Advocate John Newdigate, SC
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8 August 2013

Per Email: cbc@capebar.co.za

Higher Education Transformation Network

Non-Profit Organization (NPO) Reg No: 116-851

RE: COMPLAINT AGAINST ADVOCATE PAUL HOFFMAN SC FOR PROFESSIONAL MISCONDUCT AND UNETHICAL CONDUCT

Dear Advocate Newdigate

On behalf of the HETN, I am writing to lodge a professional misconduct complaint and ethics complaint against Paul Hoffman SC for his false and scandalous accusations against the JSC chairperson Chief Justice Mogoeng. Hoffman's transgressions are detailed in this prolix complaint.

We request that you exercise your discretion to decide whether you can investigate the matter given the previous litigation by the Cape Bar Council against the JSC and its Chairperson on issues substantially related to the underlying allegations of this complaint.. See, ***Cape Bar Council v Judicial Service Commission and Others*** (11897/2011) [2011] ZAWCHC 388; 2012 (4) BCLR 406 (WCC); [2012] 2 All SA 143 (WCC) (30 September 2011). HETN is not prescriptive but only suggests that referring this matter to the General Council of the Bar may be a prudent course of action. But we leave that to your discretion.

Background.

I. Evidence of Collaboration Amongst Whites to Undermine, Launch Politically Motivated Attacks Against Black Judges and the JSC.

1.1 The Higher Education Transformation Network (HETN), has noted with concern the recent cowardly politically motivated attacks on the JSC by Paul Hoffman, Advocate Smuts and retired former apartheid judge Johan Kriegler.

1.2 Unfortunately these attacks are not isolated but reflect a well-rehearsed strategy which has as its component the undermining of black Africcan judicial officers, attacking transformation, vilifying the JSC and regurgitating DA propaganda in which the JSC is accused of being anti-white and racist.

1.3 In an eye-opening revelation of the broader agenda of the anti-transformation forces, Advocate Paul Hoffman SC has accused Chief Justice Mogoeng Mogoeng of bringing the judiciary into disrepute and wants him removed from office. Hoffman reportedly told the paper he had briefed senior counsel to lodge a complaint against Justice Mogoeng with the JSC.

1.4 Hoffman reportedly told The Witness "he had instructed Advocate Izak Smuts SC to act on his behalf in the matter. The complaint would be lodged soon. Said Hoffman: ***'He (Smuts) knows about this through and through.*** It is an urgent matter and deserves to be given attention within this week.' Smuts declined to comment, saying: *'I don't think it is appropriate for me to speak to the press on a matter that I may be involved in.'* [1]

1.5 The selection of Smuts to champion Hoffman's causes is not a coincidence – it exposes the extent to which some white advocates have agreed to coordinate their stratagems with political parties, particularly the DA to preserve white hegemony and to forestall transformation in the judiciary. This approach is exemplified by Smuts who recently resigned from the JSC in a huff after accusing that body of harbouring anti-white sentiments.

1.6 The HETN has since discovered that Smuts' attacks on the JSC members were all based on feckless plagiarism – he has simply rehashed, repackaged and parroted falsehoods, distortions and political propaganda he copied from the Democratic Alliance(DA) and the likes of the De Klerk Foundation. In a brazen display of arrogance, Smuts has deliberately ignored countervailing empirical evidence that the JSC has continued to appoint white males to the bench. In a mad rush to brand the JSC as racist, Smuts has demanded that the JSC "must come clean" and admit that it has adopted a policy of not appointing white males.

1.7 But that is not Smuts' original idea- his rambling statement is lifted directly from a document by the Democratic Alliance entitled "***The DA'S Judicial Review: Threats To Judicial independence In South Africa***" **http://www.da.org.za/docs/621/judicial%20review_document.pdf**. The DA complains about discrimination against whites, in the following terms:

1.8 For example, in 2004, the JSC refused to appoint a white advocate, Geoff Budlender, to a permanent position at the Cape High Court. This was the third consecutive time that the JSC had rejected him. He was passed over in favour of a black candidate who is competent, but whose record is far less impressive than Budlender's. Budlender was a co-founder of the Legal Resources Centre, and had been involved in several of the most important cases in post-apartheid legal history, including the first case heard by the Constitutional Court on the validity of the death penalty, the Treatment Action Campaign's successful challenge for anti-retrovirals to be made available to HIV-positive pregnant women and the Grootboom case, which produced a landmark judgment on the rights of squatters. Budlender's rejection prompted a senior colleague at the Bar to comment: "There is no white lawyer in South Africa who can match his credentials. If Budlender is unacceptable to the commission, then no other white male lawyer can make it". .. Disenchanted with Budlender's rejection, respected legal commentator Carmel Rickard called on the Judicial Service Commission to ***"be frank with the legal profession and say that white male lawyers should no longer apply for positions on the Bench****"."*

1.9 Predictably, Smuts assiduously avoided mentioning that he lifted his assertions and ideas directly from the DA document. Smuts never acknowledged that he was aligning himself with a strategic document the DA had authored and propagated to oppose what it claimed were anti-white procedures and selection criteria of the JSC. When Hoffman claims that Smuts "knows about this through and through" he is effectively using a coded language suggesting that Smuts understands the white anti-transformation and DA-inspired agenda.

1.10 The HETN points out that in addition to the DA, other whites suffering from apartheid nostalgia have attacked the JSC along similar lines in which white males are portrayed as hapless victims of JSC's racial bias. Shortly after the 2004 Rickard article referred to in the DA document, an article by Prof Hennie Strydom of the Rand Afrikaans University appeared in the 4th Quarter 2004 edition of ***Concencus*** magazine. Strydom decried what he claims were recent disturbing developments in the

[1] Hoffman moves to impeach Chief Justice; Legalbrief Today, Fri 02 August 2013; http://www.legalbrief.co.za/article.php?story=20130802085349202

judiciary and in the Judicial Service Commission. He claimed that in pursuit of representivity in the judiciary, the JSC has adopted *a de facto policy* of refusing to appoint white males – however well qualified – to the bench. In support of his argument he also cited the refusal three times to appoint Geoff Budlender as a judge despite his alleged excellent qualifications and spotless anti-apartheid credentials.

1.11 Remarkably, Smuts has, without acknowledging that he was passing off and spewing DA propaganda he claims to be his original work, used the same line of attack and accused the JSC of having adopted a de facto policy of refusing to appoint white males to the bench. He ignores empirical evidence showing that white males were appointed to the bench at the very time Budlender and Gauntlett were rejected and simply regurgitates the propaganda call for the JSC to "come clean" about its policy of not appointing white males. It is clear that white advocates have cast aside all pretence of objectivity and have brazenly aligned themselves with the agenda, tactics and strategic objectives of the Democratic Alliance which include rolling back transformation in the judiciary or at least cowering into silence those black leaders of the judiciary who dare to advance the transformation agenda.

1.12 The HETN notes yet another despicable aspect of Smuts' propaganda - he elected to rehash scandalous and defamatory allegations against the JSC that were actually considered and rejected by a High Court and the Supreme Court of Appeal, namely, that there is deliberate exclusion of white males in the judicial appointment process. Recently the very argument of white exclusion was revisited and the JSC was taken to court by the Centre for Constitutional Rights, an outfit unit of the F W de Klerk foundation. In ***Cape Bar Council v Judicial Service Commission and Others*** (11897/2011) [2011] ZAWCHC 388; 2012 (4) BCLR 406 (WCC); [2012] 2 All SA 143 (WCC) (30 September 2011).

1.13 The De Klerk outfit, which was admitted as amicus curiae, argued that the unsuccessful white candidates' rights to dignity have been infringed in that "*the JSC is not permitted to extend an open invitation to members of the legal fraternity to make themselves available for nomination as a Judge**, if some of its members have adopted a policy in terms of which non-black members will not be appointed***." ***Id.*** at para.146. The Court ultimately rejected the submission by the De Klerk outfit that "a policy has been adopted in terms of which non-black members would not be appointed" and described the claims as "***speculative and without an evidential basis***." Clearly, this underscores that there is an intimidation campaign to label as racists with an anti-white agenda some members of the JSC, especially the Chief Justice, who must evaluate the qualifications of certain white judicial candidates preferred by the minority opposition parties and lobby groups***.*** These propagandists, like Smuts, embark on such actions with the forlorn hope that the JSC will succumb to these pressure tactics and blackmail and thus fail to advance the objectives in section 174 (2) of the Constitution.

1.14 Amongst the larger questions that must be confronted head-on in the extant complaint against Hoffman is whether Hoffman's rehashing in newspapers and other forum of allegations which have been rejected by the court as "***speculative and without an evidential basis***" brings the judiciary into disrepute and crosses the line of professional ethics. As if to highlight his shameless and unbridled plagiarism and political bias, Smuts has repeated the same racist allegations rejected by the court as *"speculative and without an evidential basis."* He has fecklessly attempted to hoodwink the JSC and the public into believing that he has come upon some revelations regarding the JSC appointment process.

1.15 This exposes him as a charlatan who walks in legal circles with ideological blinders and pays scant regard to court judgments. Smuts has no respect for the judgments of our judiciary, especially those decisions not in consonance with his political agenda. Even worse, no candid scholar, no self-respecting honest advocate and no decent human being would have claimed, as Smuts did, that the JSC has "lost" all its court cases without mentioning that the mainstay of the racism charge against the JSC was actually rejected by the Court as "***speculative and without an evidential basis.***"

1.16 In this context, Hoffman's premature public announcement of the complaint against the Chief Justice and his invocation of Smuts' name not only offer revealing insights into the strategy and thinking of the two gentlemen but they expose the game plan to abuse the grievance process for partisan purposes and to serve ideologically driven agenda of racially biased whites. Smuts, a former JSC member who resigned amidst scathing denunciation of the JSC is a useful tool and fellow traveler for Hoffman – the latter offers him a platform and organizational infrastructure through which to continue the propaganda diatribe against the JSC and the Chief Justice while Smuts uses his notoriety and status as former JSC insider to lend legitimacy to Hoffman's propaganda work.

1.17 A disturbing trend in this regard is the extent to which even white judges have endorsed the anti-transformation agenda and attacks on the competence and integrity of black judges. One writer has discussed the phenomenon in the following terms:

1.18 Judges Carole Lewis and Kriegler have made despicable statements in which *black judges were maligned under the guise of critiquing the pitfalls of affirmative action*…

1.19 Lewis delivered a lecture at the Institute of Race Relations around October 2008. She asserted that *"lack of skills and experience is taking its toll on the judiciary, leading not only to poor commercial judgments but "horrifying" convictions and acquittals in criminal cases." She reportedly "launched a scathing attack on government policy … saying the preoccupation with black economic empowerment was keeping worthy white applicants from applying for judicial positions."* Lewis said she felt that the *"judiciary had ensured that all senior positions were held by black judges, and it was time for appointments to be based solely on skills and experience. … White applicants were reluctant to apply for positions as they believed they would be rejected in favour of black applicants …"* As if to reveal the underlying political lobbying message in her speech she stated: "It was encouraging to see that for the first time in years senior white members of the bar are accepting nominations for positions, and are standing for positions in the Constitutional Court." Further, she is reported to have said "We have seen horrifying convictions and acquittals, which do not follow the fundamental principles of law."

1.20 In August 2009 Kriegler delivered a lecture at Wits University in which he regurgitated Lewis' rambling statements condemning affirmative action and alleged black incompetence. He singled out Judge President Hlophe as a symbol of a malaise in the judiciary and stated competence was "*sacrificed on the altar of transformation"*. Kriegler claimed that the ANC-led government's *"misguided [methods of] transformation would have to be confronted fearlessly and honestly."* He blasted the JSC's appointment of allegedly unqualified judges in line with the dictates of affirmative action and stated that it "eroded confidence" in the judiciary.[2]

1.21 There we have it –the current strategy of attacking and maligning black judges and the JSC under the guise of critiquing affirmative action is not of recent vintage. It was conceived and outlined long time ago and was used as a proxy to attack affirmative action and to denounce alleged black judicial incompetence. Ironically Kriegler joined Lewis in claiming that competence was "sacrificed on the alter of transformation" at the time when Lewis had been exposed for her own horrifying judgments and predilection for leniency towards rapists and murderers.[3] Lewis reportedly said that "appointments to the bench must be made by having regard primarily to merit, skill and experience. Political loyalty and race must cease to be the criteria for appointment by the JSC."

1.22 In appreciation of the anti-black and political propaganda message delivered by Judge Lewis, the DA exclaimed: *"The Democratic Alliance (DA) strongly supports the concerns raised by Supreme Court of Appeal judge Carole Lewis on the state of our judiciary".*

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[2] **Will the JSC debunk the myth of white judicial competence**? By Paul Ngobeni, September 18, 2009; http://www.thoughtleader.co.za/paulngobeni/2009/09/18/will-the-jsc-debunk-the-myth-of-white-judicial-competence/

[3] Id.

1.23 Delivering a lecture hosted by the South African Institute of Race Relations last night, Judge Lewis stated that the judiciary is being weakened by a lack of skills and experience, which affects the quality of judgements and causes undesirable criminal convictions and acquittals.

1.24 In her speech, Judge Lewis said it is important that *"new appointments are made only because of skill and experience and not solely because of race, and especially not political fealty". Judge Lewis's concerns about political appointees are particularly worrying, given how important it is for judges to be apolitical.*[4]

1.25 The HETN notes that Hoffman, Smuts and their cohorts have sought only the appointment of specific white male candidates whose political ideology would advance the interests of the DA in particular. It is not surprising that the DA leader, Zille, whose party has railed against alleged "cadre deployment" policy of the ANC and stressed the importance of judges being *"apolitical",* recently took the unusual step of nominating Jeremy Gauntlett for appointment to the Constitutional court. Consistent with their tactics, the DA and its moles within the JSC went into a frenzied propaganda overdrive when their preferred candidate, Gauntlett, failed in his candidacy.

1.26 This follows a pattern - every time white male candidates favoured by the DA or some white interest groups fail in their bid to be recommended for judicial appointment, there is a hue and cry about so-called JSC discrimination against white males. This syndrome manifests itself in the following manner: The non-selection of the white male candidate preferred by these lobbyist groups is invariably blamed on affirmative action and reverse discrimination against whites. The reaction has involved demonizing the JSC itself for alleged incompetence and political partisanship or even outright anti-white agenda. In some cases, it has involved unfair attacks on the qualifications of the selected female or black judge in an effort to buttress the argument that the "overlooked" or "snubbed' white male candidate was more qualified.

1.27 Another subtle racist narrative by these groups runs along the lines that the JSC would have selected the white male if only it had intelligent people in its ranks. Hoffman and Smuts simply expanded on this theme to launch scandalous and false attacks on the JSC itself and the integrity of the individual commissioners. The Chief Justice, whose venial sin has been to speak boldly about the constitutional imperative to advance transformation has been targeted as the most visible and easy target by these folks hell-bent on peddling outright lies and distortions in furtherance of their toxic pro-DA narrative.

1.28 The HETN notes with dismay that the highly partisan narrative by the DA, Hoffman, Smuts, Rickard, Lewis and Kriegler Smuts inadvertently exposed their hypocrisy and racial myopia in the process of launching attacks on the JSC. They attribute the non-selection of Budlender for judicial appointment to the alleged JSC policy of blanket prohibition on the appointment of white males or affirmative action. And yet they assiduously avoid mentioning that Budlender's candidacy was rejected at the time when the JSC was in the hands of not only white leadership but under the stewardship of Budlender's best friends and former Legal Resource Centre (LRC) colleagues.

1.29 At the time of Budlender's JSC candidacy, Chaskalson was the Chief Justice, Craig Howie was the President of the Supreme and George Bizos was an influential member of the JSC. Furthermore, according to the 2004 JSC Annual Report, *"[p]rior to 1994 there were two black male judges, two white female judges and the rest were all white male judges. As at June 2004 there were 76 black judges, 126 white judges and 26 women judges of whom 13 are white and the rest black*" (Judicial Service Commission, 2004: 2).

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[4] **SA judiciary needs to be strengthened to protect all South Africans**; Dr. Tertius Delport, MP; DA Spokesman on Justice; 15 October 2008

http://www.da.org.za/newsroom.htm?action=view-news-item&id=6048

1.30 Although the composition of the judiciary had changed significantly since 1994 and although the majority of new judges appointed by 2004 were black, the bench was still not demographically representative of South Africa at the time Budlender's application came up for consideration. It is absurd to attribute the failure of Budlender's campaign simply to anti-white attitude of the JSC. The issue of racial transformation continues to be urgent even to this day.

1.31 Although not susceptible to scientific measurement, diversity is a quality without which the Court's mission of rendering justice to all our citizens likely to fail. The court will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection. When viewed against South Africa's background of apartheid oppression and gross human rights abuses, this transformation mission requires judges who are willing to subject their own conception of justice to rigorous scrutiny, realizing that those conceptions are based on a limited experience of the world, shaped in large measure by their gender, cultural background or social class in apartheid South Africa. These protagonists' persistent insistence that the JSC should put heavy emphasis on "forensic" litigation skills at the expense of transformation is misplaced.

1.32 In a similar vein, Smuts' complaint about the alleged snubbing of Gauntlett exposes racist arrogance in the extreme – he is harping on the same theme that the failure of Gauntlett's candidacy was due to the JSC's bias, incompetence, mendacity and corruption. For Smuts it matters not that Gauntlett has gone on record to advocate racially discriminatory selection criteria for judges that would have adverse disparate impact on black people and Africans in particular.

1.33 In 2005, a City Press article[5] reported that Gauntlett had urged the Bar *"to take 'principled position' that would see no African acting judge in Western Cape."* The paper reported that "*Judge President John Hlophe and top lawyer Jeremy Gauntlett (SC) are engaged in an acrimonious battle over the appointment of acting judges,* some of whom *Gauntlett believes are not fit for the positions."* Gauntlett was "*proposing the appointment of only senior counsel which, if agreed, could put an end to the appointment of African advocates."* At that time the paper reported that *"none of the five Africans in the Cape are senior advocates. There are about 44 senior white advocates and six senior blacks (coloured/Indian)."*

1.34 Reportedly Gauntlett was *"urging his colleagues to take a "principled position" against the current system, being implemented by Hlophe to appoint junior counsel, who are in the main Africans, as acting judges, without allegedly "vetting" them."* At the centre of the row was "*the issue of whether attempts to deal with backlogs in the courts should be strictly implemented as such, or whether they should be used to advance the cause of transformation by bringing more blacks and particularly Africans into the courts as judges. Should the positions be reserved for senior counsel alone, as Gauntlett argues , no African would act in that court because there are no African senior counsel. It would effectively mean that except for the six coloured and Indian senior counsel, all the other appointees would be white."*

1.35 For Smuts, it matters not that this was not the first time Gauntlett was caught advocating a racist position. In one of the most seminal cases from the apartheid era, ***Komani No v Bantu Affairs Administration Board, Peninsula Area*** 1980 (4) SA 448 (A), Gauntlett argued against the abolition of the pass laws. He represented the apartheid state arguing for an extremist racist position that even apartheid judges found unpalatable. Gauntlett submitted that "*regulations restricting the right of residence at a particular place within a prescribed area[Pass laws] cannot be construed as being unreasonable*…" ***Id.*** The Appellate Court consisting of well known apartheid judges unanimously accepted the **Komani** petition and rejected Gauntlett's extremist position. The Court held that the restriction was unreasonable and that the government had exceeded its power.

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[5] ***Hlophe's appointments come under fire; City Press 2005-04-23***; Mpumelelo Mkhabela; http://www.citypress.co.za/SouthAfrica/News/Hlophes-appointments-come-under-fire-20100614

1.36 The Court recognized the right of Mrs. Komani to live with her husband. Smuts' panegyric on Gauntlett's *"forensic skills*" is a manifestation of his insouciance toward the rights of African people. Actually, Smuts' position reflects unbridled contempt for Africans in that he expects the JSC to reward Gauntlett with judicial appointment in the face of his appalling pro-apartheid record. Smuts could care less about symbolism or the incalculable damage that Gauntlett's appointment could visit upon the judiciary. Clearly, these cold hard facts are not enough to dissuade Smuts and his cohorts from their unfair and racist vitriol against the JSC. In pursuit of his political propaganda Smuts' is not inconvenienced by any sense of shame or fealty to the constitution he pays lip service to.

1.37 Added to the arsenal of weapons used against the JSC is the constant threat of lawsuits against the JSC. The HETN is aware that some opportunists led by Johan Kriegler, a former apartheid judge, have threatened a lawsuit against the JSC in the wake of Smuts' resignation. There are other groups which have mobilized and are hell-bent on litigating their way into the bench. The HETN wishes to warn against such puerile antics. We believe such moves are actuated by statements from the likes of Hoffman which are unscholarly, verdant with falsehoods and based on a deliberate distortion of our Constitution.

1.38 Hoffman and others know that the fallacious assertion that a policy has been adopted in terms of which non-black members would not be appointed has already been rejected by the courts as *"speculative and without an evidential basis*." Their persistent insistence at litigating the very issues laid to rest by the courts is frivolous and amounts to disrespect for our judiciary. The HETN will remain vigilant and will vigorously oppose any opportunistic moves by Hoffman, Kriegler and other reactionary forces. There shall be no compromise in the relentless battle for the restoration of the dignity of black people and for the total transformation of our society.

II. Transformation as Constitutional Imperative and Duty of Chief Justice to Speak As Leader of the Judiciary.

2.1 Former Constitutional Court Justice, Ackermann J eloquently enunciated a principle based upon substantive understanding of equality under our constitution in **National Coalition for Gay and Lesbian Equality v Minister of Justice**[6] where he stated: *"It is insufficient for the constitution to merely ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."*

2.2 The Constitutional Court made it very clear that the wording of the equality clause of the South African Constitution clearly signals a deliberate choice in favour of a substantive understanding of equality. In addition, the South African experience teaches us that varying degrees of marginalization, exploitation and oppression, were visited upon certain groups Africans, coloureds, Indians, women and homosexuals and the legacy of apartheid substantially affect the present status and opportunities for the various groups, albeit to varying degrees. The grounds of discrimination mentioned in section 9 of the Constitution are laden with divergent historical experiences and degrees of disadvantage suffered, or advantages enjoyed. The JSC which is charged with the constitutional responsibility of appointing suitable men and women to the judiciary must comply with Section 174 of the Constitution which provides for the 'appointment of judicial officers in the following terms:

2.3 '(1) *Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.*

2.4 *(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.*

[6] 1998 (12) BCLR 1517 (CC) at 1565H-1566A.

2.5 As Justice Goldstone recognized in Hugo[7] case: *"Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."*

2.6 Goldstone enunciated a need to develop concepts of unfair discrimination and remedial measures which recognize that although a society which affords each human being equal treatment on the basis of equal worth and freedom is the goal, that goal cannot be achieved by insisting upon identical treatment in all circumstances. Former Chief Justice Langa, who is known for adumbrating the concept of transformative constitutionalism also recognized that it is not enough to merely declare people formally equal either in constitutions or statute books. He stated in ***City Council of Pretoria v Walker 1998*** (3) BCLR 257 (CC) at par. 46 the following: *"[s]ection 8 [of the interim Constitution] is premised on the recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with."*

2.7 The constitutional imperative to ensure that the judiciary reflects broadly the racial and gender composition of South Africa was clarified by Chief Justice Chaskalson in **Van Rooyen v The State (General Council of the Bar of South Africa Intervening)** 2002 5 SA 246 (CC). Speaking of the Magistrates Commission, Chief Justice Chaskalson stated that the Constitutional Court "has on more than one occasion *stressed the transformative purpose of the interim Constitution and the 1996 Constitution*." S v Makwanyane and Another 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262; Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 157; Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 8. This *transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 where largely under the control of whites and, in particular, white men*.

2.8 Chief Justice Chaskalson went further and explained that: "*The changes made in 1996 are consistent with and reflect the change that has taken place in our country since 1993 - a transformation required by the Constitution itself. The Magistrates Commission is now more broadly representative of South African society as a whole. This was important particularly at this stage of our history. The overwhelming majority of the population is black and at least half the population is female. Yet the great majority of the legal profession and senior judicial officers are still white and male. In the light of our history and the commitment made in the Constitution to transform our society, these racial and gender disparities cannot be ignored. The recomposition of the Magistrates Commission viewed thus by an objective observer, could not fairly be seen as an attempt to exert executive control over the magistracy. There was a pressing need for the racial and gender disparities within the Commission to be changed, and for the Commission to be re-composed so as to become more representative of South African society. The changes made facilitated this, and that would have been understood by an objective observer taking a balanced view of all the relevant circumstances."*

2.9 The HETN rejects the patent falsehood purveyed by Hoffman and Smuts and their suggestion that the constitution does not mandate transformation – they both actually asserts that the JSC is wrong in taking transformation and diversity into account when recommending candidates for judicial appointment. Almost all civilized countries take diversity into account during judicial appointments. Take for instance Canada where official and unofficial qualifications are always taking into account during judicial appointments. There the Supreme Court Act also requires that at least three judges must come from the province of Quebec (which is a French-speaking civil law jurisdiction).

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[7] **President of the Republic of South Africa and Another v Hugo** 1997 (6) BCLR 708 (CC) at 729G-H.

2.10 In addition to the statutory requirements, there is a longstanding practice of ensuring regional diversity on the Court. There is also increasing emphasis on the appointment of judges who are functionally bilingual because the Court hears appeals in both English and French, Canada's two official languages

2.11 In South Africa, individuals like Hoffman and Smuts have resorted to demonizing the judges appointed by the JSC through a constitutionally sound process and have suggested that unqualified individuals are appointed simply because they are black and because of the dictates of the transformation agenda. And yet, published law reports are replete with evidence that the majority of horrible judgments overturned by high courts are actually issued by white judges.[8]

2.12 In this regard, the HETN notes that international instruments such as the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Article 15 of the African Charter on Human and People's Rights similarly support this constitutional transformation imperative. The state must affirmatively take steps to advance the interests of disadvantaged groups or categories of persons, which include among them African men and women. The JSC is obligated to ensure compliance with the crystal clear legal and moral duty to appointment more African men and women to the judiciary so that the bench is representative of our diverse society in terms of gender and race.

2.13 White advocates and commentators have asserted that there is lack of clear standards for assessing the suitability and competence of candidates appearing before the JSC. They ignore the fact that the Constitution is deliberately non-prescriptive – it requires only that judges are "appropriately qualified" and "fit and proper persons" (section 174[1]) but does not require the JSC to use any specific guidelines. This is not an omission but a recognition that members of a broadly based selection panel for appointments to the judiciary which draws on various talents from members of the legislature, the executive, political parties etc. can only perform their constitutional function if the judiciary shows respect and accords them space. Such a process does not involve science – it is a careful balancing act. Inevitably, when making appointments, the JSC considers a variety of factors including the candidate's ability to perform judicial functions, his or her commitment to constitutional values and the symbolic value of the appointment.

2.14 No one can argue with the proposition that our judiciary should as soon as practicable be representative of our population as a whole. It is not illegitimate to consider whether the appointment of a candidate who otherwise qualifies for appointment will have a positive symbolic value for the community at large. It is essential that black South Africans should have confidence in their judges and should feel that they espouse the values of the new South Africa.

III. The Duty and Right of the Chief Justice To Speak on Transformation Matters.

3.1 The HETN wishes to debunk the myth that South African judges including Chief Justices do not speak out on *"controversial"* issues and that the Chief Justice *"involved himself in the politics and policy aspects of affirmative action measures in a manner unbecoming of a sitting judge in that he adopted a position on various political questions and matters of policy in a manner which undermined the proper function, the standing and the integrity of the judiciary."*

3.2 First, it is a well-established judicial practice around the world that the Chief Justice, as a leader of the judiciary is duty-bound to speak out on matters affecting judicial independence and the administration of justice. Examples abound but only a few will suffice here.

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[8] See **Will the JSC debunk the myth of white judicial competence**? By Paul Ngobeni, September 18, 2009; http://www.thoughtleader.co.za/paulngobeni/2009/09/18/will-the-jsc-debunk-the-myth-of-white-judicial-competence/

3.3 There was a public outcry in 1999 when Judge John Foxcroft sentenced a father to seven years for raping his 14-year-old daughter, saying*: "The harm of the rape was limited to the victim and not society."* The Foxcroft decision in particular is emblematic of the hypocrisy of white liberals debate on the judiciary and appointments. In the course of his ruling, Foxcroft referred to a previous case involving a judgment by Judge Dennis van Reenen in 1996.

3.4 In 1995 both van Reenen and Foxcroft heard, on appeal, a case of a man who raped his three daughters over many years. A magistrate had sentenced the man to 11 years imprisonment. Van Reenen and Foxcroft reduced the sentence to six years on the grounds that the culprit did not pose a serious threat to society since his crime was limited to his family thereby propagating the myth that rape or sexual assault within the family is harmless and involves no injury to society. Foxcroft's ruling came after parliament passed the 1997 Criminal Law Amendment Act which changed drastically the discretion of judges in sentencing rapists who rape underage girls. The law required judges in such cases to impose a mandatory life sentence for rapes of girls under 16 except if *"substantial and compelling circumstances exist*." It should also be remembered that after Foxcroft's ruling, there were rumours that the Parliamentary Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women sought to hold a hearing with Judge Foxcroft.

3.5 Predictably, the white liberal advocates and academics denounced the summoning of the judge to Parliament as unprecedented and as undermining the rule of law. They howled that the normal procedure, if anybody is dissatisfied with the judgment, is to use the mechanism of appeal. The reaction itself was hypocritical - white judges are allowed to make errors which are susceptible of being corrected through the normal appellate review mechanisms. But black judges must be personally attacked and denounced as incompetent jurists who owe their undeserved judicial appointment to reverse racism and affirmative action as asserted by the likes of Lewis and Kriegler.

3.6 The rumours that Parliament issued summons to Foxcroft were met with swift response from Chief Justice Ismail Mahomed and Judge Arthur Chaskalson, President of the Constitutional Court. [9] In a joint statement the judges noted media reports that suggested that a committee of Parliament has resolved to "summon" Judge John Foxcroft of the Cape High Court to explain reasons for a sentence. They said they trusted "very much" that the media reports were incorrect. "Mahomed and Chaskalson pointed out that South Africa's constitution expressly separated the function of the judicial section of the state from its legislative and executive organs. Each is independent in its own sphere. A member of the judiciary cannot properly be "summoned" or even otherwise be required to explain or justify to a member of the legislature or the executive any judgment given in the course of his or her judicial duties.

3.7 Similarly, a member of the legislature cannot be required by the judiciary to explain why Parliament passed a law properly falling within its powers and functions. Neither is permissible. If any person is aggrieved or dissatisfied with any judgment of the court, the proper course is to *"follow the procedures prescribed by law to correct or review such a judgment,"* said the statement. **Id**. That was clear precedent and shows that leaders of the judiciary do speak out and protest at what they consider to be parliament's encroachment on the exclusive preserve of the judiciary and attack on judicial independence.

3.8 There was another public outcry when the SCA, during the prosecution of Shabir Shaik relied on the phrase *"generally corrupt relationship"* which was coined by the media and falsely attributed that statement to Judge Squires even though Judge Squires' judgment contained no such finding.

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[9] See, Judges rail against summons by lawmakers; October 13 1999
http://www.iol.co.za/news/politics/judges-rail-against-summons-by-lawmakers-1.15976?ot=inmsa.ArticlePrintPageLayout.ot

3.9 Then Chief Justice Langa spoke out in defence of the SCA judges[10] and his reaction was reported as follows: "*Head of the Judicial Services Commission Pius Langa came out in support of the Supreme Court of Appeal (SCA) yesterday, following the outcry over the court's incorrect attribution of a comment to the trial judge in the Schabir Shaik judgment. Langa also took political organisations to task for debating the appeal court judgment publicly. He said the correct procedure would have been to lay a complaint with the commission. The commission did not investigate a matter until it received a complaint, he said. "It goes without saying that there is a heavier responsibility on people in authority and/or leadership to desist from indulging in a free-for-all of public recriminations and vilification of the judiciary," said Langa. "Conduct of that sort only undermines the constitution and can have the effect of weakening both the judiciary and our democracy." He said the judges' oath of office required them to do justice to all without fear or favour. "Judges do not take part in everyday debates about the political situation in SA, nor do they enter public arenas to defend themselves against attacks directed at themselves."*

3.10 *Langa's comment comes after Justice Minister Brigitte Mabandla said any decision relating to the appeal court's admission that it had erred in ascribing the words "a generally corrupt relationship" to trial judge Hilary Squires, was the "preserve of the commission". The Congress of South African Trade Unions and its ally, the South African Communist Party, called for the heads of the appeal court* judges to roll for their *judgment, which they felt incorrectly implicated Zuma by association. Langa acknowledged that mistakes sometimes occurred. This was because judges were under pressure to deliver judgments on complex matters quickly.*

3.11 *"As chief justice, I can confirm that as a general rule South African judges do have the requisite integrity, competence and diligence," he said. "While they take great care to produce work of the highest quality, mistakes will sometimes occur."*

3.12 *The Supreme Court of Appeal admitted on Monday it had incorrectly attributed a statement made by the prosecution to Squires, but pointed out that the quote was in a secondary judgment that dealt with confiscation orders and not in the main appeal involving the corruption charges.*

3.13 Once again, Langa's outspoken and spirited defence of the judiciary at the time when it was under fire for glaring admitted mistakes amply demonstrates that Chief Justices as leaders of the judiciary are duty-bound and have a constitutional responsibility to ferret out, denounce and repel threats to judicial independence even if it means that doing so involves political controversy.

3.14 The HETN notes with regret that Hoffman's attack on the Chief Justice Mogoeng is not based on any legally cognizable principle – it emanates from Hoffman's virulent racism and opposition to the transformation enunciated by the Chief Justice. Even assuming arguendo that Hoffman's complaint has merit, he must nonetheless be adjudged to have violated professional ethics in line with what Chief Justice Langa stated above. Hoffman knows or should have known that the correct procedure would have been to lay a complaint with the commission.

3.15 Instead of doing so in a dignified manner, Hoffman issued media releases announcing the pending filing of a complaint that he had not yet drafted. He also made sure that the complaint was given to the news media and published on his website. He flagrantly ignored the admonition of Chief Justice Langa that it goes without saying that *"that there is a heavier responsibility on people in authority and/or leadership to desist from indulging in a free-for-all of public recriminations and vilification of the judiciary."* Hoffman knew or should have known that "conduct of that sort only undermines the Constitution and can have the effect of weakening both the judiciary and our democracy." Hoffman's acted recklessly and ignored Chief Justice Langa's observation that *"Judges do not take part in everyday debates about the political situation in SA, nor do they enter public arenas to defend themselves against attacks directed at themselves."*

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[10] See, **Chief Justice Intervenes in Shaik Uproar**; Business Day; 17-11-2006 http://www.armsdeal-vpo.co.za/articles09/uproar.html

3.16 Hoffman's act of political grand-standing was calculated to and did have the effect of inflicting maximum damage and vilification of the judiciary, particularly our Chief Justice Mogoeng.

3.17 Even after his retirement from the Constitutional Court, Chaskalson continued to speak out on controversial matters he considered to be a threat to judicial independence or proper administration of justice. In the aftermath of President Zuma's victory in ANC Polokwane conference and his subsequent indictment on corruption charges, Chaskalson and lawyer George Bizos jointly issued a statement condemning calls by supporters of president Zuma that charges against him should be dismissed.[11]

3.18 The controversial statement by Chaskalson provoked a swift reaction from legal commentators, including Paul Ngobeni, who predicted that Zuma was entitled to have his cased dismissed based on the doctrine of abuse of process.[12] Cosatu also challenged Chaskalson's statements and stated that Chaskalson and Bizos *"should not be criticising Cosatu, but [rather] the people who are manipulating the judicial system for their own political ends."*[13] The newspapers reported that "the veteran lawyers advised Cosatu to desist from making statements to the effect that Zuma was innocent, as it was the role of the court to decide whether the ANC president was guilty or not." [14]

3.19 Craven "accused the two lawyers of being partial, since they had failed to raise similar concerns when certain people were abusing state institutions for political reasons."[15] Craven said "Cosatu would have liked to have heard the judges express similar concerns when NPA head Vusi Pikoli was suspended, and when a warrant of arrest issued against police National Commissioner Jackie Selebi was cancelled."[16] He concluded as follows: *"The two judges' deafening silence on all these abuses of the legal process, and of an individual's human rights, all of which pose a real threat to the independence of the judiciary, has undermined their credibility now that they are coming up with other, non-existent threats to judicial independence, and they have therefore lost the right to claim to be neutral on the issue."*[17]

3.20 The HETN wishes to state very clearly that Chief Justice Mogoeng is not the first leader of the judiciary to speak about transformation and in defence of judicial independence. His deputy Moseneke DCJ has also spoken out about transformation particularly in the aftermath of the Lewis' outbursts against affirmative action. Deputy Chief Justice Dikgang Moseneke in a speech at the University of Witwatersrand is reported to have said any *"suggestions of political or other forms of partisanship on the part of any judge are singularly unhelpful"*[18]. *He also stated: "As for levels of competence and effectiveness, I am indeed proud to say that our judiciary is second to none.*

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[11] **Cosatu takes issue with Chaskalson, Bizos**; 07 Jan 2008. http://mg.co.za/article/2008-01-07-cosatu-takes-issue-with-chaskalson-bizos

[12] **Open letter to Judge Arthur Chaskalson and Advocate George Bizos**

By Paul Ngobeni - Deputy Registrar Legal Services, University of Cape Town, 8 January 2008
http://amadlandawonye.wikispaces.com/Open+letter+Chaskalson+and+Bizos,+Paul+Ngobeni

[13] **Cosatu takes issue with Chaskalson, Bizos**; 07 Jan 2008. http://mg.co.za/article/2008-01-07-cosatu-takes-issue-with-chaskalson-bizos

[14] Id.

[15] Id.

[16] Id.

[17] Id.

[18] http://www.iol.co.za/news/south-africa/law-society-confirms-lewis-complaint-1.422135?ot=inmsa.ArticlePrintPageLayout.ot

3.21 *By and large, our benches are adorned by men and women of significant self-application, insight and above all a commitment to doing justice. And where appropriate skills and experience may be lacking the solution can never be to halt transformation; it is rather to intensify judicial education,"* said Moseneke. Id.

3.22 Former Chief Justice Langa has spoken out eloquently against perceived attacks on judicial independence by social and political activists. Chief Justice Langa called on every state organ and component of civil society to defend the independence of the judiciary.[19] Langa, who was delivering the KwaZulu-Natal Law Society's Inaugural Ismail Mahomed Memorial lecture, lashed out at those who have criticised the judiciary. He said that while the public and the media have a right to critique the judiciary, such criticism should *'not degenerate to uninformed and unfair personal attacks*'. *'Comment and criticism must be informed and not reactionary and alarmist, because that is set to undermine the rule of law which is so fundamental to the stability of our democracy*,' said Langa. He said such criticism had the potential to weaken public confidence in the judiciary, adding that without public confidence, the judiciary cannot operate effectively. The judiciary has come under fire from the ANC, Cosatu and the SACP for its handling of Zuma's legal matters. According to a report in The Sunday Independent, Langa also warned that if attacks on the judiciary were successful, not only judges would be the victims - the rule of law as a as a whole and the country's constitutional protections would be seriously damaged. **Id.**

3.23 The point made here is very simple – Hoffman's artificial argument of a judicial lockjaw and assertion that judges do not speak out on controversial matters is simply false. HETN's argument finds ample support in the activities and statements of judges including Cameron, Harms, Lewis and Cachalia which are briefly outlined below.

3.24 Justice Cameron has been a gay rights activist and an outspoken judge for many years and continues to this day to speak out publicly against human rights violations especially oppression of gays. A few examples will suffice here. Way back in 2000 there were reports about Cameron's speech such as the following: "The South African *government came under fire at the 13th international AIDS conference in Durban this week for its flirtation with those who claim that AIDS is not caused by HIV, and for its slow response to the epidemic"*.

3.25 Judge Edwin Cameron, a member of the High Court in Johannesburg, who is himself HIV positive, said that *President Thabo Mbeki had created "disbelief," "confusion," and "consternation" by aligning himself with maverick scientists who think that the causes of AIDS do not lie in HIV.*

3.26 This had shaken almost everyone responsible for fighting the epidemic, he said. "*It has created an air of unbelief amongst scientists, confusion amongst those at risk of HIV, and consternation amongst AIDS workers.*"

3.27 Delivering the Jonathan Mann memorial lecture, named after the HIV/AIDS scientist and human rights advocate who died in a plane crash in 1998, Mr *Cameron castigated the government for failing to adopt a programme to prevent vertical transmission of HIV infection by providing pregnant women with antiretroviral therapy*. "*To our shame, our country has not come so far as to implement such a programme,"* said Cameron, who referred to cases of perinatal HIV transmission as "preventable deaths." Quoting an article by the African intellectual Dr Mamphela Ramphele, *he commented that failing to recognise HIV as the country's utmost priority "is an irresponsibility that borders on criminality."*[20]

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[19] **Langa calls for defence of judicial independence; Legalbrief Today**; 04 August 2008; http://www.legalbrief.co.za/article.php?story=20080804083414134

[20] **Judge attacks South African government's response to AIDS;** Annabel Ferriman July 15 2000 BMJ; http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1118148/

3.29 It should be noted that Cameron's speech was purely political and had nothing to do with judicial independence or administration of justice. His accusation that government engaged in *"an irresponsibility that borders on criminality"* did not elicit the type of hysterical reaction directed at Chief Justice Mogoeng from Hoffman or anyone in the legal fraternity. As a white judge, Cameron was allowed the political space and freedom to exercise his rights to free speech and association. Apparently Hoffman and his cohorts are unwilling to extend the same respect and consideration to a black African Chief Justice.

3.30 Mogoeng is accused of engaging in politics because he defended the JSC against unfounded attacks by these self-anointed apostles of judicial independence. Not only is the accusation false but it exposes the hypocrisy and double-standards of advocates like Hoffman – the freedom allowed a white judge is blatantly denied a black judge even if he is the Chief Justice. The labeling of judges' appointment as "political" and the labeling of the Chief Justice's pronouncements as "political" are deliberate ploys to silence, intimidate and vilify the Chief Justice for taking a strong stance in favour of transformation consistent with our Constitution. But that is not all.

3.31 In 2009, the New York Times profiled South African Justice Edwin Cameron, *who "became the first -- and still remains the only -- senior office holder anywhere in southern Africa, and perhaps in all of Africa, to announce he was infected with HIV*."[21] The report itself offers revealing insights into the partisan political agendas of white advocates masquerading as defenders of the rule of law and our judiciary:

3.32 According to the Times, nearly 10 years ago Cameron "stunned" the judicial panel considering him for South Africa's highest tribunal -- the Constitutional Court -- when he told them, "I am not dying of AIDS. I am living with AIDS." Soon after, Cameron also made the "*extremely rare" decision to challenge then-South African President Thabo Mbeki's policies regarding HIV/AIDS*, knowing that Mbeki *"held the power to decide whether to name him to the Constitutional Court,"* the Times reports. After revealing his HIV status and challenging Mbeki, Cameron "was promoted to the appellate court" but was not considered for the Constitutional Court until last year*, "assuming until then that his clash" with Mbeki over AIDS would "ruin his chances -- an assumption fellow judges and lawyers say was almost certainly accurate."* After Mbeki was forced to resign in September by the ruling African National Congress, Cameron sought an appointment to the Constitutional Court again, a promotion he received this month, the Times reports.

3.33 None of the white advocates, including Hoffman ever filed a judicial misconduct complaint against Cameron. Nor did they raise the fact of his *"extremely rare"* "clash" with Mbeki when he sought promotion to the appellate court and later the Constitutional Court. A disturbing pattern emerges showing indubitably that there is one standard for white judges and another standard for black African judges when it comes to freedom to speak on the judiciary and on matters of human rights.

3.34 Paul Hoffman has spoken approvingly of Cameron's outspoken views and activities.[22] Hoffman commented on Cameron's " memorable lecture to the law students involved or interested in their social justice movement at UCT recently." Id. He reports Cameron as saying that "under apartheid, law could be used for good or for evil - under the Constitution it was imperative for law to be used to create greater social justice, and this was up to imaginative, public-spirited lawyers." Id.

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[21] **New York Times Profiles Openly HIV-Positive South African Justice Cameron;** Jan 27, 2009 Kaiser Daily HIV/AIDS Report

http://www.cabsa.org.za/content/sa-judge-cameron-profiled-270109

[22] See, Paul Hoffman; Justice Edwin Cameron in a tour de force; 22nd August, 2011
http://www.ifaisa.org/Justice_Cameron_in_a_tour_de_force.html

3.35 Commenting on the "question time" Hoffman states: *"Penetrating probes were not ducked and honest engagement ensued. Perhaps most memorable was the overwhelmed response of a young black female student who simply could not find the words to thank the judge for the benefit of his insights and for being who he is, so she expressed herself with tears of gratitude instead. When the next questioner pointedly cleared his throat, the judge asked him whether he would like to cry too. Given the state of the nation, there are many who may be inclined to accept the judge's invitation."*

3.36 Is it not ironic and plainly sick that Hoffman finds remarkable the reaction of a black woman law student who is reduced to tears because a white homosexual judge is *"being who he is"* but at the same time seeks the impeachment of a black Chief Justice who seeks to ensure that racially skewed briefing patterns and employment practices which are discriminatory and illegal or have a disproportionate adverse impact on black African are discredited and abandoned so that this very same woman would enjoy equality promised by our constitution? What needs further interrogation here is Hoffman's motive in targeting the Chief Justice for retaliatory treatment and Hoffman's panegyric on Cameron whose speeches have been unabashedly political. What accounts for the disparate treatment? Before answering this question, HETN must provide further examples of Cameron's activist political speeches which have been condoned by Hoffman and other white advocates and have not provoked vitriolic attacks akin to those visited upon Chief Justice Mogoeng.

3.37 Even in recent years, Cameron has never shied away from scathing attacks on political leaders. [23] On 25 January 2012 Justice Cameron, "Justice of the Constitutional Court of South Africa, delivered an emotive and thoughtful talk entitled *"What you can do with rights".* The Law Commission's annual Lord Scarman Lecture covered apartheid, AIDS denialism, LGBT rights and delved into the essence of moral humanity. Justice Cameron *"reserved his most stinging rhetoric for the second topic: the effect of 'rights-talk' on social policy, as a corrective for public irrationality. He started this section by stating that "in 1999, President Thabo Mbeki plunged South Africa into a ghastly nightmare." The reference was to Mbeki's stance on AIDS; lending credence to a discredited, unscrupulous, denialist tranche of businesspeople, lawyers, activists and scientists*. The effects of AIDS denialism were horrific; the tactics equally so. The rate of infection increased rapidly until it was around 25% in 2001, with mother to child transmission not being prevented effectively. The methods of denialists included a consistent campaign against NGO treatment access campaigners the Treatment Action Campaign (TAC). Id.

3.38 The report continued: *"Justice Cameron described how the TAC, exasperated at the denialists and their effect on government ministers, turned to the courts. In a judgment delivered in July 2002, the Constitutional Court decided that anti-retroviral drugs had to be made available to the public. In doing so, Justice Cameron suggests the judiciary stood up, unlike other political elites in the country, and struck a victory not only for treatment access but also for "rational public discourse."* This was the discursive and ideological impact of legal rights, that go beyond their material effect, and spread into HIV-related discrimination." Id. It concluded by stating: *"Justice Cameron brought this area further to life by talking about his own experience, of being HIV positive and being saved from the inevitable disease and death of AIDS by anti-retrovirals. The decision of the Court was, in his words, a "rebuke against the absurd obfuscation" of the government. Powerful words indeed."*

3.39 The foregoing report amply demonstrates that in the eyes of Hoffman and many white advocates, recognition of freedom of speech is not colour-blind. In their moral compass, white judges may enjoy unbridled freedom of speech and conscience but black judges may do so only subject to the vetoes of these self-appointed white masters.

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[23] See, What you can do with rights – Justice Edwin Cameron http://ukhumanrightsblog.com/2012/02/07/what-you-can-do-with-rights-justice-edwin-cameron/

3.40 In Cameron's view, Mbeki who has never been given his day in court is tarred and feathered as an insensitive or heartless person who engaged in denialism which borders on criminality and led to unnecessary deaths and spead of HIV. Just like under apartheid the right to engage in what Cameron terms *"rational public discourse"* is reserved for white judges while blacks have to tip-toe carefully around these issues or face impeachment.

3.41 A few weeks ago, Justice Cameron delivered another politically controversial lecture on the occasion of the Sunday Times Literary Awards on 29 June 2013.[24] Cameron commented broadly on the politics of the country and criticized union leaders and deputy ministers by name. The following are excerpts from his reported speech with highlights:

9. "But all is not well. *Many of us are troubled by the state of our country. Political debate is sometimes annihilatingly divisive. Race rhetoric still sometimes substitutes for performance. Gross inequality, largely racially structured, persists. Public schooling for poor black children seems to be lamentably lacking. In some areas, institutional decay and infrastructural disintegration have reached dismaying proportions".*

10. "Last year saw *the highest number of service delivery protests since 2004 - and very nearly nine out of ten (88%) were violent".*

11. "And more and more *municipalities and national departments fail to fulfil basic auditing requirements"*.

12. *"Not unconnected with the accounting chaos, the tide of corruption washes higher and higher. It threatens to engulf us. The shameless looting of our public assets by many politicians and government officials is a direct threat to our democracy and all we hope to achieve in it". To many, the culture of high-minded civic aspiration that characterised our struggle for racial justice and our transition to democracy seems distinctly frayed, if not in tatters.*

21. *Constitutional sceptics fall roughly into two opposing categories.*

a) On the one side are those who think that rights and constitutionalism have diverted social power away from "the people", who should rightly own it. The Constitution was a misguided compromise that fettered the people's power to radically transform our unjust society. This form of scepticism was most potently expressed by deputy minister Ngoako Ramathlodi. He said in 2011 that the constitutional transition was a victory for apartheid forces who wanted to retain "white domination under a black government". This was done "by emptying the legislature and executive of real political power" and giving it to "the judiciary and other constitutional institutions and civil society movements".

More recently, National Union of Metalworkers of SA (NUMSA) general secretary Irvin Jim has said the clause in the Constitution protecting property rights should be "dumped" so that radical change can be effected immediately. And this kind of scepticism was evident also in SAPS Commissioner Riah Phiyega's recent statement to Redi Thlabi, on Al-Jazeera, that criminals are brazen because we "have the most beautiful Constitution that allows rights and rights are not limited". Sceptics in this camp say that the Constitution is too powerful to allow us to do what we must to make our society as it should be.

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[24] The Constitution is still our best practical hope - Edwin Cameron

Edwin Cameron;01 July 2013
http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=387371&sn=Detail&pid=71619 Keynote by Edwin Cameron, Constitutional Court of South Africa to the Sunday Times Literary Awards, Summer Place, Saturday 29 June 2013 19h00

b) On the opposing side are those who think, most recently through Ken Owen and RW Johnson after Arthur Chaskalson died, that the Constitution is not powerful at all. They suggest it is a mere guise under which radicals in the ANC and the SACP have seized for themselves as much power as they want, and through which they are distorting all state institutions in order to impose centralised control.

Sceptics in this camp suggest not only that the Constitution is not formidable enough, but that the whole constitutional project may have been a sham.

***22**. The two groups stand at opposite poles. The first say the Constitution is indeed powerful and its effects all too real in preventing popular power from being exercised - whether to stop criminals or to effect distributive reform.*

***23**. The second say that, far from being a brake on radical exercise of power, the Constitution is a flimsy veneer and perhaps a con designed to license it.*

***24**. To the constitutional sceptics on both sides, I say: thank you.Your accounts of history are both, I very strongly suspect, wrong. But your warnings are important. You alert us to the limitations of rights-talk. You are impatient with the clogs and inhibitions the rule of law places on the exercise of power. And you caution that constitutionalism may prove ineffectual as a bulwark against authoritarianism.*

***25.** These warnings are well-directed. And I do not try to disclaim them. On the contrary, I can only seek to counter scepticism by arguing that constitutionalism remains the best path we have.*

***26**. In doing so, I do not call for naive optimism. Rather, I propose a sober assessment of what constitutionalism has yielded in our democracy over the last two decades.*

***27.** The Constitution is not just a document of high aspiration and idealism. It is a practicable, workable charter. And it has proved itself modestly but practically effective as a basis for the democratic exercise of power in our half-broken, half-fixed country.*

3.42 There you have it once again. It is perfectly acceptable to white advocates for Cameron to engage Deputy Minister Ramatlhodi in a public debate and even to misrepresent the latter's argument on a quintessential political issue that is likely to serve before the Constitutional Court in the foreseeable future. In an article published in the Times Live on 1 September 2011,[25] Deputy Minister of Correctional Services and ANC NEC member, Ngoako Ramathlodi wrote that the effect of the pre-1994 constitutional settlement was to surrender of *"elements of political power to the black majority, whilst immigrating substantial power away from the legislature and executive and investing it in the judiciary, Chapter 9 institutions and civil society movements." The result was that the black majority was handed "empty political power while forces against change reign supreme in the economy, judiciary, public opinion and civil society."* He went on to argue that elections had become *"regular rituals handing empty victories to the ruling party" while minority parties and civil society ran to the courts – "where the forces against change still hold relative hegemony"* – to challenge as many policy positions as possible. Ramatlhodi also discussed matters very relevant to the current controversy regarding JSC appointments as follows:

"Regarding the judiciary, a two-pronged strategy is evident. The first and foremost is to frustrate the transformation agenda by downplaying requirements of gender and colour representation. Many obstacles, such as comments from white-dominated law societies, have to be taken into account when final decisions are made by the Judicial Service Commission.

[25] On line at: http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions

The subtext of this is to ensure that in the inevitable event of these appointments being made, the new appointees are expropriated by the system in place. This is done through the application of an unwritten plethora of rules during the initiation of new appointees.

The other tactic is to challenge as many policy positions as possible in the courts, where the forces against change still hold relative hegemony. The legislature itself has not escaped the encroaching tendency of the judiciary, with debatable decisions taken by majority views, in some instances. Decisions of the Judicial Services Commission have equally been systematically subjected to judicial reviews. The process of de-legitimising the commission and its decisions has been initiated through the instrument of "public opinion".

At an ideological level, the public sector under the control of the black majority is posited as inefficient, corrupt and not worthy of any trust. This manifests itself in the form of vulgar and at times subtle racism. This means that, in our country, capital also has colour, as was the case under colonialism of a special type.

3.43 The point is once again to highlight that Cameron's speech was no less "political" in that he responded to criticisms of constitutional judicial review as serving to undermine the prerogative of the democratically elected legislature to set policy. These issues feature prominently in the cases being litigated in court regularly and are likely to serve before Cameron at some point. Equally politically charged is Cameron's response to National Union of Metalworkers of SA (NUMSA) general secretary Irvin Jim's statement that the clause in the Constitution protecting property rights should be "dumped" so that radical change can be effected immediately. Calls for the re-examination of the property clause in light of the admitted failure of land reform and "willing seller willing buyer" policies have come from political parties, academics and commentators. These issues will feature in court cases involving unfair deprivation of property or other violations of Section 25 but no one has raised an alarm about Cameron's venturing into the public debate on them. Cameron's response to alleged comments by police commissioner Phiyega's claims that criminals are seeking protection of our constitution is also a comment about highly contested terrain and political matters. And yet Hoffman and his cohorts have not raised any alarm in this regard.

3.44 The HETN notes that Cameron has commendably spoken out against the stigma attached to HIV and being gay.[26] Justice Edwin Cameron "has urged African leaders to stop condemning and judging gays and lesbians." Id. Cameron made the call in a speech at the UNAIDS / LANCET Commissioners Dinner in Lilongwe, Malawi last week, which was hosted by the country's president, Joyce Banda, and was broadcast on television. He stated: "The most distinguishing feature of [the HIV] epidemic is the stigma that has attended it in the United States, in Western Europe, elsewhere in the world, but also on our continent …The stigma that is associated with HIV/AIDS has been our biggest battle for rationality, for calm, and for good policy in this epidemic." But this brave stance was no less political or no less controversial. Cameron is possibly the only openly gay or openly HIV positive senior public official or judge on the African continent. He spoke in Malawi, at the invitation of President Banda who announced in May 2012 her intention to overturn Malawi's ban on homosexuality. In November 2012 it was reported that Malawi had "suspended" laws criminalising homosexuality pending a parliamentary vote. If the ban on same-sex sexual activity is repealed by its Parliament, Malawi would become the first African country to decriminalise homosexuality since 1994. Cameron's speech addressed a matter which is still pending consideration by a sovereign parliament of Malawi and which is highly divisive and politically controversial.

[26] JUSTICE EDWIN CAMERON URGES AFRICA TO END GAY STIGMA

Fri, 5 July 2013 http://www.mambaonline.com/article.asp?artid=8320

3.45 One issue which illustrates the white double standards on extra-judicial writings and controversy is the attitude towards Cameron's unconventional beliefs and philosophy. Edwin Cameron co-authored with Mark Gevisser a book entitled **'Defiant Desire,**' a book which records the lives of lesbian and gay South Africans of all races as they have lived in the face of censure, denial and oppression. Controversially, the book speaks positively of sexual relations with children! In the face of the rape epidemic and sexual abuse in this country one would have expected a firestorm of controversy to erupt when Cameron was considered for judicial appointment. His ability to separate his literary work from his judgments in court was presumed and no one questioned his sensitivity to the sexual abuse of children or ability to deal with such matters which are daily before the courts. Without much fanfare, he was appointed to the Constitutional Court in 2008 by then acting President, Kgalema Motlanthe.

3.46 There was no public inquisition - no debate about his suitability for the post, nor were his previous rulings subjected to rigorous analysis, dissected and second guessed. The HETN does not seek to re-examine Cameron's suitability for judicial service and top be perfectly clear we believe that he is a good jurist whose presence on the bench has enormously enriched our jurisprudence. What we are questioning is why black jurists and leaders are subjected to ridicule, racist onslaught and vilification for delivering speeches which are less controversial and less politicized than Cameron's? We argue that the onslaught on Chief Justice Mogoeng marks for our country a turning point – it poses a challenge to all right-thinking persons whether we are willing to tolerate this flagrant racial abuse, disparate treatment and denigrating treatment of black judges under the guise of constitutionalism and freedom of speech.

3.47 As already mentioned above other judges have commented on judicial appointments and decried what they claim to be appointment of unqualified judges to the bench. Lewis reportedly said that "appointments to the bench must be made by having regard primarily to merit, skill and experience. Political loyalty and race must cease to be the criteria for appointment by the JSC." As if to underscore the political support she enjoyed for the anti-black and political propaganda message, the DA praised Lewis to the hilt. But Lewis' crusade to halt black appointments and to see whites being appointed to the judiciary did not just stop there – she recently took the unusual, unethical and politically motivated step of publicly endorsing the candidacy of Jeremy Gauntlett to the judicial vacancy of the Western Cape division.[27] A well-established judicial ethics rule is that a judge shall refrain from political activities and other dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

3.48 Further, Lewis and Harms violated a universally observed judicial ethics rule that states that a judge shall not lend the prestige of judicial office to advance the private interests of the judge or other. A sitting judge may not use the prestige of judicial office to promote the candidacy of another aspirant judge. For example, an incumbent judge may not make a judicial determination calculated to obtain support for the candidacy of another judge. It is very telling that no one in the organized legal profession raise a finger in protest at the collaboration of Judge Lewis, Harms and the DA in support of Gauntlett's candidacy before the JSC. The HETN submits that this is emblematic of a greater malaise in our public discourse and a symbol of the general belief that white judges and advocates must not be burdened by any ethical constraints.

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[27] **JSC INTERVIEWS: Hlophe's shadow hangs over Gauntlett interview**
by Franny Rabkin, 17 October 2012 http://www.bdlive.co.za/national/law/2012/10/17/jsc-interviews-hlophes-shadow-hangs-over-gauntlett-interview which reports: "But then on Monday and Tuesday, five additional letters were sent to the JSC in support of Mr Gauntlett: ***from Louis Harms, former deputy president of the Supreme Court of Appeal; from Supreme Court of Appeal Judge Carole Lewis***; from some counsel at the Johannesburg Bar, including highly respected silks Patric Mtshaulana and Timothy Bruinders; from Archbishop Njongo Ndungane, chairman of the University of Cape Town's council; and from UCT's vice-chancellor, Max Price."

3.49 No one has raised Lewis potential conflict in ALL cases involving Jeremy Gauntlett, not just those involving JSC-related issues. For the same reasons that Hoffman alleges Mogoeng might have a conflict requiring recusal in matters involving challenges to JSC appointments and procedures, why did Hoffman not raise similar concerns when Lewis insinuated herself into the JSC process through her extrajudicial speeches as well as her direct letters of support for the candidacy of Gauntlett. Once again, the answer is patently obvious – Hoffman is a bigot whose only preoccupation with judicial ethics only insofar as it comes to black judges. Because Hoffman shares Lewis' philosophy and antipathy towards transformation, he would never drop a hint of unethical conduct by Lewis – he prefers to let sleeping dogs lie!

3.50 For the sake of fairness, the HETN wishes to emphasize that the judges who have been allowed ample space for freedom of speech have not all been white. Notably, these have included judges who have either expressly endorse the whites' attacks on affirmative action or have themselves gone on the offensive to denounce the alleged horrors of judges promoted through affirmative action. A case in point is Judge Azhar Cachalia of the SCA who has publicly stated that a desire to 'transform' has been at the expense of both potential talent and racial goodwill. Running on this theme, Judge Azhar Cachalia, for example, has drawn attention what he claims are the 'unacceptable' legal errors apparent in some judgements, presumably by affirmative action appointees.28 But that is not all Cachalia has said.

3.51 In 2011, two judgements were handed down by the SCA in a matter that involves Judge President Hlophe. In the judgement involving an organisation called FUL, the SCA set aside the JSC's decision relating the complaint against JP Hlophe by the Justices of the Constitutional Court on the basis of irrationality. In the judgment involving Premier Zille, the SCA set aside the entire decision of the JSC on the ground that Zille who idly sat on her rights during the process should have been invited to be part of the JSC hearing. Justice Cachalia was one of the justices that presided in the matter involving our client.

3.52 On 1 April 2011, almost immediately after the SCA delivered its judgment, Cachalia delivered a speech at the book launch of "**When a State turns on its Citizens - 60 years of institutionalised violence in Zimbabwe by Lloyd M Sachikonye**." Cachalia railed against ZANU PF for alleged violence and claimed that the "*ruling party ensured that state institutions such as the police and the military would be firmly in control of the governing party, as would the state media…Party cadres would be 'deployed' in these institutions, a term that we have become familiar with in this country. And during elections after independence, particularly after 2000, these institutions were used to harass and intimidate opponents with the state media ensuring that the sanitized version of what happened was broadcast."*

3.53 Cachalia further claimed that "what has happened in that country has lessons beyond it, including our own. *Mugabe not only has admirers in this country. There are some who think that we should emulate his model. That path involves the dominance of the post-colonial state by a single party in perpetuity, or as someone once said, 'until Jesus returns'. The result of that sort of thinking is that the State is seen as instrument for wealth acquisition through party deployment, as in Zimbabwe - not one that provides services to its people on a non-partisan basis for which it is accountable to the people, as our Constitution envisages*."

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[28] Quoted in Waldner M, 'You be the judge', City Press, 1 September 2009, http://www.citypress.co.za/features/you-be-the-judge-20090901/ . "In 2006, during his JSC interview for a permanent position on the Supreme Court of Appeal (SCA), he stirred a hornets' nest by warning that some provincial judges were making grave, fundamental mistakes in their decisions. Reacting to angry outcry from black judges and lawyers, Cachalia remarked that if concerns of this kind could not be raised without risking complaints to the JSC it boded ill for free speech, the rule of law and the right of every citizen to an effective judicial system."

3.54 Cachalia continued: "I recall having a conversation sometime ago with one of my erstwhile comrades who told me, without a hint of irony, that the problem in this country is that we (meaning the Party) appoint comrades to independent institutions and after a while they begin to think that they are independent. In similar vein I remember one of South Africa's most powerful present day politicians reminded his audience, of which I was a part of before I became a judge that we must remember that the party created the Constitution - the Constitution did not create the party. What he was saying was that our primary loyalty must be to the party not the Constitution."

3.55 In clear reference to Judge President Hlophe's cases, Cachalia stated:

"*More recently I was involved in a case where one of South Africa's most controversial judges is alleged to have told another judge that some of his close friends, who are Cabinet Ministers, are concerned that some of some of our judges 'do not understand our history'. Decoded this meant that judges, who do not make rulings in favour of the governing party, 'do not understand our history*'.

I do not suggest that these are the only or even dominant views of those who hold public office in our country, as they appear to be in ZANU-PF. But neither are they so isolated or sporadic that we can safely ignore them.

3.56 We respectfully submit that in any normal democracy, Cachalia's statements attacking the ruling party and President Jacob Zuma and linking those attacks with Judge President Hlophe would have been swiftly followed by serious investigation and condemnation because they raise serious questions about his competence to sit in judgment in any matter involving both the government and the accused Judge President Hlophe as litigants. It is no secret that on Wednesday 11 March 2009 Newspaper reports quoted ANC President Zuma "saying that the African National Congress will rule South Africa till Jesus comes again." Jacob Zuma, the head of the ruling party said the ANC would win the upcoming elections in April because God and Jesus are on their side. "We believers know that Jesus will come back, we say the ANC will rule until he comes back," Zuma, told ANC supporters in the Mpumalanga province. [29]

3.57 Cachalia is clearly accusing President Zuma as being amongst the *"admirers*" of Mugabe in this country" and as one *"who thinks that we should emulate his model."* He portrays President Zuma as advocating the path of the "dominance of the post-colonial state by a single party in perpetuity" and having the sort of thinking that see the State as "instrument for wealth acquisition through party deployment, as in Zimbabwe- not the one that provides services to its people on a non-partisan basis …as our Constitution envisages." Interestingly, neither the ruling ANC nor the organized legal profession called for serious interrogation of Cachalia's apparent disgraceful dabbling in politics at the expense of JP Hlophe and judicial independence. There are two ways of looking at these comments: One way suggests that these comments are highly offensive, unbecoming for a judicial officer and are damaging to the judiciary. Given the orders iissued by the SCA just two days prior to Cachalia's speech, the comments clearly concerned a pending matter as the Hlophe case was remanded with instructions for the JSC to institute new hearings.

3.58 The context in which the remarks is highly disconcerting because they are intended to portray the accused Judge President Hlophe as a judge who is beholden to the ruling party and lacks the necessary independence and integrity to carry out the functions of a judge in accordance with the Constitution and the oath of office. The remarks in our view are an irresponsible conduct by a Judge on a matter that the judge sat and made judgment. Longman Dictionary of Contemporary English defines "controversial" in the following manner: "*If you describe something or someone as controversial, you mean that they are the subject of intense public argument, disagreement, or disapproval.*" Other meanings of that term are "querulous, quarrelsome, captious, pugnacious, fractious, argumentative, disputatious."

[29] http://www.africanews.com/site/SA_ANC_to_rule_till_Jesus_comes/list_messages/23648

3.59 It can also mean "difficult" person which means an arduous, indiscreet, fatiguing, severe, incisive, hard, exacting, laborious, scabrous, indecent, toilsome, low, abstruse, complicated, exigent, wearisome, improper, tiresome, trying, abysmal, abstract, bothersome, disturbing, treacherous, indelicate, rugged, deep, perplexing, demanding, burdensome, distressing, risqué, onerous, buried, puzzling, rich, heavy, troublesome. Clearly Cachalia had every intention to expose Judge President Hlophe to public condemnation and to misuse his office to cast aspersion on JP Hlophe. It is a despicable act assailing the independence of our judiciary for a judge to publicly describe another judge as "one of South Africa's most controversial judges." He totally disregarded the fact that JP Hlophe has not been adjudged guilty of any misconduct. But there is another way of looking at the matter – it is suggestive of a very permissive and liberal atmosphere and consistent with activities such as those of Cameron. Consistent with this view, Cachalia was simply exercising his right to free speech and his strongly anti-ANC views are not suggestive of a mindset and do not mean that he would be unable to preside over cases in which the ANC-led government is a litigant. It is very important in this regard that Cachalia purports to offer a "decoded" interpretation of words attributed to JP Hlophe. The Court said:

3.60 "It cannot conceivably, rationally be considered to be immaterial to the question whether Hlophe JP tried to influence Nkabinde J that Hlophe JP said, when making an appointment to see her, that he had a mandate, that, when he visited her, he said that the reason why he was there was that a concern had been raised that people in the Constitutional Court did not understand our history, that he said, when asked who those people were, that 'he has connection with some ministers', that he said that the question of privilege should be decided properly because the prosecution's case rested on it, that Nkabinde J reprimanded him for speaking about a case he was not involved in, that he said that there was no case against Mr Zuma and that Mr Zuma was being persecuted, that he said that some of the people implicated in the arms deal whose names appeared on a list he had obtained from National Intelligence were going to lose their jobs when Mr Zuma became President.."

3.61 The egregious nature of Cachalia's pronouncement stems from the fact that he purports to "decode" disputed words and alleged actions which are still subject to a hotly disputed case now pending before the JSC. Clearly, Judge Cachalia's comments about our JP Hlophe are not only reckless, but are intended to continue to prejudice Hlophe's right to any fair hearing on the matters Cachalia gloats as having presided over. They are irresponsible in that they continue to erode public confidence the judiciary and undermine the office of JP Hlophe and cast the most unfortunate aspersions of the state of our judiciary. We are outraged by such comments. Judicial neutrality is a central tenet of the rule of law. Judges are sworn to administer the law without fear, favour, affection or ill will. The right to a fair hearing by an impartial tribunal is a fundamental right guaranteed by numerous Conventions and most Constitutions.

3.62 The virtues of neutrality and impartiality also serve utilitarian goals, because they promote accuracy of decision-making and reduce enforcement costs through greater public acceptance of decisions. Public confidence depends upon the impartial administration of justice. Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal. Where there is proven bias or even the appearance of bias, a judicial decision will be set aside. By Cachalia's own admission, he harbours clearly articulated bias against President Mugabe and Zanu PF in Zimbabwe. He further extends his bigoted opinion to the ANC and President Zuma and purports to "decode" a statement attributed to Judge President Hlophe and allegedly made while he was lobbying his fellow judges to rule in favour of President Zuma.

3.63 Judge Cachalia's statements are even more egregious. He spoke of President Zuma and the alleged threats he represents to the Constitution and then offered a "decoded" explanation of JP Hlophe's statements he allegedly uttered in the course of lobbying support for Zuma. All this occurred within a day or two of Cachalia having rendered an adverse judgment against JP Hlophe on a case involving the same subject matter – Zuma's corruption charges and JP Hlophe's alleged judicial misconduct in lobbyingh support for him. It cannot be said that at the time he rendered judgment he was free from the political bias he so eloquently expressed just a day later.

3.64 The HETN does not wish to put Judge Cachalia on trial for the remarks he uttered. Reference to his utterances is simply for the purpose of illustrating the rampant partisanship and political bias on the part of the white advocates. As long as the speaking judge utters anti-government or anti-African views, the speech is deemed acceptable and will not provoke the ire of the legal purists. Hoffman who seems to be obsessed with attacks on black judges was fully aware of Cachalia's speech and approved the same. By its express orders, the SCA expected the JSC to deal with the Hlophe matters further and to address the alleged procedural deficiciencies the SCA found. Cachalia knew or should have known that the matter was pending before another tribunal and that hotly disputed factual matters were still to be resolved by the JSC. Accordingly, Cachalia's offer of a "decoded" interpretation of some of the alleged statements gives the appearance of a calculated attempt to influence the pending proceedings.

3.65 Viewed against the background of established case-law, Cachalia's statements showed appalling lack of judgment. The combination of these two factors - virulent bias and hostility toward JP Hlophe and the ruling party stemming from an extrajudicial episode involving Cachalia's own dabbling in politics - clearly satisfy the standards of automatic disqualification since any reasonable person, apprised of these circumstances, would reasonably question the Court's impartiality.

3.66 Hoffman did not raise a finger of protest against Cachalia's speech. That is a telling example of liberal hypocrisy and total disrespect of African jurists by the seniuor white advocates. Principles matter very little and pure or unbriddled venomous hatred drive their agenda. The jeremiad against Chief Justice Mogoeng should be viewed against this background. Self-serving and partisan political speeches by unelected white judges particularly on highly sensitive and politically-charged topics regarding ruling party's policies and election campaigning have been made by our judges with impunity.

IV. Legal Contours of the Chief Justice's Right to Speak on Transformation and Administration of Justice.

4.1 The HETN acknowledges that as a general rule judges should be particularly wary about making any comment concerning hot-button political issues. HETN agrees that judges who gratuitously take public stands on partisan questions erode the independence and integrity of the judiciary by blurring the line between the courts and politics. Such statements also create the danger of prejudice since a judge may later face in court an issue about which he has spoken. Although a litigant can recuse, judge is paid to be a judge, not paid to do things which disqualify him from acting as a judge. Having said that HETN wishes to demonstrate that none of Chief Justice Mogoeng's speeches transgressed the proper boundary between carrying out the duties of judicial office and that of protecting judicial independence. In fact, in light of the relentless pressure on the judiciary and lawsuits against the JSC it would be a dereliction of duty for the Chief Justice to maintain a stony silence under the circumstances.

4.2 Despite the various formal and prudential restrictions on extrajudicial speech, there are many circumstances under which extrajudicial speech is highly desirable. For instance in the US, Canon 3B(9) of the code governing judicial conduct explicitly provides that the rule against comment on a pending or impending case *"does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."*

4.3 Clearly a defence of the judiciary against unwarranted attacks falls within the scope of the official duties of a Chief Justice. Extrajudicial discussion by judges about issues concerning the legal system are particularly appropriate, provided that such comments are well reasoned and are not expressed in a manner that detracts from the dignity of the court.

4.4 Pointing out that some interest groups have mobilized their resources and acted in collaboration with political parties to intimidate the judiciary falls squarely within the responsibility of the Chief Justice – he may not sit idly like a bloodless automation when these special interest groups are busy with their pyromaniac schemes to burn down the institution of justice and judicial independence.

4.5 Even where parties threaten in newspapers to file lawsuits against the JSC, there is nothing inherently wrong in a Chief Justice commenting that such lawsuit will be vigorously defended because it is unjustified and frivolous.

4.6 Indeed, one organization of state trial judges has urged judges to "explain legal terms, and concepts, procedures, and the issues involved in [a] case so as to permit the news representatives to cover the case more intelligently."[30] By helping to facilitate more intelligent news coverage, judges can serve an important role in educating the public about the judicial process and can thereby enhance public respect for the judiciary and the judicial system. A party may not use newspapers to attack the JSC and then cry foul when the same newspapers report that a Chief Justice has made a speech in which he suggests that attacks on the JSC and the judiciary may be unwarranted and unfair.

4.7 Judges likewise have a duty to comment on issues of judicial administration about which they have unique knowledge. It is particularly appropriate for judges to speak out about proposed legislation or other actions by coordinate branches of government that would affect their own court. For example, recently judges spoke out when the issues about disclosure of interests was mooted and some have spoken out against other legislative measures which would have affected judicial indeoendence.

4.8 In the United States, for instance, it was proper for Chief Justice William H. Rehnquist in 1997 to express anxiety about the growing number of judicial vacancies caused by the friction between the Clinton Administration and the Senate Judiciary Committee.[31] Indeed, judges have a virtual duty to make such communications to the extent that they are in a special or unique position to inform legislators or the general public about the benefits or dangers of various forms of legislation. During the controversy over President Roosevelt's Court-packing plan in 1937, for example, Chief Justice Charles Evans Hughes properly rebutted Roosevelt's contention that the Court needed more justices because the Court was overworked, for no one was better qualified to speak to this question than was Hughes.[32]

4.9 Judges have made many significant improvements to the law by teaching, publishing, and serving as members of professional organizations. Recognizing the importance of such contributions, Canon 4(B) provides that *"[a] judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code*." As the commentary to this Canon aptly notes, "*As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice*." It is the height of charlatanry, idiocy and hypocrisy for anyone to suggest that a speech by the Chief Justice delivered to "Advocates for Transformation" all members of a professional body of admitted advocates can be a basis of an impeachment complaint against the Chief Justice.

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[30] ***National Conference of State Trial Judges Committee on News***

Reporting and Fair Trial, Judicial Guidelines for Dealing with News

Media Inquiries and Criticism (5thDraft, June 5, 1984), cited in

Matter of Sheffield, 465 So. 2d 350, 355 (Ala. 1984).

[31] .See **Delay in Approving Judicial Nominees Angers Rehnquist**, WALL

ST. J., Jan. 2, 1998, at 40.

[32] See M.J. PUSEY, 2 CHARLES EVANS HUGHES 754-57 (1951).

4.11 Having stated the above, the HETN submits that the artificial legal standards which Hoffman fails to articulate are woefully insufficient to impugn the conduct of the Chief Justice in any manner whatsoever. For one thing, there is not a scintilla of evidence that the speech challenged by Hoffman remotely suggests partiality or partisanship. In fact, Hoffman embarks on the most convoluted and asinine logic to cobble together what he dubs as the complaint of judicial misconduct. He asserts that the most "serious aspects [of the complaint] include allegations of contempt of court and attempting to defeat the ends of justice which it is alleged amount to gross misconduct justifying impeachment." How exactly does he come to this conclusion? He states in his affidavit that *"the facts, upon which my complaints, including the complaints of respondent's gross misconduct or gross incompetence, are based, appear to me to be common cause or undisputed and are set out separately in the formal complaint."*

4.12 These so-called facts are that: (i)On 6 July 2013, in Cape Town, Chief Justice Mogoeng delivered a speech to an open meeting of Advocates for Transformation on the topic "The Duty to Transform" and that the speech was disseminated by the Office of the Chief Justice and was widely reported in the media and it is available on the Politicsweb website."; that (ii) two days later on 8 July 2013, in The Hague, the Chief Justice told the complainant that: "you can continue to challenge me, but you will continue to be frustrated"; that (iii) On 18 July 2013, the complainant wrote a letter to the Chief Justice to which he attached a draft media article written by him entitled *"The Chief Justice descends into the arena".;* (iv) that On 25 July 2013 the Office of the Chief Justice replied to the letter via a letter in which the Chief Justice, via an official, invites the complainant to "forge ahead"; that (v) that

4.13 In his speech, Mogoeng questioned critics who complained when a white male candidate was not recommended for appointment to the Bench, while those who were appointed were described as "executive toys". Hoffman also challenges Mogoeng's statement that: "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" suggest he has descended into the arena. Hoffman also assails Mogoeng statements to the following effect: "The apparent discomfort with the progress we are making in transforming the Judiciary... must be dealt with decisively." And statement that "for the record, many white males have been recommended for appointment by the JSC over the years. It is for them and those who know them better to say whether they are 'executive toys'."

4.14 To state Hoffman's argument is to refute it at the same time. As demonstrated above, the "Duty to Transform" is not a gratuity or a luxury that the judiciary may leisurely pick from a menu to suit its fancy – it is a constitutional imperative. The Constitutional Court *"has on more than one occasion stressed the transformative purpose of the interim Constitution and the 1996 Constitution."* This transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 where largely under the control of whites and, in particular, white men. It is the unavoidable duty of the Chief Justice as leader of the judiciary to defend transformation against its detractors and those who have declared a war against transformation. This duty also involves defending judicial appointees against unfair attacks and comments which seek to denigrate them simply on the basis that they secured appointment to the bench.

4.15 As his predecessors have done before him Chief Justice Mogoeng is within his right and owes a duty to the decent men and women gracing our judicial bench to defend them against unfair accusations of being lap-dogs or sycophants pliable to executive control and manipulation. The incendiary words "executive toys" when directed against these decent judges are particularly stigmatizing and will surely erode public confidence in our judiciary. In **De Lacy v South African Post Office** 2011 ZACC 17 (24 May 2011) Moseneke DCJ succinctly stated the authority of the court as follows:

4.16 "Judicial authority is an integral and indispensible cog of our constitutional architecture. Our supreme law vests judicial authority in the courts - see s 165(1), 1996 Constitution. It commands that courts must function without fear, favour or prejudice, and subject only to the Constitution and the law.

4.17 *"It follows that, at all times, the judicial function must be exercised in accordance with the Constitution. At a bare minimum this means that courts must act not only independently but also without bias, with unremitting fidelity to the law, and must be seen to be doing so."*

4.18 The HETN unequivocally accepts that judicial neutrality is a central tenet of the rule of law. Judges are sworn to administer the law without fear, favour, affection or ill will. The right to a fair hearing by an impartial tribunal is a fundamental right guaranteed by numerous Conventions and most Constitutions, including our own. The virtues of neutrality and impartiality also serve utilitarian goals, because they promote accuracy of decision-making and reduce enforcement costs through greater public acceptance of decisions. Public confidence depends upon the impartial administration of justice. Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal.

4.19 Where there is proven bias or even the appearance of bias, a judicial decision will be set aside. That being said, the courts are always vigilant to guard against what an Australian Chief Justice once described as "fanciful and extravagant assertions and demands" in the pretext that justice should not only be done but be seen to be done. **Per Barwick CJ, Stollery v Greyhound Racing Control Board** 1972 128 CLR 509 518-519.

4.20 Hoffman faces many insurmountable obstacles in his doomed project to manufacture a judicial misconduct complaint against the Chief Justice. First amongst these hurdles is that judges are clothed with a presumption of impartiality. This is the first hurdle Hoffman must overcome in an attempt to show that the Chief Justice had conducted himself in manner which raises an apprehension of bias. The courts take the view that given the nature of the judicial office and the oath of office of judges, there is no presumption that such a highly dignified public functionary would discharge his/her important judicial office with favour, prejudice or partiality. Impartiality is the fundamental qualification of a judge and the core attribute of the judiciary; it is the key to the common law judicial process and must be presumed on the part of a judge. See, **R v S (RD)** 1997 3 SCR 484 para 106. Cory J said: Courts have rightly recognised that there is a presumption that judges will carry out their oath of office… This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high." According to the Canadian law Supreme Court , "*the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. "***Wewaykum Indian Band v Canada** 2003 231 DLR (4); para. 59.

4.21 The effect of this presumption is that "while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified." **Id**.

4.22 South African courts also apply the presumption that judicial officers are impartial in adjudicating disputes.[33] Thus, in adopting the opinion expressed in **R v S (RD)** as "entirely consistent with the approach of South African courts to applications for the recusal of a judicial officer," the Constitutional Court held in **SARFU 2**[34] that a presumption in favour of judges' impartiality must be taken into account in deciding whether or not a reasonable litigant would have entertained a reasonable apprehension that the judicial officer was or might be biased. **Id.** para.41. The court emphasised the effect of the presumption to be that the person alleging must go further to prove. It must be recalled that the applicant in this case requested that about half of the Constitutional Court bench should be recused from sitting in appeal on his matter.

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[33] Eg S v Radebe 1973 1 SA 796 (A) 813F-G; R v T 1953 2 SA 479 (A) 483C-D.

[34] President of the Republic of South Africa v South African Rugby Football Union 1999 4 SA 147 (CC) para 35 (SARFU 2)

4.23 It would appear, therefore, that the higher in the judicial hierarchy, the higher is the burden of proof of the apprehended bias against the judge, especially in a multi-judge panel. [35] In considering the numerous allegations based on the apprehension of bias in **S v Basson** 2005 12 BCLR 1192 (CC) (Basson 2) ,para. 30, the Constitutional Court held that the presumption in favour of the trial judge must apply. This means, first, that the court considering a claim of bias must take into account the presumption of impartiality. Secondly, in order to establish bias, a complainant would have to show that the remarks made by the trial judge were of such a number and quality as to go beyond any suggestion of mere irritation by the judge caused by a long trial. It had to be shown that the trial judge's was a pattern of conduct sufficient to "dislodge the presumption of impartiality and replace it with reasonable apprehension of bias."Id. at para.42.

4.24 Both the person who apprehends bias and the apprehension itself must be reasonable. This double-requirement of reasonableness also "*highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased - even a strongly and honestly felt anxiety - is not enough*." The court must carefully scrutinise the apprehension to determine if it is, in all the circumstances, a reasonable one.

4.25 Where the alleged bias stems from extra-judicial speech as opposed to a judgment, the person alleging bias faces an even tougher task. See, **Ndlovu v Minister of Home Affairs** 2011 2 SA 621 paras 20, 35 and 38 where the court dealt with an application for his recusal for apprehension of bias arising from the critical views he expressed in a public lecture relating to a system of contingency fees which he (Wallis J) argued required safeguards to prevent its being exploited by legal practitioners who might see in it an opportunity to enrich themselves. The applicant's ground for recusal was that the judge held a fixed view - a prejudgment - on the costs order which the applicant sought.

4.26 It was held that no reasonable, objective reader would conclude, after reading the judge's article and with knowledge that the area of costs was one in which there was enormous body of well-established authority setting out principles that bind a judge, that in any case involving contingency fees that came before the judge, he would disregard the established principles and make a finding on the costs adverse to the party whose lawyers were employed on a contingency-fee basis. Here Hoffman's unsubstantiated claims and paranoid fears are woefully insufficient to overcome the presumption of impartiality applicable to the Chief Justice; Hoffman has failed to identify the fixed view or prejudgment on the part of the Chief Justice. Instead he relies on conclusionary allegations that the Chief Justice *"questioned critics who complained when a white male candidate was not recommended for appointment to the Bench, while those who were appointed were described as "executive toys".*

4.27 What Hoffman assiduously avoids mentioning is that the so-called "critics", which included the rejected white male candidate went beyond merely disagreeing with the JSC's decision.

4.28 It is now a well-known fact that the JSC did not appoint Advocate Jeremy Gauntlett as a judge of the Western Cape High court for, amongst other reasons, his lack of requisite humility and judicial temperament. In Gauntlett's case, the JSC honoured former judge Harms' request by articulating reasons for not appointing Gauntlett which included amongst others, that "he has a 'short thread' and that he can be acerbic at times". While some Commissioners accepted his assurance that as a judge, one is removed from the immediate combative situation that counsels usually find themselves in, others expressed "strong reservations" whether, as part of his attributes, ***"he has the humility and the appropriate temperament*** that a Judicial Officer should display."

[35] See, C Okpaluba and L Juma; THE PROBLEMS OF PROVING ACTUAL OR APPARENT BIAS: AN ANALYSIS OF CONTEMPORARY DEVELOPMENTS IN SOUTH AFRICA; PER / PELJ 2011(14)7 .

4.29 Subsequently, judge Harms fired off a letter to the JSC in which he questioned *"where it was agreed that humility was a required judicial attribute."* Not to be outdone, Pierre De Vos, a UCT law professor and self-styled constitutional expert, has raised similar questions and also claimed that "*some JSC members decided not to appoint him because they did not like his guts*."[36] De Vos raises a rhetorical question: *Has anyone ever heard a more ridiculous reason for not appointing a lawyer to the judiciary? Let's face it, advocates seldom become successful because they are humble servants of the court and lack a sharp tongue. If the JSC is now going to refuse to appoint any senior advocate to the bench because he or she is not dripping with humility and is too combative, then it is going to be hard-pressed to find any half decent lawyer to appoint to the bench.*

4.30 As if to vindicate the JSC's statements about his lack of "humility," Mr. Gauntlet has also parroted the statements by Harms and De Vos but has done so in a manner suggesting dishonesty and lack of candour and under circumstances evincing deliberate misrepresentation of facts and legal authority.

4.31 It is common cause that after the JSC announced its decision on his candidacy, Mr. Gauntlett gave an interview to the ***Sunday Times on November 11, 2012*** in which he stated, amongst other things, the following: Gauntlett accused the JSC of taking so long to provide him with reasons for his non-selection because the "*reasons didn't exist*." When asked if he thinks the reasons were "*created after the event*," Gauntlett replied, "*I know so*." Cumulatively, these statements suggest that he believes he was a victim of legal fraud.

4.32 Gauntlett essentially accuses the Chief Justice Mogoeng of lying and the JSC of conducting a farcical hearing for judicial candidates, particularly himself. The journalist asked: "*So the JSC lied on at least two fronts?*" Gauntlett merely replied: "*It's your word"* but he made no attempt to condemn the accusation that the JSC "lied" and he made no effort to distance himself from the statement. Rather, he went further and claimed that the JSC knew who it would recommend before the hearings began. He stated: "*I think they had a slate in mind, yes.*" He confirmed that he thought the JSC made "the hearings a charade" and added that they "certainly do not serve the function that they are intended to."

4.33 When asked for his opinion on the reasons given by the JSC for not selecting him Gauntlett stated the following: "*Interesting. Firstly, they've introduced a new quality for judicial appointments: humility. The JSC itself has gone to great trouble to list required attributes for judges. This is not one of them and has not been applied to any other candidate. Unlike other candidates, I have not thought that God has called me to be a judge."*

4.34 The Chief Justice had more than ample justification to make the statements in light of the following: (a) The JSC and the Chief Justice were accused by the critics including the white make candidate of having "introduced a new quality for judicial appointments: humility" and that accusation was a false statement of fact and law; (b) the JSC was accused of not appointing Gauntlett because "some JSC members … did not like his guts;" (c) the statements from the candidate suggest that he believes he was a victim of legal fraud, the candidate accuses the Chief Justice Mogoeng of lying and the JSC of conducting a farcical hearing for judicial candidates, particularly himself.; (d) the candidate went further and claimed that the JSC knew who it would recommend before the hearings began. He stated: "*I think they had a slate in mind, yes." He confirmed that he thought the JSC made "the hearings a charade"* and added that they "certainly do not serve the function that they are intended to."

4.35 The statement was made to further Gauntlett's own ambition of being appointed to the bench and to increase pressure on the JSC to accede to his demands. The damage done to the judiciary is incalculable – the public is misled into thinking that the JSC was so biased against Gauntlett that it conducted a farcical interview with biased and prejudiced minds, that the Chief Justice lied and manufactured reasons for not appointing Gauntlett.

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[36] Running the Gauntlett: Why the struggle for appointment? Pierre de Vos
9 November 2012; http://dailymaverick.co.za/opinionista/2012-11-09-running-the-gauntlett-why-the-struggle-for-appointment

4.36 De Vos added to this assault on the integrity of the members of the JSC by stating that the JSC had advanced a "*ridiculous reason for not appointing a lawyer to the judiciary" and that the JSC failed to appoint Gauntlett "because he or she is not dripping with humility and is too combative."* The statements by De Vos and Gauntlett that humility is not a requirement for judicial appointment has been proven false.[37]

4.37 But the critics went beyond simply protesting the non-appointment of Gauntlett – they launched an attack on the integrity of the judges appointed and labeled them "executive toys." Faced with this onslaught, the Chief Justice was indeed duty-bound to not only defend the members of the judiciary so despicably being vilified but he had a constitutional duty to also defend the vital institution of the JSC as its chairperson and the Chief Justice.

4.38 It is the height of absurdity for Hoffman to argue that even in the face of vicious attacks on the integrity of the judiciary and JSC members, the Chief Justice must fold his arms and sit like a potted plant while the critics continue to mislead the public through their casuistry and politically-inspired propaganda. The Chief Justice is being accused of bias simply because he recognized and the biased political opinions of the JSC critics and their association with political causes. The critics' collaboration with political causes of the DA has been demonstrated. Accordingly, Hoffman cannot even make a threshold showing that even assuming the Chief Justice formed a view regarding such activities, his view is unjustified and illegitimate.

4.39 Hoffman's absurd argument is the analytical equivalent of saying that a judge who comments on and condemns the activities of a convicted rapist during sentencing should be forever barred from presiding over rape cases because he formed a view regarding criminal acts of rapists. The Chief Justice would indeed be remiss if he were to condone and acquiesce in the unlawful acts of the "critics" Hoffman purports to be commiserating with. In turn, they have only themselves to blame for the quandary they find themselves in. They have insulted not just the Chief Justice but the other judges they labeled "executive toys."

4.40 Their argument that judicial reaction to their provocation and insults entitles them to a recusal of any judge, including the Chief Justice, borders on moral bankruptcy. See, **Stainbank v South African Apartheid Museum at Freedom Park** 2011 ZACC 20 (9 June 2011) where it was held that there was no question that the judge was irritated by the conduct of the applicant's attorney given his disregard of the rules. But bearing in mind that the applicant was responsible for that, it was understandable that he might have formed a subjective impression that the judge was biased against him. Although Khampepe J found that this case came close to satisfying the reasonable apprehension test, she held that all factors considered, it fell short of dislodging the presumption of impartiality. Hence the case of bias failed.

4.41 The second daunting hurdle (after the presumption of impartiality) to be overcome by Hoffman is the Chief Justice's right to freedom of speech and association. Hoffman and his cohorts have tolerated and approved self-serving and partisan political speeches by unelected other judges particularly on highly sensitive and politically-charged topics regarding ruling party's policies, election campaigning, policy choices on health and affirmative action in judicial appointments. Hoffman's attack on the Chief Justice rings hollow and exposes his sinister agenda to subject the Chief Justice to retaliatory and racially discriminatory treatment as suggested above. The HETN believes that judges must avoid political controversies and act in a reserved manner. In order to preserve their appearance of impartiality In Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267, the Canadian Supreme Court, independently of a factual situation which was not before it, defined the duty to act in a reserved manner in para. 107 as follows, per Gonthier J.:

[37] http://constitutionalcrossroads.blogspot.com/2012/11/misconduct-complaint-against-jeremy.html

The *duty of judges to act in a reserved manner is a fundamental principle. It is in itself an additional guarantee of judicial independence and impartiality, and is aimed at ensuring that the public's perception in this respect is not affected. The value of such an objective can be fully appreciated when it is recalled that judges are the sole impartial arbiters available where the other forms of dispute resolution have failed.* ***The respect and confidence inspired by this impartiality therefore naturally require that judges be shielded from tumult and controversy that may taint the perception of impartiality to which their conduct must give rise.*** (Emphasis added)

4.42 Mr. Justice Gonthier went on to point out that the duty to act in a reserved manner had been enshrined in principle at the international level in various documents, including the ***Basic Principles on the Independence of the Judiciary (published by the United Nations Department of Public Information in 1998)***, which provides inter alia:

8. In accordance with the Universal Declaration of Human Rights, ***members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly ; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary***. (Emphasis by Gonthier J.)

4.43 In common with the other ethical standards which judges must apply to their conduct both in and out of court, the ultimate purpose of the duty to act in a reserved manner is to sustain the litigant's confidence in the judiciary so as to ensure the permanence of the rule of law (Ruffo, supra, para. 108). But the duty to act in a reserved manner does not require that a Chief Justice must maintain a stony silence when advocates and self-anointed legal experts engage in grandstanding or public political speech-making at the expense of hard-working members of our judiciary. When it comes to protecting the judiciary against vilification, the Chief Justice as a leader must lead from the front. He cannot retreat into a cocoon and insist on being shielded from tumult and controversy while some critics are mobilizing and going to war against the judiciary. Transformation, which is by definition a very painful and traumatic process for some, is a constitutional duty which is festooned with tumult and controversy. The dignity of the office of the Chief Justice as a leader can only be maintained if he shows fealty to the constitution by accelerating transformation. As far as the public is concerned, the judge plays a fundamental role which requires him or her to project an image of integrity, impartiality and good judgment.

4.44 In **R. v. Lippé, [1991] 2 S.C.R. 114**, Lamer C.J. said the following at 139 regarding the perception of impartiality that the public should have: "*The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means"to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.*" Viewed with this prism, the actions of the Chief Justice in fiercely defending judicial independence are pivotal. The critics seek to destroy judicial independence the "very cornerstone, a necessary prerequisite for judicial impartiality."

V. Specific Allegations of Unethical Conduct and Professional Misconduct By Hoffman.

5.1 Hoffman's Abuse of status as advocates and attempt to improperly influence the Chief Justice and the Constitutional Court in pending cases by ex parte communication, by orchestrated media campaign and by announcing the filing of false, malicious, frivolous, retaliatory and unwarranted charges of judicial misconduct against the Chief Justice, Mogoeng Mogoeng.

5.1.1 The entire sequence of events leading up to Hoffman's actual filing of the Complaint of Judicial Misconduct against Chief Justice Mogoeng clearly suggests the following breach of ethics and professional misconduct on the part of Hoffman.

5.1.2 First, Hoffman, for his own self-aggrandizement, wrote and dispatched a letter to the Chief Justice in apparent reaction to the latter's "The Duty to Transform" speech of 6 July 2013. Hoffman claims that at the time he wrote the letter on 18 July 2013, he believed that the Chief Justice, by "publicly making and disseminating the speech …Justice brought the judiciary of South Africa and the high office which he holds into disrepute in that he descended into the arena of contestation and controversy in respect of issues which are pending in the High Court and which, in the light of their constitutional nature, are likely to require final determination in the Constitutional Court." And yet, Hoffman acted to compound the alleged breach of the provisions of clause 10(1) of the Code of Judicial Conduct for Judges by engaging in ex parte communication with the Chief Justice concerning the very cases and controversies he claims are "pending in the High Court" and which are likely to be litigated in the Constitutional Court.

5.1.3 As if to underscore the ulterior purposes behind his letter, Hoffman wrote the letter and by his own admission "attached a draft media article written by him entitled "***The Chief Justice descends into the arena.***" This shows clearly that the real purpose of the letter was for Hoffman's self-aggrandizement and had nothing to do with any legitimate concerns regarding the alleged transgressions by the Chief Justice. As an officer of the Court Hoffman had an obligation to refrain from ex parte communication with the Chief Justice on matters pending before the Court and which are expected to be litigated before the Constitutional Court as he claims. Instead of acting in a dignified manner to preserve the independence of the judiciary, Hoffman sought to enhance his own media celebrity status by sending the Chief Justice attaching "a draft" newspaper article he intended to and did actually publish. Even worse, Hoffman was not briefed as counsel to appear in these matters; he was a mere interloper and a political busy-body who poked his nose in other people's legal business.

5.1.4 Second, neither the letter to the Chief Justice nor the draft newspaper article were copied or sent to the litigants in the allegedly "pending" cases despite Hoffman's conviction that the Chief Justice had violated their rights and "descended into the arena of contestation and controversy in respect of issues *which are pending in the High Court and which, in the light of their constitutional nature, are likely to require final determination in the Constitutional Court*."

5.1.5 Assuming Hoffman's premise is correct, his ex parte communication with the Chief Justice was calculated to and would have enormous prejudicial impact on the rights of the putative litigants in the cases he alleges. It was therefore unethical and professional misconduct for Hoffman to insinuate himself in the process and to engage in ex parte communication with the Chief Justice in reckless disregard of the rights of the litigants and his duties to preserve an atmosphere of impartiality for them. As an officer of the Court, Hoffman knew or should have known that his actions could potentially trigger recusal and other actions which may affect the composition of the Constitutional Court when the matters ultimately serve before the court as he anticipates. He undertook an action with potentially far-reaching impact on the rights of the litigants and did so on the basis of an ex parte communication with the Chief Justice which included "draft" article intended for publication in the newspapers.

5.1.6 Third, Hoffman's unethical conduct must be investigated to determine whether his orchestrated media campaign and leaks in regard to the allegedly "pending" cases violated the code of conduct for advocates or constitutes unethical conduct as an officer of the Court. Assuming Hoffman honestly believed that the Chief Justice had acted in a manner prejudicing the rights of the litigants in the pending cases, he had a duty to preserve the atmosphere of judicial impartiality, an obligation to refrain from contaminating the rest of the judiciary with newspaper articles about matters they are being called upon to adjudicate and to file a complaint of judicial misconduct in a dignified manner without much fanfare and with due regard to the rights of the litigants he claims to care about.

5.1.7 Hoffman arrogated to himself the right to determine and allege in newspaper articles that the unidentified people who have “complained when a white male candidate was not recommended for appointment to the Bench”, and who have labeled judges appointed to our High Court as "executive toys" are the litigants whose cases are allegedly pending. Hoffman also implies that the litigants in the pending cases are party of the war that has “been declared against transformation.” Hoffman also implies that the litigants are part of the people “clutching at straws to discredit the JSC” and who “seem to want the JSC they can dictate to." These allegations by Hoffman portray the litigants in a negative light and may suggest to the very judges before whom their cases are pending that the litigants hold the judiciary in low esteem and are contemptuous of judges appointed by the JSC in the manner suggested.

5.1.8 For this reason, it was imperative that Hoffman not engage in ex parte communication with the court, that he carefully reflect upon the potential prejudice his communications would cause and that he refrains from portraying the litigants as people who have been contemptuous of the judiciary and are racists resistant to transformation.

5.1.9 Hoffman looked at the cases with politically tinted lenses and all he saw was the political propaganda advantage he could mine and exploit from them without carefully evaluating the impact of his action on the litigation and administration of justice. The legal theory of the cases being litigated, the strategies and factual admissions to be made are the exclusive preserve of the litigants and their lawyers and not for busy-bodies like Hoffman. He had no roving mandate to assert or even imply indirectly that the current litigants are part of the groups the Chief Justice accuse of undermining judicial independence and engaging in war against transformation. Of course, if the litigants admit that they are part of the errant group then the Chief Justice’s speech in reference to them would be eminently reasonable and justified – parties have no right to attack the judiciary and its institutions and then seek refuge behind some lawsuits they have filed. If these critics who seek to destroy judicial independence the “very cornerstone, a necessary prerequisite for judicial impartiality” are indeed the litigants whose cases are pending then their complaint against the Chief Justice would be frivolous.

5.1.10 And finally, Hoffman exploited his status as an advocate to amplify the adverse publicity he sought to bear on the Chief Justice, to engage in unsolicited ex parte communication with a judge on allegedly pending matters, to comment on substantive issues the litigants have either not thought about or deemed proper to raise and to raise issues of potential recusal with the judge on matters that may or may not even serve before the judge. Hoffman arrogated to himself the rights to comment on the matters in newspapers and to portray the litigants as part of the anti-transformation racists who regard our judges as “executive toys.” Hoffman’s mandate to act in this manner must be investigated. In any event, Hoffman exploited his status as an advocate, used and exploited the litigants and issues in the allegedly pending cases for his own aggrandizement and selfish ends and engaged in prejudicial ex parte communication with the courts in a manner detrimental to the administration of justice.

5.2 Hoffman acted in breach of his ethical obligation not to make a statement that he knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, an adjudicatory officer or public legal officer.

5.2.1 Advocate Hoffman was at all times stated herein a lawyer with certain obligations towards the judiciary, the system of administration of justice and the public. A lawyer has an ethical obligation not to make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, an adjudicatory officer or public legal officer.

5.2.2 In establishing a standard by which to measure the actions of an advocate, in light of Section 16 (freedom of speech provisions) of the Constitution, the appropriate standard is that of the objective test, rather than the subjective test. When considering whether the statement made is false or made with reckless disregard as to its truth or falsity, the advocate's conduct is measured by what a reasonable advocate, considered in light of an advocate's professional functions and prevailing legal landscape, would do in the same or similar circumstances. Viewed with this prism, Hoffman's actions actions and statements are belied by the history showing that our judges have been allowed to discuss issues which may be pertinent to political controversies or pending matters without a whimper of protests from people like Hoffman.

5.2.3 An investigation is warranted too determine whether Hoffman has misused the terms "descended into the arena of contestation and controversy in respect of issues which are pending in the High Court " dishonestly to score cheap political points against the Chief Justice. The Chief Justice is the Chairperson of the JSC and to the extent that Hoffman refers to litigation against the JSC and the Chief Justice, it would be a gross misnomer to describe the Chief Justice, who is a party to the litigation, as having "descended into the arena of contestation and controversy ". In regard to cases against the JSC which inevitably include the Chief Justice as a party, the latter cannot reasonably be expected to maintain "neutrality" – he is duty-bound to defend himself and the institution he leads even if that involves suggestion that the plaintiffs' case is frivolous and that their actions are based on ulterior motives and distortions of facts. But that is not even what happened her. As an advocate Hoffman knew or should have known that to the extent the pending cases are brought against the JSC and the Chief Justice as a party the issue of his potential recusal would be intuitively obvious and would be dealt with either by the Chief Justice sua sponte or through a proper recusal application at the right time. It is an act of gross incompetence and downright asinine for Hoffman to argue that the Chief Justice is expected to maintain neutrality and avoid descending into an "arena of contestation and controversy" even where he is sued as a party.

5.2.4 Hoffman's legal contortionist stunt reveals clearly that his real intent is to scandalize the Chief Justice, portray him as a person lacking in rudimentary legal and judicial ethics and to bring the administration of justice into disrepute. The issue of potential recusal is deliberately raised by Hoffman in a propagandistic manner divorced from the real facts here – the Chief Justice must have been part of the JSC panel rejecting the white male candidates preferred by the putative litigants and certainly must have been part of the JSC decision-making regarding the transformation imperative and selection of candidates the litigants have labeled "executive toys.' It is downright incompetent and asinine for Hoffman to imply that there is some residual "neutrality" to be expected on the part of the Chief Justice in regard to the impugned JSC decisions. As a party to the JSC challenge, the Chief Justice's rights and obligations are no greater than or less than that of any party to a lawsuit. His vigorous defence of the JSC decisions and complaints about what he in good faith believes to be an assault on the integrity of the JSC and its members cannot be used as a basis to argue "recusal" or to accuse him of descending into an arena of contestation and controversy. Hoffman simply conjured up a false and artificial argument based on nonsensical pseudo-legal theory simply to stir up controversy around the Chief Justice and to assist those hell-bent on his vilification.

VI. **Hoffman is guilty of scandalizing the court within the meaning of S v Mamabolo (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001)**

6.1.1 Hoffman is fully aware that our judges may be dismissed only on serious grounds of misconduct or incompetence, after a procedure that complies with due process and fair trial guarantees and that also provides for an independent review of the decision. He is fully aware that misuse of disciplinary proceedings as a reprisals mechanism against independent judges is unacceptable.

6.1.2 Hoffman is guilty of scandalizing the court within the meaning of **S v Mamabolo** (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001) "Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it." By Hoffman's own admission he knows that there is a matter currently pending before the High Court pertinent to his allegations against the Chief Justice. Hoffman's utterances against the Chief Justice are calculated to and may adversely affect the fair adjudication of the matters. He is guilty of scandalizing the court which is an offence consisting of any publications or words which tend, or are calculated, to bring the administration of justice into contempt, amount to a contempt of Court. As one Court put it: *"Nothing can have a greater tendency to bring the administration of justice into contempt than to say, or suggest, in a public newspaper, that the Judge of the High Court of this territory, instead of being guided by principle and his conscience, has been guilty of personal favouritism, and allowed himself to be influenced by personal and corrupt motives, in judicially deciding a matter in open Court."*

6.1.3 Hoffman has relied on his own perverse misreading of the law applicable to recusal and deliberate misreading of the extant litigation against the JSC and the Chief Justice to accuse the latter of all manner of horrible sins including corruption and racism. It must also be recognized that adjudicatory officials such as JSC members and the Chief Justice, not being wholly free to defend themselves, are entitled to receive the support of the Bar against unjust malicious criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified. Accusing a party in litigation of failing to maintain neutrality goes beyond incompetence; it exposes the petty nature of the criticism and reveals the motives of the accuser. It is important to keep in mind that it is not the self-esteem, feelings or dignity of any judicial officer, or even the reputation, status or standing of a particular court that is sought to be protected, but the moral authority of the judicial process as such. The recognition given to this form of contempt is not to protect the tender and hurt feelings of the judge or to grant him any additional protection against defamation other than that available to any person by way of a civil action for damages. Rather it is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed.

6.1.4 In **Incorporated Law Society v Bevan** 1908 TS 724 at 731-732 the Chief Justice spoke about how practitioners, in the conduct of court cases, play a very important part in the administration of justice. He opined that *"any practitioner who deliberately places before the Court, or relies upon, a contention or a statement which he knows to be false, is in my opinion not fit to remain a member of the profession.*" Admittedly, this was in reference to statements made in court but the converse is also true - a lawyer who attacks a tribunal and members of the judiciary and relies upon a statement he knows to be false is not fit to remain a member of the profession.

6.1.5 Courts repeatedly have endorsed ethical rules regulating attorney criticism of the judiciary based on the rationale that allowing such criticism to flourish would severely diminish the public's confidence in the judiciary and thus hinder the efficient administration of justice.' See, e.g., ***In re Evans***, 801 F.2d 703, 706-08 (4th Cir. 1986) (stating that attorney's letter to judge questioning judge's competence and impartiality, written during pendency of appeal, amounted to attempt to prejudice administration of justice); ***In re Shimek***, 284 So. 2d 686, 689 (Fla. 1973) (finding that attorney's statement that judge was avoiding performance of his sworn duty was "calculated to cast a cloud of suspicion upon the entire judiciary"); ***Terry***, 394 N.E.2d at 96 ("Unwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purposes and considerations does nothing but weaken and erode the public's confidence in an impartial adjudicatory process."); ***Committee on Prof 1 Ethics &***

Conduct v. Horak, 292 N.W.2d 129, 130 (Iowa 1980) ("To permit unfettered criticism regardless of the motive would tend to intimidate judges in the performance of their duties and would foster unwarranted criticism of our courts."); ***Heleringer,*** 602 S.W.2d at 168 (declaring that attorney's press conference statements that judge's behavior was unethical and grossly unfair tended to "bring the bench and bar into disrepute and to undermine public confidence in the integrity of the judicial process").

6.1.6 Additionally, courts have stated that attorneys are officers of the court who have voluntarily relinquished certain rights as members of a regulated profession. See, e.g., ***In re Snyder***, 472 U.S. 634, 644-45 (1985) (reasoning that "license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice"); ***In re Sawyer***, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring) (stating that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech"); ***In re Frerichs***, 238 N.W.2d 764, 769 (Iowa 1976) (recognizing that "lawyer, acting in professional capacity, may have some fewer rights of free speech than would a private citizen"); ***In re Johnson***, 729 P.2d 1175, 1179 (Kan. 1986) (finding that one purpose of disciplinary action is to enforce "honorable conduct on the part of the court's own officers"); ***State ex rel. Neb. State Bar Ass'n v. Michaelis***, 316 N.W.2d 46, 53 (Neb. 1982) (proclaiming that "[a] lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice").

6.1.7 Just as in ***In re Evans***, 801 F.2d 703, 706-08 (4th Cir. 1986) where an attorney's letter to a judge questioning judge's competence and impartiality, written during pendency of appeal, was deemed an attempt to prejudice administration of justice Hoffman's actions must be judged similarly. In this case, it is not far-fetched to infer another ulterior motive for Hoffman's actions, namely an attempt to silence the Chief Justice through intimidation, extortion and blackmail. Even worse his actions are intended to affect and influence the strategy of the JSC and the Chief Justice in defending themselves in the allegedly pending cases. It is a tactic laying the groundwork for influencing and gerrymandering the composition of the Constitutional Court in the event these cases or related cases come before. To ensure that the Chief Justice would be knocked out of the equation when matters came before the Court, Hoffman resorted to intemperate and scurrilous attack on the Chief Justice and went to the extent of calling him a racist in the newspapers before he filed an ethics complaint against him.

6.1.8 In cases involving attacks on judges, there is a balancing of an advocate's right to free speech and the state's interest in preserving the integrity of the judicial system. A statement, that is made by an advocate which is known to be false or is made with reckless disregard as to its truth or falsity, is sanctionable. Even statements framed as opinions fall under the rule, if false assertions of fact are made. Here an advocate who is fully aware of the debate raging on about transformation and judicial appointments has rushed to abuse his status and authority by filing retaliatory grievance complaints against the Chief Justice for his view point on these matters. Hoffman's press releases and statements accusing the Chief Justice of racism are not constitutionally protected. The appropriate standard for an officer of the court in reference to the free speech provision of the constitution is the objective, reasonable attorney standard. The evidence clearly shows that the questioned statements of the Chief Justice reflected various aspects of opinion and attempts to describe threat to both judicial independence and transformation. The debate has been going on since the advent of our democracy and cannot be brought to an abrupt halt simply because Hoffman and his buddies prefer that.

6.1.9 Hoffman has in a deceitful and disingenuous manner extrapolated from the speech to claim that the Chief Justice is commenting on issues pending before the courts. It is absolutely clear that no reasonable advocate under the circumstances and in light of professional responsibilities, would charge the judges with racism and prejudicing pending cases.

6.1.10 There is no reasonable basis in fact to support the Hoffman 's actions. Hoffman made the statement with reckless disregard for its truth or falsity and disseminated the statement to the newspapers.

6.1.11 Once Hoffman's statement was in the newspaper, individuals with and without legal training could read the charge by Hoffman that the Chief Justice, that by the very nature of the charge, racism and contempt of court which is a criminal act was unfit. Hoffman also placed the statement in the press, a forum where the Chief Justice could not readily defend himself and where harm to the integrity of the judge and to the judicial system was great. The statement that the Chief Justice is a racist is a false statement. Equally false is the assertion that the Chief Justice was guilty of contempt of court. Hoffman had no reasonable basis in fact to support his assertions. Additionally, Hoffman's statement was an assertion of a false statement of fact, namely that the Chief Justice descended into an arena of controversy and contestation. Clearly, there are strong public policy grounds that hold lawyers, as officers of the court, to obligations to protect the public's confidence in the judicial system and to avoid actions that prejudice the administration of justice. Hoffman's statement, which was disseminated by him to the public through a newspaper, that the Chief Justice engaged in racism and sexism, was a statement calculated to accuse the judge of immoral and unconstitutional acts while performing his judicial duties. By making and disseminating this statement to the press, Hoffman engaged in conduct that was in reckless disregard of the truth or falsity of his statement. He also placed the statement in a forum which heightened the threat to the public of undermining the integrity of the judges and the judicial system. Hoffman's failure to act with professional reasonableness is especially troubling since the accusation made of racism and sexism as well as contempt go to the heart of the integrity not only of the Chief Justice but of the entire judicial system.

6.1.12 The HETN does not deny that Hoffman is entitled to disagree with the Chief Justice. His reaction and conduct were beyond the bounds of a reasonable advocate. Hoffman has not taken steps that reflect that he recognizes the distinction between making reckless, untrue statements and presenting legitimate criticism in a reasonable manner.

VII. **Hoffman Engaged in Acts Prejudicial to the Administration of Justice and Circumvented JSC rules Regarding the Processing of Complaints In a Deliberate Effort To Prejudice the Chief Justice**.

7.1.1 Hoffman has deliberately sought to circumvent the confidentiality rules applicable to judicial misconduct complaints by publishing in newspapers and publicizing his complaints against the Chief Justice or substance thereof several days before the actual filing of the complaints with the JSC. Hoffman is aware of the principles underlying the confidentiality rationale and knows the trauma of public accusation which is greater for an official who, due to the special constraints of the bench, is largely disabled from seeking public support. The JSC has carefully ensured that in practice, there is confidentiality in handling judicial misconduct complaints in a manner to avoid possible premature injury to the reputation of a judge and that specified measures ought to be taken in protecting the judge from malicious publicity.

7.1.2 It is in recognition of the sensitivities around accusations of misconduct against a judge that the **United Nations Basic Principles on the Independence of the Judiciary (adopted by the Seventh UN Congress on the Prevention of Crime and Treatment of Offenders held at Milan** 26 August 1985 and endorsed by the United Nations General Assembly Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985) provides in Article 17 that the examination of a complaint of judicial misconduct **"... at its initial stage shall be kept confidential unless otherwise requested by the judge**".

7.1.3 Similarly, the Rules of the Judicial Service Commission, that regulate the procedure for complaints and enquiries in terms of section 177(1)(a) of our Constitution, empowers the JSC to permit the media and public, subject to such restrictions as may be considered appropriate, to attend any enquiry unless good cause is shown (Rule 5.6). Although in keeping with our constitutional values of openness and transparency, the rule is framed in language that is positive towards and empowers media and public access, the rule has two important control measures. Firstly, the JSC is empowered to impose such restrictions to media and public access, as may be considered appropriate. Secondly, if good cause is shown such access may not be permitted. Naturally, the judge being accused of misconduct will himself have an opportunity to show "good cause", if any. In the light of this double safe-guard valve, the decision to publish the complaint by any person through whose hands the allegation or complaint may pass, has to be carefully considered with due regard to, not only the right of the public to know, but also the interest and right of the judge being accused and the interests of justice and the judiciary as a whole.

7.1.4 Hoffman, who was in a publicity seeking haste to scandalize the Chief Justice sought to ensure that he deprives the JSC of applying any prophylactic measures regarding confidentiality of the complaint and investigation. He published his allegations in the newspapers and on the website of his organization and promptly announced that a JSC complaint would be filed in the "next week." Hoffman's allegations received wide publicity and the Chief Justice was disabled from answering him in the newspapers.

7.1.5 As is the case in the USA under the American Bar Association Rules and in Canada, in South Africa there is no requirement for routine publication at the initial stages of professional misconduct inquiries against attorneys and advocates under the Law Society Rules and the Bar Rules respectively. The proceedings become a matter for public knowledge at the stage when legal proceedings are initiated before courts for removal or suspension of the respective member following a finding of misconduct by the professional disciplinary committee endorsed by the main governing council. By then the offending member has been informed fully of the allegations against him or her and has exercised the right to be heard before the professional disciplinary body. It makes no sense to expose South African judges routinely to less protective regime with regard to confidentiality at the initial stages of investigation into judicial misconduct. Hoffman's actions are unethical and in breach of the Chief Justice's right to dignity.

VIII. Hoffman Has Engaged in Unconstitutional Retaliatory acts in violation of the Constitution (Sections 10,16, 18) and Has Used Unethical, False and Underhanded Methods of Debating Public Issues and Public Discourse.

8.1.1 For quite some time there has been a lively debate in this country on numerous issues of relevance to the judiciary, which include the selection methods and criteria for judicial appointments; affirmative action, transformation and the JSC's duty to carry out the constitutional mandates as well as the rights of citizens to criticize members of the judiciary. As evidenced by the extrajudicial statements of judges referred to above, our judiciary has been engaged in a dialogue with the citizens about these issues and have fiercely defended judicial independence against perceived threats both internally and externally. Some of the debates have ended up in court such as in the matter of ***Cape Bar Council v Judicial Service Commission and Others*** (11897/2011) [2011] ZAWCHC 388; 2012 (4) BCLR 406 (WCC); [2012] 2 All SA 143 (WCC) (30 September 2011). In that case, the De Klerk outfit, which was admitted as amicus curiae, argued that the unsuccessful white candidates' rights to dignity have been infringed in that "*the JSC is not permitted to extend an open invitation to members of the legal fraternity to make themselves available for nomination as a Judge**, if some of its members have adopted a policy in terms of which non-black members will not be appointed***." ***Id.*** at para.146f. The Court dismissed the allegations as unsubstantiated and baseless.

8.1.2 Hoffman's underhanded methods against the Chief Justice are extreme and beyond the pale. Instead of continuing the public debate in a dignified manner or allowing the allegedly pending court cases to runtheir course, Hoffman has sought to neutralize and silence the Chief Justice through spurious pseudo-legal arguments as highlighted in this document.

8.1.3 For starters he has invoked the most hurtful and outrageous label against the Chief Justice. For example, in a hard-hitting article in the Sunday Times Hoffman accused the Chief Justice of **launching a racist and s exist attack against white male lawyers.** Hoffman has made a move to have the Chief Justice impeached, an unprecedented move. His complaint stems from the Chief Justice's address to the AFT – during which he complained of an apparent resistance to change by a good number of fellow South Africans who had benefited from opportunities reserved exclusively for them by the apartheid system. Hoffman countered that this ***"smacked of a racist and sexist attack against white male lawyers."*** Hoffman wrote that such an attack does not serve to achieve or advance the type of transformed nation that is envisaged in the Constitution. 'A 'reconciled and united rainbow nation', to use his (the CJ's) words, is one in which the race and gender of judges, lawyers and, indeed, anyone will not matter in measuring the worth of the individual,' argues Hoffman. He adds: *'The reference to considering the race and gender of judicial officers in the Constitution is simply a mechanism for sifting candidates of equal worth. It should not be abused as a pretext for promoting undeserving or mediocre candidates over excellent ones. The integrity, independence and impartiality of the Bench depend on this.*' Hoffman says that as a leading and important functionary of the state who is sworn to uphold the values of the Constitution and act without fear, favour or prejudice, the CJ is supposed to keep out of the political arena and controversy in much the same way as a referee in a soccer match does not actually kick the ball or score goals. He notes the Legal Practice Bill, secrecy legislation, the functioning of the JSC and Hawks legislation are all likely to be challenged in the Constitutional Court before long. 'The facts … suggest that the Chief Justice will have to recuse himself in all these matters owing to the clear perception of political bias in his utterances."

8.1.4 Hoffman hurled accusations of racism and failed to accord the Chief Justice his constitutional rights including dignity, freedom of expression and association. The Chief Justice's rights must be considered in light of the provision of the "freedom of expression" guarantees in section 16 of the Constitution. In particular, everyone has the right to freedom of expression, which includes "freedom to receive or impart information or ideas." The importance of the right of freedom of expression in a democracy has been acknowledged on many occasions by the Constitutional Court. **South African National Defence Union v Minister of Defence and Another** [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 7; **S v Mamabolo (E TV and Others Intervening**) [2001] ZACC 17; 2001 (5) BCLR 449 (CC); 2001 (3) SA 409 (CC) at para 37. Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Retaliatory acts to silence the Chief Justice constitute an infringement of his Constitutional rights to freedom of association (section 18 of the Constitution) and freedom of expression (section16).

8.1.5 Hoffman's actions constitute an attempt to render controversial that which is an accepted practice having the imprimatur of historical acceptance. In **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451, [25] Lord Bingham reasoned, '*We cannot, however, conceive of circumstances in which an objection [of bias] could be soundly based on … extra-curricular utterances (whether in textbooks, **lectures, speeches**, articles, interviews, reports or responses to consultation papers*)…' Hoffman's negative commentary is unwarranted and is being driven by ideological and partisan antipathy towards the Chief Justice or the substantive views of the organizations with which the Chief Justices has associated himself. Hoffman has resorted to using vague, intuitive criteria and distortions of fact and law to attack the Chief Justice.

8.1.6 To accuse someone of racism in the South African context is a very serious and offensive matter. In **SACWU and Another the NCP Chlorchem (Pty) Ltd and Others** [2007] 7 BLLR 663 (LC) the court held as follows in paragraph 13:

"I can hardly conceive of any place or circumstance or country where, if a person is told he is racist, it will not be experienced by such person as him or her being insulted and abused. Therefore, in our country with its history of racial discrimination, it need hardly be debated, I believe, that employers, generally speaking, are enjoined to do their best to create a working environment free from racism. Apart from employers being statutorily obliged to do so, it is patently the right thing to do."

And at paragraph 31:

"This Court is of the view that if an employee, without reasonable cause therefore, accuses a fellow employee of being a racist or of displaying a racist attitude, it will constitute a very serious form of misconduct. One can hardly think of many, if any, circumstances under which an employee who has been found guilty of being racist or displaying racist attitudes to fellow employees will avoid being dismissed. … I believe it is similarly difficult to imagine under what circumstances an employee who without just cause or a reasonable basis therefore, and accordingly unjustifiably, accuses another employee of being a racist, or that he or she was displaying a racist attitude, would easily escape dismissal. Such conduct strikes at the heart of racial harmony. It cannot be emphasised enough that to accuse somebody of being a racist, or of displaying racist attitudes, is to be regarded as a very serious allegation. The defamation of a party is a very serious attack on that party's person."

8.1.7 Hoffman must be investigated to determine whether he acted to retaliate against the Chief Justice and whether he falsely lobbed accusations of racism against the Chief Justice. In **Sindani v Van der Merwe and Others** 2002 (2) SA 32 SCA a newspaper accused Mr Sindani of stating that Mr Van der Merwe is a racist and calling him "white trash" who should rather have left the country with his white pals. The Supreme Court of Appeal had to decide whether the article was defamatory of Mr Sindani and at paragraph 15 of the judgement the court held as follows:

"So understood, I have no doubt that the answer to the second enquiry, namely whether the article is defamatory of the appellant, must be a positive one. What the article attributes to the appellant, must be a positive one. What the article attributes to the appellant is the gratuitous use of racially derogatory language and racial vilification. Such conduct is regarded by right-minded members of South African society not only as conduct that is reprehensible but as something which must, in accordance with constitutional imperatives, be eradicated. It follows that the imputation of such conduct to another must be defamatory."

8.1.8 In **Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others** [2002] 6 BLLR 493 (LAC) Zondo JP set out the approach that South African Courts should take to racism. At par 35 the court held that:

"It seems to me that in being required to uphold the Constitution and the human rights entrenched in it, *the courts are enjoined to play a particularly critical role in, among others, the fight against racism, racial discrimination and the racial abuse of one race by another. They must play that role fairly but firmly so as to ensure the elimination of racism in our country and the promotion of human rights*."

8.1.9 The HETN submits that Mr. Hoffman's racist and retaliatory activities and unethical methods of public discourse demonstrate that he does not have the fitness of character to qualify as an advocate. Members of the Bar, as officers of the courts are enjoined to play a particularly critical role in, among others, the fight against racism, racial discrimination and the racial abuse of one race by another.

8.1.10 They must play that role fairly but firmly so as to ensure the elimination of racism in our country and the promotion of human right. A full investigation must ensue to determine whether Hoffman sabotaged that objective by resorting to false accusations of racism against the Chief Justice.

IX. Hoffman Has Subjected the Chief Justice to Invidious Disparate Treatment and Discrimination on the Basis of His Religion, Race and Constitutionally Protected Activities.

9.1 Ever since the appointment of the Chief Justice, Hoffman has been engaged in a vendetta against him. Acting in a concerted fashion with other white advocates, he has mocked the Chief Justices' religious beliefs and has threatened on numerous occasions to have him impeached. As amply demonstrated above, Hoffman has subjected the Chief Justice to unequal treatment and falsely accused him of misconduct in circumstances where white judges have been allowed to engage in similar or comparable activities. Hoffman's latest stunt to have the Chief Justice impeached for simply exercising his rights and performing his duties as a leader of the judiciary deserve thorough and intensive investigation. The HETN has learned that Hoffman is an inveterate racist who has made it his mission to denigrate and vilify black judges with reckless abandon. He has in reference to the Judge President Hlophe stated: "**Who the hell does he think he is?"** Hoffman has never openly disrespected whites in a similar manner.

X. Hoffman's Attempt to Engineer Recusal of Judge Mogoeng In A Broad Category of Cases About Which He Has Not Been Briefed Is Unethical And Constitutes Professional Misconduct

10.1 Hoffman knows that his letters critical of the Chief Justice cannot validly be a basis for recusal, in light of evidence that letters are part of plan to cause recusal due to judge's reputation as tough enforcer of the constitution's transformation mandate and evidence of previous attempts by defendant at judge-shopping. Hoffman has clearly indicated his desire to use insinuations of recusal motions as strategic devices to "judge shop." In deciding whether to recuse himself, trial judge must carefully weigh policy promoting public confidence in judiciary against possibility that those questioning his impartiality might be seeking to avoid adverse consequences of his presiding over their case; litigants are entitled to unbiased judge, not to judge of their choosing.

10.2 It is unacceptable that lawyers should arrogate to themselves the right to engage in conduct in a course of litigation or political activities which involves ex parte contacts with a judge that might cause any conscientious judge to express even in caustic terms, his disapproval of it, and thereby put themselves in position thereafter to urge successfully motions to disqualify the judge in his subsequent cases before him. Hoffman has noted that "the Legal Practice Bill, secrecy legislation, the functioning of the JSC and Hawks legislation are all likely to be challenged in the Constitutional Court before long…The facts … suggest that the Chief Justice will have to recuse himself in all these matters owing to the clear perception of political bias in his utterances." An investigation is warranted to determine whether the series of interactions Hoffman initiated with the Chief Justice were all geared towards engineering a basis for recusal as he envisages. He seeks to affect the composition of the Constitutional Court in these cases for his own benefit. If true, Hoffman's actions are worse than cancerous – they are the equivalent of high treason. The only remedy would be his permanent removal from the ranks of advocates.

XI. Conclusion:

11.1 HETN urges the Bar to investigate Hoffman and to mitigate the incalculable damage his actions have caused to the administration of justice, judicial independence and the image of advocates at the Bar. On 4 July 1988, the **Basic Principles on Independence of the Judiciary were adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders** and include:

11.1.1 "Freedom of Expression and Association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens, entitled to freedom of expression, belief, association and assembly, provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."

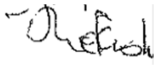
11.2 Advocates who seek to challenge judges in public debates must also be conscious that they have a duty as officers of the court to assist in preserving the dignity of the judicial office and the impartiality and independence of the judiciary. Our experience in South Africa requires sensitivity. Our judges commonly speak on legal matters, questions of law reform or matters dealing with the administration of justice in the presentation of papers to law conferences. They frequently write articles for law journals and some even have TV talk shows to discuss the law.

11.3 We give our judges latitude and wide licence to speak and write on matters which involve the administration of justice and to advocate measures conducive to its maintenance and improvement and to oppose policies which undermine it. The moment advocates such as Hoffman tinker with this carefully balanced arrangement to silence disfavoured judges to serve narrow partisan agenda, our judiciary is imperiled. The moment the likes of Hoffman send a message to the generality of the public that the privilege to speak belongs only to white judges and that black judges must be silenced we can all kiss our democracy good-bye.

11.4 Chief Justice Mogoeng is not only performing his constitutional duties but is acting in the true tradition of the legal giants who graced our bench before him. He evinces passionate commitment to the rule of law and fair play in line with our constitution. Mogoeng's kind of concern for the administration of justice would have permitted brave judges in Nazi Germany to speak out individually or collectively against the removal from the bench of hundreds of their Jewish colleagues. Sadly, they did not. The type of apartheid mindset evinced by Hoffman and his ilk is what fostered an atmosphere where the majority of South African judges under the apartheid system said nothing when the police force blatantly abused the administration of justice by mistreating and torturing suspects. Hoffman's attempt to intimidate the leader of our judiciary through frivolous complaints of judicial misconduct is deserving of severe censure and sanctions.

We thank you in advance for your prompt investigation of this Complaint.

Regards



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About the Higher Education Transformation Network (HETN):-

The Higher Education Transformation Network (HETN) is an independent network of alumni and graduates from various higher education and further educational institutions across South Africa committed to the process of transformation of education and training to increase equitable and meaningful access to education, skills and learning to eliminate of socio-economic disparities.