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SOUTH AFRICAN COURT CASES ON CORRUPTION AND SEPARATION OF POWERS: SALVATION OR GOING TOO FAR IN AN INTERNATIONAL CONTEXT

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INTRODUCTION

In recent years, the South African Constitutional Court, the South African Supreme Court of Appeal and several high courts have served as anti-corruption fighters. Some of their rulings are extraordinary. They have invalidated the existence of a government entity, designed to fight corruption as too weak, *Glenister v. President of South Africa II*[1] (hereinafter *Glenister 2*), and nullified a Presidential appointment to a national prosecuting position because of the President's unwillingness to pay heed to the appointee's integrity problems, *Democratic Alliance v. President of South Africa.*[2] The appointee was Menzi Simelane. Moreover, the Supreme Court of Appeal allowed an important case to go forward involving High Court Judge John Hlophe's alleged ex parte tampering with two Constitutional Court Justices regarding some legal issues implicating President Zuma. *Nkabinde and Jafta v. Judicial Service Commission*.[3] These decisions reveal a risky yet important role for the Court to play in a "dominant party democracy"[4] where that dominance by the African National Congress (ANC) is one source of the corruption. Moreover, the ANC has criticized the Constitutional Court on several occasions, and required an academic study be done on whether the Court has been sufficiently transformative. Many suspect the study is an excuse to criticize the Court more. This raises the question of whether the Court has gone too far in these cases, especially given the Court's democratic fragility, and given that courts in

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[1] 2011 (3) SA 347 (CC).
[2] 2013 (1) SA 248 (CC).
[3] [2014] ZAGPJHC 217.
[4] Sujit Choudry, *He Had a Mandate: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 2 (2010).

other countries would likely not have been so bold (as will be shown). In addition, some reputable scholars have said the Court's legal reasoning in these cases is weak, despite the good results, which makes the cases even more controversial.

This paper will examine these South African cases in several different ways. First, it will compare them briefly with how the U.S. Supreme Court and the U.S. has handled some scandalous situations, particularly the Watergate and Whitewater/Lewinsky scandals, that have some parallels to the Zuma criminal financial investigation and to his sexual assault case. Second, the paper will look at the criticisms of the South African cases and update the status of the cases, some of which are ongoing. Third, it will argue that the South African courts must continue to play this role, at least for the time being. I will avoid most of the convoluted facts of the South African cases to save time, and because they are not essential to my major points.

A. THE U.S. EXAMPLE

Let me start by pointing out that if the U.S. Supreme Court had received a challenge to the sufficiency of a national anti-corruption body akin to *Glenister 2*, the Court would likely dismiss the case for lack of standing and under the political question doctrine. The same is true of the litigation challenging whether President Zuma had deliberated sufficiently over Mr. Simelane's supposed lack of integrity.

Now there is a key distinction between the U.S. Supreme Court's analysis of a post-Watergate anti-corruption law called the Independent Counsel statute and the law in *Glenister 2*. The constitutional issue in the U.S. case was whether the counsel was too powerful and independent, violating separation of powers principles. By contrast, the issue in *Glenister 2* was whether the entity was sufficiently strong. Thus we appear to have opposite sides of the same coin.

The U.S. Supreme Court case involving corruption, that also links the Nixon and Clinton scandals, is *Morrison v. Olson*.[5] After Watergate, Congress decided it had to take action because Nixon had fired the first special prosecutor investigating him, namely Archibald Cox, (like the Scorpions being disbanded) and because it had been difficult to find another independent attorney to continue. Moreover, that other independent attorney, Leon Jaworski, had still been vulnerable to getting fired, though he eventually obtained the audiotapes that were the key to Nixon's demise, in the Supreme Court case of *United States v. Nixon*[6] (which is also not unlike the Democratic Alliance's successful battle for the "spy tapes" related to why the criminal investigation into Jacob Zuma by the Scorpion prosecutors was dropped just in time for him to become President). Post-Watergate, the U.S. Congress therefore passed an independent counsel statute that established procedures whereby the U.S. Attorney General could initially investigate, and report to a three judge panel whether there was sufficient evidence to appoint an "independent counsel" who could not be fired except for cause.

The issue before the Supreme Court in *Morrison* was whether such a position was constitutionally permitted as it did not seem to fit into the classic prosecutorial hierarchy of the executive branch, and had significant unchecked power. Moreover, members of the judiciary selected this prosecutor. The Supreme Court upheld the law largely based on the equitable need to have someone independent to investigate high ranking officials. The ruling actually involved a very technical part of the U.S. Constitution sometimes referred to as the "appointments and removal clause." The U.S. Supreme Court found the restrictions on the President's ability to remove this person were permitted, and noted that there were other relatively independent agencies in existence.

Justice Scalia, however, wrote a lone powerful dissent arguing that an independent counsel had the power of a "principal officer" of the government (not your average lone prosecutor) and therefore

[5] 487 U.S. 654 (1988).
[6] 418 U.S. 683 (1974).

could not be reconciled with three branches of government. Scalia even wrote that the President had no real removal power since any removal effort would likely result in the President's impeachment. And this independent counsel would have virtually unlimited funds and one or two main targets, unlike ordinary prosecutors.

The U.S. independent counsel law subsequently became an issue during the Clinton Presidency when Ken Starr aggressively investigated both the Whitewater real estate deal and whether Bill Clinton committed perjury about having an affair with Monica Lewinsky. There was also a pending civil lawsuit where Paula Jones alleged that Clinton sexually harassed her when he was Governor of Arkansas. This civil case opened the door to more Lewinsky evidence. There was no criminal prosecution, however, brought against Clinton unlike Zuma. In *Clinton v. Jones*,[7] the Supreme Court ruled that the Jones lawsuit could proceed despite Clinton's efforts to seek a stay or a form of immunity. The Court said the lawsuit would not unduly interfere with the President's functions. Yet in the end, Independent Counsel Ken Starr spent 50 million dollars, and Clinton was acquitted by the U.S. Senate. Clinton remains popular today. Thus, the Independent Counsel statute was allowed to expire, and many scholars on both sides of the political aisle believe Scalia's dissent was right in retrospect.

B. SOUTH AFRICA

Now let's return to South Africa. Analogous to *Morrison*, scholars have criticized the *Glenister 2* majority's legal reasoning. But here the critics are wrong. The remainder of this paper will examine these criticisms and *Glenister 2*'s likely legacy, especially in light of further judicial developments. It could be seminal. The Constitutional Court there ruled that a new prosecutorial entity, called the

[7] 520 U.S. 681 (1997).

Hawks, that was created because the aggressive Scorpions were disbanded, was not independent enough for numerous reasons, but predominantly two– the chances for government interference in the mission, and the lack of meaningful job security. Even Hawk salaries were decided by the officials they might investigate. The most controversial part of the ruling was the Constitutional Court's emphasis on how various international conventions required a more independent anti-corruption agency. What made these constitutional issues rather than international law and policy issues? Well the majority ruled that the Hawks' lack of independence violated Section 7 of the Constitution because, "The state must respect, promote, and fulfill"…"the democratic values of human dignity, equality, and freedom."

The *Glenister 2* dissenters, however, said that establishment of the Hawks was a parliamentary policy matter that the Court could not second guess as long as the entity met some basic elements of independence. The dissenters said that whether the Hawks were as independent as the Scorpions was irrelevant. The focus should be on rationality, not "retrogression" (the majority disagreed here by pointing out how retrogression affected public perceptions of corruption in the democracy). Moreover, the dissenters said that international law did not bind the government here, since the conventions were not self-executing. The dissenters also said international law was being misinterpreted. It was a rare, closely divided, 5-4 decision, almost akin to the U.S. Supreme Court's most controversial cases.

Scholars like Sam Isacharoff, Theunis Roux, and Ziyad Motala have criticized the *Glenister 2* Court's creative and purportedly confusing use of international law. Motala has virtually accused the Court of lawlessness. Pierre De Vos, Paul Hoffman, and Justice Cameron have authored defenses. Determining the correctness of this criticism requires an analysis of how international law was used in the case. The most detailed scholarly examination so far is by Juha Tuovinen in the South African Law Journal who argues that both sides got it wrong. First a little background.

The South African Constitution is dualist in that the President may enter into treaties on behalf of the nation, but they are not self-executing. They must be ratified by Parliament, and implementing legislation makes them binding law. Even then, they are not constitutional amendments. This is typical of many countries. But South Africa also has a unique constitutional provision, Section 39, which says the following: "When interpreting the Bill of Rights, a court, tribunal or forum… "must consider international law… and may consider foreign law." Thus, international law can be binding statutory law in South Africa or instead, it can provide interpretive guidance regarding the Constitution. These two functions differ, especially since the interpretive role has a significant discretionary and constitutional component.

Tuovinen argues the *Glenister 2* majority fails to make clear how they are using international law.[8] For example, he says that no international law or South African legislation requires a fully autonomous and independent anti-corruption agency. So the question is why South African legislation on the Hawks should not suffice, even if full independence is not present. Moreover, Tuovinen argues it's an interpretive leap to take these international provisions and say they support the requirement of such an agency (let alone a constitutional requirement). These are powerful arguments. Moreover, he says the majority opinion, jointly authored by Justices Cameron and Moseneke, confusingly uses different terms to describe the impact of international law.

Tuovinen, however, also criticizes the dissenters for viewing these international conventions as having virtually no impact, and for saying that having the Hawks is purely a domestic parliamentary policy decision. Tuovinen says that is not consistent with various part of the constitution's discussion of the potentially "binding" or interpretive impact of international law. In the end, he advocates the Court adopt a dialogical approach to international law where it is fully considered, and the substantive reasons for letting it influence constitutional law are fleshed out comprehensively. He says the majority did not

[8] Note, *The role of international law in constitutional adjudication*, 130 SALJ 661 (2013).

do this, and the dissent did not try. He acknowledges, however, that these varied anti-corruption treaties require South Africa to have some anti-corruption entity with a level of independence.

While Tuovinen's article is correct that there are ambiguities in the majority's use of language, I think he goes too far in saying the majority fails to engage in sufficient substantive reasoning to justify its international law influenced interpretation, which I view as falling into the category of clarifying the meaning of various other constitutional provisions. Indeed, the majority makes a strong and comprehensive argument about why the international law should be constitutionally influential,[9] and provides a lengthy list of the Hawk's deficiencies.[10]

C. A Pragmatic Legal Coda

But I would add a pragmatic legal argument in favor of the majority's approach in *Glenister 2*.[11] The majority's approach may be the only way to preserve democracy in a dominant party state. And preserving democracy is the essence of what the South African Constitution is about. Without the protections of a fully independent entity, there is no reason to assume that the ANC will not engage in even more drastic actions to curtail opposition, including the judicial branch. I say this with no view that the opposition parties are better, but with the realization that absolute power can corrupt absolutely. Indeed *Glenister 2* is already a bell-weather case that will help influence the various South African courts addressing other corruption issues. The Constitutional Court's insistence on the creation of a truly independent agency reminds me of the U.S. Supreme Court's support for the practical necessity of a

[9] See e.g. Glenister 2, Pars. 170-178, 189-195, 200. This is 15 paragraphs of analysis which certainly satisfies the need for substantive reasoning in my view.
[10] See e.g. Glenister 2, Pars. 208-251. This is 43 paragraphs of analysis.
[11] See generally MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES (Cambridge Univ. Press 2009) (discussing the Court's interpretive approach of "transformative pragmatism.").

Bank of the United States in the case of *McCulloch v. Maryland*.[12] In both cases, the institution was not explicitly authorized by the respective constitution.

Now, numerous corruption cases are still pending. For example, in late September, the South Gauteng High Court ruled that the special judicial services tribunal investigating Judge Hlophe's actions, was legitimate and could continue, contrary to the views of Hlophe and sadly – contrary to the views of the two Constitutional Court Justices that Hlophe contacted.[13] The High Court rejected arguments that Hlophe was being subjected to illegal retroactive punishment, based on new judiciary statutory provisions that had been enacted. The court said the statutory changes were mainly procedural so his substantive rights were not really altered. The court also rejected the arguments of the two Constitutional Court Justices that they had not authored official sworn affidavits in the earlier proceedings. One can see how the South Gauteng High Court was fighting a kind of legal formalism, like that found on the dissenting side of *Glenister 2*, and how the court was not willing to countenance easy excuses to avoid examining corruption. Unfortunately, the Hlophe case will be pursued to the Supreme Court of Appeal, meaning the public must continue to wait and have Judge Hlophe serve under a cloud of uncertainty. But the right to appeal is a price of justice.

There is also now a *Glenister 3* case on appeal from the Western Cape High Court to the Constitutional Court.[14] After *Glenister 2*, parliament created another anti-corruption entry but Mr. Glendister, as well as the Helen Suzman Foundation, have argued that this entity is still not independent enough, using much of *Glenister 2*'s reasoning.

[12] 17 U.S. 316 (1819).
[13] Supra n. 3. It would seem that these Justices should have professional ethical obligations to cooperate fully with the investigation.
[14] In re. Glenister v. President of South Africa, Helen Suzman Foundation v. President of the Republic of South Africa, [2013] ZAWCHC 189.

Even the "spy tapes" case, which may reveal why the Scorpion investigation into Zuma's financial dealings stopped, has not fully concluded though the DA finally got the tapes. But there are apparently court limitations on the tapes' usage.[15]

CONCLUSION

Let me conclude by stating that this is just the tip of the iceberg of corruption in South Africa.[16] For that reason, the country has been lucky that some higher courts have been brave and that judicial credibility does not yet seem too fragile despite some of the ANC attacks. The latest approval ratings for the courts are high. Indeed a doctrinal paradox is that the South African Constitutional Court has, in these areas, created stronger separation of powers principles than exist in the U.S. Presidential system, when the opposite is supposed to be true regarding such political systems. This is perhaps why this paper was placed on a panel titled "evolving doctrines," and it shows why the Constitutional Court is taking a significant risk. Hopefully a stronger South African anti-corruption agency, and a more democratic system, can reduce pressure on the courts. In the end, the key is not the South African courts, but developing a culture that does not tolerate such corruption, and this will require difficult change, especially without the leadership of anyone like Nelson Mandela.

[15] Stephen Grootes, *DA to Return to Court Over "Spy Tapes,"* EYEWITNESS NEWS (EWN), Sep. 22, 2014, http://ewn.co.za/2014/09/22/DA-to-return-to-court-over-spy-tapes

[16] South Africa is not alone. The U.S. has a problem with its Supreme Court countenancing huge financial contributions in political campaigns. These contributions can give the appearance of influence peddling, even if they do not amount to quid pro quo bribery.

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