

# White Paper on the Judicial System

## Memorandum by Pretoria judges

**B M Ngoepe**

*Judge President of the Transvaal Provincial Division*

*This memorandum reflects the views of the Judge President, the Deputy Judge President and the other judges of the Pretoria High Court on the proposals contained in the White Paper produced by the Policy Unit of the Department of Justice.*

### I Summary of the main points

#### **Necessity for the proposals**

The White Paper envisages a single unified judiciary consisting of the present judiciary (ie those persons who sit in the Supreme Court of Appeal, the Constitutional Court, the High Courts and the other courts of status similar to the High Courts) and the present magistracy (ie those persons who sit in the magistrates' courts and the other courts of status similar to that of magistrates' courts). The apparent purpose of creating this bureaucratic judiciary is the establishment of a career path from the lowest court to the two highest courts, the Supreme Court of Appeal and the Constitutional Court.

It is not necessary for such a radical change to the court system to achieve this purpose. At present magistrates may be nominated for judicial appointment and if found to be suitable may be appointed judges.

The creation of a single unified judiciary is unconstitutional. The Constitution creates a hierarchy of courts (sections 167–179) and clearly distinguishes between higher courts and lower courts with regard to the competence of the courts to decide on constitutional issues (section 170) and the method of appointment (section 174). An amendment to the Constitution to achieve this goal is not justified.

The creation of a bureaucratic judiciary will impoverish the judiciary as private practitioners with the required ability, competence and expertise will simply not be prepared to accept appointments, and therefore the mediocrity of the judiciary will be ensured.

#### **Competence and independence of the judiciary**

Judges of the Supreme Court of Appeal, Constitutional Court and High Court must be representative, competent, independent, committed to the values enshrined in the Constitution and sensitive to issues such as gender and race. In terms of section 174 any appropriately qualified and fit and proper person may be appointed a judge. It is the task of the JSC to appoint such people. This is provided in the Constitution and no amendment of the law for this purpose is necessary.

The White Paper overlooks the one primary requirement of competence: the ability to adjudicate correctly and expeditiously. It incorrectly assumes that it is possible to achieve such competence by "fast-track" judicial training and "appropriate support for fast-tracked judicial appointees". Experience gained through years of legal practice remains the best source of competence. The suggestion is also contrary to the Constitution which provides that judges must be appropriately qualified at the time of appointment.

The best source of appointments as judges is the advocates' profession. Many senior advocates have all the necessary qualities. Regrettably, some of them and many in this division are not allowing themselves to be nominated for appointment as they feel alienated by the JSC.

The appointment of inexperienced advocates, attorneys and academics will impoverish the bench as with few exceptions they

do not have the necessary competence for the office. The appointment of incompetent persons will destroy the legitimacy of the judiciary.

#### **Removal of the distinction between judges and magistrates**

This is contrary to the express provisions of the Constitution which creates a hierarchy of courts each with its sphere of competence.

The proposals ignore the vast difference in expertise between experienced practitioners (from whom judges are appointed) and magistrates. Magistrates tend to be competent in only a limited area of the law. Practitioners and especially advocates have acquired expertise and proficiency over the whole spectrum of legal work.

The High Court must be preserved as the repository of judicial competence and independence.

#### **The Judicial Services Commission ("JSC")**

The powers of the JSC are described in the Constitution (section 178(4)). The JSC plays a major role in the appointment of all judges (section 174(3)-(6)) and the removal of judges from office (section 177).

The Department of Justice, in conjunction with the Magistrates Commission, administers all matters relating to the judiciary and the magistracy. It is not necessary to duplicate the bureaucracy by creating a second bureaucracy under the control of the JSC. The expense is not warranted.

It is unacceptable for the judiciary to be accountable to the JSC as the majority of its members are not judges and would therefore have little appreciation of what conduct is improper for a judge. This principle is well-established in relation to professional disciplinary matters.

The Judge President and Deputy Judge President are the appropriate persons to ensure proper judicial behaviour. The need and desirability for the JSC to have disciplinary powers over judges has not been established.

## II Detailed response

### *General observations*

- 1 In this memorandum "judge" means what it means in the Constitution: ie a person who sits in the Supreme Court of Appeal, the Constitutional Court, the High Courts or a court of status similar to that of a High Court and "judiciary" is used as the collective noun. Similarly, "magistrate" means what it means in the Constitution: ie a person who sits in a magistrate's court or a lower court with status similar to that of magistrates court: and "magistracy" is used as the collective noun.
- 2 The White Paper has as its central theme the justification for the creation of a united judiciary (consisting of the present judiciary and the present magistracy) for the purpose of providing a member of this bureaucratic judiciary with a career path from the lowest court to the two highest courts – the Supreme Court of Appeal and the Constitutional Court. It is not suggested what public interest will be served by this radical proposal. It is a confusing (and confused) document which disregards the realities of legal practice and seems to take no account of the provisions of the constitution which expressly preserve the difference between higher courts (Supreme Court of Appeal, Constitutional Court, the High Courts and other courts of status similar to High Courts) and lower courts (magistrates' courts and other courts of status similar to magistrates' courts).
- 3 Chapter 8 (sections 165 to 180) of the Constitution deals with courts and the administration of justice. Section 166 provides for the courts and sections 167 to 170 provide for a hierarchy of courts. The distinction between the higher courts and the lower courts manifests itself in two significant aspects. First, all the higher courts may enquire into and rule on the constitutionality of legislation and the conduct of

the President. In terms of section 170 lower courts are expressly prohibited from enquiring into and ruling on the constitutionality of legislation and the conduct of the President. Second, the Constitution makes express provision for the appointment of judges to the Supreme Court of Appeal, the Constitutional Court and the High Courts, the qualifications for appointment and the factors to be taken into account when judges are appointed. In all cases the appointments are made either in consultation with or by the Judicial Service Commission ("JSC"). There are no such provisions in the Constitution dealing with magistrates. Magistrates continue to be appointed in terms of legislation dealing specifically with the magistracy.

The Constitution therefore preserves the clear distinction between judges (persons who sit in the Supreme Court of Appeal, Constitutional Court, High Courts and courts of status similar to that of High Courts) and magistrates (persons who sit in the lower courts). If a unified judiciary is to be created, an amendment of the Constitution will be necessary. The necessity for this and the desirability of taking such a drastic step is not addressed in the White Paper.

- 4 It is clear that the White Paper was prepared without the assistance of a judge or senior legal practitioner experienced in civil and criminal litigation. This results in a number of statements being made which are inaccurate or simply not correct. For example, it is stated that magistrates play as important a role in the administration of justice as judges do. Magistrates are clearly a vital and very important component of the legal system but they deal with a huge number of minor criminal cases and comparatively few civil cases. Only in the regional criminal

court is the work comparable with the work in the High Court as far as complexity and importance is concerned. But the jurisdiction of the regional criminal magistrate is still limited. Otherwise there is no comparison between the complexity and the importance of the work which judges and magistrates do. There is also no comparison between their training and experience. It simply does not follow that because a magistrate has proved himself to be a good judicial officer (in a magistrate's court) he is good enough for an appointment to the bench of the High Court. That is because the milieu in which they function is so different.

- 5 The essential requirement of a court system is that it be efficient and cost-effective. A court system does not produce revenue but it must be borne in mind that as far as expenditure is concerned there is a fundamental difference between the criminal justice system and the civil justice system. The State bears the entire cost of the former. The State bears part of the cost of the latter: ie the court administration and the judicial officers only. An inefficient high court civil system will be too costly to the public.
- 6 The White Paper deals with three main issues in support of its central theme:
  - (i) The composition, competence and independence of the judiciary and how this is to be achieved.
  - (ii) The removal of the distinction between judges of the High Court, Supreme Court of Appeal and Constitutional Court and magistrates and the creation of a judicial bureaucracy.
  - (iii) The role of the JSC in the administration of justice and judges of the High Court, Supreme Court of Appeal and Constitutional Court in particular.

A number of other matters are dealt with but these are either self-evident or of little or no consequence in relation to the effective functioning of the courts.

## The three main issues will be dealt with in turn

### **I *Composition, competence and independence of the judiciary and how it is to be achieved***

A judge of the High Court must be able to deal with criminal and civil work at

the highest level of difficulty and complexity. Cases of the greatest importance and difficulty are conducted by highly skilled and experienced practitioners. Very often powerful and important com-

mercial and political persons and interests are involved.

It is self-evident that judges of the Supreme Court of Appeal, Constitutional Court and the High Court apart from >

being knowledgeable about the law must be representative, competent, independent, committed to the values enshrined in the constitution and sensitive to issues of gender and race. Appointing judges with these qualities is essentially the task of the JSC. In terms of section 174(5) the President appoints judges on the advice of the JSC. This means that in effect the JSC appoints judges.

Section 174(1) provides that any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Section 174(2) provides that when judicial officers are appointed the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered.

Accordingly it is the task and function of the JSC to ensure that these considerations are taken into account. An appropriately qualified person will be someone who by virtue of academic and professional training and professional experience is able to adjudicate (efficiently) upon the issues coming before the High Court. This means the ability to reach the correct conclusion expeditiously so that the court disposes of the cases presented to it and the rolls do not become clogged. Competence is therefore an essential requirement for judicial appointment. If judges are not competent the system will fall into disrepute and become illegitimate.

A fit and proper person is someone who is knowledgeable about the law, experienced, balanced, honest, independent, committed to the values enshrined in the Constitution and is sensitive to certain issues such as gender and race. If judges are not fit and proper the system will also fall into disrepute and become illegitimate.

Representivity will depend upon the composition of the judiciary at any particular time.

The formal Bar (ie the body of practising advocates) continues to be the best source of candidates for judicial appointments. By virtue of their academic and professional training and professional experience many practising advocates have all the necessary qualities for appointment – particularly that of compe-

tence. In Johannesburg and Pretoria alone there are more than 1 100 practising advocates, 200 of whom are senior counsel and, there are at least 40 to 50 of these senior counsel at any one time who would be obvious candidates for judicial appointment. As already mentioned some members of the upper echelons of the Bar feel alienated by the JSC so that some of the very people who should be appointed as judges are refusing to be nominated.

Generally speaking, attorneys and academics do not have the training and experience for the necessary competence for judicial office. The same applies to advocates who have not achieved senior status and/or not build up successful practices at the Bar.

The notion of “fast-track judicial training for affirmative action appointees” and “appropriate support for fast-tracked judicial appointees” implies that they do not have the competence and in-

---

*“Representivity will depend upon the composition of the judiciary at any particular time.”*

---

dependence (and other qualities) for judicial office at the time of appointment. Appointing such people is unacceptable for at least three reasons:

- (a) It is contrary to the requirement of the Constitution that judges be appropriately qualified and fit and proper persons.
- (b) It is contrary to what the public is entitled to when they take their disputes to the High Court for adjudication.
- (c) It is contrary to the reality that there is no substitute for the experience gained in actual practice.

It must be borne in mind that judges are appointed for life and serve until the age of 70 years and thereafter until the age of 75 years as required. A weak appointment is made for 20 to 30 years. A number of weak appointments has a devastating effect on the Bench and the damage done to the Bench both in terms of stature and legitimacy will be irreversible. Some responsible practitioners, rightly or wrongly, have already formed the view that this has already happened. They speak about not placing their mat-

ters before certain divisions of the High Court.

Judges are required to work on their own and at speed. The workload in this and other divisions means that there is literally no time for competent and experienced judges to teach incompetent and inexperienced judges how to do their work. *It cannot be over-emphasised that a judge must be appropriately qualified and a fit and proper person when appointed.*

If a High Court judge requires sensitivity training with regard to race and gender issues and continuing education with regard to human rights and other constitutional issues that judge might not be appropriately qualified or a fit and proper person for judicial appointment.

No thought appears to have been given as to how these issues will be determined. For example: is every judge to receive training? If so by whom and according to what curriculum? There can be no objection to continuing legal education on a voluntary basis.

## **II Removal of the distinction between judges and magistrates and the creation of a judicial bureaucracy**

The principle that only appropriately qualified, fit and proper persons be appointed as magistrates and the method of appointment referred to is supported. This method of appointment has been used for the past five years. Once again it is emphasised that competence in the sense already referred to in connection with judges is essential. Incompetent magistrates will undermine the esteem in which the office is held and destroy its legitimacy.

The idea that the distinction be done away with has no merit whatsoever. The proposal overlooks the following –

- (i) The Constitution creates a hierarchy of courts each with its sphere of competence. Magistrates' courts have limited jurisdiction in respect of both criminal and civil matters and are expressly prohibited from enquiring into or ruling on constitutional issues. High Courts have unlimited jurisdiction in matters falling within their competence. High Courts decide appeals from magistrate' courts and review decisions taken by magis-

trates. High Court decisions resubject to appeal but not review. High Courts deal with disputes arising from the whole spectrum of civil law, including specialised fields such as patents, water law and income tax. In the course of a single week in the motion court a High Court judge may have to decide disputes involving trade marks, company law, income tax and administrative law.

(ii) Magistrates do not have the same training, expertise and skills as judges do and they do not play "as important a part in the administration of justice as judges do". As already mentioned they are a vital component in the administration of justice but their role is entirely different. It cannot be compared qualitatively with the role of the judges. The fact that an LLB degree will be an essential requirement for appointment as a magistrate does not mean that professional training and experience is irrelevant. The competence and independence required for an appointment as a judge is acquired only after a lengthy period of intensive practice as an advocate. The ability to do the specialised work referred to is developed by conducting cases in these fields.

Advocates are exposed to the full spectrum of legal work during their careers. When starting their careers at the Bar almost without exception advocates appear in criminal cases as well as civil cases. These criminal cases are heard in both the lower courts and the High Courts. Advocates also appear in criminal appeals in the High Court and the Supreme Court of Appeal. This valuable knowledge of the criminal law and practice is retained by advocates throughout their professional lives. Advocates also appear in unopposed civil cases in the High Court and attend to trial and motion work in both the lower courts and the High Court. As they progress and become more experienced their cases become progressively more difficult, more complicated and more specialised. Eventually as a senior counsel an advocate will appear in only the most difficult and complicated applications and trials and appeals to the Supreme Court of Appeal. Usually the best senior counsel build up

practices in specialised fields of the law. At all times advocates are involved in researching and advising on the law, solving legal problems, drafting pleadings and applications and consulting with witnesses in court. This is all done as members of a college where problems can be and are discussed with more experienced colleagues. Skills are honed continuously because advocates practice in competition with each other in an adversarial system. This stimulates the acquisition of knowledge and forensic skills. From the time they commence practice advocates also see at first hand how disputes are adjudicated upon and the process of adjudication become second nature to the experienced advocate. Practice at the Bar also promotes independence. Advocates are trained to think and act independently and fearlessly. This is essential for practice as an advocate.

A magistrate commences his profes-

*"It cannot be over-emphasised that a judge must be appropriately qualified and a fit and proper person when appointed."*

sional life in the criminal court – first in the district court and then in the regional court. If interested a magistrate may sit in the civil magistrate's court. Very few choose to do this. Traditionally the State has not encouraged civil litigation in the magistrate's court and the civil magistrates have been under-resourced and not properly supported. Many magistrates hearing criminal cases in the district courts and most regional magistrates are competent triers of criminal cases but this involves only a small part of the legal spectrum. Some magistrates in the large urban areas become competent triers of civil disputes but this is the exception and not the rule. Most magistrates who hear civil cases are simply not exposed to the spectrum of work dealt with by advocates at the Bar and they certainly do not benefit from the intensive instruction provided by that college. Magistrates do not have the same training and background as advocates in private practice. In this regard the benefits of private practice are unmatched

by a career in the magistracy.

(iii) It is in the public interest that the High Court be preserved and recognised for what it is – ie the repository of judicial competence and independence. If the High Court is not set apart as something of importance practitioners with the necessary skill and experience to maintain the standard of the High Court will not be prepared to accept judicial appointment. No one with the qualities required will be prepared to become part of a judicial bureaucracy. When people of lesser calibre seek judicial appointment for the financial benefits it will bring, that will be the end of any possibility of judicial excellence. Without the appointment of the private practitioner to the judiciary the overall mediocrity of the judiciary will be ensured – the very opposite of what is required in our constitutional democracy.

(iv) The present division between magistrates and judges is not an obstacle to the appointment of a magistrate as a judge. If a particular magistrate is thought to be a suitable candidate for judicial office that magistrate may be nominated for appointment and consideration by the JSC. However, his ability and experience will then have to be compared with that of other nominees. It is not necessary to change the entire structure of the judiciary to accommodate this.

### III The role of the JSC

The constitution determines the role of the JSC. Section 178(4) provides that the JSC has the powers and functions assigned to it in the Constitution and national legislation. As yet no national legislation has been adopted. The Constitution provides that:

- (i) the JSC consult with the President about the appointment of the President and Deputy President of the Constitutional Court and the Chief Justice and Deputy Chief Justice of the Supreme Court of Appeal (section 174(3));
- (ii) the JSC prepare for the President a list of nominees (and, if necessary a supplementary list) for the remaining members of the Constitutional Court (section 174(4));

- (iii) the JSC advise the President on the appointment of judges of all other courts (in effect appoint the judges of all the other courts) (Section 174(6));
- (iv) the JSC may find (presumably after an enquiry) that a judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct as is to warrant that judge's removal from office (section 177(1));
- (v) the JSC may advise the president to suspend a judge who is a subject of a procedure in terms of section 177(1) (section 177(3));
- (vi) the JSC may advise the national government on any matter relating to the judiciary or the administration of justice (section 178(5)).

It is highly undesirable that the JSC be fully provisioned with an administrative support structure so that it can take over all administrative functions relating to the judiciary. This will result in another bureaucratic structure alongside the department of justice which presently is responsible for the administration of matters relating to the judiciary and the magistracy. It will also result in a duplication of costs. This is neither justifiable nor affordable.

The judiciary is opposed to the principle that it be accountable to the JSC for conduct falling short of incapacity, gross incompetence or gross misconduct (section 177(1)). In terms of section 177(1) a judge may be removed from office only if –

- (a) the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; AND
- (b) the National Assembly calls for the judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

In terms of the section 177(3) of JSC may advise the President to suspend the judge who is the subject of procedure in terms of sub-section (1).

Being accountable to the JSC would be in conflict with the principles of judicial independence and the separation of powers which are built into the Constitution. Furthermore because the majority of its members are not judges they

would have little appreciation of whether a judge's behaviour falls short of acceptable judicial conduct. This is long established in relation to disciplinary proceedings conducted by professional bodies such as the medical and dental council, the law societies and the bar councils. Finally, it is highly undesirable that judges be judged by persons other than their peers who know and understand the milieu in which judges work.

Section 180 provides that national legislation may provide for procedures for dealing with complaints about judicial officers. To date no such legislation has been enacted. If such legislation is adopted it should provide that complaints about judicial officers be considered by a panel of judges, wherever possible of seniority greater than that of the judge who is the subject of the complaint.

The suggestion in the White Paper that complaints against judges be inves-


*"It is in the public interest that the High Court be preserved and recognised for what it is – i e the repository of judicial competence and independence."*

tigated by the Public Protector (wrongly referred to as the Public Defender) or a judicial Ombudsman is contrary to the provisions of the Constitution. Section 165(3) provides that no person or organ of State may interfere with the functioning of the Courts. Section 165(4) provides that organs of State must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

The need and desirability for a disciplinary procedure to deal with complaints against judges has not been established. The creation of such a procedure will inevitably lead to unjustified complaints by unsuccessful litigants. This will result in a waste of time and undermine the efficiency of the judge concerned. It is by no means clear how many complaints have been laid against judges and what the outcome of the complaints has been. It is the duty of the Judge President and Deputy Judge President to ensure that judges conduct them-

selves properly in court. There is nothing to suggest that this is not effective. It is self-evident that a person should not be appointed a judge if he/she does not know how to conduct himself/herself in court.

#### IV Sundry matters

- (i) While supporting the principle of optimal utilisation of judicial resources – both as regards manpower and materials – the proposal that all courts, ie both lower and higher courts be housed in one building is not acceptable. This will undermine public confidence in the system. It is an essential component of the system that appellate and review courts be seen to be, and in fact be, completely independent of the courts appealed against and/or reviewed. Even if legally independent of each other the symbolism of the separate court buildings is fundamental to the public perception.
- (ii) No valid reason has been put forward for altering the manner of addressing judges. The manner of address is long established and serves to emphasise the importance of the office. It is also the manner of address used in commonwealth countries. In any event, this is not a matter for the Department of Justice.
- (iii) Certain High Court judges wish to have properly qualified legal researchers. Counsel who appear before them are supposed to do the legal research and provide the judge with relevant authority. High Court judges require the services of a competent secretary/typist who is able to type judgments and attend to other typing required by the judge. To date the Department of Justice has failed to pay adequate salaries to attract secretaries/typists of that calibre.
- (iv) In the past, computer literacy was not an essential requirement for a High Court judge. However, judges, to be more efficient, should now be provided with computers and be instructed as to its use. 

#### WANTED

Bound set of *Law Reports* 1949 onwards. Please contact the GCB at (011) 337-4498.