

Judicial Collegiality and Tolerance of Difference: Insights from Justice Johan Froneman's Dissents

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Abstract

The retirement of Justice Johan Froneman from the Constitutional Court of South Africa provides an ideal opportunity to reflect on his approach to collegiality and tolerance of difference. Like his predecessors, Justice Froneman navigated a delicate balance between collegiality and dissent. While the diverse backgrounds and experiences of his judicial colleagues enriched the Court's deliberations, Justice Froneman's dissents demonstrated the need for the Court to function as a cohesive unit to resolve judicial differences. His insistence on understanding the proper context of issues, taking account of relevant facts and synthesising opposite viewpoints was particularly pronounced in cases involving potentially divisive moral and ideological questions. Cases that touched on South Africa's contested political history and the proper role of the Court in a constitutional democracy further provided him with the platform to strike a balance between collegiality and dissent, thereby showing that tensions between unity and diversity among judges can be resolved amicably and that doing so would positively contribute to the development of the Court's jurisprudence on tolerance.

Keywords

Froneman J; judges; dissent; collegiality; Constitutional Court; South Africa.

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1 Introduction

South African Constitutional Court judges not only sit at the apex of the judiciary¹ but also hold power to exercise guardianship of the Constitution,² make law, abolish and amend parliamentary Acts,³ and exercise political power.⁴ These powers and functions of the Court make its judges the ultimate deciders of all legal, political, economic and social issues, placing them in a unique position to define and influence the country's future. Thus, the retirement of a Constitutional Court judge provides an opportunity to reflect on their contribution to jurisprudence and their legacy at the Court. This can be achieved by examining how certain defining cases that the judge in question decided influenced the Court and society. The recent retirement of Justice Froneman provides this rare opportunity. Justice Froneman served at the Court from October 2009 and retired on 31 May 2020 after a career of 26 years on the bench.⁵

The cases discussed in this paper show that Justice Froneman's approach to collegiality and dissent placed him in a unique position in which he demonstrated the need for the Court to function as a cohesive unit to resolve conflicting judicial viewpoints through reasoning, discussion and debate. His insistence on understanding the proper context of issues, finding the relevant facts and synthesising opposite viewpoints was particularly pronounced when the Court faced cases involving potentially divisive moral and ideological questions. Cases that touched on the country's contested political history and the proper role of the Court in a constitutional democracy further provided him with the platform to strike a balance between dissent and collegiality, thereby showing that tensions between

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¹ See s 167(3) of the *Constitution of the Republic of South Africa*, 1996 (the Constitution).

² See *Mazibuko v Sisulu* 2013 11 BCLR 1297 (CC) (hereafter *Mazibuko*) para 135; *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2010 5 BCLR 457 (CC) para 92; *S v Mamabolo* 2001 5 BCLR 449 (CC) (hereafter *Mamabolo*) para 63, in which the Court proclaimed that one of its constitutional mandates is to exercise guardianship of the Constitution by protecting it from the overreaches of the three spheres of government and other organs of state.

³ The Court's law-making mandate, which entails reading in and reading out words from statutes, ordering Parliament to enact specific legislation and declaring validly enacted statutes as unconstitutional and therefore null and void, arises from the supremacy of the Constitution, its powers to develop customary law and the common law in s 39 of the Constitution, and from s 172 of the Constitution.

⁴ See Dube 2020 *SAJHR* 306-311 for a full exposition of the Court's role in politics and governance.

⁵ See Office of the Chief Justice 2020 https://www.judiciary.org.za/images/news/2020/Media_Statement_-_Retirement_of_Justice_Johan_Froneman.pdf.

unity and diversity among judges can be resolved amicably and that doing so would positively contribute to the evolution and development of the Court's jurisprudence.

This paper explores collegiality and dissent in the Constitutional Court in general and with reference to Justice Froneman in particular. The paper begins by contextualising procedural mechanisms through which the Court arrives at its decisions. This analysis helps to pinpoint the exact stage(s) at which dissents emerge. It is also necessary to provide the relevant background for the examination of the political, moral and ideological roots of dissents. The second part of the paper argues that when judicial officers face cases of significant constitutional and historical interest and which have political, economic and social implications, they are likely to disagree on the interpretation and application of the law and the correct remedies. The disagreements could flow from the moral and ideological positions of judges, as well as their personal histories. The third section of the paper considers the value of dissents in general and from Justice Froneman's viewpoint in particular. It also discusses the possibility of reconciling dissent with collegiality by using specific examples from Justice Froneman's judgements. The last section concludes the paper.

2 The Court's decision-making process

Like its counterparts across the globe, the Constitutional Court of South Africa reaches its decisions by simple majority through a decision-making process guided by universally accepted principles of judicial collegiality and dissent, which require judges to agree and disagree on substantive and procedural aspects of cases before them if the need arises.⁶ However, the Rules of the Constitutional Court⁷ do not mention the term dissent and do not outline the internal procedural mechanisms that judges use (in chambers) to decide cases. Due to this limitation, the writings of former and current judges of the Court, such as Moseneke DCJ and Madlanga J, are used to ascertain the Court's internal procedures.

Publicly available information shows that the Court decides cases through a process regulated by its Rules, which must conform to section 167(2) of the Constitution. This section mandates a quorum of at least eight judges for any matter before the Court to ensure that it is not left to less than eight judges to decide a matter. Although the Court has 11 judges, not all of them sit in every matter for a variety of reasons, such as leave of absence and recusal. Regardless of how many judges sit on a matter, there is a likelihood that not all of them will agree on the interpretation of the facts, the applicable

⁶ Sachs *We, the People* 179.

⁷ GN R1675 in GG 25726 of 31 October 2003 (Rules of the Constitutional Court).

legal principles and the appropriate remedy in each case. This is one of the causes of judicial dissent, as explained further below.

The Court decides on two main types of cases: appeal matters from either the High Court or the Supreme Court of Appeal and applications for direct access to it.⁸ Although the Rules provide that the Chief Justice may issue directions that disallow oral argument in a particular matter,⁹ the custom is that the "Court" is obliged to consider each application carefully and determine whether to decide it on written submissions alone or to refer it for an oral hearing. In this regard, Moseneke DCJ says that the Court may dismiss such cases outright in chambers after agreement by judges at a conference.¹⁰ Often, the reason for dismissing such matters is that they lack prospects of success. While expedient (given the Court's increasing workload), the dismissal of applications without oral hearings has the potential consequence of leaving litigants feeling "unheard" as the Court's "no [means] the end of the road for a litigant".¹¹ Dismissing matters without an oral hearing also makes it possible for the Court to easily avoid matters that, ideally, it should hear in open Court, particularly in matters of national interest. It could be argued that the right to be heard by a Court is potentially undermined when one is "read" on papers and dismissed instead of being "heard" in oral argument.

The second set of matters decided by the Court pertains to cases that it refers to oral hearing. The Chief Justice and his deputy compile the Court's role of all matters which the judges decide to refer to oral hearing. This list is published ahead of time and is accessible to the public.¹² Prior to the hearing, the Chief Justice and Deputy Chief Justice appoint a scribe, who is the judge who will write the judgement.¹³ The scribe would issue a pre-hearing note summarising the issues which require resolution as part of preparing other members of the Court for the hearing.¹⁴

After the hearing, which is held in open court and in which counsel for all parties are afforded opportunities to address the Court and answer questions, the matter will be adjourned for decision. Within a week after the hearing, the scribe would circulate an electronic post-hearing note stating a position on whether the appeal should succeed and, if so, to which extent and why. Other judges would respond electronically, also stating their positions, after which a judges' conference will be held in which the other

⁸ See Part VIII of the Rules of the Constitutional Court.

⁹ Rule 13 of the Rules of the Constitutional Court.

¹⁰ Moseneke *All Rise* 252.

¹¹ Moseneke *All Rise* 252.

¹² See, for instance, Constitutional Court of South Africa date unknown <http://hdl.handle.net/20.500.12144/38257>.

¹³ Moseneke *All Rise* 120.

¹⁴ Moseneke *All Rise* 204.

judges air their views on the scribe's approach.¹⁵ When the judges' conference ends, it will be clear to all the judges who supports the scribe's outcome and who differs. The scribe must proceed to write a judgement while the rest of the Court waits for the opportunity to add or write differing opinions, where necessary.¹⁶ Sachs J says that at his time, the judges workshopped together and negotiated "around the table several times to reach consensus where possible and to write separate judgements when necessary".¹⁷ This was mostly done at a judges' conference, where the drafts would be read and corrected for grammar and other errors and to remove contradictions and inconsistencies.¹⁸

Before going into details about the writing of separate judgements, it is imperative to further consider several options which other judges have in response to a draft judgement circulated at a judges' conference.¹⁹ First, the judges may fully agree on everything (the interpretation of the facts by the scribe, the application of the applicable law, and the proposed remedies). On such an occasion the judges may deliver a single judgement with no specifications as to the identity of the judge who wrote the judgement. The judgement will merely indicate that the decision is by "the Court" and list the coram.²⁰ Such judgements are also issued in cases in which other considerations (such as the avoidance of controversy) require the Court not to identify the author of a judgement. Alternatively, the judgement will indicate the judge who wrote the judgement, at the end of which the other judges will register their concurrences with "I concur" or such other indication that the judges may deem fit.²¹ Often, the names of the judges

¹⁵ Moseneke *All Rise* 122.

¹⁶ Moseneke *All Rise* 123.

¹⁷ Sachs *We, the People* 156.

¹⁸ Moseneke *All Rise* 123.

¹⁹ The Chief Justice, as the head of the Court, directs its operations, allocates cases and performs other administrative functions. In the absence of the Chief Justice, the Deputy Chief Justice performs these functions. When both the Chief Justice and the Deputy Chief Justice are not available, the Acting Deputy Chief Justice performs the functions of the Chief Justice. S 175(1) of the Constitution provides that the President may only appoint an Acting Deputy Chief Justice from judges serving at the Court and may only do so after consultation with the Chief Justice and Cabinet. The powers conferred by s 175(1) of the Constitution have been recently exercised by the President due to the absence of the Chief Justice on other engagements and due to absence of the Deputy Chief Justice, Zondo DCJ owing to his engagement at the Judicial Commission of Inquiry into Allegations of State Capture.

²⁰ See, for instance, *Justice Alliance of South Africa v President of Republic of South Africa; Freedom Under Law v President of Republic of South Africa; Centre for Applied Legal Studies v President of Republic of South Africa* 2011 10 BCLR 1017 (CC). However, split judgements are (at times) presented as judgement of "The Court" – see, for instance, *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* 2020 1 SA 327 (CC) (hereafter *Ascendis*). For a further discussion of judgements by "The Court", see Moseneke *All Rise* 142.

²¹ Moseneke *All Rise* 142.

who sat on the case appear at the beginning of the judgement, while the end of the judgement will usually set out the majority and minority judges.²² This information may appear anywhere in the judgement, such as where the majority judgement ends, with indications such as:

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concur in the judgement of Froneman J.²³

In rare instances, all the judges may write separate judgements (on direction by the Chief Justice) and concur with the order of the "Court". This route is unusual, although it was used in the Court's watershed judgement in *S v Makwanyane*, in which all eleven inaugural judges of the Court wrote separate judgements and concurred in a consolidated order by the Court.²⁴

However, the judges do not always agree on the interpretation of the facts, the application of relevant legal principles and the appropriate remedies. Disagreements between judges arise because it is impossible for all the judges to always reach a consensus, particularly on contentious questions of principle, law, morality and politics. At times, only one, two or three judges disagree with the majority. This leads to the second option, in which the judge who disagrees writes a separate judgement, spelling out his or her reasons for differing.²⁵ It must be noted that not all separate judgements are dissents. In some cases, a judge may differ from the majority on the reasoning and concur with the order of the majority. A classic case in this regard is *Minister of Finance v Van Heerden*, in which Sachs J, in his customary attempts to find common ground, had the following to say:

Paradoxical as it may appear, I concur in the judgement of Moseneke J on the one hand, and the respective judgements of Ngcobo J and Mokgoro J, on the other, even though they disagree on one major issue and arrive at the same outcome by apparently different constitutional routes. As I read them the judgements appear eloquently to mirror each other. In relation to philosophy, approach, evaluation of relevant material and ultimate outcome, they are virtually identical. In relation to starting point and formal road travelled, they are opposite.²⁶

²² Moseneke *All Rise* 142.

²³ See *S v Thunzi* (CCT 81/09) [2010] ZACC 12 (5 August 2010) 8.

²⁴ *S v Makwanyane* 1995 6 BCLR 665 (CC) (hereafter *Makwanyane*).

²⁵ Moseneke *All Rise* 122.

²⁶ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 135. In this case Sachs J observed that the majority ruling advanced affirmative action, while the minority opinions applied the principles of non-discrimination. Despite these differing approaches, he said that all judgements ultimately arrived at the same conclusion and expressed the belief that this convergence was not a coincidence but rather a reflection of a common underlying constitutional principle. He further argued that this principle suggests that the distinctions between the majority and minority opinions should be removed in order to better understand the similarities and commonalities between them. Doing so, he said, is mandated by the Constitution and would resolve any apparent contradictions between the judgements and allow for a clearer

Other judges (the minority) can join a dissent. When the Court splits due to dissent, the majority order is authoritative because in a democracy the majority rules. In response to dissent, some of the majority judges may write concurring judgements to explain their views in support of the main judgement (the majority judgement), whereas in most instances judges simply note their concurrence. In extraordinary cases, a judge may write a concurring judgement to address contentious issues raised in a dissenting judgement, as Froneman J did in *Economic Freedom Fighters II*. His separate judgement was written solely to respond to Mogoeng CJ's statement that the majority was overreaching on the political terrain and to affirm the need to accept differences of opinion.²⁷

Regarding dissents, the mandatory coram of at least eight judges to sit on any matter places the Court in awkward positions when eight judges sit on a matter and four of them dissent. This is rare but not surprising. Although the Court's practice is to have an odd number of judges (nine or eleven) to prevent even splits, the Court is not required by the Constitution to have an odd number of judges on a case. In *Jacobs v S*,²⁸ the Court split evenly. Four judges upheld the appeal, whereas the other four dissented. The consequence was that there was no majority judgement and no minority judgement. Without a majority judgement there was no binding order, leaving the decision of the court *a quo* intact.²⁹ In *Ascendis* the Court also split evenly. The Court had to address the implications of the even split. The judges agreed that since there was "no majority decision of this Court. ... The result is that the judgement and order of the High Court ... stands".³⁰ This situation is unfortunate. It denies the Court an opportunity to set a binding precedent to guide itself and the courts below. It explains why it is important to have nine or eleven judges sitting on a case instead of eight or ten.

The third option is for one judge (or more) to concur with the whole or part of an order of the majority judges³¹ but entirely or partially disagree with

understanding of their underlying rationale. In summary, he endorsed the fundamental reasoning behind all of the judgements and asserted that the Constitution requires judges to reconcile the differences among them.

²⁷ *Economic Freedom Fighters v Speaker of the National Assembly* 2018 2 SA 571 (CC) (hereafter *Economic Freedom Fighters II*) para 279.

²⁸ *Jacobs v S* 2019 5 BCLR 562 (CC).

²⁹ For a criticism of the judgement, see De Vos 2019 <https://constitutionallyspeaking.co.za/an-embarrassing-mistake-from-the-constitutional-court/>.

³⁰ *Ascendis* para 3.

³¹ See, for instance, *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) (hereafter *Hugo*) para 61 in which Didcott concurred in the majority judgement "[f]or the reasons given by me, and for those alone". Kriegler J also partly concurred with the majority and dissented on one aspect of the Court order – see paras 156-204.

some aspects of their reasoning. When a judge partially disagrees with the interpretation of the facts and the applicable legal principles by the Court, he/she may deem it essential to write a concurring judgement.³² A case in point is *New Nation Movement v President of the Republic of South Africa*,³³ in which Froneman J agreed with the majority to grant leave to appeal but dissented on the outcome of that appeal. He argued that constitutional values and norms, which he traversed in the judgement, made it very clear that participatory democracy requires individuals who aspire to stand for office to do so through political parties.³⁴ The following section delves into the reasons for dissent.

3 The normative foundations of Froneman's dissents

There are many reasons for dissent, such as disparate interpretations of facts and the law by judges in individual cases. These differences potentially arise from political, moral and ideological questions which the Court must answer. Also, the judges differ due to the interests at stake, some of which are difficult and controversial to articulate due to the political and historical contexts underlying such cases.³⁵ In this regard one may point to Froneman J's dissent in two cases. The first is *City of Tshwane v Afriforum* (the *Street Naming* case), in which, together with Cameron J, Froneman J dissented "with humility"³⁶ from a majority judgement which seemed to suggest that correcting colonial and apartheid injustices would be "best served by attenuating well-established and sensible rules and principles for hearing

³² See arguments in concurring judgements in *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) paras 68 and 147.

³³ *New Nation Movement NPC v President of the Republic of South Africa* 2020 8 BCLR 950 (CC) (hereafter *New Nation Movement*) para 196.

³⁴ *New Nation Movement* paras 208-209. Another illustration of a case in which a judge may agree with the majority on one aspect and differ on another is *Daniels v Scribante* 2017 8 BCLR 949 (CC) (hereafter *Daniels v Scribante*), in which Cameron J concurred with the order of the majority but questioned the competence of his colleagues to write history - paras 146-153. In the same judgement, Jafta J concurred with the order of the majority but disagreed on whether private persons have a constitutional obligation to take active steps to assist other persons in enjoying rights enshrined in the Bill of Rights - paras 156-204.

³⁵ See *AfriForum v University of the Free State* 2018 4 BCLR 387 (CC) (hereafter *AfriForum v University of the Free State*) and *Daniels v Scribante*. However, in *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2020 1 SA 368 (CC) (hereafter *Gelyke Kanse*) paras 64-98, Froneman J concurred in a unanimous judgement which confirmed the relegation of Afrikaans as a medium of instruction at the University of Stellenbosch. The concurring judgement was (as expected) in Afrikaans (with English translations).

³⁶ *City of Tshwane Metropolitan Municipality v Afriforum* 2016 9 BCLR 1133 (CC) (hereafter *Street Naming* case) para 79. The reason for their "humility" in dissenting was that since the "wounds of colonialism, racism and apartheid run deep" any "insensitivity to the continuing wounds by many of us who were not subject to these indignities can only exacerbate the fraughtness".

appeals against the grant of temporary interdicts".³⁷ Froneman J particularly dissented because of the misconception, which he argued had been created by the majority to the effect:

[T]hat any reliance by white South Africans, particularly white Afrikaner people, on a cultural tradition founded in history, finds no recognition in the Constitution, because that history is inevitably rooted in oppression.³⁸

He further argued that:

The oppressive history is there. But the constitutional discountenancing of a cultural history many continue to treasure has momentous implications for a substantial portion of our population. It invites deeper analysis.³⁹

The second case, *AfriForum v University of the Free State*, is important in understanding Froneman J's approach to the adjudication of historically and politically sensitive cases. While in the *Street Naming* case he dissented because of the procedural impropriety of hearing appeals against temporary interdicts, he dissented in the second case because the majority refused to grant leave to appeal and to set the matter down for hearing, thereby compromising the legitimacy of the outcome of a crucial case.⁴⁰ The matter concerned the removal of Afrikaans as a medium of instruction at the university. However, dissenting on such a matter immediately created difficulty for him, which he acknowledged:

This is a dissenting judgement that concerns language. It is best to acknowledge and take responsibility for "one's own ideological positioning within the disciplinary constraints and commitments of one's craft." My home language is Afrikaans and I went to a parallel medium of instruction school in Bloemfontein. That inevitably colours my perspective – as their own different backgrounds do for that of my colleagues – but the hope is that rational and critical self-reflection keeps our individual subjectivity at bay in pursuit of detached legal reasoning.⁴¹

In saying this, Froneman J was calling for the reasoning of the issues in a way that would enable the Court to frankly face and resolve the issues before it. His call for granting leave to appeal and to set the matter for hearing was a plea for a proper engagement with the merits of the case to ensure that the outcome of the case would be legitimate in the eyes of the public. Although he disclosed his obvious personal and historical connection to the case arising from his Afrikaans roots, Froneman J also highlighted that it was not him alone with such a connection to the case because the rest of the Court – composed of a majority of black judges who had been affected by colonialism and apartheid – had an obvious interest in the future of Afrikaans, which many perceive as the oppressor's language. In his

³⁷ *Street Naming* case para 80.

³⁸ *Street Naming* case para 81.

³⁹ *Street Naming* case para 81.

⁴⁰ *AfriForum v University of the Free State* para 82.

⁴¹ *AfriForum v University of the Free State* para 84 (references omitted).

dissent, Froneman J doubted if it was for the Court, and not the public, to decide whether it was "better for the country to concentrate on the inclusiveness that English might bring as the sole language of instruction"⁴² and proceeded to discuss whether "all was lost" for Afrikaans. This part of the judgement was in two languages – English and Afrikaans.⁴³

In a subsequent language case, *Gelyke Kanse v Chairperson of the University of Stellenbosch*, Froneman J concurred in the majority judgement because he was bound by the majority in the first case but wrote a separate concurring opinion as "a cautionary tale".⁴⁴ The separate opinion also came in English and Afrikaans,⁴⁵ something which is not usual in the Court's approach to handing down judgements.⁴⁶ There is something to be said about this. Even if one were to choose not to read much into it, there is the possibility that in articulating his views in his mother tongue, Froneman J was not just dissenting (in the first case) from what he perceived as a wrong approach adopted by the majority but was actually speaking to the Afrikaans community, to affirm that notwithstanding the difficulties and frustrations wrought by the majority judgement, they still had someone who cared about their interests at the Court and that he was willing to stand alone in defence of their constitutional language rights. Reading his dissent in the first case and cautionary concurrence in the second case, one understands Froneman J to mean that notwithstanding the egregiousness of colonial and apartheid South Africa, unity and diversity will not be achieved by erasing implicated cultures and languages.

Froneman J's dissents (and concurrence) in the two language cases, read together with the *Street Naming* case, illustrate that matters tied to history are inherently political and that they could be the main cause of a judge's dissent in a particular matter. In several cases, the Court's judges acknowledged the political nature of some of the cases which it has decided.⁴⁷ However, the resolution of political disputes at the judicial level creates an impression that the outcomes of such cases would be political - if one agrees that decisions in political matters are bound to have political ramifications. This does not mean that judges abdicate their responsibility by using politics to determine the outcome of cases. On the contrary, I would

⁴² *AfriForum v University of the Free State* para 127.

⁴³ *AfriForum v University of the Free State* paras 129-135.

⁴⁴ *Gelyke Kanse* para 65.

⁴⁵ *Gelyke Kanse* paras 64-98.

⁴⁶ However, Froneman J is not the first judge to write a Court judgement in Afrikaans. See, for example, *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 4 BCLR 537 (CC) paras 38-43 in which Kriegler J wrote a short but cynical judgement in Afrikaans.

⁴⁷ See *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC) (hereafter *Economic Freedom Fighters I*) para 43; *S v Lawrenco*; *S Negal*; *S v Solberg* 1997 4 SA 1176 (CC) para 42.

argue that such a political approach is necessary and unavoidable, given that the law is not detached from the influence of politics, religion and history. In fact, the law-making process is itself political – as bills are proposed by Members of Parliament (who are politicians) to achieve political outcomes. An example in this regard could be the Expropriation Bill,⁴⁸ which was sponsored by opposition Members of Parliament who sought to achieve a political objective with it – the return of the land to people from whose ancestors they argued it had been stolen. It would be difficult to see how judicial adjudication on the constitutionality of the Expropriation Bill would have been detached from history and politics.

At this point, it may be necessary to contextualise what is a political matter and what political judicial reasoning would entail to avoid confusion. Despite there being no ambiguity on the lexical meaning of the term "political", it has not always been clear what judges perceive to be a political dispute. The Court defines a political dispute as "a matter which has a political bite to it"⁴⁹ and which is of such public interest as to trigger the jurisdiction of the Court under section 167(3) of the Constitution. The first judges of the Court did not experience dissents around political issues because, unlike in the past, the contemporary judicialisation of politics makes it attractive for political parties to litigate for outcomes which cannot be achieved politically. Since 2016, ground-breaking victories scored in the courts by opposition political parties have emboldened them to advance their aims and objectives on two fronts – politically in Parliament and litigiously in the courts, adding to the growing debate about lawfare as a political tool.⁵⁰

Dissents seem to arise in political matters because politics is always tied to South Africa's contested history. In political cases with a historical flavour, dissents reveal ideological backgrounds and provide a glimpse into the "political alignment" of the judges.⁵¹ Other issues, which are closely linked with politics, also divide the Court. Although some judges do not hesitate to confront politically laden matters, some object to what they perceive as invitations to the Court to wade into the political terrain which makes up the legislative and executive domain. Mogoeng CJ is on record as lamenting the bringing of political disputes to the Court.⁵² In *Mazibuko*,⁵³ Jafta J

⁴⁸ *Expropriation Bill* [B23-2020].

⁴⁹ *Economic Freedom Fighters v Gordan; Public Protector v Gordhan* 2020 6 SA 325 (CC) para 97.

⁵⁰ Some of the cases are *United Democratic Movement v Speaker of the National Assembly* 2017 5 SA 300 (CC); *Economic Freedom Fighters I*; *Economic Freedom Fighters II*. On lawfare, see, in general, Le Roux and Davis *Lawfare*.

⁵¹ See Kelemen *Judicial Dissent in European Constitutional Courts 2*.

⁵² Staff Reporter 2017 http://www.huffingtonpost.co.za/2017/10/26/mogoeng-political-parties-must-resolve-issues-inside-the-family-first_a_23256319/.

⁵³ *Mazibuko* para 83.

admonished political actors to resolve political disputes politically instead of bringing such disputes to the Court.

However, it is important to note that although the Court decides political disputes, judges should not be seen to take partisan positions on such issues, even though there is no guarantee that they will not.⁵⁴ In other words, they judge the race but should not have a horse of their own in that race. This means that a partisan judgement is one in which bias and political affiliation influence the reasoning of the judge to the extent that it trumps objective and impartial adjudication. Such a partisan approach can be revealed by a deliberate stretch of the boundaries of interpretation and by some shrewd interpretation of the facts in a way that will enable them to arrive at a preconceived outcome using the law. In understanding the distinction between a partisan judgement and a judgement that affects politics, one ought to recall that an objective and impartial judgement on a matter that has political connotations may affect politics to the extent that it may be perceived as a political decision.⁵⁵

Hence, the distinction between a partisan political judgement and a judgement that generally affects politics is in the judge having a horse in the race or a personal interest in the matter. An example, in this case, is *Secretary of the State Capture Commission v Zuma*,⁵⁶ in which the majority had a personal interest in the former President's incarceration, it being their view that he had insulted them and undermined their dignity to justify teaching him a lesson through imprisonment without trial. This judgement is dealt with further below. For present purposes, it suffices to say that a judgement that is perceived as partisan undermines the credibility of the Court order and erodes the legitimacy of the Court.⁵⁷ Hence, some judges may disagree with their colleagues if they perceive the majority judgement as an incursion into politics and the proper functioning of the political branches of government, and wish to protect their integrity as independent, objective and impartial arbiters of disputes.⁵⁸

The influence of the historical circumstances of judges in judicial decision-making is not peculiar to Justice Froneman – in relation to the two language and *Street Naming* cases. For instance, Sachs J admitted that when he

⁵⁴ Section 165(2) of the Constitution stipulates that the courts "are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice". This provision seeks to eliminate political partisanship.

⁵⁵ For a discussion, see Venter 2003 *PELJ*.

⁵⁶ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* 2021 5 SA 327 (CC) (hereafter *Secretary of the State Capture Commission v Zuma*).

⁵⁷ Roux *Politics of Principle* 62.

⁵⁸ See the remarks by Mogoeng CJ in *Economic Freedom Fighters II* para 223.

decided *Port Elizabeth Municipality v Various Occupiers*,⁵⁹ he reflected on his life, which he spent fighting the injustices of the apartheid regime, and consequently refused to order the eviction of unlawful occupiers.⁶⁰ In *Daniels v Scribante*, Cameron J wrote an emotive concurring judgement in which he revealed the influence of his personal historical circumstances on his judicial mindset:

The first and second judgements remind us all – and remind white people in particular, people like me, lawyers who grew up with the benefits, both accumulated and immediate, of their skin colour in a society that deliberately set out to privilege them, white people who are still the majority in the profession and probably still the majority readers of these reports – that the past is not done with us; that it is not past; that it will not leave us in peace until we have reckoned with its claims to justice.⁶¹

A contextual analysis of Cameron J's concurring judgement shows that he would not have concurred in the majority judgement were it not for his conscience, which told him that not doing so would entrench the injustices of the apartheid regime. His concurring judgement was a compromise between the harsh realities of the law and the plight of poor people who stood to lose their homes. The same can be said of Sachs J's judgement in which he could not come to terms with the idea that poor people, whose poverty came because of deliberate impoverishment by the apartheid regime, had to vacate their modest homes, which they had built on vacant land owned by beneficiaries of apartheid who already owned comfortable homes elsewhere.⁶²

Although laudable for considering contextual factors, making judgements based on individual historical circumstances may seem to compromise the standards of impartiality expected by the public from the judges and demanded by the Constitution. Sachs J realised that his historical circumstances influenced his judicial mindset which was why, at some point, he entertained the thought of resigning so as not to break his oath of office to decide matters without fear, favour or prejudice.⁶³ Moseneke DCJ admits that he "had to struggle with many demons of the past"⁶⁴ when he wrote the judgement in *Thebus v S*,⁶⁵ which dealt with common purpose, because of his past unpleasant experiences with the application of the doctrine of common purpose. He says that he conquered this by putting aside his personal history, his dislike for the doctrine and the ensuing political abuse. Although it is not immediately clear how he achieved this, Moseneke DCJ

⁵⁹ *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC).

⁶⁰ Sachs *We, the People* 211.

⁶¹ *Daniels v Scribante* para 154.

⁶² Sachs *We, the People* 211.

⁶³ See Sachs *We, the People* 211.

⁶⁴ Moseneke *All Rise* 121.

⁶⁵ *Thebus v S* 2003 6 SA 505 (CC).

said that he was able to bring his duty as a judge to the fore "to shut the door on my personal prejudice in favour of fidelity to the law".⁶⁶

Whether it is impossible for judges to set aside their individual histories and moral, ideological and political positions for the greater good of unbiased jurisprudence is a difficult question to answer. In a published paper, Madlanga J confronts the question of personal attributes in constitutional adjudication when judges cannot, or does not wish, to "detach themselves from the rich and complicated web of their life experiences; of who they are as individual beings".⁶⁷ In this statement, Madlanga J essentially says that judges are conscious of the world they live in and that their judgements are contextual to that world. However, he cautions that the Court represents no constituency, and that bias, in the form of

[F]inding reasons for a pre-determined outcome makes a mockery of judging. It amounts to judicial dishonesty and breaches the oath of judicial office.⁶⁸

In considering Madlanga J's assertions, it is imperative to bear in mind that judges, like all people, have political views which, in certain circumstances, may be advanced through judgements, although the law does not permit it:

Judges as members of civil society are entitled to hold views about issues of the day and they may express their views provided they do not compromise their judicial office. But they are not entitled to inject their personal views into judgements or express their political preferences. To illustrate the point I intend to refer to some instances where the court below in my view overstepped the limits of its authority.⁶⁹

An illustration of how judges may become partisan by (ab)using judgements to advance personal issues – even to the point of inadvertently advancing certain political desires – is found in the events leading to the incarceration of former President Zuma.

In *Secretary of the State Capture Commission v Zuma*, the majority of the Court, who felt that their dignity had been undermined by the former President Zuma, concluded that it was "in the interests of justice to depart from ordinary procedures"⁷⁰ to impose a custodial sentence on him without the option of a fine and without a trial. This was in direct infringement of the constitutional right to a free trial and against the Court's earlier precedent in *Mamabolo*, in which it held that summary criminal convictions for contempt of court are unconstitutional. The Court took this route on the pretext that the former President had undermined its authority and legitimacy and that, as a result, the rule of law had suffered so much as to warrant the Court to

⁶⁶ Moseneke *All Rise* 121.

⁶⁷ Madlanga 2019 *SAJEI Journal* 48.

⁶⁸ Madlanga 2019 *SAJEI Journal* 60.

⁶⁹ *National Director of Public Prosecutions v Zuma* 2009 2 All SA 243 (SCA) (hereafter *NDPP v Zuma*) para 16.

⁷⁰ *Secretary of the State Capture Commission v Zuma* para 28.

act unlawfully by "departing from ordinary procedures". Regardless of one's personal views about Mr Zuma, there is no denying that in "departing from ordinary procedures", the majority breached the *stare decisis* doctrine, which holds that the Court should decide similar cases similarly and that it cannot suddenly change its jurisprudence to achieve particular outcomes based on the litigant(s) before it.⁷¹ Besides upholding precedent, which is valuable, this doctrine is also intended to enhance uniformity in judicial decisions and to ensure that judges are only guided only by the law and their judicial conscience.⁷²

Faced with these constitutional incursions into Mr Zuma's rights, notwithstanding what appeared to be his outright contempt of the Court, Theron J (with Jafta concurring) dissented, opening their judgement with a quotation from Holmes J's caution about the dangers of accidents caused by "immediate overwhelming interest which appeals to the feelings and distorts of the judgement".⁷³ Theron J expressed her gripe with the main judgement as follows:

I do not agree that it is constitutionally acceptable for this Court to grant an order of unsuspended committal which is not linked to coercing compliance with this Court's order in CCT 295/20. With the greatest respect, I am concerned that the main judgement's focus on the "unprecedented" facts of this case distracts from a very troubling feature; namely, that this Court, in motion proceedings and sitting as a court of first and last instance, is being asked to mete out an unsuspended term of imprisonment which is singularly punitive in purpose and effect. Whereas civil contempt proceedings have dual remedial and punitive purposes, the proceedings before us are wholly punitive. In my view, it is unconstitutional, to the extent that it violates sections 12 and 35(3) of the Constitution, to order punitive committal for civil contempt in motion proceedings, where no remedial or coercive relief is granted. The main judgement, again and again, answers this concern with recourse to the exceptional facts of this case and the conduct of Mr Zuma. In doing so, it fails, or refuses, to see the woods for the trees, with the result that, in seeking to justify a punitive order which satisfies an understandable desire to address Mr Zuma's scandalous disrespect for this Court, it trammels over the constitutional rights of alleged contemnors (including Mr Zuma).⁷⁴

In saying this, Theron J essentially accused the majority of acting unconstitutionally against Mr Zuma, something of which she was not prepared to be a part. In a subsequent rescission application against the same judgement, Jafta J also dissented, holding that the majority missed an opportunity to rescind its unconstitutional judgement, as the "urgency in which the matter had to be addressed did not justify non-compliance with

⁷¹ See Moseneke *All Rise* 208.

⁷² See Moseneke *All Rise* 208.

⁷³ See the opening of Theron J's dissent in *Secretary of the State Capture Commission v Zuma* quoting *Northern Securities Company v United States* [1904] USSC 64 400.

⁷⁴ *Secretary of the State Capture Commission v Zuma* para 143.

the need to hold a fair trial".⁷⁵ Theron J concurred with Jafta J's reasoning that "where it is established that the impugned order is inconsistent with the Constitution, this Court has no choice but to declare it invalid and set it aside".⁷⁶ In refusing to join the majority in what they viewed as unconstitutional conduct of their fellow judges, Theron J and Jafta J were acting according to their judicial conscience and judicial ethics to judge fairly and without fear, favour or prejudice. They refused to concur in what they saw as the abuse of judicial power for the purpose of the protection of personal ego.

Interestingly, both judges had, in an earlier judgement, joined a majority judgement which Mogoeng CJ had described as "a textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament"⁷⁷ and an outright disregard of the principle of separation of powers.⁷⁸ Mogoeng CJ had noted the extraordinary gravity of his assertion⁷⁹ and lamented his "deep-seated agony and bafflement"⁸⁰ by the "inability or failure [of the majority judges] to confront squarely the issues raised".⁸¹ The gravity of his judgement was that it was not for the Court but for the National Assembly to determine whether the conduct of the President was impeachable and what steps to take. Mogoeng CJ further said that it is not the role of the Court to dictate to the National Assembly how to scrutinise executive action and set up mechanisms to uphold accountability and oversight of the Executive. He reiterated that deciding on the best way to fulfil constitutional obligations is the discretion of the National Assembly, that the Court's responsibility is to evaluate whether the National Assembly has met its constitutional duties and that, importantly, the Court must be aware of the boundaries of its powers and avoid interference with the powers of other branches of government.⁸²

The tone and choice of language aside, the former Chief Justice's dissent is significant. The dissent appears to be one of the few, if not the first, in which a judge accused his colleagues of downplaying the separation of powers. It was the first time that a judge cautioned his colleagues to guard against overreach into the exclusive domain of Parliament. In the past, politicians and ordinary members of the public have been the ones criticising

⁷⁵ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 11 BCLR 1263 (CC) (hereafter *Zuma v State Capture Commission*) para 235.

⁷⁶ *Zuma v State Capture Commission* para 249.

⁷⁷ *Economic Freedom Fighters II* para 223.

⁷⁸ *Economic Freedom Fighters II* para 224.

⁷⁹ *Economic Freedom Fighters II* para 223.

⁸⁰ *Economic Freedom Fighters II* para 267.

⁸¹ *Economic Freedom Fighters II* para 225.

⁸² *Economic Freedom Fighters I* para 93.

judges for infringing on the separation of powers through politicised judicial activism. Judges had always presented a united front in defence of their judgements. They had done so to quell political attacks on the bench. Hence, the words of the Chief Justice gave credibility to perceptions that the courts were violating the Constitution in regard to constitutional supremacy and the separation of powers. If it were to be assessed using objective criteria and found to be true, such judicial conduct would not only violate the Constitution but would subvert democracy.

It is noted that the Chief Justice not only used unprecedented language but also (contrary to the custom of the Court) intervened during Jafta J's reading of the summary of the dissent and insisted that Jafta J read the full separate dissent, handing him the document in the process. Jafta J was noticeably startled. The first applicant in the matter, the Economic Freedom Fighters, was unimpressed and issued a media statement afterwards, expressing its disapproval of the conduct of the judges:

When judges fight in full view of cameras it brings the integrity of the court and their judgements into disrepute. The CJ's actions may unwittingly create doubt in the minds of the public about the majority judgement of the court, which even if it is not unanimous, it must still be respected and fully complied with.⁸³

The Economic Freedom Fighters thought that the Court was at loggerheads with itself. It is not clear whether the live broadcast of the judgement on television influenced the judges to act in the way they did. It has been alleged before that the live television coverage of judicial proceedings influences the behaviour of judicial officers. Counsel and judges are susceptible to the temptation to play to the gallery because "no one behaves in the same way on camera and *in camera*".⁸⁴

The other judges did not take the views of the Chief Justice on the alleged overreach by the majority kindly. In closing the majority judgement, Jafta J said that the Chief Justice's description of the majority decision was "unprecedented ... misplaced and unfortunate".⁸⁵ Jafta J went further to question how the interpretation and application of a constitutional provision – a duty bestowed upon the Court by the Constitution – can conceptually be described as judicial overreach. He submitted that one could not describe the exercise of a constitutional duty as an overreach for the simple reason that one does not agree with the judgement. He said that the fact that the Chief Justice disagreed did not mean that the majority had overreached⁸⁶ and that the majority judgement was not directing the National Assembly to undertake its constitutional obligations in a particular way. He said that the

⁸³ Ndlozi 2017 <http://www.effonline.org/single-post/2017/12/29/EFF-WELCOMES-THE-MAJORITY-JUDGMENT-ON-THE-IMPEACHMENT-CASE-AGAINST-ZUMA>.

⁸⁴ Beloff 1999 *Denning LJ* 157 (emphasis added).

⁸⁵ *Economic Freedom Fighters II* para 218.

⁸⁶ *Economic Freedom Fighters II* para 219.

majority view was a pronouncement of the failure of the National Assembly to fulfil its obligations and a direction for it to fulfil its obligations without further delay. This, Jafta J reasoned, was not downplaying the separation of powers but fulfilling a constitutional obligation.⁸⁷

Froneman J concurred in the majority judgement and would have noted his concurrence in the "usual manner" but felt that the Chief Justice's statement "should not be left unanswered".⁸⁸ Froneman J acknowledged the importance of robust debate and the inescapable disagreements which may flow from the unique individual interpretation and application of the Constitution by the judges but submitted that such debate and disagreement should be based on substantive reasons and devoid of "labels to the opposing views".⁸⁹ In his view, the fact that he did not agree with the Chief Justice and the Deputy Chief Justice did not mean that he thought they had abdicated their constitutional responsibility to ensure that the National Assembly upheld the Constitution.⁹⁰ To him, both the minority and the majority judgements were products of "serious, honest and detached reasoning".⁹¹ Notwithstanding Froneman J's concerns with the choice of language, there is no doubt that the assertion by the Chief Justice raised a profound question on the limitation of the powers of the Court imposed by the doctrine of the separation of powers. The following section tries to reconcile collegiality with dissent.

4 Reconciling collegiality with dissent

The impacts of judicial dissents on the litigants, society and the law determine the benefits of dissents. When a judge dissents, members of the public have access to the dissent (which is published with the majority judgement) and can weigh the reasons for the dissent and decide on the correctness of the dissenters. Langa CJ spoke about the need for dissents to enable judges to reject majority views and instead insisted on what they believe to be the correct approach to a legal problem.⁹² However, Langa CJ only wrote dissents only when he became the Chief Justice.⁹³ Notwithstanding, it is difficult to entirely disagree with the view that dissents enrich constitutional debate and nurture the development of constitutional law.⁹⁴ In a relatively young but vibrant constitutional democracy like South Africa, in which the Court often decides complex and controversial legal, political and moral questions, judicial dissent is invaluable. Dissent

⁸⁷ *Economic Freedom Fighters II* para 220.

⁸⁸ *Economic Freedom Fighters II* para 279.

⁸⁹ *Economic Freedom Fighters II* para 280.

⁹⁰ *Economic Freedom Fighters II* para 281.

⁹¹ *Economic Freedom Fighters II* para 282.

⁹² Hoexter "Importance of Dissent" 120.

⁹³ Hoexter "Importance of Dissent" 123.

⁹⁴ Kelemen *Judicial Dissent in European Constitutional Courts* 11.

encourages robust constitutional debate and allows judges to express alternative constitutional interpretations to pressing legal questions.⁹⁵

Another way of viewing dissents is in appreciation of their (minor) contributions to jurisprudence. They enable the majority to reassess and change the law in future cases, as illustrated by the *Prince* cases. In the first *Prince* case, *Prince v President Cape Law Society*,⁹⁶ the majority dismissed an appeal against the constitutionality of section 4(b), read with paragraph 1 of Part III of Schedule 2 of the *Drugs and Drug Trafficking Act*,⁹⁷ and section 22A(10)(a) of Schedule 8 of the *Medicines and Related Substances Control Act*.⁹⁸ The impugned provisions criminalised the use and possession of cannabis on religious grounds, resulting in the social and political marginalisation of the Rastafari, to whom the herb is a central tenet of religion. A judgement by Ngcobo, Madlanga, Mokgoro and Sachs J would have upheld the appeal and declared the statutory provisions inconsistent with the Constitution.⁹⁹ Almost two decades later, the Court (constituted by a different bench) unanimously ruled in *Minister of Justice and Constitutional Development v Prince* that the prohibition on the personal possession and use of cannabis is inconsistent with the constitutional right to privacy.¹⁰⁰ Although the second case was decided by a differently constituted bench based on a different challenge to the impugned statute (the right to privacy), there is always the possibility that with the passage of time and after some reflection, judges may have a change of heart. A classic case in point is *Volks v Robinson*, in which the court held that excluding a partner of a stable partnership from benefiting from a deceased estate is constitutional. Moseneke DCJ joined the Skweyiya J-led majority but has expressed regret at the decision, holding that "If I had another opportunity, I might very well have voted differently."¹⁰¹ However, the former Deputy Chief Justice does not elaborate on what changed his mind. What is clear from this is that even if the judge regrets their decision, there is not much that anyone can do, even the affected parties – who will have to live with the consequences of the decision, no matter how egregious it might turn out to be.

The first *Prince* case stimulated public and judicial debate on the resolution of the difficult constitutional, legal, and moral issues surrounding the use of cannabis. The dissent opened an avenue for a judicial and intellectual

⁹⁵ *Economic Freedom Fighters II* para 280.

⁹⁶ *Prince v President Cape Law Society* 2001 2 BCLR 133 (CC) (hereafter *Prince I*).

⁹⁷ *Drugs and Drug Trafficking Act* 140 of 1992.

⁹⁸ *Medicines and Related Substances Control Act* 101 of 1965.

⁹⁹ *Prince I* paras 90-91.

¹⁰⁰ *Minister of Justice and Constitutional Development v Prince; National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* 2018 10 BCLR 1220 (CC) (hereafter *Prince II*) para 129.

¹⁰¹ Moseneke *All Rise* 133.

exploration of alternative answers to the question of the herb, leading the Court to a different conclusion in the second *Prince* case. Arguably, the dissent in *Prince I* inspired a jurisprudential shift and nurtured the conditions which made it possible for the Court to look at the issue again. The minority in the first case was vindicated in the second case when the whole bench endorsed the order that the minority proposed in the first case.

However, Hoexter argues that even if a dissent is not vindicated, it is still valuable because dissents promote freedom of expression and transparency in court decision-making, thereby upholding the founding constitutional values, judicial independence and core tenets of the Bill of Rights.¹⁰² In this context, it will be recalled that dissents are products of rigorous debate in the Court. Yacoob ADCJ argued that the Court would be "lacking in rigour and debate"¹⁰³ if the eleven judges agreed on every judgement. He was responding to President Zuma's rhetorical question: "How could you say that [the] judgement is absolutely correct when the judges themselves have different views about it?"¹⁰⁴ President Zuma had said that dissenting judgements are often more logical than majority judgements.¹⁰⁵ The President had a point, although one might want to consider that all things equal, the absence of dissent in a judgement does not prove unanimity.¹⁰⁶ In some cases, judges may not fully agree on an issue and yet still endorse a judgement, as Cameron J did in *Daniels* (albeit with reservations).

Notwithstanding the benefits of judicial dissent, the value of dissents should not be overemphasised. Often, dissents have as many pitfalls as they have benefits for the litigants, society and the future development of law. Whereas some dissents have influenced legal change, others have not. Hence, Langa CJ observed that "[D]issenters are not always right. Often, they will be wrong, and sometimes [they may] even cause harm."¹⁰⁷ The main challenge is that dissents, like majority judgements, are personal judicial views on the interpretation of the facts, the applicable legal principles and the most appropriate remedies. Inadvertently, personal values and convictions play a central role in judicial decision-making, thus making it difficult for anyone to effectively distinguish a justified dissent "from a self-serving, vain and gratuitous one".¹⁰⁸ Therefore, judges should thoroughly

¹⁰² Hoexter "Importance of Dissent" 122.

¹⁰³ Tolsi 2012 <https://mg.co.za/article/2012-03-13-top-judge-defends-judicial-dissent-after-zuma-criticism>.

¹⁰⁴ Tolsi 2012 <https://mg.co.za/article/2012-03-13-top-judge-defends-judicial-dissent-after-zuma-criticism>.

¹⁰⁵ De Vos 2012 <https://constitutionallyspeaking.co.za/an-unambiguous-attack-on-constitutional-democracy/>. See also Hoexter "Importance of Dissent" 121.

¹⁰⁶ See Grimm "What Exactly is Political About Constitutional Adjudication?" 311.

¹⁰⁷ Langa 2007 *SAJHR* 369.

¹⁰⁸ Mendes *Constitutional Courts* 132.

consider whether their dissents are not pointless self-indulgence.¹⁰⁹ In a general context, Tushnet argues that dissents might damage the law because a "dissent will give some people – those who agree with the losing side, for example – one reason to hold on to their belief about what the law really is. And, holding that belief, they might act on it".¹¹⁰ Tushnet does not clarify how the disgruntled might act on their belief.

The judges are obliged by the oath of office to dissent when they believe that the majority decision is wrong and that their dissents may eventually lead to the correction of a fundamentally incorrect majority approach to a legal question. The *Prince* cases prove this. However, the dangers of dissenting judgements do not emanate from mere judicial differences but from a poor choice of words and tone in a dissent. A not-so-carefully-worded dissent may create an appearance that the judges are at loggerheads.¹¹¹ An impression of a divided Court could erode the legitimacy of Court decisions. Hence, it is important for dissenters to confine their views to substantive and procedural points of law. This focus could alleviate impressions of a divided court and help to preserve collegial relations between judges.

In determining the true value of Justice Froneman's dissent based on its normative foundations and the benefits and pitfalls of dissents discussed above, one may ask whether it is possible to reconcile collegiality with his dissents. In this regard, one may observe that although judicial dissent does not always promote the spirit of finding common ground, which characterised the first judges of the Court, dissents seemingly do not (and should not) affect collegiality and comity among judges because it is possible for judges to disagree without being disagreeable. A judge may concur or dissent and still be collegial to his/her colleagues.¹¹² A collegial spirit enables the judges to "find principled compromise where spontaneous agreements prove unviable. Disagreement survives when principled compromise is not possible".¹¹³ When the first judges of the Court workshopped together on all cases, exchanged draft judgements and helped one another to agree when possible, and dissented when necessary,¹¹⁴ Sachs J argued that collegiality in the Court was an essential part of constitutional adjudication. In his view, judges are obliged to defend their independence and consciences (as expressed in their judgements) and to show respect and appreciation for the opinions of their colleagues. He says that the most critical consideration when judges exchange words

¹⁰⁹ See Tushnet "Introduction" xii.

¹¹⁰ Tushnet "Introduction" xiii.

¹¹¹ Mendes *Constitutional Courts* 132.

¹¹² Mendes *Constitutional Courts* 132.

¹¹³ Mendes *Constitutional Courts* 131. See, for instance, Kriegler J's dissent in *Hugo*.

¹¹⁴ Sachs *We, the People* 156.

and interact with one another is to remember that they are team members in a prestigious institution whose integrity they must uphold. Sachs J says that:

We should avoid conduct which has the intention or effect of belittling or marginalising our colleagues...When criticising opinions with which we disagreed, we attempted to use measured and respectful argument. Indeed, collegiality extended to our making proposals to colleagues who disagreed with our own opinions! What mattered was the quality of the Court's decision as a whole rather than who we imagined would eventually come out smelling of judicial roses.¹¹⁵

Sachs J is a fierce defender of judicial dissent. In *We, the People*, he argues that a judge should always disagree on any matter in which a significant principle is involved if he/she thinks the majority judgement is wrong and should never allow himself/herself to be coerced by colleagues to sign on to a judgement which he/she thinks is fundamentally flawed. Even when a judge is part of a tiny minority, Sachs J says, the judge should stand his/her ground, even if doing so might distress colleagues "whose thoughtfulness, skills and compassion you truly admire".¹¹⁶ Sachs J believes that at times judicial dissents are unavoidable, particularly when a judge fundamentally disagrees with the majority in a judgement which profoundly impacts on the lives of the litigants and society, and "indeed on the integrity of the nation".¹¹⁷ Sachs J's views mirror Tushnet's argument that concurrence to a judgement with which one disagrees is tantamount to cooperation with evil.¹¹⁸

At times, a disagreement between judges may embroil the Court in controversy, such that a judge may elect not to take the side of either the majority or the minority so as not to entangle himself/herself in the controversy.¹¹⁹ Controversy does no good for the integrity of the Court and the legitimacy of a judgement, particularly on a contentious matter of immense public importance. Judicial deliberation, made by the judges in chambers beyond the public eye, is a critical aspect of constitutional adjudication whose success depends on collegiality. Justice Froneman's dissents outlined in this paper show that collegial deliberation is a selfless process which, together with collegial dissent, requires the judges to confine

¹¹⁵ Sachs *We, the People* 179.

¹¹⁶ Sachs *We, the People* 179.

¹¹⁷ Sachs *We, the People* 180. One of Sachs J's dissents in which he disagreed with the majority on a matter which profoundly affects the "integrity of the nation" is *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 10 BCLR 1059 (CC) (hereafter *Fuel Retailers*) in which Sachs J dissented mainly on the application of the principle of sustainable development in environmental protection (see paras 113-119).

¹¹⁸ Tushnet "Introduction" xiii.

¹¹⁹ See Didcott J's views in *Hugo* para 61.

their arguments to the factual and legal issues at hand so that they are devoid of personal attacks. When some of the judges seemingly attacked each other verbally in *Economic Freedom Fighters v Speaker of the National Assembly II*, Justice Froneman stepped in to remind the Court of the importance of dissent and of the need to appreciate that judges who holds different views hold those views not because they have abdicated their responsibility but because of their judicial consciences, oaths of office and the Constitution. He said these require judges to dissent where necessary instead of blindly following the majority for the sake of keeping the peace.

5 Conclusion

In a nutshell, the Constitutional Court of South Africa resolves cases through outcomes guided by majority rule and judicial collegiality and dissent. Whereas it is expected and even necessary for judges to differ on the correct interpretation of facts, the application of relevant legal principles and the appropriate remedies, matters that pose moral and ideological questions often split the Court. Politically sensitive cases, which touch on South Africa's contested history and the proper boundaries of the authority of the Court in South Africa's constitutional democracy, also divide judicial opinion. Justice Froneman's dissents show that the tension between individual dissenting opinions and collective decision-making by the Court manifests the importance of tolerance of diversity on the bench. His approach shows that, on the one hand, the diverse perspectives and experiences of individual judges contribute to the richness of the Court's jurisprudence and that, on the other, there is a need for the court to function as a cohesive unit and reach consensus wherever possible. This highlights the importance of judges working together to find a balance between their individuality as members of the apex Court and the need for unity of purpose and action. This can be understood as a process in which the conflicting tensions of dissension and collegiality work side by side to contribute to the evolution and development of the Court's jurisprudence.

Justice Froneman's pronouncements on the need to embrace dissent emphasise the need for the judges to work together effectively and in harmony, even in the face of some of the most divisive cases. This means that the judges can reach decisions and fulfil their duties as a group without acting independently or in conflict with one another due to personal differences. This is important in a court setting where judicial decisions have significant political and societal consequences. It is more crucial in a fractured society like South Africa. Justice Froneman's approach shows that by functioning as a cohesive unit (despite the personal differences of its judges on some issues), the Court can maintain its credibility and integrity and ensure that its decisions are fair and just for all in society. This does not

mean that judges should not dissent when there are legitimate grounds for dissent. Instead, it means that dissenting opinions must be presented in a constructive and respectful manner rather than in such a manner as to undermine the authority and decision-making of the Court.

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List of Abbreviations

ADCJ	Acting Deputy Chief Justice
AJ	Acting Judge
CJ	Chief Justice
DCJ	Deputy Chief Justice
Denning LJ	Denning Law Journal
J	Judge
PELJ	Potchefstroom Electronic Law Journal
SAJEI Journal	South African Judicial Education Institute Journal
SAJHR	South African Journal on Human Rights