

## SOUTH AFRICAN JUDICIARY

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# Threat to Justice

With President Thabo Mbeki forced out of office, South Africa is facing a crisis that goes to the heart of its democracy. What is at stake is the question of whether the judiciary is above political interference.

IT IS NOW ROUTINE FOR SENIOR MEMBERS OF THE African National Congress (ANC) or its allies in the Communist Party and the unions to assert in public that the judiciary must be brought to heel. Although there had been mutterings in the past when senior ANC leaders were before the courts, it is the allegations of corruption, racketeering and money laundering against the President of the ANC, Jacob Zuma, that have focussed minds.

The crisis was underlined by the decision of Justice Chris Nicholson to dismiss the case against Zuma on September 12. He ruled that the way in which the state prosecutor handled the issue suggested interference from ministers, including then-President Thabo Mbeki. The judge concluded that there was evidence of what he described as a continuing '...baleful political influence' on the way the case was dealt with.

This began with the decision not to prosecute Zuma in August 2003, despite the then-National Director of Prosecutions saying publically that there was a prima facie case against him - a decision Judge Nicholson described as 'bizarre'. It continued until the final decision that the prosecution would go ahead. This was made just after Mbeki suffered a humiliating defeat at the hands of Zuma at the ANC conference last December, in his attempt to continue as president of the ANC.

While the Zuma camp triumphed in this instance, it has not been above attempting to put pressure on the judiciary. In the run-up to this case there were vocal threats from his

supporters, who launched what they described 'rolling mass action' to influence the judge. So concerned was the KwaZulu-Natal Judge President, Vuka Tshabalala, that he called on the ANC not to try to intimidate the courts. 'We must prevent a situation where our courts and judges are politicised,' he said.

Nor is this an isolated incident. Zuma's supporters at the highest level have challenged the independence of the judiciary. The ANC Secretary-General, Gwede Mantashe, spoke out, appearing to accuse the Constitutional Court of being part of what he described as a 'counter-revolutionary conspiracy.'

## TITANIC STRUGGLE

At the heart of the issue has been what Judge Nicholson called the 'titanic political struggle' between Mbeki and Zuma for control of the ANC and the future direction of the country. The Judge found evidence that Mbeki had worked behind the scenes to influence Zuma's prosecution. There is a widespread belief that this was done to try to prevent Zuma becoming the next president of South Africa.

Earlier this year the deteriorating political climate prompted two of South Africa's most respected legal figures, men who were on Nelson Mandela's defence team in the 1960s, to speak out. The former Chief Justice, Arthur Chaskalson and advocate George Bizos issued a statement expressing concern about the debate around the Zuma trial.

They appealed to political leaders to tone down the rhetoric, saying that 'putting pressure on the courts by making allegations of partiality, uttering threats of massive demonstrations, and expressing opinions in intemperate language, are harmful to the judicial process, to our constitutional order and to our country's reputation.'

The International Bar Association was sufficiently concerned by these and other developments that it sent a mission to South Africa. In July, it issued a report stating that while public debate about court decisions was legitimate, 'engaging in public criticism or personal attacks upon members of the judiciary undermined public faith in the independence of the judiciary and the rule of law.'

Unfortunately, these warnings appear to have gone unheeded and an even more serious development has taken place.

## CRISIS COMING

In March, the Judge President of the Cape, John Hlophe, approached two members of the Constitutional Court, Justice Bess Nkabinde and Acting Justice Christopher Jafta. What is alleged to have taken place has rocked the judicial system. For Hlophe is alleged to have asked them to decide a pending appeal in favour of Zuma. 'You are our last hope,' the judge is reported to have said.

These are allegations Hlophe strongly contests. However, the Chief Justice of South Africa, Justice Pius Langa, was sufficiently concerned to draft a formal complaint against Hlophe, which was signed by all eleven members of the Constitutional Court.

The matter is now before the Judicial Services Commission.

The Commission, which oversees the judiciary, includes the Chief Justice, the President of the Constitutional Court and the Minister of Justice. It is a widely representative body – among its other members are two practising advocates, two attorneys and six members of the National Assembly, including three from opposition parties.

The Commission will have to decide whether to refer the complaint to parliament. If it does, the National Assembly will have to consider what action to take. A two-thirds majority could impeach Hlophe. If Parliament fails to back the Commission there will be a constitutional crisis. Yet if the Commission does not discipline Hlophe the Constitutional Court will be in an untenable position, since all eleven judges are party to the complaint.

It is both strange and predictable that the country should find itself in this situation.

On the one hand, the ANC has a long and honourable tradition of fighting for the rule of law – not surprising when men like Oliver Tambo and Mandela were themselves part of the legal profession. The ANC says it supports the independence of the judiciary and points to its backing for the South African constitution, implemented after the end of apartheid, which is seen as a model of its kind.

On the other hand, given the overwhelming political strength of the ANC, and the length of time it has now held office, it was perhaps inevitable that the party would come up against one of the few sources of influence over which it had no control: the judiciary.

