THE FIFTH ANNUAL GRIFFITHS & VICTORIA MXENGE MEMORIAL LECTURE

DELIVERED BY: **ADVOCATE DUMISA BUHLE NTSEBEZA SC (A MEMBER OF THE VICTORIA MXENGE GROUP OF ADVOCATES, JOHANNESBURG BAR, SANDTON)**

VENUE: **FACULTY OF LAW: NELSON MANDELA METROPOLITAN UNIVERSITY, (NMMU), PORT ELIZABETH**

DATE: **24 APRIL 2014**

TITLE: **TRANSFORMATION OF THE JUDICIARY: THE ROLE OF THE JUDICIAL SERVICE COMMISSION**

EXECUTIVE DEAN OF THE LAW FACULTY, PROF VIVIENNE LAWACK

OTHER MEMBERS OF THE FACULTY OF LAW

OTHER ACADEMICS OF THIS DISTINGUISHED UNIVERSITY, HONOURED GUESTS

STUDENTS (LEARNERS NOWADAYS)

COMRADES AND FRIENDS

INTRODUCTION

I follow the footsteps of legal giants and very principled members of the South African community in delivering this the FIFTH ANNUAL GRIFFITHS & VICTORIA MXENGE MEMORIAL LECTURE. I hope I will rise to the occasion because if I don't, all you might remember of me ever having been at this respectable place of learning is that I came from a **Group of Advocates** in Johannesburg which consciously took the decision to name itself after that courageous daughter of the soil, Victoria Nonyamezelo Mxenge, whose life was untimely snuffed out of her body, by the murderous security squads of the fallen Apartheid regime. It is generally accepted that the two of them, through their legal practice, represented, courageously, those whom the racist regime branded its enemies, and for that, they paid dearly with their lives.

That was a regime whose judiciary routinely sent political offenders to jail for long periods of time. In some cases, they imposed the maximum sentence - the death penalty. Some of the judges earned the dubious distinction of being dubbed the "hanging judges". To most activists of that time, the Honourable Mr Justice Curlewis immediately comes to mind in that context. There are many others whom I do not care to name.

Those judges were never appointed via a transparent process that entailed nomination, an interview session exposed to the public, and a recommendation of

candidates' names for a decision of the President, who might or might not appoint a recommended candidate. They were appointed by the regime's President in or after consultation with his Minister of Justice, in circumstances where no one knew what criteria were considered by the Minister and/or President in appointing the judges, and in a system that hardly ever contemplated a review, let alone a judicial one, of the President's decision to appoint whomsoever he wanted to elevate to the Bench.

Both President and Minister, almost invariably, were white male and Afrikaner, for the most part, and in the majority of cases, members of a secret society called the **AFRIKANER BROEDERBOND**[1].

It was an era when, on the 22 October 1962, Comrade Nelson Mandela, on the occasion of his application for the recusal of Magistrate, Mr WA Van Helsdingen, at the Old Synagogue, Pretoria, is reported to have said:

"W*hy is it that in this courtroom I face a white magistrate, am confronted by a white prosecutor and escorted into the dock by a white orderly? Can anyone honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced?*"[2]

[1] See Terry Bell:in collaboration with Dumisa Buhle Ntsebeza: **Unfinished Business: South Africa, Apartheid and Truth,** , Verso, 2003, pp.23-31.
[2] Nelson Mandela By Himself: The Authorised Book of Quotations: 2013, Macmillan (in association with PQ Blackwell)

WHERE ARE WE SINCE DEMOCRACY?

About a decade ago, almost to the day, on the 25th July 2004, the ***SUNDAY TIMES*** newspaper published an opinion piece headed.

WHY MAJORITY BLACK BENCH IS INEVITABLE

It read as follows:

"*THERE is a hackneyed expression that the more things seem to change the more they stay the same.*

I was reminded of this when I read Carmel Rickard's innuendos that the Judicial Services Commission (JSC), instead of appointing white quality candidates, chooses to appoint mediocre black judges; pandering to black demands that the judiciary must be transformed.

She predictably proceeds from the premise that in South Africa, there are particular whites who should, as a matter of course, be appointed to the Bench, because they have credentials which "no other white lawyer can match".

In the article "The Bench is closed to pale males, struggle credentials or not" (July 18), quoting an anonymous "senior and well-respected colleague at the Bar", she writes: "There is no white in South Africa who can match [Geoff Budlender's] credentials. If

Budlender is unacceptable to the commission, no other white male lawyer can make it."

Rickard then writes that Budlender was a co-founder of the Legal Resources Centre (LRC). We all know what the LRC has done in public interest law. I was very surprised to learn that, through the LRC's fellowship programme, Budlender has helped "hundreds of young black lawyers and women to embark on legal careers, among whom are judges of the High Court and the Appeal Court".

Hundreds? Where did they all get to? Why do we struggle to find black men and women for the Bench when "over 25 to 30 years" Budlender has helped produce hundreds of such lawyers?

However, Rickard's article is more significant for what it does not say. By saying Budlender should have been appointed, she insinuates that the appointment of Judge Daniel Dlodlo was a bad appointment; that he does not have the same credentials as Budlender; that he is inferior to Budlender; that he is not competent; that he has been appointed only because he is black.

Judge Dlodlo and Budlender were both acting judges in Cape Town. There was one vacancy. Both had applied for it. Dlodlo was appointed. By a warped logic, because of this, Rickard and her "senior well-respected colleague at the Bar" conclude that white male lawyers should no longer apply for positions on the Bench.

Rickard, of course, has been consistent in demeaning black lawyers in this way. In 1994, again relying on "senior lawyers, all of whom asked not to be named", she dragged Judge Tholakele Madala's name into a cesspool of slander by writing that her sources referred to Judge Madala as a "legal non-entity" whose appointment to the Constitutional Court was "tokenism".

Rickard also wrote that it was "unacceptable that he should be appointed over candidates such as Judge [John] Didcott". Quoting these anonymous "lawyers", she wrote that while appointments of black and women lawyers were essential to make the new court legitimate, there were several eminent qualified candidates who fitted this category. "Judge Madala is not one of them," she wrote.

In decrying the non-appointment of Budlender 10 years down the line, Rickard is in effect saying - whether through her sources or as a matter of her personal convictions - that "Judge Dlodlo is not one of them"; that he is not eminently qualified to fit the category of judges whose appointment it is essential to make the Cape Court legitimate.

Does Rickard know anything about Judge Dlodlo, where he comes from, what his life experience has been, how he got into the profession, the hurdles he had to overcome as a black aspirant lawyer in apartheid and post-apartheid South Africa, his work rate, his competence?

How much does she and her "senior and well-respected colleague at the Bar" know about Judge Dlodlo for her to determine that Budlender should have been appointed? How much did she know about Judge Madala when she printed that slanderous article about him based on anonymous sources?

Ten years ago, as a publicity secretary of the Black Lawyers Association, I was younger and angrier. I had also not been "toned down" by being a Truth commissioner. I am one of those who reacted furiously to Rickard. I characterised her article as defamatory. I described it as "yet another manifestation of liberalist intervention in the affairs of the nation" and a "manipulationist endeavour by the liberals and their press to choose and pick our leaders for us". Are we still there, a decade since the first Rickard article? What should be done?

Those of us who are involved in debates about transformation of the legal profession are quite concerned about the pace of transformation. Rickard and her sources must just get used to the reality that South Africa is a majority black country. No judicial system which is majority white is going to pretend that it can, with legitimacy, deliver justice to a majority black population. No judicial system that holds sacrosanct values of equality between the sexes is going to remain white and black male without having white and black women sufficiently swelling the ranks of the judiciary.

How many black women in the profession are receiving training for the Bench? How many black women is the LRC fast-tracking and training to be available in five to 10 years' time to sit on our Benches?

If in the next decade we still have a majority white judiciary, we will have failed the programme of transforming the legal system, particularly the judiciary. We need to appoint to the Bench men and women of integrity, who will hand down judgments which will be respected by the society they serve. There will be majority black judges, black women judges, white male judges, white female judges.

It is when we have that kind of judiciary that we will not have an outcry when a white judge goes into a predominantly black area, tries a white farmer accused of having killed a black farm worker by dragging him behind his bakkie, with the white judge sentencing the white farmer to a fine. When the population reacts with anger and revulsion to that scenario, as it did in Mpumalanga, we are one step from a complete lack of confidence in the judicial system. That is a slippery road to chaos and anarchy. We cannot afford that.

Nor is it true that pale males need not apply. If Rickard does her homework, she will find that in every session of the JSC over the past 10 years, there has never been an instance when white males were not appointed. That is remarkable given that that is the area in which attrition must take place the most. There were only two black

judges and about two women judges in 1994 in a judiciary of about 200 judges, yet at every session since then, white male judges have been consistently appointed.

There is another way white males can contribute to the transformation of the judiciary. Those senior practitioners - attorneys and advocates - and organisations like Budlender's LRC, must be aggressive in mentoring black aspirant judges. Over the next decade, they must consciously target black practitioners, particularly black women, and nurture them in areas they are not otherwise skilled in.

In trying to strike this balance - gender and race representativity on the one hand, and competence, integrity and skill on the other - Rickard must accept that sometimes a Budlender will be overlooked, and a Dlodlo appointed. Conservative white liberals get disappointed when that happens.

Sometimes it is black people who get disappointed when a white woman, Judge Belinda van Heerden, gets appointed to the Supreme Court of Appeal when black people had expected John Motata to be appointed. What it means is that Motata must again make himself available; so must Budlender. That, Rickard, is the kind of equality we are talking about - balance."[3]

[3] I need to place on record that I personally have the highest regard for all of the personalities that have been mentioned by name in this opinion piece. I did not indicate to any one of them that I was going to be revisiting an article that was in the public domain in 2004. Geoff Budlender SC, now a colleague and a senior member of the Cape Bar, and an Evidence Leader in the Marikana Commission of Inquiry, in which I am also involved, has conducted himself in the Commission with the utmost professionalism one can hope for. He is a very skilled jurist.

It is almost incredible that this opinion piece was written in 2004!

Almost 10 years after that article was published by the SUNDAY TIMES, on the 6th JULY 2013, the Chief Justice of South Africa, Judge Mogoeng Mogoeng, who is the Chairman of the Judicial Service Commission, gave an address at a gala dinner of an organisation I have been privileged to lead since 2008 or so, the **ADVOCATES FOR TRANSFORMATION [AFT]**.

The Chief Justice's topic was not uncontroversial. It was headed: **THE DUTY TO TRANSFORM**.

In it the Chief Justice made the following points:

1. "*Organisations like the AFT were transformation agents which must work to defeat the resistance to transformation that is now embarked upon with more vigour and boldness.*

2. *None of the personalities and NGO's who speak regularly and passionately about the perceived areas of concern about the JSC processes and even litigate about them, have ever spoken with any, let alone equal, passion against the conservative apartheid-style instruction-giving and briefing patterns. They seem to be more concerned about white men who are not appointed and do not seem*

to be concerned about the reasons for not recommending them for appointment.

3. *When black men and women of all races were appointed to higher courts for the first time, those opposed to change voiced a concern about the so-called lowering of standards. The same argument has changed tag a bit, lately. It was initially said that there was no commitment by the JSC to gender representation. Suddenly, it changed to the alleged bias against white men. Some of the advocates of gender representation even nominated and openly fought for the appointment of a white man and inexplicably jettisoned their campaign for gender representation. When "unwanted" white males were appointed they were labeled executive-friendly.*

   These developments seem to suggest that war has been declared against transformation. People are clutching at straws to discredit the JSC. They seem to want the JSC they can dictate to. The same people or organisations who are accusing the JSC of being controlled by the politicians are beginning to look like they want to control the JSC themselves."

This speech by the Chief Justice raised such a storm that some of us will recall articles that were published in the ***SUNDAY TIMES***, notably by one gentleman called

Advocate Paul Hoffman SC, who later brought impeachment charges against the Chief Justice.[4]

One of the sequels of the storm engendered by the public outcry against the Chief Justice for his speech at the AFT function was the publication by Mr George Parker, in the ***LEGALBRIEF***, of the following ***QUESTION AND ANSWER*** interview which I reproduce in full for purposes of this Lecture. The publication was made on the 23 July, 2013, almost a decade, to the day, since the publication by the ***SUNDAY TIMES*** of the opinion piece on: **Why a Black Majority Bench is inevitable**. .

THE LEGALBRIEF INTERVIEW

The following interview came under the title: **In defence of the Chief Justice's AFT address**: The following are the questions asked, and the answers thereto.

Is the CJ right when he alludes to 'a change-resistance force' that must be strongly opposed?

For those of us who were at the dinner, and heard his speech, we are able to understand it in its proper context. The CJ was addressing the privileged whites who were beneficiaries under apartheid - as ALL whites were, just by being white - who now cannot appreciate that their advancement was at the expense, and as a

[4] These charges were later thrown out by a Committee of the JSC called the Judicial Conduct Committee, the JCC

deliberate result of oppression, of black people - Africans, Coloured and Indians - and that a meaningful process of balancing the inequalities of the past is by a deliberate process of discriminating against those who were privileged, provided that discrimination was not unfair and obviously irrational. In South Africa, out of nearly close to 200 judges in 1994, there were only two white female judges, and only three black judges, two Africans and one Indian, and yet, throughout its history, at every session (not just every year) the JSC has continued to recommend the appointment of white male judges - even to date. Now there are those who say white males of 'quality' MUST be recommended for appointment, no matter what. We disagree. The Constitution deliberately specifies race and gender representivity in the judiciary as necessary imperatives so that our courts should not be the kinds of courts Madiba was confronted with in the Rivonia trial - white police officers, white stenographers, white prosecutors, white judges, white everything. Those who pretend that they are calling for 'quality' judges are actually calling for the privileged dominance of white people in the profession and the judiciary to be perpetuated. It is a reactionist position on their part because it pretends to be founded on a desire to preserve 'standards'. The CJ was spot on!

And is he (the CJ) right when he says organisations such as your own are facing 'a well-coordinated network of individuals and entities often pretending to be working in isolation from each other'? Does such a network exist in reality or are the critics of transformation a disparate bunch who think along the same lines?

Again, this is not a question of whether he is 'right' or 'wrong'. It is a matter of observation. What for me is striking is that some of the most vocal critics of the attempts to fight for a truly non-racial and non-sexist profession, and a similar kind of judiciary, are organisations and individuals who were never heard to be critical of the most evil legal and judicial system that was quite comfortable, not only to tolerate patently racist and immoral laws, but were quite comfortable to ENFORCE laws that were entrenching a violently inhumane social order that was condemned by the UN General Assembly as a 'crime against humanity'. The judges that are associated with the applications to call into question the workings of the JSC, particularly its decisions in 'overlooking' 'quality' candidates, have no track record of ever having questioned the way in which Apartheid appointed ONLY white male judges, mostly members of a secret society, the notorious Afrikaner Broederbond. No applications were brought to court by organisations in which they were challenging the morality of appointing judges on that basis. Some of their colleagues made patently racist remarks in their judgments, like Rumpff's infamous pronouncement that black people are prone to stabbing people at the slightest provocation. I am not aware that they ever championed causes to seek to have such judges removed for non-suitability for the Bench. If anything, Rumpff, who rose to be the Chief Justice, is still regarded by these individuals as one of the greatest jurists to grace the South African Bench. It goes without saying that we in the AFT would hold a different view.

Do these critics have a point when they say quality is being overlooked in the JSC's attempt to speed up transformation of the Bench?

If by 'quality' is meant longevity in the profession, even if the candidate is patently not a 'fit and proper person' notwithstanding his/her being a person of 'quality', then it is correct that in the JSC there are other criteria that are looked for. South Africa, given its history, needs judges who will always be conscious, whilst on the Bench, that they are appointed to dispense justice, not just interpret the law. They need to be sensitive to our history of division and suffering, and should use the law and the Constitution to promote the values of dignity, equality and freedom - to protect the rights of the weak, the vulnerable, the poor and marginalised of our society. Aspirant judges must convince the JSC they have the temperament to contend with those demands on them. If they do not pass muster at that level, they will in all likelihood not satisfy the majority of the current JSC, certainly NOT my expectations of whom I would recommend for judgeship. We must never forget that, all things being equal, a judge is appointed for life, not just till retirement, and therefore will impact on peoples' lives for as long as s/he is on the Bench every single day.

The critics seem to be at one on a particular point: that the CJ in his official capacity should not be commenting on criticism of the JSC selection processes when these issues - the Helen Suzman Foundation's action against the JSC - may eventually end up before the Constitutional Court. Do you share their concerns? Will the CJ,

because of what he said in his address, have to recuse himself should the matter reach the Constitutional Court?

Firstly, the CJ was not officiating as a judge at our function. He was talking as a South African citizen who, like many South African blacks, has firsthand experience of being black in Apartheid South Africa. To ask him never to express a view is like asking me never to express an opinion as AFT National Chairman because I sit in the JSC, and therefore am disqualified to express a view about what informs me when I consider whom to recommend at the JSC. The CJ never even obliquely referred to the Helen Suzman Foundation's basis for its application against the JSC. He never referred to their pleadings. However, if there was an application for the CJ to recuse himself, I am sure the application would be considered on its own merits. It is done all the time. Louis Luyt applied for the recusal of almost half of the Constitutional Court judges in the **SARFU** case. I would therefore not want to put the cart before the horse. There is a time and a place to debate whether a judicial officer must recuse him or herself.

Has he harmed judicial independence and the impartiality of the courts by the 'content and tone' of his address?

I do not know how anything the CJ said at our function has anything to do with the independence of the judiciary and its impartiality. The CJ speaks in a style that is open and passionate and honest and has no pretences to feigned 'diplomacy'. He

says it as he sees it! He has said in one address at the AFT gala dinner what many judges in the Constitutional Court, past and present, and in the Supreme Court of Appeal and in the general divisions have experienced. Most black judges, whilst they were counsel and even those who were attorneys, never got any briefs from commercial white firms, and from government. In fact, some of them never got any briefs from white practitioners who ironically have since been appointed to act in divisions now headed by the very black counsel they never briefed from their white firms. Most of what the CJ said resonates with most judges because what he said is what they experienced in their legal practices. Far from being condemned, the CJ must be commended for bringing up this contentious subject into the open for debate even by judges themselves. It is a debate that will strengthen, not weaken, the independence and impartiality of the judiciary because it will be in the open and will most likely be honest and constructive.[5]

THE JSC

In a roundabout way, I have demonstrated to you that the JSC has a tremendous role to play in the recommendation of candidates for judicial appointment. The JSC is established in terms of S.178 of the Constitution, 108 of 1996. Its transformative function is usually linked to S.174(1) and (2) of the Constitution. Although emphasis is usually placed on S.174(2) when it comes to the "articulation" of the

[5] There are no prizes offered for the person who has got it right that the author of the opinion piece in 2004, and the interviewee in the Question and Answer interview in the Legalbrief are one and the same person! How things have not changed, even rhetoric!

transformation agenda of the JSC, my own personal view is that the imperative to effect transformation lies in both subsections of S. 174. In section 174(1), it seems to me, the founding fathers and mothers had more in mind when requiring that a candidate would have to be “fit and proper” to qualify for judicial office.

It seems to me that s.174(1) imposes on the JSC the responsibility to seek to establish, in the interviews, in a courteous but probing way, whether a candidate is a fit and proper person to dispense justice for an open and democratic society based on human dignity, equality and freedom. The JSC should look for candidates who will wield the ENORMOUS power they have with sensitivity, with humility and a judicial temperament that comes from men and women who are as firm in decision making as they are polite in their disposition to those who appear before them, as practitioners and parties., The JSC Commissioners should seek to ensure that those who ascend to judicial office know and appreciate the limits of judicial power; that they realise that they are a third tier of Government, but whose power must be wielded in ways that accord the other tiers of Government the necessary comity and deference - the kind that gives sensible meaning to the “healthy tension” that creates the balance that will prevent the “judicialisation of politics” and the “politicisation of the judiciary”.

The JSC must know when the candidate, in interviews, evinces tendencies that would appear to show an absence of appreciating that neither the “judicialisation of politics” nor the “politicisation of the judiciary” augurs well for an egalitarian society

that looks up to a democratic state to deliver on goods and services promised by a freer society than we have ever had before 1994. The JSC needs to be relatively comfortable that the candidate before it understands that independence of the judiciary means the disposition to be able to resist, on the guidance of the foundational values in the Constitution, any influence that is intended to compromise those values - whether that influence emanates from Government, from the rich and the wealthy and their institutions, or from NGO'S, NPO'S and other interest groups.

We in the JSC can, of course, never claim that we can get it right all the time.

All we ask for is to be left alone to do the job at hand, a job, incidentally, that I would not wish on my worst enemy. Why am I then still in it, you will ask?

My answer is a simple one: Someone ***must*** do the bloody job, excuse my French-English!

Honoured guests, I started my Lecture by referring to what Mandela said in 1962 about the judiciary of that time. I need now to end the Lecture by referring to yet another one of his pronouncements about the judiciary, on the **19th MARCH 2004,** – once more a decade ago, at a special dinner to celebrate the official opening of the Constitutional Court building. He is reported to have said the following:

"*I always recall how one of the first judgments in the Constitutional Court was around a matter in which I was involved as President of the country, and the President of the Constitutional Court, regardless of the fact that he was once my lawyer, ruled against me. It was then clear to me that South Africa was in safe hands with that Court standing and operating at the apex of our democracy*."[6]

Comrades and friends, ladies and gentlemen, the Constitutional Court is a Court whose judges have been interviewed by the JSC, and have been appointed, by the President, at the recommendation of the JSC.

I rest my case.

[6] Nelson Mandela: By Himself: The Authorised Book of Quotations: 2013, MacMillan, in association with PQ Blackwell]