

Opening Address to the Law Society of the

Transvaal Delivered on 29 October 1993 by

The President of The ANC - Nelson Mandela

I was pleased to receive your invitation to open the general meeting of my chosen profession. Mind you, this was at least the third time the Law Society thought of me. The two previous invitations were delivered by the sheriff. I

was asked to show cause why I should not be struck off the roll of attorneys.

My eminent counsel in the first application , Walter Pollack QC and Blen

Franklin persuaded Judge Ramsbottom that my conviction in the early 1950's

for being the volunteer-in-chief in the Defiance Campaign did not make me

guilty of an offence involving moral turpitude.

I decided to ask the commanding officer on Robbin Island to arrange for me

to appear personally to oppose the second application brought soon after my

conviction at the Rivonia trial of 1964. The thought of my being brought to

Pretoria and being seen in open court must have convinced those who

initiated the application to withdraw it. Here I am with my name still on the

roll even though I have not yet got around to apply for a fidelity certificate to go into competition with you.

Some of our colleagues both at the Bar like Bram Fischer and attorney

Ntobeko Maqubela were not as fortunate . They were hurriedly struck off .

I have previously called for the reinstatement of all those who , like me,

broke the law in order to put an end to oppression in our country. I repeat

that call.

It has now become fashionable to be in favour of democracy and against

apartheid. I have heard it being said it will soon be difficult to find

anyone who will admit to having been in favour of apartheid.

But at the time of the worst excesses of apartheid, judges and lawyers

on the whole remained silent. Judges magistrates and prosecutors

enforced apartheid laws without protest. Unwarranted sentences were called

for and imposed for contravention of statutes passed to uphold apartheid.

School boys like Dikgang Moseneke were sent to prison for many years for

what they were discussing in their classrooms.

We should not be surprised that the legal profession, the prosecution services

and the judiciary are seen by the majority of the population as institutions

which upheld oppression rather justice.

I do not however wish to dwell on the past. The present and the future are more important for all of us who embarked upon the task to create a just society in South Africa.

Let us look around us. Is this gathering of lawyers representative of the people of South Africa? What of the membership of the society? What of the composition of its council? Like the judiciary, the Bar and most other important institutions in our country, the attorney's profession is dominated by white males. And most dominant of all appear to be the small number of large firms.

In their submission to the Milne Commission of Enquiry the Law Societies speak of 'the crisis of legitimacy facing the South African legal system

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today".

It States:

The crisis is evidenced by the fact that in South Africa , which has a population of some 39 million people (of which some 33 500 000 are generically black) , there are only 8368 practising attorneys and 1253 practising advocates. South Africa's total number of practising lawyers (9 621) yields a ratio of one qualified and legally trained person to every 4 053 members of the South African population. This contrasts adversely with for instance another African country such as Egypt. Of the total number of attorneys, only 1 178 are black, while of the total number of advocates , only 95 are black. Of these Black advocates , only five are senior counsel. While it is quite clear that the number of black attorneys bears no correlation to the percentage of the population which is black, this is even more true of black members of the Bar.

The law Societies are not alone in their concern about the administration of justice. The judicial colloquium held in Bloemfontein some weeks ago

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concerned itself with the composition of the judiciary. The Chief Justice, judges of the Court of the Appeal and others from the Provincial divisions, senior jurists from the Commonwealth , the USA and South Africa participated. An important statement was made which in part reads as follows:

"The participants believe that the provision of equal justice requires a competent and independent judiciary trained in the discipline of the law and sensitive to the needs and aspiration of all people. They stressed their conviction that it is fundamental for a country's judiciary to enjoy the broad confidence of the people that it serves; to the extent possible , a judiciary should be broad-based and therefore not appear (rightly or wrongly) beholden to the interest of any particular section of society. They saw this as being of special relevance in cases involving complaints of discrimination in their own countries and so of being of the highest importance in the context of the judiciary which will interpret and enforce a new South African constitution with a justiciable Bill of Rights".

No one interested in the administration of justice should have serious reservations about the correctness of this statement. The debate ought to be,

as to how soon and in what manner, can blacks and women who have historically been excluded from effective participation in the legal profession as a whole and more particularly from judicial office, be addressed. Judge of Appeal Leonora van der Heever and Judge Ismail Mohamed, the sole representatives of the two groups, focus on the seriousness of the problem.

That many blacks would not take an appointment from a government which they considered illegitimate is hardly the root cause of the problem. As we are about to change over from the politics of protest to participation in the legislative, executive, judicial and administrative functions after the first democratic election in our country, no one should want to stand aside.

The restructuring of the judiciary must and will take place. The legal profession's participation and attitudes will play an important role in the process of restructuring. It may well be that some of the well-entrenched views and practices have to change.

The vast majority of the people of South Africa cannot be asked to wait indefinitely for fundamental changes in the judiciary which is not perceived to be sensitive to the needs and aspirations of all the people of South Africa, and which does not enjoy the broad confidence of all South Africans.

The appointment of judges from the ranks of senior counsel may have its merits . The historical exclusion of blacks and women from work which would have allowed them to reach that status, cannot be allowed to continue the entrenchment of a white male judiciary. Senior attorneys and academics will have to be considered for judicial office and included on the Constitutional Court

No longer will our courts be called upon to interpret and apply apartheid statutes and security laws that kept them so busy for over fifty years. In addition to applying statute law of universal application and the common law they will have a great responsibility cast upon them. There will be a Constitution finally drawn up by the elected representatives of the people of South Africa. There will be a justiciable Bill of Rights which will guarantee the human rights of which the vast majority was deprived for so many years.

The Constitution and the Bill of Rights will have to be interpreted by the courts. They will have to give substance to their content. They will have the right to pronounce upon the validity of the legislation passed by the various levels of government and decide whether the challenges to its validity are justified. The decisions of the courts will inevitably relate to sensitive social and political values. If these decisions are not made by a judiciary which had

the confidence of the vast majority of South Africa , problems are likely to arise.

There is consensus that there will be a Constitutional Court. we share the view of Prof Tony Honore that its members. or at least most of them, should not have links with the past because as he says:

" Constitutional adjudication is unlike ordinary adjudication in that it is strongly political, not in the party sense, but in that it requires judges who are sensitive to the ways in which the values enshrined in the Constitution can be translated into concrete rights and duties and in which a balance can be maintained between different organs of government. It is equally important that the court of last resort should be of a representative character which commands confidence"

Accused ,Plaintiffs and defendant will complain that their fundamental rights have been violated by procedural irregularities in their trial or by unfair provisions on contracts entered into by unequals in bargaining power and by officials who have abused power. not only judges of the constitutional court are likely to be called upon to interpret the Constitution and the Bill of

Rights.

Will our judges who in the main have been brought up by what has been described as 'the austerity of tabulated legalism' rise to the task of adopting broad rules of interpretation to give effect to the overall intention of the Constitution and the Bill of Rights?

The manner in which judges to the Constitutional Court and other courts are to be appointed is a matter which is presently being debated. The decision will finally have to be made by elected representatives that will enact South Africa's Constitution. Whatever may be finally decided, one would expect that the elected representatives of the people, the Chief Justice, the organised legal profession and the academic lawyers must have a say. Changes in the manner of the appointment of the judiciary are necessary. It would be unacceptable that as we are coming out of a long history of racial discrimination and authoritarian rule to expect that no fundamental changes in that regard should come about. We need a representative judiciary because as Prof Jeremy Webber of McGill University says:

"Justice never utters itself, it depends upon women and men for its formulation. That being the case, we must have more of the diversity

of our society represented on the bench , so that the inescapable residue of additional bias in adjudication reflects something of the range of attitudes present in our society"

We know that most people appear , whether as plaintiffs or defendants, complainants or accused in the magistrates's courts. Has the position really changed materially from what it was in 1962 when I said:

" What is it that in the 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 atmosphere the scales of justice are evenly balanced?"

Yes, I would concede that the orderly would probably be Black.

The qualifications and training of magistrates will have to change. It is correct that they should almost invariably get onto the bench after prosecuting for a number of years? Should not our graduates and practising lawyers be appointed after some training? Would judicial experience gained in the lower courts not qualify them to become judges in the higher courts?

The majority of the people in our land because they have been excluded from the structures administering justice cry out for participation in the future. How is that call going to be answered? Are we going to have juries or a more widely used system of lay assessors? What about our rural areas and the Customary Courts?

Those who resist change say that appointments should be made on merit. Usually they do not define merit nor do they pose the question as to whether those who are already on the bench were appointed on merit. No doubt some were appointed on merit, others were appointed because they were white male Afrikaners and beneficiaries of one of the most successful affirmative action programmes in favour of Afrikaners since 1948. They benefitted by the favoured treatment of having almost all the government's work and the work brought by the industrial, commercial and financial advancement of the Afrikaners.

We are not suggesting that merit is irrelevant and that persons should be appointed to the bench on the basis of their race and gender. Certain minimum technical skills are essential for appointment to the bench. Women and men of integrity, experience, able to understand people and legal principle, deal with arguments advanced to them and write judgements that

can be understood , should be sought for appointment.

It may well be necessary to introduce training schemes not only for prospective judges, but even for some already on the bench whose horizons may have to be broadened in order that they may do justice for all in the country. If judges in Canada and elsewhere feel that they need it why should it not happen here?

The organised legal profession will have to give serious attention as to what steps it will take to remedy the imbalance particularly in relation to the opportunities of black people to join its ranks. We are not unmindful of some attempts being made to facilitate their entry into the profession.

But is there enough being done to remove the impediments?

Is Latin really necessary when hardly any schools are teaching it?

Are candidate attorneys chosen with a view to correcting the imbalance in the profession?

Is the profession happy that the number of conveyancers and notaries public

who are not white can be counted on the finger's of one's hands?

Are attorneys spreading their work among young members of the Bar to give those who have been deprived, work which will broaden their experience and enable them to become leaders and thereafter be appointed to the bench?.

Are the State Attorneys still distributing their work to the small groups traditionally favoured by them?

Is there going to be fusion of the Bar and the side Bar? What rights of audience will be accorded to attorneys in the superior courts?

We are not unmindful of the profession's recent attempts to be of some assistance in relation to legal education and the grant of scholarships, particularly to black students who would otherwise not be able to study law.

Access to legal service is a basic necessity. If people are not able to enforce their rights, those rights become meaningless. If the wealthy have privileged access to justice, that brings the whole legal system into disrepute, and rightly

so.

All lawyers should therefore encourage and support public and private institutions which promote greater access to justice. Of course, the government has a particular responsibility in this regard. However, we have to recognise that there will be many pressing calls on the funds of a government committed to social reconstruction. We need to muster all the resources we can, including available government resources, to make the legal system accessible to all.

In this regard, is it not time to look again at how the monies in the Fidelity Funds are used' and who has the responsibility for making decisions in this regard? The money in the Fund, of course, comes from interest which is earned on monies in attorney's trust accounts, in other words, on monies which belong to clients. It does not belong to the legal profession any more than it belongs to the individual attorneys who held the original capital in their trust accounts.

It would surely be very appropriate to use some of this money to promote access to justice. And is there not a case to be made for some measure of public accountability in the spending of what is really public money?

All these matters will have to be addressed . I would urge the legal profession

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not to try to do it unilaterally. Your council for obvious reasons is not representative of the population. Until it becomes representative, I believe that you should consider having wide consultations with all who will be affected by your decisions before embarking on any restructuring of the profession.

I am confident that there are colleagues with a sense of social responsibility to take the appropriate steps as a matter of urgency to remove the impediments so that it may soon become a representative body respected by the vast majority of the people in South Africa.

The first democratic election in South Africa is about to take place. Thousands of women and men of integrity will be required to assist so that it may be conducted in a free and fair manner. The skills of lawyers are needed for the smooth running of an election. When the appropriate structure makes a call for your help, I am sure that many of you will answer it.

There can be no justice without a strong independent judiciary. The judiciary can do little without the support of a strong legal profession. A profession which identifies itself with the needs and aspirations of all the people in South Africa, is likely to prosper.

With much pleasure I declare the conference open and wish you all well. May your deliberations bear fruit for all of us.

Thank you