NOTE TO THE READER

Please be advised that this issue of Apdusa Views is ***41 pages*** long.

All the best for the festive season and 2006

Editorial Committee

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THE JUDICIARY

IN CRISIS

APDUSA VIEWS
P O BOX 8888
CUMBERWOOD
3235
e-mail: malentro@telkomsa.net

THE JUDICIARY IN CRISIS – SHENANIGANS, RACISM AND INCOMPETENCE

Introduction

Recently there has been much talk about the judiciary of this country. There have been debates and discussions. All this interest was triggered off by a public statement by the Judge-President of the Cape High Court to the effect that members of the Cape Bar had made the allegation that the majority judgement in the matter involving the Pharmacists against the Minister of Health was written by him for a fellow-judge who is black. The purpose of the allegation is to show that a black judge who is not qualified to hear and adjudicate on a matter yet chooses to do so. And when the time comes to write his judgement, he finds that he does not have the skill and knowledge to do so. He then has to resort to the humiliating and dishonest practice of getting a colleague to do it for him. For the record it should be noted that the Judge-President has denied that he was asked to write the judgement or that he wrote the judgement.

TRANSFORMATION = "OPEN SESAME!"

The furore in the Cape High Court was followed by predictable complaints about racism in the legal fraternity, including the judiciary. The complaint of racism is invariably accompanied by the accusation that there has been no transformation in the legal world.

We know by now that a demand for transformation can mean a demand by a section of the new black elite for a thick slice of the cake, i.e. a life of comfort and opulence.

The world has for centuries been enthralled by the marvellous tales of beautiful princesses, enchanted beings like jinns, of great loves and of limitless treasures of gold, rubies, exquisite craftsmanship. Favourite among those tales was the one called: "Ali Baba and the Forty Thieves." The highlight of the tale was when Mr Baba and his associates would ride up in their swift Arab steeds to the face of the mountain and shout the words "Open Sesame!" The face of the mountain would open and reveal a cave in which were placed numerous caskets of the treasure described above. The treasure was

there for the full use and enjoyment by these forty one gentlemen. All they had to do was to utter the words, "OPEN SESAME!"

Today, in South Africa, ten years after democracy was ushered in, a section of the new black elite believe that all one had to do was to utter the words "transformation" and/or "racism" and/or "representivity" and/ or "demographics" the multistoried buildings would open their doors and the person uttering the words would then enter a world of comfort, wealth and luxury, without a quid pro quo of effort and/or skill.

TRANSFORMATION IN SOUTH AFRICA

The nature and quality of social transformation depends largely on the nature and quality of the persons or organisations who had initiated, driven, controlled and directed and guided transformation. Transformation then becomes a mirror of such persons and organisations. By analysing and assessing transformation, a person will in effect be analysing and assessing those persons and organisations.

When reflecting on transformation in South Africa the phrase "Jekyll and Hyde" comes to mind. This phrase refers to a two-sided personality, one side of which (Dr. Jeykll) is good and the other (Mr. Hyde) evil.

Transformation in South Africa like all the social transformations in a neo-colonial set-up is a mini Jekyll and a maxi Hyde phenomenon. The one side – a very tiny side – is socially progressive while the other side – by far the largest , is one unending frenzy of gorging by the new black elite on the wealth produced through effort of the toiling masses.

In essence transformation to this section simply means allowing the new black elite unlimited access to the feeding trough and to join in the frenzy. In the 11 years since the first democratic elections ***many billions of rands*** of public money has been devoured by the elite. There is not a day that passes by when one does not read or hear of one or more instances of fraud and theft of public monies. In an overwhelming number of cases the fraud and theft involves millions of rands. Let it be understood that for the new elite transformation has nothing to do with change for the better all round. It happens to be uni-faceted – the enrichment materially of the new elite.

THE NEW BLACK ELITE

1.We consider ourselves the mortal enemies of all castes, classes and segments called elite which live off the wealth produced by the toiling masses.
2.During the pre-1994 oppression, we condemned the bulk of the white section of the population as living a life of luxury at the expense of the real producers of wealth in this country.
3. We draw no distinction between elites of different colours. They are all the same if they are parasitic and consumed by avarice at the expense of the workers and peasants.
4. During the long years of struggle, there was no special consideration accorded to the future black elite concerning a share in the wealth produced. You can search high and low in the statements, manifestoes, programmes and charters issued by the liberation movement, you will not find a single word about the black elite to be let alone being entitled to preferential treatment when it came sharing the wealth produced.
5. In the struggle for liberation the real power and strength came from the toiling masses. They were in the forefront of the struggle and they sacrificed the most for the BETTER LIFE FOR ALL.

- Yet when it came to reaping the harvest of the struggle, ***the new elite placed itself at the head of the queue.***
- Where did these queue jumpers come from?
- Nowhere in the world do people tolerate queue jumpers.
- Hence we are implacable enemies of all those who want take possession of things that they are not entitled to.

THE SAGA OF JUDGE PRESIDENT JOHN HLOPE

For convenience Judge President Hlope will hereinafter be referred to as the "JP"

By any standard, the JP is a most remarkable person. His achievement from being a gardener to obtaining a doctorate from the legendary University of Cambridge is the stuff that inspiring biographies are made of. The contents will flesh out the striving, the effort and the suffering entailed in attaining that success. If one adds the factor of racism which permeated the whole of society in which the JP was born, brought up, worked, studied and succeeded, a heavy new dimension is added to his life.

The question is whether he was prepared to deal and handle the success, the achievement, the honour and the high status conferred on him in so short a time?
This is a field which is pre-eminently to be dealt with by sociologists and psychologists.

CHRONOLOGY OF PRESENT SAGA

1.In August 2004 or thereabout, an urgent application was made to the full bench of the Cape High Court by the Pharmaceutical Society against the Minister of Health for an order declaring invalid the regulations issued by the Minister relating to the pricing system of medicines sold by pharmacists.

2. On 27th August 2004 the Cape High Court dismissed the application. The bench was split on the issue. Two of the judges, the JP and Judge Yekiso were for the dismissal while Judge Traveso found the regulations to be invalid and in favour of the applicants.

3. Application for leave to appeal to the Supreme Court of Appeal (SCA) was heard on the 20th September 2004.

4. The courts are usually indulgent when such applications are made. They are refused only when the court is of the view that no other judge would come to a different conclusion. The granting of leave to appeal is also an expression of humility by the judge granting the order sought to be appealed against, namely that he/she could be wrong.

5. The very fact that one judge had already recorded dissent meant that for all practical purposes, the requirement for the basis of leave to appeal was already established. To put it differently, the "basic test" is when "judges may legitimately differ."

6. This is when the saga began. The JP and Judge Yekiso who had given judgement for the Minister of Health did not grant leave to appeal as a matter of course when the law literally cried out that it be granted. A whole two months had elapsed and judgement had still not been given! One begins to detect a streak of unreasonableness in the JP. How dare

they appeal against ***his*** judgement! They want leave to appeal! Well, they can wait! ***They must wait until I choose to tell them why leave to appeal is refused!***

7. When the judgement on the application for leave to appeal was not delivered by the JP and his brother judge after the passage of two two months, the Pharmaceutical Society made application to the Supreme Court of Appeal (SCA) to hear the application for leave to appeal ***as if it had been refused*** by the Cape High Court – described as "constructive refusal".

8. Before the matter was heard by the SCA, one of its judges, Justice Harms, instructed by the Chief Justice to deal with the matter, inquired by letter from the JP whether he would instruct the Registrar of his court to send him a copy of the judgement when it was handed down. The JP's response was totally unexpected. It was described by well known law reporter, Carmel Rickard[1], as the rudest letter written by one judge to a colleague. The letter read inter alia, as follows:

> "Furthermore, if the intention was to consult me in my capacity as the head of this court, you are certainly not the right person to do so. To the best of my knowledge (the Supreme Court of Appeal) has a head called the president of the Supreme Court of Appeal, and that is definitely not you." [2]

9. In the absence of a meaningful response from the JP, the SCA decided to hear the matter on the 29th November 2004.

10. That same morning the JP announced that his judgement would be delivered on the 3rd December 2004.

11. When the matter came before the SCA on the morning of the 29th November 2004, Counsel for the Minister announced that the latter would not be participating in the deliberations as the Minister did not believe that the SCA had the jurisdiction to hear the matter. He even refused to

[1] Carmel Rickard is South Africa's best known journalist/newspaper reporter on legal matters. Apart from being the most experienced writer, she has high legal-academic qualifications. We have relied heavily on her reporting in this publication. For this we make no apology..
[2] Sunday Times- 28/11/04 – Article by Carmel Rickard

hand in heads of argument prepared for the original hearing of the case. This display of non-cooperation did not go unnoticed by the Constitutional Court when the matter was considered by it. The President of the Court, Judge Chaskalson spoke of the Minister's "deplorable lack of respect" while Judge Moseneke felt that her conduct was "open to severe criticism and borders on outright disrespect for the Court."[3]

12. While the legal representatives of the Pharmaceutical society were seeking to have the matter heard before the SCA, the State Attorney did a strange thing. She, acting on behalf of the Respondent (the Minister of Health) wrote a letter to the registrar of the Constitutional Court requesting that the dispute be heard before the Constitutional Court. The strangeness lies in the fact that Respondents do not take the initiative of seeking a hearing ***when the matter is not even brought before that court.*** It was abundantly clear that the State Attorney desperately wanted the matter of the application for leave to appeal and the merits of the dispute ***to be heard before the Constitutional Court and not the Supreme Court of Appeal.***
The question is WHY?

13. The most likely answer is that the Minister believed that she would have a more sympathetic or partisan bench in the Constitutional Court than she would in the SCA.

14. If one looks and examines:

a) The conduct of the JP and the clearly unreasonable delay in giving judgement on the application for leave to appeal,
b) The almost contemptuous conduct of the Minister's Senior Counsel in refusing to participate or cooperate with the SCA
c) The conduct of the State Attorney in writing to the registrar of the Constitutional Court and asking that the matter be heard in that court,

one is constrained to ask: Are all three events coincidental? Or are they part of a single plan or strategy to circumvent the SCA and have the

[3] Sunday Times – 9/10/05 - Article by Carmel Rickard

matter heard in what the Minister believed to be a friendly and hospitable terrain?

Bear in mind, in the Constitutional Court you don't need all 11 judges in your favour. All you need is SIX!!

There is one thing about the JP. He says what is in his mind, regardless of the consequences. As one of the judges sitting on the Pharmaceutical Society case, he had certain very strong views which did not make him the ideal person to hear the matter. Here is an example:

> "Hlope said people opposed to transformation had tried to exert influence through government and had attempted to use the judiciary to further their agenda.
>
> > 'We have seen this most of the time. Parliament in its wisdom will pass legislation, they will oppose it in parliament and, if their efforts do not work, they will rush to the judiciary on the eve of the law being enacted." said Hlope.
> >
> > He said an example was the recent battle between the pharmaceutical firms and government…
> > "Fortunately James (Cape High Court Judge James Yekiso) and I are not their allies," he said.[4]

This statement must stand out as the most extraordinary statement by a judge anywhere in the world. We live in a constitutional democracy in which separation of powers are clearly laid out in the constitution. Parliament may pass any law in its wisdom, but it is not supreme any more. The Constitutional Court has the power to strike down any law if it finds such law to be in contravention of the Constitution. What the JP finds objectionable is in fact allowed by the law, namely, the right of any individual or organisation to ask the Court to have any law or regulation declared unconstitutional. As a JP, Judge Hlope ought to have been among the first to defend the right of the individual to challenge the constitutionality of any act of parliament.

[4] Business Day – 24/10/05 – "Hlope calls for 'Africanised' justice".

The last statement of the above quotation removes all semblance of impartiality. The JP considers his duty to be that of a political combatant on behalf of the ANC and not of a judicial officer.
Having this background will go some distance in explaining all the peculiar goings on in respect of the Pharmaceutical Society case.

15. The SCA heard the matter in November and sat through the vacation and gave its judgement on the 20th December 2004. It took just 17 days.[5]

16. As expected the matter was then taken to the Constitutional Court where it remained from the middle of March until the end of September 2005.[6] And for a matter considered to be one of urgency! Was it overwork? Was it laziness? Neither! The plain fact is that the judges could just not agree on the essential aspects of whether to give a judgement in ***favour ot*** or ***against*** the Minister!

AN INDEPENDENT JUDICIARY?

Section 165(2) of our Constitution reads as follows:

> "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

Section 165 (5) states:

> "An order or decision issued by a court binds all person to whom and organs of state to which it applies."

It will be seen that the Courts of the land are a separate and independent power which can compel both State and individual to obey its orders or judgements.

[5] Carmel Rickard in tche Sunday Times of he 9/10/05
[6] Carmel Rickard in the Sunday Times of the 9/10/05

The power of the judiciary becomes real for as long as the State honours its obligation to provide the wherewithal so that the orders and judgements of the courts can be enforced. This can lead to the seemingly anomalous situation where the Courts use the resources or means provided by the State to enforce orders against the State itself!

Although the Courts are "notionally powerless", they are "essential to effective state power"…. and "they have high authority in society and exert very significant influence."[7]

It will, therefore be seen that the judiciary is usually a very powerful institution in society and logically all interest groups will seek to have the judiciary look upon their cause favourably. To put it bluntly, to have the judiciary give judgments in their favour in disputes brought before it.

It is the dream of all governments to have unfettered power. The ANC is thus not different when it through its Secretary General, Mr Kgalema Motlante, stated quite frankly that a two thirds majority in parliament would enable the ANC to form a government "unfettered by constraints."[8]

On the question of power, no statement is clearer than that of Mr. Joel Neshitenzhe, President Mbeki 's most powerful "right hand man". Writing in the UMRABULO, official journal of the ANC in 1998, he stated that transformation in South Africa involved:

> "first and foremost, extending the power of the National Liberation Movement (read ANC) over all levers of power: the army, the police, the bureaucracy, intelligence structures, the ***judiciary,*** parastatals and agencies such as regulatory bodies, the public broadcaster, the central bank and so on."[9] (our emphasis)

So much for upholding the independence of the judiciary as laid down in the Constitution!

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[7] From the edited version of a lecture delivered by Justice Edwin Cameron of the Supreme Court of Appeal at the opening of UNISA's academic year in January 2005 as published by the Mail and Guardian of 11th February 2005

[8] Sunday Times – 3/5/98

[9] From a letter written by Professor George Devenish to the Editor of The Natal Witness on the 27/4/05

So how does one go about "extending the power over the judiciary"?

One of the most common method is to appoint a person who is sympathetic to position or politics of the person or organisation nominating the applicant. The other quality preferred by interest groups is pliability or fickleness. Persons who show independence of thought and spirit are preferred only by those who do not have the power or the material means to win over a judge to a particular viewpoint.

In this regard the Constitution ensures that should the government of the day so desire, the composition of the JSC can be heavily in favour of the government.

Ostensibly, the mechanism designed by the Constitution to appoint judges is the Judicial Services Commission (JSC) At the sittings of this body, in theory, applicants are closely interrogated by the members of the JSC. The applicants are not spared the need to answer even personal details of their lives. But in the end it is the President of the country who makes the selection.

BLIND SUPPORTERS SHOW THEIR LOYALTY.

The country was shocked to learn of allegations of "racism" and crude and unbecoming behaviour on the part of the Judge President of the Cape High Court, John Hlope, the very man who prepared a 43 page report on racism in the judiciary and in the Bar of the Western Cape earlier this year.

The allegations were :

1. The JP called attorney Joshua Greef "a piece of white shit" and told him to go back to Holland. This was said in the presence of a number of people – Advocate Uiys S.C., Acting judge Ndita and prosecutor Christehenus Van der Vijfer.
2. On a separate occasion the JP told Advocate Norman Arendse S.C. that he had deliberately assigned a sensitive Afrikaans language case to Judge Wilfred Thring because he knew that Thring "would fuck it up" on trial and then on appeal it would be set right.

In his capacity as Chairman of the Bar Council of South Africa, Arendse reported the latter incident to the Chief Justice of the Constitutional Court.

REACTIONS TO THE ALLEGATIONS

1. The JP has denied both the allegations. In other words, he has denied uttering those words against Greef and he has denied that he had a conversation with Arendse as reported by Arendse to the Chief Justice.
2. Advocate Uijs has confirmed the alleged utterance of the words by the JP against Greef and has recorded his confirmation in an affidavit.
3. Acting Judge Ndita and the Prosecutor have not uttered a word publicly on the alleged racial slur against attorney Joshua Greef. Their silence is one of extreme significance. Had the racial slur not been cast, then most normal or reasonable minded persons would have reacted as follows:

> " But we were present. We did not hear the JP utter those offensive words. Had he done so, we would not have failed to have heard them. It is therefore untrue to attribute those words to him."

The fact that they did not dispute or challenge the allegation against the JP means that it is overwhelmingly probable that the JP did utter those words and they were not prepared to lie or commit perjury by denying that he uttered those words.

4.The Black Lawyers Association, that racially exclusive lawyers' body, have reacted in a warped and twisted manner to the incident involving Judge Thring. They claim outrage at the fact that Arendse chose to report the conversation to the Chief Justice. According to them, Arendse had breached confidentiality by making the report. They view the alleged breach in so serious a light that they expressed no confidence in him and called for his immediate resignation from the Bar Council of South Africa.

We use the words, "warped and twisted" deliberately. This section of the new elite has failed to see the ***true outrage***, which is so glaring. The true outrage is the JP gloating over how he had arranged a situation whereby a fellow, nay, brother judge, was bound to fail and to have the failure corrected by the Appeal Court! What kind of mind finds satisfaction in

such situations? The JP is after all the captain of the team of judges. He is their leader, a leader of trained professionals whose business is to administer justice.

One would have thought as lawyers the BLA would have been able to notice without hesitation the true outrage. One would have thought there would have been praise for Arendse and opprobrium for the JP!

But that is not how the new elite thinks and behaves. The new elite will do everything in its power to protect, defend, and even cover up for fellow new elite where the latter has committed a wrong. ***Even say untrue things***. Let us illustrate:

According to the BLA, "Arendse ….had breached an age-old tradition by disclosing what was said in the judge's chambers."[10]

As it happened, the disclosure was made ***not*** in the chambers of the JP but ***at a cricket match in Cape Town*** when he was apparently in the company of Premier Ebrahim Rassool and Cameron Dugmore [11](MEC for Education), both known ANC members. We wonder whether that "age old tradition" covers cricket matches as well! What we need not wonder is whether the BLA has any respect for the truth!

It is all part of a gargantuan inferiority complex. Any criticism of the new elite or of its member is immediately perceived to be an attack on the African people and is fought tooth, nail and claw. The loud emotive accusations of "racism" and of being "against transformation" drown any reasoned rebuttal. The real issue is brushed aside and never dealt with.

4. Also entering the arena was a certain Judge Siraj Desai. He is credited with having drafted a statement in defence of the JP and had some 13-14 judges out of a total of 28 sign that statement. We do not have the full text of the statement but rely on a report which appeared in "The Natal Witness" of the 15/10/05.
   We proceed to deal with aspects of the statement:

[10] "The Star" 24/10/05 – "Top advocate hits back at lawyers Calling for his head."
[11] According to the JP as reported in "The Star" 12/10/05 – "Hlope faces new row"

Desai et al believe that the JP is the victim of a campaign by "unknown forces."

Our Response:
It makes no sense to speak of "unknown forces" when the identity of persons making the accusations has been made public. If Desai et al really believed in the campaign, then they should have the plain decency to unequivocally link the published names to the campaign and not hide behind the safety of the formulation "unknown forces"

Desai et al: Note with alarm the "continuing attack" on the integrity of the JP "by members of the advocacy and other similar sources."

Our Response: No instances are given of the continuing attack. As judges they ought to know how important it is to substantiate an assertion. If instances are not given, there is no way one can judge whether the attack in each instance was valid or not. We have come across no statement by Desai et al naming the "members of the advocacy". It is deplorable that persons who are judges can make sweeping statements and not take the trouble to substantiate them.

Desai et al: "Without commenting on the merits of the dispute, we believe that the campaign …is patently calculated to impede the transformation agenda of the judiciary."

Our Response:
1. We are not told what the "transformation agenda" is.
2. We are not told how criticism of the JP can impede the transformation agenda.
3. The public need to know whether valid criticism can also "impede transformation? If the answer is in the affirmative, does it mean that even valid criticism should not be made?
4. Desai et al should tell us why have they desisted from "commenting on the dispute'? Surely, it is a matter of common sense that before they dive headlong drafting a supportive statement, they ought to have investigated the "dispute." The actual issues are extremely narrow and small. Being judges, they should have no difficulty in forming an opinion on the two issues of the dispute, which are the racial slur on Joshua Greef

and the crude and unethical attack on Judge Thring. Had they done that, it could have meant one of two things:

a) The JP was indeed guilty of the unprofessional behaviour. In that event there would have been no need to draw a statement and to go around collecting signatures.
b) If the JP had no made the statements attributed to him, Desai et al could have come out with guns blazing , proclaiming the innocence of the JP and calling for the visitation of the law on the persons making those allegations.

But they kept away from commenting on the dispute. Why? Their statement in support of the JP flows from the "dispute". Examining and investigating the dispute would have been the only sane and logical thing to do. It is to the discredit of Desai et al that they failed to investigate the dispute and yet saw it fit to issue a statement talking about insubstantial villains like Messrs "Unknown Forces."

Desai et al: The attacks constitute a serious threat to our judicial independence, undermine our integrity and place in jeopardy the proper administration of justice."

Our Response:

1. Once again we are given a wide general statement. There is no substantiation; there is no illustration. It is all nebulous. It is what high school teachers used to warn their students against – padding.
2. No attempt is made to show how valid criticism of the JP would do all those terrible things – "serious threat…undermine…place in jeopardy…"
3. Are we then to take on trust what Desai et al have claimed??

All in all it will be seen that Desai et al have really said nothing of substance. Theirs is a blind loyalty to JP. Because they follow the personality and not the principle, we are left with huge question mark on their own integrity.

It is with great unease that we view the conduct of judges, Desai et al. What kind of minds do they have when they go public with a strong statement supporting the JP when they have not gone into the ***very heart of the matter.*** Did he make the racial slur? Did he say that he had deliberately assigned a case to one of his brother judges only to have him botch the case and the litigants to get justice only via the delayed and costly route of the appeal?

We have little doubt that had Counsel approached Desai as judge with a case based on such a wishy-washy statement, he would have received a severe dressing down from Desai in the presence of all those in his Court – his registrar or clerk, Counsel, members of the public and Court officials.

But there is heavy irony in the fact that Desai drafted the document which makes serious allegations without any substantiation. He himself was a victim of what he asserted was an unfair and unjust accusation of rape by a fellow South African delegate to a human rights conference in India. He knows firsthand the pain and humiliation that can follow unsubstantiated accusation. He should therefore be the last one to engage in that very form of activity.

The nett effect of the position of Siraj Desai and his cronies is that they are not interested whether the JP was guilty as accused. They rise to his defence regardless i.e even if he did say those things. Here we are not witnessing judges who are committed to transformation. We are seeing the JP's stooges in action!

A REPETITION OF HISTORY

Professor William[12] Makgoba applied for the position of principal or vice chancellor of the University of Witswaterand.

He presented an elaborate and impressive CV.

[12] Since the disgraceful episode following his bid for vice chancellorship, Professor Makgoba has dropped the use of "William"as part of his name and now calls himself "Malegapuru Makgoba."

There was something about his CV which sent alert signals. Professor Van Onselen did an investigation and found a large number inaccuracies. Professor Makgoba had falsified his CV!

When this was made public, one would have expected praise for Professor Van Onselen and anger and contempt for the falsifier! Quite the contrary. For the first time the country and the world saw in cinemascopic dimensions how the new elite closes rank when one of its kind is exposed by a non African. The new elite swung into action. Venom was spurted on Professor Van Onselen. Did he use the resources of the University when he made his inquiries and investigations? Who authorised his utilisation of those resources? If there was no authorisation, should he not be charged for unauthorised use of University resources?
Without going into the merits as to whether Makgoba had embellished his CV, Thami Mazwai`, spokesperson for a section of the new African elite wasted no time:

> "It is apparent that Wits Deputy Vice- chancellor Professor William Makgoba is the newest victim of the spontaneous white conspiracy against the black intelligentsia."[13]

It will not escape the reader the similarity between the defence of the JP by Desai et al and Thami Mazwai. Both have no regard for the real issue and are not concerned about whether the allegations are true or otherwise.

SASCO the student body of the ANC threatened to raze Wits to the ground.

The ANC claimed Wits as a "national asset" and threatened intervention to allow the government to "save" this "national asset" from destruction.

The new elite stood solidly behind Makgoba and, in fact, regarded him a cause *celebre* for the dignity and equality of the African person.

There was, therefore, tremendous pressure applied on the University Management.

[13] The Natal Witness of the 16/11/95

The management capitulated and entered into a "rotten compromise" with Magkoba. The crucial hearing at which Makgoba was to be confronted with accusation of falsification did not take place; Makgoba withdrew his application for principalship and he accepted a prestigious position in the research field much to the chagrin of the black elite which was willing to go to any extreme in his defence.

Makgoba's accusers never did get the opportunity to tax him about his false claims. The smokescreen, the noisy distraction and the menacing threats initiated by the new elite effectively sabotaged that inquiry from taking place.

SIMILARITIES

1. Both are part of new elite
2. Both took a conscious decision not to participate in the struggle for liberation two decades before the advent of democracy
3. Professor Makgoba and his family were safely esconced in the USA during the most of the two decades before 1994
4. Professor Makgoba spent that period feathering his career nest.
5. He only returned to South Africa after 1994.
6. The JP is a self confessed coward:

> "Asked if he took part in any student political organisation while at university, he responds: ***"Not at all,*** I don't want to lie….I was well aware that what was happening was unacceptable. It is just that I did not take part in joining any particular banned organisation. Why? ***I was a coward, to put it bluntly***."[14]
> (Our emphasis and italics)

7. The intelligentsia who were involved in the struggle, could regale an audience with accounts of their arrests, detentions, police brutality etc, What could Makgoba and the JP say? Nothing! To compensate for their absence from the struggle at a very crucial time in this country's history, they adopted a radical posture to impress a highly politicised audience.

[14] Sunday Times: 16/1/05 Article titled: "Former gardener lays down the law."

8. It is not accidental that both Makgoba and the JP use the word ***"Africanise***" as their objective.

   a) Makgoba stated in the mid 1990s that his objective was to "Africanise" the University of Wits. He has not to date defined or explained exactly what he meant by "Africanising the University". He has had ten years to do so and had failed to come up with a definition and description

   b) The JP has also called for "Africanising". In his case it is the law which has to undergo the process. Like Makgoba, the JP has also failed to explain what does "Africanise the law" mean?

   c) If Makgoba has not tendered any description or explanation, it is unlikely that the JP will because the whole notion is ludicrous to the extreme. It is airy-fairy social engineering – retribalisation! Something that Verwoerd tried with his elaborate plan of the Bantustans, Bantu Authorities and Bantu Education. We only need to glance back into recent history to see that they all have been dumped on to the dung-heap of history.

9. Both are poseurs. Makgoba parading the head gear or scarf of the Palestinian militants. The JP sought to impress his audience by writing a coarse and rude letter in response to a courteous letter by Judge of Appeal, Harms. One can imagine him brandishing his letter to his admirers, real or affected, exclaiming: "This is how I put that White man in his place." And when the Supreme Court of Appeal, the highest court of this country in all matters except constitutional, overruled his and Judge Yekiso's judgement in the Pharmaceutical Society, including the refusal to grant leave to appeal, the JP's attitude was: "I could not care less!" But that was empty boasting, as everybody knew. It is there in the law reports and will stay there for a long long time. Generations of lawyers and law students will refer to this case for it will be judicial authority entitling a litigant to bypass a court and to go to a higher court for relief on the grounds of constructive refusal to grant leave to appeal. This is when the lower court behaves in an unreasonable manner like taking an unconscionably long time in performing its duty. The JP will be the villain of the piece!

RACISM IN THE JUSTICE SYSTEM

Is there racism in the justice system? Most definitely there is. To believe or want to
believe otherwise is to live in an unreal world.

1. It will take many decades of hard endeavour and application to suppress and eradicate racism and racialism.
2. It is necessary to distinguish between racism and racialism:

   Very briefly:

   > Racism is a fallacious system of ideas which holds that certain racial groups are inherently inferior and which ideas were formulated to justify the economic exploitation and inhuman treatment of such racial groups.
   >
   > Racialism on the other hand is abuse, usually vulgar in nature, levelled against a member of a racial group. Example: "You bloody coolie!" Or to use a phrase doing the rounds: "You piece of white shit!"

3. It goes without saying that both racism and racialism are strong and alive in the judiciary as it is strong and alive in most organisations and institutions in this country.
4. In a previous issue of Apdusa Views, we had occasion to refer to ***brain imprinting or imaging.*** This refers to a process whereby things that we have learnt in the formative childhood years like beliefs, values and attitudes get almost indelibly imprinted in our memory. It can contribute significantly to make up who we are and who we become.
5. South African has been a race-ridden society for centuries. The oppressive section of society, the majority of Whites have imbued their offspring with racism from infancy. They have been taught to regard themselves as the Herrenvolk or Master Race and the rest of society, especially the African population as and inferior and subhuman species.
6. 1994 transferred political power to the oppressed majority, the African population in particular.

7. That occasion was truly the most revolutionary event in the written history of this country.

8. All political parties who took part in the first elections pledged their allegiance to the Constitution. So did the powerful civil service and the predominantly white members who controlled the army, the police force and judiciary. They all swore allegiance to the constitution which entrenched a bill of rights and which had as its foundation the belief in non racism and the equality of all human beings.

9. Raising one's right hand and swearing the allegiance is the very easy part. The actual genuine belief in non racism is the difficult part. It requires the erasure of the racist imprinting.

10. Psychologists have held that for belief in non racism and non racialism to develop and mature, there are at least two processes involved:

a) A change in behaviour

b) A change in attitude

A change in behaviour involves far less effort than a change in attitude. A change in behaviour requires abstaining from the use of derogatory and racist terms. It requires the physical manifestation of courtesy and civility in one's dealings or interaction with members of a group previously held to be inferior.

A change in attitude requires the erasure of the imprinting of racism and racialism. It requires re-education in as many fields of thought and study as have an impact on one's irrational prejudices, dislikes and hatreds. It will require deep reflection; workshops, discussions and debates. It will require social intercourse in an atmosphere of informality [15]when one can form opinions of the other.

A change in behaviour does not necessarily mean a prelude to change in attitude. A clever racist can successfully conceal a racist attitude while going through the motions of courtesy and civility. Whereas a change in attitude of necessity will result in a change in behaviour and is, therefore, far more effective. The ideal will be a combination of both processes being put into operation simultaneously.

11. When, therefore, the Bench is transformed racially or to use the official term, demographically, the members come to the Bench with the racist

[15] Our gratitude to NN for taking the trouble and making the effort to explain the complex processes involved. He is obviously not responsible for manner in which we have made the formulation.

> baggage of the past on the part of the non Africans and an inferiority complex on the part of those who were regarded as non Europeans. There is no way avoiding that. As a counter to that, the members should come in with honest intention of making a mixed Bench work. The basic function remains – the administration of justice and the application of the law. Only the hue of their fellow judges and their gender will have changed.

IS THERE A PLANNED CAMPAIGN TO BELITTLE BLACK JUDGES?

We have no evidence of a planned campaign, but we know that black judges are belittled and mocked. We know that members of the Bar and Side Bar, notorious for gossip about goings on in Court and its immediate environment, do not spare black judges who have shown inadequacy in the performance of their duties.
Many acts of belittling or the making of disparaging remarks are motivated by racism.

But you will not hear such things about a black judge who has earned the respect of the Bar and Side Bar for his or her diligence, hard work, endeavour and a passionate pursuit for the rendering of judgements sound in law.

TRANSFORMATION, INCOMPETENCE AND RACISM

The most important and the most popular word of the new elite is **transformation.** It is the key to a good life, where the holder of the key is able to enjoy all that life can offer. Transformation in essence means a change whereby those who were previously denied positions and opportunities (because of colour and/or gender) must now be given preference.

Section 174(2) of the Constitution states:

> "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."

The operative words are "reflect broadly". A broad reflection does not mean a pro rata representation based on the population. A pro rata representation can be worked out almost to mathematical exactness. That exactness goes against the intention of the constitution. Let us illustrate:

On the 4th November 2004, the SATV 3 host, Ms Nikiwe Bikithsa interviewed the Deputy President of the Constitutional Court, Justice Pius Langa. Dealing with the racial composition of the Judiciary, Justice Langa was given a leading question:

> Nikiwe Bikitsha: It (Judiciary) must reflect society – 90% black and 50% women. Is that what we strive for?
>
> Pius Langa: Oh yes! Keep in mind, some processes take long. We don't have to be patient with processes – fast track.[16]

Ms Bikitsha omitted the adverb "broadly" before the word "reflect". Hence the exact percentages!

Justice Langa on the other hand has interpolated with "We don't have to be patient – fast track."

The strategic omission of the word "broadly" and the interpolation of "fast track" is one of principal causes of the present crisis in the judiciary.

The emphasis and focus is heavily on transformation concerning racial and gender composition of the judiciary. What appears to have been disregarded are the contents of Section 174 (1) which reads:

> "Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer."

There are two conditions:

1) The person must be appropriately qualified
2) The person must be fit and proper

The first condition refers to the knowledge of law and its application acquired through University and experience. The second condition refers

[16] The question and answer are from notes made and do not claim to be verbatim.

to the very high standard of character and conduct together with the acquisition of an outlook which is consonant with the values and principles embodied in our constitution. The applicant is further required to show a social awareness of the problems facing the country and his or her contribution in alleviation of the problems.

A number of white applicants do not satisfy the second requirement and are therefore turned down.
A number of black applicants do not satisfy the first requirement, especially failing to have an adequate knowledge of the law and /or experience as judicial officers. ***But instead of being turned down, they are accepted***. Not all successful black applicants are fully properly qualified. Only a small percentage are made of "judge material." In other words, the "interpolation" by Judge Pius Langa: " We don't have to be patient with processes – fast track" is applied. The condition of being "properly qualified" becomes diluted by "fast track". The indecent haste to make the judiciary reflect society demographically has given rise to a great many problems, far more than the "fast trackers" bargained for We know of instances where totally unqualified people are appointed as judicial officers.

RESPECT FOR THE BENCH HAS TO BE EARNED

If judges wish to be respected by fellow judges, advocates and attorneys, they must earn that respect. The practice of law implies knowledge of the law. No judge who time and again exposes him or her self to be ignorant can expect to be respected by advocates who appear before them or by judges who sit with them on the same case or who sit as appeal court judges who have to make a finding of the judgement of a fellow judge.

A judge must let it be known to the advocates who appear before him or her that he or she is au fait with the law. Where the judge makes glaring displays of ignorance, those displays are going to be related in the advocates' common room. If there are repeated displays of ignorance, firm conclusions are going to be drawn about the incapacity of that judge to perform his or her duty as judge.

It is in situations like these that the racists get their chance to ply their filth. Although the matter is essentially one of the professional

incompetence of a judge, the racist will convert it into a racist "proof" of inherent incapacity. There will be savage mocking of the judge; there will be mimicking; there will be regaling of the errors and displays of ignorance at braais and other social occasions; there will be exaggeration and caricature . It is vicious and nasty. Who is to blame? First and foremost the racists! But secondly, and not far behind, the "fast trackers" who tempt the unqualified with status, salary and perks. Last, but not least, the unqualified judge. The latter in most, if not all cases knows that he or she is not competent to perform the judicial function. But it is easy money and it is away from the rat race of the practice as advocate or attorney. It is laid back and soon there will be retirement and a handsome pension. They take on the position in the false belief that they will cope, or that they can bluff their way through, or rely on the goodwill of fellow judges to help them out .

Well, it does not work out that way. The advocates and attorneys are quick to spot incapacity and fraud. They show little tolerance or compassion. The unqualified judge is in for a nightmarish time. How does the unqualified judge explain the blatant lack of respect; the gossiping and the mockery?

In desperation, the unqualified judge plays the race card! It is a card which is bound to evoke an immediate response of support and sympathy. It is a response which will simply bury the incompetence; the misrepresentation of being able to perform the function; the series of blunders in the performance of judicial functions. There will be an outcry of racism which will rally the unthinking. The real issues are covered with an avalanche of emotional outpourings against white racism. We saw it when Professor Makgoba was caught out inflating his CV. We saw Desai et al rise to the JP's defence without going into the merits of the matter; we saw the Black Lawyers Association wax moral indignation about a breach of alleged confidentiality while ignoring a vile and vicious trap the JP laid for one of his colleagues.

Let us make our position clear. We regard incompetence and incapacity as one matter. We regard racism as a separate matter. Both are to be treated and dealt with separately and seriously. Using incompetence to launch a racist attack simply clouds the incompetence. Using allegations of racism to hide and cover up incompetence and incapacity is like crying "wolf"

and when there is a real racist attack, it will simply be viewed as a cover up for incompetence. Thus it will be to the advantage of the real racist.

JUDICIAL SERVICES COMMISSION (JSC)

The function of the JSC was to ensure that the provisions of Section 174 (1
and (2)[17] are complied with.

From the newspaper reports, it appears that the current character of the JSC is a far cry from what it was in the early days. For example at the interview at the JSC in 1994, Professor Albert Louis Sachs was literally skewered by Professor Murrenik, Senior Counsel David Gordon and Advocate Trengove for the unprincipled and cowardly position he adopted concerning the detention without trial of ANC dissidents or suspected spies when the ANC was stationed in Zambia. There are 18 pages of tiny print of close questioning and interrogation.[18]

The standards for qualifying for the position of judges was high and "race" was no guarantee of success. In 1996, the JSC rejected 5 out of 7 candidates, namely Advocate MF Noorbhai SC, Advocate B Pandya SC, MNS Sithole, Professor FR Malan and attorney Klynsmith.[19]

It is inconceivable that in those days the JSC would have recommended any half baked lawyer for judgeship!

But times have changed and the new elite craves for "fast track". Of principal concern is the craving for a judiciary which is 90% black!

IMPEDIMENTS TO TRANSFORMATION OF THE JUDICIARY

The judiciary is located within a certain social milieu which bounds South African society. Its members make up the human component of the judiciary. The members bring with them the characteristics which are prevalent in society and these characteristics determine their thinking and decisions to a lesser or greater degree.

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[17] Please see pages 21 and 20 for the text of these subsections
[18] Judicial Service Commission Interview in 1994 with Professor Albert Louis Sachs
[19] Mail & Guardian December 2o to 23 1996.

1. **The aspirations of the new elite: "Filthy rich"**

The new elite aspire for instant millionaireship. The precedent has already been set. Persons like Cyril Ramaphosa, Tokyo Sexwale, Mzi Khumalo, Patrick Matsepe and many others, some lesser known, became multi-millionaires overnight without having added any economic value to the process of wealth production in the country.

Moeletsi Mbeki, Deputy Chairperson of the SA Institute of International Affairs takes the point further:

> "If South Africa is to develop and get rid of endemic poverty and high unemployment, the elite in this country cannot continue to enjoy the standard of living of the middle classes without the ***equivalent productivity.***"[20] (Our emphasis and italics)

The encouragement to instant wealth has not been discouraged by the ANC. Quite the contrary:

"The African National Congress Deputy Minister of Trade and Industry, Mrs Phumzile Mlambo-Ngcuka, recently said black businessmen (sic) should not be shy to say they wanted to become 'filthy rich'."

The author of the article Professor Heribert Adams goes on to comment:

> "Such an attitude rings of crass materialism, implying the neglect of the poor majority in the drive to self enrichment by an elite."[21]

The new elite desires that the road to multimillionaireship has to be gently downhill with a soft breeze blowing from behind. This attitude is well captured in a radio advertisement which roughly

[20] The Star of 20/10/05 under the heading "Their temptation shall be our ruin"
[21] "Embarrassment of 'filthy richness'."by Heribert Adam in the Mail and Guardian March 6 to 13 1997.

went as follows: A young man hands over a ballpoint pen forgotten by the owner in a washroom. The owner compliments the young man and as a reward appoints him to a position in charge of tourism in the South Coast of Natal. As perk, the young man is told that the position carries with it the use of a bungalow on the beach front!

When it comes to the High Courts of the country, the tradition has been that Senior Advocates who have had busy and lucrative practices after accumulating a sizeable saving, would opt for the Bench, not for the money but for the status, the power, the desire to contribute to the development of the law and other non monetary considerations.

The remuneration for judges while relatively substantial is not sufficient to enable one to amass a fortune.

When it comes to attracting members of the legal profession to the Bench, the talented young lawyers with verve and ambition are unlikely to apply for judgeships because that route is not for those who wish to amass a fortune in a short space of time. They will either remain in the profession (as Advocates or Attorneys) or seek opportunities in business to become rich in short space of time.

Dikgang Moseneke, the Deputy Chief Justice of the Constitutional Court makes the same point very forcefully when he was being interviewed by the JSC in October 2002.[22] He also illustrated the point by stating that "Business pays obviously ***nearly five to ten times what the civil service pays."*** (our emphasis and itallics)

In the clip dealing with the background to the "Interface" Programme referred to above, Carmel Rickard , makes the point that "very good" advocates make far more money in private practice than as judges. Her suggestion is salaries and working conditions of judges should be dramatically improved so as to entice them to the Bench.

Norman Arendse SC also makes the point of a lack of suitable persons applying for judgeship:

[22] Interview with Advocate Dikgang Ernest Moseneke Judicial Services Commission

> "What has not happened is black members coming forward in their numbers to sit on the bench. If leading black advocates should come to the Cape Bar and put their hands up there would be absolutely no hesitation in supporting them."[23]

To illustrate with an example

> The Sunday Times carried a headline: "Judge can't afford to stay on bench." It is an account by Carmel Rickard. She states:
>
> > "One of the whizzkids of the new-look South African judiciary is poised to leave the bench and go back to practise as an advocate…
> > A High Court judge earns about R20 000 a month after tax and car allowances are deducted. Many top advocates would earn that in a week."
>
> The report dealt with the dilemma of Judge Russel Madlanga who has six children and it was believed that he could not manage to provide for them on the salary he was earning.[24]
>
> It is our firm view that it is impossible for the Justice System to satisfy the ambitions of members of the new elite to quick wealth. There is no way that judges' salaries anywhere in the world can legitimately create millionaires.
>
> With the talented and hardworking lawyers avoiding the Bench, the way is then wide open for third raters to apply for judgeship. With the policy of "fast track", many are accepted for what they are.
>
> A third rater will usually give off a third rate performance which can only earn contempt and derision from members of the Bar and the Bench. And when that happens there is the cry of "RACISM."

[23] Cape Times of 14/2/05 - "Hlope's race report slammed."
[24] Sunday Times of 11 March 2001

The third raters or mediocrities are more often than not aware that their appointments are not on merit but on colour. They are over zealous in their sycophancy to the powers that be. It is their way of expressing gratitude. Thus they can always be counted upon to ***deliver politically correct*** judgements.
It is the dream of most if not all governments to have a judiciary, which is compliant. Therefore, it is not in the interests of such a government to have on the Bench strong-minded, independent, highly intelligent, hardworking and principled judges. Such people are not inclined to deliver politically correct judgements. And who then wants a judiciary which keeps ruling against you?

It is not accidental that three applicants for the positions of judgeship, two in the Constitutional Court, were tuned down. They are John Dugard, Edwin Cameron and Geoff Budlender. All three are outstanding lawyers. They have earned the respect of the entire legal profession. John Dugard, further, has a high international reputation in the field of law. These three, each on his own, would helped to enhance the reputation of the judiciary in the country and abroad.
Yet all three were turned down. What, then, are the qualities that the JSC/Govt look for in applicants to the Constitutional Court?

A fairly good knowledge of the law, but principally it is **loyalty.**

INCAPACITY

Being a judge is an extremely demanding profession. The judge is expected to be knowledgeable in many branches of the law. It is no coincidence that many of the JSC appointed judges (based on demographics or gender) are assigned to criminal trials which involve little of complex legal issues and almost all of an assessment of the facts.

Many of such judges do not have the capacity to perform functions of judges. Hence it is not uncommon for judgements to be drawn and formulated by qualified judges or even eminent Senior Counsel.

It was not unheard of when the Nationalist Party government began packing the judiciary with loyal but under qualified judges.
There is nothing racist about the allegation that Judge X's judgement was written by Judge Y. It has never been claimed that all or most members of a particular racial group have their judgements written for them by others.

In all the cry about transformation, little or nothing is said of quality of work or capacity of the new judges. Where yesterday's oppressors and oppressed have to work in harmony, it is of vital importance that there be mutual respect for one another in the carrying out of their functions in the justice system. The ***members of the various segments of the justice system must strive for proficiency and in that process must show diligence.***

Where incapacity is present because of the weakness in the educational system through which the candidate judge has had to pass, then active steps must be taken to remedy the disadvantage suffered by that person.
But the first step has to be recognition of the presence of that incapacity. That is easier said than done. The new elite is loath to admit any incapacity. It is part of the inferiority complex. Should a non-elite make an observation of incapacity or under qualification, there will be strident cry of racism. That is why you will not find persons like Chief Justice Langa or the JP or the Black Lawyers Association or Siraj Desai et al make serious mention of the problem of incapacity and how to engage in capacity building. They are too busy beating the drum of transformation which is narrowly interpreted to simply mean altering the racial and gender composition of the judiciary.

One of the exceptions is the Deputy Chief Justice of the Constitutional Court, Judge Dikgang Moseneke.
In the course of the interview referred to above he makes striking and honest observations and presents solutions.

Because of its importance, we quote at length:

> "The three months I have at the TPD (Transvaal Provincial Division) what struck me was the increasing gap between young black practitioners and women on the one side and high levels of skill at the middle to top end particularly skilled counsels and attorneys. Attorneys you see from the paper work that comes before you and counsel from the heads and the argument they present. But there is an amazing absence of that same level of excellence in just the middle and lower end of the Bar. The work ethic is low. The preparedness, by the time appearance comes by these young counsel is nearly absent and therefore there is no appropriate reservoir to create that representative institution that is ideal for our country over time.
>
> I accept that it will take time but I think the starting point should be a cadet scheme of sorts. It is done all round…I think it is quite in order to identify a hundred, two hundred, three hundred young people of all backgrounds and races and genders and subject them to a fairly structured programme that would impact in ten years time and make them appropriate to serve in the department of justice…In other words they would constitute a reservoir which I seem to think is absent…As a feeder programme to ensure continuity and to ensure, I think, ultimately a representative profession and a representative judiciary…."

This statement made in response to a question during the interview is one of most important statements made. It is courageous; it pulls no punches and sets out the problem as it is and presents a solution. Sadly, it is also unique.

TRANSFORMATION CONCERNING THE GENDER COMPOSITION OF THE JUDICIARY.

South Africa is a strongly patriarchal society. The feature of patriarchy cuts across the racial, religious or tribal divide. The oppression and exploitation of women has continued unabated from time immemorial, The male has been a brutal aggressor. He rapes, he kills, he abuses and he tramples underfoot all rights, legal or customary, that women may have in

theory. It is not for nothing that South Africa is considered to be amongst the most violent societies in the world.

The level of abuse had reached such a level that Parliament had to pass a special law to protect women from male violence.[25] A number of other laws have been passed asserting the equality of women and striking at discrimination based on gender.
Most of those laws do no more than adorn the statute books and become useful to present as proof that post 1994 South Africa is a non sexist society.

In real life women and children face an uninterrupted onslaught from the aggressive males. Post 1994 has witnessed a new phenomenon of the murder of the wife or partner, the murder of the children and then the suicide of the murderer to escape the consequences of his vile actions.

All this violence is a brutal manifestation of the patriarchal mindset. It is a cruel and senseless manifestation of male chauvinism. Not all belief in the inferiority of women results in violence and murder. It manifests it self in a large number of non violent, but no less repugnant methods.

An account of non violent but disgusting male chauvinism and sexism has been written by Carmel Rickard. Its title is : **"Judging women harshly".**[26]

The account deals with a meeting of the Judicial Services Commission where a number of women applicants were interviewed. The interviewers came out as chauvinists and sexists with a sense of humour which if submitted to an examination, would have earned them marks in minus quantities. According to Carmel Rickard when one of the applicants, Judge de Vos was asked blatantly unfair questions about her gay sexual orientation:

> "One of the most telling features of this exchange is that no one objected; not a single voice was raised to assure Judge de Vos that the question was out of order; that the Constitution was on her side.

[25] The Domestic Violence Act also provided for protection of males from females.
[26] Sunday Times 23/10/05

> Not even the Chief Justice intervened. To an observer it seemed she had been abandoned."

That abandonment stood in sharp contrast to instant solicitous concern for the question asked of Acting Judge Ndita. The question was whether she had experienced racism and sexism. In this instance the Chief Justice protectively intervened directly.

If the reader has not read the article, we urge her/him to do so without fail.

Carmel Rickard has shown tremendous courage and nobility of character. If that room was filled with a pack of moral cowards who dared not rise to the defence of Judge de Vos, Carmel Rickard has done so through her article. She has also administered the chauvinists and sexists a sound drubbing.

So the question is who are to be the guardians of the gender transformation of the Bench? Carmel Rickard answers :

> "Judges are not the only people who should undergo sensitivity training – ***those choosing them could also do with some help."*** **(**our emphasis)

THE VOLCANO ERUPTS

The world of lawyers and judges in the Western Cape has been sitting on a volcano for a number of years. The pressures have been building up of the social toxic gases of racism, racialism, inferiority complex, plain inferiority, inefficiency, incompetence, intolerance, malice, gossiping, bad mouthing and all the social ill-graces one can think of .
The eruption was overdue. It was the tensions and conflict emanating from the Pharmaceutical Society case which ignited it all.
When the eruption did take place, many of the subterranean issues surfaced. It was ugly and the judiciary in the Western Cape was in danger of being consumed by an avalanche of accusations and counter accusations. The JP and those who rushed to his defence could not point to a single clear case of racism. It was always a ***case of inferences***. For example, the reluctance of attorneys to have the matter of Mogoemat heard before acting Judge Ndita was categorised as racism. Yet it could

just as well be that the legal representative for the defence genuinely felt that she was not
experienced enough to do justice to the case. It could well be that the question of race did not enter the minds of those who wanted the matter heard before another judge.
As against the JP there were direct accusations of racialism and /or unprofessional conduct. There was no case of inferences. Advocate Uijs S.C. put his allegation on oath. This was a very serious step. If it turns out that the allegation under oath was false, Mr Uijs S.C. can be charged criminally and be struck off the roll of advocates.
Would Mr Uijs risk his reputation and career thus? If so, why would he want to do that? What would be his motive? Does he belong to the "unknown forces" which oppose transformation ?

And what would be motives of Norman Arendse S.C. be? Why would he want to concoct the statement made by the JP as to why he handed the matter to Judge Thring? What would he get out of the accusation against the JP. Is Norman Arendse also part of the unknown forces who oppose transformation? Does it not stretch the bounds of credulity to believe that Arendse who is the chairperson of the General Council of the Bar (GCB) and the nominee of the Advocates for Transformation to the GCB was all along opposed to transformation and is prepared to risk reputation and career to embarrass the JP? Arendse, incidentally, belongs to a racial group which was part of the oppressed people.

In actual fact the two accusations coming from very senior members of the Cape Bar would normally carry a great deal of weight and which would point to the removal of the JP as head of the Cape High Court.

A ROTTEN COMPROMISE

How was this crisis dealt with?

At a meeting held on the 16th October 2005, the JP apparently received a grilling at a meeting of the heads of High Courts called by Chief Justice Langa.

> "Cape Judge President John Hlope stormed out of heads of court meeting, slamming the door behind him. He was earlier seen making animated gestures in a behind-closed-doors discussions with his fellow judges. He declined to speak to the media as he left the Cape Town hotel where the heads of meeting was being held, saying only to reporters "Oh, please, could people leave me alone."[27]

For the record when asked to give his version of the incident, the JP denies making the racialist remark, though not under oath.

Thereafter, a series of meetings/discussions were held concerning the allegation of the racialistic remark against attorney Greef.[28]

> "The result of these discussions is that although neither version of the events in issue is or has ever been withdrawn, neither party concerned wishes any action to be taken against the other…[29]

This settlement was reached after Chief Justice Langa got Advocate Uijs to concede that he (Uijs) did not regard his affidavit in which he states (swears under oath) that the JP called Greef "a piece of white shit", as a complaint.

Once he extracted that concession, the Chief Justice stated that he had no complaint before him and therefore could not proceed with the matter.

The position taken by the Chief Justice has been severely criticised.

1. Zapiro, South Africa's most illustrious cartoonist, captured the compromise when he depicted a hot and bothered Chief Justice sweeping under a carpet (or is it a judge's robe?) the judicial racism row.
2. The whole country knows that one of the actors in this drama is being untruthful

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[27] The Natal Witness of 17/10/05 –"Judge storms out".
[28] To date the allegation concerning the JP's remarks about Judge Wilfred Thring have not been dealt with
[29] City Press of the 23/10/05 – "Wise Langa handled race row very well"

3. Untruthfulness in these circumstances would invite removal from judge presidency if the JP is found to be untruthful or disbarment plus a charge of perjury if Advocate Uijs is found to be untruthful.
4. The compromise exonerates the liar and perjurer if Uijs is being untruthful.
5. The compromise exonerates a racialist and a liar if the JP is being untruthful.
6. Now, more than before the corridors of the court and the common rooms will be buzzing loudly with whispers about what really went on.
7. The position adopted by the Chief Justice in washing his hands off the matter on the ground of absence of complaint smacks loudly of a less than honest and a blatantly legalistic approach. He had within sight a sworn statement accusing the JP of racialism. He knows that the deponent (Uijs) had at no stage denied, refuted or withdrawn the contents of the affidavit. The accusation stands. It is there in the affidavit. The affidavit is the complainant even if Uijs chose not to regard the affidavit as a complaint. In criminal matters, the complainant does not occupy a special position. The complainant is no more than a State Witness since a crime is a wrong against the State.
8. Why did the Chief Justice not act on the affidavit and call Uijs as a witness? The simple answer is that ***he had no intention of doing so.*** What he did intend was what was depicted in Zapiro's cartoon!

WHY THE VOLTE FACE?

If Advocate Uijs and attorney Greef are part of a conspiracy of "unknown forces" to undermine transformation, why did they back off? Why did they not pursue the JP until he was dismissed? How would getting rid of one Judge President undermine transformation? There will always be other black Judge Presidents committed to transformation.
The probabilities are that in those meetings/discussions immense pressure would have been applied on them not to insist on action being taken. In this day and age of transparency, we do not know what went on in those meetings. We suspect that moral pressure would have been applied. Another way of putting it is powerful soft blackmail! We believe that a picture of chaos in the functioning of a vital arm of the justice system, instability and exacerbated tension between black and white would have been painted as likely consequences if the charge against the JP was pursued. In the words of the Chief Justice:

> "Those concerned adopt this attitude (non withdrawal of allegation but non insistence of regarding it as a complaint) in the interests of the greater good of the public and in the contemplation of constructive and effective steps to stabilise relationships between the judiciary and the legal profession of this province."

The tactics were similar to the one employed in the Makgoba/ Wits saga – the powerful soft blackmail that unless the matter was settled the University of Witswaterand as an institution was in grave danger of being destroyed.

TRAVESTY OF JUSTICE

It is commonly believed by many that the failure to deal with the burning issues in the justice system in the Western Cape will return to haunt that area. There was strong condemnation and a demand that the culprits be brought to book.
Nobody did so as eloquently and passionately as Khathu Mamaila, Deputy-editor of the "The City Press", a very widely read paper among the African community. These are his words:

> "He (Langa) said the complaint against Hlope had been withdrawn and that there was no complaint to investigate. Really?
>
> This conclusion is a travesty of justice. If there was no basis of the allegations against Hlope, justice demands that those who made these false allegations must be exposed and be dealt with…..
>
> On the other hand, if Hlope had made those remarks , he should be dealt with in accordance with the law.
>
> However, the manner in which the matter has been resolved does not only serve to tarnish the image of the accusers and

the accused but also deals a severe blow to the credibility of the judiciary." [30]

THE BATTLE FOR THE HEART AND SOUL OF THE JUDICIARY

We have said before that the judiciary is a very important site of power. Those who have the judiciary on their side have the power and resources of the State to enforce a favourable judgement or order of court.

In a well ordered society in which the rule of law prevails, conflicts in society are settled through the Courts. The judiciary, although part of the State, has been guaranteed independence and organs of the State are specifically prohibited from interfering with the functioning of the courts (Section 165(3).

Parties to a conflict will use the law, eloquence, argument, logic and equity in an endeavour to elicit a favourable judgement. But members of civil society strive and stand for an independent judiciary – a force in society which stands between the ordinary citizen and the might of the state; a force which has the power to compel the all powerful state to bow before the supremacy of the constitution and the law.

The State on the other hand does not wish for an independent body which can act as a constraint on its wish and resolution to pursue certain policies which it believes are in the interests of society. The current South African state in keeping with the standards set by modern democracies is bound to accept and uphold the ***separation of powers*** which gives the Courts their powers.

While bound to uphold the independence of the judiciary, the State will leave no stone unturned to construct the human component of the judiciary which is favourable to it.

It is not accidental that the composition of the Judicial Services Commission (JSC) is weighted heavily in favour of the government of the day. It is within the power of the JSC to recommend only pro-government applicants, although it will be loathe to do so because of the adverse publicity that would generate.

The public has had a taste of the fury of a section of the ANC when the Supreme Court of Appeal strongly criticised the JP and gave judgement in favour of the Pharmaceutical Society and against the Minister of Health.

[30] "The City Press of the 23/10/05 – "CAREFUL WITH WHITES, HLOPE" by Khathu Mamaila.

We will recall the heavy menace contained in the public statement by that section of the ANC which stated that there was a challenge to:

> " transform the collective mindset of the judiciary to bring it into consonance with the visions and aspirations of the millions who engaged in struggle to liberate our country from white minority domination." The statement went on to say that too many judges failed to see themselves accountable to the masses.[31]

We know that politicians have no problem in using the masses of the people as a threat to get their own way. We got a whiff of that when demagoguery was used to whip up unthinking support for Jacob Zuma against the charges brought.
However, the then Chief Justice, Judge Arthur Chaskalson insisted on the centrality of the Constitution to any debate over transformation and went on to state:

> " Their (judges') obligation under the Constitution is to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. In so doing, as the Constitutional Court has stressed on more than one occasion, they must give effect to the values of the Constitution. It is these values clearly articulated as they are in the Constitution which must inform the decisions made by judges."[32]

This statement was in fact a stern rebuke to those who wanted to use "the masses" i.e. the ANC itself, to influence the decisions of the judges. We heard no more about the judiciary and the "aspirations of the millions."

The battle for the heart and mind of the judiciary took place when the conflict between the Health Ministry and the Pharmaceutical Society was brought before the Constitutional Court. It was a prolonged battle – from the middle of March 2005 until the end of September. No matter how closely this battle was fought out, for the present the highest court of the land asserted the independence of the judiciary. The Minister of Health was "severely chastised for lack of respect for the Supreme Court of

[31] Mail and Guardian , January 14 to 20 2005 – "ANC divided on judiciary"
[32] Mail and Guardian January 14 to 20 2005

Appeal; the JP was criticised for refusing leave to appeal and for taking so long to say so.

Most importantly, the Court reasserted its right to scrutinise and consider the government's regulations and to decide on their validity by testing them as to whether they were made in accordance with the requirements of the Constitution and the law.[33]

But the fact that it took the Constitutional Court over six months to give its decision on a matter which took the Supreme Court of Appeal just over two weeks to finalise, means that in all probability there was intense disagreement among the judges on the crucial issues and on the issue of the validity of the dispensing fee prescribed by the Minister. On this issue it was a matter of 6 against 5 declaring it invalid!

Well known columnist of the Mail and Guardian. "Sergeant at the Bar"comments:

> "Suffice it to conclude that those who watch the Constitutional Court may be interested in the different levels of deference that certain of the judges revealed to the state. And that may well be the most important lesson to be drawn from this saga."[34]

What is to be the fate of the Constitutional Court once its first crop of judges pass out and increasingly the "fast tracked" and politically correct judges form the majority?

THE FUTURE OF THE JUSTICE SYSTEM

In essence the justice system, including the judiciary is part of the State as are Parliament and the Executive (the government). Although the independence of the judiciary is enshrined in the Constitution, the government wields tremendous power on it for a whole range of reasons, most important of which is the ultimate appointment of members of the judiciary is in the hands of the government. But that is not the end of the

[33] Sunday Times 9/10/05 Carmel Rickard.
[34] Mail and Guardian October 14 to 20 October 2005.

matter. If it were so, the government would not lose a single case it contests.
The judiciary like other institutions has a tendency to move in the direction of independence. Not necessarily the whole institution, but sections of it.

1. The composition of the judiciary can never be wholly of pro-government persons. At all times, the appearance must be given of appointments being based on merit. Therefore there will always be judicial officers who will wish to apply the law as it ought to be and not to please the government.

2. The judiciary as a collection of professional persons value consistency in the application of the law. Its sense of pride will seek to prevent it from acting inconsistently especially in favour of the government.
3. The procedures of reviews and appeals act as a check. Very few judges will invite ridicule and contempt by doing something glaringly inapposite.
4. Apart from review and appeals, judgements delivered are subject comment and criticism by teachers of law at institutions of learning and by lawyers who devote an important part of their lives studying judgements, analysing them and making critical comments.
5. Last but not least there are the journalists who are well versed in the law and who do not hesitate to disagree. These disagreements are published in newspapers and are read by millions.
6. When, therefore, a judgement is written and delivered the judicial officer is aware that his or her judgement is going to be under careful scrutiny and if there are inconsistencies or incorrect interpretations of the law, that judgement is going to be under heavy fire from many quarters.
7. Civil society through numerous organisations can also make its views felt when unjust decisions are made.

It will therefore be seen that even if a judge is a pro-government person, he or she is subject to a great deal ***of healthy and legitimate pressure*** to act consistently and deliver judgements which are in accordance with the Constitution and the law.

PREJUDICE AND DISCRIMINATION BASED ON RACE, GENDER, TRIBE, LANGUAGE CULTURE AND RELIGION PRACTISED BY MEMBERS OF THE JUDICIARY AND THE LEGAL PROFESSION

There must be a zero tolerance towards abuse, prejudice and discrimination based on race, gender, tribe, language, culture and religion. The transgressors must be named and shamed publicly. They should be penalised in an appropriate manner – a fine, a suspension from practice for a certain period and compulsory counselling and re-education for a defined period depending on the severity of the transgression.
The process of counselling and re-education should be left in the hands of suitably qualified persons including psychologists, political analysts, academics and representatives from all the political organisations which are committed to the elimination of prejudice and discrimination based on what has been set out above.

The above punishment and treatment should be reserved for first offenders.

For repeat offenders found guilty by a properly constituted tribunal there should be dismissal and expulsion from the position or profession that person holds in the justice system, including the legal profession.

Once the message goes out that these obnoxious and repugnant prejudices have no place in a civilised society and that there are severe reprisals waiting for the perpetrator, you will find a dramatic reduction of such undesirable conduct. But there must be a steely determination to grasp the nettle and deal with the perpetrator, regardless of who that person may be; regardless of the racial category he or she belongs to and regardless as to that person's relationship with powerful politicians.

APPOINTMENT TO THE BENCH TO BE ON MERIT FIRST AND FOREMOST

It is cruelty of great magnitude to allow, permit and push a person into a highly responsible position when that person is not qualified to perform that function. Yes, it is true that blacks were for all practical purposes denied access to the judiciary for centuries. 1994 marked the beginning of

the era in this country's history when members of the oppressed people for the first time had barriers in so many facets of life removed. They could now become judges, magistrates and prosecutors in the highest courts of the land.

But the ruling party is impatient. It wants the undoing of almost 350 years of oppression and discrimination with unholy haste. Thus began a process in many spheres of activity described as wrecking what has been working well and leaving untouched that which needed repairing. Persons with no skills and /or qualifications were given positions as reward for political loyalty. The basic reward was an unbelievably high salary. Added to the basic income were massive sums of money from graft and corruption.

An editorial in The Natal Witness of 12/9/05 states that 124 out of 284 municipalities received ***qualified audit reports*** **"**according to the Auditor General's report for the 2001/2002 financial year**."** This meant that the Auditor General was not prepared to give a clean bill for proper management. The editorial goes on to reveal that 136 out of 284 municipalities were unable to "fulfil their basic functions."

This happens when you cast skill and ability to the winds. All you are interested in is a black face occupying a position previously occupied by a white. The new elite have been taught and they have been eager pupils to raise the cry of racism whenever there is criticism of their performance.

South Africa has lost scores of billions of rands since 1994 through inefficiency, theft and graft. Take the case of the Eastern Cape government. It spent R3,4 billion on the use of private consultants. At the end of it all, according to Colm Allan, the director of the Public Service Accountability Monitor:

> "By and large the same problem that they set out to address remained in existence in the province."[35]

The ruling party needs to pause and ask itself: Why the tearing hurry? Is it preferable to have, in record time, an all black or 90% black in all institutions in the country, a lot of whom are ill fitted for the positions they occupy? Or is it preferable to transform at a slower pace but to ensure

[35] The Natal Witness 8/11/05 –"Eastern Cape spent R3,4 bln 'to no end.'

that there is genuine skill and quality which in turn will provide the solid foundation to build on as well as the standards and yardsticks to be followed by future generations.?

For how long can this country afford to keep spending sums of R4,3 billion “to no end”?

When is the country going to produce excellence in the intellectual field? When will a formerly oppressed intellectual in South Africa produce works of the standard and calibre of a CLR James, an Oliver Cox , a WEB Du Bois or a Frantz Fanon?

This is where the submission (referred to above) made by Advocate Dikang Moseneke S.C. to the Judicial Services Commission comes in. Two keywords - hard work and excellence for the future judges of this country. The training Advocate Moseneke S.C. (as he was then) recommended is a sine qua non for a judiciary of which we can be proud of and the members of which will not provide the racists the fun and jokes derived from ill-trained and incompetent judges.

ONE FINAL MATTER

The judiciary is not the profession for those who seek quick fortunes and who aspire to enjoy a life style of the likes of the Tokyo Sexwales of this country. If persons enter the profession with that intention in mind, then either they did not do their research properly or they are bent on augmenting their income through graft and corruption.

The justice system must not be perceived as a route to riches. It must be seen as a vocation, a calling. The prospective judicial officer must be recruited from school to serve the country and the people by bringing justice to them. Justice is what people have sought and struggled for over the centuries. It is a very precious commodity for which people have willingly laid down their lives. What can be more appealing to the young person who seeks meaning in life than to be dispenser of this commodity.

The training of such person begins early in life. By the time they are adults they would have been steeped in the knowledge of the law; the

intricacies of the operation of justice system will not be a series of legal traps.

Like the priests, and the teachers, the soldiers, the freedom fighters and their like, the trained and dedicated judicial officer will enter the world of the adult community, not to self enrich but to serve.

17th November 2005