

# Back to the Future – to Manguang from Polokwane



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## Introduction

*President Jacob Zuma will seek election, as ANC President in December at the ANC's elective conference in Manguang, for a second term. The first time he did this he had just had the criminal charges hanging over him dropped and was on track to solidifying an unbelievable political comeback. President Mbeki was his competition at Polokwane and was facing down a party he had lead, essentially from the unbanning of the ANC in the early 90's, which had now fractured into Mbeki supporters and an alliance of everyone else.*

Zuma went on to defeat Mbeki at Polokwane in December 2007. In September of the following year the ANC NEC, after the Nicholson Judgement which was subsequently overturned by the Supreme Court of Appeal, recalled Mbeki, forcing his resignation as President of the Republic. Kgalema Motlanthe was installed as the caretaker president until the next general election could be held in 2009, where Jacob Zuma would ascend to the Presidency.

It is widely believed that this sequence of events completely altered the political landscape in South Africa. It compromised the internal functioning of the ANC and it entrenched factionalism throughout the ranks of the ANC. It spawned the first breakaway faction of the ANC in post-apartheid South Africa, which went on to become the Congress of the People (COPE). It brought a disparate alliance of competing interests to power based on the shared objective of removing Mbeki, which meant that Zuma, once President, was beholden to all of them. The result of which has been the continued policy paralysis that has bedevilled the country. South Africa has suffered two ratings downgrades and a scathing rebuke in the most recent Economist, a leading international publication.

A close reading of events as they have unfolded under President Zuma's watch would indicate that key decisions, which could benefit South Africa, have only been taken once the political dimensions which concern narrow party political battles have been resolved. If we reflect on some of the cabinet choices which were made, four names come to mind: former Ministers General Siphwe Nyanda, Sicelo Shiceka, and Gwen Mahlangu-Nkabinde. They were all sacked. All the while the Minister for Basic Education, Angie Motshekga, remains in her post, despite having failed to adhere to two Constitutional Court rulings on the delivery of textbooks to schools in Limpopo<sup>1</sup>. As the school year reaches its completion it remains unclear

as to how many of the students remain without text books for their exams. As Minister Motshenkga happens to sit on the ANC's NEC and is President of the ANC Women's League it is no wonder she remains on the Cabinet.

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These are just a few examples where the interests of the party, or individuals in the party, seem to have been put above those of South Africa. It would indicate that South Africa is hamstrung by internal ANC battles. As this paper will outline the problems go even deeper, and reach into the very core of the state. If South Africa is unable to effectively combat this trend, then its future is in grave jeopardy.

### **State Capture and Undermining the Constitution**

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Presidency. Key among those factors was his ability to portray the charges levelled against him as being politically motivated. This tactic meant he could delegitimise the investigations and the prosecution into his affairs. It did not help that Mbeki was perceived as meddling, and the Nicholson judgment seemed to confirm that a political conspiracy did indeed exist. The consequences of the way in which these events unfolded are grave, as now it is not uncommon to hear "political conspiracy" bandied about when an attempt is made to remove people from key positions within the state. The most recent of which is Julius Malema, who made his first court appearance in late September.

As battles for positions intensify, so too do the accusations, by one faction or another, of political meddling in the procedures of nomination. The indication being that South Africa is continually hamstrung by internal party political fights, as the ANC and its alliance partners continue to fracture along the lines of political power brokers. Literally, as South Africa burns, our leaders continue to fiddle, with little or no regard for how this impacts the greater society. Putting South Africa first seems to be beyond many of these leaders in government. Cadre deployment plays its role in these internal fights for supremacy, as people deployed to key positions within the state take sides in factional disputes resulting in proper procedures being undermined in order to protect political principles. The scathing article in the Economist underlies much of my argument when it comes to Jacob Zuma's presidency –

"The ANC under his aegis has sought to undermine the independence of the courts, the police, the prosecuting authorities and the press. It has conflated the interests of party and state, dishing out contracts for public works as rewards for loyalty<sup>29</sup>".

The compromised way in which Zuma ascended to the Presidency could only result in the mechanics of state being abused under his watch. The undermining of crucial independent institutions has severely weakened the state and provided the impetus for the subsequent ratings downgrades. The various crises South Africa has faced recently can be seen in this light – the undermining of the rule of law, the Marikana incident, the breakdown in labour relations, the underperforming education and

health sectors and the pressure that has been applied to the judiciary the rising perception of governments inability or unwillingness to deal with corruption n its root causes all point to a failure of leadership and this rests with President Zuma.

The appointment of Menzi Simelane to the position of National Director of Public Prosecutions (NDPP) by President Zuma is a case in point. The position of NDPP is an extremely important one within South Africa’s constitutional dispensation. It is a position which must remain independent in order to ensure the integrity of the legal system and promote and defend the principle of the rule of law. The person responsible for carrying out these duties must be able to carry out his or her mandate as the Constitution stipulates, without fear, favour or prejudice.

A Public Service Commission investigation into Simelane’s conduct in the Ginwala Inquiry found that Simelane had been less than forthcoming in his testimony to the Ginwala Inquiry. The Public Service Commission then recommended disciplinary action be instituted against Simelane by the Justice Department. However, newly appointed Justice Minister Jeff Radebe rejected these recommendations and advised President Zuma to appoint Simelane the new National Director of Public Prosecutions.

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The Democratic Alliance challenged this appointment and, having lost in the High Court, was able to appeal the decision in the Supreme Court of Appeal. The decision was unanimous – President Zuma’s appointment of Simelane was deemed to be irrational and thus inconsistent with the Constitution. It was thus set aside. This decision was upheld by a unanimous bench of the Constitutional Court. The Constitutional Courts evaluation of Simelane’s evidence at the Ginwala Inquiry concluded that “the evidence was contradictory and, on its face, indicative of Mr Simelane’s dishonesty and raised serious questions about Mr Simelane’s conscientiousness, integrity and credibility”<sup>3</sup>.

The National Prosecuting Authority (NPA) now has another party politico at its helm, in an acting capacity. She has a chequered disciplinary past in the NPA and has been happy to make a number of contentious, politically motivated decisions during her tenure<sup>4</sup>. Thus, the NPA, an institution that can only function properly if its independence is protected, continues to be hamstrung by political interests. This greatly undermines South Africa’s constitutional dispensation and it undermines the rights of people relying on the South African system to function as it should.

It is not only in the NPA where questionable appointments have been made. South Africa lost its second National Police Commissioner in a row – Bheki Cele in June of this year. A board of inquiry mandated to establish whether Cele had acted corruptly, dishonestly, or with an undeclared conflict of interest in relation to two police lease deals signed with business tycoon Roux Shabangu, found that General Cele was unfit to hold office and recommended his removal by the President. Instead of seeking to promote a seasoned and qualified officer from the ranks of the Police, the newest appointment is another civilian with links to the ANC. Time will tell how successful Ms. Phiyega will be in restoring the prestige and morale of the Police Services and rebuilding an institution that has been wrecked by successive



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Police Commissioners with little or no direct policing skills. Also playing itself out in the ranks of the Police Services is the ongoing Mduli saga in Crime Intelligence. This saga has greatly affected the ability of the Crime Intelligence Unit to function properly. It has also exhibited the usual hallmark of these political battles such as – allegations of political conspiracy, nepotism, allegations of corruption and the misuse of secret slush funds to pay for a lavish lifestyle and the misuse of state resources to fight internal political battles.

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More ominous though have been the unrelenting attacks on the Judiciary and the Constitution by senior political leaders. From as early as 2008, some senior ANC members have accused the Judiciary of being part of what Gwede Mantashe termed “counter-revolutionary forces”<sup>5</sup>. Gaining pace after the election of Jacob Zuma to the Presidency, other senior ANC and government officials have levelled

accusations and scorn on the role of senior judges and the Judiciary as the final arbiters on constitutional matters. These include later statements made by Gwede Mantashe<sup>6</sup>, Deputy Minister Ramatlhodi<sup>7</sup>, Cabinet Minister Blade Nzimande<sup>8</sup> and the President himself<sup>9</sup>. It is difficult not to interpret these statements as an indicator of a concerted effort by some senior members of the government, and the governing party, to undermine the legitimacy of the judiciary and, therefore, the Constitution<sup>10</sup>.

This sequence of events culminated in the Executive putting out a tender for the review of the Constitutional Court and the Supreme Court of Appeal. The judicial review, when it was initially announced, supported the view that the Executive was attempting to undermine the powers of the Judiciary. However, when the terms of reference were released and the call for tenders went out, the scope of the review seemed to have been watered down. The question still remains though as to what basis the Executive has to review the decisions of the Judiciary?

The argument presented by those seeking to undermine the judiciary is that the current constitutional order has emptied the state of its power to formulate policy choices. This argument suggests that, based on a majority mandate achieved at the polls, the Executive must be given the freedom to formulate policy. However, it is important to note here that where policy is alleged to conflict with the constitution, civil actors have a right to challenge that policy through the courts. Judge O'Regan, in her Helen Suzman Memorial Lecture, defended the right of citizens and organisations to challenge government policy in the courts if they believed their rights were being infringed<sup>11</sup>. This state of affairs is a normal part of the functioning of a constitutional order.

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## National Policy and its Consequences

At the National policy level South Africans have been bombarded with dubious policy proposals. The Protection of State Information Bill, the Traditional Courts Bill, and the National Health Insurance Green Paper, are among some of the contentious pieces of legislation currently up for discussion.

What these Bills share is that each one of them, in some way, undermines a multitude of rights. As they stand they will take South Africa backwards. They have been poorly conceptualised and poorly drafted, with little consideration given to their potential consequences. Of particular concern are the security based pieces of legislation, which seek to cloak South Africa's constitutionally enshrined openness and transparency in darkness and secrecy. One can only guess at the real reasons for wanting to take South Africa down this road.

The South African Police Service Amendment Act was the government's response to the Glenister judgment, which called on the government to create a corruption fighting unit which was both structurally and operationally independent. This had come as a result of the disbanding of the Directorate for Special Operations (DSO), or the Scorpions as they were more commonly known, and the creation of the Directorate of Priority Crime Investigation (DPCI), or the Hawks as they are known. The ultimate decision to disband the hugely successful Scorpions was as political as it gets, coming out of a Polokwane resolution, under the title Peace and Stability<sup>12</sup>.

Instead of taking the opportunity, afforded by the Constitutional Court, to create a wholly independent body to fight corruption, the government has opted, against the advice of a number of civil society organisations, to maintain the unit within

the South African Police Service. The consequences of this Act remain to be seen. The indication, however, is that South Africa will continue to fail in its fight against corruption, misappropriation of state funds, and the continued looting of state coffers by officials. Ultimately, South Africa will be the loser. Corruption will continue to undermine our institutions, it will continue to tear apart the social fabric in which we live and work, it will diminish the state's capacity to deal with the consequent challenges that will face this country and it will undermine the rule of law.

## Conclusion

It is difficult to view the current state of affairs in a positive light. The pressure on the Judiciary and other independent institutions like the Public Protector raise concerns about the ability of the state to function effectively and for the betterment of South Africa. The fractured nature of South Africa's political landscape will only intensify as we move closer to Mangaung. The battle for positions will take centre stage and the biggest question on the minds of the delegates will not be: how do we ensure the greatness of South Africa? Instead, it will be: will President Zuma win a second term?

This unfortunately does not bode well for South Africa. If Zuma does win a second term expect more of the same. There will be no 'Lula moment' as Zwelinzima Vavi hopes there will be. Until South Africa's political arena becomes more competitive, with a particular focus on good governance and effective policy formulation, the country will continue to plod along under the yoke of a compromised leader.

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### NOTES

- 1 See <http://dailymaverick.co.za/article/2012-06-25-limpopos-education-crisis-the-siege-of-angie-motshekga>, <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=308357&sn=Marketingweb+detail>, <http://www.equaleducation.org.za/node/713>
- 2 Sad South Africa: Cry, the beloved country, *The Economist*, 20 October 2012
- 3 Democratic Alliance v President of the Republic of South Africa case CCT 122/11 [2012] ZACC 24
- 4 See <http://mg.co.za/article/2011-12-29-zuma-sends-in-jiba-to-take-npa-reins-from-simelane>, <http://mg.co.za/article/2012-01-06-fall-from-grace-does-not-harm-jibas-climb-in-npa>
- 5 Gwede interview M&G July 4 2008 <http://www.mg.co.za/article/2008-07-04-anc-boss-accuses-judges-of-conspiracy-against-zuma/>
- 6 Mantashe Aug 18 2011 "Judges moving into politics" <http://www.sowetanlive.co.za/news/2011/08/18/judges-moving-into-politics>
- 7 Ramathodi 1 September 2011 <http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions>
- 8 Blade 18 Dec 2011 <http://www.news24.com/SouthAfrica/Politics/Nzimande-slams-judicial-dictatorship-20111217-2>
- 9 Zuma 12 Feb interview <http://www.businesslive.co.za/southafrica/2012/02/13/zuma-wants-concourt-power-reviewed-report> (original link broken)
- 10 Helen Suzman Foundation, Building a House of Justice in Africa: The Delivery of Justice Series, September 2012
- 11 Judge Kate O'Regan, Helen Suzman Memorial Lecture 2011 – Reflections on the role and work of the Constitutional Court, 22 November 2011.
- 12 52nd ANC National Conference: Resolutions, 20 December 2007 [accessed at <http://www.anc.org.za/show.php?id=2536>, on 9 October 2012]