

A TALE OF POLITICAL CONSPIRACY AND INCOMPREHENSIBLE JUDICIAL IMAGININGS

By Thabo Mbeki
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On 12 September 2008, Justice Chris Nicholson, Judge in the then Natal Provincial Division of the High Court of South Africa, granted the order that:

"It is declared that the decision taken by the National Prosecuting Authority (NPA) during or about 28 December 2007 to prosecute the applicant (Jacob Zuma), a copy of which is annexed to the applicant's founding affidavit as annexure "A" thereto, is invalid and is set aside."

Celebrating this decision, Blade Nzimande, General Secretary of the SACP, wrote in the 17 September, 2008 edition of Umsebenzi Online that:

"The SACP, together with millions of other South Africans, are of course hugely relieved at the judgement by Judge Nicholson on the application by President of the ANC, Cde Jacob Zuma, to have his case, once more, struck off the roll...The judgement vindicates us in our long held view that the charging of Cde Zuma is not a criminal but a political trial. The judgement has greatly assisted us in eloquently, and in a detailed fashion, outlining elements of this political trial.

"A very strong message needs to be sent out to the whole of society that at no stage, now or in the future, should we allow organs of state to be used for internal party political machinations or to pursue narrow and factionalist agendas."

Immediately after, on 19 September, 2008, the Mail & Guardian published an article entitled "No need to lie spread-eagled" by Ranjeni Munusamy, then described as 'a communications consultant who runs the Friends of Jacob Zuma website'. She wrote:

"It is a surprise...that Mbeki did not employ any of (his supposed) abundant virtues to salvage both the ANC and the country from the crisis caused by a disastrous "investigation" of Jacob Zuma...

"To many, the most astounding part of Nicholson's judgement was his conclusion that there was "political meddling" in the investigation against Zuma and "baleful political influence" in the decision to prosecute him...

"But the question is how the media got it so horribly wrong...? Why is the South African media so chronically off the mark when it comes to issues related to Zuma?..."

"Now that the debauchery and political manipulation is exposed (by the Nicholson judgement), the media no longer needs to lie spread-eagled before its pimp (the NPA). It has the opportunity to restore its soiled image, its credibility and perspective. Or it can become someone else's bitch."

This celebration of the Nicholson judgement by Nzimande, Munusamy and others was occasioned by both his ruling that the NPA attempt to re-institute charges against President of the ANC, Jacob Zuma, was invalid and the conclusion he reached that the NPA actions were driven by political interventions hostile to President Zuma.

Among his findings in this regard, Nicholson said: "He (Zuma) goes further and suggests that (the reinstatement of the criminal charges against him)...was a stratagem to cloak him in the guise of an accused at the critical moments in the political process and so hamper his election as ANC President. There does seem to be merit in that contention. I am therefore not inclined to strike out these allegations (by Zuma)..."

"The timing of the indictment by Mr Mpshe on 28 December 2007, after the President (Mbeki) suffered a political defeat at Polokwane was most unfortunate. This factor, together with the suspension of Mr Pikoli, who was supposed to be independent and immune from executive interference, persuade me that the most plausible inference is that the baleful political influence was continuing..."

Thus did Judge Nicholson give a judicial stamp of approval to an allegation that some had sustained for some time that I and others in Government were part of a "political conspiracy" which had interfered with the NPA falsely to charge Jacob Zuma, an allegation which even the ANC NEC as a whole had rejected.

In a Statement issued on 14 June, 2005, the ANC National Working Committee (NWC) said: "The African National Congress accepts and supports the decision of President Thabo Mbeki to release Deputy President Jacob Zuma from his duties in government...The ANC reaffirms that the Deputy President and the entire leadership of the Alliance accept and support the decision of the President."

But then the allegation of a "political conspiracy" surfaced.

To attend to this corrosive accusation I suggested that the Alliance should establish a Commission of Inquiry to determine the facts about this matter.

In a 6 September, 2005 Statement, the ANC NWC said: "The ANC National Working Committee (NWC), which met in Johannesburg yesterday (Monday, 5 September), agreed in principle with the proposal of President Thabo Mbeki for a commission of inquiry into allegations of a political conspiracy."

Later still, ANC NEC issued its own Statement dated 20 November, 2005 in which it said:

"Having considered the report presented by the President (Mbeki) and Deputy President (Zuma), the NEC understands the events, information and circumstances that have impelled the Deputy President to come to the conclusions he has reached regarding what he perceives as representing a 'political conspiracy'. This makes it unnecessary for the ANC to pursue within the Alliance the proposal it had tabled to constitute an Alliance Commission to establish the facts or otherwise of the existence of a political conspiracy against our Deputy President.

"The NEC recognises that...the Deputy President may have been subjected to hostile action by forces opposed to the National Democratic Revolution, and thus the 'conspiracy' that has been spoken of. However, we are unanimous in our conviction and the determination that such a 'conspiracy' did not originate from within our movement...The NEC therefore unequivocally rejects any suggestion that there is in existence a political conspiracy within our movement and its leadership, dedicated to marginalising or in any other way harming our Deputy President."

It was against this background, and three years after the ANC NEC Statement I have just cited, that Judge Nicholson came to the conclusion celebrated by Nzimande, Munusamy and others, that there had been a political conspiracy after all!

To the consternation of these, the NPA appealed to the Supreme Court of Appeal (SCA) contesting the Nicholson judgement. I and the previous Cabinet intervened to join this appeal.

On 22 September, 2008 the media reported that ANC Secretary General, Gwede Mantashe, had said: "The biggest worry for us is the question of the reversal of the possible closure of that chapter (Zuma's prosecution). That case (the appeal), in our view, is not in the public or national interest. If the case is pursued, it will continue to be a point of division in the ANC. That's the main issue."

The SACP said that it "strongly condemns this latest manoeuvre by the NPA, and is actually further proof that there is a political force driving the NPA to make Cde Zuma's ascendancy to the Union Buildings as difficult and unpleasant as possible..."

Zet Luziphlo, KZN COSATU Secretary, was reported as having said, "The fact that NPA wants to continue the case...is a declaration of war on our people." Threatening workers' strikes in this context, he said, "And it won't only be on the day of the court case, but also before he goes to court."

However, the Appeal against the Nicholson judgement went ahead despite this threat and the SCA handed down its judgement on 12 January 2009 and upheld the NPA Appeal.

The SCA made strong and negative statements about Nicholson's comments about the so called 'political meddling', saying, for instance:

"As the trial judge (Nicholson) recognised, 'political meddling' was not an issue that had to be determined. Nevertheless, a substantial part of his judgment dealt with this question; and in the course of this discussion he changed the rules of the game, took his eyes off the ball and red-carded not only players but also spectators. Lest his judgment be considered authoritative it will be necessary to deal with these matters...

"The court below failed to adhere to some basic tenets, in particular that in exercising the judicial function judges are themselves constrained by the law... This...was unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions...

"Even if, in the words of the learned judge, the judiciary forms a 'secular priesthood', this does not mean that it is entitled to pontificate or be judgemental especially about those who have not been called upon to defend themselves – as said, its function is to adjudicate the issues between the parties to the litigation and not extraneous issues...

"Dr Maduna's supposed machinations around the Ngcuka decision were then extrapolated to cover Mr Mbeki and the whole cabinet...Once again, the 'strategy' involving Dr Maduna, Mr Mbeki and all the other members of Cabinet as well as the causal connection between the Ngcuka decision and Mr Mbeki and the Cabinet as found by the trial judge were not based on any evidence or allegation. They were instead part of the judge's own conspiracy theory and not one advanced by Mr Zuma. "Further, the finding...that a non-party may have committed a criminal act where this was not alleged, where it was not in issue and without hearing that party, is incomprehensible..."

And finally,

"The legality of the Mpshe decision is the crux of this appeal. Unfortunately, the court below subjected Mr Mpshe to the same treatment that it had inflicted on others. It also used the newspaper report referred to above to make a similarly

unfounded finding against Mr Mpshe. Having done this, the court went on to assume that Mr Mpshe complied with the supposed instructions of Mr Mbeki to prosecute Mr Zuma fearing that he, like Mr Pikoli, might be suspended or dismissed should he assert his prosecutorial independence. All this was gratuitous and not based on any evidence.”

After all this, including my ‘recall’ as President of the Republic, based on Nicholson’s completely unfounded comments about ‘political meddling’, in June 2015 Zwelinzima Vavi publicly apologised for “naively believing in (the) conspiracy theory” that “the charges (against Zuma) were being made up by Mbeki and his clique...The person who made me not to believe in that is the lawyers of the President who go to every court to try to block evidence that should prove that he was a victim of these shenanigans.”

Earlier, in 2014, Julius Malema had tendered a similar apology saying, “We are in a mess because we did not listen to the silent communication from President Mbeki...As this generation we owe it to many generations to come by ensuring that the mistake we committed in Polokwane in 2007 and in South Africa in 2009 is corrected... (We treated President Mbeki) “in a manner that was not correct...(because the ANC Youth League under my leadership) “was misled”.

He did not say who had misled the ANC Youth League and what had been said in this regard.

Neither has an explanation been offered as to why Judge Nicholson acted as he did on the matter of so the called ‘political meddling’. This was especially puzzling given that Nicholson was an experienced Judge with thirteen years of experience by 2008, having been appointed to the bench in 1995.

In my 22 September 2008 Address to the Nation announcing my resignation as President of the Republic, I said, “I would like to restate the position of Cabinet on the inferences made by the Honourable Judge Chris Nicholson that the President and Cabinet have interfered in the work the National Prosecuting Authority (NPA). Again I would like to state this categorically that we have never done this, and therefore never compromised the right of the National Prosecuting Authority to decide whom it wished to prosecute or not to prosecute. This applies equally to the painful matter relating to the court proceedings against the President of the ANC, Comrade Jacob Zuma.”

Earlier still, on June 14, 2005, the day I relieved him of his government responsibilities, our then Deputy President, Jacob Zuma, issued a Statement in which he said, among other things:

"President Thabo Mbeki has taken a decision regarding my presence in Government and Cabinet. It is the President's prerogative to take such a decision, in the context of, and within his authority as the President of the Republic. I accept and respect his pronouncement. I believe he has taken this decision not because he believes I am guilty of any crime, but because of considerations relating to the constraints within which government operates...

"I sincerely trust and hope that those authorised to take decisions - at whatever level - will act within a reasonable period with regard to the conclusion of this matter. I need to be given an opportunity to tell my side of the story, and bring finality to these accusations and speculations.

"All said and done, I believe that we should put national unity and the interests of our country and nation first - whatever views people may have about the President's decision and the Durban court judgment...Let me reiterate that all of us should put national unity and the national interest above everything, as we grapple with these difficult matters. Our freedom and democracy are more important than us as individuals."

The defence of that freedom and democracy demanded, among others, that we should under no circumstances abuse state power to corrupt the criminal justice system to serve particular political purposes, a prescription we always respected - contrary to Judge Nicholson's "incomprehensible" findings about 'political meddling' which never took place.