Re-affirmation of judicial independence in South Africa: A brief report on recent landmark judgments

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A. Introduction

Section 172(1)(a) of the South African Constitution demands in imperative terms: When deciding a constitutional matter within its power a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. The courts have no other choice. The Supreme Court of Appeal (SCA) and the Constitutional Court of South Africa (CC) have recently made such declaratory orders re-affirming the independence of the courts and anti-corruption institutions in South Africa in two sets of landmark judgments.

B. The ruling against the Judicial Service Commission

I. The facts

In 2008 the Justices of the Constitutional Court lodged a complaint of gross judicial misconduct against the Judge President of the Western Cape, John Hlope.[1] They alleged he had approached two Justices in an attempt to influence them in a case pending before the Constitutional Court regarding the prosecution of Jacob Zuma, the current President of South Africa, and Thint (Pty) on corruption charges and related arms deal matters.[2] The Judge President spuriously lodged a counter-complaint of judicial misconduct on the part of the Justices. In 2009 the JSC considered the complaints and decided that the evidence in respect of both complaints did not justify a finding of gross misconduct and that the matter was finalised accordingly.

II. The core issue

On 31 March 2011 the South African Supreme Court of Appeal ruled against Hlope (the Judge President of the Western Cape) and the JSC in two judgments.[3] The core issue in

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1 Statement of the Judges of the Constitutional Court, 30 May 2008, available at http://www.legalbrief.co.za.

2 See VRÜ 43 (2010) 318.

3 *Judicial Service Commission v. Premier, Western Cape* (537/10) ZASCA 53 (31 March 2011), referred to here as *SCA I*; *Freedom Under Law v. JSC* (52/2011) [2011] ZASCA 59 (31 March 2011), referred to here as *SCA II*.

these cases is the constitutional validity of the decision of the JSC to terminate the investigation. They deal with different aspects of the same subject matter. The first case, SCA I, concerns the composition and the majority vote of the JSC, something governed by the Constitution.[4] The second case, SCA II, concerns the decision of the JSC to terminate the investigation altogether, sweeping serious allegations of judicial misconduct under the carpet, and thus to abdicate its constitutional obligation to protect the independence of the courts.[5] Both judgments set aside the decision of JSC to terminate the investigation and thus to let Hlope off the hook.

III. On the decision to dismiss the complaint (SCA II)

Any attempt by an outsider to improperly influence pending judgment of a court constitutes a threat to the independence, impartiality, dignity and effectiveness of that court.[6] It is the constitutional mandate of the JSC in terms of section 177 of the Constitution to investigate allegations of judicial misconduct and to make a finding on whether or not a judge is guilty of gross misconduct.[7]

The allegations is that Hlope JP attempted to improperly influence the Constitutional Court's pending judgment in one or more cases. The JSC accepted that Hlope JP probably had said what he is alleged to have said, but dismissed the complaint against him on the basis that cross-examination would not take the matter any further anyway. This, the court declared, constituted an abdication of its constitutional duty to investigate the complaint properly. It was not in the interests of the judiciary, the legal system, the country or the public to sweep the allegation under the carpet because it is being denied by the accused judge.[8] The dismissal of the complaint against Hlope JP was therefore unlawful.[9] The decision of the JSC 'that the evidence in respect of the complaint does not justify a finding that Hlope JP is guilty of gross misconduct' and that the matter accordingly be 'treated as finalised" is reviewed and set aside.[10]

4 SCA I paras 19, 23, 24..

5 Ib.

6 SCA II para 49.

7 SCA I para 25.

8 SCA II para 63.

9 SCA II para 50.

10 SCA II para 65.

C. The Hawks judgment of the Constitutional Court

I. The core issue

The core issue in this case[11] is the constitutional validity of national legislation that established the Directorate for Priority Crime Investigation (DPCI), otherwise known as the Hawks,[12] and disbanded the Directorate of Special Operations (DSO), otherwise known as the Scorpions.[13] In dealing with this issue, two crucial questions were canvassed. The first is whether the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. If so, the second is whether the unit established by the impugned legislation, the DPCI, meets the requirement of 'necessary independence'[14].

II. Split bench

Moseneke DCJ (Deputy Chief Justice) and Cameron J[15] for the majority concluded unequivocally that the Constitution imposes such an obligation, that the requirement of independence has not been met and that therefore the impugned legislation does not pass constitutional muster. In a split decision the court therefore found the offending legislative provisions establishing the DPCI constitutionally invalid, but suspended the declaration of invalidity for 18 months to allow Parliament to remedy the constitutional defect.[16] Ngcobo JC for the minority held otherwise, finding erroneously[17] 'that the DPCI enjoys an adequate level of structural and operational autonomy which is secured through institutional and legal mechanisms aimed at preventing undue political interference.'[18]

III. Grounds for invalidation

1. Lack of independence

The core ground advanced in order to invalidate the legislation that established the DPCI is that it lacks the necessary and operational independence to be an effective corruption-

11 *Glenister v. President of South Africa and Other* Case CCT 48/10 [2011] ZACC 6.

12 South African Police Service Act 68 of 1995 (SAPS Act) as amended by the the South Afrcian Police Service Amendment Act 57 of 2008 (SAPS Amendment Act).

13 National Prosecuting Authority Act 32 of 1998 (NPA Act) as amended by the National Prosecuting Authority Amendment Act o 56 of 2008 (NPA Amendment Act).

14 *Glenister*, note 11, para 165.

15 With Froneman J, Nkabinde J and Skweyiya J oncurring.

16 With Brand AJ, Mogoeng J and Yacoob J concurring .

17 Para 199

18 Para 156.

fighting mechanism.[19] The entity is in significant ways less independent than the now-defunct DSO.[20] On a common sense approach, South African law demands a body outside executive control to deal effectively with corruption.'[21]

2. Hands-on management, supervision and interference

The provisions creating the DPCI fail to afford an adequate measure of autonomy. The main reason for this conclusion is insufficient insulation from political influence.

The gravest disquiet with the impugned provisions arises from the fact that the new entity's activities must be coordinated by Cabinet. The statute provides that a Ministerial Committee may determine policy guidelines in respect of the functioning of the DPCI as well as for the selection of national priority crimes. The power of the Ministerial Committee to issue policy guidelines for the functioning of the DPCI creates a plain risk of executive and political influence on investigations.

The power of the Ministerial Committee to determine guidelines appears to be untrammelled. The guidelines could specify categories of offences not appropriate for DPCI investigation, or, conceivably, categories of political office-bearers for that matter. The competence to issue policy guidelines puts significant power in the hands of senior political executives who could themselves be the subject of anti-corruption investigation.

The DPCI is not, in itself, a dedicated anti-corruption entity. Strictly speaking, in its express terms it is a directorate for the investigation of 'priority crimes'. Its anti-corruption nature of the directorate therefore depends on a political say-so, .which must be given, in the exercise of a discretion, outside the confines of the legislation itself.

3. Lack of adequate safeguards

The new provisions also make provision for hands-on supervision. These provisions afford the political executive the power directly to manage the decision-making and policy-making of the DPCI. The statute places no limit on the power of the Ministerial Committee in overseeing the DPDI. This lays the ground for inevitable intrusion into the core function of the new entity by senior politicians, when that intrusion is itself inimical to independence.

The new provisions contain an interpretative injunction which says that in their application 'the need to ensure' that the DPCI 'has the necessary independence to perform its functions'.[22] But this is an admonition in general terms, containing no specific details. The interpretative rule enjoins political executives to take the need to ensure institutional inde-

19 Para 178.

20 Para 118.

21 Para 201.

22 Para 237 n 99.

pendence into account, whereas other provisions place in their hands, without any express qualification, the power to determine policy guidelines and to oversee the functioning of the DPCI.

As to parliamentary oversight of the DPCI, the court found them insufficient to rectify the deficiencies flowing from the extensive powers of the Ministerial Committee. Other safeguards the provisions create were considered to be equally inadequate to save the new entity from a significant risk of political influence and interference.

In summary, the court concluded that the statutory structure creating the DPCI offend the constitutional obligation resting on Parliament to create an independent anti-corruption entity.