Appointment of public servants as judges

The Minister of Justice and Constitutional Development has invited the General Council of the Bar of South Africa (the GCB) to submit to him a memorandum elucidating its concerns regarding the appointment of public servants as acting judges. (These concerns – as explained below – were previously conveyed to the Chief Justice and Heads of Court in a memorandum dated 28 September 2008, and were acted upon by the then Minister.)

This memorandum has been prepared at the request of the chairman of the GCB, Patric Mtshaulana SC, and the national executive of the GCB, by Jeremy Gauntlett SC and Jean Meiring.

The factual context

In recent years, while international consensus has solidified regarding both the practical meaning of judicial independence and its indispensability to constitutional democracy, the GCB has on two occasions become concerned by the fact that the Government appeared to hold the view that appointing incumbent public servants as acting judges was consistent with the principle of judicial independence as contained in the Constitution.

Most recently the appointment in February 2010 of Mr Mokotedi Mpshe, at the time in the employ of the National Prosecuting Authority, as an acting judge in the North West High Court raised serious concerns. Previously the GCB addressed the same issue in a memorandum dated 28 September 2008 and presented to the Chief Justice and Heads of Court which was occasioned when, at that time, it was mooted that a member of the Asset Forfeiture Unit of the NPA might be appointed as acting judge in the Western Cape High Court.

In October 2008 the memorandum was presented to the then Chief Justice and the Heads of Court who gave consideration to it and undertook to communicate the Bar's concerns to the then Minister of Justice and Constitutional Development. After the submission of the memorandum, the then Minister decided not to proceed with the appointment of the public servant in question as an acting judge. She subsequently resigned from the public service and duly served as an acting judge, before in 2009 being appointed to a permanent position in the Western Cape High Court with the support of the Bar.

Just over a year later, in February 2010, Mr Mpshe was appointed as an acting judge in the North West High Court. The GCB (and as far as we are aware the Heads of Court) have at no time received from the Minister any communication indicating his rejection of the position articulated in the memorandum of 28 September 2008 nor reasons for the Minister's apparent reversal of the position of his predecessor on this issue.

The Minister subsequently publicly stated his conviction that the appointment of a public servant as an acting judge did not present a threat to the core constitutional principle of judicial independence and that he considered himself fully entitled under the Constitution to appoint further acting judges from among the ranks of serving public employees.

The Bar is at pains to emphasise that the concerns it thus raised had nothing whatsoever to do with the specific individual and that the question whether he was a fit and proper person to serve as a judge in terms of section 174(1) of the Constitution was at no time in issue. The Bar was and still is concerned solely about the fundamental questions of principle raised both by appointing a member of the public service as an acting judge and by certain specific features of the appointment in question.

In media reports from February 2010 the Minister indicated that he had been approached by Mr Mpshe who had been seeking an acting judicial appointment and, after consulting the then acting Judge President of the North West High Court (Justice Leeuw), he had decided to appoint Mr Mpshe for a period of six months.

The constitutional importance of the principle of judicial independence

Section 1(c) of the Constitution declares 'supremacy of the Constitution and the rule of law' to be among the founding values of the Republic of South Africa. Fundamental to these values is a system of government based upon the separation of powers and in which an independent judiciary fulfils a crucial role as part of a complex set of checks and balances limiting the exercise of State power.

Section 165 of the Constitution (in relevant part) sets out the role and characteristics of an independent judiciary as follows:

> '(2) the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice;
>
> (3) no person or organ of State may interfere with the functioning of the courts; and
>
> (4) 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.'

The constitutional position of the public service is very different. The public service falls directly under the executive, and must explicitly 'loyally execute the lawful policies of the government of the day' (s 197(1) of the Constitution). Judges have no such constitutional duty; they are independent of government, 'subject only to the Constitution'. Their duties, as spelt out in section 165 may indeed require them to sit in judgment on those policies which public servants must 'loyally execute,' and to hold them inconsistent with the Constitution.

On a number of occasions, the Constitutional Court has emphasised the centrality of an independent judiciary to South Africa's constitutional system. In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (the *First Certification Judgment*), at paragraph 123, the Constitutional Court held that '[a]n essential part of the separation of powers is that there be an independent judiciary … What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce law impartially and that it should function independently of the legislature and the executive.'

The principle of judicial independence is related to, yet is distinct from, the notion of judicial impartiality. This bears emphasis, in view of public statements in which the Bar's concerns regarding institutional independence have been equated with attacks on an individual's impartiality. To say that a member of the public service acting as a judge breaches the principle of judicial independence does not imply that that individual judge has acted in a partial or biased manner. Rather, judicial independence presupposes (and requires) an institutional separation, which is clear to the public, among the three branches of government (namely the legislative, executive and judicial) and the officials employed in those three branches. This idea has traditionally been known as the *trias politica* principle.

The Constitutional Court held in *Van Rooyen & Others v the State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), at paragraphs 33-34, that judicial independence was measured according to an objective standard based on whether a well-informed, thoughtful and reasonable person would perceive a court to be independent. This perception had to be based on a balanced view of all the material information, with the objective observer being sensitive

to South Africa's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the distinction it made between different levels of courts.

The very same principle was compellingly articulated by the Court of Appeal of Lesotho, when the legal profession opposed the appointment of a member of the Attorney-General's staff as an acting judge, namely that the courts were under a particular duty to ensure that there was no possibility that they might appear to be subject to interference or influence by the executive arm of Government because then they might appear to lack impartiality not only in specific cases, but in entire categories of cases. Schutz JA (Mahomed et Aaron JJA concurring) held that 'the public's right to feel confidence in the independence of judges is itself part of the concept of independence' (*Law Society of Lesotho v The Prime Minister and Another* LAC 1985-1989 129 at 150E).

Attention is also drawn to the Guidelines for Judges issued by the Heads Of Court. The provisions of (and explanatory commentary to) A1, 16 and 27 underscore the legal principles summarised above.

There is clearly at least a reasonable perception among the general public that a State employee, who stands to return to a career in the public service, will be less inclined to make particular findings, or to hold against the State, than would a private practitioner in the same position. It cannot be a ready solution to appoint public servants as acting judges but only to act in cases not involving State litigants. Besides obvious problems in roll-setting and case allocations, even disputes between ordinary litigants may (often unpredictably) involve questions about the regularity or otherwise of the actions of State agencies. An unanticipated witness or affidavit may introduce an issue relating to the regularity of State conduct. The risk thus always exists that in such cases disgruntled litigants take the point at an advanced stage. If good, the effect would be to nullify proceedings from the outset (*Council of Review, SADF v Monnig* 1992 (3) SA 482 (A) at 495B-D).

Moreover, State employees appointed as acting judges continue to receive salaries and other benefits as public servants. In effect, the State pays them twice. As a matter of principle, such appointees hold other 'offices of profit,' which, in terms of the Judicial Guidelines to the Code of Ethics, they are not permitted to do.

The appointment of acting judges in terms of section 175(2) of the Constitution

In terms of section 175(2) read with section 175(1) of the Constitution the Minister must appoint acting judges to courts other than the Constitutional Court after consulting the senior judge of the court on which the acting judge will serve.

In the *First Certification Judgment* objections were raised to this provision. These objections were to the effect that the Minister of Justice effectively had a sole discretion to make the appointments of all acting judges, save for the appointment of acting judges to the Constitutional Court; the principle of separation of powers was compromised since political control over these appointments became possible; and safeguards such as tenure, an open process and involvement of the JSC had been omitted.

The Constitutional Court acknowledged that these objections had merit but determined that there were sufficient safeguards to ensure that section 175(2) did not become the vehicle for an abuse of power. One of the expressly articulated assumptions underlying the Constitutional Court's rejection of these objections was that temporary judges would in the majority of cases fill vacancies that needed to be filled 'urgently and unexpectedly' in circumstances where it would not be practicable to convene the large body of the JSC (at paragraph 129). A further important consideration was that the Minister was precluded by section 165 of the Constitution from interfering in any way with the discharge by the acting judge of his or her duties (at paragraph 130).

Moreover, as noted above, the danger exists in the case of serving public employees being appointed as acting judges (however scrupulously and impartially they perform their duties) that the public will have the perception that, since they are in the employee of the Executive, their discharge of their duties might in some way be interfered with.

It would therefore appear that the premises which led the Constitutional Court to hold that section 175(2) passed constitutional muster are notably absent in the case of public servants being appointed as acting judges.

International consensus on the threat posed by temporary judicial appointments

Moreover, the practice of appointing temporary judges is internationally controversial. Many countries, and indeed also the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy, have adopted the uncompromising stance that such appointments are in principle contrary to sound legal policy and the independence of the judiciary because of their insecure tenure. Ordinarily both the choice of such appointees and the duration of their temporary judicial appointments are matters within the gift of the Executive.

For instance, in the Commonwealth (Latimer House) Principles on the Three Branches of Government (1998), endorsed by Commonwealth Heads of Government (including South Africa) in Abuja, Nigeria, in November 2003, the importance of the principle of judicial independence is endorsed. It is clear from the Principles that short-term or temporary judicial appointments are regarded as an exception to the norm. Since temporary judges lack security of tenure, the practice of appointing them is likely to pose a threat to the rule of law, and the independence of the courts.

In the Mount Scopus Revised International Standards of Judicial Independence, approved on 19 March 2008, the following two general principles are, inter alia, included:

'4.7. The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

4.8. Part-time judges should be appointed only with proper safeguards secured by law.'

Finally, in the report *Beyond Polokwane: Safeguarding South Africa's Judicial Independence*, published by the International Bar Association Human Rights Institute (IBAHRI) in July 2008 after a delegation from that organisation visited South Africa during May 2008, at 3.115 (p 39), the following cautions are expressed and recommendations made regarding the appointment of acting judges:

'The appointment of acting judges, while they may be necessary to fill temporary judicial vacancies or for temporary increases in the work of the courts, has significant implications for judicial independence. The temporary appointment of a judge violates one of the fundamental safeguards of judicial independence – that of security of tenure. The risks to judicial independence are decreased if a judge is appointed for one non-renewable term (and therefore not eligible for future judicial appointment) or from a list of pre-approved individuals, prepared for example by a Judicial Services (sic) Commission.'

Thus, it is plain that public employees serving as acting judges were regarded as beyond the purview of section 175(2) when, in the *First Certification Judgment*, the Constitutional Court rejected objections to the section and a consensus has emerged internationally that acting or temporary judges imperil the principle of judicial independence. It is submitted that, against this background, as a fundamental issue of international legal policy and constitutional compliance, special care is required to assure the public of the independence of temporary judicial appointees.

Conclusion

The GCB therefore respectfully requests the Minister to support what is understood to have been the consensus of the Heads of Court at its October 2008 meeting, namely the proposition that the appointment of acting judges from the ranks of serving public officials does not comply with the principle of judicial independence as stated in the Constitution.

29 April 2010