e-MANTSHI

A KZNJETCOM Newsletter

September 2010: **Issue 56**

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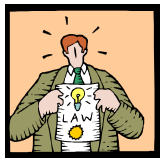

New Legislation

1. The Rules Board for Courts of Law has, under section 6 of the *Rules Board for Courts of Law Act*, 1985 (Act No. 107 of 1985), read with section 9(6)(a) of the *Jurisdiction of Regional Courts Amendment Act, 2008* (Act No. 31 of 2008), with the approval of the Minister for Justice and Constitutional Development, made the rules in the Schedule. These rules have been published in Government Gazette no 33487 dated 23 August 2010. The rules shall be called the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa and shall commence on a date to be fixed by the Minister.

2. In Government Gazette no 33508 dated 2 September 2010 the National Instruction from the SAPS on children in conflict with the law issued in terms of section 97(5) of the *Child Justice Act, 2008* (Act No. 75 of 2008), was published for general information. The *Child Justice Act, 2008* (Act No. 75 of 2008) creates a new separate criminal justice system for children in conflict with the law.

The Act requires that children be treated differently from adults, but provides for them to be held responsible and accountable for their actions. The Act provides that children be treated in a manner that will encourage them to turn away from crime.

The purpose of this National Instruction is to ensure that members treat children in conflict with the law in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage them to become law-abiding and productive adults.

Recent Court Cases

1. S v Libazi and another 2010(2) SACR 233 (SCA)

While the prejudice to an accused of admitting accomplice evidence is very high, the cautionary rule makes its probative value very low.

The two appellants were convicted in the High Court on one count of conspiracy to commit murder, and on three and two counts respectively of attempted murder. They were sentenced to ten years' imprisonment on the first count, and to ten years' imprisonment on each of the attempted murder counts. With concurrence, the effective sentences were 13 and 12 years, respectively. The convictions arose from a series of shooting incidents in which members of one taxi association had attacked members of another. In convicting the appellants, the trial court relied mainly on the evidence of certain eyewitnesses and on an extra-curial statement that had been made by a co-accused, S. It was argued on appeal, firstly, that the trial court had erred in ruling that S's statement was admissible, not only against him, but against the appellants; and secondly, that the eyewitness evidence was unreliable due to the influence of the rivalry between the taxi groups, and due to the inadequate opportunity that the witnesses had had to identify the perpetrators.

Held, that, while the court (in *S v Ndhlovu* 2002 (2) SACR 325 (SCA) (2002 (6) SA 305; [2002] 3 All SA 760) had recently narrowed the ambit of the right to challenge hearsay evidence tendered in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988 if the requirements of the section were satisfied, and if the interests of justice required its admission, what had been decided in that case was not meant to be an inflexible rule. The right to challenge adverse evidence was a foundational component of the fair trial rights regime set out in s 35(3) of the Constitution. Cross-examination was an integral part of the arsenal placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him or her. Failure to protect an accused person's fair trial rights had the potential to undermine the adversarial nature of judicial proceedings and to imperil their legitimacy. A further reason militating against the wholesale application of the rule in *Ndhlovu* was rooted in the injunction to treat accomplice evidence with caution. While the prejudice to the accused of admitting accomplice evidence was very high, the cautionary rule made its probative value very low. *In casu*, S had not testified and this had effectively precluded the trial court from evaluating the evidence contained in his statement; this, in turn, clearly militated against the admission of the statement against the appellants. (Paragraphs [10]-[16] at 240h-243e.)

2. Carter Trading (Pty) Ltd v Blignaut 2010(2) SA 46 (ECP)

A written acknowledgement of debt in respect of goods sold and delivered where payment was deferred, does amount to a credit agreement in terms of the National Credit Act, Act 34 of 2005.

The defendant had on 23 December 2008 signed an acknowledgment of debt in respect of goods purchased from the plaintiff, undertaking to pay the outstanding amount on 24 December 2008 by 16h00. The defendant also undertook to pay interest on the amount owed and 'the cost of negotiating and preparing this acknowledgment of debt and collection commission calculated with the Rules of the Law Society of the Cape of Good Hope'. The defendant failed to pay the amount owed to the plaintiff. The plaintiff instituted action in a High Court for the amount outstanding and the defendant entered an appearance to defend. The plaintiff thereupon filed an application for summary judgment. The defendant opposed the application for summary judgment, averring (a) that the acknowledgment of debt in question was a credit agreement described in s 8(4)(f) of the National Credit Act 34 of 2005; and (b) that the plaintiff had failed to comply with the provisions of ss 129 and 130 of the Act.

Held, that it appeared that the payment of the amount owing had been deferred to 24 December 2008 and that the defendant had undertaken to pay, in addition to the amount owing, at least the cost of preparing the acknowledgment of debt (whatever it might have been) and, in the event of a failure to pay the sum owing, also collection commission and legal fees. (Paragraph[16] at 50J-51B.)

Held, further, that in the application of these terms of the acknowledgment of debt to the provisions of s 8(4)(f) of the Act it appeared that those terms were exactly what was envisaged in the Act to be a credit agreement, namely an agreement in terms of which payment was deferred and at least a fee or charge was payable in respect of the acknowledgment of debt, and interest and legal fees were payable in the event of a failure by the defendant to pay the amount as agreed therein. (Paragraph [17] at 51B-C.)

Held, accordingly, that the acknowledgment of debt clearly fell within the ambit of the provisions of s 8 of the Act and, therefore, constituted a credit agreement as envisaged in the Act. (Paragraph [18] at 51 C.)

Held, further, that it was in any event apparent from the provisions of s 8(1) (a), read with s 8(3), that an agreement in terms of which a credit provider undertakes to supply goods to a consumer and to defer the consumer's obligation to pay any part of the cost of such goods, together with any charge, fee or interest payable to the credit provider in respect of any amount so deferred, was regarded as a credit facility and therefore to be a credit agreement. (Paragraph [22] at 51H-I.)

Held, further, that, insofar as the plaintiff had provided goods to the defendant on

credit on the basis set out in the acknowledgment of debt which had eventually been concluded, it appeared that such an agreement would in any event have been a credit agreement. (Paragraph [23] at 5l I-J.)

Held, further, that the acknowledgment of debt was not a novation of the obligations of the defendant under the agreement in respect of the goods sold and delivered. It rather appeared that the acknowledgment of debt had been intended to be a confirmation that created a further obligation relating to the same performance and not a replacement of the obligation which existed under the agreement in respect of the goods sold and delivered.
(Paragraph [25] at 52B-C.)

Held, accordingly, that the acknowledgment of debt was indeed a credit agreement as envisaged in the Act and that, because of the plaintiff's failure to comply with the provisions of ss 129 and 130 of the Act, the summons had to be regarded as having been prematurely issued so that summary judgment could not at this stage be considered. (Paragraph [26] at 521D.)

Held, further, that the provisions of s 130(4) of the Act could in the circumstances find application in these proceedings, since the plaintiff might, bearing in mind that the merits of the matter were not in dispute, after the remedies referred to in s 129(1)(a) of the Act, if resorted to, had been exhausted, resume its application for summary judgment. (Paragraph [30] at 52 I-53B.) Application postponed sine die on appropriate terms.

3. Strategic Liquor Services v Mvumbi NO and others 2010(2) SA 92 (CC)

Written reasons for a judicial decision is indispensable when a judgment is appealed.

It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights and an impediment to the appeal process. A reasoned judgment may well discourage an appeal by the loser. The failure to state reasons may have the opposite effect. In addition, should the matter be taken on appeal, the court of appeal has an interest in knowing why the judge who heard the matter made the order which he did. While there is no express statutory provision requiring judges who have given judgment *ex tempore* to furnish written reasons when later required, a reasoned judgment is nonetheless indispensable to the appeal process. Judges ordinarily account for their decision by giving reasons—and the rule of law requires that they should not act arbitrarily and that they be accountable. (Paragraphs [15] and [17] at 96G-H and 97C-E.)

Quaere: Where a decision is subject to appeal, whether it would ordinarily be a violation of the constitutional right of access to courts if reasons for judgment were to be withheld by a judicial officer. (Paragraph [18] at 97G.)

4. Fish Hoek Primary School v GW 2010(2) SA 141 (SCA)

The non-custodian father of a child born out of wedlock is liable for the child's school fees.

The appellant, a school, appealed against a full bench decision of the Cape High Court in *Fish Hoek Primary School v Welcome* 2009 (3) SA 36 (C). The High Court held that only a custodian parent was a 'parent' as envisaged in S 1(a) of the South African Schools Act 84 of 1996 (the Act) and accordingly read in the words 'custodian by operation of law'. It thus concluded that 'parent' in s 40(1) meant 'the [custodian by operation of law] parent or guardian'.

Held, that the legislature chose a meaning of considerable breadth. On the literal and ordinary meaning of s 1(a), a natural father such as the respondent was a 'parent' as defined. It mattered not that he was not married to the child's mother. On the plain meaning of the word, he self-evidently was the child's 'parent'. In the court's view there was nothing in the definition to suggest that a non-custodian or non-guardian parent was excluded from the meaning of the word. Far from narrowing the definition of parent in that way, the legislature had chosen a more expansive definition of the word 'parent', to include persons not ordinarily comprehended by its plain meaning. Thus in s 1(c) the legislature simply added a further category of persons not ordinarily contemplated by the word 'parent', to whom the school could look for payment. But it did so without releasing those envisaged in categories (a) or (b) from their obligation to pay. (Paragraph [8] at 145A-C.)

Held, further, that each of subdefinitions (a), (b) and (c) ought to bear different meanings. If not, one or more of them would be rendered superfluous. It followed that (b) and (c) as defined categories ought to add something to (a). By reading in the words 'custodian by operation of law' the High Court rendered the reference to 'parent' in s 1(a) superfluous and redundant, That a court should be slow to do. (Paragraph [9] at 145D.)

Held, further, that the Act explicitly distinguished between parents in general and custodian parents when the need arose. The unqualified use of the word 'parent' in s 40(1) seemed to be a clear indicator that non-custodian parents were intended to be included within its reach. (Paragraph [11] at 146A-B.)

Held, further, that the interpretation was consistent with the achievement of gender equality, the common-law duty of support, as well as the injunction in s 28(2) of the Constitution that 'a child's best interests are of paramount importance in every matter concerning the child'. (Paragraphs [13] and [14] at 146D-E and 147B-C.) The appeal accordingly succeeded.

5. MB v NB 2010(3) SA 220 (GSJ)

If a husband holds himself as the father of his wife's minor child from a previous marriage, there is an obligation on him to contribute to the child's school fees.

The plaintiff, MB, a widow with a teenage son, married the defendant, NB. The defendant agreed to adopt SB, the son, with whom he had by then formed a strong bond. Adoption was not pursued, but in September 2000 SB took the surname of B. In 2007 MB and NB, on a visit to the Eastern Cape, examined a private school. They completed and signed, as father and mother, the application forms for SB's admission to the school as a boarder. The application was successful. Shortly after the birth of their daughter, JB, in 2002, the defendant embarked upon a secret, long-standing relationship with another woman. Upon discovering this, the plaintiff put the defendant on terms to leave the matrimonial home, which he did in mid-2008. The plaintiff lost no time in bringing divorce proceedings. At trial various issues remained contested. The defendant contested the plaintiff's claim for maintenance for herself; also contested was the plaintiff's claim that he should pay SB's school fees for so long as the boy remained at the private school. In addition, the plaintiff had a fairly significant claim under the so-called system of accrual.

<u>SB's school fees</u>

The plaintiff placed reliance on the agreement to pay maintenance that, she contended, was implicit in the defendant's agreement to pay SB's school fees. The plaintiff said that the agreement constituted a contract that bound the defendant to pay the school fees until SB left the school.

Held, that the defendant was not under a contractual obligation to pay the fees. However, the defendant's obligation to pay SB's school fees was pleaded as a species of maintenance, and the question that then presented itself was whether the defendant had the obligation to support SB in this way.
(Paragraphs [15]- [17] at 225J- 226G.)

Held, further, that, to find that the defendant was obliged to pay SB's school fees, the court did not have to conclude that he was de facto adopted, that such a relationship was or should be recognised under the operative statute, or even that he was under a general duty to maintain the boy. It was enough that a court conclude, as the court did, that the defendant held himself as SB's father; that both SB and his mother relied on this representation; and that, in pursuit of the obligations implicit in this ostensible relationship, the delendant joined with the plaintiff in deciding to place SB in a private school and undertaking to pay the school fees that the decision entailed. To find that, in such circumstances, the defendant bore the obligation to contribute towards SB's private-school tuition gave due recognition to the constitutional rights and protections to which children were entitled in terms of s 28(1) in the Bill of Rights. The defendant had in effect promised to do this, and the law would be blind if it could not hold him to his promise. (Paragraph [21] at 227E-H.)

Held, further, that, while the court saw no reason to say that SB had to be treated as though he were the defendant's child by adoption. Were it necessary for the court to make this finding in order to conclude that the defendant was bound to look after SB, it would have had little hesitation in doing so. (Paragraphs [22]—.[23] at 227H-J.)

Held, further, having regard to case law, that the context in which a claim based on *de facto* adoption was made was important and the practical implications of the claim had to be considered. In the present case the point of concern was simply the rights of putative father and son *inter partes*. (Paragraph [24] at 228D- I.)

Held, further, as to the scope of the duty, that the duty could go no further than the one that the defendant would owe his natural son. In the present context, it did not require the defendant to do more than help keep SB at the school for so long as the family, striking appropriate balances, could be expected to afford the fees. If the burden became excessive, as the court believed it had, the defendant should only be expected to contribute towards an appropriate, but less expensive, alternative. In the present case this entailed private schooling as a day boy, provided this option was available and sustainable. (Paragraph [28] at 229H-I.)

From The Legal Journals

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"The impact of the National Credit Act 34 of 2005 on school fees charged by Public Schools"

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"Die Mediese ongesteldheid of afsterwe van 'n voorsittende beampte tydens die strafregtelike 'Maratonverhore' :perspektiewe rakende die prosessuele stappe verbonde aan de novo- verhore asook die grondwetlike en koste- implikasies daarvan"

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Van Heerden, C & Lotz, D J
"Over – indebtedness and discretion of court to refer to debt counselor : Standard Bank of South Africa Ltd v Hales 2009 3 SA 315 (D)"

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Stadler, S
"Section 129 and s 86(10) notice in terms of the National Credit Act: conflicting judgments"

De Rebus September 2010

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

S112 of the Criminal Procedure Act and questions from the bench

A guilty plea by an accused person generally indicates that there is no issue between him and the state and that he admits all the allegations in the charge made against him. Section 112 of the CPA lays down procedure to be followed where an accused pleads guilty and the prosecutor accepts the plea. It has the interest of the accused at its core, with its requirement of questioning from the bench. It is designed to safeguard against incorrect pleas of guilty and the undesirable consequences thereof. S112 contains procedures which are designed to determine whether a plea of guilty has been properly tendered.

Section 112 provides:

'(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea –

(a) ….

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding [R1500], or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.'

Thus, where a plea of guilty has been tendered, the presiding officer must satisfy himself that the accused is indeed guilty of the offence to which a guilty plea has been tendered. Then only can he proceed to convict the accused. He must do so by

questioning the accused, the aim of such questioning being to elicit whether the accused admits guilt to all the allegations in the charge.

In the case of *S v Rozani ;Rozani v Director of Public Prosecutions, Western Cape and others* 2009 (1) SACR 540 (C), the accused pleaded guilty on two counts of rape and one count of attempted rape. He did so by tendering a written plea in terms of s112(2) of the CPA, which was drafted by his legal representative. The accused was found guilty based on his plea statement that he had had non-consensual sexual intercourse with the complainant, who was a minor.

The matter was brought on review to the Cape Provincial Division of the High Court. The founding affidavit stated that he (the accused) had never penetrated the complainant and that he had never instructed his attorney that he had penetrated her. Further that his attorney had never asked him if he had done so and merely assumed that sexual intercourse had occurred between the complainant and the accused. The crux of his review application being that he had pleaded guilty to something which was not a crime (the offence having been committed prior to the passing and implementation of the Criminal Law Amendment Act 105 of 1997).

It transpired at the review application, that the prosecution had in its possession as evidence, a J88 form, confirming that no sexual penetration by the penis of the accused into the vagina of the complainant had occurred on any of the three occasions, with the district surgeon confirming that the hymen of the complainant was intact and that she was still virginal. This, it appeared, had deliberately been withheld from the purview of the court (by both the prosecutor and the defence attorney). Also, that there had been a further failure of justice at the hands of the defence attorney who allowed his client to sign two formal admissions, admitting to having had ‘sexual intercourse’ with the complainant, showing no regard for the fact that one of the definitional elements of the crime of rape was penetration as described above, further failing to bring to the courts attention the existence of the J88, all of which would have resulted in the bench asking the relevant questions and thus the plea being changed to not guilty in terms of the procedure set out in s113(1) of the CPA.

This case is an example of the s112 safeguards failing as a result of the ineptitude of the officers of the court. The first question was whether or not the magistrate fulfilled his duties as described in s112. The issue being whether further questioning from the magistrate would have exposed the fact that the accused had never in fact penetrated the complainant. The appeal court found that the magistrate could not have been expected to delve deeper on questioning the accused than he had. Justification for this finding was based on the fact that the accused had legal representation, that his s112 statement was drafted by his legal representative, that the court was entitled to assume that the accused understood “sexual intercourse” meant that penetration had occurred, and that the legal representatives had presented all the necessary evidence in support of his guilty plea (particularly the J88 form). The court found that had the J88 form been presented as evidence, the accused’s plea would have been changed in terms of s113.

However, when it came to the duty of the prosecutor and the defence attorney, the court found that their performance was severely below the bar. The prosecutor for failing to present the J88 as evidence, and the defence attorney for failing to actually defend the accused where an obvious defence existed.

This case is a good example of the need for questioning from the bench. Although there is a limit to the type of questions the court can ask, the court must firstly try to ensure that incorrect guilty pleas are not accepted. It may appear to be putting a greater burden on the bench, but to do otherwise would be too costly.

Suhayfa Bhamjee
University of KZN
Pietermaritzburg

Matters of Interest to Magistrates

CLAUDE LEON PUBLIC LECTURE

SUSTAINING PUBLIC CONFIDENCE IN THE JUDICIARY:

AN ESSENTIAL CONDITION FOR REALISING THE JUDICIAL ROLE

SANDILE NGCOBO

CHIEF JUSTICE OF SOUTH AFRICA

University of Cape Town

16 September 2010

INTRODUCTION

It is a great honour to deliver the first Claude Leon lecture here at the University of Cape Town. I am quite grateful for this opportunity to speak to and exchange views with members of the academic community present, including law students. I am told that the Claude Leon Foundation has recently endowed a Chair in Constitutional Governance at the University of Cape Town. This is commendable. The legal academy is vital to the rule of law: it produces future lawyers, advocates, and judges; it helps guide the growth of legislation and jurisprudence through its insight

and inspiration; and, of course, it is the source of some constructive criticism of legal developments that helps to keep the judiciary efficient and upright.

The subject of my address today is the question of confidence in the judiciary. Unfortunately, not all criticism of the judiciary is as salutary as that which can be found in legal treatises and articles. Let me give you two examples. A little over a month ago, a senior member in the ruling party's youth league was quoted in a daily newspaper as asserting that a High Court Judge arrived at a "drunken decision" when the Judge ruled against the league.[1] Another political leader from the league was quoted to suggest that the High Court decision must be ignored and that he wanted to "warn the judiciary to desist from meddling with our internal political issues."[2] He went so far as to allege that judges had assumed a political role, stating:

"We have always respected the independence of the judiciary. However, the conduct of some of these judges who have become political role players has made us conclude that we will engage with them in a political manner."[3]

These assaults on the judiciary are very troubling, for this kind of criticism may well undermine public confidence in our courts. And yet public confidence in the judiciary is vital to the preservation of the rule of law, and, ultimately, to the preservation of our constitutional democracy.

In light of the importance of public confidence, and in light of these recent attacks, it is vital that all South Africans—judges, lawyers, and laypersons alike—understand why public confidence in the judicial system exists, what might put it at risk and what we are doing, and need to do, to preserve it. It is these questions that I will explore today. My talk will consist of three parts. Firstly, why is public confidence so important? Secondly, what can and should be done to sustain public confidence in the judiciary? Thirdly, how can public confidence in the judiciary be undermined?

But first, who are the public? Justice Susan Kenny got it right when she said: "As trustees of the rule of law, the judiciary administers the law not for its own benefit, but for the benefit of each and every member of the community. The public, then, is the whole community – which at times may not be represented by the majority or the media."[4]

WHY IS CONFIDENCE IN THE COURTS IMPORTANT?

Why is public confidence important? In short, because it is necessary for the effective performance of judicial functions. Former Chief Justice of Israel, Justice A Barak has said, public confidence is "[a]n essential condition for realizing the judicial role." He explains that "the judge has neither sword nor purse. All he [or she] has is the public's confidence in him [or her]. This fact means that the public recognizes the legitimacy of judicial decisions, even if it disagrees with their content."[5]

The vulnerability of the judicial branch has been acknowledged for centuries. Alexander Hamilton, one of the founders of the American republic,

famously recognised that in a body politic whose legislative, executive and judicial powers are separated, the legislative branch controls money, the executive controls force, and the judiciary controls neither.[6] More recently, our own former Chief Justice Mahomed expressed this idea with his usual eloquence when he observed that:

"[u]nlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship.

Its ultimate power must therefore rest on the esteem in which the judiciary is held within the psyche and soul of a nation."[7]

In other words, the acceptance of judicial decisions by citizens and by governments, which is essential for peace, welfare and the maintenance of the rule of law, rests, not upon coercion, but upon public confidence.[8]

It is important to the rule of law that people and governments develop such confidence in the judiciary that they routinely accept and comply with judicial decisions. This acceptance is most necessary in the case of decisions that are controversial and unpopular. Every day courts make decisions that injure or offend people; sometimes, as in cases of the eviction of informal housing dwellers, judicial decisions may redound to the injury of many people. Of course, there is a greater good underlying these decisions—respect for the law, and the policy goals and the protection of rights that the law represents. Yet that greater good is not always apparent to losing parties. And yet the rule of law depends upon peaceful acceptance of those decisions, and compliance with court orders, even if they are strongly resented.

Moreover, as I have said before, without public confidence in the ability of the courts to dispense justice, there can be no faith in the rule of law. Without faith in the rule of law, valuable relationships of trust within society begin to break down. Citizens can no longer be assured that their rights will be respected. Businesses can no longer be assured that their contracts will be honoured. Victims of crime can no longer be assured that justice will be served in court.

Yet on the other hand, where law reigns, public confidence in the court system has a multiplying effect. Those who would violate the rights of the citizenry know that they will be held accountable, so they refrain from violating those rights. Businesses that know they will be held to their obligations in court will meet those obligations willingly. And potential criminals will think twice about breaking the law when they know that lawbreakers are swiftly and justly punished. When the public has faith in the courts, judges do not only protect the litigants that enter the courthouse doors—

they protect all people. The justice that the courts promise to deliver has a deterrent effect that encourages all citizens to act lawfully.

WHAT CAN AND SHOULD BE DONE TO SUSTAIN PUBLIC CONFIDENCE IN THE JUDICIARY?

As we have seen, public confidence in the judiciary is vital. But what can be done to foster that confidence? Before we address this question, we must first understand what the concept of public confidence means when applied to the judiciary. Indeed, public trust in the judiciary has many components. As Justice Barak has observed, trust in the judiciary:

"means confidence in judicial independence, fairness, and impartiality. It means public confidence in the ethical standards of the judge. It means public confidence that judges are not interested parties to the legal struggle and that they are not fighting for their own power but to protect the constitution and democracy. It means public confidence that the judge does not express his [or her] own personal views but rather fundamental beliefs of the nation."

Justice Barak rightly emphasizes the broad dimensions of the ideal of public confidence. Across the globe, judiciaries enjoy the confidence of their citizens for only so long as the people believe that judges are honest, incorruptible, and guided by principles of independence, impartiality, fairness, and fealty to established law. Here in South Africa, these principles are firmly secured in our Constitution. As a general matter, this means that the people will retain confidence in the judiciary only so long as it and the other branches faithfully adhere to our Constitution.

Of particular importance is section 165 of the Constitution, which vests judicial authority in the courts; demands that the courts be "independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice"; commands that "[n]o person or organ of state may interfere with the functioning of the courts"; and requires that "[o]rgans 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." Faithful compliance with these constitutional requirements will go a long way towards ensuring public faith in the judicial branch.

Fortunately, we do not start from scratch. While history is replete with examples of judiciaries undone by a lack of confidence, our judiciary is not one of them. Even during the darkest days of apartheid, certain judges and judicial decisions shone as beacons of light marking the fundamental promises of fairness and justice upon which law is founded. This much is evident from the original composition of the Constitutional Court, for some of the most distinguished and stalwart judicial defenders of the new Constitutional dispensation were men who had served as judges as the Apartheid era drew to a close. Indeed, our judiciary has a long and noble history of integrity, impartiality and independence.

Since 2006, I have had the privilege of teaching a seminar on the role of the judiciary

in the enforcement of socio-economic rights at the law schools of Harvard and Columbia Universities in the United States. From these experiences I can assure you that our judiciary is held in high regard. Our decisions are read and taught in law schools around the world—and not just when I'm the teacher!

In this country too, whenever there is controversial legislation proposed or enacted, one hears threats of a challenge in the courts, in particular, the Constitutional Court. Indeed, more and more people are resorting to courts in order to resolve their disputes. As the unfortunate comments I mentioned earlier demonstrate, even internal disputes within political parties are taken to court and resolved there. This is good for democracy, and it illustrates the confidence that the people have in the judicial system.

To date, enforcement of court decisions and orders has not been an issue in this country. However, as those unfortunate reported comments suggest, continued public support cannot be taken for granted. The challenge facing the judiciary, then, is how to sustain and build upon this public confidence. According to Justice Smith of Australia, public confidence "depends on the reality and appearance of individual and institutional independence and the impartiality of the courts."[9] The related principles of independence and impartiality are of central importance. Indeed, they are critical to democratic society.

From the outset, it is important to recognise that the independence and impartiality of the judiciary are not private rights of judges. They are human rights of citizens. The Universal Declaration of Human Rights enshrines the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. The International Covenant on Civil and Political Rights guarantee the exercise of this right. And section 34 of our Constitution guarantees everyone, "the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

It follows that the public has a powerful interest in effective and just courts. In particular, the people have an interest in assessing whether courts operate without fear, favour or prejudice, as our Constitution requires, and whether they do so efficiently given the substantial public and private resources that are invested in the judicial system. This interest is deepened by the special role of the judiciary in our constitutional democracy.

The judicial branch is responsible not only for resolving disputes between private parties, but also for resolving disputes between government and private parties and even disputes between different branches or sectors of government. It has the responsibility to protect individuals from government overreaching, and it plays an important role in our country's constitutional balance of powers.

Indeed, sometimes the judiciary is the fulcrum on which the powers of government are balanced. The judiciary, after all, is the branch of government that holds the

other branches to their responsibilities.

If the actual independence and impartiality of the judiciary are essential to the successful operation of democracy, so too is the perception that courts provide an independent and impartial forum to resolve disputes and provide protection to individuals. As already suggested, without public confidence in the judiciary, its ability to do justice is lost. Where people do not trust courts, they will resort to other means to resolve matters that properly belong to the realm of the judiciary. I am reminded here of a comment by an administrative judge in the US who expressed the idea well when he explained that, if the public does not have faith in the judiciary, "people won't go to court, but to the streets or to a gun dealer."

There are definite steps that judges can and should take to secure their reputations for impartiality and independence, given the critical importance of these factors. In terms of impartiality, judges must be ever vigilant in assessing their ability to apply an unbiased mind to each dispute they hear. It is not enough that judges recuse themselves when they are actually biased against a party or cause. Rather, judges must carefully reflect upon whether their sitting in a particular matter would give rise to a reasonable apprehension of bias in the mind of a reasonable litigant armed with the relevant facts. Where it would, the judge must recuse himself or herself, rather than waiting for a litigant to seek such recusal. More generally, to assure that "justice is not only done, but seen to be done," judges should carefully monitor their courtroom demeanour, and should always strive to interact with litigants and their legal representatives in a civil and professional manner.

According to Justice Barak**,** public confidence in the judiciary can be maintained in the following ways:

1. The judge ought to be aware of his [or her] power and its limits. Due to the great power that is reposed in a judge in a democracy, there is potential for abuse of power by judges.
2. A judge must admit his [or her] mistakes. We are human and therefore fallible. Judges must have the humility and courage to accept and correct their mistakes.
3. Judges must display modesty and absence of arrogance in their writing and thinking.
4. Judges must be honest. If they have created a new law they must admit it. Honesty builds acceptance."[1]

To these I might add that the unrelenting pursuit of excellence in one's work will build a reputable, vigilant and trusted judiciary. In order for the judiciary to deliver on its commitment to justice, it is important that judges perform to the highest standards expected of them.

Even outside of the courtroom, judges must be aware of their special role in our democracy, and conduct themselves in a manner befitting their office. I appeal once again to Justice Barak's eloquence. Judges, he writes:

"must understand that judging is not merely a job but a way of life. It is a way of life that does not include the pursuit of material wealth or publicity; it is a way of life based on spiritual wealth; it is a way of life that includes objective and impartial search for the truth. It is not fiat but reason; not mastery but modesty; not strength but compassion; not riches but reputation; not an attempt to please everyone but a firm insistence on values and principles; not surrender to or compromise with interest groups but an insistence on upholding the law; not making decisions according to temporary whims but progressing consistently on the basis of deeply held beliefs and fundamental values."[11]

PRACTICAL STEPS TO ACHIEVE PUBLIC CONFIDENCE

Judges must strive to live up to the vision expressed by Justice Barak. Yet the judicial virtues are not simply abstract ideals for judges to aspire to in their hearts and minds. In terms of judicial independence, concrete steps are required to give meaning to the constitutional imperative in section 165 that courts be "independent and subject only to the Constitution and the law." As one of three co-equal arms of government, the judiciary must enjoy the same status as the legislative and executive branches. It is therefore not entirely consistent with the notion of judicial independence if the courts are administered, as they historically have been in our nation, by the executive branch. This is no more defensible than it would be to have the legislature or executive administered by the judiciary.

My view in this regard is not new. Indeed, I articulated my stance in a paper I delivered at the First Conference of Judges in July 2003. One goal I set for myself upon taking office was to remedy this aberration. The first step in realizing true judicial independence is to give the Office of the Chief Justice the same administrative status—particularly with regard to budgetary independence—as the Office of the President. And it gives me great pleasure to report that this first hurdle has recently been cleared. Just less than two weeks ago, the President announced by Proclamation in the Government Gazette, the creation of an independent Office of the Chief Justice. While this is a significant step in the right direction, more work remains. Next, it is necessary to establish judicially-based court administration. This is a long-term project, but one that must still be pursued.

Institutional changes are necessary, but not sufficient. Judicial independence also means that the court must be free from political influence. It is not enough, however, that the judiciary in fact be free from influence. It must also be seen to be free from influence. How can this be assured? The answer, it seems to me, is that the judiciary must be accountable. Accountability implies the following. Firstly, the justice system must be accessible and efficient, and responsive to the needs of the public that it serves. Secondly, judges must give reasons for their decisions in a timely fashion and be open to informed criticism of those decisions. Finally, there must be diversity in the judiciary that reflects the diversity of our nation.

Section 34 of the Constitution guarantees to everyone the right to have access to the courts. When such access is denied, public confidence in the judiciary is inevitably diminished. To this end, justice must be affordable and efforts must be made to

provide legal assistance to those without the resources to pay for legal representation.

Because “justice delayed is justice denied,” meaningful access to the courts is compromised where the courts operate inefficiently. There are at present huge delays in the justice system. In particular, there are delays in getting cases to trial and delays in delivery of judgments. Both these factors limit the accountability of the judiciary and endanger public confidence in the judiciary.

Our courts generally suffer from huge backlogs. To respond to the particular issue of delays in getting to trial, I have put together a task team to investigate the causes of the delays and to recommend steps to reduce the length of time between initiation of litigation and final resolution. I have also asked for input from the General Bar Council, the Law Society and the National Prosecuting Authority. I expect that these groups will have useful input to inform future policymaking, and am optimistic that the results of this investigation will allow us to make inroads on this vexing problem.

Delay in the delivery of judgments is another problem. Why are written judgments important? Exposing the reasons for decisions to the public enables society to criticize, understand and—one hopes—perhaps even applaud the reasoning that has informed the judicial decision-making. Sir Kitto has explained that:

“The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance.”[12]

For their part, judicial officers have a duty to deliver judgments in a timely fashion. When I took office I was greatly disturbed to discover that there was a vast number of reserved judgments that had yet to be handed down, despite the passage of four, five or even six years. Such delays are intolerable. As I have said, for the individuals involved, justice delayed is justice denied. The harm is not limited, however, to those with a direct stake in the outcome. It is critical that members of the broader community have access to timely judgments so that they can assess for themselves whether the courts are fulfilling their constitutional role.

A judge who sits on a case for years fails to perform the threshold judicial function, the adjudication of disputes. This phenomenon has led me to recommend to the Judicial Services Commission (JSC) the initiation of disciplinary proceedings against judges whose judgments have been outstanding for an inordinate time. I am pleased to report that this effort has begun to yield results. Of the 47 judgments outstanding as of October 2009, 27 remain outstanding and we continue to pursue their final resolution. Parallel to our efforts to discipline judges who have repeatedly failed to provide judgments within a reasonable time period, we are investigating the causes of these delays. Once we have this information, we will devise an appropriate remedy. We have also recently adopted and submitted to the Minister a

Code of Conduct for Judges, which sets out, among other things, standards for delivery of judgments.

It is my hope that as we move forward to an era in which the judiciary is able to manage and allocate its own resources, delays due to resource constraints will become a thing of the past. We need to move with speed to provide the courts and judges with modern technological resources, efficient internet and electronic research facilities and adequate research assistance. We also need to appoint more judicial officers and to provide more court facilities. I believe these measures will go a long way towards ensuring that judgments are delivered on time. I am also optimistic that the newly constituted and invigorated Office of the Chief Justice, and a future judicially-based court administration, will help secure and implement the needed reforms, and thereby ensure meaningful access to court for all South Africans, rich and poor alike.

There is another factor that is crucial to sustaining public confidence.

In a country such as ours, judicial diversity is another critical component of accountability and therefore public confidence. We come from a history where judges were drawn from a narrow sliver of society – white males. On these grounds alone, the judiciary lacked legitimacy. Our Constitution changes the equation. Section 174(1) provides that "[a]ny appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer." Section 174(2) provides a special mandate to the JSC. It requires that "[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered" when judicial officers are appointed. This provision echoes the preamble to the Constitution which declares that "[w]e, the people of South Africa . . . [b]elieve that South Africa belongs to all who live in it, united in our diversity." But at the same time, the Constitution recognises that to achieve diversity in the judiciary, it is necessary to redress the race and gender imbalance brought about by our history.

The importance of diversity to public confidence in the judiciary cannot be gainsaid. It underscores the principle that consideration of a broad range of views is the surest path to sound governance and a foundation of democracy. Diversity on the bench promotes confidence in judges in many ways. When a litigant comes before court and sees from time to time people reflective of his or her own background and experience, it engenders confidence that he or she can get a fair trial. It also promotes confidence because it facilitates the taking into account of different perspectives. In short, "diversity allows justice to see."

While progress has been made, there remains much work to be done to attain a bench fully reflective of our society. In particular, the number of women in the judicial ranks is worrisome. To give but a few statistics, in the Constitutional Court of 11 justices there are only 2 women. In the Supreme Court of Appeal, out of the 22 judges there are only 6 female judges. I can assure you that the High Court numbers are not much better. In total, of the 221 judges in South Africa, only 54 are female. The dearth of female judges is reflective of a dearth of female applicants for

judicial positions. As such, we need programs which will prepare women for the bench and encourage qualified women to apply.

Pursuant to the special meeting of the JSC I will be appointing a special committee of the JSC to explore ways and means of expanding the pool from which female judges can be appointed.

At the same time that we strive for diversity, we must also strive for transparency. The appointment of judges must be a transparent process. People must understand the process and the criteria so that they can independently evaluate the effectiveness of the criteria in identifying capable men and women to sit on our bench.

The Constitution does not provide detailed criteria for judicial appointment. As mentioned, section 174(1) refers to "any appropriately qualified woman or man who is a fit and proper person." It does not define "appropriately qualified" or "fit and proper person"; instead, these broad criteria were deliberately left undefined so as to gather meaning from the experience of the JSC. One of the challenges now facing the Commission is to distil the teachings of the last fifteen years into transparent selection criteria. It is vital that the public know and understand the criteria. People should be able not only to debate the adequacy or the effectiveness of the selection criteria, but also monitor their consistent application.

To this end, just last Friday I convened a special sitting of the JSC, the Judges President and the Provincial Premiers, in order to reflect upon the criteria for the appointment of judges. It was indeed a comprehensive and frank discussion. And the broad criteria agreed upon are as follows:

Criteria stated in the Constitution focus on three basic questions:

1. Is the particular applicant an appropriately qualified person?

2. Is he or she a fit and proper person, and

3. Would his or her appointment help to reflect the racial and gender composition of South Africa?

Supplementary Criteria:

1. Is the proposed appointee a person of integrity?

2. Is the proposed appointee a person with the necessary energy and motivation?

3. Is the proposed appointee a competent person?

(a) Technically competent

(b) Capacity to give expression to the values of the Constitution

4. Is the proposed appointee an experienced person?

(a) Technically experienced

(b) Experienced in regard to values and needs of the community

5. Does the proposed appointee possess appropriate potential?

6. Symbolism. What message is given to the community at large by a particular appointment?

WHAT CAN UNDERMINE PUBLIC CONFIDENCE IN THE JUDICIARY?

I have wished to convey to you that there are many, many elements that form the foundation of public confidence in the judiciary, from the temperament and mental and emotional discipline of judges to the structure of court administration to the racial and gender composition of the bench. It should not be surprising that public confidence is hard to gain, but easily lost. While the steps already discussed are aimed at fortifying public confidence, the failure to achieve those steps will erode the confidence that presently exists. In addition, there are two other factors which are, in my view, of particular concern: judicial misconduct; and baseless criticism of the judiciary.

Firstly, confidence in the judiciary is eroded when judges act without integrity. Judicial misconduct undermines the esteem with which society holds the judiciary, and can only weaken the willingness of the public to accept judicial decisions. This is why it is critical that we hold judges to the highest ethical standards and come down hard if they fail to meet these standards. When misconduct occurs, judicial disciplinary procedures must be credible, effective and swiftly implemented.

The second threat to public confidence comes not from within the judiciary, but from without. Unbridled and unwarranted attacks on the judiciary, whether from political parties or academics or political commentators, imperils confidence in the courts. This does not mean that court decisions should not be criticised, or that judges who engage in misconduct should not be criticised. What this means is that criticism should focus on the reasons for the decisions or the unacceptable ethical conduct.

It is completely appropriate, and indeed healthy and necessary, that the decisions of judges be subjected to scrutiny. Judges are human, and no matter how diligently they attend to their duties, mistakes are inevitable. At the same time, the judicial system has a built in mechanism for the correction of errors – the opportunity to appeal. Parties should take advantage of this opportunity and invoke the appellate process where they believe that a judge has made a mistake. For interested parties and academics alike, constructive criticism is crucial in the development of the law. Nevertheless, criticism should be directed at the judge’s analysis, rather than at

the judge's person. And at no time should anyone, particularly public officials, question the necessity of respecting and obeying the judgment, no matter how strong their disagreement.

CONCLUSION

The role of the judiciary in a constitutional democracy is an expansive one. Decisions of judges affect many people. Courts have the power to overrule even the most popular decisions of other arms of the state if they believe they are contrary to the Constitution. The acceptance and support of these and all court decisions by society depends upon public confidence in the integrity and independence of the judiciary.[13] So too does the respect for the rule of law in the mind of the public. To preserve public confidence, it is vital that we take measures to ensure that the courts work swiftly and effectively, to encourage the highest respect for principles of integrity and fairness in the judiciary, and perhaps most of all to safeguard judicial independence.

Public confidence in the judiciary is especially vital during this formative stage of our constitutional jurisprudence. Our courts, in particular, the Constitutional Court, are still engaged in a delicate, fundamental process of developing our constitutional jurisprudence. During this formative stage, the role of the judiciary in our constitutional democracy will be tested to its ultimate limits. As we have seen in the past, courts are being called upon to intervene in the parliamentary process and thus intrude into the affairs of Parliament; courts are being called upon from time to time to strike down crucial legislation aimed at addressing some of the pressing issues in our constitutional democracy such as land dispossession; courts are being asked to set aside government policy on health and housing issues. Decisions taken by the executive, regardless of the nature of the decision, are being challenged in our courts. And courts are being drawn into internal struggles within political parties.

In discharging its role during this formative period, the judiciary must fall back on the sources of strength it has drawn upon over the centuries – its independence, impartiality and integrity. It is these values which have made the judiciary the important institution that it is. It is the faithful and diligent pursuit of these values which will earn the judiciary public confidence and help it to sustain this confidence, which is an essential condition for realizing the judicial role.

And to the public may I say this:

"In a society such as ours, the judiciary needs the full confidence of the public if it is optimally to perform its task of helping to maintain the `precarious equilibrium'. Public confidence is, however, elusive: it may not at times be measured by the majority's opinion or by what is said in the media. It is easier to see when it has gone than when it remains. It is easier to say what should protect it than what actually threatens it. What is plain is that not all threats to public confidence are of the judiciary's own making. The community has its own role to play in maintaining the precarious equilibrium; and the entire community needs to take a genuine and constructive interest in its judges. The judges are there only to

serve the community, and they will serve it all the better with the community's confidence."[14]

Thank you for your attention.

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[1] Comments attributed to ANC Youth League Secretary-General, Vuyiswa Tulelo, www.iol.co.za 'Official not sorry for 'drunk' slur on judge'. Article was originally published in the Cape Times on 9th August, 2010. This was in response to an interdict granted by the High Court in Grahamstown interdicting the ANCYL from proceeding with its conference in the Eastern Cape without the involvement of a disbanded provincial executive.

[2] The Citizen, 'ANCYL warns judiciary' 3 August, 2010. The statement is attributed to ANC Youth League KwaZulu-Natal provincial secretary, Bheki Mtolo.

[3] *Id.*

[4] Justice Susan Kenney "Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium."

[5] Aharon Barak, 'The Judge in a Democracy', Princeton University Press, 2006 at page 109.

[6] Hamilton, The Federalist Papers, No 78, New York: Random House, 504.

[7] Mr. Justice I. Mahomed, 'The role of the Judiciary in a Constitutional State', Address at the First Orientation course for new judges, 115 SALJ 111 1998 at page 112.

[8] Murray Gleeson, Chief Justice of Australia, Public Confidence in the Judiciary at page 1 (www.hcourt.gov.au/speeches/cj/cj_jca.htm).

[9] Justice TH Smith, 'Court Governance and the Executive Model', The Judicial Conference of Australia, Colloquium, Canberra, Australia 2006, at page 17.

[10] Barak at page 111-112.

[11] Barak at page 110.

[12] F Kitto 'Why Write Judgments?' (1992) 66 Australian Law Journal 787 at 790. Also cited in Justice Kenny's paper on page 9.

[13] Chief Justice John D. Richard, Federal Court of Canada "The Role of the Judiciary in Canada", (2000) at page 1.

[14] Justice Susan Kenny, 'Maintaining public confidence in the judiciary: a

precarious equilibrium' (1999) 25(2) Monash University Law Review 209 at page 223-4.

A Last Thought

"The true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it. And there is no better discipline for a judge than writing (or giving orally) such reasons. It is only when one does so that it becomes clear whether all the necessary links in a chain of reasoning are present; whether inferences drawn . . . are properly drawn; whether the relevant principles of law are what you thought them to be; whether or not counsel's argument is as well founded as it appeared to be at the hearing (or the converse); and so on.

. . . The very act of having to summarize in one's own words what a witness has said, or what is stated in an affidavit or what a document says or provides, is in itself a very good discipline and is conducive to a better and more accurate understanding of the case." M Corbett "Writing a Judgment" (1998) 115 *SALJ* 116 at 118 and 123.