



Established in 1977

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28 February 2024

**TRANSFORMATION IN THE LEGAL FRATERNITY: RESPONSE TO
QUESTIONS ON JUDGE MOTHA**

1. **Should Judges ask such questions regarding diversity/transformation in an email/open court to legal representatives when dealing with cases or should they address this in judgments/other forums?**

The first issue cannot be whether Judges should ask such questions. As the BLA, we believe that the debate, in its current form, or as understood in some segments of society, is taking an incorrect direction. The first and main question is- whether transformation is taking root as it should? However, we proceed to answer your questions, as you asked them and shall revert to whether transformation is taking root as it should.

Nothing, other than legalism, stops Judges from raising such questions. Transformation is central to our constitutional democracy. And in matters which affect or have aspects which affect transformation, legalism is not permitted.

A directive, whether communicated by email or not, should be complied with, even if a litigant or a law practitioner does not like it. As the BLA, we therefore support Motha J, in raising this issue.

2. **Transformation within the judiciary has been raised as an issue that needs to be addressed. In your view is it being adequately tackled in the legal fraternity regarding - black advocates, lawyers being briefed?**

Transformation in the Judiciary and legal profession must be addressed. As the BLA, our take is that it is not attended to as it should. The BLA was established, in the first place, to advance the course of African legal practitioners, who suffered from the effects of exclusion from opportunities. That mission is still relevant.

All are enjoined to actualise the spirit of the Constitution that seeks to redress the past and ensures that the playing fields are levelled. That is the context.

The composition of the legal teams in the matter in which Judge Motha presided is evidence of an untransformed system. The case in point is reflective of the obtaining situation in the country, skewed briefing patterns.

Worse, a State Organ, which is supposed to be a champion of transformation, sees it fit to have the team as was the case in the matter. Were this to remain, others would feel emboldened to act as the Commission did. As the BLA, we reject such an approach by the State Organ concerned and others who act in similar fashion.

It is particularly disturbing since the matter before Judge Motha involved and/or was about transformation. The law should not be further developed in the absence of Africans. Jurisprudential development would, in the context of the case in question, have been grounded in the submissions of the legal teams. Absent an input from African practitioners, law which affects Africans, would have been developed without Africans.

3. **What steps need to be taken so we have more black advocates, lawyers being briefed in matters especially civil matters?**

The first step is for the State to ensure that its briefing pattern is no longer skewed. The Legal Sector Code, too, should be Gazetted by the government. The Code is a document which, if signed into law, would apply to the legal profession, on the transformation front, and may contribute to bringing about transformation. That is the part about the State.

Transformation plays an immediate and long term role. The immediate impact is obvious, since State legal instructions bring immediate empowerment. For the future, we need to remember that Judges are sourced, in the main, from legal practice. Therefore, redress would result, in the long run, with the Judiciary which is equipped with men and women, from all racial backgrounds, who are properly qualified to deal with matters having been exposed to quality work during their time in practice.

As the BLA, we shall pay particular attention to matters of transformation, not because of this matter, although the matter may partly serve as an impetus to the steps we shall take. We shall work hard for solutions well beyond the commission matter.

Solutions may include punitive measures against those who violate the Constitutional Transformative imperatives. We take it that there will never be any sound basis for anyone not to comply with the transformation imperatives. Legal representation, in the commission matter, demonstrates the violation of section 9 of the Constitution, equality. Judge Motha was right in directing as he did.

Beyond the commission case, without serious legal consequences, a society based on the achievement of equality can never be attained. Therefore, as the BLA, beyond this statement, further work shall be attended to and the outcomes be announced, once we have resolved on what should be done.

4. Should the office of the chief justice be doing more to ensure that the profiles of black advocates and lawyers are raised?

As recorded above, the government and organs of State, including the Commission, should take responsibility. Yes, the Chief Justice, further President of the Supreme Court of Appeal and Judges President may play a special role. A rule may be developed to the effect that were there is more than one legal representative in a matter, in the order of the effect of the injustices of the past, composition should include legal representatives from those who are meant to benefit from the BBBEE. Section 173 of the Constitution permits Judges to regulate the conduct of proceedings. Amongst other persons who play a role in the conduct of proceedings are Advocates and Attorneys. It is imperative for those who appear before Judge, on their own, to bear in mind, before Judges raise issue with composition, to attend to racial aspects of their composition. Failing, Judges are permitted to act as Judge Motha did.

There could be many other ways in which the leaders of the Judiciary may assist.

Prepared by

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