FORMAL OBJECTION TO THE REQUIREMENT THAT COUNSEL ROBE IN LOWER COURTS (AND ALL OTHER COURTS)

Introduction

1. The Chief Justice has invited written submissions from legal practitioners who object to the amendment of "norms and standards" as contemplated in section 165(6) of the Constitution read together with section 8 of the Superior Courts Act, 2013.

2. The Chief Justice has given notice of his intention to amend the norms and standards by the introduction of a new paragraph 5.2.6A to require all legal practitioners, including advocates, to robe when appearing in the lower courts.

3. This has not been a requirement for advocates except, it is alleged by some, in the Western Cape. I have no direct knowledge of this practice in the Western Cape.

4. Mine is an objection not only to advocates being required to robe in the lower courts but also to the robing requirement in any South African court by all legal practitioners who appear in these courts. I believe this is an opportune moment for this issue to be interrogated not only in relation to advocates robing in the lower courts but also in relation to all legal practitioners robing in all South African courts. For this reason, I shall address the robing issue in its broad terms rather than confine my objection to the narrow framing of the Chief Justice's notice or directive.

5. My address is structured as follows:

    5.1. First, I point out that the norms and standards is not the appropriate means by which to introduce robing by advocates in the lower courts. In other words, the norms and standards document does not empower the Chief Justice to introduce a robing requirement where it was not there before. Neither does the Constitution and the Superior Courts Act, 2013. The entire

exercise would thus, in my submission, be unlawful, irrational and unconstitutional.

5.2. Second, I trace the origins of the robing requirement. I do so in order to place the practice in its proper context so as to assist the Chief Justice in properly evaluating the practical necessity of the practice in today's 21st Century South Africa.

5.3. Third, I set out some of the arguments that have traditionally been advanced in favour of retaining the robing practice.

5.4. Fourth, I seek to make a case for the discontinuation of the robing practice altogether in today's South Africa. In short, I argue that there is no practical imperative for the retention of the robing practice in our courts, including lower courts. The objectives of the norms of standards, as recorded in the government gazette 37390 of 28 February 2014, are *"to achieve the enhancement of access to quality justice"*; *"to affirm the dignity of all users of the court system"*; *"to ensure the effective, efficient and expeditious adjudication and resolution of all disputes through the courts"*. Not one of these objectives requires robing for their achievement.

Lawfulness, Rationality, Constitutionality

6. It is my respectful submission that the pursuit by the Chief Justice of this mooted amendment of the norms and standards to introduce robing in the lower courts by advocates would, if implemented, be unlawful, irrational and unconstitutional.

7. The norms and standards are intended to regulate the conduct of Judicial Officers in the exercise of their judicial functions, not the conduct of legal practitioners appearing in the courts. The idea is that the exercise of judicial function by Judicial Officers must result in the achievement of the objectives of the norms and standards. As pointed out earlier, the objectives of the norms and standards are *"to achieve the enhancement of access to quality justice"*; *"to affirm the dignity of all users of the court system"*; *"to ensure the effective, efficient and*

expeditious adjudication and resolution of all disputes through the courts". The Norms and Standards document promulgated in government gazette 37390 of 28 February 2014 then records that:

> *"These objectives can only be attained through the commitment and co-operation of all Judicial Officers in keeping with their oath or solemn affirmation to uphold and protect the Constitution and the human rights entrenched in it and to deliver justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law."*

8. The norms and standards document is therefore not an appropriate vehicle for introducing robing by advocates in the lower courts. In other words, the norms and standards regulate judicial conduct in the exercise of judicial functions with a view to achieving a set of objectives expressly set out in the norms and standards. The norms and standards therefore do not empower the Chief Justice to regulate counsel's dress code in the courts. Counsel's dress code does nothing to achieve (or subvert) the stated objectives of the enhancement of access to quality justice; the affirmation of the dignity of all users of the court system; the effective, efficient and expeditious adjudication and resolution of all disputes through the courts. The Chief Justice's mooted amendment of the norms and standards to regulate legal practitioners' dress code in court is therefore not rationally related to the purpose for which the norms and standards were established and promulgated.

9. The Chief Justice also invokes the Constitution for his mooted amendment of the norms and standards. But the Constitution does not empower the Chief Justice to amend the norms and standards for the purpose he advances. Section 165(6) of the Constitution says

> *"The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts."*

10. By its *ipsissima verba*, the Constitution confers on the Chief Justice the power to exercise responsibility over the establishment and monitoring of norms and standards ***"for the exercise of the judicial functions of all courts"***. Therefore,

the norms and standards are, according to the Constitution, intended to regulate ***"the exercise of judicial functions of all courts"***. Legal practitioners' dress code in the courts does not fall under *"judicial function"* as contemplated in the Constitution.

11. In this regard, section 165(6) of the Constitution must be read together with section 8(6) of the Superior Courts Act, and the stated objectives of the norms and standards as captured in government gazette 37390 of 28 February 2014 (set out earlier).

12. Section 8(6) of the Superior Courts Act sets out the nature of the *"judicial functions"* contemplated in the phrase *"norms and standards for the exercise of the judicial functions of all courts."* These are:

    12.1. determination of the sittings of courts;
    12.2. assignment of judicial officers to sittings;
    12.3. assignment of cases and other judicial duties to judicial officers;
    12.4. determination of sitting schedules for judicial officers;
    12.5. determination of sitting places for judicial officers;
    12.6. case flow management;
    12.7. period within which judgments must be delivered;
    12.8. period within which cases must be finalised;
    12.9. determination of recess periods for superior courts.

13. While the word *"include"* in the introductory part of section 8(6) signifies that this is not an exhaustive list of *"judicial functions"* contemplated in the phrase *"norms and standards for the exercise of the judicial functions of all courts"*, the list makes plain the nature or *genus* of judicial functions that the legislature had in mind. These are the kind of functions that are directed at the achievement of the objectives of the enhancement of access to quality justice, the affirmation of the dignity of all users of the court system, and the effective, efficient and expeditious adjudication and resolution of all disputes through the courts. Counsels' dress code can play no role in the achievement of these objectives.

14. Therefore, nothing in the norms and standards, the Constitution, and the Superior Courts Act confers on the Chief Justice the power to amend the norms and standards *for the exercise of the judicial functions of all courts* to introduce robing by advocates in the lower courts – or in any court.

15. If the Chief Justice were to proceed on the path he has embarked upon, the decision will in my respectful submission be susceptible to review and being set aside for being unlawful, irrational and unconstitutional.

16. This scenario triggers immediately the line of cases that began with ***Fedsure***[1] and ***Affordable Medicines***[2]. In seeking to amend the norms and standards the Chief Justice invokes a public power conferred on him by the Constitution read together with the Superior Courts Act. The exercise of public power is constrained by the principle – which is rooted in the constitutional doctrine of legality and which is in turn an incident of the Rule of Law – that no public power may be exercised and no public function performed beyond that which is conferred to the functionary by law.

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[1] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458; [1998] ZACC 17, at para 58:
"It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality."

[2] Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC); 2005 (6) BCLR 529; [2005] ZACC 3, at paras 48 & 49:
"[48] Our constitutional democracy is founded on, among other values, the '(s)upremacy of the Constitution and the rule of law'. The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'. And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.
[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power." (footnotes omitted)

17. In ***Democratic Alliance & others v Acting National Director of Public Prosecutions & others 2012 (3) SA 486 (SCA)*** at [30], the Supreme Court of Appeal held that the Rule of Law also requires rationality as a prerequisite for the validity of the exercise of all public power.

18. Thus, since the Chief Justice seeks to amend the norms and standards to achieve that for which the norms and standards are not intended, such an exercise will in my submission be irrational and a breach of the principle of legality as now firmly rooted in section 1(c) and section 2 of the Constitution as a constitutional value.

19. I now move to the next section: the origins of the robing requirement in the courts.

Origins of robing requirement in courts

20. The tradition of robing in court originated in medieval Europe and can be traced back to the legal practices of ancient Rome and England.

21. As regards Roman influence, magistrates and other court officials in Rome wore togas as a symbol of their authority and status. The toga was a distinctive garment that denoted a person's position in society. Its use in legal contexts established a precedent for formal dress in judicial proceedings.

22. In medieval England the practice became more formalized. Judges and legal practitioners began wearing specific clothing to signify their roles in the legal system. During this period, the distinctive black robe became associated with the legal profession, particularly in the context of the church of England and its courts. The ecclesiastical influence on legal dress was significant as many early legal practices were intertwined with religious authority.

23. As the common law system developed in England, the wearing of robes became a symbol of the legal profession's seriousness and authority. The robes served to distinguish judges and lawyers from the general public, emphasizing their roles as representatives of the law and protectors of justice.

24. Robing is also a colonial influence. When European powers colonized various regions, including South Africa, they brought legal traditions, including the wearing of robes, with them. In many former colonies, including South Africa, these practices were adopted and adapted within local contexts, resulting in the continuation of the tradition.

25. Over time, the wearing of robes has evolved into a symbol of the rule of law, professionalism, and impartiality. Some argue that the attire is not only a mark of the legal profession but also serves to instil a sense of respect for the court and its proceedings.

26. While many countries (including countries on the African continent) maintain the tradition of wearing robes, the styles and colours vary, reflecting local customs and legal cultures. In South Africa, for example, the robes worn by attorneys differ from those donned by junior advocates and both differ from those worn by senior advocates or Silks. The idea is that this signifies the individual's role or status within the legal framework or hierarchy.

Arguments in favour of retaining robing in courts

27. The arguments in favour of retaining (and even extending) the requirement of robing in South African courts are wide and varied. In this section I advance those that are frequently advanced.

28. It is argued that the requirement for legal practitioners in South Africa to wear robes in court serves multiple important purposes that reflect both the legal tradition and the cultural context of the country. This practice, which is rooted in colonial history, symbolizes the dignity, authority, and professionalism of the legal profession.

29. Firstly, it is argued that robing establishes a formal atmosphere within the courtroom. This attire signifies the seriousness of the judicial process and the respect that should be afforded to the law. By donning robes, judges and lawyers

create a visual representation of the gravity of their roles in upholding justice. This formality helps to reinforce the rule of law, reminding all participants – litigants, witnesses, and the public – of the importance of the proceedings.

30. Secondly, it is argued that robes serve to promote equality within the courtroom. In a diverse society like South Africa, where socio-economic disparities are significant, the uniformity of legal attire minimizes distinctions based on personal wealth or fashion. This can help to level the playing field, allowing the focus to remain on the legal arguments and evidence rather than on the outward appearances of those involved in the case. The robes act as “a great equalizer”, emphasizing that all individuals, regardless of their background, are subject to the same laws and judicial processes.

31. Thirdly, it is argued that the tradition of wearing robes connects South African legal practitioners to a broader global legal heritage. Many legal systems around the world have similar practices, which fosters a sense of continuity and respect for the law that transcends national boundaries. This connection to international legal norms can enhance the credibility of South Africa’s legal system, especially in a globalized world where legal professionals often collaborate across borders.

32. Fourthly, it is argued that the requirement for lawyers and judges to wear robes can also be seen as a way of preserving the dignity of the legal profession. It instils a sense of pride and responsibility among legal practitioners, reminding them of the ethical standards and professionalism expected in their roles. This pride can enhance the public’s perception of the legal system, fostering trust and confidence among citizens.

<u>The case against robing in courts</u>

33. The practice of wearing robes in courts by lawyers in today’s South Africa is in my view an anachronistic norm for several reasons, and there are cogent arguments for why it may be time to reconsider or discontinue this tradition altogether.

34. But before advancing arguments against retention of the robing practice and in favour of discontinuing it, I want to address the arguments usually advanced for retaining the practice. I have set them out above. All of them can be dismissed with one overarching argument: they are irrelevant to the attainment of the core values and objectives of a modern justice system, namely, the enhancement of access to quality justice, the affirmation of the dignity of all users of the court system, and the effective, efficient and expeditious adjudication and resolution of all disputes through the courts.

35. As regards the *"formal atmosphere"* that is said to be created by robing in the courtroom, and the *"seriousness of the judicial process and the respect"* that it signifies, it should be borne in mind that other formal processes like private arbitrations, specialist tribunals like the Competition Tribunal and the Financial Services Tribunal, are also *"formal"* in nature and have an air of a *"formal atmosphere"* about them. Legal practitioners appear in these fora and are not required to robe. The proceedings in these fora are not thereby rendered less formal or command less respect by the public. And the proceedings are not rendered less dignified by counsel appearing in attire other than robes. The Chief Justice has himself presided over a commission of inquiry that spanned over 3 years. Counsel appeared before him unrobed. The process was not thereby rendered less formal or less dignified or less respected by members of the public. On the contrary, lawyers, analysts and casual observers alike continue to make earnest calls for his recommendations to be implemented. The fact that no one was required to robe there has not detracted from the formality, dignity, seriousness and general gravitas of these processes.

36. The uniformity and *"equality within the courtroom"* argument is perverse; the idea that robing *"levels the playing field"* even more so. These ignore the fact that the cost of robes, waistcoats, bibs and robe bags serves to increase barriers to entry in the legal practice market. Many entrants into the legal profession in South Africa these days are black and first generation tertiary qualified people. Upon obtaining their tertiary qualification in law, these aspirant advocates are currently subjected to a 12 months unpaid period of pupillage, and are forbidden from

earning income anywhere.[3] Only one Bar (Pabasa) voluntarily pays a monthly stipend to each of the young aspirant advocates doing pupillage with us at the Pius Langa School of Advocacy. Emerging fresh from an unpaid apprenticeship period of 12 months, they are then subjected to spending some R5,000 on a robe, a waistcoat and bib that they can only wear in court. At least a suit has multiple uses. So does everyday African attire which is usually worn on so-called "Heritage Day" in South Africa or on themed occasions. To say robing creates *"equality within the courtroom"* is perverse. I address this issue further in a different context later.

37. The argument that wearing robes *"connects South African legal practitioners to a broader global legal heritage"* and fosters a sense of continuity and respect for the law that transcends national boundaries is not borne out by reality. The UK Supreme Court, formerly House of Lords, is the highest court in the UK. Since November 2011 neither counsel who appear there nor the appeal judges themselves are required to wear robes in that court. There is no sense of connectedness to the *"broader global legal heritage"*, or sense of continuity, even though the tradition of wearing robes originated in medieval England. Courts in the United States, once a colony of England, do not require legal practitioners to robe in court. There, too, there is no sense of connectedness with global legal heritage, and the rule of law is no less respected by virtue of the absence of the robing requirement. On the contrary, robes notwithstanding, some of us have experienced in our higher courts some of the worst behavioural excesses. In at least one instance, even law enforcement officers saw fit to barge into a courtroom, populated by robed legal practitioners, and arrest a robed legal practitioner while performing his professional duties as counsel defending an accused person in a criminal court. Robing does not confer dignity on court proceedings. The conduct of legal practitioners, judicial officers and law enforcement officers does.

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[3] Only recently, on 16 August 2024, the Legal Practice Council has published a notice that pupils will now be paid a monthly stipend of R8,000. Whether this will be enough for an under-privileged pupil's living expenses, including a daily commute from the distant South African townships to his or her mentor's chambers in Sandton or Cape Town or Durban City (a vestige of apartheid spatial planning) or pay rent for an apartment closer to town, is doubtful.

38. So, what are the arguments against retention of the robing practice?

39. First is Cultural Relevance: South Africa is a diverse nation with a rich tapestry of cultures and traditions. The formal robes primarily reflect a colonial legacy that may not resonate with many South Africans today. As the country continues to evolve and embrace its multicultural identity, maintaining a dress code rooted in colonialism is out of touch with contemporary societal values.

40. Second is Accessibility and Inclusivity: As I have already pointed out in relation to the uniformity and equality argument by proponents of the robing tradition, the requirement to wear formal robes can create barriers for individuals entering the legal profession. Aspiring lawyers from less privileged backgrounds may find the costs associated with purchasing specific attire prohibitive. Discontinuing the practice could promote a more inclusive legal environment that welcomes diverse voices and reduces socio-economic disparities within the profession.

41. Third is the Shift Towards Practicality: In an increasingly fast-paced world, there is a growing emphasis on practicality and functionality in the workplace. Formal robes can be cumbersome and impractical, detracting from legal practitioners' ability to work efficiently. A more relaxed dress code could allow lawyers to focus on their cases without the added concern of adhering to traditional court attire. What is more, the South African climate does not generally conduce to the wearing of robes in courtrooms. This is particularly so when (more often than not) the air conditioning system is dysfunctional in our courts on hot days, and the spectre of unpredictable "loadshedding" or power outages offers no comfort even when the air conditioning system does work.

42. Fourth is Focus on Substance Over Appearance: The legal profession should prioritize the quality of legal arguments and the pursuit of justice over outward appearances. These are the objectives of the norms and standards. Discontinuing the requirement for robes would shift the focus from superficial aspects of legal practice to the merits of the case at hand. This change could foster a more egalitarian atmosphere in the courtroom, where all participants are viewed through the lens of their legal expertise rather than their attire. In this

regard, the perception that some judges tend to rule based on WHO (seniority) is advancing which point may be removed. It is generally difficult to form a bias based on seniority when you do not know which legal practitioner before you is senior. This conduces to the enhancement of access to quality justice, the affirmation of the dignity of all users of the court system, and the effective and efficient adjudication and resolution of all disputes in the courts.

43. Fifth is Global Trends: Many jurisdictions around the world are moving away from traditional legal attire, adopting more modern and varied clothing styles for legal professionals. I have already pointed to examples in the UK Supreme Court and in the United States. This trend reflects a broader societal shift towards informality and personal expression. South Africa could benefit from aligning its legal practices with these global changes, promoting a more contemporary image of the legal profession.

44. Sixth is Representation of Justice: While it may be argued (and has indeed been argued by proponents for the retention of robing) that robes symbolize the authority of the law, they may also perpetuate a sense of elitism and exclusivity. In a democratic society striving for equality and justice, it is crucial to ensure that the legal system appears approachable and relatable to the general public. A less formal dress code could help demystify the legal process and make the court system seem more accessible.

Conclusion

45. In conclusion, while the tradition of wearing robes in South African courts has historical significance, there are compelling reasons to consider its discontinuation. Embracing a more modern and inclusive approach to legal attire could align with the values of a diverse and democratic society, ultimately enhancing the legal profession's accessibility, relevance, and connection to the public it serves.

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