2024" *PER / PELJ*
2024(27) - DOI
[http://dx.doi.org/10.17159/1727-
3781/2024/v27i0a20135](http://dx.doi.org/10.17159/1727-3781/2024/v27i0a20135)

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DOI

[http://dx.doi.org/10.17159/1727-
3781/2024/v27i0a20135](http://dx.doi.org/10.17159/1727-3781/2024/v27i0a20135)

Abstract

Most commentary on the Constitutional Court focuses on its published judgments. Yet the vast majority of applications made to the Court are disposed of in chambers. Empirical studies on this aspect of the Court's work has been limited. Using available online records, we monitored and tracked trends in petitions filed between 1 January 2024 and 26 July 2024. We also extracted some information relating to petitions filed in 2023. We present an overview of the number of petitions received by the Court between January 2023 and July 2024, as well as the rate at which the Court appears to be processing such applications. We then consider the nature of the petitions filed with the Court during the first two terms of 2024. Our analysis includes an overview of the route that litigants have travelled in reaching the Court, the area(s) of law the petitions engage, and for cases which were dismissed, the reasons for dismissal. We find that there are large gaps in the Court's disposition of new applications, and that the processing time for most petitions is relatively prolonged. The data also suggests that the Court is inundated with generalist appeals, as opposed to matters raising issues of special constitutional or public importance. We conclude by briefly outlining some recommendations for further consideration.

Keywords

Constitutional Court; judiciary.

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1 Introduction

The Constitutional Court currently delivers around 50 judgments a year. Yet this is just a small portion of the Court's overall workload. The vast majority of applications made to the Court are disposed of in chambers, without a fully reasoned judgment. Over the past decade, the total number of petitions filed with the Court has increased over three-fold.¹ The Court's judges have pointed to its pressing caseload as the leading cause of delays in the finalisation of matters. This diagnosis has prompted various proposals for reform, ranging from recruitment of retired judges to filter new applications,² to increasing the size of the bench,³ to allowing judges to decide petitions in panels (rather than *en banc*).⁴ Despite these calls for reform, empirical work on petitions decided in chambers (the bulk of the Court's docket) has been limited.⁵ This gap may be owing to the challenges in finding such information. While the Court should be commended for making some of its case flow records publicly available on its website, key data has to be pieced together from various sources, which are neither updated regularly, nor entirely accurate.⁶ Nonetheless, based on available online records,⁷ we

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¹ In 2010, the Court received 118 applications. In 2023, over 350 applications were filed with the Court. See Ally and Boonzaier 2022 *CCR* 330.

² Following public criticism, a proposal by the former Chief Justice to have retired judges support the processing of new applications was abandoned; see Rabkin 2024 <https://www.timeslive.co.za/sunday-times-daily/news/2024-02-07-concerned-casac-writes-to-chief-justice-over-yacoobs-concourt-role/>; February and Oxtoby 2024 <https://www.dailymaverick.co.za/opinionista/2024-03-24-chief-justices-concourt-proposals-present-opportunity-for-measured-judicial-reform/>.

³ Justice Maya, now Chief Justice, has been a vocal proponent of such an approach; see Ferreira 2024 <https://mg.co.za/news/2024-05-21-maya-proposes-increasing-number-of-concourt-judges-to-15/>.

⁴ Again, Justice Maya has championed this proposal; see Wicks 2024 <https://www.ewn.co.za/court-capacity-among-mayas-top-priorities-if-appointed-as-chief-justice/>.

⁵ An exception has been annual reports on Constitutional Court statistics published by the *South African Journal on Human Rights*. Starting in 2005, the reports included useful data about cases dismissed in chambers (see Bishop *et al* 2006 *SAJHR* 529-531). Unfortunately, the journal has not published an annual report since 2020.

⁶ For more on the problems with the Court's record-keeping, see Ally and Boonzaier 2022 *CCR* 320-323; see also Ally 2023 <https://groundup.org.za/article/constitutional-court-where-are-the-online-records/>.

⁷ We consulted the following records on the Court's website: Case flow summary records as at 26 July 2024; Cases dismissed records as at 26 July 2024; Cases awaiting directions records as at 26 July 2024 (available at Constitutional Court 2024

monitored and tracked trends in petitions filed between 1 January 2024 and 26 July 2024 (the first two terms of the Court year). We have also extracted information relating to petitions filed in 2023, although this is more limited since the Court does not keep an archive of older records on its website.

We begin by providing an overview of the number of petitions received by the Court between January 2023 and July 2024, as well as the rate at which the Court appears to be processing such applications. We find that there are large gaps in the Court's disposition of new applications, and that the processing time for most petitions is relatively prolonged. We then consider the nature of the petitions filed with the Court during the first two terms of 2024. Our analysis includes an overview of the route that litigants have travelled in reaching the Court, the area(s) of law the petitions engage, and for cases which were dismissed, the reasons for dismissal. Such information can be revealing of litigant behaviour, as well as trends in the Court's decision-making. The data suggests that the Court is inundated with generalist appeals, as opposed to matters raising issues of special constitutional or public importance. We conclude by briefly outlining some recommendations for further consideration.

While our analysis only offers a snapshot of the Court's activity this year, we hope it demonstrates the value of a data-driven understanding of the Constitutional Court's functioning.

2 Number and processing rates of new applications

In addition to concerns over the Court's slow judgment turnaround times,⁸ there has been growing disquiet around the sluggishness with which new applications are processed in chambers.⁹ Some practitioners have even complained that petitions are left "gathering dust in the building".¹⁰ In order to establish whether such anecdotal reports are empirically supported, we considered the Court's case flow records for petitions filed between January and December 2023, as well as for petitions filed between January and July 2024. Our results offer some indication of the Court's case load, as well as the rate at which the Court determines new petitions.

<https://www.concourt.org.za/index.php/caseload/caseload-summary>). We also considered the newly created "Orders without a hearing" section on the Court's website (see Constitutional Court 2024 <https://collections.concourt.org.za/handle/20.500.12144/38333>).

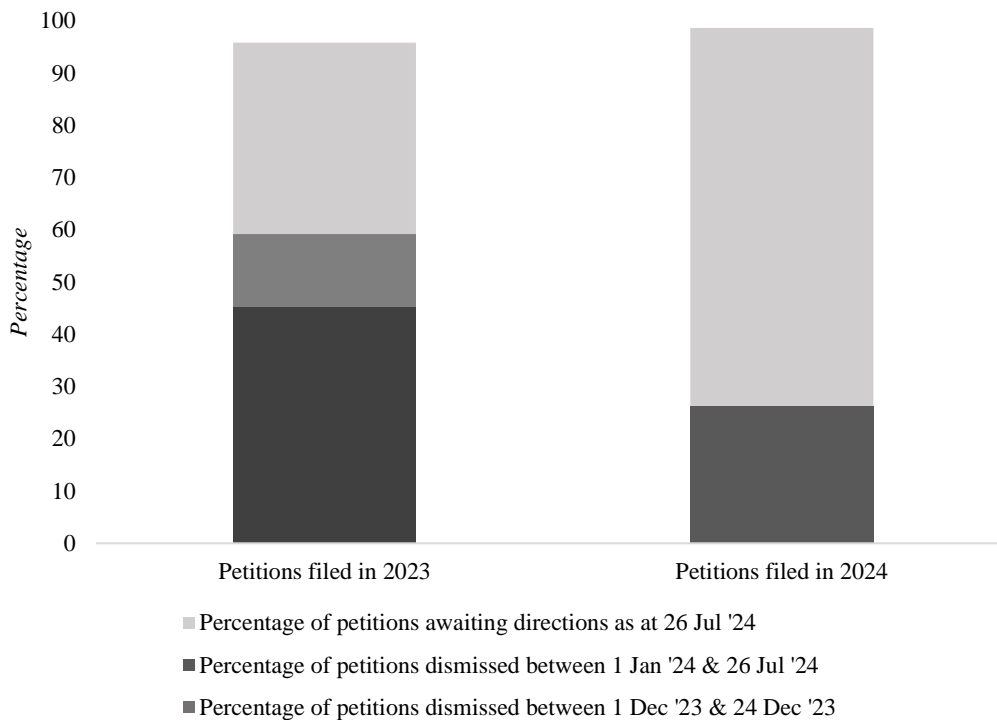
⁸ Ally and Boonzaier 2022 CCR 317-342, see also Balthazar 2024 <https://www.dailymaverick.co.za/opinionista/2024-03-24-from-turtle-to-snail-judicial-pace-in-south-africa-was-a-key-help-to-stalingrad-practitioners/>.

⁹ Bates 2022 https://www.businesslive.co.za/bd/national/2022-02-01-case-backlog-judicial-criticism-and-gender-at-issue-in-madlangas-jsc-grilling/#google_vignette.

¹⁰ Bates 2021 <https://www.businesslive.co.za/fm/features/cover-story/2021-09-30-who-will-be-sas-new-chief-justice/>.

In 2023, the Court received 355 petitions. In the first seven months of 2024 (until 26 July), the Court had already received 217 new applications. Figure 1 shows the percentage of petitions filed in 2023 and 2024 that were either dismissed or awaiting directions as at 26 July 2024. The first column also shows the percentage of applications that were dismissed between 1 January and 24 December 2023.

Figure 1: Percentage of petitions filed in 2023 and 2024 dismissed or awaiting directions as at 26 July 2024



At the end of 2023, less than half (45%) of the applications filed that year had been dismissed in chambers.¹¹ By 26 July 2024, the Court had dismissed 60% of the applications received in 2023,¹² and just over a third of the petitions (36%) were still awaiting directions. In relation to petitions filed in 2024, the Court had dismissed just over a quarter of those applications by 26 July,¹³ with over two thirds of petitions still awaiting directions.¹⁴

¹¹ A total of 161 petitions.

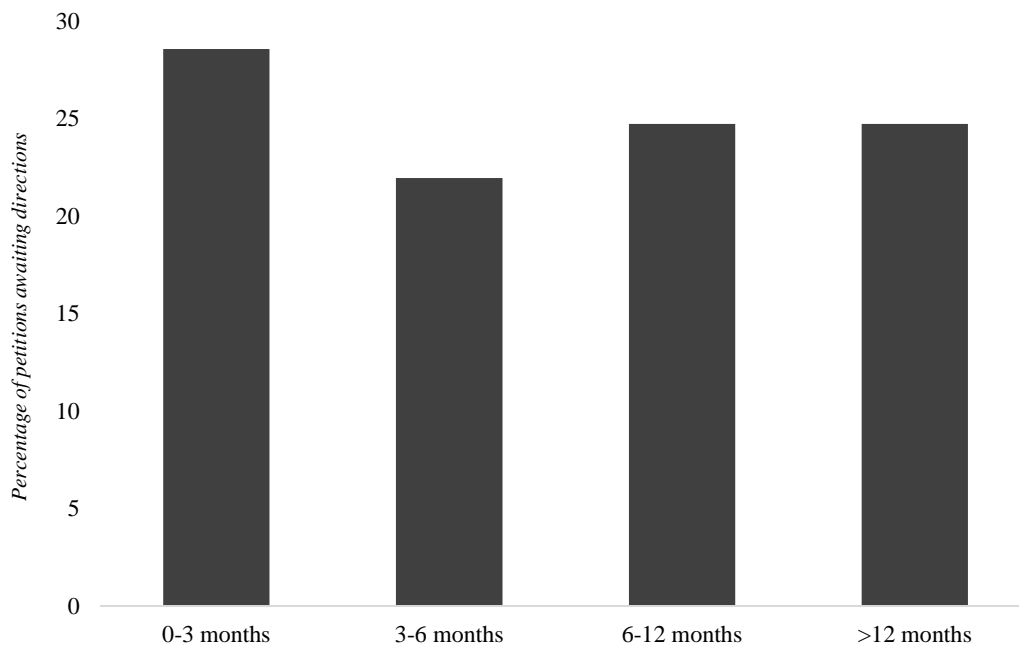
¹² Five petitions filed in 2023 were decided through reasoned judgments between 1 January 2023 and 26 July 2024; and 4 cases were withdrawn by November 2023.

¹³ The Court recorded 56 dismissals as at 26 July 2024, however this omitted one case, *Umkhonto Wesizwe Party v The Chief Justice of The Republic of South Africa* CCT 178/24, which we have included.

¹⁴ Notably, 4 of the petitions filed in 2024 were set down for hearing on an urgent basis and subsequently decided through 2 reasoned judgments, namely: *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party* 2024 7 BCLR 869

Taken together, by 26 July 2024, the Court had 287 pending applications before it (filed in either 2023 or 2024).¹⁵ Figure 2 shows how long these applications had been awaiting directions from the Court, as at 26 July 2024.

Figure 2: Percentage of petitions filed in 2023 and 2024 awaiting directions for 0-3 months, 3-6 months, 6-12 months, and more than 12 months



Our results show that the processing of most petitions at the Court can take more than 3 months. For the period we reviewed, around half of pending petitions before the Court had not had any movement for 6 months or longer,¹⁶ and almost a quarter had been on the Court's docket for over a year.¹⁷

Notably, according to the Court's records, there was a four-month period – from December 2023 to April 2024 – during which the Court recorded no activity in deciding pending applications at all.¹⁸ The inactivity is particularly odd as the Court did not hand down any judgments between January and

(CC); *African Congress for Transformation v Electoral Commission of South Africa; Labour Party of South Africa v Electoral Commission of South Africa; Afrikan Alliance of Social Democrats v Electoral Commission of South Africa* 2024 8 BCLR 987 (CC).

¹⁵ Including 130 petitions carried over from 2023 and 157 petitions filed in 2024. We have not considered the status of applications filed in 2022, although it is possible that the Court also has petitions pending from that year.

¹⁶ Comprising 130 petitions filed in 2024 and 17 filed in January 2024.

¹⁷ These were 68 petitions filed between January and June 2023.

¹⁸ The last case dismissed in 2023 was on 22 November 2023, and the first recorded dismissal in 2024 was on 5 April 2024.

March 2024.¹⁹ It is not clear if the Court usually does not process petitions over these months, or if this was an anomalous period of inactivity. Either way, the gap likely explains why many petitions have been pending for more than 3 months.

We would ideally be able to compare current processing times against previous year-on-year averages. Starting in 2006, the *South African Journal on Human Rights* reported, on an annual basis, the average time taken to decide a case in chambers.²⁰ Unfortunately, the collection of this data seems to have ended in 2012. In that year, the average time taken to decide a case in chambers was just 33 days²¹ (with the Court having received 134 applications in that year).²² We will only be able to calculate average processing times for petitions filed in 2024 once all have been decided. Even so, our initial data is instructive. With at least half of the applications before the Court pending for 6 months or more, it is clear that petitions are being processed at a far slower rate than a decade or so ago. Bearing in mind that cases that are eventually set down will still have to be heard, and then await full judgment, the time between the filing of an application and eventual judgment is likely to take over two years in most cases.²³

3 Route to Court of petitions filed in 2024

The Court's case flow summary, as published on its website, records the rule in terms of which each petition has been filed. From this information, we were generally able to determine whether a petition was made as an application for leave to appeal (under Rule 19 of the Constitutional Court Rules),²⁴ or a direct access application (under Rule 18).²⁵ Figure 3 shows the proportion of petitions that were filed either as a direct access application or leave to appeal application. Of the 217 petitions filed in 2024, 19 sought direct access to the Court (i.e. without having approached a lower court). The majority of petitions, 189 in total, sought leave to appeal (including direct leave to appeal) against a lower court judgment. Four applications included a combined request for leave to appeal on some

¹⁹ See Ally and Benjamin 2024 <https://groundup.org.za/article/constitutional-court-where-are-the-judgments/>.

²⁰ Bishop *et al* 2006 SAJHR 530.

²¹ Tungay *et al* 2015 SAJHR 423.

²² Ally and Boonzaier 2022 CCR 331.

²³ As evidenced by the fact that, as at the time of writing, the majority of judgments handed down in 2024 were for cases filed in 2022.

²⁴ GN R1675 in GG 25726 of 31 October 2003.

²⁵ We have not used the Court's designation of an application in 2 cases. In *Paballo Mothulwe v Labour Court, Johannesburg* CCT 13-24, the Court's records indicated that the application sought direct access but we categorised it as an appeal as we found a lower court judgment in the matter. *Portia Nonhlanhla Siska v Nedbank* CCT 14-24 was only marked as an "urgent application", but we categorised this as an appeal as we found a lower court judgment for the case.

issues and direct access on other issues. The origin of the application was unknown in 4 cases.

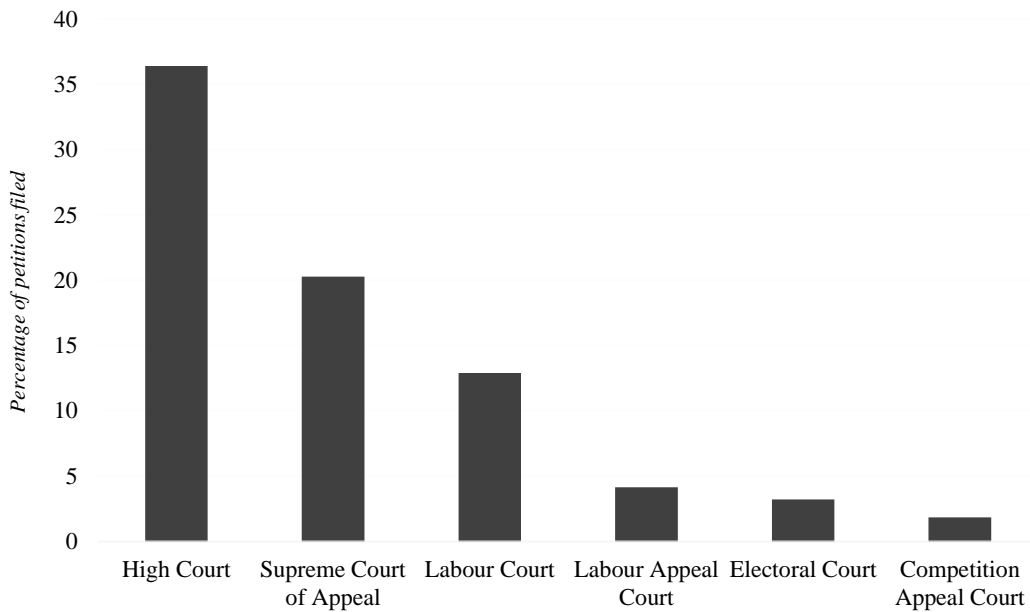
Figure 3: Route to court of all Constitutional Court petitions filed between 1 January 2024 and 26 July 2024



Based on the names of the parties listed in the applications, we conducted case searches to locate the lower court judgment against which an appeal was likely sought. Figure 4 shows the proportion of petitions originating from various lower courts, where known. Just over a third of all petitions (around 36%) sought leave to appeal against a High Court judgment. Litigants in some of these cases would have appealed directly to the Constitutional Court (without having engaged the Supreme Court of Appeal).²⁶ However, in most cases, we expect litigants approached the Supreme Court of Appeal and were denied leave to appeal through an order in chambers, which is not publicly available. A fifth of petitions were appeals against a judgment of the Supreme Court of Appeal. Applications for leave to appeal against a judgment of the Labour Court or Labour Appeal Court accounted for a sizable proportion of the appeal petitions (around 17%). We were not able to identify the lower court judgment against which an appeal had been lodged in 13% of cases.

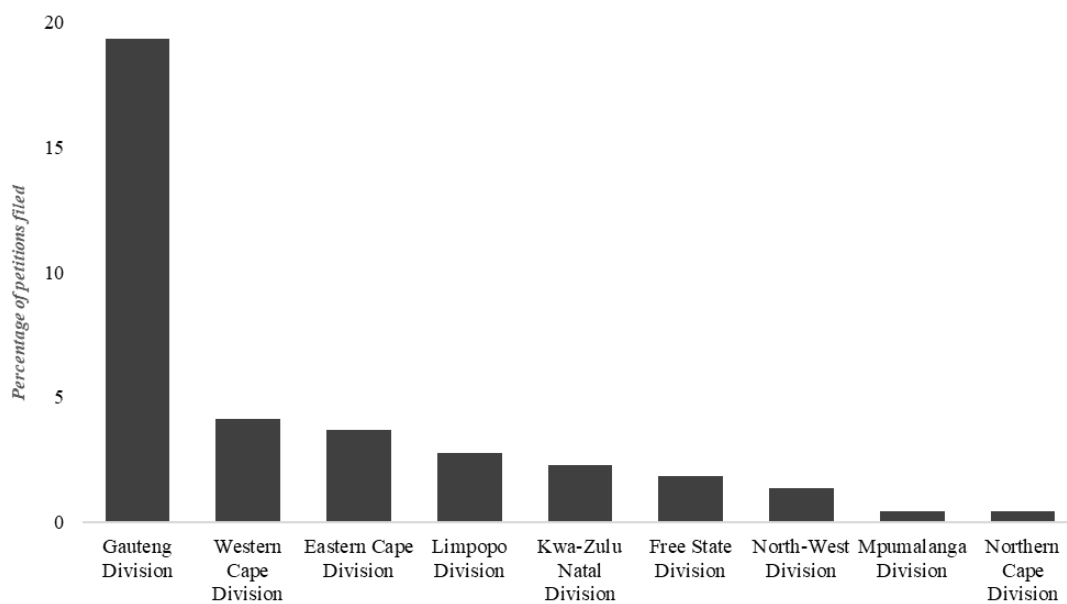
²⁶ The Court's information on applications for direct leave to appeal appears to be unreliable. Only 2 cases were marked as direct leave to appeal application in the Court's case flow summary. However, we found at least 5 cases that were dismissed for not making out a case for direct appeal.

Figure 4: Route to court of petitions filed between 1 January 2024 and 26 July 2024



In respect of appeals against judgments of High Courts, most of these judgments (19% of all petitions filed) are from the Gauteng Division of the High Court (comprising both the South and North Gauteng divisions). The lowest number of appeal petitions come from the Mpumalanga and Northern Cape divisions. Figure 5 shows the percentage of petitions originating from each of the High Court divisions.

Figure 5: Percentage of petitions filed in 2024 originating from each of the High Court divisions; 1 January 2024 - 26 July 2024



4 Subject matter of petitions

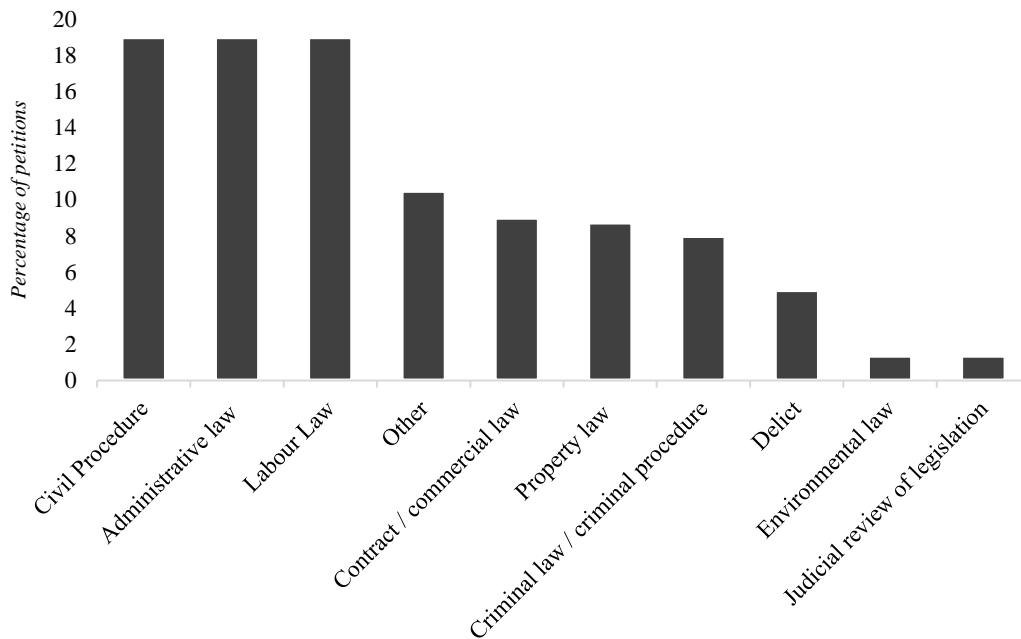
Where we were able to source the lower court judgment that was the likely subject of an appeal, we identified the areas of law that the appeal might engage. We say "might" because, without access to the underlying petitions, we cannot be certain of the basis on which an application was brought. Nonetheless, our tentative analysis offers some insight into the areas of law that appeal applications likely engage, as set out in Figure 6. The graph shows the percentage of cases which raised a particular area of law. Where a case raised multiple areas of law, we counted these more than once.

The most prevalent topics emerging across the cases were civil procedure, administrative law,²⁷ and labour law (at almost 19% of petitions each). Around 9% of petitions concerned contract law or commercial law. Similarly, property law (including cases relating to access to land or housing) featured in almost 9% of petitions. Appeals in respect of criminal law cases (including criminal procedure) accounted for almost 8% of petitions, and the law of delict was relevant to around 4.5% of cases. Roughly 1% of cases concerned environmental law and judicial review of legislation respectively.

Just over 10% of cases engaged a range of other issues. These included 6 cases on local government, 5 on the right to equality, 4 tax-related matters, 2 cases involving customary law, 2 children's rights cases, 1 case on competition law, 1 matter concerning the right to privacy, 1 case on the right to freedom of expression, and 1 raising a claim based on the right to electricity. We were not able to identify the subject of the petition for approximately 16% of petitions filed between January and July 2024.

²⁷ We include here judicial review applications based on the principle of legality.

Figure 6: Percentage of petitions filed between 1 January 2024 and 26 July 2024 raising certain areas of law



5 Reasons for dismissal

Historically, orders issued by the Court in chambers were not published (even though the overwhelming number of applications made to the Court are determined this way). In 2024, in a welcome development, the Court began publishing "orders without a hearing" on its website. This enables the public to gain more insight into the Court's functioning, particularly the basis on which petitions are summarily dismissed. While some of the Court's orders have not been uploaded (a practice we hope will improve in time), we were able to determine the reason for dismissal in respect of 40 of the 57 applications filed and dismissed in 2024.²⁸

The Court's reasons for dismissal generally fall into four categories: (i) the application fails to engage the Court's jurisdiction;²⁹ (ii) the application has no prospects of success; (iii) no cause has been made out for direct access or direct leave to appeal; and (iv) it is not in the interests of justice to consider the matter. Figure 7 shows the percentage of petitions that were dismissed according to each of these categories, where known.³⁰ Where

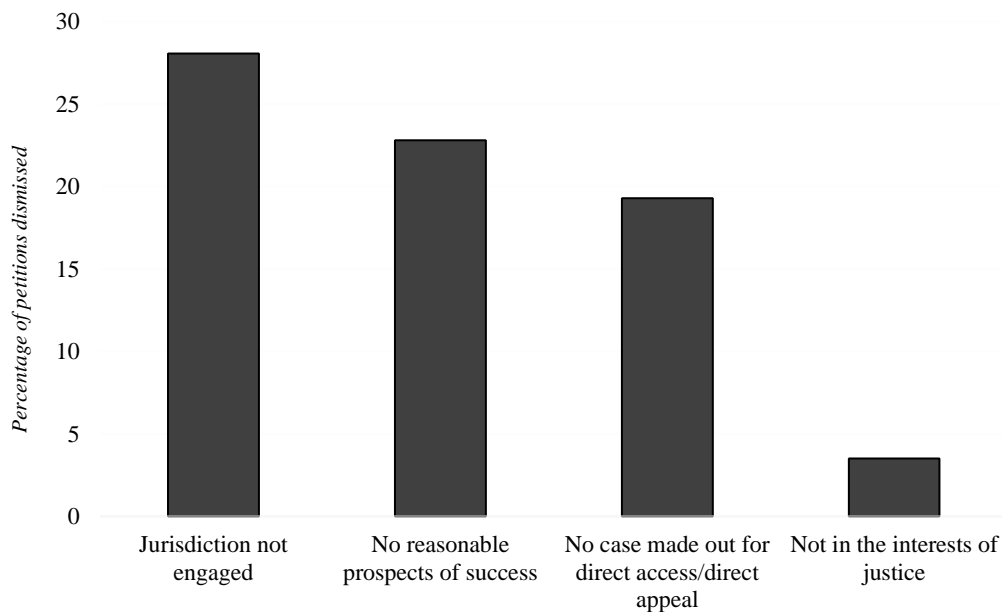
²⁸ Orders in chambers are generally for *dismissal* of a case. Although the Court has, on at least one occasion, issued an order in chambers for an appeal that *succeeded* (*Dlodlo v Minister of Constitutional Development* CCT 237/23).

²⁹ This is where neither a constitutional issue nor an arguable point of law of general public importance has been raised.

³⁰ These categories are, of course, imperfect. For example, whether a point of law is "arguable", though technically regarded as a matter of the Court's jurisdiction, might

there was more than one reason for dismissal, we included the application under each of those categories. Our results show that 16 cases (28%) were dismissed on the basis that the Court's jurisdiction was not engaged, and 13 cases (22%) were dismissed because the application bore no reasonable prospects of success. Eleven cases (19%) were rejected because no case was made out for direct appeal or direct access, and in 2 cases (3.5%), the Court found that it was not in the interests of justice to grant leave to appeal. We were unable to find the orders in 17 of the 57 cases dismissed in 2024 (approximately 30%).

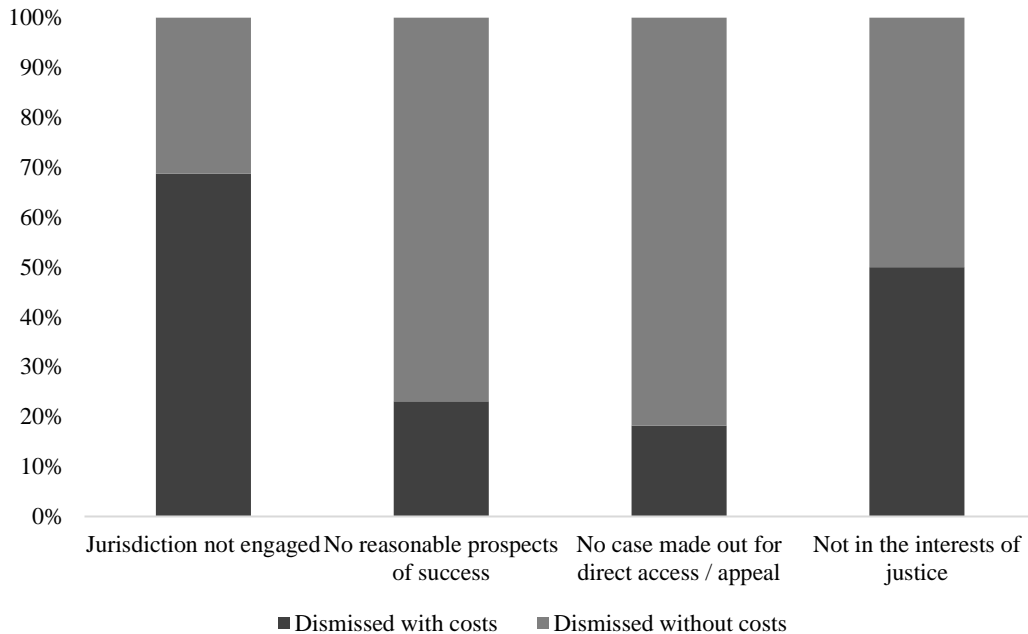
Figure 7: Reasons for dismissal of petitions filed in 2024 and dismissed between 1 January 2024 and 26 Jul 2024



Notably, of the petitions for which the reason for dismissal was known, the majority (57.5%) were dismissed *without* costs. Figure 8 shows the percentage of petitions, filed between January and July 2024, which were dismissed with or without costs according to category of dismissal, where known. Petitions dismissed for not engaging the Court's jurisdiction attracted the most cost awards (which were ordered in 11 of the 16 cases, or 69%, in that category). Costs were awarded in only 3 of the 13 cases (23%) dismissed for having no prospects of success; 2 of the 11 (18%) cases were dismissed for not making out a case for direct access or direct appeal; and 1 of the 2 (50%) cases where it was not in the interests of justice to grant the appeal.

seem to overlap with the question of whether it has "reasonable prospects of success". And whether it is "in the interests of justice" to hear the appeal might encompass many issues, including ones that bear on the other categories too.

Figure 8: Percentage of petitions filed in 2024 dismissed with or without costs for each category of reasons for dismissal



6 Conclusions

While our analysis of the Court's docket has only covered the first half of 2024, there are already some eye-catching trends. The length of time the Court takes to respond to petitions – over a year in some cases – is certainly concerning. Our data confirms speculation that the Court is struggling to process petitions timeously.

The nature of petitions filed with the Court is also revealing. It is striking, for example, that at least 28% of petitions were rejected for failing to engage the Court's jurisdiction (i.e. the case neither raised a constitutional issue, nor an arguable point of law of general public importance). Having perused the lower court judgments against which appeals are sought, it is evident that many litigants approach the Court as a "last chance" and are simply exhausting all available options in the appeal system, rather than raising matters of special public or constitutional concern. It is telling that almost a fifth of appeal petitions are in respect of labour matters, which, for the most part, appear to be run-of-the-mill cases challenging the fairness of dismissals. Similarly, many of the criminal appeals are directed at correcting the lower court's application of established legal principles to the facts, as opposed to raising a novel or controversial issue of law. The number of direct access applications made to the Court is also noteworthy. Of the 19 applications made, almost half were dismissed for failing to make out a case

for expedited access.³¹ Finally, it is remarkable that only 1% of applications to the Court nowadays are for the judicial review of legislation – even though these are the sorts of cases that provide the paradigmatic justification for having a specialist constitutional court.

Of course, it is understandable that litigants will seek to utilise every avenue of recourse available to them. Indeed, when the Court's jurisdiction was expanded by the *Constitution Seventeenth Amendment Act 72 of 2013*,³² it was predicted that the Court would be inundated with general appeals.³³ The problem has, however, been compounded by the Court's confusing approach to its own jurisdiction.³⁴ Given the resulting uncertainty, litigants may be forgiven for approaching the Court regardless of the nature of their case. Developing coherent principles that can guide litigants as to when the Court will (or will not) entertain matters is undoubtedly necessary.³⁵ There are also some simple practical interventions that could be considered. For example, requiring petitioners to submit a pro forma filing sheet with a crisp statement of the point of law of general public importance that the case raises could focus litigants' attention on the question of jurisdiction.³⁶ This would also allow the judges (or their clerks) to quickly sift out petitions that do not meet the Court's jurisdictional threshold. A clearer indication of the types of cases that will attract adverse costs awards may also influence the behaviour of potential applicants and could reduce the number of appeals lodged with the Court. Such interventions will not resolve the Court's caseload burden, but might go some way to better managing it. Comparative lessons from other constitutional or apex courts will also be instructive.³⁷

³¹ The remaining applications were still awaiting directions.

³² The Amendment widened the Court's jurisdiction from "constitutional matters" only to any matter that involves "an arguable point of law of general public importance". For more background on the amendment, see Cohen 2021 *CCR* 5-7.

³³ Lewis 2005 *SAJHR* 520-523; see also Democratic Governance and Research Unit 2011 https://law.uct.ac.za/sites/default/files/media/documents/law_uct_ac_za/2353/apex_court_2011.pdf.

³⁴ For recent commentary on the Court's "jurisdictional quagmire", see Cohen 2021 *CCR* 3. The problem is not unique to South Africa; see, for example, Khaitan 2020 *ILR* 1-30 (on the Indian Supreme Court's "identity crisis" between its general appellate function and role as a constitutional court).

³⁵ Cohen 2021 *CCR* 1-49 and Loxton 2023 *CCR* 292 offer suggestions in this direction. There have also been similar debates elsewhere. Commentators on the Supreme Court of India, for example, have urged a more selective approach to the admission of matters with priority being given to the most serious cases which raise a constitutional issue or legal questions of general importance; see Chandra, Kalantry and Hubbard *Court on Trial* 14-20, 29-38 and Khaitan 2020 *ILR* 26-27.

³⁶ Rebecca Gore must be credited for this suggestion.

³⁷ See, for example, Chandra, Kalantry and Hubbard *Court on Trial* 14-38 and Khaitan 2020 *ILR* 1-30.

We share our findings at a pivotal moment – a new era of judicial leadership has just begun, and with it, we hope, a renewed focus on strengthening the Court's capacity, efficiency and rigour. We have demonstrated that by collecting information on all petitions filed at the Court (and not just judgments), we can gain greater insight into the Court's overall functioning. Consistent engagement with accessible data of this sort can inform proposals for reform and enhance transparency and accountability around the Court's daily work.

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List of Abbreviations

CCR

Constitutional Court Review

ILR

Indian Law Review

SAJHR

South African Journal on Human Rights