The judiciary as a site of the struggle for political power: A South African perspective

Freddy Mnyongani: mnyonfd@unisa.ac.za

Department of Jurisprudence, University of South Africa (UNISA)

1. Introduction

In any system of government, the judiciary occupies a vulnerable position. While it is itself vulnerable to domination by the ruling party, the judiciary must at all times try to be independent as it executes its task of protecting the weak and vulnerable of any society. History has however shown that in most African countries, the judiciary has on a number of occasions succumbed to the domination of the ruling power. The struggle to stay in power by the ruling elite is waged, among others, in the courts where laws are interpreted and applied by judges who see their role as the maintenance of the status quo. To date, a typical biography of a post-independence liberation leader turned president would make reference to a time spent in jail during the struggle for liberation.¹

In the post-independence Sub-Saharan Africa, the situation regarding the role of the judiciary has not changed much. The imprisonment of opposition leaders, especially closer to elections continues to be a common occurrence. If not that, potential opponents are subjected to charges that are nothing but a display of power and might. An additional factor relates to the disputes surrounding election results, which inevitably end up in court. The role of the judiciary in mediating these disputes, which are highly political in nature, becomes crucial. As the tension heats up, the debate regarding the appointment of judges, their ideological background and their independence or lack thereof, become fodder for the media.

Historically the South African judiciary was used as an institution that gave effect to oppressive laws enacted by the apartheid government. As a result the judiciary suffered a legitimacy crisis and people lost confidence in it.² The might of the apartheid government manifested itself in among others, the courts. It was in these courts that those opposed to apartheid and its policies were given harsh sentences, including death. With an exception of a few, judges of the time limited their role to that of being interpreters of laws. Those who opposed the system did so at the cost of their upward mobility within the ranks of the noble profession. The life of Judge Oliver Shcreiner bears testimony

¹ To name but just a few examples, Robert Mugabe of Zimbabwe, Nelson Mandela of South Africa, Sam Nujoma of Namibia and Kenneth Kaunda of Zambia.
to this. On two occasions, contrary to the established practice of seniority, he was overlooked when the position of Chief Justice of the republic became vacant.³ Later Ellison Khan wrote of him that:

It has been said of R A Butler that he was the greatest Prime Minster Britain did not have. So it may be said of Oliver Deneys Schreiner that he was the greatest Chief Justice South Africa did not have.⁴

When the interim Constitution⁵ was enacted into law, South Africa became a constitutional democracy. The South African Constitution, like most constitutions in a democratic world is firmly rooted in the notion of the separation of powers, consisting of the judiciary, the legislature and the executive. Within this trias politica, the judiciary is the weakest of the troika.⁶ The legislature has numbers in the form of constituencies to flaunt while the executive has both the political and the financial muscle in its power. As the dicta of the Constitutional Court in S v Mamabolo states,

Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of states and, ultimately, as the watchdog over the constitution and the Bill of Rights.⁷

This implies that the judiciary executes its role in an independent manner and guard against any interference in its authority to do so. Straddling the balance is a mammoth task, which may also depend on factors external to the judiciary.

In the light of the foregoing background, this paper seeks to discuss the rule of law in a nascent democracy like South Africa. The paper will argue that while constitutionalism is firmly grounded on the notion of separation of powers, this separation unfolds within a given political context which may give rise to perceptions of power being concentrated in one arm of the state or the other. The first part of will provide a political background to the debate. In the second part the paper will present the constitutional framework for the doctrine of separation of powers as entrenched in the Constitution of the Republic of South Africa.⁸ In the third part the paper will discuss the process for the appointment of judges as outlined in the constitution, and the safeguards which are intended to guard against interference with the work of judges. Central to the idea of the trias politica, is the counter-majoritarian debate which will be the subject of the discussion in part four. These subsections will be discussed within the context of a country struggling with issues of nation

⁴ As quoted in Moseneke at 342.
⁷ S v Mamabolo 2001 (3) SA 409 (CC) paragraph 16.
building, development and reconciliation. In the fifth section this paper will look at the contested topic of the transformation of the judiciary and then conclude.

2. The debate in its political context

In South Africa, the *trias politica* unfolds within a political context which was preceded by a period of oppression and exclusion of the majority of the people. Because the apartheid machinery was oiled by among others, the judiciary, the role of the judiciary was looked at with great suspicion by the majority of the people. The judiciary became a tool in the hands of the apartheid government. As if to give credence to the claims, the judiciary also delivered decisions which were “more executive minded than the executive”.9 In the early years of the Constitutional democracy, efforts were made to transform the judiciary. Though, not entirely transformed, the judiciary has gained some legitimacy in the eyes of the majority. Decisions delivered by the judiciary during this period, painted a picture of an institution at one with the vision of the new constitutional dispensation.

In the recent past, that is, the last five years or more, there has been a renewed interest in the role of the judiciary in a nascent democracy like South Africa.10 Three main events led to this discussion. The first one was the release in December 2004 of a set of Bills by the ministry of justice which were aimed at a variety of judicial reforms.11 The second one relates to the legal travails of the then deputy president of the ruling party and now the President of the Republic, Mr Jacob Zuma. The third one, for which there is still no end in sight, relates to the matter between the Judge President of the Cape High Court, Judge Hlophe and the Justices of the Constitutional Court. All the three unfolded at time when former president Thabo Mbeki’s presidency was at its zenith, and therefore sparked the debate about allegations of abuse of state power.12

Elsewhere in Africa, the judiciary has been the site of political struggle in trying to silence prospective opponents or candidates in the election. In the last ten years, this struggle has unfolded in, to name but just a few countries Zambia, Zimbabwe and Malawi.13 Whether genuine or not, the

---

9 Hlophe (note 2 above) at 25.
11 The Superior Court Bill, the National Justice College Bill, the Judicial Services Commissions Amendment Bill and the Judicial Conduct Bill.
12 To list but just a few examples of abuse of power, the following, among others, were cited: the release of Mr Jacob Zuma from office as the Deputy President of the Republic, the dismissal of Billy Maseela as the Director General of the National Intelligence Agency (NIA) and the suspension of Vusi Pikoli as the Head of The National Prosecuting Authority for investigating the National Commissioner of Police Mr Jackie Selebi.
13 In Zambia former president Dr Keneth Kaunda was accused of not being a true Zambian as he had Malawian parents, in Zimbabwe opposition leader Morgan Tsvangirai was charged with treason, charges from which he
problem with these court cases is that they occur within a political milieu where the parties are
contesting for power. In South Africa, the role of the judiciary in the Zuma cases has been under the
microscopic eye of both the ruling party and its alliance partners. This was at the time when cracks
were emerging within the ruling party as it was preparing for its 52nd Polokwane conference, at
which the new leadership was to be elected. In the pre-Polokwane era, there were allegations and
counter allegations against the role of the judiciary in the African National Congress’ (ANC)
succession battle.

Post Polokwane, Mr Zuma emerged as the president of the ruling party. In the meantime,
institutions like the Scorpions (a specialist’s investigative unit) were to be discontinued. It did not
take long before Mbeki was recalled as the president by the ruling party following its September
2008 National Executive meeting in Kempton Park. Charges hanging over Mr Zuma were then
withdrawn/thrown out/discontinued by the NPA against him. The ruling party then experienced a
breakaway when Mr Patrick Lekota the former chairperson of the ANC served “divorce papers” on
the ruling party. His departure was then followed by that of a handful ANC heavyweights who then
formed a party called Congress of the People (COPE). COPE was formed on the basis of the need to
advance the rule of law which the founders thought was threatened under the Zuma leadership.

3. The constitutional framework for the separation of powers in the constitution of the Republic of
South Africa

By way of a historical background, it is worth noting that South Africa has gone through three major
constitutional moments. First there was the Union Constitution of 1909 which facilitated the
formation of the union government of 1910. The union government was modelled on the
Westminster system of government, with two Houses of Parliament, the House of Assembly and the
Senate. The executive not only formed part of the legislature but was also answerable to it, while
the judiciary occupied an “independent” position. In the division of labour, parliament represented
the white minority while the unrepresented black majority were governed by the executive.

Interesting to note about the independence of the judiciary was that the executive was responsible
for the appointment of judges, and there was no provision for a body like the Judicial Service
Commission. The process of appointing judges was not transparent. There were no systems in
place to constrain parliament and courts could only intervene if acts were passed not in accordance

has since been acquitted and in Malawi the deputy president Cassim Chilumpha was under house arrest for
fraud.
16 Langa P N “Symposium ‘A delicate balance’: The place of the Judiciary in a Constitutional Democracy”
2006(22) SAJHR at 3.
with the law as laid down in the constitution. No law could be struck down on substantive grounds.\textsuperscript{17} The 1909 \textit{status quo} continued to be maintained in the 1961 Constitution.\textsuperscript{18}

A slight change to the form of government in South Africa was introduced when the 1983 Tricameral Constitution\textsuperscript{19} was promulgated. Under the Tricameral Constitution, the President ceased to be a member of parliament. The change however, did not affect the link between the executive and the legislature. Notwithstanding the slight change, all the three Constitutions were as De Waal et al noted, “in most respects, little different from ordinary Acts of parliament. They did not have supreme status and parliament was free to amend them by ordinary procedures”.\textsuperscript{20} Too much power was vested in parliament, which was at liberty to pass draconian laws\textsuperscript{21} which could not be challenged on substantive grounds as long as they satisfied the constitutional processes and procedures. The three constitutions enacted during the apartheid era were clearly contrary to the doctrine of the separation of powers. In Montesquieu’s words;

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because many apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.\textsuperscript{22}

The core of separation of powers, as O’Regan correctly points out, is to “prevent tyranny and protect liberty”.\textsuperscript{23}

A great breakthrough took place in 1994 when the interim Constitution came into force. On the separation of powers, Principle VI annexed to the interim Constitution provided that, “There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness”.\textsuperscript{24} When the 1996 Constitution was drafted, it did not make an express mention of the doctrine of the separation of powers; however the essence of what the document denotes was clearly captured. When the document came before the Constitutional Court for certification, the court stated that,
The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch over the terrain of another.  

Different political contexts will of course call for different models of the application of this doctrine, and of course the separation itself is not absolute. There may indeed be instances where the powers of the different branches of the state may overlap. The relationship between the three arms can at times be intricate and complex.

A second breakthrough in the new democratic era was the supremacy of the Constitution in the democratic era. The task of ensuring that the Constitution is protected and respected is vested in the courts. For judges to be able to execute their task without fear, favour or prejudice, the Constitution has ensured the independence of the judiciary. The constitution enjoins it on organs of state, “to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts” through legislative and other means. This then raises the age old question: who watches the watchers? To provide an answer to this question we now turn to the appointment of judges in South Africa and the measures in place to ensure their independence.

4. The appointment of judges in South Africa

The Constitution outlines the court system as consisting of the constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates Courts or any other court established or

26 Ibid at paragraph 108 where the court stated that, “There is however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch upon another, there is no separation that is absolute....While in the USA, France and the Netherlands members of the executive may not continue to be members of the legislature, this is not a requirement of the German system of separation of powers”.
27 See O'Regan (note 22 above) at 12/30-30/30.
28 Section 1 of the Constitution of the republic of South Africa.
29 See section 165(2) of the Constitution.
30 Section 165(4) of the Constitution.
32 Section 166(a)-(e).
33 With its seat in Braamfontein.
34 With its seat in Bloemfontein.
35 South Africa has nine provinces: Limpopo, Gauteng, North West, Mpumalanga, Kwazulu-Natal, Western Cape, Eastern Cape, Gauteng, and Free States. Not all provinces have high courts though. The High Courts are in Cape Town, Eastern Cape, Free State, Gauteng and Kwazulu-Natal.
recognised in terms of an act of parliament. Currently there is a Bill before parliament that seeks to introduce the traditional Courts system.\textsuperscript{36} The Constitution provides guidelines as to who may qualify for appointment as a judge, how they are to be appointed, for how long and the circumstances under which they may be removed from office. Over and above being appropriately qualified, the person to be appointed a judge must be a South African who is a fit and proper person.\textsuperscript{37}

While the President has the final say in appointing judges, the involvement of the Judicial Services Commission (JSC)\textsuperscript{38} ensures protection against any possibilities of bias. In a country where the ruling party commands an overwhelming majority, the involvement of the JSC may in certain regard not be very helpful, as it is possible for the institution to be flooded by people who are party loyalists. The JSC consists of 23 permanent members who are either nominated or appointed from the different ranks of the legal fraternity in the country. These consists of the Chief Justice, who presides, the President of the Supreme Court of Appeal, the Minister of Justice, one judge President, two advocates, two attorneys, a university law professor, six members of the National Assembly, at least three of whom must be members of opposition parties and four delegates from the National Council of Provinces (NCOP) as well as four persons designated by the President. In addition, the Judge President and Premier, or their delegates, join the commission in respect of the appointment of judges to the high court in that province.

The JSE calls for nominations, and interviews are done in public.\textsuperscript{39} The JSE then moves to the second phase of the deliberations of the suitability of the candidates which is done in private. The JSC then prepares a list with three names more than the number of appointments to be made, and submits them to the president. If the President does not make an appointment from the list furnished, then the president must provide the JSC with reasons, in which case the JSC will supplement the list and submit it to the president.\textsuperscript{40} All Judges, even those acting, take an oath before the commencement of their duties that they will be faithful to the Republic of South Africa, “will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike

\begin{itemize}
\item\textsuperscript{36} The Traditional Courts Bill [B15-2008] published in the Government Gazette No. 30902 on 27 March 2008. The Bill Seeks to affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation by providing for structures which will deal with matters connected therewith.
\item\textsuperscript{37} Section 174(1) of the Constitution.
\item\textsuperscript{38} Section 178(1) (a)-(k) sets out the composition of the Judicial Service Commission.
\item\textsuperscript{39} Members of the public can access the transcripts of the JSE interviews of the Judges currently serving on the Constitutional Court under each member’s profile available on: \url{http://www.constitutionalcourt.org.za/site/judges/currentjudges.htm} Accessed on 02 July 2009.
\item\textsuperscript{40} Section 178(4) (a)-(c).
\end{itemize}
without fear, favour or prejudice, in accordance with the Constitution and the law”. 41 The oath is taken before the Chief Justice or any judge designated by the chief justice. 42

The Constitution has further put in place mechanisms to ensure that there is less interference in the work of judges, for instance their salaries, allowances and benefit may not be reduced. 43 To remove a judge from office is a laborious process. 44 A judge may only be removed in cases where he or she suffers from incapacity, gross incompetence or is found guilty of gross misconduct. Other than that the National Assembly may call for a removal of a judge by a resolution which is supported by a vote of at least two thirds majority. 45 Judges of the Constitutional Court must serve for a non-renewable term of 12 years or must retire at the age of 70, whichever occurs first. 46 South Africa has not as yet had to invoke any of the provisions for the removal of a judge from office.

As pointed out above, the President has the last word as to who to appoint and who to leave out. One name that has relentlessly knocked at the doors of the Constitutional Court for a while is that of Judge Edwin Cameron. He was appointed by former President Nelson Mandela in 1995 to be a High Court judge and has on three occasions applied to move to the Constitutional court without success. 47 He had acted on the Constitutional Court bench before and has been a Judge of the Supreme Court of Appeal for eight years. An openly gay judge, one of the first high profile people in the republic to declare that he was living with HIV, legally astute, highly regarded in the legal fraternity and beyond, he kept on trying. 48 He had been a firm critic of Mbeki’s government on HIV. 49 It was only during the brief tenure of former President Kgalema Motlanthe that Judge Edwin Cameron was eventually appointed to the Constitutional Court on 31 December 2008.

5. The Countermajoritarian debate in the South African context

41 Section 178(8) requires that judicial officers take an oath in accordance with Schedule 2 of the Constitution.
42 Schedule 2(6)(1) of the Constitution.
43 Section 176(3) of the Constitution.
44 Section 177(1) –(3) sets out circumstances under which a judge may be removed from office.
45 Section 177(1)(b) of the Constitution.
46 Section 176(1) of the Constitution. See also section 3(a) of the Judges Remuneration and Conditions of Employment Act No. 47 of 2001.
47 Barron C “You be the Judge-at long last” Sunday Times 11 January 2009 available on: http://www.aegis.com/news/suntimes/2009/ST090102.html Accessed on 29 June 2009. Another human rights advocate who was also overlooked three times and is still not a judge is Geoff Budlender.
48 His work was celebrated at the University of the Witwatersrand on 10 October 2008. The symposium was simply titled: “Judges and the World: A Symposium in celebration of the Work of Edwin Cameron” and the proceedings were published in SAJHR (2008) 24.
49 According to studies, about 300 000 died of HIV/AIDS due to the HIV/AIDS policies of the government under the leadership of former President Thabo Mbeki, and according to Judge Edwin Cameron, these figures are “conservative”. See Barron ibid.
In the early 1990s when the country was going through the process of political metamorphosis, the judiciary managed to survive the political transition almost wholly intact.\textsuperscript{50} The country made its way into the constitutional democracy with a judiciary that was all white and with the exception of one, all male.\textsuperscript{51} Institutionally, the court names have only been changed recently to reflect the geographical names of the new era.\textsuperscript{52} While strides have been made in diversifying the judiciary in terms of race over the last fifteen years, there has not been much progress on gender transformation. To date, the country does not as yet have a woman judge president and the constitutional court has only three women judges, two of whom are about to retire.\textsuperscript{53} There are myriad of reasons given for the slow pace of diversifying the judiciary in terms of gender. One such reason is that women are not keen to be nominated to the bench.\textsuperscript{54} For Bonthuys, the few numbers of women is mainly due to the unwelcoming nature of both the legal profession and the courts to women.\textsuperscript{55}

Answerable only to the Constitution, an institution which was itself struggling with issues of transformation was to be the watchdog over the transitional process. This then raised questions of legitimacy, more so because other branches of the state do account to the electorate. The political vision is driven by both the executive and the legislature in response to the will of the electorate. The core of the mandate of the Constitutional court is to uphold the constitution itself. In upholding the Constitution, the Constitutional court has on several occasions had to counter the wishes of the majority in a number of cases over the last fifteen years.\textsuperscript{56} The rational of the court is that, if public opinion were to be decisive in adjudicating matters, then that would negate the very need for Constitutional adjudication.\textsuperscript{57} As Kriegler stated;

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.\textsuperscript{58}

Unpopular as decisions of the court may be, they continue to bind all persons to whom they apply.

\textsuperscript{51} Wesson M & Du Plessis M, Ibid.
\textsuperscript{52} See the Renaming of the High Courts Act No 30 of 2008 which came into effect on 1 March 2009.
\textsuperscript{53} Judges Yvonne Mokgoro and Kate O’Regan were appointed in 1994 by President Nelson Mandela and constitutionally reached the end of their tenure. This leaves the court with Judge Bess Nkabinde who was appointed in 2006 by President Thabo Mbeki. See Wesson M & Du Plessis M (note 50 above) at page 196 for statistics.
\textsuperscript{54} Chaskalson A in his preface to the \textit{SAJHR} (2008) 24 at xiii.
\textsuperscript{55} Bonthuys E “The Personal and the Judicial: Sex, Gender and Impartiality” (2008) 24 \textit{SAJHR} 239.
\textsuperscript{57} \textit{S v Makwanyane} 1995 (6) BCLR at 703.
\textsuperscript{58} \textit{S v Makwanyane} at 704.
In the early years of the transition, both the executive and the legislature fared well in giving effect to court orders. This culminated in the then President Nelson Mandela publicly declaring that he would abide by court decisions even those that were against the government under his leadership. 59

6. Transformation of the Judiciary in South Africa

The South African Constitution stands in a league of its own for its insistence on transformation. In the words of Budlender;

Our Constitution differs from many others in a fundamental respect. Most constitutions reflect the outcome of a change which has already taken place, and lay down the framework for the new society. A key theme for our Constitution is the change which is yet to come – the transformation which is yet to come. 60

Since the early 1990s, transformation has been high on the agenda of the new constitutional state. This being the case, it is important to note that transformation can also mean a number of different things, to different people. The first obvious ones would relate to questions of race, gender and disability. The second aspect relates to accessibility of courts, and this speaks to both access to buildings and to court proceedings by litigants. 61 The most contested aspect of transformation relates to transformation of the mindset or attitudes of those who sit on the bench. That is, judges should be more than defenders of the prevailing status quo as was the case in the era of apartheid, and must enforce principles of a new legal order. 62 In January 2005 at its 93rd anniversary celebration, the ANC issued the following statement in relation to transformation of the judiciary:

We face the continuing and important challenge to work for the transformation of the judiciary…We are also confronted by the similarly important challenge to transform the collective mindset of the judiciary to bring it into consonance with the vision and aspirations of the millions who engaged in struggle to liberate our country from white minority domination. The reality can no longer be avoided that many within our judiciary do not see themselves as being part of these masses, accountable to them, and inspired by their hopes, dreams and value systems. 63

Elements of bias, whether real or imagined, can be damaging to the judiciary. The judiciary must at all times strive to have legitimacy in the eyes of the general populace so that it can continue to command moral authority. This is not always easy to do. The Schabir Shaik corruption trial

59 See Moseneke D (note 3 above) at 352.
62 See Wesson M & Du Plessis M (note 44 above) at 200.
illustrates this better. 64 Firstly the matter was assigned to a judge who was called from retirement; Judge Hilary Squires. Secondly, though everything in the charge sheet of Mr Schaik pointed to Mr Zuma, the two were not prosecuted together. Mr Schaik was a close friend to Mr Jacob Zuma while they were in exile and he later became his financial advisor when Zuma was the Deputy President of the Republic. In a trial that was politically charged, Mr Schaik was found guilty for contravening section 1(1) of the Corruption Act of 1992 and was sentenced to fifteen years in jail.

The third interesting point to note is not what came from the judgment itself but what came from the media about what the judge was quoted as having said. The media coined a phrase which they attributed to Justice Squires. He was reported to have said that there existed “a generally corrupt relationship” between Schaik and Zuma.65 It then turned out that the phrase did not exist anywhere in the original judgement. What was even more problematic was that the Supreme Court of Appeal Judges had also used the phrase, as if it had appeared in the original judgement. The General Secretary of the Congress of South African Trade Unions (COSATU) blasted the judges calling for their heads. His claim was simply that,

Instead of going through Squires’ judgement line by line, the Supreme Court merely parroted newspaper editorials. The five of them clearly must go. If they can do this in such a high profile case, imagine what they do to ordinary, poor people.66

For Zuma himself the judgement was purely political. Zuma had been a political activist and in the 1960s he was sentenced to ten years imprisonment in Robben Island. Commenting on the Schaik judgement he said,

In 1963, I was sentenced to 10 years in prison by Justice Steyn. It was a political trial...I listened to Judge Squires and there was nothing different to what I heard 42 years ago in terms of the political judgement.67

The judgement indeed had political ramifications on Zuma’s political career. He was relieved from office as the Deputy President of the Republic by President Thabo Mbeki on 14 June 2005 in a speech delivered in front of a joint sitting of parliament. Interesting for this paper, was Mbeki’s reference to the rule of law. In his own words,

Among others, and relevant to the reason why I requested this joint sitting, the executive must discharge its responsibilities within the rule of law, which includes

---

64 S v Schabir 2007 (1) SACR 142 (D).
65 For a detailed discussion of this, see Davis D, Marcus GJ & Klaaren JE “The Administration of Justice” Annual Survey of SA Law (2006) 841,
66 As quoted in Davis D, Marcus GJ & Klaaren JE (ibid) at 844.
respect for the integrity and the independence of the judiciary and presumption of innocence of any person, pending findings of the courts. Similarly, we have to respect decisions of our parliament. 68

As the Deputy President of the Republic and of the African National Congress, Zuma was in line as Mbeki’s heir apparent. His dismissal from office was to mark the beginning of the end of his political career, at least, so it appeared.

In both the rape trial and the corruption cases that followed, Zuma’s court hearings were a site of a political struggle. His court hearings were characterised by thousands of supporters and sympathisers. Inside and outside the court room, there were accusations of political conspiracies and abuse of political power directed at the government of Mbeki. Accusations were that the charges against Zuma were merely designed to thwart his rise to the presidency of the Republic. This happened at the time when Mbeki himself was planning to stand for elections at the 52nd African National Congress conference. Had he won the elections, he would have been the president of the ruling party for three consecutive terms. This was not to be as he lost to Zuma.

Like Zuma who was relieved from office based on insinuations made by a judge in a case where he was not the accused, Mbeki too was recalled following remarks by judge Nicholson in a case in which he too was not an accused. The courts became a site of the struggle where allegations and counter allegations emerged. In the process, the judiciary too became a side show to the main event. Slightly connected to the ANC succession race is the battle between Judge Hlophe and the Constitutional court judges. The leadership struggle within the ruling party may be over, but the struggle between Hlhophe and his Constitutional Court counterparts is far from over. As to what the impact of this will be on the judiciary, and its legitimacy, only time will tell.

7. Conclusion

As the final arbiter in disputes, the courts will not avoid getting involved in disputes of a political nature. Elements of bias, whether imagined or real, will always arise, but the judiciary has a task to ensure that the courts continue to command moral authority. The first step towards legitimacy and commanding authority is for the courts to be independent.

and execute their mandate without fear, favour or prejudice. As the paper has pointed out, the apartheid judiciary failed to do this. In the early years of the constitutional democracy, the courts have managed to keep and maintain their independence. However the last few years have witnessed a heightened tension which was directly related to the succession battle within the majority the ruling party. The succession battle to the highest seat in the land turned the judiciary into the site of political struggle. Whether damage was done to the image of the judiciary as a result or not, only time will tell.