

THE APPOINTMENT OF ACTING JUDGES IN SOUTH AFRICA AND LESOTHO

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SUMMARY

The appointment of acting judges is a common practice in many Commonwealth countries, including South Africa and Lesotho. The practice has been criticised as infringing judicial independence. This article explores this criticism with reference to the recent decision of the Lesotho Court of Appeal in *Sole v Cullinan*, and the Report of the United Nations Special Rapporteur for the Independence of Judges and Lawyers' fact-finding mission to South Africa in 2000.

1 INTRODUCTION

The appointment of acting judges is a common practice that is sanctioned by the Constitution.¹ It is an essential mechanism to ensure the effective and efficient functioning of the administration of justice in the superior courts. The Judicial Service Commission relies heavily on this mechanism as a form of probation to assess the suitability of a person for permanent appointment to the bench.² A burning question is whether this practice of appointing judges in an acting capacity infringes judicial independence. This article will briefly address this issue with reference to a recent decision of the Lesotho Court of Appeal in *Sole v Cullinan*.³ In this case, the highest court of Lesotho answered the question whether the appointment of acting judges in that country on certain grounds infringes judicial independence. The legal position in Lesotho will be compared with the legal position in South Africa. An overview will be given of the sources of law that regulate the appointment of acting judges. Arguments in favour of and against the appointment of acting judges will be evaluated in order to assess whether this practice violates judicial independence. But first, the concept of judicial independence will be briefly introduced.

¹ S 175 of the Constitution of the Republic of South Africa, 1996.

² See Moerane "The Meaning of Transformation of the Judiciary in the New South African Context" 2003 *SALJ* 708 713.

³ 2003 8 *BCLR* 935 (LesCA).

2 JUDICIAL INDEPENDENCE

2.1 South Africa

It is trite that judicial independence is a cornerstone of any democracy based on the rule of law. The principle of judicial independence is addressed in a number of international instruments.⁴ It is also regarded by a number of international and regional instruments as a fundamental element of the protection of human rights.⁵ Judicial officers cannot perform their functions without the existence of judicial independence; it is a core value of the judicial function. As explained by the late Mahomed CJ, “the principle of an independent judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundations of the civilization which it protects”.⁶ There are many definitions of judicial independence but essentially it means “the right and the duty of [judicial officers] to perform the function of judicial adjudication, through an application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution”.⁷ In short, therefore, it relates to the ability of the judiciary to perform its functions independent of interference of any kind from whatever source, including government.⁸ A number of requirements have been identified that need to be met in order for there to be judicial independence.⁹ The appointment of acting judges could possibly violate the following of these requirements: an open and transparent appointment process overseen by a judicial service commission; security of tenure; and guidelines regarding remuneration. A discussion of these particular requirements follows below.¹⁰ The primary requirements for the existence of judicial independence are that the constitution must protect judicial independence, and judicial functions must be vested in the judiciary.¹¹ In South Africa, the independence of the judiciary is safeguarded in the Constitution. Section 165(2) provides that the courts are independent and subject only to the Constitution and the law, which the courts must apply impartially and without fear, favour or prejudice. The judicial authority of the

⁴ See eg, the United Nations *Basic Principles on the Independence of the Judiciary* (1985); *Latimer House Guidelines for the Commonwealth* (1998); and *Bangalore Principles of Judicial Conduct* (2002).

⁵ See eg, the *Universal Declaration on Human Rights* (1948); and *African Charter of Human and Peoples’ Rights* (1981).

⁶ “The Role of the Judiciary in a Constitutional State” 1998 *SALJ* 111 112.

⁷ Mahomed 1998 *SALJ* 112.

⁸ On judicial independence generally, and particularly regarding interference from the executive, see the statement issued at the conclusion of the 2003 National Judges’ Symposium, and the contributions of speakers at the symposium published in 2003 *SALJ* 647-718.

⁹ See Van de Vijver *The Judicial Institution in Southern Africa* (2006) 4-9 who identifies 14 requirements.

¹⁰ See par 4 below.

¹¹ See principles 1-7 of the *Basic Principles on the Independence of the Judiciary* (1985); and Van de Vijver 4.

country is vested in the courts.¹² No person or organ is allowed to interfere with the functioning of the courts, and organs of state must actively assist and protect the courts to ensure their independence.¹³ The rationale for this constitutional protection was expressed as follows by Chaskalson P in *South African Association of Personal Injury Lawyers v Heath*:¹⁴

“The separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined. The Constitution recognises this and imposes a positive obligation on the State to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they apply impartially without fear, favour or prejudice. No organ of state or other person may interfere with the functioning of the courts and all organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.”

Whether there is in fact judicial independence is a different matter. Recently, the South African government introduced several bills dealing with the judiciary that have been universally criticised by the judiciary and academics as threatening judicial independence.¹⁵ These bills include the Constitution Fourteenth Amendment Bill of 2005, the Superior Courts Bill, the Judicial Conduct Tribunals Bill, The South African National Justice Training College Draft Bill and the Judicial Service Commission Amendment Bill. A discussion of these bills falls outside the scope of this article.

The greatest threat to judicial independence has always been perceived to be from the executive. Judicial independence and the doctrine of separation of powers are inextricably linked, particularly in a constitutional democracy with a justiciable bill of rights such as South Africa, because of the power of the courts to declare invalid any legislation or conduct that is inconsistent with the Bill of Rights:¹⁶

“The separation of the Judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implementing the laws thus made, but have no law-making power other than that vested in them by the legislatures. Although Parliament has a wide power to delegate legislative authority to the Executive, there are limits

¹² S 165(1).

¹³ S 165(4).

¹⁴ 2001 1 SA 883 (CC) par 26.

¹⁵ See the criticism of *eg*, Lewis “Making the Case for Judicial Freedom in a Democracy” *Business Day* of 2006-01-23; Mpati “Executive Control Over the Judiciary” 2005 3 *Advocate* 32; Spilg “Judicial Independence – A Dummy’s Guide” 2005 2 *Advocate* 16; and Bizos “Justice Sector and the Rule of Law” http://www.lrc.org.za/features/george_bizos.asp.

¹⁶ *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) par 25; and see also s 172 of the Constitution.

to that power. Under the Constitution, it is the duty of the courts to ensure that the limits on the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.”

No judicial system can claim to be totally devoid of any relationship with the legislative or executive branches of government. The South African constitution also does not provide for a Utopian notion of absolute separation of powers, with both the executive and the legislature playing some role in judicial matters:¹⁷

“An essential part of the separation of powers is that there be an independent Judiciary. The mere fact, however, that the executive makes or participates in the appointment of Judges is not inconsistent with the doctrine of separation of powers or with ... judicial independence ... What is crucial to the separation of powers and the independence of the Judiciary is that the Judiciary should enforce the law impartially and that it should function independently of the Legislature and the Executive ... Constitutionally, therefore, all Judges are independent.”

2 2 Lesotho

Lesotho gained independence from Great Britain in 1966. The first constitution, known as the 1966 Independence Constitution, guaranteed the independence of the judiciary and security of tenure for the judiciary.¹⁸ However, when Chief Leabua Jonathan, the prime minister, declared a state of emergency in 1970 which essentially suspended the constitution, it presented a threat to judicial independence.¹⁹ At the time, Jonathan suspended sittings of the High Court.²⁰ In 1978, the courts were restored by legislation.²¹ In 1993, the first multi-party elections were held and a new constitution which provides for a constitutional monarchy was enacted. Sections 118(2) and (3) of the Constitution of Lesotho, 1993, provide for judicial independence as follows:

“(2) The courts shall, in the performance of their functions under this Constitution or any other law, be independent and free from interference and subject only to this Constitution or any other law.

(3) The Government shall accord such assistance as the courts require to enable them to protect their independence, dignity and effectiveness, subject to this Constitution and any other law.”

The independence of the Lesotho judiciary was recently challenged in *Basotho National Party v Government of Lesotho*.²² *In casu*, the BNP

¹⁷ *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par 123 (hereinafter “*First Certification judgment*”).

¹⁸ Amoah “Independence of the Judiciary in Lesotho: A Tribute to Judge Mofokeng” 1987 *Lesotho Law Journal* 21 30.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Amoah 1987 *Lesotho Law Journal* 31. The legislation was the High Court Act 5 of 1978, and the Court of Appeal Act 10 of 1978.

²² 2005 11 BCLR 1169 (LesH).

applied for a court order declaring the Lesotho judiciary not independent and not free from government influence, and compelling the government to ensure judicial independence by giving effect to various international conventions on judicial independence. It was alleged that institutional independence, security of tenure for judges, and financial security for judges, all essential elements of judicial independence, were absent in the Lesotho judiciary. The court found that no objective evidence was brought before it to prove the allegations, and dismissed the application.²³

“To ask us to declare that the Courts established under the [1993] Constitution not to be independent is tantamount to asking us to declare a constitutional institution to be unconstitutional. No court of law could make such an illogical declaration.”

The court adopted a similar approach to the separation of powers doctrine as the South African Constitutional Court:²⁴

“The primary function of the courts is to dispense justice according to the law. In doing so they must be independent and free from interference and influence by the other arms. That is essentially what is meant by judicial independence. What it does not mean is that the judiciary should completely sever itself from the rest of the arms of government. Government is one whole with three parts of which one is the judiciary. So, as in one body, it is neither possible nor desirable that one part should function completely independently of the other.”

3 THE APPOINTMENT OF ACTING JUDGES IN LESOTHO: *SOLE V CULLINAN*

3.1 Facts

Sole, the former chief executive of the Lesotho Highlands Development Authority, was convicted in the High Court of Lesotho on 11 counts of bribery and two counts of fraud and sentenced to an effective 18 years' imprisonment. The hearing was held before Mr Justice Cullinan, a retired Chief Justice of Lesotho, who had been appointed in an acting capacity to hear this particular matter. Sole appealed to the Full Bench of the High Court (FB) against his conviction and sentence. In addition, Sole launched a collateral challenge in terms of section 22 of the Lesotho Constitution on the validity of this trial, which he based on the allegation that the appointment of Cullinan as an acting judge had been in breach of the Lesotho Constitution. The FB dismissed Sole's challenge, following which Sole appealed to the Lesotho Court of Appeal (LCA). The appeal was against three separate orders made by the FB, including the denial of an application for the recusal of two members of the FB. Only the appeal against the third order, dealing with the constitutional validity of the appointment of Cullinan as an acting judge, is relevant to this discussion.

²³ *Basotho National Party v Government of Lesotho supra* 1176I.

²⁴ *Basotho National Party v Government of Lesotho supra* 1177F. See fn 8 and 9 above.

3 2 The appellant's argument

Sole alleged that the appointment of Cullinan as an acting judge had been "tainted with irregularities and failure to observe peremptory provisions of the law and the Constitution"²⁵ in that:²⁶

- Cullinan had not been appointed generally, but specifically to hear a particular case, which infringed judicial independence (argument 1);
- Cullinan had been appointed while he held the remunerated office of Judge Advocate, which infringed section 115(1) of the Lesotho constitution read with section 6A of the Statutory Salaries Order 8 of 1972 as amended and judicial independence (argument 2);
- The procedural requirement stated in section 120(5) of the Lesotho Constitution had not been complied with, which made the appointment irregular (argument 3); and
- Cullinan's remuneration as an acting judge had specifically been agreed upon and had not been in terms of applicable legislation, which infringed judicial independence (argument 4).

The relevant provisions of the Lesotho Constitution that Sole alleged had been infringed are the following:

- Section 2, which provides for the supremacy of the Constitution;
- Section 12, which guarantees a fair trial before an independent and impartial court;²⁷
- Section 118(2) and (3), which further protects and guarantees the independence of the courts,²⁸ and
- Section 120(5), which regulates the appointment of acting judges.²⁹

3 3 Judgment

Gauntlett JA, with whom Grosskopf, Plewman, Smalberger and Melunsky JJA concurred, delivered the judgment of the court. The court dealt with each of the arguments as follows:

²⁵ Par 39.

²⁶ Par 41.

²⁷ "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

²⁸ See above.

²⁹ "If the office of any puisne judge is vacant or if any such judge is appointed to act as Chief Justice or is for any reason unable to perform the functions of his office or if the Chief Justice advises the King that the state of business in High Court so requires, the King, acting in accordance with the advice of the Judicial Service Commission, may appoint a person who is qualified to be appointed as a judge of the High Court to act as a puisne judge of that Court. Provided that a person may act as a judge notwithstanding that he has attained the age prescribed for the purposes of section 121(1) of this Constitution."

3 3 1 *Argument 1*³⁰

The allegation that Cullinan had been appointed solely to preside in the criminal trial of Sole was not disputed. Affidavits from both the Attorney-General and the Chief Justice confirmed that the Chief Justice had formed the opinion that a judge of stature should be appointed from outside Lesotho to preside in the matter. The court found that it was clear that the reason for this opinion was the anticipated scale, duration and complexity of the trial.³¹ The court also referred to examples contained in the papers before the court where acting judges had been appointed to deal with one matter only. A comparison was also drawn with a provision in the Constitution of Namibia³² comparable to section 120(5) of the Lesotho Constitution. Article 82(3) provides that “[a]t the request of the Judge President, the President may appoint Acting Judges of the High Court from time to time to fill casual vacancies in the Court, or to enable the Court to deal expeditiously with its work”.

The court found that section 120(5) of the Lesotho Constitution does not prohibit the appointment of an acting judge to adjudicate in a particular matter only.³³ The court therefore found Sole’s objection to be “without substance”. The court did, however, sound a word of caution:

“It would, of course, be an entirely different state of affairs if an appointment was made for the purposes of securing a particular result, or otherwise undermining the primary constitutional guarantees regarding the independence of the Court and the right to a fair trial ...”

It is not uncommon in South Africa for an acting judge to be appointed to preside solely in one case. Reasons for such an appointment are diverse, but could include the particular expertise of the appointee, or the anticipated duration of the trial. Also, in politically sensitive trials it could be beneficial not to have a permanent judge preside.

3 3 2 *Argument 2*³⁴

The claim that Cullinan had held the remunerated office of Attorney-General at the time of his appointment as an acting judge was not disputed by the respondent. It was also common cause that Cullinan’s remuneration was significantly higher than that of a permanent judge.³⁵ The respondents relied

³⁰ Par 41.

³¹ The trial commenced on 11 June 2001; judgment was delivered on 20 May 2002; sentence was imposed on 4 June 2002.

³² Art 82(3).

³³ S 120(6) of the Lesotho Constitution provides that an acting judge holds appointment for the stipulated period of their appointment, or if no period has been stipulated, until the King revokes the appointment.

³⁴ Par 43-44.

³⁵ See 3 3 4 below.

on section 14(2) of the High Court Act³⁶ as support that Cullinan had not been disqualified from appointment as an acting judge due to his holding a remunerated office within the government service. The appellant contended that the provision only applied to acting appointments from outside the government service. The court, however, held that the language of the provision is clear. It therefore allows an acting judge to hold an office or position of profit, irrespective of whether it is within or outside government service. The court therefore rejected Sole's objection.

In South Africa, the Judges' Remuneration and Conditions of Employment Act provides that "[n]o Constitutional Court judge or judge [of the high court or supreme court of appeal] may, without the consent of the Minister, accept, hold or perform any other office of profit or receive in respect of any service any fees, emoluments or other remuneration apart from his or her salary and any amount which may be payable to him or her in his or her capacity as such a Constitutional Court judge or judge".³⁷ It would appear that the provisions of section 2(6) only apply to permanent judges, and not acting judges. This is based on an interpretation of the definitions of "constitutional court judge" and "judge" in section 1 of the Act, both of which do not include reference to an acting judge. Also, read with section 13(1)(d), this is the only reasonable inference that can be drawn.

3 3 3 *Argument 3*³⁸

Section 120(5) of the Lesotho Constitution requires that the King appoints acting judges on the advice of the Judicial Service Commission. The appellant contended that this procedural requirement had not been complied with. It was alleged that the Chief Justice had not advised the King that the business of the court required the appointment of Cullinan as an acting judge. The court rejected this argument as it was apparent from the evidence that the Chief Justice had in fact advised the King to appoint Cullinan.

The South African legal position relating to the appointment of acting judges is discussed below.³⁹

3 3 4 *Argument 4*⁴⁰

The respondents did not dispute that Cullinan's remuneration had been specifically agreed upon. His remuneration was significantly higher than that of a permanent judge, but less than half the usual daily fee of senior

³⁶ Act 5 of 1978. S 14(2) reads as follows: "(1) No Chief Judge or Judge shall accept or perform any other office or place of profit or emoluments not authorised by law. (2) Sub-section (1) shall not apply to a Judge who may be temporarily appointed under section 3(4)."

³⁷ S 2(6).

³⁸ Par 45-46.

³⁹ See par 4 below.

⁴⁰ Par 47-51.

counsel. It was also tax-free. The court held that the terms of his remuneration were not prohibited by legislation. For the sake of argument, even if the terms were not in accordance with statute, it would not vitiate the proceedings or the validity of Cullinan's appointment.

In South Africa, section 2 of the Judges' Remuneration and Conditions of Employment Act provides for the payment of both permanent and acting Constitutional Court judges and other judges. The President determines an annual salary and allowances or benefits from time to time by notice in the Government Gazette after taking into consideration the recommendations of the Independent Commission for the Remuneration of Public Office Bearers. Parliament must approve such notice before the publication thereof. The payment made to judges is taxable against the National Revenue Fund.

Section 13(1)(d) of the same Act provides that the President may, after consultation by the Minister of Justice with the Chief Justice, the President of the Supreme Court of Appeal and the judges president of the respective high courts, make regulations as to the amounts which may be paid to acting Constitutional Court judges or acting judges in connection with the maintenance by them of their practices as advocates or attorneys. This is acknowledgement that the overwhelming majority of acting judges are practitioners who will have to return to their practices after the completion of their term as an acting judge. They therefore have to be compensated adequately to maintain their practices during their absence. This is a mechanism to address the lack of financial security for acting judges, which is a criticism against the appointment of acting judges.⁴¹

3 3 5 *The cumulative effect of the arguments: does it surmount the test for recusal?*

Although this was not strictly a recusal matter, the court applied the test for recusal. The legal test applicable in South Africa for the recusal of a judge is the reasonable apprehension of bias test:⁴²

"[T]he question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submission of counsel."

In essence, therefore, the test is how a well-informed, thoughtful and objective observer, not a hyper-sensitive, cynical and suspicious person, would view the facts. *In casu*, Gauntlett JA ruled that this test should apply to Lesotho also.⁴³ The court found that the facts of Cullinan's appointment were such that they would not give rise to a perception of a lack of impartiality on the part of Cullinan.

⁴¹ See par 4 below.

⁴² *President of the RSA v SARFU* 1999 4 SA 147 (CC) par 48. For a discussion of judicial recusal, see Olivier "Anyone But You, M'Lord: The test for Recusal of a Judicial Officer" 2006 *Obiter* 606.

⁴³ Par 22.

In the result, the court dismissed the challenge of the appellant on all the grounds.

4 THE APPOINTMENT OF ACTING JUDGES IN SOUTH AFRICA

In South Africa, the practice of appointing acting judges is well established.⁴⁴ It applies equally to trial and appellate courts, although acting judges in the appellate courts are permanent trial judges or former judges.⁴⁵ The appointment of acting judges to the specialist Labour Appeal Court⁴⁶ and the Competition Appeal Court⁴⁷ is also common. One only needs to peruse the monthly law reports to see the substantial number of acting judges who perform judicial service for some period during any particular court term.⁴⁸ The appointment of acting and temporary magistrates in terms of section 9 of the Magistrates Court Act⁴⁹ falls outside the scope of this article.⁵⁰

The appointment of acting judges is regulated by a number of sources. Firstly, the Constitution is the primary source which provides for the appointment of acting judges. Section 175 reads as follows:

- “(1) The President may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice with the concurrence of the Chief Justice.
- (2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.”

Secondly, the Supreme Court Act contains a number of provisions that regulate the appointment of acting judges.⁵¹ The President, or the Minister of Justice under certain circumstances, can appoint acting judges. Section 10(3) makes provision for the appointment of acting judges by the President; section 10(4) provides for the appointment of acting judges by the Minister of Justice:

⁴⁴ See *Van Rooyen v The State (General Council of the Bar of South Africa intervening)* 2002 5 SA 246 (CC) par 243-245.

⁴⁵ See S 10(5) of the Supreme Court Act 59 of 1959.

⁴⁶ See S 153(5) of the Labour Relations Act 66 of 1995.

⁴⁷ See S 36(4) of the Competition Act 89 of 1998.

⁴⁸ *Eg*, the 2006(1) volume of the South African Law Reports records that 40 acting judges served in the high courts during the two-month period covered by this volume of the reports; four high court judges acted in the Supreme Court of Appeal; and another four high court judges acted in the Competition Appeal Court.

⁴⁹ Act 32 of 1944.

⁵⁰ For a discussion of the appointment of acting and temporary magistrates, see Olivier “Onlangse Wysigings aan Artikel 9 van die Wet op Landdroshowe 32 van 1944 met Betrekking tot die Aanstelling van Landdroste in Waarnemende of Tydelike Hoedanighede” 2005 *THRHR* 654ff; Olivier “The Appointment of an Unqualified Person as a Temporary Magistrate in Terms of Section 9(3) of the Magistrates Court Act 32 of 1944: *Piedt v The State* [2001] 2 All SA 415 (E)” 2005 *Speculum Juris* 233ff.

⁵¹ See S 10.

- “(3) Whenever it is for any reason expedient that a person be appointed to act as a judge in the place of any judge of that division or in addition to the judges of that division or in any vacancy in that division, the State President may appoint some fit and proper person so to act for such a period as the State President may determine.
- (4) The Minister may in the circumstances mentioned in subsection (3) appoint some fit and proper person to act as provided in that sub-section for any period not exceeding one month.”

It is clear that there are contradictions between the Constitution and the Supreme Court Act. The Superior Courts Bill attempts to address these contradictions by providing for the repeal of the entire Supreme Court Act. Section 6 of the Bill deals with the appointment, remuneration and tenure of office of judges and acting judges. Subsection (1) provides that acting judges are appointed in accordance with the provisions in the Constitution and remunerated as determined by the Judges’ Remuneration and Conditions of Employment Act. The supremacy of the Constitution is reflected in this provision. Section 2(2) of the Superior Courts Bill specifically stipulates that the provisions of the Bill must be read in conjunction with chapter 8 of the Constitution which deals with the courts and the judiciary.⁵²

The Judges’ Remuneration and Conditions of Service Act⁵³ also allows for the performance of service by Constitutional Court judges and other judges discharged from active service. Section 7 makes it possible under certain circumstances for a retired judge to perform service as a judge if that judge’s mental and physical health enables him or her to perform such service.⁵⁴ A judge under the age of 75 years must be available to perform service for a total period of three months a year until he or she reaches the age of 75 years.⁵⁵ A judge who has already attained the age of 75 years may voluntarily perform further services if his or her services are so requested.⁵⁶ In both instances, a judge may only serve in the capacity of a judge if, after consultation with the Judicial Service Commission (JSC), such service is requested by the Chief Justice, President of the Supreme Court of Appeal or judge president in whose area of jurisdiction the Constitutional Court judge or judge resides or of the court to which the judge was attached when discharged from active service.⁵⁷ The approval of the Minister of Justice is also required.⁵⁸

Criticism has been expressed about the practice of appointing acting judges in general, and in South Africa particularly. In May 2000, Mr Dato’ Param Kumaraswamy, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, conducted a fact-finding mission to

⁵² See below for comment.

⁵³ Act 47 of 2001.

⁵⁴ See generally s 3 of the Act regarding the discharge of judges from active service.

⁵⁵ S 7(1)(a)(i).

⁵⁶ S 7(1)(a)(ii).

⁵⁷ S 7(1)(b)(i).

⁵⁸ S 7(1)(b)(ii).

South Africa.⁵⁹ The report of the visit deals with many issues relating to the South African judiciary and administration of justice, including the position of acting judges. The Special Rapporteur expressed concern in the report about the practice of appointing acting judges and its impact on judicial independence. The report cites a number of reasons for this concern that are specific to South Africa:

- The procedure for the appointment of acting judges bypasses the formal procedure provided for by section 174 of the Constitution in terms of which selection and recommendation for appointment of judges may only be made by the JSC.⁶⁰

Section 175(1) allows the President to appoint an acting Constitutional Court judge under certain circumstances, while section 175(2) empowers the Minister of Justice to appoint acting judges of other courts. In both cases, the appointments are made without consulting the JSC, but with the concurrence of the Chief Justice (in the former instance) and after consultation with the senior judge of the particular division (in the latter instance).

One of the objections filed against the constitutional provisions dealing with the appointment of acting judges during the certification proceedings of the text of the Constitution, was the lack of the JSC's involvement in the appointment process. The Constitutional Court rejected this objection, finding that there was justification for the JSC not to be involved in the appointment of acting judges.⁶¹

"The appointment of acting Judges is a well established feature of the judicial system in South Africa. Such appointments are made to fill temporary vacancies which occur between meetings of the JSC, or when Judges go on long leave, are ill or are appointed to preside over a commission. These appointments are necessary to ensure that the work of the Courts is not disrupted by temporary vacancies or the temporary absence or disability of particular Judges."

And further:⁶²

"If there is a vacancy in a Court the JSC is under a duty to fill it. It may no doubt deal or defer an appointment until a suitable appointment is identified, but it should not be assumed that it will abdicate its responsibility by allowing permanent vacancies to be filled indefinitely by acting Judges ... Acting appointments often have to be made urgently and unexpectedly. The JSC is a large body and there are practical reasons why a meeting of the JSC cannot be convened whenever the need arises for such an appointment to be made."

⁵⁹ The mission was pursuant to a mandate contained in the United Nations Commission on Human Rights Resolution 1994/41 and renewed by Resolution 2000/42 for a further three years.

⁶⁰ See par 64 of the report.

⁶¹ *First Certification* judgment par 127.

⁶² *First Certification* judgment par 128.

Coupled with the criticism about the exclusion of the JSC from the appointment of acting judges, is criticism of the power of the Minister of Justice to appoint acting judges of all courts other than the Constitutional Court. During the certification proceedings for the Constitution, an objection was filed against this power of the Minister to appoint without consulting the JSC. The Constitutional Court rejected the objection, finding that this provision was in line with conventions in other countries with independent judiciaries:⁶³

“The constitutional requirement that such consultation take place is a formalisation of a constitutional convention followed in many Commonwealth countries in which the Judiciary is regarded as independent. It leaves the final decision to the Minister but requires the decision to be taken in good faith with regard to the advice given.”

The Constitutional Court also dealt with the provision allowing for the appointment of an acting Constitutional Court judge. At the time of the certification proceedings, the provision required the appointment to be made by the President on the recommendation of the Minister of Justice acting with the concurrence of both the President of the Constitutional Court and the Chief Justice. The Constitutional Court dealt with the objection as follows:⁶⁴

“Appointment of an acting Judge to the Constitutional Court ... is in a special category. All three [Minister of Justice, Chief Justice & President of the Constitutional Court] are members of the JSC and the requirement that there be agreement between them as to the person to be appointed meets any reasonable concern that the power of appointing an acting Constitutional Court Judge might be abused.”

Subsequently, the Constitution was amended.⁶⁵ The amended section 175(1) requires the President to make the appointment on the recommendation of the Minister of Justice and the Chief Justice only. The amended provision therefore only requires the concurrence of one senior judge, and not two, as was previously required.

The Constitution Fourteenth Amendment Bill of 2005⁶⁶ proposes some further amendments to section 175. Subsection (2) as it currently stands is left unaffected. It is proposed in the Bill that subsection (1) is amended to allow, in addition to the appointment of an acting Constitutional Court judge, for the appointment of an acting Deputy Chief Justice, an acting Deputy President of the Supreme Court of Appeal, or a Deputy Judge President of a division of the High Court of South Africa, if there is a

⁶³ *First Certification* judgment par 131.

⁶⁴ *First Certification* judgment par 130.

⁶⁵ S 175(1) was substituted by s 14 of the Constitution Sixth Amendment Act, 2001. Ss 167 and 168 of the Constitution were also amended. The head of the Constitutional Court is now the Chief Justice of South Africa, while the head of the Supreme Court of Appeal (formerly the Appellate Division) who was formerly the Chief Justice, is now the President of the Supreme Court of Appeal.

⁶⁶ GN 2023 in GG 28334 of 2005-12-14.

vacancy in any of these respective positions, or if the incumbent is absent. It further provides that the appointment must be made on the recommendation of the cabinet member responsible for the administration of justice, who is the Minister of Justice, *after* consultation with the Chief Justice. The present provision requires the *concurrence* of the Chief Justice. The amendment therefore proposes a lowering of the consent requirement. The lowering of the consent requirement can be criticised as it devalues the input of the Chief Justice. The concurrence requirement, which amounts to consent, is replaced by consultation only. Also, the requirement is not that the recommendation is made *in* consultation with, but *after* consultation. This means that a decision about a recommendation can be made by the Minister of Justice without following the advice of the Chief Justice. The gist of the proposal is therefore that it places acting appointments to the most senior positions in the South African judiciary in the hands of the executive. Acting appointments to the senior judiciary should be in a “special category”, as explained by the Constitutional Court.⁶⁷ This proposal would result in acting appointments to the senior judiciary being treated as similar to that of ordinary members of the judiciary.

The Bill further proposes the addition of subsection (3):

“A person holding an acting position in terms of this section has the responsibilities, powers and functions of the judicial office in which the person is acting.”

Another reason why the formal procedure for the appointment of permanent judges is inappropriate for the appointment of acting judges, is that the purpose for the appointment of each is different. Section 10(3) of the Supreme Court Act is instructive in this regard. An acting judge can be appointed when it is for any reason expedient to do so: if there is a vacancy, an acting judge can be appointed until such a vacancy can be filled by a permanent judge, who is then appointed in terms of section 174; or if a judge is absent from duties for whatever reason, an acting judge can be appointed in his place; or an acting judge can be appointed in addition to the permanent judges in a particular division. The provision in the Superior Courts Bill that will replace this section does not specifically provide for the instances in which an acting judge can be appointed. It is submitted that this is an oversight which should be rectified. Recently, amendments were made to section 9 of the Magistrate’s Court Act in order to regulate the procedure for, and the circumstances under which, a temporary or acting magistrate can be appointed. Acting magistrates can only be appointed under circumstances similar to those listed in section 10(3) of the Supreme Court Act.⁶⁸ It is submitted that a provision similar to the existing section 10(3) should be included in the Superior Courts Bill to specify the circumstances under which an acting judge can be appointed.

⁶⁷ See *First Certification* judgment par 130.

⁶⁸ See Olivier 2005 *THRHR* 658-661.

- There is no security of tenure for such acting appointments, which the Special Rapporteur regards as an essential requirement for the existence of judicial independence.⁶⁹

By nature, “[a]cting appointments are essentially temporary appointments for temporary purposes”.⁷⁰ It is submitted that security of tenure for acting judges is therefore not possible. Judicial independence can, however, be safeguarded in a number of other ways. In the *First Certification* judgment, the Constitutional Court found that the absence of security of tenure does not violate judicial independence.⁷¹ The court found that there are sufficient other safeguards in place to ensure judicial independence.⁷² They include: consultation by the minister with the judge president of the court on which the acting judge will serve,⁷³ and the taking of the prescribed oath or making of the prescribed affirmation by the acting judge.⁷⁴ Furthermore, the acting judge will only sit in matters assigned by the Judge President of the particular court, meaning that the minister has no control over the cases heard by an acting judge.⁷⁵

Justice Michael Kirby, of the High Court of Australia, also criticises the lack of tenure of acting judges.⁷⁶ According to him, the appointment of acting judges undermines the tenured judiciary. He contends that there is always the possibility that an acting judge, hopeful of a permanent appointment, may rule in a particular way in order to secure such permanent appointment.

- The periods of acting appointments are too long. As a rule, these appointments are only supposed to be temporary and for short periods, mostly for a period of up to three months in order to substitute judges who are ill or on leave. However, it appears from the report that “there is no longer any rule”. An example is cited where two persons were appointed as acting judges for a period of two years. There is also a reported instance where an acting judge continued in this capacity uninterrupted for a period of five years.⁷⁷

It is submitted that the periods of acting appointments should not exceed one court term. As stated earlier, acting appointments are naturally temporary. The Supreme Court Act limits the duration of an acting appointment made by the Minister of Justice to a period not exceeding one month. The Superior Courts Bill is silent on the duration of the appointment. In principle, the period should be short. The

⁶⁹ See par 65 of the report.

⁷⁰ *First Certification* judgment par 128.

⁷¹ *Ibid.*

⁷² *First Certification* judgment par 132.

⁷³ *First Certification* judgment par 131.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ See “Acting Judges – A Non-theoretical Danger” http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_young2.htm.

⁷⁷ See par 63 of the report.

appointment is of a temporary nature; it is not permanent.⁷⁸ Many appointments are for much shorter periods. Any appointment exceeding one term is unacceptable and would justify the criticism of the Special Rapporteur. It would also raise the question whether there is a sufficient number of permanent judges in the particular division to dispose of the judicial business in that division.

- Acting appointments are used in judicial transformation in that it acts as a form of probation.⁷⁹ The JSC has expressed itself in favour of the practice of appointing acting judges:⁸⁰

“It has been the practice, which has now almost hardened into a rule, that, before being considered for judicial appointment, candidates must have acted, preferably, though not necessarily, in the Division to which they seek appointment. This enables the JSC to assess whether a candidate has the potential to dispense justice effectively, efficiently and without undue delay. It also provides candidates with an opportunity to determine whether or not they are sufficiently equipped for, and comfortable with, the job to spend the rest of their working lives at it.”

The Constitutional Court has also acknowledged the important role played by acting appointments in preparing potential candidates for permanent appointment to the Bench:⁸¹

“Acting appointments provide [the JSC] with a valuable opportunity for assessing the qualities of potential Judges. The use of part-time Judges has become a feature of the Court system in England, which is a country always associated with an independent Judiciary. Such appointments are made for the same reasons they are made in South Africa: ‘to assist the work of the Courts’ and to ‘give to possible candidates for full-time appointments the experience of sitting judicially and an opportunity to establish their suitability’.”

It is submitted that this is a very successful practice that should be encouraged. Caution should, however, be exercised in how the performance of the candidate is evaluated during the JSC public interview. At the October 2005 JSC interviews for a vacancy in the Cape Provincial Division, one of the candidates, who had acted in the division on several occasions, was persistently questioned about the six-year sentence he had imposed on a serial child sex offender.⁸² He was not successful in his application for a permanent judgeship. The concern raised by Justice Kirby⁸³ about the impartiality of a judge hopeful of a permanent appointment should be borne in mind in this regard. Also, it may result in potential candidates not making themselves available for acting appointments.

⁷⁸ S 9 of the Magistrates Court Act provides that the maximum period for the appointment of an acting magistrate is three months.

⁷⁹ See par 66 of the report.

⁸⁰ Moerane 2003 SALJ 713.

⁸¹ *First Certification* judgment par 128.

⁸² See “Judge Awes Judicial Panel During Interview” *The Mercury* of 2005-10-18.

⁸³ See fn 76 above.

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- There is no restriction on the type of cases or appeals that acting judges may adjudicate.⁸⁴ It is submitted that the reason for the appointment of the acting judge should be a factor taken into consideration by the head of the court in which the acting judge will serve in determining the cases which the acting judge will adjudicate. For example, if an acting judge is appointed in addition to the judges of a division in order to assist with a backlog of criminal appeals, then he or she should only deal with criminal appeals. Potential permanent judges should however be exposed to all aspects of the judicial function, including motion court, in order to determine their potential and/or competence.

5 CONCLUSION

The appointment of acting judges is controversial. Legal professionals have mixed opinions about the wisdom and legality, in some jurisdictions, of this practice. Severe criticism has been leveled against the appointment of acting judges. The essence of the criticism is that this practice infringes judicial independence. Yet, despite this criticism, the appointment of acting judges is becoming more prevalent in other parts of the world. In Australia, for example, a bill was recently introduced in the state parliament of Victoria to allow for the appointment of acting judges who can hold office for a continuous period of up to five years.⁸⁵ There is no doubt that the appointment of acting judges is legal in terms of South African and Lesotho law. Both the South African and Lesotho constitutions expressly provide for the appointment of acting judges. Furthermore, in South Africa the practice has become an integral part of the administration of justice system. It is also an indispensable component of judicial transformation.

It is submitted that in the case under discussion the Lesotho Court of Appeal correctly decided that the appointment of Cullinan had not infringed judicial independence. The grounds advanced by the appellant were without substance and merit. There are sufficient similarities between the South African and Lesotho legal positions to justify our courts referring to this decision of the LCA in the event of the validity of the appointment of an acting judge ever being challenged in the South African courts.

⁸⁴ See par 67 of the report.

⁸⁵ See criticism by Justice Ronald Sackville, the Chair of the Judicial Conference of Australia "Acting Judges and Judicial Independence" <http://www.jca.asn.au/docs/Age28Feb05.doc>.