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SPEECH BY DAVE STEWARD, EXECUTIVE DIRECTOR OF THE FW DE KLERK FOUNDATION TO THE SOLIDARITY SEMINAR ON THE RENATE BARNARD JUDGMENT CENTURION 9 SEPTEMBER 2014

THE RENATE BARNARD JUDGMENT AND ITS IMPLICATIONS FOR OUR CONSTITUTIONAL ACCORD

The judgment last week of the Constitutional Court in *Renate Barnard* raises questions as to whether the foundational value of non-racialism is still applicable to white South Africans. In so doing it strikes another blow at the national accord on which our new society has been constructed.

Section 9 of the Constitution was one of the most carefully negotiated elements of our accord. It sought to strike a balance between the need for measures to promote the equality of those who were disadvantaged by past discrimination, on the one hand, and the need to avoid unfair discrimination on a number of grounds, on the other.

The *Barnard* judgment upsets this balance. It reinforces the Court's finding *in Minister of Finance v Van Heerden* that affirmative action in terms of section 9(2) of the Constitution is automatically fair provided only that the measures involved:

a) target a particular class of people who have been susceptible to unfair discrimination;
b) are designed to protect or advance those classes of persons; and
c) promote the achievement of equality.

In the *Barnard* judgment the Court reaffirmed that "once the measure in question passes the test, it is neither unfair nor presumed to be unfair".

According to the *Van Heerden* judgment the only other limitation placed on affirmative action in terms of section 9(2) was that it "… should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal (of a non-racial society) would be threatened."

This formulation must be carefully analysed because it poses a potentially fatal threat to the constitutional accord that we thought that all our people had reached in December 1993.

What the Court was saying was that

- measures that impose significant harm on South Africans according to their race are acceptable - provided only that the harm is not *so* substantial that our long-term constitutional goal would be threatened;
- the term "undue" harm creates the clear idea that it is permissible to inflict "due" harm on people according to their race; and

- the reference to "our long-term constitutional goal (of a non-racial society)" consigns the foundational constitutional principle of non-racialism to some undetermined date in the middle or distant future. In so doing the Court also seriously undermined the rights of white South Africans to human dignity and equality which are inextricably interlinked with the right to non-racialism.

It is, in effect, a prescription for, and validation of, harmful discrimination against millions of South African citizens for an indefinite period, on no basis other than their race - and with no reference to their individual merits, circumstances or concerns.

In his separate judgment in *Van Heerden*, Sachs J warned that it was important "to ensure that the process of achieving equity is conducted in such a way that the baby of non-racialism is not thrown out with the bath-water of remedial action". While he concurred with the main judgment that "it would be illogical to permit a presumption of unfairness derived from section 9(3) (read with section 9(5)), to undermine and vitiate affirmative action programmes clearly authorised by section 9(2), by the same token" he believed "it would be illogical to say that unfair discrimination by the state is permissible provided that it takes place under section 9(2)."

The significance of the *Barnard* judgment is that the baby of non-racialism has been well and truly tossed from the bath and is now lying in the dust for all to see. The judgment raised the serious probability that even in the most deserving cases the majority on the Court will side with racially motivated affirmative action over the individual's human right to equality, human dignity and protection against unfair discrimination.

The approach of those who support demographic representivity is based on fundamental fallacies:

- The first fallacy is that the measures adopted in terms of section 9(2) have promoted equality. They have not. South Africa is now a more unequal society than it was in 1994. The overall GINI coefficient has increased not only nationally - but within all our communities as well. Affirmative action measures have done nothing to advance the equality of the most disadvantaged 85% of the black population.
- The second fallacy is the idea that affirmative action by itself is the best measure to promote the equality of disadvantaged South Africans. What is required instead is the empowerment of disadvantaged South Africans through the provision of decent education, effective social services and employment opportunities. The appointment of key personnel on the basis of race and political affiliation - rather than merit - is one of the main reasons why this is not happening.
- Another fallacy that underlies the government's approach in terms of section 9(2) is the supposition that all whites are advantaged and all blacks are disadvantaged. By 2009 there were more than one million black South Africans who were earning more than 800 000 whites. By 2007 there were 2.6 million black, coloured and Indian South Africans who had higher education qualifications than 1.6 million whites. How is equality advanced if advantaged blacks have automatic preference over less advantaged whites?

In fact, the government's approach to affirmative action also fails to comply with the internal tests laid down in *Van Heerden*:

- Most of its beneficiaries can no longer be described as being "susceptible to unfair discrimination". On the contrary, there are mostly middle class public servants and private sector employees in the top 10% of black income earners. They also represent a class that has almost exclusive control of political power.
- The measures are not designed to protect or advance those classes of persons - the bottom 80% of the black population - who continue to be truly disadvantaged and disempowered; and
- As is clear from our deteriorating GINI coefficient they certainly have not promoted the achievement of equality.

The *Barnard* judgment is suffused with suppositions that bear little scrutiny - but that may nevertheless be useful in future cases before the Constitutional Court:

- According to the judgment "Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned." Clearly they have not been so formulated and increasingly invade the dignity of targeted South Africans: just ask Renate Barnard and coloured employees of the Department of Correctional Services in the Western Cape who have been told that they will not be promoted because they have exceeded their 8.8% racial quota for the province.
- The *Barnard* judgment warns that "remedial measures under the Constitution are not an end in themselves". However, they have no cut-off date. They have become an end in themselves – as is clear from the National Democratic Revolution whose millenarian National Democratic Society is based firmly on permanent demographic representivity.
- The judgment says that such measures "are not meant to be punitive nor retaliatory" - but how else does the Court expect that they will be experienced by those who are told that they will not be promoted because of their race - or that they will have to move to another province if they want promotion?
- The judgment says that "remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination". However, many of their beneficiaries are members of a new privileged black middle class who can no longer be described as disadvantaged.
- The judgment says that remedial measures "must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society". But clearly they do invade the dignity of those affected by them - and in so doing create a society that is based once again on race and social exclusion.
- The judgment underlines "the requirement that beneficiaries of affirmative action must be equal to the task at hand. They must be suitably qualified people in order not to sacrifice efficiency and competence at the altar of remedial employment."However, practical experience throughout the public service has shown that personnel appointed to achieve demographic representivity are frequently incapable of carrying out the duties and providing the services for which they were appointed.

So where does all this leave us?

Firstly, it is important to note that those who support the *Van Heerden* and *Barnard* judgments believe implicitly and sincerely that the government's approach to affirmative action is both equitable and essential. They truly - and incorrectly - think that the relative wealth of white South Africans is undeserved and has been derived from centuries of exploitation.

They point to the fact that whites continue in economic terms to be the main beneficiaries of the new South Africa. This is true, partly because the failure of our education system has resulted in white South Africans continuing to have a disproportionate share of the skills that are necessary to run a modern economy. Also, it turns out, ironically, that one of the best ways to advance the economic interests of any community is to force them to leave the public service, to start their own businesses or to go into the professions.

The main threat of the *Barnard* judgment is that it will be seen by government and by organisations like the Black Management Forum to remove the remaining constitutional obstacles to the radical implementation of the second phase of the NDR. This is bad news for white South Africans because a primary goal of the second phase is to limit further the economic space within which they can still operate.

Minister Rob Davies has already warned the government intends to impose demographic representivity on the private sector:

> "We need to make sure that in the country's economy, control, ownership and leadership are reflective of the demographics of the society in the same way the political space does."

Increasing pressure will now be placed on other institutions outside the ambit of the state to conform with the government's racial agenda:

- Universities, the media, the professions and sports teams are under increasing pressure to impose demographic representivity;
- White farmers are confronted with wildly unworkable proposals for land reform - while the re-opening of restitution claims will cast a pall of uncertainty over the agricultural sector for many years to come.
- Property rights are under mounting pressure from a raft of new laws including the *Property Valuation Act;* the *MPRDA Amendment Bill;* the *Private Security Industry Regulation Amendment Bill*; the *Promotion and Protection of Investment Bill*.

These measures could create an impossible situation for many non-designated employees, business owners, farmers, academics and those involved in the professions. It is important for all those involved to wake up to the very unpalatable reality that the second phase of the NDR constitutes a direct assault on their economic interests.

So what can be done?

- We must make it clear that we are not prepared to accept a status as second-class citizens.
- We must continue to mount challenges in the courts in the hope that they will uphold the values and rights in the Constitution.
- We must use the full range of our rights to protest against unfair discrimination.
- We must use our right to freedom of expression to warn the government and our fellow countrymen of the potentially catastrophic consequences of the NDR.
- We must commission research into what the implications will be for South Africa if the ANC proceeds along the road of the NDR.
    - What will happen to the economy?
    - What will happen to the scarce skills that the country needs so desperately?
    - What will happen to foreign and domestic investment?
    - What will happen to national unity - once it becomes clear to whites and other minorities that they are the victims of systematic and pervasive racial discrimination?
    - What will happen to South Africa's international image?
- We must appeal to the international community and ask that it should oppose new forms of racial discrimination as resolutely as it opposed apartheid in the past.
- We must engage with the government regarding the radical second phase of the NDR.

As FW de Klerk pointed out on 31 January this year, this is not what the non-ANC parties agreed to during our constitutional negotiations:

> "We signed off on the values, rights and institutions that are articulated in the Constitution. We did not sign on for the National Democratic Revolution".
>
> "We were never consulted about the ANC's approach to transformation and we do not accept it. These policies - in the ANC's second phase of transition - are overtly directed against South African citizens on the basis of their race as part of an on-going historic struggle that we had hoped had been concluded in 1994. This is the antithesis of the goal of national reconciliation."
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> "The time has come for serious talks between the Government and all those who are targeted by its version of transformation - including, our minorities, our farmers, the media, civil society organizations; and small and large businesses. Collectively, we need to talk to government
> - about its approach to transformation;
> - about its divergence from the values in the Constitution;
> - about the likely consequences for the economy, for inter-community relations and for the future of our national accord of its transformation approach; and
> - about how we can all work together to achieve real transformation as envisioned in the founding values of our Constitution."

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