LAW MATTERS

by **Franny Rabkin**

Limewrite

As I write the nation is mourning the death of Eusebius McKaiser. It is such a shock. He was so young and full of life.

Eusebius often wrote and talked about law. One of our first conversations – he, perched on the corner of my desk at Business Day – was about *S v Makwanyane*.

The law was important to him, but he was especially passionate about ethics and morality. He was careful to differentiate between the two. He was interested in the limits of the law.

The law sets the minimum bar for how we should behave and relate to each other. We should expect more from our leaders and from the people who occupy high office. We should expect more from each other.

What does it say about our society that we are constantly in court litigating against our political leaders – to hold them to the black letter of the law? That they act lawfully should be a given.

As I write, I am, in my main job as a legal reporter, currently covering the following cases:

1. a case in which the minister of home affairs had to go back to the Constitutional Court asking it to "revive" a court order it gave in 2017 – because three years after the order expired, the minister had failed to implement it or to seek an extension from the court;
2. a case to interdict members of Operation Dudula – private members of society – from demanding people's ID documents to see if they are legally in the country;
3. a case to force the government to provide uninterrupted electricity to clinics, schools and police stations;
4. a judgment in which the Constitutional Court found that the Promotion of Access to Information Act and the Tax Administration Act were unconstitutional to the extent that they did not allow for a limited and narrowly tailored opportunity for the public to access tax records in appropriate circumstances; and
5. a judgment from the Constitutional Court that said the government had failed to properly consult affected communities when it passed legislation.

When I was writing up the Home Affairs case, I did a bit of research: the minister of Home Affairs was in 2017 ordered by the Supreme Court of Appeal to enact regulations for the process of naturalisation of people born in South Africa to foreign parents. It's 2023 now. There are still no regulations.

That's just a random snapshot of a week in the life of a legal reporter in South Africa.

Some of these cases are still ongoing. I am not here commenting on the rights and wrongs of them – in law. But, with the exception of the taxpayer records case (which involved a delicate weighing up of competing constitutional rights), one may ask of the other cases: why did the courts have to be resorted to?

When you take the law out of them, and look at them from the perspective of morality alone, the answers are very clear: of course, hospitals and schools should have electricity. Of course, it is wrong for mobs of private parties to randomly stop others from entering schools or clinics and demand their ID documents. Of course, government departments cannot blithely ignore court orders from our appellate courts. Of course, if you are going to pass a law, you must consult those who are going to be affected by it.

Parliament, public discourse and, ultimately, elections are the spaces where morality and ethics are debated and decided. The fact that these urgent concerns in our society are being ventilated in court starkly and worryingly reveals the poverty of those other spaces.

It now feels as if our judges are being called upon to solve everything.

As I write, the president has appointed a retired judge to investigate the circumstances that led to the docking of the *Lady R* cargo ship and the alleged loading of cargo, and its departure from Simonstown in December.

The panel, chaired by retired Gauteng deputy judge president Phineas Mojapelo, will enquire into, according to the presidency's media statement, "persons who were aware of the cargo ship's arrival, and, if any, the contents to be off-loaded or loaded, the departure and destination of the cargo".

It "will evaluate whether constitutional, legal or other obligations were complied with in relation to the cargo ship's arrival, its stay, the loading or off-loading of its contents, and its departure".

The panel's report will include recommendations on any steps that may need to be taken in light of its findings or as a result of any breaches that may have occurred.

The panel is not a commission, the presidency has said. Its work will be secret, its terms of reference and report not published. It will not have the power of compulsion to call witnesses or documents. It has no investigators of its own – its staff is administrative support from within the presidency.

DJP Mojapelo is well known for his independent-mindedness and will be supported by a senior counsel. But other than that, the panel's function and process is materially different to a judicial one.

Yet because it is headed by a retired judge, it has been clothed with the credibility that comes with the authority and independence associated with judicial office.

The presidency has said that the appointment of Mojapelo DJP was guided by the principles set out in the Constitutional Court's 2000 judgment in *South African Association of Personal Injury Lawyers v Heath*, in which the highest court found that it was unconstitutional for a judge to head up the Special Investigating Unit.

In that judgment, Chaskalson P examined whether having a judge heading up this organ would breach South Africa's unique model of separation of powers. He held that there was no "rigid test for determining whether or not the performance of a particular function by a judge is or is not incompatible with the judicial office." But some guiding considerations were put forward. These included whether the function is more usual or appropriate to another branch of government, whether it is subject to executive control or direction and whether it creates the risk of judicial entanglement in matters of political controversy.

We need to be cautious when judges are called on to do work that is not, strictly speaking, judicial work. A recent example is instructive: the independent panel that determines whether there is a case to answer before Parliament decides whether to hold an impeachment inquiry into the president may, in terms of parliamentary rules, include a judge. Suspended public protector Busisiwe Mkhwebane challenged this aspect of the rules, arguing the rules were unconstitutional on the grounds set out in *Heath*.

The Constitutional Court rejected her argument and found that the inclusion of a judge passed constitutional muster.

It may be constitutional, but Judges Matter's Mbekezeli Benjamin has argued persuasively that it is not a good idea. In an article published in September 2022 in the *Mail & Guardian*, he said:

> "The most plausible reason a judge would be included on this panel would be to lend the prestige and status of judicial office to what is essentially an extremely fraught and divisive political process.
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> "Whatever the outcome, its legitimacy will be clothed in judicial robes, whose coercive force is usually deployed by the judicial branch of government, which is admired for its independence.
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> "Judicial legitimacy is a scarce currency that needs to be used sparingly. There is no compelling reason for it to be deployed in the task of the independent panel. In fact, by judges participating in the panel on the Phala Phala allegations, there is far more for the judiciary to lose than to gain."

Benjamin's article was published before the release of the report of the independent panel chaired by retired chief justice

Yolanda Booyzen

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Sandile Ngcobo, which found there was an impeachment case to answer in a motion put forward over the Phala Phala allegations involving President Cyril Ramaphosa. But Benjamin's article proved to be prescient. In the end, the independent panel's report was not adopted by Parliament and it was widely – and rightly, in my view – criticised.

Again, the panel's work was constrained by the nature of its process. It too did not have the power to subpoena evidence, to test contradictory versions, and was constrained by what was put before it. In its report, it said that much of the information before it was hearsay, its source unclear, that there were gaps in the story and many unanswered questions. The panel also had limited time to complete its task.

Ngcobo's report said: "We neither have the tools nor the power to excavate beneath the information that we have been provided with to uncover the answers to the unanswered questions."

Yet the fact that it was headed by a judge gave its finding an authority they would not have had otherwise. For example, in court during a recent hearing in the case by President Cyril Ramaphosa to set aside former president Jacob Zuma's private prosecution against him, counsel for the amicus curiae said the Ngcobo panel's finding that, prima facie, he had a case to answer for breaching the Prevention and Combatting of Corrupt Activities Act – "by a former chief justice, no less" – should have moved the NPA to charge Ramaphosa. Had the panel been headed by a senior counsel, that argument would have had little traction.

There is a part of Chaskalson P's judgment in *Heath* that struck me. He quoted the minority decision in the Australian *Grollo* case, which said: "The executive may not borrow a federal judge to cloak actions proper to its own functions with the

'neutral colours of judicial action'".

The appointment of the Mojapelo panel may too be constitutional. And I can say without reservation that I have nothing but the highest respect for the DJP's integrity and independence. But I question the need and the wisdom of him heading the *Lady R* investigation.

The investigation may achieve little more than a proper internal probe by the executive would have. And, given the nature of its subject matter – involving state security and intelligence – an internal investigation by the executive is what should always have happened.

Whatever motivated the president's choice, it was short-sighted. In the long term, it won't increase our confidence in the executive and could diminish our trust in the judiciary.

We don't want that. Our courts and justices should not be a crutch for the weaknesses of our other arms of state.

Rest in peace Eusebius. A