

## Donald Molteno Q.C. (1908-1972)

Donald Molteno was born on 13 February 1908. He was the eldest son of Wallace Molteno, a sheep farmer in the Karoo, and a grandson of Sir John Molteno, the first Prime Minister of the Cape Colony



**The farm house at Nelspoort, c. 1914**

(1872-78). From a very early age, he proved himself a serious little boy with an intense interest in current affairs. Early in the First World War, his mother, Lil, wrote to his Aunt Betty Molteno from the family home at Nelspoort saying: "Little Donald [who was not yet seven at the time] thinks about the War all day and pores over the war map. He has worried out for himself where all the fleets are, and I can't turn his thoughts to anything else. He 'rests' after lunch, but never

sleeps, and is always ready with a question at tea time." (Lil to Betty, 10 November 1914) And a few months later, he has become an avid reader, and his mother writes to Betty again (25 April 1915): "Such a new world has opened up to the dear little chap and his eyes are always shining with wonder. I am teaching him to recite a little and find the histrionic powers on my side of the family have descended to him."

In 1918, at the age of ten, Donald was sent down from the Karoo to boarding school at the Diocesan College ('Bishops') in Cape Town. In 1927 he got a place at Pembroke College, Cambridge, where he read the Law Tripos. He also ate his dinners at the Inner Temple, one of the Inns of Court, and was called to the Bar there on 27 November 1930. He spent the next year in Common Law Chambers, starting out as a practising barrister in London, and living at the university settlement of Toynbee Hall in the East End. There he witnessed the onset of the Great Depression and paid for his board by giving free legal advice to the poor living in the slums roundabout. In late 1931, he accompanied his parents back to South Africa where, on arrival in Cape Town, his father died almost immediately that November. Donald began to practise at the Cape Bar in early 1932, and he remained a member of the Bar for over 30 years until he joined the Law Faculty of the University of Cape Town in 1964.

Quite soon a large part of his time was spent as the first – and unpaid – representative of the newly formed South African Institute of Race Relations. He served as its first regional representative in the Western Cape from 1936. Twenty years later, he became its honorary President from 1958 to 1960. Much of his energies were devoted to case work trying to help individual Africans in the Cape with their endless problems relating to pass laws, housing, and the right to work in the area.

In the early 1930s, Donald met his first wife, Veronica Stromsoe. Her family had settled in the Cape from Norway. She and Donald got married in 1934 and had two children – the eldest, Wallace, who was born in 1936, and his sister Josephine in the following year. Donald and Veronica were not happy, however, and got divorced in 1940. In the same year, Donald married again. His new wife, Molly (Mary Fleet)

Goldsmith, was a teacher who had been recruited in England by Roedean School (girls only) to come out to Johannesburg and teach French and German. Molly and Donald had three children – Robert (b. 1943), Patrick (b. 1945), and Frank (b. 1953).



**Donald Molteno, at 29 years, the youngest South African Member of Parliament in 1937**

Meanwhile in 1936 the all-white South African government, under the Boer War Generals J. B. M. Hertzog and Jan Smuts, passed the Native Representation Act which in fact *took away* the right of those Africans in the Cape Province who met certain educational or property qualifications to be on the voters roll in parliamentary constituencies. Donald served as a junior counsel to the former Chief Justice, Sir James Rose Innes, in challenging (unsuccessfully) the constitutionality of this legislation. The African National Congress (ANC) then decided to test the political effectiveness of this derisory provision of three seats in Parliament which had been offered to those Africans who had lost their right to be electors on the common voters roll. The ANC asked Donald to stand in June 1937 as one of the three candidates it supported. He did so in the huge constituency called the Cape Western Electoral Circle with the support of the ANC provincial chairman, Canon Calata, the trade unionist Tom Ngwenya, the Rev. Z. Mahabane and many others. He was elected, and for the next eleven years had the dispiriting task of representing and defending the interests of African South Africans in Parliament. In carefully prepared and incisively delivered speech after speech, he put forward

their case, deplored the failure to recognise black South Africans as equal citizens, and setting out the principles of a common society and equality before the law.

What is more, since no Coloured or Indian South Africans were allowed to be Members of Parliament, Donald found himself in the extraordinary role of taking up issues on behalf of *all* South Africans of colour. As early as 5 June 1939, when the young thirty-one year old M.P. had only been in Parliament two years, A. I. Kajee and S. R. Naidoo, joint honorary secretaries of the South African Indian Congress which Mahatma Gandhi had founded early in the century, wrote to him “conveying the gratitude of the Indian community for the liberal and sympathetic attitude shown by you towards our people.”

By the time of the 1948 general election after the Second World War, the political situation had changed radically. Afrikaner nationalism was triumphant. And the ANC realized that they had to find a new strategy. In particular, they began to mobilize large numbers of Africans in civil disobedience against oppressive legislation like the Pass Laws and to demand democratic rights. Donald decided not to stand

for re-election in November 1948. Now aged forty, he intended at first to build up his legal practice at the Cape Bar, and reduce his financial worries of supporting his family.



**Harry Snitcher, Graeme Duncan and Donald Molteno ( L to R ) – the barristers in the ‘Coloured vote’ constitutional cases, 1950s**

But the course of events soon diverted him once again. A radically racist Afrikaner only government under the National Party was now in power. It spent the 1950s passing law after law to institutionalise racial discrimination and segregation – the system that came to be called Apartheid. The government also decided on a big new anti-democratic step in 1951, namely to remove all South Africans of mixed ethnic descent, so-called Coloured South Africans, from the voters roll. Donald was part of a three-man team of distinguished lawyers, led by Graeme Duncan and Harry Snitcher, who in legal case after case spent much of the years 1952 to 1957 challenging the constitutionality of this further step excluding all South Africans of

colour from any role in the government of their country. Despite some success in the courts, the government in the end succeeded in getting its way.

Donald’s life can be seen as a sequence of political defeats which he took terribly to heart. He lived through the rise of fascism in Europe, the years when it looked possible that Britain might be defeated by Nazi Germany in the Second World War, the coming to power in South Africa after that War of an Afrikaner nationalist government whose hegemony lasted nearly half a century, the entrenchment of racism and segregation in every sphere of South African life, and, as popular resistance mounted, the destruction of the rule of law and civil liberties. He knew intimately the enormous human suffering apartheid imposed on the vast majority of South Africans. And he understood the inevitable consequences in the long term of political exclusion and systematized injustice. Little wonder that, throughout his life, he was plagued by worry, nervous tension and unhappiness.

There were occasional beacons of hope shining in the darkness. In the course of the legal battles of the 1950s, a small number of white South African women formed the Black Sash. These courageous women stood (literally, for their characteristic *modus operandi* was to stand in silent vigil) for civil rights and in opposition to racism. Donald became the Black Sash’s key legal advisor and its mentor in developing its understanding of the legal issues involved. As its magazine, *The Black Sash* (February 1973) said in its obituary about him: “He taught us all we had to know about Civil Rights, about the inequities and iniquities of the pass laws and influx control...; and so very much more. His knowledge and experience ... illuminated all our efforts to inform and educate ourselves and the South African public.”

Another thread in his life during the 1950s was a further intensification of his case work. He was constantly approached by South Africans of colour who were the victims of the avalanche of racist laws.

The Population Registration Act, 'racial classification' by another name, tore families apart. The Group Areas Act threw them out of the homes where they had often lived for generations. 'Job Reservation' closed off all sorts of employment to South Africans of colour. And the 'Pass Laws' threw literally millions of African South Africans out of the urban areas where they had to go in order to find jobs, breaking up families in the process. Some of Donald's work involved taking these cases to court; some of it was one to one counselling of poverty-stricken people in desperate circumstances. As his work day by day showed him relentlessly, the human toll of apartheid was one of the great human tragedies of the 20<sup>th</sup> century.

During these years, Donald remained convinced that South Africa's only solution was a democratic transition so that the laws and policies of government were influenced by the concerns and interests of the great majority of South Africans, not just the 20 per cent or so of South Africans classified as 'white'. He joined a small number of liberal and non-racist South Africans who formed the Liberal Party in 1953 and served as national Vice-Chairman. The tiny party set itself the desperately difficult, and as it turned out impossible, task of persuading the white electorate of the self-destructive folly, as well as immorality and economic nonsense, of excluding their fellow South Africans politically. After four years Donald resigned from the Liberal Party because he concluded that its subsequent adoption of a universal franchise made this task impossible.



**Donald Molteno, first Professor of Public Law at the University of Cape Town, 1967**

Then in 1959, a dozen or so Opposition White M.P.s founded another political party, the Progressive Party, with similar objectives to the Liberals but comprising only white South Africans. Donald was part of this initiative and chaired the Constitutional Commission which the new party set up. Its detailed report, which he drafted and which came to be known as the Molteno Report, proposed a complete constitutional overhaul of the country's system of government. It put the case for, and made detailed proposals relating to a written constitution; non-racial voters roll (but based on the 19<sup>th</sup> Century notion of 'qualifications', rather than a universal 'one person, one vote' franchise); a federal system devolving significant powers to the provinces; a bill of rights to protect the individual; and an independent, non-politicised judiciary.

But events continued to outpace all attempts at gradualist reform. The Progressive Party was immediately crushed by the white electorate at the polls and for years had only one Member of Parliament. The South African regime also decided from the mid 1950s to crush all opposition that might pose a serious threat. It put the African National Congress and other leaders on trial for treason, and when this play

failed, four years later banned the ANC and many other political organizations. In the first half of the 1960s, successive laws ended up creating a police state where the police were free to use detention and torture on a routine basis. This destruction of human rights pushed Donald's life in new directions. Increasingly, he found himself involved in cases where South Africans were victims of bannings, detention, house arrest and other forms of police state repression. And he began to play a leading role in the Civil Rights League.

His legal practice faded away all the while as potential clients who could afford to pay for legal services feared that briefing him would prejudice their cases in the eyes of judges. In 1964, he was forced to give up his practice at the Bar. He became instead a Senior Lecturer in Roman-Dutch Law at the University of Cape Town. And then, with his reputation as a leading constitutional lawyer, he was appointed the first Professor of Public Law at UCT in 1967.

During his life he held many honorary positions, including president of the South African Institute of Race Relations, president of the Cape Flats Distress Association (CAFDA), a member of the Council of the University of Cape Town, as well as giving endless time advising the Legal Aid Bureau, Institute of Citizenship, the Black Sash, Civil Rights League and Spro-cas. As his biographer, David Scher, put it, 'to these and other organizations and individuals he gave his time and service, faithfully and generously, until the very end of his life.'<sup>i</sup>

His funeral in St George's Cathedral in December 1972 bore witness to the values he stood for and the friendships he made. His pallbearers, in addition to his eldest son, Wallace Molteno, comprised Professor Ben Beinart, who was a Jewish South African; V. C. Qunta, an African South African; John Ramsdale, a Coloured South African; David Knight, an English-speaking lawyer at the Cape Bar; and Mr Justice Theron, of Afrikaner ancestry). It would be another twenty years before democracy and non-racialism finally came to the 'rainbow country'. As his entry in the *Dictionary of South African Biography* (Vol. V, p. 515) says, "he was a man of great humanity, as well as of brilliant intellect."

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<sup>i</sup> D. Scher, *Donald Molteno – 'Dilizintaba' – 'He who removes mountains'*, South African Institute of Race Relations and Donald Molteno Memorial Committee, 1979, p. 3.