

Sandile Ngcobo: A Short Study in Judicial Leadership

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ABSTRACT

This personal tribute to the retired Chief Justice discusses his judicial leadership while he held the position of Chief Justice. It seeks to fill a gap and to ensure that this aspect of Justice Ngcobo's professional record is not overlooked. This tribute does not attempt to delve into the academic literature related to judicial governance and leadership other than in passing; nor does it draw on the even bigger scholarly pool on leadership in general. Instead, it offers a discursive, somewhat personal account of my perception of the leadership role that Ngcobo played, especially during his brief, but to my mind seminal, period as Chief Justice between 2009 and 2011.

Keywords: judicial leadership; reforming Chief Justice; Judiciary; independence

For very good reasons, Sandile Ngcobo is widely regarded as a jurist of the highest order. Understandably, this volume and much of the critical acclaim and commentary on his career has focused on Ngcobo's distinguished contribution to South Africa's jurisprudential journey since 1994. But far less has been said or written about the former Chief Justice's leadership role. This short essay seeks to fill a gap and to ensure that this aspect of Justice Ngcobo's professional record is not overlooked. As such, it re-deploys some of the material and knowledge that I have cited elsewhere in my commentaries on the South African Judiciary,¹ attempts at modernising it,² and its critical place in the politics of the country since the advent of constitutional democracy in the mid-1990s. While it seeks to place the commentary on Ngcobo's leadership role within a wider constitutional governance and political framing, it does not attempt to delve into the academic literature related to judicial governance and leadership other than in passing; nor does it draw on the even bigger scholarly pool on leadership in general. Instead, it offers a discursive, somewhat personal account of my perception of the leadership role

1 Richard Calland, *The Zuma Years: South Africa's Changing Face of Power* (Zebra Press 2013).

2 Richard Calland (forthcoming).

that Ngcobo played, especially during his brief, but to my mind seminal, period as Chief Justice between 2009 and 2011. It is a short study of one man's short period at the helm of South Africa's judicial branch of government.

Unfortunately, Ngcobo's term as Chief Justice was not extended as it might have been. The Constitutional Court held that President Zuma's exercise of a power to extend the term of the Chief Justice purportedly delegated to the president by parliament was unconstitutional.³ Regrettably, parliament failed to act in time to recover the situation, by amending the law, and so, essentially abandoned by the ruling African National Congress (ANC) whose 'support for Ngcobo evaporated into thin air', as I argued soon afterwards,⁴ Ngcobo's two-year term expired and he was in due course succeeded controversially by Justice Mogoeng Mogoeng.

But Ngcobo's two-year term was impactful because the Chief Justice had a bold ambition, which he focused on almost to the exclusion—and possibly the cost—of everything else: in his two years, Ngcobo provided as much leadership, with clarity of vision, as any other Chief Justice of South Africa:

Ngcobo's first goal as chief justice was to create space for the independent leadership that he believed was essential if the judicial branch of government was to flourish and to operate in the way that the Constitution envisages. Hence, his first objective was to establish the OCJ, from which he would be able to lead the reform of the administration of the judiciary and the building of a strong judicial branch of government.⁵

Indeed, had he stayed in office, I submit that he would have come to be seen as a great, reforming Chief Justice. This is a significant claim and, therefore, close to the outset of this essay, I should declare my own interest. The unit at the University of Cape Town (UCT) that I led from 2007 to early 2017—the Democratic Governance and Rights Unit (DGRU)—benefited both from the good relationship that I had with Justice Ngcobo and from his willingness to entrust us with an important research report in the service of his greater goal—namely, a research report on comparative models of judicial governance. But, as I argued in 2013,

my assertion is premised on this reasoning: he had the vision of an independent courts' administration – independent of the Department of Justice and the executive arm of government – and the wisdom to understand its importance for the long-term democratic sustainability of the country. Moreover, he had the guts and the political clout to push it through.⁶

3 *Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law v President of Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of Republic of South Africa & Others* 2011 (5) SA 388 (CC).

4 Calland (n 1) 293.

5 *ibid* 275.

6 *ibid* 273–274.

At least one of the people who worked closely on Ngcobo's single-minded project to strengthen the judicial branch of government by creating a powerful Office of the Chief Justice (OCJ) at its head agrees with my assessment. Kevin Malunga, who now serves as the Deputy Public Protector, was part of a special task team established to explore institutional modalities for the OCJ⁷, takes the view that

[t]he OCJ is CJ Ngcobo's greatest legacy. His vision was a Judiciary that is institutionally, politically and financially independent from the Executive. The OCJ was his vision and he put in place and set in motion all the structures that exist to this very day.⁸

Upon what kind of historical backdrop did Ngcobo seek to paint his vision for the future of the judicial arm of government? In terms of judicial governance, prior to 1994 no framework was provided by any of South Africa's constitutions or even by law.⁹ As one of the main architects of the South African Constitution (as the executive director of the Constitutional Assembly) and a subsequently important figure in the establishment of the OCJ, Hassen Ebrahim notes:

The governance of the South African judicial system has always been somewhat opaque. Traditionally, the executive branch has been responsible not only for the magistracy but also for the administration of the superior courts with regard to finance, support staff and logistics...¹⁰

As is customary in parliamentary systems, the governance and administration of the judicial branch was then controlled by, and contained within, the executive branch of government, raising questions about the separation of powers and functions and, as a result, about judicial independence.

As democratic South Africa's first black Chief Justice pointed out:

Unlike Parliament or the Executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier.¹¹

The final Constitution of 1996 seemed to anticipate substantive reform and modernisation. As Ebrahim has noted, a transitional provision envisaged the kind of rationalisation of

7 Malunga was head-hunted from the private sector by Sizani, the first Secretary-General of the OCJ, on behalf of Ngcobo. He was appointed to assist the secretary to the task team, Hassen Ebrahim, as a researcher, while reporting to Sizani. Malunga worked in a two-person team with Liezel Power. He later served as Acting Chief of Staff in the OCJ.

8 Author's interview with Malunga, 4 May 2017.

9 Mtendeweka Mhango, 'Transformation and the Judiciary' in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014) 68, 70.

10 Hassen Ebrahim, 'Governance and Administration of the Judicial System' in Hoexter and Olivier (n 9) 99.

11 Ismael Mohamed, 'The Role of the Judiciary in a Constitutional State: Address at the First Orientation Course for New Judges' (1998) 115 SALJ 111 at 112.

the court system commensurate with a ‘judicial system suited to the requirements of the new Constitution’.¹² Ebrahim further points out that one would have expected a carefully constructed and detailed plan to have emerged in the period after the promulgation of the final Constitution. Instead, there was a long period of procrastination, peppered by piecemeal reforms that did very little to advance the idea of autonomous judicial governance: ‘Successive Ministers of Justice failed to give the constitutional obligation the careful, deliberate and methodical consideration it deserved.’¹³

Ebrahim was provided with an opportunity to help address this lacuna in judicial governance when he was appointed by Ngcobo’s seasoned aide-de-camp, Advocate Richard Sizani, to head the Secretariat responsible for supporting a high-level committee established by Ngcobo early in his short term of office as Chief Justice to support the development of an appropriate model for a future OCJ. Sizani was later appointed as the first Secretary-General of the OCJ. He knew Ebrahim from when Ebrahim headed the Constitutional Assembly Administration. Ebrahim notes now that:

[D]uring the negotiations, we addressed the transformation of the Executive and Legislature, but aside from the Constitutional Court, we did not touch the Judiciary. It was therefore the ‘last frontier’ in the process of democratic transformation.¹⁴

In this context, it is important to note that Ngcobo had first raised the topic back in 2003, long before his time as Chief Justice, when at the National Judges’ Symposium he argued:

At a conceptual level, one cannot talk about the judiciary as a genuinely independent and autonomous branch of government if it is substantially dependent upon the executive branch not only for its funding but also for many features of its day-to-day functions and operations. The practical dimension flows directly from this. While the judicial officers may be free to operate independently and to hand down fair and impartial decisions according to law, their ability to do this may be constrained in various ways, notably by the financial, human and physical resources available to perform their tasks. A key element of this is the extent to which the judiciary has control over its own resources and thus is able to determine its policy and strategic priorities and how funds are to be allocated to pursue those priorities.¹⁵

12 Ebrahim (n 10) 100, referring to item 16(6) of Schedule 6 of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’).

13 *ibid.*

14 Author’s interview with Ebrahim, 19 April 2017.

15 Quoted by the current Chief Justice in Mogoeng Mogoeng, ‘The Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa’ Annual Stellenbosch Law Faculty Human Rights Lecture (University of Stellenbosch, Cape Town, 25 April 2013) <<http://constitutionallyspeaking.co.za/chief-justice-speech-at-annual-stellenbosch-law-faculty-human-rights-lecture/>> accessed 22 February 2016.

While the duties and responsibilities of the Chief Justice ‘steadily escalated’, as the OCJ’s ‘legacy report’ describes it,¹⁶ little progress had been made to develop the capacity of, and around, the Chief Justice. Soon after his appointment in 2009, Ngcobo presented a memorandum to the heads of court that made the basic case for greater judicial independence in its governance.¹⁷ Ngcobo then began to further build the case for judicial governance autonomy by first of all conducting research that set out the very considerable powers and authority that were now vested in the Chief Justice and then commissioning research on different models of judicial governance. His purpose with the first research effort was to show how much responsibility and authority now sat on the shoulders of the Chief Justice and why, therefore, the capacity of the OCJ needed to be beefed up. Indeed, in this regard, I recall how Chief Justice Ngcobo began our first meeting to discuss how UCT might assist by presenting me with a dossier that enumerated the very long list of legal and constitutional functions and responsibilities that fell on his shoulders and which ran to several pages. Ngcobo made it plain to me that he regarded it as fundamentally unsustainable to place such a burden on the head of the Judiciary without providing concomitant levels of support—both institutional capacity and resources. In accordance with this underpinning understanding of the need to recognise the authority of the head of the judicial branch of government, a subsequent 2012 constitutional amendment confirmed the Chief Justice as the head of the Judiciary, with authority to ‘exercise responsibility over the establishment of norms and standards for the exercise of the judicial functions of all courts.’¹⁸

Initially, however, Ngcobo’s strategy was regarded, at least by some observers, especially those in the liberal legal establishment, as ‘imperial’ or even ‘self-aggrandisement’. And Ebrahim offers his own dash of scepticism:

The OCJ was really established in response to a call made from the time that Arthur Chaskalson was Chief Justice. He asked for more support and the OCJ was then established. Ngcobo’s vision was different. He believed that the Judicial Branch was headed by a Chief Justice who was to be the ‘co-equal’ to the President and Speaker. This equality would, therefore, come down to even having the same level of salary, benefits, security detail and even the entitlement to entertainment allowances.¹⁹

16 Office of the Chief Justice, Republic of South Africa, ‘The Establishment of the Office of the Chief Justice: 2010–2013’ <<http://www.judiciary.org.za/images/establishment/Establishment-of-the-OCJ-2010-2013.pdf>> accessed 4 May 2017.

17 Judicial Governance Reform Proposal to the Heads of Court (25 November 2009), referred to in Ebrahim (n 10) 107.

18 Section 1 of the Constitution Seventeenth Amendment Act, 2012 amends s 165 of the Constitution by adding subsec (6), which states that ‘The Chief Justice is the head of the judiciary and exercises responsibility over the establishment of norms and standards for the exercise of the judicial functions of all courts.’

19 Author’s interview with Ebrahim, 19 April 2017.

Rightly or wrongly, this was the preoccupation of the Ngcobo chief justiceship: as Ebrahim notes,

no-one wanted to talk about magistrates or judicial accountability. All they were interested in is having and controlling their own budget, except that they did not want to be held accountable for this.²⁰

In the meantime, Ngcobo had made significant single-minded progress in laying the foundation stones for a much sturdier institutional edifice to be built around the Chief Justice: the establishment of the OCJ in a three-line presidential proclamation in August 2010 represented a small acorn from which a great oak tree might grow.²¹ It attracted little or no attention from the media or legal commentators, despite widespread reporting about ‘threats to the independence of the judiciary’. Ebrahim’s view is that Ngcobo’s ‘focus was more on the OCJ rather than judicial independence’.²² But the counter-argument is that Ngcobo was executing his revolution quietly, beneath the radar, recognising that ‘Rome was not built in a day’ but rather incrementally, and that judicial independence required as a precondition a strong and capable institutional base in the judicial branch itself: as the current Chief Justice has acknowledged, the OCJ potentially represented ‘a critical stepping stone towards the establishment of a fully-fledged court administration system led by the judiciary and created in terms of legislation as an entity independent of the executive’,²³ because of the leadership and governance role assigned to the Chief Justice by the Constitution. Indeed, recognising the relationship between budgetary autonomy and separation-of-powers’ independence, Ebrahim himself notes that Ngcobo ‘also then pursued the argument of Judicial Independence and control over the budget which is a subject that Arthur too called for.’²⁴

But there was a further question concerning the precise modality to be employed that needed to be considered, and finessed. Hence, a second piece of research, conducted by the DGRU, was intended to help interested parties understand that what Ngcobo wished for, by way of judicial governance autonomy, was not so out of the ordinary compared to the approaches taken elsewhere in the world, but that there were different ways of organising it. Shrewdly, Ngcobo enlisted the assistance of his two predecessors as Chief Justice, Chaskalson and Pius Langa, to chair an internal committee to review and finalise the report, with the assistance of former Constitutional Court Justice Yvonne Mokgoro.

20 *ibid.*

21 The OCJ was established as a national department by proclamation of the president in (GG) 335500 (23 August 2010).

22 Author’s interview with Ebrahim, 19 April 2017.

23 Mogoeng Mogoeng, ‘The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards’ (Speech delivered at Chatham House, London, 25 June 2013) <<https://www.chathamhouse.org/sites/files/chathamhouse/public/Meetings/Meeting%20Transcripts/250613Mogoeng.pdf>> accessed 22 January 2018.

24 Author’s interview with Ebrahim, 19 April 2017.

With others, they constituted a ‘Committee on Institutional Models for the Office of the Chief Justice’.²⁵

Malunga recounts:

The Committee and officials worked like clockwork. Once or twice Chief Justice Chaskalson did lose his temper as he was not pleased with the speed at which we were moving. Chief Justice Langa was the dove of the Co-Chairs, always calm and humorous. CJ Ngcobo had also appointed retired Constitutional Court Justice Yvonne Mokgoro as ‘Judge in the Office of the Chief Justice’. She had a cursory role in this project but was highly instrumental in setting up the structures of the OCJ. Our [the secretariat’s] job was to consolidate the Committee’s vision. I was given a lot of leeway by my bosses to be proactive in researching the various models and outcomes that we sought. The mission was clear: to create a model for an independent Office of the Chief Justice that would be in line with international best practice. What we didn’t realise is that we were creating something so innovative and powerful that is not found in most advanced democracies.²⁶

The committee’s research project formed the basis for a subsequent report—Policy Framework: Independent Court Administration²⁷—which provided a survey of three different models of court administration: an executive-based model, an entirely autonomous model and a Judiciary-based model. The Judiciary-based model emerged as the preferred one, which would ‘locate[s] an independent court administration authority outside both the executive and judiciary’, accountable only to the judiciary.²⁸

In line with the original Ngcobo proposal, two independent bodies would be established: a Court Administrative Authority or Office would be the executive and administrative part of the new institutional arrangement, under the oversight of an independent Judicial Council and a Courts Advisory Board. Explicitly adopting the approach of the Asmal Report,²⁹ a seminal report on constitutional bodies and their funding and other institutional arrangements, the Department of Justice’s Policy Framework addressed the critical issue of the budget of the Judiciary by submitting the proposal that the court administration body would be required to submit the budget of the judiciary directly to

25 The committee consisted of former Chief Justices Arthur Chaskalson and Pius Langa (Co-Chairpersons), along with a number of people selected for their special skills: Constitutional Law academic, Prof Karthy Govender; human resources expert, Cecilia Khuzwayo; financial expert, Ynze de Jong; public administration expert, Prof Sibusiso Nkomo; governance expert, Prof Mandla Mchunu; experienced attorney, Themba Langa; and an experienced researcher, Prof Nic Olivier. Hassen Ebrahim served as the Head of Secretariat that supported the committee.

26 Author’s interview with Malunga, 4 May 2017.

27 ‘Policy Framework: Independent Court Administration’, unpublished document prepared by the Department of Justice ‘in order to assist it to adopt a policy position in relation to a new system of court administration in South Africa’, referred to by Ebrahim (n 10) 104.

28 ‘Policy Framework’ (n 27) para 104.

29 Parliament of the Republic of South Africa, *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions* (Parliamentary Communication Services 2007) (chaired by the late Professor Kader Asmal, MP).

parliament without going through the conduit of a national department. This inserted a significant element of protection for the fiscal integrity of the judicial branch of government. This idea drew, to some extent at least, on the model of the Norwegian Court Administration, which has a semi-autonomous status and is symbolically located not in the nation's capital city, Oslo, but in Trondheim, some 500 km to the north-west.³⁰ However, despite these good intentions and the platform that had been carefully built for the institutional autonomy and independence of the Judiciary, a further period of procrastination has becalmed the waters of reform modernisation, although an increasingly frustrated Chief Justice Mogoeng has apparently done his best to keep the wheels of reform turning. In October 2014, the Minister of Justice, Michael Masutha, announced that the staff and administrative functions attached to South Africa's superior courts would be transferred to the OCJ. These transfers would go a long way towards enhancing the institutional independence of the Judiciary, Masutha said. He stated that the decision to transfer the courts to the OCJ was founded on constitutional guidance:

The government appreciates that the independence of the courts and the rule of law can only thrive in a constitutional setting where there is clear separation of powers with appropriate checks and balances.³¹

The OCJ even found a place in President Jacob Zuma's February 2015 State of the Nation address and, two weeks later, a substantial sum of R6bn was appropriated to the OCJ in the national budget to provide for its resourcing for the next three years. Chief Justice Mogoeng has built steadily on the advances made during his predecessor's short term. That Ngcobo had made such progress so relatively quickly was testimony not only to his vision and leadership, but also to his political guile. Notably, he had built a viable relationship with the then Minister of Justice, Jeff Radebe. Ngcobo's skill in igniting the modernisation process, and in persuading Radebe to be supportive, should not go unacknowledged or be underestimated.³² As Malunga acknowledges:

The relationship was good until the controversy over the renewal of Chief Justice Ngcobo's tenure, during which time various tensions arose with the Department of Justice (DOJ) and among Constitutional Court judges. There was a perceived reluctance by DOJ officials to give away powers and responsibilities from what was a behemoth structure. When CJ Ngcobo left and CJ Mogoeng took over he found those tensions still prevalent.³³

In fact, the committee's report gathered dust for a while as the government was unsure what to do with it. Ironically, Malunga later left the OCJ in 2012 to become a State

30 In June 2011, with the support of the Norwegian Embassy in South Africa, the DGRU organised a study visit by South African judges to Norway, led by Chief Justice Ngcobo. The study tour included visits to the Supreme Court of Norway and the Norwegian Court Administration in Trondheim.

31 <<http://www.southafrica.info/about/government/judiciary-011014.htm#ViDK9BOqqkoi#ixzz3oiy5r7TA>> accessed 24 September 2015.

32 Calland (n 1) 278.

33 Author's interview with Malunga, 4 May 2017.

Law Adviser in the DOJ, where one of his projects was the Discussion Document on the transformation of the judicial system and role of the Judiciary in the developmental South African state that he had worked on with Advocate JB Skosana, who was then Head of Policy at the DOJ: ‘in this respect we started implementing what we had started in the Ngcobo project.’³⁴

I have argued that

[w]hile there has been significant progress in modernizing the judiciary since the establishment of a democratic constitutional order in the mid-1990s, there has also been procrastination in important areas of reform, leading to a prognosis for the future that is somewhat precarious.³⁵

Yet, in the realm of judicial governance, after a slow start, significant progress has been made. It is clear that judicial independence—with which South Africa is greatly endowed—depends, in turn, on judicial leadership. This independence is evidenced, first, by the refusal of the Judiciary to bend to the various attempts that have been made to intimidate it in recent years and by ongoing tensions between the executive and judicial branches and, secondly, by the forthrightness with which the courts have been willing to hold both the executive and the legislative branches to account when they act unlawfully or otherwise violate the Constitution.

Democratic South Africa has been blessed with some extraordinary judicial leaders. The first black Chief Justice, Ismail Mohamed, was widely regarded as a colossal legal figure, and so, too, in their own ways were his three successors: Arthur Chaskalson, Pius Langa and Sandile Ngcobo. While the first three of this quartet were great jurists and leaders of the Constitutional Court, it was the fourth, Ngcobo, who has had the greatest impact on judicial governance and, as a result, on judicial reform,³⁶ because of his far-reaching understanding of the importance of attaining sufficient judicial autonomy in the governance of the judicial branch of government and, more importantly still, his acumen in persuading the government of the day to accede to his request to have a semi-autonomous OJ established to lead the governance of the Judiciary. As Malunga puts it:

CJ Mogoeng has been implementing CJ Ngcobo’s vision. The contribution Ngcobo made as CJ was to create the Office of the Chief Justice with a mandate that is in keeping with international best practice. In fact, he is a trailblazer in this regard as the institution that we created is unique in terms of its framework and structure.³⁷

34 *ibid.*

35 Richard Calland (forthcoming).

36 Calland (n 1) 273–275.

37 Author’s interview with Malunga, 4 May 2017.

It is a noble legacy, of vision and leadership, achieved within a remarkably short two-year term of office as Chief Justice, one that should be added to Sandile Ngcobo's extraordinary accomplishments as a jurist.

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