OPINION PIECE

The Long Term Effects of Skewed Briefing Patterns in South Africa and Some Solutions

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Introduction

In an unprecedented move, Judge Mandlenkosi Motha of the Pretoria High Court has recently grasped the Transformation nettle in the legal profession. He directed that two teams of counsel appearing before him, and comprising only white counsel in a case that had to do with black economic empowerment, address him on the demographic composition of their teams of counsel.

One of the all-white teams in the case represented the Broad-Based Black Economic Empowerment Commission,[1] a government agency within the Ministry of Trade, Industry and Competition. The Commission is tasked, among other things, with

- overseeing, supervising and promoting adherence with the Empowerment Act in the interest of the public;[2]
- strengthening and fostering collaboration between the public and private sector in order to promote and safeguard the objectives of broad-based black economic empowerment;
- receiving, investigating and making recommendations on resolution of complaints relating to broad-based black economic empowerment;
- promoting advocacy, access to opportunities and educational programmes and initiatives of broad-based black economic empowerment;
- maintaining a registry of major broad-based black economic empowerment transactions, above a threshold determined by the Minister by notice in the Gazette;
- exercising such other powers, not in conflict with the Empowerment Act, as may be conferred on it in writing by the Minister.

Only a judge who is entirely blind to the objects of the Empowerment Act, as mandated by the SA Constitution, would fail to raise the issue that Judge Motha has now placed firmly at the centre of the Transformation debate in the legal profession.

Perspective

While the judge has placed the spotlight on Transformation in its broader sense, in this short paper I hope to give a perspective on skewed briefing patterns which, in my experience spanning over 30 years in the legal profession, are at the core of Transformation being elusive in this profession.

The briefing patterns debate is unfortunately often entirely lost as colleagues and members of the public cling steadfastly to their firm politics on the issue. In giving this perspective, I hope to demonstrate that many of the keenly held views on Transformation (including on this briefing patterns issue) are nothing short of mythical and shortsighted. But most importantly, I hope to demonstrate that unless the skewed briefing patterns favouring white colleagues is addressed expeditiously and remedied sustainably, the standard of adjudication in our higher courts will continue on a dangerous downward spiral. With that comes loss of confidence in the higher courts (which has already started as commercial disputes are increasingly being diverted by legal practitioners to private arbitration notwithstanding the Gauteng Judge President establishing a dedicated "commercial court" function presided over

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1 Established in 2013 in terms of s 13B of the Broad-Based Black Economic Empowerment Act, 53 of 2003 ("the Empowerment Act")

2 The Empowerment Act is the piece of legislation envisaged in s 9(2) of the SA Constitution. Its stated objectives include "promoting economic transformation in order to enable meaningful participation of black people in the economy"; and "achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises".

by senior judges)[3] and loss of legitimacy of the judiciary will not be far behind. This has significant implications for the sustainability of the profession, and the consequences will be equally dire for all racial groups represented in the profession.

It is not the first time that this skewed briefing patterns issue is being raised. Norman Arendse SC[4] and I raised it as long ago as 1998.[5] Still, 26 years later, little has been done to address the problem, despite the legislature's intervention with pieces of legislation such as the Empowerment Act. While we advocated for a voluntary solution, even the legislative stick has made no meaningful difference. The slow pace most probably has its roots in human beings' natural tendency to go into self-protection when there is a mindset of scarcity. This would be amplified by our propensity to cling to our own grouping, a phenomenon that had been artificially intensified by our racially divided past.

So, since both the self-correction of a voluntary approach and the compulsion of legislative approach have failed, what are we now to do? Whatever view one holds on Transformation in the legal profession, a briefing patterns regime that is skewed in favour of white lawyers does not bode well for the stability of South Africa's justice system. In a country reputed as being the most unequal in the world, and poverty and deprivation generally associated with black Africans, it should not be difficult to see the dangers that an unstable justice system, precariously propped up largely by beneficiaries of preferential policies of the apartheid crime against humanity, pose to the country.

Summary of argument against skewed briefing patterns

I advance three arguments on the dangers of skewed briefing patters that favour white lawyers:

- One, it has deleterious effects on the legitimacy and competence of the judiciary in the long run which will take many generations to reverse when the penny finally drops.
- Two, it sends the wrong message to a society that is still struggling with freeing itself from the destructive indoctrination of the past. It inevitably spells out that the white skin is synonymous with competence and the black skin (is synonymous) with incompetence.
- Three, it has harmful effects on the development of the country's jurisprudence as potential litigants are driven to "privatise" the resolution of commercial disputes as they believe (probably not without justification) that high court judges are largely ill-equipped to adjudicate commercial disputes competently.

I shall refer to these as *"merits arguments"* to distinguish them from the following three *"antecedent issues"* that must be confronted and put to bed before embarking on the merits arguments themselves.

- The first is the notion that skewed briefing patterns are a figment in the imagination of some among us. In advancing this narrative, the Solicitor-General has now published a 4-page press statement in which he claims he *"Propels Transformation in Legal*

[3] As I discuss later, this subverts the development of South Africa's commercial law jurisprudence since arbitration decisions (or awards) are not publicly available and are therefore not open to critical analysis by law students and legal scholars, or to being advanced as authority in courts and therefore receive judicial consideration and analysis.

[4] A former Chairman of the General Council of the Bar of South Africa

[5] See 1998-may-vol011-no1-pp74-77.pdf (gcbsa.co.za)

Practices".[6] When one considers the true facts as demonstrated by the lived experiences of many black legal practitioners, this can only be seen as sophistry.

- The second is the idea that Transformation is a game of numbers, so that if you can claim that 95% of state legal work has gone to black lawyers you have thereby achieved Transformation. This may seem compelling but is only so as long as the application of mind remains on the surface and superficial.
- The third issue is the notion that law and politics do not mix. This argument is also deeply flawed. It is often trotted out by those for whom any talk of Transformation is necessarily rooted in race which to them is a political concept which has no place in a legal debate.

Let me address each of these antecedent issues in turn.

The Solicitor-General's Sophistry

On 5 March 2024 the Solicitor-General issued a press statement in response to Judge Motha's directive that teams comprising wholly white counsel in a broad-based black economic empowerment case explain to him why they did not have a single black advocate as part of the team.[7]

The press statement is long on *"commitments"* and sophistry but short on verifiable substance. It is also notable less for what it says and more what it omits to say.

But before giving my assessment of the Solicitor-General's press statement, I should give a semblance of my authority on these issues. I have been deeply immersed in the Transformation efforts of the legal profession since 1998. Since then, I have been part of various teams driving a spirited attempt to expose skewed briefing patterns in my role as an ordinary member of the Bar, then as Chairman of the Transformation Committee of the largest Bar under the General Council of the Bar or GCB (the Johannesburg Society of Advocates or JSA), then as Chairman of Advocates for Transformation both in the JSA and later nationally, then as member of the JSA Bar Council, then as Chairman of the GCB, and now as an ordinary member of the Pan African Bar Association of South Africa. I have heard all the arguments advanced by the state on skewed briefing patterns. So, the Solicitor-General's fictional statistics, vacuous statements of commitment and trite policy statements are not new to me.

First, a state department checking its own health status on the Transformation front and then giving itself a stellar bill of health is at best short sighted and at worst self-serving with the objective to misguide. In the spirit of good governance, and given the enormity of the issue at hand and the times we live it, it should be obvious that only an independent assessment and report on the state's performance on briefing patterns can be credible.

Second, in the very opening paragraph of the statement, the Solicitor-General claims to be *"committed to fostering a legal profession that reflects the principles of diversity, inclusion, and equity"*. Then follows a panoply of an assortment of policy statements that read like exhaustively workshopped talking points, vacuous commitments, and sheer sophistry that demonstrate a clear disconnect from the reality on the ground. What the Solicitor-General describes has no rational connection to the lived realities of most Black and African legal practitioners in the organised Bar.

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[6] 20240305-SG-Transformation-in-Legal-Practices.pdf (justice.gov.za)

[7] The merits of the Learned Judge's directive is not the focus of this paper. I have addressed elsewhere in public statements.

I can say this with authority because I have previously embarked on a national tour of all constituent Bars of the GCB to learn of the real lived experience of Black and African advocates in relation to state briefing patterns. I documented these and had some of them[8] published in *Advocate*, a GCB official magazine or journal.[9] The experiences were, and by all accounts continue to be, grim.

Third, the Solicitor-General talks of "Previously Disadvantaged Individuals" or PDIs having received up to 95% of state legal work valued at 87% of the total spend by the state on legal services in the 2023/24 year. These percentages may look impressive on the surface; however, to realise that they are fanciful you need look no further than the complexion of firms of attorneys appointed by the state to provide "forensic services" in the "close to R1 billion"[10] overall spend on the Zondo Commission that served for almost 5 years since August 2018. Will the Solicitor-General disclose independently audited accounts of how much of the "close to R1 billion" the state has spent on these white firms for "forensic" and legal services?

Moreover, the Solicitor-General omits to say what a PDI is. It includes white women, persons of oriental descent and disabled persons of all races. In addition, these numbers mean nothing without a meaningful breakdown. In 2009, the following breakdown was expressly requested from the state by the Black Lawyers Association:

- Identity of black lawyers actually instructed by the state in the last 3 years (so that we could check with each of them ourselves)
- Nature of the brief in each instance (because it is the quality of the brief that matters)
- Value of the brief in each instance (both as regards its importance to the state and its monetary value because that is the true measure of commitment to capacitating lawyers for complex cases in future)
- Total value of briefs to black legal practitioners as compared to total state spend on legal work for the last 3 years (so that we can verify ourselves the amounts that the state claims to have spent on Black lawyers)
- Same information on white lawyers (so that we could "trial balance" the whole information)

The information never came. I know because I drafted that request. The stated purpose of this request was captured as follows in the request letter:

> ***"Our client seeks the above information in light of what it considers to be a stark incongruence between the legislative framework on preferential procurement on the one hand, and the inadequate procurement of the services of black lawyers in general on the other."***

Yet the Solicitor-General still offers numbers without context and *dehors* any means of verification. The only manner by which the Solicitor-General's numbers can be verified as correct is by providing the detail we requested back in 2009. Otherwise, these numbers are not worth the paper on which they are written.

Fourth, the Solicitor-General seems to think that trotting out numbers amounts to Transformation. Dr Claudelle von Eck, a business leadership expert, describes Transformation as:

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[8] Some of what was reported to me was not fit for print in an advocates' journal.

[9] 2017-april-vol030-no1-pp03-08.pdf (gcbsa.co.za)

[10] US$66 million in the June 2022 Rand/Dollar exchange rate

> ***"[A] process of profound and radical change that orients an organisation in a new direction and takes it to an entirely different level of effectiveness. Unlike 'turnaround' (which implies incremental progress on the same plane) transformation implies a basic change of character and little or no resemblance with the past configuration or structure"***

By this measure, the state's so-called "transformation" efforts, rooted as they are in distortion by elision, do not even get off the starting blocks. The legal profession is generally not materially different on the qualitative briefing patterns front than it was in 2009. Black lawyers are still lamenting the dearth of quality (complex) briefs from the state and late to no payment of their fees by the state attorney. There has been no ***change in the character of the legal profession that demonstrates little or no resemblance with its past configuration or structure***.

Is Transformation a numbers pursuit?

As I hope I have demonstrated in the last section, even if the Solicitor-General's numbers are correct (they are not, because they bear no rational connection with the lived experiences of many Black practising lawyers), they do not credibly prove that there has been any Transformation (in the sense of ***"a basic change of character and little or no resemblance with the past configuration or structure"***) in the legal profession.

A respected and revered colleague (a white male), who has also served as Chairman of the GCB, describing the Legitimacy of Transformation, once observed:

> ***"What makes something legitimate in South Africa now, I suggest, is its acceptance because it is institutionally respected, not because it is immediately popular. The Constitutional Court's decisions on the death penalty, and in relation to gay rights, are respected … but they are probably not popular. They are nonetheless not considered to be illegitimate, simply because they do not reflect the view of most people. The essence of constitutionalism is indeed that we are ruled by law, not in terms of numbers. The decisions are legitimate because they are respected for their fealty to constitutionalism, not because of a weekly Markinor poll."***[11]

Addressing skewed briefing patterns that favour white lawyers is a legitimate purpose in which the state should be leading. This purpose seeks to achieve the constitutional imperative of equal benefit and protection of the law. It seeks to redress inequalities wrought by apartheid preferential treatment of white people. Popularity is not the measure of its legitimacy. Its legitimacy lies in its fealty to constitutionalism.

Law and Politics

Former Chief Justice Pius Langa once debunked the myth that law and politics should not mix. In a lecture delivered at the Stellenbosch University in 2006 he said —

> ***"[T]here is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked."***

Giving a lecture at the same venue some 16 years later (on 24 March 2022), Judge

[11] See Jeremy Gauntlett's "A Matter of Race?" in 1999-december-vol012-no4-pp03-04.pdf (gcbsa.co.za)

President Dunstan Mlambo echoed Chief Justice Langa's observations on the relationship between law and politics. Citing Karl Klare with approval, the Judge President posited that

> ***"[A] necessary implication of transformative constitutionalism is that the project takes on a political character. On this score … the traditional bright-line framing of the law/politics dilemma in adjudication is simplistic. In short, judges' personal/political values and sensibilities cannot be excluded from the interpretative process of adjudication. In the circumstances … judges – and other legal practitioners – should instead just acknowledge and forthrightly accept their political and moral responsibility in adjudication."***[12]

So, a senior advocate who accuses Judge Mandlakayise Motha of "playing politics" when the Learned Judge seeks an explanation on briefing patterns does not seem to appreciate that this traditional bright-line framing of law and politics is simplistic. In any event, our courts, including the Constitutional Court, have made it quite clear in numerous decisions that the subject of remedial or restitutionary measures is positively political and constitutional. Being measures aimed at redressing the insidious effects of apartheid, a crime against humanity, in fulfilment of s 9(2) of the Constitution, they are inherently socio-political.

- In ***Stoman v Minister of Safety and Security and Others 2002 (3) SA 468 (T) at 477F-H*** (cited with approval by van der Westhuizen J in ***Barnard 2014 (6) SA 123 (CC) at para [137]***), the North Gauteng High Court said:

> ***"[T]he recognition of substantive equality means … that equality is more than mere non-discrimination. When a society, and perhaps the particular role players in a certain situation, come from a long history of discrimination, which took place individually, systemically and systematically, it cannot simply be assumed that people are in equal positions and that measures distinguishing between them amount to unfair discrimination."***

- In ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) at para [60]*** the SA Constitutional Court said:

> ***"It is insufficient for the Constitution merely to 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 are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."***

- In ***South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC)***, the Constitutional Court said (at para 29):

> ***"At the point of transition, two decades ago, our society was***

[12] Transformative Social Change and the Role of the Judge in Post-Apartheid South Africa – A Lecture by Justice Dunstan Mlambo, Judge President of the Gauteng High Courts, South Africas – Anchored in Law

divided and unequal along the adamant lines of race, gender and class. Beyond these plain strictures there were indeed other markers of exclusion and oppression, some of which our Constitution lists. So, plainly, it has a transformative mission. It hopes to have us re-imagine power relations within society. In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds."

- In ***Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)*** the Constitutional Court said:

  "The essence of restitutionary measures is to guarantee the right to equality for the reason that, without such measures, the achievement of equitable treatment will continue to elude us as a society. The Labour Court (Waglay J as he then was) commented, in Harmse v City of Cape Town, that the implementation of employment equity orientated measures is a duty placed upon designated employers by the Employment Equity Act which also provides them with affirmative action as a defence against claims of unfair discrimination. Commenting on that decision, Prof Carole Cooper states that employment equity orientated measures 'do not amount to an exception to equality but are integral to its achievement' which is in essence 'substantive equality'."

- In ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC)*** it said:

  "[75] The commitment to achieving equality and remedying the consequences of past discrimination is immediately apparent in section 9(2) of the Constitution. That provision makes it clear that under our Constitution '[e]quality includes the full and equal enjoyment of all rights and freedoms'. And more importantly for present purposes, it permits 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'. These measures may be taken '[t]o promote the achievement of equality'.
  [76] But transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. <u>The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goals we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution</u>."

- Again, in ***Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC)*** the SA Constitutional Court

made it clear that measures implemented to redress past imbalances are not a deviation from, or invasive of, the right to equality, but rather contribute to the constitutional goal of achieving equality in order to ensure the full and equal enjoyment of all rights. Moseneke J (as he then was) said:

> ***"[30] Thus, our constitutional understanding of equality includes what Ackermann J in National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Another calls 'remedial or restitutionary equality'. Such measures are not in themselves a deviation from or invasive of, the right to equality guaranteed by the Constitution. They are not 'reverse discrimination' or 'positive discrimination' as argued by the claimant in this case. They are integral to the reach of our equality protection. In other words, the provisions of s 9(1) and s 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure 'full and equal enjoyment of all rights'. A disjunctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives.***
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> ***[31] Equality before the law, protection in s 9(1) and measures to promote equality in s 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes, which I need not discuss now. However, what is clear is that our Constitution and in particular s 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised underprivilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow."***

The South African equality jurisprudence is clear. The taking of measures aimed at advancing persons or categories of persons disadvantaged by apartheid is to be celebrated and reinforced, not ridiculed. Redressing skewed briefing patterns falls among that category of measures envisaged in s 9(2) of the SA Constitution. Those in the executive of government, and who swore an oath to protect and uphold the Constitution, who either actively campaign against this remedial measure or who fail to implement it, are failing in their constitutional obligation and there is a remedy in the SA Constitution itself against an executive which is guilty of such conduct. Section 89(1)(a) of the SA Constitution says the National Assembly (Members of Parliament) may remove the President for ***"a serious violation of the Constitution or the law"***.

If Members of Parliament should themselves fail to hold the President to account for his failure to fulfil his constitutional obligation of redressing skewed briefing patterns, the affected lawyers can approach the courts to force them to do just that. The Secret Ballot Case of the SA Constitutional Court is a perfect illustration of the exercise of that right.

So, the ignorance demonstrated by a senior advocate (in his contemptuous refusal to comply with Judge Motha's directive that he explain the composition of his counsel team) as regards the significance of s 9(2) of the Constitution in this regard is surprising. At best for him, it is self-serving.

The skewed briefing patterns problem in the legal profession is a constitutional and political issue. It is constitutional because

it engages frontally the equality jurisprudence born of s 9(2) of the SA Constitution. It is also political because without political will (and positive action) by the state, the problem will persist as it has for the last three decades despite South Africa being feted as possessing the most progressive and liberal Constitution in the world.

Also disappointing is the determination of some legal practitioners to shut down debate on skewed briefing patterns on a legal practitioners' social media platform. This past week, some legal practitioners on a social media platform set up for legal practitioners sought to have me booted out of the platform for raising the issue. Others suggested that I should start my own social media platform to debate the issue. Cynically, they started discussions on a Rugby match as if to send the message that Rugby trumps the topic I believe is of significance to the legal profession and should be discussed by lawyers on their own platform. I can only hope they change their minds after considering the concerns I raise in this paper. I have in any event invited them to engage in a debate and advance opposing argument.

I now turn to the merits arguments against skewed briefing patterns.

The deleterious effects of skewed briefing patterns on the legitimacy and competence of the judiciary

Entirely lost in the brouhaha over Judge Motha's directive to an all-white set of counsel in a black economic empowerment case is the deleterious effects that skewed briefing patterns have on the legitimacy, diversity and competence of the South African judiciary in the long run.

If the judiciary is to function optimally in the fulfilment of its constitutional function of resolving disputes without fear, favour and prejudice by the application of law subject only to the Constitution, then it stands to reason that persons who are appointed as judges must be conversant not only with the letter of the law, including the supreme law that is the Constitution, but also with its spirit. Proficiency in anything is gained through more than just study. It is cultivated through experience. Experience is gained by doing, not by observing or studying. For courts to function optimally, and have the respect of those who appear before them, they need to be presided over by people with both knowledge of and experience in the practice of law. Judges should be appointed from the ranks of people who have been in the trenches of the practice of law at the highest possible level and who have seen it all. This will enable them to navigate litigation intricacies with relative comfort and expedition.

What skewed briefing patterns that favour white people do is that they exclude black lawyers from the indispensable experience that is required of a competent judge. The result, if we remain true to the merit standard for appointing judges, is that only white lawyers will be eligible for appointment as judges on merit. That spells danger for the legitimacy of the judiciary. White people comprise less than 10% of the South African population by last count of the most recent national census. It should not be difficult to see a crisis of legitimacy in this picture.

Let me explain briefly what I mean by skewed briefing patterns. I have already explained that Transformation is not a numbers pursuit. Assuming that the Solicitor-General's numbers are correct, it is the quality and value (complexity) of briefs that matters and not the quantity. Any decent law graduate (and I mean no disrespect to those who practise in these areas) can hazard their way through a Road Accident Fund brief (many of which never proceed to trial), an unlawful arrest brief, an eviction brief, an anti-spoliation brief, an unfair dismissal brief either at the CCMA or in the labour court, and such like. However, much more application and industry is required to navigate the less than placid waters of opposed reviews, interdicts in hotly contested narrative cases, constitutional challenges to conduct, legislation or agreements, tax

disputes, intellectual property disputes, maritime law disputes, and generally complex commercial law disputes. It is practice in these esoteric areas of law that prepares a legal practitioner for a competent career on the bench. Absent experience in these and similar areas of practice, one is simply set up for failure on the bench.

It should then come as no surprise that many high court judgments, mainly by black judges, are often reversed on appeal to the SCA, often with scathing remarks. I have read a few. This is possibly a function of a lack of grounding and experience in the practice of law at the highest level. It is a function of skewed briefing patterns in favour of whiteness. The Judicial Service Commission does no one any favours by appointing Black lawyers to the bench just to make up numbers in the diversity game. The focus should be on capacitating Black practitioners for judicial appointment while they are still in practice. The only fool-proof way of achieving that is taking the chance on black lawyers with important qualitative briefs. If this is not done while people are in practice, the inadequacy of the ill-suited will catch up with the entire judicial system sooner or later.

The training provided to aspirant judges, while a welcome intervention, cannot be a substitute for the experience a legal practitioner gains from working on complex briefs while in practice over an extended period.

The deleterious effects of skewed briefing patterns on perceptions of competence

Not so long ago, the President appointed 3 legal practitioners to act as Justices of the Constitutional Court. All of them, bar none, are white males. The Pan African Bar Association of South Africa (PABASA), of which I am a member, issued a media statement congratulating them. But the statement rightly cautioned on the impression that such appointments create. The inescapable impression is clearly that the President and the Chief Justice could find no suitable Black legal practitioner to appoint as an acting Justice of the Constitutional Court. Short of the refusal of Black practitioners who may have been approached to take up the opportunity, the only other reason must be that the Chief Justice and President see merit only in these 3 white males to act in the apex court. Now, why would that be? A possible answer would be that Black practitioners are not exposed to constitutional litigation sufficiently to get the nod for an acting stint in the apex court. And why would that be? Skewed briefing patterns in constitutional litigation that favours white males. The message is loud and clear: only white males in legal practice are sufficiently competent to act in the apex court. This is the deleterious effect of skewed briefing patterns in constitutional litigation.

The impression created by these appointments (without any explanation) is implicitly racist. It reinforces the perennial stereotype in South Africa that a white male is synonymous with competence that is lacking in black people. This is a lie. But lies reinforced have a tendency of taking root as fact. This does not assist the Transformation cause so eloquently captured not only in the Constitution and numerous pieces of legislation seeking to give effect to it but also in numerous judgments of our courts, including the apex court.

The deleterious effects of skewed briefing patterns on the development of South African jurisprudence

Another irreversibly damaging effect of skewed briefing patterns that favour white lawyers is felt in the development of South Africa's jurisprudence. At an international law conference in Franschhoek, a revered Justice of the SCA and former colleague laid this bare in his explanation of why there has been an increasing resort by commercial litigants to private arbitration and away from the high court: it is the perception that latter day appointments to the high court in South Africa are not equipped to adjudicate complex

commercial disputes. Of course, this is a less than subtle vote of no confidence in Black judges because there has been a surge in the appointment of Black judges to the high court in recent years as s 174(2) of the Constitution looms large as regards the need for the judiciary to reflect broadly the race and gender demographics of South Africa in the judicial appointment exercise.

The danger with privatising the resolution of complex commercial disputes, however – as with most Transformation-centric issues in South Africa that is lost in the white indignation towards an inconvenient wrestling with Transformation imperatives that have been relegated to insignificance for the past 30 years – is that the development of South Africa's commercial law jurisprudence is the worse off for it.

Private arbitration awards are exactly that: private. They do not form part of the rich tapestry of the body of law that informs the jurisprudence of the country. That in turn weakens the stability of a functioning state. So, because white business (which comprises the majority in South Africa because of the legacy of apartheid) has no confidence in Black judges' competence to adjudicate complex commercial disputes, they "opt out" of the court system leaving mainstream commercial law jurisprudence stagnant.

The whole development is thick with irony that is completely lost in the very people who "opt out" of the mess they themselves have caused and continue to cause. The irony is, self-evidently, this: white business opts out of the court system for the adjudication of commercial disputes because they lack confidence in Black judges. Black judges lack experience in complex commercial cases because they were not briefed in such cases while in practice. So, if white business is not briefing Black lawyers in complex commercial cases, from where do they expect Black lawyers to gain experience in these matters so that they can adjudicate on them competently when appointed as judges? In other words, are those who "opt out" of the court system not the authors of the very mess from which they now "opt out"?

When adjudication on commercial law disputes is privatised in this way, law libraries do not get access to the rich harvest of complex legal principles that are developed in private arbitration disputes. When law libraries lack this material, law students and legal scholars will not have access to it and so will not get to engage with these principles in critical analysis and development of our commercial law learning. When academics have no access to the wisdom that springs from private arbitrations, practising lawyers will have no access to them either, and so will not be able to cite them as authority in argument before courts. When courts have no access, these principles will not find their way into our law reports. It they are not in our law reports and in academic publications, the law stagnates. It is that simple. Skewed briefing patterns have a serious detrimental effect on the development of our law.

What is the solution?

Many white colleagues have asked whether they should now decline a brief just because they are briefed with other white lawyers by a white lawyer. I do not know if this is a serious question expecting a serious answer. And so I have given it a simplistic answer: No. It is not, in my view, a question that requires cerebral engagement as it does not appear to spring from such an exercise either.

The solution is not complicated. The South African state in all its forms,[13] as the largest consumer of legal services, must

[13] Local government, provincial government, national departments, state-owned enterprises, and other organs of state

trust Black lawyers with quality and complex legal work of the kind I have described. No one is born an expert. Black lawyers went through the same vocational rigours through which our white colleagues went. The difference is that white lawyers are afforded the opportunity to excel. For reasons that perhaps only social scientists can explain, there tends to be a belief, particularly among many black people in South Africa (including professionals), that white people are inherently competent until each proves otherwise. This presumption of competence favours whiteness, while black people are, as a group, stuck with the presumption of incompetence. This is the inferiority complex that our government needs to confront and overcome. It is a legacy of apartheid.

As regards the private sector, there is not much that can legally be done to address skewed briefing patterns because – as three decades of experience in the practice of law in South Africa bears testimony – one cannot effectively legislate against racial prejudice in private spaces. The state has even failed to intervene where Black lawyers are excluded (or subjected to fronting practices) by white law firms doing state legal work. And even calling out white racism these days has become something of an occupational hazard, with courts issuing stern warnings against it in judgments, seemingly expecting evidence of racism on the criminal standard as if perpetrators of white racism are in the habit of announcing the true reason for exclusionary conduct against Black lawyers.

Short of legislating racial prejudice out of the procurement of legal services, and assuming that those in the legal profession who baulk at redressing skewed briefing patterns do so because they do not quite appreciate the serious long term negative effects of this practice, it seems to me an industry-wide symposium or conference would be a good start on the subject and other related Transformation issues. Such a symposium should be arranged by the Legal Practice Council (LPC) and attended by everyone from candidate legal practitioners to the Judges of the apex court. Failing the LPC, I would urge the Chief Justice to arrange such an industry-wide symposium. To my mind, nothing on this scale has ever been attempted in South Africa. Now is the time.

The debate in such a symposium should cover Transformation in the legal profession as a whole, including barriers to entry in the profession, attrition rate among Black and women practitioners and reasons therefor, briefing patterns both in state and private legal work, fee payment regime, what is a reasonable fee, judicial independence and impartiality in practice, law and politics, judicial activism (what is it and whether it is desirable in today's SA), and other topics.

It would be great if the symposium culminates in a statement of intent or some (morally) binding agreement among legal practitioners, the state and big business. But my primary purpose is to leave the symposium having achieved at least one thing: a common understanding of what the real problem is and what the lasting solution to that problem is on which we are all agreed and to which we can all commit. I have learnt from experience that a solution to Transformation challenges in the legal profession will not come through coercion or court litigation; it will come through political will and courage, and a sense of moral outrage from those who are in control and are driven by a sense of selfless desire to avoid the looming disaster that will befall the country if we continue on this path to purgatory.

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