

Eyes on the courts

During September 2008, two momentous High Court judgments were delivered, one halting the prosecution of ANC President Jacob Zuma, at least for the time being, and the other implicating leading members of the judiciary in breaches of the Bill of Rights. Appeals in both matters are imminent, but whatever their outcome, the judgments will prove historically important.

Susannah Cowen of the Cape Bar contributed the following summary:

The Zuma decision

On 12 September 2008, Nicholson J set aside the decision to recharge Mr Zuma for corruption and related offences, taken in December 2007 by Mr Mpshe, then NDPP. In 2003 the NPA had announced that it was going to prosecute Schabir Shaik, but not Zuma. Zuma was charged only in 2005 after Shaik had been convicted, but in September 2007, Msimang J struck the matter from the roll because the NPA was unprepared for trial.

The dispute before Nicholson J turned on whether Zuma was entitled to a hearing before Mpshe recharged him. Nicholson J's central finding was that Zuma had a right to be heard, sourced in section 179(5)(d) of the Constitution which required the NDPP to hear an accused when reviewing a decision to prosecute (or not to prosecute). The provision was repeated in section 22(2)(c) of the NPA Act. He also held, on the facts, that Zuma had a legitimate expectation to be heard.

A week later, the ANC 'recalled' President Thabo Mbeki, leading to his resignation, the election of President Motlanthe and a reconstituted cabinet. Mbeki's fate had been secured by detailed findings in the judgment that the executive had meddled in the decisions to prosecute Zuma. It remains to be seen whether Zuma will be charged again and what the repercussions will be for the NPA and other members of the executive implicated.

While the main findings of the judgment concerned important questions such as whether decisions to prosecute were reviewable and when the NDPP's duty to consult arose, the real controversy revolves around the factual findings that caused Mbeki's demise. Nicholson J's affirmation of the constitutional imperative of prosecutorial independence has been received with general acclaim. It is the detail that has sparked intense debate including his 'bright line' ruling that the Minister of Justice, though constitutionally obliged to exercise final responsibility over the prosecuting authority, could have no lawful involvement at all in prosecuting decisions. The sting, however, lay in the finding that there was merit in Zuma's contention that there had been a political

stratagem to cloak him in the guise of an accused at critical moments in the political process and so hamper his election as ANC President.

According to the court, this contention was relevant to why the NPA had changed its mind about prosecuting Zuma, which enabled 'an evaluation' of his right to be heard. Space constraints preclude an analysis or full summary of the findings but they deserve to be read and lawyers will continue to debate both whether the inferences could or should have been drawn and whether the court should have ventured so deeply into this terrain. Perhaps most striking for lawyers was the finding that the NPA's failure in 2003 to prosecute Zuma had been a negation of the duty to prosecute honestly and independently. For Mbeki, his decision to stand for a third term as ANC President was held 'not (to be) in accordance with the Westminster system we espouse in this country' and his firing of Zuma as Deputy President in 2005 described as unjust and unfair. Whatever the legal merit in the move, it is unsurprising, if ironic, that Mbeki, while accepting his political fate, has since approached the Constitutional Court directly to challenge findings against him made in proceedings to which he was neither party nor witness.

The Hlophe judgment

Similarly important constitutional implications arose from a split decision of the WLD delivered on 25 September 2008, in which South Africa's Constitutional Court judges were declared to have infringed the rights of the Judge President of the Cape High Court. The judges' offending conduct was the manner in which they had lodged with the JSC and published a complaint of misconduct against Hlophe JP, more particularly on the basis of *ex parte* representations by two of the court's judges, Nkabinde J and Jafta AJ. Hlophe JP was alleged to have attempted to influence the court in its deliberations about recent cases material to the investigation and prosecution of the charges against Zuma. (Zuma was not implicated in the complaint.)

Mojapelo DJP wrote the majority judgment, with Moshidi and Mathopo JJ concurring. The majority found that Hlophe JP, as a

member of a judiciary (the integrity of which needs special protection) had been entitled to be heard not only when the JSC adjudicated the complaint, but at each material stage including before the complaint was lodged and before a press statement was issued. The failure by the Chief Justice and Deputy Chief Justice and those judges who had not witnessed the conduct complained of, to hear Hlophe JP's version before lodging the complaint, was held to have been unlawful. His rights had also been violated, the majority held, because the complaint had reached the media immediately after Hlophe JP had received it, and because at that stage it had contained insufficient particularity to enable him to respond.

It was thus the speed and lack of detail in lodging the complaint and not the fact it was lodged and published that was held to have breached Hlophe JP's rights to dignity, equality and to be heard. The violation was held to have been temporary, lasting only from 30 May 2008, when the complaint was first lodged and publicised, until 17 June 2008, when the judges furnished fuller particulars of the complaint to the JSC, thereby enabling Hlophe JP to respond. Importantly, Mojapelo DJP dismissed prayers that the judges had committed gross misconduct, had violated Hlophe JP's rights to privacy and access to court and that the decision to lodge the complaint was unlawful and legally incompetent.

Gildenhuys and Marais JJ wrote separate dissents. Both were unpersuaded that declaratory relief – the only final relief sought by Judge Hlophe – should be granted. The judgments evinced a concern about the effect of the declaratory relief both on the JSC deliberations on Hlophe JP's counter-complaint (that the Constitutional Court judges' conduct itself constituted misconduct) and on any damages claim. As to the latter, a letter of demand claiming R10 million in damages has reportedly already been sent to the judges.

Mojapelo JP emphasised that the declaratory relief had no bearing on the judges' complaint, which was to be determined by the JSC. But what of the counter-complaint?

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tion of racism and discrimination. I mention Selma because they have similar values, and have shared a long and valuable life together, in which what one does, the other is part of. We can learn lessons from their lives. That it is important to struggle for justice, and to speak out when there is a need to do so. In this context I feel compelled to express my own deep concern about the thoughtless, ill-informed and politically motivated attacks on our courts by some in the political arena. Our Constitution provides that courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice; that no organ of state may interfere with the functioning of the courts; and that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. Few things could entail more danger for our democracy than the reckless undermining of the integrity of our courts, that we see at present.

Jules appeared for Oliver Tambo to apply for his admission as an attorney, for Mandela & Tambo when attempts were made to evict them from their offices because they were in 'white Johannesburg', and he used his legal skills wherever possible to assist victims of apartheid. He was a founder member of Lawyers for Human Rights when it was established in 1980 and from 1983 until 1993 he was its chairman. During this period, which included several years of arbitrary rule under a state of emergency, Lawyers for Human Rights, at no small risk to those involved in its activities, publicised human rights abuses and confronted such abuses through litigation it conducted. Jules at all times supported that work and identified himself with it.

Jules has held judicial office as a member of the Court of Appeal of Lesotho, of the Court of Appeal of Swaziland, and he has served as an acting judge in South Africa on various occasions. He has also presided over a number of important commissions.

For the past six years Jules has been the Integrity Commissioner to the Gauteng Provincial Legislature. Who better than him to be an integrity commissioner. It is, however, a hazardous job involving

enquiries into whether there have been proper disclosures by members of the Gauteng Legislature of their financial interests, which drags him into asking about share dealings, visits to restaurants, bottles of blue label whiskey and incorrect media reports. Hazardous, because it seems now to carry the threat of being sued if an adverse finding is made – a threat not likely to deter Jules, and indeed one he has apparently already experienced and survived. According to a report in the *Sunday Times* of uncertain date that I came across on the internet, a merchant banker took exception to a report prepared by Jules Browde SC, as commissioner in an insolvency enquiry, in which, so the *Sunday Times* said, the banker was accused of having put about R5 million into his own pocket. He was to sue Jules for R100 million. I did not know Jules was that wealthy, but we live and learn.

There have been many talented members of the Bar; Jules is one of them, skillful in court in trials, motions, appeals, and all types of cases, and wise in his advice to his clients. What makes Jules Browde special, however, is his integrity, his commitment to the Bar as an institution, his values rooted in his respect for the dignity of all persons, and his public commitment to the struggle for a better life for all.

The respect in which Jules has been held by his colleagues was demonstrated by his regular election to the Bar Council of which he was chairman in 1983 and 1985, and by his being asked by the General Council of the Bar to represent it at the Truth and Reconciliation hearings into the legal profession. The respect in which he is held beyond the Bar is demonstrated by the award to him of the degree of Doctor of Laws, *honoris causa*, by his old University, Wits, recognising him as 'a bold-hearted campaigner against injustice' and his commitment 'to securing basic equity for all South Africans'.

Tonight the Bar honours him again by conferring on him the Sydney and Felicia Kentride Award for service to law in Southern Africa. An honour truly earned and well deserved.



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The question whether the judges' conduct constituted misconduct is admittedly different to whether the judges breached Hlophe JP's rights. But the JSC will probably consider a breach in determining whether there was misconduct. The minority judgments raised the dangers of a court pre-empting the decisions of the JSC and effectively usurping its constitutionally ordained functions given the relevance in both forums of judicial ethics and the need for oral evidence.

Whether the court should have granted any declaratory relief will be an important question on appeal. Ironically, what might be of greater practical importance is the SCA's willingness to test the conclusions on the merits. Unless overruled on appeal, or at least shown to be in doubt, the JSC might well consider it appropriate to have regard to those findings even if the SCA holds that it was not a proper case for the grant of a declaratory order. Grounds of appeal include a failure to have regard to precedent on the rights in question and the justifications offered by the judges for the conduct.



South Africa honours Sir Sydney with the Order of the Baobab



On 22 April 2008, Sir Sydney Kentridge QC received the Order of the Baobab in Gold from President Thabo Mbeki at a ceremony held in the Union Buildings – 'For his exceptional contribution to the fight against unjust apartheid laws and embracing the vision of a non-racial, non-sexist, free and democratic society.'

