Southern African Catholic Bishops' Conference
PARLIAMENTARY LIAISON OFFICE

Briefing Paper 458

July 2018

Lawfare

> *This excessive use of the courts speaks to the concern that democratic arrangements in our land are virtually devoid of non-litigious sites for mediation of conflict. Why would party faithful rush off to court to resolve an internecine dispute? Why is the state the chief of all litigators? How does it happen that labour federations should seek solace in court processes?*
>
> Justice Dikgang Moseneke[1]

1. Introduction

Are South African political actors too quick to ask the country's judges to referee their disputes? Ordinarily, in a stable and orderly democracy, it is highly desirable that people, and the parties and factions that they constitute, should 'go the legal route' rather than settle their differences by force, or bribery, or by any of the myriad other underhand methods that are typically associated with the world of politics.

In this sense, the tendency to 'rush off to court', in Justice Moseneke's words, is praiseworthy. It ought to mean that important disputes are being properly elevated, as a final resort, to the objective, non-partisan and principled forums of the law. However, it can get out of hand, especially if political players lose the ability to negotiate and compromise with each other; if different views always lead to the emergence of factions, and those factions inevitably see each other as mutually threatening; and if individual ambition for public office is the paramount consideration. When this happens, we run the risk that, far from elevating our legitimate disputes to a higher level, we end up dragging the institutions of justice down into the murkier reaches of political pettiness and rivalry.

We also risk clogging them up unnecessarily: "Superior courts of our country are confronted by an avalanche of litigation from powerful interests in [the] land. This phenomenon is known as *lawfare*."[1]

2. Background

During the last few months, Cape Town Mayor Patricia de Lille has been in and out of court, facing off against her own political party, the Democratic Alliance, which has been moving heaven and earth to get rid of her. Something similar may be on the cards in Knysna and George as well, where the DA is at loggerheads with the Mayors that represent it in those municipalities. As for the ANC, it is impossible to keep track of how many court applications it has brought against, or opposed from, its own members, often at senior provincial level. New ones are enrolled on a weekly basis, and at least half of its provincial conferences this year have been halted or delayed due to court applications brought by disgruntled party members.

It is by no means only the two biggest parties that require the help of judges to run their affairs. A few years ago the Congress of the People (COPE) was paralysed by a prolonged court battle between its two main founders, Mosiuoa Lekota and Mbazima Shilowa. In 2014, barely a month after contesting its first general election, Agang's rival leadership factions were seeking interdicts against each other; and in 2015 the EFF fought an ugly court battle against four of its leading MPs, who had publicly accused the party's leadership of abusing party monies and preventing internal debate.

However, the use of the courts to resolve political disputes goes much further than these examples of the 'internecine disputes' mentioned by Judge Moseneke. We have seen a spate of cases brought by NGOs and opposition parties against the government and against various parastatal

organisations, such as the SABC and Eskom. It sometimes appears that obtaining a court order is the only way of overcoming inertia or, worse, intransigence, at senior levels of state administration. And on occasion, as with the still unresolved debacle around the system for payment of social grants, initial court orders have been ignored, leading to further litigation.

Lastly, we have also become used to the phenomenon of multiple appeals. Losing political litigants, it seems, are almost never satisfied with the ruling of a division of the High Court; they routinely seek leave to appeal to the Supreme Court of Appeal and, if they lose there as well, to the Constitutional Court. Where government is the losing party, this trend is facilitated by its endlessly deep pockets, courtesy of the taxpayer, but even opposition parties (witness the DA in the De Lille matter) are prone to take matters 'all the way'.[2]

3. The Right to Litigate

It should not be suggested that political disputes should never come before the courts. Section 34 of the Constitution provides that:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

'Everyone' certainly includes government, political parties and individual politicians. However, this does not mean that each and every dispute ought to be brought court simply because it is capable of resolution 'by the application of law'. Large numbers of the kinds of application under discussion here are about essentially political matters which can and should be resolved politically. For instance, when two factions of a party's provincial structure cannot agree, it is surely preferable that the national leadership should resolve the matter, rather than that one faction rushes off to court for its remedy. And, when the national leadership does step in, and makes its ruling, surely the 'losing' faction should accept it with good grace?[3]

The tendency of politicians and parties to approach the courts as a first resort, rather than a final resort, raises serious questions about their capacity to negotiate in good faith, their willingness to compromise, and their commitment to democratic practices. Simply because a right is available it does not mean that it has to be exercised. Sometimes, the wider good is served when a person (or party) has the good grace not to insist upon the ultimate vindication of what they perceive to be their right(s).

4. Politicising the Courts

Excessive litigation to settle political disputes risks undermining the status and independence of the courts, in that it tends to draw them into the political arena. This is not so much of a danger when the litigation centres on allegations of corruption or maladministration (though even there courts have been accused of 'interfering' in matters best left to government to deal with) but it becomes a real problem when courts are forced to pronounce in favour of one party to an internecine argument. It can hardly be expected that rank-and-file members of the losing side will always accept their defeat with understanding and respect. And while we should be able to expect that political leaders would demonstrate a mature approach to such outcomes, experience shows that we cannot.

Some of the most pronounced attempts to undermine the credibility of the courts – to reduce them in effect to political actors – have been made in connection with litigation around technical and procedural questions.[4] Here, again, the risk is that members of political parties, the majority of whom may not be in a position to follow the intricacies of the legal arguments, will interpret the outcome as evidence that the court is 'in favour of' and 'against' the winning and losing litigants respectively.

4.1. The separation of powers

The doctrine of the separation of powers, which applies to a large extent in our country, requires that the various arms of government (legislature, executive and judiciary) respect the limits of their spheres of power, and do not attempt to exercise powers which properly belong to one of the other arms. This is perhaps the best way yet devised to provide for checks and balances on the exercise of state power, and to prevent its over-concentration in any one part of the structure of state.

Two recent examples illustrate how this important doctrine can be threatened by 'lawfare'. In the litigation around the SA Social Security Agency (SASSA) and the contracts and

mechanisms for the payments of social grants, the Constitutional Court found itself having to play a role that was "not one of the Court's choosing", in that, in order to undo the mess created by the then Minister of Social Development's utter disregard of her responsibilities, it had to prescribe detailed administrative remedies of a kind that properly belong to the executive arm of government.[5] The Court, facing the horrifying possibility that over 15 million social grants would not be paid, thus had to intrude into the domain of the executive, blurring the lines of separation.[6]

In another matter the Court declined to cross the lines. When a motion of no confidence in President Zuma was tabled in April 2017, some opposition parties asked the Speaker to allow a secret ballot to be held, citing the likelihood that some ANC MPs would be reluctant to vote with their consciences if the vote was an open one. The Speaker responded that she believed she was constitutionally precluded from authorising a secret ballot, whereupon the United Democratic Movement approached the Constitutional Court for a ruling. Among the orders it sought was one that read as follows: "The Constitution requires that motions of no confidence in terms of section 102 of the Constitution must be decided by secret ballot."

The Court rejected this notion on the basis of the separation of powers: *"This Court has been asked to direct the Speaker 'to make all the necessary arrangements to ensure that the motion of no confidence . . . is decided by secret ballot, including designating a new date for the motion to be debated.' But no legal basis exists for that radical and separation of powers-insensitive move. […] To order a secret ballot would trench [upon the] separation of powers."* [7]

So far, it is probably true to say, our courts have avoided 'judicial overreach', the term that describes unwarranted intrusion by the judiciary into the business of the legislature and the executive; but the more that judges are invited, even implored, to adjudicate on the doings of these other two spheres of government, the more likely it is that overreach will occur.

4.2. Political proxies

At the time of writing, the NGO Afriforum had just announced that it intends to launch a private prosecution for animal cruelty against Thandi Modise, the Chairperson of the National Council of Provinces. This litigation stems from the discovery a year or two ago of various sick and starving animals on a farm owned by the Ms Modise in North West Province. Previously, Afriforum announced a private prosecution of Duduzane Zuma for the deaths of two women in a car accident which was allegedly his fault.

The law provides for private prosecutions, and there is certainly a place for them if the statutory prosecuting authority fails in its duty to bring suspected criminals to court. But, for most people, it does not take much of a leap of the imagination to grasp that Afriforum's agenda is a political one. Now, it may be that all the organisation wants to do is to prod the National Prosecuting Authority into action (as it has succeeded in doing in the Duduzane Zuma case), but what would happen if – for example – its prosecution of Ms Modise were to come to court? There would surely be a widespread perception that the court was assisting a predominantly white, Afrikaner organisation to attack a senior and much-respected ANC leader.

The situation is aggravated by the fact that the courts are as powerless to refuse to entertain such litigation as they are to decline to hear the endless litany of applications launched by ANC factions. As long as these matters are enrolled procedurally they will be given a hearing, regardless of the underlying agendas; and the courts concerned will find it hard to avoid being seen as politically interested actors in the manufactured drama.

5. Undermining Politics

If on the one hand lawfare risks the credibility and status of the courts, then on the other it also threatens to weaken or sideline traditional methods of political engagement. Raymond Suttner puts it as follows:

> *"Even if the opposition succeeds in enlisting judicial support for various constitutional matters, it needs to be careful that 'lawfare' does not become a substitute for winning political support in conventional ways, building its support base and constituency.*
> *A judicial victory is not the same as what is gained through political organisation and through winning political support as an organisation or for a political cause or vision. It is very important that the courts are not seen as substitutes for doing the work that is necessary to build an alternative vision and also organisational work needed to mobilise*

and activate South Africans from all walks of life."[8]

It is also important that the voting public does not lose confidence in political parties and their leadership. If politicians are constantly seen to be rushing to court the moment a dispute or difficulty arises, they surely risk giving an impression of weakness or ineptitude. There is perhaps an analogy with football: some of our politicians are like soccer players who, at the slightest touch from a rival, fall to the ground with much writhing and screaming, doing their best to secure the referee's sympathy. Even their most loyal fans eventually end up frustrated, wishing the players would simply grow up and get on with the game.

6. How Have We Ended Up This Way?

In other liberal, multi-party democracies it is unusual to find members of a political party taking the party to court, or to have one faction battling it out with another before a judge. In most cases, if a member or faction is dissatisfied with a decision or policy, they will fight it according to the party's internal procedures. If they lose, they either accept the situation or – if they feel strongly enough about it – they resign.

Our context is different. Most MPs, MPLs and municipal councillors have no other source of income, and thus it is materially vital for them to retain their positions. To resign on a matter of principle is a massive financial risk. If we add ambition to the mix, then it is easy to see why all means, including litigation, are employed in order to secure political survival.

Another way in which our situation differs from that of many other democracies, especially in the developed world, is that we have had one completely dominant governing party for 24 years. Almost all of the court challenges launched by NGOs and community groups, and many of the cases brought by opposition parties, concern corruption, maladministration or incompetence in government departments, organs of state, or state owned enterprises There can be little doubt that, if the ANC's electoral support had generally been around the 40 – 50% mark, rather than in the area of 60 – 65%, it would have worked much harder to combat these maladies long before it became necessary for disgruntled organisations and communities to seek remedies through litigation.

7. Conclusion

Justice Moseneke sums it up this way:

> *"[C]ourts are not and should not be a substitute for the obligation to move our society to spaces envisioned in the Constitution. We must rethink our democratic processes in a manner that permits peaceable conflict mediation. We must find a new ethos that permits the lamb and the lion to graze together. Losers and winners should both overcome."*[9]

It may be a bit much to hope that our various lambs and lions are going to graze together anytime soon, but there is certainly a lot that can be done to reduce the need for lawfare. Perhaps, with the new spirit of robust oversight that seems to be emerging in Parliament, and with President Ramaphosa's tentative efforts to rid government of some of its more egregious offenders against democratic values, we are moving in the right direction.

Mike Pothier
Programme Manager

[1] There are various uses of this term. In the United States, particularly, it refers to the use of legal means and strategies in actual warfare or in connection with 'national security' issues. Others use it as a combination word for 'law' and 'welfare', describing how law can be used to advance socio-economic rights. In South Africa it is generally used, to quote Justice Moseneke again, to refer to party political battles being staged in court; see https://city-press.news24.com/News/newsmaker-dikgang-moseneke-the-end-of-a-historic-era-20160522

[2] It must be noted that the Ramaphosa administration has to some extent bucked the trend. It withdrew pending appeals, for example, against a High Court ruling that the appointment of NPA head Shaun Abrahams was invalid; and against another ruling that former President Zuma was personally liable for court costs in his failed attempt to have the Public Protector's *State of Capture* report set aside. Mr Ramaphosa also sidelined Bathabile Dlamini who, as Minister of Social Development, had overseen her department's protracted and hugely wasteful litigation on social grant payments.

[3] Not in matters where criminal acts such as bribery or intimidation are suspected, but certainly in matters where the dispute is over procedures or perceived unfairness.

[4]See, for example, https://businesstech.co.za/news/government/175209/__trashed-59__trashed/ and https://www.news24.com/Video/SouthAfrica/News/courts-are-interfering-robbing-us-of-our-rights-kzn-anc-secretary-20170515

[5] http://www.saflii.org/za/cases/ZACC/2017/8.pdf para [14].

[6] It is possible to view this from a different, but complementary, perspective. Adv Thuli Madonsela, speaking at a Roundtable Discussion on this topic hosted by the CPLO and the Hanns Seidel Foundation earlier this year, remarked that the separation of powers also implies that, if one branch of government is not working properly, the others have to step in to remedy the situation.

[7] http://pmg-assets.s3-website-eu-west-1.amazonaws.com/Full_judgment_Official.pdf paras [92] & [93].

[8] https://www.dailymaverick.co.za/article/2017-05-23-op-ed-the-question-of-judicial-overreach/

[9] See note 1 above.