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STELLENBOSCH LAW FACULTY**

**“THE IMPLICATIONS OF THE OFFICE OF THE CHIEF JUSTICE FOR  
CONSTITUTIONAL DEMOCRACY IN SOUTH AFRICA”**

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***Introduction***

When all others fail in their obligations to give practical expression to the rule of law, human rights and the constitutional aspirations of all the people in any democracy, that constitutional democracy would be safe, provided a truly independent body of Judges loyal to the oath of office or solemn affirmation, is in place and ready to administer blind justice to the aggrieved.

Government by its very nature is divided into three branches. The Executive, the Legislature and the Judiciary. As you know, the three tiers of the Executive government are led by the President. Each tier enjoys real autonomy beginning with the national and provincial governments to the smallest municipality you can imagine. Their success or failure is entirely or largely in their hands. Similarly, the Legislative branch of government is led by the Speaker and the Chairperson of the National Council of Provinces at national levels, by Speakers at Provincial levels, again by Speakers at local government level. They are also institutionally independent.

These two branches of government have their own vote accounts, they are vested with the power to determine the administrative support they need, to work out job descriptions and salary levels for their personnel and to

decide which projects to embark on according to their own order of priority. But the same cannot be said of the South African Judiciary.

### ***The History of Court Administration***

The Judiciary in this country has over the years looked very much like a unit within or an extension of the Department of Justice and Constitutional Development. It had no say on any major projects intended to improve the efficiency and effectiveness of the courts, no control over the budget, very little, if any say, on the IT that could best serve its needs, the appointment of the limited support staff the Judiciary has been assigned by the Executive, to mention but some of the challenges. Yet, it is not just a national or provincial department but the third arm of the State. Unlike the NPA and the Chapter 9 institutions, it has not been allowed to run its administrative affairs. And this cries out for urgent and meaningful attention.

The virtual non-existence of institutional independence perceived to be in conflict with the Constitution has also presented a whole range of practical challenges to the Judiciary. Some of the challenges include the determination of court budgets without consultation with the Judiciary, inadequately trained administrative staff, shortage of courtrooms and chambers for Judges and Magistrates and substandard interpretation services. It is for these reasons that the Judiciary has been calling for a radical paradigm shift from the current executive court administration system to one that is led by the Judiciary.

Over the years the role and functions of the Chief Justice as head of the Judiciary and head of the Constitutional Court have steadily escalated. The Chief Justice has, however, not had the benefit of an adequate support

structure to provide the capacity and human resources required for this purpose. As a result, the attention of successive Chief Justices have been diverted from their core judicial functions to the need to attend to various administrative tasks, and they have had to rely largely on support from the Executive to enable them to do so.<sup>1</sup>

This raised important issues concerning the independence of the Judiciary, and led to requests by Chief Justices for the capacitation of their office to facilitate the performance by them of their duties and functions. Important issues were also raised by the Judiciary concerning the system of court administration inherited from the apartheid state, which was driven by the Executive. There have been ongoing discussions between the Judiciary and the Executive in regard to these matters and the establishment of a system of court administration consistent with the Constitution and the evolving system of judicial independence contemplated by section 165.<sup>2</sup>

When Arthur Chaskalson was the Chief Justice of this great country, he organised the first National Judges' Conference in Johannesburg, in 2003. He arranged that Justice Sandile Ngcobo delivers a paper on court administration and what needed to be done to enhance the independence and efficiency of the court system.<sup>3</sup> Justice Ngcobo said:

“At a conceptual level, one cannot talk about the judiciary as a genuinely independent and autonomous branch of government if it is substantially dependent upon the executive branch not only for its funding but also for many features of its day-to-day functions and operations. The practical dimension flows directly from this. While the judicial officers may be free to operate independently and to hand down fair and impartial decisions according to law, their ability to do this may be constrained in various ways, notably by the financial, human and physical resources available to perform their

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<sup>1</sup> See para 1.2.1 of the CIM Report.

<sup>2</sup> *Van Rooyen & Others v S & Others* 2002 (4) SA 843 (CC) para 75. See also para 1.2.2 of the CIM Report.

<sup>3</sup> “Delivery of Justice: Agenda for Change” (2003) 120 SALJ 688.

tasks. A key element of this is the extent to which the judiciary has control over its own resources and thus is able to determine its policy and strategic priorities and how funds are to be allocated to pursue those priorities."

Following on that paper and conference discussions, the Heads of Court resolved that more capacity be built around the Chief Justice to help him carry out the administrative functions that lay on his shoulders with relative ease. The proposal was that the envisaged administrative structure was to be led by a Director General with a team that would include a media relations officer. In response the Executive approved additional capacity but downgraded the head to the level of a Chief Director added one Director to assist the JSC, but the request for a communications director was declined. These functionaries were appointed and did alleviate the administrative workload of Chief Justices Chaskalson and Langa to some degree.

The bulk of the functions that are at the core of a court system remains in the hands of the Justice Department. The Judiciary asks, and their request may be granted or denied. It virtually has no control over the budget for the courts.<sup>4</sup>

To help us locate the role of the courts in this great nation, I quote the provisions that highlight the essence of our constitutional democracy and the kind of Judiciary we are promised by our Constitution below.

### ***The Nature of our Constitutional Democracy***

Section 1 of our Constitution defines the nature of our constitutional democracy in these terms:

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<sup>4</sup> The budget of the South African Judicial Education Institute was cut this year, and I only got to know why, when I asked.

"The Republic of South Africa is one, sovereign, democratic State founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the Constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

And section 2 underscores the supremacy of our Constitution as follows:

"This Constitution is the Supreme Law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Under the chapter on "Courts and Administration of Justice", section 165 provides for the Judiciary this nation deserves thus:

- "(1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of State may interfere with the functioning of the courts.
- (4) Organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- (5) An order or decision issued by a court binds all persons to whom and organs to which it applies.
- (6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms

and standards for the exercise of the judicial functions of all courts.”<sup>5</sup>

These provisions put together, constitute the nerve-centre of our constitutional democracy. Without the essence of these foundational values, our constitutional democracy would cease to exist. For this reason, unlike other constitutional amendments that require two thirds majority to effect,<sup>6</sup> section 1 and subsection 1 of section 74 of the Constitution can only be amended by the National Assembly with the support of at least 75 per cent of all its members and a supporting vote of at least six provinces in the NCOP.<sup>7</sup> It is important to note that provision is only made for the amendment but not for the repeal of the section that sets out the foundational values at the heart of our constitutional democracy.

Turning to Judicial independence, as Chaskalson and Langa<sup>8</sup> said, it is always necessary to stress the centrality of judicial independence to the post-apartheid legal order. Judicial independence is a condition precedent for the existence of a constitutional democracy and for its protection and advancement.<sup>9</sup> Section 165 is a crucial provision of our post-apartheid Constitution which entrenches fundamental rights and binds the Legislature, the Executive and all organs of State.

Courts are required to enforce the criminal law, resolve civil disputes in which other branches of government or senior players therein are involved and to enforce legislation enacted by Parliament or initiated by the

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<sup>5</sup> Subsection (6) is provided for in the Constitution Seventeenth Amendment Act.

<sup>6</sup> Section 74(2) and (3) of the Constitution.

<sup>7</sup> Section 74(1) of the Constitution.

<sup>8</sup> See para 1.4.12 of the CIM Report.

<sup>9</sup> Ackermann J captured the essence of this definition in *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC) para 59 ‘. . . judicial independence which is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law. This independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by subsections (2), (3) and (4) of section 165 of the Constitution . . .’

Executive. In doing so they must, protect the public, enforce entrenched rights, uphold the fundamental values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and on occasions consider the constitutionality of legislation and legality of actions of all organs of government, including the Legislature and the Executive.<sup>10</sup>

This means that the State in one form or another is frequently party to court proceedings. Hence, the requirement for judicial independence. Judicial independence is for the protection and benefit of the public. It is to ensure that the Judiciary is able to carry out its role as guardian of the Constitution without fear or favour, and to inspire the confidence of the public that it is able to, and will do so.<sup>11</sup>

At the core of judicial independence is 'the complete liberty of individual Judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision.'<sup>12</sup> In addition, judicial independence includes security of tenure, financial security and institutional independence.<sup>13</sup> Institutional independence concerns the day to day operations of courts and is required to ensure that they are not directly or indirectly controlled or seen to be controlled by other arms of government. It is to this end that the phased transformation of court administration is directed,<sup>14</sup> and this underscores the urgency and critical importance of judicial self-governance.

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<sup>10</sup> See para 1.4.13 of the CIM Report.

<sup>11</sup> See para 1.4.14 of the CIM Report. See also section 165(2).

<sup>12</sup> *Van Rooyen supra* at para 70.

<sup>13</sup> *De Lange supra*; *Van Rooyen supra*.

<sup>14</sup> See para 1.4.15 of the CIM Report.

The Judiciary must “determine its policy and strategic priority and how funds are to be allocated to pursue those priorities”.<sup>15</sup> This entails determining which personnel is best suited to support it in the execution of its constitutional obligations and that those functionaries be answerable to judicial authority. It must identify all the needs that are closely related to the proper functioning of the courts, budget for them, prioritise them and have them carried out under its eye. It must run its own affairs in keeping with the principle of separation of powers and judicial independence.

The placement of court administration in the hands of the Ministry has given rise to an unfortunate public perception that the Minister for Justice and Constitutional Development is the head of the Judiciary. This openly articulated perception, exacerbated by the fact that special and long leave of all Judges including the Chief Justice is authorised by the Minister, has the unintended effect of undermining the authority, dignity, independence and efficiency of the courts, contrary to the thrust of section 165(4) of the Constitution. It underscores the critical importance of the debates that have been going on between the Judiciary and the Executive about judicial self-governance over the years.

### ***The Role of the Chief Justice***

The Chief Justice of the Republic of South Africa is the most senior Judge and presides over the Constitutional Court, which is the apex Court of a single Judiciary. In addition to his or her judicial role, the Chief Justice represents the Judiciary nationally and internationally, which entails various coordinating and administrative responsibilities, and is also required to

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<sup>15</sup> See Justice Ngcobo's article above.



perform a multiplicity of constitutional and statutory duties and functions. The Chief Justice is regarded as the de facto head of the judiciary.<sup>16</sup>

The Constitution Seventeenth Amendment Act formalises the Chief Justice's role as head of the Judiciary.<sup>17</sup> The Superior Courts Bill makes provision for the rationalisation of the structure of the superior courts and for matters relating to court administration. It vests additional powers and functions in the Chief Justice.<sup>18</sup> These draft legislations have been the subject of discussion between the Judiciary, Parliament and the Executive and are on the verge of being signed and promulgated into law.<sup>19</sup>

In his budget speech on 07 June 2011 Minister Jeff Radebe referred to these pieces of legislation and said of the Constitution Seventeenth Amendment Bill:

“[t]he Constitution Seventeenth Amendment Bill provides a Constitutional framework for the judiciary to take charge of court administration. It affirms the Chief Justice as the head of the judiciary and entrusts the incumbent of the highest office of the judiciary, with the authority to develop norms and standards for all courts. Flowing from the envisaged Constitutional amendments, a court administration framework that is commensurate with the model of separation of powers in our Constitution will be developed. I will seek guidance of Cabinet and this House at the appropriate time once we have come up with firm proposals from both our research and those undertaken by the Chief Justice and his office.”

Consistent with this, the Preamble of the Superior Courts Bill states that rationalisation is an ongoing process that ‘is likely to result in further

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<sup>16</sup> Para 1.1.1 of the report of the Committee on Institutional Models. (CIM Report).

<sup>17</sup> See also Section 165(6) of the Constitution after the recent Constitution Seventeenth Amendment Act. See also section 166 of the Constitution Seventeenth Amendment Act, which expressly recognises the Constitutional Court as the apex Court.

<sup>18</sup> See sections 8, 9(2), 11(1)(c) and 54 of the Superior Courts Bill that is on the verge of being passed into law.

<sup>19</sup> In fact the Constitution Seventeenth Amendment Act has already been signed and promulgated by the President.

legislative and other measures in order to establish a judicial system suited to the requirements of the Constitution'. I deal with some of these issues later.

### ***The Establishment of the Office of the Chief Justice***

Ultimately, agreement on how to address these issues was reached between Chief Justice Ngcobo and Mister Jeff Radebe in 2010. This led to an exchange of correspondence between Minister Jeff Radebe and the Minister for Public Service and Administration. It was about the establishment of permanent capacity for the Chief Justice to perform his or her functions as head of the Judiciary and head of the Constitutional Court, and the need to establish a judicially based system of court administration.<sup>20</sup> The process agreed to was defined in the following three distinct Phases:

Phase 1: The establishment of the Office of the Chief Justice as a national department located within the Public Service to support the Chief Justice as head of the Judiciary and Head of the Constitutional Court;

Phase 2: The establishment of the Office of the Chief Justice as an independent entity similar to the Auditor-General; and

Phase 3: The establishment of a structure to provide judicially-based court administration.

Phase I was subsequently initiated by the President who established the Office of the Chief Justice as a government Department. This was done by means of Proclamation 44 of 2010, dated 23 August 2010, which amended

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<sup>20</sup> For the purpose of this section, I draw very generously from the Chaskalson-Langa CIM Report, para 1.2.3 to 1.2.7.

Schedule 1 to the Public Service Act 44 of 2010 to make provision for the new Department.

The functions of the OCJ in Phase 1, as determined by the Minister for Public Service and Administration in terms of the Public Service Act 1994, are to:

- provide and coordinate legal and administrative support to the Chief Justice;
- provide communication and relationship management services and inter-governmental and international co-ordination;
- develop courts administration policy, norms and standards;
- support the development of judicial policy, norms and standards;
- support the judicial function of the Constitutional Court; and
- support the Judicial Service Commission in the execution of its mandate.

The ongoing process bolstered by the establishment of the OCJ was reaffirmed by Minister Jeff Radebe during his address at the opening of the "Access to Justice Conference" in July 2011. He said then:

"The constitutionalisation of the judicial leadership powers and functions of the Chief Justice which he or she exercises jointly and collectively with the other senior judicial officers who are heads of the different courts, is not only consistent with the trends in established democracies world-wide, but is a furtherance and enhancement of judicial independence. The enactment of the Constitution Seventeenth Amendment Bill and the Superior Courts Bill will put the judiciary on course for the ultimate goal of administrative autonomy which would enhance judicial independence which is necessary for the rule of law as well as the strengthening of the accountability arrangements. We will be guided by the outcome of the on-going research undertaken by the Department and the judiciary on the appropriate court administration model that will be commensurate with our Constitutional framework."

This commitment by the Minister, to further and enhance judicial independence is consistent with our Constitution, which entrenches the independence of the courts and requires that independence to be ensured by organs of state through legislative and other measures.<sup>21</sup>

The establishment of the Office of the Chief Justice provides a platform for the implementation of initiatives designed to improve the culture of non-performance that has sneaked into the Judiciary over the years. The Chief Justice in his or her capacity as the head of the Judiciary is responsible for developing policies, norms and standards for case management and monitor and evaluate performance of the courts.

Additionally, he or she is responsible for information technology and knowledge management which have an important role to play in enhancing access to justice. Financial and administrative support to Heads of Court, court budget, and support for SAJEI and allied judicial institutions, are his or her additional responsibilities.

The creation of the capacity necessary to undertake these responsibilities would assist the Judiciary to execute its constitutional mandate more efficiently.

We continue to grapple with issues relating to the achievement of a truly independent Judiciary. The dialogue in July 2011 at the 'Access to Justice Conference' and the subsequent 'Judicial Leadership Retreat' in August 2012, bear testimony to our endeavors. The resolutions taken constitute a milestone in our quest for unquestionable judicial independence.

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<sup>21</sup> Section 165(4) of the Constitution.

The over-arching objective of the 'Judicial Leadership Retreat' was to afford the leadership of the Judiciary the first opportunity ever to do a brutal self and institutional introspection, identify all performance-related challenges, find solutions to those problems and design the most effective interventions to address them. Ideas were exchanged and strategies discussed on how best to achieve an independent and single Judiciary, which is consistent with our Constitution.

The creation of a judicially based court administration system will not compromise the independence of the Judiciary, at all. Unlike the Auditor General who must personally account to Parliament, the accounting responsibilities for a court administration model led by the Judiciary rests squarely on the shoulders of the Secretary General, as is the case in the USA and the Russian Federation. She will thus have to face to Justice Portfolio Committee all by herself, possibly with an occasional voluntary appearance by the Chief Justice.

### ***Norms and Standards***

In anticipation of the coming into operation of the Superior Courts Act and the Constitution Seventeenth Amendment Act, we have started the process of developing norms and standards and working out how their implementation could be properly monitored. We are concerned about the disturbing regularity of delays, the backlogs, absenteeism and sub-standard performance by some Judicial Officers. It is through the envisaged norms and standards, which seek to address realistic case finalisation periods and performance monitoring and evaluation, that these decades-long problems can be effectively addressed.

The Office of the Chief Justice, even in its current mode, has helped the Judiciary to build some capacity to look at the best practices in jurisdictions in comparable democracies, so as to work on our own norms and standards, performance monitoring and evaluation mechanism, an effective case management system, determining of Judicial policy and strategic objectives, performance-enhancing Judicial Education programmes and self-governance system commensurate with Judicial independence.

With the coming into operation of the new legislation, we will circulate the drafts among Colleagues for their input to circumvent delays in putting these measures into operation, to serve our democracy better.

### ***Judicial Case Management***

The effective management of cases is central to excellent court performance. Within the limited operational space at its disposal, the OCJ has been able to test the efficacy of the case management model that would best help us address our performance challenges, wherever they persists, more importantly to enhance efficiency because there is always room for improvement. We are running a pilot project in the North and South Gauteng High Courts, the KZN High Court and the Western Cape High Court for about one year. The pilot projects commenced in September 2012 and they are running very smoothly. From the lessons drawn from these projects, we will be better prepared for a roll out to all High Courts and later to the Magistrates' Courts.

This project and the very nature of the judicial case management model has generated so much interest that both the North West and the Eastern Cape High Courts have volunteered to be additional pilot sites. The

progress recorded has been humbling. Wherever this case management model was correctly implemented, superior performance has been the result.<sup>22</sup>

The establishment of the OCJ has made it possible to build additional capacity in the pilot sites to facilitate the proper implementation of the system, some predictable resistance notwithstanding.

### ***Judicial Education***

The OCJ met the staffing needs of SAJEI while it was without any permanent or acting staff member, except for the Council minute taker.<sup>23</sup> We used our semi-autonomy to have personnel seconded to us by the NPA and Justice Department and that is how we were able to get SAJEI up and running from 2012.

To ensure that those who are appointed to act as High Court Judges and those who are permanently appointed are appropriately equipped for their judicial functions, we commenced with our aspirant Judges training programmes, the orientation of newly appointed Judges and Magistrates and continuing judicial education of Judges and Magistrates from 16 January 2012. SAJEI has since organised many workshops and educational programmes designed to empower Judicial Officers across the board, to discharge their functions more efficiently.

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<sup>22</sup> In essence, this model takes the control of the pace of litigation from legal representatives and restores it to judicial officers, in both criminal and civil matters. Botswana, Courts in the USA, North West, the Gauteng, Western Cape and KZN High Courts.

<sup>23</sup> Permanent staff members of SAJEI have since been appointed and the CEO at the level of Deputy Director General has been recommended for appointment through the collaborative efforts of the SAJEI Council and the OCJ.

## ***Modernisation***

One of the major contributors to court efficiency and effectiveness is court modernisation or automation. We have through our Heads of Court IT Committee, duly assisted by the IT Directorate of the OCJ, identified the need for the Judiciary to have a server that is separate from that of Justice Department to eliminate the possibility of inadvertent and premature access to our draft judgments and alleviate the burden of the already over-laden Justice server. Electronic filing and electronic record keeping on- and off-site will, in our view, facilitate the efficient management of cases and their speedy finalisation and ensure that the disappearance of records of proceedings, which often result in grave injustice to the affected parties sometimes even the general public, becomes something of the past. These are some of the projects that the Judiciary, with the support of the OCJ, has identified and is working on.

The Judiciary has through the OCJ, embarked upon the development of the capacity to gather and analyse its own court performance statistics. This will enable us to establish timeously, the court performance challenges that require intervention so that appropriate remedial action is taken without delay. At the moment, only the NPA and the Justice Department has that capacity and we are informed by them, how courts are performing. And this has caused some members of the Judiciary to raise serious concerns about the implications of this kind of monitoring and evaluation of judicial performance by “outsiders” on judicial independence. We have also started a case file audit exercise in all the higher courts to identify dead files or old cases that should have been finalised a long time ago, and to prioritise them for finalisation. Again, the OCJ has provided some capacity to help address this issue.



## ***Access to Justice***

The leadership of the Judiciary at all levels, has resolved to begin a massive project of overhauling all the Rules of the High Court and Magistrates' Courts. This is made possible by the willingness of colleagues to sacrifice their time and the support we have from our own Department, the OCJ.

This project will help us do away with archaic Rules, progress- and efficiency-retarding Rules, to inject flexibility, facilitate the full scale implementation of electronic filing and electronic record-keeping, video conferencing, judicial case management harmonisation or streamlining of all Court Rules.

More importantly, this overhauling will facilitate access to justice. When Rules of Court are easy to understand, lay people who can read and write will be able to represent themselves more meaningfully in courts of law. The need to get to this point is underlined by the prohibitively high fees charged by lawyers these days. We believe that the successful accomplishment of this self-imposed responsibility would give meaning to our constitutional democracy by making justice accessible even to the poor, because the budgetary constraints do not allow Legal Aid South Africa to fund every indigent litigant. It is forced to be very selective.

When the spade-work has been done, and comments received from Colleagues, we will pass the draft Rules onto the Rules Board to fulfil its statutory role. The Memorandum of Understanding, to be briefly discussed later, paves the way for more meaningful engagement between the OCJ, the Judiciary and the Rules Board.

The point needs to be made however that ideally, rule-making authority should vest in the Judiciary. Just as the other two branches of government

make the rules that are intimately connected to their core business, so should this be with the Judiciary. We resolved at the “Judicial Leadership Retreat” to pursue this objective with more vigour.

### ***Media Relations***

As a matter of principle, the Judiciary ought not to borrow a voice from the Executive about its core business. They must speak for themselves. Otherwise, this could create the incorrect and unfortunate impression that the Judiciary is not as independent as it should. To this end, a media relations Director has been appointed by the OCJ, to help us communicate who we are and what we are about to the public and to educate them. Our visibility, particularly during August, when we ran the women Judges' programme, is a matter of public record.

In collaboration with a Committee of Judges drawn from all courts and representatives of the Magistracy, this Directorate will be developing a more comprehensive communication strategy.

### ***Provincial Leadership***

To facilitate better coordination of the functions of the Judiciary in each Province, the Superior Courts Bill seeks to streamline the leadership roles of the Judge President, Regional Court President and Chief Magistrate responsible for the Cluster. The Judge President will play an oversight role and this bodes well for more efficiency and effectiveness in the entire court system.

The capacity required by the Judges President to fulfil these and other duties will be created by the OCJ. The transfer of High Court functions to

the OCJ would make it the responsibility of the OCJ to provide additional administrative capacity where necessary, obviously if the budget permits.

### ***Role-Player Coordination***

The Judiciary, with the financial and personnel support of the OCJ, was able to initiate the establishment of the National Efficiency Enhancement Committee (NEEC), on 13 October 2012. The NEEC comprises all the key role-players in the justice cluster, including the Attorneys and Advocates' professions. As the name suggests, the primary objective sought to be realised is the efficiency and effectiveness of the justice cluster, and brought closer to home the courts. Together, we identify challenges that undermine efficiency and employ our collective wisdom, behind closed doors, to find solutions, without compromising any principle.

We have established a wide range of committees to identify our common approach to common problems where practicable, we have identified challenges that we must each address in the short, medium and long term. We are confident that this integrated attempt to address issues that undermine our individual and collective performance will benefit our people and strengthen our constitutional democracy.<sup>24</sup>

We decided to do this because the underperformance of any key role player does not only affect that entity, but also impact negatively on the performance of others as well. Think about it !

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<sup>24</sup> Members of the NEEC are the Chief Justice, President of the SCA, Judge President of the North and South Gauteng High Courts, the Judge President of the Northern Cape High Court, a Judge representing the Judicial Case Management Committee, National Commissioners of SAPS and Correctional Services, DG's of Public Works, Justice, Health, Social Development, the Regional Court Presidents, the Chair and CEO of Legal Aid South Africa, CEO of RAF, the NDPP, Chief Magistrates, representatives of LSSA and the GCB, etc.

## ***Memorandum of Understanding***

On 26 January 2012, a Memorandum of Understanding (MOU) was signed by the Justice Department and the OCJ. In terms thereof, the administrative functions of the Constitutional Court, Supreme Court of Appeal, JSC and elements of SAJEI, Rules Board and the Magistrates' Commission were to be transferred from the Justice Department to the OCJ.

While consultation with the affected structures, including personnel and the trade unions were underway, Treasury proposed that the administrative functions of the High Courts should also be transferred to the OCJ. A breakthrough in finalising this project and in the OCJ acquiring the status of a fully fledged Department with its own vote account, is reportedly imminent. Our Secretary General, Ms Memme Sejosengwe,<sup>25</sup> and the DG of Justice are engaged in discussions to translate these plans into reality.

But a departmental mode or phase is not what our constitutional democracy deserves. Like any national or provincial government, it has a political head, the Minister for Justice and Constitutional Development. It is with the Minister that the Secretary General signs her performance contract, not the Chief Justice. Arguably, it is the sole responsibility of the Minister to decide on the content of the contract, and to determine whether her performance is acceptable to him or not.

But, this deficiency cries out for urgent attention. And appropriate intervention will take the form of legislation in terms of which an independent entity will be created, to take over the responsibilities of this new Department. It is evident from Minister Jeff Radebe's 2011 budget

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<sup>25</sup> Who was appointed with effect from 01 April 2013.

speech and his address to the “Access to Justice Conference” of the same year, that he openly supports Judicial self – governance.

### ***Our Preferred Court Administration Model***

The kind of court administration model that is, in our view, compatible with and conducive to judicial independence and the enhancement of dignity and efficiency, is one led by a Judicial Council comprising members of the Judiciary only. We have decided that that Council, to be constituted by Heads of Court, will have to be guided by an Advisory Board whose members will be drawn from a wide range of disciplines for purposes of judicial accountability and transparency. That administration system will have to be created in terms of legislation to facilitate migration from a Department to an independent entity, such as Parliament and the Executive entities have.

Eventually, the entire Court Services Unit of the Justice Department, Regional Offices, Rule-making Authorities, Library Services, IT and facilities components of Justice would have to be transferred to the OCJ or the new entity created by legislation, together with the concomitant budget and personnel.

Just as there is no Cabinet Member responsible for Parliament, there should be none for the court administration structure led by the Judiciary. This augurs well for judicial independence and our constitutional democracy.

And the stage is set for that model. There have been meaningful engagements with other jurisdictions like the USA, the Russian Federation, Singapore, Ghana, Qatar, France, Germany, etc, to establish which of the

many models would best serve our kind of constitutional democracy. We are satisfied that the court administration system of the USA,<sup>26</sup> the Russian Federation, Singapore, Ghana and Qatar, would serve as a good model for the one our democracy deserves.

Senior officials in the OCJ, duly guided by Justice K.K. Mthiyane, the Deputy President of the SCA, and his Committee of Judges, have embarked on a process of working out this model and drafting a Bill. We hope that their finished product will be ready for circulation among Colleagues some time this year. Thereafter, we will present it to the Executive for consideration and hopefully, approval.

## **CONCLUSION**

My predecessor Chief Justice Ngcobo appointed a Committee on Institutional Models, under the joint-leadership of former Chief Justices Chaskalson and Langa, to propose a court administration system that would best serve the needs of the courts. Its report proposes a self-governance structure created by legislation that would perform functions to be transferred to the OCJ. We changed certain aspects of the report and passed it onto the Executive. A response is awaited. For now we are still operating in a departmental mode led by a Director General who, as I said, bears the title of Secretary General.

The heading of the report on institutional models is particularly revealing, in the way it richly captures the implications of the OCJ for our constitutional democracy. It reads, "Capacitating the Office of the Chief Justice and

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<sup>26</sup> In the United States the Chief Justice is the head of the United States Judicial Conference which is composed of the Chief Justice of each judicial circuit, the Chief Justice of the Court of International Trade, and a district judge from each regional circuit. Their primary purpose is to make policy with regards to the administration of US courts and to supervise the Director of the Administrative Office. They also promulgate the rules for the Federal courts.

Laying Foundations for Judicial Independence: The Next Frontier in our Constitutional Democracy: Judicial Independence". And that is what the OCJ has achieved – to lay a very solid foundation for Judicial self – governance, the only remaining barrier to the attainment of complete Judicial independence.

The implications of the OCJ for the constitutional democracy in this country are self-evident. And so is the role of a court administration system lead by the Judiciary in our constitutional democracy. The courts will be able to determine their policy and strategic priorities and how best to meet them, decide on projects to embark upon to help the courts take their rightful place as guardians of our constitutional democracy, and serve the nation more effectively and efficiently.

**I THANK YOU ALL**