The Judiciary

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From the Editor

Dear Colleagues,

Welcome to the fourth quarter Issue of the Judiciary newsletter!

The South African Judiciary, represented by the Honourable Chief Justice Mogoeng Mogoeng, has over the past two years played an elevated role in supporting and deepening democracy in the African continent. As our colleagues and stakeholders are aware, Chief Justice Mogoeng Mogoeng has since 2017 served as President of the Conference of Constitutional Jurisdictions of Africa (CCJA). His term as President of the CCJA ends in June this year. We start off the newsletter with reflections from the Chief Justice on progress and direction of the CCJA.

As you will notice as you go through the publication, we have tried to make this Issue educational by getting some of our colleagues to share important lessons relating to the work of the Judiciary.

On 19 March 2019 the Gauteng Division of the High Court, Johannesburg, proudly launched the Phineas Mojapelo Continuing Judiciary Education Centre aimed at improving the Gauteng Division's role in contributing to jurisdictional development in South Africa. Our colleagues Justice Khampepe, Justice Theron, Judge President Musi and Judge Lamont also write for us on various topics which we trust you will find informative.

The Judiciary this year will say goodbye to a dedicated jurist, Judge Mojalefa Rampai, who retires at the end of the current term. We feature a Q&A with Judge Rampai reflecting on his career as we wish him a peaceful and enjoyable retirement.

We express our gratitude to our colleagues in the Judiciary who have contributed articles to this newsletter. We trust that this will help to motivate other colleagues to write articles for publication as we continue to build this periodical. Our thanks also goes to the Spokesperson for the Judiciary, Mr Mncube, and the OCJ Communications team for their continued commitment to this publication.

Enjoy reading!

Judge President Dunstan Mlambo
Chairperson: Judicial Communications Committee

The CCJA Executive Bureau holds its Tenth Annual Session

On 30 January 2019, the Conference of Constitutional Jurisdictions of Africa (CCJA) Executive Bureau held its Tenth Annual Session in Midrand. The following are reflections on progress and direction of the CCJA by its current President, Chief Justice Mogoeng Mogoeng.

The CCJA is a very powerful and strategic platform from which a clean and unentangled vision or strategy for the preservation and promotion of the best interests of the African people can and must be worked out. Judges are by design a collective of truly independent intellectuals and thought-leaders who are highly qualified and were taught by experience and the exchange of best practices. They know best, what regulatory framework and implementation matrix it would take to inculcate the culture or spirit of good governance, the value of meritocracy so as to enable our constitutional democracies to realise the collective aspirations of our people.

We therefore, as the CCJA, need to be on high alert about the dangers that always loom large in the horizon, of being ensnared with or allured by gifts, and networking possibilities extended to us by those who wield raw political power and those who really control and benefit from the wealth of our continent. We must also vigilantly guard against the love for manipulative praises, publicity and fame. For, at the heart of our calling is the obligation to administer justice to all alike, in terms of the Constitution and the law, and without fear, favour or prejudice. That is the rare and humbling privilege we enjoy, as members of the third and unelected Arm of the State, to effectively function as the conscience and moral compass of our respective nations as well as final arbiters of issues relating to justice and equity.

And the capacity to live up to this exceptionally high calling of adjudicating the most complex of challenges or disputes, often national destiny-defining, can only be truly refined at your base and improved upon at the level of the CCJA. Whether we jostle for, and unfairly seek to occupy positions of authority in our jurisdiction or in the CCJA or wait to be recognized for what we can offer, will determine the profundity or insignificance of our contribution to the critical needs of our people and continent. Remember, although all other continents also have their differences, they have found a way of uniting about and against us. It is about time that we too allow ourselves to be united by the plight of the African people, and characteristic of African generosity, to also allow ourselves to be united by the plight of the human race as a whole.

Only when integrity, ethics, fairness and trustworthiness define who we really are, can the African people ever have a reason to hope for a better tomorrow – free of prejudice, marginalisation, and poverty in the sea of wealth facilitated by greed, free of injustice and all-round corruption and poor governance. We come to our institutions, positions and networks as either the truly professional and ethical people we are expected to be, or as compromised constitutional office-bearers who have sold their souls to the highest bidders, and disguised practitioners of injustice that we have allowed ourselves to be shaped into being.

As the CCJA we have come a long way. It has by all standards been a challenging and truly rocky but richly rewarding journey. But our collective sense of purpose and our sharp focus on what matters the most and what is best for our continent has allowed us to iron out our differences with impressive maturity and wisdom. And here we are now, 45 members strong. We have become global trend-setters. At the time when the WCCJ had not even considered what to do in the event of their members facing serious challenges that threaten judicial independence and security, the CCJA had already traversed that territory in the most admirable way. And that is why at its latest Executive Bureau meeting in Venice, Italy the WCCJ decided to follow our example albeit in a somewhat restrained way.

As you will hear from the Secretary General's report, I had a very sobering meeting with the Chief Justice of the Federal Republic of Nigeria, His Excellency Walter Onnoghen, in Turkey late last year. I had previously made two attempts to visit Nigeria and meet with him which did not materialise for reasons I need not go into. He was part of the meeting at which the CCJA was formed. Based on what transpired there, he informed me that he formed the view that non-Francophone jurisdictions were by design supposed to play second fiddle to Francophone jurisdictions. He said he left the meeting with a distinct impression that the CCJA is meant to be virtually "owned" by Francophone jurisdictions. He communicated that to his government and the then Chief Justice of Nigeria. For that reason

he advised the Nigerian Judiciary not to join the CCJA. I also got a clear sense from some jurisdictions, including Ghana, that they share these reservations. I went out of my way to explain to him that although I initially had similar misgivings, the CCJA has since developed into a formidable force, an inclusive and highly focused and progressive association that Nigeria would do well to join.

As a way forward, I propose that we take to heart, criticisms levelled against us and use them as the basis for a thorough self-introspection. Do we perhaps, without meaning to, create the unintended impression that some are first class members and others second class members of the CCJA? I believe, that to make progress we must stare that reality in the face and take such corrective measures as are necessary rather than being defensive or overly self-righteous.

Rotational leadership must become a practical reality. Opportunities to host CCJA conferences and Bureau meetings must be deliberately spread in a way that seeks to give all groups or regions a genuine and unmistakable sense of belonging.

As Judges, we ride only on our moral authority, our integrity and unchoreographed public confidence. Peace and stability in our nations would stem from and be secured by the knowledge that we Judges will never corrupt justice. When the public know that nobody is guaranteed success however rich, powerful, connected or popular, and that impartiality, justice and true independence reigns, then they will trust us, accept and comply with our decisions however painful or devastating to them. And that incorruptibility of the Judiciary is what Africa needs now more than ever before.

We must strengthen the CCJA and continue to build it into an even more powerful and influential force to be reckoned with that it has the potential to be. None of us must thus be allowed to turn it into a vehicle for the attainment or advancement of personal or sectional agendas. You don't need to be a President of the CCJA to be powerful, respected and influential. Undeniable impact and real difference-making is not a function of manipulation, dishonesty and unfairness, particularly within judicial circles. It comes only with diligence, vision, wisdom and fidelity to the high ethical standards that Judges are expected to uphold.

We must all embrace the reality that functional leadership is often more impactful and appreciated than positional leadership. We therefore must always support rather seek to undermine any of our own who happens to occupy a key leadership position at any given time. Leaders of Constitutional Courts or Councils must demonstrably take meetings of the Bureau and the CCJA seriously, rather than almost always sending delegates. Happily, this is the general trend.

We need to keep on recruiting more and more African jurisdictions into the CCJA. There is power, credibility and greater impact that flows from numerical strength. Our membership recruitment-drive must thus be ongoing until all African jurisdictions are members in good standing of the CCJA.

Additionally, we need to reflect on what, if any, we are to say or do in circumstances where a non-CCJA member jurisdiction like Nigeria is going through a difficult period. Is it in our place to say or do anything without being notified or asked to by the affected jurisdiction? Are we to pretend that we are not aware of what is happening? How are we to get the true picture? When would getting involved amount to meddling in the internal affairs of a sovereign nation? I implore us to reflect on this issue that touches on the complexities around when, if at all, and how, to demonstrate brotherly or sisterly solidarity, even as it relates to non-members.

And that leads me to the next point. We need to find a courteous and yet effective way of clearing our operational space of all undesirables. This mainly takes the form of constitutionally and legally impermissible interference by all others including the rich and powerful, at national and international level, but we must also secure a demonstrably genuine equality of the Arms of the State in our respective nations.
We also need to work towards normalising our relations with our counterparts who are at the helm of the political Arms of the State wherever

and whenever there is a need to do so. I once attended a meeting with a Head of State together with the Head of the Judiciary in that nation. It did not take long to realise beyond doubt, just how extremely unequal the balance of forces were in that nation, at the instance of that President. My colleague was completely fear-stricken. Even how the Head of State spoke to him made it abundantly clear that he was in all likelihood the kind to be told how to decide cases, and that he had no possibility to say no.

Where the peculiarities in a particular jurisdiction are such that judicial independence exists only on paper, a way must be found to at least inform the leadership of the CCJA about this. And a smart, tactical and decidedly effective mechanism for intervention must be developed and put into practice. All this is intended to ensure that the Arms of the State are in reality co-equal and functionally independent. The Head of State will of course have to be respected as such but without the possibility of him or her imposing his or her will on the other Arms of the State, particularly the Judiciary.

Of equal importance is the long overdue necessity to escalate our engagement with the Heads of States and Heads of Government to a regional, continental and global level. The expression "nothing about us, without us" must be practicalised. I will spare you the details by simply referring you to my report on my visit to the AU Headquarters early last year. Suffice it to say, that all judicial structures at a regional, continental and global level must be established and appointments of Judges to them must all happen with the full or at least make meaningful participation of the Judiciary at each level. It is irreconcilable with the fundamentals that ought to undergird a clear desire to achieve uncompromised justice to leave judicial structures and appointments to the exclusive regulation or control of the political arms of the State at each level.

Furthermore we ought to find a way to use the CCJA resources to assist, within reason, member jurisdictions that are acutely under-resourced. How this can be accomplished is a matter I propose we make time to reflect on and work out. This would help to reinforce the judicial capacity to administer real justice to the litigants in these jurisdictions.

I also propose that whenever the Secretariat attends meetings on our behalf, it must be obligatory for them to report on the essence of what transpired at the meeting they attended – what it was about. We must be very deliberate and intentional in and about everything we do. The presence of the Secretariat at conferences and meeting of other continental or linguistics associations must be about much more than a mere demonstration of support. They have to say to this forum what it is we have learnt and how those lessons could benefit the CCJA and by extension the broader African Judiciary or the WCCJ, as the case may be. It follows, that going forward the Secretariat must be keenly alive to issues that could enrich the discussions and programmes of the CCJA.

And I also think that the time has come for us to explore possibilities of developing an effective platform for sharing our experiences and the lessons drawn from our engagements with a diverse group of colleagues around the world. This would go a long way towards strengthening judiciaries in our respective countries and in our continent. Not all countries have a single Judiciary with one Judicial Head. In some there is.

Once again, I thank this structure of the CCJA and the broader membership of the association for the commitment to the noble cause of contributing to the renaissance of Africa and the realisation of her glorious destiny, and all the support through my Presidency that I will gladly relinquish in June 2019.

The CCJA Executive Bureau holds its Tenth Session

Chief Justice Mogoeng Mogoeng addressing the Session.

Members of the Executive Bureau observe a moment of silence at the begining of the Session.

Chief Justice Mogeong Mogoeng greets Professor Sean Eric Rakotoarisoa, President of the High Constitutional Court of Madagascar.

Members of the Executive Bureau getting ready for the start of the Session.

The CCJA Executive Bureau holds its Tenth Session

President Manuel Miguel Da Costa Aragao, President of the Constitutional Court of Angola.

Justice Aboudou Salami Sani, Constitutional Court of Togo and Secretary General of the CCJA

Members of the CCJA Executive Bureau

Judge President Dunstan Mlambo

Bids Farewell to Legal Aid SA

Deputy Minister John Jeffery; Incoming Legal Aid SA Chairperson, Judge Motsamai Makume; Other Judges present; Board Members outgoing, incoming and retired; CEO Ms Vidhu Vedalankar and Members of the Executive Management Team; Directors of Public Prosecutions; Presidents of the BLA and Nadel; Chairperson of the Johannesburg Society of Advocates and former Board ~Member, Advocate Kameshni Pillay SC; Chairpeosn of the Humna Rights Commission, Mr Tsediso Thipanyane; Deputy Public Protector, Advocate Kevin Malunga; other Leaders present here today; Legal Aid SA Family, Ladies and Gentlemen

It is a bittersweet occasion for me to be finally leaving a home and family I became part of in 2001. A very wise African Professor coined the phrase – *"There comes a time when even the best dancer has to leave the dance floor"*. So true, though be it 17 years later.

Mine was meant to be a quick three-year stint but that was not to be. Yes, I was duped into joining the Board in 2001 with the objective of taking over from Justice Navsa a year later. The chief architects of that deception are none other than late Chief Justice Arthur Chaskalson; Justice Mohamed Navsa and the late Judge George Maluleka. When the penny finally dropped it was too late to back out.

And once I was at the helm there was no option but to dig the organization out of the morass it was in. It was beyond any dream no matter how wild – that the organization would today be -

- Transformed from being ridiculed by all and sundry to what it is today – one of the successes stories of our Constitutional democracy;
- The Top employer for the past 10 consecutive years in the legal sector;
- The architect of Coin the Mixed Model Legal Aid Services delivery model and perfect it to being the preferred model internationally especially in the developing world;
- Becoming a dominant player in the international arena on access to justice particularly on the legal aid services discourse;
- Becoming a dominant voice in the adoption of the Lilongwe Declaration in 2004, the Johannesburg Declaration in 2014, The Buenos Declaration in 2016, The Tbilisi Declaration in 2018, Joining the call to include justice in the Sustainable Development, the prime mover of the adoption of the United Nations Principles and Guidelines on Legal Aid in Criminal Justice Systems;
- Becoming the most sought after subject matter expert on access to justice with emphasis on Legal aid services, for countries seeking to establish legal aid entities;
- Hosting and guiding some 65 country delegations from this continent and the globe in the past 17 years on Legal Aid Services provision and regulation;
- The recipient of 17 unqualified audit opinions from the Auditor General; and last but not least
- Establishing and maintaining a national footprint of some 130 service points covering the length and breadth of SA.

I'm the first one to acknowledge that the years I spent at Legal Aid SA were good times, sometimes challenges – but hugely enriching.
I have enjoyed the support of 5 Ministers of Justice – Ministers Penuel Maduna, Brigitte Mabandla, Enver Surty, Jeff Radebe and now

Advocate Tshililo Masutha. I have enjoyed debating issues and collaborating with Deputy Ministers De Lange, Nel and John Jeffries.

Sustaining a legal aid entity in a developing country is not easy. Bringing one back from the very brink of oblivion was challenging but achievable as we did. And yet, our Board and our Executive Management team united to make the mission of being the leader in the provision of accessible, sustainable, ethical, quality and independent legal aid services to the poor and vulnerable a reality.

Watching Legal Aid South Africa grow from strength to strength over these years has been inspiring and fulfilling. Watching how the sentiment of the Judiciary and other stakeholders change from serious ridicule to respect and confidence has been very gratifying. Watching the organization's mindset become rooted in human rights and a keen desire to ensure that the rights and responsibilities enshrined in the Constitution are realized to ensure equality, justice and a better life for all, has been immensely gratifying.

Legal Aid South Africa has grown from only assisting in criminal matters, to offering much-needed assistance in civil matters. Our Impact Litigation Unit shines as a beacon of hope for communities, and enables many others to reach out and assist even more communities. We have a national footprint, and are becoming both more widely known and positively regarded each year.

Our successes are the result of excellent planning and commitment to bettering the execution of our Strategic and Business Plans every year, and by every Legal Aid SA Citizen.

Above all however is embracing a corporate governance culture based on the simple but profound truth that – Public money is just that – public money. I was surrounded by excellence, innovation and a hunger to serve the public even better than ever. Always seeking improvement rubs off on people, and it certainly has done so on my fellow Board members, who I applaud today. And I say to them thanks for embarking on this journey with me and guiding me along the way.

The success of the Board of Legal Aid South Africa cannot be applauded without also applauding our CEO, Ms Vidhu Vedalankar. Vidhu stood out to me from the day I met her as highly competent, a strategic thinker, goal driven and someone with an implementation mindset. While we credit the Board for much of Legal Aid South Africa's success, the ship was also capably steered by Vidhu. It has been a great honour to work with you these past 17 years, Vidhu. The foundations you have established during your tenure will ensure Legal Aid South Africa stays on the right course, ever improving and seeking more ways to help the public.

A danger of heaping too much praise on one organisation, or one Board, is that we begin to think that the performance we are applauding is out of the ordinary. In fact, our Board became impactful through the sustained commitment of ordinary individuals – this created the magic that we see today. We faced some hard times and took tough decisions, but continued to be guided by our commitment to human rights. That has resulted in our culture of excellence – finding our vision, mapping out the steps to get there, and then doing it, Board meeting after Board meeting, year after year. Our tenacity and perhaps stubborn conviction in our potential has gotten us to where we are today – Board members of a high-performing, well respected public entity.

I thank the Ministers of Justice I have mentioned, for trusting me to lead Legal Aid SA for all this time. Your trust bolstered my faith in this organization and its calling, and certainly in my own calling. I should thank the many Ministers of Justice who refused to let me step down – I can see now that my work was not done. But can it ever be? Innovation has no bounds, and with the global legal aid crisis highlighting the great need

there is for such public institutions, legal aid remains topical and very, very necessary. I know that this organization – Legal Aid South Africa – will continue to make me proud, and I am excited to welcome the new Board members, along with their fresh ideas. And a special welcome to Judge Motsamai Makume the incoming Board Chairperson. I congratulate you and your new team. I am counting on you all to continue fighting the good fight, but more importantly, the public is counting on you.

It is in this respect that I thought I could ask you to stroll down memory lane with me –

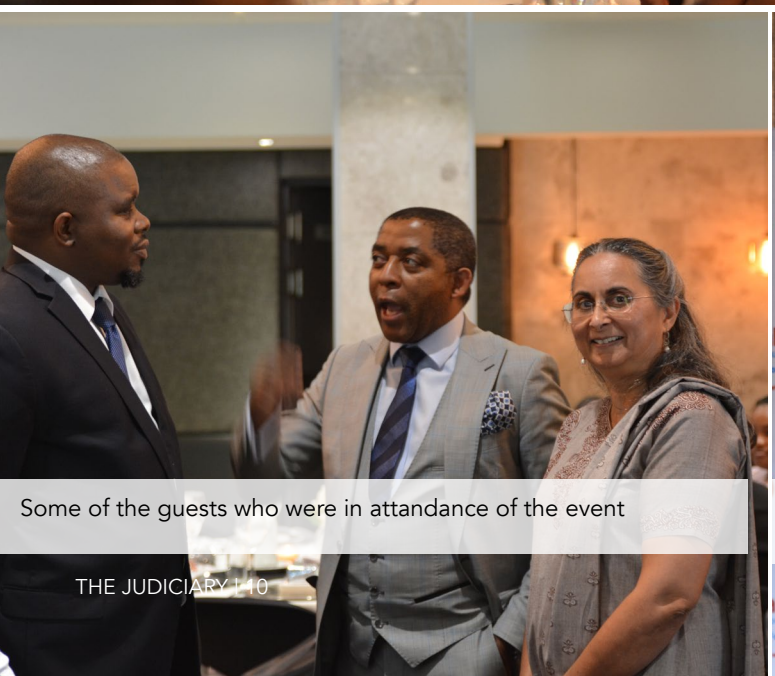
Chief Justice Chaskalson – when I expressed my doubts as capable of leading the Board – he said *"Don't doubt yourself young man, you will surprise many, yourself included."*

Judge George Maluleka – saying to me *"Young man don't be scared of your destiny."*

Justice Mohamed Navsa – saying *"You are a darkie boy, work twice as hard if you want to succeed."*

I thank you.

Deputy Minister of Justice & Correctional Services John Jeffrey & Judge President Dustan Mlambo



Some of the guests who were in attandance of the event

Judge Motsamai Makume incoming Chairperson of Legal Aid South Africa

Outgoing Chairperson of the Legal Aid SA Judge President Dustan Mlambo delivers a speech

Deputy Minister of Justice & Correctional Services Honourable John Jeffrey

Outgoing Non-Executive Director Adv. Pieter du Rand

CEO of Legal Aid SA, Ms Vidhu Vedalankar

Outgoing Non-Executive Director Ms Nonhlanhla Mgadza

Outgoing Non-Executive Director, Professor Yousuf Vawda

Ms Margaret Kusambiza from COASA

Outgoing Non-Executive Director, Ms Marcella Naidoo

Outgoing Non-Executive Director, Ms Thulisile Mhlungu

The role of the Judiciary in the establishment of the 6th Parliament

On 8 May 2019 South Africa will hold national and provincial elections. The Constitution of the Republic requires that every time the National Assembly's term expires after five years, the President must set a date for an election before it dissolves. After an election and the first sitting of the National Assembly, the House (National Assembly) must elect a Speaker and a Deputy Speaker from among its members. The Chief Justice is responsible for presiding over the election of a Speaker.

Leading up to its establishment, Parliament provides the Chief Justice with draft Rules of the first sittings of the National Assembly, National Council of Provinces and Provincial Legislatures as well as the designs of the ballot papers to be used during elections in the National Assembly for approval by the Chief Justice. This function is prescribed by Item 9 of Schedule 3 to the Constitution which provides that these Rules must prescribe:

a) the procedure for the meeting to which Schedule 3 applies;
b) the duties of any person presiding at a meeting, and of any person assisting the person presiding;
c) the form on which nomination must be submitted; and
d) the manner in which voting is to be conducted.

The Chief Justice is also responsible for the designation of Judges President to determine the dates of the first sittings of the Provincial Legislatures, preside over the first sittings to administer the oath to Members of the Provincial Legislatures, the election of the Premiers of the Provinces and the Speakers of the Provincial Legislatures as prescribed by sections 107, 128(2), 110(1) and 111(2) of the Constitution.

Section 51(1) of the Constitution read with sections 52(2) and 64(4) charge the Chief Justice with the responsibility of determining dates for the first sittings of the National Assembly and the National Council of Provinces. The Chief Justice must publish in the Government Gazette the dates of the first sitting of the National Assembly and the National Council of Provinces.

Other roles to be played by the Judiciary in the establishment of the 6th Parliament include the following:

- The Chief Justice is responsible for swearing in of Returning Officers preferably the day before the first sitting of the National Assembly and the National Council of Provinces.

- The Chief Justice presides over the election of the Chairperson of the National Council of Provinces as prescribed by sections 64(4) and 65(5) read with Schedule 3 Part A.

- Designated Judges President preside over the meeting of the Provincial Legislatures to administer the oath to Members of the Provincial Legislatures, the election of the Premiers of the Provinces and the Speakers as prescribed by sections 107, 128(2), 110(1) and 111(2) of the Constitution.

- The Chief Justice is responsible for the Review of Order of Ceremonies, Order of Proceedings and Order Paper for the first sitting of the National Assembly and the National Council of Provinces.

- The Chief Justice presides over the first sitting of the National Assembly to administer oath or solemn affirmation to members of the National Assembly in terms of section 48 read with Schedule 2: 4(1) to the Constitution.

- The Chief Justice is responsible for swearing in certificates of Members of the National Assembly and also presides over the election of the President of the Republic of South Africa in line with section 86(2) read with Schedule 3 Part A.

- The Chief Justice administers the oath or solemn affirmation to permanent delegates to the National Council of Provinces in line with section 62(6) read with Schedule 2: 4(1).

- The Chief Justice is responsible for swearing in certificates of permanent delegates to the National Council of Provinces.

SUMMARY OF THE DUTIES AND FUNCTIONS OF THE CHIEF JUSTICE IN TERMS OF THE CONSTITUTION

Section	Specific Responsibilities
51	Chief Justice must determine the time and date of first sitting of the National Assembly
52	Chief Justice must preside over the election of the Speaker of Parliament
64	Chief Justice must preside over election of the Chairperson of the National Council of Provinces
86	Chief Justice must preside over the election of the President
111	Chief Justice must preside at the first sitting of the Provincial Legislature (Currently delegated to the provincial heads of court); election of the Provincial Speaker (Currently delegated to provincial heads of court)

Children's rights, ICT and organized crime

On 17 January 2019, Justice Sisi Khampepe addressed a Judges' Seminar hosted by the South African Judicial Education Institute (SAJEI) on ICT and Organised crime. She discussed a wide range of cases that have come before the Constitutional Court since the advent of the Constitution and stressed the need for judges to adapt in line with the legal developments relating to the digital age.

While it can sometimes be daunting for judges, especially us that are slightly older, to have to engage with new concepts and legal developments, it is essential that we do so. As Albert Einstein said, "intellectual growth should commence at birth and cease only at death". The programme for this seminar focuses on legal developments relating to digital age that we find ourselves in, and emphasises the need for us to adapt. I have no doubt that the seminar will be enriching.

As some of you may know, I have a particular interest in the protection and advancement of children's rights, and I have had to privilege to have been involved in some seminal cases regarding children's rights during my tenure at the Constitutional Court. I recently gave a keynote speech at the Centre for Child Law's 20th anniversary conference, the theme of which was imagining children constitutionally. In looking at the programme for this Judges seminar, which revolves around ICT and organised crime, it occurred to me that this would be the perfect opportunity to remind ourselves of our duty as judges to protect and promote the best interests of children in all matters which may have an effect on children, including the matters falling within the scope of this seminar.

As we all know, the Constitution of South Africa makes express provision for children's rights in section 28. Recognising the special place that children occupy in our society, the Constitution provides rights beyond that afforded to every other person within this country's borders. Every child, it says, has rights. To a name and nationality from birth. To family and pre-natal care. To basic nutrition, shelter, health care, and social services. To be protected from maltreatment, neglect, abuse or degradation. To be protected from exploitative labour practices. These rights are in addition to other rights under the Constitution, which are afforded to all persons. Everyone, including every child, has the right to dignity. Everyone, including every child, has the right to privacy. And everyone, including every child, has the right to equality and non-discrimination. Most importantly, section 28(2) of the Constitution states "a child's best interests are of paramount importance in every matter concerning the child".

But these words have no meaning unless they are brought to life. It is important for us as Judges to realise the role that we play in the realisation of these rights. In a post-apartheid South Africa where Constitutional supremacy has replaced parliamentary sovereignty, it is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority but also reference to ideas and values. Judges therefore have a duty to breathe life into the rights and values enshrined in the Constitution. This could involve the manner in which we set out and/or comment on the facts of a particular case when writing a judgment- not merely glossing over the plight of our most vulnerable but rather exposing social injustices, even in cases where the relief sought cannot be granted. It also involves the manner in which analyses the legal principles and the crafting of an appropriate and effective remedy. While this should be done in respect of all the rights enshrined in the Bill of Rights, it is particularly important that we do this when dealing with children who can often not speak for themselves.

The important role of our courts in the development of children's rights can be easily seen from the wide range of cases that have come before us since the advent of our Constitution.

In Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others, the Constitutional Court was called upon to decide on the constitutional validity of certain provisions of the Criminal Procedure Act dealing with child complainants and child witnesses in sexual offences. It was the High Court judge before whom the criminal matters came for sentence that raised the issue of the constitutional validity of certain provisions of the Criminal

Procedure Act of his own accord, and called upon the accused, the state and various non-governmental organisations that look after the interests of children, to submit written argument on the constitutionality of certain provisions of the CPA, concerning the testimony of child victims of sexual offences. The High Court declared the relevant sections invalid and issued declaratory and supervisory orders concerning the rights of child complainants and child witnesses.

The Constitutional Court confirmed that courts have a crucial role to play in developing a system of law based on the Constitution and that it is the duty of all courts to uphold the Constitution, and that a court may thus raise a constitutional issue of its own accord in certain instances. Although the Constitutional Court found that the High Court had erred in considering the constitutionality of the relevant provisions on the facts before it, the Court still considered the declarations of constitutional invalidity, in order to avoid legal uncertainty. The Constitutional Court also elected to consider the matter as the issues raised by the High Court were issues that affected child complainants of sexual offences who are not parties to criminal proceedings but who nonetheless possess constitutional rights.

While the Constitutional Court acknowledged that any order made by it would not affect the accused and complainants in the cases before it, it still deemed it necessary to decide the issues given the practical effect it would have on future criminal proceedings. The Constitutional Court did not confirm the orders of constitutional invalidity made by the High Court, but in light of the amici's submissions which evidenced serious problems in the implementation of the protective measures of the CPA, it still made an order requiring government to submit reports on these shortcomings. This case highlights the important role that we as judges play in the realisation of rights. Even though the Constitutional Court could not confirm the constitutional invalidity of the relevant provisions, it was still able to craft an effective remedy of its own accord in order to protect and advance the rights of the child. The judgment also shed light on the hardships suffered by children complainants in sexual offences cases and gave content to their rights in this regard.

In S v M, Justice Sachs gave expression to the weight of children's rights and the importance of the framework through which to view the rights of children. In that decision Justice Sachs wrote: "Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood."

In De Reuk, which dealt with the possession of child pornography, the Constitutional Court gave further content to children's rights to dignity, holding that the degradation of children through child pornography is a serious harm which impairs on their dignity and contributes to a culture which devalues their worth. Having regard to the important purpose of the

Criminalisation of the possession of child pornography- to protect the dignity of children - the Court found the limitation of the right to freedom of expression and privacy was justified.

In Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development, which concerned the constitutionality of the criminalisation of consensual sexual activity of children between the ages of 12 and 16, I was faced with the difficult task of determining whether it is constitutionally permissible for

children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated therewith. I wrote in that judgment:

"Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development. . . We must be careful . . . to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development."

When drafting that judgment it was important for me to emphasise that we must envision children as individual rights-bearers, and not mere extensions of their parents or mere reflections of what limitations we may wish to legally impose at the outset. When we breathe life into the mere words and promises that make up constitutional rights, each child takes form as its own person, with its own journeys and personalities. After a careful analysis, I found that the impugned provisions of the Act infringed on children's rights to dignity, privacy and violated the guiding principle of the best interests of the child.

With respect of the violation of the right to dignity, I was able to build on the Constitutional Court's previous findings in De Reuck and S v M that children's dignity rights are of special importance and are not dependent on the rights of their parents. It was obvious to me, and other members of the Court, that the criminalisation of consensual sexual conduct is not neutral-it is a form of stigmatisation which is degrading and invasive, and has significant impact on one's self-worth and dignity. The violation of the right to privacy was likewise clear. The creation of these offences created a legal sanction for police officers, prosecutors and judicial officers to scrutinise and assume control over the intimate relationships of adolescents.

With respect to the best interests of the child as protected in section 28(2), there are at least two separate roles created by the provision: it is a guiding principle in each case, and it is a standard against which to test provisions or conduct which affect children in general. Even if applied flexibly, it was clear to me that the best interests of the child was violated because subjecting the conduct of children, the numbers of which the expert report stated would be in the majority of adolescent South Africans, to the harshness and risks associated with the criminal justice system, could not be said, to be in the best interest of the child.

The judgment is one of the ones of which I am most proud. Not only does it underscore that children are fundamental bearers of human rights, it recognises that the criminalisation of conduct can be an overly harsh consequence. The judgment recognises that while criminalising conduct may be intended to keep people safe, including the most vulnerable in our society, the criminal justice system, is not always well-equipped for that purpose. With the uncontradicted social and psychological evidence before the Court, I simply could not find, that the means chosen by Parliament, in this instance, were rationally connected to the dream of a South Africa that we all want to see. Rather, ensuring that our laws promote healthy development of our young people is fundamental to curbing some of the issues that plague our society today, including all forms of gender-based violence.

The Teddy Bear Clinic judgment then formed the pretext for a subsequent case, decided just one year later, J v National Director of Public Prosecutions. Here the Constitutional Court found that it was unconstitutional to require automatic placement of child offenders on the Sex Offenders Register. The Court stepped in to prevent the harrowing consequences that the criminalisation of our young people can have. Here again, imagining children constitutionally meant less harsh consequences.

The law has developed in all realms of children's rights over the last twenty years. For instance, over the course of its existence, the Constitutional Court has heard more than one case involving corporal punishment.

In S v Williams, six young people were sentenced to receive "moderate correction" of a number of strokes with a light cane, a sanction meted out in terms of section 294 of the

Criminal Procedural Act. It was in that case in 1995 that the Constitutional Court declared judicial corporal punishment unconstitutional, finding that it violates dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. The Constitutional Court found that juvenile whipping violated the dignity of the juvenile as well as that of the person administering the whipping.

In the case of Christian Education South Africa v Minister of Education the Constitutional Court was against called to deal with the issue of corporal punishment, this time in schools. Parliament passed a law prohibiting corporal punishment in all schools. The question was whether Parliament had unconstitutionally limited the rights of parents of children in independent schools who sought to consent to "corporal correction". The Court was unanimous. In a judgment penned by Justice Sachs in 2000, the Court found that although religious and community rights had been limited, the limitation was justifiable in an open and democratic society. No exemption would be provided for schools which, although they were independent, functioned in the public domain.

And less than two months ago, the Constitutional Court heard the case of Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others concerning an appeal of a High Court judgment which found that the common law defense of reasonable chastisement for parents charged with assaulting their children is unconstitutional and no longer applies in our law. Again, here, we as judges of the Constitutional Court will have to consider the full breadth of the Constitution and what the appropriate balance is between freedom of religion and the constitutional rights

This year the Constitutional Court will hear an application brought by the Centre for Child Law, in Centre for Child Law and Others v Media 24 Limited and Others, to confirm an order of constitutional invalidity of certain provisions of the Criminal Procedure Act insofar as they fail to protect the anonymity of children as victims of crimes during criminal proceedings, and whether their identity should remain protected after they tum 18.

The breadth of these cases demonstrates impact that judges can have on the protection, promotion and development of children's rights in ventilating the full content of those constitutional rights.

The incorporation of special provisions that protect children's rights in our Constitution sheds light on the importance of children in the project of reconciliation. As I have previously said, reconciliation is like a tree that needs to be watered continuously, until it grows, and takes firmly to root. Without the full ventilation of children's rights as constitutionally guaranteed, we will never be able to have our tree take root. We will never see it grow tall and strong, for generations to come. And we will never be able to enjoy the benefits of the shade the tree will provide.

I hope that you will appreciate the role that you as judges play in this and implore you to utilise every possible opportunity that may come before you to further develop our jurisprudence concerning children's rights. Almost every matter impacts on the rights children, including ICT and organised crime.

Refreshing and Enhancing Judgment Writing Skills

On 17 January 2019, Justice Leona Theron delivered a seminar presentation on judgment writing skills during a workshop hosted by the South African Judicial Education Institute (SAJEI) on ICT and organised crime. "The primary purpose of judgment writing is to communicate the decision, and the reasoning underlining it, accurately through the written word," notes Justice Theron as she elucidates the importance of good judgment writing.

I Introduction

Judgment writing is an art that requires not only legal skills but also creative expression, common sense and human understanding. The primary purpose of judgment writing is to communicate the decision, and the reasoning underlining it, accurately through the written word. Not everyone has the natural ability to communicate effectively. However, with study and practice the quality of judicial writing can be improved. There are as many opinions about what makes a good judgment as there are lawyers. I will explore some of the considerations that are relevant to judgment writing, in the hope that, if these considerations are kept in mind, we will be able to communicate judicial decisions effectively to interested parties.

II Why do we need judgments?

Judgment writing goes to the very heart of the exercise of the judicial function. The giving of reasons for judicial decisions is part and parcel of the duty of the judiciary to conduct judicial proceedings fairly, respecting the rights of the parties involved.

In Mvumbi, the Constitutional Court explained that—

"[i]t is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process."

In Mphahlele, the Constitutional Court held that furnishing reasons—

"explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters."

It is therefore in the interest of the open and proper administration of justice that courts state publicly the reasons for their decisions. The rendering of reasons give some assurance that the court in question gave due consideration to the dispute and did not act arbitrarily. And this in turn is crucial to the maintenance of public confidence in the judiciary and, ultimately, the maintenance of the rule of law.

A written judgment should be given where:

(a) the case involves complicated issues of fact and law that require resolution;
(b) there is a possibility of an appeal no matter what the decision is;
(c) the court issues an order declaring an Act of Parliament or a provincial Act or the conduct of the President unconstitutional;
(d) novel points of law are raised;
there is differing authority on the issues; and
(f) the matter is of great public interest.

The option of making an order with a direction that reasons will be delivered later should be used sparingly. Only when the judge is convinced that the decision that is intended to be given in support of the order is correct should this be resorted to. This option leaves no room for afterthought or a change of mind about the case, so be careful. If the practice is used, reasons must be furnished within a reasonably short time after the order.

III Purposes of writing a judgment

As mentioned, the primary purpose of the judgment is to communicate the decision as well as the reasoning of the court. Judgments are generally read and studied by a number of different people. Therefore, before the writer begins, it is important to identify the group most likely to be interested in the judgment. There are advantages that flow from this. How this audience

will respond, its needs and requirements, as well as the intended goal and function of the particular judgment, will determine the form and content of the judgment.

Where the decision is intended for the parties alone, only minimal facts along with an abbreviated legal analysis is necessary. On the other hand, where the judgment is directed to the legal community or the academic fraternity, the analysis, logic and reasoning must be clearly expressed in greater detail.

IV The structure of a judgment

What should a judgment consist of or contain?

First, the judgment should begin with an introductory statement setting out the nature of the case and identifying the parties. This statement should be concise and uncluttered by unnecessary detail. References to the pleadings and case law should ordinarily be avoided in the introduction.

For an example of a good introduction, consider the opening paragraph in the Constitutional Court's judgment of Saidi. The paragraph reads:

"Does a Refugee Reception Officer (RRO) have the power to extend a temporary asylum permit pending the outcome of a review – in terms of the Promotion of Administrative Justice Act (PAJA) – of a decision of a Refugee Status Determination Officer (RSDO) rejecting an application for asylum, including the PAJA review of decisions on internal reviews and appeals? That is the principal question that must be answered in this matter."

Or consider the opening paragraph of Pillay:

"What is the place of religious and cultural expression in public schools? This case raises vital questions about the nature of discrimination under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) as well as the extent of protection afforded to cultural and religious rights in the public school setting and possibly beyond. At the centre of the storm is a tiny gold nose stud."

Second, the facts of the judgment must be laid out in a chronological sequence. It is not necessary to recount every step of the litigation – only the facts or history relevant to the issues to be determined.

Third, the issues should be listed and dealt with separately.

After the issues, the applicable law must be explained. When citing case law, only necessary and relevant portions should be cited. Avoid, if at all possible, citing long passages. Clearly state why the authority is being referred to. Where possible, try paraphrasing instead of direct citation or insert the citation in a footnote. This approach tends to make judgments more reader friendly.

Thereafter, the law must then be applied to the facts. The conclusion and remedy follow.

The last part of the judgment should tie in with the introduction. The conclusion should resolve the issues identified in the introduction. The conclusion should not contain new material, factual or legal, not previously discussed.

Even if the conclusion or decision is wrong, the reader should be able to understand the reasoning of the judge and how the judge arrived at that particular conclusion.

Returning to Saidi, the last paragraph of the judgment directly answers the question posed in the first paragraph:

"For all these reasons I conclude that section 22(3) [of the Refugee Act] grants the RRO a discretionary power to do two things. These are to extend permits and to amend conditions attached to them. Therefore, I do not support the declaration that the RRO has no discretion and as a result he or she is obliged to extend every permit upon application."

And Pillay:

"It is worthwhile to explain at this stage, for the benefit of all schools, what the effect of this judgment is, and what it is not. It does not abolish school uniforms; it only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices. There should be no blanket distinction between religion and culture. There may be specific schools or specific practices where there is a real possibility of disruption if an exemption is granted. Or, a practice may be so insignificant to the person concerned that it does not require a departure from the ordinary uniform. The position may also be different in private schools, although even in those institutions, discrimination is impermissible. Those cases all raise different concerns and may justify refusing exemption. However, a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline, will not."

V Editing the judgment

Before delivery of the judgment, ensure that all issues have been dealt with, eliminate repetition, delete irrelevant detail, check punctuation, simplify lengthy complex sentences, and scrutinize length and content of paragraphs.

Decisions should be based on sound legal principles. It is essential to carefully evaluate the legal principles upon which a judgment rests. For example, in determining an appropriate sentence, a judicial officer reasoned as follows:

"In respect of the sentence, I sentenced you in terms of the minimum sentencing provisions for robbery with aggravating circumstances, that is 15 years. The three years that I added on were because my life was threatened by some members of your gangs, that is the information that I was given and that is why I came here under police protection. It had nothing to do with any other case that day, it was your case. And since the National Intervention Unit took that threat seriously I just abided by what they asked me to do."

The presiding officer was quite clearly not entitled to add three years to the sentence because her life had been threatened. This could have been avoided had she reflected critically on her legal reasoning before handing down the judgment on sentence.

Editing also prevents obvious, patent errors that often creep into judgments. They do not reflect on the competence of the judge, but are nonetheless embarrassing and confusing. For example, in Madiba, the Supreme Court of Appeal held that:

"It is quite clear that [the trial Judge] misdirected himself when he stated that the cumulative effect of the sentence imposed was that the appellant was sentenced to 70 years' imprisonment. Regard being had to the fact that one of these sentences imposed was life imprisonment, it is incomprehensible how [the trial Judge] came to this conclusion."

VI Do's and Don'ts

There are several "do's and don'ts" that can easily improve judgment writing and delivery.

Do use simple clear language. Verbose, complicated language should be avoided. It helps no one:

"Innovative nuances of evidential inadequacies, procedural infirmities and interpretational subtleties, advanced in defence, otherwise intangible and inconsequential, ought to be conscientiously cast aside with moral maturity and singular sensitivity to uphold the statutory sanctity, lest the coveted cause of justice is a casualty."

The Supreme Court of India recently set aside a judgment of the Himachal Pradesh High Court on the bias that it could not comprehend the legalese used in the judgment. Here is an extract from the High Court judgment:

"However, the learned counsel appearing for the tenant/JD/petitioner herein cannot derive the fullest succour from the aforesaid acquiescence occurring in the testification of the GPA of the decree holder/landlord, given its sinew suffering partial dissipation from an imminent display occurring in the impugned pronouncement

hereat wherewithin unravelments are held qua the rendition recorded by the learned Rent Controller in Rent Petition No.[..] standing assailed before the learned Appellate Authority by the tenant/JD by the latter preferring an appeal therebefore whereat he under an application constituted under Section 5 of the Limitation Act sought extension of time for depositing his statutory liability qua the arrears of rent determined by the learned Rent Controller in a pronouncement made by the latter on . . .

The summom bonum of the aforesaid discussion is that all the aforesaid material which existed before the learned Executing Court standing slighted besides their impact standing untenably undermined by him whereupon the ensuing sequel therefrom is of the learned Executing Court . . ."

Do exercise logic, deal with each issue separately, and ask counsel to identify the issues.

Do maintain an impartial demeanour when dealing with litigants. The following exchange appears from the record of the proceedings of a local Court:

"COURT: Are any of these people in court today? --- I am not sure. I don't believe you, you are scared, aren't you? Am I right? You are scared to say anything. --- I …[intervention]. Yes, you don't have to answer me
. . .
COURT: Come here, please, accused 4. Come here, please. No, come here. Stay there. Turn your face that way. Turn your face this way. He has got one scar on his left cheek, but on the side of his cheek, one about two and a half centimetre scar. Go back there.

COUNSEL: Your worship, if the Court can just note the scar on his nose as well.

COURT: On where?

COUNSEL: On his nose.

COURT: Come back here. Oh, yes, I see now he has got a scar across his right nose, but this is three years later. Go back there. Across his right nostril.

COURT: …after all [the witnesses'] tooth nonsense, not nonsense, sorry, tooth problem."

This letter, written by a judge was part of the record in an application for leave to appeal to the Supreme Court of Appeal (where there was a complaint that the judge had delayed in delivering reasons for judgment):

"This case was before me during the urgent court proceedings, at the end of July, 2007. I gave brief reasons indicating that I expected that I might be called upon to give more detailed reasons, in the future. A week or so – or even less – after 26 July, 2007, Mr Masilo was in my chambers, asking for full reasons. I did not chastise him for approaching me, a judge, for that purpose and in that fashion. You know, JP, that is unprofessional. I told him that full reasons are – as I had said in court – tantamount to a full judgment, that I did not have time to attend to it before the short recess, as I had other judgments that took precedence to it. It surprises me that Mr Masilo wrote this letter – which, by the way, reached me shortly after 11 September, 2007. Incidentally, something I had forgotten when I spoke to Mr Masilo – I had no short recess, having been in the unopposed motion roll. So, regrettably I cannot touch that judgment before January, 2008. I attach a copy of a letter I wrote on 13 September 2007, in reply to Mr Masilo's letter. My registrar (Francois) and I are uncertain as to whether it was, indeed, forwarded to Mr Masilo, as Francois went for study leave in about that time."

Do be respectful and courteous to all parties, the legal representatives as well as colleagues. It may be necessary to express disagreement with another judgment or the views of a colleague. Do so courteously and with full recognition of the fact that to err is human: you yourself may be wrong.

Don't rely on points of law that have not been raised by, or canvassed with, the parties. For example, a Canadian Judge found an accused

guilty of second-degree murder on the basis of a provision of the Canadian Criminal Code that has been unconstitutional for 26 years. The prosecution did not rely on the impugned section in its written argument. Even less surprisingly, nor did the defence.

Don't quote heads of argument at length. As stated in Stuttafords Stores v Salt of the Earth Creations:

"The judgment [on appeal] consists of 1890 lines of typing of which, apart from a summary of the relief sought and the terms of the order, only approximately 32 lines are the judge's original writing.
The rest consists of words taken exactly from [X]'s counsel's heads of argument, sometimes even without taking out phrases like "it is submitted" and emotive comments on the parties' contentions and actions.
…
While some reliance on … counsel's heads … may not be improper, it would have been better if the judgment had been in the judge's own words."

Don't improperly draw from your own experience beyond the evidence. It is important that the judgment is decided on the relevant facts and law—not a judge's personal experience.

VII Conclusion

Courts are theatres in which many of the dynamics and dramas of society are played out. Judgments analyse and record some of these performances. They also provide opportunities for skilful writing. Judgments should, however, be confined to the relevant issues and facts. It is essential that the reasoning underpinning a judgment is clear, lucid and understandable for the intended target audience. As stated by the former Chief Justice S Ngcobo "[b]revity, simplicity and clarity are the watchdogs for effective judicial writing."

Social Media and the Judiciary

Social media platforms have made it easier for people from all over the globe to connect, share ideas, discuss matters of personal and public importance, and most importantly share their personal opinions on various matters. A relatively new mode of communications, social media has expanded at an exponential rate over the past two decades. There are however pro's and con's to using these platforms. As evidenced in recent years there have been a number of instances where people have posted content that has inevitably garnered them negative publicity, and even convictions. In a seminar delivered in January 2019 Judge President Cagney Musi explores the judiciary's relationship with social media, as he dissects how it can be used as well as the dangers it can pose for jurists.

Social media has become an important part of our lives. The exponential increase in social media platforms has caused many institutions, including judiciaries, to rethink their communication policy and strategy. Many Judicial Officers are active on social media platforms. They are, however, divided on whether Judicial Officers should use social media. In my view, Judicial Officers may and should use social media platforms. They must do so with circumspection and consideration of their ethical duties.

Facebook, which is one of the popular social media sites, was founded on 4 February 2004. WhatsApp version 2.0 was released in August 2009. The Code of Conduct for the South African judiciary was published on 18 October 2012 . Although the Code of Conduct was published more than eight years after Facebook was started, it does not make any reference to social media. The principles contained in the Code of Conduct are, however, also applicable to social media interaction by judges.

Some of the relevant articles and notes contained in the Code of Conduct include:

"Article 4: Judicial Independence
A judge must-
- uphold the independence and integrity of the judiciary and the authority of the courts;

Article 5: To act honourably
- A judge must always, and not only in the discharge of official duties, act honourably and in a manner befitting judicial office.

Notes:
- A judge behaves in his or her professional and private life in a manner that enhances public trust in, or respect for, the judiciary and the judicial system.
- Judicial conduct is to be assessed objectively through the eyes of the reasonable person.

Article 7: Equality
A judge must at all times-
- personally avoid and dissociate him-or herself from comments or conduct by persons subject to his or her control that are racist, sexist or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution;
- in court and in chambers act courteously and respect the dignity of others;
- in the performance of judicial duties refrain from being biased or prejudiced.

Notes:
- These provisions are aimed at promoting courtesy and ensuring a degree of decorum.
- Judges strive to be aware of and understand the many differences between persons and to remain informed about changing social attitudes and values.
- The multi-cultural nature of South African society calls for special sensitivity for the perceptions and sensibilities of all who are affected by court proceedings.

Article 8: Transparency
A judge must-
- take reasonable steps to enhance the accessibility of the courts and to improve public understanding of judicial proceedings; and
- unless special circumstances require otherwise-

* conduct judicial proceedings; and
* make known his or her decisions and supporting reasoning, in open court.

Notes:
- The legitimacy of the judiciary depends on the public understanding of and confidence in the judicial process.
- The function of the judiciary fails if its proceedings are not understood.
- A judge avoids unnecessary discussion in chambers (i.e. with the legal representatives in the absence of the parties) of matters that may be relevant to the merits of the case.

Article 11: Restraint
A judge must-
- save in the discharge of judicial office, not comment publicly on the merits of any case pending before, or determined by, that judge or any other court;
- not enter into a public debate about a case irrespective of criticism levelled against the judge, the judgment, or any other aspect of

the case;
- refrain from any action which may be construed as designed to stifle legitimate criticism of that or any other judge;
- not disclose or use non-public information acquired in a judicial capacity for any purpose unrelated to his or her judicial duties;
- unless it is germane to judicial proceedings before the judge concerned, or to scholarly presentation that is made for the purpose of advancing the study of law, refrain from public criticism of another judge or branch of the judiciary.

A judge may participate in public debate on matters pertaining to legal subjects, the judiciary, or the administration of justice, but does not express views in a manner which may undermine the standing and integrity of the judiciary.

Formal deliberations as well as private consultations and debates among judges are and must remain confidential.

Article 12: Association
A judge must not-
- belong to any political party or secret organization;
- unless it is necessary for the discharge of judicial office, become involved in any political controversy or activity;
- take part in any activities that practice discrimination inconsistent with the Constitution; and
- use or lend the prestige of the judicial office to advance the private interests of the judge or others."

The South African Judiciary has adopted a Communications Policy which includes a section on social media. The policy provides as follows:

"Judges and Magistrates may not make political statements or express a political opinion on their personal social media sites or on other social media.

Judges and Magistrates must not represent the Judiciary on their personal social media sites or on other social media.

When using social media in their personal capacity, Judges and Magistrates must make every reasonable effort to make it clear that they are contributing to social media sites as private individuals, and not as a representative of the Judiciary.

Whilst using social media in their personal capacity, Judges and Magistrates must not disclose any Judiciary information or content that they are not specifically authorised to disclose.

In their personal capacity using social media, Judges and Magistrates should be aware of their responsibilities under the Judicial Code of Conduct, Code of Conduct for Magistrates, including the Oath or Affirmation of Office, and other policies relating to political activity, acceptable use of government network and information technology assets, harassment and discrimination, and discipline policies, including off duty conduct.

In their personal capacity, when engaging in social media activities, Judges and Magistrates must use a private e-mail address rather than their official e-mail address."

Judicial Officers must always act honourably and their activities must be compatible with the status of judicial office. Public trust in the judiciary and the judicial system can be eroded by the manner in which Judicial Officers use social media. Interacting on social media or reading tweets or posts whilst the court is in session is unacceptable and may diminish the public's trust in the judiciary to consider all the facts of a case properly. It may also create the impression that the Judicial Officer is uninterested or disengaged.

There is nothing magical about social media, it is a way of communicating. Communication may either be one-on-one or to a group of people. Judicial Officers should therefore not communicate anything via social media which they would otherwise not have communicated. Put differently, communicate via social media that which is conventionally acceptable.

Judicial Officers should be careful about whom they befriend or unfriend on social media

platforms. They should also not randomly follow people on twitter or retweet texts that may be offensive. When a Judicial Officer is part of a WhatsApp group, it is important to monitor the messages sent by all the group members in order to discern whether any offensive messages has been sent by any member of the group. If a racist, sexist, discriminatory or otherwise offensive message has been sent a Judicial Officer has a duty to dissociate him or herself from such message.

Do not accept virtual friends or follow persons who post or tweet controversial texts which may compromise the judiciary. Many Judicial Officers have friends, virtual and real, who are legal practitioners. They should be careful not to refuse to accept a friendship request or to unfriend legal practitioners in circumstances which may be perceived as disliking or showing bias against a practitioner, e.g. accepting friendship requests from all members of the bar but refusing to accept such request from a particular member or unfriending a particular member without any reason. The problematic question that may be asked, is why did you unfriend or refuse to accept a friendship request from that particular legal practitioner?

Judicial Officers should not tweet or post any material about matters before them or any other court. They should also not Google about a witnesses or prospective witnesses during the proceedings. There is nothing wrong in doing so after the proceedings have been finalized.

Judicial Officers are sometimes criticized for the manner in which they handled a particular case or their thoughts in a case. This is nowadays done on social media. The criticism may be fair or unfair. A Judicial Officer should not respond to such criticism, at all, less so via social media. It is advisable to request the head of court to respond or he or she may ask the spokesperson of the judiciary to respond.

Social media platforms can be harnessed to inform Judicial Officers about changing social attitudes and values. It can also be used to deepen the public's understanding of the judicial process, which, in turn, would engender trust and confidence in the judiciary. During high profile cases twitter and Facebook are abuzz with information about court proceedings. This to some extend, assists in heightening the understanding of court processes.

Judges in other jurisdictions also use blogs to inform the public about legal developments. Although blogging is an effective way to discuss legal developments, Judicial Officers should do so with restraint. They should be careful not to blog about matters which may undermine the standing and integrity of the judiciary. They should also avoid becoming involved in political controversy through their blogs.

Social media has its advantages and disadvantages. Being active on social media requires constant vigilance and consideration. Security settings should be audited regularly. All activity on social media platforms should be conducted with due consideration of the Oath of Office and the Code of Conduct, in order to avoid controversy and pitfalls.

Judge President Phineas Mojapelo

Phineas Mojapelo Continuing Judicial Education Centre to bolster jurisprudential development

On 19 March 2019 it was a joyous day for Judges as they welcomed the launch of a Judiciary Education Centre. The centre was officially launched at the Gauteng Division of the High Court, Johannesburg, by Judge President of the Gauteng Division of the High Court, the Honourable Dunstan Mlambo.

Previously known as the Continuing Judicial Education Centre, the centre is now called The Phineas Mojapelo Continuing Judiciary Education Centre, named after the Honourable Deputy Judge President, Phineas Mojapelo.

The purpose of this centre is to improve the Gauteng Division's role in leading jurisdictional development in South Africa.

"We are going to make sure that we deepen and embed continuing judiciary education", said Judge President Mlambo.

The centre will be located at the conference room on the seventh floor of the Johannesburg High Court premises.
The space on the seventh floor had for some time remained vacant due to financial constraints and national austerity measures. Now, Judges of the Johannesburg High Court have received a grant from the Johannesburg Society of Advocates (Johannesburg Bar) which will be used to furnish and equip the Judiciary Education Centre with the requirements specified by the judiciary.

"The contribution by the litigating legal profession demonstrates the realisation of the importance of the facility for the strengthening and continued development of judicial capacity through education and the effectiveness of the courts," said Deputy Judge President Mojapelo.

Judge Mojapelo conveyed thanks to everyone, particularly the Johannesburg Bar, for their support and effort in making sure that the project is a success.

"On behalf of all the Judges of the Johannesburg High Court I express appreciation for the

Deputy Judge President Mojapelo, Judge Wepener, Judge Siwendu and Judge President Mlambo during the launch.

enthusiastic support for the project," said Judge Mojapelo.

The centre will be overseen by the Johannesburg High Court Trust. The trustees are: the Honourable Deputy Judge President Phineas Mojapelo (Chairperson of the Trust), and the Honourable Judges WL Wepener and N T Siwendu.

The centre will require further funding in order to make it an efficient, up to date Centre with appropriate facilities to ensure quality continued training of Judges. Couzyns Inc. have agreed to receive funds on behalf of the Johannesburg High Court Trust and account to the Trust on a regular basis.

Judge Mojapelo has encourages all parties that are in agreement with the vision and goals of the centre to assist financially by making contributions. The Couzyns Inc. trust account details are as follows:

Couzyns Inc Trust Account
Bank: Nedbank
Branch: Kruis Street
Account number: 1906 355 010
Branch code: 19060
Ref: Your name and JHCT (Johannesburg High Court Trust)

Please forward an email to confirm your payment and receive acknowledgement to: Nakka@couzyns.co.za

Judge President Dunstan Mlambo addressing the launch.

Some of the guests who were present at the launch of the Judiciary Education Centre.

Judge Colin Lamont

Handling expert evidence in court

Often issues arise in court which can only be dealt with by a person having appropriate skill knowledge and expertise which is not generally within the domain of all judges. These issues can only be approached by a judge once s(he) has been instructed in the skill in question. This instruction is provided by experts who the parties call. Opinion evidence will be admissible when the court can receive appreciable help from the witness on the particular issue. That will be when "by reason of their special knowledge and skill, they are better qualified to draw inferences then the trier of fact. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful." See: Cooper's (South Africa) (Pty) Ltd v Deutsche Gesellschaft fur Schadlingsbekampfing MBH 1976 (3) SA 352 (A) at 370 G – H.

The evidence which an expert gives cannot readily be dealt with by the opposing party. For this reason the rule dealing with expert evidence provides that advance notice of a party's intention to call an expert is required to be given. The notice provides for the identity of the expert to be disclosed. This enables the opposing party to see who the expert is and establish the field of expertise. The rule requires the giving, a few days later, of a notice setting out a summary of the expert's opinion and his/her reasons for it (Rule 36 (9)).

The reasons for an expert's opinion will encompass the facts upon which s(he) relies, the reasoning and opinion which s(he) applies to those facts as also why the opinion which s(he) applies to the reasoning is the appropriate opinion.

It is immediately apparent that there are 3 integral sets of data involved:
1. the facts;
2. the reasoning and opinion; and
3. why the opinion is apposite.

As part of the pre-trial procedure there will usually be some degree of Case Flow Management as also a requirement that there be a meeting of experts and a pre-trial conference.

The meeting of the experts is necessary for them to identify the precise set of facts on which each relies. Once this is achieved it will be possible for them to identify which facts are common cause and which are in dispute. Often the experts will concede that if a particular fact is present or absent that the opinion is apposite or not as the case may be. This process can lead to it becoming unnecessary to do more at the trial than decide which fact is proven. The benefits are obvious. On rare occasions the opinion itself is disputed. (Even if all the facts on which you base your opinion are established it is not an appropriate opinion). In these rare cases the experts will place the opinions before court and explain why the particular opinion is probably the correct one. Experts who rely on expertise to

express an opinion cannot simply be dismissed. The classic example of such an opinion is "in my experience the plaintiff will need a further operation in x years." The logic is not readily capable of being understood yet the facts which underlie the opinion in the expert's view entitle him/her to draw the conclusion (opinion). The underlying facts are not known to the court nor is there evidence establishing them. The conundrum can only be solved by understanding that it is the best evidence that can be produced and that there is a degree of certainty as to the facts by reason of the experience of the expert. The judge will apply his/her own judgement and skill to see whether the opinion is rational.

The views and opinions of experts are not binding on the party using him/her save to the extent such party adopts them (the expert after all no more than a witness for the party.) This is why it is vital that once the experts have met and drawn their joint minute the parties must meet and deal with the issues raised. This happens at the pre-trial conference during which parties will make admissions and debate the minutes.

It is exactly because a party may not call a particular expert to give evidence at the trial that there is a rule dealing with forced disclosure of reports and examinations in certain circumstances. This enables the opposing party to consider what to do. The way in which the trial is conducted including admissions made are determined by the party and his/her legal team. This is not to say that it will be easy for a party to ignore what a witness s(he) employed has said. From the judge's perspective admissions and calling witnesses are in the hands of the party and the legal team and this principle must not be forgotten. As a general rule in civil cases the court has no power to call a witness without the consent of the parties; it is the parties who lay before the court the evidence they think necessary to support their respective cases. See City of Johannesburg Metropolitan Council v Patrick Ngobeni [2012] ZASCA 55 para 37.

The function of the witness is to provide a judge with the necessary skill and expertise to himself/herself reach a conclusion on the issue to which the expert speaks. This fundamental feature of an expert's evidence is often overlooked by judges. A judge is required to evaluate the evidence of the expert and consider whether the facts have been established and there are proper reasons advanced in support of the opinion. "It is not the mere opinion of the witness that is decisive but his/her ability to satisfy the court because of his/her special skill training and experience the reasons for the opinion which s(he) expresses are acceptable". The court must be satisfied that the opinion has a logical and rational basis, in other words, that the expert has considered comparative factors including the risks and benefits and has reached a conclusion which accords with the facts and underlying reasoning. See MEC For Health, Western Cape v Sinethemba Qole [2018] ZASCA 132 at paragraph 38.

Judges must be careful not to accept too readily isolated statements by experts. Their evidence must be weighed as a whole and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion. See Life Healthcare Group (Pty) Ltd v Dr Abdool Samad Suliman [2018] ZASCA 118 paragraph 15.

What is required in the evaluation of an expert's evidence is whether and to what extent the opinion advanced is founded on logical reasoning. See Michael & Another v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 1188 (SCA) at para 36 to 37. Charles Oppelt v Head: Health, Department of Health, Provincial Administration: Western Cape [2015] ZACC 33 at paragraph 36. In medical cases even if the body of professional opinion sanctions particular conduct if the opinion of the body of opinion is not capable of withstanding logical analysis and is therefore not reasonable it would be permissible to find that a competing rational and logical view is apposite. The assessment of medical risks and benefits is a matter of clinical judgment which the court is not normally able to make without expert evidence. It is wrong to decide a case by simple preference where there are conflicting views both capable of logical support. Probably stated negligence in medical cases is determined by comparing the conduct of the doctor against the conduct standard set by the generally accepted sound

medical practice; if the generally accepted medical practice accepted to be sound cannot be rationally and logically defended then it does not set an appropriate standard by which to test the medical practitioner's conduct. See Linksfield supra at 243 A – E.

An expert's opinion should express his/her reasoned conclusion based on certain facts or data which are either common cause, or established by some evidence or that of some other competent witness. An expert's unsupported statement of his/her opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which leads to the conclusion including the premises from which the reasoning proceeds are disclosed by the expert. See Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A.D.) at 616 H.

An expert has duties which s(he) should observe when s(he) gives evidence.

1. the evidence s(he) presents should be the independent product uninfluenced as to form or content by the exigency of the litigation;
2. the expert should provide independent assistance by way of objective and unbiased opinion in relation to matters within his/her expertise;
3. s(he) should state the facts or assumptions on which his/her opinion is based, s(he) should not omit to consider material facts which detract from his/her concluded opinion; and
4. s(he) should make it clear when a particular issue or question falls outside his/her expertise.

An expert is there to assist the court. S(he) must be neutral and must provide sufficient factual basis for his/her reasoning and explain why the reasoning is appropriate to enable the court to be able to assess the value of his/her opinion. See PWC v National Potato [2015] ZASCA 2 at para 96 and following.
It is the duty of the court to ensure that the expert gives evidence of an admissible nature on an issue which is to be decided. Frequently experts are called on issues which they are not entitled to express a view on, as for example the interpretation of the document. A judge should be careful to allow the witness to give evidence on what may be an inadmissible issue. To allow a witness to proceed to give evidence which may be lengthy intricate and detailed and all of which may later prove to be inadmissible results in a lengthy wasteful and expensive trial. See PWC supra at 78.

The court when it assesses expert evidence must remember that experts are generally scientists and apply the standards which are applicable in their field to their reasoning. The scientific standard whatever it may be, is not the appropriate standard which the court must apply. The standard which applies in court is a balance of probabilities and facts and opinions must be tested against that standard. It is the difference in the tests that explains why different results are given to the same set of facts applying the same reasoning but also applying the different standards. For example if the scientific standard is based on a 100% certainty and the result of a test shows only a 99.9% the test result will not be proof of what the scientific standard would regard as proven on 100% certainty. If the test of a balance of probabilities is applied the court will have regard to other factors which may have a bearing on the matter and affect the result and come to the conclusion that the result is proven. So for example if a paternity test establishes with 99.9% certainty of the father in fact being the father, on the application of the scientific test the father is not established to be the father. A court may consider an additional fact for example that the only person who had access to the woman at the relevant time was the person identified with 99.9% certainty and reached the conclusion that on the probabilities the person so identified is the father. See Linksfield at 1188.

Courts deal in probabilities. A court must decide whether or not something probably happened not whether or not as the scientific certainty it would happen. The scientific measure of proof is the ascertainment of scientific certainty; the judicial measure of proof is the assessment of probability.

Surveys as evidence

There are two problems – the problem of admissibility and the problem of the value of the survey, having regard to the manner in which it was conducted. As to the latter problem, if a survey is to have any value, the questions asked of interviewees should be fair and should be formulated so as to preclude weighted or conditioned responses. See Hoechst Pharmaceuticals (Pty) Ltd v The Beauty Box (Pty) Ltd (in liquidation) and Another 1987 (2) SA 600 (A), MacDonald 1997 (1) SA at 25.

To sum up generally the attack of a party is to the facts upon which the expert relies. If that is the attack the issue is the existence of the fact not the opinion of the expert and the experts can be dispensed with by parties making appropriate submissions. Sometimes the opinion of the expert who is in doubt, it will then be necessary for experts all to determine what the opinion is and why that is correctly adopted opinion is applicable to the facts. The court once it has been "trained" by the expert to deal with the scientific issue arising must itself decide on the probabilities whether the conclusions are rational and justified.

Judge Colin Lamont speaking during the Aspirant Judges Programme hosted by the South African Judiccial Education Institute (SAJEI) in January.

State of the Nation Address 2019

The Heads of Court at the State of the Nation Address 2019, at Parliament.

The Judicial procession ahead of the start of the State of the Nation Address.

Judge President Monica Leeuw with Judge President Dunstan Mlambo.

The Heads of Court arriving at Parliament ahead of the State of the Nation Address.

Judge Rampai

Up close and personal

1. Who is Judge Mojalefa Rampai?

I have no idea. I don't know the character. I am told that he looks like a boy from Sophiatown who was forcefully removed from there and resettled at Meadowlands. Later his parents took him to the Free State where he grew up on a few farms in the districts of Parys, Vredeford, Kroonstad and Welkom. He became a great lover of country life and nature. He was educated at the famous Adams College at Amanzimtoti in the south coast of Natal, now KZN. He acquired a little knowledge of law at Ngoye, Kwa-Dlangezwa in KZN. He practised law as an attorney in Welkom and Nelspruit. He was in the same law firm as Dr NM Phosa, Justice PM Mojapelo DJP, Justice EM Makgoba JP and Justice Legodi JP. Later he became a judge because nobody wanted the job.

2. What is your personal philosophy in life?

Do what you do and do well. You the master of your own destiny.

3. What qualifications do you possess?

MH Rampai B.Proc (UZ)

4. When did you join the judiciary?

I was elevated to bench in year 2001.

5. When you joined the judiciary was there any specific objective that you wanted to see come to pass that you longed to fulfil?

Undoubtedly. My burning desire was to collaborate with my fellow sons and daughters of the soil to restore the human dignity of our people, to beef up crime reduction endeavours of all the responsible law agencies, to improve the global image of our of our beloved country which has been seriously tarnished by the disturbingly high levels of lawlessness, to show that unjust laws cannot be justly applied, to show that any child can, given a fair and equal opportunity and to prove that this intricate and troublesome vocation called law or legal science, was not the natural preserve of one particular race. Those then were a few snippets of my dream. Looking back over my life as a judge, I realize that my

dream remains just that.

6. What challenges have you encountered working in the judiciary?

In the beginning black judges were not well received for obvious reasons. For time immemorial, the judiciary was considered to be the exclusive domain of white males. Being considered an affirmative action candidate unworthy of the job and status was a challenge of enormous magnitude. It was no easy walk in the park to convince the world that the transformative values of our society would not be complete without a truly transformed judiciary. I had to work harder than most of my colleagues because I did not want to disappoint my people. I appreciated that, first and foremost, I represented my people and not myself. My energy reserves were constantly fuelled by the words of Dr Martin Luther King Jr. He reminds us that when a black child fails, the black nation fails and that when a black child succeeds, the black nation succeeds.

7. Since you will be retiring from the bench, where are you heading to?

The big wild world is beckoning out there. I would like to take my wife, Nthwentle, on a tour around the world to see places, to admire faces but to avoid cases. I would like to travel a whole lot more around our beautiful country. I would like to play a little bit of casual golf. And I would like to spend some tranquil moments in my garden.

8. How would you like to be remembered in the legal fraternity?

If the legal fraternity can help it, let them simply forget me – so much the better if they can do that.
However, in case they have nothing else to do, tell them they can remember me as a modest judge who did his bit to serve his country and its people without fear, favour or prejudice.

En nou gaan ek oorskakel na die boere taal want ek's mos 'n Vrystater:

"Dit sal ook aangenaam wees as die regsgemeenskap my kan onthou as dié regter wat vir ure en dae oor die jare heen op die regbank stil gesit het, wat geduldig geluister het en wat daarna lang uitsprake geskryf het om die hofdebatte van sy geleerde vriende en vriendinne sinvol aan die arme kliënte te verduidelik wat die rekeninge van die deurmekaarspul moes betaal."

9. If there was something you could change in the South African judiciary, what would it be?

They say the more things change – the more they remain the same. That being the truth, plain and simple, I would not change much save the designation of the most senior judges in the land. Consider this example:

- Cameron J, where the letter "J" is understood to mean Judge of the High Court.
- Cameron JA, where the abbreviation "JA" is understood to mean Judge of the Supreme Court of Appeal.
- Cameron J, the abbreviation "J" is detached from the Constitutional Court where he now sits.

To the uninitiated, Cameron J, creates a wrong impression that such a senior judge has once again become a High Court Judge. I am of the view that the current designation or acronym of the most senior judges in the land is a misnomer. It does not appropriately distinguish them from us, the High Court judges, as it should. I would, therefore, change their designation as follows: Cameron JC, which acronym will be readily understood to mean Judge of the Constitutional Court.

MH Rampai J, finally signing off.

Recent judgments from the Constitutional Court and Supreme Court of Appeal

Below are some of the recent judgments from the Constitutional Court of South Africa as well as the Supreme Court of Appeal.

CONSTITUTIONAL COURT

Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others CCT40/15A. The Constitutional Court handed down judgment in an application by the Speaker of the National Assembly and Chairperson of the National Council of Provinces (Parliament) for an extension of an interdict issued by the Constitutional Court in Land Access Movement of South Africa v Chairperson, National Council of Provinces (LAMOSA 1) against the processing of any land claims lodged between 1 July 2014 and 28 July 2016 (interdicted claims) pursuant to the now repealed Restitution of Land Rights Amendment Act (repealed Amendment Act).
Full judgment

Cloete and Another v S (Legal Aid South Africa as Amicus Curiae); Sekgala v Nedbank Limited CCT324/17 & CCT63/18. The Constitutional Court handed down judgment in two applications seeking leave to appeal against a decision made by the President of the Supreme Court of Appeal (President) pursuant to section 17(2)(f) of the Superior Courts Act (Act). The applications raise the same question: is a decision under section 17(2)(f) of the Act appealable to this Court? In a unanimous judgment written by Theron J, the Constitutional Court dismissed the applications for leave to appeal.
Full judgment

Long v South African Breweries (Pty) Limited and Others; Long v South African Breweries (Pty) Limited and Others CCT61/18. The Constitutional Court handed down judgment in an application seeking leave to appeal against a judgment of the Labour Court relating to two review applications, one concerning Mr Long's dismissal and the other his suspension prior to dismissal. In a unanimous judgment written by Theron J, the Constitutional Court partially upheld the application for leave to appeal. The Constitutional Court refused leave to appeal on the merits of the review, holding that the Labour Court had correctly held that an employer is not required to give an employee an opportunity to make representations before a precautionary suspension. The Constitutional Court further held that the Labour Court was correct in holding that the dismissal had been fair and that Mr Long should not be reinstated. However, this Constitutional Court granted leave to appeal against the Labour Court's costs order.
Full judgment

Trustees of The Simcha Trust v Da Cruz and Others; City of Cape Town v Da Cruz and Others CCT125/18 and CCT128/18. The Constitutional Court handed down judgment in two applications seeking leave to appeal against the judgment of the Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Full Court). Both applications raised the same legal issue, namely does the legitimate expectations test, which is used to assess building plans that might derogate the value of neighbouring properties, also apply to approving building plans that might disfigure a neighbouring area or be unsightly? In a unanimous judgment written by Theron J without a hearing, the Constitutional Court dismissed the applications for leave to appeal.
Full judgment

SUPREME COURT OF APPEAL (SCA)

Recycling and Economic Development Initiative of South Africa v The Minister of Environmental Affairs (1260/2017 and 188/2018) and Kusaga Taka Consulting (Pty)

Ltd v The Minister of Environmental Affairs (1279/2017 and 187/2018) in which matter the SCA upheld an appeal against a ruling by the Western Cape High Court winding up two companies, Recycling and Economic Development Initiative of South Africa (Redisa) and Kusaga Taka Consulting (Pty) Ltd (KT).
Full judgment

Tutton v The State (294/18) in which matter the SCA ruled that non-parole order under s 276B of the Criminal Procedure Act not to be lightly imposed unless justified by circumstances relating to parole - parties should be forewarned of the intention to make such an order and be invited to present oral argument on the specific issue.
Full judgment

Parktown High School for Girls v Hishaam & another (93/2018) in which matter the SCA upheld an appeal against a judgment of the Gauteng Division of the High Court, holding the Parktown High School for Girls liable for the injuries sustained by Mr Naqeeb Emeran on the School's premises while attending a fashion show on 24 August 2012.
Full judgment

Benhaus Mining v CSARS (165/2018) in which matter the SCA upheld an appeal against a decision of the Tax Court, Johannesburg, that had held that contract miners, who work open cast mines for a fee, do not conduct mining operations and are not thus entitled to the benefit of the special dispensation afforded by the Income Tax Act 58 of 1968 to mining companies.
Full judgment

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