

Executive summary of political forum

Topic : reflecting on the Nicholson judgment: has it served the cause of democracy?

Date : 15 October, 2008

Venue : Southern Sun – Elangeni

Presenter: Professor Pierre De Vos (constitutional expert at UWC)

The purpose of the forum was to zero-in on Judge Chris Nicholson's political inferences with a view to evaluating whether his objective to enforce the principle of judicial independence was achieved. According to professor De Vos, the Judge faced an unenviable challenge given the context in which the judgment took place, i.e. the suspension of Vusi Pikoli, Head of the NPA, the intimidation of judges and the unabated political feud between supporters of ANC President, Jacob Zuma, and his predecessor, Thabo Mbeki. He contended that judges cannot completely escape the realities of the particular social and political contexts in which they operate, although, their role is to interpret the law in a principled manner without being swayed by the pressures of the political environment.

He indicated that the legal remit of the judgment pertained to clause 179 (5) D of the NPA Act, which requires that if the National Directorate of Public Prosecutions (NDPP) intends to overturn an existing prosecution decision, he first has to consult the relevant Directorate of Public Prosecutions (DDP) and take representation from the accused. So, in this regard, the task of the judge was a fairly easy one, which was to establish whether the NPA had followed the correct procedure when they decided to recharge Jacob Zuma.

However, the judge decided to move beyond the narrow legal remit and ventured into the contentious political issues, even though, the legal parties agreed not to pursue them, De Vos observed. Hence, his comments regarding the firing of Jacob Zuma as Deputy President of the Republic and Thabo Mbeki's ambition to serve a third term as president of the ANC related to political decisions, which had no direct bearing on the key legal question that faced the court.

Meanwhile, he indicated that whilst both Mbeki and the NPA have decided to appeal against the Judge's inferences of political interference, at the very least, the evidence does suggest a misunderstanding of the relationship between the Minister of Justice and the NPA. This is the corollary of a grey area in the NPA Act. He noted, for example, that the Act allows the Minister to request information, but not to interfere in individual prosecutorial decisions. Hence, whilst the Act requires the Minister to apply political oversight over the operations of the NPA, it safeguards its independence. However, the legal boundary between oversight and independence is not always clear in practice.

Some participants felt that the judgement had a retroactive effect in that it merely confirmed the perceptions of many lay people that Jacob Zuma has been the victim of a political vendetta. Others were more circumspect and argued that the judgement was not a pronouncement of Jacob Zuma's innocence or guilt.

At a macro level, the Nicholson judgment has profiled the heightened discourse about the relationship between politics and law. According to Anthony Butler of UCT, the idea that constitutional law can protect society from politics is a silly dream. For Butler it is not the rule of law that will protect democracy, but it is the popular participation of citizens in our body politic that serves as a more durable buffer against undemocratic practices. On the converse, Chief Justice Pius Langa, in a speech to a recently held conference of lawyers and judges, asserted that its only when judicial independence is guaranteed that ordinary citizens will be protected from arbitrary leaders.

What these two contradictory notions demonstrate is the conceptual ambiguities embedded in this particular discourse, especially in terms of who precedes who. To engage with this contentious issue the DDP in conjunction with the School of Law at the UWC will be hosting a series of discussions on the relationship between politics and law, in 2009.
