TRANSFORMATION IN THE JUDICIARY – A CONSTITUTIONAL IMPERATIVE

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INTRODUCTION

The judicial authority of the Republic is vested in the courts, which are independent and subject only to the Constitution and the law.[1] Section 166 of the Constitution lists the magistrates' courts (and other courts of similar status) as part of the judicial system. Ordinarily, therefore, when one speaks of the judiciary and its transformation one would include the magistracy. But for purposes of this discussion I shall confine myself to the superior courts.

The concept of transformation, although the term 'transformation' may not necessarily have been used to describe developments in the judiciary, was not foreign to the South African judiciary prior to 1994.

(a) History reveals that the dominant centre in terms of legal practice prior to Union was the Cape, whose Bar supplied most of the judges in Natal, the Orange Free State (I suppose it was the

[1] Section 165 (1) and (2) of the Constitution of the Republic of South Africa Act 108 of 1996.

Orange River Colony) and the Zuid Afrikaansche Republiek – later also four of the first five judges of appeal. Most of those judges appointed to the various divisions had been educated academically and professionally in England. As a result, the Cape courts were entirely wedded to the English system of procedure and practice. At that time, according to Corder[2], positivism was in the ascendancy in England, a doctrine which 'would have discouraged overt judicial forays into "law-making" activity, especially in the sensitive areas of policy, and would have stressed the subordination of judges to the legislature'. Inevitably this English influence was transported to the other divisions as the scholars who had received their professional training in England and then practised in the Cape, assumed judicial duties at those divisions.

During the 1960's there appeared to be a purism/antiquarianism revival, which was attributable to the growth, since around 1921, of legal education at universities where Afrikaans was the medium of instruction and where law professors had adopted a more scientific approach to the sources of law, concentrating on the Roman-Dutch authorities and the continental legal systems. In due course

[2] Hugh Corder : Judges at Work : The Role and Attitudes of the South African Appellate Judiciary 1910-1950 Juta & Co Ltd 1984 at 15-16.

students from these institutions began to write text books and later secured appointments as judges with the result that the purist/antiquarian movement started to exert its influence. The desire of the purists to change the law was motivated, it is said, by a growing political force of Afrikaner nationalism, which was largely opposed to most British influences in South Africa. Some writers submit that these endeavours were not entirely successful.[3]

(b) As to the Appellate Division of the Supreme Court, which was constituted in 1910 in terms of the South Africa Act 1909[4], we are well aware, I think, of the developments that took place in the 1950's. The year 1950 was very significant for the court as the right to appeal to the Privy Council was abolished with the Appellate Division becoming the final court of appeal for the Union. I have mentioned that the first judges of appeal numbered five – that number was increased to six when the National Party Government that had assumed power in 1948 made its first appointment to the Appellate Division, that of Mr Justice F P van den Heever. During the early 1950's the court was for the first time called upon to interpret the apartheid policy laws of the National Party Government. One of those laws was the Separate Representation

[3] See CF Forsyth In Danger for their Talents : A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80 Juta & Co Ltd 1985 221.
[4] Section 96.

of Voters Act of 1951, a measure which removed coloured voters from the common voters' roll and placed them on a separate roll which allowed them to vote for four white persons who would represent them in Parliament. Section 35 (1) of the South Africa Act empowered Parliament to prescribe qualifications necessary to entitle persons to vote. Section 35 (2), however, provided that 'no person (other than a native as so defined) who at the passing of such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour'. At the time the Cape Province did not discriminate regarding registration of voters. It was widely believed that the Separate Representation of Voters Act was not open to legal challenge, but in the cases of *Harris v Minister of Interior*[5] and *Minister of Interior v Harris*[6] the Appellate Division showed commendable courage in resisting the government's plans and invalidated the legislation on the grounds that the special procedures prescribed by the proviso to Section 152 of the South Africa Act had not been followed. That proviso prohibited the repeal or alteration of section 35 'unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament

[5] 1952 (2) SA 428 AD
[6] 1952 (4) SA 769 AD

sitting together and at the third reading be agreed by not less than two-thirds of the total number of the members of both Houses'. However, the National Party government, being committed to the objective it had set itself, decided, through Cabinet early in 1955, to change the composition of the Appellate Division as a first step in the plan which was eventually to succeed. It raised the quorum to eleven in all cases in which the validity of an Act of Parliament was contested. Since there were only six judges of appeal a further five judges were appointed, the overall aim being, of course, to dilute the opposition in the court to the removal of the coloured voters from the roll. It is said that the 'old guard' felt that the new appointees acted dishonourably in accepting their appointments.

(c) Another development involving the Appellate Division during the National Party rule concerned the appointment of the Chief Justice. The tradition had been that the most senior judge of appeal would become Chief Justice upon retirement of the incumbent. But in 1957 Fagan JA was appointed Chief Justice ahead of Schreiner JA who was five years his senior on the Appellate Division when Centlivres CJ retired. Thereafter L C Steyn JA was appointed Chief Justice at the end of Fagan CJ's term in 1959, again ahead of Schreiner JA. It is reported that O H Hoexter JA, who was junior to Schreiner JA by four years on the Appellate Division, had declined

an offer to become Chief Justice upon the retirement of Centlivres CJ precisely because he was junior to Schreiner JA.

(d) The next two developments I wish to mention are probably of profound interest to this university. The South Africa Act, in terms of which the Union of South Africa was constituted proclaimed by Section 137 that both the English and Dutch languages shall be official languages of the Union and shall be treated on a footing of equality and possess and enjoy equal freedom, rights and privileges. That section was amended by Act 8 of 1925 of which section 1 provided that the term 'Dutch in section 137 of the South Africa Act 1909 is hereby declared to include Afrikaans'. That amendment was deemed by Section 2 of the amending Act to have been in operation from 31 May 1910. In spite of this amendment, the first full judgment of the Appellate Division written in Afrikaans was in the matter of *Schoeman v Fourie*[7]. The appellant was a registered student and chairperson of the Students Representative Council at the University College of the Orange Free State during the 1939 academic year. The respondent was acting Rector of the College. The appellant had instituted an action for damages against respondent, alleging that he had been suspended unlawfully and *mala fide* from the College by the respondent on 22

[7] 1941 AD 125.

August 1939. His action was dismissed by the Provincial Division and that decision was confirmed on appeal. As has been mentioned, this was the first full judgment of the Appellate Division (per De Wet CJ) written in Afrikaans. There had previously been short judgments by Beyers JA, the first such being a dissenting judgment in *Rex v Traub and Another*[8]. But the first Afrikaans judgment that I could trace was by Botha J in *Els v Els*[9].

The second development relevant to the university of the Free State is the appointment of Her Ladyship Ms Justice Leo van den Heever, an alumnus of the university, who was the first woman to be appointed as a judge – she was appointed to the Northern Cape Division of the Supreme Court on 1 July 1969. Her Ladyship was also the first woman to be appointed to the Appellate Division during 1991, an appointment she held until she retired in 1996.

The few instances that I have highlighted above show that the South African Judiciary has been the subject of transformation in one form or another prior to the introduction of the constitutional

[8] 1936 AD 115 at 121.
[9] 1933 OPD 9.

era. But why is it that the appointment of a woman onto the bench only took place in 1969?

WOMEN AND THE BENCH

The tradition in South Africa over the years was that judges were appointed from the ranks of senior advocates, obviously white. After the establishment of Union the authority to appoint judges of the Supreme Court of South Africa vested in the Governor-General-in-Council.[10] The section did not provide that only male persons were eligible for such appointment. Similarly, section 97 which empowered the Governor-General to appoint 'some fit and proper person' to act as a judge did not stipulate that such person must be male. The position, however, had for centuries been regulated by the common law rule from the praetor's edict that prohibited women from appearing as advocates for other persons.[11]

In the Transvaal case of *Schlesin v Incorporated Law Society*[12] the applicant, who had been articled to Mr Gandhi, sought an order compelling the Law Society, who had refused to register her

[10] Section 100 of the South Africa Act, 1909.
[11] D 3.1.1.5; Voet 1.3.5.
[12] 1909 TS 363.

articles, to do so. Section 11 of the Administration of Justice Proclamation, which regulated the admission of attorneys in the Transvaal, contained the words ‘him’ and ‘he’, but section 10 of the Interpretation of Laws Proclamation (15 of 1902) provided that in all laws passed since the annexation of Transvaal ‘words of the masculine gender shall include females’, with the proviso ‘unless the contrary intention appears’. And Bristowe J found, in interpreting section 11 of the Administration of Justice Proclamation, that indeed the contrary seemed to arise from the use of the word ‘attorney’ which, in the learned judge’s opinion ‘indicates that the persons who are to be attorneys are to be of that class who have always been capable of being attorneys, and not that class who, so far at all events as practice is concerned, have never been capable of being attorneys’.[13] He suggested that ‘an important change of this kind is a question for the legislature’. And further that ‘. . . similar arguments to those which have been used . . . in the present case might equally be used in the case of an application by a woman to be admitted as an advocate – a change which would mean an enormous difference in the practice of the courts in this country . . .’.[14]

[13] At p 364-5.
[14] At p 366.

Wookey v Incorporated Law Society[15] was a similar case which emanated from the Cape. Section 20 of the Cape Charter of Justice (1828) authorised the admission of 'persons' as attorneys by the Supreme Court. The Appellate division held, referring to the old authorities and the ancient rule prohibiting women from practice, that 'persons' in the Charter meant men only.

Melius de Villiers, who was once Chief Justice of the Orange Free State, wrote that women's 'entrance into the profession is incompatible with the idea and duties of Motherhood'. Only when a female was incapable of 'exercising the functions of Motherhood' should she possibly be allowed to start a legal practice.[16]

It was only when the Women Legal Practitioners Act 7 of 1923 came into operation on 10 April 1923 that women became eligible to be admitted to practise as advocates, attorneys, notaries public or conveyancers in any province of the Union. But it still took 46 years before the first woman judge was appointed.

[15] 1912 AD 623.
[16] 1918 (35 SALJ) 289.

BLACK JUDGES PRE-1994

Prior to the adoption of the Interim Constitution (Act 200 of 1993) the appointment of judges was regulated by Section 10 of the Supreme Court Act 59 of 1959. In terms of that section judges were appointed by the State President. There is, however, a widely held view that the State President was merely a rubberstamp and that the Minister of Justice was in effect the person who made the appointments. Apart from the fact that in the 1970's and before, black senior advocates were non-existent in South Africa and therefore none could be appointed to the Bench anyway, it would be far-fetched to think that any such appointment would ever have been made in white South Africa, because of the policies of apartheid. The first black person to be admitted as an advocate was the late Duma Nokwe who became a member of the Johannesburg Bar in 1956, followed by one F A Gani and the late I Mahomed, who in later years became Chief Justice of South Africa. Not only did these pioneers have to fight the Group Areas Act in terms of which they could not hold chambers where their white colleagues did, but also certain members of the Johannesburg Bar who were sympathetic to the apartheid regime

and who were opposed to blacks holding chambers in the same building as they did.[17]

If we look at our history and go back to 1994, out of 166 judges of the Supreme Court of South Africa there was only one black judge – the late Chief Justice Ismael Mahomed, who had been appointed in 1991, at the time when the winds of change were already blowing across the face of South Africa. There were two other black judges, Justice Madala in the Transkei (now in the Constitutional Court) and Justice Khumalo in Bophuthatswana – two so-called independent territories.

THE CONSTITUTIONAL DISPENSATION

The adoption of the interim Constitution which came into effect in 1994 signalled the demise of apartheid in South Africa. The document was proclaimed as ‘a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence and

[17] G Bizos SC, The Johannesburg Bar and Others v Apartheid; a contribution in the work : The Johannesburg Bar – 100 years in Pursuit of Excellence, Lexis nexus Butterworths, Durban p 23.

development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'. [18]

In the preamble to the Constitution of the Republic of South Africa Act 108 of 1996 (the final Constitution) the people of South Africa commit themselves to laying the foundations for a democratic and open society, to improving the quality of life of all citizens and freeing the potential of each person. With regard to the judiciary Section 174 (1) declares that any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. The second part of that subsection decrees that any person to be appointed to the Constitutional Court must also be a South African citizen, from which one may conclude that a non-South African citizen may be appointed to the Supreme Court of Appeal and the High Courts. (Such appointment would, I suppose, be subject to the country's immigration laws.)

Judges are no longer appointed by the State President on the recommendation of the Minister of Justice, but on the recommendation of the Judicial Service Commission, a body of 23 designated persons (25 when matters relating to a specific High

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[18] Post-amble to the Constitution of the Republic of South Africa at 200 of 1993.

Court are considered), presided over by the Chief Justice. The Minister of Justice is a member of the Judicial Service Commission. Unlike in the past when the Minister of Justice simply made a recommendation to the State President that a particular person be appointed as a judge without the vacancy having been advertised, the Judicial Service Commission calls for nominations whenever a vacancy occurs; candidates are then interviewed, where after the Judicial Service Commission makes recommendations to the President who must make the appointment 'on the advice of the Judicial Service Commission'.[19] (For the procedures to be followed with the appointment of the Chief Justice, Deputy Chief Justice and other judges of the Constitutional Court see Section 174 (3) and (4).)

There have been some criticism in the past that because candidates are dismissed at the end of their interviews and the Judicial Service Commission's deliberations on a candidate's plight are conducted in private the process is not transparent. I suppose that the real gripe is that the Judicial Service Commission does not make public its reasons for preferring candidate A over candidate B or when no appointment is made. A similar criticism appears to

[19] Section 174 (6) of the final Constitution.

have been levelled at the system of appointing the members of the House of Lords in England where appointments are made by the Prime Minister on the recommendation of the Lord Chancellor, to which criticism Sir Sydney Kentridge QC responded as follows:

> 'What good would it have done either for [candidate B] or the appointment system if, in the name of transparency, the reasons for the Prime Minister's choice had had to be made public?'[20]

I associate myself with this view. A question often asked, which is related to the transparency criticism, is what criteria are considered by the Judicial Service Commission in the process of making a recommendation to the President for an appointment. Judges are no longer appointed from the ranks of senior counsel only and the reasons are obvious. All that the Constitution demands is that for appointment as judicial officer a candidate must be suitably qualified and must be a fit and proper person. The requirement of 'suitably qualified' is not defined, but in my view it cannot be interpreted as being a reference to academic qualifications only. Legal knowledge and experience must form part of that

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[20] Sir Sydney Kentridge; The Highest Court : Selecting the Judges (The Second Sir David Williams Lecture, Cambridge, 10th May 2002).

requirement. Sir Sydney Kentridge comments in this regard that the Judicial Service Commission had succeeded in eliminating some poorly qualified candidates who might otherwise have hoped for political favour, but that it (JSC) has not been sufficiently rigorous in ensuring that legal knowledge and experience accompany the other qualities needed for the transformation of the judiciary.[21] This is indeed so, I agree, but in a country with a past history as ours there are bound to be lapses such as observed by Sir Sydney Kentridge. In an interview reported in the March 2000 issue of the De Rebus the present Chief Justice was asked whether the transformation of the judiciary was proceeding as quickly as it should. He answered that it was proceeding as quickly as it could and said:

> 'But we have already drawn deep into the pool of existing candidates from these sections of the profession (meaning advocates and attorneys). We need to increase the size of the pool. . . . I believe there is positive action to ensure that the transformation keeps underway.'

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[21] See footnote 19.

I think that the Chief Justice was referring here to the work of the Judicial Education Committee, a sub committee of the Judicial Service Commission, tasked with the responsibility of arranging orientation programmes for newly appointed judges as well as training for practitioners, academics and magistrates who aspire to become judges in the future and who have been identified by the Judges President of the various High Courts. In these circumstances, ie where judges are not only appointed from the ranks of senior counsel, it would be naive of anyone to deny, in respect of some appointments that have been made, that appointees were not yet ready for judicial appointments for lack of experience. And this is true of both black and white appointees. One can only hope that their colleagues give them the necessary support.

In addition to a consideration whether a candidate is suitably qualified and is a fit and proper person for appointment the Judicial Service Commission and the President are enjoined to have regard to the need for the judiciary to reflect broadly the racial and gender composition of South Africa when judicial officers are appointed.[22] Very often the Judicial Service Commission has been confronted

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[22] Section 174 (2) of the final Constitution.

with a situation where candidates from different racial groups are vying for the same position. Indeed, in their last sitting in July/August 2004 the Judicial Service Commission was faced with such a situation in the Cape Provincial Division, where one black and one white candidate were interviewed for a vacancy. I did not know the black candidate and I am accordingly unable to speak about his qualities, but I know the white candidate and acknowledge his exceptional qualities. He would be an asset to the judiciary. But I also do not know how the Judicial Service Commission went about their duties, but I suppose they would, as a starting point, have considered the two candidates on merit. If they were on par or if, although the white candidate may have been superior to the black candidate (not i.t.o. race) but the black candidate showed potential, they would have looked at the racial and gender composition of the Cape Bench, as they are obliged to do, and thereafter made a recommendation to the President.

Whether that was their approach I cannot tell. But whatever it was the ultimate appointment of the black candidate drew what one would call divisive comments from the media. The impression was created that however impeccable his qualities, where a white candidate is pitied against a black candidate, he/she will be rejected

in the name of transformation. I venture to say that that assertion is misleading. It is a fact that the Judicial Service Commission has on occasion preferred a white candidate over a black for judicial appointment.

I take the liberty of mentioning a few statistics.

(a) In the Supreme Court of Appeal 20 appointments have been made since 1994, of which only four are black (including the late Chief Justice I Mahomed). Since the last black appointment in 2001 seven white appointments have been made, including two women.

(b) In the Transvaal Provincial Division (Johannesburg included) 51 appointments have been made since 1994 – 27 blacks and 24 whites. Of a total of 66 judges in that division 26 are black (one is now in the Supreme Court of Appeal).

(c) In the Cape Provincial Division 26 new judges have been appointed since 1994 – 13 blacks and 13 whites. At present the total number of judges is 26, 10 of whom are black. (One is now in the Constitutional Court, one is heading a commission and the other has been transferred to the Eastern Cape.)

(d) 19 Judges have been appointed to the Natal Provincial Division since 1994 – 14 blacks and 5 whites. Of a total of 27 permanent

judges in that division 12 are black. (One is now in the Constitutional Court and one in the Supreme Court of Appeal.)

(e) In the Eastern Cape Division 5 judges have been appointed since 1994 – 4 blacks and 1 white. There are at present 17 permanent judges in that division of whom only 5 are black (one was transferred back from Cape Town, one is in the Supreme Court of Appeal and the present Judge President was transferred from Transkei).

(f) In the Free State Division 5 judges have been appointed since 1994 – 3 blacks and 2 whites. Of 13 permanent judges 3 are black.

(g) As far as the divisions in the former homelands are concerned (Bophuthatswana, Ciskei, Transkei and Venda) the majority of judges are black; so also in the Northern Cape Division.

If these figures are not accurate they are substantially correct. Leaving aside the Supreme Court of Appeal and the Constitutional Court, in total 134 appointments have been made since 1994, 83 blacks and 51 whites. Of the total of 199 judges (including the Constitutional Court and the Supreme Court of Appeal), only 25 are women (12.5%).

WHY THE NEED FOR TRANSFORMATION IN THE JUDICIARY

The Constitutional order replaced a regime whose oppressive laws caused untold harm to the majority of our population. Many black South Africans were forcibly removed from their homes and there were detentions without trial. Laws were introduced that provided the means to suppress dissent and keep discrimination in place. The courts were drawn into the process of enforcing apartheid as they had to interpret and apply those laws that sustained oppression and discrimination. That was part of their function. The laws they had to apply ensured that blacks were denied respect and dignity. In the eyes of those who were subjected to these unjust laws the courts were merely part of the system of oppression. And some of us who are judges today also held that view, because of our own experiences as practitioners. As the Deputy Chief Justice said recently:

> 'Justice had a white unwelcoming face with black victims at the receiving end of unjust laws administered by courts alien and generally hostile to them. The language of the courts was not that of the majority. Nor was the culture and social practises of the judicial officers that of the racial majority. The white face of justice was not only overwhelming and part of an

> oppressive discriminating system; it also failed to recognize the humanity of the victims of the apartheid system.'[23]

Speaking about the establishment of the Judicial Service Commission Sir Sydney Kentridge said that during the 45 years of apartheid government the standing of the South African Supreme Court had been diminished by far too many appointments of judges whose only apparent qualification for the bench was their adherence to the party in power.[24]

It was thus absolutely necessary that, with the advent of democracy, measures be introduced to improve the image of the courts and to ultimately make them acceptable to the majority who had for decades viewed them as being illegitimate. Advocate Dumisa Ntsebeza wrote :

> '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

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[23] Justice P Langa : Judging in a Democracy : The Challenge of Change (Delivered in Johannesburg on 20 March 2004).

[24] See footnote 20.

> going to remain white and black male without having white and black women sufficiently swelling the ranks of the judiciary.'[25]

CONCLUSIONS

As a student of law 25 years ago I suggested in an essay that judges should be appointed by a panel consisting of the Chief Justice, who would preside, all the judges president and maybe two or three members from the Bar. (This was at a time when judges were appointed from the ranks of senior counsel.) The idea of judges being appointed by political figures did not find favour with me. The Judicial Service Commission is not quite the body I envisaged as a student and although a total of 11 politicians serve on it (together with four persons designated by the President after consultation with the leaders of all the parties in the National Assembly) there are at least eight lawyers on it and it is chaired by the Chief Justice. The absolute power of the executive to make judicial appointments has thus been fettered.

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[25] Dumisa Buhle Ntsebeza : Why Majority Black Bench is inevitable, Sunday Times, 25 July 2004.

The objects of the Judicial Service Commission are first to prevent unmeritorious candidates being appointed on political or other improper grounds and second to encourage the transformation of the judiciary by the appointment of suitable black lawyers and woman lawyers. The second objective just mentioned is a constitutional imperative. I have already mentioned section 174 (2) of the Constitution which imposes a duty on the Judicial Service Commission to consider the need for the judiciary to reflect broadly the racial and gender composition of South Africa when judicial officers are appointed. A judiciary that reflects diversity is sure to enrich the courts.

> '. . . [A] generally more diverse bench, with a wider range of backgrounds, experience and perspectives on life, might well be expected to bring about some collective change in empathy and understanding for the diverse backgrounds, experience and perspectives of those whose cases come before them.'[26]

Much as it is imperative that a racial and gender mix be achieved, that by itself is not enough to make the courts legitimate.

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[26] A speech to the Citizenship Foundation, Saddlers' Hall, London, 8th July 1996, referred to by Sir Sydney Kentridge QC (see footnote 20).

Competence, integrity and skill are important and necessary ingredients. The former Chief Justice of Zimbabwe, Chief Justice Enoch Dumbutshena, once wrote:

> 'It is up to judges to make the legal system legitimate. Judges too must prove their own legitimacy. In order to be legitimate judges should see through their own eyes the condition of the ordinary people. When sitting on their high benches in the splendour of their robes, judges should look out through the window in order to see what is going on outside there, where their judgments have effect.'

What is thus also required of candidates for appointment to the bench is, in my view, an understanding of the South African society and an appreciation of its immediate past. As Advocate Ntsebeza observed: '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'.[27]

I accordingly agree with Advocate Ntsebeza that to achieve the objectives of the Constitution we need to strike a balance – gender

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[27] See footnote 25.

and race representivity on the one hand, and competence, integrity and skill on the other. Whether the Judicial Service Commission succeeds in this task, time will tell.

L MPATI

DEPUTY PRESIDENT

SUPREME COURT OF APPEAL