

## *The Bruising of Our Constitution*

In the wake of what is potentially a constitutional crisis, one is reminded of the conscience-pricking message of a poem whose authorship is widely attributed to Pastor Martin Niemöller (1892–1984) about the insouciance of German intellectuals in the face of the Nazi purging of their targeted victims, one group at a time.

He wrote:

First they came for the Jews  
and I did not speak out  
because I was not a Jew.  
Then they came for the Communists  
and I did not speak out  
because I was not a Communist.  
Then they came for the trade unionists  
and I did not speak out  
because I was not a trade unionist.  
Then they came for me  
and there was no one left  
to speak out for me.

I am not a judge. While I have discussed pending Constitutional Court judgements with other judges in the recent past, strongly advocating one outcome over another, I have not done so with any judge of that court. That does not disqualify me from expressing a concern about the manner in which the Constitutional Court judges have dealt with an allegation of improper influence against the Cape Judge President.

Beneath the huff of those of the Constitutional Court judges who subscribed to the media statement issued from that quarter on 30 May 2008, lies prostrate several constitutional values – bruised and battered beyond recognition – whose worth has been lost in the undignified public lynching of a man the basis for whose notoriety seems more imagined than factual.

At the risk of being maligned by my peers and a scandal-enthused public, I have decided to speak out in defence not of a man but of a principle. This is no time for sycophancy, masquerading as judicious restraint, and a feigned indignation against an ostensibly errant judge with a view to currying favour with the masses in a popularity contest before a public that is so starved of principled leaders that any pretence of a principled stand will do.

I am disappointed in those Constitutional Court judges who align themselves with the media statement of 30 May 2008. Constitutional Court judges are supposed to uphold the values enshrined in our liberal Constitution. I fear they have elected instead to trample on the Cape

Judge President's right to human dignity by issuing a media statement about an allegation that the Judge President has "approached some of the judges of the Constitutional Court in an improper attempt to influence" that court's pending judgements. The statement is long on condemnation and short on fact.

What was the nature of this "approach" to which the statement refers? What were the circumstances in which "some of the judges" of that court were "approached"? What precisely did the Judge President convey to them? How many judges were "approached"? Is this a complaint by the judges who were "approached" or by the entire Constitutional Court contingent? Was an explanation sought from the Judge President as regards his intentions before issue of the media statement?

The statement is silent on all these facts. All we have is a conclusion that the Judge President attempted improperly to influence judgements of that court. Having acted as a judge on a number of occasions, I know that judges routinely discuss with their colleagues cases in which they preside. From the media statement of the Constitutional Court judges, it is impossible to say on what basis it is alleged that the Judge President crossed the line, as it were, in doing so.

I am disappointed also in the leaders of the organised legal profession – particularly the Cape Bar Council and the General Council of the Bar. At a time when leaders of the organised legal profession should be standing up for what is right, they have joined the out-of-tune chorus in calling effectively for the Cape Judge President's head.

But what is the basis for this chorus? They do not know because the Constitutional Court judges involved in the release of the media statement have not even told the Judicial Service Commission yet. They have until 13 June to do so.

Here is another issue I find concerning. The JSC says in its media statement released on 6 June that it is not yet in possession of the "facts underlying the complaint" because the Constitutional Court judges concerned "have been unable" to provide them. If that is so, then what "complaint" has been lodged with it? Does that not mean the judges have submitted what is effectively a conclusion, and are now looking to the JSC to endorse that conclusion on facts they are yet to find?

In issuing a media statement before lodging a complaint based on facts, the judges of the Constitutional Court have created fertile soil for speculative analyses. Now analysts – senior members of the Bar and professors of law even – appear on television and speak of the Judge President's past encounters with the JSC. That the JSC found his conduct on those occasions not so serious as to warrant his head on a platter for his detractors seems conveniently forgotten.

Now, as recompense for infractions they believe the Judge President should have been impeached but was not, leaders in the legal profession and the public (guided by a media statement of the Judge President's accusers that is long on condemnation and short on fact, and historical events that should have no bearing on this case) want him lynched on speculation that he may have discussed cases with a number of Constitutional Court judges before judgement was delivered in those cases.

This is wrong. It would still have been wrong if the judge were white or woman or gay or a suspected paedophile. Even if the facts ultimately show that he did what is alleged of him, the public lynching is in my view indefensible. That is not to say a complaint against him to the JSC is not competent. Of course it is.

I believe the Judge President's right to human dignity has been harmed by the manner in which the judges of the Constitutional Court have elected to deal with the allegation they make against him. Newspaper columns, magazine opinion pieces and the public's comments on the internet, radio and newspapers leave one in no doubt that the Judge President has already been condemned: and all this on the basis of one media statement released by Constitutional Court judges who conclude, without giving us facts, that the Judge President has acted improperly.

What makes this charade even more concerning is the assumption by analysts – senior members of the Bar even – that judges of the Constitutional Court would not have taken the decision to go public with the allegation lightly, thus assuming, improperly, that if the Constitutional Court judges say it is so, then it must indeed be so. This is wrong.

On this reasoning, there would be no point in the Judge President even making submissions to the JSC in his defence because the Constitutional Court judges have decreed that he acted improperly and the JSC has no choice but to purge him. Clearly, that cannot be right.

Consider this: who will ultimately preside in a case if the Judge President decides to sue the Constitutional Court judges for constitutional damages for the violation of his right to human dignity, and the case ends up before the Constitutional Court?

In my view, what the Constitutional Court judges have done is wrong. Everyone who stands for what is right – black and white – ought to apply their minds to the facts of this case (if and when they come out) and make a stand instead of cheering on a public lynching based, evidently, on the Judge President's past experiences. You may be next.

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