



THE DGRU PRIZE IN EXCELLENT WRITING ON THE JUDICIARY

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CONSTITUTIONAL COURT: STRIKING A BALANCE BETWEEN LEGITIMACY AND
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1. INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (Constitution) signifies a transformation process from the country's former authoritarian polity into a democracy. Before 1994, the political rights of the black majority in South Africa were suspended by operation of racist laws that were enforced through government institutions.¹ Race became the concept around which relations to the state were defined. Against the background of the country's apartheid history, the African National Congress (ANC) adopted a Freedom Charter which contained claims and expressed the aspirations of an inclusive, equal and non-racial society that was subsequently given further expression to in the Bill of Rights of the Constitution.² The Charter proclaimed, among other things, that 'South Africa belongs to all who live in it... and no government can justly claim authority unless it is based on the will of the people' and 'The People Shall Govern!'.³ That is to say, government will be legitimate if the authority it derives comes from the people.⁴ It is for this reason that the preamble of the final Constitution envisages that the people of South Africa, through its freely elected representatives, adopts the Constitution as the supreme law of the Republic so as to, *inter alia*, provide for a democratic government that is based on the will of the people.⁵ Broadly construed, the government in this

¹ The apartheid laws also suspended their inherent human rights such as the right to human dignity. See for example Natives Land Act 27 of 1913, Native Trust and Land Act 18 of 1936, Group Areas Act 41 of 1950 (as amended) Mixed Marriages Act 55 of 1949, Population Registration Act 30 of 1950, Bantu Homelands Citizenship Act 26 of 1970.

² The Bill of Rights sets out a list of civil, political, social and economic rights for all who live in the country (save for those rights that apply particularly to citizens). Section 7(2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights (BoR). Section 8(1) of the Constitution also makes it clear that the BOR informs all law and binds the legislature, executive, judiciary and all organs of state.

³ African National Congress 'The Freedom Charter, adopted at the Congress of the People at Kliptown, Johannesburg' (25-26 June 1995) available at http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-Ea6-1-001-jpeg.pdf (accessed 17 September 2021).

⁴ This may be further explained in the context of the principal-agent theory which encapsulates the tradition that people, as opposed to political leaders, are principals who delegate their political power to political representatives in the general elections, and if elected who will serve at the behest of their voters and in accordance with the prescripts of the Constitution. Political representatives, in turn, act as agents of a delegated authority. The argument is thus that the exercise of authority (legislative, executive or judicial authority) is only authorised or legitimate if its leaders were endorsed by the populace.

⁵ Constitution of the Republic of South Africa, 1996 (Preamble).

context comprises three branches of government: the legislature, the executive and the judiciary.⁶

The architectural design of South Africa's constitutional democracy is premised on a supreme Constitution⁷ which provides for three spheres of government- national, provincial and local- and an independent judiciary.⁸ The structure of the three-tier system of government ascribes to a system of parliamentary government. In this system the parliament, provincial legislature or municipal council exercises legislative authority and executive power resides in the head of executive (the president, premier or mayor) and their cabinet⁹ or executive committees¹⁰ (at provincial and local level). Leaders in the legislature across the three spheres of government are elected by the populace through general elections.¹¹ The president, premier and mayor along with its cabinet or executive committees are, in turn, elected from among the members of the parliament, provincial legislature or municipal council.¹² In line with the above mentioned provisions of the Freedom Charter and the final Constitution, in practice, legislative and executive authority are thus exercised by leaders who were authorised to govern by the people. However, in the case of the judiciary, judges are appointed by different means as prescribed by the s 174 of the Constitution.¹³

Unlike members of the legislature and executive who come from political parties that were voted into office by the populace, judges are elected through procedures that involve the executive and the Judicial Service Commission (JSC). Judicial appointments in South Africa have been a subject of debate for years. In particular, conversations pertaining to the composition of the JSC along with the role of the President of the Republic of South Africa in the appointment of judges are often brought up when seats will soon become vacant in courts.

⁶ De Vos P, Freedman W, Boggenpoel Z & Others *South African Constitutional Law in Context 2* ed (2021) 56.

⁷ Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.

⁸ These three spheres of government are distinctive, interdependent and interrelated. See s 40(1) of the Constitution.

⁹ At national level.

¹⁰ At provincial and local level.

¹¹ In South Africa, members of the executive are elected from among the members in the legislature. The Constitution does not provide for strict separation of powers between the legislature and the executive.

¹² In the case of local government this is so provided that the municipality has an executive committee system in which the council elects the members of the executive committee including the mayor. This changes if a municipality has a mayoral executive system where the council only elects a mayor who is assisted by a mayoral committee. The latter executive system provides the mayor with discretion to appoint councillors to the executive committee. See s 7 of Local Government: Municipal Structures Act 117 of 1998

¹³ The Constitution distinguishes between judges and judicial officers. Judges are appointed through procedures that are set out in s 174 of the Constitution and which involves the Judicial Service Commission (JSC). Judicial officers such as magistrates are appointed through ordinary legislation (see s 174(7) of the Constitution).

This conversation has yet again flared up in 2021 as five of 11 seats of the highest court in the country, the Constitutional Court will become vacant in October 2021. These seats include that of the Chief Justice (CJ) who is the head of the judiciary and the focus of this paper. This paper seeks to contribute to this discussion.

It will be argued here that the current political landscape in South Africa makes it plausible to raise the suspicion that the independence of the judiciary may be threatened if judicial appointments are not made in good faith and in the interest of the people. However, depoliticization of the nomination and selection process is not the answer. A better approach to protecting the independence of the judiciary may be to consider whether, in light of the current political climate in the country, it may be necessary to consider alternative practices that can enhance legitimacy in the appointments process. This paper will critically analyse the role of politics in the appointment of the CJ and assess how legitimacy in the appointment process may be enhanced to protect the independence of the judiciary. The paper will be structured as follows: This paper commences with a brief overview of the Constitutional Court and the importance of, and challenges to, its independence in South Africa. Next, the paper provides an account of the procedure for appointing the CJ to the Constitutional Court. Thirdly, the paper provides an account of the current political landscape and how this may impact on the appointment process and invariably the independence of the judiciary. The fourth section will evaluate how the vulnerabilities to which the judiciary is currently exposed may be mitigated through alternative measures that can ensure that judicial appointments, although political in character, are made in good faith and for the people. The paper ends with concluding remarks.

2. OVERVIEW OF THE CONSTITUTIONAL COURT AND THE IMPORTANCE OF JUDICIAL INDEPENDENCE IN SOUTH AFRICA

2.1 The status and role of the Constitutional Court in South Africa

The Constitutional Court (CC) of South Africa enjoys a special authority as the apex court in the country's judicial system.¹⁴ The CC is the final arbiter of all constitutional matters and

¹⁴ Next in the judicial hierarchy is the Supreme Court of Appeal followed by the High Courts, including any high court of appeal that may be established to hear appeals from High Courts, Magistrates Courts and other courts that are established or recognised in legislation. Other courts include the following: Income Tax Courts, Labour Court and the Labour Appeal Court, Land Claims Court, Competition Appeal Court, Electoral Court and the Small Claims Court. See s 166(a)-(e) of the Constitution.

issues connected with decisions on constitutional matters.¹⁵ Section 172(1)(a) and (b) of the Constitution provides that the CC, in deciding constitutional matters within its jurisdiction, must declare law or conduct that do not align with the prescripts of the Constitution invalid to the extent of its inconsistency; and may make any order that is just and equitable. The CC exercises both exclusive and concurrent jurisdiction.¹⁶ The Court exercises concurrent jurisdiction with the Supreme Court of Appeal (SCA) and High Courts in matters that directly attack the constitutionality of any Act of Parliament.¹⁷ In such matters, the CC as the final arbiter has to confirm or reject orders of invalidity that found a legislative provision to be unconstitutional.¹⁸ Orders of invalidity made by the High Court or SCA will not have force until it is confirmed by the CC.¹⁹ Constitutional powers are thus decentralised in the judicial hierarchy. The extent to which the powers of lower courts in this concurrent area of jurisdiction are curtailed defines the degree of decentralisation. The responsibility to confirm remains centralised in the CC who is the only source that is authorised by the Constitution to endow such orders with legal force; without which a decision of the lower court cannot stand.

The above discussion regarding the extent of constitutional review powers across the judiciary encapsulates the unique constitutional architecture for South Africa's three branches of government: the legislature, executive and judiciary.²⁰ The judiciary does not have unlimited powers and cannot unduly interfere with the functional independence of the legislature or the executive.²¹ The above discussion demonstrates that the judiciary will only be permitted to interfere in the processes of the legislature if and when the CC decides that it is necessary by

¹⁵ Constitution (1996) s 167(3)(a) and (b).

¹⁶ Exclusive jurisdiction refers to those matters enlisted in s 167(4) of the Constitution that only the CC is authorised to decide. This includes, *inter alia*, the authority to decide disputes of organs of state in the national or provincial sphere that relate to the constitutional status, powers or functions of any of those organs of state; deciding on the constitutionality of any parliamentary or provincial Bill; and deciding on the constitutionality of any amendment of the Constitution. Conversely, concurrent jurisdiction refers to shared powers over certain matters between the CC and other courts. See footnote 17 below.

¹⁷ Constitution (1996) s 167(5). The High Court and the SCA have jurisdiction to decide any constitutional matter save for those matters that fall within the exclusive jurisdiction of the CC (see footnote 16 above).

¹⁸ Section 172(2)(a) of the Constitution confirms that the 'SCA, High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court'. See also *Von Abo v President of the Republic of South Africa* [2009] ZACC 15 at para 27.

¹⁹ See footnote 18 above.

²⁰ The Constitutional Principles of the Interim Constitution envisaged, among other things, that South Africa's government structures ought to adhere to the principle of separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness. See *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (C); 1996 (10).

²¹ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 at para 94.

virtue of its declaratory and confirmatory orders.²² As the CC stated in the *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*, courts ‘must be on high alert against impermissible encroachment on the powers of the other arms of government’.²³ Each branch of state are thus duty bound to respect the independence of each other. This begs the question: Why is it important for the CC to be independent? This discussion will follow next.

2.2 The importance of the independence of the Constitutional Court

The independence of the judiciary is a core principle that informs South Africa’s structure of democracy. Judicial independence encompasses two ideals which relates, on the one hand, to individual independence of judges and to the institutional independence of the judicial branch on the other hand.²⁴ In *De Lange v Smuts NO and Others*,²⁵ the court referred to judicial independence as the complete freedom of individual judges to hear and decide the cases that come before them without being subjected to external interference or influence. The court referred a passage of the Canadian Supreme Court in *The Queen in Right of Canada v Beauregard* which stated that:

“No outsider! -be it government, pressure group, individual or even another judge- should interfere in fact, or attempt to interfere, with the way a judge conducts his or her case and makes his or her decision”.²⁶

Therefore, in deciding cases judges must act independently and impartially and at an institutional level, independence requires that judicial structures be protected from external interference. As the highest court of appeal and the final arbiter on constitutional and related matters, it is important that the Court is independent and impartial. Section 165(2) of the Constitution guarantees the independence of the courts, including the CC. This section confirms that courts are only subject to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. Organs of state are also tasked with the constitutional function to, through legislative and other measures, assist and protect the courts

²² *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* at para 93.

²³ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* at para 93.

²⁴ De Vos et al (2020) 246.

²⁵ 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

²⁶ *Queen in Right of Canada v Beauregard* (1986) 30 DLR (4TH) 481 (SCC) at 491.

to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.²⁷ Among the measures adopted to ensure the independence and impartiality of the courts include the establishment of the Judicial Service Commission in s 178 of the Constitution, the requirement for judges to take an oath before assuming office,²⁸ security of tenure as entrenched in s 176 and s 177 of the Constitution, financial security,²⁹ and limitation of civil liability to protect judges from defamation claims.³⁰ In relation to other arms of government, the independence of the judiciary plays a pivotal role to enable the judiciary to effectively serve as a check on the legislature and the executive.

2.3 Challenges to institutional and individual judicial independence in practice

Despite the objective conditions and guarantees that are in place to ensure the independence of the judiciary, judicial independence in South Africa is becoming increasingly threatened. The outbreak of the COVID-19 pandemic laid bare several challenges which negatively impacted on the judicial governance which, in turn, posed risks to the independence of the judiciary. In the recent 2019/20 Annual Report of the Judiciary, the report bemoaned the lack of modernisation in the court system and budgetary constraints which have negatively impacted on case progression and finalisations and increased backlogs in the court system.³¹ The conflation of the role of the executive and the judiciary in the functioning of the Court administration is another pressing challenge that has weakened the independence of the judiciary and impacted on its capacity to execute its administrative functions effectively and efficiently.³² These challenges constitutes an impediment on the judiciary to maintain its institutional independence.

²⁷ Constitution (1996) s 165(2). An 'organ of state' refers to any department of state or administration in the national, provincial or local sphere of government; or any functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation but does not include a court or judicial officer (s 239(1) of the Constitution).

²⁸ S 174(8) of the Constitution.

²⁹ S 176(3) of the Constitution states that the 'salaries, allowances and benefits of judges may not be reduced'.

³⁰ See *May v Udwin* 1981 (1) SA 1 (A) where it was held that a judicial officer can raise the defence of qualified privilege to a defamation action. In *Soller v President of the Republic of South Africa* [2005] ZAGPHC 13; 2005 (3) SA 567 (T) at para 14, Judge President Ngoye stated that '*Broadley, the purpose thereof is to ensure the independence of the Judiciary. The oath which judges take upon assumption of office requires of them to adjudicate matters fearlessly. This they can only do if protected against non-meritorious actions. Judges should not, in the execution of their judicial functions be inhibited by fear of being dragged to Court unnecessarily over their judgements. Such a threat could have a chilling effect on the execution of their duties...*'

³¹ The Judiciary of the Republic of South Africa *Judiciary Annual Report 2019/20* (2020) 9.

³² The Judiciary of the Republic of South Africa (2020) 9.

Furthermore, recent events also suggest that individual independence of judges are under threat. In August 2021 the former Judge President (JP), John Hlope, was found by the JSC to have breached s 165 of the Constitution, citing that his conduct amounts to gross misconduct. The JSC voted for the former JP to be impeached, making him the first judge in the Republic to face impeachment. This decision comes after the former JP tried to influence the outcome of a Constitutional Court judgement by attempting to corrupt Nkabinde J and Jafta J to rule in favour of the former President of RSA, Jacob Zuma, in 2008.³³ The President of RSA, Cyril Ramaphosa, also recently gave testimony at the Zondo State Capture Inquiry which raised questions about potential political influence in the appointment of judges. His testimony revealed that the ANC deployment committee had previously discussed appointments to the CC, SCA and provincial judge president.³⁴ The danger of this approach is that these discussions may take priority over interviews that are conducted before judges are appointed and may thus result in unlawful political influence in the appointment of judges. The method of appointing judges is thus crucial to protect courts from external interference especially by the executive arm of government. Therefore, the above discussion illustrates that the judiciary is confronted with several challenges that may undermine good governance practices in the functioning of courts and its administration. At the same time, the courts are not immune from corrupt individuals who can undermine the integrity of the courts. These weaknesses have the potential to significantly water down the independence of the judiciary. The rest of this paper focuses on one of these aspects, in particular, the appointment process in respect of the appointment of the Chief Justice. The next section will discuss the role of the Chief Justice and elaborate on the procedure for appointing the Chief Justice to the Constitutional Court.

3. THE CHIEF JUSTICE OF THE CONSTITUTIONAL COURT

3.1 The role of the Chief Justice (CJ)

The CJ is the Head of the CC which comprises of 11 justices with equal standing that serve on the bench of the Constitutional Court.³⁵ The equal standing of CC justices in deciding matters

³³ Maughan K 'First Take: Hlope finally faces impeachment, but JSC still stalling on recommending suspension' available at <https://www.news24.com/news24/analysis/karyn-maughan-hlope-finally-faces-impeachment-but-jsc-still-stalling-on-recommending-suspension-20210825> (accessed 18 September 2021). See also Judges Matter 'JSC votes to impeach Hlope' available at <https://www.judgesmatter.co.za/opinions/jsc-votes-to-impeach-hlope/> (accessed 18 September 2021).

³⁴ Judges Matter 'Is there political influence at play in the selection of judges?' available at <https://www.judgesmatter.co.za/opinions/political-influence-selection-of-judges/> (accessed 28 September 2021).

³⁵ Section 167(1) of the Constitution provides that the Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.

in the CC is important to ensure that the offices of the CJ and Deputy Chief Justice are not abused to influence other judges and undermine the integrity and independence of the CC. In *Justice Alliance of South Africa v President of Republic of South Africa (RSA) and Others, Freedom Under Law v President of RSA and Others, Centre for Applied Legal Studies and Another v President of RSA and Others*,³⁶ the Court made it clear that when matters are heard in the CC, the office of the CJ or the Deputy Chief Justice (DCJ) are not afforded special status in relation to the other six judges³⁷ who sit alongside the CJ and DCJ when deciding a matter before them. *In casu*, the Court stated that:

'[T]heir high office and extra-judicial duties they may be called upon to perform add nothing to the tally. Nor does office count when this Court determines the cases and matters before it. Their views count and their voices are heard equally with the respect and authority accorded every member of this Court'.³⁸

As the head of the CC, the CJ is thus first among equals (*primus inter pares*) but in discharging the CC's judicial functions, he or she is no different from the other judges.³⁹ The CJ is also the head of the judiciary and exercises responsibility over the establishment and monitoring of Norms of Standard for the exercise of the judicial functions of all courts.⁴⁰ These Norms and Standards are aimed at enhancing access to quality justice by ensuring, *inter alia*, the effective, efficient and speedy adjudication and resolution of disputes. The exercise of this function entails the issuing of written protocols or directives, performance monitoring and evaluation of judicial officers, giving guidance or advice to judicial officers in respect of Norms and Standards for the performance of judicial functions and regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts, conducting.⁴¹

The CJ is also the chairperson of the JSC and is assigned by the Constitution to preside over meetings of the JSC.⁴² In his or her capacity as chairperson of the JSC, the CJ plays a central

³⁶ (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011).

³⁷ Section 167(2) of the Constitution provides that a matter before the CC must be heard by at least eight judges. This section does not make any distinction between the CJ, DCJ and the other CC judges of how this quorum is constituted.

³⁸ *Justice Alliance of South Africa v President of Republic of South Africa (RSA) and Others, Freedom Under Law v President of RSA and Others, Centre for Applied Legal Studies and Another v President of RSA and Others* at paras 79-80.

³⁹ *Justice Alliance of South Africa* case at para 82.

⁴⁰ Constitution (1996) s 165(6). See also s 8(2) of the Superior Courts Act 10 of 2013.

⁴¹ Superior Courts Act, s 8(3).

⁴² Constitution (1996), s 178(1)(a).

role the appointment of judges. For example, s 174(4) of the Constitution prescribes the procedure for the appointment of other judges to the CC. In this case, the CJ plays an active role in the composition of the list of nominees that should be submitted to the president and from which appointments will be made. The Constitution further mandates the President to first consult with the CJ and leaders of parties represented in the National Assembly before judges are appointed in the CC.⁴³ This process significantly curtails the discretion of the President in nominating candidates whilst at the same time constraining the president to choose from among confirmable candidates set out in the list of recommendations put forward by the JSC.⁴⁴

The Constitution also provides that after a national election, the responsibility to convene the first sitting of Parliament falls on the Chief Justice.⁴⁵ In addition, the CJ must also preside over the election of the President, Speaker of the National Assembly and the Chairperson of the National Council of Provinces.⁴⁶ The Chief Justice is thus required to perform important functions not only in the execution of judicial functions in deciding matters but also relating to the administration of the courts. Other functions of the Chief Justice also extend beyond the judiciary to other arms of government.⁴⁷ The office of the Chief Justice is thus one of the most important and powerful positions to occupy in the country.

3.2 The procedure for electing the Chief Justice

The President as head of the national executive and the JSC established in s 178 of the Constitution plays a fundamental role the appointment of judges in all superior courts. Unlike the procedure for the appointment of ordinary judges to the CC as discussed in paragraph 3.1 above, the Constitution provides a special appointment procedure for the Chief Justice and the Deputy Chief Justice. Section 174(3) of the Constitution provides that the President as the head of the national executive appoints the CJ and DCJ after consulting the JSC and the leaders of parties represented in the National Assembly. In the appointment of the CJ and DCJ, the head

⁴³ Constitution (1996), s 174(4).

⁴⁴ The president may, however, refuse to make appointments from the list submitted to him or her. In this case, the JSC will provide the President with a supplemented list.

⁴⁵ Constitution (1996), s 51(1).

⁴⁶ Constitution (1996), s 52(2), s 86(2), s 64(4) respectively.

⁴⁷ To accommodate the Chief Justice in arresting his or her wide functions, the Office of the Chief Justice was established as a national department in terms of Proclamation 44 of 2010. The purpose of this national department was to ensure that the CJ can properly execute his mandate as both the Head of the CC and as head of the Judiciary and to improve organisational governance, accountability and the effective and efficient use of resources. It is also the first step to enhance the institutional independence of the judiciary in order to achieve the goal of having a full judiciary-led administration as in America, Kenya and Russia.

of executive therefore has wide discretion as to who will be nominated and subsequently appointed to serve on the CC. This means that the President may name any candidate to be considered for the offices of the CJ and DCJ. In practice, the president has always nominated only one candidate for consideration and who, subject to consultation, were elected to serve as the CJ.⁴⁸ The requirement to consult serves the function of dispensing with the *audi alteram partem* principle that underpins South Africa's democracy. The consultation process should thus serve the purpose of enabling the President to hear the views of the consulting parties and to take these seriously to the extent that the final decision of the President has benefited from the views of the consulting parties.

3.3 Risks associated with the procedure for appointing the CJ

The procedure for the appointment of the CJ and DCJ discussed above significantly reduces the role of the JSC in the nomination and subsequent appointment of CJ and DCJ. The lack of openness regarding the process of how candidates are nominated makes this process prone to abuse. While the appointment process cannot be entirely insulated from the political process, the extent to which politics influences the appointment process is a matter of worthy consideration. The CJ exercises important functions that are crucial to realise transformative constitutionalism in society. It is thus insufficient for the president to only consider professional qualifications when he or she nominates a candidate. The President must also be satisfied that the candidate's political values and ideology are such that a CJ would interpret the law to advance the values of the Constitution and to do so in a manner that is consistent with the objects of the Bill of Rights. However, political motives ought not to become the sole criteria for these appointments. For example, it would be inappropriate to nominate a candidate simply because he or she is personally affiliated with the president or with the governing political party.

The president only nominates one candidate to be considered for the office of the CJ and DCJ, the interview process becomes a tick-box for purposes of ensuring compliance. This is because there are no alternative options to consider as in an ordinary interview process. Members of the JSC and the NA may thus be of the view that the interviewee will most likely be appointed as the CJ (which have been common practice) and therefore not engage in a rigorous interview process. Further, it also calls into question the actual purpose of the consultation process. As

⁴⁸ This was the case with the last three successive chief justices namely justices Pius Langa, Sandile Ngcobo and Mogoeng Mogoeng.

stated above, the views of the JSC and the NA must be given genuine consideration and ought to inform the final decision of the president. However, if consulting parties know that the nominated candidate will probably be appointed as the CJ then the consultation process may be watered down to rubber-stamp the views of the president. Only nominating one candidate for consideration may thus delegitimise the appointment process. These risks make the judiciary vulnerable to undue external influence which threaten its independence and may bring into question the legitimacy and credibility of the process. Later, this paper provides recommendations that are useful to mitigating these risks in the appointment of the CJ.

4. THE CURRENT POLITICAL LANDSCAPE IN SOUTH AFRICA: IMPACT ON THE APPOINTMENT PROCESS AND IMPLICATIONS FOR JUDICIAL INDEPENDENCE

Political parties are the vehicles through which the notion of representative democracy can be realised. For this reason, political parties play a vital role in the system of checks and balances. In the legislature, political representatives play an active role in the creation of laws whilst overseeing its implementation by the executive arm of government. In the context of South Africa which is characterised by its apartheid history which caused deep divisions and inequalities in society, elected representatives are required to use its legislative and executive functions to heal the divisions of the past, address prevailing inequalities through adopting laws and policies that are aimed at improving the quality of life for all citizens and to realise a government that is based on the will of the people.⁴⁹

The current political landscape, however, suggests that these functions and arms of government have been abused to promote the interests of an elite few at the expense of the majority of South Africans. The State Capture Inquiry that is currently ongoing is hearing testimonies of how leaders in top senior positions, including those who are tasked with the responsibility to prevent corruption, played an active role in large-scale looting of state resources. The State Capture Report uncovered grand corruption which extend to most government departments and state-owned entities (SOEs) and which involve large amounts of taxpayer funds and state resources.⁵⁰ While this was going on, governance in government departments and SOEs were deteriorating thus resulting in a decline of quality delivery of services which are integral to the promotion of human rights in South Africa. According to the latest report of the Auditor-

⁴⁹ Constitution (1996) Preamble.

⁵⁰ *Jacob G Zuma v The Office of the Public Protector and Others* (1447/18) [2020] ZASCA 138 (30 October 2020) at para 26.

General of South Africa (AGSA), the financial health of government national and provincial departments as well as SOEs is a cause for concern. For the 2019/20 financial year the AGSA provided that 60 per cent of the departments had insufficient funds to settle all liabilities that existed at year-end.⁵¹ Poor governance in these departments, especially the provincial health departments, attracted claims totalling R147,12 billion which were not budgeted for and had to be paid from funds that were earmarked for other strategic priorities including service delivery.⁵² The South African Airways and LMT Products (a subsidiary of Denel) are SOEs which are already under business rescue whilst South African Express is under provincial liquidation. Other SOEs including Petroleum Oil and Gas Corporation, South African Broadcasting Corporation, Denel and Pelchem have disclosed uncertainty in their financial statements about whether they will be able to continue.⁵³ Similarly, local government continues to regress and municipalities are struggling to deliver essential services such as water and sanitation, electricity, transport, health services at the grassroots. It was recently reported by the portfolio committee on Cooperative Governance and Traditional Affairs that of 257 municipalities, only 16 are considered stable. The majority of these municipalities (163 of 257) are under financial distress and struggling to deliver services, 64 municipalities are dysfunctional and failing to deliver services and 29 municipalities are already under provincial administration.⁵⁴

The ANC is the governing party at national party. It also governs all provinces except for the Western Cape which is governed by the DA. The ANC also enjoys control over most municipal councils across South Africa. Therefore, to a large degree, the status of government across all three spheres of government may be attributed to the leadership of the ANC. The status of national, provincial and local government along with alleged and proven cases of corruption involving top ANC officials have undoubtedly tarnished the brand of the political party. The trends in voting behaviour at national, provincial and local level also suggests that trust in the ANC is declining.⁵⁵ The party is viewed by constituents as a corrupt political party that is only interested to serve the interests of its party members.

⁵¹ Auditor-General of South Africa *Consolidated General Report on National and Provincial Audit Outcomes: PFMA 2019/20* (2020) 13.

⁵² Auditor-General of South Africa (AGSA) (2020) 13.

⁵³ AGSA (2020) 13.

⁵⁴ Felix J 'Just 5% of SA's municipalities considered stable, with more than half in a financial mess' available at <https://www.news24.com/news24/southafrica/news/just-5-of-sas-municipalities-considered-stable-with-more-than-half-in-a-financial-mess-20210825> (accessed 18 September 2021).

⁵⁵ See election results for national, provincial and local government at www.iec.org.za

The President of RSA is a member of the ANC party. At the same time, the JSC is composed of 23 members of which 15 represent political interests, including the Minister of Justice and Constitutional Development. The JSC is made up of judges, representatives of the legal profession, members of the NA and NCOP.⁵⁶ Currently there are 12 politicians on the JSC of which 8 members belong to the ANC. The ANC also controls the majority vote in the JSC and is thus able to swing a vote in its favour in cases where the JSC is required to pass a majority vote before appointing a judge as with judges in the High Court. The dominance of the ruling political party in the JSC and the fact that the President is a senior member of the political party have raised the reasonable suspicion that appointments by the President may be motivated by the questionable political motives of the ANC party. This suspicion emanates from the doings of the ANC leadership in the legislative and executive arm of government where top positions were offered to those who are affiliated with the ruling party and occupied to pursue ulterior motives. The presence of the ANC in the appointment process have thus caused the media and academics to question whether the independence of the judiciary is under threat and to direct their focus to discussions on how political influence in these processes may be reduced. However, it is argued here that it is clear that by making the appointment of judges an executive matter, the Constitution intended for politics to influence judicial appointments. Any approaches which seek to remove politics from this process will provide the judiciary with a degree of independence that is stretched far beyond that which the Constitution intended for it to have.

As mentioned above, South Africa's democracy is underpinned by the notion of representative (and participatory) democracy. In this form of democracy, citizens act as principals who delegate their power through general elections to elected political representatives who act as agents. They are then expected to serve as a voice of their constituents and must act in the best interests of their principals. It is precisely for this reason that the drafters of the Constitution structured the appointment process in a manner that allows for political influence. As stated in the Freedom Charter mentioned above, 'no government can justly claim authority unless it is based on the will of the people'. Similarly, the Constitution demands that government be based

⁵⁶ Section 178(1)(a)-(j) of the Constitution provides for the list of members who are to serve on the JSC. These are as follow: the CJ; President of SCA; one Judge President designated by the Judges President; the Cabinet member responsible for the administration of justice; two practicing advocates nominated from within the advocates profession to represent the profession as a whole, and appointed by the President; two practicing attorneys nominated from within the attorneys profession to represent the attorneys profession as a whole, and appointed by the President; one teacher of law; six persons designated by the NA; four permanent delegates to the National Council of Provinces; four persons designated by the President.

on the will of the people. The executive and political interests that are represented in the JSC serve to ensure the indirect participation of the people through their elected representatives. Therefore, to render these appointments legitimate it is crucial for politics to play a role. This may also explain why the Constitution provides for a special appointment process in the case of the CJ. The political party who obtains the most votes in the national elections will represent the majority in the legislature from which the President must be elected from among the members in the Parliament. The President, though not directly elected by the populace, nonetheless represents the will of the people because he or she was elected by majority of the members of parliament acting in a representative capacity. For this reason, his or her powers are legitimate. The institutional attributes of the process of appointment of the CJ is thus to ensure that the *choice* rests with the executive and not the JSC. In this case it can be argued that this choice represents the will of the people (or at least the majority). The purpose of the JSC in this instance is to ensure that the voices of other groups including minority political parties are also heard and considered but the decision for appointment correctly rests with the executive whose authority is based on the will of the people. That is to say, if such authority is exercised in pursuit of his or her own political agenda, the nexus between the principals and agent is severed and the decision thus irrational.⁵⁷ Therefore, the process for appointment of the CJ and other judges cannot be entirely insulated from political considerations and the Constitution intended for political considerations to influence judicial appointments. However, the reputation of the ruling party makes the judiciary vulnerable to external influence. For this reason, it may be necessary to consider what additional measures may be implemented to supplement this process. This will be considered next.

5. RECOMMENDATIONS

The reputation of the ANC and the status of government under its leadership have contributed to growing low levels of trust among citizens and the disintegration of the social contract between the State and the people. Their workings in the legislative and executive branch of government have correctly raised questions about whether the appointment of the CJ in October would be legitimate. The current circumstances perhaps show some of the cracks in the system that have always made judicial appointments vulnerable to external interference. If not

⁵⁷ In *Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of RSA and Others* 2000 (2) SA 674, the court stated the following: "It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement".

corrected, should citizens find themselves in a similar position 50 years from now, the independence of the courts may be a costly price to pay. This section therefore provides recommendations on measures that can be adopted in the appointment process.

5.1 Nominating more than one candidate for consideration of the vacant Chief Justice post

It was mentioned above that the last three successive Chief Justices in South Africa were the only nominations that were made and each candidate was subsequently elected the Chief Justice.⁵⁸ Instead of nominating only one candidate for consideration of the office of the CJ, it is better to nominate multiple candidates. This would make the interview process more rigorous and competitive and thus legitimate. At the same time, it enhances the consultation process with the JSC and members of the NA as the diversity in the interviewees allows for concrete views to be put forward by the consulting parties. This process will allow for a more informed decision to be taken by the President in making his or her final decision.

5.2 Formulate guidelines that should inform the nomination process

Currently, it is not clear how the President decides who will be nominated as a candidate for the office of the Chief Justice. A clear set of guidelines or criteria may thus be appropriate to ensure candidates meet the preliminary requirements to be considered as one of the best possible candidates to serve as the chief justice. This criterion should consider, among other things, his or her status in the community, administrative skills, political orientation, experience and capacity to interpret the law in accordance with the values and precepts of the Constitution.

5.3 Adopt measures to allow for the direct participation of the electorate

The discussion in paragraph 4 above makes it clear that the appointment process cannot be apolitical as this would eliminate indirect participation of the electorate that injects the appointment process with legitimacy. Paragraph 1 stated that legitimacy is derived from exercising public powers that are based on the will of the people. Thus, depoliticising the appointment process may render judicial appointments illegitimate. However, there is also a risk that the current political party may seek to advance its own political agenda in the appointment of the CJ. To mitigate this risk and to increase trust and confidence in the process which is essential to render it credible, a form of direct participation may be favourable. Recently, the President announced that he will be inviting the public to make nominations for

⁵⁸ See paragraph 3.3 above.

the position of the next Chief Justice in South Africa.⁵⁹ This approach will enable the public to directly participate in the process of nominating the head of the judiciary and Constitutional Court. This approach therefore prevents potential agency loss in the decision-making process by placing political power back into the hands of the agents who can constrain the presidential freedom of choice and only appoint a CJ the nominations put forward by them.

An important question is whether this practice can be retained in future appointments of the CJ? The case of *Law Society of South Africa and Others v President of RSA*,⁶⁰ suggests that the executive is not obligated by the Constitution or legislation to invite the public in its decision-making processes as required by the legislature. The CC stated the following:

“Public participation in the law-making process is a requirement, specifically provided for in our Constitution that must be met by our law-making institutions. But participatory democracy is not provided for in similar terms in relation to the exercise of presidential or executive power... And there is no legal provision or principle that even remotely imposes an obligation on the executive to invite the public to participate in its decision-making processes... Desirable though it may be, we would be straining even the scheme of the Constitution if we were to elevate public consultation to the level of a requirement”.⁶¹

Therefore, it is sufficient if the conduct of the executive is exercised lawfully, rationally and in a manner consistent with the Constitution. The novel practice by the President to call for nominations by the public, though enriching the decision-making process in the appointment of the CJ places no legal obligation on future presidents or even the current president to do the same in the future. However, it always remains open to the national head of executive to involve the public whenever it deems fit to do so. To this extent, it may be argued that this practice to allow for direct participation in the appointment process may be established as a convention that will be followed in the future though not being legally binding on the executive.

6. CONCLUSION

Judicial independence is important to ensure that courts serve as a proper check on the legislative and executive arm of government through applying the law without fear, favour or prejudice. Any threat to its independence must therefore be countered with appropriate

⁵⁹ The Presidency of the Republic of South Africa ‘President Ramaphosa invites public participation in selection of Chief Justice’ available at <http://www.thepresidency.gov.za/press-statements/president-ramaphosa-invites-public-participation-selection-chief-justice> (accessed 18 September 2021).

⁶⁰ 2019 (3) SA 30 (CC).

⁶¹ *Law Society of South Africa and Others v President of RSA* at para 87.

measures that can address any weaknesses that makes the courts vulnerable to external influence. This paper discusses the role of politics in the appointment of judges, particularly the Chief Justice. It argues that the Constitution intended for appointments to be influenced by political considerations by virtue of the appointment procedure it prescribes. However, current circumstances in South Africa in which several top leaders of the ruling party have been alleged, and in some cases proven, to be involved in grand corruption and State Capture have contributed to suspicions that judicial appointments especially that of the Chief Justice may be tainted with ulterior motives. The current state of affairs instead shows some of the cracks in the system that existed all along. This paper therefore provides recommendations on how the appointment process may be strengthened to protect the independence of the judiciary.

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