

**The President
of the Republic of South Africa
Hon JG Zuma
10 August 2009**

President Zuma

RE: The nomination of Justice Sandile Ngcobo as Chief Justice.

We write in response to your two facsimiles, sent through to our respective offices on 7 August 2009.

The first facsimile was sent through at 9.10 am, without a cover sheet, and comprised a letter from yourself requesting our opinion on your nomination for the position of Chief Justice - Constitutional Court Judge Sandile Ngcobo - a copy of whose CV you attached. Your letter was dated 5 August 2009.

The second facsimile was sent through at 12pm. It comprised the identical letter and CV but this time followed a cover letter, dated 7 August 2009, and which read as follows:

“The president of the Republic of South Africa, Mr J.D. Zuma intends to appoint Mr Justice Sandile Ngcobo as Chief Justice of SA, please find the attached letter from the President on this regard.

“We would appreciate if we can have your input on the proposed appointment on or before 17 August 2009.”

The cover letter was signed by Adv Makhene, your legal advisor.

As you state in your letter, the Constitution requires that you consult the leaders of all political parties represented in the National Assembly, as well as the Judicial Service Commission (JSC) before making the appointment.

The relevant section of the South African Constitution is found in Chapter 8, Section 174 (3), and reads as follows:

“The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.”

In an address to the South African Press Club on 6 August 2009 - before your letter was sent through to the Democratic Alliance and Independent Democrats - you announced your nomination to the media and the public. In that address you stated:

“I have decided to nominate Justice Sandile Ngcobo as the next Chief Justice since Chief Justice Pius Langa is due to retire. I have requested advice from the Judicial Services Commission and leaders of political parties represented in the National Assembly in this regard.”

Subsequent to your address but also on 6 August, the South African Press Association (SAPA) reported that you had nominated Judge Ngcobo and that, in explaining your choice, you stated that you had taken the decision “properly” and “objectively”. Importantly, it also reports you as saying: *“The fact of the matter is that I have appointed a judge that I believe is capable.”*

Both your address and the subsequent statement attributed to you are significant, for they are both inaccurate and consequences of that, we believe, are profound.

Our offices and the late facsimiles from your office both confirm that you did not consult all the leaders of the political parties represented in the National Assembly.

We have also confirmed that you did not consult the JSC on this matter prior to your announcement.

Please find attached to this letter a joint statement released by all three parties in this regard.

Put another way, you did not, as you state in your address, “*request advice from the Judicial Services Commission and leaders of political parties represented in the National Assembly.*” And, as a consequence of this, your nomination was not, in our considered opinion, undertaken “*properly*” or “*objectively*”.

The reason why the South African Constitution requires the President to consult the leaders of all political parties in the National Assembly is clear: The National Assembly consists of 400 public representatives, democratically elected to represent the interests of all South Africans. As the judiciary is an independent body - an independence epitomized by the position of Chief Justice - it is appropriate that those Members of Parliament be consulted before such an appointment is made. In much the same fashion, it is necessary to consult the JSC, a representative body both of the National Assembly and the justice system more broadly. Not to consult the members of these institutions would result in the appointment being made entirely at the discretion of the head of the executive; a situation which lends itself to the abuse of power, undermines the Constitutional principle that there be a separation of power between the executive and judiciary and, in practical terms, runs the risk that the Chief Justice and those candidates eligible for the position of Chief Justice might act in a manner designed to find favour with the President.

There is also a practical purpose to this particular Constitutional provision: by consulting widely, one naturally gathers more information and opinion than was initially available. This information might be critical to the decision at hand. Should one not consult, one might overlook an important fact or insight that may have profound implications. This need not necessarily be the case, but it certainly is a possibility, and as it is the particular process you have followed in this instance which is problematic, we believe it to an important procedural point.

We would like, also, to address the concept of consultation, because we believe it central to this process. Consultation fairly means eliciting and considering the views of particular parties with the purpose of better informing one’s decision. In other words, one cannot consult after the fact or retroactively - which is what, for all intents and purposes, your two facsimiles received by our offices on 7 August attempt to do. To seek out the opinion of a party after you have arrived at a conclusion is a meaningless exercise.

The statement attributed to you by SAPA - that you believed you had already “*appointed*” Justice Ngcobo - and the fact that your communication arrived after your public announcement to this effect, suggests to us, that to provide you with our considered opinion now would fall short of the intended purpose of consultation.

In this regard, we would like to request that you withdraw your public statement, in which you stated “*The fact of the matter is that I have appointed a judge that I believe is capable*”.

This request is far more complex than it appears. For, by publicly stating that you believe you have already appointed Judge Ngcobo to the position of Chief Justice and by failing to consult prior to that announcement, the process is compromised: the public and the media believe you have arrived at a

conclusion and, if you wish your final decision to be interpreted as fair and objective, you need to convince them that you have an open mind on the matter.

The ultimate test of such a position is, of course, a public expression that, after consultation, you may alter your decision. Only by making such a statement does it become plausible to say that the President takes the consultation process required by the Constitution seriously and that you in particular are committed to making the best possible choice after you have sought out all the relevant facts and opinions in this regard.

Sincerely,

P. de Lille

Leader

Independent Democrats

H. Zille

Leader

Democratic Alliance

M. Dandala

Parliamentary Leader

Congress of the People

M. Buthelezi

Leader

Inkatha Freedom Party

(Signed electronically)

**JOINT STATEMENT BY HELEN ZILLE, MOSIUOA LEKOTA AND PATRICIA DE LILLE
LEADERS OF THE DEMOCRATIC ALLIANCE, THE CONGRESS OF THE PEOPLE AND THE
INDEPENDENT DEMOCRATS**

Released on Friday, August 7, 2009

President Zuma must withdraw his nomination for Chief Justice

Section 174 (3) of Chapter 8 of the South African Constitution reads as follows:

“The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.”

This is a critical constitutional requirement and central to it is the phrase: “...after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly”.

The idea of consultation is straightforward: it is the necessity that the President elicits and considers the advice of the leaders of all parties represented in the National Assembly before coming to a conclusion about his appointment. Obviously, that consultation is designed, therefore, to inform his decision.

This is borne out by both logic and precedent.

With regard to logic: To announce a candidate and then consult defeats the very purpose of consultation in the first place. It means the President has arrived at a conclusion prior to consulting and the process of consultation will have no effect on his decision - it would be a meaningless exercise. This, quite clearly, is not the intention of Section 174 (3). That section exists to ensure that the President - in an open, consultative and democratic manner - seek out and incorporate the considered opinion of all parties represented in a democratically elected Parliament, before arriving at a decision. Obviously, this is in the interest of best democratic practice.

With regard to precedent: For every other judicial appointment for which the Constitution requires the leaders of parties in the National Assembly to be consulted, since 1994, the Presidency has sought out the opinion of those parties prior to announcing a nominated candidate. This process was

followed with regard to the candidates proposed for the Supreme Court of Appeals, earlier this year, and on every relevant occasion in the past.

Yesterday (6 August) the South African Press Association (SAPA) reported that President Zuma had nominated Constitutional Court Judge Sandile Ngcobo to replace Judge Pius Langa, who retires from the position of Chief Justice later this year.

The SAPA report stated that, in explaining his choice, President Zuma had said he had taken the decision “properly” and “objectively”. Importantly, it also reports the President as saying: “The fact of the matter is that I have appointed a judge that I believe is capable.”

This statement is unequivocal. Quite clearly, in President Zuma’s mind, by announcing Judge Sandile Ngcobo as his candidate, he had effectively made the appointment and had no intention of consulting before doing so, as the South African Constitution requires.

We can jointly confirm that none of us were consulted ahead of the President’s announcement yesterday.

On hearing the President’s announcement yesterday, the Democratic Alliance issued a statement setting out that the President was required by the Constitution to consult and that, as the DA had not yet been consulted, the Party was not prepared to comment.

This morning (7 August), at 9.10am, the Democratic Alliance received a facsimile (traditionally, the manner in which these matters are communicated) from the Presidency requesting our opinion, in terms of Section 174 (3) of the Constitution. Significantly, the facsimile is dated 5 August 2009. The DA’s records confirm no facsimile was sent on 5 August and that nothing else was received from the Presidency prior to today’s communication.

In other words, only after a statement was issued pointing out this fact that the Constitution required the Presidency to consult, did the Presidency send the relevant communication.

We can also confirm that the President has not consulted the Judicial Service Commission on this matter, as is required by the Constitution.

This is unconstitutional. If the point of consultation is to seek out opinion in order to inform one's decision, it cannot be done after the fact. And it is absolutely apparent, both from President Zuma's comments to the media and by the fact that no communication was received from the Presidency that he had made up his mind on this matter and considered Judge Ngcobo "appointed", before he properly consulted, as required by the Constitution.

That the facsimile was backdated, suggests the Presidency is now trying to rectify its mistake by consulting retroactively.

In light of this and the President's failure to properly consult or act in the manner required by the Constitution, it is necessary for him to withdraw his statement and consult properly before arriving at a decision as to who his desired candidate is.

President Zuma has repeatedly given South Africa the assurance that he respects the Constitution, that he wishes to engage the opposition and that he is dedicated to upholding our institutions and ensuring best democratic practice. His attitude to this matter, however, suggests otherwise.

MEDIA ENQUIRIES:

Ross van der Linde (DA) - 076 543 7254

Geordin Hill-Lewis (DA) - 072 320 1289

Philip Dexter (COPE) - 082 453 4088

Patricia de Lille (ID) - 084 777 2065