

Bar Dinner Johannesburg Saturday 1 November 2014 – acceptance of honorary life membership

1. Esteemed colleagues, ladies and gentlemen – I thank you from my heart for this exceptional honour. And I thank Gilbert Marcus, SC, in particular for his feelingful and most generous tribute.
2. In accepting this honour, allow me to start with two anecdotes.
3. First, Ntokozo Qwabe, a recently elected Rhodes Scholar from KZN, asked earlier this year to spend time in my chambers. I readily agreed. On his first day, he told me that many considered the judgments of the Constitutional Court “long-winded”. When I agreed with him that this was true, he paused and added: “Some people consider your judgments to be long-winded.”
4. When I recently introduced Ntokozo to Lord Clarke, of the Supreme Court of the United Kingdom, at my London book launch, I asked him if didn’t consider Lord Clarke’s judgments long-winded. His reply was, in effect, that he was taking the matter under advisement: he said, I haven’t read them yet.
5. The second anecdote – during the recent national elections, I heard a report that Mr Julius Malema had said that President Jacob Zuma “should consider himself lucky that he was not sitting on a street corner selling single cigarettes”, for that was what he should be doing, rather than being President.
6. There was no reported reaction to Mr Malema’s comments, and no action was taken against him.
7. The two stories are connected: an outspoken young lawyer, and an outspoken leader of a political party – both tell us something about the state of our country, and about its future.

8. Across two thirds, perhaps even three quarters, of the land surface of the earth, Mr Julius Malema would have been locked up for saying what he did about the head of state. In South Africa, there is no controversy – it was only an item, a curiosity, on a late-night news bulletin.
9. I personally find it shocking that Mr Malema can be so flagrantly disrespectful of President Zuma. But I also find it thrilling that we live in a country where he can be.
10. How are the two stories connected?
11. At the end of apartheid, our country had two crucial advantages, delivered to it by the struggle against apartheid. The first was a cadre of highly skilled and principled public interest lawyers – Arthur Chaskalson, Sydney Kentridge, Ismail Mahomed, George Bizos, Denis Kuny and others.
12. They exploited the leeway that existed under apartheid law, right until the end, to try to secure some measure of justice in the interstices of an extremely unjust and oppressive legal system.
13. They were ready to continue their task in a democratic South Africa. For they saw that apartheid was but one manifestation of injustice under law – and that lawyers’ task is to identify all injustices and to tackle them at their roots.
14. The second advantage was perhaps even more significant. It was that we inherited a populace that was beaten, battered and impoverished by apartheid – but completely uncowed.
15. The people of South Africa are sceptical of power, disrespectful of authority, suspicious of hierarchy. They have already successfully resisted oppression, and stand ready to do so should it threaten them again.
16. This is a profound advantage.

17. It makes it possible for Mr Julius Malema to consign President Zuma to a street corner selling single cigarettes – and to do so with impunity in the exercise of his Constitutional right of free speech.
18. The importance of this is that the Constitution itself cannot save South Africa from crime, corruption, misgovernance, governmental inefficiency and police brutality.
19. What can save us is the Constitution in combination with a proud, deeply sceptical population, together with principled lawyering.
20. That, ladies and gentlemen, is where you come in.
21. The Johannesburg Bar has a long and proud tradition of providing legal services to those who need them.
22. Its standards are high and its leaders, both in the past and right now, rank very highly indeed on the world scale of advocacy.
23. Even under apartheid, the record of the Johannesburg Bar – to put it at its most ungenerous – was by no means discreditable. It hastened to strike Bram Fischer off the roll of advocates when he estreated bail. But the Bar Council's action, at the time, was probably understandable.
24. Apart from the Fischer episode, the Bar repeatedly took a stand against racial injustice and state oppression.
25. But we cannot rest on our past achievements. The significance of the past lies in its lessons for the present. And it is time to take stock. The Legal Practice Act makes it imperative for us to do so. There may be aspects of the statute that will be challenged in the Court in which I serve. I will express no view on them.
26. But other aspects of the new provisions should claim our unhesitating support. These include the provision (section 29) that empowers the Minister to make regulations for LLB graduates to perform community service.

27. For the truth is that the state of our country leaves us with no cause for complacency. Economic growth is stagnating. Increasingly widespread degradation of state institutions is occurring. Violent crime is edging higher. And corruption – widespread, brazen looting of public resources by politicians and state officials – is endemic.
28. And our legal system is creaking. We have a desperate oversupply of legal needs, and a desperate undersupply of legal services.
29. The market in legal services has not served the public well.
30. We must not be surprised if government feels the necessity to intervene.
31. Prominent amongst the government's motivations is securing racial justice in the allocation of legal services and the reward for them. But behind the demand for racial justice lies the need for social justice.
32. Increasingly, the lines of race have had superimposed upon them the edgier lines of class.
33. Class is a potentially more exclusionary and divisive social categorization. This is because, unlike race, it seems invisible. Yet it can be enormously powerful and indeed pernicious.
34. It is no exaggeration to say that our country is at a crossroads. It is 20 years since we became a democracy, and much has been achieved. We should rejoice at the houses, the taps, the school desks and the democratic freedoms that we have secured.
35. But there is a terribly long way to go. And the legal profession, particularly the Bar, has a central responsibility in charting that way and in ensuring we get there.
36. My point is this. Critical to this struggle against apartheid was the notion of law and lawyering, and the role that vigorous, courageous anti-apartheid lawyers played in it.

37. We are confronted today by a new and in some ways more urgent social struggle: one that seeks to fulfil the practical promise of the Constitution.
38. Those promises are large – equality, dignity, freedom, environmental justice and social security.
39. None of us can flinch from the responsibility of seeing to their fulfilment.
40. And we, as lawyers, bear the heaviest burden of all – most of all in the case of the Johannesburg Bar, with its long commitment to justice.
- The Bar’s tradition of pro bono work is long and laudable. But we need more of it.
  - Counsel who have been willing to act on reduced fees carry forward a noble tradition. But we need more of it.
41. Here, it is impossible for me to pass over the extortionate fees and vast fortunes that some members of this Bar are reputed to accumulate through their legal practices.
42. As the Court I sit in recently said in a judgment on costs, “No doubt skilled professional work deserves reasonable remuneration, and no doubt many clients are willing to pay market rates to secure the best services. But in our country the legal profession owes a duty of diffidence in charging fees that goes beyond what the market can bear.”
43. “Many counsel who appear before us are accomplished and hard-working. Many take cases pro bono, and some in addition make allowance for indigent clients in setting their fees. We recognise this and value it. But those beneficent practices should find a place even where clients can pay. Fees should never be extortionate.”
44. For it cannot be right for those who are fiduciaries of a constitutional order that is designed to secure justice and equality to become instead

exponents of the extremities of the increasing wealth gap in South Africa and the world.

45. And it is no answer to this to say that the market bears it. The market is a poor defence against the ills of greed, financial mismanagement and social disintegration that the 2008 financial crisis illustrated so vividly.
46. Let me be clear. We need an independent Bar – and the Bar, to be independent, must be prosperous.
47. But prosperity can be secure only within a system that all feel confident is moving toward greater justice and greater equality.
48. The Johannesburg Bar must focus its professional skills, which are considerable, and its professional resources, which are huge, on providing legal services for those who most need them.
49. This includes those seeking to fulfil social and economic rights.
50. But, crucially, it also includes those seeking to challenge the abuses of power, whether through corrupt awards of tenders, misuse of executive power, disregard of independent institutions and abuse of judicial office.
51. We need both Mr Ntokozo Qwabe – a brave young lawyer who didn't flinch on his first day in my chambers from denouncing my judgments to my face – and Mr Julius Malema – a political leader who is unapologetically scornful of the President of the country.
52. But the Bar needs to support and nurture both its own traditions of defiant uncompromising opposition to injustice, and a populace that thirsts eagerly for accountable power.
53. It must rededicate itself to the vision of a South Africa that has less racism, less poverty, less inequality, and, instead, more justice, more freedom and more dignity.
54. Thank you.