

# A fearless and independent judiciary

Address by **Judge L Mpati**, President of the Supreme Court of Appeal, at a function of the Transkei Society of Advocates held at the Holiday Inn, Mthatha, on 7 June 2013, honouring the late **Judge ZS Peko**, former ADJP of the Eastern Cape High Court

Today we live in exciting, but also depressing times, with devastation in certain parts of the world as a result of earthquakes, floods, hurricanes and wars. In our country, though, we are able to claim, despite endless demonstrations in certain areas, that we live in a constitutional State and that we are a rights-bound society. Indeed, our Constitution does not differentiate between South Africans and non-South Africans in respect of the rights entrenched in it. Section 7(1) provides that:

'[t]his Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'

And the State is enjoined by subsection (2) to 'respect, protect, promote and fulfil the rights in the Bill of Rights.' That our Constitution extends the enjoyment of those rights to all who find themselves within the borders of our country can be seen from the number of cases that have come before our courts, where foreigners have sought protection against unlawful deportations, detentions, extraditions and refusals by the bureaucracy to issue asylum or residence permits. More often than not, courts have found in their favour. And more often than not, the basis for the courts' findings is non-observance of, or non-compliance with, the provisions of the law by some or other official in the bureaucracy. As we know, or at least should know, failure to observe the law in the exercise of public power touches on one of the foundational values of our constitutional democracy, namely the supremacy of the Constitution and the rule of law. But besides those cases where foreigners are involved, we have had a number of decisions from our courts where the concept of the supremacy of the Constitution and the rule of law has featured prominently. One such decision is *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC), where the Constitutional Court stated (at para 49):

'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.'

The issue of the control of public power has been a bone of contention between the powers that be and the judiciary. Some may argue that it has been the subject of a turf war between the executive branch of government and the judiciary. The authority

of the court with regard to the control of public power has been under intense scrutiny. For some time the President of the country has stated emphatically that the judiciary has no business to interfere with policy adopted by the elected representatives of the people of South Africa. One trusts, though, that this attitude has changed. During July 2012 the President was reported as having said that he was satisfied with the work of the judges and that he accepted that it was the task of the Constitutional Court to interfere if government policy was unconstitutional. But the courts had in any event never wavered in their constitutional responsibility of exercising judicial control and oversight to ensure that Government, particularly the Executive arm, performs its functions in accordance with the law.

You will recall the decision, for example, in *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA), where the appointment, by the President, of the National Director of Public Prosecutions was set aside, the judgment being grounded on the principle of legality, or, put differently, on the doctrine of the rule of law.

The importance of this foundational value of the supremacy of the Constitution and the rule of law cannot be understated. It is therefore of great concern to note that a significant number of candidates who appear before the Judicial Service Commission (JSC), aspiring to be appointed onto the Bench, are unable to express themselves on their understanding of the concept of the rule of law. I find that difficult to understand.

From what I have said in relation to judicial control of public power, it is manifest that it is essential for the judiciary to be strong and independent. It is true that the core function of the judiciary is to decide disputes between litigants. But part of that function is judicial control of the exercise of public power. And in the performance its function, the judiciary must engender confidence in the eyes of the public; the public must have confidence in it. This the judiciary can achieve by being truly independent and accountable. In that way, it will ensure its overall integrity. Let me say a little more on these aspects. A retired justice of the United States Supreme Court said the following about the independence of individual judges:

'An independent judiciary requires both that individual judges are independent in the exercise of their powers, and that the judiciary as a whole is independent, its sphere of authority protected from wrongful interference by the other two branches of government ... As for ... individual judges, there are at least two avenues for securing their independence: First, judges must be protected from the threat of reprisals, so that fear does not direct their decision-making. Second, the method by which judges are selected, and the ethical principles imposed upon them, must be constructed so as to minimize the risk of corruption and outside influence. The first endeavour is to protect judicial in-

dependence from outside threats. The second is to ensure that judicial authority is not abused, and it is the core concern of the enterprise of judicial accountability.<sup>1</sup>

The idea tonight is not to speak about the selection of judges, but rather to comment on the other important requirement for the judiciary to earn the confidence and respect of the public. In this regard I want to repeat what I said almost two years ago.<sup>2</sup> Much as the judiciary needs to be independent from outside sources that does not mean that judges should be free to behave as they please. As I have mentioned, the core function of a judge is to decide cases in a court of law. And for the execution of that function judges are given enormous powers. In constitutional matters they are able to declare invalid any law; including legislation passed by the elected representatives of the nation, and can declare unconstitutional any conduct, of/by the President of the country, that is inconsistent with the Constitution.<sup>3</sup> Their decisions affect the rights of individuals, including their liberty, property, status, etc. And if they want to be independent enforcers or guardians of the rule of law, judges must be incorruptible. In the words of Justice Howie, the former President of the Supreme Court of Appeal, judges owe no favours, they must never do; and equally important, the public must never think they do.<sup>4</sup> Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Judges are thus required to be fair in the adjudication of matters before them.

Dr Stephen Colbran<sup>5</sup> reasons that independence and integrity are without doubt essential requirements for a judge. For this view he takes his cue from Article 14.1 of the *International Covenant in Civil and Political Rights*, which reads:

'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'<sup>6</sup>

Judges must accordingly ensure that when litigants leave the courtroom at the end of their case they do so satisfied that, whatever the outcome, they individually received a fair hearing before a competent, independent and impartial judicial officer, in the sense that they each had a fair opportunity to present their case and that they were afforded equal treatment. Judicial integrity in a system that applies the rules of law equally to all 'is manifested by impartiality ..., procedural fairness, and a vigorous application of the law.'<sup>7</sup>

It has been argued that a vital step towards ensuring the overall integrity of the judiciary is to foster a culture of independence, impartiality and accountability among judges.<sup>8</sup> Greg Mayne, who makes this argument, suggests that the judiciary, like other branches of government, must be accountable directly or indirectly to the general public it serves. My former colleague,

Justice Edwin Cameron, states the position thus: 'In the context of the judiciary, accountability entails that judges' performance of their functions should be subject to certain constraints ... Institutionally, judges are obviously subject to the ... constraints of precedent ... and to the constraints of collegiality (in terms of which decisions of coordinate rank are treated with deference even if not formally binding).'<sup>9</sup> Justice Howie, in similar vein, holds that for the decisions they make in court, judges are bound only to the decisions of higher courts, to the law and their consciences.<sup>10</sup>

Judges cannot call on their independence as a defence against criticism for judgments unduly delayed, or poorly written. Litigants come to court in the belief that their disputes will be resolved. Delivering judgments timeously is, in my view, part of being accountable.

But judicial independence may be undermined and the integrity of the judiciary dented as a result of internal weakness. Judges cannot call on their independence as a defence against criticism for judgments unduly delayed, or poorly written. Litigants come to court in the belief that their disputes will be resolved. Delivering judgments timeously is, in my view, part of being accountable. And judges need to remind themselves that their decisions must be made through a process of reasoned decision-making and not arbitrarily. Their judgments must be justified in law.

Jeffrey M Sharman suggests that judicial independence presupposes a judiciary that is well trained and educated in the law, and that accordingly 'the ideal judge is independent, impartial, and learned in the law'.<sup>11</sup> Although this was said in the context of the

United States of America, it is true for all democracies. Prior to 1994 judges in South Africa were appointed mainly from the ranks of senior advocates, the rationale being that they were experienced in the practice and procedure in the superior courts. That policy is now a thing of the past. Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer.<sup>12</sup> The responsibility for the selection of suitable candidates for appointment (by the President) as judges rests with the JSC. That body is thus required to ensure that the candidates it recommends for appointment will contribute to maintaining the integrity of the judiciary. In this regard the supplementary criteria used by the JSC in the evaluation of candidates for appointment are important. These include the following: the proposed appointee must be a person of integrity; a person with the necessary energy and motivation; and a person with experience and the necessary competence. Some candidates will be less experienced than others but will exhibit the potential to be 'the ideal judge'. But there can be no compromise on the requirements of integrity and competence.

Sandra Day O'Connor<sup>13</sup> sums up in this way:

'Independence, integrity and competence are the hallmarks of a judiciary committed to upholding the Rule of Law and they are the principles for which a judiciary should be accountable.'

The Bar and the attorneys' profession must share this huge responsibility of making sure that when interviewing candidates the Judicial Service Commission has before it all information relating to the suitability of a particular candidate to be appointed onto the Bench, particularly information relating to a candidate's integrity and competence. You owe it to your clients and the

public at large to ensure that people who are appointed as judges are people who will recognise their responsibility to maintain the integrity of the judiciary. Let me end off with the words uttered by the late Justice Eksteen back in 1971, which, I think, still have value, although said in a different era:

'The judges on the other hand are drawn from the ranks of the Bar, where they have been brought up and nurtured in a long tradition of fearless independence in no way subject to the pressure of powerful litigants or influenced in the least degree by the importance of their adversaries. It is this spirit of fearless and selfless independence which is the proud tradition of our Bar and our Side-bar in South Africa; which has shaped the outlook of our judiciary and which has made it what it is.'

If members of the Bar and the attorneys' profession subscribe to this spirit of fearless and selfless independence, that would be the ideal way of honouring the late Justice Peko. 

**Endnotes**

- <sup>1</sup> Sandra Day O'Connor 'Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction' (2008) 86 *Denver University Law Review* 1.
- <sup>2</sup> On 8 July 2011 at the Access to Justice Conference held in Johannesburg.
- <sup>3</sup> Section 172.
- <sup>4</sup> Justice CT Howie 'Judicial Independence' (2003) 20 *SALJ* 647 at 683.
- <sup>5</sup> 'Independence and Integrity as a Criterion for Judicial Performance Evaluation' (2003) *University of Notre Dame Law Review* 15.
- <sup>6</sup> At p 15.
- <sup>7</sup> Stephen Colbran, above n 10, quoting Justice Brennan *Courts for the People – Not Peoples' courts* in a speech delivered at the inaugural Deakin Law School Oration, 26 July 1995
- <sup>8</sup> Greg Mayne 'Judicial integrity: the accountability gap and the Bangalore principles' in Transparency International's Global Corruption Report 2007. Comparative analysis of judicial corruption are available at [www.baselgovernance.org](http://www.baselgovernance.org) or [http://www.transparency.org/publications/gcr/gcr\\_2007](http://www.transparency.org/publications/gcr/gcr_2007).
- <sup>9</sup> 'Judicial Accountability in South Africa' (1990) 6 *SAJHR* 251.
- <sup>10</sup> Above n 9.
- <sup>11</sup> Jeffrey M Sharman *Judicial Ethics: Independence, Impartiality and Integrity* available at [www.iadb.org](http://www.iadb.org)
- <sup>12</sup> Section 174(1) of the Constitution.
- <sup>13</sup> Above fn 1.

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