



Judges' Chambers

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12th July, 2011

TO: The Hon. Mr. L.T. Landers, MP
Chairperson, Portfolio Committee on Justice and Constitutional
Development,
c/o Mr. V. Ramaano,
Third Floor, 90 Plein Street,
Cape Town
email: vramaano@parliament.gov.za

SENT VIA EMAIL

Dear Sir,

RE: JUDGES' REMUNERATION AND CONDITIONS OF EMPLOYMENT BILL
[B12-2011]

I refer to the invitation of the Portfolio Committee on Justice and Constitutional Development to stakeholders and interested persons to

make written submissions on the Judges' Remuneration and Conditions of Employment Bill [B12-2011].

I am a judge of the High Court, based in Johannesburg. I had the privilege of serving as a judge of the Labour Appeal Court for a fixed term of ten years from 1999 to 2009. I am opposed to the Bill.

It is the duty of all South Africans to remember that we are engaged in a project of nation building. It especially behoves Ministers of State, Judges and Parliamentarians to remember that we shall be judged by history for our contribution to this project rather than our acquiescence in measures of convenience. South Africa has the potential to become a great, prosperous and progressive society. To arrive at this goal we must think strategically, avoiding short-term "solutions" to the issues which confront us. Strategic thinking, in order to be effective, must ensure that there is consistency, reliability and predictability in a number of fields of human endeavour. This applies, most importantly, in law. Shifting goal-posts undermines the entire system of law.

Since the first judges of the Constitutional Court were appointed, their term of office was extended from seven to nine to twelve to fifteen years. This has been deeply offensive to principle. It is necessary to understand why well-meaning, indeed good people allowed this to happen.

It was generally accepted that when the first judges to the constitutional court were appointed, most of them would have to be drawn from outside the existing judiciary because it was overwhelmingly white, male and conservative. We as a nation also adopted the progressive principle that we should put our faith in systems rather than in individual men and women: to this end, we originally agreed on limited terms of office for Constitutional Court judges. This principle also applied to the term of office of the president for which a maximum of ten years was set.

A series of convoluted legal measures has since been adopted to give those judges who were originally appointed to the Constitutional Court from outside the judiciary, the same comfort and security as all other judges in South Africa. At the same time, an attempt was made not to dilute the "new blood" principle too much. There is much empathy with the individuals who were affected but, ironically, important principles of

constitutional law were eroded at the very apex of our legal system. Among these is that *ad hominem* legislation (legislation directed towards a specific individual, even if it is “disguised” as “general” legislation) and the retrospective operational effect of legislation should be avoided. We all know how these principles were ignored, with devastating effect, during the apartheid era. Think of Robert Sobukwe. Think of Herman Toivo ja Toivo.

Among lawyers, there is a famous expression, *quis custodiet ipsos custodiet*? (who is to guard these very guards themselves?) The Latin tends to show that the idea has been around for a very long time. History has shown that the most effective way to “guard the guards” is to ring-fence them with protocol and a clear demand for strict adherence to the principles and conventions of right conduct in constitutional matters. Extending the term of office of the Chief Justice is a measure of convenience. It is offensive to principle. Incidentally, there is no need for such a measure for the President of the Supreme Court of Appeal. His term of office is, quite correctly, the same as that of any other judge in South Africa. It is quite absurd (and wrong in principle) to imagine that we, in South Africa, are so utterly dependent on the skills of any individual serving in the judiciary that we need special legislative measures to extend the term of any of its members, let alone the Chief Justice and the President of the Supreme Court of Appeal.

Among lawyers there is another famous expression *cui bono*? (who is to benefit from all this?) It is a good question. Without this proposed legislation, the Chief Justice will be discharged from active service in August on the salary he receives now. Many in South Africa would wish they could be so lucky. So why do we need this unfortunate Bill? The people of South Africa deserve to experience constitutionality both in spirit and action. They will benefit immeasurably more from this experience than by having any individual’s term of office in a court extended by an Act of Parliament.

Rather than pass this Bill, let us rather focus on a number of other issues relating to the Chief Justice and the Constitutional Court. Let us try to develop consensus on fair, simple and clear rules relating to their appointment and term of office. Issues that need attention are the following:

- (i) Make the terms of the Constitutional Court Judges in future the same as they are presently for Supreme Court of Appeal Judges (you must be a High Court Judge to be eligible and, expressed simply, if you have 20 years of service, you retire at 65 years of age or at 70, if you have 15 years service);
- (ii) Subject candidates for appointment to the position of the Chief Justice and President of the Supreme Court of Appeal, to the same rigorous public interviews by the Judicial Service Commission as all other candidates for judicial service;
- (iii) Vest the decision as to who will serve as Chief Justice, President of the Supreme Court of Appeal and Constitutional Court judges in the JSC itself - as applies in the case of all other judges;
- (iv) Remove the requirement that the President must be given three additional names from whom to choose any Constitutional Court judge;
- (v) Restructure the composition of the JSC so that it has fewer politicians and more retired judges, leaders of faith communities, trade unions and business serving on it.

We South Africans have shown that when we act with clarity of purpose and a sense of fairness, we can make giant leaps of progress. Here is the real opportunity.

I hope that the above will be considered helpful. I would appreciate an acknowledgement that you have received this letter.

You have asked that those making submissions should indicate their interest in making a verbal presentation on 26 July 2011. I am happy to do so if (a) I am invited by your committee for this purpose and (b) the Minister of Justice and Constitutional Development is prepared to excuse me from my duties at the High Court on that day and (c) I am offered an economy class ticket to Cape Town to attend the proceedings. I certainly do not think it imperative that I attend. I shall be content if the Committee gives serious attention to the contents of this letter.

Yours sincerely,

NIGEL WILLIS