THE ROLE OF THE COURTS IN THE FIGHT AGAINST CORRUPTION

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1. The main function of the courts is of course to resolve controversies between parties. They do so by determining factual disputes and by application of the law to the facts thus established. In essence our law consists of two parts: common law, which is essentially Roman Dutch Law with some influence of English law; and statutory law which is created by acts of Parliament. In the process they ultimately decide, in civil cases, whether the one party ─ the defendant ─ should be held liable to the other party ─ the plaintiff, and in criminal cases whether the accused person should be convicted and, if so, what sentence should be imposed. The main focus of our courts in the context of corruption is in the field of criminal law. Even in Roman times corruption was penalised by criminal sanction. The most important of these was an edict by Julius Caesar. In Holland the most important statute was the Placaat of the Stategeneraal of the Verenigde Nederlande in 1652. In 1992 our common law regarding corruption was expressly abolished by our Parliament in terms of the Corruption Act of 1992.[1]

[1] Act 94 of 1992.

2. The 1992 Act was replaced in turn by the Prevention and Combatting of Corrupt Activities Act of 2004.[2] While the 1992 Act was commendably brief and concise, the 2004 Act by contrast suffers ─ as perhaps foreshadowed by its long-winded title ─ from prolixity, complexity and repetition. These afflictions render it rather difficult to understand and apply. As often happens with over-elaboration, some conduct that was clearly punishable under common law was not covered by the detailed provisions of the 2004 Act. Since the common law had been expressly abolished the question arose whether that conduct could, in the circumstances, still be regarded as criminal. To give one example, under the common law it was no defence for an official who took a bribe to say that he or she always intended to do no more and in fact did no more than perform his or her duty. Stated somewhat differently, it was of no matter that the person who paid the bribe received no *quid pro quo*.[3] But the 2004 Act does not cover this situation. That is why it was open to the appellant in the headline-grabbing case of *S v Selebi*[4] to raise the defence that he was not guilty of an offence under s 4(1) of the 2004 Act in that Mr Agliotti did not receive any *quid pro quo* for the payments that he made to Commissioner Selebi. The majority of the SCA found it unnecessary to decide this question because of their conclusion on the facts that Agliotti did indeed receive value for his money. In her minority judgment

[2] Act 12 of 2004.
[3] As Tindell JA put it in *R v Kemp* 1942 AD 147 at 156, 'the accused person could never successfully contend that the receipt of the money [ie the bribe] loses its corrupt character because he had made up his mind to act in the manner desired before he was approached by the briber'.
[4] 2012 (1) SA 487 (SCA).

Snyders JA, on the other hand, had no difficulty in finding that a *quid pro quo* is not a requirement for a conviction under the 2004 Act. In other words, that although the common law was repealed, it prevails in circumstances that fall outside the wording of the Act. This shows a willingness on the part of our courts, in cases of doubt, to give a wide interpretation to statutory provisions aimed at rooting out the affliction of corruption in our society.

3. Indeed, the manner in which the minority judgment approached the problem is in accordance with the general attitude of both the SCA and the CC with regard to corruption, first, when it comes to sentencing and, secondly, with regard to corrupt activities under the Prevention of Organised Crime Act 1998.[5] That approach appears for instance from the following statements by the SCA in *S v Shaik*:[6]

'The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe.'

[5] Act 121 of 1998 (or POCA). See *S v Shaik* 2008 (2) SACR 165 (CC).
[6] 2007 (1) SA 240 (SCA) para 223.

And by the CC in *South African Association of Personal Injury Lawyers v Heath & others*:[7]

'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.'

4. Corruption also plays a role in civil litigation. Administrative review forms the principle basis of the courts' activities in this arena. The most commonly understood role that the courts play in ensuring ethical relationships between the public and private sector is in the review of tender awards. An interesting development of the law by our courts in recent times in this regard is that, although the Government is not liable for damages resulting from negligence of its employees in tender proceedings,[8] the Government is indeed liable for the loss suffered by an unsuccessful tenderer through the conduct of an employee which was not only negligent, but also dishonest and corrupt.[9]

5. A further category of important review cases are those in which the courts have set aside decisions by the National Prosecuting Authorities not to

[7] 2001 (1) SA 883 (CC) para 4.
[8] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) (*vis-à-vis* the unsuccessful tenderer) and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) (*vis-à-vis* the successful tenderer).
[9] *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) para 90.

prosecute or to terminate prosecution. In doing so the courts were applying their administrative review jurisdiction. Of some interest in this regard, is that the Promotion of Administrative Justice Act (PAJA)[10] – which was intended to be the sole source of the courts' review authority – specifically excludes a decision 'to institute or continue prosecution' from the ambit of judicial review. This means that, when PAJA was promulgated, Parliament obviously intended that the courts should not interfere with decisions of the NPA not to prosecute or to withdraw prosecution that had been instituted. Nonetheless, the courts have created an alternative pathway to judicial review where PAJA finds no application on the basis of what has become known as the legality principle. The underlying constitutional foundation to the legality principle, as explained by the Constitutional Court,[11] that it is an incident of the rule of law that the exercise of all public powers must be lawful.

6. Currently, the legality principle provides a more limited basis of review than PAJA. Why I say currently is because it is accepted 'that legality is an evolving concept in our jurisprudence, whose full potential will be developed in a context driven manner and an incremental way'.[12] In other words ─ while the basis for review under PAJA has been fixed by legislation, the courts are working out the bases of review under the legality principle in an incremental

[10] Act 3 of 2000.
[11] See eg *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 49.
[12] See *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others (Treatment Action Campaign & another as amicus curiae)* 2006 (2) SA 311 (CC) para 614.

way. An example of a case in which the decision to withdraw the prosecution was set aside on the basis of the legality principle is, in *National Director of Public Prosecutions & others v Freedom Under Law*[13] where the decision by the Special Director of Public Prosecutions to withdraw charges of corruption and fraud against Lieutenant-General Richard Mdluli, the Head of Crime Intelligence of the SAPS, was set aside by both the high Court and the SCA. The SCA however refused to confirm the order by the high court that the NPA should enrol and proceed with the prosecution of these charges without undue delay. The reason for refusing to do so, advanced by the SCA, was that this order would constitute an inappropriate transgression of the separation of powers doctrine.[14]

7. As part of their administrative review jurisdiction, the courts can also set aside decisions taken by the executive authorities – including the President – in the exercise of their functions. And in our new constitutional dispensation courts can also set aside Acts of Parliament. Under the Westminster tradition, which we inherited as a former British colony, Parliament reigned supreme. It has often been said that under the Westminster system of Parliamentary supremacy, Parliament can do whatever is naturally possible. Its statutory enactments were final. Under this system, however discriminatory the Acts of Parliament may be and however gross their violation of human rights, the courts

[13] 67/14 [2014] ZASCA 58 (17 April 2014).
[14] Para 50 of the judgment.

were bound to apply the law. That system did not serve as well. In short it enabled Parliament of the previous government to set up a system of governance which was discriminatory and in many respects in conflict with basic human rights as recognised in more civilized countries, without any control by the courts. No wonder that in the new democracy we unequivocally moved away from that system. The present position in this regard is governed, firstly, by s 1(c) of our Constitution under the heading 'founding provisions' that:

'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) . . .

(b) . . .

(c) Supremacy of the constitution and the rule of law.'

That provision is immediately followed by s 2 ─ which provides that:

'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

With regard to the Bill of Rights in Chapter 2 of the Constitution, s 8(1) is even more specific. It provides:

'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'

8. But the courts can only set aside an Act of Parliament if the Act is found to be inconsistent with the Constitution. More specifically, the courts have no power to interfere because they do not agree with the import of the legislation or even on the ground that it finds the legislation unreasonable.[15] It is true that the courts – and ultimately the Constitutional Court – are the final arbiter of what is constitutional and what is not. To an extent that places the court in a strong position in that it is able to decide the limits of its own powers. In a sense the courts are therefore accountable only to themselves. That brings about the tension well-known in constitutional democracies such as the USA, France and Germany between ─ on the one hand the watchdog role of the court and, on the other, the criticism that an unelected judiciary should not be able to override the will of the majority of the people as expressed by their elected representatives in parliament. Our courts are aware of this tension and they tried to dispel it by constantly reminding themselves of the separation of powers doctrine. Although the Constitution itself does not refer to the doctrine in terms, it is accepted by the courts to lie at the heart of our whole constitutional dispensation.[16] The power and duty of the courts are thus confined to protect the Constitution; to decide what is constitutional and to set aside that which is not. Should the courts exceed these boundaries, it is they who would be breaking the law. These limitation on the powers of the court must always be borne in mind,

[15] See eg *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) paras 22-24.
[16] See eg *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) at 302.

not only by the courts themselves, but also by those who believe that they have been let down by the courts' refusal to interfere.

9. An illustration of how the courts exercise the power to set aside an Act of Parliament in the sphere of corruption is to be found in the legal contest started by the public-spirited Mr Glenister, which dispute is still playing itself out before the courts. It had its genesis in two Acts of Parliament, the joint effect of which was (a) to disband the Directorate of Special Operations (the DSO), also known as the Scorpions, a specialised crime-fighting unit located within the National Prosecuting Authority (the NPA); and (b) to replace it with the Directorate of Priority Crime Investigation (the DPCI), also known as the Hawks, located within the South African Police Service (the SAPS). Two pieces of legislation brought about these changes, namely: the NPA Amendment Act[17] and the SAPS Amendment Act.[18]

10. The first salvo was fired by Mr Glenister ─ which case is referred to as *Glenister I* ─ when he challenged Cabinet's decision to initiate this legislation. On the basis of the separation of powers doctrine, the Constitutional Court held, however, that it will only interfere with a Bill before Parliament if the applicant can show that he or she would have no effective remedy after the Bill is passed into law. The Constitutional Court also acknowledged that by the nature of

[17] Act 56 of 2008. At that time the NPA Bill of 2008.
[18] Act 57 of 2008. At that time the SAPS Bill of 2008.

things such a situation would indeed be extremely rare. This is so because an Act of Parliament which fails to pass constitutional muster, if challenged, stands to be set aside as soon as it is adopted by Parliament. In this case, so the Constitutional Court held, Mr Glenister had failed to bring the matter home under this category of rare exceptions.

11. Not unexpectedly, the Bills were then adopted by the majority in Parliament and signed into law by the President in January 2009. Soon thereafter Mr Glenister fired the second salvo with a constitutional challenge to the two impugned pieces of legislation in the Western Cape High Court. He was again unsuccessful. That led him to the Constitutional Court where he was joined by the Helen Suzman Foundation as *amicus curiae.* The judgment of the Constitutional Court is reported as *Glenister v President of the Republic of South Africa and others* (2) 2011 (3) SA 347 (CC) or *Glenister II.* As appears from the reported judgment in *Glenister II*, the majority of five held that the impugned Acts were indeed inconsistent with the provisions of the Constitution. But they suspended the declaration of invalidity for 18 months in order to give Parliament an opportunity to remedy the defect. In other words the Hawks remained extant for at least 18 months. The minority of four judges, on the other hand, held that although the two Acts were rightly subjected to severe criticism by the appellants, they were not inconsistent with the Constitution and should therefore stand. I happened to be one of the minority. Nevertheless I will

describe to you the reasoning of the majority. Not because I am now persuaded to agree with it, but because I am bound by that reasoning.

12. Mr Glenister's challenge of the impugned Acts relied on various grounds. The majority and the minority however agreed that most of these could not be sustained. Most prominent amongst the contentions raised by Mr Glenister was the allegation that the Acts were irrational, which, if established, would render them unconstitutional. In support of this contention Mr Glenister argued that the legislation gives effect to the Polokwane Resolution, an ANC resolution adopted at its 52nd annual conference, which Parliament blindly followed; and that the DSO was dissolved in order to shield high-ranking ANC politicians and their associates from prosecution. To dissolve the Scorpions was irrational, so Glenister further argued, because it was the most successful crime-fighting unit. As he put it, the 'dilution of the excellence of the DSO into the unknown and untested DPCI, which will be required to function in a dysfunctional SAPS under political control instead of independently, makes no rational sense at all'.[19] The minority of the Constitutional Court pointed out, however – and the majority agreed – that in the constitutional law context, irrationality has a confined meaning, namely, that the decision in question was not rationally connected to a legitimate governmental purpose. In this context the reason for the decision advanced by the Government was, however, that it was intended to

[19] Para 59.

enhance the investigative capacity of the SAPS in relation to priority crime such as corruption; that within the NPA the Scorpions was not really held accountable by anyone and thus became a law unto themselves; and that prosecutors within that unit lost their objectivity. These considerations, so the court held, could not be said to be irrational in the constitutional sense of the term. In this light the question whether the Scorpions was better structured than the Hawks; whether the same governmental purpose could be achieved by retaining the Scorpions; and whether the decision was politically motivated, were irrelevant.[20] All this, I believe illustrates the restraint exercise by the courts which is motivated by the doctrine of separation of powers.

13. The narrow issue upon which the minority and the majority parted company turned on the rather technical debate concerning the role of international agreements in deciding upon the constitutionality of legislation adopted by Parliament. The debate started out from the various international agreements which had been adopted and approved by Parliament[21] in terms whereof the Government bound itself to establish an adequately resourced, independent anti-corruption agency or unit. Most prominent amongst these agreements was the United Nations Convention against Corruption[22] which in fact gave rise to the 2004 Corruption Act. The minority view was, however, that

[20] Paras 55 et seq read with para 162.
[21] In terms of s 231(2) of the Constitution.
[22] (2004) 43 *ILM* 37. The Convention was ratified by Parliament in November 2004. See also the South African Development Community Protocol against Corruption (the SADC Protocol against Corruption) adopted on 14 August 2001 and the African Union Convention on Prevention and Combatting Corruption, 2004.

the adoption of international agreements was not to elevate the contents of these agreements to constitutional principles. [23] Even if it could therefore be said, so the minority held, that the impugned acts were in breach of international obligations, that in itself would not render them unconstitutional. In essence the majority did not agree with this finding. Without any intent to enter into the intricacies of the opposing arguments raised between the majority and the minority in Glenister, I believe one point can be made with confidence because it appears from both the majority and the minority judgments, namely, that is that insofar as the courts have it in their power to do so, they will resist any attempt by the other arms of government to detract from the very specific obligations they undertook in terms of various international agreements, to pursue the fight against corruption.

14. As a sequel to the *Glenister II* decision, Parliament adopted the Police Service Amendment Act of 2012[24] which was signed into law by the President on 14 September 2012 (on my reckoning three days before the eighteen month period had lapsed). That, however, was not the end of the matter. Mr Glenister and the Helen Suzman Foundation launched an application in the Western Cape High Court for an order declaring that the new SAPS Amendment Act did not remedy the constitutional defects identified by the Constitutional Court in Glenister (2). That application proved to be successful. In consequence the

[23] See paras 100-103.
[24] Act 10 of 2012.

matter is now again before the Constitutional Court – and I believe it had been heard by that court on 19 May 2014 – for confirmation of the high court's order.

15. Civil litigation, which includes all of the categories of litigation outlined above – damages claims, review applications and constitutional challenges to legislation - forms the breeding ground of the courts' increasing readiness to order the government to justify its actions. It could be that the most effective and far-reaching role that our courts have to play in the fight against corruption in fact lies in this arena. I say this for several reasons. To begin with, civil litigation allows for dispute resolution on the basis of a lower burden of proof ie on a balance of probabilities as opposed to beyond reasonable doubt, which is the measure in criminal cases. This lends itself to cases built on suspicions of corruption, a nebulous crime which may present itself in many different shapes and forms and is notoriously difficult to prove beyond a reasonable doubt for it will almost inevitably manifest in private agreements concluded far from the public eye.

16. A classic example is to be found in the case of *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others*.[25] Disgruntled by the loss of a R10 billion tender for the payment of social security grants, Allpay approached the courts on allegations of corruption in the tender process. But the allegations of corruption

[25] 2013 (4) SA 557 (SCA).

rested on a secretly recorded conversation that itself made only vague innuendos. The remarks of Nugent JA in the SCA leg of the litigation noted that while the affidavits of AllPay 'evoke suspicion of corruption', these charges were not brought outright. Rather, Allpay '*confined* its case to what were said to have been fatal irregularities and it was on that basis that the appeal proceeded'.[26]

17. Eventually, the Allpay matter came before the Constitutional Court.[27] Here, the appellant was joined by Corruption Watch as amicus curiae. In argument, Corruption Watch contended and the Constitutional court accepted[28] that deviations from fair process may themselves be symptoms of corruption or malfeasance in the process. In other words, an unfair process may demonstrate a deliberately skewed process. 'Hence, so said Froneman J, insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences'.[29]

18. The most recent case in which the courts have demonstrated themselves willing to infer corruption from procedural irregularities is in a case handed

[26] Para 5.
[27] Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others 2014 (1) SA 604 (CC).
[28] Para 5. See also para 40.
[29] Para 27.

down just last week: *Valozone 268 CC & others v The Minister of Education*.[30] In that case the judge agreed with the applicant that the 'on a conspectus of all the evidence that the deviations from fair process are symptoms of corruption or malfeasance in the process and the unfair process demonstrate a deliberately skewed process'.[31]

19. The role played by the courts in civil matters, shows that safeguarding the public from corrupt activities extends the court beyond clear cases of blatant corruption. It fulfils its function also simply by enforcing procedural safeguards. This is the forum in which the courts, arguably, have most room for flexibility and influence over the prevention of corruption in our country.

F D T BRAND
Chamber G2
Supreme Court of Appeal
Bloemfontein
June 2014

[30] North Gauteng High Court, case number 3285/14 (26 May 2014).
[31] Para 10.