



*Not since the 1950s has there been such a sustained attack on the highest court.*

# The dispensable judiciary



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## Not just Polokwane

Not since the 1950s has there been such a sustained attack on the highest court. Then the attack was the result of a clash between, on the one hand, pushing through political ideology and, on the other, a court's determination to preserve its own independence. There the battle was fought out in the courts in what is known as the 'High Court of Parliament' case.

Today the attack is more collateral, but if successful, it has the potential of destroying the integrity of the Constitutional Court (the Concourt) and the public's faith in the judiciary as an impartial institution capable of dispensing justice impartially to all. And the battle is not being fought in courts but in the forum of public opinion - an

arena where the courts are impotent and must depend on others to respond.

Few lawyers and fewer organisations within our profession have spoken out against interference with judicial independence. Instead a division has been drawn within our ranks which is not based on any sociological issue but on alignments regarding the leadership issue within the ANC and on the support for particular individuals. Present and possible future conduct by members of national institutions, including the judiciary, are analysed by reference to whether they might favour the ANC President Jacob Zuma and the Polokwane elected or disfavour them. If Zuma may be affected then as if by inevitable deduction the conclusion is that there must be institutional bias, and the attacks begin. The most explicit attack was the statements by Julius Malema which illustrates the extent to which supporters of an individual will have no qualms about undermining democratic institutions and disregarding the rule of law.

Despite this clear evidence, we as a professional body are divided between those who believe that President Mbeki has already tainted our judiciary, as part of a process of centralising power and dominating institutions, by appointing judges who would decide matters by reference to perceived personal allegiances or dislikes, and on the

other hand, those who claim that the present attacks are part of a strategy to ensure that Zuma is not tainted in the eyes of the public by an adverse court judgment. The short term consequence of these debates affects the protagonists and their loyalists. The long term consequence of the positions they take, whether irresponsible or otherwise, affects us more gravely. It impacts on whether we have an independent judiciary and if so, for how much longer we can expect that to survive. The new kid on the block seems to have the political survival of Zuma as the immediate objective. But the long term objective (which can be achieved on the same platform) may also be to change the face of the judiciary and the basis of appointments. Whilst the present system has many detractors it would come as no surprise that changes, whatever the spin, would be directed appointing to the Bench those who might not demonstrate an unqualified empathy for constitutional values when it comes down to the crunch.

What I had perceived as solely an extension of government's turf war to try and control the judiciary (since the set of Justice Bills were sprung on the public over the 2005 December holidays) now has an added conflict. This added conflict is based on protecting or advancing an individual. It is a conflict where the judiciary is tarnished in public because its reputation is expendable in the perceived bigger picture. It is this short term and myopic view and the failure of most of the respected bodies within our profession to take a clear public position that must change if we wish to preserve the quality of the judiciary and its independence against any attempt to change the face of the judiciary and effect a wholesale change of those who preside in the highest courts, as if it is of no more consequence to the public than a change of provincial premier.

The immediate conflict seeks to elevate the issue of Hlophe JP as already providing proof that the Concourt is likely to be biased in deciding the Zuma cases. This is opportunistic. Either Hlophe did approach certain justices of the Concourt as alleged by its members or he did not. If he did, then the question that should be asked is completely unrelated to the court's view about the Zuma case. Again, if the Chief Justice was told what is contained in the Concourt's complaint and took adequate steps to verify its correctness, then it has everything to do with a person who has no business talking about what connections he may or may not have

and of the Concourt's response to immediately place in the public domain the concern that someone has tried to tamper with the courts - even if it happened to be one of their own. It is of cardinal importance to jealously guard the integrity of the Concourt and its reputation (which is enviable if regard is had to commentators both in South Africa and in the rest of the World) when there exists a rea-

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sonable fear by its appointed head of grave interference with the court's independence and impartiality.

If an issue of this magnitude, having regard to the status of all involved, is not immediately brought to the public's attention then scope exists for attempts to influence other members of the court to persist or to mutate in other ways. Should there not have been an immediate public response then there would remain unfounded public suspicion, if the court were to find in favour of Zuma and Thint, that an attempt to influence the court had succeeded and that the members of the court, or some of them, could be susceptible to fear or favour.

However, the slant put on the Concourt's action by ANC Secretary General Gwede Mantashe was that the only explanation for the Concourt's press release of the complaint is that it was in 'pursuit by some people of a vendetta against the ANC President' The quote comes from an article published in *ANC Today* on 11 July.

Whilst recently there have been regular complaints of statements being taken out of context, the statement by Mantashe that the Concourt justices were part of a 'counter-revolutionary force' was apparently taped. I recall PW Botha, during the period of toenadering claiming that some outlandish right wing statement he had made was taken out of context. Sitting in the old common room at Innes Chambers Sidney Kentridge remarked that indeed it was; the President had only meant his words for local consump-

tion by the constituency he was addressing in Bronkhorstspuit or thereabouts and they were not meant to be repeated outside that context.

Nonetheless it seems appropriate to introduce some of the counter-revolutionaries in our midst. I do so with apologies to the other counter-revolutionaries who I do not mention.

### Of counter-revolutionaries and cultural revolutionaries

Pius Langa started work at a shirt factory, then found a job as a court interpreter cum messenger and rose to magistrate before joining the Durban Bar. He was always involved in organisations concerned with the welfare of the community. He was involved with the United Democratic Front, and as democracy approached was also concerned with the work of CODESA. He was a member of the Constitutional Committee of the ANC. His CV is impressive and it is not the purpose of this article to recap on what can be read elsewhere. I wish rather to identify the person. My own recollection perhaps best illustrates what I wish others to know about him. Whilst at the Durban Bar he would often travel into the heart of the Transkei to defend individuals charged with political crimes or involved in political activity. When I met him then, I recall thinking what a fearless person he was. I do not think I was alone in believing that, having regard to his well-known views, there was a great risk that he may not be seen again once inside the borders of the Matanzima regime and bearing in mind the scrutiny of the omnipresent security police. So if fearlessly defending the rights of individuals from then on and without falter to the present is the qualification for counter-revolutionaries then it is fully deserved in the case of the Chief Justice.

The other well known counter-revolutionary, Dikgang Moseneke, by contrast did not start his career going in and out of courts representing those who opposed apartheid. He could not, because at 15 years old, he was convicted of participating in anti-apartheid activity and was imprisoned in Robben Island for a decade. Some time later and after he came to the Bar he was a founder member of the Black Lawyers Association and also of NADEL. These then are some of the credentials of an equally fearless opponent of inequality, not because he was a card-carrying member of any particular organisation but, I would suggest, because of an

allegiance to protecting and promoting the rights of people. When he had a chance to become a counter-revolutionary is difficult to assess. Although he left the Bar and chaired the Telkom Board, I do not recall that heading a parastatal is the hallmark of a revisionist. Perhaps it was the appointment as CEO of New Africa Investments that did it. Yet there have been some ANCYL members who have exercised their own vision of economic upliftment through involvement in corporate South Africa.

Justices Tholie Madada, Zac Yacoob and Thembile Skweyiya all involved themselves in organisations and programs which benefited and uplifted others. By way of example both Madada and Skweyiya were involved in campaigning for, or setting up programs to assist, political detainees and other prisoners. Justice Yvonne Mokgoro started off as a nursing assistant and salesperson. Surely the embryonic state of a counter-revolutionary.

In case Albie Sachs is included as a Concourt counter-revolutionary, it is worth mentioning that since starting at the Bar when 21 years old he was involved extensively with defending those charged under racist statutes or security laws. He went into exile in 1966. He suffered the loss of an arm and the sight of an eye when a bomb planted by the South African security agents exploded. What might influence anyone wishing to call him a counter-revolutionary is his predisposition to the arts and architecture. However that would rather qualify Justice Sachs as a *cultural-revolutionary*. But I say this with some hesitation. I know that in China it was a good term. But later the Chinese accepted that this period was no more than an excuse to purge members of the ruling party from within (history has a tendency of repeating itself). But maybe it is back in fashion elsewhere. I still like the idea of a cultural revolutionary in the sense of someone who tries to embody the culture and values that created our democracy and hopefully will sustain it - provided there is no interference.

### The protagonists

It is all very well to look at the contribution made to society by those appointed to the Concourt. But this does not mean that those who are critical of the court and have openly disparaged it are to be automatically cast in a bad light. Doing so fails to recognise the point of departure and why as lawyers we are obliged to take a stand.

Gwede Matashe and Zwelinzima Vavi have enviable credentials as individuals who have known poverty and disadvantage, and who rose through the ranks of the trade union movement. They have made enormous contributions to the benefit of labour. Their

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popularity and support comes from dedication and hard work. The current positions adopted by COSATU, and which has been influenced by them, regarding Zimbabwe and the economy find broad support.

As with Zuma, Matashe and Vavi have only known one master and one allegiance - the movement to which they have belonged and dedicated themselves. The closing of ranks and distrust of the motives of others is also a symptom of their experiences and the risks they have had to guard against.

Perhaps some insight is gained from Vavi's speech when he took over the reins of COSATU from Matashe. He identified one of Matashe's traits as arrogance. This was not in a pejorative sense. It is an attribute that allows the movement to progress and solidify.

### Solidarity

Those at the forefront of Polokwane revolution have known only the struggle for a party or a movement. They have stood steadfast even when ideologies changed. The movement is all-consuming.

By contrast judges and in particular the justices of the Concourt have been activists for causes. Causes that have as their common denominator the protection and promotion of rights tested against basic and immutable laws and values. It is our Constitution that gives expression to these - not the other way around.

It will be recalled that the evolution of sociology within the legal framework commenced with the understanding that society is composed of innumerable competing interests which could not all be compromised as some

are inherently in conflict. However it was well understood that an '... unfettered clash of these interests could only lead to chaos and anarchy.' (Dennis Law *The Idea of Law*)

The legal fraternity in Pakistan well understood that Musharraf's use of the state of emergency to terminate the appointment of Chief Justice Choudree and 60% of the Judiciary was not an issue to divide lawyers. Lawyers there fully appreciated that irrespective of party allegiance, at stake was the government or its supporters' attempt to get rid of judges who it was believed did not support them and to replace them en masse with those who were more pliable to the wishes of government. Their concern has proven to be correct because, despite the change in government after the election, the leadership of the new ruling party sees the return of the dismissed judges as a threat to them. The reason is not hard to find since there are corruption charges outstanding against certain of the new leadership and the return of an independent judiciary is accompanied by the risk of decisions being made solely on the merits of the case and without reference to the political positions or clout of the accused.

We are at a cross-road and we as a profession should ensure that we transcend the myopic view that has been taken of the issue regarding the attack on the Concourt. Whatever our view as to whether the ANC President should have been charged, and if so whether there are others who should have been charged with him, it is necessary that we as a body protect the independence of the judicial institution. This requires of us not to naively believe that attacks on groups of judges on the Concourt do not constitute an attack on the independence and reputation of that court and its competency to deliver impartial decisions irrespective of which institution or which individual is seeking relief before it.

The judiciary is not some type of disposable nappy which can be regularly trashed and replaced. Our judiciary stands for independence which is irreplaceable and any attack on the institution that succeeds or alters its makeup undermines it for all time. 