Editorial

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It is such an honour to write an editorial for this double Special Issue on *Twenty-First Century Constitutional Jurisprudence of South Africa: The Contribution of Former Chief Justice S Sandile Ngcobo*. This project is a result of a discussion between myself and professors Okpaluba and Mhango, as constitutional law academics that have admired former Chief Justice Sandile Ngcobo's work. I also had a pleasure of working for the retired Chief Justice as a law clerk in 2003/2004. Our aim when we conceptualised this project was to invite academics, colleagues and lawyers who have come before the judge to contribute. We felt that the retired Chief Justice's judgments have shaped and will continue to shape South Africa's (foundational) constitutional jurisprudence in the years to come. In our view, it was incumbent upon the contributors to study these judgments and his other writings with a view to venturing an opinion as to what type of jurist former Chief Justice Ngcobo really or seemingly was during his time on the bench.

This double Special Issue includes personal tributes by a colleague, a former clerk and someone who worked closely with the retired Chief Justice when he established the Office of the Chief Justice (OCJ). The first personal tribute is by Justice Albie Sachs, his colleague at the Constitutional Court, who discusses the retired Chief Justice's legacy, especially in cases such as *Hoffmann v South African Airways* and *Doctors for Life International v Speaker of the National Assembly*. Justice Sachs reminds us how former President Thabo Mbeki's appointment of Justice Ngcobo to the Constitutional Court was not popular. He then confirms that despite that, Justice Ngcobo made 'a huge contribution towards the transformation jurisprudence of [the Constitutional] Court.' Using the example of the *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* judgment, Sachs J discusses how Justice O'Regan and Justice Ngcobo flagged future themes differently while at the same time came to the same conclusion and outcome in this case. Interestingly, O'Regan J's main judgment and Justice Ngcobo's concurring judgment in *Bato Star* both received unanimous endorsement by other judges in Court. I was still a law clerk at the time and I remember how excited my judge was of this outcome as this happened after rigorous judges'

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deliberations. Sachs J also let us in on Justice Ngcobo's lesser-known humorous side. I can attest to the judge's subtle sense of humour. For example, we were told that the Court is a relaxed environment unlike other courts and that on Fridays we could dress casually. One cold Friday I was dressed in a tracksuit and he asked 'are you going to a race later?' I also deliberately had uncombed hair and this one time, we were in a meeting with him and fellow clerks when he asked, 'Zozo, don't you have a comb at home?' Justice Sachs describes Justice Ngcobo as 'a fine legal craftsman, very correct in his reasoning. But what stood out was his creativity and independence of mind.'

Keeping with the theme on personal tributes, Richard Calland looks at what he feels has been largely ignored when it comes to discussing the retired Chief Justice's legacy: his leadership. Calland worked closely with the retired Chief Justice when he headed the Democratic Governance and Rights Unit—a unit within the University of Cape Town. He therefore, takes the reader through the retired Chief Justice's short term in this role and how he established a strong OCJ. Calland claims that Chief Justice Ngcobo 'has had the greatest impact on judicial governance and, as a result, on judicial reform, because of his far-reaching understanding of the importance of attaining sufficient judicial autonomy in the governance of the judicial branch of government, and more importantly still, his acumen in persuading the government of the day to accede to his request to have a semi-autonomous OCJ established to lead the governance of the Judiciary.' Calland believes that the former Chief Justice could have been a great reforming chief justice had he stayed in office for longer.

Closing the personal tributes' theme is Justice Ngcobo's former law clerk, Elizabeth Brundige, who worked for him while he was drafting the *Doctors for Life* and *Matatiele Municipality v President of the Republic of South Africa (1)* judgments. Brundige takes the reader inside the judge's chamber during the deliberations on these judgments. She describes, what we as his former clerks know too well, that one had to be fully prepared for the deliberations in his chambers. One had to be sure about, and be able to articulate one's point. Brundige also discusses how clerking for the retired Chief Justice 'was one of the most transformative experiences of [her] early professional career' and how she has and still applies the lessons learnt in her human rights law career.

The second theme of this Special Issue looks at the retired Chief Justice's jurisprudence on the separation of powers, including his judgments on federalism and local government. The first article on this theme is co-written by Gilbert Marcus SC and Max du Plessis. Marcus SC is one of the senior counsels that appeared before the retired Chief Justice numerous times at the Constitutional Court. The authors focus on Justice Ngcobo's jurisprudence on procedural fairness, and in particular, the fair process for dispute resolution and the rule of law in *Zondi v MEC for Traditional and Local Government Affairs*; public participation and law-making in *Doctors for Life* and

Matatiele; and procedural fairness as a requirement for rationality in *Albutt v Centre for the Study of Violence and Reconciliation*. The authors argue that the judge's jurisprudence as illustrated in the *Doctors for Life*, *Matatiele* and *Zondi* cases demonstrate the retired Chief Justice's application of the principle *audi alteram partem* 'in entirely different decision-making contexts'. They also argue that the *Albutt* case demonstrates Justice Ngcobo's legacy application of the *audi alteram partem* principle albeit differently. However, Marcus and Du Plessis are not impressed with the former Chief Justice's lone dissenting judgment in *Thint (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions*, which involved search and seizure warrants to obtain evidence against former president Zuma. Here the authors argue that Justice Ngcobo got the balance wrong in his failure to consider the public interest in criminal proceedings.

The second contribution under this theme is that of Ziyad Motala, which analyses the *Doctors for Life* judgment through the lens of democracy. Motala examines how Justice Ngcobo's jurisprudence developed the concept of democracy from its ancient understanding. He remarks that the traditional concept of democracy required the direct participation of the people in the decision-making processes that affect their lives. Motala argues that whilst this traditional concept of democracy is no longer practical in large nation states, Justice Ngcobo's opinion in *Doctors for Life* 'provides a vision for citizen participation, which the Court correctly framed as an issue that lies at the heart of our constitutional democracy.' Above all, in his analysis of *Doctors for Life*, Motala notes that 'Ngcobo conceives democracy as a social idea that requires the participation of the electorate in matters that are of crucial concern to them.' He links Justice Ngcobo's idea of democracy in *Doctors for Life* to Brexit and the election of the United States President, Donald Trump. He concludes that Justice Ngcobo 'reinvigorated democratic theory on citizen participation and gave it meaningful application.'

Mtendeweka Mhango's contribution deals with Justice Ngcobo's separation of powers legacy, and in particular the unchartered territory—the political question theory in South Africa. In his examination of the former Chief Justice's judgments and speeches, Mhango argues that Ngcobo J's majority judgment in *Doctors for Life* reflects the first time that he focused on the political question theory in South Africa. Mhango also uses Justice Ngcobo's dissenting opinion in *Glenister v President of the Republic of South Africa* (*Glenister II*) to illustrate his point that Justice Ngcobo has dealt with the political question theory in some of his separation of powers judgments. Mhango boldly argues that although the Constitutional Court did not expressly overrule the majority judgment in *Glenister II*, it endorsed the principles put forward by the former Chief Justice in the *Economic Freedom Fighters v Speaker of the National Assembly* judgment in determining 'whether the National Assembly had breached its constitutional obligation to hold the president to account.'

Continuing with the theme is Victoria Bronstein's contribution, which examines Ngcobo CJ's judgments that deal with the 'intersection of federalism and democracy'. Bronstein, who has previously examined Ngcobo CJ's judgments on federalism, argues that he 'stands out as one of the architects of our federalism jurisprudence.' In her contribution, Bronstein discusses the *Tongoane* and *Matatiele* judgments and argues that these 'are bound together by Justice Ngcobo's powerful commitment to democracy at the subnational level.' Bronstein also traces the battles over provincial borders that have led to the conflicts brought before the Constitutional Court, and also discusses the aftermath of the cases. She argues that Justice Ngcobo's judgments in *Doctors for Life* and *Matatiele* foster the 'need for legislators to listen to the people, because the act of listening both improves the deliberative process and fortifies a sense of civic dignity.'

Maropeng Mpya and Nomthandazo Ntlama's contribution expands on Bronstein's theme by 'highlight[ing] Ngcobo J's judicial identity' in his judgments on intergovernmental relations. In their contribution, the authors discuss Justice Ngcobo's judgments on cooperative governance, in particular the *Executive Council, Western Cape v Minister, Provincial Affairs and Constitutional Development*; *Executive Council, KwaZulu-Natal v President of the Republic of South Africa*; and *DVB Behuising (Pty) Limited v The North West Provincial Government*. They argue that 'Justice Ngcobo has proved to be the 'pinnacle' of promoting the values and principles that underpin the open and democratic society.

Chuks Okpaluba's contribution opens the last theme, which is based on the former Chief Justice's selected judgments on the Bill of Rights. Okpaluba's contribution 'discusses Judge Ngcobo's interpretation of the remedial jurisdictional powers of the Court embedded in the phrase "appropriate relief" and, to some extent, the expression "just and equitable" order.' The contribution looks primarily at three cases: *Hoffmann*; *Masetlha v President of the Republic of South Africa* and *Bel Porto School Governing Body v Premier of the Western Cape Province*. In the highly appraised *Hoffmann* judgment, Okpaluba discusses 'the novel remedy of "instatement"' and argues that 'judicial activism was at its pinnacle, with the result that the remedies lexicon in both the employment-law and the public-law spheres has been greatly enriched.' In *Masetlha*, Okpaluba observes that both the majority judgment as penned by Moseneke DCJ and Justice Ngcobo's dissenting opinion agreed that the reinstatement was not possible. Okpaluba also highlights how Justice Ngcobo's judgment in this case differed from the majority judgment, when he found that the President 'had acted in breach of the doctrine of legality [and his] conduct was therefore inconsistent with the Constitution and fell to be declared as such under section 172(1)(a) of the Constitution.' This is an interesting observation as years later this has been the bone of contention by political parties before the Constitutional Court as to whether this declaration against the President means that he may be impeached in the National Assembly. The third judgment by Ngcobo J that Okpaluba discusses is a 'dissent within a dissent' in *Bel*

Porto, where he focuses on Justice Ngcobo's 'approach to the issue of appropriate relief'.

Jonathan Klaaren's contribution also focuses on Justice Ngcobo's rights jurisprudence, where he analyses Ngcobo J's take on citizenship. In this contribution, Klaaren argues that Ngcobo CJ 'adher[ed] to a republican notion of citizenship'. Klaaren draws this conclusion from his analysis of Ngcobo J's judgments in particular *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* and *Kaunda v President of the Republic of South Africa,* while also discussing *Bato Star, Doctors for Life* and *Matatiele*. Klaaren is of the view that 'Justice Ngcobo has fused economic and political aspects of citizenship in a number of his judgments, participating in the creation of a powerful strand of a newly born republican tradition of South Arican constitutional law and theory.'

Justice Ngcobo penned a partial dissenting opinion in *Bhe v Khayelitsha Magistrate*, an important judgment on the customary law principle of primogeniture, the majority of which was written by the late former Chief Justice Langa. While Langa DCJ, as he then was, struck down the principle of primogeniture on the basis that it was in conflict with the right to equality because it made an unfair distinction between males and females, and between eldest children and other children, Ngcobo J felt that this principle could be developed to be in line with the Constitution. However, the judge did not find it problematic for this principle to distinguish between eldest children and youngest children, reasoning that '[e]ntrusting these responsibilities to the eldest child is consistent with the role of the eldest child in relation to his siblings. The eldest child has a responsibility to look after his or her siblings. The rule simply recognises this responsibility' (para 181). I must declare that I was Justice Ngcobo's clerk when this issue was heard by the Constitutional Court and my task was to do research on the principle of primogeniture in Africa and to write an opinion for the judge. Justice Ngcobo credits me for his partial dissenting opinion in the *Bhe* matter. When the judgment was handed down, I had already left the Constitutional Court. On the day, Justice Ngcobo called to tell me that he had partially dissented and explained his reasons for not fully dissenting. Mama, I made it!

Two prominent scholars on African customary law reflect on this dissenting opinion in this Special Issue. First is the contribution by Chuma Himonga, which 'seeks to vindicate [Ngcobo J's dissenting opinion] with regard to its reflection of the grounded realities of succession under living customary law, using [empirical] research findings.' In her contribution, Himonga gives a background of the judgment and highlights the differences between the majority judgment and Justice Ngcobo's dissenting opinion. She then links the *Bhe* judgment to the Reform of the Customary Law of Succession and Regulation of Related Matters Act, 2009. She argues that Ngcobo J's dissenting opinion can make a valuable contribution to the constitutional jurisprudence when it

comes to the interpretation of the Reform of the Customary Law of Succession and Regulation of Related Matters Act—in order to develop 'the jurisprudence that will respond, as closely as possible, to the lived realities of the people to whom that Act is intended to apply.'

The second contribution that reflects on Justice Ngcobo's dissenting opinion on *Bhe* is by Muna Ndulo, which has a specific focus on customary law and women's rights. Ndulo observes that 'cases involving customary law and gender rights are not unique to South Africa' as these issues are also found in Africa and beyond. Hence, Ndulo's contribution discusses pluralism, customary law and women's rights in African legal systems. He argues that Ngcobo J's 'approach to resolving conflict between customary law and the Bill of Rights in constitutions is instructive and makes a significant contribution to the [customary law] jurisprudence.'

My contribution is in keeping with gender rights, *albeit* on a different aspect. The contribution revisits the criticisms levelled against two of Justice Ngcobo's judgments in *S v Jordan* and *Volks NO v Robinson*. These judgments deal with the 'interface between social context and legal rules in relation to women as sex workers, in one context, and those who are in unmarried permanent life partnerships, in another.' My contribution also examines recent developments since these two cases were handed down more than a decade ago, in particular the South African Law Reform Commission's report on the decriminalisation of sex work and also the Constitutional Court judgment in *Laubscher NO v Duplan*. I found that these latest developments still keep the *status quo* leaving women at a disadvantage. I, therefore, argue that the Legislature has a constitutional duty to protect the rights enshrined in the Bill of Rights and therefore it is up to it to legislate on these issues to bring about the change.

Still keeping with the rights theme, Enyinna Nwauche examines the religious question jurisprudence of the Constitutional Court, in particular, as dealt by Justice Ngcobo in his minority opinion in *Prince v President of the Law Society of the Cape of Good Hope*, and later in *De Lange v Presiding Bishop of the Methodist Church of Southern Africa For The Time Being*. The latter judgment was handed down years after Justice Ngcobo's term in the Constitutional Court had expired. Nwauche argues that Justice Ngcobo's opinion in *Prince* 'highlighted aspects of the religious question by recognising that the religious question could rightly be a threshold enquiry into the sincerity and/or truth of a belief and practice.' He concludes that the Constitutional Court's jurisprudence, to which Justice Ngcobo was party, on the religious question signifies 'a credible and sustainable means of engaging with petitions for the protection of religious freedom.'

Meryl du Plessis' contribution reflects on Justice Ngcobo's judgment in *McBride*, which sought to strike the balance between freedom of expression and dignity, especially when it relates to the narratives of the past and present. She argues that 'the newspaper

narratives about Mr McBride's planting and detonation of a bomb in 1986 contain various omissions and half-truths, which has an adverse impact on the media's contribution to post-apartheid South Africa.' Du Plessis also contends that the law of defamation is inadequate to address the shortcomings of the media when it comes to South Africa's history. She notes that Ngcobo CJ in McBride emphasised that the determination on what constitutes a fair comment has to be made through the lens of the right to dignity. She then concludes that 'Ngcobo CJ's of affirming the dignity of black persons in South Africa, while exercising restraint in curbing the media's freedom of expression, is commendable. It requires the media to be honest to act in furtherance of democratic tools at our disposal to challenge unbalanced and unfair media.'

Mpfari Budeli-Nemakonde's contribution reflects on Justice Ngcobo's separate opinion in *NUMSA v Bader Bop (Pty) Ltd* about the minority trade unions' organisations rights in South Africa. She notes that before South Africa's constitutional democracy most organisational rights were not recognised except for the right to stop order facilities. She further notes that both the Interim Constitution, 1993 and the Constitution recognised workers' rights, in particular the right to form and join trade unions and to participate in the activities and programmes of such trade unions. In this contribution, Budeli-Nemakonde traces the litigation history of the case from the CCMA to the Constitutional Court and discusses the different judgments. She then concludes that Justice Ngcobo's separate opinion 'followed a broader interpretation of the relevant provisions of the [Labour Relations Act], taking into account a worker's right to freedom of association, which is the most fundamental worker's right previously denied some groups of workers in South Africa.'

The final contribution in this Special Issue is by Itumeleng Tshoose, which examines Ngcobo J's judgment in *Doctors for Life* through the lens of socio-economic rights. He argues that the former Chief Justice's judgment in *Doctors for Life* paved way for the public participation in socio-economic rights adjudication. Tshoose also discusses selective socio-economic rights judgments that deal with the principle of public participation in order 'to demonstrate the importance of public participation in the adjudication of socio-economic rights.'

I would like to take this opportunity to thank the authors for their contribution to this Special Issue highlighting the former Chief Justice's legacy. I am particularly grateful to my collaborators, professors Okpaluba and Mhango for giving me this opportunity and task to edit this project. I will also like to thank the *Journal* for agreeing to publish this project and in particular, Tanja Botha, the technical editor, for her fantastic work, and the deputy editor of this *Journal*, Professor Babatunde Fagbayibo. Last, but certainly not least, I would like to take this opportunity to thank 'my judge', the former Chief Justice S. Sandile Ngcobo, for his contribution to the constitutional jurisprudence

in the Twenty-First Century, and for leaving such a rich legacy that will continue to shape our jurisprudence for decades to come. I am inspired.