

Courts and counter- revolutions

In a debate between Khehla Shabane and RW Johnson published in *Business Day*, 16 July 2008, Shabane referred to ANC secretary-general Gwede Mantashe who recently entered the fray in the battle between the Constitutional Court and Cape Judge President John Hlophe, and who was quoted as saying that Constitutional Court judges were part of 'counter-revolutionary forces' preparing to 'pounce on Zuma.'

Shabane asked: 'Did Mantashe have a right to make those statements? What is their deeper significance, if any? Is the ANC preparing for an all-out attack on the judiciary? Who are the real counter-revolutionaries? ... The ANC is convinced there is a conspiracy against Zuma and appears to hold the view that anyone who does not show support for Zuma not to be prosecuted is part of that conspiracy. Not one ANC leader has, however, explained this conspiracy. Mantashe would be helpful if he explained the conspiracy and who the counter-revolutionaries are.'

In his reply RW Johnson stated: 'There certainly has been a conspiracy against Zuma. When you think of the hundreds of thousands of manhours the state has devoted to trying to convict Zuma, it is obvious that this could not have happened without extreme pressure from the very top. Just think of how on the eve of Polokwane the Scorpions suddenly leaked to the media a greatly extended list of charges against Zuma - while not informing Zuma himself of them. This was a quite transparent attempt to influence opinion against Zuma. You couldn't possibly go after its deputy president in such a fashion unless you had a green light from the party's president.'

So the original mischief is Thabo Mbeki's corruption of all the chapter nine bodies.

And let's not pretend that judges have been above this. The appeal court leaked its verdict against Zuma to the media before it was publicly announced. And they parroted the phrase about a "fundamentally corrupt relationship" between Schabir Shaik and Zuma, betraying that they hadn't even read the original transcript of the Shaik trial.

But you are of course right that we need an independent judiciary. The key will lie in the Constitutional Court showing some real guts now.'

Jeremy Gauntlett SC subsequently joined the debate. In a letter to the editor, posted on the *Business Day* website on 22 July 2008, he writes as follows:

'RW Johnson asserts (in *Courts and Counter-Revolution*, 16 July) that the courts are party to a Mbeki-led conspiracy against Zuma.

He says South Africa should "not pretend" that its judges "have been above this." He invokes two pieces of proof: that the Supreme Court of Appeal "leaked its verdict against Zuma to the media before it was publicly announced," and that it "parroted the phrase about a 'fundamentally corrupt relationship'" between Zuma and Shabir Shaik "betraying that they hadn't even read the original transcript of the Shaik trial."

Johnson's facts are not just scant – they are flat wrong.

- He confuses the SCA judgment in 2006 in Shaik's corruption appeal with its ruling more than a year later relating to search and seizure warrants served on Zuma. Two appeals, not one, Zuma not a party to the first and Shaik not a party to the second.
- The phrase "generally corrupt relationship" (Johnson cannot even get this right) was used in the Shaik ruling, not the Zuma one.
- Of course the SCA slipped (as it immediately acknowledged) in ascribing the phrase to the trial judge. But it was used: in public comment on the trial judgment, before the appeal, and in oral argument during the appeal.
- The trial transcript for the appeal in Shaik exceeded 6 000 pages. Johnson knows the SCA judges cannot publicly answer his blunt charge that they did not even read it. Someone who knows must set the record straight. As the leader of the defence team in the Shaik appeal, I have read that record and observed every moment of the hearing. I watched each judge and heard each of the probing questions - fired at both prosecution and defence - during a long hearing. Their command of the factual and legal issues reflected weeks of study and reflection. Their ruling stood the test of a further marathon appeal to the Constitutional Court.
- The court outcomes belie Johnson's thesis. Zuma succeeded in his rape trial defence. He succeeded in having his corruption trial struck from the roll. He won one warrant challenge in the High Court and lost one. The appeal against those orders to the SCA resulted in three judges dismissing his claims and two supporting him (the Constitutional Court ruling is now pending). Hardly the stuff of institutional servility.
- There was no "leak" of which I am aware of the SCA ruling - in either the Shaik appeal or the Zuma appeal.

Johnson's co-columnist in *Face Off*, Khehla Shabane, is stoic in dealing with his weekly condescensions. But he is spot-on to challenge Johnson this time on his astonishing allegations that the judiciary as an institution is involved in the presidential conspiracy in which he believes.

Johnson's alignment with those who would call the Chief Justice and his colleagues "counter-revolutionaries" on this gossamer basis is discreditable. It says little for a superannuated history don and (understandably brief) director of the respected Helen Suzman Foundation, turned pundit. Openly asserting moral corruption in the top judiciary on no responsible factual basis undermines constitutionalism and the rule of law itself.

Of course individual corrupt judges should be pursued with vigour (would we saw that). Of course court judgments should be analysed and, where appropriate, criticised. But even a conspiracy theorist should read them first, and check his facts with those involved.

Or might that get in the way of a sensationalist conclusion, drawn first and sketchily reasoned after?'



See also pages 35 and 41 for comments on the Judiciary.