

THE USE OF STATE ORGANS TO SETTLE PERSONAL DISPUTES

*By *Professor George Devenish: Associate, Centre for Constitutional Rights*

In a media briefing following the Constitutional Court's historic judgment, in which it ruled that the Public Protector's report on the upgrades at President Zuma's private Nkandla home was binding on him, and as a result he was obliged to pay money back in relation to non-security upgrades, Thuli Madonsela commented that instead of celebrating, she would only be happy if the Hawks and the National Prosecuting Authority (NPA) stopped investigating her. Although this has been denied by the two state agencies concerned, it is submitted that she would not have made such a statement without there being some tangible substance to it.

In the acrimonious dispute between Finance Minister, Pravin Gordhan, relating to the so-called South African Revenue Service (SARS) rogue unit and the Directorate for Priority Crime Investigation (Hawks), the latter are refusing to comment on Gordhan's pertinent response to the questions to him. In this regard he has insisted that they (the Hawks) have no reason to investigate him and their decision to send him questions and threats of retaliation was unlawful.

Although, as indicated above, both the NPA and the Hawks have denied such investigation as far as Madonsela is concerned, a question arises from both incidents related above and reported in the press. Are the Hawks indeed deliberately overstepping their jurisdiction and being used by certain unscrupulous elements or persons in political polemics to discredit Madonsela and Gordhan? The conduct of both Madonsela and Gordhan over a period of time indicates that they are persons of integrity, in contrast with the controversial General Berning Ntlemenza, whose appointment as head of the Hawks is currently being challenged in the High Court by the Helen Suzman Foundation.

Further, in what has been described as 'no ordinary robbery', the Helen Suzman Foundation was recently subject to a seemingly carefully orchestrated armed robbery, in which various electronic equipment was stolen. While the SAPS is still conducting investigations into the robbery, the highly sophisticated nature of the crime suggests that the Foundation may have been targeted due to its involvement in the litigation.

In the constitutional crisis in relation to President Zuma, in the wake of the Nkandla debacle and the subsequent Constitutional Court judgment, the Hawks appear to be acting in a vindictive manner to promote the cause of the President by trying to intimidate those who have exposed wrongdoing.

If this is indeed the case - in the absence of any other rational explanation - then such conduct, where it appears that a state organ such the Hawks or NPA is being used to settle political scores, is the antithesis of both the Rule of Law and the principles, philosophy and values encapsulated in the Constitution. This is a cause for profound concern, and the public and civil society need to be on their guard. Unfortunately, this kind of unlawful conduct



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occurred under the apartheid regime and the erstwhile South African security police abused their powers, causing great suffering and abuse of rights. We dare not allow this to occur again. Our tragic and traumatic history must be a salutary warning to us, in the extant system of liberal democracy that prevails, premised on an exemplary Constitution and a progressive Bill of Rights.

It is of fundamental importance that no organ of state can take the law into its own hands. No such organ, however important it may be, can be allowed to act in manner in conflict with the law or the Constitution. This was spelled out in no uncertain terms by erstwhile Chief Justice Chaskalson in the *Fedsure Life Insurance* case in the following words:

“It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law.”

It is categorically clear from the above quotation that no state functionary or organ can use state power for any purpose other than lawful reasons. This would constitute a violation of the Constitution and the Rule of Law, which is set out in section 1 of the Constitution as a fundamental value. Should this occur then such action can be taken on review to the Courts, which are the ultimate guardians of human rights and the Constitution in South Africa.

South Africans, having created an authentic democratic system of government premised on the values of equality and liberty for all, at a sublimely great cost, need to ensure that it is defended against the predations of those in the new body politic who prove to be corrupt and unscrupulous in the manner in which they use state power. It cannot under any circumstance be used to settle political scores in the body politic or for any unlawful ulterior purpose.

The cost of liberty is indeed eternal vigilance and those who have a responsibility in our society to uphold the Constitution and its values must be constantly on their guard. The universal rights and values in the Constitution are not self-executing, but have to be invoked and upheld by all those who are affected by their violation or abridgment.

This article was written independently by an Associate of the Centre for Constitutional Rights (CFCR) and represents the views of the author. It does not necessarily represent the views of the CFCR, its staff or members of its Panel of Experts. The CFCR is, however, committed to a broad public dialogue aimed at the promotion and protection of the values, rights and principles enshrined in the Constitution.

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