

ATTACKS ON JUSTICE – SOUTH AFRICA

Highlights

Issues of the gender and racial composition of the judiciary, as well as allegations of racism within the judiciary, have come to the fore towards the end of 2004. The introduction of a package of bills allegedly affecting the independence of the judiciary received considerable attention in the first few months of 2005 and is still the subject of ongoing debate. The trial and conviction of Schabir Shaik, the former financial adviser to Jacob Zuma, on charges of corruption and fraud, led to the dismissal of Zuma as deputy president of the country in June 2005. Zuma has subsequently been charged with corruption by the National Prosecuting Authority.

BACKGROUND

The ANC-SACP-COSATU alliance continues to hold approximately two-thirds of parliamentary seats, as it has done since the first democratic non-racial elections in 1994. President Thabo Mbeki was elected President of the country for a second term in 2004. Jacob Zuma, the deputy president from 1999 to 2005, was recently dismissed because of his alleged involvement in fraud and corruption. He was replaced in June 2005 by South Africa's first woman deputy president, Ms Phumzile Mlambo-Ngcuka.

Economically, South Africa is characterized by a marked disparity between rich and poor. Despite a well-developed infrastructure and an abundant supply of natural resources, daunting social and economic problems remain that are mainly the legacy of the apartheid era: poverty, high unemployment and a high crime rate. The government's black economic empowerment programme has been criticized for creating a wealthy black middle class but failing to address the dire poverty of the majority of South Africans. In July and August 2005 a large number of strikes took place. There has also been civil unrest in a number of historically disadvantaged communities, related to dissatisfaction with service delivery.

Cases of corruption at local, provincial and national government level have occurred, and concern has been expressed about the fact that not all allegations of corruption have been addressed properly. For example, it has been alleged a recent investigation by the Public Protector was inadequate and part of a "whitewashing" operation.

JUDICIARY

Section 165 of the *Constitution* of South Africa states that courts established under the Constitution are to be independent. No person or organ of state may interfere with the functioning of the courts. Organs of state are required to assist and protect the courts, by way of legislation and other measures, to ensure their independence, impartiality, dignity, accessibility and effectiveness.

The Constitutional Court (CC) is an apex court with ultimate jurisdiction to determine constitutional matters. It will not usually grant direct access to a litigant, and matters therefore come to it on appeal from, or for confirmation of, decisions of a High Court or the Supreme Court of Appeal.

The Supreme Court of Appeal (SCA) is the highest court for all other matters. In that sense it too is an apex court. It has no original jurisdiction and hears civil and criminal matters on appeal from decisions of High Courts. Initially after 1994, when the interim Constitution started operating, the SCA was precluded from pronouncing on constitutional issues, but its jurisdiction was extended in 1997.

Independence of the judiciary

1. General Requirements: Composition of Judicial Service Commission (JSC), Appointment of Judges, Security of Tenure

Composition and functions of the JSC

Section 178 of the Constitution deals with the Judicial Service Commission (JSC). The *Judicial Service Commission Act* of 1994 was passed to regulate matters incidental to its establishment.

The JSC is chaired by the Chief Justice and consists of representatives or nominees of all three branches of government as well as the legal profession and a contingent appointed by the President. Although the President appoints the judges and, in the case of vacancies on the Constitutional Court, is given the final choice, it is the JSC that conducts the selection process for all permanent appointments, including most of the promotions to which judges may aspire.

The JSC consists of the Chief Justice, who presides at meetings of the JSC; the President of the Supreme Court of Appeal; one Judge President designated by the Judges President; the Minister of Justice or an alternate designated by the Minister; two practising advocates nominated from within the advocates' profession and appointed by the President; two practising attorneys nominated from within the attorneys' profession and appointed by the President; one teacher of law designated by teachers of law at South African universities; six members of the National Assembly chosen by it, of whom at least three are to be members of opposition parties represented in the Assembly; four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces; and four persons designated by the President as head of the national executive, after consulting the leaders of all parties in the National Assembly. The fact that the JSC is dominated by politicians has been raised by some critics as a cause for concern.

The JSC may determine its own procedure, but decisions of the JSC must be supported by a majority of its members. The Minister publishes in the Government Gazette particulars of the procedure adopted by the JSC.

When vacancies arise on the bench, nominations are made, candidates are short-listed and then interviewed by the JSC. The interviews are open to the public and the media, but the deliberations of the Commission take place in private (although the JSC has made available a transcript of its discussions concerning its priorities and its general approach to the selection process). Selection is by consensus or majority vote and the Commission notifies the President of the names of the successful candidates for each vacancy. These are also announced publicly.

The JSC's criteria for selecting judges have been criticized. The Constitution merely states that anyone appropriately qualified who is a fit and proper person may be appointed as a judge – to meet the constitutional requirement to reflect broadly the racial and gender composition of the country (what is usually referred to as 'transformation'). During the 1990s, candidates were frequently asked about their involvement in the struggle for democracy, and those who were not involved were usually not appointed. Currently, the most important issues appear to be a candidate's race and gender, and his/her attitude towards the transformation of the Bench.

The JSC procedure for the selection of judges is a complete break with the practices followed before 1994. It is no longer possible for the head of a court to make a recommendation to the Minister of Justice, and for the Minister to endorse the recommendation and forward it to the President.

Appointment Process

The President as head of the national executive is responsible for the appointment of judges. The senior appointments in the judicial hierarchy oblige him to consult before making the appointments, but also allow him some room for executive preference.

The President appoints the Chief Justice and Deputy Chief Justice after consultation with the JSC and the leaders of parties represented in the National Assembly. He consults the JSC before appointing the President and Deputy President of the Supreme Court of Appeal.

The President appoints the other Constitutional Court judges, after consultation with the Chief Justice and the leaders of parties represented in the National Assembly, from a list of nominees prepared by the JSC. The list must have three more names than the number of vacancies to be filled. The President must advise the JSC if any of the nominees are unacceptable, and must give reasons. The JSC then supplements the list with further nominees and the President must make the remaining appointments from the list so supplemented.

The President's executive discretion is removed in the case of other appointments to the Supreme Court of Appeal and the High Court, including the Judges President of the divisions of the High Court. These other appointments are made on the advice of the JSC. The President appoints the persons selected by the JSC.

Notwithstanding the latitude given to the President in the appointment of the Chief Justice and the Deputy Chief Justice, the President and Deputy President of the SCA, and the other judges of the CC, the JSC is clearly the key agent in the selection of candidates for judicial office.

Security of Tenure

Constitutional Court judges hold office for a non-renewable term of 12 years, or until they reach the age of 70, whichever occurs first (Section 176(1) of the Constitution). Judges of the High Courts and the Supreme Court of Appeal are appointed until they are discharged from active service in terms of an Act of Parliament (Section 176(2) of the Constitution).

2. Executive Interference

The judiciary has usually not been interfered with, even when judges have confronted and/or restrained the interests of the executive and made judgments critical of the government. However, a case of interference by the prosecuting authority on the judiciary has been reported (see below).

3. Gender and Racial Composition of the Judiciary ('Transformation Issues')

Section 174(2) of the Constitution states that ' [t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed'.

In 1990, there were 166 judges, all of whom were white. In 1994, of the 166 judges, 161 were white men, two were white women, and three were black men.

Current statistics (2005) show that the judiciary has already undergone considerable transformation with regard to race, but not with regard to gender. In 2005, there were 210 judges in total: 114 were white men and 47 black/African men. There were 13 white women, and 8 black/African women. There were 8 coloured men, 2 coloured women, 13 Indian men and 5 Indian women.

Despite this marked improvement in the racial composition of the judiciary (but not in the gender composition), balancing the imperative of visible transformation against the practical necessity of continuity has been far from easy. Tensions around issues of 'transformation' abound. The JSC decided at its meeting in October 2004 not to recommend a prominent white male human rights lawyer for a permanent High Court appointment. This was the third occasion on which the human rights lawyer, widely regarded outside the JSC as being eminently suitable for appointment to the High Court, was passed over in favour of 'transformation candidates'. This decision was sharply criticized in several quarters as indicating that judges were being appointed on the basis of colour and quality was being ignored, and that white males had no hope for advancement in the South African judiciary. The JSC meeting itself took place at a time when the Minister of Justice had stated publicly that the pace of racial and gender transformation on the bench was too slow.

4. New Judiciary Bills

In 2005, five bills were introduced with the avowed objectives of rationalizing court structures, enhancing justice delivery and ensuring judicial accountability. These bills are still under consideration. Some commentators view some provisions in the Bills as compromising judicial independence, and there has been considerable vocal and written criticism emerging in the public arena. Many judges too have expressed their displeasure in public and in the media at some of the provisions of the bills that are highlighted below.

The *Judicial Service Commission Amendment Bill* establishes a judicial conduct and ethics committee as part of the JSC as well as a subcommittee on judicial conduct. The bill also proposes a **judicial code of conduct** (since the current code of conduct constitutes only guidelines and has no legal effect) and a **register of financial interests**, both of which will be compiled and maintained by the committee. Critics argue that bestowing oversight over judicial conduct and ethics on the JSC is inappropriate (since the judiciary should oversee itself) and that the bill is over-regulatory.

The *Judicial Conduct Tribunals Bill* provides for the appointment of a tribunal in cases of alleged incapacity, gross incompetence or gross misconduct on the part of judges. The tribunal is given the powers to inquire into, and report on, allegations of such incapacity, incompetence and misconduct. Critics argue that the threat of disciplinary action may give government, politicians or even disaffected litigants an opportunity to influence judicial decisions. Supporters of the two bills argue that greater judicial accountability is required since judges have the power to reverse the decisions of the legislature and executive.

The *National Justice College Bill* proposes that judges should be trained at a state-managed institution: Justice College, based at the University of South Africa in Pretoria. The Minister of Justice is arguably given too much control over the activities of Justice College, while the director-general of the Department of Justice has too much control over its finances. This appears to be at odds with the preamble of the bill which states that 'education and training of judicial officers should, as far as possible, be directed and controlled by the judiciary'. Chief Justice Pius Langa has stated that the college should be managed by judges, so as not to create the perception that the judiciary lacks independence.

The *Superior Courts Bill* gives critical managerial authority to the office of the Chief Justice over the functioning of all superior courts, including the allocation of cases to judges. It also prescribes (possibly excessive) control of judges' working hours and the micro-management of judges. The bill bestows upon the Minister of Justice final responsibility over administrative functions of courts, including budget and finance. Furthermore, the Minister may make rules for courts – which must be tabled in Parliament for approval. The Minister is not under an obligation to consult the advisory board established for the purpose of rule-making. This last provision arguably conflicts with section 173 of the Constitution which states that 'The Constitutional Court, SCA and High Court of South Africa have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'.

The *Constitutional Amendment Bill (Working Draft)* provides that the Cabinet minister responsible for administration of justice exercises final responsibility over the administrative functions, including the budget, of all courts. The amendment bill also states that: 'Notwithstanding any other provision of this Constitution, no court may hear a matter dealing with the suspension of, or make an order suspending, the commencement of an Act of Parliament or a provincial Act.'

Public perceptions of the judiciary have suffered as a result of tensions between the ANC and the executive on the one hand and the judiciary on the other. A July 2005

survey of 2,000 adults in metropolitan areas around South Africa revealed that a third of participants considered the courts not to be independent of government. More than two-thirds said it was easy for criminals to bribe justice officials. Race and gender were also seen as influencing factors: half of the participants said that a judge's race influenced the outcome of a case, and almost half thought that gender was an influence.

Case of Alleged Racism in the Judiciary

On 27 August 2004 in the Cape High Court, the majority of a full bench (Yekiso J and Hlophe JP, both black judges) dismissed a challenge by the Pharmaceutical Society of South Africa, New Clicks and others to the medicine-pricing regulations promulgated in April 2004 by the Minister of Health and the Chairperson of the medicines pricing committee. Traverso DJP (a white judge) dissented. Subsequently Hlophe JP stated that there were baseless and racially insulting rumours circulating, to the effect that he – and not Yekiso J – had written the majority judgment (this alleged slur being that Yekiso J was intellectually incapable of writing a judgment.) The Cape Bar Council established that these alleged rumours did not emanate from any of their members. The Judge President then clarified his remarks to indicate that the racial slur had occurred within the court.

The same full bench of the Cape Provincial Division heard argument on leave to appeal on 20 September 2004. Hlophe JP reserved judgment. In mid-November 2004, with the CPD judgment still awaited, applicants petitioned the SCA directly for leave to appeal, because of the urgency of the matter.

The matter was heard in the SCA on 30 November and 1 December 2004, and the SCA struck down the drug price regulations (See *Pharmaceutical Society of South Africa and Others v The Minister of Health and another; New Clicks South Africa (Pty) Limited v Dr Manto Tshabalala-Msimang NO and another*, case numbers 542/04 and 543/04, 20 December 2004, as yet unreported judgment of the SCA, available at <http://wwwserver.law.wits.ac.za/sca/index.php>). The Department of Health appealed against this decision in the Constitutional Court where the matter was heard in March 2005. The judgment of the Constitutional Court has yet to be delivered.

The CPD judgment on leave to appeal was handed down on 3 December 2004. The majority (Hlophe JP, Yekiso J concurring) refused leave to appeal; Traverso DJP dissented. In his judgment, Hlophe JP rebuked the senior counsel who had approached the President of the SCA informally about a possible date for a hearing in that forum, saying this 'bordered on contempt for this court'. The Cape Bar Council, to whom no formal complaint had been made, issued a public statement in response, endorsing the conduct of their member.

This split decision of a full Bench led to highly public allegations of racism within the ranks of the Cape High Court. The tensions also appear to have affected relations between the Judge President of the Cape High Court and senior members of the Bar (many of whom are white), and between him and judges of the Supreme Court of Appeal (many of whom are also white). Judge President Hlophe subsequently submitted a report to the Minister of Justice, in which he accused a number of his colleagues of racism.

Case of Interference in the Judiciary

Graham Travers, a magistrate at the Regional Magistrate Court in Pretoria presiding court 12, which deals exclusively with minors who are victims of sexual offences, filed a case against the National Director of Public Prosecutions, the Minister of Justice and four other respondents, for preventing him from hearing any new matters in court. Magistrate Travers suffers from a muscular dystrophy, which affects his ability to write speedily. On successive occasions in October and November 2003, and again in June 2004, decisions were taken by the respondents to reassign Mr Travers away from court 12 and to ensure that no new trial would be placed before him, on the basis that his condition affected his productivity and performance. Among others, the applicant tried to solve his case by approaching the International Commission of Jurists, which intervened with the National Director of Public Prosecutions in February 2004 (see http://www.icj.org/news.php3?id_article=3232&lang=en) and with the Chief Justice, Arthur Chaskalson, who recommended that the matters be referred to the Magistrates' Commission.

In October 2004, the ethics committee of the Magistrates' Commission urged that 'matters [be] allocated to Mr Travers in the same way that they are allocated to other regional magistrates'. In its judgement delivered in July 2005 (Case No: 16611/2004), the High Court of South Africa referred to Section 165 of the Constitution relating to the independence of the judiciary and in particular the fact that "no person or organ of the State may interfere with the functions of the courts". The High Court concluded that the prosecuting authorities have no authority to take a decision preventing new matters from being placed before Mr Travers, and that they should have taken up the matter with a regional magistrate and then with the Magistrates' Commission.

The High Court concluded that "the allocation of cases to magistrates by the prosecution would be perceived by accused persons and any responsible person as interference in the judiciary as the prosecution could manipulate the outcome of a trial by choosing certain presiding officers instead of others". All prosecutors were consequently instructed not to take any steps to prevent the "enrolment of new trials before the applicant".

LEGAL PROFESSION

The *Qualifications of Legal Practitioners Amendment Act* of 1997 provides that the LLB degree is the universal legal qualification for admission and enrolment as an advocate or attorney. Normally, those LLB graduates who wish to enter private practice as advocates are required to become members of a Bar Association by undergoing a period of training in pupillage with a practising member of the Bar and by sitting an admission examination. Before admission as an attorney, an LLB graduate must serve as a candidate attorney with a practising attorney. Attendance at a practical legal training course or performance of community service may reduce the period required to serve articles. Thereafter candidates write a professional examination set by the relevant provincial Law Society. The draft *Legal Practice Bill* – which has been with the Ministry of Justice for over two years – will have a considerable effect on the structure and functioning of the profession, once finalized.

The bill has been delayed because of a disagreement between the attorneys' profession and advocates about the referral status of advocates. The latter wish to maintain their status, while the attorneys have called for the abolition of the division between the Bar and the Side-Bar. Another reason for the delay is the fact that the matter has not been prioritized by the Minister of Justice. The bill also provides for the recognition of foreign legal qualifications, and for a uniform period of training.

PROSECUTORS

The National Prosecuting Authority (NPA) is established by the Constitution (section 179) and includes the National Prosecuting Services, the Directorate: Special Operations, the Witness-Protection Programme, the Asset Forfeiture Unit and specialized units such as the Sexual Offences and Community Affairs Unit and the Specialized Commercial Crime Unit.

The Office of the National Director of Public Prosecutions (NDPP) is the head office of the NPA. The NDPP is appointed by the President. Prosecuting authority vests in the NDPP and this authority has been delegated to other members of the NPA. They have the power to:

- institute and conduct criminal proceedings on behalf of the state;
- carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
- discontinue criminal proceedings.

In June 2005, Schabir Shaik, the former financial adviser of the then Deputy President of South Africa, Jacob Zuma, was found guilty on two counts of corruption and one count of fraud. The judge in the case found that 'a generally corrupt relationship' existed between Shaik and Zuma; Shaik had made certain payments to Zuma and had also arranged a bribe. Zuma was subsequently dismissed from his position as Deputy President of the country in the same month (although he remains as deputy president of the ANC.) The National Prosecuting Authority's decision to prosecute Zuma – also taken in June 2005 – may be interpreted as a sign of the independence of the NPA, particularly since Zuma continues to garner extensive popular support.

ACCESS TO JUSTICE

A challenge to the *Promotion of National Unity and Reconciliation Act* of 1994, which established the **Truth and Reconciliation Commission (TRC)**, came before the Constitutional Court in 1996 in *AZAPO and Others v President of the Republic of South Africa*. The TRC could grant amnesty to those who had committed gross human rights violations under apartheid, and there would be immunity from criminal prosecution in the future. However, the question before the court was whether the amnesty also extinguished any civil liability on the part of the perpetrators, or whether victims or the families of victims could bring civil claims against them. The appellants argued that the act stretched the concept of amnesty too far. They relied on their constitutional rights to life, dignity, freedom from torture and access to courts, as well as on principles of international law. The Constitutional Court found

unanimously, if uncomfortably, that the amnesty compromise had been essential to the political transition in the country, and that without it the ‘historic bridge’ between past and future might never have been built. The negotiators of the interim constitution had made a choice and had preferred ‘understanding over vengeance, reparation over retaliation, *ubuntu* over victimization’.

The transition process – from apartheid to democracy – was therefore a contract of political compromise that included the TRC process, which granted amnesty to perpetrators of human rights violations. Although the process was far from perfect, it was essential for a relatively peaceful transformation. It was a precondition for the introduction of the rule of law – although some would argue that it also had a negative impact on the rule of law, since many perpetrators were not held accountable for their crimes.

Section 34 of the Constitution guarantees the right of access to the courts. Section 35(2) of the Constitution provides that every person has the right to legal representation. However, as the majority of South Africans live in poverty and many are illiterate, many people are unaware of their rights. The Legal Aid Board does provide representation for those unable to afford a lawyer, but its resources are limited.

LIST OF LEGAL REFORMS DURING THE PERIOD

- 2004:** *Prevention and Combating of Corrupt Activities Act 12*, to provide for the strengthening of measures to prevent and combat corruption, e.g. investigative measures; extra-territorial jurisdiction.
- 2004:** *Social Assistance Act 13*, to provide for the rendering of social assistance/security, and to provide for the necessary mechanism to administer this assistance.
- 2004:** *Protection of Constitutional Democracy against Terrorist and Related Activities Act 33*, of 2004 – to provide for measures to prevent and combat terrorist and related activities.

See www.gov.za for all these Acts and Bills.