CHAPTER 5: THE JUDICIARY

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1. INTRODUCTION

Judicial independence is the idea that the judiciary — the branch of government that interprets and applies the law — should be independent from the other branches of government. Moreover, that the judiciary should not be subject to improper influence from powerful people and entities, whether they be individuals in government or private persons. The Constitution establishes an independent judiciary in South Africa which is subject only to the Constitution and the law, which the judiciary must apply impartially and without fear, favour or prejudice.[1]

The judiciary is synonymous with the courts in South Africa. Note that this does not refer to the buildings in which the courts are housed, but rather the courts as institutions, including the judges, magistrates and other officers that are responsible for the day-to-day functioning of the court system, and the rules by which the courts operate. All judicial authority in South Africa is vested in these institutions.[2]

In order to give effect to the doctrine of the separation of powers, all organs of state must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.[3] This duty is incumbent on any government department in any sphere of government, and on any person or institution exercising power or performing a function in terms of the Constitution or any legislation.[4] All persons and organs of state — from law students to the President — are subject to

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[1] Section 165(2) of the Constitution.

[2] Section 165(1) of the Constitution.

[3] Section 165(3) of the Constitution.

[4] Section 165(3) read with section 239 of the Constitution.

the authority of the courts, and a court order or decision binds anyone to whom it applies.[5]

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.[6] The Chief Justice also presides over the Constitutional Court, the highest court in the Republic.

2. THE JUDICIAL SYSTEM

(a) The Courts

The courts in South Africa are[7] —

(a) the Constitutional Court;
(b) the Supreme Court of Appeal;
(c) the High Court of South Africa;
(d) the Magistrates' Courts; and
(e) any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts.

For the most part, items (a) to (d) above represent the hierarchy of South African courts. The High Court may hear matters on appeal from the Magistrates' Courts, and the SCA may hear matters on appeal from the High Court. As stated above, the Constitutional Court is the highest court in this hierarchy.

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[5] Section 165(5) of the Constitution.

[6] Section 165(6) of the Constitution.

[7] Section 166 of the Constitution.

While the Magistrates' Courts and the various divisions of the High Court only have power (jurisdiction) to hear matters that arose within their geographical boundaries, the SCA and Constitutional Court have jurisdiction across South Africa. The Superior Courts Act 2013 divides the High Court of South Africa into nine divisions, one for each of the provinces. Some divisions have multiple seats: one main seat, and one or more local seat. The main seat has jurisdiction over matters arising anywhere in the province, while local seats have concurrent jurisdiction over matters arising in smaller parts of the province.

There are also several 'specialist high courts' created by Acts of Parliament to deal with issues specific to that legislation. The creation of these courts is envisaged in section 166 *(e)* of the Constitution. While these courts have the hierarchical status of high courts, they all exercise national jurisdiction:

- The Labour Court and Labour Appeal Court in Johannesburg, which adjudicate over labour disputes and hear labour appeals, respectively.
- The Land Claims Court, in Randburg, which hears matters on the restitution of land rights lost as a result of racially discriminatory land laws.
- The Competition Appeal Court in Cape Town, which deals with appeals from the Competition Tribunal.
- The Electoral Court in Bloemfontein, which sits mainly during elections to deal with electoral disputes.
- The Tax Court in Pretoria, which deals with tax-related matters, including non-compliance with tax obligations.

(b) Constitutional Jurisdiction

A court's power to hear argument in and pass judgment on a legal matter is known as its jurisdiction. As noted above, some courts, such as the various divisions of the High Court and the Magistrates' Courts have geographically-determined jurisdictions. However, a court's jurisdiction is not determined by location alone — subject matter is also an important aspect of jurisdiction. Magistrates' Courts, for example, do not have jurisdiction over divorce matters or matters that involve the interpretation of a will.

Not all courts have subject matter jurisdiction over constitutional issues. The 1993 interim Constitution, which 'welded' the Constitutional Court onto the existing court system, placed the Constitutional Court in an 'equal position' with the SCA.[8] The SCA retained its position as having final jurisdiction over all non-constitutional matters, but enjoyed no jurisdiction over constitutional matters.[9] The final Constitution changed this arrangement, empowering the SCA with Constitutional jurisdiction.[10] At this stage, the Constitutional Court had no general jurisdiction over non-Constitutional matters. A third major change was brought about by the Seventeenth Amendment to the Constitution in 2012.[11] Since this amendment, the Constitutional Court has jurisdiction not only over constitutional matters, but also over any other matter, if it grants leave to appeal the matter. Leave to appeal is granted by the Constitutional Court if the matter raises an arguable point of law of general public importance which ought to be considered by the Court.[12] Note that the 'arguable point of law' requirement excludes matters that only involve disputes of fact.[13] Similarly, the Constitutional Court may not entertain matters involving the straightforward application of the law.[14] The Constitutional Court makes the final decision whether a matter is within its jurisdiction.[15]

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[8] P de Vos & W Freedman (eds) *South African Constitutional Law in Context* (2014) at 213.

[9] Ibid.

[10] Ibid.

[11] Constitution Seventeenth Amendment Act, 2012

[12] Section 167(3)(b) of the Constitution.

[13] De Vos & Freedman op cit note 8 at 215.

[14] Ibid at 216.

[15] Section 167(3)(c) of the Constitution.

There are some subject matters upon which the Constitutional Court has exclusive jurisdiction. In other words, no other court may hear or adjudicate upon matters of this nature. These are listed in section 167(4):

(a) disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
(b) matters concerning the constitutionality of any parliamentary or provincial Bill, where the Bill has been referred to the Court by the President in terms of section 79 or a provincial Premier in terms of section 121;
(c) applications by members of the NA or provincial legislatures for an order declaring that certain legislation is unconstitutional;
(d) matters concerning the constitutionality of any amendment to the Constitution;
(e) matters concerning the failure of Parliament or the President to fulfil a constitutional obligation; and
(f) the certification of provincial constitutions in terms of section 144

In terms of the final Constitution, the SCA has jurisdiction over appeals in most matters arising from the High Court.[16] This includes constitutional matters. Whereas before the Seventeenth Amendment, the SCA was the highest appeal court in South Africa in non-constitutional matters, the SCA may now be the court of final instance in non-constitutional matters where the Constitutional Court has decided not to hear the appeal on the grounds mentioned above.[17]

[16] Section 168(3)(a) of the Constitution.

[17] De Vos & Freeman op cit note 8 at 222.

3. POWERS OF THE COURTS IN CONSTITUTIONAL MATTERS

A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.[18] The fact that this provision uses the word 'includes', means that constitutional matters are not limited to this definition. Thus, the Constitution does not seem to offer any clear-cut definition of 'constitutional' matter at all.

The Constitutional Court has not been proactive in providing an all-embracing definition of 'constitutional matter', either. Instead, the Court has tended to decide on a case-by-case basis whether a particular matter raises constitutional issues.[19] Indeed, in *S v Boesak,* the Court said:

> The Constitution offers no definition of a constitutional matter, or an issue connected with a decision on a constitutional matter. Section 167(3)(c) leaves that ultimately to the Constitutional Court to decide.[20]

There are, however, some clear examples of cases involving a constitutional matter. One such example is where someone alleges that the effects of a piece of legislation are to discriminate against them in a way that violates the Bill of Rights.

When deciding a constitutional matter within its power, a court must first ascertain whether there is a law or conduct (especially by the state) that is inconsistent with the Constitution. If the answer is yes, the court must declare that law or conduct invalid to the extent of its constitutional inconsistency.[21] The court may then make any order that is just and equitable in the circumstances of the case.[22] Often, especially

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[18] Section 167(7) of the Constitution.

[19] S Seedorf 'Jurisdiction' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa 2 ed (RS 6, 2014) at 19.*

[20] S v Boesak 2001 (1) SA 912 (CC).

[21] Section 172(1) of the Constitution.

[22] Section 172(1)(b) of the Constitution.

where the order involves declaring legislation unconstitutional, the court will suspend the declaration of invalidity to allow the competent authority (Parliament, for example) to correct the defect.[23]

While the SCA or the High Court may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, such an order has no force until it is confirmed by the Constitutional Court.[24]

4. JUDICIAL INDEPENDENCE AND IMPARTIALITY

(a) Judicial Independence and the Appointment of Judges

The independence of the judiciary is a 'distinctive feature of a constitutional democracy'[25] and is an important feature of the doctrine of the separation of powers. As noted above, the Constitution demands that the courts remain independent, subject only to the Constitution and the law.[26] As the branch of government that applies the law, it is important that the courts are able to apply it to the other branches of government too — this gives effect to the principle that no one is above the law, not even the most powerful political actors in society.

Where political considerations play a decisive role in the appointment of judges, the impartiality and independence of judges is put at risk.[27] However, it must be noted that judges are sometimes, themselves, political actors, as their decisions can have

[23] Section 172(1)(b)(ii) of the Constitution.

[24] Section 172(2)(a) of the Constitution.

[25] De Vos & Freedman op cit note 8 at 225.

[26] Section 165(2) of the Constitution.

[27] De Vos & Freedman op cit note 8 at 229.

far-reaching political consequences.[28] The fact of judges' potentially-great political power, along with the fact that they are unelected officials, raises concerns about the democratic legitimacy of judicial authority. If judges are not chosen by the people, what business do they have invalidating laws or actions by organs of state who are elected by the people?

As a compromise between the need to ensure judicial independence and the democratic legitimacy of judges, the Constitution created the Judicial Service Commission (JSC).[29] The JSC is involved in the appointment of all judges of the Constitutional Court, the SCA and the High Courts.

When considering the matter of the appointment of judges, the JSC is composed as follows:[30]

(a) the Chief Justice (who presides over meetings of the JSC);
(b) the President of the SCA;
(c) one Judge President of the High Court;
(d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
(g) one teacher of law designated by teachers of law at South African universities;

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[28] Ibid.

[29] De Vos & Freedman op cit note 8 at 230.

[30] Section 178(1) of the Constitution.

(h) six persons designated by the NA from among its members at least three of whom must be members of opposition parties represented in the NA;
(i) four delegates to the NCOP;
(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the NA; and
(k) when considering matters relating to a specific Division of the High Court, the Judge President of that Division and the Premier of the provinces concerned, or an alternate designated by each of them.

When a vacancy occurs on a court, the Chief Justice, as chairperson of the JSC, calls for nominations to fill the vacancy. The shortlisted candidates are then interviewed in open interviews, which members of the public and the media are free to attend. The JSC then makes recommendations to the President on which candidate(s) to appoint.[31]

Any appropriately qualified person who is a fit and proper person may be appointed as a judge. Additionally, any person to be appointed to the Constitutional Court must be a South African citizen.[32] When judicial officers are appointed, the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered.[33] This requirement certainly applies to the considerations of the JSC,[34] but may arguably also apply to the President in his exercise of discretion to appoint candidates recommended to him.

The consultation requirements that apply to the President when appointing judicial officers differ according to the office to which the candidate is being appointed.

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[31] De Vos & Freedman op cit note 8 at 230.

[32] Section 174(1) of the Constitution.

[33] Section 174(2) of the Constitution.

[34] De Vos & Freedman op cite note 8 at 234.

When appointing the Chief Justice and the Deputy Chief Justice, the President is required to consult both the JSC and leaders of parties represented in the NA before he makes his appointment. On the other hand, when appointing the President and Deputy President of the SCA, the President is only required to consult the JSC before making his appointment.[35]

The other judges of the Constitutional Court are appointed by the President after consulting the Chief Justice and the leaders of parties represented in the National Assembly.[36] The Constitution specifies a procedure for this kind of appointment. First, the JSC must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the president.[37] The President may make any appointments from this list, and must advise the JSC, with reasons, if any of the nominees are unacceptable and thus that any appointment remains to be made.[38] In this case, the JSC must supplement its list with further nominees. The President must, thereafter, make the remaining appointments from the supplemented list.[39]

The President enjoys far less discretion with respect to the appointment of all other judges, for example, judges of the High Court: the President must simply appoint these judges on the advice of the JSC.[40]

Note that while the judges of the superior courts (i.e. the Constitutional Court, the SCA and the High Court) are appointed in terms of the Constitution's provisions

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[35] Section 174(3) of the Constitution.

[36] Section 174(4) of the Constitution.

[37] Section 174(4)(a) of the Constitution.

[38] Section 174(4)(b) of the Constitution.

[39] Section 174(4)(c) of the Constitution.

[40] Section 174(6) of the Constitution.

relating to the Judicial Service Commission, other judicial officers (including magistrates) are appointed in terms of an Act of Parliament.[41] The constitutionality of some aspects of the appointment of Magistrates in terms of the Magistrates Act was challenged in the case of *van Rooyen,*[42] which is discussed in depth below.

The selection processes of the JSC, and the rules relating to review proceedings of decisions of the JSC, were brought under the scrutiny of the Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission.*[43]

Helen Suzman Foundation v Judicial Service Commission

2018 (4) SA 1 (CC)

Facts

In October 2012, the JSC took a decision to advise President Zuma to appoint certain candidates as judges of the Western Cape Division of the High Court, and not to appoint others. This decision followed the public interview of the candidates and the subsequent private deliberations of the JSC. The Helen Suzman Foundation approached the High Court seeking to have that decision reviewed and set aside on the grounds that it was unlawful and irrational.

Rule 53 of the Uniform Rules of Court is the rule that is usually used when a party wants to have the decision of an administrator or administrative body set aside by a court. The HSF brought its application in terms of this rule. In terms of Rule 53, the JSC was required to file at court the record of the proceedings sought to be

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[41] Section 174(7) of the Constitution.

[42] *S and Others v van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC).

[43] *Helen Suzman Foundation v Judicial Service Commission (Trustees for the Time Being of the Basic Rights Foundation of South Africa as amicus curiae)* 2018 (4) SA 1 (CC).

corrected or set aside. The record filed by the JSC, however, did not include any minutes or transcripts of the JSC's deliberations.

HSF became aware that the JSC routinely recorded its deliberations and that the deliberations in question had also been recorded. It requested that the JSC file the recordings, on the basis that they formed part of the Rule 53 record. The JSC refused, claiming that the deliberations of the JSC are done in a closed session for reasons of confidentiality.

HSF brought this application to compel the JSC to file a gull record of the decision, including a recording of the deliberations.

Judgment

The purpose of the Rule 53 record is to operate in favour of an applicant in review proceedings, and ensure that review proceedings are not launched in the dark. It enables the applicant and the court to properly assess the lawfulness of the decision-making process.

The Rule 53 record contains all the information relevant to the decision or proceedings which are the subject of the review. Information is considered relevant if it 'throws light' on the decision-making process, and explains what factors were likely taken into account by the decision-maker.

The JSC's argument for a blanket ban on the disclosure of the record of its deliberations (rather than choosing not to disclose in certain specific cases) is unfounded, and conflicts with the rule of law and the constitutional values of accountability, responsiveness and openness.

There is no reason why the deliberations of administrative bodies in general should be shielded from disclosure in a Rule 53 record. Moreover, there is no reason why the deliberations of the JSC in general should not form part of the record. While there may be cases in which confidential information should not be disclosed, the need for confidentiality must be proven on a case-by-case basis. In this case, the JSC had established no need for confidentiality.

The JSC is ordered to comply with Rule 53 and deliver the full recording of the proceedings sought to be reviewed in HSF's application, including the audio recording and any transcript of the deliberations of the JSC after the interviews.

(b) Security of Tenure and Financial Security

Another mechanism by which the Constitution protects the independence of the judiciary is security of tenure for judges. This is the guarantee that judges will not be dismissed from office (or threatened with dismissal) for making a decision that other powerful actors do not like, especially members of the national executive.[44]

Judges are either appointed for a fixed term (in the case of judges of the Constitutional Court), or appointed on a permanent basis until they reach a fixed retirement age (in the case of all other judges). Constitutional Court judges hold office for a non-renewable term of twelve years, or until they reach the age of 70, whichever occurs first.[45] The Constitution allows for an Act of Parliament to extend the term of office of a judge on the Constitutional Court.[46] Pursuant to this provision, Parliament passed section 4 of the Judges' Remuneration and Conditions of Employment Act,[47] which extends the term to fifteen years' active service.[48] This includes service performed as a judge on any other court.[49] A Constitutional Court judge must nevertheless retire when he reaches the age of 75. The practical effect of these provisions is that a judge on the Constitutional Court who has been in active service on another court (e.g. the High Court) for more than three years will usually serve a

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[44] De Vos & Freedman op cit note 8 at 238.

[45] Section 176(1) of the Constitution.

[46] Section 176(1) of the Constitution.

[47] Act 47 of 2001.

[48] De Vos & Freedman op cit note 8 at 238.

[49] Ibid.

twelve-year term on the Constitutional Court, unless they reach the age of 75 before the end of that term. A judge who has not served on another court before being appointed to the Constitutional Court will usually serve a fifteen-year term provided he does not reach retirement age before the end of his term.[50]

Judges other than those on the Constitutional Court (i.e. judges on the High Court or SCA) hold office until they are discharged from active service in terms of an Act of Parliament.[51] This is governed, again, by the Judges' Remuneration and Conditions of Employment Act.[52] Section 3(2) of the Act provides that judges must retire when they reach the age of 70. However, if they have not yet completed ten years' active service upon reaching retirement age, their tenure will only end after they have served for ten years. Section 4(4) of the Act provides a further possibility for extension of tenure by allowing a judge who has not completed fifteen years' active service when he reaches the age of 70 to continue to serve until he has completed fifteen years' active service or reaches the age of 75, whichever occurs first.[53]

Over and above their constitutionally-guaranteed terms of office, the security of judges' tenure is further protected by the Constitution's requirements that judges can only be prematurely removed from office in very specific circumstances. A judge may only be removed from office if the JSC finds that that judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct.[54] In addition to this, the National Assembly must pass a resolution calling for the removal of that judge with a supporting vote of at least two thirds of its members.[55] After such a resolution is

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[50] Ibid.

[51] Section 176(2)

[52] Op cit note 44; De Vos & Freedman op cit note 8 at 239.

[53] De Vos & Freedman op cit note 8 at 239.

[54] Section 177(1)(a) of the Constitution.

[55] Section 177(1)(b) of the Constitution.

passed, the president must remove the judge.[56] Quite simply, these provisions make it difficult to remove a serving judge, and this in turn ensures that judges are not removed from office for political reasons or reasons unrelated to a judge's fitness to hold office.

Another related aspect of judicial independence as guaranteed by the Constitution is judges' financial security. The Constitution provides that judges' conditions of employment are to remain stable; the salaries, allowances and benefits of judges may not be reduced.[57] This ensures that judges do not fear reprisal in the form of salary cuts or the loss of benefits for making unpopular decisions, especially findings against officials from other branches of government.

(c) Impartiality

A further fundamental aspect of judicial independence is impartiality, the idea that judges should interpret and apply the law with minds open to argument and free of bias. When hearing a matter, a judge should not have already decided the outcome before he hears each side. This principle is placed under threat if judges take their own personal allegiances — whether they be political, religious, ethnic, or arising from some other source — into account when adjudicating a matter.

The case of *van Rooyen*[58] illustrates the importance of the principles of independence and impartiality in our law, and establishes the test for the impartiality of judicial officers

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[56] Section 177(2) of the Constitution.

[57] Section 176(3) of the Constitution.

[58] *S and Others v van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC).

S and Others v van Rooyen and Others

2002 (5) SA 246 (CC)

Facts

Van Rooyen was convicted in the Magistrates' Court for theft and the unlawful possession of a firearm and ammunition, and sentenced to imprisonment for a total period of six years. Van Rooyen appealed his conviction and sentence to the High Court. One of the grounds of his appeal was that the Magistrates' Court lacks the institutional independence required by the Constitution. Two other accused brought similar proceedings in the High Court, seeking to have criminal processes against them set aside on the grounds of the Magistrates' Court's lack of independence. These matters were consolidated in this application.

Much of the complaint related to the provisions of the Magistrates Act that created the Magistrates Commission, a body that played a significant role in the appointment and promotion of Magistrates and any disciplinary action to be taken against them. It also played a part in determining the salaries and duties of Magistrates. The Magistrate's Commission was composed of a judge, six magistrates, four legal practitioners, one teacher of law, eight members of Parliament and five nominees of the executive, along with the Minister of Justice and head of Justice College.

Van Rooyen's contention was that the Magistrate's Commission was effectively subject to the control of the Minister of Justice, and this impermissibly limited Magistrates' judicial independence.

Judgment

Judicial independence and impartiality are enshrined in the Constitution. Section 165(2) provides that 'the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.' Judicial independence and impartiality are also implicit in the rule of law which is foundational to the Constitution, and in the separation of powers demanded by the Constitution.

Institutional protection for courts' independence is provided by sections 165(3) and (4), which ensure that no person or organ of state may interfere with the functioning of the courts, and that organs of state must assist and protect the courts, to ensure their independence and impartiality.

While the Constitution provides that judges of superior courts are to be appointed on the advice of the JSC, there are no comparable provisions in the Constitution that an independent commission be appointed to deal with matters relating to the appointment and removal of magistrates. Nonetheless, magistrates are entitled to the protection necessary for judicial independence.

When assessing whether judicial officers are acting independently and impartially in the discharge of their duties, regard is had not only to whether there is actual independence and impartiality, but also to whether there is the appearance or perception of such. Nonetheless, the test is an objective one. In testing for a lack of impartiality, the court must ask whether the apprehension of bias is a reasonable one. The question is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge will not bring an impartial mind to bear on the adjudication of the case.

The test for impartiality is as follows: whether the court, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence.

The Magistrates Commission is composed similarly to the Judicial Service Commission. The Constitution has thus set a norm for the composition of such a commission, which takes into account safeguards to protect the judiciary's independence.

The fact that the national executive has a strong influence in the appointment of the members of the Magistrates Commission does not mean that magistrates' courts lack independence. Nor does it mean that the Minister is likely to have undue influence over the decisions of the Commission. The diverse composition of the Commission, including the presence of judges, magistrates and lawyers, is a powerful indication of independence.

In general, the provisions of the Magistrates Act are consistent with the constitutional value of judicial independence. There is no objective reason to believe that magistrates would not administer justice independently and impartially. On an application of the test, then, the magistrates in the criminal proceedings concerned were impartial and independent. Thus, the applications to set aside the criminal proceedings that gave rise to this application are dismissed.

5. REVISION QUESTIONS

1. Is it true that the Constitutional Court is only empowered to hear constitutional matters? Explain.

2. What is jurisdiction?

3. List six types of matters over which the Supreme Court of Appeal enjoys no jurisdiction.

4. During the apartheid era, the independence of the judiciary was not guaranteed. In a short essay, explain how the independence of the judiciary is protected in our new democratic, constitutional dispensation.

5. Do you think that the fact that a judge is a member of a political party, or espouses a particular political philosophical ideology, means that that judge does not live up to the standards of impartiality demanded by the Constitution?

6. With reference to case law and the Constitution, explain whether the involvement of the national executive or the legislature in the process of appointing judges will necessarily be considered a barrier to the independence of the judiciary.

7. Explain the test for judicial impartiality developed by the Constitutional Court in *van Rooyen.*

8. The President wishes to appoint Adv Buthelezi as a judge on the Supreme Court of Appeal. Explain what processes need to have been followed before he may do so.

6. ANSWERS

1. Before 2013, the Constitutional Court was not considered a court of general jurisdiction: it had jurisdiction only in respect of constitutional matters and issues connected with decisions on constitutional matters. Matters regarded as constitutional in nature are defined by section 167(7) as involving the interpretation, protection or enforcement of the Constitution. This is nevertheless a vague categorization and constitutional matters are not limited to this definition. The effect of the Constitution Seventeenth Amendment Act was to extend the jurisdiction of the Constitutional Court. The Constitutional Court may now hear both constitutional matters and any other matter which in the opinion of the Court raises an arguable point of law of general public importance. The 'arguable point of law' requirement excludes matters that only involve disputes of fact. As section 167(3)(c) makes plain, the Constitutional Court itself has the power to determine whether a particular legal issue falls within its jurisdiction.

2. Jurisdiction refers to the competence of a court to hear, adjudicate on, and dispose of a legal dispute in a specific geographical area or in respect of a specific subject matter.

3. In terms of s168(3) of the Constitution, the SCA is empowered to decide appeals in *any* matter referred to it, except in respect of certain labour or competition matters. Moreover, the SCA has no jurisdiction over matters which fall exclusively within the jurisdiction of the Constitutional Court. Only the Constitutional Court, according to section 167(4) of the constitution, may: (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of those organs; (b) decide (finally) on the constitutionality of any parliamentary or provincial Bill; (c) decide applications envisaged in section 80 or 122; (d) decide on the constitutionality of any amendment to the Constitution; (e) decide whether Parliament or the President has failed to fulfil a constitutional obligation; (f) certify a provincial constitution in terms of section 144.

4. The independence of the judiciary in democratic South Africa is protected in a number of ways. First, from a historical perspective, the decision to create the Constitutional Court, and to entrust it with the enforcement of the supreme Constitution, was a decision aimed at increasing the independence and legitimacy of the judiciary following apartheid, during which the institution's legitimacy was demonstrably eroded in the eyes of the majority of South Africans.

   Second, our courts have interpreted the concept of independence as it pertains to the judiciary as comprising two ideals: namely, impartiality and freedom from external (political and financial pressures) interference. The extent to which the judiciary may be said to be independent therefore depends on the extent to which these ideals are manifestly protected and affirmed by other branches of government.

   Impartiality requires that judges approach their adjudicative task with an open and unbiased mind, and that they suspend – to the best of their ability – the influence of their own ideological and political commitments when interpreting and applying the law. Impartial adjudication is indirectly safeguarded by the rigorous selection and interview processes that guide the appointment of prospective judges. The involvement of the Judicial Service Commission in the appointment of all judges in the Constitutional Court, SCA and High Courts protects impartiality by reducing the risk that judges will be appointed based on partisan political interests. Nevertheless, it bears mentioning that impartiality in this sense is difficult to guarantee, since whatever structural safeguards are in place, the responsibility tied to judicial impartiality is one that ultimately falls to individual judges to exercise. As the Constitutional Court in *SARFU* affirmed, 'it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial.'

   The second ideal related to the independence of the judiciary, namely freedom from external interference, is secured through various means. The first is

security of tenure: that is, the guarantee that judges will not be dismissed from office (or threatened with dismissal) for carrying out their duties in ways that other powerful actors do not like, especially members of the national executive. Section 176 of the Constitution guarantees that both Constitutional Court judges and judges on the SCA and High Courts hold office for a specified time period irrespective of political counter-pressure. Note that early retirement is not a matter of security of tenure. Second, freedom from external interference is protected by section 176(3) of the Constitution, which guarantees that judges have financial security. Specifically, the salaries, allowances and benefits of judges may not be reduced. This ensures that judges do not fear reprisal in the form of salary cuts or the loss of benefits for making unpopular decisions, especially findings against officials from other branches of government.

Lastly, although lower courts and traditional courts have a lesser degree of independence than superior courts, the CC has held that this does not threaten the requisite threshold of judicial independence and impartiality, since it is the function of the superior courts — mostly through judicial review — to protect the impartiality and independence of lower courts (*Van Rooyen*).

5. There are a number of persuasive responses to this concern. First, one might point out that the Constitution cannot demand a standard of impartiality that is impossible to achieve. To insist that judges who hold particular political views cannot but fall short of the standard of impartiality required by the Constitution is to demand a standard that very few, if any, judges will meet. The fact is that most judges do privately support and favour certain political views over others. Thus the claim that they ought not to do so faces the immediate factual reality that judges — like everybody else — are members of political society too. But maybe judges should be held to a different standard? It may be impractical or near impossible to achieve, but this is no argument against it being desirable. Considering the immensely power they wield, perhaps judges should not be allowed to align themselves with any political standpoint? Was it not the extreme deferential partisanship of the apartheid-era judiciary which led to some of the most abhorrent violations of individual liberty? Notwithstanding the fact that most judges do support certain political views, the question here would

be whether it is constitutionally permissible for them to do so. One response would be to acknowledge the latent concern that judges, if they are beholden to the particulars of their political morality in discharging their judicial duties, may well lack the requisite degree of impartiality. However, the concern that judges will necessarily be partial to their personal political commitments when deciding a case exaggerates the issue. Insofar as judges substantiate their reasoning, demonstrating how their argument is guided by the fundamental values of the Constitution, it is unclear how the personal political views of judges threaten to undermine impartiality.

6. In *Van Rooyen*, the Constitutional Court held that judicial independence requires that judges must be able to hear and decide cases without any external interference or influence. At an institutional level, this necessitates that there are structures in place to protect the courts against undue interference from both the state and private actors. How, then, is the independence of the judiciary preserved considering that, in terms of section 178(1), the very composition of the Judicial Service Commission – the body which assists in interviewing and appointing candidates for judicial posts – includes members of the national executive and National Assembly? At first blush, it would seem that the involvement *per se* of either the national executive or the legislature threatens the independence of the judiciary.

7. The test for impartiality – formulated in *SARFU* and affirmed in *Van Rooyen* - is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge will not bring an impartial mind to bear on the adjudication of the case. The test is objective and must be properly contextualized, taking into account a balanced view of all the material information. The informed person posited in the test is thoughtful, aware and sensitive to South Africa's complex social reality; rather than cynical, paranoid or hypercritical of its past and present.

8. The judges of the superior courts (namely the Constitutional Court, the SCA and the High Court) are appointed in terms of the provisions of the Constitution; other judicial officers (including magistrates) are appointed in terms of an Act

of Parliament. In terms of section 174(1), to be eligible for appointment as a judicial officer, Adv Buthelezi must be both appropriately qualified and a fit and proper person. This is a precondition for appointment. The consultation requirements that apply to the President when appointing judicial officers differ according to the office to which the candidate is being appointed. Section 174(6) of the Constitution provides that the President *must* appoint the judges of all other (superior) courts on the advice of the JSC. Thus the President does not have much influence or discretion with regard to appointing Adv Buthelezi as a judge on the SCA. Only if the JSC approves of his application may the President appoint him as an SCA judge. Before Adv Buthelezi begins to perform his duties, he must take an oath or affirm that he will uphold and protect the Constitution – in line with section 174(8) of the Constitution.