

“Dead Scorpions and Clipped Hawks: Corruption Beyond *Glenister*”

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Opening remarks

Judge Brand yesterday began with a disclaimer and cited the present Chief Justice and the immediate past Chief Justice with reference to the *Glenister* case. He assured us that the Justices in the minority judgement did not, by implication, support corruption. Let me, in turn, assure Judge Brand that while we are delighted to have his assurances, no one ever doubted this. Indeed, the minority judgement is an *impressive* one, and one would have been hard put not to have concurred. But I would like to believe that the majority judgement in the *Glenister* case constitutes a great judgement, and one which has profound implications for our constitutional jurisprudence.

Of course, I am somewhat biased in this matter. The Helen Suzman Foundation (HSF) featured prominently as the *amicus*. I am also delighted with Judge Brand’s observation about the decisive role of the HSF in this case.

So, I am very pleased to be here this morning to be able to participate in this symposium as the director of the HSF.

Now my disclaimer: The title of my address is *Dead Scorpions and Clipped Hawks: Corruption Beyond Glenister*. I will say very little about the Scorpions. The heads of argument in the judgement of the Constitutional Court are all on our website¹. But I do want to add that I wish to qualify the phrase “Clipped Hawks”.

¹ <http://www.hsf.org.za/projects/justice/litigation/glenister-case>

We have a great regard for what the Hawks are doing and for their leadership. Our concern at the HSF is that we fear that they are handicapped in terms of their operational functions. Hence my phrase “clipped”. And hence our filing papers before the High Court testing the constitutionality of the SAPS Amendment Act.

As the matter is now before the Court it would be inappropriate for me to comment further. Again, our heads of argument are on our website and may be viewed there.

Let me also be clear that I do not speak today as a lawyer or an economist but as the head of a policy think tank rooted in civil society. This interplay, or dialectic, of institutions, leadership, and civil society is what informs our work and, no doubt, explains civil society NGOs’, often perceived, unruliness.

I’d also like to believe that South Africa is the richer for this plethora of institutions, most of whom in the last few days have had their registration suspended by the Department of Social Development. We trust that this is because of technical or bureaucratic reasons which will soon be resolved. I trust that there is not something more sinister about this.

1) Introduction

- A constitutional democracy is not merely created. It requires that parties are firmly committed to its realization.
- South Africa’s Constitution and its Bill of Rights embody a particular type of society under a particular type of government. A society that is free, open, and fair; and a government that is legitimate, representative, transparent, and accountable.
- The HSF is dedicated to promoting the values and principles that underpin our Constitutional Democracy, and ensuring that these are not undermined.
- The HSF recognizes that the separation of powers is the most effective and indispensable way of checking power, ensuring accountability and that the exercise of power is not abused.
- However, as is well known, South Africa faces a number of challenges.

- The National Development Plan², crafted by the National Planning Commission, presents a comprehensive set of strategies and initiatives to address these challenges and to get us closer to the ideals embodied in our Constitution.
- With the ultimate aim of eliminating poverty and reducing inequality, The National Development Plan seeks to address a number of key issues, and a range of social ills.
- One of the issues addressed in the National Development Plan is widespread corruption which is an acknowledged problem in South Africa.³
- The HSF maintains that corruption is not only an issue in itself, but an obstacle to social progress. In short, corruption stands in our way of achieving a just society.
- As (the late) Judge Arthur Chaskalson’s words reminds us:

“Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.”⁴

- With this in mind, The HSF, as *amicus* to the Constitutional Court, challenged the legitimacy of the 2008 National Prosecuting Authority Amendment Act (NPAA Act)⁵ and the South African Police Service Amendment Act (SAPSA Act)⁶ in the landmark case: *Hugh Glenister v the President of the Republic of South Africa and Others*.
- The HSF was successful in its arguments concerning the unconstitutional nature of these Amendment Acts.
- Our assumption is that without a properly independent anti-corruption body, corruption reigns free, and South Africa’s constitutional ideal is impeded. This is a vitally important point. It is, though, hardly an original observation. It’s in the *Glenister* judgement, and, most recently, it’s in the call made by the Public Protector at a Roundtable⁷ hosted by the HSF.

² Published November 2011

³ NDP, Chapter 14 (pp 401-410)

⁴ [4] of *South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 833 (CC)*

⁵ Act 56 of 2008

⁶ Act 57 of 2008

⁷ September, 2012

2) Corruption

- Broadly, corruption is:

“...the abuse of entrusted power for private gain. It hurts everyone who depends on the integrity of people in a position of authority.” (Transparency International)⁸ and

“...the abuse of public resources to enrich or give unfair advantage to individuals, their family or friends.” (Corruption Watch)⁹

- Four questions arise from these definitions:

(1) Who is committing corruption? And why is it tolerated?

- Public sector corruption is rife in South Africa. This centres on the misuse of public funds for private-gain, family or friends, and extends to police corruption.
- In the Private sector corruption goes largely unnoticed with fewer cases being reported and fewer convictions being made.
- Of course, the Private Sector is rife with ‘facilitation payments’, tender rigging, and other forms of solicitation.
- There remains the big question about the interplay between the Public and the Private Sector. Not a Public/Private partnership, which should be encouraged.

(2) What are the consequences?

- Corruption has long-run consequences for economic development.
- Corruption slows economic growth (by lowering investment), it erodes institutions, sabotages public service delivery, undermines the integrity of the state, and violates human rights.

⁸ <http://www.transparency.org/>

⁹ <http://www.corruptionwatch.org.za/>

- A culture of corruption also has moral consequences: Notions of integrity, responsibility, and accountability, are compromised.

(3) Who are most affected?

- Corruption diverts resources from those who need it the most: the poor.
- I again refer to a recent HSF Roundtable¹⁰, where the Public Protector, Advocate Thuli Madonsela, highlighted the effect of corruption on the poor.
- Advocate Madonsela cited cases of corruption in the Department of Home Affairs, and in the RDP housing programme, and illustrated how corruption undermines socio-economic rights, and the justice system, impinging on the rights to water, social security, food and related measures. Provision of these is guaranteed under Section 27 of the Constitution.

(4) Is corruption getting worse?

- Assessing absolute levels of corruption is not straight-forward.
- However, Transparency International¹¹ uses a Corruption Perception Index to rate levels of corruption.
- The Index is based on how corrupt a country's Public Sector is perceived to be, and is measured by examining the effectiveness of prosecutors, courts, and the media are in exposing and investigating and corruption.
- South Africa now ranks 69 out of 187 countries. Over the last 12 years there has been a consistent downward trend.
- South Africa has dropped 31 places between 2001 and 2012.
- And in the years 2009-2012 South Africa has dropped 14 places on the Index.

¹⁰ September, 2012

¹¹ <http://www.transparency.org/>

- Various factors explain the precipitous decline of South Africa down the Index. These include low political competition, weak social values, absence of strong institutional mechanisms, nepotistic appointments, and a lack of enforcement power for relevant legislation.
- This leads to the big question: Is South Africa doing enough to fight corruption?

3) Where we stand and where we want to go.

- The National Development Plan outlines that there needs to be a *political will* to fight corruption.
- This *political will* includes:
 - the will to commit money to fighting corruption: There must be a will to find funding for anti-corruption initiatives;
 - the will to ensure an appropriate ‘legal arsenal’ against corruption;
 - and the will to support independent ‘corruption busting’ institutions.
- The National Development Plan also stresses the importance of:
 - Deterrence, Prevention, and Education, which includes appropriate:
 - punishment (i.e. appropriate legislation),
 - effective law enforcement (i.e. the power to enforce legislation for appropriate bodies), and
 - the promotion of Constitutional values.
 - The need for Anti-Corruption institutions that are independent, adequately funded, competent, skilled, and well staffed, specialized teams of prosecutors and special courts.
- The National Development Plan argues:

“Corruption undermines the rule of law and hinders the State’s ability to affect development and socio-economic transformation.”¹²

- South Africa already has a legal framework, giving rise to what the National Development Plan refers to as ‘the Multi-Agency Anti-Corruption System’¹³.
- The Multi-Agency System includes:
 - **The Special Investigations Unit (SIU)**, under the Special Investigating Units and Special Tribunals Act (Act No. 74 of 1996) and Proclamation R118;
 - **The Public Protector**, under Section 181 and 182 of the Constitution ;
 - **The Public Service Commission (PSC)**, under Sections 195 and 196 of the Constitution;
 - **The Auditor General**, under Section 181(1)(e) of the Constitution;
 - **The Asset Forfeiture Unit (AFU)**, under the Prevention of Organised Crime Act (Act No. 121 of 1998) (POCA);
 - **The Independent Police Investigative Directorate (IPID)**, under the Independent Police Investigative Directorate Act (Act No. 1 of 2011); and
 - **The Directorate for Priority Crimes Investigation (The Hawks)**, under the South African Police Service Amendment Act (Act No. 57 of 2008)/ South African Police Service Amendment Act (Act No. 10 of 2012).
- The legislative framework within which this system operates is underpinned by the **Public Finance Management Act (PFMA)** (Act No. 1 of 1999).
- **The Office of the Auditor-General** provides leadership in aiding effective internal and external accountability through auditing on behalf of the taxpayer, and also ensures that the accounting officers are held accountable on the use of public funds.

Why then is corruption still a problem?

¹² NDP (p446)

¹³ NDP (p447)

- Dr Dovhani Mamphiswana, the Deputy Director General in **the Public Service Commission** responsible for investigation and anti-corruption, speaking at the HSF Roundtable on Corruption¹⁴, doubts that there is a political will to eradicate corruption in the public service. In a moving and brave account, he detailed instances of some of the case histories he has dealt with, and how very little is being done - not because of a lack of information, but because there is very little political will to do it.
- Mr. Steven Powell, a partner at *Edward Nathan Sonnenbergs Forensics*, at the HSF Roundtable discussion¹⁵ highlights two problems:
 - anti-corruption resources and initiatives are often not marketed effectively (people/institutions are not aware of them, their implications, and application), and
 - these initiatives often lack the requisite human capital.
- Mr. Powell points out that there is a huge salary disparity between the Public and Private sector, and, consequently, the Public sector fails to attract the talent the Private sector can pay for.
- Another impediment to the proper functioning of an anti-corruption institution is political interference.
- Anti-corruption institutions cannot function effectively if they are not independent.
- We must remember that the Constitution imposes a duty on the State to establish and maintain an independent body to combat corruption and organised crime.

4) Hugh Glenister v the President of the Republic of South Africa and Others.

- On 17 April 2009, Mr Hugh Glenister launched proceedings in the Western Cape High Court, challenging the constitutionality of the 2008 National Prosecuting Authority Amendment Act (Act No. 56 of 2008), and the South African Police Service Amendment Act (Act No. 57 of 2008), on the grounds that the National Executive and Parliament's actions in enacting the Amendment Acts were irrational and breached a number of constitutional obligations. That application was dismissed. Mr Glenister then appealed to the Constitutional Court.

¹⁴ September, 2012

¹⁵ September, 2012

- At this point HSF intervened as *amicus curiae*. The HSF considered that this case raised matters of fundamental constitutional importance in that the Policing Acts:
 - unjustifiably infringed a variety of basic human rights;
 - breached the State's constitutional obligation to promote, protect and fulfil these rights;
 - violated the State's obligations in international law; and
 - severely hampered the State's ability to deal effectively with corruption and organized crime.

- The HSF argued in Court that the failure on the part of the State to create a sufficiently independent anti-corruption entity infringed a number of rights which included the rights to equality, human dignity, freedom, security of the person, administrative justice and socio-economic rights, including the rights to education, housing and healthcare.

- The HSF maintained, and still maintains, that independent policing and prosecutorial bodies, i.e. bodies which are sufficiently protected from executive, political and other interference, are indispensable in the fight against corruption and organised crime.

- Where this independence is undermined, legislatively or otherwise, it will in turn impact on the capacity of these bodies to effectively and efficiently combat these vices.

- An obvious consequence of this decreased capacity on the part of these bodies will be an increase in corruption and organised crime.

- In addition to the Constitutional obligations of the state, the HSF urged the Court to consider the Republic's international law obligations.

- The Republic has signed and ratified six international agreements relating to corruption and organised crime:
 - The UN Corruption Convention;
 - The AU Convention;
 - The OECD Convention;

- The United Nations Convention against Transnational Organized Crime ('the UN Organised Crime Convention');
 - The SADC Corruption Protocol; and
 - The Southern African Development Community Protocol on Combating Illicit Drugs ('SADC Drugs Protocol').
- In 2004, Parliament enacted the Promotion and Combating of Corrupt Activities Act (Act No.12 of 2004) (PRECCA), giving effect to the UN Corruption Convention and the SADC Corruption Protocol.
- It also appears that PRECCA covers South Africa's obligations under the OECD convention.
- From the international instruments above, it is patent that whilst the measures to be adopted by a member state may depend on the "*fundamental principles of a member state's legal system*", there are certain core characteristics that must accompany any body tasked with combatting corruption and organised crime.
- The body must:
 - have the powers to initiate its own investigation;
 - allow investigators and prosecutors autonomous decision-making powers in handling cases;
 - not be subject to undue influence from any of the branches of government or any third party; and
 - have structural and operational autonomy.
- The requirement of strictly defined independence becomes all the more acute in circumstances where there is systemic corruption and organized crime, or where there are comparatively weak or corrupt law enforcement institutions.
- The Constitutional Court made two key findings in the *Glenister* judgment:

- That the Constitution imposes a duty on the State to establish and maintain an independent body to combat corruption and organised crime.
 - That the creation of the Hawks did not meet the constitutional requirement of adequate independence, especially with regard to the risk of political influence and interference.
- Crucially, the Constitutional Court pointed out that corruption undermines the rights which are enshrined in the Bill of Rights, and that this imperils our democracy.
 - By acknowledging the centrality of rights, and the duty of the State to protect them, the Constitutional Court has advanced the cause of liberal constitutional democracy in South Africa.

5) Looking forward

- The role that political leaders play in society is more than just heading government. It is also about moral integrity (i.e. setting an example), and providing moral leadership.
- Citizens should hold leaders to a high standard, and hold them accountable for their actions, and leaders should rise to the occasion.
- After all, elected officials are entrusted with the responsibility to serve in the best interests of the citizenry. Thus, establishing formal independent institutions with the power to hold government officials accountable is essential.
- Responsibility ensures accountability, and with accountability comes information. This allows the scrutiny of decision making processes, and the underlying logic of particular decisions.
- Thus, having regard to questions relating to the underlying logic of particular decisions becomes a central focus in civil society's responses to decision-making. This approach may very well not be a popular one: it certainly doesn't win too many friends, but it may help to influence people, and processes.
- In his keynote address yesterday, the Chief Justice did voice his concern relating to judicial appointments. These concerns are very understandable, and any intervention by civil society must be done with great circumspection.

- But I would like to add that the underlying logic of the process of judicial selection must always be rational (and, of course, open to scrutiny). Thus where the process may become irrational, the task for civil society is to challenge not so much the appointments, but the underlying process or methodology.
- I would argue that the failure to do just this may indeed also give rise to the corruption, intended or unintended, which the Chief Justice fears.
- Likewise, challenging the grounds by which MPs are appointed should not be seen as seeking to undermine the constitutional basis of our democracy, but rather as further enhancing democracy by ensuring that public representatives are held accountable to the voters, and not merely the party leadership. And this applies to all parties, across the board.
- And we can only wonder at the implications of the Protection of the State Information Bill (POSIB).
- A properly functioning democracy needs checks on power. And this includes not only sets of independent anti-corruption institutions, but an active civil society, NGOs, a free media and independent minded journalists, and appropriate protection for whistleblowers.
- POSIB is incompatible with these hallmarks of the messy business of democratic life.
- Our concern at the HSF is that POSIB, if it finds its way into law, will result in an exponential growth in corruption and all that follows in its train.
- If our assumption is correct, then we must take urgent heed of what Deputy Chief Justice Moseneke and Justice Cameron said in *Glenister* about the dangers corruption poses for our Constitutional order and society¹⁶.

“There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfill its obligations to respect, protect, promote and fulfill all the rights enshrined in the Bill of Rights. When corruption and organized crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.”

¹⁶ [166] of the *Glenister* Judgement
