

MEDDLING WITH THE CONSTITUTIONAL COURT

BY RAYMOND LOUW

We are all aware of the loud opposition that has been voiced by many civil society institutions against the Protection of State Information Bill and how the government's determination to have it enacted in law has been severely criticised. This, however, is only one aspect of an environment where government leaders have expressed hostility to the press – which some have labelled “the opposition” – and adopted other practices which obstruct the press and prevent the public from knowing what is going on. The press and many civil society institutions have been highly critical of the misrule, serious shortcomings in service delivery, ever-increasing levels of corruption and other deficiencies in government. As a result the government has resorted to attempts to cloak its activities in secrecy.

Government officials obfuscate or withhold information – including official reports which should be released to the public – and reporters and photographers have been arrested at crime scenes or other events under police control only to have the cases thrown out of court. Not one case has been prosecuted. Fortunately, these attacks on journalists have diminished, probably because of protests by the South African National Editors' Forum. However, there are laws enacted that can hobble the media and others waiting to be processed.

In a similar category to the “Secrecy Bill” are the Protection of Personal Information Bill, introduced to protect people's privacy but which will inhibit publication; the National Key Points Act, which prevents publication of security information at certain institutions and buildings – which are not identified; the Protection from Harassment Act, which will restrict journalists from gathering information by “staking out” the office or home of a person who refuses to answer questions over the telephone; anti-terrorism legislation called the Protection of Constitutional Democracy Against Terrorist and Related Activities Act; the Films and Publications Act, which provides for pre-publication censorship; the Promotion of Equality and Prevention of Unfair Discrimination Act; and waiting, in the wings, draft laws concerning public broadcasting and the operations of Icas (Independent Communications Authority of SA). We are still to discover how the Traditional Courts Bill and the General Intelligence Laws Amendment Bill will affect the media.

In Parliament, ministers have refused to answer questions from opposition parties on grounds that they are official secrets; Press Gallery correspondents have been removed from the offices close to the debating chamber that they have occupied since 1910 and accommodated in another building presumably to prevent them from having informal access to Members of Parliament for confidential discussions. Another move that angered parliamentary journalists was the compilation by the Presiding Officers of a parliamentary code of conduct for journalists without them being consulted.

That's not the end of it. There is also the African National Congress (ANC) official who tried to encourage supporters to burn down the *Herald* offices in Port Elizabeth – he professed that it was only a copy of the paper he wanted to burn – and another looming danger is the ANC proposal to set up a statutory media appeals tribunal which it is feared will set in motion measures to control the press. Hostility by government towards the press is one of the reasons cited by Freedom House, the New York-based monitor of the freedom of nations and their media, to downgrade South Africa from a “free” country – since 1994 – to “partly free”.

But the really worrying aspect of government-media relations is the threat by government and senior ANC leaders of curbs against the judiciary and the Constitutional Court. These leaders with President Jacob Zuma at the forefront have set the alarm bells ringing among journalists

and lawyers as well as academics because of their stated intention to review the judgments and conduct of the Constitutional Court and their impact on transformation.

Despite the recent publication of the terms of reference for the review of the judiciary which emphasise judicial independence, the separation of powers and the supremacy of the Constitution, there are grave doubts about the government's real motives. In an interview with *The Star*, President Zuma bluntly disclosed that what he wants is a review of the powers of the Constitutional Court. He said, “We don't want to review the Constitutional Court, we want to review its powers.” A few months earlier, on July 8 last year, he complained that the powers conferred on the courts cannot be superior to the powers of a body elected in popular democratic elections – Parliament. He added that the government's political opponents should not be able to subvert the popularly elected government by using the courts “to co-govern the country”.

One interpretation of his view is that he wants to reduce the powers of Constitutional Court judges so that they are subservient to Parliament. If this is what he means and he gets his way, this will be the end of constitutional democracy in South Africa. Indeed, the Black Lawyers' Association read this into his statements. It said they reflected an intention by Zuma to revert to the National Party model of governance where Parliament and not the Constitution is supreme. BLA president Pritzman Mabunda, in referring to what Zuma wants, said, “the only way is to divorce the current constitutional democracy and remarry parliamentary sovereignty.” This means Parliament would be the ultimate arbiter of judicial decisions – in effect that the politicians of the majority party in Parliament would have the power to decide on jurisprudence on political grounds rather than the rule of law.

The published terms of reference for the review suggest this is not intended. Some observers, however, describe this as a tactical retreat by the government because of the massive opposition it has encountered.

But I don't see Zuma climbing down. He cannot interfere with the powers of the judiciary directly because he does not have the required two-thirds majority in Parliament to bring this about by constitutional change. That means he has to turn elsewhere. The most obvious move is to look to the discredited Judicial Service Commission, the body that nominates judges which Zuma appoints. The *Daily Maverick* claims the ANC dominates the commission. It estimates the party has 14 potential votes among the 23 members composed of judges, advocates, attorneys, and members of Parliament and the National Council of Provinces. If the *Daily Maverick's* calculation is accurate, Zuma can use that majority to bring about the nomination of judges who support his views so that he can appoint them.

When American President Roosevelt tried that trick he was thwarted by the new judges promptly jettisoning their support for him and adopting the constitutional court's mantle of independence. There's no guarantee that if Zuma opts for that strategy, he will be similarly balked. However, there is no knowing what means Zuma will resort to in seeking to review the judiciary's powers.

The uncertainty and dangers surrounding Zuma's intentions lead me to make an earnest appeal to South Africans to exercise maximum vigilance over his and the government's actions in relation to the judiciary and the Constitution as well as in regard to secrecy and restrictive legislation. If there is a hint of unconstitutional conduct people must protest loudly and long. The Constitutional Court is the last line of defence to preserve press freedom – indeed all our freedoms. We must prevent South African being rated “not free” – which would mean our descent into an authoritarian state, if not worse.

