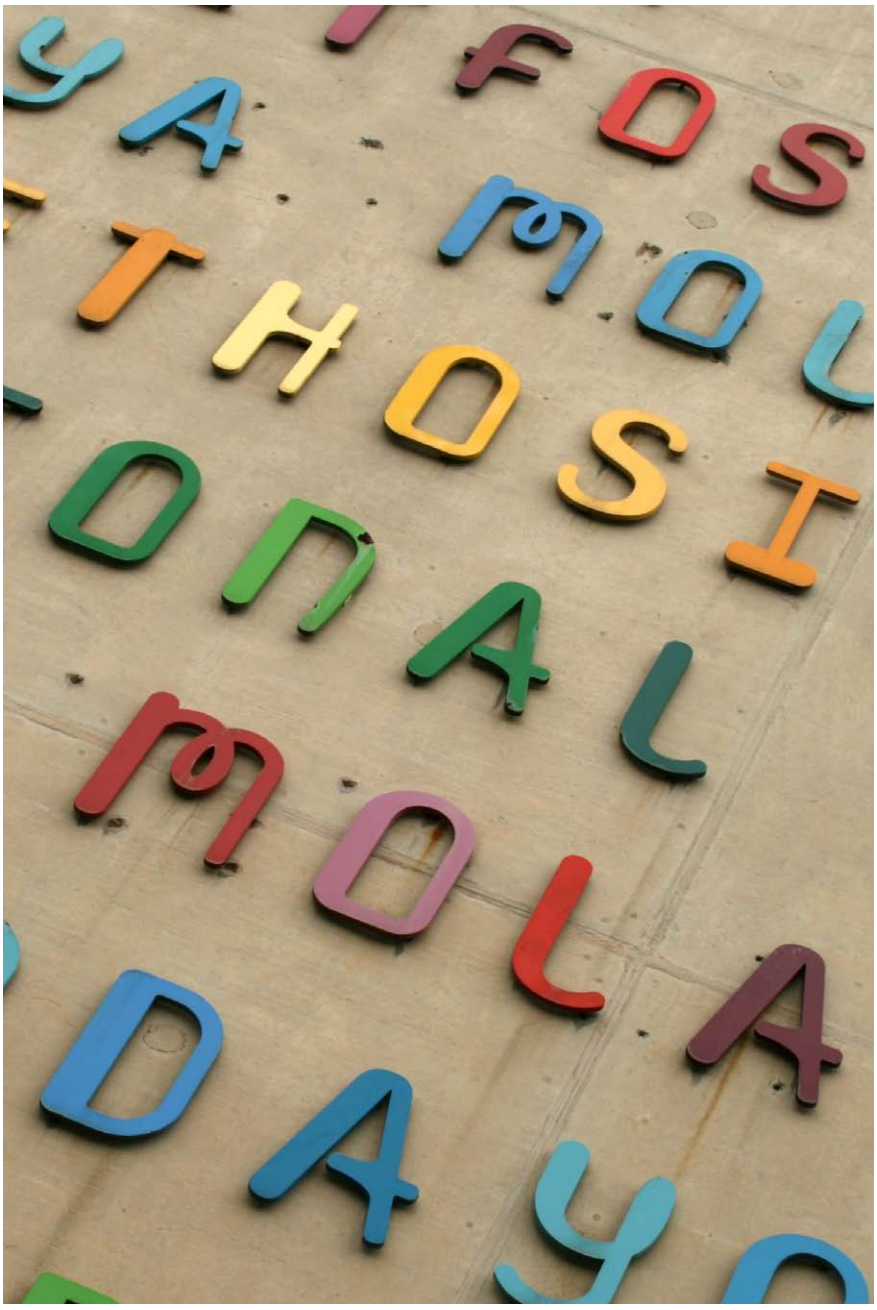
THE CONSTITUTION
A MERE TOOL NEVERTHELESS

by **GEORGE MODISA**, Pretoria Bar

We are often told to "stay away from politics" and "just focus on the law". These phrases were repeated numerous times by the senior advocates under whose tutelage we did our pupillage. It always boggled my mind, although I confess that the bewilderment was never one of genuine confusion. I understood, at least in part, what they meant when they cautioned us as pupils to "stay away from politics". I know they meant "party politics". Because I also knew that they knew that no lawyer, at least one truly devoted to the practice of law, can escape politics altogether.

For a legal practitioner, be it a judge, an advocate, an attorney, or even a pupil, the question of justice is inescapable, and justice itself does not exist in a sterile vacuum detached from political reality. Every legal system is shaped by political choices: who holds power, whose suffering is acknowledged, whose rights are protected and whose humanity is deferred. To speak of justice, therefore, is inevitably to speak, at least indirectly, of politics and the distribution of power in society.

I am convinced I know that they knew that what they truly meant was not that lawyers should avoid politics, for that would be impossible, but rather that they should avoid becoming partisans in the crude and often corrosive theatre of party-political allegiance; Because the law demands independence of mind, while party politics frequently demands loyalty of another kind. I am further convinced that some of the legal giants in our country would never agree to the idea that the law is a system devoid of politics, from former DCJ Dikgang Moseneke, Justice Azhar Cachalia, George Bizos SC, Muzi Sikhakhane SC, just to mention a few jurists who have been highly political in their practice of the law. They would never agree that a world exists where law and politics are successfully kept apart.



> "I REFLECT AND ASK MYSELF, WHAT MAKES THIS DOCUMENT THE MOST WONDERFUL DOCUMENT IN THE WORLD?"

That long introduction seeks to introduce a seriously contested issue called the Constitution of the Republic of South Africa. I call the Constitution a seriously contested issue because, depending who you speak to, the Constitution is either the most wonderful and powerful legal document to ever come out of South Africa, our saviour, the saviour of the country, or, on the other side, one finds those, including Professor Joel Modiri of the University of Pretoria's Law Faculty, who view the Constitution as a sell-out position of sorts and often refer to themselves as constitutional abolitionists.

As a lawyer, I regard the Constitution (in particular, chapter two) as a sacred tool, a compass perhaps, a script to which all of us legal practitioners look when we are lost or when we forget the roles we are meant to play in society. When we get admitted as legal practitioners, we all stand up in court, raise our right hands, and take an oath that speaks to being loyal to the Constitution. However I am forced to pause and reflect when abolitionists like Prof Modiri point to the fact that in 30 years of the existence of the most "wonderful document in the world", South Africa remains the most unequal society in the world, and that the material conditions created by colonialism and apartheid persist unhindered. For example, we still adjudicate cases of children who fall and die in pit toilets, we still contend with lack of basic needs such as clean running water, not to mention high levels of corruption and crime in general, despite the strong stance the Constitution takes on human rights. I am forced to pause and reflect whenever I am confronted with such hopelessness. I reflect and ask myself: what makes this document the most wonderful document in the world?

The answer I get is that the Constitution is a political tool or legal or social tool, a tool nevertheless, and perhaps in trying to find "what is so wonderful about this document that keeps South Africa as the most unequal society in the world", I propose that the fact that it exists at all is the first wonder.The Constitution is itself evidence of a political settlement, a settlement without which we could have faced civil war, chaos and a further division of the South African society.

Perhaps it is therefore nonsensical to blame a tool for the ills of the country. Perhaps we need skilled moral leaders who are able to be 100% conscious about the ills and the inequalities in our country, to head our courts, councils, Societies, groups etc., and perhaps we need even more honest leaders to head government institutions in order to deliver the promises enshrined in the preamble of the Constitution. A tool is just what it is, a tool, not magic. Dare I say even a magic wand is a tool that requires a hand to wield it. A tool derives its usefulness from the hands that hold it and the minds and hearts of those who wield it.

As lawyers we are also powerful wielders of this tool – in subcommittees, in the *pro bono* matters we do, in the conversations we have with our friends and family and in our practices. I propose that as jurists, we also have a responsibility to educate the public and hold those who lead our institutions accountable in wielding this powerful tool (called the Constitution) as a compass to guide us and point towards the correct direction to deliver real justice and hope to our people.

May we all reflect on this, as we celebrate the 30 years of the Constitution, and consider what we have done to wield this tool in a way that makes justice and equality a reality, not just words in chapter 2 of some 30-year-old document.