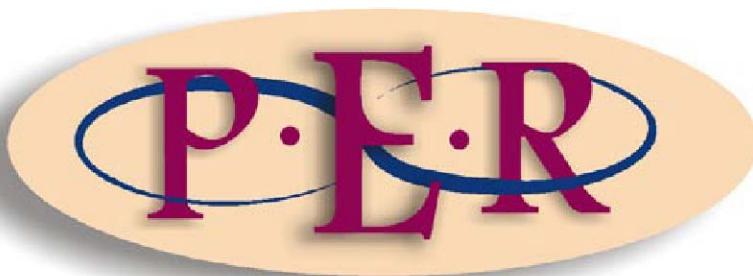


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DEFENDING THE ABSURD: THE ICONOCLAST'S GUIDE TO SECTION 47(1) OF THE SUPERIOR COURTS ACT 10 OF 2013

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1 Introduction

This contribution began life as a defence of section 25(1) of the *Supreme Court Act* 59 of 1959 (the *Supreme Court Act*). However, the *Supreme Court Act* was repealed on 12 August 2013 and replaced by the *Superior Courts Act* 10 of 2013 (the *Superior Courts Act*), and in the process section 25(1) of the former gave way to section 47(1) of the latter. Both sections deal with civil claims against judges. Both prescribe that any civil litigation against any judge requires the consent of the court out of which such litigation is to be launched.

The repealed section 25(1) provided that:

Notwithstanding anything to the contrary in any law contained, no summons or subpoena against the Chief Justice, a judge of appeal or any other judge of the Supreme Court shall in any civil action be issued out of any court except with the consent of that court: Provided that no such summons or subpoena shall be issued out of an inferior court unless the provincial division which has jurisdiction to hear and determine an appeal in a civil action from such inferior court, has consented to the issuing thereof.

The new section 47(1) stipulates that:

Notwithstanding any other law, no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the head of that court or, in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be.

It should be apparent that, despite their linguistic variations, section 47(1) of the *Superior Courts Act*, for all legal intents and purposes, is a re-presentation of section

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25(1) of the *Supreme Court Act*. To be sure, there are two noticeable differences between the sections. Firstly, section 47(1) is wider than its predecessor in the sense that it includes judges of the Constitutional Court, who did not feature in section 25(1).¹ Secondly, section 47(1) is narrower than section 25(1) in that it makes no express reference to suing judges out of an inferior court.² However, these differences are of a quantitative order, pertaining to the ambit of the doctrine of leave to sue. The doctrine itself has endured intact. In other words, there is no qualitative discrepancy between the two sections. The South African legislature evidently was comfortable with transplanting the substance of the doctrine of leave to sue from the old section 25(1) to the new section 47(1).

During its many years on the statute books, section 25(1) always had been one of the more inconspicuous sections of the *Supreme Court Act*. Indeed, it was remarkable for its relative obscurity. Unlike countries such as the USA and Germany, South Africa is not a very litigious society, and civil suits against members of the judiciary tend to be a rarity.³ This South African disinclination to engage in lawsuits allowed section 25(1) to retain its reclusive status well into our new constitutional dispensation. However, despite its low profile, section 25(1) was also one of the more controversial provisions in the *corpus* of the South African law of civil procedure. In terms of the 1996 *Constitution*, the section was an aspect of old order legislation⁴ which survived the transition from apartheid to neo-liberal democracy in 1994.⁵ Indeed, section 25(1) had been rubbished as one of "apartheid's legal

¹ This is evident from s 1 of the *Superior Courts Act* 10 of 2013, which defines a Superior Court to mean "the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court". The question of suing Constitutional Court judges used to be governed by the *Constitutional Court Complementary Act* 13 of 1995. The *Superior Courts Act* has consolidated the doctrine of leave to sue and repealed both the *Supreme Court Act* 59 of 1959 and the *Constitutional Court Complementary Act* 13 of 1995.

² The questions of whether this omission was deliberate or accidental, and whether s 47(1) may include inferior courts by implication, fall outside the scope of this contribution.

³ There are, no doubt, many reasons for the dearth of litigation against judges. One of these has to be the success which most judges have had in leading lives, both professional and personal, which generally are beyond reproach.

⁴ See Schedule 6 of the *Constitution of the Republic of South Africa*, 1996 (the 1996 *Constitution*) which defines old order legislation as legislation enacted before the passage of the *Constitution of the Republic of South Africa* 200 of 1993 (the 1993 *Constitution*).

⁵ Whereas we agree with Roux *Politics of Principle* 203-207 that the post-apartheid South African constitutions may be characterised as liberal democratic, we consider that the South African political economy may be classified as neo-liberal (despite the imprecision of this epithet) in that

absurdities"⁶ which found its way into the post-apartheid legal order. Such a transposition is a recipe for contestation.

Section 47(1) of the *Superior Courts Act* has not been in existence long enough to have attracted any sustained attention, academic or otherwise. By contrast, as intimated above, section 25(1) of the *Supreme Court Act* did become the object of some considerable debate during the last decade or so of its existence. The legitimacy of an old order legislative stipulation's continuing to govern the right to pursue civil suits against judges in the new constitutional order was fated, more or less, to become a bone of contention. Sooner or later controversy had to find section 25(1), as remnants of the old legal order fell to be re-evaluated against the *mores* of the new. Although the transmogrification of section 25(1) into section 47(1) went unnoticed for the most part, section 47(1) is vulnerable to assaults similar if not identical to those that have been launched against section 25(1). Of course, section 47(1) is a new order legislative product and thus cannot be dismissed readily as an apartheid legal absurdity. However, that does not mean that section 47(1) will not be condemned as a post-apartheid legal absurdity which has replicated, for the most part, the apartheid legal absurdity that was section 25(1). The point is that, because of the historical and substantive continuities between them, sooner or later the objections to section 25(1) are likely to be redirected at section 47(1).

This contribution is a pre-emptive defence of section 47(1) of the *Superior Courts Act* and, by extrapolation, a belated justification of section 25(1) the *Supreme Court Act*. An attempt will be made to demonstrate not only that section 47(1) does not

it foregrounds marketisation, privatisation and deregulation at the expense of the welfare dimensions of classical liberalism. Although it may be argued that the ANC leadership had drifted towards neo-liberalism even before 1994, it is probably more correct to say that the new South African democracy took its neo-liberal turn two short years after 1994, when the ANC abandoned the Reconstruction and Development Programme (RDP) in 1996 and embraced the Growth, Employment and Redistribution (GEAR) policy instead. For detailed considerations of the question of neo-liberalism in South Africa, see generally Terreblanche *Lost in Transformation*; Peet 2002 *Antipode* 54-84; Bond *Elite Transition*; Carmody 2002 *JSAS* 255-275; Michie and Padayachee 1998 *Cambridge J Econ* 623-635; Narsiah 2002 *GeoJournal* 29-38; and Williams and Taylor 2000 *New Political Economy* 21-40.

⁶ Ngobeni *Cape Times* 11.

transgress against the 1996 *Constitution*⁷ but also that the protection which section 47(1) offers to judges is both a desirable and necessary aspect of the unimpeachable ideal of judicial impartiality. If we are entitled to require judicial officers to perform their functions impartially, then they are entitled to legal protections which secure their capacity to do so, including the kind of protection afforded by section 47(1). The new South African legal order has raised the notion of judicial impartiality to a constitutional imperative.⁸ This contribution contends that section 47(1) is necessary to the realisation of this imperative.

The defence of section 47(1) must proceed from an appreciation of the controversy which its predecessor had attracted not long before its repeal. The assault upon section 25(1) constitutes the historical context in which section 47(1) has to be comprehended and defended. What follows, then, is an exegesis of objections to section 25(1) from various quarters. These objections need to be confronted because they transcend the limits of section 25(1) and go also to the existential rationale of section 47(1). Thereafter, an attempt is made to prove that section 47(1) is unreservedly constitutional in that it does not violate section 34 of the 1996 *Constitution*, which guarantees everyone the right of access to courts. The contribution concludes with a jurisprudential consideration of the judicial office in relation to section 47(1).

2 The Hlophe-Oasis-Desai imbroglio

For more than a decade after the demise of apartheid, section 25(1) continued to exist in the same relative obscurity which it had enjoyed prior to the advent of our neo-liberal democracy. However, things changed radically in 2004 when section 25(1) was stripped of that obscurity and thrust into the public spotlight. This sudden celebrity was visited upon the section by the notorious episode in which the Judge

⁷ The specific constitutional provision at issue here is s 34, which is part of the Bill of Rights and bestows upon everyone the right of access to court for the resolution of civil disputes in a fair trial. The section will be considered in more detail later.

⁸ See s 165(2) of the 1996 *Constitution*, which provides 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". See also the judicial oath of office in item 6(1) of Schedule 2 to the *Constitution* in terms of which all judges undertake to "administer justice to all persons alike without fear, favour or prejudice".

President of the Western Cape High Court, John Hlophe, granted permission to Oasis Group Holdings (hereinafter referred to as Oasis) to sue Judge Siraj Desai of the same court for defamation. Oasis alleged that in November 2001 Judge Desai had made public statements accusing it of using fraud and intimidation to secure the support of the residents of University Estate⁹ for its plans to establish its head office in the area. Judge Desai lived in the area and allegedly made his claims at a meeting of the residents' association convened to canvas the issue. Oasis considered that the judge's utterances at the meeting were defamatory and designed to injure its reputation as a business. Aware of the provisions of section 25(1), the company's lawyers wrote to Judge Hlophe on a number of occasions, beginning in December 2001, asking for the permission required to sue Judge Desai for defamation. These efforts were met with an express refusal in April 2002 and with silence thereafter. However, the company was not deterred. Its persistence bore fruit when, in October 2004, shortly before the expiration of the three-year prescription period, Judge Hlophe finally granted Oasis the leave it sought to sue Judge Desai. The defamation suit, including a claim for damages in the amount of R250 000-00, was filed in November 2004.¹⁰

In isolation, the granting of such permission in terms of section 25(1) would have been unremarkable and not an especially public issue.¹¹ Indeed, the matter did not assume a public aspect until 2006, when it became known that there already had been a long-standing pecuniary relationship between Judge Hlophe and Oasis when he consented to the company suing Judge Desai in 2004. It emerged that, when he exercised his powers under section 25(1) in favour of Oasis, Judge Hlophe had been receiving regular monthly payments from the company as a member of the board of

⁹ This is a residential suburb in Cape Town.

¹⁰ See Myburgh 2007 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=91986&sn=Detail>; Maughan 2005 <http://www.iol.co.za/news/south-africa/defamation-suit-pits-desai-against-hlophe-1.235281#.UMqqgLmeBz3A>; and Schroeder 2007 <http://www.iol.co.za/news/south-africa/hlophe-received-cash-from-oasis-court-hears-1.313523#.UMqeueBz3A>.

¹¹ See, for example, *N v Lukoto* 2007 3 SA 569 (T) in which Judge President Ngoepe (who acted also as Judge President of the Venda High Court) granted permission for maintenance proceedings against a judge of the Venda High Court. This decision did not raise any public interest whatsoever. See also *Carrim (Pty) Ltd v The Hon Mr Justice Bosielo* (T) unreported case number 18887/08 of 10 October 2008 in which the court unceremoniously granted the applicant leave to sue the respondent for payment of the amount of R304 501-92 plus interest and costs.

its Crescent Retirement Fund. From May 2002 Judge Hlophe was paid R10 000-00 per month as consultancy fees, which amount increased to R12 500-00 per month from May 2003. It has been estimated that Judge Hlophe had received close to half a million rand from Oasis by the time the payments were exposed. Furthermore, faced with the argument that he required ministerial permission to perform extra-judicial work for remuneration, Judge Hlophe alleged that he had been given such permission orally by the former Minister of Justice, the late Dullah Omar. However, as former Constitutional Court Justice Johann Kriegler¹² has observed acutely:

This is odd. Omar had relinquished the Justice portfolio more than a year before the creation of the fund concerned, long before Judge Hlophe was appointed to its board and even longer before the payments (eventually totalling R467 500) commenced.

The Oasis financial connection and the ill-timed attempt to rely upon the impossible imprimatur of the late Dullah Omar landed Judge Hlophe in a right judicial pickle. The self-evident ethical quandary in which the judge placed himself when he gave Oasis leave to sue Judge Desai became the trigger which launched section 25(1) into the public domain for the first time in post-apartheid South African legal history.¹³

However, despite its being the legal fulcrum of Judge Hlophe's decision, lay people were not particularly interested in section 25(1) itself. Indeed, it would be hard to identify a popular news medium which made any express reference to the section in its coverage of the rumpus. Both the media and the citizenry were more concerned with the obvious conflict of interest embedded in the affair. It is the public scandal generated by this conflict which captured and held the public imagination for a number of months.¹⁴ The notion of a judge sacrificing a fellow judge for reasons of financial self-interest goes to the core of the judicial office and invites public scepticism about the supposed impartiality of the judiciary. Section 25(1) constituted

¹² Kriegler 2007 *Advocate* 33-34.

¹³ For accounts of the episode see Seedat 2007 http://www.idasa.org/our_products/resources/output/judicial_ethics; Seedat and February 2007 http://www.idasa.org/our_products/resources/output/the_danger_of; and Hoffman 2011 http://www.ifaisa.org/The_Hlophe_Inquiry_Papers.html.

¹⁴ The public dimension of the episode was brought to an end, more or less, in 2007 when Oasis announced publicly (in full-page newspaper advertisements) that it would not be pursuing its suit against Judge Desai. See Ensor 2007 <http://allafrica.com/stories/200705210251.html>.

an integral albeit innominate dimension of this public preoccupation. It had acquired, paradoxically, an incognito public presence.

3 Ngobeni's raid

Unsurprisingly, section 25(1) did not escape scrutiny from within the legal community. Legal professionals may well have shared the public fascination with the judicial goings on within and without the Western Cape High Court. However, the episode also prompted legal questions and discussions about section 25(1) itself, about the need for its existence, its rationale, its constitutionality and the like. As already noted, the section was a piece of old order legislation, and it was inevitable, more or less, that its legal interrogation would elicit an attack upon its appropriateness to the new South African legal order. In this regard, the strongest public assault upon the legitimacy of section 25(1) by a member of the legal profession came from Paul Ngobeni, former Deputy Registrar, Legal Services at the University of Cape Town, in an article published in the *Cape Times*.¹⁵ His perspective is worth quoting at some length:

The whole controversy highlights the danger of inheriting wholesale some of apartheid's legal absurdities.

The law in question, section 25(1) of the Supreme Court Act 59 of 1959, prohibits civil lawsuits against a judge except with the permission of the court in which the judge sits.

This bizarre statute applies to suits against judges even for purely personal extra-judicial acts such as car accidents, bar brawls and breach of contract.

It is mind-boggling why, in our constitutional democracy, a private citizen should be required to obtain permission to sue a judge for purely personal conduct which occurs when the judge is off-duty.

Such an absurd requirement is certainly not consistent with section 34 of the constitution and amounts to an unconstitutional impediment to the right of access to judicial forum.¹⁶

¹⁵ It must be noted here that Ngobeni wrote the article in his personal capacity.

¹⁶ Ngobeni *Cape Times* 11. In an interesting turn of events, Winston Nagan, a Florida University law professor who held an acting judgeship in the Cape High Court during 2006, was granted permission in 2009 under s 25(1) by Judge Steven Majiedt to sue Judge President Hlophe for defamation. See Schroeder *Cape Argus* 10; and Schroeder 2009 <http://www.iol.co.za/news/south-africa/hlophe-s-double-legal-blow>. According to Grootes 2009

In defence of the Judge President's decision to grant Oasis leave to sue Judge Desai, Ngobeni opted for the populist route, using the columns of a newspaper to assail the validity of section 25(1), to assign it an infamous place amongst "apartheid's legal absurdities" and to berate it as an unconstitutional infringement of section 34 of the Bill of Rights.

4 Soller's challenge

An arguably more serious assault upon section 25(1) which took place in a public forum but did not attract the kind of publicity which attached to the Hlophe-Oasis-Desai affair is to be found in the case of *Soller v President of the Republic of South Africa*.¹⁷ Like Ngobeni, the applicant in the *Soller* case impugned section 25(1) as unconstitutional for violating the fundamental right of access to courts protected by section 34 of the 1996 *Constitution*. Unlike the Ngobeni article, the *Soller* case represented a full frontal legal offensive against section 25(1). It is the specifically legal dimension of Soller's challenge to the constitutionality of section 25(1) which makes the case especially significant for the purposes of this contribution. The requirements of the section stood or fell as requirements of law and were confronted by Soller as such in open court. Whereas the Ngobeni piece had all the features of a populist but passing raid, the *Soller* case constituted an authentic offensive against the legality of the protection afforded the judicial office by section 25(1). The case will be considered in detail below.

5 Von Heulsen's disapproval

Academic distaste for section 25(1) predated the new constitutional dispensation.¹⁸ Thus far, however, Von Huelsen's is the only post-apartheid academic consideration of the doctrine of leave to sue judges in South Africa. He submits that the requirement of leave to sue is "a remarkable doctrine of South African law, as it appears that practically no other legal system in the world contains such a

¹⁷ <http://www.eyewitnessnews.co.za/articleprog.aspx?id=9351>, Ngobeni was offended by this decision and slammed it as "horrifying" and "outrageous".

¹⁸ *Soller v President of the Republic of South Africa* 2005 3 SA 567 (T) (*Soller*).

¹⁸ See, for example, Marcus 1984 *SALJ* 170-171.

concept".¹⁹ In other words, section 25(1) ran counter to international trends in respect of civil suits against judges. Von Heulsen²⁰ explores the history of the concept of leave to sue and demonstrates that it is a *sui generis* Batavian-Cape-Dutch legal concept; that is, "a rare example of original Cape (Dutch) Colonial law-making that has managed to survive in a practically unaltered form until today".²¹

Von Heulsen's overall disapproval of the doctrine of leave to sue reduces to four issues: firstly, the need for scepticism about the retention of the doctrine; secondly, the fact that judges decide if judges can be sued; thirdly, the possibility that section 25(1) violated section 34 of the 1996 *Constitution*, which he understands to provide for "unrestricted access to the courts"; fourthly, the need for section 25(1), given the extensive immunity already granted judges by the substantive law.²² Although he does not canvas all these issues in detail (and neither shall we), Van Heulsen's²³ position on section 25(1) is unequivocal: it was rooted historically in "a non-enlightened and undemocratic colonial class society" and, "amazingly", had overcome its opprobrious history to achieve a seamless transfer into the post-apartheid constitutional dispensation.²⁴

Their differences notwithstanding, Ngobeni, *Soller* and Von Heulsen share a new order rejection of an old order legislative provision. Indeed, although he takes a longer historical view, Von Heulsen's position is remarkably close to Ngobeni's in damning section 25(1) as absurd in the contemporary South African legal landscape. And both concur with *Soller* that the section did or probably did constitute a breach of section 34 of the *Constitution*. Their collective stance places firmly on the agenda of jurisprudential discourse both the legitimacy and validity of the doctrine of leave to sue. It is a matter of considerable moment, demanding scrutiny of a legal precept

¹⁹ Von Heulsen 2000 *SALJ* 713.

²⁰ Von Heulsen 2000 *SALJ* 723-727.

²¹ Von Heulsen 2000 *SALJ* 714.

²² Von Heulsen 2000 *SALJ* 715.

²³ Von Heulsen 2000 *SALJ* 727. Von Heulsen 2000 *SALJ* 726-727 demonstrates that the leave to sue doctrine was introduced at the Cape as protection for the entire Dutch colonial ruling class, including all members of the political, administrative, religious, military and judicial authorities. The scope of the doctrine was narrowed over time, as non-judicial colonial notables were excluded progressively, until by 1959 the doctrine applied only to judges.

²⁴ Von Heulsen 2000 *SALJ* 717.

which goes to the heart of the judicial office. Certainly, Ngobeni's dismissal of section 25(1) as a "bizarre statute" itself cannot be dismissed as either frivolous or as self-servingly ideological. Also, *Soller's* challenge is weighty enough and Von Heulsen's scepticism is stern enough not to be rejected summarily. In this connection, it bears noting that item 2(1)(b) of Schedule 6 to the *Constitution* prescribes "consistency with the new Constitution" as a requisite for the continued validity of old order legislation. The sequel thus needs to confront the question of whether or not section 25(1) of the *Supreme Court Act* passed the test of constitutional consistency. Although section 47(1) of the *Superior Courts Act* is not old order legislation, it too has to pass constitutional muster, as must all new order legislation. Given that there are no differences of substance between them, the analysis of the constitutionality of section 25(1) may be extended with confidence to the comprehension of section 47(1). However, such analysis has to be preceded by a consideration of the notion of judicial immunity which underlies the doctrine of leave to sue embedded in both section 25(1) and section 47(1).

6 Judicial immunity from suit

Since the doctrine of leave to sue relates directly to the issue of legal proceedings against judges, we consider that it may be classified under the broader rubric of judicial immunity. We take judicial immunity to encompass those situations in which judges enjoy exemption from legal proceedings. The doctrine prescribing that in certain circumstances legal proceedings may not be brought against judges without leave thus fits comfortably within the ambit of judicial immunity from suit. The latter bifurcates. On the one hand, there is the issue of immunity in relation to the performance of judicial functions; on the other hand, there is the question of immunity for judges in relation to extra-judicial matters.

The general approach internationally appears to be that judges be accorded absolute or comprehensive immunity against civil law claims for any and all actions taken in their judicial capacity. In this regard it matters not that they were negligent or even erred in the performance of their duties. The only question is if, during his or her lapse in judgment, the judge was performing a judicial function. If the answer is in

the affirmative he or she is beyond the reach of any civil claim for damages caused by his or her errancy. In a word, the judge is untouchable. This is the position in countries such as the USA, Canada, Australia and England.²⁵

The US case of *Mireles v Waco*²⁶ is a graphic example of the principle of absolute judicial immunity in action. Waco, a public defender, sued Judge Mireles of the California Supreme Court for general and punitive damages arising out of an episode in which the judge had Waco frog-marched backwards to his courtroom. Waco had earned the ire of the judge for failing to appear in his courtroom as scheduled. In fact, Waco was waiting to appear in a different courtroom in the same building. The angry Judge Mireles apparently ordered the police officers on duty "to forcibly and with excessive force seize and bring plaintiff into his courtroom". The police officers obliged and Waco was dragged backwards from the courtroom where he was waiting into Judge Mireles's courtroom. According to Waco he was also "cursed and called vulgar and offensive names" by the police officers and "slammed" unnecessarily by them through the doors and swinging gates of the judge's courtroom. Waco's suit against Judge Mireles was dismissed by the court of first instance, the Federal District Court, on the grounds that the judge enjoyed complete immunity from civil claims. However, the Court of Appeals disagreed and held that Judge Mireles was not acting in his judicial capacity when he ordered the forcible transfer of Waco to his courtroom and hence lost the immunity which came with his office.

When the matter reached the US Supreme Court, Judge Mireles prevailed. The majority of the court found that the Court of Appeals had erred in classifying the judge's act as non-judicial. In this regard, the court held that whereas the judge's act of ordering Waco's forcible transfer to his courtroom went beyond the pale, it nonetheless fell within the compass of a "function normally performed by a judge",²⁷ namely, "the function of directing police officers to bring counsel in a pending case

²⁵ See *Claassen v Minister of Justice and Constitutional Development* 2010 6 SA 399 (WCC) para 23; *Mireles v Waco* 502 US 9 (1991) 11; and Friedland *A Place Apart* 33.

²⁶ *Mireles v Waco* 502 US 9 (1991) (*Mireles*).

²⁷ *Mireles* 12.

before the court".²⁸ In other words, the fact that Judge Mireles's order exceeded the bounds of his authority did not render his act non-judicial *ipso facto*; his immunity was not nullified if the nature of said act, absent the excess, was consistent with the ordinary judicial function. The US Supreme Court thus made it clear that judicial immunity in respect of all acts performed by a judge *qua* judge, regardless of their aberrance, is indeed absolute, even in the face of "allegations of bad faith or malice" on the part of the wayward judge.²⁹

The invariable obverse of absolute immunity for judicial acts performed by judges is absolute liability for non-judicial acts. It is virtually a universal norm that a judge ought not to be immune from suit in respect of conduct which does not amount to a "function normally performed by a judge". The judge whose errantry falls outside his or her judicial capacity cannot invoke the doctrine of judicial immunity when the victim seeks recompense in the courts. In such a case, the judge is unprotected by his or her office and, like all other defendants, will have to rely upon the normal processes of law to rebuff the plaintiff's demands in order to avoid personal liability. In a word, the judge who causes damage extra-judicially is fair game. This was the approach taken by the Court of Appeals in *Mireles*. It was also the view adopted by dissenting Supreme Court Justice Stevens who submitted that Judge Mireles had ordered the police officers to perform two acts: the first was to bring Waco to his courtroom; the second was to assault Waco. Justice Stevens decided that whereas the former order was judicial, the latter was not, having "no relation to a function normally performed by a judge".³⁰ Accordingly, Judge Mireles ought not to have been immune to Waco's claim for damages.

Such, then, is the popular position regarding judicial immunity: the judge enjoys absolute protection in respect of all conduct which is judicial in the sense that it accords with the normal judicial function; the judge is afforded no protection whatsoever in respect of any conduct which is non-judicial and exceeds the purview of the normal judicial function. The generally accepted approach to judicial immunity

²⁸ *Mireles* 13.

²⁹ *Mireles* 11.

³⁰ *Mireles* 14.

thus may be comprehended in antithetical terms, in the sense that the judge who crosses the line between propriety and impropriety is either completely impervious or completely vulnerable to a damages suit.

The doctrine of judicial immunity as it operates in South Africa differs in two ways from the generally accepted approach outlined above. Firstly, judicial officers in South Africa do not enjoy an absolute immunity from lawsuits for conduct which constitutes part of the ordinary judicial function. Instead, South Africa adheres to a doctrine of limited judicial immunity derived from the Roman-Dutch side of our legal heritage. In terms of Roman-Dutch law judges could be forgiven their errors arising from lack of skill or knowledge and were shielded from liability therefor. However, fraud and deceit by judges were not to be countenanced and the offending judges could not rely upon their office to avoid accountability for their malfeasance.³¹ South African law has retained the gist of the Roman-Dutch position, affording judges only a "qualified privilege" pertaining to conduct performed "in the course of judicial proceedings".³² Their immunity is circumscribed by a requirement of good faith, in the sense that they are vulnerable to lawsuits for judicial acts which are performed *mala fide*. Thus, for example, in *May v Udwin*,³³ a magistrate faced a defamation suit for statements made during the performance of his judicial duties. Judge of Appeal Joubert held that judicial immunity would be defeated and personal liability for defamation would ensue if the statements were motivated "by *personal spite, ill will, improper motive or ulterior motive*, that is to say, by *malice*".³⁴ The Judge of Appeal went on to note that in South African law malice is a well-established criterion for determining the validity of judicial immunity.³⁵ In South Africa, then, proof of malice aforethought negates judicial immunity as a viable defence to a civil suit.

³¹ For a useful discussion of the writings of such Roman Dutch authorities as Voet and Groenwegen on the issue, see *Penrice v Dickinson* 1945 AD 6.

³² *May v Udwin* 1981 1 SA 1 (A) 9.

³³ *May v Udwin* 1981 1 SA 1 (A) (May).

³⁴ *May* 18, original emphasis. See also *Claassen v Minister of Justice and Constitutional Development* 2010 6 SA 399 (WCC), in which the court confirmed that judicial immunity was invalidated by judicial malice or bad faith.

³⁵ *May* 18.

Secondly, South Africa is exceptional in affording its judges the so-called procedural immunity previously contained in section 25(1) of the *Supreme Court Act* and now in section 47(1) of the *Superior Courts Act*. It is a form of immunity which applies to any judicial misadventure, whether committed inside or outside the ambit of the normal judicial function.³⁶ In other words, it is triggered in relation to civil suits against judges for damage caused by either judicial or non-judicial conduct. Essentially, a litigant wishing to sue a judge has to be granted prior leave to do so by the court of suit.³⁷ A judge whose judicial conduct had been motivated by malice or who had strayed beyond his or her judicial capacity could not be sued in terms of section 25(1) of the *Supreme Court Act* and cannot be sued in terms of section 47(1) of the *Superior Courts Act* unless the plaintiff has obtained leave to sue. This is an unusual requirement as regards both the judicial and non-judicial shenanigans of judges.³⁸ It departs from the fair game convention which could be expected to govern such cases and saddles the prospective plaintiff with a preliminary procedural responsibility of having to apply for and secure permission to sue the errant judge.

Leave to sue has to be sought by way of an application on notice to the relevant court.³⁹ In *N v Lukoto*⁴⁰ Judge President Ngope discusses briefly the practical operation of section 25(1) of the *Supreme Court Act*. The Judge President would receive the application for permission to institute proceedings. He or she then would consider the application in Chambers. Any application which is "patently frivolous" would be denied immediately. If it appears that an application may be meritorious, the Judge President would engage the judge in question and, where appropriate, may even "urge the judge to oblige". If the judge refused to co-operate, the application would be heard either in chambers or in open court, with the judge being

³⁶ See *Soller* para 17, in which the court held that for the purposes of s 25(1) there was no substantive difference between a suit based on a decision made by a judge in court and one based upon the extra-curial transactions of a judge. The judge needs protection against both if they are without merit.

³⁷ As noted above, it is unclear why s 47(1), unlike s 25(1), does not include expressly the possibility of an inferior court as the court of suit.

³⁸ Von Huelsen 2000 *SALJ* 714 identifies only Botswana and Namibia as two other jurisdictions which also rely upon the doctrine.

³⁹ Cilliers, Loots and Nel *Civil Practice of the Superior Courts* 137.

⁴⁰ *N v Lukoto* 2007 3 SA 569 (T) para 4 (*Lukoto*).

free to oppose it. However, if the applicant were able to demonstrate good cause,⁴¹ the Judge President would endorse the application and consent to the suit.⁴² If consent were refused despite good cause being shown, the Judge President's decision could be taken on appeal.⁴³ It may be presumed that this manner of dealing with applications for leave to sue would apply also to applications brought under section 47(1) of the *Superior Courts Act*.

The purpose of spelling out the operational tenets of an application for leave to sue in the previous paragraph was to highlight the procedural nature of the judicial immunity entrained in the designated sections. Such immunity does not pertain to the suit itself; that is, it does not comprise a substantive bar to civil litigation against judges for their excesses. Rather, the immunity in question is of a different order, with the doctrine of leave to sue constituting a procedural mechanism for protecting the judiciary against meritless lawsuits. In this regard, it is possible to comprehend the procedural immunity of section 25(1) of the *Supreme Court Act* and section 47(1) of the *Superior Courts Act* as a *quid pro quo* of sorts for the incomplete substantive immunity available to South African judges who transgress within the parameters of the judicial function.

7 The constitutionality of the doctrine of leave to sue

Both the curial and extra-curial challenges to section 25(1) of the *Supreme Court Act* referred to in the previous sections assailed its constitutionality, alleging essentially that its provisions violate section 34 of the 1996 *Constitution*.⁴⁴ It may be anticipated with considerable confidence, given its legal continuity with section 25(1), that any

⁴¹ In *Soller* para 9, Judge President Ngoepe read a relative dimension into the concept of good cause, holding that: "Whether or not good cause has been shown will depend on the facts and circumstances of each case." In *Lukoto* para 4, he went on to link the idea of good cause to the idea of the applicant having "an arguable case" against the judge. However, the concept of good cause does not have a precise definition in the context of the leave to sue doctrine. The most that can be said with any degree of confidence is that the meaning of good cause is to be determined on a case-by-case basis. This is also the position taken by Van Loggerenberg, Bishop and Brickhill *Superior Court Practice* A1-76.

⁴² *Lukoto* para 4.

⁴³ See *Soller* para 17.

⁴⁴ Although both Ngobeni and Von Heulsen founded their arguments for the unconstitutionality of s 25(1) on the s 34 right of access to courts, the analysis which follows necessarily focus upon the legal challenge launched by Soller.

serious assault upon section 47(1) of the *Superior Courts Act* also will focus upon its relationship to section 34 of the *Constitution*. Section 34 confers upon all persons a fundamental right of access to courts. It provides that:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.⁴⁵

In a word, section 34 seeks to guarantee the fair adjudication of justiciable conflicts in open court. The constitutional weight of the right of access to courts may be read from the fact that section 34 falls within the Bill of Rights, a self-proclaimed "cornerstone of democracy in South Africa".⁴⁶

The allegation that section 25(1) of the *Supreme Court Act* violated section 34 of the *Constitution* and the likely charge that section 47(1) of the *Superior Courts Act* offends against the same constitutional provision amounts to a double claim: firstly, that the sections in question contradict the "democratic values of human dignity, equality and freedom", which are affirmed by the Bill of Rights;⁴⁷ secondly, that the State, by re-enacting the old order section 25(1) as the new order section 47(1), has failed to obey its constitutional injunction to "respect, protect, promote and fulfil the rights in the Bill of Rights".⁴⁸ The argument from section 34 evidently is serious and thus needs to be taken seriously.

The *Soller* case is the only case thus far to have raised pertinently the relationship between the doctrine of leave to sue and section 34 of the *Constitution*.⁴⁹ In it the applicant sought to have section 25(1) of the *Supreme Court Act*:

declared to be invalid on the ground that such section is inconsistent with the Constitution of the Republic of South Africa on the grounds that such section is fundamentally discriminatory and offends the rights of citizens of the Republic of South Africa to proper and effective access to a court of law and to a fair trial.⁵⁰

⁴⁵ Since suits against judges invariably are curial affairs, this contribution will focus on the right of access to courts and will not consider the right of access to non-curiel adjudicative fora.

⁴⁶ S 7(1) of the 1996 *Constitution*.

⁴⁷ S 7(1) of the 1996 *Constitution*.

⁴⁸ S 7(2) of the 1996 *Constitution*.

⁴⁹ Unsurprisingly, there is no case law yet which features s 47(1) of the *Superior Courts Act*.

⁵⁰ *Soller* para 2.

Judge President Ngoepe understood the application to be making two interrelated allegations about section 25(1): firstly, that it "violates the rules of natural justice"; secondly, that it was discriminatory, affording judges "special protection which other people do not enjoy". He held that, in combination, these allegations reduced to a submission that section 25(1) of the *Supreme Court Act* contravened the right of access to courts guaranteed by section 34 of the *Constitution*. In other words, the application was calling into question the constitutionality of section 25(1).

In order to evaluate the application Judge President Ngoepe had recourse to the well-established test which assesses the constitutionality or otherwise of a legal provision according to a two-stage enquiry. The first stage involves a determination as to whether or not the provision violates the constitutional right as alleged. If the determination in the first stage is positive, the enquiry moves to the second stage, which entails an investigation of the legitimacy of the violation. If it emerges that the violation is warranted in terms of section 36 of the *Constitution*, then the legal provision in question is constitutional, and *vice versa*.⁵¹

In *Soller* the Transvaal Provincial Division of the High Court found without ado that section 25(1) of the *Supreme Court Act* did violate the applicant's right of access to courts protected by section 34 of the *Constitution*. According to Judge President Ngoepe:⁵²

It is true that s 25(1) of Act 59 of 1959 places a hurdle in the way of a prospective litigant, namely, that leave first be applied for and obtained.

This declaration contains the court's determination of the first stage of the enquiry into the constitutionality of the leave to sue doctrine. The court made no serious effort to explain why this requirement transgressed upon the applicant's section 34 right and based its finding upon a single Constitutional Court precedent.⁵³ However, section 25(1) was express in establishing curial consent as the *sine qua non* for any civil suit against a judge. Hence it always was more likely than not that the court

⁵¹ See *S v Makwanyane* 1995 3 SA 391 (CC), especially para 104.

⁵² *Soller* para 14.

⁵³ See *Soller* para 13, in which the court relied upon the precedent of *Beinash v Ernst & Young* 1999 2 SA 116 (CC).

would conclude that the section did trespass against the applicant's constitutionally entrenched and *prima facie* unqualified right of access to court.

Immediately after making the finding quoted above, Judge President Ngoepe proceeded to a consideration of the validity of the constitutional transgression implicit in section 25(1) with the question: "Is the section justified?"⁵⁴ This question introduced the second stage of the enquiry into the constitutionality of the leave to sue doctrine, which question the court sought to answer by having recourse to the purpose of section 25(1). This purpose, according to Judge President Ngoepe, was "to ensure the independence of the Judiciary" and to enable its members "to adjudicate matters fearlessly". However, this purpose is attainable only if judges are "protected against non-meritorious actions".⁵⁵ Section 25(1) provided judges with the protection which they required to execute their mandate without fear, favour or prejudice. The section operated as a "sifting mechanism", shielding judges from "an avalanche of non-meritorious civil claims by disgruntled litigants", that they may better devote their energies to the proper adjudication of meritorious claims.⁵⁶ In sum, then, section 25(1) was about guarding against non-meritorious civil suits intruding upon the judicial function and encumbering the administration of justice. The requirement of leave to sue was designed to separate claims with merit from those without, and ensure that judges were spared the tribulations of having to cope with the latter while being held to account for the former. In the end, the court decided that the transgression in section 25(1) was justified, and rejected the application to have the section struck down as unconstitutional.⁵⁷

In adjudging section 25(1) as passing constitutional muster Judge President Ngoepe followed the standardised two-stage approach for so-called Bill of Rights litigation in South Africa. He tested the constitutionality of section 25(1) and held that despite violating section 34 of the *Constitution* its trespass against the section was defensible in the light of its overall purpose of promoting judicial impartiality and independence. The procedure which Judge President Ngoepe followed was a

⁵⁴ *Soller* para 14.

⁵⁵ *Soller* para 14.

⁵⁶ *Soller* para 15.

⁵⁷ *Soller* para 19.

somewhat telescoped version of the more comprehensive procedure set out in section 36 of the *Constitution*. Even though he placed no express reliance upon the criteria specified in section 36, it is apparent that they informed his decision to uphold the constitutionality of the section 25(1) violation of the section 34 right of access to courts, and hence of section 25(1) itself.

At this point it bears repeating that when Judge President Ngoepe decided that a statutory provision enjoining a person to obtain leave to sue a judge does infringe upon that person's right of access to court, he did so without any apparent fuss or bother. Presumably, the infringement was considered to be self-evident by the Judge President and in no need of sustained analysis. As noted above, section 47(1) of the *Superior Courts Act* has not yet been the subject of judicial interpretation. However, it is patently a first-degree legal relation of section 25(1) and, should it become the target of a constitutional challenge, its analysis will probably follow that made of section 25(1) by Judge President Ngoepe in *Soller*. In other words, an acknowledgment that the section infringes the right of access to courts combined with the rider that such infringement is legitimate is apt to be accepted as the conventional assessment of section 47(1) from a constitutional perspective.

In this contribution we take the proverbial road less travelled and argue that section 47(1) of the *Superior Courts Act* does not limit the right of access to courts enshrined in section 34 of the *Constitution*, and hence does not need to be assessed against the limitation criteria contained in section 36 of the *Constitution*. We submit, *contra* conventional wisdom and possibly *contra mundum*, that it is possible to sustain a credible argument which does not require advancing to the second level of the test of constitutionality because section 47(1) passes constitutional muster at the first level of enquiry. We believe that section 25(1) of the *Supreme Court Act*, too, did not violate section 34 of the *Constitution*, and hence respectfully disagree with the approach taken by Judge President Ngoepe in *Soller*. The argument which follows in defence of the new order section 47(1) of the *Superior Courts Act* is derived directly from the constitutional examination of the old order section 25(1) of the *Supreme Court Act* and thus encompasses a defence of that section also.

In order to present this argument we must have recourse to the purpose of section 34 of the *Constitution*. In the forthcoming paragraphs it is argued that the section is fundamentally about warranting that all civil trials are fair trials, that in effect it creates a "fair trial right for civil proceedings".⁵⁸ It is an attempt to ensure that civil litigation is conducted according to the *mores* of fairness and that all civil litigants may be satisfied that the verdict which is rendered has been reached according to such *mores*. A right which is not properly implementable is no right at all. A right of access to courts counts for nothing if the courts in question are unable or unwilling to provide the adjudicative context which the right in question requires. In this connection, the right of access to courts is perforce a right of access to courts staffed by judicial officers who are independent and impartial, who are able and willing to discharge their functions without fear or favour or prejudice.

The predecessor of section 34 in the 1993 *Constitution* was section 22.⁵⁹ In *Bernstein v Bester*⁶⁰ the Constitutional Court had the following to say about the provisions of section 22 pertaining to access to courts:

These provisions do not expressly provide for a fair trial, but imply it. The right of access to court cannot mean simply the right to formally engage in a judicial process, however unfair it might be. In order to have substance and be meaningful, the right of access to court must imply the right of access to a fair judicial process.

The court went on to remind us that:

The need for civil judicial process to be fair is emphasised by the Constitution's insistence that the judiciary be independent and impartial, the prescribed oath of office, and the endorsement by the General Assembly of the United Nations of the principle that the judiciary should be independent and impartial.⁶¹

The court here is inserting an independent and impartial judicial authority as the natural and necessary link between the right of access to court and the right to a fair trial in civil matters. The proper implementation of the former right hinges upon the latter right, the literal manifestation of which is in the hands of the judiciary. It is in this context that the purpose of the right of access to court becomes apparent:

⁵⁸ Currie and De Waal *Bill of Rights Handbook* 739.

⁵⁹ S 22 provides that: "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."

⁶⁰ *Bernstein v Bester* 1996 2 SA 751 (CC) para 103 (*Bernstein*).

⁶¹ *Bernstein* para 103.

When section 22 is read with section 96(2), which provides that '[t]he judiciary shall be independent, impartial and subject only to this Constitution', the purpose of section 22 seems to be clear. It is to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the state. Section 22 achieves this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state, the '*regstaatidee*', for it prevents legislatures, at whatever level, from turning themselves by acts of *legerdemain* into 'courts'.⁶²

This is an important statement. It expressly ties the right of access to courts to those ideals subsumed within the juridical constitution of modern liberal (and neo-liberal) democracy. It associates the right directly with all the ideational accoutrements of legal liberalism, injecting into it a set of values which transcends its immediate concern with the adjudication of civil disputes. An impartial and independent judicial authority is a pillar of the normative architecture of the right contained in section 22. Absent such an authority, the right becomes trivial and banal, reduced to no more than a right of bare access. The proper fulfilment of the right of access to courts depends upon its elevation to a fair trial right under the aegis of a judicial office distinguished by impartiality and independence.

This perspective on section 22 meant that the Constitutional Court considered that the section did not provide only for the constitutionalisation of the right to invoke the authority of the courts to adjudicate civil disputes. It encompassed also the constitutionalisation of "the requirements of independence and impartiality", putting "the *nature* of the courts ... beyond debate".⁶³ In sum, for the Constitutional Court an impartial and independent judicial office was the operational *sine qua non* of the right of access to courts. The Court charged with interpreting the new constitutional dispensation bestowed upon the right created by section 22 a special status in this dispensation, indicating that the realisation of the right hinged upon the nature of the courts which constituted the object of the right. In a word, the right of access to courts would be of no account if the courts to which a litigant had access were of no account.

⁶² *Bernstein* para 105.

⁶³ *Bernstein* para 105, original emphasis.

Section 34 of the 1996 *Constitution* is the re-presentation of section 22 of the 1993 *Constitution*. Other than being wordier, section 34 re-enacts the substance of its predecessor with this crucial difference: that whereas section 22 incorporates an implied fair trial right, section 34 creates such a right expressly by prescribing a "fair public hearing" for the adjudication of civil disputes. This addition removes all doubt that may have attached to the fair trial reading of section 22;⁶⁴ the composition of section 34 confirms unambiguously that civil litigants have a constitutional right to a fair trial. In other words, section 34 constitutionalises the right to a fair civil trial (as does section 35 constitutionalise the right to a fair criminal trial).

In *De Beer v North-Central Local Council and South-Central Local Council*⁶⁵ the Constitutional Court had occasion to consider that aspect of section 34 which it dubbed "the section 34 fair hearing right". It had the following to say:

This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair.⁶⁶

Welcome as this pronouncement may be in drawing attention to the interrelation between fair proceedings, the rule of law and the quest for justice, perhaps its real significance lies in its ready confirmation that the right of access to courts constitutionalised by section 34 encompasses a right to a fair hearing before such courts.

It is true that for the practical purpose of deciding the matter before it, the court in *De Beer* sought to isolate the fair trial dimension from the overall right. It is submitted, however, that section 34 is jurisprudentially indivisible. The motif of access is fairness, and the substance of the right of access is governed by the extent to which the court seized with a matter is able and willing to adjudicate it fairly. Fairness, in its turn, is a function of judicial impartiality and independence. The court

⁶⁴ *Bernstein* para 106.

⁶⁵ *De Beer v North-Central Local Council and South-Central Local Council* 2002 2 SA 429 (CC) para 10 (*De Beer*).

⁶⁶ *De Beer* para 11.

in *Bernstein* was alive to this complex of relations, finding that the right of access to courts in fact constitutionalised the judicial obligation to adjudicate without fear, favour or prejudice. Although the court in *De Beer* did not foreground the integrated nature of the right, it did highlight the fact that section 34 did not create a bald right of access, accepting that it incorporated a right to a fair trial. In short, section 34 represents the constitutionalisation of the domain of juridical fairness, including impartiality and independence as juridical ideal types.

Contrary to Von Huelsen's understanding that section 34 "provides for unrestricted access to courts",⁶⁷ the right to litigate cannot be an unqualified right for the simple reason that it has to exclude suits which are without merit. After all, a free-for-all right of access would put a tremendous strain upon the resources of the administration of justice. It probably would do more harm than good, prejudicing those who have meritorious claims to prosecute. This delimitation of the ambit of section 34 ought not to be taken as an exercise in interpretive pedantry. The argument for a qualified right of access is not only logically valid but also practically necessary. No legal regime could tolerate the untrammelled pursuit of insubstantial claims in its courts without doing serious injury to the interests of meritorious claimants. Therefore, section 34 must be construed as having a built-in filter which separates meritorious from frivolous claims and which extends access rights only to holders of the former. Despite adopting the traditional assessment of section 25(1) as a justifiable infringement of section 34 in *Soller*, Judge President Ngoepe hit our nail on its juridical head with his colourful "who on earth has a 'right' to prosecute a frivolous or non-meritorious claim?".⁶⁸ To answer this interrogatory is to comprehend the ironic truth that even though it was a product of the old order, section 25(1) was also completely consonant with the new constitutional dispensation.

Our submission that section 47(1) of the *Superior Courts Act* does not violate section 34 of the *Constitution* is founded upon the foregoing discussion. If section 34 is centrally about ensuring that every person with a meritorious civil claim has access to a court which will adjudicate such a claim without fear, favour or prejudice, then

⁶⁷ Von Heulsen 2000 *SALJ* 715.

⁶⁸ *Soller* para 16.

section 47(1) is crucially about facilitating the impartiality and independence of judicial officers in the exercise of their functions. From this perspective there is a large and palpable intersection between the general purposes of the two provisions: both are concerned to have justiciable civil disputes with merit adjudicated by an impartial and independent judiciary. In other words, the ultimate ambition of both sections is to ensure that the uncorrupted juridical apparatus needed to meet the fairness requirement for civil trials is readily available. If section 34 exists to safeguard the right to a fair civil trial, then section 47(1) exists to safeguard from unfair intrusions the judges upon whom we rely to implement that right. This is the context of our proposition that requiring litigants to obtain leave to sue a judge in fact does not make any inroads upon their right of access to court. Indeed, the point may be pressed further, to contend that the leave to sue requirement may be comprehended legitimately as promoting the right of access. In other words, section 47(1) may be construed validly as being a complement to section 34 rather than as being its contrary. If section 34 constitutionalises the right to a fair civil trial then section 47(1) is constitutional for its practical endorsement of the implementation of that right. Indeed, the two conspire to advance the cause of the fair trial as the constitutional hallmark of civil litigation in South Africa.

There is a dialectic at work in the relationship between section 47(1) and section 34. Apparent opposites converge in defiance of their historical roots and unite in defence of the fundamental right to a fair civil trial. The yin of section 47(1) conjoins with the yang of section 34 in an integrated quest for the constitutional aspiration of a fair civil procedural regime presided over by judicial officers untainted by the debilities of fear, favour and prejudice. If section 34 constitutionalises the right to a fair civil trial then the realisation of that right requires the admission of the constitutionality of section 47(1). We have argued that section 47(1) passes constitutional muster in the first stage of the traditional two-stage investigation into the constitutionality of statutes. We have sought to convince that its provisions do not violate those of section 34, and that, contrariwise, they contribute to attaining the constitutional right to a fair civil trial enshrined in section 34. We have contended that section 47(1) aims to protect the judiciary against mischievous or malicious claims for no

other purpose than that it may devote its time and talents to the judicious determination of meritorious claims. In this context, to argue that the leave to sue injunction is a constitutional infraction, even a justifiable one, is questionable and to accept it as such is regrettable.

8 The judicial office

Hitherto we have focused upon the black letter law of judicial immunity. However, statutory stipulations invariably have a jurisprudential provenance of one form or another. This final section seeks to excavate the core jurisprudential tenets of the doctrine of leave to sue. It explores the nature of the judicial office with a view to discerning the jurisprudential justification of section 47(1). We consider that such an exercise is both a necessary and a desirable complement to the formal legal argument presented earlier. Black letter legal argumentation is enriched and authenticated when comprehended within the context of its jurisprudence. Also, we hope that viewing the doctrine of leave to sue through a jurisprudential lens will deliver fresh insights into why it has survived unscathed into our new constitutional order.

Section 47(1) is an aspect of the universal ideal of judicial impartiality in the disposition of legal conflicts.⁶⁹ We understand judicial impartiality to mean, essentially, that the decisions of judges are disinterested, free of bias and even-handed. In other words, a judge is impartial when his or her decisions are, and are perceived to be, fair and just. Indeed, in the Australian case of *Fingleton v R*⁷⁰ the court considered the availability of judges who "can be assumed with confidence to exercise authority without fear or favour" to be "the right of citizens".

Judicial impartiality, in turn, is founded upon the cognate notions of judicial independence and judicial accountability. The former refers to sovereign decision-making, unconstrained by external considerations of any sort;⁷¹ the latter requires rational decision-making which is defensible both logically and legally, and which is

⁶⁹ See s 165(2) of the 1996 *Constitution*.

⁷⁰ *Fingleton v R* 2005 HCA 34; 2005 216 ALR 474 para 38 (*Fingleton*).

⁷¹ See Dingake 2012 http://icj.org/dwn/database/Dingake_J-Concept-Independence-Judiciary_2.

open to public and appellate scrutiny.⁷² We take judicial impartiality, as structured by judicial independence and judicial accountability, to be the core aspirational value of the judicial office. Ultimately public confidence in the administration of justice is a function of public confidence in the ability of judges to be impartial in the adjudication of civil disputes.⁷³ As a judge of the High Court of Botswana explains, "Courts in liberal democracies founded on the rule of law depend on public confidence for their credibility."⁷⁴

The quest for judicial impartiality is bound up intimately with the nature of the judicial office itself. The judicial office is fundamentally a legal institution, that is, it is an attribute of the law.⁷⁵ For the purposes of this contribution, we accept Seagle's⁷⁶ proposition that law "represents humanity's effort at self-domestication". Law is the "civilised" alternative to the coercion inscribed in the self-help regime of the pre-legal era, the era of the so-called *bellum omnium contra omnes*.⁷⁷ Civilisation, according to Seagle, has a decidedly "legal cast", in terms of which "all transactions assume legal forms, and everything is subject to legal regulation".⁷⁸ In other words, the civilised worldview is, at bottom, a juridical worldview. There is no truer representative of the legal cast of our civilisation than the judge.

⁷² See *Soller* para 15; *Fingleton* para 39; and Cameron 1990 *SAJHR* 253. Although the notion of judicial accountability is relatively unproblematic, often it is difficult to distinguish definitively between the concepts of judicial independence and judicial impartiality. These two concepts tend to converge in the idea of courts delivering judgments without fear or favour or prejudice. It is this conceptual coalescence which perhaps explains the tendency in the literature and cases to neglect their differences.

⁷³ See *Valente v The Queen* 1986 24 DLR (4th) 161 SCC 36-37.

⁷⁴ Dingake 2012 http://icj.org/dwn/database/Dingake_J-Concept-Independence-Judiciary_3.

⁷⁵ Law is used here as the historical antithesis of and successor to custom. The latter signifies a pre-legal social condition and is associated with the pre-history of humankind. Law, by contrast, betokens civilisation, that is, humankind's transcendence of the primitive stage of social evolution. In this connection it must be noted that law is not an aboriginal feature of human society and that it is circumscribed by its own historicity. Thus, Seagle *Quest for Law* 11 reminds us: "Mankind has been governed by custom longer than it has lived under the reign of law."

⁷⁶ Seagle *Quest for Law* xv.

⁷⁷ Of course, it must be acknowledged here that, despite its non-violent façade, law ultimately relies upon state violence or the threat of such violence for its efficacy. Legal relations are steeped in the self-same dynamic of duress which characterises self-help. They are imperative to the core. In this regard, law may be classified as a structure-in-violence. It is different from self-help only in the sense that its violence is generally neither immediate nor overt.

⁷⁸ Seagle *Quest for Law* 27.

Our civilisation has appointed judges as the human fulcrum of the legal system. We have embraced Blackstone's famous oracular conception of the judicial office,⁷⁹ in terms of which the judge is the law incarnate.⁸⁰ In court, judge and law are indivisible.⁸¹ Judges embody the law by disembodying themselves, by assuming the attributes of a generic office, unencumbered by the idiosyncrasies of personal difference.⁸² The highly ritualised and stylised curial processes, including the judicial sartorial conventions, which comprise the physiognomy of the judicial office, are designed to dehumanise judges so that they may humanise the law.⁸³ In order to personify the law judges depersonalise themselves.⁸⁴ They are the conduit for the corporealisation of the law,⁸⁵ concentrating in their persons the entire edifice of legal discourse and intercourse.⁸⁶

⁷⁹ See Dawson *Oracles of the Law* xi; Ehrlich *Ehrlich's Blackstone* 26; Cameron 1990 *SAJHR* 252; and Davies *Delimiting the Law* 68.

⁸⁰ More than 50 years ago already Cantrall 1959 *ABAJ* 339 perceived that: "To the people of his jurisdiction, the judge is the personal embodiment of our American ideal of justice. In his jurisdiction he is the court. He is the leader in all judicial matters, the one to whom all look for the administration of justice."

⁸¹ In terms of the theory of semiotics, a sign consists of a signifier and a signified. The former refers to a given materiality, the latter to its meaning. In our case the judge or judicial office may be comprehended as a sign consisting of the union of the person occupying the office as signifier and of the law as signified. See Saussure *General Linguistics* 65-70.

⁸² See Cantrall 1959 *ABAJ* 340: "The judge cannot punch a time clock and leave the job. He is The Judge twenty-four hours a day, every day."

⁸³ See Berns *To Speak as a Judge* 206-210; Goodrich and Hachamovitch "Time out of Mind" 171; and Cantrall 1959 *ABAJ* 340. It may be argued that the trappings of the judicial office are an expression of the monopoly of legal authority and of the power of legal discourse to eject all matters non-legal from the precincts of adjudication. Thus, Hay "Property, Authority and the Criminal Law" 27 has written convincingly about the "importance of spectacle" designed to evoke "awe in ordinary men" during criminal trials in eighteenth-century England, and rightly has described it as an "elaborate ritual of the irrational". This perspective is valid but not inconsistent with the idea of the judge as vivifier of the law. In this case, there is something eminently rational inscribed in the judicial ritual of the irrational.

⁸⁴ Judicial depersonalisation or de-individuation must not be confused here with judicial impartiality. The former goes to the constitution of the judicial office and the propagation of the juridical worldview. The latter traverses the ideological constitution of the judicial officer. The Realists taught us long ago that the judge's ideological predisposition survives his or her subsumption under the judicial office.

⁸⁵ The following musical pronouncement by the Lord Chancellor in Gilbert and Sullivan's comic opera *Iolanthe* captures consummately, if perhaps somewhat cynically, the relationship between the law and the judge: "The Law is the true embodiment of everything that's excellent. It has no kind of fault or flaw, And I, my Lords, embody the Law."

⁸⁶ Most judges likely have a much more prosaic self-image. However, their subjective understandings do not invalidate the objective conditions structuring the judicial office.

Absent the judge, we have no law.⁸⁷ What is more, the contemporary world has witnessed a remarkable expansion of the judicial office beyond traditional legal parameters. We live in an epoch marked by the judicialisation of life.⁸⁸

The types of decisions that contemporary democracies entrust to courts [are] consistently on the increase as the public hand reaches deeper into the lives of individuals and develops new areas of regulation, often under a growing demand for justice. As a consequence, judges today not only settle disputes but also solve problems that other institutions are unable or unwilling to deal with effectively.⁸⁹

Nowadays we expect judges to be the regulators of many matters social, economic and political. Following the dictates of the dialectic, we require the dehumanised and disembodied judge to ensure that our humanity and our bodily integrity are not violated. As the impotence of our non-judicial institutions has been exposed progressively, so have we looked to the judiciary to modulate also some of the stubborn contradictions which confound our quest for human solidarity.⁹⁰

Whether or not we like it and whether or not it offends our democratic sensibilities,⁹¹ judges are different from the rest of us. We require them to craft non-violent solutions to conflicts in the shadow of the violence immanent in the law. In order for them to do what we ask of them, judges need to be impartial, and hence independent and accountable.⁹² In practical terms, judicial impartiality demands that

⁸⁷ Of course, other offices in the justice system (state attorneys, prosecutors, counsel, court officials, correctional officers, parole officers and the like) also corporealise the law. But they all do so synecdochically. Only the judge embodies the law.

⁸⁸ Koopmans *Courts and Political Institutions* 268 defines judicialisation as "the growing influence of the courts, in particular on matters which were once considered purely political".

⁸⁹ Guarnieri and Pederzoli *Power of Judges* 1. See also Lee *Judging Judges* 7.

⁹⁰ Classic cases in which the Constitutional Court decided upon such major issues or provided guidelines for parliament to do so include *S v Makwanyane* 1995 3 SA 391 (CC) (death penalty); *Fourie v Minister of Home Affairs* 2005 3 BCLR 241 (SCA) (same-sex marriage); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (access to adequate housing); *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) (access to health care); *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC) (access to health care); and *MEC for Education, KwaZulu-Natal v Pillay* 2008 2 BCLR 99 (CC) (right to equality, cultural rights and religious rights). For informative and interesting analyses of all but the last of these cases, see Roux *Politics of Principle* 238-248, 252-256, 273-303.

⁹¹ It hardly can be disputed that the process of judicialisation is *prima facie* undemocratic, in the sense that it entrusts immense power to unelected state officials. However, such judicialisation arguably is not inconsistent with the neo-liberal catechism which has insinuated itself into the constitution of latter-day democracy.

⁹² The need for judicial impartiality is inscribed in our renunciation of self-help and our installation of the judiciary as the vanguard of self-regulation. We require our judges to be and to be seen to be impartial when they decide our conflicts. Of course, it is notorious that judges sometimes

judges be free of the quotidian cares and contestations which bedevil the transactions of the pedestrian subjects of the law. There is, in other words, good reason to be found in the very nature of the judicial office for its members not to be subject to all the fetters which structure the lives of ordinary people.

The jurisprudential crux of section 47(1) of the *Superior Courts Act* is embedded in the nature of the judicial office and its core value of judicial impartiality. The procedural immunity which the section affords South African judges is a mechanism for sparing them the nuisance of having to deal with frivolous litigation, either as defendant or as adjudicator. Every specious suit against a judge, *per definitionem*, represents an incursion into judicial impartiality by urging that the court give credence to a claim which does not qualify for curial adjudication.⁹³ In this regard, the doctrine of leave to sue seeks to ensure that judges do not have to adjudicate claims which resort beyond the compass of their judicial capacity. It is a doctrine which operates to protect and advance the principle of judicial impartiality.

The need to free judges from the burden of having to face or adjudicate frivolous claims is self-evident in an era marked by the judicialisation of life. The contemporary expansion of the judicial role brings with it an exponential increase in the likelihood that the conduct of judges will offend as much as it will satisfy. Perforce, therefore, we need the doctrine of leave to sue in order to warrant that judges do not become sitting ducks for wrongly aggrieved or opportunistic claimants and to ensure that judicial resources are not expended unnecessarily upon the adjudication of their claims. Judicial immunity, including the procedural variety of

make decisions informed by their political beliefs, their ideological dispositions or their class affiliations. In other words, judges are known to betray their oath to adjudicate without fear or favour or prejudice. However, we are not concerned here with the *realpolitik* of judicial practice. The submission is that impartiality and its major constituent values, independence and accountability, are aspirational attributes of the judicial office. In other words, notwithstanding that they are "ideal-types", impartiality, independence and accountability remain core resources in delineating the parameters of adjudication.

⁹³ It must be noted here that the plaintiff's claim, albeit frivolous, probably derives from interaction with a judge in the latter's capacity as a private person. However, the private life of a judge is not a constituent element of the judicial function.

section 47(1), "is meant to afford the public protection and not the judicial officer per se".⁹⁴

Meritless suits against judges do violence to the status which our society, rightly or wrongly, has bestowed upon them. If countenanced, they place at risk the proper functioning of the judicial office. Needless to say - and no judge will demur - the rule of law demands that judges whose non-judicial behaviour causes damage not be shielded by the majesty of the judicial office. The judge who has gone off the rails of his or her office has to join the ranks of regular people, temporarily at least.⁹⁵ However, meritless allegations ought not to trigger litigation which probably will cause damage to the judicial office itself. In South Africa the survival of the old order doctrine of leave to sue into the era of constitutional supremacy comprises a new order homage to the judge as the corporealisation of the law and to the pivotal position occupied by the judicial office in our collective "effort at self-domestication".

Despite their differences in wording and ambit, section 47(1) of the *Superior Courts Act* self-evidently is a contemporary re-proclamation of section 25(1) of the *Supreme Court Act*. Certainly, both the substance and spirit of the old order section 25(1) live on in the new order section 47(1). A similar re-enactment had taken place earlier with the passage of the *Constitutional Court Complementary Act* 13 of 1995. Section 5(1) of this Act extended the leave to sue doctrine from ordinary judges to Constitutional Court judges.⁹⁶ Section 5(1) was enacted after the commencement of the 1993 *Constitution* which enshrined the right of access to courts in section 22, the predecessor of section 34 of the 1996 *Constitution*. The *Constitutional Court Complementary Act* was thus a new order statute in that it was the creature of the post-apartheid legislature.⁹⁷ The fact that the new constitutional state elected not to abandon the leave to sue doctrine but instead to broaden its protective ambit to

⁹⁴ Dingake 2012 http://icj.org/dwn/database/Dingake_J-Concept-Independence-Judiciary_1. See also Soller para 14 and Lukoto para 4.

⁹⁵ See Lukoto para 3-4.

⁹⁶ S 5(1) provided that: "Notwithstanding anything to the contrary in any law contained, no civil proceedings by way of summons or notice of motion shall be instituted against any member of the Court, and no subpoena in respect of civil proceedings shall be served on any member of the Court, except with the consent of the- (a) Chief Justice, in the case of the President of the Court; or (b) President of the Court, in the case of any other judge of the Court."

⁹⁷ See Von Heulsen 2000 *SALJ* 728.

include judges of the Constitutional Court is highly suggestive, bespeaking a new order confidence in the doctrine. Significantly, the *Constitutional Court Complementary Act* was passed without any vocal opposition from either the legal fraternity or the public.⁹⁸

The passage of the *Superior Courts Act* itself was preceded by two bills,⁹⁹ and the proposals contained in these bills to restructure the superior courts in South Africa caused a public furore. However, the inclusion of the doctrine of leave to sue in the bills¹⁰⁰ did not elicit so much as a murmur of protest. Its inclusion in the *Superior Courts Act* has elicited no public comment whatsoever. It would appear that the nature of the judicial office and the existential vinculum between judge and law have not been affected in any serious way by the South African political and legal transformation. Certainly, section 47(1) of the new order *Superior Courts Act* constitutes an unambiguous acceptance of the old order notion of the judge as the cultural repository of legal relations.

9 Conclusion

The earlier part of this contribution attempted to prove that the doctrine of leave to sue does not offend against the constitutional right of access to courts, and to do so from a decidedly polemical position. The latter part sought to situate and justify the existence of the doctrine in the context of the nature and operation of the judicial office. In this connection, the doctrine of leave to sue may be comprehended as a necessary and desirable statutory adjunct to the jurisprudential constitution of the judicial office.

The provisions of section 47(1) of the *Superior Courts Act* represent a means of promoting and protecting the concept of judicial impartiality, thereby allowing the judicial office to be what, wisely or otherwise, we expect it to be. The section endeavours to give practical effect to the notion of the judge as the personification of the law, thereby facilitating the optimal functioning of the judicial office. It

⁹⁸ The *Constitutional Court Complementary Act* has been repealed since by the *Superior Courts Act*.

⁹⁹ The *Superior Courts Bill* B52 of 2003 and the *Superior Courts Bill* B47 of 2011.

¹⁰⁰ S 44(1) of B52 of 2003 and s 47(1) of B47 of 2011.

comprises a statutory acknowledgment that an impartial judiciary is a necessary component of the juridical worldview which is embedded in the socio-economic and political structures of contemporary life. Section 47(1) of the *Superior Courts Act* is the direct descendant of section 25(1) of the *Supreme Court Act*. The latter was an element of the old order legislative landscape. Hence, it may be taken that the old order doctrine of leave to sue qualifies to be acknowledged as a precondition for an effective and efficient judicial office in the new South Africa.

The analytical fulcrum of this contribution is the proposition that, despite its derivation from the old order section 25(1) of the *Supreme Court Act*, the new order section 47(1) of the *Superior Courts Act* passes the test of constitutionality at the first level of enquiry. That is to say, it does not violate section 34 of the 1996 *Constitution* and hence does not have to be justified under section 36 of the *Constitution*. In a word, there is no misalignment whatsoever between section 47(1) of the *Superior Courts Act* and the *Constitution*. It will be recalled that section 25(1) of the *Supreme Court Act* was attacked as unconstitutional from a number of quarters before being repealed. In the only case which confronted the constitutionality of section 25(1), the court considered that the section failed the first level of enquiry but could be redeemed at the second level. The argument of this contribution thus may be read as a somewhat subversive submission that section 25(1) of the *Supreme Court Act*, which has been condemned variously as absurd, bizarre and mind-boggling, never actually was impeachable constitutionally. Primarily, however, it is presented as an anticipatory defence of the immaculate constitutionality of section 47(1) of the *Superior Courts Act*.

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LIST OF ABBREVIATIONS

ABAJ	American Bar Association Journal
Cambridge J Econ	Cambridge Journal of Economics
GEAR	Growth, Employment and Redistribution Policy
JSAS	Journal of Southern African Studies
RDP	Reconstruction and Development Programme
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal

DEFENDING THE ABSURD: THE ICONOCLAST'S GUIDE TO SECTION 47(1) OF THE SUPERIOR COURTS ACT 10 OF 2013

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R Koen**

SUMMARY

This contribution was intended as a defence of section 25(1) of the *Supreme Court Act* 59 of 1959. However, the Supreme Court Act was repealed in August 2013 and replaced by the *Superior Courts Act* 10 of 2013, and in the process section 25(1) of the former gave way to section 47(1) of the latter. Both sections concern the doctrine of leave to sue judges in South Africa. Both prescribe that any civil litigation against a judge requires the consent of the court out of which such litigation is to be launched. Both apply to civil suits against judges for damage caused by either their judicial or their non-judicial conduct.

Although section 25(1) had been one of the more inconspicuous sections of the *Supreme Court Act*, it was contested on occasion. Both curial and extra-curial challenges to section 25(1) assailed its constitutionality, alleging essentially that its provisions violated the right of access to courts enshrined in section 34 of the *Constitution of the Republic of South Africa*, 1996 and that such violation did not meet the limitation criteria contained in section 36. It may be anticipated with considerable confidence, given its legal continuity with section 25(1), that any serious assault upon section 47(1) of the *Superior Courts Act* also will focus upon its relationship to section 34 of the *Constitution*.

This contribution is a pre-emptive defence of section 47(1) of the *Superior Courts Act* and, by extrapolation, a belated justification of section 25(1) of the *Supreme Court Act*. An attempt will be made to demonstrate, contrary to conventional wisdom, that section 47(1) does not limit section 34 and passes constitutional

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muster at the first level of enquiry, thereby obviating the need for advancing to the second level of enquiry contained in section 36 of the *Constitution*.

The jurisprudential crux of section 47(1) of the *Superior Courts Act* is embedded in the nature of the judicial office and its core value of judicial impartiality. The procedural immunity which the section affords South African judges is a mechanism for sparing them the nuisance of having to deal with frivolous litigation, either as defendant or as adjudicator. Every specious suit against a judge, *per definitionem*, represents an incursion into judicial impartiality by urging that the court give credence to a claim which does not qualify for curial adjudication. In this regard, the doctrine of leave to sue seeks to ensure that judges do not have to adjudicate claims which resort beyond the compass of their judicial capacity. It is a doctrine which operates to protect and advance the unimpeachable principle of judicial impartiality.

KEYWORDS: judicial immunity; leave to sue; suing judges; right of access to courts; civil litigation; judicial office; judicial independence; judicial impartiality.