

The Nkandla judgement

In a well-reasoned judgement, written by Chief Justice Mogoeng and concurred to by all ten other judges, the Constitutional Court today ruled, amongst several rulings, that the President acted inconsistently with his duties under the Constitution when he did not comply with the Public Protector's finding to pay for the reasonable costs of non-security related improvements to his homestead at Nkandla. These improvements refer to the infamous "fire pool", amphitheatre, visitors' centre, cattle kraal and chicken run.

In paragraph 83 of the judgement the Court stated: "The President thus failed to uphold, defend and respect the Constitution as the supreme law of the land." It is a damning finding; much more so than the order that the President must now personally pay an amount to be determined by National Treasury. Money is one thing. Legitimacy, acting with integrity, upholding the oath of office ... these issues are of an altogether different magnitude.

The Court made a number of other findings along these lines as well, too many to deal with in this note. The golden thread through it all was constitutionalism and accountability.

Not just the President

The Court also found that Parliament acted inconsistently with the Constitution when it passed a motion that absolved the President from compliance with the Public Protector's findings, declared Parliament's motion invalid and set it aside. It is clearly not enough to have a parliamentary majority; that majority must also act in line with the Constitution. It is the ultimate supremacy of the Constitution – it ranks higher than Parliament.

Pity those ANC members of parliament who defended the President with all kinds of spurious arguments. They really got slapped down.

In the third sentence of the judgement it was clear that the President and Parliament were in trouble. Chief Justice Mogoeng wrote: "... public office-bearers ignore their constitutional obligations at their peril." He referred to sec 1(c) and (d) of the Constitution which contain the principles *accountability*, the *rule of law* and the *supremacy of the Constitution* (my emphasis). Not just words, but words with meaning and consequences.

Public Protector

One of the big winners of the day is the Public Protector whose status and authority was confirmed and clarified. The remedial actions that the office has determined can only be reviewed by a court of law; it cannot be ignored or "second guessed" to use a phrase the Chief Justice used several times. The Public protector has binding authority. It has obvious implication for other cases where the Public Protector has made determinations and parties do not want to follow them, noticeably the SABC.

The Court also found that the President failed to "assist and protect the Pubic Protector so as to ensure her independence, impartiality, dignity and effectiveness...." It was not just that he did not pay, he should have protected her as well.

One wonders how the ANC veterans' leader – and deputy minister of Defence – who accused Public Protector Thuli Madonsela of being a CIA spy, now feels about paragraph 52 of the judgement that says: "The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs..."

Over to politics

The Court made comprehensive and stronger findings than most observers expected. Do not be fooled by the silence on impeachment – it is not within the Court's power to order that. That decision is for Parliament. In practice it is the ANC that will have to decide it.

The DA has already said that they will now bring an impeachment motion in Parliament. The EFF has taken a slightly different stance – they appealed to Pres Zuma step down and to the ANC to stop supporting Mr Zuma. That sentiment was echoed by Messrs Bantu Holomisa and Terror Lekota. Perhaps their intuition is closer to where the ANC is – the latter is unlikely to humiliate one of their own in public. Better then to allow some space where Mr Zuma can step down. The Methodist Church has also called on Mr Zuma to do that. More appeals are likely to follow in the next days.

If the ANC allows other parties the opportunity to bring an impeachment motion to Parliament, it will put itself in an envious position. The party would then either have to support the motion and dethrone Mr Zuma or they would have to defend him, in spite of the Con Court having ruled that he behaved inconsistent with his Constitutional duties. Do they really want their members to again run the risk of acting outside their constitutional obligations? The same would result if Mr Zuma tries to sit this one out.

The President has reacted to the Court by saying in a statement: "President Jacob Zuma has noted and respects the judgement handed down by the Constitutional Court and its findings relating to the Public Protector Report on Nkandla, the President's homestead. The President appreciates and reaffirms the powers of the Constitutional Court as a final arbiter on matters of the Constitution in the Republic of South Africa."

The ANC in Parliament has said through the Chief Whip: "... we accept without reservations the orders made in the judgment, particularly as they relate to Parliament, and therefore we will ensure they are fully realised."

Over the next days we will see how the ANC reacts.

Some reflections

- When Mr Mogoeng was appointed Chief Justice he was widely seen by some as a Zuma lackey who would do the President's bidding. Well there was no evidence of that today. How often people are appointed and then they turn out to be independent and just do their job.
- Institutions are tested under pressure – the Constitutional Court, the unanimity of the eleven judges, the Public Protector; the earlier decision on the Bashir case; the strength with which society (including unlikely actors like the SACP and Cosatu) has rallied against the Van Rooyen appointment at Treasury. Our institutions have come through with flying colours... those who wish to write them off may want to reconsider.
- The whole Nkandla saga was brought into the open by newspapers and the media. If it was not for their consistent digging, all of this may not have come out.

- Since the Nene/Des van Rooyen debacle on 9 December, Mr Zuma's position has consistently weakened. There is also still the High Court case on the withdrawal of charges way back in 2009 – that case was heard in the Pretoria court recently and judgment reserved. It all adds up.
- All of the above (and more) are testimony to the correcting power of an open society. It is not that open societies do not make mistakes, they do. The question is whether they can correct, improve and then succeed. The Nkandla saga is certainly a prime example of that.

So What?

- The rule of law, accountability and supremacy of the Constitution are clear winners. A lot of people who supported Mr Zuma in this affair have been repudiated in no uncertain terms. In future at least some of them will consider their constitutional responsibilities more diligently.
- The Public Protector is a clear winner and emerges from the saga stronger and more protected. Try and touch her in future and you will have trouble.
- Mr Zuma's political position has become very tight and the ANC would have to think carefully about the risk of continued support for him. One must not assume that he will go, but his position has weakened dramatically.
- The reactions of both the President and ANC caucus to the judgement suggest that they accept the supremacy of the Court and the Constitution. Richard Nixon did not do that during Watergate and I cannot imagine Robert Mugabe doing it now. Piece by piece the values of the new SA are being entrenched.
- The political philosopher Alexis de Tocqueville described political institutions as "habits of the heart" – the way we feel we are bound to behave. Today we have taken a huge step in that direction.