

THE WIDER SIGNIFICANCE OF THE JUDGEMENT OF THE CONSTITUTIONAL COURT ON THE “NKANDLA MATTER”.

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On 31 March, 2016, Chief Justice Mogoeng Mogoeng conveyed the unanimous decision of the Constitutional Court (ConCourt) in the matter of *“Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11.”*

This decision has evoked much understandable and inevitable political discussion and activity in our country, which has included calls for the immediate removal of the President of the Republic.

However what must also preoccupy the Nation, including and especially the Political Parties, is the wider and deeper significance of the ConCourt decision.

That wider and deeper significance derives from the fact that in its consideration of the “Nkandla matter”, the ConCourt made an outstanding contribution to the clarification of the issue – **what do we mean when we say that ours is a Constitutional Democracy?**

It has therefore made a critical contribution in terms of the evolution of our democracy by posing and answering the question – **what does our Constitution prescribe in terms of how South Africa should be governed?**

In this context it has also answered the question in the affirmative – **should any consequences arise from any failure by anybody or any governance institution to act according to the Constitutional prescripts?**

The adoption of the Constitution in 1996 constituted a strategically important step forward towards defining the kind of new South Africa we all want, thus to end the centuries-long period of conflict-ridden colonial and apartheid rule.

The Constitution was therefore conceived and designed as an agreed social compact about South African Governance that is binding on the Nation as a whole.

Necessarily it constituted and constitutes a United National Response to the question – **what must we do in the new South Africa to avoid**

the fundamentally Bad Governance which characterised the old South Africa of colonialism and apartheid?

The ConCourt put this matter in these words:

"One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck."

Thus, to constitute the new, we took the solemn decision to **define our System of Governance as a Constitutional Democracy.**

Together, through the Constitutional Assembly and the extensive National Consultations which contributed to the outcomes of the Assembly, we therefore made the determination that it will only be through respect for and the implementation of the provisions of our **Constitutional Democracy** that:

- we will avoid the conflict-ridden Bad Governance of the past, including through the full application of the rule of law;
- we will be able to regulate the contending interests which had become entrenched because of that past, as well as those that would arise in future;
- we will achieve national unity and reconciliation; and,
- we will build a new South Africa that truly belongs to all who live in it, committed, among others, to heal the divisions of the past.

It therefore stands to reason that when all of us decided to establish a **Constitutional Democracy**, we accepted and committed ourselves to respect the **legal, political** and **ethical** obligations which attend this strategic decision about our System of Governance.

By definition, the practice of **Constitutional Democracy** means recognition of the Constitution as the supreme law of the land and therefore the central determinant of our Governance System.

Indeed, in this regard, our Constitution says:

"This 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."

It was to honour this Constitutional precept, which is fundamental to any **Constitutional Democracy**, that in considering the "Nkandla matter", the ConCourt had to make the determination for which it is **constitutionally** empowered, as to whether the decisions and actions of the State Organs concerned were **consistent** with the Constitution.

In this context it underlined the requirement that the obligations imposed by the Constitution **must** be fulfilled.

It therefore commented that:

"Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy."

One of these '*foundational values*' is obviously the prescript that all the obligations imposed by the Constitution **must** be fulfilled.

As a corollary to this, the ConCourt therefore made the determination that failure to observe these '*foundational values*' might threaten the very '*survival of our democracy*', and therefore constitute a counter-revolutionary act, where the revolution is understood as the establishment of our **Constitutional Democracy**.

Ours is a young Constitutional Democracy and will inevitably make mistakes as it works faithfully to implement the provisions contained within this Democracy, as prescribed by the Constitution.

It therefore stands to reason that everybody concerned and all State Organs should regularly assess their decisions and actions taken over time, to determine whether these have been correct in the context of the legal, political and ethical obligations arising from the continuous effort to ensure the proper functioning of a **Constitutional Democracy**.

This assessment would make it possible for all concerned to take such corrective action as might be necessary.

The eminent ConCourt Judgement relating to the "Nkandla matter" has laid a vitally important foundation for such an assessment, which, again, all those concerned should act upon.

In this regard, and as all of us know, the ConCourt dealt definitively with such matters that are important to our **Constitutional Democracy** as:

- the separation of powers among the Executive, the Legislature and the Judiciary;
- the role and tasks of the Executive, especially the President of the Republic;
- the role and tasks of the National Assembly;
- the role and tasks of the Judiciary; and,
- the role and tasks of the Public Protector.

In this regard all of us will have studied the comments of the ConCourt about the role and tasks of the President of the Republic when it said that, among others:

"The President is the Head of State and Head of the National Executive. His is indeed the highest calling to the highest office in the land...As the Head of State and the Head of the National Executive, the President is uniquely positioned, empowered and resourced to do much more than what other public office-bearers can do..."

"He is after all, the image of South Africa and the first to remember at its mention on any global platform..."

"He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project...The President is a constitutional being. In the Constitution the President exists, moves and has his being. Virtually all his obligations are constitutional in nature because they have their origin, in some way, in the Constitution..."

"Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination that all other progress-driven nations strive towards on a daily basis..."

"Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed."

"The promotion of national unity and reconciliation falls squarely on his shoulders...to unite the nation, obviously with particular regard to the painful divisions of the past..."

"He initiates and gives the final stamp of approval to all national legislation."

"And almost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him..."

"The President has the duty to ensure that State resources are used only for the advancement of State interests. On the other hand, there is the real risk of him closing an eye to possible wastage, if he is likely to derive personal benefit from indifference. To find oneself on the wrong side of Section 96 (of the Constitution), all that needs to be proven is a risk. It does not even have to materialise...The President is expected to endure graciously and admirably and fulfil all obligations imposed on him, however unpleasant.

"He is required to promise solemnly and sincerely to always connect with the true dictates of his conscience in the execution of his duties..."

"The President (should) do all he can to ensure that our constitutional democracy thrives. He must provide support to all institutions or measures designed to strengthen our constitutional democracy. More directly, he is to ensure that the Constitution is known, treated and related to, as the supreme law of the Republic..."

"He is required to (discharge his responsibilities) with all his strength, all his talents and to the best of his knowledge and abilities."

Arising from all these critically important responsibilities of the President of the Republic, and in the context of what we have suggested concerning a periodic assessment of our success in terms of ensuring the proper functioning of our Constitutional Democracy, it would seem obvious that:

- whatever Political Party/s present candidates to Parliament for election to the post of President of the Republic, they must satisfy themselves that such candidate/s have the capacity to discharge their Constitutional responsibilities in our **Constitutional Democracy**;
- Parliament must take all necessary measures to satisfy itself that the person it elects is capable of and is committed to this discharge of their Constitutional responsibilities in our **Constitutional Democracy**;
- subsequently, in honouring its oversight responsibilities over the Executive, Parliament should regularly make an assessment of whether the elected President is indeed carrying out his/her Constitutional responsibilities; and,
- Government and the State should ensure that the President is provided with the ways and means to empower her/him effectively to discharge the said Constitutional responsibilities.

It is also important that we understand the observations made by the ConCourt concerning the National Assembly, including its comments that:

"The National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least remembered.

"It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people.

"It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made to the populace through the State of the Nation Address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office.

"Parliament also passes legislation with due regard to the needs and concerns of the broader South African public. The willingness and obligation to do so is reinforced by each member's equally irreversible public declaration of allegiance to the Republic, obedience, respect and vindication of the Constitution and all law of the Republic, to the best of her abilities...Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'...

"In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa."

Arising from all the foregoing, it would seem obvious that:

- all Political Parties must ensure that their Parliamentary members understand that their first responsibility as Members of Parliament, above Party loyalty, is to serve as the '*voice of all South Africans, especially the poor, the voiceless and the least remembered*';
- similarly, Parliament should conduct induction processes for all its Members such that they understand this principal individual and collective responsibility on their part;
- consequently Parliament should educate its Members to understand the meaning of their oversight role over the Executive and State organs, which includes ensuring that these properly execute their Constitutional and Statutory obligations, and meet the

commitments they have made to Parliament, again above Party loyalty;

- Parliament should also help to ensure that each Member understands that with regard to whatever she/he does, she/he is duty bound to honour to their best of her/his ability her/his public declaration of allegiance to the Republic, and obedience, respect and vindication of the Constitution and all law of the Republic;
- the Parliamentary Presiding Officers in particular must ensure that Parliament implements all Decisions handed down by the Courts relating to Parliament, consistent with the Separation of Powers, including as this relates to oversight over the Executive and the State Organs; and,
- these Presiding Officers must ensure that in everything it does, Parliament respects the reality that ours is a **Constitutional Democracy** and therefore that the Constitution is the supreme law of the Republic with obligations which must be fulfilled.

The ConCourt also made observations which relate to the Judiciary, including itself, the ConCourt, as when it said:

"As the highest court in constitutional matters and "the ultimate guardian of the Constitution and its values", (the ConCourt) has "to adjudicate finally in respect of issues which would inevitably have important political consequences".

"Also to be factored into this process is the utmost importance of the highest court in the land being the one to deal with disputes that have crucial and sensitive political implications..."

"Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.

"Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations..."

"It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly.

"Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon."

Again arising from the foregoing, it would seem obvious that given the delicate role that the Judiciary must play within the context of the Separation of powers in a **Constitutional Democracy**, it would be important that:

- the processes to select and appoint Members of the Judiciary should be such that they give the best possible guarantee that those selected are properly qualified truly to understand the meaning and application of the Separation of Powers and the role and place of the Judiciary in this regard, in the context of the reality that ours is a **Constitutional Democracy**;
- the leadership of the Judiciary, especially the Chief Justice, should undertake the processes that Members of the Judiciary are properly schooled with regard to the immediate foregoing; and,
- this leadership, especially the Chief Justice, should engage the Members of the Judiciary in educational processes to ensure that these Members understand the national circumstances which gave birth to, as well as those under which our **Constitutional Democracy** must function.

Of course the ConCourt also commented on the matter of the Public Protector and said, among others:

"The institution of the Public Protector is pivotal to the facilitation of good governance in our constitutional dispensation..."

"The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance.

"The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector...The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance..."

"The purpose of the office of the Public Protector is therefore to help uproot prejudice, impropriety, abuse of power and corruption in State

affairs, (in) all spheres of government and State-controlled institutions. The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant...

"As with other Chapter Nine institutions, the Constitution guarantees the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate. The obligation to keep alive these essential requirements for functionality and the necessary impact is placed on organs of State. And the Public Protector is one of those deserving of this constitutionally-imposed assistance and protection..."

"If compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect..."

"The power to take remedial action is primarily sourced from the supreme law itself. And the powers and functions conferred on the Public Protector by the Act owe their very existence or significance to the Constitution. Just as roots do not owe their life to branches, so are the powers provided by national legislation incapable of eviscerating their constitutional forebears into operational obscurity..."

"Our constitutional order hinges also on the rule of law. No decision grounded on the Constitution or law, (such as remedial action prescribed by the Public Protector), may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help".

Given its Constitutional mandate and powers, it would seem obvious that:

- the Public Protector should, at all times, be given sufficient resources to carry out her/his important work;
- it should further be popularised among the people as a whole to encourage these to access it as need may arise; and,
- the (State) National Executive should take all necessary action to familiarise the Executive authorities and State Organs in all the Spheres of Government both with the powers of the Public Protector and their responsibilities to support her/him in the discharge of her/his duties.

It is critically important that all of us should understand that the ConCourt Judgement on the "Nkandla matter" has raised many vitally important issues about the functioning of our **Constitutional Democracy** on which all those concerned should act.

In this regard these should keep in sharp focus that the solemn decision to establish this **Constitutional Democracy** was born out of the

immense sacrifices that were made by countless numbers of our people, up to and including the sacrifice of many lives, as well as the millions in the rest of Africa and across the globe who joined us in struggle to end the system of apartheid and help ensure the birth of our Democracy.

That decision to establish a **Constitutional Democracy** sought to entrench an outcome which would help to ensure that the need should never arise again for future generations to have to make similar sacrifices.

Among others the decision to establish a **Constitutional Democracy** means that we wanted to ensure that Executive Power is not abused to undermine the Constitutional and Statutory rights of the people and to weaken the capacity of the State Organs to discharge their Constitutional obligations to the Nation and the country.

It also means that Members of all Political Parties elected to Parliament should understand that they share a collective responsibility to act in concert to discharge the responsibilities imposed by the Constitution, at all times to honour their public declarations of submission to the Constitution and all laws, and to respect their primary obligation to serve as true peoples' tribunes, which makes them accountable, first and foremost, to our people as a whole whom they are elected to represent.

The decision to establish a **Constitutional Democracy** also means that all Members of the Judiciary, others in the Criminal Justice System, as well as all those who serve in other State Organs should not allow themselves to be "**owned**" by any Political Party and/or any other interest, remaining loyal to the fundamental proposition advanced recently by the Chief Justice when he said – "My soul is not for sale."

It also means that all Chapter Nine institutions, regardless of who heads them, should do everything possible, acting without fear or favour, strenuously to discharge their Constitutional and Statutory responsibilities.

The decision to establish a **Constitutional Democracy** also means that all Political Parties which function within this Democracy, whether in the Executive and/or the Legislature, have a primary obligation to help develop and entrench this **Constitutional Democracy**, at all times respecting and popularising the understanding that they, like everybody else, are obliged to operate within and under the imperative that the Constitution is the supreme law of the Republic which dictates the nature and functioning of our System of Governance. In this regard they would be acting to honour their legal, political and ethical commitments attendant to the acceptance of a **Constitutional Democracy**.

That strategic decision to establish a **Constitutional Democracy** also imposes the obligation on the masses of our people, and all their organisations, continuously to act as the guardians of our **Constitutional Democracy**, at all times determined to defend it as the product of their sacrifices and their guarantee that the people shall govern!

We owe it to our Constitutional Court to salute the Chief Justice and his fellow Judges for the meticulous manner in which they discharged their Constitutional responsibilities as our Apex Court, clearly to identify the national imperatives binding on everybody with regard to the strategic task to ensure the vibrant functioning of our **Constitutional Democracy!**

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