Briewe aan die redakteur

Judgments granted by the executive branch?

ONE of the classic clauses in the Magna Carta determines that "(n)o freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed – nor will we go upon or send upon him – save by the lawful judgment of his peers or by the law of the land".[1] In 1215, for the sake of the English population, it entrenched the recent development in Europe (and also in England during the previous century under King Henry II (1154–1189) of a more independent judiciary.[2] Over the ages it formed one of the building blocks of the Rule of Law, which was in later centuries identified with the doctrine of the separation of powers – the cliché of the French philosopher, Montesquieu, that governmental power should, for the protection of individual freedoms, be separated into legislative, executive and judicial functions.

Being the legacy of nearly a thousand years of Western civilisation and part of the founding of the western legal tradition, this development provides the inherent common law jurisdiction to the supreme court.[3] Because of this deep-seated constitutional tradition, the jurisdiction of the supreme court is handled with circumspection in legislation. The supreme court has inherently – it need not be granted by parliament. That is why section 19 of the Supreme Court Act determines territorial jurisdiction over persons and then refers vaguely to all other matters of which it may according to law take cognisance. Sections 96 and 101 of the Constitution of the Republic of South Africa, Act 200 of 1993) noticeably treat the jurisdiction of the supreme court with similar caution.

It is therefore astounding to, since 1991, read in section 27A of the Supreme Court Act, 59 of 1959, that a "judgment" (by default) may be granted by a registrar, and shall then be deemed a judgment by the supreme court. A "judgment" of the supreme court granted by a civil servant?[5] It is vintage parliamentary sovereignty. It is a "judgment" because parliament says it is a judgment. If parliament in its sovereignty had not decreed it that way, it could, according to the common law, never inherently have been a judgment of the supreme court and would merely have been the exercising of statutory granted power by a civil servant.[6]

Since the commencement of the transitional constitution, the wisdom and insights acquired through the ages are no longer so vulnerable to the powers of parliament. Section 22 thereof entrenches the right to have justiciable disputes settled by a court of law, or where appropriate, by another independent and impartial forum. According to Du Plessis and Corder[7] the effect of this provision is that the legitimacy of bodies like the Special Income Tax court and the Industrial court can constitutionally be challenged. So much more the matter under discussion. Section 33 thereof provides the test, of course.

Several reasons can be advanced why a parliamentary provision that a civil servant may grant a judgment of the supreme court, is not reasonable and not justifiable in an open and democratic society based on freedom and equality, and negates the essential content of the right to have justiciable disputes settled by a court of law (or where appropriate, by another independent and impartial forum).

Whatever the reasons could have been for the enactment of section 27A, it is doubtful whether it could have been significant enough to justify such a drastic deviation. Mere comfort for a litigant will, par excellence, not be convincing. These considerations must be weighed against the gravity of the deviation. It will thus be difficult to argue that it is reasonable.

A civil servant, as a member of the executive is inherently not independent and impartial. The idea underlying section 22 is not mere superficial independence and impartiality, like not having an interest in the cause. The spirit and purport of section 22[8] (in the light of the history behind it) is rather inherent professional independence and impartiality – comparable to that of the judiciary. A civil servant just is not that.

The mere fact that a defenddant for some reason or another did not get a notice of a summons or decided not to defend an action, does not make the claim against him unjusticiable. The question whether a claim is for a debt or a liquidated demand, requires a judicial decision. It should not be determined administratively. The same concerns the question whether the service was effective or sufficient. Who must decide on these questions, the practitioner acting for the plaintiff or the civil servant?
With reference to Judge Ismail Mahomed,[9] it can be said that the *trias politica* forms one of "the very ethical and jurisprudential foundations upon which the state is structured" and it cannot be argued that in this respect there occurred "changes and mutations in the ethos and values which sustain the ethical imperatives of the constitution". Lately there was a movement to move the lower courts from the executive branch to the judicial fraternity where it manifestly ought to be. Besides section 22 of the constitution and the common law,[10] section 96 of the constitution determines that the judicial power will be vested in the courts of law. Clauses six and seven of the constitutional principles contained in Annexure 4 thereof determine the same. Within this context the decision in *Waterside Workers Federation v Alexander* (1918), 25 CLR 434 is a comparable foreign case.[11] The Commonwealth of Australia Constitution Act of 1900 provided that the judicial power of the Commonwealth shall be vested in a Federal Supreme court. Consequently the then Chief Justice Griffith adjudicated as follows: ➤

"It is impossible under the constitution to confer such functions upon any body other than a court... In short, any attempt to vest any part of the judicial power of the Commonwealth in any body other than a court is entirely ineffective." [12]

In a decision that it is constitutionally not viable to vest judicial powers (among others) in a conciliation and arbitration "court" which must settle industrial disputes, the British Privy Council in *Attorney-general of the Commonwealth of Australia v Reginam and the Boilermakers' Society of Australia and Others* [1957] 2 All ER 45 used the above-mentioned dictum in Alexander's case as principal authority for its decision.

Section 27A of the Supreme Court ACt thus seems to be *prima facie* unconstitutional.

[Letter shortened – *Editor*]

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Footnotes:

1. Clause 39 as translated and reproduced in Downs *Basic Documents in Medieval History* (1959) 121, London: Van Nostrand.
2. Cf Poole *From Domesday Book to Magna Carta* (1993) 1087-1216, 474-477, Oxford University Press. According to Berman *Law and Revolution: The Formation of the Western Tradition* (1983) 442-443, Harvard University Press, the general use of a few neighbours to settle cases before royal judges, originated in civil cases. Although the above-mentioned clause is usually associated with the jury system, it should be remembered that neither Anglo-Saxon law, nor Frankish or Norman law at that time differentiated between civil and criminal cases.
3. Taitz, J *The Inherent Jurisdiction of the Supreme Court* (1985) 9-10, Cape Town: Juta. Cf also Hosten, Edwards, Nathan & Bosman *Introduction to South African Law and Legal Theory* (1977) 591, Durban: Butterworths; Van Zyl *Beginsels van Regsvergelyking* (1981) 291, Durban: Butterworths and Baxter *Administrative Law* (1984) 31, Cape Town: Juta.
4. Harms LTC *Civil Procedure in the Supreme Court* (1990) 82, Durban: Butterworths.
5. A registrar is a typical civil servant resorting under the line function and bureaucratic authority of the director-general and Minister of Justice. His promotion and salary are handled by the Public Service Commission as contemplated in chapter 13 of the Constitution of the Republic of South Africa, Act 200 of 1993).
6. Baxter, op cit, 75.
7. Du Pessis and Corder *Understanding South Africa's Transitional Bill of Rights* Cape Town: Juta.
8. Haysom "The Bill of Fundamental Rights: Implications for legal practice" (1994) *De Rebus* 125 at 127.
9. Mahomed I "The impact of a Bill of Rights on Law and Practice in South Africa" (1993) *De Rebus* 460.
10. *Sigcau v The Queen* 1985 12 SL 256; and *Minister of the Interior v Harris* 1952(4) SA 769 A at 792.
11. As contemplated in section 35(1) of the constitution.
12. At 442. The decision in *South African Technical Officials' Association v President of the Industrial Court and Others* 1985(1) SA 597 AD is in the same spirit.

Kritiek op die Verkiesingshof

[Briewekolom: *Die Burger*, Dinsdag, 12 Desember 1995]

Hierdie brief word gepubliseer nie om kant te kies in 'n politieke geskil nie, maar om die aandag te vestig op die dikwels oppervlakkige wyse waarop politici en die pers oorwoë hofuitsprake benader – Redakteur.

DIE Spesiale Verkiesingshof se funksie is om hoogs omstrede verkiesingsgeskille te ontlont. Sy uitsprake is nie bo kritiek verhef nie. Maar dan moet dit ingelig wees, veral omdat die hof (bestaande uit 'n appèlregter en vier hooggeregshofregters) homself nie kan verweer nie.

Die onlangse aanval deur 'n ANC-segsman op die hof se uitspraak betreffende die Durbanse metropool ('n "travesty of justice") en u eie onlangse hoofartikel oor die Wes-Kaapse uitspraak ("Die afbakeningsgeskil", *DB*, 6 Desember) is albei erg waningelig en onbillik.

Dit is nie waar dat Langa "die verantwoordelikheid van die Tygergergse substruktuur" geword het, soos u hoofartikel konstateer nie. Word 'n hofuitspraak nie eens geléés voor u kritiseer nie?

Maar die ergste is u getroue herhaling van premier Hernus Kriel se kritiek teen die hof: "dat dit moeilik is om te begryp hoe die hof binne 'n dag en 'n half oor so 'n ingewikkelde saak met soveel verreikende implikasies kon beslis." Die insinuasie is duidelik: of die hof het op 'n partydige wyse vooraf oor die saak besluit of hy het 'n onbesonne uitspraak gelewer.

Die vertrekpunt is verbysterend. Premier Kriel is selfs 'n vinniger ontleder. Reeds op 10 Augustus het hy (nogal uit Hongkong) 'n gedetailleerde mondelingse uitspraak van die Kaapse volbank, wat daardie selfde middag gelewer is, as te "tegnies" afgemaak. Amper so vinnig was die twee NP-gesinde lede van die provinsiale komitee wat blykbaar in staat was om hul eie afbakeningsbesluit ter ondersteuning van mnr Peter Marais, LUR, binne ure te neem. Oor die einste "ingewikkelde saak met soveel verreikende implikasies".

Gemeet teen sulke standaarde werk die Spesiale Verkiesingshof teen 'n slakkepas!

Belangriker is egter die feite wat u nie noem nie. Die hofstukke is weke vooraf geliasseer. Volledige skriftelike betooghoofde is die vorige week ingedien. Al wat oorgebly het, is die mondelinge argument – en dié namens mnr Kriel se kollega het maar anderhalfuur geduur.

Die Burger se nuwe rol as kritikus nie slegs van regerings nie, maar die howe boonop, is werklik verfrissend. 'n Mens kan slegs hoop dat dit met integriteit selfs binne 'n verkiesingstryd waarin u blykbaar uself nou op party-vlak beywer — sal geskied.

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