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2017

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Per Email: chiloane@concourt.org.za

Higher Education Transformation Network

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

RE: GROSS JUDICIAL MISCONDUCT COMPLAINT AGAINST JUDGE LOUIS HARMS

Dear Mr Chiloane

On behalf of the Higher Education Transformation Network (HETN), I am writing to lodge a judicial misconduct complaint and ethics complaint against retired Judge Louis Harms. Judge Harms's transgressions are detailed in this prolix complaint.

A. Background:

1. Around August 2012 Judge Louis Harms, the former DJP of the SCA was *"the proposer of Jeremy Gauntlett SC as a candidate for the Western Cape High Court."* He nominated Gauntlett to be appointed as judge. We are reliably informed that Harms who nominated Gauntlet submitted his papers more than 23 days late. Under normal circumstances that would have been the end of the candidacy and no further questions asked. In this case, Gauntlett's email accepting the nomination was sent on 21 August 2012, that is more than 25 days past the deadline. In an ironic twist, Gauntlett was a beneficiary of reverse discrimination up to the point of being short-listed – the JSC appears to have extended special favourable treatment for Gauntlett and accepted his application under circumstances where whites would never have tolerated similar bending of the rules for a black candidate. Had Gauntlett been black, the likes of Harms' would be fulminating about the 'rule of law' and principle of equality to argue that singling out a candidate and accepting his papers many weeks after the deadline is discriminatory and 'irrational.' By this act of negligence Harms risked bringing the JSC into disrepute.

2. Following the closing of nominations, eight shortlisted candidates were interviewed on the 17th October 2012 by the JSC in Cape Town. After a grueling interview process, five of the candidates were recommended by the JSC for the appointment to the Western Cape High Court. They are Cloete Al. Dolamo Al, Mantame AJ. Rogers SC and Schippers SC. Justice Harms' preferred candidate, Gauntlett SC was not recommended.

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3. Before the JSC could issue a public statement announcing its recommendations, lawyers for Harms - who had nominated Gauntlett - wrote to Chief Justice Mogoeng Mogoeng, saying he viewed the exclusion of Gauntlett to be *'irrational and therefore legally assailable'*.

4. They claimed: *'The preferring of Dolamo AJ over Gauntlett SC is in particular irrational and inexplicable given what emerged in the interview of Dolamo AJ,"* Barry Cloete, the lawyer acting for Harms, wrote to the JSC. Cloete asked Mogoeng to refer Dolamo's recommendation back to the JSC and ask for reasons why it recommended him and not Gauntlett. He told Mogoeng if he was not prepared to refer the recommendation back to the JSC, Harms requested that he did not act to appoint Dolamo until he *'had a reasonable opportunity of instituting an application to review, and set aside the appointment'.* They challenged the Chief Justice to confirm the accuracy reports regarded the recommendations of the candidates.

5. The lawyers claimed that Harms "*regards the consequences of not acting on the veracity of these reports to be so deleterious to the proper administration of justice in the country."* They claimed that *"the recommendation by the JSC appears on the available information to be prima facie irrational and unconstitutional. It would, with respect. similarly be unconstitutional for you to act on the JSC's recommendation in these circumstances and appoint Dolamo AJ as a judge. Our client would therefore urge you to refer the recommendation of Dolamo AJ back to the JSC together with a request that the JSC provide its reasons for recommending Dolamo PU and not recommending Gauntlett SC."*

6. Harms' lawyers concluded: *"Should you not be prepared to refer the recommendation of Dolamo AJ back to the JSC, our client requests that you do not act on the JSC's recommendation and appoint Dolamo AJ as a judge until our client has had a reasonable opportunity of instituting an application to review and set aside the JSC's recommendation of Dolamo AJ."* What is inexplicable is why Harms focused only on Dolamo AJ, the only black African male, if his concern was with the irrationality of the entire JSC decision-making process. Harms appears to have unfairly singled out the appointment of Dolamo AJ for unfair criticism.

7. His entire focus was on Dolamo, a person he claimed should not be appointed in light of what emerged during the interview before the JSC. What Harms deliberately left out of his false narrative is that the Law Society had cleared Dolamo and raised no objections to his judicial candidacy. The JSC which reviewed the alleged complaints filed against Dolamo in his previous professional life were very old and had resulted in no disciplinary action against Dolamo. Harms acting in willful disregard of Dolamo's rights sought to revive these stale matters in the newspapers and to impugn the integrity of Dolamo.

8. 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".*

9. 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."* Upon receiving this explanation, Judge Harms fired off a letter to the JSC in which he questioned "***where it was agreed that humility was a required judicial attribute."***

10. Harms' attempt to raise some metaphysical doubt about humility as a judicial attribute and its consideration by the JSC reflects lack of honesty, candour and shows gross negligence, incompetence and constitutes judicial misconduct. As we all know, the JSC's articulated position with specific regard to humility and judicial temperament was discussed in the recent judgment, ***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).

11. There the JSC explicitly stated in Court papers and under oath that a candidate who is qualified in terms of technical skills and knowledge, "*may be found to be wanting in other important and relevant qualities and criteria, such as for example* **judicial temperament, patience and humility**, which **may render a particular candidate not suitable for appointment.**" The matter subsequently served before the SCA where Harms is a judge. Harms knew or should have known of the JSC stance even before he submitted papers nominating Gauntlett.

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

    (a) 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.

    (b) 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."*

(c) 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."*

13. The implications and statements by Harms and Gauntlett respectively that the JSC *"introduced a new quality for judicial appointments: humility"* constitutes a false statement of fact and law. The statement was made to further Gauntlett's own ambition of being appointed to the Constitutional Court and to increase pressure on the JSC to accede to his demands.

14. Harms actively aided and abetted Gauntlett in that endeavour. 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. Harms lends credence to the public deception by raising doubts about whether *"humility"* was a judicial attribute and a factor taken into account by the JSC. Harms knew that humility has always been a judicial attribute considered in all JSC appointments.

15. Harms violated the Code in that by virtue of his nomination of Gauntlett he indicated that this lawyer held some special position with the Supreme Court of Appeal judges and specifically the office of Judge Harms. The impropriety was compounded by another SCA Judge Lewis alleged letter of support for Gauntlett which is dealt with in the companion complaint against Lewis. The Code requires that a judge should act at all times in a manner that promotes public confidence in the impartiality of the judiciary.

16. Judge Harms' public endorsement of a candidate for public office violates the Code of Judicial Conduct because such an endorsement tends to diminish public confidence in the independence and impartiality of the judiciary and may give the appearance of involvement in partisan interests and of judicial concern about public clamor or criticism, and because such an endorsement of necessity involves the use of the prestige of the judge and the prestige of his office.

17. The public controversy and political debates about judicial appointments threaten to split the judiciary along the lines of race and constitute a threat to the existence of our democracy itself. Accusations of alleged reverse racism are being made even by white judicial officers or others acting in cahoots with them. Chief Justice Mogoeng Mogoeng dealt with the issue of transformation and alleged reverse racism when he spoke at the Commonwealth Law Conference on 15 April 2013.[1] Mogoeng also issued a grim warning to the media not to *"rubbish"* the Judicial Service Commission because that could destroy constitutional democracy. Id. He stated that red lights *"begin to flash whenever a concerted effort is being made to project the only true guarantor of constitutional democracy in a bad light, especially when you are recklessly going about that." Id.*

[1] Mogoeng: Tread gingerly or hamba kahle; Charl du Plessis ; 15 April 2013; http://www.citypress.co.za/politics/mogoeng-tread-gingerly-or-hamba-kahle/

18. He told the conference that the surest way to weaken a constitutional democracy was to deligitimise the judicial appointment authority and by extension, its judicial officers. Id. The Chief Justice also said *the "truth often gets compromised"* when *"campaigns"* for the appointment of preferred judicial candidates take place.

19. As an example, Mogoeng referred to the discussion document regarding the appointment of white males, which was authored by Commissioner Izak Smuts. The document sparked controversy and subsequently led to the resignation of Smuts. Id. Mogoeng said weekend media reports incorrectly stated the document had been leaked when it was in fact circulated. *"Why don't you tell the nation the truth*?" said Mogoeng. Id.

20. Regarding the specific subject of transformation in the judiciary and legal profession, the Chief Justice said the need for transformation was so obvious that it *did "not even require to be defined".* Id.

21. Justice Mogoeng said when appointments were made to courts such as the Supreme Court of Appeal and Constitutional Court, people became *"worked up and very active"*.[2] He stated: "***What they do in support of preferred candidates often borders on the sort of campaigns which we thought were reserved for politicians***." He referred to deliberate distortions regarding the *"race factor"* which was being contorted when it came to the appointment of judges, which could create a false impression of *"reverse racism."* Id. He backed up his argument with statistics which showed that when South Africa became a democracy, the country had about *170 judges. Two were women and three were black. Id. Mogoeng explained that "since October 2009 the Commission had recommended 46 black men, 21 black women, 22 white men and eight white women for appointment to higher courts."* Id.

22. He further elaborated on this by stating: *"we can provide you with even more statistical proof that any suggestion that there is some hunger maybe to get even with our white male compatriots is unfounded ... As a matter of fact, even during (last) week's (JSC) sitting, two white males were recommended for appointment. How, then, does this race factor get contorted in the manner that it is, with the disastrous possibility of creating a false impression in the international community that we want to apply reverse racism?* ***And not just the politicians this time; even judicial officers are party to that irresponsible drive to delegitimise the judiciary themselves****…As I said, we would do well to tread gingerly or hamba kahle (go well)… "* Id.

23. As detailed below, Harms has acted in a grossly negligent manner and has made himself guilty of gross judicial misconduct.

[2] Chief Justice denies 'reverse racism' April 16 2013; By Leila Samodien; http://www.iol.co.za/news/crime-courts/chief-justice-denies-reverse-racism-1.1500861#.UqlJhYWE44A

B. Specific Violations by Justice Harms.

I. Violation of the Duty To Act With Restraint. Good Cause Exists For The JSC to Investigate Harms For Gross Incompetence and Gross Judicial Misconduct.

24. To preserve their appearance of impartiality judges must avoid political controversies and act in a reserved manner. This duty to act with restraint or in a reserved manner is enshrined in Article 10 of the Code which states:

> (1) Save in the discharge of judicial office, a judge does not comment publicly on the merits of any case pending before, or determined by, that judge or any other court. A judge does not enter into a public debate about a case irrespective of criticism leveled against the judge, the judgment, or any other aspect of the case.
>
> (6) Unless it is germane to judicial proceedings before the judge concerned, or to scholarly presentation that is made for the purpose of advancing the study of law, a judge refrains from public criticism of another judge or branch of the judiciary.
>
> (7) Any judge may participate in public debate on matters pertaining to legal subjects, the judiciary, or the administration of justice, but does not express views in a manner which may undermine the standing and integrity of the judiciary.
>
> 10C - Criticizing another judicial officer and criticizing another judgment are separate matters. Personal criticism must be avoided unless necessary during the course of appeal proceedings.
>
> 10D – Courtesy and collegiality towards colleagues are not merely good manners but indispensable attributes of a judge.

25. We draw your attention to **Ruffo v. Conseil de la Magistrature**, [1995] 4 S.C.R. 267, where 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.:

> 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)

26. 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.)

27. 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). Accordingly, no sober jurist would claim that he has the same right to grandstanding or public political speech-making as any ordinary citizen. Justice Harms is fully aware that the issue of judicial appointments has recently been hotly debated and litigated through the courts. He was fully aware of the debates and controversies surrounding judicial transformation, affirmative action and alleged reverse racism in judicial appointments.

28. Just a few months before he nominated Gauntlett, the court had just decided the matter involving ***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).

29. There the court required the JSC to state clearly its reasons for selecting or rejecting any of the short-listed candidates. In that case, the Centre for Constitutional Rights, a De Klerk outfit, 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.

30. 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 who must evaluate the qualifications of certain white judicial candidates preferred by the minority opposition parties and lobby groups***.*** The actions of propagandists and other methods aimed at forcing the JSC to succumb to these pressure tactics and blackmail have been undertaken under the guise of advancing the objectives in section 174 of the Constitution. The question is what compelling reason existed for Harms to insinuate himself in a process that had become very politicized and in which the threat of litigation against the JSC was palpable and ever-looming?

31. 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. In **<u>The Canadian Legal System</u>** (1977), Professor G. Gall goes even further, at p. 167 :

> The dictates of tradition require the *greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary.* ***We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity.***

There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary.
(Emphasis added)

32. In short, impartiality is "*the fundamental qualification of a judge and the core attribute of the judiciary*" **(Ethical Principles for Judges** (1998), published by the Canadian Judicial Council, p. 30). 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.*

33. Harms failed to display the greatest restraint, the greatest propriety and the greatest decorum expected from the members of our judiciary. He violated the provisions of Article 10 as set forth above. At the time when he knew that Gauntlett's 2011 candidacy had resulted in litigation and was likely to raise further controversy in case he was unsuccessful, Harms displayed his lack of judgment by personally nominating Gauntlett for a vacant judicial position.

34. He further compounded this transgression by engaging the JSC and the Chief Justice in a public debate about whether the JSC's decision regarding Gauntlett was *"irrational*" etc. He engaged in full-blown controversy involving threat of litigation and unbridled public criticism of a black African male candidate whose qualifications Harms deliberately distorted.

35. Consistent with the principle of neutrality and restraint, judges should not take a partisan position. If the politicization of the judiciary is to be prevented judges should not publicly support candidates or take political stands. The challenge in this case is as follows: Can the JSC sit idly by and allow judges who are sponsoring certain judicial candidates and who are displaying anti-transformation bias continue to pontificate about their political views disguised as discussion of the relative merits of candidates.

36. As discussed here, it was highly inappropriate for Harms to involve himself in the nomination of judicial candidates, make partisan statements and to launch scathing attacks on the JSC headed by his leader in the judiciary while at the same time launching attacks on the qualifications of Dolamo or lack thereof. By his words and deeds he chose to place himself above the law or ethical principles for judges. By his words and deeds he has shed any pretence of judicial impartiality and has assumed the role of an unelected politician or simply an advocate for white male privileges. He is now masquerading as a politician in robes. By his words, deeds, and even attacks on another judge he had done great harm to the notions of judicial collegiality, honesty and integrity that form the underpinnings of our democratic order.

37. The HETN demands that Harms be evicted from the ranks of honourable men and women who grace the Bench and who serve the cause of justice with distinction.

II. Violation of the Article 4: Judicial Independence By Failing to Uphold the Independence and Integrity of the Judiciary; By Paying Heed to Political Parties or Pressure Groups and By Failing to Perform All Professional Duties Free from Outside Influence.

38. Article 4 of the Code states that a judge must—

(a) uphold the independence and integrity of the judiciary and the authority of the courts;
(b) maintain an independence of mind in the performance of judicial duties;
(c) take all reasonable steps to ensure that no person or organ of state interferes with the functioning of the courts; and
(d) not ask for nor accept any special favour or dispensation from the executive or any interest group.

39. This underscores the fact that a judge acts fearlessly and according to his or her conscience because a judge is only accountable to the law. That independence is compromised when a judge appears to have been drafted into an army waging war against transformation or appears to be instrumental in promoting and defending white male privilege against the gains made by those seeking transformation. Harms violated the common-sense ethical rule that judges do not pay any heed to political parties or pressure groups and perform all professional duties free from outside influence.

40. Harms knew that Gauntlett had been previously nominated for various vacancies on our judiciary and he also knew that Gauntlett had been unsuccessful in those endeavours. Harms knew that each time Gauntlett was unsuccessful there was public controversy about his being *"overlooked"* or at worst being a victim of racism against white male. Immediately upon learning through leaked JSC documents that Gauntlett was not appointed as a judge in 2010, a group of judges serving in Lesotho and Swaziland "***expressed their outrage and dismay that Jeremy Gauntlett has been overlooked for one of three vacant seats on the Western Cape High Court, as reported in leaks to the media***."[3]

41. The unprecedented letter, penned by Swaziland Chief Justice Mathealira Ramodebedi, Justice DG Scott, Justice LS Melunsky, and retired justices Johan Steyn, Craig Howie and John Smalberger, expressed their "*surprise and dismay*" at the exclusion of Gauntlett from the bench. The letter states in relevant part the following:

> *Several of us have served as judges on the courts of South Africa. Three of us have recently retired as members of the Supreme Court of Appeal. In our capacities as such, Advocate Gauntlett frequently appeared before us…We testify that he is an outstanding lawyer and one of the leading senior advocates in South Africa. He is principled and conscientious.*
> *He also has great forensic skills… He is, in short, a most able lawyer and highly qualified in all respects for judicial appointment in South Africa.*

[3] Judges fume after Gauntlett snub April 19 2010 By Quinton Mtyala; http://www.iol.co.za/news/politics/judges-fume-after-gauntlett-snub-1.481028#.UHkyuRjSSUc

We express our surprise and dismay at the decision of the JSC not to recommend his appointment as a judge. Southern Africa, and South Africa in particular, have been denied the opportunity to benefit from the great contribution he would have made to the development of the law…"

42. In a typical response, Adv. Paul Hoffman, Director of the Institute for Accountability, said Gauntlett's omission was proof that neither merit nor transformation had been considered by the JSC. "It seems that the JSC ***gave greater weight to its consideration of the need for the judiciary to reflect broadly racial and, particularly in this instance, gender demographics than to appropriate qualification. If merit had been accorded its proper place he would have been successful;*** none of the other candidates have as much 'heavy duty' experience of litigation both at the Bar and on the Bench," said Hoffman. **Id.**

43. Swaziland Chief Justice Mathealira Ramodebedi, also nicknamed "Makhulubaas" is a controversial figure who has allegedly wreaked havoc in the judiciary of Swaziland. Ramodibedi, from the nearby kingdom of Lesotho, was brought in June 2011 by Mswati to become Chief Justice. One of his first official acts was an order preventing anyone from "***directly or indirectly***" suing the king. He subsequently sparked controversy by suspending Judge Thomas Masuku for "insulting" King Mswati III.

44. In 2011, the Botswana Law Society condemned Ramodibedi and described his action as *"an assault on the judiciary and rule of law in Swaziland"*[4] The newspapers summarized the statement of the Botswana Law Society as follows:

The Law Society of Botswana also fears that Justice Ramodibedi's way of doing things and his 'warped' sense of justice may find its way into Botswana, although they vowed to guard against that.

Justice Ramodibedi is also a sitting judge of the Court of Appeal of Botswana, while Justice Masuku was until recently a Judge at the High Court of Botswana in Francistown. The charges were described by Batswana lawyers as 'patently spurious' and Judge Masuku seen as *'a victim of abuse'* in this whole scenario.

"The Law Society of Botswana would think that the honourable Ramodibedi as a member of our Court of Appeal should inspire confidence in all of us who believe in judicial independence, the rule of law and democratic governance," Botswana Law Society Executive Secretary Tebogo Moipolai said in a statement, further observing that *"the world has shrunk to a very small global village of which the BOLESWA countries are only a tiny ward".*

The statement also reads*: "Our fear is that honourable Ramodibedi's way of doing things and the way he understands democracy (in the eyes of the beholder) is inimical to the development of a progressive judicial system that we would love to see for Botswana and indeed within and outside the BOLESWA region".* Other organisations that condemned Justice Ramodibedi's actions include the SADC Lawyers Association, Southern African Association of Jurists, Civic Organisations and other international bodies.

[4] Botswana Law Society condemns Makhulu Baas, Swazi Observer, 16 July, 2011 11:35:00 By Hlengiwe Ndlovu; http://www.observer.org.sz/index.php?news=27446

Justice Masuku was slapped with 12 counts of misconduct which include insulting the King and being intimately involved with a fellow judge. The Law Society of Botswana assures its Swazi counterparts and the citizens of its support as they fight to protect and enhance the rule of law in Swaziland.[5]

45. In July 2011, the Law Society of Swaziland lawyers filed a sexual harassment complaint with the Judicial Service Commission (JSC) in which it accused Ramodibedi of sexual harassment, based on complaints from five female court workers.[6] The complaint stated: *"Justice Ramodibedi has conducted himself in an inappropriate manner towards female employees of the High Court of Swaziland."* It also stated: *"There is prima facie evidence that the chief justice is guilty of charges of sexual harassment."*

46. Swazi lawyers went on strike to protest against Chief Justice Michael Ramodibedi's decision to suspend Judge Thomas Masuku over 12 misdemeanour offences, including a reference to Mswati as *"forked-tongued"* in a 2010 ruling and a sexual affair with a female judge. Masuku is also accused of *"actively associating with those who want to bring about unlawful change to the regime".*[7]

47. At the 12th SADC Lawyers Association Annual General Meeting and Conference held in Maputo, Mozambique from the 4th - 6th of August 2011 under the theme ***"towards democratic elections and the peaceful transfer of power in the SADC Region***", attended by bar leaders, judges, lawyers and civil society representatives from the SADC region and beyond, the following resolution was adopted regarding the administration of Justice in Swaziland and Ramodibedi:

    i. That the Association is ***deeply concerned by the serious breakdown of the administration of justice in Swaziland and in particular the role reportedly played by the Chief Justice of that country, Justice M.M. Ramodibedi in undermining the independence of the judiciary***

    ii. That the SADC Lawyers Association ***expects any Chief Justice in the SADC region to lead by example and ensure that all processes concerning the administration of justice fully comply with the law***

    iii. That the Association ***is seriously concerned by the fact that the Chief Justice is undermining the independence of the very judiciary that he leads and calls upon the Judicial Services Commission of Swaziland to expeditiously ensure that the Chief Justice does not become the judge and the jury in his own cause in relation to the charges that are being preferred against Justice Thomas Masuku.***

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[5] Id.

[6] See, Lawyers accuse Swazi chief justice of sexual harassment 14 Jul 2011; http://mg.co.za/article/2011-07-14-lawyers-accuse-swazi-chief-justice-of-sexual-harassment

[7] Judge charged with insulting Swazi king's 'forked tongue' 30 Jun 2011; http://mg.co.za/article/2011-06-30-swazi-judge-faces-suspension-for-insulting-kings-forked-tongue

iv. The SADC Lawyers Association fully supports the call made by the Law Society of Swaziland for the Chief Justice to answer to the complaints that have been made against him by the law society and that in the meantime he must be suspended pending the outcome of his hearing

v. That the SADC Lawyers Association further supports the demand made by the Law Society of Swaziland that the hearing for Justice Thomas Masuku set for the 11th of August 2011 must be carried out in public.

48. Harms knew of the previous controversy and should have fully anticipated that similar controversy would ensue in the event Gauntlett failed in his bid for judicial appointment. Harms threw all caution to the wind and for ideological reasons sought to inject himself in the controversy surrounding judicial appointments knowing fully well the firestorm of controversy it was likely to provoke.

49. His cantankerous spat with the JSC accompanied by threats of litigation and challenges to its evaluation criteria shows that the seemingly external support by foreign judges was migrated to the South African judiciary and Harms was determined to be its driving force or Dalai Lama. Harms' actions caused incalculable damage to the judiciary and judicial independence.

50. Harms also violated another ethical principle within the ambit of Article 4. Judges do not appear at public hearings or otherwise consult with an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice. At the time Harms threw a tantrum or kicked off controversy regarding the Gauntlett and Dolamo nomination, the JSC's recommendation to the President to appoint Dolamo was pending. Harms' unseemly intervention appears to have been calculated to influence the executive against Dolamo's appointment.

51. His letter to the Chief Justice, the leader of the judiciary and his colleague, was widely publicized in the newspapers at the same time it was dispatched to the Chief Justice. The latter's response was also widely publicized in the newspapers. Clearly all these actions were acts of grand-standing meant to lend the veneer of legitimacy and judicial imprimatur to a well-orchestrated political campaign to appoint a preferred white male candidate at all costs.

III. **Violation of Article 12 of the Code entitled "Association" Which States that A Judge Must Not Become Involved in Any Political Controversy or Activity; or Use Lend the Prestige of the Judicial Office to Advance the Private Interests of the Judge or Others. We submit that Harms knowingly violated these provisions by not only nominating Gauntlett but also by his subsequent public pronouncement on the matter.**

52. Article 12 provisions are standard canons of judicial conduct, and some form of them is present in virtually every judicial conduct code in the civilized world. As a rule, judges must be held to a higher standard of conduct than the public at large. Even relatively slight improprieties subject the judiciary as a whole to public criticism and rebuke. The Code recognizes that an independent and honorable judiciary is indispensable to justice in our society. Judges have a duty to respect and honor their office as a public trust and should strive to enhance and maintain confidence in the legal system.

53. It specifically states that judges should avoid lending the prestige of judicial office to advance the private interests of the judge or others. The Code has influence beyond the judge's actions in court as well. Any extra-judicial activities the judge participates in should not cast reasonable doubt on the judge's ability to act impartially as judge. A judge who enters the fray and nominates a judicial candidate and later argues the merits and demerits of his competitors commits a gross violation of these provisions. Canon 2B of the Code of Judicial Conduct in the US contains similar language and has been strictly interpreted to mean that a *"judge shall not testify voluntarily as a character witness."* The general import of Canon 2B is that judges may not use the power and prestige of the judicial office to "*advance the private interests of the judge or others."*

54. In fact, the Commentary to Canon 2B goes on to provide, *"A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies....Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness."*

55. A request by a judge to another public official or agency for special consideration for any person " **is wrong, and always has been wrong**" (**Matter of Byrne**, 47 NY2 d[b], 420 NYS2d 70, 71 [Ct on the Jud 1979]). As the New York Court of Appeals has stated:

> [N]o judge should ever allow personal relationships to color his conduct or lend the prestige of his office to advance the private interests of others. Members of the judiciary should be acutely aware that any action they take, on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved. There must also be recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary. Thus, any communication from a judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office. [Citations omitted.]
>
> **Matter of Lonschein**, 50 NY2 d 569, 571 (1980). In numerous cases over more than three decades, the New York Commission and the Court of Appeals have disciplined judges for lending the prestige of judicial office to advance private interest in violation of code of ethics, by inter alia, using judicial stationery in connection with a private matter or otherwise asserting judicial position while contacting a judge, law enforcement official or other person in authority in order to assist a close friend or relative.
>
> See **Matter of Martin,** 2002 NYSCJC Annual Report 121 (where a Judge sent two unsolicited letters to sentencing judges in other courts on behalf of defendants awaiting sentencing); see also, e.g., **Matter of Dixon**, 47 NY2 d 523 (1979).

> Even where a judge's judgment may have been clouded by a *"sincere, albeit misguided desire"* to help someone who he believed merited support (**Matter of Lonschein**, supra, 50 NY2d at 573; see also, **Matter of Edwards**, 67 NY2d 153, 155 [1986]), that does not excuse the favoritism demonstrated by his action nominating a judicial candidate, which undermines public confidence in the impartial administration of justice and in the integrity o f the judiciary as a whole.

56. The recommendation or endorsement of a lawyer for a judicial appointment is neither submitted for private consideration nor neutral as to other candidates. These recommendations and endorsements are considered as part of a constitutionally mandated judicial appointment process required by Section 174 of the Constitution which provides for the 'appointment of judicial officers in the following terms:

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

57. It is a process in which judicial officers, members of legal professions and politicians meet to make decisions about qualities and relative merits of candidates. A nomination or letter of support constitutes the means by which a judge communicates that one lawyer in the candidates group is preferred over others in the race. In fact, it is likely the influence of the judicial office itself that causes judges to be asked to provide recommendations and endorsements in judicial appointment nomination.

58. Harms knew that to have any effect on the recommendation of Gauntlett as a candidate, the letter must be disseminated to the voting members of the JSC. A judge who makes a nomination or recommendation or endorsement would have to reasonably expect that the judge's views of the candidate would be used in campaign and shared generally with members of the public who were rooting for Gauntlett. For all of these reasons, this JSC must find that judicial recommendations and endorsements of judicial candidates by judges not participating in the JSC process violates the Code as an improper use, and therefore an "abuse," of the prestige of office to advance the personal interests of a third person.

59. Given Judge Harms' notorious apartheid history his act of favouritism must leave many black legal practitioners at pains as to what they must do, short of changing their skin colour and race, to earn Harms' favourite treatment and to be nominated by him. Had the JSC caved in and acted to appoint Gauntlett, Harms' intervention would have been forever viewed as the critical factor which did swing matters his way. The judiciary's image is left in tatters under such circumstances – judges are perceived simply as nothing but politicians for hire.

60. Other potential judicial candidates would also be forced to start mobilizing their "own" judges to improve their odds for judicial appointment. Factionalism will inevitably ensue and judicial appointments would simply be reduced to a game where opposing factions vie for supremacy and candidates are appointed on the basis of "slates."

61. The prestige of office standard must also be read in conjunction with the rule that requires judges to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and *"avoid impropriety and the appearance of impropriety".* With our apartheid background the race of legal practitioners and opportunities they have had to influence particular judges to love them and to be willing to nominate them for judicial appointment are inextricably intertwined. Identifying one candidate in a judicial appointment contest as the better candidate shows favoritism and does not promote confidence in the judge's ability to remain impartial.

62. This may imply that the candidate has the ability to influence the judge. The judge may also be faced with frequent disqualification. In short, judicial endorsement of candidates implicate the rule that a judge must always avoid even the appearance of impropriety and must always promote public confidence in the judiciary's integrity and impartiality. Thus, a judge must not lend the prestige of judicial office to advance the private interests of the judge or others.

63. A judge who wades into a public debate engage in extra-judicial activities, and must avoid doing so in a manner that (1) casts reasonable doubt on the judge's capacity to act impartially as a judge; (2) detracts from the dignity of judicial office; or (3) interferes with the proper performance of judicial duties and is not incompatible with judicial office.

IV. Harms Anti-Transformation Stance and Reckless Attacks on Other Judges.

64. 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). 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.

65. 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**.**

66. 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:

> 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…***
>
> 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."*
>
> 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.[8]

67. 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.

68. Ironically Kriegler joined Lewis in claiming that competence was *"sacrificed on the altar of transformation"* at the time when Lewis had been exposed for her own horrifying judgments and predilection for leniency towards rapists and murderers.[9]

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[8] **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/

[9] Id.

69. 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."*

70. 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. 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 judgments and causes undesirable criminal convictions and acquittals.
>
> 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***.[10]

71. The HETN notes that Harms has 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, Helen 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. 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.

72. 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. 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.

73. For Harms who was a "death squads" denialist, does not find problematic Gauntlett's past advocacy of racism and apartheid. 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.

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[10] **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

74. 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. The Court recognized the right of Mrs. Komani to live with her husband.

75. Added to the arsenal of weapons used against the JSC is the constant threat of lawsuits. Harms used this threat although he never followed up on it.

76. The HETN submits that transformation is a constitutional imperative. 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**[11] 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."*

77. 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.

78. 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:

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

[11] 1998 (12) BCLR 1517 (CC) at 1565H-1566A.

79. As Justice Goldstone recognized in Hugo[12] 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."*

80. 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.

81. 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."*

82. 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*.

83. 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.***

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

***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.

84. The HETN is very concerned that in South Africa, individuals like Harms 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.

85. 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.[13] 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.

86. 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.

87. 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.

88. 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.

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[13] 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/

89. 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.

90. And finally, Judge Harms, has the most unenviable record of launching personal attacks on other High Court judges at the behest of litigants favoured by Harms. A prominent judge targeted by Harms was Judge President Hlophe. This was in a case which stemmed from a racially charged background[14], that is the ***New Clicks Pharmaceutical case***. The matter ended came before the Cape High Court where Judge President Hlophe, sitting with Judge Yekiso and Judge Traverso, heard the case.

91. The two black judges - Hlophe and Yekiso - ruled in favour of the government while the sole white judge, Traverso, in a minority judgement, backed the Pharmaceutical Society. Gauntlett was the advocate in the case.

92. On appeal to the SCA, Harms delivered a judgment which was verdant with hyperbole and bristling with insult directed solely at Judge President Hlophe. He devoted 13 pages of his 28 page judgment to lambasting Hlophe - he accused him of undermining the rule of law through his alleged unreasonable delay in issuing judgment. He wrote that there was "***deliberate obstructionism on the part of a court of first instance or sheer laxity or unjustifiable or inexplicable inaction, or some ulterior motive***."

93. The matter did not end there because an appeal to the Concourt was lodged and Hlophe was vindicated. The Concourt eventually heard the appeal in March 2005 but took until 30 September 2005 to deliver a very long 446 pages judgment which vindicated Hlophe's meticulous approach. When it came to the merits, Harms had little to say about the relationship between constitutionalism and the rule of law and chose to bypass altogether a question which had occupied the Cape High Court, and was to occupy the Concourt - whether the Promotion of Administrative Justice Act 2 of 2000 (PAJA) governed the regulations made by the Pricing Committee.

94. The Concourt steered clear of Harms' unwarranted attacks on Hlophe and chose not to endorse his savage attacks on Hlophe. Harms' attacks on Hlophe are still being used by the likes of Hugh Corder, the former Dean of Law at UCT to attack Judge President Hlophe's jurisprudential record.[15] In fact, Judge Harms has established a pattern of transgressing the limits of these boundaries in his decisions and often unfairly and unjustly accuses other judges of bias.

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[14] The DA describes the case in this manner. See, "***THE DA'S JUDICIAL REVIEW: THREATS TO JUDICIAL INDEPENDENCE IN SOUTH AFRICA***" **http://www.da.org.za/docs/621/judicial%20review_document.pdf.**

[15] See, A nomination in print PAUL NGOBENI: COMMENT Jun 17 2009 http://mg.co.za/article/2009-06-17-a-nomination-in-print

See, also A lowering of the bar: HUGH CORDER: COMMENT - Jun 21 2009 http://mg.co.za/printformat/single/2009-06-21-a-lowering-of-the-bar/

95. During the course of the November 2008 oral argument in the **Zuma vs. NPA** appeal, Harms cast the most serious aspersion on the integrity of Judge Nicholson by remarking to Zuma's legal team that Judge Nicholson "…***thought that he was doing you a favour***."

96. The same Harms later accused Nicholson of pursuing "***his own conspiracy theory***" in his ruling regarding political interference. Predictably, this charge that a trial judge has not faithfully and conscientiously administered the laws of our country impartially or that the High Court judge was so corrupt as to seek to curry favours with litigants has encouraged Harms to see the integrity of other judges as fair game.

97. In fact, some political organizations have subsequently filed complaints against Judge Nicholson based in part on rationale from the unwarranted ad hominem attacks emanating from Harms.

98. Regarding Harms attack on the qualification of Dolamo, the JSC must crack the whip and bring to an end the disgraceful conduct of this former apartheid judge who believes that he can attack judicial candidates without giving them a forum in which to defend themselves.

99. The HETN urges the JSC to take action against Harms.

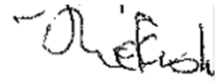
Conclusion:

We respectfully request that:-

1. The JSC investigate Justice Harms for gross incompetence, gross misconduct and judicial grandstanding likely to bring the judicial system into disrepute.

2. That Harms be investigated for breach of the Code as detailed herein.

Yours faithfully



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