

## Women Lawyers' Una Prentice Dinner 14 May 2001

The Honourable Attorney-General, my judicial colleagues and friends.

It is now two and a half years since I had the privilege of being appointed a judge of the Supreme Court of Queensland. In many ways, this period has been the most interesting period of my professional life. The work of a judge is intellectually stimulating and personally challenging and carries great responsibility. Together with those responsibilities come some extraordinary opportunities.

One of those opportunities has been to assist in the implementation in South Africa of the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* ("Equality Act"). In order to assist in that process I was invited to South Africa twice: for three weeks in November and December 2000 and then again this year in April for a judicial education seminar which took place over a week in a lodge in the Magliesberg Range outside Johannesburg. May I share some of those experiences with you.

### **Implementation of the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000***

The Act provides that it is to give effect to s 9 of the *Constitution of the Republic of South Africa 1996* so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.

Section 9 of the South African Constitution provides:

- "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). . .
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

Item 23(1) of Schedule 6 to the Constitution provides that national legislation of the type envisaged in section 9(4) must be enacted within 3 years of the Constitution coming into effect.

The Constitution of South Africa, as one might expect after the struggle that gave rise to it, is a strong statement as to rights and obligations of citizens and the powers given to the various organs of civil society. It is also an inspirational document for the citizens of South Africa in much the same way as the Constitution of the United States and the Charter of Rights and Freedoms in Canada operates for the citizens of those countries.

The inspirational and aspirational nature of South Africa’s Constitution is reflected in the preamble of the *Equality Act* which provides:

“The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systematic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people;  
Although significant progress has been made in restructuring and transforming our society and its institutions, systematic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy;  
The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom

and social justice in a united, non-racial and non-sexist society where all may flourish;

South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination;

Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality;

This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences;

This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.”

In South Africa, cases under the *Equality Act* will be decided by judges and magistrates in courts throughout the land. This has the advantage of making the protection of the right to equality central to the judicial role in South Africa. The disadvantage, however, is that, by not setting up a specialist tribunal, cases may well fall to be decided by judicial officers who are neither sympathetic to nor have any deep understanding of the issues which the Act raises.

As a result of this, it was thought advisable to invite to South Africa, to assist in the implementation of the Act, an academic with specialist knowledge of Human Rights Law and a judge who had experience of deciding equality cases. Hence an invitation was issued by the South African government to Associate Professor Phillip Tahmindjis and myself to visit South Africa under the auspices of AusAid and USAid.

Our first visit was an opportunity to educate ourselves as to the resources available in South Africa and to make recommendations as to judicial education and the best way to

implement the Equality Act. As a result, we met with officers from the Department of Justice and Constitutional Affairs in Pretoria and Durban and many government and non-government organisations, along with the judges, magistrates and academics.

We consulted, for example, with the Commission on Gender Equality, the National Institute of Public Interest Law and Research and the Human Rights Commission. We also consulted with judges of the Supreme Court of Appeal, in particular Judges Zulman and Farlam in Bloemfontein, the Chief Magistrate Joe Raulinga and other magistrates of the Bloemfontein Magistrates Court, the Judge President of the High Court in Bloemfontein, the Acting Chief Magistrate in Durban in Quazulu Natal and a meeting of judges hosted in Pretoria by Judge President of the Transvaal, Mr Justice Ngoepe. In addition, we consulted with the faculty of the Law School at the University of the Orange Free State, the Law School at Vista University in Bloemfontein, the Centre for Applied Legal Studies at the University of Witwatersrand, the Community Law Centre and the Faculty of Law of the University of the Western Cape, the Race, Law and Gender Institute in the Faculty of Law at the University of Cape Town, the Human Rights Centre in the Faculty of Law at the University of Pretoria, the Centre for Socio-Legal Studies at Natal University and the Justice College in Pretoria which conducts training programs for magistrates and other court personnel.

We made a number of recommendations for the implementation of the Act and prepared a draft curriculum for judicial education and a draft bench book.

The rationale for judicial education in South Africa is based on an address given in 1997 by the late Chief Justice Mahomed of the Supreme Court of Appeal, welcoming judges to the first orientation course for judges held in South Africa. The Chief Justice in his address, gave four reasons for judicial education which conform with the generally accepted international paradigm:

1. the intensity of qualitative and quantitative changes in the content of laws and in the complexity of litigation which has been generated by unprecedented technological development and industrial innovation;
2. the potential areas of jurisdiction of Judges have continued to expand exponentially with the growth of a constitutional culture which makes it

very often necessary for the judiciary to make value judgments in assessing the constitutionality of parliamentary statutes and the legality of executive and administrative action following upon this;

3. proper judicial insights in many areas involve training sensitive to the perspectives and the complaints of special groups unfairly marginalised in the past, such as women, blacks, homosexuals, illiterate and disabled persons, all disadvantaged by assumptions which might need review and discussion;
4. accountability of the judiciary makes it a necessary initiative for judges to adopt. As the Chief Justice said:

“There has been a potentially massive expansion in the powers of the judiciary which now includes the jurisdiction to strike down laws made by a democratically elected Parliament. This is of course crucial for constitutional democracy, but will undoubtedly stimulate public demand to understand the process of judicial adjudication, the values and beliefs which inform it, and the competence of the men and women who hold judicial office. Particularly in areas where the conclusion of the court is not based on some very complex technical rule but on some kind of basic values, in respect of which the lay person has a different view, he or she will want to understand the approach of the court and the justification for its conclusions. If he or she does not, the decisions of the courts will not enjoy legitimacy in his or her mind. If that legitimacy is assailed, the independence of the judiciary which we must jealously protect, will itself become threatened. Judicial education in collegial discussion is therefore necessary to maximise our efficiency and competence, to effectively nurture our legitimacy, and ultimately to protect our independence.”

The judicial education seminar in April 2001 was organised partly in response to our recommendations. Over 50 judges and magistrates from all levels and areas of the judiciary in South Africa attended. There were a number of characteristics of the judiciary that were immediately apparent.

1. Their diversity: the Constitution recognises 11 official languages - Sezpedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. In addition, there is the language of the original inhabitants the Koisan (which I knew at primary school as the Bushmen and Hotentots). As well there are significant communities who speak German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu. And there are religious communities who speak Arabic, Hebrew and Sanskrit. The judges and magistrates included members of many of those communities, as well as coming from cities and isolated rural communities.

This diversity gives effect to what many (myself included) see as a very desirable or indeed essential attribute for the judiciary. As Cherie Booth QC said in an article in "The Times" on 21 July 2000:

"Judges and lawyers should be diverse because the issues they handle [are] diverse. Law and the legal profession must be representative to strengthen public confidence. It must be multi-faceted, then it will be more in touch with society."

2. A second characteristic of the judiciary is their commitment: to the country, its ideals, the Constitution, and the independence and neutrality of the judiciary.

The independence of the judiciary is protected by the Constitution. The judges of the Supreme Court of Appeal recently took a strong stand with regard to the disgraceful situation in Zimbabwe. The judges at the conference took a stand on a section of the Equality Act which they believe may impact on judicial independence which is protected by s 165 of the Constitution which provides:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.

- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
  - (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”
3. It is inspiring to see how far the judges have come: with all races, religions, and both genders seeing how much they have in common. I quoted earlier from Chief Justice Mahomed who was appointed after the changes in South Africa. He was one of the foremost advocates of his generation and his appointment was widely welcomed. He died after spending an all too brief time in office. When he was an advocate, he regularly appeared in the Supreme Court of Appeal in Bloemfontein. He was however obliged to leave Bloemfontein every night and return in the morning because, as a “coloured” person, he was not permitted to stay overnight in the Orange Free State, of which Bloemfontein is the capital. At a commemorative sitting in his honour, I was told that the Acting Chief Justice, an Afrikaner who had been a judge on the Court when Mahomed appeared before them, spoke movingly of his own failure to even consider Mahomed’s situation and whether the Court should have insisted on that requirement being dispensed with.

But it is not all serious. They are no longer embarrassed to talk about the stereotypes which held back their understanding of one another. One of the learning techniques used in the seminar held at Aloe Ridge was the discussion of hypothetical problems in groups who then reported back to the whole assembly. They were able to laugh together at the following hypothetical problem.

“The ALOE RIDGE WINNING TEAM is a private firm specialising in “diversity training and up-market professional recruitment”. The adverts for its services read as follows:

“Assisting employers to recruit and retain employees who possess well-known attributes of the diverse people of South Africa such as-

- the loyalty and pride of the Zulus
- the intelligence and leadership abilities of whites, especially the English-speaking whites
- financial genius of Jews and Indians
- the cunningness of the Xhosas
- entertainment genius of the Coloureds
- industriousness of the Boer Afrikaner and the Southern-Sotho Native
- the superior language communication skills of graduates of Model C school and formerly White tertiary institutions”.

The ALOE RIDGE WINNING TEAM has been appointed by a local government authority with serious management and financial problems to assist it to “turn-things-around”.

A local human rights activist group has instituted proceedings against the local government authority and the ALOE RIDGE WINNING TEAM for promoting racism and ethnic discrimination. The complainants pray for, among other remedies, the investigation of racial and ethnic composition and dynamics in all past clients of the ALOE RIDGE WINNING TEAM and an interdict preventing the local government authority from using the services of the ALOE RIDGE WINNING TEAM. The complainants also seek some “judicial remedy” against the print media that publish the adverts.”

Confronting such silly and simplistic stereotypes led to a good humoured but sophisticated discourse about the stereotypes which still unfortunately inform the modern South Africa.

For me personally, the experience has demonstrated how the judges and magistrates in South Africa, like the judges in Zimbabwe, are our judicial colleagues and we must stand



with them in promoting and protecting the values of an independent judiciary and of human rights. We are all, as I said in a speech I gave whilst there, guardians and custodians of the administration of justice and human rights generally.

Perhaps even more importantly it graphically showed me that we are all citizens of one world. Poverty and inequality anywhere, as exists in Africa, affects each one of us. Lastly, may I say how enriching and uplifting to the spirit it was to be in a society and a judiciary with such diversity of origin but unanimity of spirit!