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Constitutional freedoms

Judgments are not set in stone and can be open to question, writes

WHEN a judgment is delivered, people take positions, and it is not uncommon for lawyers, academics and the public to engage in criticism. MEC of Local Government, Housing and Traditional Affairs Mike Mabuyakhulu's attempt to "rebut" the constructive criticisms of the High Court's controversial judgment of the Slums Act is sophistry plastered with clichés. He would want us to believe that criticising a judgment translates into disrespect for the rule of law. He further avers "that when judges rule, they make their ruling on the basis of law and not on the basis of opinion or feelings".

Does this mean that judges do not err and that once pronounced a judgment cannot be interrogated meaningfully?

If one were to adopt Mabuyakhulu's reasoning, ANC president Jacob Zuma's court challenges are tantamount to "disrespect for the rule of law".

In a unanimous judgment of the Supreme Court of Appeal (SCA)[1], Ponnan JA cites the following: "...the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave…

"True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."

On page 33 of the S v Le Grange judgment, referring to Kgomo JP of the Kimberley High Court, it was stated: "Taken cumulatively though, I have no doubt that they compel the conclusion that in fact the learned Judge President was not fair and impartial during the trial."

Judges have to follow the doctrine of precedent (stare decisis) and are therefore bound to base their judgments accordingly. This does not mean that every judgment is correct even if it is based on previous decisions or that the precedent itself is apposite.

The courts, for seventy years, have generally refused specific performance orders against landlords because it believed that it would be difficult to enforce such an order. Judge Satchwell rejected this composite view[2].

Justice Squires's decision was overturned by a unanimous judgment of the Supreme Court of Appeal[3] which found that he had erred in his interpretation of the law regarding the principle of "*huur gaat voor koop"* in relation to a tenant.

There is a robust debate around contracts. Our courts have more than a century of experience and an accumulated "consciousness" based on entrenched legal

[1] *S v Le Grange* 2008 JDR 1168 (SCA) at page 32

[2] *Mpange and Others v Sithole* 2007 (6) SA 578 (W)

[3] *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A).

principles from English law, early Roman law and Roman-Dutch law.

The "ancient" laws, created by brilliant minds, are very much alive and relevant but changes are inevitable within a changing society like South Africa.

Few judges have been daringly outspoken, allowing the principle of fairness to prevail over the jealously protected principle of the sanctity of a contract.

Bhana (2007) argues that the court ought to reassess its approach to constitutional values in general and the importance of the liberal notion of freedom of contract in particular.

Barnard (2006: 161) states, "The being of the law of contract has always been shot-through with the values associated with altruistic political morality (fairness, reasonableness, etc.) but, more often than not, the law of contract is portrayed in the standard texts and in case law as value-neutral, socially stagnant, rule-bound and an individualistic approach that favours freedom of contract above all other considerations, and is dogmatically endorsed, followed and worshipped as an untouchable foundation and idol of the law of contract.

"This classic portrayal only narrows down, furthers and delineates in contract law the false consciousness regarding the legitimacy of law in general. It provides the means to further the commercial interests of the societal elites, the powerful bargaining agents and the corporate giants to the detriment of the blindfolded labourers, debtors and have-nots who are all told that this way of contract is the best and only way: take it or leave it (you had better believe it!."

The Slums Act indirectly aims to subvert the "pro-poor" judgments[4] with ensuing public debates adding to the legal genre within the Constitutional guarantee of freedom of expression. The freedom to express one's opinion is one of the pillars of our democracy. In terms of Section 15 our Constitution, "Everyone has the right to freedom of conscience, religion, thought, belief and opinion." Section 16 states: "Everyone has the right to freedom of expression, which includes - freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research."

Dr. Sayed Iqbal Mohamed
Chairperson, Organisation of Civic Rights

[4] *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC); *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

caption under pics
CIVIC rights activist Sayed Iqbal Mohamed defends his criticism of judgment on housing for the poor handed down by Judge President Vuka Tshabalala recently