24 August 2016

Dear Honorable Members of the Ad Hoc Committee for the appointment of the Public Protector.

We understand you will be deliberating on the appointment of a public protector from the list of five candidates agreed last week. We would like to raise some concerns regarding one of the candidates, Judge Siraj Desai, which we list below.

1. **The alleged case of rape in Mumbai.**

Judge Desai said in the interview, although this is not an exact transcript, the following

“I was never acquitted, I was not convicted either.

The allegation was withdrawn under oath. In India in terms of the penal code, it can’t be compounded, or be withdrawn. You take the docket to the court and see if there a case to answer. They then took the case to court, and then it was dismissed.

Its an absolute lie that I changed my version. The press engaged in a great deal of speculation, I never gave any version, I had legal advice from the beginning. I never expressed any view.

For those of you know Shantaram, the novel: it was at  [unclear], the police station where I was entertained**.** The press were trying to buy a statement. A statement appeared, let me say this, I never signed it, it was not my statement.

I’ve never been a popular judge. A judge came up with a criticism of me. I never changed my version. Senior advocates came to my defence. Any criticism is based on speculation and inferences. Its terrible for me having to repeat this.

I have never given a version as to what happened.”

The full audio recording is at <https://pmg.org.za/committee-meeting/23063/?utm_source=homepage&utm_medium=featured-card> from 14 minutes in.

The SA Law Review piece that Corruption Watch referred you to, written by Judge Davis, Prof Jonathan Klaaren, and Gilbert Marcus SC says:

"Mr Justice Desai was initially **refused bail. He spent several days in a Mumbai prison** and was eventually allowed to return to South Africa **pending his prosecution.** In ensuing weeks, [Mrs SI] withdrew the charges, culminating in an acquittal. The Indian presiding judge reported to have stated that the allegation against Mr Justice Desai were not probable: 'no force’, he is reported to have said, 'appears to have been applied.’

The saga spawned an intense debate, which raised a crucial issue about the relationship between private conduct and fitness for judicial office. This debate proceeds as it must, on the acceptance that Mr Judge Desai was innocent of rape…..

Thirdly, (from Flemming’s letter to the Sunday Times)  I have seen no denial of statements by the Indian police, who would hardly choose to fabricate on this point, that when the police confronted the judge, he claimed that nothing happened between him and [Mrs SI] other than that they had had drinks. This seems to have been a lie because Desai’s later statement admitted that sex did take place. The word of any judge should be beyond doubt.”

We would submit our concerns about Judge Desai’s statement are as follows:

* He does not actually deny the event took place. “I never gave any version, I had legal advice from the beginning. I never expressed any view.” is as far as he goes.
* He did not mention being denied bail.
* He rejects the fact that he made a statement, while Flemming says he did make a statement.
* He never acted against Flemming, or Davis, Klaaren and Marcus, who wrote the SALR piece, in terms of a defamation action,
1. **Questions unanswered.**

In a second issue around rape, the Honourable Mr Shivambu asked twice about Judge Desai’s views on the silent protest by the four anti-rape activists at IEC National Results Centre during the President’s speech. He did not answer the question on either occasion.

1. **Temperament**

We note that an even temperament is a criterion considered in the appointment of judges, and we would submit even more so in the appointment of the Public Protector, who is bound to be faced with significant pressure around the reports they produce. Judge Desai appeared to become angry in the actual interview. We would also refer the committee to the numerous reports of conflict between Judge Desai and his colleagues.

1. **Volume of work, health**

We note that a number of Judge Desai’s judgments have been delayed, which speak to his ability to handle large volumes of work. This may be because of his health concerns. We do not suggest that any person suffering from any disability or illness should not be considered for a position, but we remain concerned about the stability of the office.

1. We note that there are concerns about Judge Desai’s bias. The Judge states his pro-poor stance, and repeated that he regards himself as a socialist. We do not have concerns about this.
2. We note that the Judge has not worked within government, and has no experience in intersectoral co-operation which is key to much of the PP’s work. We also note that he has no management experience, except as sitting on boards in an advisory capacity. He has not run an organisation in compliance with the PFMA or MFMA, nor has he experience in how the PFMA or MFMA should be applied across the state. We note that other candidates do have such experience.

We ask that the committee consider these concerns in reaching a decision.

Yours faithfully

Alison Tilley