

THE NKANDLA JUDGMENT: LESSONS FOR ZIMBABWE

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One of the most progressive judgments made in 2016 by the Constitutional Court of South Africa was the 'Nkandla judgment' wherein the court dealt definitively with matters important to the evolution and application of constitutional democracy, such as:

- The separation of powers among the executive, legislature and judiciary.
- The role and tasks of the executive, especially the President of the Republic.
- The role and tasks of the National Assembly.
- The role and tasks of the Judiciary.
- The role and tasks of the public protector.

The constitutional court had to decide whether the President of the Republic of South Africa had a constitutional duty to comply with recommendations made by the public protector and whether — in failing to do so — the President had failed to uphold, defend and respect the constitution. It found in favour of the applicants that the President, indeed, had a duty to uphold, defend and respect the constitution; and that, further, there was a clear duty on the National Assembly to hold under scrutiny the conduct of the executive on behalf of the public.

This decision not only gave life to the reconciliatory and purposive interpretation of South Africa's constitution but it also indicates a trend of how the judiciary — through constitutional activism when properly applied in a democratic context — acts as a legitimate and successful defender of the core fundamental values that constitute a democracy.

The decision also demonstrates what it means for South Africa to be living as a 'constitutional democracy', as opposed to a parliamentary democracy. It reinforced the fact that whilst parliament

has the duty and obligation to make and debate laws, these laws still have to pass constitutional muster because the constitution is the supreme law.

This paper articulates the relevance of the Nkandla judgment for Zimbabwe and the lessons which, if applied locally, would ensure that Zimbabwe begins to live up to the expectations required of a genuine constitutional democracy.

Introduction

On 31 March 2016, the Constitutional Court of South Africa made legal history when it found that the President of the Republic of South Africa had failed to uphold, defend and respect the Constitution¹ by failing to comply with the recommendation for remedial action made by the public protector.² This case has become known as the 'Nkandla judgment' and the ruling was unanimously celebrated by the legal fraternity, civil society and politicians alike in South Africa as being an affirmation of the supremacy of the constitution, the effectiveness of the principles of transparency and accountability, and the enforcement of the rule of law.

The primary issue brought before the constitutional court was whether the President of the Republic of South Africa had a constitutional duty to comply with recommendations made by the public protector and whether, in failing to do so, the President had failed to uphold, defend and respect the constitution.³

The Constitutional Court further had to decide whether the National Assembly, in exonerating the President from complying with the recommendations provided by the public protector, had failed in its constitutional obligations to scrutinise and oversee executive action and to hold the President accountable as a member of the executive.

¹ The Constitution of the Republic of South Africa as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly.

² See also s 182 of the Constitution of South Africa which establishes the office of the public protector No. 23 of 1994: Public Protector Act, 1994.

³ Ibid

The general constitutional principles which influenced the court's decision had to do with transparency, accountability and the ethical conduct of the executive branch of government. The courts' opening judgment noted that

"... One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck".⁴

Another key issue expounded in the Nkandla judgment was the role of independent institutions and, in this case, the office of the Public Protector.⁵ The Nkandla judgment effectively reinforced the constitutional powers of the public protector to investigate any conduct in State affairs and public administration in any sphere of government and to provide remedial action had been undermined by the subsequent actions of both the National Assembly and the President of South Africa after receiving the recommendations of the public protector.

The effect of the Nkandla judgment has great constitutional and institutional significance locally as it provides an opportunity to interrogate constitutional democracy especially in respect of accountability and transparency mechanisms provided by the Constitution of Zimbabwe as well as national legislation and institutional frameworks. It provides an opportunity to question the extent to which institutions, meant to be independent, risk or have been compromised due to the political landscape in Zimbabwe. It further provides an opportunity to assess the extent to which the unchecked abuse of State power and resources has been institutionalised in Zimbabwe thus undermining an already fragile constitutional democracy.

⁴ Paragraph 1 of the judgment

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This paper juxtaposes the practice of constitutionalism and constitutional democracy prevailing in Zimbabwe against the fundamental active principles of democracy that were brought to light by virtue of the Nkandla ruling. Opportunity to strengthen transparency and accountability systems in light of specific constitutional provisions coupled with brief comparisons concerning the manner in which constitutional principles are executed in other countries are discussed in this paper followed by a conclusion which comprises a summary of the key points made in the Nkandla judgment relevant to Zimbabwe.

Background and Critique of The Nkandla Judgment

As a result of several complaints lodged with the public protector concerning certain “security upgrades” made at President Zuma’s private residence in Nkandla, the public protector in accordance with her constitutional powers⁶ investigated allegations related to improper conduct or irregular expenditure. The basis of the complaints and subsequent investigation was that the improvements were non-security features and that the State was only under an obligation to provide security features for the President at his private residence. Therefore, it was argued any improvements unrelated to security features amounted to undue benefit or unlawful enrichment.

The public protector concluded that the President failed to comply with specific constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of State resources and directed that the President, duly assisted by certain State functionaries, should work out and pay a portion fairly proportionate to the undue benefit that had accrued to him.

The public protector produced a report arguing that the President had acted in breach of his constitutional obligations in terms of section 96 (2) (b) and (c) of the Constitution which refers to the conduct of Cabinet members and Deputy Ministers and states as follows:

“(2) Members of the Cabinet and Deputy Ministers may not;

⁶ Section 182 South Africa Constitution

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.”

The report was submitted not only to the President, but also to the National Assembly with the intention that the National Assembly would facilitate compliance with the remedial action in line with its constitutional obligations to hold the President accountable.

The National Assembly responded to the report of the public protector by setting up two *ad hoc* committees to examine the report as well to examine a further report compiled by the Minister of Police which essentially exonerated the President from any wrong doing. The National Assembly proceeded to endorse the report by the Minister exonerating the President from any liability which led to its resolve to absolve the President of all liability. Consequently, the President did not comply with the remedial action taken by the public protector.

Dissatisfied with the resolution of the National Assembly, members of Parliament –specifically the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA) –launched an application with the constitutional court to seek direct access to it concerning whether the failure to comply with the remedial action set out in the public protector’s report constituted a breach of the constitutional duties by the National Assembly and the President.

The public protector also took part in the applications in order to defend her powers and argue on their ambit. The public protector and both applicants sought clarity from the court on the nature and extent of the power to take remedial action that the public protector was granted under s 182 (1) (c) which prescribes the functions and powers of the public protector.

The applicants submitted that the public protector's remedial actions were binding and enforceable unless set aside by a court of law and could not be diluted, ignored or circumvented by other organs of State which are constitutionally obliged to ensure the protection of the public protector's dignity and effectiveness.

In reaching its findings, the constitutional court had to address preliminary issues relating to the powers of the public protector; the powers and functions of Parliament in holding the executive accountable for its conduct; and the powers of the courts regarding its jurisdiction to preside over such proceedings.

The Court's Jurisdiction

Using a contextual and purposive interpretation of s 167, the constitutional court affirmed its powers and exclusive jurisdiction to decide that Parliament or the President had failed to fulfil a constitutional obligation⁷ and further that only the constitutional court could decide whether or not the conduct of the President was constitutional.⁸ However, the determination of whether or not the President had failed to fulfil a constitutional obligation was dependant on whether there existed an obligation specifically imposed on the President to observe or refrain from a certain conduct.

The Duty of the President

That there did exist a specific obligation on the President of the Republic of South Africa imposed by the constitution of South Africa was recognised by the constitutional court in its reliance on s 83 (b) which refers to the duty of the President to uphold, defend and respect the constitution. The court then linked the constitutional obligation imposed by s 83 (b) to s 182 (c) which empowers the public protector to take appropriate remedial action in respect of any conduct by government officials or public administrators which is improper or results in any impropriety or prejudice. Even more specific is the fact that the President as an organ of the State is required to promote and protect State institutions

⁷ Section 167 (4) Constitution of South Africa

⁸ Section 167 (5)

including that of the public protector to ensure amongst other things its dignity and effectiveness.⁹

Having established that there was such a duty the next question determined by the court was whether there had been any violation by the President of his constitutional obligations.

Regarding the office of the President and his executive role the court stated that;

*"The President is the Head of State and Head of the national executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project".*¹⁰

The court added that;

*"The President thus failed to uphold, defend and respect the constitution as the supreme law of the land. This failure is manifest from the substantial disregard for the remedial action taken against him by the public protector in terms of her constitutional powers. The second respect in which he failed relates to his shared section 181(3) obligations. He was duty-bound to, but did not, assist and protect the public protector so as to ensure her independence, impartiality, dignity and effectiveness by complying with her remedial action."*¹¹

⁹ Section 181 (3)

¹⁰ Paragraph 20 of the judgment

¹¹ Paragraph 83

The court acknowledged that the President might have been following wrong legal advice and therefore acting in good faith, however it still concluded that;

*"It does not detract from the illegality of his conduct regard being had to its inconsistency with his constitutional obligations in terms of sections 182(1)(c) and 181(3) read with 83(b)."*¹²

The court in this instance demonstrated that a breach of a constitutional duty remains a breach whether or not it occurs as a result of a genuine error.

The National Assembly

The constitutional court of South Africa found further that the National Assembly had failed in its constitutional obligation to scrutinise and oversee executive action and to hold the President accountable as a member of the executive.¹³

Regarding the role and tasks of the National Assembly, the court emphasised the importance of the oversight role that the National Assembly has over the executive and other State organs and further that this watch dog role meant that the National Assembly was instrumental in ensuring accountability and transparency in respect of the governance of the country.¹⁴

The Public Protector

The constitutional court's assessment was that the public protector was clearly acting within the powers of her constitutional mandate and further that such powers were legitimately derived from the constitution. She had conducted proper investigations of the allegations brought before her, produced a report and provided remedial actions which the President and the National Assembly saw fit to disregard and that was the constitutional crisis which objectors brought before the court.

¹² *ibid*

¹³ *Economic Freedom Fighters v Speaker of the National Assembly and Ors; Democratic Alliance v Speaker of the National Assembly and Ors* (2016) ZACC 11.

¹⁴ Paragraph 22

In her findings, the public protector relied on the provisions of s 96 which is the main constitutional provision that seeks to curb corrupt conduct of members of the executive branch of government by explicitly prohibiting them from behaving in a certain manner or engaging in conduct which is likely to bring its office into disrepute. The provision further seeks to curb abuse of power in recognition of the positions of influence and power that members of the executive obviously hold by virtue of their offices.

Executive powers and their sphere of influence if left unabated poses a threat to constitutional democracy, hence the need to ensure transparency and accountability through independent institutions and systems that can provide the necessary checks and balances.

For this reason, the constitutional court observed that;

"The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force".¹⁵

The court in its ruling acknowledged that the work of the public protector was sanctioned by law and that the executive did not have discretion as to whether or not to comply with the decisions made by those *"clothed with the legal authority to make them..."*¹⁶

The Declaratory Order

¹⁵ Paragraph 75 of the judgment

¹⁶ *ibid*

The relief granted by the constitutional court was wide ranging; it was declaratory, mandatory and supervisory in nature.

Regarding the President the court found that

"... consistent with this constitutional injunction, an order will thus be made that the President's failure to comply with the remedial action taken against him by the public protector is inconsistent with his obligations to uphold, defend and respect the Constitution as the supreme law of the Republic; to comply with the remedial action taken by the public protector; and the duty to assist and protect the office of the public protector to ensure its independence, impartiality, dignity and effectiveness".¹⁷

Regarding the National Assembly the court found that

"... the failure by the National Assembly to hold the President accountable by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinise and oversee executive action and to maintain oversight of the exercise of executive powers by the President. And in particular, to give urgent attention to or intervene by facilitating his compliance with the remedial action".¹⁸

The order made by the court was definitive and effective because it had the following legal consequences;

- It affirmed that the public protector's remedial powers were legally binding.
- It affirmed the constitutional courts mandate to declare conduct inconsistent with the constitution unlawful.
- The supervisory powers of the constitutional court were invoked to ensure that the President pay back what he owed.
- A structural interdict was imposed requiring that i) the national treasury report back to the court within 60 days with the amount to be repaid and ii) within 45 days thereafter the President must

¹⁷ Paragraph 103

¹⁸ Paragraph 104

repay.

The court noted that declaring law or conduct inconsistent with the constitution and invalid was plainly an obligatory power vested in the court as borne out by the word “must”. Unlike the discretionary power to make a declaratory order in terms of s 38 of the constitution, the court had no choice in this particular matter but to make a declaratory order where s 172(1) (a) applied.

Transparency and Accountability

The standard set by the Constitution of Zimbabwe

Although it remains far from being a perfect system, the practice of constitutional democracy in South Africa has enjoyed far greater success than Zimbabwe in holding members of the executive to account for alleged violations of the constitution which they are duty bound to uphold. This, in spite the fact that the constitutional and institutional frameworks prevailing in both countries are similar to the extent that both advocate for the democratic principles of transparency, accountability and the existence of independent institutions that ought to facilitate the advancement of such democratic principles.

However, the question posed in this section is whether these frameworks in the case of Zimbabwe are adequately designed to ensure that members of the executive are subject to the principles of transparency and accountability enshrined in the constitution.

Accountability of the President and Cabinet Members

Similar to the South Africa context, the Constitution of Zimbabwe places a specific obligation on the President of Zimbabwe to “*uphold, defend, obey and respect this Constitution.....*” and so serious an obligation is it that the President may be removed from office for failure to uphold the same.¹⁹

Section 97 as an accountability mechanism

¹⁹ See s 90(1) as well as s 97(d) Inability to perform the functions of the office because of physical or mental incapacity is the fourth ground of removal.

Section 97 of the constitution of Zimbabwe prescribes the legal standard and procedural requirements for removal of the President and in so doing it provides means by which the President may be held accountable; three of which are:

- a) Serious misconduct
- b) Failure to obey, uphold or defend this constitution
- c) Wilful violation of this constitution

The fact that there exist grounds of removal for the President in the constitution reinforces the principle highlighted in the Nkandla judgment that the President is a subject and creature of the constitution; indeed it is the constitution which dictates how the President may come into office, how the President may or must leave office, and the conduct of the President during the tenure in office as President.

The constitutional court in the case of the President of the *Republic of South Africa v Hugo* described the President as follows;

*"Ultimately, the President as the supreme upholder and protector of the constitution is its servant. Like all other organs of State, the President is obliged to obey each and every one of its commands".*²⁰

However, the grounds for removal regarding the reference to "*serious misconduct*" of the President (s 97) is, at best, open-ended and provides little clarity as to what those particular grounds actually constitute.

Does it refer to specific criminal acts, neglect of official duties, or generally conduct which undermines the integrity of the office of the President? At the same time it may also be argued that defining the grounds of removal is not necessary because allegations of constitutional violations will generally be based on the circumstances and that it is the courts which will then make its finding after assessing the circumstances of the particular violation alleged to have been committed. Is s 97 in itself sufficiently embodied to hold the president of Zimbabwe accountable in the same manner that the South African

²⁰ [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 65

constitution holds the president of South Africa accountable?

Section 106 as a means of ensuring accountability

Similar to the constitution of South Africa, the constitution of Zimbabwe contains provisions found under section 106 that can be described as negative obligations on senior public officials such as Ministers requiring that they refrain from certain types of conduct. The section prohibits vice presidents, ministers and deputy ministers from;

- a. Directly or indirectly holding any other public office or undertaking any other paid work.
- b. Acting in any way that is inconsistent with their office or exposing themselves to any situation involving the risk of conflict between their official responsibilities and private interests; or
- c. Using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

Section 106 also contains elements of the criminal offence of corruption which may be defined as acts involving the misuse of entrusted power for personal or sectional gain.²¹

The absence of the office of the President from s 106 is alarmingly conspicuous, especially when one considers the very critical public interest a properly functioning constitutional democracy would have in ensuring that constitutional mechanisms to curb corruption and abuse of powers by the executive should apply just as much to the Head of State as they would to other members of the executive. Corrupt practices in government undermine democracy, because they distort normal decision-making processes and subvert the policy objectives of legitimate democratic government and the President of any nation should be playing a leading role at both a policy and individual level in fighting conduct by public officials which is contrary to public interest and constitutional values.

Another point of observation relevant to s 106 and as also highlighted in the Nkandla judgment is

²¹ See UNCAC definition of corruption. And also Towards a national integrity strategy for Namibia : A national discussion paper, Technical Committee on the Promotion of Ethics and the Combating of Corruption, Windhoek, 1998, p 7

that when alleging a breach of a constitutional obligation it must surely relate to an obligation which is specifically imposed on the President or Parliament. In contrast to the silent approach of s 106, s 96 of the Constitution of South Africa places a specific constitutional obligation on the President to refrain from certain conduct. The provision is clearly designed to curb corrupt practices, abuse of power and unethical conduct not only by the executive but by the President as well. Section 96 accordingly prohibits members of the cabinet²² (which includes the President) and deputy ministers from;

- b. acting in any way that is inconsistent with their office, or exposing themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
- b. using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

The relevance of s 96 5 to the Nkandla judgment is that it formed the basis of the public protectors finding that the South African President had failed to comply with specific "*constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of State resources*". The public protector was propelled to investigate alleged corrupt practices on the basis that the constitution of South Africa prohibited the President from unjust enrichment and improperly benefiting from State resources and this was enabled by specific constitutional provisions which prohibit the President from engaging in certain kinds of conduct.

The effect of the omission of the President from s 106 of the constitution of Zimbabwe is that there is no clear and specific obligation on the President to avoid conflict of interest situations but this invariably creates an obvious and specific problem when addressing transparency and accountability measures for the highest public office. The standard set by the constitution of Zimbabwe to ensure that President can be refrains from conflict of interest activities (whether real or perceived) is at a lower bar than that set by the constitution of South Africa.

²² Section 91 of the Constitution of South Africa states that *The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.*

Transparency and accountability as a regional necessity

The Nkandla judgment is relevant not just for Zimbabwe²³ but has a far-reaching effect on other African countries including Zambia and Kenya whose constitutions and democratic practices espouse the democratic principles of ensuring accountability at the highest level of government.

These two examples demonstrate that measures to provide for transparent and accountable conduct which seeks to deter elements of corrupt practices and abuse of office by members of the executive (including the President) is not an unusual constitutional provision; in fact it is a necessary constitutional safeguard found in most progressive democracies.

The constitution of Kenya,²⁴ for example, prescribes the conduct of a State officer, and specifically prohibits any conflict between personal interests and public or official duties including a prohibition on receiving certain gifts.²⁵ The constitution goes on to define State office to include the office of the President which means that the President of Kenya has a specific obligation to avoid conflict of interest because there is no exemption from the requirements of s 75.

The constitution of Zambia²⁶ provides for the impeachment of the President under the following circumstances;

- (a) a violation of a provision of this constitution or other law;
- (b) a crime under international law; or
- (c) gross misconduct.

The constitution of Zambia recognises that the President can violate not only the constitution but also any other 'law'. Such a provision effectively creates a broader context of prohibited conduct and widens the circumstances under which a President can be removed from office.

²³ See s 46 (1) (e) where the constitution of Zimbabwe clearly expresses the need to have regard to foreign law

²⁴ Constitution of Kenya 2010 s 75

²⁵ Section 76 "State officer" means a person holding a State office

²⁶ Section 108

Zambia's constitution does not define the term 'law'; however, the Zimbabwe constitution defines law to mean;

- a) Any provision of the constitution or an Act of Parliament
- b) Any provision of a statutory instrument
- c) Any unwritten law in force in Zimbabwe including customary law.

Section 266 of the definitions section found under the constitution of Zambia proceeds to define gross misconduct to mean;

- (a) Behaviour which brings a public office into disrepute, ridicule or contempt;
- (b) Behaviour that is prejudicial or inimical to the economy or the security of the State;
- (c) An act of corruption; or
- (d) Using or lending the prestige of an office to advance the private interests of that person, members of that person's family or another person;

The definition of offences which constitute serious misconduct provides for a clearer process for the removal of the President of Zambia which differs distinctly from the state of the Zimbabwean constitution.

Zambia has also demonstrated an impressive institutional and constitutional capacity to enforce the principles pertaining to the rule of law, separation of powers, and transparency and accountability through its most recent ruling.

In the case of a petition brought before the constitutional court of Zambia by Steven Katuka, Law Association of Zambia against the Attorney-General, Ngosa Simbyakula and sixty three others²⁷ the second and the third petitioners challenged the continued stay in office of the Cabinet and Provincial Ministers. The issue was whether the Vice-President and Cabinet Ministers of the Government of the Republic of Zambia could continue holding their ministerial positions and continue to enjoy benefits

²⁷ Selected Judgment NO. 29 OF 2016 P.957 in the constitutional court of Zambia held at Lusaka (Constitutional Jurisdiction) 2016/CC/0010/ 2016/CC/0011

associated with their portfolios and draw salaries and allowances when Parliament was dissolved.

The second petitioner averred that the Vice President and Cabinet Ministers held their Cabinet portfolios by virtue of being Members of Parliament and that they could not be a Vice-President or Cabinet Minister without first being elected or nominated as Member of Parliament. It was argued further that the failure by the President of the Republic of Zambia to dissolve his Cabinet following the dissolution of Parliament was a deliberate infringement of the Constitution and that, in so doing, the President had failed in his duties to, among others, respect, uphold and safeguard the Constitution and the sovereignty of the Republic and to promote democracy and enhance the unity of the nation and to uphold the rule of law.

The petitioners submitted that upon dissolution of Parliament on the 11 May 2016 all Members of Parliament ceased to hold their positions by operation of law.²⁸ Counsel for the petitioners argued that Article 81(8) of the Constitution only allowed for the President to continue in office until the President-elect assumes office. For that reason, it was only the President, the Speaker and the First Deputy Speaker who could survive the dissolution of Parliament and that the constitution did not provide for the Vice-President and Cabinet Ministers to continue in office upon the dissolution of Parliament.

The constitutional court ruled that the Ministers and their Deputies were in office illegally following the dissolution of Parliament and they were therefore ordered to pay back all the salaries and other allowances which they had illegally accrued and vacate office with immediate effect. In its land mark ruling, the constitutional court added that President Edgar Lungu was wrong to maintain

²⁸ Article 72(1) of the Constitution of Zambia provides that with the exception of the Speaker and the First Deputy Speaker, a Member of Parliament shall vacate the seat in the National Assembly upon the dissolution of Parliament. And that, while by definition, Parliament includes the President and the National Assembly, the dissolution of Parliament only affects Members of Parliament as specified in Article 68(2) with the exception of the Speaker and the First Deputy Speaker.

the Ministers in office after the dissolution of Parliament.

Similar to the Nkandla judgment, this case demonstrates the intervening role the court plays in respect of interpreting the law without fear, favour or prejudice because the democratic principles of separation of powers and the twin principles of transparency and accountability were in operation.

Available Legal Remedies

One of the key principles derived from the Nkandla judgment is that where a person, irrespective of status, commits an alleged offence the full course of the law must be allowed to take place because no one is above the law. This principle was also recognised by the Supreme Court in *Chavunduka & Anor v Commissioner of Police*²⁹ when the full bench of the Supreme Court stated that:

"The entitlement of every person to the protection of the law, which is proclaimed in s 18(1) of the constitution³⁰, embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator provided the investigation so warrants and the bringing him or her for trial before a court of competent jurisdiction".

The laws of Zimbabwe do provide constitutional, legislative and institutional frameworks which have been established to ensure that, amongst other situations, the executive are held to account for any conduct in breach of their constitutional and legislative obligations as high ranking public officials although not at the same success rate as South Africa. The poor success rate is attributable to the fact that the executive have often refused to comply with certain court orders that they deem to be unfavourable to the State or particular political interests.³¹

²⁹ 2000 (1) ZLR 418 (S) at pages 421-422 B

³⁰ Constitution of Zimbabwe as amended at 30 November 2007

³¹ The Executive has not enforced Court orders in the following cases inter alia, *Mark Chavunduka and Ray Choto v Ministry of Defence* (1999 case); *Andrew Meldrum v The Chief Immigration Officer and Ors* (May 2003); *Associated Newspapers Of Zimbabwe v Chief Superintendent Madzingo & The Commissioner Of Police* HC8191/2003; *Dorothy Kumunda & 7 others v District Administrator Chikomba District & Anor* HC9481/03; *Charles De Kock v Mike Madiro and 4 Ors* HH 217/03, *Cuthbert Chivhunze & Ors v John Chitozho & Ors* Mutare Court Case No.416/02; *Commercial Farmers Union v Minister Of Lands & Ors* 2000 (2) ZLR 469; see also article by Arnold Tsunga 'The legal profession and the judiciary as human rights

In respect of the constitutionality of the conduct of the President or Parliament, it is only the constitutional court³² which can make a final decision in regards thereof.

Recourse Against the President

As a general rule, the President enjoys immunity meaning that whilst in office the President cannot be sued for civil or criminal proceedings for any act of a personal nature. Although, if relating to acts done in an official capacity there lies no privilege of immunity.

Outside of this right to immunity there are two courses aggrieved parties may take against the President. The first recourse is to approach the courts for an order declaring that the President has failed to fulfil a constitutional obligation, as was the case in the Nkandla judgment. According to the constitutional court rules³³ of Zimbabwe an application can be made to the constitutional court by way of a court application supported by an affidavit which details the constitutional obligation in question which the President has failed to uphold.

The other resource remains a preserve for the political arena as it relates to the prerogative of Parliament under s 97 to institute the prescribed procedure for the removal of the President from office. It is in essence an impeachment process designed to investigate any alleged violations of the constitution listed in s 97. This entails the passing of a joint resolution by the Senate and the National Assembly passed by at least one-half of their total membership. The political aspect of this process stems from the fact that the participants are elected officials who serve as representatives of specific constituencies and not as representatives of the court.

However, it should be pointed out that the mere fact (as in the case of the Nkandla judgment) that

defenders in Zimbabwe in 2003: separation or consolidation of powers on the part of the state?’

³² Section 167 (3)

³³ Statutory Instrument 61 of 2016 section 27

the constitutional court makes an adverse finding against the President does not necessarily mean that the President will be impeached and, even if that were the case, there is no guarantee that the motion to impeach will be successful due to the reality of majority politics. As was discovered to the bitter disappointment of the DA party of South Africa, when it tried to impeach the president just days after the Nkandla judgment, the motion failed as they required 160 votes to pass, but lost by 243-133.

The vote may have been political, and the ANC's numerical advantage effectively doomed it but that doesn't make it illegal. Although the Constitution provides that the National Assembly may remove the president if he commits a "*serious violation of the Constitution*," it is the National Assembly which decides whether or not to do so; indeed similar to the Zimbabwe context.

Recourse Against a Cabinet Minister

Section 106 of the Constitution of Zimbabwe provides for a constitutional standard in respect of what Ministers are prohibited from doing; however, it does not in itself create offences. The section merely provides that Ministers are, for example, prohibited from enriching themselves or improperly benefiting other persons. Section 106 contains elements of criminal conduct and is aimed at curbing corruption, abuse of power and abuse of State resources.

In the event of such constitutional violations by Ministers, recourse may be found through the ordinary courts of law either using the criminal justice system or the civil courts.

The criminal justice system specifically provides for recourse to be taken against a public officer under the Criminal Law (Codification and Reform) Act.³⁴

The Criminal Law (Codification and Reform) Act³⁵

Section 174 of the Act deals with criminal abuse of duty by public officers and states as follows;

³⁴ [Chapter 9:23] of Act 23 of 2004

³⁵ Section 174

(1) If a public officer, in the exercise of his or her functions as such, intentionally

(a) does anything that is contrary to or inconsistent with his or her duty as a public officer;

or

(b) omits to do anything which it is his or her duty as a public officer to do; for the purpose of showing favour or disfavour to any person, he or she shall be guilty of criminal abuse of duty as a public officer and liable to a fine not exceeding level thirteen or imprisonment for period not exceeding fifteen years or both.

(2) If it is proved, in any prosecution for criminal abuse of duty as a public officer, that a public officer, in breach of his or her duty as such, did or omitted to do anything to the favour or prejudice of any person, it shall be presumed, unless the contrary is proved, that he or she did or omitted to do the thing for the purpose of showing favour or disfavour, as the case may be, to that person.

(3) For the avoidance of doubt it is declared that the crime of criminal abuse of duty as a public officer is not committed by a public officer who does or omits to do anything in the exercise of his or her functions as such for the purpose of favouring any person on the grounds of race or gender, if the act or omission arises from the implementation by the public officer of any Government policy aimed at the advancement of persons who have been historically disadvantaged by discriminatory laws or practices.

Unfortunately, s 174 only deals with conduct which amounts to “showing favour or disfavour to any person” and does not comprehensively address all aspects of corruption related activities and abuse of office those public officials should be held liable for when in violation of such laws.

Institutional Mechanisms as a Means for Redress

There are several institutional mechanisms existing in Zimbabwe with the constitutional mandate to promote the rule of law and hold those responsible for criminal conduct and conduct in violation of the constitution to account.

The Zimbabwe Anti-Corruption Commission (ZACC)³⁶ is constituted under s 255 and is primarily empowered to investigate and expose cases of corruption in the public and private sectors. Therefore, an infringement of s 174 of the Criminal Law (Codification and Reform) Act may be brought to the ZACC because its powers of investigation are criminal in nature.

The National Prosecuting Authority (NPA) was established under s 258 and is empowered to institute criminal prosecutions on behalf of the State. Similar to ZACC, it is constituted as an independent body for the purposes of ensuring that it exercises its duties impartially, without fear or favour.

The Auditor General is a public and independent office established under s 309. It plays a pivotal role in the detection of crime including corruption-related offences as one of its core functions is to audit the accounts, financial systems and financial management of all departments, institutions and agencies of government, all provincial and metropolitan councils and all local authorities.

The Zimbabwe Human Rights Commission (ZHRC) was also established under s 242 and has powers to investigate all human rights abuses as well as act as a guardian for the public by protecting the public against abuse of power and maladministration by State and public institutions.

The ZHRC took over the functions of the public protector³⁷ an office which existed in terms of the old constitution. The functions of the public protector under the old constitution were to investigate administrative action taken by any officer, person or authority who was a member of any government ministry or department. Formerly, a complainant could allege that they had suffered injustice but there was no remedy reasonably available by way of court proceedings.

³⁶ See also the Anti Corruption Commission Act: [*Chapter 9:22*] section 12-13 which describes the functions and powers of the Commission.

³⁷ Section 107.

The functions of the public protector under the old constitution demonstrated that there existed a public office solely mandated to investigate and hold to account abusive conduct by those in public office but under the new constitution this is no longer the case. The role of the public defender and human rights defender has become blurred and indistinguishable; yet there is a distinction. Human Rights are universal legal guarantees protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity.³⁸

The public protector as a missing link?

Unlike the constitution of South Africa, the constitution of Zimbabwe no longer recognises the office of the public protector as an independent office.

The public protector of South Africa played a critical role in the investigation of allegations of misuse of power by the President of South Africa: she acted in the public interest and her functions as a key player strengthening constitutional democracy was clearly recognised and applauded by the courts in the Nkandla judgment.

The constitutional court in its judgment described the powers, functions and purpose of the public protector and specifically addressed the office of the public protector as being;

*"One of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance."*³⁹

It noted that:

"The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and

³⁸ See the Universal Declaration of Human rights (UDHR) adopted by the 56 members of the United Nations on 10 December 1948

³⁹ Paragraph 52

marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the public protector”.

The court added further that

“The purpose of the office of the public protector is therefore to help uproot prejudice, impropriety, abuse of power and corruption in State affairs, all spheres of government and State-controlled institutions. The public protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant.”

Zimbabwe does not have an independent office of the public protector because it was repealed by the 2013 Constitution. Its functions have been incorporated into the ZHRC. This means that there is a gap in respect of a public office which is solely designed for the purposes of investigating allegations of corruption or abuse of powers by public officials on behalf of the public.

Relevance of The Nkandla Judgment for Zimbabwe

The Nkandla judgment draws many political, institutional and legislative parallels for Zimbabwe in respect of how to hold to account members of the executive for conduct that the constitution of Zimbabwe expressly prohibits them from doing.

For example, the action taken by the National Assembly of South Africa to undermine the public protector’s recommendations also signifies a similar problem in Zimbabwe pertaining to majority politics where decisions are made to protect political and party interests rather than to ensure the adherence to the rule of law and the principles of transparency and accountability.⁴⁰

Additionally, a point to consider is that whilst both countries appear to have similar constitutional

⁴⁰ For example, the Local Government Bill which was pushed through both houses of Parliament in July 2016 and sent for presidential assents to become an Act of Parliament within twenty one days. Zanu-PF took advantage of the vulnerable MDC-T as Deputy Ministers, Ministers and the two Vice Presidents are the only ones who have constitutional powers to bring in bills which require support from treasury.

and institutional frameworks, only South Africa has effectively used its mandated authority to hold the executive accountable for alleged violations of its constitution and public office duties.

Analogous to South Africa's constitution, the constitution of Zimbabwe is the supreme law of the land which accordingly states under s 2 that;

(1) This constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

(2) The obligations imposed by this constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level and must be fulfilled by them.

Subsection 2 reinforces the fact that no person, law, practice or conduct is exempt from constitutional scrutiny and section 2 effectively makes every person accountable and answerable to the constitution.

This demonstrates that Zimbabwe is as a nation subject to a constitutional democracy and the practice of constitutional democracy presupposes the recognition of the Constitution as the supreme law of the land.

As reiterated earlier, there are several legal principles emanating from the Nkandla judgment which Zimbabwe must learn from especially considering that the judgment was a strong endorsement of the rule of law, the principle of separation of powers, and transparency and accountability as well as the supremacy of the constitution over every act of the executive and legislative arm of Government.

First, all persons including the President and members of his cabinet (the executive) are subject to the constitution. Secondly, not only are they subject to the constitution but the President in particular is the primary defender of the Constitution as is seen in s 90 which confers on the President the responsibility *"to uphold, defend, obey and respect this constitution.."*

Thirdly, constitutionally, the President can be held accountable for any conduct where he fails to uphold, defend, obey and respect the constitution, and for any wilful violation or serious misconduct.

Fourthly, the judgment demonstrated that whether or not the President and Parliament had acted in bad or good faith was irrelevant because the courts' enquiry into whether any constitutional obligations had been breached was an objective assessment which was not dependant on the motive of any of the actors.

Finally, the rule of law requires that the different constitutional arms of government – especially the executive, legislative and judiciary – function in accordance with the principle of separation of powers which must be observed and respected. When this rule of law is functional it protects, ensures and enforces the constitutional values of transparency and accountability of government officials including the executive.

The principle of upholding the rule of law and separation of powers was alluded to in the matter between *Commissioner of Police v Commercial Farmers' Union*⁴¹ relating to a court order obtained by the Respondent which had been issued by consent and which, among other things, declared the land invasions of 2000 to be unlawful and required the police within seventy two hours of the issue of the order to inform the invaders that the invasions were unlawful and to remove them if they did not leave the farms. The order also required the police to disregard any executive instructions to the contrary. However, six days after the order was issued, the applicant applied to the court to delete the paragraphs of the court order requiring the police to disregard contrary instructions from the executive and requiring the police to evict the invaders.

The court held that a court order must be obeyed until it is set aside and that the rule of law meant that everyone must be "*subject to a shared set of rules that are applied universally and which deal*

⁴¹ 2000 (1) ZLR 503 (HC) 2000 (1) ZLR p503

on an even-handed basis with people and which treat like cases alike”.

In its judgment the court noted further that

“... under a constitutional democracy such as Zimbabwe there is recognition that society’s power is dangerous to its members if it is exercised by one group of individuals. It is recognised therefore that there must be a separation of powers to perform the three jobs which have to be done - that of making the law (by Parliament) that of applying the law to particular cases (by the judiciary) and that of enforcing the laws and decisions of the courts (by the executive)”.

Similar to the Nkandla judgment, the court in this case concisely drew imperative distinctions necessary for a true democracy and also cautioned against the danger of majority politics as representing a threat to democratic and constitutional principles.

Conclusion

The constitutional principles of separation of powers, rule of law, transparency and accountability which were defended in the Nkandla judgment serve as examples of how the rule of law ought to apply in Zimbabwe. The measure by which a nation esteems and values its constitution is not found in the mere existence of a constitution. It achieves that quality or status of a constitutional democracy only when the constitution acquires a practical significance, in other words, when the principles and rights enshrined in it can be translated into practice. The South African courts including the constitutional court have demonstrated repeatedly that separation of powers is not mere rhetoric but a lived reality; that the rule of law is not an unattainable concept but can be practically applied for the benefit of all; and that transparency and accountability apply as much to the political elite as they do to the majority of ordinary South Africans and the Nkandla judgement reaffirmed these principles.

However, this is not the case in Zimbabwe for a number of reasons; constitutional democracy

becomes much more difficult to achieve if the constitutional safeguards in terms of clear provisions that support the underlying values and principles of the constitution, corresponding legislation and institutional frameworks are lacking. In respect of Zimbabwe, there is a process of not only constitutional alignment but also constitutional amendments which must take place in order to have the legal and democratic fundamentals which justified the Nkandla judgment delivered by the Constitutional Court of South Africa.

This process also needs to be enabled by a change in the political culture of the nation which must begin to interact with the President and all executive powers and representatives as constitutional beings, subject to the constitution, bound by the constitution and the democratic systems that it introduces. The lines have never been drawn more clearly as to the duties and responsibilities of the three branches of government as what unfolded in the unanimous Nkandla ruling and Zimbabwe can, and must, learn from those lessons and should hasten to follow regional trends of democracy in practice seen through the examples of other countries such as Zambia and Kenya.