

Friends and colleagues,

INTRODUCTION

1. Thank you for inviting me to share this occasion with yourselves. You celebrate new premises and hope perhaps for an invigorated future. I wish you well and trust that you and your clients enjoy and work productively in this new era of Fairbridges.
2. As "friends and colleagues" we share many bonds.
3. We probably didn't get seven distinctions in Matric which is why we didn't study medicine and instead became lawyers.
4. I also suspect that our families and friends probably tell us that we think too much or talk too much or have too many views on too many subjects. If so, it may be that we have inquiring minds are interested in and have concerns about the society in which we live.
5. I think that this must be so. We cannot fail but be interested by the society in which we live.
6. If you are a conveyancer - then you care that land ownership is open to all who wish to purchase and sell property, you are pleased that there is no longer a Group Areas Act, you are concerned about threats of expropriation without compensation, you would like to see efficient and honest employees staffing the Deeds Office, you want contracts to be honoured, you want the finance for purchase of property to be the product of honest, non-mafia-type activity.
7. If you are a family lawyer - you want clients who are not suffering from PTSD arising from stresses and experiences of living in an unsafe society, you want parents who anticipate living in the same continent as their children, you hope for married couples who are not smuggling their wealth abroad, you want people to know happiness rather than discord and hatred which then

translates from family life into work and social life and wider society and of course vice versa.

8. So all here tonight know the challenges of living and working in South Africa. We are all active participants in the functioning of this society. We all have a very direct interest in the fate of this constitutional democracy. We should all be what Mamphela Ramphele calls "active citizens".

THE CHALLENGE TO OUR COURTS

9. Which brings me to our understanding as lawyers of the challenges faced by our courts and judiciary at the present time in South Africa.
10. Some media would have you believe that war has been declared between Government or the executive or the majority political party on the one hand and the judiciary or the all or some of our courts or all or some of our judges on the other hand. The answer is a simple no.
11. I can appreciate that there may currently be concerns about the relationship. But let's step back and take a look at where we started, what the reality has been, why some might now be worried, where we might arrive.

SOUTH AFRICAN HISTORY- OUR COURTS

12. In the pre-democracy era those in power used the law and indeed the entire legal system to promote white supremacy and suppress other races. I wrote on this and addressed the Truth and Reconciliation Commission in 1996.
13. One more blatant example was the so-called packing of the Senate and the Appellate Division of the High Court. In 1951, the year I was born, the new National party government passed the Separate Representation of Voters Act to exclude coloured voters from the voters roll. Litigation culminated in the Appellate Division ruling that this legislation was "invalid, null and void and of no legal force and effect". Government then introduced the High Court of Parliament Bill according to which members of Parliament would now constitute a High Court with the powers to review and overturn court

decisions. This Act too was challenged and again the Appellate Division ruled the legislation invalid - the entrenched clauses of the Constitution could not be altered in the manner done. The response of government was to pack the Senate with National Party supporters to ensure a larger majority to pass the Bill and to alter the constitution of the Appellate division from five to eleven judges, make six new judicial appointments and so ultimately deprive coloured people of their vote in the Cape Province.

14. And as we know laws continued to be passed by Parliament and approved and implemented by our courts - group areas, pass laws and influx control, job reservation and then all the paraphernalia of detention without trial, bannings and criminal trials on charges under the Suppression of Communism Act and other so-called security legislation.
15. But the law was also used by the people of as what has been called "the weapon of the weak". Law became a strategy used by the oppressed precisely in order to resist rule by unjust law. This use of lawfare in the struggle against apartheid is well known - challenging influx control, asserting the right to gather, demanding entitlement to express and disseminate views contrary to those of the apartheid regime, refusing to serve in an army of oppression and so on.

THE CONSTITUTION

16. But in 1994 SA transitioned from parliamentary supremacy to constitutional supremacy. Tension is the result.

SUBMISSION TO THE LAW

17. Since that time we have had a history by those in power of respect for the legal system.
18. We saw in the early years President Mandela submit himself as a witness in court to answer to the courts on his appointment of the Browde commission of enquiry. He provided this tremendous example of submission to the law.

And I might add to a judge who had been appointed by the apartheid government.

19. We then saw the former deputy head of the ANC taken to court and standing trial on a charge of rape. However controversial his acquittal may have been - he submitted to the law. And again to a judge appointed by the apartheid government.
20. We then saw a judge appointed by the apartheid government, ordering President Mbeki to have his government do a total policy u turn and provide anti-retroviral treatment at government expense to pregnant women living with HIV/AIDS. This was done and lives continue to be saved today by the provision of anti-retroviral treatment to all who need it.

Judge Satchwell then read the below extract from the Australian Bar Association Conference –

3/9/22, 3:28 PM

Tensions between the executive and judiciary

Australian Bar Association Conference

Paris

Wednesday, 10 July 2002

The Hon Justice McHugh AC

TENSIONS BETWEEN THE EXECUTIVE AND THE JUDICIARY*

In common law countries, the tension between the Executive and the Judiciary is the result - I would say the inevitable result - of the doctrine of separation of powers.¹ Under that doctrine, the political system of a nation divides its governmental power between a legislature, an executive and a judiciary. In theory, the doctrine constructs a system that avoids concentrating too much power in any one body of government - the three powers are separated from one another and "none is supposed to trespass into the other's province". Furthermore, no arm of government is supposed to abdicate power to another arm.² The premise of this construct is not a harmonious relationship but a checking and balancing of power. Inevitably, the checking provides the

blueprint for, and generates, tension between the three arms of government.

Many students of political theory regard this tension between the arms of power as indicating a healthy and well-oiled, working government. ³ They do not see the tension as a cause for alarm. ⁴ Writing extra-judicially, Lord Woolf has said: ⁵

"[t]he tension ... is acceptable because it demonstrates that the courts are performing their role of ensuring that the actions of the Government of the day are being taken in accordance with the law. The tension is a necessary consequence of maintaining the balance of power between the legislature, the executive and the judiciary ..."

Lord Woolf has also said ⁶ that the tension between the arms of government is:

"... no more than that created by the unseen chains which ... hold the three spheres of government in position. If one chain slackens, then another needs to take the strain. However, so long as there is no danger of the chains breaking, the fact that this happens is not a manifestation of weakness but of strength."

https://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_pavis.htm

21. So we have a good foundation - our constitution - and instances of the

22. So I must ask - why this present tizz, drama about the judiciary.

OBVIOUS ATTACKS ON THE JUDICIARY

23. Well there have more recently been developments where legitimate tension between government and judiciary has escalated.

24. We recall the 2015 debacle when the Pretoria high court granted an application for the detention of President Al Bashir pending his release to the International Criminal Court to answer allegations of crimes against humanity and war crimes. The full bench, headed by Judge President Mlambo, ordered that Al Bashir be detained by government pending his transfer to the Hague. Upon the order being read out in court, counsel for the government informed the court that contrary to its ruling of the previous day, Al Bashir had left this country. Quite obviously this was done with government connivance.

25. After the full bench decision on the detention of Al Bashir and government frustration thereof, Gwede Mantashe - then ANC sec- general, labelled the

courts as "problematic" saying that "some sections of the court system are driven by a desire to "create chaos for governance" in SA.

26. This was followed by a meeting involving the then chief justice and other judges with President Zuma, Deputy President Ramaphosa and cabinet ministers. As Judith February has commented "after meeting for seven hours the parties agreed to adhere to the constitution".
27. More recently, Minister of Tourism Minister Lindiwe Sisulu supposedly penned an article under her name criticising South Africa's Constitution and black judges. Her opinion piece pointed out that actions in Nazi Germany were implemented in terms of the law and then questioned whether SA "has the rule of law" and "whose law is it anyway" charging that SA is being "mentally colonised by black judges settled with the view and mindset of those who have dispossessed their ancestors".
28. So for this Minister, the SA constitution enjoys the same status as the laws of Nazi Germany while the so-called black judges of SA who are amongst those who administer those constitutional principles are mentally colonised persons - presumably meaning they have no mind of their own other than as allowed by their colonial masters.
29. The Presidency has called the article reckless of the highest order. But Sisulu has not been removed from her cabinet position, she has not been called to disciplinary hearings of the relevant bodies of the ANC, no action appears to have been taken against her.
30. So we are entitled to ask to what extent does this government and members of cabinet and perhaps other apparatchniks share the Sisulu view of our Constitution and the judiciary.
31. And here we must be grateful for the robust approach of the South African media - the fourth estate - the fourth arm of government - who have not let anyone get away with disrespect for the constitution and the rule of law. Ramathodi, Mantashe, Cabinet, Sisulu have been hounded with mockery and serious critique. We owe much to the media ranging from Business Day to

Daily Maverick, publications such as Groundup and amaBhungane as well as community radio for their exposure and comment on the trials and tribulations of this country.

LAWFARE AND ITS EFFECTS ON THE JUDICIARY TODAY

32. Unhappiness with the courts is found not only in South Africa. Boris Johnson, Prime Minister of the UK, was most indignant when Brenda Hale (senior presiding judge in the UK Court of Appeal and her fellow judges) held that his Brexit plans vis a vis ousting the views of Parliament had to be set aside. Like Gwede Mantashe he felt that the UK judiciary were bringing chaos to governance. Look at President Donald Trump and the Republican Party on their approach to the appointment of judges to all courts and especially the Supreme Court.
33. One view is expressed by Nontobeko Hlela former senior government employee and now researcher at a global think tank who has suggested that the Sisulu attack on the Con Court and the judiciary are part of the wider crisis of political and institutional legitimacy "actively incited by powerful forces in search of both a convenience scapegoat for their failures and legal impunity for their looting from public funds". There is she writes a crisis of legitimacy where the solution is "to find a scapegoat to externalise the blame and much like foreigners, the Constitution and the judiciary are an easy target".
34. Another view expressed by Chris Pieters of the Helen Suzman Foundation is that there has been what he calls "judiciation of politics" in the sense of "the use of litigation to resolve contentious political disputes."
35. Pieters says this is triggered by the rise of nepotism, corruption and state capture as well as the abdication of government responsibilities to the judiciary. Because the courts have been drawn into the public arena and thrust into a relationship of constant tension with the political branches, the judiciary has become the primary casualty of this barrage of lawfare.

36. This lawfare to which many writers and commentators have adverted is not unknown in SA. I have pointed out how the judiciary became embroiled in SA troubles during the pre-democracy decades.
37. But there is perhaps something different about this tension at the present time.
38. In 2015 Judith February pointed out that there are many matters which are not dealt with politically and end up in court.
39. There is an endless list of examples. You only have to read Business Day. But for myself the best such example is the work of the Zonda Commission. In any functioning democracy, complaints would be laid with the **SAPS**, National Prosecuting Authority would have instituted prosecution and criminal cases would follow. Instead we had a long and expensive process of publicizing what the state apparatus was not prepared to tackle.
40. I am a Trustee of an organisation which has funded and continues to fund Public Benefit Organisations such as Legal Resources Centre, Social Economic Rights Institute, the Black Sash, Centre for Environmental Rights and many others which have and continue to successfully bring to the courts issues of government and administrative incompetence or corruption.
41. February wrote that this places the judiciary in a difficult position since some matters are simply not meant for court adjudication. There has become an over-use of court processes.
42. Yet often in the face of a recalcitrant state, parties have no choice but to seek clarity and a last word from the courts.
43. February suggests this signals our inability to deliberate and persuade on another of an alternative viewpoint.
44. She may be absolutely correct. Why should this fractured society be capable of discussing and debating and listening in 11 official languages?? Why should leaders of parties, organisations, citizens, business leaders - all of an

- age to have grown up in the life and attitudes pre 1994 - be able to hear and listen and understand and empathise with other world views???
45. There can be no mistake - we are an inexperienced democracy, we have an incompetent administration, we have known colonial dispossession and greed in the past, we see corrupt enrichment at the present time, we know and work with people who speak no SA language other than their own, we knew or experienced or learnt of human rights abuses by one racial group against another and have seen no punishment therefore, we assume that transformation of a society and the use of affirmative action means incompetence and so the list goes. We even have a national anthem in four languages!!!!
 46. Of course we don't talk and hear and listen and learn and debate and agree and share world views. We fight and go to court.
 47. And who is the piggy in the middle, the judiciary!!

WHERE TO NOW

48. And so of course, as in most societies, a degree of tension between the executive and judiciary is healthy. It is the natural outcome of our constitutional arrangements. The judiciary exists to resolve disputes and to keep government on its toes - everywhere in the world.
49. But in 2015 February cautioned that "we need to keep a close watch on the judgments handed down and appointments made to the bench in the coming months and years". She said "what we really need to be watching is future appointments - not only to the Con Court but also the High Courts. Keeping a close watch on the JSC that deals with the appointment of judges will be key.
50. Well what has happened??
51. Judges have continued with their constitutional duties. Though not sitting as judge, Justice Raymond Zondo, has not tailored his cloth to suit his hopes of appointment to the position of chief Justice. Judge President Dunstan Mlambo has continued to lead a division which deals with cases against

members of the executive and against government and finds against government in judgments written by himself which are upheld by higher courts on appeal.

52. But the JSC has regrettably fulfilled the concerns expressed some years ago.
53. In 2021 CASAC sought to have proceedings of the JSC for the appointment of judges to the Constitutional Court set aside as unlawful. Those interviews were described as a "sham". The founding affidavit of Lawson Naidoo pointed out that those interviews should not be "a platform for party politics; they are not there to give commissioners a chance to quibble with judgments they lost as litigants. Nor do they exist to enable individual commissioners to ventilate grudges against judges...."

Party political considerations and political agendas should play no role in the JSC's decisions and processes."

54. The JSC did not oppose the application. The hearings for appointment were commenced from scratch.
55. Alas the JSC learnt nothing from this humiliating litigation.
56. Most recently, two candidates for the highest judicial office of Chief Justice, have now become victims of what Professor Balthazar has called "the disaster that was the hearing conducted by the Judicial Service Commission (JSC)."
57. Balthazar writes that "Thanks to the ineptitude of the acting chair of the JSC, Justice Xola Petse, Dali Mpofu SC was allowed to launch an unprecedented personal attack on Justice Mlambo without any justification. It is all very well pointing to the belated decision to strike these questions, but in the court of public opinion, which was the obvious purpose of this line of question, the damage had been done."
58. The upshot is that this issue has now tainted and polluted the entire process, most recently prompting allegations against Justice Maya.

59. Those allegations are that, Judge Mandisa Maya President of the Supreme Court of Appeal, repeated rumours of sexual harassment against Gauteng Judge President Dunstan Mlambo which were based on no allegations. These rumours were perhaps a misrepresentation of complaints brought to JP Mlambo by two female judges which concerned a third party and where JP Mlambo then he appointed former Justice of the CC, Bess Nkabinde, to resolve those complaints which in no way involved himself.
60. Balthazare writes that the "the very institution which the JSC is designed to promote is now the loser". He speaks of course of the judiciary. And he goes on to point out that "Not one commissioner objected, as they were obliged to do, when Mpofubegan his assault."
61. Where does that leave us???
62. February warned us in 2015. Balthazar now writes that "the JSC failed lamentably to do its mandated task". And whoever is appointed will, thanks to the behaviour of the JSC, says Balthazar "assume office in a climate of some controversy."
63. We still have no chief justice.
64. What is the solution?
65. Politicians must resolve political issues in the chambers of Parliament. Ministers and their administrative functionaries from Director General to clerk must perform the work for which they are paid salaries and must remember that being a civil servant means one must behave with civility and aspire to provide excellent service.
66. Members of society should not need to go to court to obtain healthcare, housing, toilets at schools, school books, and safety in homes and so on.
67. And the judiciary must be left to get on with its work of judging - not continually designing the country and its operations according to constitutional principles, not continually explaining to those who receive salaries from the taxpayer that having a job means doing some work, not

trying to imagine how the country should or could be managed and making orders in that regard, not wading through a morass of corruption and incompetence and disregard to find facts and law.

CONCLUSION

68. So let us all be active citizens. Let lawyers go to court and present the cases of their clients and seek resolution of disputes. But let lawyers also be confident that they can draft contracts, prepare financing arrangements, seek administrative action from public servants, give advice to their clients without always looking over their shoulder and wondering how this or that will appear in court because that has become the bastion of democracy, of rights and of competent administration.
 69. So get to it in your wonderful new offices.
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