

Bar backs Judiciary in standing up to government

THE GENERAL COUNCIL OF THE BAR (GCB) has strongly backed the Judiciary in its dispute with government over its independence, the respect due to it and the need for the determined implementation of court orders by all levels of government.

Matters came to a head after government failed to prevent the departure from South Africa of the President of Sudan, Omar Hassan al-Bashir, despite an order by the North Gauteng High Court forbidding that while the question of the latter's outstanding subpoena by the International Criminal Court remained unsettled.

As GCB chairman Jeremy Muller puts it in his contribution on page 3 of this issue of *Advocate*, this led to an unprecedented decision by the Chief Justice, the Heads of Courts and other senior judges to call a press conference to highlight and warn against the ongoing public attack against sections of the Judiciary by prominent individuals within the ruling party and its alliance partners.

The GCB had warned against this trend in a press statement on 19 June. Some two-and-a-half weeks later, on 8 July came the statement issued by the Chief Justice (CJ), the Heads of Court and senior judges of all divisions requesting the CJ to meet with the head of state to point out and discuss the dangers of the repeated and unfounded criticism of the Judiciary.

On 10 July, the GCB expressed its unequivocal endorsement of the content of the Judiciary's earlier statement. For the sake of record the three statements are printed verbatim.

At the time of writing it was reported that the President had agreed to the meeting, which was to be held on 27 August.

GCB press statement on President Al Bashir's departure from South Africa, 19 June

The presence of Sudanese President Omar Hassan al-Bashir at the African Union ("AU") summit in Johannesburg, and President Bashir's departure from Waterkloof Airbase following a ruling by the North Gauteng High Court, have made international headlines. These events give rise to profound concerns. As the Chief Justice is reported to have said on Wednesday, the High Court case is of great importance for this country and the African continent and, perhaps, even the global village.

The GCB is aware that South Africa's position as a member of the AU and host of the AU summit placed it in an awkward diplomatic position in view of the AU's antipathy towards the International Criminal Court ("ICC") and the decision by member states of the AU not to respect arrest warrants issued by the ICC. These considerations are, however, trumped by the fact that South Africa signed up to the Rome Statute, which established the ICC, by passing an act of Parliament in 2002

making it part of our domestic law, thereby obliging this country to arrest anyone entering our borders who is the subject of an arrest warrant issued by the ICC.

The GCB is also alive to allegations that the ICC prosecutors have selectively issued arrest warrants against African leaders while ignoring calls for similar action to be taken against certain western leaders and other prominent individuals. The hypocrisy of some who have criticised South Africa, but have not themselves signed up to the Rome Statute, is also undoubted. The diplomatic dilemma in which the South African Government found itself by allowing President Bashir to enter the country, evidently under a promise of immunity, is self-evident. None of these considerations, however, justifies a contravention of our Constitution or domestic laws.

If the South African Government considers that these are reasons enough no longer to subscribe to the principles and practices of the ICC, it should ask Parliament to revoke the legislation which makes the Rome statute part of our law. Until then, it must respect our law and Court orders made pursuant to that law. Respect for the rule of law and orders of Court by all, including the Government of the Republic of South Africa, is sacrosanct. It cannot be equated with, or traded against, pragmatic geo-political considerations.

We look forward to a full and frank explanation of the Government's involvement, if any, in President Bashir's departure from South Africa in the affidavit which the Full Bench on Monday directed it to deliver by next week.

Regarding the Judiciary's statement on the Rule of Law, 8 July

On Wednesday, 8 July 2015 the Chief Justice and 26 senior Judges of all divisions of the High Court, including all but two of the Judges President, held a press conference and released a press statement ("the Judiciary's statement of 8 July 2015").

The Judiciary's statement of 8 July 2015 is virtually unprecedented. It comes after an order of the North Gauteng Division of the High Court in the matter involving the President of Sudan, Mr Omar Hassan al-Bashir was, on the face of it, flouted by the Government of the Republic of South Africa. This attracted sharp criticism of the Government from various quarters. In response, senior officials of the ruling party and its alliance partners publicly made statements attacking the Judiciary.

Against this background, the General Council of the Bar of South Africa ("GCB") considers that the Judiciary was fully justified in viewing these developments as requiring a public response. The GCB unequivocally endorses the content of the Judiciary's statement of 8 July 2015. In particular:

- The GCB supports the timely reminder that our Constitution sets out the powers of each arm of the State and accords to the Judiciary the right and responsibility ultimately to determine the limits of public power.
- Unlike other organs of State and political parties, Judges do not act as a collective. Judges ordinarily consider one dispute at a time. Judgments are generally considered by a single Judge (or in the case of the Constitutional Court and Appellate Courts, by a bench of Judges) and the decision is that of the Judge or bench alone. Charges that groupings of the Judiciary have a political agenda are dangerous, and wrong.
- Judges occasionally err in their decisions. That is why we have a system of appeals where incorrect judgments can be corrected. The apex Court in all matters is the Constitutional Court, comprising 11 Constitutional Court Justices. It is worth remembering that all these Justices were appointed by the Head of State.
- While criticism of a particular judgment is perfectly in order, criticism should be fair, specific and clear. General criticism of the Judiciary as a whole or, as we have seen,

- certain divisions of the High Court, is entirely unacceptable. It erodes the Constitution and the Rule of Law.
- Veiled or overt suggestions, without formal complaint, that the Judiciary in general, or members of the Judiciary, are guilty of bias or under the influence of outsiders are equally unacceptable and undermining of the institution and independence of the Judiciary. The correct avenue for anyone claiming to have evidence of wrongdoing on the part of any judge is to submit their complaint to the Judicial Service Commission so that due process can take its course.
- The Rule of Law is the cornerstone of our Constitutional democracy. A refusal to abide by a Court order gravely subverts the Rule of Law. Generalised attacks on the Judiciary of the kind seen recently have a similar effect.

The GCB trusts that the meeting between the Chief Justice and the President, for which the Judiciary has called, will take place without delay and that its outcome will be an unequivocal commitment by the Government to the Rule of Law, in all its facets, as enshrined in our Constitution. **A**



8 July 2014

Statement issued by the Chief Justice,
the heads of court and senior judges of all divisions

The Judiciary's commitment to the Rule of Law

A JUDGE'S PRINCIPAL ARTICLE OF FAITH is to adjudicate without fear favour or prejudice. When each Judge assumes office she or he takes an oath or affirmation in the following terms: to be faithful to the Republic of South Africa; to uphold and protect the constitution and the human rights entrenched in it; to administer justice to all persons alike without fear favour or prejudice and in accordance with the constitution and the law.

To Judges this obligation and the oath are sacred.

Our constitution, like others of its kind, sets out the powers of each arm of state. No arm of the state is entitled to intrude upon the domain of the other. However, the constitution requires the Judiciary ultimately to determine the limits and regulate the exercise of public power.

Judges like others should be susceptible to constructive criticism.

However, in this regard, the criticism should be fair and in good faith. Importantly the criticism should be specific and clear. General gratuitous criticism is unacceptable.

In the adjudication process, Judges do not act as a collective with a collective mindset. Each Judge is informed by constitutional values, her or his conscience and brings to bear an individual judgement.

Of course, Judges, like other mortals, err. There are several levels of courts that serve a corrective purpose when Judges make a mistake.

That explains why the constitution provides for an appeal mechanism. Moreover, judgments are often subjected to intensive peer and academic scrutiny and criticism.

There have been suggestions that in certain cases Judges have been prompted by others to arrive at a pre-determined result. This is a notion that we reject. However, in a case in which a Judge does overstep, the general public, litigants or other aggrieved or interested parties should refer the matter to the Judicial Conduct Committee of Judicial Service Commission.

The Rule of Law is the cornerstone of our constitutional democracy. In simple terms it means everybody whatever her or his status is subject to and bound by the constitution and the law. As a nation, we ignore it at our peril. Also, the rule of law dictates that court orders should be obeyed. Our experience by and large is that court orders have been honoured by others arms of state. The few instances of where court orders have not been complied with, whatever the reasons, have the effect of undermining the rule of law.

The Heads of Court and senior Judges of all Divisions have requested the Chief Justice, as head of the Judiciary to meet with the head of state to point out and discuss the dangers of the repeated and unfounded criticism of the Judiciary. Criticism of that kind has the potential to delegitimise the courts.

Courts serve a public purpose and should not be undermined. **A**