

## **Judges address corruption**

The Institute for Judicial Excellence at the University of the Free State (UFS) recently held an international symposium on corruption. Speakers at the event included Chief Justice Mogoeng Mogoeng, a number of judges of the Supreme Court of Appeal and the Free State High Court, as well as legal academics and others.

The senior officer of media liaison and strategic communication at UFS, René-Jean van der Berg, told *De Rebus* that the law faculty viewed corruption as a topical issue and had wanted 'to get experts into one room to discuss the issue'.

### **Chief Justice Mogoeng**

Chief Justice Mogoeng was the keynote speaker at the symposium. In a speech titled 'Corruption: A threat to our constitutional democracy', he said that corruption had played a major role 'in the betrayal of the aspirations of many' that are embodied in the Constitution.

The Chief Justice described corruption as 'the engagement in a particular conduct by an authorised person, in the public and private sector, with a view to illegitimately advance self, relational or sectoral interests, to the prejudice of the interests of others, including the public'.

The Chief Justice said that no effort should be spared to uproot any corruption in the judiciary, adding that there was a fundamental difference between members of the judiciary and members of the other two branches of government. This difference, he said, was that judges and magistrates, unlike members of the executive and the legislature, are not elected to office. He added that the developing trend of organisations and individuals inside and outside the country openly lobbying for the appointment or promotion of some candidates to judicial office should therefore be a source of great concern.

'Their actions sometimes border very close on campaigning against the appointment of some judicial officers, particularly those who pose a threat to the appointment of their preferred candidates. This should be conducted or managed with great circumspection for it could otherwise give rise to unintended corruption. It ought to be enough that interested parties make representations to the Judicial Service Commission,' he said.

Chief Justice Mogoeng said that the 'love of power, the pursuit of populism and the addiction to being approved by the powerful', in the public or private sector, was 'the surest recipe for corruption'.

The Chief Justice said that when corruption became endemic in a country, the lifespan of a true constitutional democracy could not be guaranteed. He added that the far-reaching implications of corruption tend to drive its victims to 'boiling point' and moves them to the 'level of desperation that renders even their resort to life-threatening measures or responses to corruption look like they are worth the sacrifice'.

The Chief Justice said that during apartheid black and white people fought against each other, but now they faced a common enemy in the form of corruption: 'When corruption is left to run wild, white people who had a fairly decent life, even if they were not wealthy, will see their standard of living decline drastically before their very eyes and black people who were hoping for some improvement with the advent of freedom will see the situation deteriorate even more.'

The Chief Justice added that decisive action must be taken 'to arrest this disgraceful "profession" called corruption'.

Chief Justice Mogoeng also highlighted steps that departments and bodies in the criminal and civil justice systems had taken to consolidate efforts to fight corruption. In October 2012 he, the President of the Supreme Court of Appeal, the judges president and regional court presidents, the National Commissioner of Police, the National Director of Public Prosecutions, representatives of the attorneys' and advocates' professions and others formed the National Efficiency Enhancement Committee to enhance the efficiency and effectiveness of all units and entities in the broader justice system. The Chief Justice said that the body was expected to significantly contribute to the eradication of corruption and crime.

### **Judge Brand**

Judge Fritz Brand of the Supreme Court of Appeal spoke on the application and development of common law principles regarding corruption in South African law.

Judge Brand said that no judge in the country could ever be soft on corruption. 'The reason is simply this: Judges have taken an oath to uphold the rule of law and I can think of nothing more destructive of the rule of law than corruption. It undermines the credibility of the organs of state, including the courts; ultimately it destroys all faith in the rule of law,' he said.

He added that the existence of courts is based on public confidence and if this is lost, the courts may close their doors.

'Little imagination is required to appreciate that even the vaguest notion that judges and magistrates may be open to corruption will destroy that confidence,' he said.

Judge Brand added that the 'cancer of corruption' had many victims and it destroyed moral values, as well as the economy.

'It hurts the poor disproportionately more because they cannot pay their way. They cannot afford to buy what they should rightfully receive for free,' he said.

He added that among the first victims of corruption were the rule of law and the judicial system. 'That is why we are never allowed to give up our battle against this insidious evil that is threatening to destroy the very fibre of our constitutional order,' he said.

### **Judge Kruger**

Judge Albert Kruger of the Free State High Court spoke on the legislative provisions to address corruption and their effectiveness.

Judge Kruger defined 'corruption' as: 'Corruption, simply defined, means that a person gets more than his or her salary or wage to do work for someone. The taking of any consideration over and above the employer's wage constitutes corruption. There are two parties to corruption, the third party who makes the payment and the employee, official or person who accepts it. Each commits an offence. More blatant corruption is where the official, employee or person does something for the third party in exchange for the payment.'

Judge Kruger said that several Acts had been enacted to curb corruption, including –

- the Prevention of Organised Crime Act 121 of 1998;
- the Financial Intelligence Centre Act 38 of 2001;
- the Prevention and Combating of Corrupt Activities Act 12 of 2004;
- the Protected Disclosures Act 26 of 2000;
- the Promotion of Access to Information Act 2 of 2000; and

- the Public Finance Management Act 1 of 1999.

Judge Kruger concluded by saying that South African legislation dealing with corruption is wide ranging and comprehensive and the prosecution of corruption cases is problematic because of an unwillingness to report corruption and to testify in such matters.

### **Mr Antonie**

Director of the Helen Suzman Foundation (HSF), Francis Antonie, gave a speech titled: 'Civil society and corruption'. Mr Antonie said that public sector corruption was rife in South Africa, adding that it centred on the misuse of public funds for private gain, family or friends, and extended to police corruption.

In the private sector, corruption largely goes unnoticed, he said, with fewer cases reported and fewer convictions achieved. However, this sector was rife with facilitation payments, tender rigging and other forms of solicitation, he said.

Mr Antonie highlighted the following consequences of corruption –

- slow economic growth (by lowering investment);
- erosion of institutions;
- sabotaging of public service delivery;
- undermining the integrity of the state; and
- violation of human rights.

Mr Antonie said that corruption affected the poor the most as it diverted resources from them. He added that according to the Transparency International Corruption Perceptions Index, 2012, South Africa ranked 69 out of 176 countries and territories. He said that South Africa had dropped 31 places between 2001 and 2012.

'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,' he said. Mr Antonie said that the National Development Plan (NDP) stated that a political will was necessary to fight corruption. This included the will to –

- commit money to fighting corruption in terms of funding anti-corruption initiatives;
- ensure an appropriate 'legal arsenal' against corruption; and
- support independent 'corruption-busting' institutions.

Mr Antonie said that the NDP also stressed the importance of deterrence, prevention and education, including appropriate punishment, effective law enforcement and the promotion of constitutional values.

Mr Antonie said that South Africa had a legal framework to fight corruption, which gave rise to what the NDP refers to as the 'multi-agency anti-corruption system'. This system includes –

- the Special Investigating Unit;
- the Public Protector;
- the Public Service Commission;
- the Auditor-General;
- the Asset Forfeiture Unit;
- the Independent Police Investigative Directorate; and
- the Directorate for Priority Crime Investigation (the Hawks).

To conclude, Mr Antonie said that a properly functioning democracy needed checks on power such as independent anti-corruption institutions and active civil society, non-governmental organisations, a free media and appropriate protection for whistle-blowers and independent-minded journalists, adding that the Protection of State Information Bill (B6B of 2010) was 'incompatible with the hallmarks of democratic life'.

'Our concern at the HSF is that the Protection of State Information Bill, if it finds its way into law, will result in an exponential growth in corruption and all that follows in its train,' he said.

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