THE ADMINISTRATION OF JUSTICE

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Judiciary

Appointment of new Chief Justice

2011 saw a transition from the tenure of former Ngcobo CJ to a new era in which the judiciary will be led by Mogoeng CJ. Both the end of Ngcobo CJ's term, which followed an unsuccessful attempt to extend his term, and the appointment of the new Chief Justice attracted significant public interest and raised critical issues of process and substance relating to judicial appointments.

One of the central constitutional reforms was to change the method of judicial appointments. Under apartheid, the system was intrinsically secret and undemocratic. All that was required was a nod from the Minister of Justice. The result was unsurprising. The vast majority of the all-white and almost exclusively male judiciary were comfortably in tune with the prevailing political morality, even if they were not card-carrying members of the National Party. This was all to change with the creation of the Judicial Service Commission ('JSC') The JSC was created under the Interim Constitution and continues to exist under the Final Constitution. Its powers are regulated by the Judicial Service Commission Act 9 of 1994 read with the Constitution. Politicians comprise the majority on the JSC. Of the 23 members, fifteen represent political interests, including the Minister of

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Justice. It has been pointed out that the ANC's dominance in the political landscape means that 'political representatives on the JSC who are either ANC members of Parliament or who are appointed by members who hold office by virtue of their membership of the ANC, currently have a majority of JSC seats, albeit by a small margin' (Susannah Cowen *Judicial Selection: What Qualities Do We Expect in a South African Judge* (2010) 13).

Since its inception, the JSC has conducted interviews of candidates applying for judicial office. These have taken place in public and are generally regarded as a significant improvement on the practice of the previous regime of secret and unaccountable appointments. The interviews themselves, however, have frequently been dogged by controversy, none more so than the recent hearings which resulted in the appointment of Mogoeng CJ. That hearing in itself was precipitated by another extremely controversial episode — the attempt by President Zuma to extend the office of Ngcobo CJ. Within the space of a few months, an intense spotlight was focused on the highest judicial office. It resulted in the demise of one Chief Justice and the rise of another.

Fall of Chief Justice Ngcobo

Constitutional Court judges are appointed for a fixed term. The matter is regulated, inter alia, by section 176(1) of the Constitution of the Republic of South Africa, 1996: 'A Constitutional Court judge holds office for a non-renewable term of twelve years, or until he or she attains the age of 70, whichever occurs first, except when an Act of Parliament extends the term of office of a Constitutional Court judge.' The matter is further regulated by the Judges' Remuneration and Conditions of Employment Act 47 of 2001('the Judges' Remuneration Act') which, in broad terms, provides that a Constitutional Court judge is normally discharged from active service when he or she reaches the age of 70 or completes a twelve-year term of office, whichever comes first. If, however, at that stage the judge has not completed fifteen years of active service, whether as a judge of the High Court or Constitutional Court, he or she continues in active service until completion of fifteen years or the age of 75, whichever comes first. The Judges' Remuneration Act, nevertheless, deals separately with the office of Chief Justice. Section 8*(a)* provides: 'A Chief Justice who becomes eligible for discharge from active service in terms of section 3(1)*(a)* or 4(1) or (2), may, at the

request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa, for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years.'

Ngcobo CJ was appointed as a judge of the Constitutional Court on 15 August 1999. He had previously served as a judge of the High Court. His term of office, therefore, was due to expire on 14 August 2011. He was appointed as Chief Justice on 12 October 2009. During the early part of 2011, rumours began to circulate in the media that President Zuma was considering extending Ngcobo CJ's term of office. The Centre for Applied Legal Studies ('CALS') wrote to the President and the Minister of Justice on 17 May 2011, enquiring whether the President was indeed contemplating extending Ngcobo CJ's term of office, and expressing the view that section 8 of the Judges' Remuneration Act was unconstitutional (see pages 93–4 of the record in the proceedings of *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC)) ('the Constitutional Court judgment'). The letter made it clear that should the President exercise his powers under section 8 of the Judges' Remuneration Act, there would be a challenge to its constitutionality.

The constitutional challenge foreshadowed in CALS' letter seemed compelling.

Section 176(1) of the Constitution clearly contemplated the extension of judicial office. But it was explicit in prescribing the mechanism by which this could be done. What was required was 'an Act of Parliament'. The proposition that delegation of this power was impermissible was strengthened by the very next subsection, section 176(2), which deals with the position of judges other than Constitutional Court judges. It provides that such judges remain in office until discharged from active service 'in terms of an Act of Parliament'. This formulation contemplates delegation of the power. By contrast, the formulation in section 176(1) seemed to rule out the possibility of delegation to the executive. Moreover, it was by no means clear that the Act of the Parliament envisaged in section 176(1) could be applied to a particular individual. Rather, its terms seemed to permit a generic extension of the terms of office of all Constitutional Court judges (and arguably all Chief Justices) but not a particular judge or Chief Justice.

It transpired that the speculation about the extension of Ngcobo CJ's tenure was well founded. In fact, on 11 April 2011, President Zuma requested Ngcobo CJ to continue to perform active service in terms of section 8*(a)* of the Judges' Remuneration Act. In his letter (reproduced in para [7] of the Constitutional Court judgment), President Zuma drew specific attention to section 8*(a)* of the Act and also stated that he took 'cognisance of the critical role you have, of providing leadership to the Judicial Branch of Government'. Ngcobo CJ was requested 'to continue to perform active service as Chief Justice of South Africa from the 15th August until 15 August 2016'. Ngcobo CJ responded to this letter on 2 June 2011 (quoted in para [9] of the Constitutional Court judgment):

> '. . . I refer to the letter from the President of 11 April 2011 requesting me to continue to perform active service as Chief Justice of South Africa.
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> 'I have carefully considered the reasons for the request and the period suggested by the President. I have decided to accede to the request and continue to lead the Judicial branch of Government during this critical time of the transformation of the Judiciary and Judicial system in South Africa.
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> 'A number of Judicial transformative initiatives have recently been undertaken by the Minister of Justice in Constitutional Development in collaboration with the Chief Justice and the Judiciary. Some of the most important programmes which require leadership over the next five years are the following:
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> (i) the process of implementing Proclamation No. 44 of 2010 by the President establishing the Office of the Chief Justice as a national department located within the Public Service would only be completed over the next year;
> (ii) the development of a model and policy in respect of the creation of an independent Office of the Chief Justice in line with the independence of the Judiciary is only expected to be finalized over the next two years;
> (iii) the establishment of the Constitutional Court as the apex court in South Africa and the constitutional recognition of the Chief Justice as the Head of the Judiciary and head of the Constitutional Court proposed in the Constitution Seventeenth Amendment Bill and the Superior Courts Bill, must still be piloted through Parliament and the subsequent implementation would have to occur over the next five years;
> (iv) the Access to Justice Conference scheduled for July 2011, is expected to yield programmes to improve access to justice throughout the country, including the deep rural areas of South Africa, and their implementation would require the Judiciary to

work together with the Minister of Justice and constitutional development over the next five years;

(v) consultation and negotiation with the Minister of Justice and Constitutional Development on the draft Judicial Code of Conduct and the Regulations for the Register of Registerable Interests of Judges, are currently underway;

(vi) the changes to the legislative framework for dealing with complaints on judicial conduct are only in the first stages of implementation and it is expected that substantial development to improve judicial accountability will take place over the next five years.

'I am therefore in agreement with the President that a five year term is appropriate and adequate to place the independence of the Judiciary, judicial accountability and access to justice on a sound footing and continuity in leadership is vital at this stage of these transformative changes. . .'.

The following day, the President extended the term of office of the Chief Justice and communicated this decision to the JSC and to leaders of the political parties represented in the National Assembly, before he announced his decision in an address to Parliament (Constitutional Court Judgment para [10]).

The Chief Justice's response to the President's invitation is remarkable for a number of reasons. At the level of principle, it is surprising that the Chief Justice would have so readily acquiesced in the extension of his own appointment in circumstances where he, of all people, must have been acutely conscious of the risk that such extension would be unconstitutional. He would, in all probability, have been aware of the letter from CALS to the President and the Minister of Justice. Even if this letter had not come to his attention, the matter had already attracted debate in the media.

More importantly, however, whether or not Ngcobo CJ was alive to the concerns raised by CALS, he could not have been oblivious to his own judgment in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC), which dealt with a similarly worded section of the Constitution. The case concerned section 159(1) of the Constitution which required the term of a Municipal Council to be determined 'by national legislation'. Section 239 of the Constitution defined 'national legislation' to include subordinate legislation made in terms of an Act of Parliament. In the judgment of Ngcobo J, as he then was (concurred in by all the other judges), it was held that Parliament could not delegate its power in terms of section 159(1) to the Minister. He stated:

> 'The Constitution uses a range of expressions when it confers legislative power upon the National Legislature in chap 7. Sometimes it states that "national legislation must" and other times it states that something will be dealt with "as determined by national legislation' and at other times it uses the formulation 'national legislation may". Where one of the first two formulations is used, it seems to me to be a strong indication that the legislative power may not be delegated by the Legislature, although this will of course also depend upon context' (para [125]).

Ngcobo J, however, articulated a point of principle. He stated:

> 'Given its importance in the democratic political process, and given the language of section 159(1), the conclusion that section 159(1) does not permit this matter to be delegated by Parliament, but requires the term of office to be determined by Parliament itself, is unavoidable. In addition to the importance of this matter, I also take cognisance of the fact that it is one which Parliament could easily have determined itself for it is not a matter which requires the different circumstances of each municipal council to be taken into consideration. All that is required is to fix a term which will apply to all councils. In my view, this is not a matter which the Constitution permits to be delegated. The delegation was, therefore, impermissible. . .' (para [126]).

Given this judgment, it is inconceivable that Ngcobo CJ was not alive to the risk of the extension of his appointment being declared unconstitutional. That he took the risk was, therefore, regrettable in itself. But perhaps more controversial was the content of his letter of acceptance. He did not simply accept the President's invitation. Instead, he chose to explain why it was such a good idea for his tenure to be extended. It was scarcely surprising that this move was described as 'lobbying to stay on' (L Donnelly, I Rawoot & N Dawes 'Why did Ngcobo pull out now?' *Mail & Guardian Online*, 29 July 2011)

The threatened challenge became a reality. Four NGOs formally challenged the decision — The Centre for Applied Legal Studies, the Council for The Advancement of the SA Constitution, The Justice Alliance of South Africa, and Freedom Under Law. Two *amici curiae* were admitted — the National Association of Democratic Lawyers and the Black Lawyers Association. Given the urgency of the matter, the Constitutional Court convened during recess. The matter was argued on 18 July 2011. Two days before judgment was due to be handed down, Ngcobo CJ made a dramatic announcement. He stated that he had withdrawn his acceptance of the President's invitation. In a statement issued by the Department of Justice and Constitutional Development, the

reasons for the withdrawal were given. Ngcobo CJ had apparently taken the decision 'in order to protect the integrity of the Office of the Chief Justice and the esteem of the Judiciary as a whole'. He apparently 'found it undesirable for a Chief Justice to be a party in litigation involving the question of whether or not he or she should continue to hold office as this detracts from the integrity of the Office of the Chief Justice and the esteem with which it is held' (statement issued by the Department of Justice and Constitutional Development, 27 July 2011).

The news of the withdrawal was met with mixed reactions. Some commentators saw the decision as an act of selflessness. Professor Pierre de Vos wrote that '. . . by resigning, Chief Justice Ngcobo is displaying the kind of integrity and respect for his office and for that of the Constitutional Court that those of us who have always admired him, came to expect from him'. He went on to argue that 'it spares us all from the rather destructive effects of a long drawn out fight'. (Pierre de Vos 'Government dropped the ball on Chief Justice', *Constitutionally Speaking* (<www.constitutionallyspeaking.co.za>), 27 July 2011).

Eusebius McKaiser, by contrast, thought it 'surprising' that Ngcobo CJ was 'receiving mostly uncritical praise for his decision'. His standpoint was that the Chief Justice had been 'aware for months already that there is compelling doubt about the constitutionality of the statutory clause in terms of which the President had made him the offer to stay on'. He went on to state:

> 'He should have either gently alerted the Presidency to these concerns back then or declined the offer. The timing of this withdrawal is curious. One cannot but help speculate that the embarrassing prospect of one's constitutional peers handing down a judgment that inadvertently shows you to have acted self-interestedly, rather than with sound constitutional sense, motivated this last minute withdrawal' (Eusebius McKaiser 'Sandile Ngcobo's bombshell decision', *Politicsweb*, 28 July 2011).

Regrettably, McKaiser's view regarding the timing of the withdrawal may be more in accordance with the facts. It has been suggested above that Ngcobo CJ must have been well aware that the extension of his office was constitutionally vulnerable before the litigation commenced. A concern for the integrity of his office and the judiciary as a whole would have compelled him to decline acceptance of the President's invitation at the outset. But that was not the only opportunity that he could have seized. He was a named respondent in the litigation. The papers were

served upon him. Once proceedings were initiated, that too would have been an opportunity to avoid being a (passive) party to the litigation. (Ngcobo CJ chose to abide the decision.) Instead, however, he waited for the matter to be argued in court and only on the eve of judgment chose to withdraw.

Why Ngcobo CJ thought that his withdrawal would bring an end to the litigation, presumably by avoiding the need for any judgment, is also not clear. In the midst of the litigation, there was a serious endeavour by the Ministry of Justice to introduce new legislation to remedy the perceived problem with the Judges' Remuneration Act. This development featured prominently in the debate before the Constitutional Court even though the precise legislative contours of the proposed remedial legislation were unknown. Indeed, counsel for both the President and the Minister of Justice urged the court to consider whether section 176(1) of the Constitution permits Parliament to single out the Chief Justice for purposes of extending an incumbent's term of office. The Constitutional Court judgment specifically records (para [70]) that

> '. . . both the President and the Minister asked the Court to determine this issue in addition to the delegation point. Counsel for the President asked the Court to do so for the guidance of the President. Counsel for the Minister stated that it was important for the President, the Minister, the Cabinet and Parliament that the Court determines whether this basis of constitutional challenge is sound'.

The reason for this request flowed from the possibility of remedial legislation that would have singled out Ngcobo CJ and permitted his tenure of office to be extended.

Unsurprisingly, the Constitutional Court unanimously declared section 8*(a)* of the Judges' Remuneration Act to be unconstitutional. It followed that the decision of the President to request Ngcobo CJ to continue performing active service as Chief Justice was inconsistent with the Constitution and invalid (for the order of the court, see para [116]). Three (unnamed) members of the court, while agreeing that section 8*(a)* was invalid on the basis of the differentiation it effected, did not agree that section 176(1) never permits differentiation on the basis of the office that the Chief Justice holds. Put differently, these three were of the view that Parliament could extend the term of office of the Chief Justice, but this could only be effected through an Act of Parliament 'of general application which rationally pursues a legitimate governmental purpose' and, in particular, that such

a measure 'must further judicial independence' (para [95]). Thus the door to remedial legislation singling out Ngcobo CJ was effectively closed.

The failure of President Zuma's attempts to extend Ngcobo CJ's tenure of office necessarily meant that the office became vacant. A Bill introduced in the midst of the furore around the extension, which would have provided for a minimum term of seven years after appointment as Chief Justice or President of the Supreme Court of Appeal, has now been withdrawn. A Bill was tabled by the Minister of Justice and Constitutional Development in June 2011 to amend the Judges' Remuneration and Conditions of Employment Act, with particular focus on the appointment of judges, including the Chief Justice. The Bill provided for an amendment in terms of which the Chief Justice and President of the Supreme Court of Appeal must continue 'to perform active service until either completes seven years or attains the age of 75 years whichever occurs first'. The Bill was withdrawn by the Minister on 28 February 2012 (B12–2011 *GG* 34444 of 7 July 2011). The Constitutional Court judgment and the announcement that Ngcobo CJ was withdrawing his acceptance of the extension were to presage yet another controversial event: the appointment of Mogoeng CJ.

Rise of Chief Justice Mogoeng

The Constitutional Court judgment was followed by public speculation as to the possible successors to Ngcobo CJ. Media reports, citing unnamed sources, suggested that the likely candidates included Moseneke DCJ, Khampepe J, Mpati P (Supreme Court of Appeal), and others.

As it happened, President Zuma announced that he intended to nominate Mogoeng J for appointment as Chief Justice. On 18 August 2011, Mogoeng J wrote to the JSC to accept the nomination by President Zuma as a candidate for Chief Justice. In his acceptance, as is required for all JSC interviews, he disclosed his personal and professional particulars, and his most significant contributions to the law and the pursuit of justice. He highlighted certain judgments that he had delivered and his roles within the judiciary in processes relating to judicial education, case-flow management, and access to justice. This was the beginning of a short, but dramatic, period of public comment and the interview proceedings before the JSC.

Public comments on Justice Mogoeng's nomination

On 20 August 2011, the JSC passed a resolution stating that it would issue an invitation to legal professional associations and other institutions with an interest in its work to make written submissions to it 'on the suitability of the nominee by the President for appointment as the Chief Justice' (para 4). 21 sets of comments were lodged with the JSC by interested parties, predominantly civil society organizations and professional associations.

Significant among the public responses were the comments of Cosatu and leading legal and other non-governmental organizations, opposing Mogoeng J's appointment as Chief Justice. The position taken by Cosatu was significant given that the trade union federation forms part of the tri-partite alliance, together with the African National Congress and the South African Communist Party, which governs South Africa. The comments opposing the appointment generally addressed four themes: gender insensitivity, Mogoeng J's antagonistic approach to homosexuality, concerns relating to judicial ethics, and his lack of experience in constitutional matters.

We do not recount all the submissions, but highlight two significant submissions by Cosatu and Section 27, a leading legal NGO.

Cosatu disagreed that Mogoeng J lacked the necessary (minimum) experience for appointment as Chief Justice, but expressed concerns relating to certain of his decisions on gender-related and sexual violence, equality, and sexual orientation and his role as a State Prosecutor in the apartheid era. Cosatu referred to five of Mogoeng J's decisions as a High Court judge relating to gender-related and sexual violence.

In *S v Moipolai* 2005 (1) SACR 580 (B), Mogoeng J reduced a sentence of rape from ten years' imprisonment to five years with a further five years suspended. The case involved the 'marital rape' of a woman who had been in a relationship with the perpetrator. Cosatu highlighted *dicta* by Mogoeng J in which he distinguished this situation from 'rape of one stranger by another', doubts about whether the boyfriend 'could . . . have known that she was in fact opposed to the intercourse', and that it was 'highly insensitive' of the appellant to punch the eight-month pregnant woman. Cosatu stated that this judgment raised a number of 'fundamental concerns', including,

> 'General insensitivity to gender-based violence as reflected by the reduction of the original sentence, taking into account the lack of

> rational factors justifying the need to do so[;] trivialization of the offence of rape and the understanding of what constitutes consent, regardless of the nature of the current or previous relationship[;] distinct lack of awareness of criminal law on rape, including the offence of marital rape[; and] illogical and contradictory weighing of the factual assessment as to whether there was in fact consent, which seems to suggest that the judge was predisposed towards finding reasons to reduce the sentence' (para 3.1.1).

The second case mentioned by Cosatu was *S v Mathibe* (unreported judgment, 1 March 2001). This case concerned a review of a sentence of two years' imprisonment for grievous bodily harm for an accused who had tied a woman to his car bumper and dragged her for about 50 metres. On review, Mogoeng J reduced the sentence to a fine of R2 000. His reasons included that the woman had 'provoked' her assailant and that he had pleaded guilty, showing remorse. Cosatu commented: 'An appreciation of the facts underlying the decision above can only lead to the conclusion that the judge either did not appreciate the gravity of the offence or was merely grasping at straws to ground a decision allowing for the reduction of the original sentence' (para 3.1.2).

Cosatu referred further to *S v Modise* (unreported, 19 November 2007). This case concerned an appeal against a conviction and sentence of five years for attempted rape involving a husband and wife undergoing a divorce. Mogoeng J (Gura J concurring) reduced the sentence on appeal to a wholly suspended sentence. The judgment described the conduct of the accused who 'throttled and pinned down' the woman as 'minimum force'. It further distinguished the case from rape by a 'stranger' and referred to the fact that the offender must have been 'sexually aroused', thereby overwhelming him and probably causing his 'somewhat violent behaviour'.

Cosatu commented:

> 'As with the previous cases commented on, the facts considered appeared to contradict the eventual conclusion that one would have expected the judges to have made. Again what is reflected is a fundamental lack of appreciation of the seriousness of gender-based violence. Further, the decision disregarded the meaning of consent, and appears to take the problematic view that where two parties know each other and/or were in prior relationship the right to withhold consent is diminished' (para 3.1.3).

Cosatu also highlighted the decision in *S v Mathule* (no citation provided by Cosatu). This case was an appeal against a convic-

tion and life sentence for rape of a seven-year-old girl. Mogoeng J concurred with the judgment of Hendricks J in which the sentence was reduced on appeal to eighteen years, justified on the basis of the personal circumstances of the appellant.

Cosatu commented:

> 'Firstly apart from the general seriousness with which the offence of rape should be treated, this case reflected a serious disregard for the rights and interests of a minor. Further, none of grounds listed above would rationally correspond to a decision that justifies a reduction of the sentence. Children are generally considered to be a vulnerable group, which necessarily places profound obligations on a court in relation to the protection of their rights and interests. This decision shows no cognisance of that fact' (para 3.1.4).

Cosatu also discussed *S v Serekwane* (unreported decision, 2005). This was an appeal against a conviction and sentence for the attempted rape of a seven-year-old girl. In a concurring judgment, Mogoeng J upheld the appeal against conviction and converted the conviction to one of indecent assault, reducing the sentence from five to three years. The basis for the conclusion lay in the medical evidence. The judges concluded that, although bruising was found on the complainant's vagina, the fact that 'she did not feel pain whatsoever . . . militates against the magistrate's conclusion that the appellant's penis caused the injury.' The judgment also described the injury as 'not serious'. Cosatu commented: 'This judgment reflects an evolving and consistent thread demonstrating a trivializing of the nature of sexual violence as well as the courts' responsibilities towards the protection of minors' (para 3.1.5).

Cosatu also referred to the Constitutional Court decision in *Le Roux v Dey* 2011 (3) SA 274 (CC), a case in which the plaintiff had alleged, among other things, that he had been defamed by being portrayed as homosexual. In a section concurred in by all the judges except Mogoeng J (para [9]), the court held that '[a]n actionable injury cannot be based solely on a ground of differentiation that the Constitution has ruled does not provide a basis for offence' (para [184]). Mogoeng J did not provide reasons in the judgment for declining to support this proposition. Noting that it was difficult to draw conclusions from this judgment alone, especially since Mogoeng J had not explained his position, Cosatu proposed that Mogoeng J should be required to explain the matter before the JSC (Cosatu submissions, para 3.2).

Finally, Cosatu addressed Mogoeng J's role as a State Prosecutor before democracy. Cosatu noted that, in the past, a

background as a prosecutor had disqualified other candidates because of the 'history of prosecution of politically motivated cases on what was an illegitimate state'. Cosatu noted, in particular, that Mogoeng J had acted for the Bophutatswana Government in 1991 in opposing an application to stay an execution in a death penalty case.

Cosatu concluded its submission as follows:

> 'On the basis of our concerns we cannot support the appointment of Justice Mogoeng for the position of Chief Justice, which we believe he would hold for the next 10 years if successful. Moreover, while this is not presently for the consideration of the JSC, it is disturbing that even if NOT successful Justice Mogoeng will remain on the bench as an ordinary Constitutional Court judge.
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> 'Whereas the reality is that questions as to his fitness and appropriateness to serve as a judge in ANY court, let alone the Constitutional Court, raises serious concerns as to the nature and rigour of the original process that enabled him to ascend to the bench.
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> 'This highlights the need to ensure a process that will seek [to] democratize the way judicial appointments are made.
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> 'Mogoeng proves the correctness of the theory that says ''black is not equal to transformation''. Ultimately we need a new beginning with a transformed judiciary that is sensitive, accessible and accountable, and which has as its focus the interests of the marginalized, the acceleration of development, justice and socio-economic justice in particular. Mogoeng does not reflect any class bias and we do not believe that he is capable of taking forward the objective of transforming the judiciary.
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> 'Based on his remarks, it is evident that he reflects an insensitive, patriarchal and backward mindset that is chauvinistically inclined towards the stereotypical role of women. His appointment would be a slap in the face of millions of black, and African women in particular, who have championed the rights and interests of women, and would constitute a reversal of the struggle for total women emancipation.
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> 'Accordingly we are calling on the JSC to recommend against Justice Mogoeng's appointment and to further call on the State President to review and re-open the nomination process in order to identify more suitable candidates' (Cosatu submissions, para 5).

Section 27, a legal NGO, made a submission in its own name and on behalf of other prominent organizations — Sonke Gender Justice Network, the Lesbian and Gay Equality Project and the Treatment Action Campaign. The organizations expressed the 'firm view' that Mogoeng J was not suitable for the position of Chief Justice (Section 27 submissions, para 6), addressing similar themes to Cosatu.

In the first instance, Section 27 addressed the issue of Mogoeng J's approach to sexual orientation, referring to the

Constitutional Court judgment in *Le Roux v Dey*. Section 27 noted that judges are constitutionally required to give reasons for their decisions (Section 27 submissions, paras 19–21). Section 27 complained that the issue was not whether Mogoeng J was right or wrong to dissent, but rather that the public were entitled to know the extent of his dissent, why he dissented, and whether he is actually able to discharge his oath of office (para 22). Section 27 argued that this is particularly so given Mogoeng J's membership of Winners Chapel South Africa, the local branch of David Oyedopo Ministries International, which preaches that homosexuality is a perversion that can be cured (para 23). Section 27 recommended that the JSC question Mogoeng J on his dissent (para 24). Section 27 also proposed that the JSC require Mogoeng J to make a public commitment to protect the rights of LGBTI persons (para 25).

Secondly, Section 27 considered Mogoeng J's approach to gender — based violence. Section 27 referred to some of the judgments discussed in the Cosatu submission, expressing concern at what it considered to be a 'trend of patriarchy in a line of judgments of Justice Mogoeng relating to cases of gender based violence' (para 25). Having reviewed these judgments, Section 27 stated that they reflected that Mogoeng J 'reached for arguments akin to ''she asked for it'', ''she wasn't really hurt'', ''he was understandably sexually aroused'', and ''it wasn't really that bad because he was not a stranger''' (para 44). In the view of Section 27, these arguments were not befitting a judicial officer, let alone one who occupies a seat on the Constitutional Court (paras 44–5). Section 27 concluded that it, and the organizations joining its submissions, had 'no confidence in [Justice Mogoeng's] ability either to dispense justice in accordance with the values of the Constitution or in his ability to address the complex gender questions that arise in the judicial and in the legal profession appropriately' (para 51). Section 27 considered that the judgments to which it had referred evidenced 'a patriarchal attitude to woman', adding that they had no reason to believe that Mogoeng J would not exhibit similar patriarchy in relation to gender transformation in the judiciary, the legal profession and, indeed, society as a whole (para 51).

Section 27 concluded its submission by stating its 'firm view' that 'Justice Mogoeng is not suitable for the position of Chief Justice of South Africa' (para 53). In addition, Section 27 called on the JSC to conduct an open and accountable interview and

consultation process, including conducting a public interview of Mogoeng J open to all media (including broadcast media), as well as to committing to publishing the advice given to the President on the suitability of his nominee for appointment as Chief Justice (para 54). As we show below, the JSC responded favourably to some, but not all, of Section 27's suggestions regarding the process.

Mogoeng J published a detailed, 38-page, written response to the various comments submitted to the JSC by interested parties (available at <www.timeslive.co.za/pdf/JusticeMogoengResponse.pdf>, last accessed 2 May 2012).

Mogoeng J started by addressing the theme of gender sensitivity, discussing each of the judgments that had been raised by interested parties in their comments. He asserted that sound reasons were given for all the sentences imposed in these matters (para 15). To the extent that he was criticized for leniency, he referred to other cases in which he had dealt with the perpetrators of rape firmly (ibid). He added that the reasoning employed in the criticized judgments was similar to the reasoning adopted by other appellate judges in different cases. He stated:

> 'The sentences imposed may differ but the reasoning we all employed is essentially the same. If the submissions based on gender sensitivity were to be upheld, then at least all the above judges will also be unfit for judicial office' (para 17).

Mogoeng J then turned to address the complaints relating to his attitude towards sexual orientation. He began by asserting that his church's opposition to homosexuality was similar to the position of other Christian churches and was not one of the core values of the church (para 22). He affirmed that he had made a public commitment to uphold the constitutionally entrenched rights of the gay and lesbian community (paras 23–24).

Regarding the complaint about his failure to give reasons for his position in *Le Roux v Dey*, Mogoeng J noted that the paragraphs that he declined to endorse related not only to gay people but also to other categories of persons, including Christians (paras 26–7). He added that he had not had sufficient time to provide proper reasons for his position and accordingly decided not to provide reasons so as not to hold up the judgment (para 30).

Mogoeng J then turned to address criticism of his professional ethics. A complaint had been made that he had failed to recuse himself when his wife appeared before him in an appeal. In this

regard, he indicated that he had consulted with other senior judges who had assured him that there was nothing wrong with his wife appearing before him and that he had taken the position that she would only appear before him in appeals (para 34). He also noted that close family members of other judges had appeared before those judges in various matters and provided annexures listing the matters in which specific practitioners appeared before their fathers (para 36). He argued that this situation was analogous to that of his wife appearing before him (para 37).

Mogoeng J next addressed concerns about his age and seniority. Regarding his age (50, at the time of nomination), he provided four examples of Chief Justices of comparable age when appointed elsewhere in the world, including John Roberts, who was appointed Chief Justice of the United States of America at 50 (para 40). Regarding experience, he referred to his service as Judge President of the North West for seven years, arguing that he had 'a track record for taking measures to enhance access to justice, court efficiency and the independence of the judiciary' (para 46). He further referred to his work in the National Case Flow Management Committee and the Access to Justice Conference as demonstrating his capacity to lead the judiciary (para 47).

In response to the complaints that he had worked as an apartheid prosecutor, Mogoeng J explained that he came from a poor background and when offered a bursary by the Boputhatswana Government in 1981, he accepted it. He explained that, because his political standpoint was known to his superior, he was not allocated political trials as a prosecutor (para 57). He explained that he prosecuted persons accused of murder, robbery and rapes, and that he had no regret for having done so and was also not apologetic about the bursary (para 58). In relation to the matter of *State v Ngobeza and Another* 1992 (1) SACR 610 (T), an application for a stay of execution, he explained that it was an urgent application assigned to him by his superior (para 59). He added that at the time, the death penalty had not yet been abolished, and that the new Constitution did not exist (ibid). He also related that, in 1992 or 1993, he had appeared in a radio debate about the death penalty, arguing for its abolition (para 60).

Mogoeng J then turned to deal with some of the specific judgments raised by other commentators. In particular, he discussed judgments in which the Supreme Court of Appeal had set

aside his decision on appeal. He explained that, in relation to *State v De Beer* [2006] SCA 78 (RSA), 'the SCA set aside my decision and I took it as a lesson' (para 70). In relation to *Molotlegi and Another v Mokwalase*, Mogoeng J said:

> '. . . here I got the law completely wrong. It does happen to all of us sometimes. Besides our court system has appeal procedures precisely because it is recognized that judicial officers are human beings and may therefore err in their decisions. It would then be for an appeal court to correct whatever error they have made' (para 71).

In conclusion, Mogoeng J reaffirmed his commitment to upholding and protecting the Constitution and the human rights entrenched in it. He argued that he is neither homophobic nor gender insensitive when it comes to the rape of women, and concluded:

> 'I decide cases based on the facts and the Constitution and the law. And if I am appointed as the Chief Justice, I will continue to do so, as I have done for the past 14 years as a judicial officer' (para 73).

Against the background of these written submissions and the written response of Mogoeng J, the JSC convened a public hearing.

JSC interview process

AIDS activist organization, the Treatment Action Campaign, gathered to protest at the JSC interview venue, making a statement that the TAC was 'firmly of the view that he [was] not a suitable candidate', explaining that a study of his judgments showed 'patriarchy' and leniency towards rape and women abuse (SAPA report, 'Aids activists protest at Mogoeng interview', 3 September 2011.) Professor Richard Calland described the scene of the interviews to be held in the 'sleek modernity of Cape Town International Conference Centre', the venue for 'the hottest ticket in town' ('Mogoeng a test case for JSC' *Mail & Guardian Online*, 2 September 2011). He commented that '[r]anged against Mogoeng [was] a formidable band of representatives of the legal profession and the human rights community, who raise formidable and serious issues of objection to the presidential nominee'.

The interview proceedings were broadcast live on a national radio station and on a pay-per-view national television channel, with portions broadcast on national free-to-air television. The interview proceedings ran over an unprecedented two days and

dominated local media for several days. Many members of the legal profession attended the proceedings, including judges and practitioners who travelled to Cape Town for the purpose.

Following discussion about whether the JSC should consider other possible candidates, the JSC resolved not to do so but to begin Mogoeng J's interview. He began by reading to the JSC, verbatim, his written response to the submissions made by interested parties. The members of the JSC, chaired by Deputy Chief Justice Moseneke, took turns to ask questions. Niren Tolsi provides the following account of the drama and its principal actors:

> 'If the JSC interview were a boxing match, then minister Jeff Radebe would undoubtedly be Mogoeng's sweat-dabber in the corner, towel at the ready to dry the brow — or staunch the blood — between rounds.
>
> 'Radebe and the three ANC MPs on the JSC, including deputy ministers Fatima Chohan (home affairs) and Ngoako Ramatlhodi (correctional services) together with Advocate Dumisa Ntsebeza (one of four presidential appointees to the JSC) were instrumental in ensuring Mogoeng had breathing space between probing, questioning combinations with much softer questions and observations' ('JSC bruising keeps Justice Mogoeng on the ropes' *Mail & Guardian Online*, 3 September 2011).

Some of the more striking moments of the hearing included Mogoeng J telling the chair, Moseneke DCJ, not to be 'sarcastic' when pressed to explain his 'jurisprudential position' for dissenting in *Le Roux v Dey* (ibid). This exchange has been reported as follows:

> ''"If you listen, you might be able to answer", said Moseneke.
>
> "You don't have to be sarcastic, sir", retorted Mogoeng' (Stuart Graham 'Mogoeng grilling ends ahead of considerations' *Mail & Guardian online*, 4 September 2011).

Mogoeng J later admitted that he had 'erred' in not providing reasons for his position (Tolsi loc cit). It was reported that '[Justice] Mogoeng shared many tense exchanges with Deputy Chief Justice Moseneke, although he later apologized saying "There is not a single human being who never loses his or her temper"' (Katharine Child 'Mogoeng interview: did JSC fulfil its constitutional duty?' *Mail & Guardian Online*, 5 September 2011.) Another example of such an exchange was the comment by Moseneke DCJ, in response to a reference to Mogoeng J's experience of organizing a conference on access to justice, that

'it may be one thing to run a conference, quite another to be chief justice' (Tolsi loc cit).

Another striking moment was the exchange with Member of Parliament, Koos van der Merwe, relating to Mogoeng J's statement that he had prayed and got a signal that he should accept the nomination. The exchange between Van der Merwe and Justice Mogoeng was reported as follows:

> 'Do you think God wants you to be appointed chief justice?
> — I think so.
> 'That creates a problem for me. If I vote against you, what is God going to do to me?
> — That is between you and God, commissioner' (Graham loc cit).

At the end of the JSC proceedings, Mogoeng J gave a media statement that, if appointed, he would 'ensure that no judicial officer would suffer the way [he] did' in the days between his nomination and his two-day interview, referring to the 'intensity of pressure and comments made about [him]' in the media (Niren Tolsi 'JSC accepts nomination of Mogoeng' *Mail & Guardian Online*, 4 September 2011.) He also assured women, as well as the gay and lesbian community, that their rights would be protected and that he hoped to unite the judiciary by making it 'a priority to reach out' to members of the Constitutional Court and other courts, including those critical of his nomination (ibid).

Following the interview proceedings, the JSC met behind closed doors to deliberate and vote. The majority of the JSC voted to support President Zuma's nomination of Mogoeng J (ibid). Tolsi reports that JSC spokesperson, Dumisa Ntsebeza, made a statement that, for the first time, the full transcript of the JSC deliberations would be furnished to the President in light of concerns raised about the suitability of Mogoeng J for the position.

Several commentators criticized the decision of the JSC on the basis that it had failed to discharge its constitutional duty. As to the substance of the decision, the JSC was criticized for merely asking whether Mogoeng J fulfilled the formal requirements for appointment, and not whether he was an 'exceptional' candidate, or considering his nomination in light of other possible nominees (Child loc cit). Section 174 of the Constitution provides that the President may appoint the Chief Justice after consulting the JSC and heads of the opposition parties represented in the National Assembly. The leader of the Democratic Alliance also complained that the President had not adequately consulted her, after

the President cancelled a meeting scheduled to discuss the issue (ibid).

In our view, a purposive interpretation of section 174 of the Constitution does require the JSC, when consulted by the President, to advise the President on the merits of potential appointees beyond simply confirming that a nominee meets the formal requirements for appointment. COSATU in its submissions conceded that Mogoeng J met the 'minimum requirements for appointment' in terms of section 174 of the Constitution, but argued that the focus should rather be on the character and mindset of the nominee, in particular the extent to which these are consistent with the Constitution (COSATU submission on the nomination of Justice Mogoeng for the post of Chief Justice, 3 September 2011, para 2). The function of minimum threshold vetting could be met without involving the JSC at all. During the interview, Minister of Justice and Constitutional Development, Jeff Radebe, surprisingly referred to the 'minimum' requirements for appointment of a Chief Justice in terms of the Constitution, stating that Mogoeng J met these requirements and implying that this was the end of the JSC's enquiry (Pierre De Vos 'Interview with Justice Mogoeng — live blog', *Constitutionally Speaking*, 3 September 2011, last accessed on 26 March 2012). It would be startling, however, if the President were to assert that he did not wish to appoint an excellent (if not the 'best') candidate but would be satisfied with appointing someone with the formal qualifications for appointment as Chief Justice. It is difficult to assess whether Mogoeng CJ would have met the appropriate constitutional standard, as the entire JSC proceedings were not directed to this question.

More debatable is whether it is appropriate for the JSC to propose other possible candidates to the President. However, comparison among candidates may be necessarily implied in any substantive assessment of the President's nominee for appointment.

Benefits and lessons of the JSC process

In a media briefing to announce his decision to appoint Mogoeng J to the position of Chief Justice, President Zuma said that the manner in which the candidate had responded to what he called the 'spirited public commentary on his candidature' had protected the integrity of the Constitutional Court and the judiciary (Charles Molele 'Zuma applauds ''dignified'' Mogoeng' *Mail & Guardian*, 9 September 2011). President Zuma commented:

> 'Chief Justice, you maintain[ed] a dignified silence and only responded to the criticism at the correct forum, the JSC. The judiciary should not be part of mud-slinging and other spats that happen from time to time in society' (ibid).

Speaking at the same press conference, Mogoeng CJ described the process surrounding his nomination and interview as 'a tsunami of a special kind' (ibid).

While Mogoeng CJ undoubtedly experienced the JSC process and 'spirited' public commentary as unpleasant, in our view the transparency and openness of the JSC interview process and the increased public participation are to be strongly welcomed. It is indeed deeply unfortunate that the concerns about his suitability that were voiced in the process, most of which pre-dated his 2009 JSC interview and appointment to the Constitutional Court as an ordinary justice, were not raised earlier.

Following the appointment of Mogoeng CJ, there has been heightened interest and participation in the judicial appointment process generally, in particular among the legal professional bodies. The General Council of the Bar and the constituent Bars have taken steps to ensure that all applicants for judicial appointment are now reviewed and comments are furnished to the JSC. Civil society organizations have also increased their participation in the process.

There is also heightened scrutiny over the JSC itself, but commentators continue to express concerns at its institutional 'capture' and loss of independence. Tolsi's prediction of the voting of the JSC on Mogoeng J reflects a deeply troubling general understanding of the independence of members of the JSC: 'The JSC, whose 23 members will vote by secret ballot on whether to endorse the president's nomination of Mogoeng, are likely to find in his favour with the body having enough Zuma appointees (four) and ANC members (three MPs, four National Council of Provinces members and Radebe) to have a 12–11 majority' (Tolsi loc cit).

In the JSC as constituted in the past, there was never any suggestion that the members appointed by the President, who included George Bizos SC and Kgomotso Moroka SC, were bound, or even expected, to endorse candidates preferred by the President. Worryingly, commentators now suggest that the four presidential appointees are partisan and that the members of the JSC no longer exercise independent judgment, but operate as a caucus on instructions of the ruling party, as we discuss below.

However, we reiterate that the greater openness and transparency of the JSC proceedings is to be strongly welcomed, and may in future serve to enable the public (including civil society and the legal profession) to influence the approach of the JSC to questions such as the threshold for 'suitability' and the degree of independence required of JSC members in future.

Conclusion: presiding under scrutiny

Mogoeng CJ stands to serve a term of a decade at the head of the judiciary, a significantly longer term than his two immediate predecessors. This period will, in all likelihood, be a significant one in shaping South Africa's nascent constitutional jurisprudence and influencing the institutional culture of the Constitutional Court. Under Mogoeng CJ, the Constitutional Court has moved towards an approach to oral hearings that seeks to follow the practice of the United States Supreme Court. The Chief Justice has explained to counsel appearing in the Court that the Court wishes oral argument to be brief, limited to highlighting the central issues and responding to questions from the Court. Hearings are now usually completed by lunchtime, even where four or five sets of counsel appear. In the earlier days of the Court, hearings would typically last for the full day. Unlike his predecessors, Mogoeng CJ faces the challenge of considerable media and professional scrutiny over his conduct as Chief Justice and the substance of his decision-making, as a result of the events described above.

Already, there has been one fresh incident resulting in commentators raising questions about the Chief Justice. Reports emerged that the Chief Justice had sent an e-mail requesting senior judges to attend a leadership conference to be conducted by a well-known American evangelical speaker. It was reported that an e-mail was sent on behalf of Mogoeng CJ by Memme Sejosengwe, Chief Director of Court Performance, in which heads of court, judges president, their deputies, and 'the most senior judge in the division where there are no deputy judges president' were 'requested to be available' for an evangelical leadership conference to be held in Johannesburg in early March 2012. The 'I Can John Maxwell Conference' was hosted by John C Maxwell, an American evangelist and motivational speaker, as the main speaker. The event was hosted at Hope Restoration Ministries, a Christian church.

The request sparked controversy in the media, with anonymous judges and members of the legal profession reportedly

complaining (anonymously) that the Chief Justice had acted inappropriately in appearing to instruct colleagues to attend a conference with specific Christian content hosted at a church. The *Mail & Guardian* quoted several senior judges, speaking on condition of anonymity, as reacting with 'astonishment' and 'deep concern' to the request and complaining that it showed 'religious insensitivity' and 'blurring of church and state' (Niren Tolsi 'Mogoeng's evangelical gaffe' *Mail & Guardian,* 16–22 March 2012). The heads of court responded to the media storm by issuing a statement in support of Mogoeng CJ, in which they said that '[t]he invitation was not to a religious event but to a leadership conference, which nobody was ordered or compelled to attend' (SAPA article, 'Heads of court support Mogoeng' *News 24*, 18 March 2012).

Prominent journalist, Mondli Makhanya, reacted strongly to this incident, using the issue to rehash the JSC proceedings leading to Mogoeng CJ's appointment ('The JSC must answer a charge of moral cowardice', *Sunday Times*, 18 March 2012.) Makhanya asserted that the Chief Justice's request relating to the conference has proved right those who questioned his suitability for appointment. He accused the JSC of 'moral cowardice' in supporting the appointment, which he described as 'the worst decision in the JSC's 15 years of existence'. Makhanya provides the following analysis of what he calls the 'capture' of the JSC:

> 'While the institution started off as a collection of the strongest minds from the legal, political and academic worlds, today it is hard to vouch for its collective wisdom and integrity.
>
> 'Not that they are intellectually lacking. Rather it is that many of them lack moral steel. Instead of doing what is right and selecting the best candidates, they follow a Luthuli House brief. The philosophy of many on the commission seems to be: "Ask not what is good for the country, but what the party mandarins want".'

Makhanya gloomily predicts that this philosophy is likely to prevail with future appointments and that

> '. . . the Constitutional Court has already been identified as the next target for capture. And the already captured JSC will be the instrument with which this capture is carried out.'

Makhanya warns that South Africans should brace themselves for 'more Justice Mogoengs', adding that he considers that it will be 'hard for anyone to match the wackiness of our current chief justice' (ibid).

All of this makes for a fraught and tension-filled atmosphere within which Mogoeng CJ must perform his function as Chief Justice. At the time of the appointment, some civil society organizations indicated that they were considering a legal challenge to the appointment. For instance, gender rights organization, Sonke Gender Justice, issued a statement that they were considering a legal challenge to the appointment of Chief Justice Mogoeng (Child loc cit). The consensus that appeared to emerge in civil society was that such a challenge would be unlikely to succeed and would, whatever the result, do damage to the administration of justice.

Arguably, rehashing the JSC proceedings and the debate around the appointment today also threatens to destabilize the judiciary. However, the media has already shown that the appointment debate remains fresh in the memory and that the concerns about his suitability are likely to be repeated whenever the Chief Justice attracts any fresh controversy. This leaves the Chief Justice operating under close and constant public scrutiny, not only in his judgments, but whenever he acts as head of the judiciary, especially where matters of religion, sexuality and gender arise.

As Chief Justice, he will also now chair the proceedings of the JSC. It is to be hoped that the gains in terms of transparency and openness will not be sacrificed on the back of Mogoeng CJ's criticism of the process following his nomination. Crucial questions relating to the proper role of the JSC and its members and the constitutional standards by which to judge candidates for appointment to the judiciary are likely to continue to arise during the tenure of Mogoeng CJ.

Continuing review of JSC

For the past several years, news media and the law reports, as well as this section of the *Annual Survey*, have been dominated by coverage and analysis of the 'Hlophe saga', in its various manifestations. 2011 was no exception, with two high-profile legal challenges being resolved on appeal to the Supreme Court of Appeal. In both of these matters, the Judicial Service Commission (JSC) and Hlophe JP failed to persuade the court of appeal of the lawfulness of their actions. In the light of the notoriety of the factual background, it is not necessary to rehearse the story in detail. It suffices to recall that both legal disputes arose directly out of the decision reached by the JSC in August 2009 that it would not proceed with its inquiry into the alleged impropriety of

Hlophe JP's conduct in approaching two members of the Constitutional Court in early 2008, and in initiating discussions with them about then-pending matters involving Jacob Zuma, elected as President of South Africa a year later. These approaches led directly to the laying of a complaint of gross misconduct with the JSC by all the judges of the Constitutional Court against Hlophe JP, and a counter-complaint by Hlophe JP of widespread breach of his rights caused by the publication of this complaint without giving him a hearing.

The appeals under consideration in 2011 were heard within three days of each other in mid-March, and judgment was delivered in each case by a separate bench of the Supreme Court of Appeal, on the last day of the month. The appeal which was argued first arose from the decision of a full bench of the Cape High Court (in *Premier, Western Cape v Acting Chairperson, Judicial Services Commission* 2010 (5) SA 634 (WCC)), and turned on three issues: the necessity for the premier of a province to be present when the JSC considers 'matters relating to a specific High Court' (s 178(1)*(k)* of the Constitution); the lawfulness of the composition of the JSC when taking decisions not concerning the appointment of a judge; and the necessity of complying with the requirements of section 178(6) of the Constitution, which prescribes that any decision of the JSC must be supported by a majority of its members. On all of these issues, the court *a quo* had found for the applicant premier, with the result that the JSC and Hlophe JP appealed against these decisions.

In *Acting Chairperson, Judicial Service Commission and Others v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA), the Supreme Court of Appeal dismissed the appeal in fairly summary fashion (per Cloete JA; Harms DP, Lewis JA, Ponnan JA and Majiedt JA concurring). After a brief review of the facts and issues (paras [1]–[5]), the court turned to the proper interpretation of section 178(1)*(k)* of the Constitution, key to the resolution of the first two issues on appeal. After noting that it was common cause that the premier was entitled to be present (as was the Judge President of a high court) when a judge was to be appointed to a high court within their province (para [6]), Cloete JA turned his attention to whether the same approach should be taken where decisions about a judge's fitness or propriety to continue in office (as contemplated in s 178(5) of the Constitution) were to be taken. In the face of arguments from the

appellants that Hlophe JP's alleged misconduct bore no relationship to his membership of any particular high court, the SCA concluded that Hlophe JP's fitness to stay in office was '. . . so plainly a matter relating to the specific high court concerned that no further discussion is necessary. . .' (para [10]). In response to arguments of the JSC about what would be the case when the possible removal of judges who served in other courts (such as the Supreme Court of Appeal, or the Constitutional Court) was before the JSC, the court pointed out simply that these were not 'high courts', and so section 178(1)*(k)* did not apply; and, further, that it was 'inconsistent and illogical' for a premier to be involved at the appointment stage, but not when removal of a judge was being considered (paras [11] and [12]).

After dealing with several arguments by the appellants based on linguistic points, the Supreme Court of Appeal squarely faced the contentions based on the separation of powers, essentially that it was inappropriate under the Constitution to involve members of the executive in such delicate decisions as the determination of misconduct of a judge. Cloete JA was of the view that such an argument flew in the face of the deliberate construction of the JSC under section 178, which ensured that each branch of government, as well as all the elements of the legal profession, was appropriately represented in its ranks. When it came to questions of judicial misconduct, the process was in two stages, the first involving the JSC, and the second requiring a two-thirds majority of the National Assembly, which made it logical that the ten members of the JSC drawn from Parliament should not be involved in the first stage (paras [14]–[18]). Thus the court concluded that the Premier should have been included as a member of the JSC when it took its decisions of August 2009; the failure to invite her to be present rendered the decisions unlawful.

The court took an even more dismissive attitude to the appellants' arguments about the majority required for the JSC to make a decision. While section 178(6) of the Constitution required a majority of its members (thirteen in this case) to take any decision, the Premier had alleged that only ten members had been present, and that the decisions had been taken by a vote of 10–6. In response, the JSC refused on 'policy grounds' to disclose the vote count, which drew strong censure from the court, as follows (para [19]):

> 'An evasive answer like this by senior counsel [the deponent] on behalf of a body like the JSC cannot be countenanced. It is the

> number of members who voted either way, not their identities, that is relevant. . . . Nor is this attitude reconcilable with our constitutional democracy which values openness and transparency.'

Thus the court dismissed the arguments by the appellants that all that was required by section 178(6) was a majority of those present and voting: the Constitution stipulated clearly to the contrary (para [20]). On the issue of whether the absence of one of the advocates who should have been present on the day was fatal to the work of the JSC, the court preferred not to decide the matter, as there was insufficient clarity on the reasons for his absence.

As to the remedy, and in response to arguments from the appellants that the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and the Constitution (s 172(1)*(b)*) gave the court a discretion to choose a 'just and equitable' award, the Supreme Court of Appeal expressly ruled out any reliance on the PAJA: the matters before it were governed directly by the Constitution, and did not raise procedural matters which could be regarded as 'administrative action' as defined in section 1 of the PAJA. However, in the face of several arguments from the JSC and Hlophe that the matter should be left undisturbed despite the irregularities, Cloete JA again made the court's univocal view clear (para [25]):

> 'I pause to remark that it would indeed be a sorry day for our constitutional democracy were serious allegations of judicial misconduct to be swept under the carpet for reasons of pragmatism and practicality. . . . The public interest demands that the allegations be properly investigated, irrespective of the wishes of those involved.'

As a result, the order of the court *a quo* was confirmed, setting aside the decisions of the JSC in August 2009, so as to enable it to perform its constitutional obligations (para [25]).

This strong rebuff to the attempts by the JSC and Hlophe JP to explain (and essentially to excuse) the JSC's procedural lapses in this set of decisions was reinforced as regards the substantive justification for it in the second appeal handed down on 31 March 2011. In *Freedom under Law v Acting Chairperson: Judicial Service Commission and Others* 2011 (3) SA 549 (SCA), a different bench of the same court (per Streicher JA; Brand, Cachalia, Theron and Seriti JJA concurring) granted leave to appeal the decision of Mabuse J in the North Gauteng High Court, delivered just over three months previously, and

overruled it, as well as dismissing a conditional counter-appeal by Hlophe JP.

The judgment on appeal starts by setting out a very useful summary of the dispute between the judges of the Constitutional Court and Hlophe JP, from its beginnings in late May 2008, and the law and regulations pertaining to it (see paras [1]–[15]).

The first hurdle to be overcome by the appellant was to justify its standing to pursue the matter, which had been raised in the court *a quo*, and was argued again by Hlophe JP in his conditional counter-appeal. Freedom Under Law (FUL) is a non-governmental organization which seeks to advance the rule of law and the independence of the judiciary under the Constitution, and it argued that it accordingly had standing not only in its own interest, but also in the public interest and in the interest of all litigants who come before the courts over which the respondent judges may preside (para [16]). The Supreme Court of Appeal noted that the Constitutional Court had from its inception stressed that a broad approach to standing be adopted in matters of constitutional compliance (paras [19] and [20]), and concluded that —

> '[t]here is no reason to doubt the applicant's statement . . . that it is acting in the public interest. Every South African citizen has an interest to be served by judges who are fit for judicial office and by courts which are independent and impartial. . . . It is therefore in the interest of every . . . citizen that the JSC should properly and lawfully deal with every complaint of gross misconduct. . . .' (para [21]).

In addition, the court was of the view that '[i]t is for bodies like the applicant that can afford to [call the JSC to account] and whose very mission is to secure and strengthen the independence of the bench to take action' (para [22]), and so it upheld the stance taken by Mabuse J.

As to the substance of the matter, the essence of appellant's arguments was that the JSC's decisions of August 2009 were in breach not only of section 165(4) of the Constitution but also amounted to unlawful administrative action in breach of section 33 of the Constitution (the rights to administrative justice). FUL argued that when the JSC had decided in July 2009 to initiate an enquiry, it had done so without appreciating that such action had already been taken by it, a year before, and that its decision was thus tainted by mistake of fact, and unlawful as a consequence. It is important to note that the membership of the JSC had during this period altered to some degree, consequent particularly on

the replacement of the four presidential nominees to the JSC after the election to office of President Zuma in June 2009. While the court below had found in favour of the JSC on this issue, the Supreme Court of Appeal decided that it was unnecessary to do so, as the later decision of the JSC could only have been explained on the basis that the matter between the Constitutional Court judges and Hlophe JP should be reconsidered, given its changed membership and other factors (para [28]). As a result, FUL's argument about the existence of a mistake of law could not prevail (para [29]).

The Supreme Court of Appeal then proceeded to look closely at the justifiability of the decisions taken by the JSC in the course of July and August 2009. It rehearsed the various views advanced by those judges (Langa CJ, Moseneke DCJ, Nkabinde J, Jafta AJ and Hlophe JP) who had appeared before the sub-committee of the JSC (see paras [31]–[40]), which clearly indicated that there was a series of untested contradictions (set out in para [42]) between the evidence of Nkabinde and Jafta JJ, on the one hand, and Hlophe JP, on the other. The JSC's failure to find that these contradictions related materially to the question of Hlophe JP's fitness to hold office was found by the Supreme Court of Appeal to be irrational (para [42]). Furthermore, the standard of proof employed by the JSC (beyond reasonable doubt, as in criminal proceedings) was found by Streicher JA to be inappropriate to an enquiry into judicial misconduct, which was likened more to a disciplinary enquiry, in which proof on a balance of probabilities was generally required (paras [45] and [46]). The court examined the five attempts at justification for its decisions by the JSC, reasoning which the appeal court found 'surprising' (paras [47] and [48]). Especially in the light of the JSC's constitutional duty to 'investigate allegations of misconduct that may threaten the independence, impartiality, dignity, accessibility and effectiveness of the courts' (para [49]), its dismissal of the complaint of the Constitutional Court judges was an 'abdication of its constitutional duty', and thus unlawful. Unlike in the previous case discussed above, the Supreme Court of Appeal found here that the conduct of the JSC satisfied the definition of 'administrative action' in the PAJA, and was thus 'reviewable in terms of section 6(2)*(h)* of [the] PAJA for being unreasonable in that there was no reasonable basis for it' (para [50]).

One further issue merited the attention of the Supreme Court of Appeal here, being Hlophe's countercomplaint against the

Constitutional Court judges. Although FUL had also argued in its papers for the setting aside by the Supreme Court of Apeal of the JSC decision to dismiss the counter complaint, the court pointed out that (para [55])

> '. . . there was no evidence contradicting the evidence of the Constitutional Court justices on the basis of which the allegations [by Hlophe] against them could be established. The JSC was therefore entitled to dismiss the counter-complaint on the basis that the allegations were incapable of establishment.'

As to remedy, the respondents once again (as they had in the *Premier* case above) endeavoured to persuade the court to exercise its discretion to make a 'just and equitable' award (both in terms of s 172(1) of the Constitution and s 8 of the PAJA), and to let the decisions stand, citing delay and cost considerations. The court would have none of this: not only did the constitutional inconsistency of the JSC's decisions oblige the Supreme Court of Appeal to declare them invalid (para [61]), but '[i]t cannot be in the interests of the judiciary, the legal system, the country or the public to sweep the allegations under the carpet because it is being denied by the accused judge, or because an investigation will be expensive, or because the matter has continued for a long time' (para [63]).

In the formal words used in the order of the court, after granting leave to appeal to FUL but denying Hlophe leave to cross-appeal, 'the decision of the JSC . . . ''that the evidence in respect of the complaint does not justify a finding that Hlophe JP is guilty of gross misconduct'' and that the matter accordingly be ''treated as finalized'', is reviewed and set aside', with costs (para [65]). (Discussion of this judgment should not be closed without a bow in the direction of legal history: the *amicus* brief filed by Professor Kader Asmal, a former Cabinet Minister and leading proponent of constitutionalism, on his own account, while appreciated by the Supreme Court of Appeal, was not favoured with a costs order, given the fact that all parties were 'well represented' (para [64]). Professor Asmal died within three months of this judgment, vindicated in his arguments, but saddened by the decline in the level of constitutional governance exemplified in this saga.)

So, what can be said by way of temporary conclusion on this long-running, festering wound on the judicial body politic in South Africa? The main point perhaps to be made is to note the appalling track record of the JSC in the frenzied rounds of litigation fought out over the past few years, at enormous cost to

all concerned, not least the taxpayer. Time and again, almost without exception, the JSC has been found wanting in terms of its proper compliance with its constitutional and statutory obligations, let alone its public image as one of the bastions of the effective safeguarding of the independence and impartiality of the judicial arm of government. One needs ask whether the composition of the JSC, or more accurately the manner in which its members have been appointed, has not been usurped for sectional purposes, which in turn has led it to take decisions for unlawful reasons.

By contrast, the response of the courts has been to remain generally true to the constitutional project. In the two decisions discussed at length above, there is striking affirmation of the values of the Constitution (s 1) as well as the specific requirements laid down for the role, composition and functioning of the JSC. For an administrative lawyer, the passing references to the applicability of the PAJA to the conduct of the JSC, especially given the express reference to it in section 1*(gg)* under the definition of 'administrative action', are of interest, although most would agree that the Supreme Court of Appeal 'got it right' on both scores in these cases.

On 30 March 2012, the Constitutional Court unanimously refused leave to appeal against both these decisions. The Constitutional Court judgment will be reviewed in the 2012 *Annual Survey*, but its effect was to ensure that the Supreme Court of Appeal has had the final say on these matters (*Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law* [2012] ZACC 4). In law, the JSC is once more seized of the matter, despite its apparent reluctance. Meanwhile, the clock runs, almost four years after the original complaint by the judges of the Constitutional Court.

Legal Profession

Given the travails of judicial officers in regard to their ethical and professional conduct over the past few years, as detailed above and in this part of the Annual Survey in prior years, and given the pervasive concern in government about growing levels of corruption in society, it is small wonder that the bodies whose task it is to govern the legal profession have had their work cut out for them. In the year under review, three reported cases involving the attorneys profession are worthy of note.

In *Law Society of the Northern Provinces and Another v Viljoen; Law Society of the Northern Provinces and Another v Dykes and Others* 2011 (2) SA 327 (SCA), the Council of the appellant governing body of the attorneys' profession had adopted a resolution (in June 2009) to the effect that, where it had resolved to apply for the suspension or removal of an attorney from the roll, a 'fidelity fund certificate' should not be issued to such a member, unless the Council decided otherwise for good reason. The applicable legislation (s 42 (3)*(a)* of the Attorneys Act 53 of 1979) provided that, if the secretary of the Law Society to whom application for such a certificate was made was 'satisfied that the applicant has discharged all his liabilities to the society in respect of his contribution and that he has complied with any lawful requirement of the society' he should forthwith issue such a certificate. Effectively, therefore, the Council resolution, which was not publicized to the attorney-members of the Society, introduced a new criterion for the issuing of a certificate.

Respondents in these two appeals, decided together as the issues were the same, were attorneys in respect of whom the Society had received many complaints from the public as to their conduct, such that the Society had instituted proceedings in the High Court to strike their names from the roll, but pending resolution of these proceedings they remained on the roll. The Society reminded them to apply for a certificate, but then promptly refused to issue it, which meant that they were unable to practise.

The respondents sought to review the lawfulness of the resolution on two grounds: that it was so vague as to be of no force or effect; and that the apparent additional requirement for the granting of a certificate imposed by the Council through the resolution was not consonant with the legislative scheme of the Act (para [12]). Bosielo JA (Heher JA, Shongwe JA, R Pillay AJA and K Pillay AJA concurring) accepted both these arguments, dismissing the appellant's attempts to breathe life into the resolution by pointing out that the respondents could have made representations to the Council to avoid its sanctions (paras [17]–[19]). In dismissing the appeal, the court also awarded costs against the appellant, despite the fact that the Society argued that it enjoyed a special status as a litigant, as it was not pursuing its own interests in such litigation (paras [20]–[22]).

Thus we see the judiciary insisting on fair process, despite the laudable objective being pursued by the regulatory authority. In

similar vein, but with a different outcome, a full bench of the Free State High Court was asked by the provincial law society to prevent two attorneys who had been struck off the professional roll from continuing effectively to practise as attorneys but as members of a close corporation. In *Law Society, Free State v Macheka and Another* 2011(5) SA 591 (FB), Lekale AJ (Ebrahim J concurring) was asked by the applicant to interdict the respondents from continuing to practise as attorneys, to hold themselves as attorneys, or to provide legal services for financial reward, having continued to operate, but in the form of a different business enterprise, from the same premises as they had before being struck off the roll. The respondents denied that they were acting in contravention of the striking-off order, and also relied on their right (s 22 of the Constitution) to freedom of trade, occupation and profession.

Having considered the relevant statutory framework and the applicable case law, the court found that, on a balance of probabilities, the respondents had continued to create the impression that they operated as attorneys (paras [21]–[23]), but that the court order preventing them from providing legal services was 'so general and so wide' that it infringed on their freedom to trade, and that any such order ought more clearly to specify the legal services which were not to be performed in the future (para [25]). However, it was clear that these particular respondents had continued at least to hold themselves out as attorneys, having been struck off, and were thus in contempt of the court order which removed them from the roll (para [36]). This conclusion was reached despite Lekale AJ finding, in a colourful metaphor, that it was 'reasonably possibly true' that Macheka, in anticipation of his likely striking-off, had thrown 'the proverbial javelin by divesting himself of the relevant files in favour of the close corporation before the lightning could strike' (ibid).

Finally, in regard to the maintenance of professional regulation, several issues relating to entry into the attorneys' profession, and in particular the calculation of the period in which articles of clerkship are served, came before the Supreme Court of Appeal in *Law Society of the Northern Provinces v Mahon* 2011 (2) SA 441 (SCA). In this case the respondent had entered into a contract relating to her service as a candidate attorney with a leading firm of trademark attorneys, but this service was subject unusually to a probationary period of three months. Mahon duly served such probation, and then a further period of about 21 months as a

candidate attorney, after which she left to work as a legal adviser for a financial institution. She then applied to the Gauteng North High Court for enrolment as an attorney, arguing for the condonation of the period served on probation before she entered into the formal contract of articles of clerkship, as being the type of 'irregular service' contemplated in section 13(2) of the Attorneys Act. This order was duly granted (see *Ex parte Mahon* 2010 (2) SA 511 (GNP)), but the Law Society was unhappy with this ruling, and so appealed. In a carefully reasoned and detailed judgment, Cachalia JA (Lewis JA, Leach JA, Tshiqi JA and Ebrahim AJA concurring) explored the proper meaning to be given to the concept 'irregular service' in the Act, and concluded that the probationary period served by Mahon did not qualify as such. In doing so, the court endorsed the crucial role played by the Law Society as the gatekeeper of entry into the profession, as follows (para [12]):

> 'What emerges . . . is that the legislature intended the terms of the clerkship agreement to be the bedrock of the regulatory regime governing candidate attorneys. But it recognized that the strict application of this regime may sometimes cause hardship. . . . What the legislature had in mind by ''irregular service'' were ''breaks in service either through accident . . . or through a *bona fide* mistake, or through other sufficient cause''.'

But the recognition of such service by the high court was conditional on the conclusion of a valid contract of articles of clerkship, which had not been the case here.

The court then had to deal with the possible influence on the Law Society's regulatory regime flowing from the entrenchment in the Bill of Rights (s 22) of the freedom of profession, as in *Macheka*. In a learned and nuanced analysis, Cachalia JA weighed up the effect of this right as well as the general constitutional values of fairness and justice on the court's interpretation of section 13 of the Act (paras [20]–[32]), but held that they did not assist Mahon. As to remedy, the court adopted an agreement reached by both parties, which allowed Mahon to complete the final three months of her service as a candidate attorney, or to do community service in its place, and then to approach the high court with an application for enrolment as an attorney.

These cases show the courts maintaining the hegemony of the professional governing bodies over the disposition of legal services to the public, founded in a concern for compliance with

professional ethical standards, yet being willing to situate the discharge of those responsibilities within the broader constitutional context. It may well be argued that the practising professional governing bodies have been more assiduous in pursuit of their disciplinary function than has the JSC in regard to alleged judicial misconduct, as detailed above.

Police

In *Minister of Safety and Security and Others v Craig and Others NNO* 2011 (1) SACR 469 (SCA), the court confirmed an approach adopted in *Mtati v Minister of Justice* 1958 (1) SA 221 (A), that police have a duty to ensure the wellbeing of prisoners in their charge. Thus, police have an obligation to obtain the necessary medical assistance for a prisoner when it appears that he or she is in distress, injured or ill.

In this case, a driver of a motor car, who was heavily under the influence of alcohol, caused an accident with disastrous consequences. An oncoming vehicle was hit which caught alight. Two children who were passengers in this vehicle were burnt to death. The intoxicated driver survived the collision and was arrested at the scene by two police officers. The driver was taken to the rooms of a district surgeon for the purposes of the administration of a blood-alcohol test. He was then transferred to the nearby police station where members of his family requested that he be released on bail. This was refused. The family then urged the police to allow them to take him to hospital but this plea, too, was refused.

The police officer on duty summonsed paramedics to examine him. They duly arrived and announced that there was nothing wrong with him. It appears that on the next morning the driver complained that he was feeling unwell. The investigating officer, acting on his own initiative, transported him to the nearby hospital, where, despite the hospital staff's best efforts to resuscitate him, he died.

The deceased's wife and daughter instituted an action against the appellant. In overturning the judgment of the court *a quo,* which had held in favour of the family, Navsa JA found that the police had fulfilled the relevant obligations in that paramedics had been summonsed. Later, when the deceased had complained that he was unwell, he was transported expeditiously to hospital. Accordingly the court concluded that, 'it could hardly be said of the police that they were negligent' (para [69]).

In *Minister of Safety and Security v Venter and Others* 2011 (2) SACR 67 (SCA), the appellant was held liable for the respondent's damages arising from the negligent failure of members of the police service to perform their duties in terms of the Domestic Violence Act 116 of 1998, being to advise and to assist persons in asserting their rights under this Act.

Briefly, the facts were that the first respondent enjoyed a close relationship with the second respondent, who was married to a third party, Van Wyngaardt. It was clear that Van Wyngaardt had become particularly jealous of this relationship between the respondents and made incessant telephone calls and sent abusive text messages to them. He threatened to set their house on fire as well as to kill them. At some point, the respondents approached the police for assistance. As the first respondent did not wish the police to conduct an investigation, the police officer on duty informed him that the police could not assist and nothing came of his complaint. Thereafter, the first respondent again approached the police and, with some reluctance, the police officer took down 'a brief, unattested statement' from the second respondent.

The respondents' fears proved justified. Some time after the second approach had been made to the police, Van Wyngaardt entered the first respondent's house, raped the second respondent, and attempted to kill the first respondent with his firearm. After he had been arrested, he committed suicide in the police cells. The respondents sued the appellant for damages based on the failure of the police to perform the legal duty to assist the respondents to take steps to protect themselves under the Domestic Violence Act.

In his judgment, Majiedt JA set out a wide range of duties which are imposed upon both the station commander and the police officer on duty who receives a complaint under the Domestic Violence Act. There is a duty to render general assistance to the complainant as well as specific assistance, including an obligation to open a docket, to register it for investigation and, when no complaint is made, to assist a complainant to formulate a complaint. The complainant must be provided with a notice which details a complainant's right to lay a charge or to apply for a protection order or to do both. The complainant must be informed that it is not necessary to lay a charge before applying for a protection order. The respondents' case was that, had they been made aware of these rights, they would have taken the appropriate steps to protect themselves and to procure a protection order.

The court emphasized the important obligations which were placed upon the police in terms of the Act:

> 'The legislature clearly identified the need for a bold new strategy to meet the rampant threat of ever increasing incidents of domestic violence. Its efforts would come to nought if the police, as first point of contact in giving effect to these rights and remedies, remain distant and aloof to them, as the facts of this case appeared to suggest' (para [27]).

In contrast to the court *a quo*, Majiedt JA found that the respondents were also negligent in failing to obtain the necessary interdict. This failure had contributed to the harm which had ensued. The court emphasized that the first respondent was an ex-policeman and was knowledgeable about this type of remedy although only in broad detail. Accordingly, the court determined that the respondents' degree of culpability be put at 25 per cent and that the necessary apportionment in respect of the damages had to be made.

Crime statistics

The most recent statistics were published in the SAPS Crime Report 2010/2011 for the period 1 April 2010 to 31 March 2011.

The following table sets out the comparison for serious crimes as from the 2003/2004 year to the 2010/2011 year.

Serious crime during the 2003/2004 to 2010/2011 financial years and the percentage increases/decreases in crime between 2009/2010 and 2010/2011

Crime category	Incidence of crime per 100 000 of the population									Raw figures/frequencies								
	2003/2004	2004/2005	2005/2006	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011	% Increase/Decrease 10/11 vs 09/10	2003/2004	2004/200 5	2005/2006	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011	% Increase/Decrease 10/11 vs 09/10
Contact Crime																		
Murder	42.7	40.3	39.6	40.5	38.6	37.3	34.1	31.9	–6,5%	19 824	18 793	18 528	19 202	18 487	18 148	16 834	15 940	–5,3%
Total sexual offences	142.5	148.4	145.2	137.6	133.4	144.8	138.5	132.4	–4.4%	66 079	69 117	68 076	65 201	63 818	70 514	68 332	66 196	–3,1%
Attempted murder	64.8	52.6	43.8	42.5	39.3	37.6	35.3	31.0	–12,2%	30 076	24 516	20 571	20 142	18 795	18 298	17 410	15 493	–11,0%
Assault with the intent to inflict grievous bodily harm	560.7	535.3	484.0	460.1	439.1	418.5	416.2	397.3	–4,5%	260 082	249 369	226 942	218 030	210 104	203 777	205 293	198 602	–3,3%
Common assault	605.7	575.0	485.3	443 .2	413.9	396.1	400.0	371.8	–7,1%	280 942	267 857	227 553	210 057	198 049	192 838	197 284	185 891	-5,8%
Robbery with aggravating circumstances	288.1	272.2	255.3	267.1	247.3	249.3	230.6	203.0	–12,0%	133 658	126 789	119 726	126 558	118 312	121 392	113 755	101 463	–10.8%
Common robbery	206.0	195.0	159.4	150.1	135.8	121.7	116.7	109.8	–5.9%	95 551	90 825	74 723	71 156	64 985	59 232	57 537	54 883	–4,6%
Contact-related Crime																		
Arson	19.0	17.6	16.3	16.6	15.5	14.1	13.6	13.1	–3,7%	8 806	8 184	7 622	7 858	7 396	6 846	6 701	6 533	–2,5%
Malicious damage to property	341.2	323.7	307.7	302.5	286.2	275.8	267.9	250.7	–6,4%	158 247	150 785	144 265	143 336	136 968	134 261	132 134	125 327	–5,2%
Property-related Crime																		
Burglary at residential premises	645.2	592.8	559.9	526.8	497.1	506.5	520.2	495.3	–4,8%	299 290	276 164	262 535	249 665	237 853	246 616	256 577	247 630	–3,5%
Burglary at non-residential premises	139.3	120.3	116.0	123.3	131.7	143.8	1 45.5	138.2	–5,0%	64 629	56 048	54 367	58 438	62 995	70 009	71 773	69 082	–3,7%
Theft of motor vehicle and motorcycle	190.0	180.0	183.3	182.1	167.7	156.0	145.5	129.0	–11,3%	88 144	83 857	85 964	86 298	80 226	75 968	71 776	64 504	–10,1%
Theft out of or from motor vehicle	370.8	318.8	296.6	261.7	233.4	225.0	245.1	246.2	0,4%	171 982	148 512	139 090	124 029	111 661	109 548	120 862	123 091	1,8%
Stock-theft	89.0	70.1	61.3	60.8	60.1	61.7	65.7	60.3	–8,2%	41 273	32 675	28 742	28 828	28 778	30 043	32 380	30 144	–6,9%

Fluctuations in the ratios of serious crime trends between the 2009/2010 and 2010/2011 financial years per province

Crime Category	Eastern Cape			Free State			Gauteng		
	2009/2010	2010/2011	% Increase/ Decrease 10/11 vs 09/10	2009/2010	2010/2011	% Increase/ Decrease 10/11 vs 09/10	2009/2010	2010/2011	% Increase/ Decrease 10/11 vs 09/10
Contact Crime (Crimes Against the Person)									
Murder	48.4	47.3	–2,3%	31.4	34.1	8.6%	32.7	29.1	–11,0%
Total sexual offences	136.1	139.1	2,2%	157.8	171.3	8,6%	148.6	125.0	–15,9%
Attempted murder	29.2	25.5	–12,7%	29.1	27.3	–6,2%	45.6	36.7	–19,5%
Assault with the intent to inflict grievous bodily harm	485.0	456.8	–5,5%	542.5	546.6	0,8%	466.1	416.4	–10,7%
Common assault	260.4	246.0	–5,5%	655.2	634.9	–3,1%	559.8	486.8	–13,0%
Robbery with aggravating circumstances	145.5	154.9	6,5%	171.2	171.8	0,4%	449.0	357.9	–20,3%
Common robbery	81.1	82.5	1,7%	102.5	99.0	–3,4%	190.9	162.7	–14,8%
Contact — Related Crime									
Arson	16.9	16.5	–2,4%	13.8	13.2	–4,3%	15.2	14.5	–4,6%
Malicious damage to property	198.1	199.5	0,7%	315.5	310.8	–1,5%	419.2	366.5	–12,6%
Property — Related Crime									
Burglary at residential premises	426,9	404.1	–5,3%	545.2	528.5	–3,1%	711.2	632.6	–11,1%
Burglary at non-residential premises	96.9	96.6	0,0%	179.1	180.9	1,0%	170.0	149.7	–11,9%
Theft of motor vehicle and motorcycle	64.1	59.0	–8,0%	83.7	78.5	–6,2%	345.0	288.4	–16,4%
Theft out of or from motor vehicle	154.9	164.8	6,4%	167.3	155.9	–6,8%	371.6	334.6	–10,0%
Stock-theft	114.1	111.2	–2,5%	173.4	164.7	–5,0%	8.4	6.4	–23,8%
Crime Detected as a Result of Police Action									
Illegal possession of firearms and ammunition	21.4	21.7	1,4%	11.4	11.9	4,4%	39.1	32.7	–16,4%
Drug- related crime	134.6	141.8	5,3%	176.1	149.0	–15,4%	139.3	147.0	5,1%
Driving under the influence of alcohol or drugs	165.3	122.2	–26,1%	57.0	56.0	–1,8%	141.6	191.4	35.2%

Other Serious Crime									
All theft not mentioned elsewhere	434.9	456.4	4,9%	752.6	707.5	–6,0%	1 113.1	1 041.1	–6,5%
Commercial crime	117.2	123.7	5,5%	120.5	167.5	39,0%	323.7	310.6	–4,0%
Shoplifting	120.2	105.3	–12,4%	123.9	116.3	–6,1%	263.6	221.3	–16,0%

Crime Category	KwaZulu-Natal			Limpopo			Mpumalanga		
	2009/2010	2010/2011	% Increase/ Decrease 10/11 vs 09/10	2009/2010	2010/2011	% Increase/ Decrease 10/11 vs 09/10	2009/2010	2010/2011	% Increase/ Decrease 10/11 vs 09/10
Contact Crime (Crimes Against the Person)									
Murder	40.4	35.2	–12,9%	14.6	12.2	–16,4%	24.3	20.0	–17,7%
Total sexual offences	127.0	120.2	–5.4%	93.8	89.8	–4,3%	127.6	122.8	–3,8%
Attempted murder	44.2	36.8	–16,7%	13.9	12.0	–13,7%	34.0	22.7	–33,2%
Assault with the intent to inflict grievous bodily harm	295.6	287.3	–2,8%	254.8	237.8	–6,7%	439.8	399.0	–9,3%
Common assault	315.6	303.1	–4,0%	171.0	149.3	–12,7%	310.6	285.8	–8,0%
Robbery with aggravating circumstances	222.4	183.9	–17,3%	56.8	50.8	–10,6%	183.3	153.4	–16,3%
Common robbery	76.4	68.8	–9,9%	62.9	57.5	–8,6%	110.0	98.0	–10,9%
Contact — Related Crime									
Arson	11.5	10.7	–7,0%	11.8	10.4	–11,9%	15.9	11.2	–29.6%
Malicious damage to property	160.7	155.7	–3,1%	116.4	106.2	–8,8%	227.6	199.2	–12,5%
Property — Related Crime									
Burglary at residential premises	386.6	371.5	–3,9%	267.4	246.7	–7,7%	536.5	500.7	–6,7%
Burglary at non-residential premises	108.3	103.2	–4,7%	119.6	108.0	–9,7%	153.6	144.7	–5,8%
Theft of motor vehicle and motorcycle	109.6	99.5	–9,2%	20.9	16.4	–21,5%	90.1	76.1	–15,5%
Theft out of or from motor vehicle	136.1	149.8	10,1%	66.4	63.8	–3,9%	178.2	185.2	9,9%
Stock-theft	76.2	69.5	–8,8%	29.7	30.6	3,0%	92.3	80.4	–12.9%
Crime Detected as a Result of Police Action									
Illegal possession of firearms and ammunition	47.5	47.6	0,2%	8.8	7.4	–15,9%	17.2	15.0	–12,8%

Drug- related crime	274.6	304.9	11,0%	92.5	85.2	–7,9%	56.6	87.8	55,1%
Driving under the influence of alcohol or drugs	114.2	95.0	–16,8%	42.5	50.2	18,1%	58.8	74.6	26,9%
Other Serious Crime									
All theft not mentioned elsewhere	448.7	472.3	5,3%	307.2	297.5	–3,2%	647.9	654.2	1,0%
Commercial crime	131.8	143.5	8,9%%	57.5	58.1	1,0%	129.8	127.4	–1,8%
Shoplifting	147.4	120.4	–18,3%	85.5	71.9	–15,9%	109.4	100.1	–8,5%

Crime Category	North West			Northern Cape			Western Cape		
	2009/2010	2010/2011	% Increase/ Decrease 10/11 vs 09/10	2009/2010	2010/2011	% Increase/ Decrease 10/11 vs 09/10	2009/2010	2010/2011	% Increase/ Decrease 10/11 vs 09/10
Contact Crime (Crimes Against the Person)									
Murder	21.5	23.2	7,9%	33.2	31.0	–6,6%	42.4	44.2	4,2%
Total sexual offences	137.9	147.0	6,6%	160.8	169.2	5,2%	180.7	178.0	–1,5%
Attempted murder	24.3	22.0	–9,5%	62.0	58.8	–5,2%	31.9	41.4	29,8%
Assault with the intent to inflict grievous bodily harm	421.9	439.9	4,3%	830.7	815.5	–1,8%	449.2	473.3	5,4%
Common assault	257.7	243.2	–5,6%	485.7	461.9	–4,9%	642.3	637.0	–0,8%
Robbery with aggravating circumstances	157.1	158.7	1,0%	90.4	80.7	–10,7%	234.1	234.5	0,2%
Common robbery	87.2	85.6	–1,8%	117.2	106.5	–9,1%	176.8	199.1	12,6%
Contact — Related Crime									
Arson	12.2	15.7	28,7%	14.6	16.1	10,3%	11.2	12.1	8,0%
Malicious damage to property	204.2	199.8	–2,2%	270.6	253.2	–6,4%	456.1	446.7	–2,1%
Property — Related Crime									
Burglary at residential premises	431.6	461.7	7,0%	483.6	452.5	–6,4%	808.3	838.5	3,7%
Burglary at non-residential premises	155.4	155.8	0,3%	194.9	184.4	–5,4%	215.5	221.7	2,9%
Theft of motor vehicle and motorcycle	77.5	76.8	–0,9%	21.1	22.3	5,7%	187.4	174.2	–7,0%
Theft out of or from motor vehicle	151.2	170.3	12,6%	162.7	191.2	17,5%	660.2	697.8	5,7%
Stock-theft	91.2	85.2	–6,6%	154.1	143.9	–6,6%	20.7	19.0	–8,2%

Crime Detected as a Result of Police Action									
Illegal possession of firearms and ammunition	11.3	11.7	3,5%	4.4	5.5	25,0%	40.7	48.8	19,9%
Drug- related crime	223.3	223.9	0,3%	206.6	219.0	6,0%	1 127.7	1 351.3	19,8%
Driving under the influence of alcohol or drugs	63.1	50.6	–19,8%	112.0	95.4	–14,8%	292.0	330.1	13,0%
Other Serious Crime									
All theft not mentioned elsewhere	554.6	602.9	8,7%	647.8	580.1	–10,5%	1 616.3	1 626.9	0,7%
Commercial crime	149.2	140.0	–6,2%	99.7	103.4	3,7%	218.4	227.6	4,2%
Shoplifting	80.0	77.5	–3,1%	192.1	148.6	–22,6%	382.7	359.2	–6,1%

Perhaps the most reliable figure in this set of statistics is the number of murders reported, given the fact that when a murder is reported a dead body has been found. Hence, it is less likely that these figures could be manipulated to reveal an improvement. The number of murders in South Africa declined by 6.5 per cent in 2010/2011 with 15 940 cases having been recorded. An examination of a pattern which can be gleaned from the reported figures 2003/2004 shows that the murder rate has declined by almost twenty per cent during this period. Attempted murders have also declined, in this case by 12.4 per cent, and assault with the attempt to inflict grievous bodily harm has decreased by 4.5 per cent.

Although the figures of sexual offences revealed a decline of three per cent, the number of reported rapes, which is a notoriously unreliable figure, still rose from 55 097 to 56 272 during the reported year.

94 police officers were killed in the line of duty, which constitutes a slight decline from the previous year of 110 fatalities.

Statistics South Africa released key findings from a victim of crimes survey which was conducted from January to March 2011 (Statistics South Africa: Statistical Release: PO 341: November 2011). From a sample size of 29 754 dwelling units drawn across all nine provinces, the authors of the report found that more than 40 per cent of these households believed the level of both violent and non-violent crimes had decreased in their area of residence during the period 2008/2010. Less than 35 per cent noted that crime had increased and the balance of the sample believed that crime had stayed the same. 53 per cent of households, which reported, perceived housebreakings/burglaries to be one of the most common types of crime, followed by home robbery (49.7 per cent), street robbery (40.9 per cent) and pickpocketing (28.5 per cent). A third of households avoided going to open spaces unaccompanied because of the fear of crime, followed by 22.2 per cent of households who would not allow their children to move around, unsupervised by an older person, or play freely in the area, while 14.7 per cent of households do not permit their children to walk to school alone.

The gender imbalance with regard to fear of crime was also reflected in the study. Male headed households were much more likely (54.1 per cent) to feel safe and walk alone during the day as opposed to female headed households (34.1 per cent). 22.7 per cent of male headed households feel safer when walking alone after dark, compared to 14.3 per cent of the female population.

Significantly, more than 60 per cent of households consider that property and violent crimes were likely to be committed by people from their own area, while 32 per cent believe that crimes were committed by people from other areas. Approximately seven per cent considered that the perpetrators of crime in the neighbourhood were people who came from outside of South Africa. A large portion of households consider that criminals were more likely to be motivated by real need (57.6 per cent) rather than by greed (45.9 per cent) and non-financial motives 28.7 per cent. Approximately twenty per cent reported that criminals were motivated by behavioural issues such as drug usage.

Some 21.9 per cent of victims of assault were attacked by those who were members of the relevant community in their area, including their spouse or partner (20.9 per cent). Only 10.5 per cent reported that perpetrators were unknown to community members. With regard to sexual assaults, 38.4 per cent of victims were victimized by a known community member. The study indicated that 33.6 per cent of sexual offices, including sexual assault, rape and domestic abuse occurred in a field or a nearby park followed by 29.8 per cent who reported that these offences took place at home and 18.5 per cent who reported that the crime took place at someone else's home.

Prisons

Legislation

The Correctional Matters Amendment Act 5 of 2011 has amended certain key provisions of the Correctional Services Act of 1998. The significant amendments to the 1998 Act include the express objective of managing remand detainees, amendments regarding the calculation of the length and form of sentences so that a shorter non-parole period for offenders serving sentences of less than 24 months can be imposed, together with the repeal of the ⅘ non-parole period in respect of mandatory minimum sentences. An amendment regulates medical parole in far greater detail and includes offenders who have 'become physically incapacitated'.

The majority of these provisions came into effect on 1 March 2012, in particular the new medical parole policy and amendments to section 73 of the Act which provide for minimum detention periods. A medical parole advisory board has also now been appointed in order to give effect to the changes brought about by the amending Act.

Offenders who are sentenced for a period of up to 24 months now qualify for consideration for parole after having served a quarter of their term as opposed to a third. Offenders sentenced to a prescribed minimum sentence now qualify for consideration for parole after serving half of their sentences as opposed to a fifth of the sentence.

Provision is now made for remand prisoners to be allowed to be supplied with food and drink which can be brought to them by family while in a remand detention facility. They must wear a prescribed uniform which distinguishes them from sentenced prisoners. Every remand detainee, who, upon admission, claims to be pregnant, must immediately be referred to a registered medical practitioner for a full medical examination in order to confirm the pregnancy and thereafter every pregnant remanded detainee must be provided with an adequate diet to promote good health.

Of particular significance is a new provision (s 49G), which provides that the period of incarceration for a remand detainee must not exceed two years from the initial date of admission into the remand detention facility, without the matter being brought to the attention of the court concerned. Once a remand detainee is held for a period exceeding two years, he/she must be referred to the relevant court by the head of the remand detention facility or correctional centre to determine whether the person should be detained further or be released under conditions which the court considers appropriate.

In the case of a sentenced offender serving a determinate sentence or cumulative sentences of more than 24 months, the offender may not be placed on parole until he/she has served either the stipulated non-parole period or, if there is not such a stipulated period, then half of the sentence. Parole must be considered when the prisoner has served 25 years of the sentence or accumulated sentence.

Case law

In *Lee v Minister of Correctional Services* 2011 (2) SACR 603 (WCC), the plaintiff claimed damages from the defendant for harm which had been suffered as a result of his having contracted Pulmonary Tuberculosis ('TB') while incarcerated as an awaiting trial prisoner in Pollsmoor Prison for some four and a half years between 1999 and 2004. The plaintiff had testified that he had been tested for TB once or twice when he was a child but that

he had never encountered any problem with the disease. He was always a fit and active person apart from some trouble with his heart and prostate. However, he had never been ill with TB prior to his incarceration. He testified that in 2003 he experienced heavy coughing fits which continued for weeks. He started losing weight and had experienced night sweats. He became concerned and asked for a sputum test to be conducted. The test results were negative. When the cough continued, he was given another test which also produced negative results. Only after he was admitted to hospital, was a further test conducted which revealed that he did suffer from TB.

Based on the evidence, De Swardt AJ found that a considerable number of prisoners who were ill with TB and were thus infectious were not isolated from the general prison population. It was reasonable to conclude that persons who were so infected would expel bacteria by coughing, sneezing or spitting. The transmitted bacteria would infect fellow inmates who were in close proximity. In the view of the court, the plaintiff had been infected with TB bacteria during his imprisonment and had consequently become ill. The prison authorities could have prevented or curtailed the spread of TB in a maximum security prison like Pollsmoor by providing for a sufficient number of adequately trained nursing staff, to properly screen all incoming prisoners for TB, to screen inmates regularly for TB, and to counsel those inmates who had contact with freshly diagnosed patients.

Based on the evidence the court concluded that the plaintiff had been detained in extremely overcrowded and poorly ventilated cells. Despite the fact that he received adequate medical treatment once he had been diagnosed with TB, the severe shortage of qualified nurses, who could have conducted the necessary tests and cared for the prisoners, had

> '. . . caused health services in prisons to break down. As a consequence, persons who were ill with TB were not routinely provided with adequate treatment. . .' (para [264]).

De Swardt AJ concluded that prison inmates live in a closed environment, which puts them at the mercy of the officials who run the prisons. The court held that —

> '. . . it was the duty of the defendant and his officials in terms of the 1958 Act (the Correctional Services Act 8 of 1959) and the Constitution to provide prisoners with treatment which is neither inhumane nor degrading and to preserve prisoners' rights to dignity. The failure of

defendant and his official to do so is, in my view, not justifiable whether in terms of s 36 of the Constitution or otherwise' (para [268]).

For these reasons, the court held that the failure of the prison officials to take the necessary steps to guard against the spread of TB in the maximum security prison was unlawful and the defendant was declared to be liable in delict, pursuant to the plaintiff having become ill with TB while still incarcerated.

The Supreme Court of Appeal has since set aside the High Court judgment (*Minister of Correctional Services v Lee* [2012] ZASCA 23 (to be discussed in the 2012 *Annual Survey*)).

Prison statistics

The figures relating to the state of prisoners in South Africa is derived from the Annual report of 2010/2011 of the Judicial Inspectorate for Correctional Services. As at 31 March 2011, there were 241 operational correctional centres in South Africa, 129 of which were used for male inmates, eight for females, and 91 for both male and female prisoners. These prisons have the joint capacity to house 118 154 prisoners but, as at 31 March 2011, they contained a total of 160 545 prisoners, an overcrowding level therefore of 135.87 per cent, which is a reduction on the level of 139 per cent for the comparable date in 2010. By 31 August 2011, the Inspector Judge reported a further improvement in the total number of prisoners which had reduced to 157 375.

The highest level of overcrowding took place in Gauteng (172.65 per cent) followed by the Eastern Cape (146.35 per cent) and the Western Cape (142.95 per cent). The total number of sentenced prisoners is 112 683. 66 per cent of these prisoners are older than 25, 25 per cent are aged between 21 and 25; juvenile prisoners between ages of eighteen and 21 constitute eight per cent of the prison population while only one per cent consists of children below the age of 18.

The prison population can be further divided into categories of crime which have been committed, including aggressive crimes (52 per cent), economic crimes (25 per cent), sexual offences (15 per cent), narcotic offences (3 per cent) and other forms of crime (5 per cent).

The Inspector Judge reported that, as at 31 March 2011, notwithstanding the reduction in the average rate of overcrowding, eighteen prisons were critically overcrowded by more than 200 per cent.

The effect of minimum sentence legislation is again emphasized in the report concerning the nature of the prison population. 52 050 prisoners are serving sentences ranging from twenty years to life. Accordingly, the report suggests that the Department of Correctional Services has committed itself to reviewing the minimum sentence legislation that has contributed to these increases and the further effects that long sentences have on overcrowding, costs or prisons and prison gangs. There was a small reduction in the number of long term prisoners from 53 944 in 2010 to 52 050 in 2011.