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QUARTERLY

roundtable

THE HELEN SUZMAN FOUNDATION

SERIES

roundtable

The Helen Suzman Foundation

The Helen Suzman Foundation seeks to promote constitutional liberal democracy and human rights. As an active member of South African civil society, The Helen Suzman Foundation contributes to debates on contemporary events and institutional challenges that form part of efforts to consolidate democracy.

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- Carrying out and commissioning research into political, social and economic affairs in South Africa and elsewhere in order to provide information and to stimulate debate on issues relevant to the future of democracy in South Africa;
- Publishing a journal, *Focus,* as a vehicle for information and comment on issues relevant to the future of democracy in South Africa;
- The arrangement of and attendance at roundtables and conferences on matters related to politics and governance in or of relevance to South Africa;
- Advocating measures designed to promote the ideals of liberal constitutional democracy in South Africa, including the improvement of race relations and the combating of any discrimination on the grounds of race, gender, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth;
- Forging relations with other actors in civil society that seek to protect liberal constitutional democracy and human rights.

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HELEN SUZMAN FOUNDATION

Contents

2 PROFILES

6 INTRODUCTION BY RAENETTE TALJAARD

8 RAENETTE TALJAARD
Director: Helen Suzman Foundation.

10 PAUL HOFFMAN
Director: Centre for Constitutional Rights.

14 RAJ DAYA
CEO: Law Society of South Africa.

18 HUGH CORDER
Dean: Faculty of Law, UCT.

20 RUDI VAN ROOYEN
Chairperson: Cape Bar Council.

24 PIERRE DE VOS
University of the Western Cape.

26 PROF MATHOLE MOTSHEKGA
Head: ANC Commission on Religious Affairs.

30 QUESTIONS AND ANSWERS

34 MEDIA COVERAGE

36 RELEVANT ARTICLES

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Cover picture: The ceramic sculpture by Carol Smollan, titled Constitutional Court:2, depicts seated judges, one of whom has his arm raised, below the logo of the Constitutional Court. Created in 1995, the sculpture is inscribed with the historic date of South Africa's first democratic elections, '27-4-1994'.

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Profiles

Paul Hoffman

Advocate Paul Hoffman completed his BA LLB at the University of the Witwatersrand in 1974. In 1975 he was admitted as an attorney practising in Johannesburg, having served articles at Bowen Sessel & Goudvis concurrently with his part-time LLB studies. He practised as a litigation attorney in Johannesburg and Cape Town with Bowens, Herold Gie & Broadhead, Roup Schneider and Wacks and Syfret-Godlonton Fuller Moore Inc. (now Cliffe Dekker Inc.) between 1975 and 1980. He was admitted as an advocate in 1980 and practised as a junior at the Cape Bar until 1995 – many of his cases have been reported in the South African Law Reports and Industrial Law Reports.

Advocate Hoffman was the founding editor of Current Law Cassettes, and a part-time lecturer in law of contract and public international law at the University of the Western Cape. He also contributed to De Rebus and Consultus and was a Small Claims Court Commissioner as well as a Labour Appeal Court Assessor. He took silk in 1995 and continued to practice at the Cape Bar. He was also a member of AFSA (commercial and labour arbitration panels).

Both in 1997 and 1998, he accepted an acting appointment for one term on the Cape High Court Bench at the invitation of J.P. Friedman. In 1998 he accepted an acting appointment for one month on the Cape High Court Bench at the invitation of J.P. King, and in 2001 he accepted an acting appointment for one month on Cape High Court Bench at the invitation of J.P. Hlophe.

Advocate Hoffman is currently the Executive Director of the Centre for Constitutional Rights of the FW de Klerk Foundation.

Raj Daya

Mr Daya was born in Umzinto, KwaZulu-Natal in 1961. From 1979 to 1984 he attended the University of Durban Westville to study law. This exposure was a defining moment for him as his political and social awareness was groomed. Mr Daya is currently the CEO of the Law Society of South Africa.

In 1987 Mr Daya was admitted as Attorney and commenced practice in Port Elizabeth. Since then he has been involved extensively in shaping the legal landscape of South Africa and surrounding countries. His positions include branch secretary of the National Association of Democratic Lawyers, legal commissioner for the IEC in the first democratic elections in South Africa, and President of the Attorneys Association in Port Elizabeth. He was also an independent observer at the first democratic elections in South West Africa. In 2000 Mr Daya was presented with the Human Rights Award by the Human Rights Trust.

Mr Daya is currently involved in a variety of projects including the Legal Services Charter deliberations of the Legal Profession, Legal Education and Development for the legal profession and probono strategies for the legal profession. ttDaya also contributes to the International Bar Association representations and the Commonwealth Lawyers Association representations.

Mr Daya's passions are ethics and professional conduct.

Hugh Corder

Born and educated in Rondebosch, Cape Town, Prof. Corder matriculated in the First Class in 1971. He was a conscript in the SADF in 1972. Prof. Corder holds a BCom LLB from the University of Cape Town, an LLB from Cambridge, England, and a D Phil from Oxford, England.

Prof. Corder has lectured at a variety of institutions including the University of Cape Town and Stellenbosch University. He is currently the Dean of Law at the University of Cape Town and was elected as a Fellow of the University in 2004.

Prof. Corder was a Member of the Technical Committee which drafted South Africa's transitional bill of rights in 1993. He was also technical adviser to Constitutional Assembly and consultant to the Joint Ethics Committee of Parliament. He has held various memberships and was a Member of the Panel of Arbitrators of the Independent Mediation Service of South Africa, and a Member of the Law Commission Project Committee which investigated the Administrative Justice Act.

Prof Corder has been published widely.

Rudi van Rooyen

Adv. van Rooyen was born on 30 March 1958. His qualifications include a BA Law and LLB from the United States as well as an LLM from Unisa entailing International Economic Law, Public International Law, Conflict of laws and Human Rights. He also has a certificate in course on the Bill of Rights from UCT

From 1984 to 1985 he worked as a public prosecutor. In 1988 he completed his attorney's articles and practiced as an attorney. Since December 1988 he has been a practising member of the Cape Bar (also admitted in Namibia).
In December 2004, Adv. Van Rooyen received letters patent (appointed as senior counsel) from the State President. He has been serving on the Cape Bar Council since 2005 and as Chairperson since April 2008. Prof. van Rooyen has also been appointed as an acting judge on occasion.

Profiles

Pierre de Vos

Prof. Pierre de Vos
University of the Western Cape (Faculty of Law)

Pierre de Vos teaches Constitutional Law and Human Rights Law at the University of the Western Cape. He is widely published in scholarly journals and writes regular opinion pieces for newspapers on constitutional issues and the judiciary in South Africa. He also publishes a Blog entitled Constitutionally Speaking where he comments on legal and social issues from a constitutional perspective. He has also served as the chairperson of Board of the Aids Legal Network for the past four years.

Prof. de Vos has a BCom, LLB and LLM (cum laude) from Stellenbosch University, a LLM from Columbia University in New York and a LLD from the University of Western Cape. He also worked as a journalist for Die Suid Afrikaan and IDASA after graduation and has been the guest editor of the journal Law, Democracy and Development on several occasions

Mathole Motshekga

Prof. Motshekga is an ANC National Executive Committee (NEC) Member and Head of ANC Commission on Religious Affairs

Motshekga holds a Bachelor of Law with distinctions in Criminal Law and Constitutional Law (Unisa); a Master of Laws from Harvard Law School with distinctions in United Nations Law, Human Rights Law, and Law and Development; and a Doctor of Laws (Unisa) with distinctions in Constitutional Law, Criminal Law and a Thesis on Concepts of Law and Justice and the Rule of Law in the African Context.

In 1979 he was admitted as an Attorney of the Supreme Court of South Africa, Pretoria and as an Advocate of the Supreme Court of South Africa in 1984.

Motshekga has lectured and practiced law widely, published extensively and participated in numerous conferences locally and abroad.

Motshekga was the Legal Advisor of Queen Mokope Mudjadji V and Makobo Mudjadji VI of Balobedu Nation as well as to the National Coalition of Traditional Leaders, South Africa. He was the co-chairperson of the Legal and Constitutional Commission of the National Local Government Negotiating Forum which drafted Chapter10 of the South African Constitution, 1996. Motshekga also facilitated the Traditional Governance Commission at the IV African Development Forum. From 1988-1993 he consulted Unicef on women and children's rights in South Africa.

Prof. Motshega is a Founder Member of NADEL and holds various professional memberships and fulfills a host of expert advisory roles.

Helen Suzman Foundation

Courts in a Crucible:
Are we politicising our justice?

Open Society Foundation for South Africa

Introduction

The past year has been a challenging one for South Africa's judiciary. It has been both the object and subject of much political controversy.

Judges have been in the spotlight of controversy, senior political leaders of various affiliations have brazenly and calculatedly attacked the judiciary under the guise of legitimate criticism and judges themselves have acted in ways that have posed new challenges for the judiciary as a whole (with a judge of the High Courts and the justices of the Constitutional Court at loggerheads). The situation has furthermore posed challenges for the operation and procedures of the Judicial Services Commission (JSC) and the concept of judicial misconduct and for the manner in which the public view the judiciary, the legitimacy of the courts and the justness of rulings from the bench.

In unprecedented ways judges have been called 'counter-revolutionary' and a perception has taken root that court verdicts are only acceptable and legitimate when they uphold the views of litigants and illegitimate when they go against key political figures. This has exposed South African courts and the judiciary to great uncertainty and the prospect of peril.

There can be little doubt that the judgement of Judge Nicolson in the Pietermaritzburg High Court corruption case of the NPA and ANC President Jacob Zuma stands out as a key defining moment in South African jurisprudence. Though the case strictly dealt with Jacob Zuma's rights under Section 179 of the Constitution, the ruling itself went far beyond the matter at hand and arguably heralded a new era of judicial activism in South African jurisprudence.

There can be little doubt that the Nicolson ruling will stand out in years to come as a seminal moment of jurisprudence. This is possibly not only by virtue of the pressure on courts that preceded the ruling itself, but also because of the dramatic political events that followed the ruling – a 'recall' of President Thabo Mbeki by the ANC that largely marginalised Parliament in the process and the installation of a 'caretaker' President Kgalema Motlanthe. This seminal ruling is now the subject of an

Introduction

appeal process before both the lower courts as well as the Constitutional Court by the NPA and the former State President Thabo Mbeki respectively.

Amidst the heat and light of these controversies South Africa's Chief Justice Pius Langa did a series of critically important interviews subsequent to the Nicolson judgement in which he underscored the role and position of the judiciary in our constitutional state given the history of our country and the power relations that still reside within it. These interviews stand out as an important defining moments in the societal discourse about the role of the judiciary. All South Africans must pay attention and be concerned when the highest court in our country – the Constitutional Court – is struggling to fill vacancies that will arise as incumbent judges prepare to retire. This must be a wake-up call signal of the long-term dangers of imperilling our judiciary for the politics of the day.

The Helen Suzman Foundation assembled a diverse Panel of discussants to probe these matters from different perspectives on the 15th of September 2008 – mere days after the Nicolson ruling – in order to develop clear guidelines of how we can have a robust societal discussion about our courts, judges and their rulings without offending their constitutional role and whilst remaining vigilant of critiques that may offend core founding provisions of our constitutional democracy.

Inputs by Panellists varied from the specific controversies that surrounded the Nicolson judgement and the advent to it where unprecedented political pressures were unleashed on the judiciary to the role the Judicial Services Commission can and must play in cases of judicial misconduct to the role the South African Law Society can play in broadly educating the public about the role and function of the judiciary in our society and what constitutes legitimate constitutionally tolerable critiques of the bench and its servants – our judges.

The Helen Suzman Foundation is deeply grateful to all sponsors, Panellists and participants that made this event possible.

Raenette Taljaard

"In the past months a number of issues have emerged with respect to the judiciary."

Chairperson

In the past months a number of issues have emerged with respect to the judiciary, and the Helen Suzman Foundation thought it prudent to convene a panel of thoughtful South Africans who observe these issues from a variety of vantage points. It was particularly relevant in the circumstances of various issues that have emerged around Judge Hlophe, Judge Dikgang Moseneke, Judge Nkola Motata and Judge Nathan Erasmus, and the public comments made in that regard, and also the recent seminal judgment by Judge Chris Nicholson.

In an interesting interview in Business Day, Judge Pius Langa dealt with why the judiciary and the rule of law are so important. I want to cite these paragraphs because they provide a very important starting and vantage point for the various inputs from our panellists:

"The independence of the judiciary is one of the cornerstones of our constitution. In a democracy, the judiciary and the courts must not only be independent, they must be seen to be. That is the essence of the separation of powers doctrine."

Judge Langa said the people of South Africa fought for the constitution:
"We come from a ... horrible apartheid dispensation, which did not have the values which our constitution has, and we fought for this constitution, we fought against apartheid. We wanted to establish a society which is envisioned in this constitution – a society which is founded on the values of equality, human dignity and freedom."

On the rule of law he said:
"[It's] important because we live in a very unequal society – you have strong people, you have weak people, you have poor people, you have wealthy people. Now, if we did not have the rule of law then it would be the law of the jungle, the survival of the fittest. And some of our people have suffered a long, long time. They have been weakened by the previous systems of government here, and they cannot afford to face, and get fairness when pitted against the strongest among us. That is why the rule of law is important – it's important because it's an equalising process between those who are in authority and the ordinary citizen… [it also means] we live in an orderly society, governed by laws. It means

that laws are applied to all, no one person or institution being above the law."

We've assembled a very high-ranking panel this evening. We have Advocate Paul Hoffman of the Centre for Constitutional Rights, FW de Klerk Foundation; Raj Daya of the Law Society of South Africa; Professor Hugh Coder, the Dean of Law from the University of Cape Town; Professor Mathole Motshekga, who is with the African National Congress (ANC) National Executive Council; Professor Pierre de Vos, lecturer in Constitutional Law at the University of the Western Cape and Rudi van Rooyen from the Cape Bar Association.

"It means that laws are applied to all, no one person or institution being above the law."

Raenette Taliaard

"Organs of state, through legislative and other measures must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

Paul Hoffman

My input is related to two sub-sections of Section 165 of the Constitution. When the increasingly strident chorus of noise began in the run-up to the various forensic manoeuvres being executed by the legal team assembled to defend Jacob Zuma on the serious criminal charges he was facing until [the Nicholson judgement], the Centre for Constitutional Rights decided to look into the constitutionality of that chorus.

In the chapter of the Constitution which deals with courts and the administration of justice there's a simple sub-section; one which needs to be read in its context, however. It says: "No person or organ of state may interfere with the functioning of the courts." That's all it says. The context is one in which the judicial authorities are under discussion, and the section is neatly surrounded by the oft-quoted sub-section 2 and the barely known sub-section 4. Sub-section 2 says: "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." The lesser known sub-section is the important one, and the focus of my talk tonight: "Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

The organs of state, which have a direct role to play in the current circumstances, include the Presidency, the Ministries of Justice and Safety and Security, the Human Rights Commission, the Public Protector, the South African Police Services (SAPS), the National Prosecuting Authority (NPA) and the Judicial Services Commission (JSC). "Legislative measures" concerning the judiciary, and indeed the legal professions, have proved problematic. A raft of bills to transform the judiciary was published in December 2005, but they were all withdrawn in the middle of 2006 on the basis that a white paper on the transformation of the judiciary would be prepared. No such document has seen the light of day and the controversial elements of the transformation legislation in respect of the judiciary will be held over for the next Parliament. The concept "other measures" in sub-section 4 gives the responsible organs of state carte blanche – within the limits of the law – to do whatever is necessary to ensure that the courts are protected and assisted. There's been a failure to comply with that constitutional obligation by all organs of state, other than, to some extent, the Human Rights Commission and the SAPS. When fire hoses get directed at the offices

of the NPA and people are press-ganged into joining a protest march in Durban, and violence and looting take place, the police do eventually react.

When it became apparent that a little encouragement was needed, a letter was addressed to President Mbeki by former President FW de Klerk as long ago as 30 July 2008. He wrote:

"I must respectfully inform you of my deep concern over recent attacks on the dignity and independence of the judiciary. I refer in particular to the statements by senior leaders of the ruling alliance that the Constitutional Court is a laughing stock, counter-revolutionary, will be roughly tackled, is guilty of shenanigans and that it has already ruled against Zuma and that it is ready to pounce on Mr Zuma. The main individual culprits are Gwede Mantashe, Julius Malema and Bhuti Manamela, according to media reports. See also the Legal Brief Today website under the heading 'Judiciary under Siege?'."

And if I may interpose, that is a very good place for anybody who is interested in the full depth of what's going on to do a little nocturnal web-surfing. It will certainly not help any insomniacs.

"Their comments go far beyond the boundaries of acceptable comment on and criticism of the judiciary in that they charge the Constitutional Court with political bias, they state without any grounds whatsoever, that the Court has prejudged the issue of Zuma's guilt, which is not currently before it, and bring the Court into general disrepute and ridicule. These activities impinge upon the dignity and effectiveness of the highest court in the land. The attacks cannot be separated from the context of the various cases involving Mr Jacob Zuma and the radical statements that have been made by alliance leaders, that they will be prepared to kill in his defence, nor from the complaint of the Constitutional Court that is pending before the JSC – that is the Hlophe matter – neither can they be dismissed as being inconsequential, coming as they do from senior office bearers in the ruling alliance. As you are aware, organs of state are obliged to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. This obligation goes hand in glove with the prohibition against interference in the functioning of the courts. I respectfully call on you, in your capacity as Head of State and President of our country, to take immediate steps, including such interim action as you deem appropriate, to bring an end to these attacks. This can be done by:

1. Securing public undertakings from the persons involved, that they will not interfere with the judiciary by persisting in their defamatory, hostile and demeaning attacks against it.
2. The encouragement of disciplinary steps against them by the structures of the institutions to which they belong.
3. The launching of urgent interdictory and/or criminal proceedings against those who prove themselves recalcitrant.
4. By ensuring that the High Court proceedings against Mr Zuma on the 4th of August are not disrupted in any way and that no interference with the proper administration of justice will be tolerated.

"I am confident that you and your government share a deep commitment to the constitution and to the independence of the judiciary. I nevertheless respectfully request you to let me know by Friday, the 8th of August what steps you plan to take to fulfil the obligations placed on you."

This is President Mbeki's reply:
"As you correctly point out, the organs of state as defined in Section 239 of the Constitution, do indeed have constitutional responsibilities with regard to safe-guarding the independence of the judiciary. I reiterate the government's commitment to the Constitution, including the independence of the judiciary and the rule of law. It is self-evident that the government continues to provide the necessary environment to facilitate the independent functioning of the courts at all its locations. We do this within the context of the law, which includes protection of and respect for the rights of all citizens to freedom of expression. At the same time we are fully mindful of the provisions of Section 165.3 of the Constitution, which, among other things, says that no person or organ of state may interfere with the functioning

Paul Hoffman

"I've not been presented with any evidence of such interference with the functioning of the courts, which indeed would be unconstitutional and require the government to take the necessary legal action." *Former President Thabo Mbeki.*

of the courts. I've not been presented with any evidence of such interference with the functioning of the courts, which indeed would be unconstitutional and require the government to take the necessary legal action. Nevertheless, as you know, you are entitled to lodge any complaint you may have concerning both persons and organs of state with the appropriate authorities for investigation and possible prosecution, if you believe you have sufficient evidence to support such action. We have sent copies of both your letter and this response to the ANC for its information and any comment it might choose to make."

No comment has been received.

"In your letter you refer to your own interest as the then leader of one of the principal political parties that negotiated and agreed the Constitution. I am certain that the ANC is also fully conscious of the central role it played in drafting and adopting the Constitution and, therefore, its obligation to protect an outcome that was achieved at a high cost in terms of human lives."

We were still not satisfied that the matter had been given the attention it deserved and a follow-up letter was despatched on 13 August:

"Dear President Mbeki. Thank you for your prompt and constructive reply to my letter of the 30th July. I am reassured by your letter and also the statement of the CEO of the GCIS [Government Communication and Information System] on the 7th of August 2008."

That was the statement which said that the cabinet was looking at this problem.

"His statement will also help to address similar concerns regarding recent attacks on the judiciary that were expressed by the General Counsel of the Bar and the Law Society of South Africa. Thank you

also for drawing our correspondence to the attention of the ANC, which also has a responsibility to ensure that its members and office bearers respect the dignity and impartiality of our courts. I agree with you on the importance of respecting Section 165.3. It is imperative that no person or organ of state should interfere with the functioning of the courts. I shall follow with interest the steps that are being taken in this regard. However, it is also important that the organs of state should carry out their responsibility in terms of Section 165.4 through legislative and other measures to assist and protect the courts to ensure inter alia the independence, impartiality and dignity. Although I share your commitment to freedom of expression and the right of citizens forthrightly to criticise decisions of the courts, I am sure that you will agree that such freedom of expression does not extend to any action or utterance that might be regarded as intimidation or an expression that impugns the dignity of the courts or baselessly attacks their impartiality. The evidence in this regard is readily available in recent media reports. Last week's Road Accident Fund litigation has also unfortunately engendered criticisms that are at least disrespectful, if not contemptuous of the courts. In the light of your reassurance, it should not be necessary for me as a private citizen either to remind the organs of state to carry out their responsibilities or to lodge any complaint in this regard. This, after all, is the responsibility of the Executive and of all those who have taken oaths of office to uphold the Constitution. In this regard, the Acting National Commissioner of Police, the Acting National Director of Public Prosecutions, the Public Protector and the CEO of the Human Rights Commission should all take note of the need to protect the courts and should consider the remedies available to them to prevent any recurrence of unacceptable activity. The common law relating to contempt of court, the Riotous Assemblies Act and the Equality Act, as well as civil interdictory and mandatory remedies can all be invoked in ways that are appropriate to each instance in order to assist and protect the independence and impartiality of our Bench. It is also important that this be done urgently so as to prevent any recurrence of these regrettable and unconstitutional attacks on our courts. I join you and the ANC in the commitment that you express to uphold the Constitution, that parties representing the overwhelming majority of all our people helped to negotiate after so many centuries of division and conflict. It remains the foundation of our national unity and the best hope of all our people for freedom, equality, human dignity and social development. As the Judicial Services Commission has the constitutional responsibility to advise national government on any matter relating to the judiciary, I shall send copies of our correspondence to it, as well as to the officials named above. I believe that the reassurance in your letter would also help to address the widespread public concern regarding the protection of the courts and would be grateful to learn whether you will have any objection to my releasing our exchange of correspondence to the media."

Permission to release the exchange of correspondence to the media was forthcoming, but to date, the only party to give a reply of any substance to this exchange is Jody Kollapen, as Chair of the Human Rights Commission. He draws attention to the interaction that the Commission has had with both Mr Malema and Mr Vavi of "kill for Zuma" fame. It is not clear, at this stage, whether any further action is planned by any organ of state despite the plain and peremptory 'must' in sub-section 4 and the duty to 'ensure', inter alia, the independence and the dignity of the courts. This is a less than satisfactory state of affairs, especially if regard is had to the manifest urgency of the matter and to the various avenues open to the state that have been expressly set out by former President De Klerk as a possible option open to those in authority who are responsible to assist and protect the courts. It is not even clear that there is any co-ordination or co-operation between the various role players.

"The stand-off between the SAPS and the Department of Justice in various instances is an area of serious concern, as are the attacks on the judiciary."

Raj Daya

Raj Daya

The Law Society of South Africa believes that our role, apart from having to be a trade-union function, serving the interests of its members, is to be a watchdog – we have to act for the public; and there has to be a role of advocacy. There has to be a serious challenge to the legal profession to play a more pertinent advocacy role. We need to get a panel of experts in our ranks and identify public-interest matters that the law societies need to take on board. There are very similar challenges happening elsewhere in the region. We need to find a way for the law societies to champion the advocacy role within the SADC communities, and South Africa in particular.

An issue of concern for the Law Society relates to the delay in dealing with enquiries on the suspended National Director of Public Prosecution, because a delay in a serious indictment that suffocates the justice system from operating efficiently is a source for concern. The Law Society came out strongly for the delay to be finalised and for that process to be completed. The stand-off between the SAPS and the Department of Justice in various instances is an area of serious concern, as are the attacks on the judiciary, Deputy Chief Justice Moseneke, events surrounding him and comments made against him, comments made against the Chief Justice of the Constitutional Court, Justice Langa, and the recent Road Accident Fund fiasco.

The Law Society of South Africa challenged, by way of a review application, the direct-payment system of monies to Road Accident Fund victims. What the Road Accident Fund sought to do was cut the attorneys from the equation totally, and it justified that by saying that all attorneys are thieves and steal the clients' monies. The comments made in the paper by the CEO of the fund don't border on defamatory, they are defamatory, and there has been a sustained call from members of our profession to institute an action for libel. The focus of the Law Society is not to be defensive but to show to the public the value that [its members] add in the existing system. What we have difficulty with is a high-ranking official of a parastatal who takes issue with the judgement and with the judge. Saying that the Law Society of South Africa is racist because of wanting to protect the interests of clients is completely absurd. This present matter is under review and there are ongoing events that I'm inclined not to go deeper into, but what concerns us are those elements who believe that judgements that do not go your way justify vicious attacks against the judiciary. That's a source of concern.

"We have a wonderful Constitution [that guarantees] freedom of expression and thought, but these have to be exercised in a dignified and a professional manner."

Rai Daya

We have a wonderful Constitution [that guarantees] freedom of expression and thought, but these have to be exercised in a dignified and a professional manner. You have to be able to take issue on points that are restricted to law; but you cannot go beyond that. The independence of the judiciary cannot be compromised. Attorneys play an important role in ensuring that anything close to a tampering with an independent legal profession must be subject to criticism. The recent suspended Superior Courts Bill, in which the ministers sought to have a direct say in the appointment of judges, was viciously opposed by the profession, which had every right to do so. This morning I received a call that there is a mass demonstration in Johannesburg outside the courts by a group of people that say that the attorneys are continuing to steal the monies from Road Accident Fund victims. It's a serious indictment on the lack of information and the flow of information to the communities. We need to deal with this responsibly. How the Law Society chooses to deal with it would be to empower the communities on the role that the attorneys' profession has to play with regard to legal matters. There has to be an independent process by which attorneys are able to champion the cause for the communities.

In the main, I think that the legal profession has moved in a positive direction. I still think that there are areas in which we need to be challenged, I think that the public needs to continue to challenge us with regard to our advocacy role, and I'm hoping that out of tonight's discussion, there might be areas in which some of these thoughts might come through.

"Judicial accountability has been all the more necessry since 1994, because of the greatly increased formal political profile of the Bench in the area of judicial review."

Hugh Corder

Hugh Corder

I want to deal with three questions, but to spend most of my time on the question of judicial misconduct.

The first question is: "Who judges the judges?" Judicial accountability has been all the more necessary since 1994, because of the greatly increased formal political profile of the Bench in the area of judicial review. Accountability is typically achieved through a series of mechanisms in relation to judgements, but typically, that court process happens in open court. Judges respond to arguments put by counsel, they write reasoned judgments, which are reported, there's a system of appeal and review; ultimately the transparency of the whole process is the safeguard. Judgments can be criticised, can be reported on in the media, and are increasingly subject to international scrutiny and international judicial collegiality. The process of judging is inherently political in the broader sense of the word, of making decisions about the relative power of the parties appearing before them, whether they be husband and wife in divorce proceedings, landlord and tenant, political party or alleged criminal and the state.

Secondly: "Do our judges share a common ethical or values framework?" Until 1994, when all judges were appointed from an extremely narrow basis from the members of the Bar, I think they did share a common ethical framework – the values of the Bar, which sometimes coincide very directly with the demands of justice. Since 1994, judges have been appointed from the ranks of the attorneys, academic life, even former magistrates have been appointed as judges, and I'm not sure that each of the people appointed to the Bench has shared that same common ethical framework. This is not a code for race. I want to say that very directly. But I think that we need to do hard work on the ethical framework within which our judges operate. The bottom line for me is that a judge is never not a judge; a judge is always on duty in his/her private actions. They will and ought to be judged by a higher standard than ordinary members of the public, and judges should not forget that.

Against this background, what about judicial misconduct? I think that there are very strong arguments for lawyers to sort these matters out. So the provisions of Section 178.5 of the Constitution demand that only the lawyer members of the JSC hear any matter other than judicial appointments. The grounds for impeachment of judges are appropriately seriously couched in Section 177.1 of the Constitution. The critical issue for us is: "What about judicial misconduct short of impeachable conduct?"

This has got us into great difficulties in the past few years. There is a Code of Conduct,

and there are draft proposals on the process for dealing with conduct short of impeachable conduct. The problem is that the former legislative framework for this, other than in the rules of the JSC, has shared the fate of various judiciary bills that fell victim after the June 2004 general election to a critical change engineered chiefly by the Deputy Minister of Justice, Mr De Lange, such that it created a crisis. Since then the judiciary bills have largely been shelved and generally held up. At the same time, the JSC has not acted in matters of judicial misconduct short of impeachable conduct sufficiently clearly and decisively to set the tone. For example, the first Hlophe set of complaints against our Judge President here in the Cape High Court were resolved by the JSC in October 2007, to the great disappointment of many people. It opened the door, in my view, to opportunistic attempts, by those who want to limit the judiciary's authority, to capitalise on that weak response of the JSC through an attack on the judiciary more generally. Judicial infractions must be dealt with through the individual; not by attacking the judiciary as a whole.

How secure is our constitutional democracy? I think very few were rosy-spectacled enough in 1994 to think that a shift to the new constitutional superstructure would induce behavioural changes in our people and institutions of government in as short a time as a decade or so. Recent assaults on those who wear mini-skirts at taxi ranks and on black women at rugby tests show us how sexism and racism continue to thrive in this country. For present purposes, I'm more interested in the issues of separation of powers, the attitudes of the legislature, the executive and the judiciary to their division of authority and to each other, from the vantage point of the courts.

Courts are reactive forums. They only hear and decide on what is brought to them; they don't go out and seek issues. But many of the issues which reach them are hugely charged in a political sense. This is particularly so with a constitution such as ours, and it's understandable that we need time to adapt to new ways of working to build expertise, expectations and confidence. From the point of view of the judicial branch, headed by the Constitutional Court, I'd argue that there's a very impressive record of cautious insistence on constitutional rights and processes by that court, seeking to strike a balance within the constraints of the injustice of our history and of our continuing present. In the process, that court has built up an enviable reputation both at home and abroad for pioneering jurisprudence, often, but not always, of a transformative nature.

What has the response of Parliament and the executive been? In Parliament the judiciary bills, largely engineered by the executive, have come to nought thus far. In

Hugh Corder

the executive, we've seen under President Mandela in 1994 to 1999, on a number of occasions, a very conscious expression of confidence in the judiciary, even when the judiciary found the executive wanting. Since 1999, I would suggest we've seen, at best, silence, and at worst, resentment from people like the Minister of Health when she was corrected by the courts, and, in the Eastern Cape Province, I regret to say, wholesale lack of commitment by the executive to correct its shortcomings as identified by the judges in the area of pensions in Social Development. This has been the case until the latest debacle surrounding Judge President Hlophe, too, which I would like to examine.

The 30 May statement of complaint about Judge President Hlophe of the Constitutional Court was met with initial silence from the Jacob Zuma camp. It is also important to note that early on in that statement, the Constitutional Court judges say: "We stress that there is no suggestion that any of the litigants in the cases referred to in paragraph 1 was aware of/or instigated this action by ..." (this alleged action – it says "action") "… Judge President Hlophe." There was silence for four full weeks, unless you take Mr Malema's statement that he would kill for Mr Zuma as an implied threat to the judiciary. I didn't take it as that at that point, but we know that, on 28 June, at a closed meeting of the ANC Youth League, Secretary-General Mantashe launched an attack on the Constitutional Court and the judges. He said: "It's not about Hlophe. It's rather about Zuma; it's rather about creating a hullabaloo and preparing us psychologically for a judgement against Zuma."

In the light of that statement, what has the virtual cacophony of orchestrated attacks on the Constitutional Court, and the judicial process generally been intended to do, other than to create an opposite psychological conditioning of us? Until [the Nicholson judgement], it was though the word had gone out that the judiciary provided the stumbling block between Jacob Zuma and his supporters, desperate to assume the reins of power and to reap its many fruits, and that the frenzy of protest would facilitate either an absolution from prosecution, or, better, a political solution. In the popular mind, the Nicholson judgement of last Friday may well have strongly reinforced the view that you get what you want from the judges when you take a sufficiently threatening attitude. Let me state categorically, and unambiguously, that I'm absolutely sure that Judge Nicholson was not susceptible to such

blatant and violent threats, but that's not the point. Public perceptions are critical.

I'm appalled by the range of attacks on the judiciary. Institutions that build a constitutional democracy such as ours must be protected and treasured. They take decades to establish in the popular mind; they can be destroyed much more quickly. It took Zanu-PF less than three years completely to eliminate the notion and practice of judicial independence at High Court level in Zimbabwe.

The events of the past three months have set us back immensely. There seems to be a popular belief deliberately instilled – I would suggest in this campaign – that judges are swayed by party-political factors or even follow political orders. Ironically, at the same time, the very same critics have spared no time, expense and energy in exploiting the judicial process to prevent the courts from a final pronouncement on the innocence or guilt of a person charged with serious criminal offences.

What is destroyed cannot be built again by a mere change of rhetoric. Those indulging in this crescendo of mostly unfounded invective are likely to regret such destruction, should – as happens from time to time – balances of political power shift and they wish to seek protection through the law and the Constitution. The ANC's reaction to Jacob Zuma's success in this case must be a quick and unequivocal endorsement of judicial independence in all its forms, and conduct which is consistent which such a stance. This must be enforced through its ranks.

I end with a dramatic recreation of events some 400 years ago. Sir Thomas More was Chancellor to Henry VIII. His impetuous son-in-law, Will Roper, wishing to stop someone from informing on Sir Thomas, says to Sir Thomas: "So, now you'd give the Devil benefit of the law!"

More says: "Yes! What would you do? Cut a great road through the law to get after the Devil?"

Roper says: "I'd cut down every law in England to do that."

More responds: "Oh, and when the last law was down and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country's planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the devil benefit of the law for my own safety's sake!"

Hugh Corder

"What is complex, though, is the question of the parameters within which such respect is to be shown."

Rudi van Rooyen

The constitutional imperative that the judiciary is to be respected is not debatable. What is complex, though, is the question of the parameters within which such respect is to be shown. I want to focus on the duty that rests on the leadership of organisations to guide their members through this maze in a responsible way.

May I offer the following as a first draft – a beginner's guide to what I believe the leadership of organisations should resort to in guiding their constituencies.

The structure within which the judiciary operates is clearly spelt out in the Constitution. The JSC is the first port of call when individual judges suffer from incapacity or are grossly incompetent or guilty of gross misconduct. A balance must be struck between the preservation of the reputation of the judicial process, including matters referred to the JSC whenever there is impeachable conduct in play, and, on the other hand, acknowledging the right to freedom of expression. Therein lies the rub: people have grabbed the right to freedom of expression and run with it in this country without realising that with every right there comes a duty. There I blame leadership for failing to lead by example. Robust and informed public debate about judicial affairs is necessary, the Constitutional Court tells us so, but it must be informed debate. Leaders of organisations often instantly have a lot to say about a judgment when there's no conceivable way that they could have read the judgement, let alone be informed about the reasons and legal principles followed by the particular judge. Unfounded statements which impugn the integrity of courts are not permissible and may constitute contempt of court, but do ordinary people know that? No. It is the duty of leadership which they fail to fulfil – to inform ordinary people about it.

As a last general principle, nobody may interfere with the functioning of the courts. Within the structure, leaders of organisations need to be tolerant and I suggest all to bear the following in mind in the process: organisations ought to co-operate, within the constraints of their expertise, when the judiciary is the focus. Politicians, lawyers, academics, non-governmental organisations and yes, cartoonists, should all be allowed to contribute their expert views and to be recognised for their particular expertise. Parties should refrain from shouting each other down and resorting to personal attacks through the media. Let each area of expertise offer its comments in an informed and dignified way in order to guide members of the public, while allowing the constitutional structures, particularly the JSC, to do their work.

Let me resort to practical examples of how these principles have not been followed, with more damage than anything else being done in the process. On 31 July this year, the Constitutional Court handed down its judgement in the Zuma and Thint matters pertaining to search and seizure warrants. The following was said that very same day by the South African Students Congress. It attacked the judgement – because they said it was political – and they expressed the view:

"This ruling is part of an invincible political hand that handles judges in order to achieve political and factional agendas. We remain resolute that Constitutional Court judges have lost integrity and impartiality when dealing with the JZ issue."

At the time of this judgement, three other counsel and I were involved in a matter here in Cape Town concerning similar issues. Needless to say, we waited for this judgement and the moment it was out that day we started working on it. It took us days to analyse the thorough, 212-page judgement properly. The judgement considered and applied existing law and on no construction could it be said that it was influenced by political expedience. We eventually agreed that the matter that was set down for hearing on 10 September ought to be postponed for us to analyse this judgement properly and adapt our papers in order to provide for the impact it had. And yet, the day that that judgement was given, the South African Students Congress saw it fit to attribute the reasoning of that judgement to an invincible political hand.

Some of the other speakers alluded to the Road Accident Fund matter. There, the court's judgement was given on the Friday. Reasons were to be given later. On the Monday following that Friday, three unions made a joint public statement published in the media commenting, inter alia, as follows on the court's judgement:

"It is quite clear that the judge did not apply her mind as bias was exercised from the onset in favour of her colleagues in the Law Society and the manner in which the judgement was arrived at again begs the question whether ordinary working class South Africans can really depend on judges who appear to be more and more incapable of taking independent and objective decisions."

Yet again, playing on the feelings of working-class South Africans, instead of guiding them. The accusations of bias against the judge ought to be assessed in light of the following: the judge obviously doesn't have colleagues in the Law Society, but do ordinary people know that? The order was interim, not final; reasons were to follow later, so the union's statement could not have been based on any reasons. The unions were not parties to the litigation, nor were they represented in court when the matter was heard. In the circumstances, the unions have reached and publicly announced the alarming conclusion that the judge was biased without even being aware of the findings and reasons which underpin her order, let alone undertaking a criticism of any particular finding or reason.

I use these examples to show how dangerous it is for organisations to lend themselves to statements in haste without calling on some expertise. If they're not lawyers, call in lawyers and ask their advice as to the reasoning followed by judges in particular judgements, and the impact of those judgements. I hasten to add that we as lawyers should take care not just to condemn organisations; what I'm trying to offer is guidance as to principles that are entrenched in the Constitution, and ought to be followed and borne in mind.

"We like to respect the courts when they make a decision that is in our favour, but if they don't, we don't always agree with them and we say it in ways that are not appropriate."

Pierre de Vos

Pierre de Vos

My colleagues have said some of the things that I was going to say, so I may now be a little shorter. Somebody asked me the other day about whether South Africans have really internalised the judicial and legal and constitutional revolution that happened in 1994. My answer was: yes. The wonderful thing about South Africa is whenever somebody is aggrieved they appeal to their own rights. Everybody has rights now, and they are not shy to try to enforce them. Unfortunately, it's also no, because if other people claim their rights, we don't really want to hear that. We want to respect and have our own rights respected, but we don't really want to respect and have other peoples' rights respected. And the same thing, in a way, often applies to the courts. We like to respect the courts when they make a decision that is in our favour, but if they don't, we don't always agree with them and we say it in ways that are not appropriate. So that's the starting point. It's going to take a long time for South Africans really to internalise a whole rights culture and a culture of constitutionalism, and it doesn't come overnight. At least we believe in rights.

On the second point, I think that in the past judges had far too easy a ride. They could not really be criticised vociferously, vigorously, sometimes harshly, because the contempt of court, the fake respect for the judiciary, and sometimes the so-called sub judice rule that has been often used and mostly abused by, especially, politicians, have meant that their judgements and actions couldn't always be sufficiently scrutinised. But it is very, very important in a democracy that judges' decisions are scrutinised because judges are not elected.

Judges are appointed, yet they are the third branch of government; they have immense power. They can declare invalid the acts of our democratically elected Parliament and of the President. But judges don't have the automatic legitimacy that comes through the ballot box. The only legitimacy they have is the legitimacy and trust they gain from the population through their actions – through their judgements and through a vigorous analysis engagement with those judgments. In a democracy, we are often going to find it difficult to locate the correct border between that vigorous kind of criticism, on the one hand, and the kind of statements that border on or constitute an undermining of the independence of the judiciary and respect for the judiciary. I think sometimes we are too scared to fight with each other about these kinds of things. And we – especially, I think, white

people – are a little bit Afro-pessimistic. We look at Zimbabwe or whatever and say: oh, my God, there was a criticism of the judiciary; it's the end of the independence of the judiciary. That, for me, is wrong. There must be criticism, it's very important. But there should be limits to how this is done, and this is where, in the recent past, things have not gone very well. Some examples have been given; I will add another.

The leader of the opposition made a statement to say that a certain judge of the Cape High Court should not have taken up the position of head of a commission of enquiry, and the fact that he did means that he's basically a lackey of the ANC. Like the other statements made by Mr Malema, by Mr Gwede Mantashe, by members of Cosas and so on, these statements obviously went too far. They strayed to the wrong side of vigorous criticism. But that is really not the point for me, because words are, for me, not that dangerous. We all know Eugene Terreblanche used to talk a lot, but in the end it turned out there was nothing more to it. What is important is not necessarily only the words – although they are a first step, so statements by Mr Zuma, for example, that he respects the independence of the judiciary are a good starting point.

For me the greatest piece of evidence, in action, that shows an undermining of the judiciary is something that hasn't been noted that often: a decision by the National Working Committee of the ANC that Mr Jacob Zuma will be the presidential candidate for the ANC in the next election, regardless of what any court might say or might find. I think many of the statements emanating from people like Mr Malema – because maybe I'm being a bit rude, but I don't think he can come up with these things himself – flow directly from that action, and I feel that decision was a flagrant and irresponsible infringement of the independence of the judiciary. It set the ANC – which as the majority party has a special responsibility to safeguard our constitution and our democracy, for which many in the ANC also fought – on a collision course with the judiciary. Everything that has happened since then really stems from that decision. That's the first action.

The second is a failure to act. When statements are made by Mr Malema or whoever else, one way of dealing with this is to call a disciplinary hearing to send a signal that threats against the judiciary are not acceptable. Unfortunately this has not happened. That action on the one hand and failure to act on the other do make us a little bit nervous. They should, and I think there are many people in the ANC who think the same way and who know better. Unfortunately they are remaining quiet, and if people remain quiet forever, by the time they think it's necessary to speak up, it will be too late.

"The perceived attacks on the judiciary have nothing to do with President Jacob Zuma, but the public perceptions of violations of the law and the Constitution in the prosecution, perceived as persecution, of President Zuma."

Mathole Motshekga

I think our starting point should be that the ANC is not only the author, but is also the defender of our legal and constitutional order. It is in the best interests of the ANC that this order survives. The conduct of the ANC leaders and alliance members are humble attempts to defend not [ANC] President Jacob Zuma, but the South African criminal justice system, which appears to be threatened by non-observance of the rules of the game by the administrators of justice. The issue is not the judiciary, it is the threat against our entire criminal justice system. The perceived attacks on the judiciary have nothing to do with President Jacob Zuma, but the public perceptions of violations of the law and the Constitution in the prosecution, perceived as persecution, of President Zuma. The judiciary was merely caught in the cross-fire by making statements which created the impression that they are descending into the arena.

The statement "killing for Zuma" by Malema became a big issue because South African people, especially white people, do not make an attempt to understand the indigenous languages of this country. If they did, they would know that if you look at a young girl or a young woman and you love her, you will say "I will die for her", which means that you love her so much and you use the word "die" to express extreme emotion. It has nothing to do with spilling blood. When Comrade Gwede Mantashe, our Secretary-General, talks about a counter-revolution, people who divorce this legal and constitutional order from the liberation struggle fail to appreciate the fact that these human rights and constitutional protections we enjoy are the product of a revolution; that's why even today we talk about the national democratic revolution. So anything that is done to undermine this Constitution and the Bill of Rights is counter-revolutionary because the revolution is that of entrenching democracy, human rights and ensuring that all the people of South Africa are protected. Anything that is against that is counter-revolutionary, in the sense that this revolution must be protected, and its essence is that we must entrench democracy, human rights and so on.

I heard a suggestion that people have not internalised human rights. I must say that members of the ANC, without exception, have internalised the human-rights tradition because it's not something that they learnt from the book, it was borne out of the struggle. When we talk about human rights in the ANC, starting from 1923 when we adopted the Bill of Rights, we say that the humanity of all South Africans must be the fundamental point of departure and therefore human rights derive from the

Mathole Motshekga

"So if there's anyone who would be the last to undermine the Constitution, the judiciary and the Bill of Rights, it would be the ANC members."

humanity of all of us regardless of race, gender and social status. It was because of that internalisation that ANC members went into the struggle, sacrificed life and limb. So if there's anyone who would be the last to undermine the Constitution, the judiciary and the Bill of Rights, it would be the ANC members.

So we are dealing not with attacks on the judiciary, we are dealing with whether or not the administrators of justice in this country are prepared to abide by the rules of the game. In terms of the Constitution and the NPA, there must be no political or perceived political meddling in any case. Non-interference in the prosecution of cases is a constitutionally guaranteed matter, so the members of the public and yourselves should not be addressing President Zuma, you should be asking yourself whether in this case – it just happened to be President Zuma involved – there is no political meddling. And if you want to find an answer to that question, you must look at the activities of the national prosecutors, the Minister of Justice, the Scorpions, and measure their conduct against the Constitution, and tell us whether that could not create the perception that there is meddling in this case.

I met our President Jacob Zuma for the first time at night, at one o'clock, in Lusaka in 1986. He had called me to tell me that he wants to make sure that when we prosecute the struggle in this country, we must make sure is that there is a respect for human rights. That's why, in 1986, the ANC was the first liberation movement to establish a Department of Legal and Constitutional Affairs, and I happened to serve on that committee, deployed there by Jacob Zuma. So I know his commitment to human rights.

But leaving that aside, the bedrock of our justice system is the demand for access, and I want to refer you to two speeches that President Zuma made so that you understand his position. On 10 December last year he gave a memorial lecture at Wits on "Human and Peoples' Rights". On Friday, he made a speech at the University of Johannesburg on "Access to Justice in a Democratic South Africa". What comes out clearly in his speeches is that justice, whether it is in a traditional setting or in a modern society, is based on the rules of natural justice. This includes the right to hear the other side before you judge them. If you hear both sides you will be able to be impartial. If you hear only one side, you will side with the side that you heard. The other point was that justice delayed is justice denied; and it is for you to ask yourself whether it is just for a person to be investigated secretly for seven years and, when he's brought to the court, the learned judge says the case of the prosecution is limping from one disaster to another. But we and the institutions supporting democracy say nothing when it is quite clear that the rights of a citizen are violated, except that he must have his day in court. When you go to court, you are entitled to a fair trial, but the fairness of a trial depends on the fairness of the pre-trial procedures. If the pre-trial procedures limp from one disaster to another, there can be no basis for a fair trial. So when members of the public, including the alliance, say President Zuma cannot get a fair trial, that is not an attack on the judiciary, it's an observation based on the pre-trial processes in which the judges are not concerned. How do we then come to the conclusion that anyone in the ANC attacks the judiciary, because President Zuma has not faced that trial so far?

What we will do as the ANC is defend the entire criminal justice system. In the 1980s, the public lost confidence in the criminal justice system and established alternative courts and took the law into their own hands. We cannot allow any situation that endangers this democracy. So the concern of the ANC and the alliance is to save the criminal justice system in the interests of all of us, black and white.

I would want to take this opportunity to appeal to you to understand that if there's anyone who can guarantee your human rights in this country, it is the ANC and President Zuma personally, and his collective will not allow any situation that threatens the criminal justice system. I also want to point out that the NPA and the Constitution require the Ministers of Justice to develop policy guidelines in the public interest. If you prosecute people without guidelines, the prosecutors will be unguided missiles. The Scorpions were unguided missiles. The Cabinet and Ministers of Justice failed to produce those guidelines.

The NPA and the Constitution elevated the rules of natural justice to constitutional principles, and therefore, if you violate those rules, you are violating the Constitution. By dragging people to court after violating the Constitution, we are creating a situation where the public may think that there's no justice. In my view there was a neglect of duty to ensure that the law and the Constitution are complied with. Lastly, I want to quote Judge Nicholson, who I think is a great South African because he's able to identify what is on the table and deal with that. Some people, of course, will say I say that because we like judges who hold in our favour. I quote:

"The independence of the prosecuting authority is vital to the independence of the whole legal process. If one political faction or sectional interest gains a monopoly over its working, the judiciary will cease to be independent and will become part of a political process of persecution of one particular targeted political enemy."

The President of the ANC utilised the courts to save the courts and the judiciary, and also to save the criminal justice system.

This must also remind us that if justice is so costly, it cannot be accessible to all. If this were you and I who would not have access to state support, we would long be serving 15 years in jail. So I think this case must also put on the table the question of access to justice, which President Jacob Zuma has ably done in the two papers that I referred to.

Questions & Answers

Mr Ernst: My name is Helmut Ernst. I'm asking: what access do I have as an ordinary citizen to the protection of the Constitution? I have been fighting for my property rights for years: I have been invaded on my industrial lands by about 40 000 squatters. No ways that I'm heard by the government, no ways that I'm heard by anybody. We have lodged our pleas; the government does not respond. The government, through the Council, has in fact taken possession of my land by installing services, against my attorney's letter of objection that the Council should buy the land and they can do whatever they want with it. I have the funds, but I have reached a level where I must say: practically, I cannot carry on. I have missed a little bit that "rights on the ground" aspect of how the Constitution is accessible to the ordinary citizen like me.

Prof. Motshekga: The problem the first speaker has with the so-called squatters is a symptom of the failure of all us to appreciate the human tragedy that colonialism and apartheid created. How can we, in a land such as South Africa, which is virtually empty, find ourselves in a situation where the majority of the people in the country have no access to land where they can go and build a house? Why is the land inaccessible? We have not addressed that, and there are also some municipalities who are selling land before we can even find land for the citizens of the country. So your problem is part of a national problem, and I will take it back. I think we must address it.

Your feeling unprotected by the law brings up the whole question of access to justice. To go to a court, you need an attorney, junior counsel, senior counsel; all of them must be paid. So if you are unemployed, you have no access to the courts. What kind of justice system is that? If you need legal aid, then you must go to the taxpayer, who is facing huge challenges of housing backlogs, water, electricity and so on. So we have a big social problem. So the inaccessibility of justice comes from there. I'm coming to the last one.

Adv. Hoffman: I think only two questions were directed to the panel in general. I have good news for the gentleman with the property rights problem. I'm sure your lawyer has told you that a person in Gauteng in a similar position to you was successful, even though the sheriff

was unable to evict the 60 000 people who landed up on his farm. I would encourage you to continue with your litigation as you are likely to get a successful outcome from the courts.

Mr Joubert: Jan-Jan Joubert, Die Burger. Firstly, to Professor Motshekga. Sir, you said that because of what's happened in the pre-trial, a fair trial is impossible for the president of your organisation. Would this not be a decision for a judge to take, rather than for the ANC? And roughly the same question to Professor De Vos, who raised the issue of our mayor of Cape Town's criticism of Mr Justice Nathan Erasmus. Do you not believe that the judgement handed down by the self-same Mr Justice Nicholson and Justice Swain actually proved her correct when she made the point that she made?

Prof. Motshekga: [On the question of it being up to a judge to say whether our President can get a fair trial] you are very right. The courts must decide, but the public is a stakeholder in the administration of justice, that's why an important rule of natural justice says: "Justice must not only be done, it must be seen to be done." So while we are waiting for the court to sit, we have to ensure that even a lay person is convinced that justice will be done. Public confidence in the system is very, very important. So the run-up to the court session is very important for both the court itself and the public.

Mr Prilaid: My name is Edgar Prilaid. What is the basis of justice? Speaking as a layman, it's upholding a morality, first of all, as a kind of guideline – upholding a contract. As far as the contract is concerned, we have, I think, become a nation of takers because people take the benefit without paying the price. The political reasons for that are not my concern. Also, with the contract come rights and responsibilities. There are various kinds of morality, including religious and secular, altruistic and reciprocal, and I doubt very much that most people have even explored the topic or, indeed, know the difference between those. This attack on the

Questions

judiciary is simply one example of a long litany of problems. The system has been eroded from within to such an extent that this sort of thing becomes possible. In what ways can one tweak the system to protect the electorate from arbitrariness and ideologically driven actions of the party in office? As I see it, the struggle is to control government and protect the individual,and I feel very unprotected at the moment.

Prof. Motshekga: What is the basis of justice? It's easy to say morality, but what is the basis of morality? The ANC was the first in Africa to come up with a Bill of Rights, before the United Nations, and the basis was the common humanity of all people. That's why at Limpopo the ANC said: we want to build a non-racial, non-sexist, democratic South Africa in which the value of every citizen is based on their humanity. That vision doesn't make room for discrimination. But class, race and gender are the sources of social conflict, and the ANC wants all of us to work together to fight the negatives: the social ills that flow from class, race, gender. That's why we appreciate our alliance with the Communist Party, with COSATU, with the civics, because we have a common purpose which can help all of us to fight gender, race and class.

Prof. de Vos: I'll try to answer the question about morality and justice. I think in the new South Africa since 1994, the source of morality and justice is the Constitution and the values in the Constitution. Those values are not only the traditional, liberal values of property rights, the law of contract and individual freedom, because the Constitution also contains rights such as the rights to housing and health care, other rights that point to a need to transform our society away from the preposterous imbalances between black and white, rich and poor in South Africa. If we don't embrace both aspects of the Constitution, no matter what our race, we are not going to have a healthy country. Because if there are such huge imbalances and we don't care about it, we don't address it, then our society cannot flourish.

Answers

Adv. Hoffman: As to the question of the basis of justice in our system, I think that what changed most of all between the old South Africa and the new was that sovereignty resided in Parliament before 1994 and now the supreme law of the land is the Constitution, and it is according to the Constitution and the rule of law, rather than the rule of men, that what is just and unjust is decided. We've adopted a system called constitutionalism, which implies a limitation on the powers of the government of the day, a legitimacy in the minds of the people who are subjected to the ups and downs of daily life in that system, and a culture of human rights in our society. If you have those three, you're likely to find a just society.

Mr Steward: I'm Dave Steward from the FW De Klerk Foundation. I'd like to know whether Professor Corder is not worried about moves to make the proceedings of the JSC secret, when considering disciplinary action against judges.

Prof. Corder: I'm responding to the question about whether the proceedings of the JSC should be in secret. The JSC, when it makes decisions to appoint judges, holds interviews in public session and then closes the doors to discuss the selection of candidates for the bench. I, with two colleagues, made a submission to the JSC when it called for submissions about the openness of proceedings of the disciplinary hearing in the Judge President Hlophe matter. We have pursued essentially the same argument, that proceedings should be in open court, so to speak, until the JSC, in its attenuated form, sits actually to debate and decide what action should be taken. We had one limitation on that, which also applies in the appointments process: we feel that television cameras make people – especially, perhaps lawyers – play to them. We would have radio present, but not television. So I'm completely in favour of open process, but I believe that the presence of the media or any outsiders when the decision is actually being taken inhibits debate. Therefore I would exclude non-members of the JSC at that point; in both the appointments and disciplinary process.

Questions

Prof. de Vos: [The question about Helen Zille] goes to the heart of the matter, namely that when we criticise the judiciary, the criminal justice system, we don't do it in a way that casts aspersions on the personal integrity of the judges. That is unfortunately what Ms Zille did, and also what some of the members of the ANC did, and both were wrong. If you have a problem, you can either challenge the matter in court, which will show your respect for the system, or if you feel that the court cannot give you assistance, you can go to the JSC, as Ms Zille belatedly decided to do. That would have been the correct way to deal with it, because if we all think that judges are only driven by politics, then things are not going to go very well.

One last point: in the Sanderson case in the Constitutional Court, Justice Kriegler said that the right to a fair trial is not what happens necessarily before the court proceedings start, it is what happens inside a court, and whether a judge sitting and hearing the evidence impartially and independently, can make a decision without being swayed by what happened before. Whether a person's rights were infringed before the judgement started, the Constitutional Court says, is not decisive for whether there is a fair trial or not – but that is just the Constitutional Court.

Mr Daya: I'm going to answer a question that I asked tonight about challenges for the Law Society, and I think I figured one out by listening to the debate. I think the attorneys in this country can educate the public on the functionality of the courts and the judgements, and the interpretation of the judgements. I think there's sufficient ignorance about those processes to lead to a lot of confusion and misunderstanding. So that's a challenge for the law societies.

Prof. Corder: I've learnt a lot this evening. The thing that continues to worry me, however, even after Mathole Motshekga's helpful comments, is that when Judge Nicholson found the manipulation with the prosecutorial service to have taken place, it seems to me that he was pointing fingers at the leadership of government. These are all members of the ANC. So while accepting that the ANC subscribes to and believes in and has suffered for the values in the Constitution, I worry that that ANC leaders apparently manipulated one of the fundamental organs of state. If it can be done once, it can be done again.

Prof. Motshekga: Let us work together to save our criminal justice system. Let us embrace the shared humanity – Ubuntu-buthu – of all South Africans, both black and white, as the basis of our human-rights culture, and cultivate the right to equality, freedom and justice for all among our people. Let us work together to make justice accessible to all, including the poor. The ANC, by pointing a finger – as Professor Corder says – at its own government, shows that it is not going to cover up for anyone, because President Mbeki is a deployee of the ANC; his ministers, his premiers, MECs are deployees of the ANC. The ANC has a responsibility to make sure that its present and future government do not violate the Constitution, so what has happened must give you an assurance that you are in safe hands.

Adv. van Rooyen: To pick up where Pierre left off, I think it's imperative to understand that the Constitution isn't something esoteric for lawyers to play with and to make money out of – we do that, but some of us are also passionate about taking it to the public, and I think it's incumbent on members of the public to also do a bit of work, and understand that the Constitution provides for the most basic of rights. That's the beauty of it.

When it comes to access to services; if you want to enforce those rights, we as legal practitioners try our best. We have pro bono services if the Legal Aid Board cannot assist you, the Law Society has a pro bono desk, we as advocates render pro bono services, we have organised pro bono programmes. I want to implore the public not to get despondent. We are peppered by negative news every single day, but take a step back. We are part of a robust society. If you analyse the Constitutional Court judgements from the early 1990s to today, it's remarkable how our rights have been strengthened by the Constitutional Court.

CAPE TIMES, 16 SEPTEMBER 2008

Finding proves that judge is great South African – Motshekga

MICHELLE JONES

ANC NEC member Mathole Motshekga has said the Jacob Zuma ruling proves Judge Chris Nicholson is a "great South African" – a comment that drew laughter from the audience at the Helen Suzman Foundation quarterly round-table discussion last night.

Motshekga said it was obvious Zuma had "demonstrated respect for the courts" and the ANC would continue to "defend the entire criminal justice system".

He was on a panel of experts trying to answer the question, "Are we politicising our justice?", at the Centre for the Book in the city. About 50 people attended the discussion.

Law Society of SA chief executive Raj Daya said the judiciary was too often criticised when it ruled against but complimented when a ruling was in favour.

Daya said the challenges facing the judiciary promised an "amazing time for SA" and it was pleasing that amid the confusion Nicholson's ruling proved that sanity had prevailed.

UWC law professor Pierre de Vos said many people wanted their rights respected, but did not respect the rights of others. The same principle applied to the courts.

UCT dean of law Hugh Corder said it was a popular opinion that if you threatened the courts, you would get the outcome you wanted. He said he was "appalled" at the recent attacks on the judiciary by Zuma supporters.

Following the logic of the judgment, is it not unjust to call for Mbeki's head?

JOEL NETSHITENZHE

ACCORDING to some interpretations of the Chris Nicholson judgment, September 12, 2008 will go down in recent history as the moment in which, in legal-moral terms, "the hunter became the hunted". If in Polokwane the party whip changed hands, Mgungundlovu completed the circle.

All of us are duty bound to accept court judgments. But as judges have emphasised in recent times, nothing prevents citizens from debating court findings, as long as the debates are informed and are not aimed at impugning judges' integrity.

In a sense, the odyssey and its dramatis personae have compelled society at large to become "lay-lawyers", poring over judgments to extract interpretations. Good for democracy. From a historical point of view, this period will stand out as one in which civic education thrived – as citizens sought to understand the logic of legal processes that affect their lives.

If only the same could happen on economic issues – about growth and redistribution, the impact of poverty on growth and vice versa. But we digress ...

What, then, are some of the implications of Nicholson's Judgment for immediate political strategy? Contained in it are many assertions on critical issues; but there are also several stings in the tail that most interpretations have tended to miss.

That the judgment is damning of President Thabo Mbeki, specific ministers and Cabinet is beyond doubt. What is not clear, though, is the utility of the judge's meander into intra-party contestations, including a seeming conflation of developments before the 2002 ANC national conference where there was no contestation, with the build-up to the 2007 Polokwane conference.

In the event, the judgment turns on their head assertions that Mbeki and ANC president Jacob Zuma had made over the years that there was no political conspiracy within the ANC against Zuma. It lays the blame for unwarranted meddling squarely at the door of successive ministers of justice, the president and the Cabinet (of which Zuma was for most of the period a member). Though, in most instances, it uses inference and conjecture – making it difficult to establish what in the judgment really counts – the findings are natural grist to the mill of recall and impeachment campaigns.

In response, the Presidency has argued that it could not establish what facts the judge adduced to come to these conclusions; and that in any case it was not party to the hearings and therefore did not have an opportunity to state its case.

In fact, in most instances where such inferences are drawn, they seem to be based on press statements, assumptions on motives behind actions such as the suspension of chief prosecutor Vusi Pikoli, and political reasoning such as the correctness or otherwise for an ANC president serving a second term as state president to stand for the ANC presidency, which has no term limits.

A question will be asked why the National Prosecuting Authority (NPA) as respondent did not call the implicated individuals; and whether government should have maintained a watching brief to advise in real time on courses of action. Some may contend that the arguments were so incidental to the core issue that this was unnecessary. This is a lesson for the future.

The sting in the tail, though, is about the logic of the judgment in relation to possible political decisions going forward. This is because a parallel can be drawn between Judge Nicholson's findings and those of Judge Hilary Squires on the matter of Schabir Shaik: on the latter, Zuma was neither charged, nor called to give evidence; and yet adverse findings were made against him. It is this issue that the judge seizes upon to assert that, though not illegal, the dismissal of Zuma as deputy president was unfair and unjust. Thus, besides the fact that Cabinet as a whole is implicated, is calling for Mbeki's head, according to this logic, not similarly unfair and unjust?

The judgment argues at length on the issue of the independence of the NPA. This is indeed a constitutional requirement. Yet the Constitution also obliges the relevant minister to "exercise final responsibility over" the NPA. Where does the one requirement start and the other end; and are they mutually exclusive?

These are matters that were comprehensively canvassed at the hearings of the Ginwala Commission on the suitability of Pikoli as head of the NPA.

There are many schools of thought on this matter. On the one extreme are those who virtually equate prosecutors with judges and magistrates, so that informing a minister or president about the intention to charge a deputy president or police commissioner would constitute interference. On the other extreme are those who argue that the NPA is an instrument of the executive in dealing with malfeasance.

Quite clearly, it is a matter for continuing debate whether the judgment does not lean towards the first extreme.

The sting in the tail, though, is that, if the judgment is taken to its logical conclusion, any interactions with the NPA on this or any other case by the executive, a political party or any other external authority cannot be entertained.

No one can fault the judgment on the core, procedural issue relating to the right of a person under investigation to be consulted before a decision is taken on prosecution. Some legal experts are astounded at this omission on the part of the NPA.

Going forward, one does not envy the NPA the momentous decisions that it now has to take. Acting without fear, favour or prejudice, it will have to determine whether the matter should be laid to rest.

For the executive, the challenge remains: what avenue is open to clarify issues on which, without its involvement, adverse inferences and findings were made?

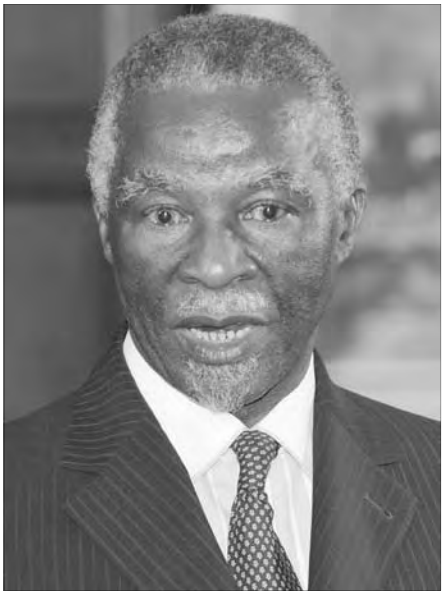
For the ANC, the question is about appreciating the totality of this and other judgments on this matter, and the imperatives of rule of law, stable transition and party self-interest, including timing of the elections and organisational unity during the campaign.

● *Netshitenzhe is a member of the NEC of the ANC and head of the Policy Unit in the Presidency. He writes in his personal capacity.*

NICHOLSON TACKLED ABUSES OF MBEKI ADMINISTRATION, BUT IGNORED THREATS FROM ZUMA SUPPORTERS

Judge has left legal system open to future abuse

MIKE MORRIS



SLAMMED: The writer argues that Judge Chris Nicholson correctly blamed the authoritarian administration of Thabo Mbeki for interference in the prosecution of Jacob Zuma. *Picture: GALLO IMAGES*

OFF THE HOOK: Though he said the question of Jacob Zuma's guilt or innocence of the charges had not been decided, the judge did not address the threats to the judiciary made by Zuma's supporters, the writer argues.

JUDGE Chris Nicholson was not simply presiding over a technical legal application from Jacob Zuma. He was also sitting in judgment over a political case with severe consequences for the future independence of one of the pillars of our fragile democracy.

There were two issues at stake in front of the court: the application in its strict sense, concerning the legal technicality of whether Zuma's rights were infringed upon by not granting him a prior consultation. That was the legal issue that Nicholson was asked to pronounce on.

But there was also at stake the wider issue of the independence and credibility of the judicial system, under attack from all quarters – both the authoritarian executive under the current presidency and the populist mob mobilised by those in support of Zuma.

Nicholson was not bound to go beyond his legal remit and comment on the political issues. But he could certainly choose to do so on the basis of the supporting documents presented to him by the applicant.

Discussing and analysing the legal technicalities of the case is best left to the expertise of lawyers. The politics of it, and the fallout that we all have to live with, is another matter altogether.

Nicholson was presented with a moment few judges have – the chance to fundamentally impact on, and shift their countries' political and social terrain. To defend the judiciary and judicial system from all those seeking to undermine it – both in the term of Thabo Mbeki and in the future one of the incoming political regime.

The judges of the United States in the middle of the last century were presented with such a constitutional opportunity and they shifted the trajectory of their nation's approach to race and civil liberties.

Nicholson was presented with the same pristine moment in history. Did he fail us or did he have the courage to rise to the occasion, defending this central pillar of democracy, the judicial system, from those who were undermining it?

Nicholson presented his reasons as to why the legal technicalities favoured Zuma and hence found in his favour. He could have stopped there. That was the main legal issue at stake and all he was technically asked to do. Or he could have simply reflected on possible other reasons for this – including legal incompetence, organisational arrogance – without finding on the issue.

But seemingly, Nicholson was up to confronting the bigger issues at stake. He chose to tackle the big political issues head-on through addressing the Zuma team's supporting affidavits, which argued that the prosecution was politically motivated.

In some lengthy detail, bringing in issues and events not directly pertinent to the case in front of him, Nicholson in his judgment chose to go beyond a narrow interpretation of his remit and pronounced in his findings on why this had occurred, upon whom blame should be laid, and who was responsible for dragging the case out for so many years.

From his perspective, it was because of the interference of the presidency and executive in the independence of the prosecutorial authority. They were solely to blame.

Hence, despite saying he was not judging whether Zuma was guilty or not of the charges laid against him, he doubly let him off the hook.

For his broadside has effectively organisationally crippled the National Prosecuting Authority, and politically made it highly unlikely that Zuma will be charged yet again.

Leaving aside the possible and likely retort from Mbeki, Penuell Maduna, Bulelani Ngcuka, Vusi Pikoli and Mokotedi Mpshe – were they not also entitled to be heard before the learned judge pronounced on their "guilt"? – the Pikoli/Selebi events have made this an eminently plausible conclusion. The machinations of this executive stand clear.

In this respect, the judge seemingly defended his colleagues, the judicial system, the Constitution, and our democracy. I say seemingly, because while our judge was correctly berating the post-Polokwane toothless Mbeki executive, their shabby suitcases in hand as they stumble to catch the train exiting the government station, the snarling tiger seeking to devour the judicial system in the next round has been left to run wild behind his back.

But once Nicholson chose to take on the political issues at stake he was morally and politically obligated to do so wholeheartedly. To rise to the occasion and say loudly and clearly, there are two blocs currently threatening the fragility of our independent institutions, particularly the judicial system.

These are the secret authoritarian machinations of the current executive under Mbeki and the howling populist mob mobilised in the political defence of Zuma.

To tackle the former only and not correspondingly the latter is to open the field for the incoming regime to run riot.

In the wake of a severely weakened and demoralised investigative and prosecutorial arm, it is to give them the freedom now to replicate these practices as they consolidate their new power bloc, to settle scores owed, to pay off the debts of support through further patronage, and allow the new elite to greedily feed at the trough, unhindered by legal niceties.

History and our struggle (and I include Nicholson in these ranks) for a state that is the opposite of the authoritarian, racist apartheid regime, demanded greater things of the judge.

If, in defending the judicial system, he correctly chose to tackle the one, then he was obligated to also find a way to go for the other. Not to do so is to lay himself wide open to the insinuation that he was simply posturing.

The cause of democracy has not been served by Nicholson. Certainly, the incoming regime will be extremely grateful for this judgment, for it lets them wholly off the hook.

If Nicholson sought to defend the judiciary and judicial system against current political interference, he should not have left it, as Zapiro has so presciently portrayed it, still spreadeagled on the ground, wide open to further assault in the future.

Instead, Nicholson's judgment has eschewed the real act of historical courage, of rising to the political and historical moment.

And we, the populace – who do really care about the vision we struggled for under apartheid and which was held up by the Mandela era – are left to face the consequences.

● *Professor Morris has a joint post in the University of Cape Town and the University of KwaZulu-Natal. He is a former trade unionist, academic, analyst and political activist.*

Relevant articles

BUSINESS DAY, 10 SEPTEMBER 2008

Hofmeyr defends Scorpions' pedigree

Wyndham Hartley

Parliamentary Editor

CAPE TOWN — Only nine of the 300 investigators in the Scorpions had served in apartheid security agencies, and their loyalty to the new democratic order could not be questioned, deputy national director of public prosecutions Willie Hofmeyr said yesterday.

He was responding to repeated assertions in public hearings in Parliament that the Scorpions were overwhelmingly old apartheid agents bent on destabilising the new order.

Hofmeyr had been asked to give a tally of possible apartheid agents in the Scorpions.

He said that there were nine who had served in the old-order security police.

These people had done good work in investigating, among other things, bombings by the People Against Gangsterism and Drugs (Pagad) vigilante group in Western Cape, and by the Boeremag.

They had put their lives on the line, he said. "We do not have any reason to doubt the loyalty of any of these people."

He also reminded detractors of the Scorpions that there were far more former apartheid agents in the South African Police Service.

"I'm confident that they are committed to work for our new democracy," he said

Earlier, the Young Communists League (YCL) became the latest organisation to suggest that the perception was that the Scorpions were politically controlled and motivated.

Parliamentary justice committee chairman Yunus Carrim of the African National Congress

Continued on Page 3

Zuma speaks up for judiciary

AFRICAN National Congress (ANC) president Jacob Zuma said yesterday SA's judicial authority was "vested in the courts", and that a decision of a court was binding on all, *writes Karima Brown.*

Zuma's comments come amid calls for a "political solution" to his seven-year legal standoff with the National Prosecuting Authority (NPA). Some in the ANC have called for a law to shield sitting presidents from prosecution.

But the majority view in the ANC is that this should be a last resort, and that there should be an accommodation between Zuma and the NPA before he becomes SA's next president.

Yesterday, at a debate at the University of Johannesburg, Zuma committed himself and the ANC to the rule of law and the independence of the judiciary, saying that the ANC "is no stranger to human rights and access to justice".

He said the judiciary was one of the pillars of a peaceful and stable co-existence, and that to destabilise it would mean "we are cutting off our noses to spite our faces".

Some ANC leaders and judges have locked horns over the handling of Zuma's legal troubles, leading to a debate about whether the ANC was trying to "intimidate" the judiciary and whether constitutional democracy was "under threat".

Zuma said it was unavoidable that tensions would arise between the courts and the executive, and political parties and individuals, "given that we are a developing democracy".

Full report: Page 3

BUSINESS DAY, 08 JULY 2008

LEADERSHIP/Raymond Suttner

Where are the alternatives to these harmful voices?

WHEN Gwede Mantashe, who holds the key African National Congress (ANC) secretary-general, attacked the Constitutional Court and associated it with counter-revolutionary forces aiming to destroy ANC president Jacob Zuma, he gave us a glimpse of what many already feared.

Mantashe has been one of the less-strident voices in the new leadership, and his decades of experience have shown in his attempts to understand the public and the ANC base that goes beyond, and in many cases has deep misgivings about, a Zuma presidency.

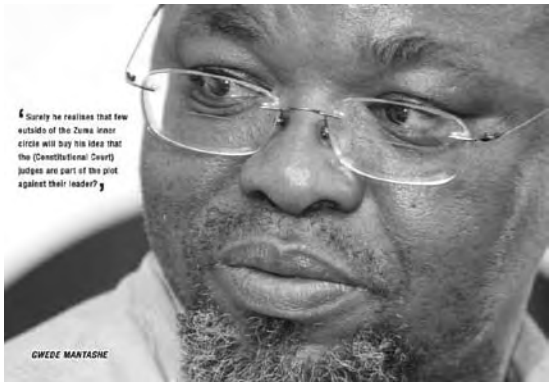
I spent a great deal of my life as an academic writing attacks on the judiciary operating within the apartheid constitution. When the ANC achieved the 1994 democratic breakthrough, it set in place not only a new constitution, but also a Constitutional Court.

There are obviously problems with any notion of neutrality, especially those that lawyers and courts tend to ascribe to themselves. But there is also a need for something to stand above the ruling organisation and, in SA's case, we have a very advanced constitution and a Constitutional Court whose rulings are sometimes not what the ANC would want.

This may be because of the preponderance of judges with one or another background or political inclination, which affects their legal insights. But these are factors that are built into any judiciary, and the question is whether the advantages of having a judiciary — which, as with the Truth and Reconciliation Commission, sometimes makes findings the ruling organisation does not like — is outweighed by considerations that are deemed to be necessary by the ruling organisation.

A Constitutional Court, like the constitution itself and unlike the apartheid judiciary, reinforces values above any organisational consideration and creates broad democratic confidence.

When the ANC decided to establish the truth commission and the court, it understood that some decisions or findings would be contrary to what the ANC knew (in the case of the commission) or believed should be decided (in the case of the court). But it considered these bodies necessary for healing (the commission), and for legitimacy (the court).



The ANC leadership has until now appreciated that abiding by Constitutional Court decisions has instilled public confidence in the democratic system. Its respect as the strongest political force is essential for stable democratic order. This does not preclude criticism of decisions or individual judges or judgments, which are not the same as impugning the integrity of the institution. Surely someone as experienced as Mantashe ought to know that? Surely he realises that few outside of the Zuma inner circle will buy his idea that the judges are part of the plot against their leader?

Personally, I sought and gained nothing from the Mbeki presidency — or should I say the Mbeki-Zuma presidency for, until his dismissal, the Mbeki vision was simultaneously a Zuma project. One never heard a word in support of the poor emanating from Zuma, nor attempts to make the ANC government more people-driven, nor similar sentiments that might give credence to claims by South African Communist Party (SACP) and Congress of South African Trade Unions (Cosatu) leaders that Zuma's victory was a victory for the left, or a democratic gain.

In truth no programme, linked to any plot, was defeated at Polokwane. It was a battle for loot, between those who sought to benefit from continued Mbeki rule and those who had been ditched by Mbeki or sought to benefit from a Zuma presidency. There was no programmatic difference; or what left inflection the Zuma election platform may have had was deflected by pictures of the Cosatu and SACP leaders dogging his heels to share the applause that greeted Zuma the "deliverer".

What Mantashe and other members of the Zuma leadership have had to confront is that the man they protect and fall under stands more disgraced than any other ANC president in history. We can recall how JS Moroka betrayed his comrades after the Defiance Campaign and other moments of shame. But no ANC leader has been charged with rape and escaped conviction on such sexist grounds. No leader has previously stood trial for such a range of corrupt practices, and had to engage in such protracted efforts to prevent evidence being heard.

Despite not supporting the desirability of a Zuma's presidency, I, like many others, believe the ANC is bigger than any individual and that we owe it our support and assistance to try to reverse some of the setbacks and recover some of its legacy.

Now that task is made inordinately difficult, with ANC and Communist Youth League figures and adult leaders throwing around the word "revolution". In reality, some of these people were nowhere near the battlefield when danger was present. The only battlefield they know is that for loot, and they believe they can gain this through devaluing the words revolution and counter-revolution.

Where do we go from here? Are the views of Mantashe, Julius Malema, Blade Nzimande, Zweinzima Vavi and Zuma himself those of the whole of the ANC, SACP and Cosatu and, if not, where are the other people in this leadership? Do they approve of the SACP displacing the police in investigating a fraud allegation against their general secretary and purging those who made the claim? What has happened to analysis and political understanding? There are some who claim to bear this mantle. Where are they and where do they stand?

It is all very well to say that one must be inside to prevent the worst excesses, but what has been prevented and what is there that is still to come?

■ *Suttner is a former political prisoner and part of the ANC/SACP national leadership. He is a professor at Unisa and the author of the forthcoming book, The ANC Underground (Jacana).*

DEMOCRATIC INSTITUTIONS/Tony Leon

Scary dimension to latest ANC attack on judiciary

THE Roman poet Juvenal provided history with the famous question: Sed quis custodiet ipsos custodes? (But who will guard the guards themselves?) In most democracies, the answer has been provided by the judiciary — the branch of state that is the ultimate guarantor of the citizen's rights against all comers, including the most powerful in the land.

Thus, when Gwede Mantashe, secretary-general of the African National Congress (ANC), attacks SA's judicial apex — the Constitutional Court — in a bare-knuckled fashion as "counter-revolutionary", alarm bells start to sound.

It is noteworthy that one of the critical respondents to Mantashe's depiction is Raymond Suttner, a former executive member and parliamentarian of both the ANC and the South African Communist Party (Business Day, July 8). Not only does he carry intellectual heft; far more than the "Toy Town Trotskyites" (as Dennis Healey would have disparaged them) such as the egregious and ill-educated ANC Youth League president, Julius Malema, Suttner suffered mightily for his convictions.

Suttner, however, implies that Mantashe's attack is somewhat exceptional and contrary to the ANC's general respect for the judiciary. Yet there have been at certain key and critical junctures over the past decade vicious attacks on the judiciary by ANC leaders, particularly in respect of judgments that went against the grain of the party's interest. Mantashe's attack is therefore just the latest salvo in a fairly lengthy war of attrition against the judicial branch in an attempt to "soften them up" for the forthcoming Jacob Zuma trial.

Of course, the most novel feature of the latest round is the identity of the criminal accused, whom the ANC is determined to install as the next president of SA.

The attack stretches back (in the democratic era, at least) to 1998, which saw the commencement of a verbal and political assault, first aimed at judicial appointments, and then aimed squarely at the judiciary itself.

Dressed in the rhetorical cant of redress and the garb of transformation, its purpose was to radically racialise the judiciary and consolidate and extend the power of the ANC. It began with the bare-knuckled playing of the race card as the Judicial Service Commission (JSC) wrestled with the issue


DULLAH OMAR GWEDE MANTASHE

and identity of judicial appointments and promotions.

The ANC was doubtless surprised when several among the new crop of jurists proved to be robustly independent and, whatever their partisan preferences, were often inured to the siren calls of race or party loyalty. Sixty years before, National Party justice minister Oswald Pirow preordained the dilemma when he ruefully observed: "The problem with political appointments is that six months after their appointment, they presume they were appointed on merit!"

In 1998, the first overt racial attacks were launched at the JSC hearings in support of the candidacy of Vuka Tshabalala for the deputy judge presidency of Natal.

But this period was also marked by unprecedented ANC criticism of judgments that went against the party's interests. For example, the decision (by another Natal judge) to acquit a Richmond warlord (and ANC renegade) Sifiso Nkabinde on murder charges drew an extremist response from ANC KwaZulu-Natal MEC (today premier) Sibusiso Ndebele that the presiding judge was "an accomplished fascist".

This theme and line of attack was not confined to the provinces; it clearly enjoyed approval at a national level. Then justice minister Dullah Omar applied stern heat to the JSC by telling the National Assembly: "It is imperative that both the JSC and Magistrate's Commission consciously and deliberately embark upon a programme which will transform our courts so as to make them representative in the shortest possible period of time." Omar's agenda was plain: he wanted more control over the judiciary.

His attack also created a following wind for his explicit attack later that year when Judge William de Villiers of the Transvaal Provincial Division made adverse findings against Nelson Mandela and then sports minister Steve Tshwete, in the South African rugby matter. Omar released a statement announcing that "the apartheid judiciary ... was fortunate not to have been dismissed as the judiciary in the (East) German Democratic Republic had been after unification".

During the extraordinary legal manoeuvring orchestrated by now infamous Cape Judge President John Hlophe in the pharmaceutical pricing case in 2004, the ANC again sprang into action. Before this matter was concluded, the ANC used its 93rd anniversary statement in January 2005 to release a fusillade of enormous effect: "We are also confronted by the similarly important challenge to transform the collective mindset of the judiciary to bring it into consonance with the vision and aspiration of the millions who engaged in struggle to liberate our country from white minority domination.

"The reality can no longer be avoided that many within our judiciary do not see themselves as being part of these masses, accountable to them, and inspired by their hopes, dreams and value systems. If this persists for too long, it will ... result in popular antagonism towards the judiciary and our courts, with serious and negative consequences for our democratic system as a whole."

The timing of the ANC's attack was seen by many as a political attempt to soften up the Constitutional Court judges ahead of the pharmaceutical appeal. But crucially, on that occasion, the inevitable furore generated caused a rapid backtrack on the part of the ruling party, which insisted that the statement was "an honest assessment of the state of transformation within the judiciary and that it merely emphasised the need to reflect broadly the racial and general composition of SA".

Again, in December 2005, when the current government published the infamous Fourteenth Constitutional Amendment Bill, there was both a fight back and a retreat.

The bill proposed to vest "the authority over the administration and budget of all courts" in the hands of the justice minister. Another bill released at the same time gave the government, not the judiciary, responsibility for the training of judges.

The legislation was condemned by senior jurists, black and white. Human rights lawyer George Bizos, who had defended Mandela in the Treason Trial, spoke out, warning that the bill could be "the first step down that path" taken by the apartheid regime to subjugate the judiciary. Former chief justice Michael Corbett was moved to express his criticism in public: "The world respects SA for what it has achieved (with its constitution).... (Its) continuance without attenuation is vital to our social order. I believe that the proposed amendments to the constitution stand to do significant harm."

Stung by such widespread and vociferous criticism, from sources not usually given to publicly rebuking the state, President Thabo Mbeki reiterated the government's commitment to the independence of the judiciary.

Though he did not withdraw the controversial bill, he promised to slow down its passage. Later in the year, he was reported to have suspended the bills altogether until a "buy-in" by the judiciary, which appeared unlikely.

Mbeki knew the effect that the controversy over the bills was having on perceptions of his government. But he had also found that an independent judiciary could serve a useful purpose. For the courts played a major role in the unfolding legal battles around former deputy president Jacob Zuma, and succession battles within the ANC.

But today, of course, the poachers have become the gamekeepers. And while the ANC's attacks on the judiciary gather in their vehemence and momentum, and civil society and former ANC grandees, such as Suttner and Kader Asmal, push back, there is no rebuttal from the top. Nor can there be. Zuma's forward march to power requires the judiciary's guns to be spiked.

The governing party has now declared war on the most vital of all constitutional props. The consequences are truly frightening.

■ *Leon is a Democratic Alliance MP.*

Relevant articles

BUSINESS DAY, 10 SEPTEMBER 2008

While defending the judiciary, he also quotes SA's first black chief justice saying judges are not beyond criticism

Zuma speaks up for independent courts

Karima Brown
Political Editor

AFRICAN National Congress (ANC) president Jacob Zuma yesterday said SA's judicial authority was "vested in the courts" and that a decision of a court was binding on all.

Zuma's comments come amid calls for a "political solution" to his seven-year legal standoff with the National Prosecuting Authority (NPA), with some in the ANC arguing that a law should be introduced to shield sitting presidents from prosecution, similar to Italian legislation.

But the majority view in the ANC is that this should be a last resort and that an accommodation between Zuma and the NPA be found before he becomes SA's next president. Zuma is the ANC's presidential candidate in the forthcoming elections.

Yesterday, Zuma committed himself and the ANC to the rule of law and the independence of the judiciary, saying that the ANC "is no stranger to human rights and access to justice".

He was addressing a public debate at the University of Johannesburg on justice in SA as calls for charges against him to be dropped grow louder.

He said the judiciary was one of the pillars of a peaceful and stable co-existence and that to destabilise it would mean "we are cutting off our noses to spite our faces".

Some ANC leaders and judges have locked horns over the handling of Zuma's legal troubles, leading to a debate about whether the ANC was trying to "intimidate" the judiciary and whether constitutional democracy was "under threat".

Zuma said it was "unavoidable that tensions would arise between the courts and the executive, and political parties and individuals, given that SA was a developing democracy.

"This calls on us to exercise restraint.

"We must not jump to conclusions on the one hand that there is an attack on the independence of the judiciary, or that the judiciary is useless or failing in its duty on the other hand," he said.

Zuma answered questions from the audience but refused to be drawn on the details of his own case, saying he did not want his comments to be "misread".

He said this in response to questions about the threat of violence from some of his supporters should the courts find him guilty. He called on all parties, including the judiciary, to "step back and reflect on the tensions".

He insisted that robust debate and criticism were a necessary prerequisite of any democracy.

Zuma said the test for criticism of the judiciary had always been that it should be "fair and informed".

In defence of the ANC's right to criticise the judiciary, Zuma quoted the late chief justice, Ismail Mohamed, who said: "Judges must consciously accept the risk that their judgments in crucial areas may be subject to vigorous attack and criticism. This should cause them no distress. A viable and credible constitutional culture evolves most effectively within the crucible of vigorous intellectual combat and even moral examination.

"What they are entitled to, and demand, is that such criticism should be fair and informed, that it must be in good faith, that it does not impugn their dignity or bona fides, and above all it does not impair their independence."

Zuma has to answer to charges of corruption, including tax evasion and racketeering.

On Friday, Pietermaritzburg High Court Judge Chris Nicholson will rule in Zuma's application that the charges against him were unlawful because he was not allowed to make representations when he was charged by the state. Whatever the outcome of that application, Zuma will also apply for a permanent stay of prosecution on the grounds that his rights have been so abused that he will not receive a fair trial.

Jacob Zuma declined to discuss his own corruption case at a debate on justice yesterday. Picture: MARTIN RHODES

Hofmeyr defends Scorpions' pedigree and loyalty to new order

Continued from Page One

(ANC) said there was a widespread view, expressed in provincial hearings, that there were elements in the Scorpions opposed to the transition.

YCL secretary-general Buti Manamela insisted the Scorpions should be dissolved, and attacked the political parties that want MPs who have been investigated by the Scorpions to be excluded from participating in the legislative process to scrap the Scorpions and create a new directorate for priority crimes investigation.

Manamela said at a joint meeting of two parliamentary committees that the new unit should be expanded to include members of crime intelligence, forensic investigations, home affairs, the Financial Intelligence Centre and the South African Revenue Service, co-ordinated under one roof by the South African Police Service.

"We should send a warning to criminals with the formation of the new structure that we are forming an institution that is 10 times more effective, efficient and vigorous in fighting crime as compared to the Scorpions," Manamela said.

The new unit should not be formed in a negative atmosphere, so that criminals would know that crime did not pay.

On the issue of the recusal of MPs investigated by the Scorpions in the Travelgate scandal, originally raised by African Christian Democratic Party MP Steve Swart, Manamela said: "We cannot ask people not to exercise their constitutional right as public representatives on the basis that they were investigated.

"We should rather contest their being MPs completely, or leave them to vote on any issue they so wish. There is nothing in law that will prevent them doing so," Swart said.

The YCL said it was in possession of a list of Scorpions investigators who had served under the apartheid regime, and who might still be resentful of the new democratic dispensation. Manamela said it was crucial for Scorpions members to be vetted before joining any new security structure.

"This is mainly because there has always been a perception that some of the employees of the DSO (Directorate of Special Operations, the Scorpions' official title) are from apartheid-era security forces, and that they continue to serve the interest of that regime," he said.

Asked by Carrim whether he was in possession of the names of former apartheid security operatives now serving in the DSO, Manamela answered "yes", and said he would submit a list to the committee.

Carrim said the committee was not interested only in the names of former apartheid security operatives, but also those of prosecutors who practised under the apartheid government and were now employed by the Scorpions.

He appealed to all those organisations that had made claims similar to those of the YCL to submit the names to the committee.

Hofmeyr said no one had come forward with evidence suggesting the investigators were engaged in underhand activities. Carrim said that while there might not be evidence suggesting the investigators were engaged in counter-revolutionary activities, members of the ANC were of the view that there were people within the DSO who were pushing an "agenda that does not serve the interest of our democracy".

"It's a view that pervades the tripartite alliance," he said.

However, ANC MP Ben Turok warned the committee against creating the impression that everyone who had worked for the apartheid government was counter-revolutionary.

With Sapa

Door shut on judges' misconduct hearings

New law will make secrecy, not transparency, the norm to protect the 'independence and dignity of the judiciary'

Franny Rabkin
Staff Writer

A NEW law on the Judicial Service Commission (JSC) will, as a general rule, see hearings on judicial misconduct closed to the public. The Judicial Service Amendment Act was signed last week by President Kgalema Motlanthe.

A JSC hearing would in future be open to the public only if its head decided that a public hearing was "in the public interest and for the purpose of transparency".

This comes despite intensifying calls for the complaints process to be open, following a complaint against Western Cape Judge President John Hlophe. The Constitutional Court judges laid a complaint against Hlophe for allegedly attempting to improperly influence the outcome of cases dealing with African National Congress (ANC) president Jacob Zuma.

The new procedure will differ from the current position which presumes openness as the general rule and allows the proceedings to be closed only for "good reason".

One of the stated purposes of the new act is to balance "protecting the independence and dignity of the judiciary" with "the overriding principles of openness, transparency and accountability".

It says that only people directly involved in the complaint, witnesses, legal representatives and JSC staff may attend a hearing — unless the president of the tribunal says otherwise. Similarly, all documents put before a JSC tribunal and its record of proceedings will be confidential, unless it had been decided that the related hearing would be public.

The act makes it an offence for anyone on the JSC or its staff to make any confidential information available to the public.

The tribunal is the new procedure in the legislation to decide cases of impeachable conduct.

It comprises two judges, one of whom is the "president of the tribunal" and one non-judge chosen from a list of available people determined by the chief justice in concurrence with the justice minister.

A tribunal may collect evidence, conduct a formal hearing and make a determination on the merits.

Another new development in the act is that it allows the JSC to discipline judges for conduct which is not impeachable.

Previously, if a judge was found to have done something wrong but it did not amount to gross misconduct, there was no disciplinary remedy available to the JSC. The new law creates three categories of conduct: "lesser complaints", "serious non-impeachable complaints" and "impeachable complaints".

"Lesser complaints" may be summarily dismissed by the chief justice or the judge president of the division which the judge falls under. Lesser complaints include complaints that are "hypothetical", "frivolous or lacking in substance" and complaints that are "solely related to the merits of a judgment or order". Complaints that are more serious, but do not amount to impeachable conduct, can result in a reprimand or written warning by the JSC or the JSC requiring the judge concerned to apologise, make compensation or to undergo counselling or a training course.

For impeachable conduct, the position is the same as it is currently: the JSC would recommend to Parliament to impeach the judge concerned and two-thirds of Parliament would need to vote for the judge to be removed.

Apart from the tribunal, the law also establishes a permanent committee to receive and deal with complaints.

Lack of candidates it can recommend compels commission to advertise yet again for a Constitutional Court judge

Judiciary struggles on rocky road of transition

Franny Rabkin
Staff Writer

THE announcement by the Judicial Service Commission (JSC) last week that it would advertise again for a Constitutional Court judge means that this will be the third time the position has been advertised.

Chief Justice Pius Langa said last Wednesday that even though four candidates had been interviewed for the position, "the JSC considered that the names it would be able to submit to the president, as a result of the interviews, fell short of the requisite number of four".

The constitution requires the JSC to give the president a list of names with three more names than the number of posts available.

Because the JSC felt that one or more of the candidates interviewed could not be recommended, Langa said "no recommendations for appointment to the vacancy could therefore be made".

This will be the second time the post has had to be readvertised. In August, the position was readvertised for similar reasons: because the number of "appointable candidates" fell short of what was required.

Before the August advertisement, Business Day's sources said that the earlier list of people who had applied was "weak". This was apparently a result of the immense pressure on the Constitutional Court following the complaint made by the Constitutional Court judges to the JSC that Western Cape Judge President John Hlophe had tried to influence the outcome of cases then before the court involving African National Congress president Jacob Zuma.

But the JSC was already cutting it fine when it interviewed only four candidates for the position. This happened because three of the original seven hopefuls withdrew their applications.

Judge Eberhard Bertelsmann withdrew his application a week before the interviews, and judges Chris Jafta and Frank Kroon withdrew theirs at the last minute.

Again the JSC would not give reasons for the Jafta and Kroon withdrawals, but both are entangled in the legal wrangle with Hlophe. Both were acting on the Constitutional Court bench when Hlophe allegedly made his approach, and Jafta was one of the judges Hlophe is said to have approached.

This meant that only four people eventually applied, leaving the JSC with no option but to submit all their names to President Kgalema Motlanthe or readvertise.

When the JSC last readvertised the post, other explanations were bandied about in the media for the lack of candidates: unhappiness at the way the Constitutional Court was being run and also, unhappiness at how the Constitutional Court chose which cases it could decide. Candidates were said to have thought they might have a better chance in the next round of interviews when four posts instead of one would be made available.

It is likely there is more than one explanation, and that potential candidates were motivated by different considerations. It may also be that behind it all is a deeper problem going to heart of the rocky transition of the judiciary from a (usually blunt) apartheid instrument to an instrument of justice and transformative change.

This process has not been without its pains, with many of the more conservative judges and advocates having to be dragged to the transformation party kicking and screaming.

The constitutional imperative of racial and gender representivity continues to cause dark mutterings in the corridors of courts and chambers.

White lawyers feel hard done by as they feel being a brilliant lawyer is not good enough for judicial appointment or promotion any more. Black lawyers feel hard done by because old patterns of privilege are still being perpetuated, and being a brilliant lawyer does not mean one will be briefed.

Nowhere was this school of thought made clearer than in Judge Carole Lewis's speech last week, which has since led to a decision by Advocates for Transformation to make a complaint to the JSC.

In her speech, Lewis referred to the practice of the JSC since 1995 to broaden the pool from which it could choose candidates for judicial office. Judicial appointments were previously drawn only from senior counsel.

Now, the JSC interviews attorneys, magistrates, junior counsel and academics. She said that this was necessary for transformation because the vast majority of silks were white.

Lewis said that appointing judges with little court experience had "done the public no service" as it resulted in bad decision-making.

In the past few years many potential candidates were disenchanted because they felt they might be "deprecated as white, and therefore old-order, judge(s)", she said. Some felt "that political fealty is a more assured path to appointment as a judge than ability".

Lewis told Business Day last week that this was not her own view — it reflected the views expressed by members of the legal fraternity — but the issues needed to be debated openly.

Indeed, what Lewis said openly is what one hears off the record often.

Since Constitutional Court judges are often drawn from judges on other benches, the same feelings and perceptions would presumably apply to those who could potentially be promoted to the Constitutional Court.

But the problem with the feelings reflected on by Lewis is threefold. On the one hand, it seems based on an assumption that only silks really know the law and have enough court experience to become judges.

From the JSC interviews in Cape Town earlier this month, that was not cut and dried. There were senior counsel who stumbled when quizzed on landmark judgments, and there were magistrates whose legal knowledge and understanding was excellent.

Second, the appointment of a wider range of people has had dramatically positive results. Judges are more representative, less elitist, and more diverse.

The face of authority in SA is no longer an old, male, white, rich, private-school educated, suburb-dwelling face.

Finally, the idea that "struggle credentials" give you the edge misconstrues what the JSC is really doing.

Justice Minister Enver Surty put it clearly when he said "the expectation is not that you have to have been a political activist to be appointed to the bench".

He said the question was whether a candidate had contributed to transformation because it showed a type of consciousness that would enable a person to be a better judicial officer.

The Judicial Service Commission is to advertise again for a vacancy in the Constitutional Court after having only four nominations — too few to present to the president. Picture: MARTIN RHODES

NEWS Analysis

AU urged to solve Africa's peace problems

Hopewell Radebe
Diplomatic Editor

PRETORIA — Sustainable mechanisms must be found to support Africa's mediation, peacemaking and peacekeeping efforts, the deputy minister of foreign affairs, Sue van der Merwe, said yesterday.

Addressing a round table discussion with members of the African Union-United Nations (AU-UN) panel, chaired by Italian Prime Minister Romano Prodi, Van der Merwe said Africa was increasingly taking its role seriously and shouldering its responsibilities in resolving conflicts on the continent.

The panel was created through UN Resolution 1809 after a debate in the Security Council early this year sponsored by SA. Van der Merwe said this had reaffirmed the international community's belief in the vital contribution of regional groups to maintaining international peace and security.

Deployments in Burundi, Darfur, Somalia, Sierra Leone and Liberia were testimony to the continent's desire to work towards building peace and a prosperous environment for its citizens, Van der Merwe said. She added that in some instances Africa had initiated peace monitoring operations that were later followed by the deployment of UN peacekeeping forces.

The AU-UN panel has been mandated to work out the details of exactly how to support peacekeeping operations undertaken by regional organisations, with particular reference to start-up funding, equipment and logistics. This was the result of the AU's appeal for more structured relations with the UN after its limitations to react quickly and to fund missions were acknowledged.

Van der Merwe said that under the leadership of UN Secretary-General Ban Ki-moon and his two predecessors, the UN has made significant strides towards supporting Africa's peace and security efforts.

Van der Merwe said UN capacity-building efforts have remained largely ad hoc as it has had to rely heavily on voluntary contributions. "Therefore we cannot overemphasise the work of this panel," she added.

Van der Merwe said while the UN in 1993 created a trust fund to finance activities aimed at enhancing African peacekeeping capacity, the fund had unfortunately proved to be insufficient and unsustainable.

"So rather than a trust fund, providing funding for UN capacity-building efforts and African peacekeeping operations from assessed United Nations contributions would thus seem to be the most reliable option. We therefore hope that the panel will explore this and other options in detail," Van der Merwe said.

Relevant articles

MAIL & GUARDIAN,08 - 14 AUGUST 2008

ATTACKS ON THE JUDICIARY

The leaders of Cosatu, the South African Communist Party and the ANC have stepped up their rhetoric against the judiciary, despite Chief Justice Pius Langa's warning that their criticisms could undermine confidence in the judiciary and hinder its effectiveness.

At a lecture on Friday in honour of former chief justice Ismail Mahomed, Langa said: "Comment and criticism must be informed and thoughtful, not reactionary and alarmist, because that would tend to undermine the rule of law ... Such criticism also has the potential to weaken confidence in the judiciary; and without public confidence, the judicial system loses its legitimacy and cannot operate effectively."

On Wednesday Cosatu deputy secretary Bheki Ntshalintshali told protesters in Pretoria: "We cannot have a judicial system that acts in the manner which our courts have acted ...

"No amount of threat will intimidate Cosatu from talking about the conduct of the judiciary. We are not going to be told that judges are angels. They take decisions under the influence of liquor."

On Thursday SACP general secretary Blade Nzimande said institutions of the criminal justice system are not above the law and cannot act outside the prescriptions of basic law.

Nzimande told the *Mail & Guardian* last week that the Constitutional Court's ruling against Zuma was "a constitutional jungle" and that South Africa "was going down the dangerous route of becoming a banana republic".

He also attacked senior ANC members Kader Asmal and Raymond Suttner for keeping quiet while Zuma's rights were being abused.

"How do we explain this long lapse and the suddenly renewed post-2007 activism of theirs — in the light of the need for revolutionary consistency on matters of justice and human rights?" he asked.

Writing recently on the SACP website, the party's national organiser, Solly Maphaila, accused the judiciary of "being collusive to a perpetual assassination of human rights and justice in this country".

"The judiciary is living in its own elitist lagoon away from the reality of South African society. In fact it has almost become a judicial cabal subtly colluding with one another and sending particular signals on its course of action," Maphaila wrote.

Reacting to Langa's speech and the fact that the Constitutional Court handed down its judgement days before Zuma's Pietermaritzburg High Court application, ANC secretary general Gwede Mantashe suggested the judiciary was being "mobilised" against Zuma.

ANC spokesperson Jessie Duarte told reporters outside the Pietermaritzburg High Court this week that Zuma was being subjected to malicious prosecution and that ANC leaders "had serious reservations" about whether he would receive a fair trial. — *Mail & Guardian reporter*

National

Commentators weigh in on the likely Constitutional Court candidates

Judges in the dock

Sello S Alcock

The Judicial Service Commission will meet on September 17 to finalise a shortlist of candidates to interview for a solitary Constitutional Court seat, to be vacated later this year by retiring Judge Tholakele Madala.

The seat is the first of five to be vacated this year and in 2009 by Nelson Mandela-era judges who spearheaded South Africa's first Constitutional Court.

It marks an initial step in a process of renewal that will see the largest number of the court's founding judges leaving together. The group includes Chief Justice Pius Langa and judges Albie Sachs, Kate O'Regan and Yvonne Mokgoro.

According to the JSC a shortlist of candidates to be interviewed between October 13 and 17 in Cape Town will be available towards the end of this month.

The post was re-advertised after the JSC could not garner enough candidates for the interview. The original list, according to *Business Day*, consisted of magistrate Samuel Mashimbye, Judge Nigel Willis of the Johannesburg High Court, former Wits professor Mervyn Dendy, Judge Shenaz Meer of the Land Claims Court and Pretoria High Court Judge Eberhardt Bertelsmann.

Members of the JSC subsequently added the names of Supreme Court of Appeal judges Edwin Cameron and Christopher Nyaole Jafta and Acting Supreme Court of Appeals judge and judge president of the Northern Cape Division, Frans Kgomo.

The *Mail & Guardian* this week canvassed opinion in the legal and academic worlds to ascertain what the three judges who were approached by the JSC would bring to the Constitutional Court.

Most commentators said the ability to deliver timeously and write "quality" judgements that propel South Africa's liberal democracy forward were prerequisites for appointment to the court.

The appointee should have experience in constitutional and other legal matters. He or she need not come from the SCA but should have shone either as a judge, attorney or advocate.

Kgomo, from the North West town of Brits, is considered by some to be the weakest of those added to the list.

Currently serving in an acting capacity on the SCA, he is the judge president of the Northern Cape Division, one of South Africa's smallest divisions.

Kgomo has taken a similar legal route to that of Langa, working his way from the bottom of the legal system — he first worked as an interpreter and clerk in the former homeland of Bophuthatswana.

The 61-year-old married father of five, whose career began in the 1960s, has also served as a prosecutor and district and regional magistrate.

Kgomo will be remembered for his judgements in two landmark cases dealing with equality. The first of these involved Judge Kathy Satchwell who fought for the right of her same-sex partner to benefit from her pension payout.

Kgomo declared that sections of the enabling legislation were unconstitutional and referred the case to the Constitutional Court for confirmation. The Constitutional Court, in a ruling handed down by Judge Madala, later confirmed his ruling.

In contention: Judge Frans Kgomo. Photograph: Garth Stead

Kgomo's other prominent case, while a judge in the Pretoria High Court, involved another judge, Anna-Marie de Vos, who sought an order declaring that lesbian couples might adopt children.

In 2006 Kgomo was involved in a racial spat with other judges of his division after he recommended to Justice Minister Brigitte Mabandla that a "junior judge" act as head of the court while he was on leave. He later laid a complaint with the JSC.

Once seen as a rising star who was certain to rise to the highest court in the land, Christopher Nyaole Jafta's ascent has, according to legal sources, been slightly tainted by involvement as one of the judges Cape Judge President John Hlophe allegedly attempted to influence in a case involving ANC president Jacob Zuma.

Hlophe allegedly approached Jafta while the latter was an acting Constitutional Court judge.

Hlophe has admitted that the two judges indeed discussed the Zuma case and would not reveal the contents of another "confidential" conversation he had had with Jafta.

The majority of those canvassed still believe, however, that he would make an exceptional Constitutional Court judge and that he has delivered some solid judgements in the past.

Jafta served for many years as acting judge president of the Transkei division and also had a spell as an acting judge in the Labour Appeals Court.

A former academic, he previously taught in the Western Cape with Hlophe.

In 1999 Mandela is said to have seriously considered appointing a former Oxford University Vinerian scholar, Edwin Cameron, to the Constitutional Court.

At the last minute, it is said, deputy president Thabo Mbeki intervened and Cameron was not appointed.

The *M&G* understands that it is Cameron's fear of again being rejected, primarily on racial grounds, that made this SCA judge reluctant to make himself available for the Constitutional Court on this occasion.

It is believed, however, that the highly respected Pretoria-born jurist, who has openly declared that he is gay and HIV-positive, will make himself available if enough of his peers ask him to.

One prominent lawyer described Cameron as the best lawyer of his generation. Across the race spectrum, he is seen as the judge most suitable to take up Madala's seat on the Bench.

However, the consensus is that Mbeki is still unlikely to appoint him, as he has been a staunch critic of the president's stance on HIV/Aids and state provision of antiretrovirals.

Cameron has been a judge since 1999 and has served acting stints on the Constitutional Court, where he wrote judgements which are widely cited in teaching and legal practice.

A lawyer friend of his told the *M&G* that principle drove him, while highlighting his clarity of thought.

Judge Edwin Cameron

Relevant articles

MAIL & GUARDIAN, 06 - 12 JUNE 2008

Comment & Analysis

Without fear or favour ...

The statement by the Constitutional Court complaining that Cape Judge President John Hlophe tried to influence its deliberations

1 A complaint that the Judge President of the Cape High Court, Judge John Hlophe, has approached some of the judges of the Constitutional Court in an improper attempt to influence this Court's pending judgment in one or more cases has been referred by the judges of this Court to the Judicial Service Commission, as the constitutionally-appointed body to deal with complaints of judicial misconduct.

2 The complaint relates to the matters of Thint (Pty) Ltd v National Director of Public Prosecutions and Others (CCT 89/07); JG Zuma and Another v National Director of Public Prosecutions and Others (CCT 91/07); Thint Holdings (South Africa) (Pty) Ltd and Another v National Director of Public Prosecutions (CCT 90/07); and JG Zuma v National Director of Public Prosecutions (CCT 92/07). Argument in these matters was heard in March 2008. Judgment was reserved in all four matters. The Court has not yet handed down judgment.

3 We stress that there is no suggestion that any of the litigants in the cases referred to in paragraph 1 was aware of or instigated this action.

4 The judges of this Court view conduct of this nature in a very serious light.

5 South Africa is a democratic state, founded on certain values. These include constitutional supremacy and the rule of law. This is stated in section 1 of our Constitution. The judicial system is an indispensible component of our constitutional democracy.

6 In terms of section 165 of the Constitution the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts. Organs of state must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the Courts.

7 Each judge or acting judge is required by item 6 of schedule 2 of the Constitution, on the assumption of office, to swear an oath or solemnly affirm that she or he will uphold and protect the Constitution and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. Other judicial officers or acting judicial officers must swear or affirm in terms of national legislation.

The seat of justice: the highest court in the land, the Constitutional Court. Photograph: Nadine Hutton

8 Any attempt to influence this or any other Court outside proper court proceedings therefore not only violates the specific provisions of the Constitution regarding the role and function of courts, but also threatens the administration of justice in our country and indeed the democratic nature of the state. Public confidence in the integrity of the courts is of crucial importance for our constitutional democracy and may not be jeopardised.

9 This Court — and indeed all courts in our country — will not yield to or tolerate unconstitutional, illegal and inappropriate attempts to undermine their independence or impartiality. Judges and other judicial officers will continue — to the very best of their ability — to adjudicate all matters before them in accordance with the oath or solemn affirmation they took, guided only by the Constitution and the law.

May 30 2008

The people must stand up for the judiciary

Serjeant at the Bar

The past couple of weeks have confirmed the truly risky nature of our constitutional journey, begun more than a decade ago. For most of the first decade it appeared as if the country had been blessed by a miracle. But warning sounds have been evident for some time. The xenophobia of the past few weeks revealed the uncontrolled visceral hatred that lurks below the surface of our society. The lesson was clear: we South Africans have not yet embraced the normative basis of our Constitution, that all who live here are deserving of equal concern and respect.

Last week the seemingly endless problems surrounding Western Cape Judge President John Hlophe bubbled again to the surface. The complaint was probably unique in a democratic society in that it was lodged by the highest court in the land, the Constitutional Court. The substance of the complaint is of the gravest kind: interference with the judiciary in the execution of its function. Let there be no mistake — had the complaint been made against an ordinary citizen, he or she would have been charged with a criminal offence.

As soon as the news broke, the debate began to take the form of the previous controversy, which had to do with Hlophe's financial relationship with Oasis. The Cape Bar Council called for his suspension, pending the outcome of the inquiry. Newspaper comment followed suit. Hlophe was quoted as both denying the allegations and suggesting that the complaint was yet another manifestation of the campaign against him.

The reason for this campaign was not spelt out by Hlophe, but newspaper reports provided some lines for speculation. The Zuma presidency-to-be would prefer Hlophe as chief justice over the current Deputy Chief Justice, the hugely distinguished Dikgang Moseneke.

Hlophe's supporters rallied as they did last time: no reason for him to step down pending an investigation; he is innocent until proven guilty. So the scene is set for a replay of last year. But this time the accusers are the highest court in the land. Will the legal profession be divided again, essentially on race lines, so that no agreement can be reached as to how to deal with the crisis? Last time the major lesson was that, as a country, we cannot agree even upon one broad set of standards or values by which to deal with public conduct. In turn, that raised serious questions about the country's constitutional future. If there can be no shared set of basic values, there can be no Constitution in practice.

That must be the challenge this time round: can we, the people of South Africa, agree about the appropriate standards for judicial conduct? If we fail, there may not be a judiciary. We are dependent upon an independent judiciary for the future of our constitutional democracy. Hlophe is clearly innocent until and unless the Judicial Service Council (JSC) pronounces to the contrary. Both he and the country will need the matter to be dealt with speedily and openly. The ultimate decision of the JSC must be clear, reasoned and understandable, so that it can be justified and thus supported. The public must know precisely how and why the JSC has acted. In this way the gulf that emerged last time can be bridged and the country can emerge with agreement about the basic values that should govern public institutions.

We, the public, are the last line of defence for the institution that protects all of us from arbitrary exercises of power. We have to stand together and insist on an independent and incorruptible judiciary. If we fail to agree, within a decade we will no longer have constitutional democracy.

Making way for Hlophe? Deputy Chief Justice Dikgang Moseneke

Comment & Analysis

Contretemps

Richard Calland

Part one: Spotlight on the Judge President

Glaring intrusions

The proceedings of the Hlophe hearing must not be distorted by TV cameras and lights

The legal profession is all aflutter. Ahead of the Judicial Service Commission (JSC) hearing on the historic complaint by the Constitutional Court against Western Cape Judge President John Hlophe, the tension is mounting. As noted in this column before, the stakes are very high on all sides.

But the immediate question is whether the hearing will be open to the public. Hlophe Mark I — the inquiry into whether he had obtained prior permission from then justice minister, Dullah Omar, in respect of his retainer from Oasis — was essentially held in secret. A terse statement emerged at the end of the deliberations announcing that the special JSC subcommittee had been unable to conclude that Judge Hlophe had not received oral permission.

There was no reasoning attached and, because the main hearing in spring 2006 was conducted in private, it proved hard for the JSC to sustain the credibility of its process. The transcript of the proceedings had to be prised out of the JSC through an access-to-information request made by the University of Cape Town, with other records, one of which showed that between 1994 and 1999 Omar had considered and assented to no fewer than 48 written requests for permission to take up financial compensation beyond the judicial salary.

This time, therefore, the JSC's own procedural integrity is as much in the spotlight as Judge Hlophe or the Constitutional Court. Given the background, the arguments for an open hearing are surely overwhelming. But what about the press and the broadcast media in particular?

This is not such a straightforward matter. The Freedom of Expression Institute's submission, along with others, makes the lazy assumption that once you accept that a hearing should be open, then it will automatically follow that the broadcast media in all their forms should be permitted to cover the proceedings.

But, at the risk of sounding a little pompous, the solemnity of the occasion must not be prejudiced. These are grave matters at hand and the hearing must balance the need for open justice with the importance of respecting the procedural integrity of the hearing.

It is important to distinguish between television and radio. The problem with TV cameras and their supporting lights in particular is that they are especially obtrusive. They are likely to add heat — figuratively as well as literally — rather than light, and what light is cast may well be outweighed by the distraction and the additional, and unwarranted, pressure they put on witnesses.

Open hearing: the Truth and Reconciliation Commission

The Truth and Reconciliation Commission proceedings were televised for good reason. While the cameras no doubt added to the stress on the participants, it enabled South Africans to see as well as hear the details of the gross human rights violations that were perpetrated.

In the case of Hansie Cronjé, it was necessary for South Africa to see Cronjé give evidence — in a sense to see the sweat roll down his temples as he was compelled to account for his acts of greed and manipulation. The thinking behind Idasa's challenge to the King Commission was that it was more about corruption and public abuse of power than cricket and it would reinforce the message that "corruption does not pay". I had not accounted for South Africans' apparent inexhaustible capacity for forgiveness; bizarrely, Cronjé was able to resurrect his standing, at least in some quarters, to the point where he is now widely regarded as a flawed hero, rather than an avaricious traitor to the cause of cricket and social transformation.

But back to the Hlophe hearing. While it would no doubt make for good theatre to be able to watch one of the country's finest cross-examiners, Wim Trengove SC, apply his forensic skills to the judge president, one suspects that the probative value of the exchange will be eclipsed by the impact that the TV footage will have on public perceptions of the hearing — and not for the good.

This is already a highly divisive issue. It is one thing to believe that seeing a disgraced former cricket captain emit sweat and even tears as he accounts for his wrongdoing would be in the public interest, but quite another to think that members of our judiciary should be subjected to the additional pressure of televised coverage. Being able to listen to the leading and cross-examination of witnesses on radio is more than enough.

Part two: Judicial salariat

Nice work if you can get permission

Talking of judges, to my great astonishment the ministry of justice has done something it has never done before: it has overturned its initial "deemed refusal" to provide records of all applications by members of the judiciary for permission to receive financial compensation beyond their judicial salary. This is good news in itself; perhaps it marks the breaking of a new dawn of openness in the ministry and a new commitment to complying with its own legislation, the Promotion of Access to Information Act.

It is also good news in terms of what it tells us about the judiciary. I feared that the records would reveal a range of potential conflicts of interest. It seems that Judge Hlophe was not only unique in making an oral, as opposed to a written, request for permission, but was a rare specimen in having acquired a corporate interest (his retainer with Oasis). Of the 336 requests for permission made by 79 active and discharged judges since 1994, the great majority are requests for permission to sit as private arbitrators and only a small handful reveal any corporate directorships.

It seems that rumours of the growth of the arbitration business are well-founded. Companies such as Woolworths and Sanlam increasingly prefer to appoint private arbitrators to resolve disputes, rather than going through the civil courts. Discharged Judges G Freidman and C Plewman top the table with 30 arbitrations apiece.

Nice work if you can get it.

The constitutional dance makes way for a populist jig

Serjeant at the Bar

This column has argued previously that constitutionalism depends upon the existence of a broad societal consensus on key values and norms. The future of the constitutional project also depends on cooperation rather than confrontation between government and the courts. Presciently, David Dyzenhaus, a renowned legal philosopher, warned last year in the pages of the *South African Law Journal* that it was no longer clear whether the government was prepared to continue this cooperative dance.

Developments during the past six months have confirmed the need for his warning. The government's foreign affairs policy, not only on Zimbabwe but also on other dictatorships like Burma, reveals that foreign policy and the Constitution are distant relatives who have not met for half a decade. The xenophobia that engulfed the country in the past two months confirmed so passionate a hatred of the "African stranger" that it made a mockery of our commitment to respect for the dignity of all who reside in this country. Julius Malema and Zwelinzima Vavi insist that their supporters would kill for Jacob Zuma. ANC secretary general Gwede Mantashe goes on to call the Constitutional Court "counter-revolutionary".

Whatever hermeneutic spin is placed upon these comments, the purport was clear: counter-revolutionaries wish to undermine the "revolution".

Then there's Judge John Hlophe. The Constitutional Court filed a complaint that goes to the heart of the administration of justice. A number of prominent lawyers complain about the publication of the complaint but say nothing about the fatal danger to the rule of law if the complaint is proved.

The deputy president of the ANC muses in public about the targeting of judges committed to transformation, thereby implying that there is some substance to the allegation of a Constutitional Court conspiracy against Hlophe. Mantashe roars in public about the counter-revolutionaries in the Constitutional Court.

So now we know what the fight against counter-revolution might entail, at least for the courts: the judges of the Constutitional Court must eschew a fidelity to the law and instead ensure the promotion of the cult of personality. To date Jacob Zuma has not denied unequivocally that no mandate, express or implied, would ever be given by him or his advisers to any person, including Hlophe, to seek to influence a court in the manner alleged.

Meanwhile, the litigation by businessman Hugh Glenister against the termination of the Scorpions revealed, from the government's own answering papers, that there was hardly a rational reason to destroy an effective crime-fighting agency rather than simply effecting improvements to the unit to ensure its greater accountability. As it stands, only those who engage in corruption will benefit from this decision.

All these developments support the idea that the constitutional dance is over and that a populist version is about to take over. ANC and Cosatu statements suggest that constitutional democracy may not be sacrosanct.

How have we arrived at a situation where the constitutional discourse of our leading judges, Pius Langa and Dikgang Moseneke, who have devoted their lives to the transformation of our society, gives way to the opportunistic populism of legal commentators who, in many cases, made no or a minimal contribution to the struggle for our democracy?

If this tendency continues, supported by adherence to a cult of personality, a disregard for institutions that can hold power accountable and curb corruption, then the constitutional dance will be over for good.

The values for a truly democratic country as set out initially in the Freedom Charter will then be honoured only as a historical curiosity. Make no mistake — we are in serious danger of ruining the possibility of continued struggle for the attainment of a transformed democracy by adherence to the demands of short-term political ambitions.

Relevant articles

THE STAR, 23 OCTOBER 2007

Comment & Analysis

Judiciary judged

The ANC has reportedly proposed a merging of the Constitutional Court and the Supreme Court of Appeal. Is this an attack on the judiciary or an attempt to streamline it, asks Pierre de Vos

Judges are not (and should not be) above criticism. The judiciary is one of the three branches of government and in a vibrant democracy the decisions and actions of judges must be scrutinised, debated and criticised — even harshly if need be.

But the judicial branch of government has a special place in our constitutional democracy because it acts as referee and — in the case of the Constitutional Court — as final interpreter and enforcer of the Constitution.

This means that the independence and integrity of judges must be jealously guarded to ensure that their decisions command wide respect and legitimacy — even when a decision is unpopular, inconvenient or damn well infuriating to some.

Criticism of judicial decisions or the actions of judges should therefore be honest and principled and should not be based on petty self-interest or expediency.

While the independence of our judiciary is partly safeguarded by the institutional mechanisms contained in the Constitution, the judiciary can be said to be truly independent only if all important role players in society respect and protect the freedom of judges to do their job "without fear, favour or prejudice".

The independence of the judiciary — one of the three pillars of our democracy — is therefore threatened not only when its institutional independence is under attack through proposed constitutional amendment, but also when politicians and lawyers attack the integrity of individual judges in an unprincipled way to gain a short-term political advantage. Over time such attacks will erode confidence in the courts and in the judicial system.

And no matter how ANC secretary general Gwede Mantashe now wants to "contextualise" his charge that the Constitutional Court had gone public with its complaint against Judge President John Hlophe "in psychological preparation of society" for its attack on Jacob Zuma, he was directly assaulting one of the pillars of our democracy. Mantashe, using a line of attack invented by Paul Ngobeni, argued that the Constitutional Court had breached a long-standing international law principle which prohibits those who lodge a complaint against a judge from making this public.

A quick perusal of the relevant UN document makes clear that such a principle does not exist.

What is required is that the body charged with examining a complaint against a judge — in this case the Judicial Services Commission — must keep the examination confidential at least during the initial stage.

No such obligation rests on those who lay a complaint against a judge. It is therefore difficult not to conclude that this attack on the Constitutional Court is not based on an honest and principled concern for the law, but on a desire to discredit any decision the Court might make that would be to the detriment of ANC leader Jacob Zuma.

Against this background, it is perhaps understandable that proposals by the ANC to radically reorganise the judiciary will be viewed with alarm by those who understand and value the importance of an independent and impartial judiciary for a constitutional democracy.

The ANC document, reported on in the press at the weekend, includes proposals to merge the Constitutional Court and the Supreme Court of Appeal and to create a "judicial council" to assist the chief justice with governance of the judiciary.

The document also proposes that an advisory board, consisting of legal representatives and civil society delegates, draft rules for all courts and that the minister of justice should control the administration of courts, leaving judges only to adjudicate cases.

The document also argues that a complete separation of powers is neither possible nor desirable.

"What is critical is that overlap [between the three branches] must be carefully checked and balanced to avoid usurpation of power of one organ by another."

In the climate of distrust created by the unprincipled attacks on the Constitutional Court and the leadership of the judiciary, it would be easy to jump to conclusions and to assume that the ANC is planning an all-out attack on the judiciary.

But many of the proposals — while perhaps not wise or well thought through — could be viewed as a genuine attempt to streamline the administration of justice and to provide ordinary people with better and faster access to courts.

It is worrying, though, that the proposals seem to resuscitate the idea that judicial independence merely requires judges to be allowed to decide their cases, effectively leaving the administration of justice in the hands of the minister.

Judicial independence can be safeguarded only if politicians are kept at arm's length from the administration of justice and from decisions about how to administer the courts.

Recent events have shown that some politicians — given half a chance — will interfere with the governance of the judiciary for short-term political ends. This must not be allowed to happen.

One hopes that the honest and principled membership of the ANC leadership collective understands this and will thwart any attempt by hotheads to usurp the power of judges to administer their courts.

Professor Pierre de Vos teaches constitutional law at the University of the Western Cape

HIGHEST COURT . . . Our judicial system already has a backlog of cases, without political in-fighting adding to the pressure on busy courtrooms *Picture: Khaya Ngwenya*

POLITICAL BALL IS IN OUR COURTS

The judiciary is the cornerstone of any vibrant democracy, but **SABELO NDLANGISA** wonders if South Africans are becoming over-reliant on it to settle political disputes

WHILE it is almost inevitable that courts will be drawn into resolving political disputes, it seems that they are increasingly being used to resolve political disagreements when members of political parties fail to agree.

A case in point is Bantu Holomisa's drawn-out but futile battle to prevent two United Democratic Movement (UDM) MPs and four MPLs from crossing over to the ANC three years ago.

He sacked the six on the eve of the 2005 floor-crossing period after accusing them of violating the "letter and spirit" of the UDM constitution and of "pursuing a campaign to destabilise our party". He suspected they were plotting to defect to the ANC, taking with them the seats the party had won during the previous year's general election.

The six members – the late MP Malizole Diko, MP Nomokhaya Mdaka, Eastern Cape MPL Mahandla Gogo, ex-Limpopo MPL Ike Kekana, Western Cape MPL Zolile Siswana and Gauteng MPL Kofie Needane – challenged their suspension on the grounds that Holomisa had flouted the party's constitution in suspending and then sacking them.

Justice

They took the matter to the Cape High Court, which ruled in their favour. Even though they subsequently left the UDM, the six did not defect to the ANC but formed their own party. This could suggest Holomisa was being paranoid in suggesting they were intending to cross over to the ANC, and that his decision to fire them to prevent their defection was a self-fulfilling prophecy.

But what was interesting about that case was that a court stepped in to bring justice into a situation where internal party mechanisms had failed to provide members with any recourse to justice.

Holomisa himself has never been shy about threatening the ruling party or government with court action when there is disagreement on a political issue. His expulsion from the ANC in 1996, after testimony implicating a fellow party member in corruption, is a case in point.

Laws

More recently, his party was part of a legal battle initiated by businessman Hugh Glenister to prevent the ANC-dominated Parliament from passing legislation to absorb the Directorate of Special Operations (DSO) into the SAPS.

The fate of the Scorpions, as the DSO is commonly known, was sealed by the ruling party's national conference in Polokwane, which resolved they should be disbanded.

Other opposition parties, which clearly do not have the numerical strength to stop such a move by the ANC in Parliament, had joined Glenister's Pretoria High Court bid to prevent the passing of such a bill.

After the failed high court bid, Glenister took the matter to the Constitutional Court, asking it to stop the move before it caused irreparable damage.

He is not the first citizen to take a contentious political issue to court. Last year a Louis Trichardt residents' association took the local municipality to court over the changing of the name of the Limpopo town to Makhado.

The Supreme Court of Appeal set aside that court's decision to allow the renaming of the town, after it found the municipality had not done enough consultation. The town is still officially Louis Trichardt.

NAME GAME . . . Last year a Louis Trichardt residents' association took the municipality to court over the changing of the name of the Limpopo town to Makhado *Picture: Chester Makana*

LEGAL ACTION . . . Bantu Holomisa battled to prevent two United Democratic Movement MPs and four MPLs from crossing over to the ANC *Picture: Johnny Onverwacht*

Powerlessness

Somadoda Fikeni, a political analyst at the Human Sciences Research Council in Pretoria, says the trend of taking political issues to courts should be seen partly as the response of minorities which feel powerless to influence political decisions through electoral processes.

Citing the example of Makhado, Fikeni said: "They are saying: what we lost through the elections, we will recover through the technicalities of law."

He argues that poor communities (for example Khutsong, which was being moved to North West from Gauteng province) tend to resort to violence when they feel the avenues for venting their anger over government decisions are closed. They use the expensive avenue of the courts, he says, only as a last resort.

However, this begs the question of whether such expressions of dissatisfaction – through violence or legal action – would arise if people's views were fully taken into account during public consultations on policy issues.

If the views of the majority of Khutsong and Matatiele residents (see story on the right) had been factored in during consultations, would we see the kind of fall-out that resulted from their re-demarcation?

Too Slow

And then there are those cases where minorities may feel the ruling party or government is taking too long to make policy decisions that could address their rights to equality.

The recent lawsuit by the Chinese community to be recognised as historically disadvantaged for purposes of black economic empowerment benefits, and the gay and lesbian communities' Constitutional Court action to have their unions officially recognised, spring to mind.

It is probably also the slow-footed approach to resolving problems that prompted the community of Phiri, in Soweto, to successfully take the ANC-led Johannesburg municipality to court over prepaid water meters, which they felt were infringing their rights.

In such cases the judiciary is criticised for encroaching on the domain of the executive, which is to formulate policy.

Internal

The ANC itself has been prone to internal litigation. This undoubtedly led to the Polokwane resolution that the party should come up with "a procedure that allows ANC members to exhaust internal processes before they take the movement to court on organisational matters".

The more that divisions and tensions grow within the ruling party, the more we see lawsuits by party members aimed at addressing internal disputes. Many of these have happened in Free State, where there has been in-fighting in ANC-controlled municipalities and regions, the latest being a court bid by Vax Mayekiso and Sello Dithebe to reverse decisions taken by regional ANC conferences in the province.

Other Parties

The Pan Africanist Congress is also dealing with its current internal leadership squabbles in court.

Former PAC leader Motsoko Pheko is taking current leader Letlapa Mphahlele to court to reverse his expulsion from the party.

But can a judiciary battling to cope with criminal justice and civil cases afford to mediate in endless political squabbles?

Fikeni says it is not normal for a young democracy such as ours to be dealing with political issues through the courts. "It is an indication of strains in the political system. This thing is putting so much strain on our judiciary because they come up as urgent applications when the judiciary (already) has other issues to deal with," he says.

Faith

But Joe Teffo, a political analyst based at the University of Limpopo, believes such lawsuits are a sign that our democracy is maturing and the public has faith in the independence of the judiciary.

"It says the integrity of the judiciary will have to be protected by the judiciary itself," Teffo says.

Maybe, as a young democracy, we need to test our laws and constitution to know the limits of the rights they give us as citizens.

Judiciary's role is resolution

THE following are four examples of political disputes which will be or have gone to court to find justice.

Hugh Glenister and the Scorpions' legislation

A FEW months ago, businessman Hugh Glenister brought a case before the Pretoria High Court to prevent cabinet passing legislation to dissolve the Scorpions.

The initial decision to dissolve the Scorpions was taken by the ANC at its national conference in Polokwane in December last year. There are widespread perceptions that the decision was taken to shield ANC leader Jacob Zuma from prosecution by the Scorpions and the National Prosecutions Authority.

The ANC feels that some of the prosecutions of its top officials are politically motivated, and that the elite investigations unit has failed to deliver on its mandate to fight organised crime. The court struck the matter off the roll because it felt it did not have the jurisdiction to hear the matter.

The contentious law has not yet been passed, and Parliament is still conducting consultations on the Scorpions.

The court is expected to consider whether the circumstances warrant that it should intervene to reverse the process of passing the law that will incorporate the Scorpions into the SAPS. This even though the executive is yet to sign the bill into law.

Glenister argues that the decision to dissolve the Scorpions violates his, and the rights of the public, to safety, saying it could cause "irreparable damage".

While opposition political parties acted as friends of the court during the high court bid, they are currently cited as respondents along with President Thabo Mbeki, Justice and Constitutional Development Minister Brigitte Mabandla, the NPA and the speaker of the National Assembly. Opposition parties say they will abide with the court's decision.

Mabandla and Safety and Security Minister Charles Nqakula oppose the application on the grounds that courts should only step in regarding the exercise of the executive's power "where the protection intended by the Constitution cannot be provided by the courts unless they intervene at an early stage".

Free State ANC dispute

Two months ago, senior Free State ANC members Vax Mayekiso and Sello Dithebe brought a court case against provincial party leader Ace Magashule and others to nullify the decisions of three ANC regional conferences.

The regional conferences in Fezile Dabi, Lejweleputswa and Motheo were held in the build-up to the elective provincial conference in Parys last month. Mayekiso and Dithebe, who now face the party's national disciplinary committee for sowing divisions in the ANC, wanted the Bloemfontein High Court to reverse their suspension from taking part in the ruling party's activities.

The court case was a sequel to the one they brought before the same court on the eve of the Polokwane conference, which was settled out of court. Mayekiso and Dithebe lost the more recent case.

UDM and floor-crossing

In 2002 the United Democratic Movement took the president and the government to court over newly passed legislation allowing Members of Parliament to defect from their parties during floor-crossing periods without losing their seats.

During such intervals, members of a political party could defect to another without losing their seats as long as 10% of the elected representatives in that party also defected – something seen as favouring the ruling party at the expense of smaller parties.

The UDM, which feared losing elected officials to rival parties, questioned the validity of the four acts of Parliament that made floor-crossing legal.

The UDM argued that the right to vote and proportional representation in all tiers of government were enshrined in the Constitution, and not subject to change. It said the legislation was not in line with constitutional values such as multiparty democracy.

The Constitutional Court ruled that "a prohibition on floor-crossing is not an essential component of multiparty democracy, nor of proportional representation".

While it stressed that the merits or the demerits of the defection legislation was a political question the court was not concerned with, it found that floor-crossing was not inconsistent with the Constitution.

In the aftermath of the ruling, parties such as the UDM became the biggest casualties as they lost public representatives to rivals such as the DA and the ANC.

PUBLIC CAUSE . . . Hugh Glenister tried to protect the Scorpions *Picture: Christiaan Kotze*

Matatiele and demarcation

In 2006, the ANC-led Matatiele municipality and others took President Thabo Mbeki and others to the Constitutional Court over amendments to the Constitution that changed the country's boundaries and moved the municipality from KwaZulu-Natal to the Eastern Cape.

The move was in line with an earlier ANC and government decision to get rid of cross-boundary municipalities to speed-up service delivery.

They argued that the changes to the Constitution were unconstitutional as the redemarcation ought to have been done by the Municipal Demarcation Board.

In February 2006, the court threw out the application but called for further arguments over whether amendments were in line with the Constitution.

Even though the new Matatiele council abandoned the case when it took over after the March 2006 local government elections, the court ruled that provincial legislatures had to approve changes to provincial boundaries.

Therefore, the provincial legislature had a duty to consult the affected communities, the court found. It ruled that "the Eastern Cape had complied with its duty to facilitate public involvement by holding hearings in the affected areas, but KwaZulu-Natal, in not holding any public hearings or inviting any written submissions, acted unreasonably."

The legislature went back and consulted, and now Matatiele is fully in the Eastern Cape.

Relevant articles

THE STAR, 23 OCTOBER 2007

African National Congress (ANC) president Jacob Zuma speaks at the launch of the Gauteng ANC election campaign in Pretoria yesterday. Thousands of people dressed in yellow T-shirts bearing Zuma's image listened attentively as he encouraged them to register to vote. Picture: ARNOLD PRONTO

No need for early Mbeki exit – Zuma

Party unity is more important than 'beating a dead snake'

Sibongakonke Shoba
Staff Writer

WHILE Jacob Zuma's supporters called for the removal of President Thabo Mbeki from office after Friday's Pietermaritzburg High Court ruling, the African National Congress (ANC) president has told Gauteng party cadres he will not waste his energy on a "dead snake".

Sentiment in the ANC and its allies for Mbeki to be recalled is growing, but yesterday's speech was an indication that Zuma wants Mbeki to stay until next year's election.

Zuma said issues that divided the party and the tripartite alliance should be discussed only after the election.

"We can't hold debates among ourselves that raise the temperature. There is an administration that is coming to an end, so if you do so, you are like someone who beats a dead snake. It died a long time ago, but you are still beating it... wasting your energy."

But sentiment in the party is so strong that Zuma might not be able to prevent Mbeki's removal. The ANC Youth League and the Umkhonto we Sizwe Military Veterans' Association have called for Mbeki to go after Judge Chris Nicholson found "political entanglements and machinations in the whole matter of the applicant's (Zuma's) prosecution" and set aside the decision to prosecute him.

Gauteng ANC chairman Paul Mashatile said the provincial executive would meet on Thursday to discuss the judgment and "what we need to do".

"We welcome the decision of the court," he said.

The ANC national executive committee is also expected to discuss Mbeki's future when it meets from Friday.

However, Zuma has called for party unity before the elections, saying this was not the time to criticise each other.

Zuma said the ANC needed to identify its achievements as it campaigned. "You can't win an election by saying 'look I'm very bad but please elect me'. You can't say so. You've got to say 'I look very nice and I'm going to be nicer'."

He said party cadres had the task of reporting back to the voters on the ANC's successes and failures and how it planned to rectify its mistakes.

He emphasised the need for the party to promote the culture of volunteering, reviving mobilising structures and street committees in order for the party's manifesto messages to reach all citizens.

He said the ANC must increase its vote in next year's election as the party was the main factor in South African politics and economics. Its advantage was that it was "a caring government", Zuma said.

More reports: Page 3
Comment: Page 8
Opinion & Analysis: Page 9
The Bottom Line: Page 10

CITY PRESS, 24 AUGUST 2008

Kgalema defends judges

■ **War talk at Zuma trial could anger judges**
■ **Attacks on Judge Langa based on ignorance**

MAKHUDU SEFARA, CAIPHUS KGOSANA and SABELO NDLANISA

ANC deputy president Kgalema Motlanthe has sharply contradicted some ardent supporters of party leader Jacob Zuma on the judiciary, economy and even the SABC.

In an interview with City Press at his Cape Town office, Motlanthe said attacks on the judiciary were predicated on "ignorance" and that often people confused the utterances of individuals with party policy and positions.

Motlanthe, seen by some as the voice of reason within the Zuma group, said the attacks on Chief Justice Pius Langa for his comments that Zuma's pre-trial litigation appeared to have no purpose other than to delay his criminal trial, were baseless.

He said: "I would always be wary of doing that (attacking the judge) from a position of ignorance. But ordinary people don't have access to that kind of information (submissions by the state claiming Zuma's pre-trial litigation was meant to delay his trial).

"I know I can access those because they are public documents now, but ordinary people wouldn't, and it would be helpful also if journalists are able to contextualise the quote in that fashion."

But other less ordinary people who attacked Langa included SACP general secretary Blade Nzimande and ANC treasurer Mathews Phosa.

The two have also criticised Langa's comments on how the Constitutional Court has handled a complaint against Cape Judge President John Hlophe, who stands accused of having tried, but failed, to influence two Constitutional Court judges to rule in favour of Zuma.

Nzimande, in his response to Langa's pre-trial litigation statement, said the pursuit of justice did not start at the commencement of a trial and questioned why Langa had to mention the Hlophe matter in the judgment.

Motlanthe said: "That's why I am saying you can't just say 'why did he have to comment on' this if you are not aware of what was placed before the Constitutional Court." Motlanthe said he had access to records which he read, but that the majority of those who had criticised the courts and Langa were unaware of the content of the submissions.

Asked if busing thousands to sing outside court when Zuma appeared at the Pietermaritzburg High Court would not have an intimidatory effect on the judges hearing Zuma's case, Motlanthe said it was difficult to intimidate judges as they were well-trained.

He warned that, if anything, such support could have an adverse effect on Zuma as the judges could adopt hostile positions against him. He said the war talk outside court and threats to bring down the building could "actually irritate judges and anger" them.

He said a balance ought to be struck, though, between the right to express an honest opinion without inhibitions.

When the Constitutional Court ruled against Zuma four weeks ago, Nzimande suggested it was not purely on merit. He said the case against Hlophe was meant "to prepare us for this", implying the country's top judges were using subterfuge to deal with Zuma.

KGALEMA MOTLANTHE

But on Friday, members of the Congress of SA Students (Cosas) were more direct in their attacks on Langa and the judiciary. Kenny Motshegoa, president of Cosas, said judges were "drunk with opportunism" and engaged in "evil and dangerous games".

Motshegoa, who said the Constitutional Court was led by counter-revolutionaries, added that it had "failed to act without bias towards the president of the ANC" and claimed that the judges had become politicians.

The insults Cosas hurled at the Constitutional Court followed Sasco's attack on Deputy Chief Justice Dikgang Moseneke after the court ruled against Zuma four weeks ago.

"We were, however, not surprised at the ruling because actions of Deputy Chief Justice Moseneke when he was drunk in (sic) his birthday party had clearly expressed his utter hatred for the president of the ANC, comrade Jacob Zuma. In our view a judge doesn't cease to be a judge because he is drunk, instead he becomes a drunk judge who, like all other drunkards, start expressing his honest views," said Sasco.

Motlanthe said the ANC's positions on the judiciary should not be lumped together with the views of individuals.

He said if South Africans, including members of the ANC, harmed institutions meant to uphold the country's democracy, "we harm ourselves".

When President Thabo Mbeki appointed the SABC board shortly after his defeat in Polokwane in December, some of Zuma's supporters in Parliament, Cosatu and the SACP publicly complained about the people appointed.

It took Motlanthe to point out to them that the same members of Parliament's communications portfolio committee had sent the names to Mbeki to endorse – and when he did, they complained.

On the SABC Amendment Bill, contrary to the enthusiastic embrace by Cosatu, the SACP and YCL of the bill that removes the powers vested in the president to appoint the board and forces him to consult with the Speaker prior to such appointments, Motlanthe threw caution to the wind.

"It (the bill) raises constitutional matters of course, because the Constitution defines the president as the chief executive of the country. The role of Parliament is to legislate and the role of the executive is to execute and if you say that (the president must consult the Speaker, head of legislature) then (the lines) gets blurred," he said.

On the economy, Motlanthe described Gear as a "prudent" macroeconomic policy. Cosatu has called it a "monster"not suitable to meeting the challenges inherited from apartheid.

Motlanthe said Gear was "useful" but had served its purpose. "If we hadn't followed that policy, I think the situation would have been worse now."

He said inflation targeting, an anchor of the country's monetary policy which has been the bane of Cosatu and the SACP's existence, should be sustained.

■ **See page 4 for full interview**

ANC NWC Statement

ANC National Working Committee (NWC) Statement on ANC President, Jacob Zuma
2 September 2008

The ANC National Working Committee (NWC), met in an extended session in Johannesburg yesterday (1 September 2008) and discussed - among others - the organisation's position on the case against the ANC President, Jacob Zuma.

It reviewed developments in this matter over the last years. It reaffirmed the view that the rights of the ANC President have been repeatedly and continually violated by state institutions and his dignity impaired without cause.

This case has been and continues to be divisive, resulting in the expression of sharply divergent views. It has become deeply politicised, with South Africans being asked to take sides.

It is the view of the NWC that it is time to address these divisions and to work towards a national consensus in dealing with this matter. It should be based on a shared commitment to the values, principles, rights and obligations contained in our country's constitution.

We should move beyond narrow political agendas towards a common national position in the interest of our country and our future in order to reinforce the integrity of the institutions of the State, and to safeguard the rights of all citizens.

These should include the right of all citizens to equal treatment before the law, to a fair trail, to be presumed innocent until found otherwise, and to protect against unreasonable and malicious actions by State institutions.

It is clear that the continuation of this case does not serve the interests of South Africa. It has long ceased to be a justifiable prosecution that can be said to be motivated by nothing more than the pursuit of justice.

The NWC urges all South Africans to look beyond entrenched positions to find common ground in a concerted effort to answer this challenge.

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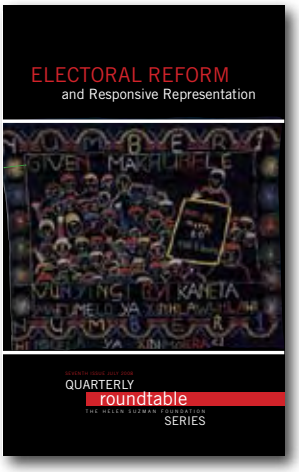

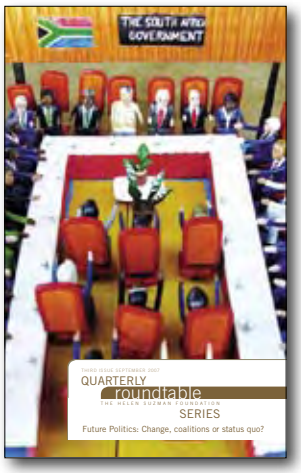

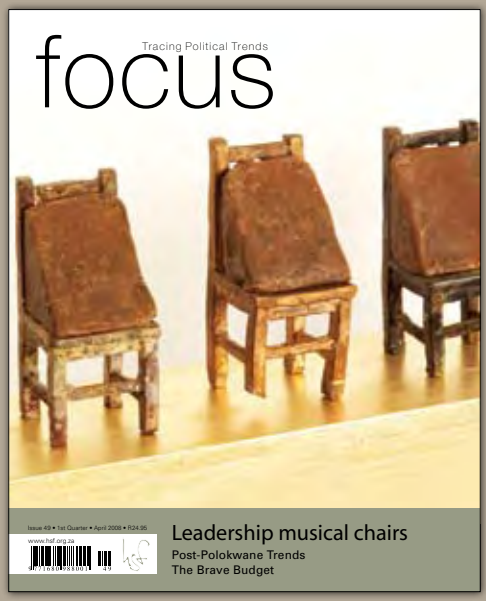

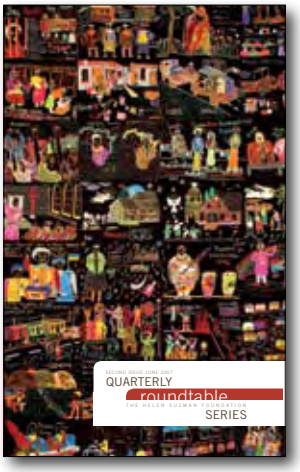

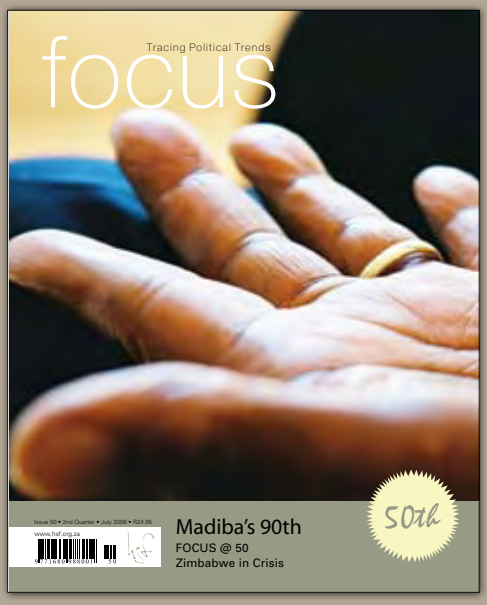

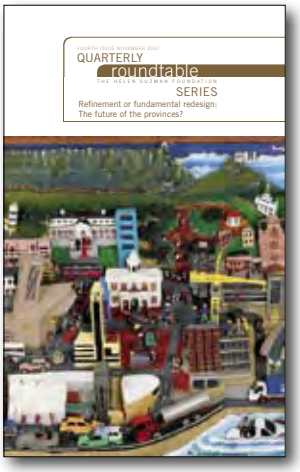

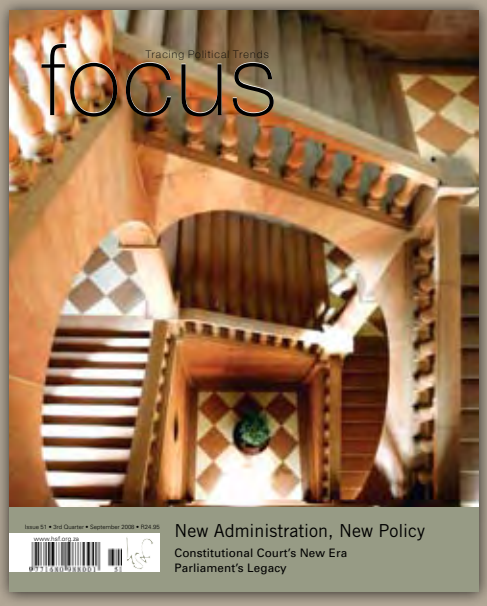

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