BOOK REVIEW

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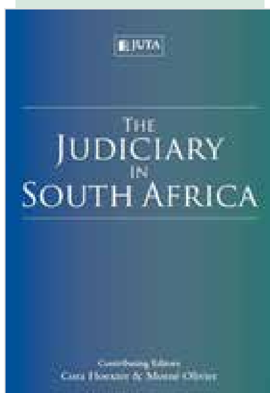
The Judiciary in South Africa: Cora Hoexter and Morné Olivier

This collection of essays represents a comprehensive examination of the South African judiciary, and could not have come at a more appropriate time. As the editors note in their introduction, during President Mandela's term of office the government showed an admirable level of compliance with adverse court orders and continued to proclaim the centrality of the judicial institution to the constitutional enterprise upon which the country had embarked in 1994.



THE JUDICARY IN SOUTH AFRICA contributing editors Cora Hoexter & Morné Olivier
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By the turn of the century, the first warning lights had begun to flicker. The then Minister of Health, Manto Tshabalala-Msimang, reacted to a judgment of the High Court – ordering the government to allow the distribution of anti-retroviral drugs for the prevention of mother-to-child HIV transmission – with these words: *'the courts and the judiciary must also listen to the regulatory authorities both from this country and the United States'*. When asked further whether the government would respect the court order she said 'no'.

More recently, members of the ruling party have weighed in against the judiciary, notably Mr Ngoako Ramatlhodi – the then Deputy Minister of Correctional Services and now Minister of Mineral Affairs. Mr Ramatlhodi spoke of forces against change which reign supreme in the economy, judiciary, public opinion and civil society, and that *'in the courts forces against change still hold relative hegemony'*. A government commissioned inquiry, conducted by the HSRC and the Law School of Fort Hare, into the role of the judiciary, with regard to assessing its contribution to the promotion of social and economic transformation in South Africa, is expected to report by March 2015.

For these reasons a comprehensive examination of the jurisprudence which has been produced by the judiciary during the constitutional era is to be welcomed, similarly for, the appointment of judges, the role of the Judicial Service Commission in the selection and appointment of judges, broader issues relating to judicial accountability and a specific examination of the Constitutional Court. A reader will find a rich reservoir of information on all of these topics.

The context to the present challenges facing a constitutional judiciary is set out in a chapter penned by Professor Christopher Forsyth. He examines the judiciary under apartheid. Forsyth shows how the record of the judiciary during this era was both complex and contradictory. On the one hand, courts retained a formal independence and judges were never corrupt in a sense that they took orders directly from politicians. Although trials before the courts may have been unjust, they were never a formality and, on occasion, there were principled liberal judges that found against

egregious action of the apartheid regime. But, as Forsyth also notes, 'we should not overlook the many occasions in which a court, faced with a choice, chose to adopt the most pro-executive interpretation of the law. Here the judiciary facilitated the implementation of the policy of apartheid. More was expected from the judges for *'avoiding politics meant kowtowing to the government.'*

It was from this legacy that the drafters of the Constitution drew the lesson that there was a need for a new court to develop constitutional jurisprudence; hence the establishment of the Constitutional Court rather that the Appellate Division would be the highest court in respect of constitutional matters.

The book contains a general chapter about the transformation in the judiciary which examines some of the jurisprudence of the newly created Constitutional Court. As is inevitable with an edited collection, there are overlaps between chapters and a reader will be required to read this chapter together with a further chapter which deals specifically with the jurisprudence of the Constitutional Court.

The tour through this jurisprudence justifies the conclusion that *'the Constitutional Court has established a firm foundation and has secured international acclaim and substantial domestic legitimacy'*. What the chapters in this book fail to do, an omission which is sadly reflective of the poverty of intellectual ambition in South African academic life, is to engage in an examination of whether the methodology (and hence the approach) to law, which was inherited from the apartheid regime, has been sufficiently transformed.

Any reader wishing to understand the manner and the selection appointment of judges and the role of the Judicial Service Commission therein will not be disappointed. These chapters are a font of useful information and considerable insight.

This problem has been illustrated in a most thoughtful review of a work devoted to the life of Professor J C De Wet, the review having been written by Constitutional Court Judge Johan Froneman. (2014 South African Law Journal 474) In his review Justice Froneman engages with the importance of legal methodology; in particular, the extent to which regard must be given to the social role and context of law, especially in private law such as the law of contract. To date the Constitutional Court has not embraced this challenge as might have been expected when the country began its constitutional journey in 1994. The authors of this book do not deal with this particular problem, save for a brief discussion of the concept of transformative constitutionalism in the chapter written by Mtendeweka Mhango. This is a useful contribution but it is regrettable that this concept was not invoked as the means to focus critically on the development of an appropriate legal methodology for all South African law as a result of the introduction of the Constitution.

Any reader wishing to understand the manner and the selection appointment of judges and the role of the Judicial Service Commission therein will not be disappointed. These chapters are a font of useful information and considerable insight. In particular, a chapter by Professor Catherine Albertyn on judicial diversity is deserving of a careful read. Those wishing to understand the implications of section 174 of the Constitution, which raises challenges for the Judicial Service Commission (JSC) to give sensible meaning both to the concept of merit and that of representivity. Professor Albertyn suggests that merit should be redefined to include an appreciation of South Africa's different communities and an understanding

of the values of the Constitution. Section 174 (2) which provides for a need for the judiciary to reflect broadly the racial and gender composition of South Africa enables, in her view, the adoption of a flexible approach to appointing black and women judges when the JSC is presented with a list of promising candidates.

A transformed judiciary is therefore not only a representative one but also a diverse institution. Diversity is sourced in multiple differences including differences in values and judicial philosophies. It can only be hoped that the members of the JSC will carefully examine these observations since they provide considerable guidance towards fashioning a coherent approach to the constitutional mandate to appoint members of the judiciary.

Professor Hugh Corder wrote a typically comprehensive chapter on judicial accountability. His chapter raises a host of interesting questions, and I would like to mention two, briefly.

First, he canvasses the question of judicial error and the importance of the appeal process. Here there is an interesting discussion about the legal process that resulted from Mr Zuma (before he was President) seeking to set aside a set of charges that had been brought against him by the National Director of Public Prosecutions. While he was successful before the High Court, the decision of Judge Chris Nicolson was set aside by the Supreme Court of Appeal. Criticisms contained in the judgment of Harms DP on behalf of the unanimous Supreme Court of Appeal were extremely harsh, culminating in the conclusion *'the trial court, again failed to comply with basic rules of procedure. Judgement by ambush is not permitted.'* This was the most robust exhibition of judicial accountability over a High Court judge that I can recall. The question which arises is whether this attack, vicious in content and intemperate in tone, was appropriate for the exercise of curing a judicial error, no matter how egregious it may have appeared to the appellate court, particularly as the broader legitimacy of the judicial institution needs to be balanced against the principle of accountability when judges are criticised by a higher court.

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Second, Professor Corder deals with the cases relating to Judge President John Hlophe and Judge Nkola Matata – both individuals have been required to respond to charges of judicial misconduct brought against them by the JSC. On dealing with the Hlophe case, Professor Corder writes:

> 'One is constrained to ask whether the composition of the JSC allowed the institution to be manipulated for sectional purposes which in turn led it to take decisions for unlawful reasons. By contrast the response of the courts has been to remain true to the constitutional project affirming the values of the Constitution as well as the specific requirements laid down for the role, composition and functioning of the JSC.'

This passage refers to the various challenges which have been brought against decisions of the JSC, all of which have flowed from the Hlophe enquiry. The

reader is left with the question of what the appropriate steps to be taken are, in the light of this saga, to ensure that any complaint against a judge is dealt with expeditiously, and fairly – with fairness being accorded to both complainant and to the judge in question. In other words, the mechanism of accountability must be sufficiently improved to prevent the kind of debacle that has flowed from these initial complaints. It may well be that the new system devised for the JSC to deal with complaints will solve the problem.

I hope, by virtue of this brief examination of some of the key chapters in this book, to have given sufficient proof of this important work – the very first to survey the democratic South African judiciary as an institution. It provides the reader with sufficient information to participate in an essential debate about the performance, composition, accountability and the ultimate role of a judiciary in vindicating our constitutional vision.

Apart from the few conceptual complaints that I have voiced, my only remaining criticism is that the text, unfortunately, is written in language which is overly skewed in favour of a legal audience; hence it is, at times overly technical and does not promote reading for the lay reader. However, as a site for research of the present judicial system, this book makes an invaluable contribution to the broader democratic debate.

NOTES

1 As cited at xxviii – xxx in the Introduction.