THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS CCT 16/98

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

In April last year the Transvaal High Court set aside the appointment of a presidential commission of inquiry into the affairs of the South African Rugby Football Union (SARFU). The President appealed against that decision and on 2 December 1998 this Court ruled that it had to hear the appeal. Three court days before the appeal was due to be heard, Dr Louis Luyt, a former president of SARFU and one of the parties in the case, filed a recusal application. Although his allegations implicated each of the judges of the Court, he directed the application at five judges only, stating that he "left it to the conscience"of the others to decide what to do. Having heard full argument, the Court on 7 May 1999 unanimously dismissed the application, stating that it would furnish its reasons for doing so later. Today the Court furnished those reasons in a written judgment.

Dr Luyt did not allege that any of the judges were actually biased, but founded the application on what he alleged was a reasonable apprehension on his part that Chaskalson P, Langa DP and Kriegler, Sachs and Yacoob JJ, would be biased in favour of President Mandela and against him. He relied on a number of allegations for that perception. They included this Court's decision that it was the appropriate court to hear the appeal; an allegation that the judges had been appointed by the President and would therefore be "grateful" to him for their appointments and unable to judge this case impartially; an alleged relationship which the families of Chaskalson P and the President shared; and the political association that some members of the Court had had with the African National Congress at a time prior to their appointment as judges. Dr Luyt accepted that whatever their association had been, such members had severed all ties with the ANC prior to or on appointment to this Court.

A number of allegations relied on by Dr Luyt in his application were not correct and were not relied on after the judges responded in a written statement read at the inception of the hearing. During argument the application against Kriegler J was withdrawn. Other complaints by Dr Luyt were founded on what turned out to be an incorrect understanding of the procedures in terms of which judges are appointed to the bench.

The allegations made by Dr Luyt were considered by all of the judges. In doing so they applied the test for perceived bias, namely whether a reasonable and informed litigant in the position of Dr Luyt would reasonably apprehend that the judges concerned would not decide the case impartially. The Court stated that judicial officers are under a duty to withdraw from cases if there is a reasonable apprehension that they will not decide the case impartially. However, if there are no good grounds for such apprehension, judicial officers are under a duty to adjudicate cases before them. This is the approach adopted in many democracies and

in this regard the Court referred to decisions of the South African Supreme Court of Appeal, and the highest courts of Australia, Canada, the United Kingdom and the United States of America. After a full and detailed consideration of the allegations and complaints of Dr Luyt and the submissions of counsel, the Court decided unanimously that a reasonable litigant with knowledge of the true facts, would not apprehend that any of the members of this Court would not act impartially in this matter.

There was in fact no close personal or family relationship between Chaskalson P and the President, nor was there any such relationship between the President and any other member of the Court. The Court pointed out that in most democracies, including our own, many judicial officers engage in political activity prior to their appointment to the bench and, after appointment, may have to decide cases with political implications. It has also never been suggested that judicial officers do not have political preferences or views on law and society. In South Africa, especially after its transition to democracy, it would be surprising if many candidates for appointment as judicial officers had not been active in or publicly sympathetic towards the liberation struggle. Prior political associations alone have never been regarded as a reason for recusal unless the subject matter of the litigation in question arises from such association or activities. Judicial officers are required to terminate such association on appointment to the bench.

Dr Luyt also alleged that because of the public criticism of De Villiers J in the aftermath of his handling of the matter in the High Court, the judges of the Constitutional Court would be afraid to act impartially in this matter. In dismissing this argument, the Court deplored the tendency for decisions of our courts, with which there was disagreement, to be attacked by impugning the integrity of judicial officers rather than by examining the reasons for their judgments. Decisions of our courts are not immune from criticism but political discontent or dissatisfaction with the outcome is no justification for recklessly attacking the integrity of judicial officers.

Under our new constitutional order judicial officers are now drawn from all sectors of the legal profession, having regard to the constitutional requirement that the judiciary shall reflect broadly the racial and gender composition of South Africa. While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn form a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judges are nonetheless required to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law". To this end they must resist all manner of pressure, regardless of where it comes from. This is a constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.

4 June 1999