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CASE NOTE

The Nicholson Judgment: An Exercise in Law and Politics

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Abstract

The Nicholson judgment was clearly a precipitating factor in the resignation of former South African President Thabo Mbeki in 2008. Engaging with the judgment in its own terms, this note first puts forward a best legal interpretation of the judgment, covering the doctrines of prosecutorial independence and legitimate expectations. It then identifies the degree to which the comment in the judgment may be termed politically activist. In the authors' view, Nicholson tackled political issues in his judgment that he need not have: in particular, allegations of executive interference in the independence of the prosecutions authority. Assuming that Nicholson J's text may be read as an attempt to bolster the legitimacy of the judiciary, the note explores whether it succeeds on those terms and concludes that the judgment is ultimately an example of failed dramatic art.

INTRODUCTION[1]

The judgment of Nicholson J in *Zuma v National Director of Public Prosecutions*[2] delivered on Friday 12 September 2008 may be said to be remarkable for several reasons. To say that it was much anticipated would be an understatement: crowds gathered outside; the television cameras were rolling; and the crowd of luminaries included, no less, the president of the African National Congress (ANC) (indeed, as the applicant) and the speaker of Parliament. Further, its outcome surprised many (though by no means all) within the legal profession: a

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1 This note flows directly from an unpublished paper written jointly by the authors: J Klaaren and T Roux "The Nicholson judgment: An exercise in law and politics" (unpublished South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) working paper, 25 September 2008). This working paper itself followed the authors' presentation at a SAIFAC seminar on the Nicholson judgment held on Constitutional Hill on 19 September 2008. Information regarding SAIFAC seminars and publications is available at: <http://www.saifac.org.za>. Klaaren was a SAIFAC sabbatical fellow 2008–09 and Roux is the former director of SAIFAC. Needless to say, the authors take all responsibility for any errors in the current version of the note.

2 Natal Provincial Division, case no 8652/08; [2008] ZAKZHC 71; [2009] 1 All SA 54 (N) (12 September 2008).

striking down of the then current indictment against Mr Zuma. The judgment was delivered against a background of increasingly polarized pro- and anti-judiciary rhetoric. This prompted some analysts to ask whether the effect of "the Nicholson judgment" (as it has become know) was akin to a "switch in time", a change of judicial heart which would nonetheless maintain the relevance and standing of the judiciary as an institution. These aspects aside, what was further remarkable about the judgment was its content and its comment on what it termed instances of "political meddling" and interference.[3] Indeed, it was this aspect and these allegations that played over and over in the intense media reporting on the case and its aftermath. The aftermath was particularly pointed for one office, the presidency of the Republic. A week and a day after delivery of the judgment, the secretary general of the ANC reported at a news conference that the ANC's National Executive Committee had recalled the president, Thabo Mbeki, and was understood to say that that the Nicholson judgment was the main cause of the recall. The Nicholson judgment, it seems fair to say, was at least the proximate cause of Mbeki's recall and resignation.[4]

It was first reported and then confirmed that the National Prosecuting Authority (NPA) would appeal the judgment to the Supreme Court of Appeal (SCA). Indeed, Nicholson J granted leave for such an appeal.[5] Further, (the former) President Mbeki was first reported and then confirmed to have launched an application in the Constitutional Court against the judgment, an application intended to vindicate his good name.[6] This application was dismissed by that court.[7] However, in the appeal, the SCA reversed Nicholson's judgment, delivering its judgment on 12 January 2009, four months after the initial decision.[8] Unsurprisingly, that judgment itself is likely to be appealed to the Constitutional Court.[9]

As was expected at the time, the legal and political appeal mechanisms and processes have and will continue for some time. In the course of these

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3 Nicholson judgment, para 139.

4 For an overview of the politics around the recall and resignation of President Mbeki, see R Southall "Thabo Mbeki's fall: The ANC and South Africa's democracy" (14 October 2008), available at: <http://www.opendemocracy.net/article/thabo-mbekis-fall-the-anc-and-south-africas-democracy> (last accessed 6 November 2009).

5 *National Director of Public Prosecutions v Zuma* (8652/08) [2008] ZAKZHC 77 (22 October 2008).

6 Founding affidavit of TM Mbeki in the matter of *Mbeki v Zuma and Another* (CCT 79/08) (22 September 2008). In para 34.6 of his affidavit, Mbeki states: "[O]n a reading of the judgment of Nicholson J, there is a real possibility that persons with malicious intent could act on it to the detriment of the office of the president of the Republic of South Africa, members of the National Executive, and to me personally".

7 *Mbeki v Zuma and Another* CCT 79/08 (order of court, 10 November 2008).

8 *National Director of Public Prosecutions v Zuma*, case no 573/08; [2009] ZASCA 1 (12 January 2009).

9 As of 16 March 2009, the date for the hearing of such an application was set for 12 May 2009.

processes, the legal and political position, as articulated in and immediately affected by the Nicholson judgment on 12 September 2008, has changed and will probably change again. What will not change (at the risk of stating the obvious) is the form and content of the judgment itself, as well as the extraordinary political events which followed.

This note proposes to engage with the Nicholson judgment on its own terms. At the very least, due to the remarkable impact the judgment itself has had (without of course neglecting the political campaigning that accompanied the judgment), it seems appropriate to consider the judgment on its own. This note does so as an exercise in law and politics. The purpose of this note is therefore to accomplish two linked goals: first, to outline the essential legal questions and bases in the judgment; and second, taking into account the first, to identify the degree to which the comment in the judgment may be termed politically activist. In the first section, there is no attempt to be complete or authoritative. This outline will attempt to put a best legal interpretation of the judgment, in order to explicate the legal issues and make them more prominent within the current public debate.[10] In doing so and in revising the initial working paper, reference is made to some of the materials from the appellate process. Nonetheless, the focus of this note is not to assess whether the legal interpretation made by Nicholson J is ultimately correct but rather what degree of plausibility it possesses.[11] In the second section, the authors parse the text of Nicholson J, assigning to some of it the characterization of fair if nonetheless strictly speaking unnecessary comment and to some of the rest less legitimate comment. In this section, we assume that Nicholson J's text may be read as an attempt to bolster the legitimacy of the judiciary and ask whether it succeeds on those terms.

AN EXERCISE IN LAW

As we know, the result of the judgment was that the decision taken by the National Director of Public Prosecutions (NDPP) to prosecute Mr Zuma on December 2007 was declared invalid and was set aside. How was this done? This section argues that the Nicholson judgment reached its conclusion by means of three arguments: one which was largely a counter argument; and

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10 For an example of such a charitable interpretative approach, see F Michelman "On the uses of interpretive 'charity': Some notes on application, avoidance, equality, and objective unconstitutionality from the 2007 term of the Constitutional Court of South Africa" (Harvard Public Law working paper no 08-26) (2007) *Constitutional Court Review* (forthcoming). As one might expect, the Mbeki application to the Constitutional Court (above at note 7) did not adopt an interpretive approach of "charity".

11 For a broadly similar exercise, see L Lazarus "The president, the prosecutor and the secular priest: Corruption, politics and the courts; *Jacob Zuma v National Director of Public Prosecution*", available at: <http://ssrn.com/abstract=1307207> (last accessed 6 November 2009). See also A Dodek "*State v Zuma* and the future of constitutional democracy in South Africa" (unpublished draft, 17 February 2009).

two independent affirmative arguments, one based on section 179(5) of the South African Constitution (the Constitution) and one based on constructing, and then protecting through the Promotion of Administrative Justice Act (PAJA), an existing legitimate expectation.[12]

The first argument is the counter argument. This appears to be one of procedure but it clearly overlaps with substantive law as well.[13] The state, led by one of the country's foremost advocates Wim Trengove, argued that the application was governed exclusively by the PAJA, the statute that enforces section 33 of the South African Bill of Rights: the right of just administrative action.[14] The force of this argument was that the case before Nicholson J was at least arguably ousted from PAJA review by the terms of that statute. As Nicholson J put it, the argument was that "the Court is precluded from considering this application because [the decision to prosecute] does not constitute administrative action in terms of the PAJA".[15] As is well known, a decision to prosecute is excluded by the PAJA from review in terms of the PAJA.[16] Review of a decision "to institute or continue a prosecution" is in this sense blocked. While the judgment does not detail the state's argument in this respect, the argument of the exclusive character of the PAJA can be based on passages of the Constitutional Court judgments in *Bato Star* and *New Clicks*[17] for instance, where the necessity to use the PAJA was stressed. Still,

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12 In granting leave to appeal, Nicholson J himself characterized his earlier judgment in terms of three questions: "The primary question of whether the matter was of a civil or criminal nature was *res nova* in the sense that it had never been considered before and occasioned me much anxious deliberation. In addition, the legal question as to whether the provisions of section 179(5)(d) of the Constitution and the corresponding provisions of the National Prosecuting Authority Act were applicable to the application in the main application was a very complex issue which had never been considered before by the Courts. … Apart from the above matters I was also minded to decide the factual question as to whether the applicant had a legitimate expectation that he could make representations to the National Director": *National Director of Public Prosecutions v Zuma* (8652/08) [2008] ZAKZHC 77 (22 October 2008) at 77.

13 While this is not a particular theme of this section, it is striking the degree to which administrative law concepts and reasoning pervade this judgment; indeed this raises the fundamental issue of the extent to which an administrative law paradigm is appropriate in holding the exercise and the organization of criminal prosecution constitutionally accountable (which would appear at least somewhat less appropriate than Judge Nicholson apparently thinks). The judgment does not overtly and clearly cast itself as one undertaken in terms of the PAJA. Nonetheless, on a close reading, it is apparent that Nicholson J did intend to review in terms of the PAJA. See paras 66, 126 and 243 of the Nicholson judgement.

14 Id, para 57.

15 It appears that the constitutionality of the PAJA was not brought into issue in the case.

16 PAJA, sec 1 onwards.

17 *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15, 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC); *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* [2005] ZACC 14, 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

the precise terms of that necessity and exclusive character remain open to interpretation.[18]

Nicholson chose not to canvass what he termed the "fascinating arguments as to whether PAJA constitutes an exclusive codification of the rights of review".[19] Indeed, for a PAJA judgment there is much PAJA jurisprudence and debate that is not canvassed in this judgment.[20] Instead, he reasoned that the court's jurisdiction to review was unimpaired. His mode of argument was essentially to the effect that, if a decision was purported to be made in terms of section 179(5)(d) but no representations were entertained as were required, then the decision was effectively not a decision in terms of section 179(5)(d). It was instead an absent jurisdictional fact and the PAJA ouster regarding prosecution decisions would not prevent the court from investigating a defective procedure that preceded the making of the decision.[21] Indeed, Nicholson's reasoning can be understood ironically to be old anti-apartheid anti-ouster reasoning. Of course, the standard critique of the doctrine of jurisdictional facts is that it allows courts to expand their review power more or less as they wish and the force of this critique is arguably demonstrated here.[22] It can also be noted that a much simpler counter argument was available to Nicholson J. He did not need to maintain the possibility that the decision to prosecute constituted administrative action and instead could have conceded that doctrinal point (and its procedural consequences, if any). One option along these lines would have been to note that an operative effective constitutional regime of accountability was the principle of legality either on its own or as explicitly supplemented by section 179(5)(d). Either of these regimes may be accompanied by a direct constitutional civil procedure of review.[23] Taking this route, Nicholson J would not have had the

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18 For a recent discussion of this question, see J Klaaren and G Penfold "Just administrative action" in S Woolman (eds) *Constitutional Law of South Africa* (2nd ed, Original Service June 2008, Juta) chap 63.6 to 63.14.

19 Nicholson judgment, para 66.

20 This forms part of a general though declining tendency among the legal profession to avoid engagement with the PAJA and instead to continue to engage with the question of procedural fairness through the common law jurisprudence. See I Currie "What difference does the Promotion of Administrative Justice Act make to administrative law?" in H Corder (ed) *Comparing Administrative Justice Across the Commonwealth*, first published as *Acta Juridica* (2006, Juta) 325.

21 Nicholson judgment, paras 63 and 64.

22 In a slightly different sense (as Cora Hoexter pointed out in the SAIFAC seminar held on 19 September 2008) to the extent that this reasoning is akin to that in *Marais v Democratic Alliance* 2002 2 All SA 424 (C), 2002 (2) BCLR 171 (C), it can be critiqued as fallacious. See also C Hoexter *Administrative Law in South Africa* (2007, Juta) at 192.

23 Perhaps the apparent need to blaze this particular procedural path (and the difficulty to do so) may have inclined Nicholson J to the PAJA (and administrative) route. Another alternative, akin in some respects to the route recently taken with the Labour Relations Act 66 of 1995, would have been to argue that the procedural fairness regime of sec 179(5)(d) can stand at least to some extent on its own. *See Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22, 2008 (2) SA 24 (CC), 2008 (2)

second (legitimate expectation) ground available to him as a basis of reasoning; however, as we shall see, that might have been a good thing.

We turn next, however, to the first affirmative ground on which Nicholson J found for Mr Zuma: section 179(5)(d) of the Constitution.[24] The principal argument here is that there are two potential readings of the provision.[25] The right to make representations can be limited on one reading to review by the NDPP of decisions of the deputy public prosecutors (DPPs) only, or on another reading can extend to review of decisions made by the NDPP herself as well as her predecessors and the deputy NDPP. Since the decision at issue was either itself taken or was based upon a decision of the NDPP of the Directorate of Special Operations (DSO) rather than of a DPP (an old attorney general, for example in a province of pre-1994 South Africa) this was significant. Once he had identified and admitted the ambiguity in the constitutional provision, Nicholson then examined the arguments for and against. As might be expected from any forceful judgment, he appears to load the argument in favour of extending the protection of section 179(5)(d) beyond the DPPs.[26] In Nicholson's view, the NDPP is quite like a judge, a chief reviewer of decisions taken by others (or at least presented in neat order before a judge). In particular, the NDPP should invite representations since his or her decisions often regard serious matters (although one might question this since the DPPs can decide upon prosecutions for murder, itself a serious matter) and can impact on individual rights. Principally, the NDPP is independent.

In contrast, the argument that Nicholson J does not favour (nor explicate as much as he might have) draws upon the legislative history that the purpose of section 179 was for (internal) review of the DPPs (who were then geographically separate attorneys general), that the DSO followed the creation of the post of the DPPs and was more of a national than a regional unit, and that the DSO worked more closely with the NDPP than did the provincial DPPs. Essentially, this contrasting interpretation sees the NPA more as an organization needing to establish final and consistent policy within itself and its decentralized divisions and doing so either through policy or the internal review of DPP decisions. Since Nicholson J is in favour of the first judicial

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BCLR 158 (CC), (2007) 28 ILJ 2405 (CC), holding that compulsory labour arbitrations are administrative action but reviewable in terms of labour legislation rather than the PAJA.

24 That section provides in pertinent part: "The National Director of Public Prosecutions may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following: (i) The accused person. (ii) The complainant. (iii) Any other person or party whom the National Director considers to be relevant."

25 An additional argument was whether the decision was itself a review. See Lazarus "The president", above at note 11 at 6–7.

26 See for instance Nicholson judgment, para 78: "From time immemorial the executive has cherished the notion of usurping the independent function of the prosecuting authority and directing criminal prosecutions at its political opponents."

model, the right to make representations in a review (but strangely not in the initial decision to prosecute) is extended through section 179(5)(d) to changes by the NDPP herself as well as the deputy NDPPs. Arguably, the contrasting model is more in line with the constitutional policy exclusion encapsulated in the PAJA that a decision to institute or continue a prosecution is not reviewable. In any case, it is clear that the Nicholson judgment will have serious organizational consequences for the NPA apart from this case. This is in part what may have motivated the NPA to appeal.

The two interpretations above of the relevant constitutional provisions are both plausible. While the interpretation not favoured by Nicholson J might be the better one, that is not the concern in this note. Having outlined these two interpretations and opted for one, Nicholson J could have stopped here: the decision not to have representations was invalid in terms of section 179(5)(d) as read with PAJA section 6, and the story could end.

However, Nicholson J went on to raise a second affirmative argument and an independent basis for his decision to set aside the decision to prosecute Mr Zuma. This was the legitimate expectations argument begun with the statement at the initial press conference by Mr Ngcuka in 2003 to the effect that Mr Zuma was generally welcome to make representations. Heightened by the material of political interference, this statement was turned into a legitimate expectation that, on its own, would justify setting aside the decision.[27] Nicholson J was arguing here that this legitimate expectation is protected through PAJA review, though he does not acknowledge the vibrant jurisprudence around the protection of legitimate expectations in the PAJA context.[28] More substantively, a press conference statement is a weak basis for the existence of a legitimate expectation, itself of course a lesser legal concept than a right. Classically, a legitimate expectation is based either on lengthy practice or an explicit promise or, to a lesser degree, on the avoidance of great unfairness.[29] The 2003 Ngcuka statement (albeit in the context of an arguably unfair decision) would not appear to be a strong foundation for such a legitimate

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27 Id, paras 127 and 230–31.

28 The basic difficulty comes from the textual inclusion of "legitimate expectations" in sec 3 of the PAJA but not in sec 33 of the Constitution nor in the definitions section of the PAJA. See Klaaren and Penfold "Just administrative action", above at note 18. Note also that Nicholson's basis of arguing that Zuma had a legitimate expectation could not have been protected by the principle of legality on its own without the underpinning of the PAJA. Such a pure constitutional assertion of procedural fairness outside the context of the PAJA would fall foul (or at least run into serious trouble) of the recent Constitutional Court rejection of extending the content of the principle of legality and rationality to include procedural fairness: *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20, 2008 (1) BCLR 1 (CC).

29 Here, it must be said that Nicholson's comment (at para 150 of the judgment) that "[g]iven that a decision was made to prosecute Mr Shaik and his corporate entities, the decision not to prosecute the applicant, when there was a prima facie case and bribery is a bilateral crime, was bizarre to say the least …" has the ring of real truth, even if it be truth in hindsight.

expectation. Nicholson J nonetheless constructs the legitimate expectation from this statement but also the circumstances of the response or, put differently, the allegations of political meddling. Nicholson's argument here is that "[i]t is difficult to evaluate the real significance of the offer made by Mr Ngcuka and the letter requesting the change to make representations, sent four years later, without considering the events that took place in between".[30] It remains unclear how subsequent political interference, even if true, heightens the strength of the legitimate expectation, other than by sharpening perhaps the degree of initial unfairness. If this legitimate expectation is to be defended as one based on unfairness rather than on a promise, the argument would be from the weakest and most malleable of the bases of the legitimate expectations doctrine. Certainly, one may assess this second affirmative ground as less well-grounded and plausible than the first.

AS AN EXERCISE IN POLITICS, IS NICHOLSON'S AN ACTIVIST JUDGMENT?

To answer whether Nicholson's judgment is "an activist judgment" we of course need a definition of activism, one that is different from one of mere consequentialism (for example that the judgment was activist because it led to the ouster of Mbeki). The working definition proposed and used here is that an activist judgment is one that makes findings of fact or law that the judge was not legally compelled to make, or expresses opinions on matters in the public domain or of a private nature that were irrelevant to the issues for decision. The danger with such a type of activism is that it undermines the judiciary's necessary reputation for political neutrality. There will be differences of opinion about what was legally required and therefore different opinions about whether a particular judgment was activist or not. The mere fact that a judgment touches on matters in the public domain is not on its own evidence of activism because, especially in a constitutional democracy with a justiciable Bill of Rights, the law may compel judges to involve themselves in such matters.

The question this section addresses is therefore, even though thrust into political matters, did Nicholson J so answer the legal questions as to maintain a distinction between law and politics, the maintenance of that distinction being for present purposes the assumed basis for judicial legitimacy? Or did his judgment address matters in the public domain that the judge was not

30 Id, para 139. In para 217, the argument is stated: "If there was political interference in the earlier decision not to prosecute the applicant and in all probability the later one to prosecute him what does one make of the offer of the NDPP that the applicant can make representations at any time about the investigation or prosecution? It seems to me that if he was afforded the chance to make representations at any time for any reason, it would be the duty of NDPP as he expressed it to consider these."

legally compelled to address, in a way that could be said to amount to his own kind of meddling in the political process?

In posing the question in these terms, the authors do not wish to suggest that there is an impermeable line between law and politics.[31] Indeed, it is rather the case that there is an interplay and interweaving of law and politics. This is true both at the highest institutional level and in respect of the specific topic of Nicholson J's decision: independence from the executive. In institutional terms, one may argue that a court in a new democracy faced with a dominant political party might act to trade off gains in legal legitimacy, achieved by principled decision making, against the likely impact of its decisions on its institutional security, without much regard for public opinion. Indeed, Roux's review of the Constitutional Court's record has revealed exactly such strategic action: where that court has, in politically controversial cases, used its considerable forensic and rhetorical skills to avoid confrontation with the political branches and, in more routine cases, where it has developed a number of context-sensitive review standards.[32] Likewise, one may also argue for the interweaving of law and politics in terms of the more specific topic of independence. For instance, Gerald Rosenberg has observed that "treating court decisions as either ignoring political preferences (judicial independence) or taking them into account (no judicial independence) creates an on / off, either / or variable that may miss much actual practice". He has suggested that "[i]t may be more helpful to treat court decisions … ranging along a continuum from total lack of regard for political preferences to absolute subservience to them".[33]

With respect to the main affirmative argument that interpreted section 179 (5)(d) and addressed the applicability of the PAJA, the judgment seems clearly within the bounds of plausible legal argument. Even if one disagrees with the reasoning, the judgment in this respect cannot be described as activist. Certainly, Nicholson J brought his personal experience of challenging ouster clauses under apartheid and investigating independence of the attorneys general to bear on the case before him. But this part of judgment cannot be said to have been distorted by these personal experiences in a way that was not legally permissible. Put differently, another judge, without those experiences, might have written similarly.

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31 It is remarkable that Nicholson J used the term "political" five times in the first two paragraphs of his judgment.

32 T Roux "Principle and pragmatism on the Constitutional Court of South Africa" (2009) 7 *International Journal of Constitutional Law* 106.

33 G Rosenberg "Judicial independence and the reality of political power" (1992) 54(3) *The Review of Politics* 369 at 371 (operationalizing independence as judicial independence). Rosenberg's argument might apply analogically in the context of the independence of the NDPP. Indeed, it is noteworthy that President Molanthe made the surprise suggestion that candidates for appointment as NDPP be nominated by an independent body such as the Judicial Services Commission.

Another part of the judgment, the procedural matter of the application to be admitted as *amicus curiae* [friend of the court] by the Society for the Protection of Our Constitution (not covered as part of the charitable interpretation of the judgment above) occupies in Nicholson J's writing a full 20 paragraphs, nearly a tenth of the judgment as a whole.[34] Nicholson J's judgment here could have ended with finding that "this court has no power to appoint a commission of inquiry".[35] Everything between this statement and its repetition 12 paragraphs later is legally unnecessary.[36] But Nicholson J goes on to discuss the purpose of commissions generally and states: "Only a commission of enquiry can properly rid our land of this cancer that is devouring the body politic and the reputation for integrity built up so assiduously after the fall of Apartheid. If the allegations by Ms de Lille and a group of courageous journalists are true then there is no better reason for a commission to probe this corruption."[37] These comments were certainly not legally necessary and were therefore activist according to the working definition above.

Were these (activist) comments also unwise? Do judges have a duty, when the opportunity arises, to speak out on matters of general public concern in their judgments, unlike some judges who feel such a duty outside their judgments? The best response partly depends on what is said and how the comments are expressed. Nothing in Nicholson J's 12 redundant paragraphs amounts to a factual finding or imputation of guilt against someone who was not party to the court proceedings. The best conclusion to draw is that no damage is done by this type of activism, and potentially a great amount of good.

Apart from the matters above and the first affirmative argument, the remaining part of the judgment relates to a procedural aspect (the set of cross applications on striking out) as well as to the weaker of the two main affirmative arguments: the legitimate expectations basis. This remaining part of the judgment also had a number of other findings of fact and expressed a number of opinions in relation to politics rather than law. Indeed, in covering the instances of interference, it was this material that was particularly politically sensitive.[38] When the relative weakness of the legal argument within which these comments are embedded is taken alongside the set of these findings and opinions, the character of this remaining part of the judgment as activist in terms of the working definition is clear. Such a conclusion is reinforced by the absolutist terms of the definition of independence / interference used and by the largely conclusive rhetoric employed.

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34 Nicholson judgment, paras 20–40.
35 Id, para 25.
36 Id, para 37.
37 Id, para 33.
38 Southall "Thabo Mbeki's fall", above at note 4 at 5.

Defenders of the judgment have argued that everything in it was legally compelled, by the need to answer the main question, or by the need to decide the cross applications on striking out, or by a combination of the two. However, that assertion seems unwarranted. Some examples of these other findings of fact and law, and opinions expressed include: (1) the opinion that the president's decision to dismiss Mr Zuma as deputy president of the Republic of South Africa, though not illegal, was "unfair and unjust" (this was not really a finding of fact or law, but is best understood as an opinion on a matter in the public domain);[39] (2) the opinion that President Mbeki's decision to "stand as party leader was controversial and not in accordance with the Westminster system we espouse in this country";[40] (3) the statement that the involvement of Mr Maduna, the former minister of justice, in the strategy to unseat Mr Zuma as deputy president by not prosecuting him "constituted a serious criminal offence";[41] (4) the remarks about the timing of current NDPP Adv Mpshe's indictment of Mr Zuma on 28 December 2007 just days after President Mbeki's political defeat within the ANC at Polokwane, implying that it was a vengeful action;[42] and (5) the remark that it was improbable that Mr Maduna was acting without presidential knowledge.[43]

Two points may be made regarding these findings, taken together. First, the implicit definition of executive interference with the independence of the prosecuting authority that these findings evince is indeed a binary one. For Nicholson J, independence and interference are two sides of the same coin. There either is independence (and thus no interference) or else there is interference and thus no independence. Compare such an understanding with Rosenberg's idea above of a line of independence that may be either approached or receded from, and in any case is itself continually being drawn.[44]

Secondly, as made by Nicholson J these findings are subtle neither in content nor in expression. Words are blunt instruments here rather than guides towards an inherent understanding. Take as an example Nicholson J's paragraph 207, which states:

> "The NDPP states unequivocally that the NDPP Mr Pikoli was suspended by the President because of a breakdown in his relationship with the Minister of Justice. There should be no relationship with the Minister of Justice - certainly

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39 Nicholson judgment, para 158.

40 Id, para 173.

41 Id, para 196.

42 Id, para 210.

43 Id, para 196.

44 Writing after the release of the Ginwala report (which investigated the firing of the NDPP, Vusi Pikoli) and the handing down of the SCA decision, Franny Rabkin noted that "there are now three different versions of the appropriate relationship between the executive and the NPA": F Rabkin "Zuma saga puts constitution to the test" (14 January 2009) *Business Day* 3 at 3.

> insofar as his decisions to prosecute or not to prosecute anybody from the Commissioner of Police downwards. All that is clear from the Constitution, the NPA Act, and the various prosecution policies, directives, and codes of conduct. The suspension of the National Director was a most ominous move that struck at the core of a crucial State institution. Of importance to the applicant was the fact that Pikoli's replacement, Mr Mphse, who had to decide his fate, must have realized that to disobey the executive would in all probability ensure his own professional demise".[45]

The legal assertions here (such as "no relationship") are admirably clear but also stark. Likewise, the rhetoric employed in stating the facts and making inferences from them is hardly nuanced (such as "most ominous" and "to disobey the executive …"). Compare the rhetorical skill of several judges of the Constitutional Court, who are arguably engaged in a conceptually equivalent struggle for the legitimacy of the judiciary. While the court's rainbow rhetoric in particular may be in large part borrowed from South African public figures, it is recognized as largely successful if taken on its own terms, making the point to its legal audience that "since (apartheid) law has been instrumental in the destruction of community, symmetry demands that (new constitutional) law be a site of repair and reinstatement of the community".[46]

CONCLUSION: AN EXERCISE IN LAW AND POLITICS

In what must break some sort of race-to-publish record, an account of the Nicholson judgment was contained in several pages of the conclusion of a jointly-authored book published within two months of the case.[47] Writing with Michelle le Roux, Dennis Davis (who is also a High Court judge) uses the case and its surrounding politics as an example of what he terms the era of "lawfare" in constitutional South Africa.[48] In Davis's telling, the Nicholson judgment was "lawfare in all its jurisprudential technicolour". Davis then poses the questions: "[D]id the Court retreat from compelling Mr Zuma to face trial in the face of the incessant political pressure? More important, perhaps, is the question of whether those who shouted the loudest and

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45 This paragraph predates the report of the Ginwala Commission and deals with material and questions within that commission's terms of reference.

46 P Lenta "Rainbow rhetoric" in M du Plessis and S Pete (eds) *Constitutional Democracy in South Africa 1994-2004: Essays in Honour of the Howard College School of Law* (2004, Lexis Nexis Butterworths) 15 at 30.

47 D Davis and M le Roux *Precedent & Possibility: The (Ab)use of law in South Africa* (2009, Double Storey). The discussion of the Nicholson judgment is at 190–93.

48 The concept of "lawfare" is derived from: J and J Comaroff "Law and disorder in the postcolony: An introduction" in J and J Comaroff (eds) *Law and Disorder in the Postcolony* (2006, University of Chicago) 1.

threatened most menacingly will consider these to be acceptable tactics for compelling the judiciary to find in its favour in the future?"[49]

As Davis does, the lawfare concept may be considered parallel to the judicialization of politics.[50] However, it may be given nuances of particular relevance in South Africa that go further. For one, it invites us to pay attention to the spectacle of law, and particularly to the use to which the spectacle may be put. Law, as it did in colonial times, may provide "a solution to the anxieties of crime, corruption, and social disorder".[51] Along these lines, the spectacle of public policing in South Africa may be argued to be designed to convey the appearance of order exactly where such order is under suspicion.[52]

Since the scope of this note does not extend beyond the four corners of the judgment, it has not delved into the considerable spectacle of the politics before and after the judgment. Yet, even within the text itself, there is spectacle. This note has argued that Nicholson tackled in his judgment political issues that he need not have: in particular, allegations of executive interference in the independence of the prosecutions authority (an authority but one step away from the judiciary). In his judgment, he attempted to turn these issues into legal ones, not particularly successfully in the view of the authors. Whatever motivated this judge, these actions were consistent with the anxieties of many that the judiciary and its particular construction of independence will indeed be subject to undermining by the executive in a post-Polokwane era of politics.[53]

Did Nicholson's legal art conjure well? Nicholson J's final dramatic flourish comes in his observation: "[T]here is a ring of the works of Kafka about this".[54] It is indeed perhaps as failed dramatic art that Nicholson J's judgment can be best understood.

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49 Davis and le Roux *Precedent & Possibility*, above at note 47 at 193–94.

50 See id at 189 (equating the turn to lawfare with the juridification of politics).

51 See S Merry "Book review" (2008) 42 *Law & Society Review* 683 at 683.

52 "Consequently, beyond constituting a public, the 'scene of the crime' in South Africa, broadly conceived is also the source of a passionate politics on the part of government, a politics aimed at making manifest both the shape of the nation and a form of institutional power capable of underwriting its ordered existence": J and J Comaroff "Criminal obsessions, after Foucault: Postcoloniality, policing and the metaphysics of disorder" in Comaroff *Law and Disorder in the Postcolony*, above at note 48 at 273 and 276. The Comaroffs continue: "What we have here, in other words, is an *inversion* of the history laid out by Foucault in *Discipline and Punish*, according to which, famously, the theatricality of premodern power gives way to every more implicit, internalized, capillary kinds of discipline. Indeed, it is precisely this telos – which presumes the expanding capacity of the state to regulate everyday existence and routinely to enforce punishment – that is in question in South Africa. To wit, the drama that is so integral to policing the postcolony is evidence of a desire to condense dispersed power in order to make it visible, tangible, accountable, effective."

53 See L Lazarus "The president", above at note 11 at 32: "[A]lthough Nicholson J used the principle of judicial independence to rationalise accusing politicians of breaching the separation of powers when interfering with prosecutorial discretion, he was in effect breaching the very same principles by doing so".

54 Nicholson judgment, para 237.