

LAW MATTERS

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A REFLECTION ON **FREEDOM AND JUDICIAL ACCOUNTABILITY**

These days it is common to hear people questioning the Constitution. Twenty-odd years on and the shiny promise of the new South Africa has been somewhat dimmed in the face of continued inequality, racism and patriarchy.

More and more, one hears people asking whether anything has really changed, whether there was any real victory over apartheid, and whether we were “sold out” by our leaders who drafted the Constitution. There is a debate over whether the bill of rights needs to be amended to allow for expropriation of property without compensation.

Even though I believe we should be slow and careful to amend the bill of rights, I don’t fear this debate.

But I also recently had an experience that showed me that, actually, there have been some real victories; there has been real and tangible change.

It started as a newsroom nightmare. When I am not editing this publication I am the news editor at the Mail & Guardian, and one day we made a terrible mistake. We published a web story saying that the late Judge Ramon Leon, who had only recently passed away, was the trial judge that had sent struggle hero Solomon Mahlangu to the gallows. He was not. He was the judge

that sent another struggle fighter, Andrew Zondo, to the gallows.

The story went viral and it was just awful. We hurt a grieving family. There was no excuse.

The error was pointed out and we then had a mad scramble - to try urgently to establish and verify the real facts. We quickly confirmed that it was Transvaal Provincial Division Judge Theron who had in fact sent Mahlangu to the gallows. Much harder was figuring out which judges of the appellate division had refused his two petitions to appeal.

In the end, I had to journey to Bloemfontein, to the archive of the Supreme Court of Appeal and into history.

My late friend Peter Makurube once described how, when the death penalty was handed down for someone convicted of political “crimes”, a hush would fall over the streets of his Soweto neighbourhood. People would talk in low murmurs, heads bowed, as they boarded their trains and taxis to work. For the majority of South Africans, every time a liberation fighter was sentenced to death, the moment was marked, it was known, it was felt.

And for us that grew up as lawyers after the Constitution was enacted, the repeal of the death penalty – set aside in the

seminal Makwanyane judgment, the first case the Constitutional Court heard – became a signifier, a symbol, of what the new South Africa was all about.

It was a big, big deal.

So you can imagine my sheer confusion when the judgments in the Zondo and Mahlangu cases were not to be found in the law reports. I spent half a day on LexisNexis and Jutastat, trying different search permutations, looking – thinking I must be doing something wrong. It did not even occur to me that these judgments would not be reported.

Apparently the compilers of the law reports did not see these cases as legally significant.

When I got the (jaw-dropping) numbers of how many people were sent to the gallows, year after year, I realised why. According to numbers published in the SA Journal of Human Rights from 1974 to 1989, 1742 people were hanged in the period.

I could not find the judgments and that's how I ended up at the registrar's office of the SCA.

Then – I'm still so indignant about this – as I went through the court records of Mahlangu and Zondo's appeal petitions, I saw that no appellate judges had put their names to the refusals.

We will never know which appellate division judges sent Mahlangu – whose conviction was a travesty of justice if ever there was one – to death. Judge Leon is held accountable for

his sentence in the Zondo case, but the justices of the appellate court – more senior - who refused his appeal petition have escaped scrutiny altogether.

This would never happen today. Every appeal – heard or refused – has names attached to it. This principle of judicial accountability is so deeply weaved into our legal values that it had never even occurred to me that it could be any different.

That day at the SCA I saw the original, hand-written signature of Solomon Mahlangu on his appeal petition – in blue pen. When I saw that Zondo – just 19 when he was hanged – called out for his mum after Judge Leon sentenced him to death, my knees actually buckled and I had to sit down.

Later I sat quietly in the courtyard of the SCA weeping. For Zondo, for Mahlangu, for every person who had died for my freedom.

I wept for how cruel and wrong the death penalty is. And from sheer relief that I never had to be a lawyer in a system that imposed it. I even wept for Judge Leon - because he did.

It was surreal sitting there in the courtyard weeping with the bemused security guard looking on.

But it was a good reminder. Yes, it is true that in many ways the society envisaged by the Constitution is a distant dream and, on many fronts, we have failed dismally. But the repeal of the death penalty is a real, and lasting, victory. Judicial accountability and judicial independence - two sides of a single coin - is another. 

