

attorney is assured of competent delivery whilst building a relationship with the new member that may in turn result in the attorney's subsequently briefing the junior directly with more complex and substantive matters. This method enables attorneys to brief new counsel who have not yet had the opportunity to prove their worth whilst at the same time ensuring the structured transferring of skills to junior members across the gender and race lines. For this project to succeed, the support of attorneys is essential and in Johannesburg there are apparently several firms which are already participating in the BRIDGEbrief project and which

are committed to contributing towards the growth of a pool of demographically diverse and talented young counsel. These firms, as well as the senior counsel involved in the BRIDGEbrief project, should be commended for their efforts, and it is hoped that similar initiatives will be undertaken at the various Bars across the country.


At this stage of our country's political landscape, when our judiciary and the legal profession generally is under great pressure to transform, it is imperative that the various stakeholders, including the attorneys' profession, play their part in developing the skills of com-

petent advocates of all races and both genders. This is especially so if one considers that many members of our judiciary will be sourced from the Bar. It is therefore in the interests of the administration of justice that the Bar is seen to be representative of the larger community. Hence, it is vital that measures are adopted to alleviate the financial obstacles facing many women and black junior members when joining the Bar, as to ensure that traditional briefing patterns are changed and to ensure that there is a structured transferring of skills to junior members, specifically women and black members.

Endnotes

- ¹ Justice Kate O' Regan 'Identifying the Barriers' in 2004 August *Advocate* 29.
- ² See Tables 'A' and 'B', O' Regan *op cit* 30.

- ³ Janet Kentridge 'Women at the Bar in England and Wales' 2004 August *Advocate* 27.
- ⁴ Roland Sutherland SC 'Changing briefing patterns' in 2005 (3) April *Without Prejudice* 20.

- ⁵ *Ibid.*
- ⁶ The manner in which the BRIDGEbrief operates is discussed in the article by Sutherland cited in fn 4. 

Letters to the editor

The silk route

Bert Bester, Pretoria and Johannesburg Bars

As postscript to my paper entitled 'What, when counsel can no longer be bothered to apply for silk?' which I withdrew from publication after you indicated to me that your editorial committee was not willing to publish it, but would consider publication of a letter of 'not more than 1 000 words' as 'I am entitled to my view', briefly then I raise the following points as it seems that the paper has nevertheless now wended its own way around the Bars.

- 1 It would be a great pity if that letter focuses undue attention on the *successful* silk 2005 applicants, as it would be unfair to them, much in the same way as it would be unfair to begrudge a lottery winner his or her good fortune.
- 2 Where the focus should be, is also not on me, but on the very many, very deserving candidates (much more so than I) who have been made to suffer multiple, successive, humiliating and often grossly unfair rejections (some as many as eight, nine and eleven) over the course of many years. Some of them, from several of the Bars, have contacted me after having read my paper. I only wish that some, or even better, all, of them would make known their ordeals and expose the often outrageous injustices perpetrated on them. But

that will not happen. How can one, for example, expect of an unsuccessful, but decidedly meritorious silk candidate and one-time very successful counsel to tell the world that he was rejected because he was considered 'a drunkard', and that he was told never to bother to apply for silk again? (Privately and orally of course, so that the reason then given for the rejection could, if necessary, easily be denied.)

- ³ At the close of the silk applications at the Pretoria Bar this year, the chair was asked by some members, for the purposes of the 2005 silk application round the following: Who had set the ratio of silks:non-silks at that Bar? Who had set the proposed quota for new silks at four? How was that ratio and quota determined? His attempts to explain and justify those sore points rapidly faded into bluster, much to the mirth of his audience. (Perhaps he ought rather to have retreated from the public corridors to the safe haven in the arms of his silky co-conspirators than to attempt an answer.)
- ⁴ And that, by a circuitous route, gets me to my real point. The leaders of our Bar, with suffocating piety, proclaim that the Bar is and always has been the Champion of the weak, the Great Defender of the rule of law, the Crusader for transparency and for truth, justice and equality for all, for 'zero tolerance' (for racism), for *liberté, égalité et fraternité* and all those nice sounding clichés that make us feel so warm about ourselves. The Bar rushes headlong to be the first with


press releases to decry every perceived infringement of basic human rights and even every conceivable indicator of brewing injustice. Yet, when it concerns our own backyard, these leaders, who hold all the power, knowingly and deliberately and with total abandon deny their non-silk members even the most basic of such rights in the silk selection procedure and perpetuate discriminatory and self-serving monopolies and anti-competitive practices for their sole benefit.

- ⁵ It may seem an issue *de minimis* to the newcomer at the Bar and the now mouldy silk, both years distant from the boiling epicentre of the silk selection farce, or even to those whose more recent progression to silk at a tender year of call was uncomplicated and smoothed by years of sycophancy in elitist groups and by the generous ladling of leader briefs to silks. But is it *de minimis*? On the contrary, inconsequential as the injustice and unfairness inherent in the procedure may seem to some, to others it is no less than a vile hypocrisy and a disgrace. If our self-righteous and Pharisaic leaders can so glibly fail us in so small a matter and so jealously safeguard their own interests at the expense of the rest of us, how can we believe that their motives are pure in other much more important matters?
- ⁶ To give just one example, the body of silks, in a Damascene conversion, now magnanimously tenders all manner of strategy to address skewed and unjust 'briefing patterns' (which was of surpris-

ingly little concern to them even up to the very recent past). Of course there is no fault in principle with that effort, but is their real underlying motive not that, when translated into practice, these new briefing patterns must be so structured as to ensure that they, as mentors and litigation leaders of their new-found, formerly disadvantaged friends, will not themselves be excluded from those lucrative State briefs and eventually, when the black empowerment legislation peaks, other briefs too?

7 In this context, one of our silky brethren at the recent Johannesburg Bar AGM proclaimed that 'he has in the past often

used blacks in important cases and that he has always considered them his friends.' And who am I to query him on that? But hard as I might try, I cannot recall *ever*, in the days of yore and those more recent, seeing any of them (except for the few exceptions amongst us) at work and at play with black colleagues. Do you? Must we now believe that these reformist strategies by silks are inspired by genuine, contrite concerns and philanthropy, or are they also driven purely by self-interest and the desire to maintain and perpetuate self-serving monopolies and anti-competitive practices?

8 So why not have recourse to the courts and the Competition Commission to address this wrong some have asked. I say 'no' to that. Our silks know what is right and they know what they must do to remedy their wrongs. And that they must now do, of their own accord, without being forced to do so. In the meantime, the embarrassment of having to suffer their hypocrisy and perhaps even their deceit is so much smaller than the embarrassment of having our Society [of Advocates] held up by a court or a commission to public ridicule. 

Racism on the Bench?

PAM Magid, Durban

In recent months there has been quite a furore about alleged racism on the Bench. The origin of the debate was the publicity accorded to a report submitted by Hlophe JP to the Minister of Justice. Indeed, all sorts of people (and whether or not they know anything about the topic) have felt compelled to make their views known. (I refer, for example, to an article in the *Daily News*, 7 April 2005, by the Premier of KwaZulu-Natal under the bold type heading 'Guarding the guardians.') It is not for me to comment on the propriety of the learned Judge-President's conduct in sending the report to the Minister of Justice (and thereby creating a political issue) rather than the Chief Justice (which would have enabled the judicial family to deal with it).

Most of the incidents mentioned in the report occurred in the CPD and I therefore am unable to express any view as to the accuracy with which the learned Judge-President has described them. I do not for one moment doubt that he has correctly described his perception of the incidents but in the interests of the *audi alteram partem* principle one would have liked to hear the versions of the persons criticised and implicated in the report and, more important, their reasons for acting in the manner alleged. I say this because Hlophe JP draws an inference that the conduct he complains of was motivated by racism. But in my view *res ipsa loquitur* does not apply to any of the incidents he describes.

The word 'racism' is of relatively modern origin – it did not even appear in the third edition (1967) of the *Shorter Oxford English Dictionary*. The latest edition of the *Oxford English Dictionary* (the OED)

gives two definitions of the word. The first reads as follows:

'(a) the theory that distinctive human characteristics and abilities are determined by race.'

The second definition simply equates the word to the word 'racialism' which the OED defines as:

'belief in the superiority of a particular race, leading to prejudice and antagonism towards people of other races especially those who may be felt as a threat to one's cultural and racial integrity and economic well-being.'

It follows that before conduct or language can be labelled 'racist' it must be motivated by racial prejudice or racist beliefs.

It is necessary before analysing the arguments advanced in the report that I make my own position perfectly clear. I have a two-fold reason for embarking on this exercise. In the first place I disagree profoundly with what appears to be Hlophe JP's fundamental thesis, namely that any white person who criticises a black person is necessarily a racist. And secondly (and I declare my interest in this regard) I consider that his recommendation that retired judges be prohibited from sitting as arbitrators is based on faulty reasoning.

I was one of the fourteen white judges of the NPD who opposed the appointment of our present JP as DJP of our division. As a consequence we were all labelled racists. This was simply, in my view, a knee-jerk reaction to criticism levelled at a black man by persons of a different colour. It is not axiomatic that a white person who opposes the appointment of a black person to an office must necessarily be motivated by racial prejudice. The Judicial Service Commission (the JSC),

it must be remembered, invited (and, I believe, still invites) comments on applications to it for appointment to the Bench. In those early days of the activities of the JSC many of us believed that it really wanted the comments of the Bench on new appointments.

In this day and age, it is extremely hurtful, if not defamatory, to attribute racist motives to anybody. Rightly or wrongly, I, and probably the other signatories to the letter, thought that Tshabalala J (as he then was) was not the right man for the job but that view had nothing to do with the colour of his skin. He had, after all, been a friend and colleague of many of us who had been members of the Natal Bar. If I remember correctly, Judge Tshabalala had been a judge for barely three years at the time. Judges, and particularly those with a background at the Bar, tend to be rather conservative in relation to matters of seniority and that, rather than the fact that he was a black man, was certainly the reason that it may have been suggested that he would not be able to command the respect of his colleagues.

In describing conduct as racist, Hlophe J P's reasoning is, with respect, faulty. It tends to go like this: 'Judge X resigned from the Bench after losing a nomination contest. The person who beat Judge X to the nomination was black. Therefore Judge X resigned because he had been beaten by a black man.' This line of reasoning is a false syllogism and also suffers from the logical fallacy of *post hoc, propter hoc*.

It is an elementary principle of our law that, in deciding a criminal case by drawing inferences, the inference sought to be drawn must not only be consistent with all the proved facts, but the proved facts must be such that they exclude