Transformation, independence and poor 'products' of the LLB

By Judge Phineas Mojapelo

The attorneys' profession occupies an important position in the legal life of society. Yours is a profession that serves most of the time as a point of first contact for those who seek remedies from the law. For many, your image is the image and face of the law. The rest of the legal profession watches this face and understandably expects you to keep it shining in the mind of users of legal services. That carries with it a number of challenges and expectations, some of which I will share with you.

Transformation of the legal profession and the judiciary

Transformation of the legal profession is essential for transformation of the judiciary, and transformation of the judiciary is important to align it with the Constitution. One therefore welcomes the move to transform the legal profession and significant steps have been taken in this direction.

Transformation of the governance of the profession is another area and the profession appears to have found a model that has worked reasonably well for 18 years. However, the negotiations that resulted in the 50/50 model were not easy. Change is never easy. Be assured, however, that the profession is better off with that deal than it would have been without it. Defend and preserve it until you find something better that works.

According to records of the General Council of the Bar of members of its constituent Bars, as at 30 April 2012 there are 2 384 practising advocates, 60% of which are in Johannesburg and Pretoria. Of that total, 76% are male, 24% female, 73% white and 27% black.

According to figures from the Law Society of South Africa, as at 5 May 2012 there are 21 007 practising attorneys. Of that number, 65% are male, 35% female, 65% white and 34% black [in the remaining 1% race was not specified].

These figures show that in regard to race and gender representivity, the attorneys' profession has made 10% more progress on the transformation trajectory than the advocates' profession. The average of the two professions shows that there are 23 391 legal practitioners in total, 67% of which are male, 33% female, 66% white and 33% black.

The representation of black lawyers in the legal profession has moved in the 20 years since 1992 from 10% to 33%.

Gender representation has moved to about the same level, although it took off from an even lower base. It is a noteworthy improvement but one that unfortunately still reflects the deep impact of some 342 years of racial segregation. It is true that the legacy of centuries of racial domination cannot be undone over two decades. On the other hand,

we do not have the luxury of another 300 to 400 years to correct the imbalances. This simply means that our generation, which transcends an era of a repressive system to an ideal one envisaged by the Constitution, is challenged to find effective measures to transform society. Speed, however, should not outpace sustainability. It will be fruitless to bring quick-fix measures overnight that will simply be swept away by lack of attention to sustainability. Effectiveness and sustainability must underpin our transformation programme as we resolve to speed it up.

The position of the judiciary at the High Courts, the Supreme Court of Appeal and the Constitutional Court, according to figures kept by the Judicial Service Commission (JSC) is, as at 31 May 2012: Of the 237 judges, 34% are white, 66% black, 71,7% male and 28,7% female (I have included in the term 'black' those who were referred to as 'coloured' and 'Indian'. In the figures provided by the professional groupings, the category 'black' is subdivided into 'African, coloured and Indian' and at least one of the groups refers to 'Asians').

A comparison of the legal profession with the judiciary shows that racial transformation of the judiciary has gone almost 100% faster than that of the legal profession. Black judges constitute 66% of judges, while practising black practitioners constitute 33% of legal practitioners. Gender transformation of the legal profession has gone a tiny bit faster than the judiciary. This is thanks mainly to the faster transformation of the attorneys' profession (34%) compared to the advocates' profession (27%). At almost 29%, gender transformation of the judiciary is between that of the Bar and the attorneys' profession. On all fronts we still have a lot to do to advance gender transformation. If one looks at the figures, we need to do doubly more to advance black women than women in general.

The fact that racial representivity of the judiciary has moved faster than that of the legal profession is a lopsided development that not unexpectedly induces a strain on the judiciary, given the fact that a transformed legal profession has to feed into a transformed judiciary. The legal profession is challenged to work harder to advance transformation in the profession in order to sustain and improve transformation in the judiciary.

When I focus on the judiciary alone, and on race transformation in particular, like a typical lawyer I am tempted to pose one or two questions about transformation, which I will not answer, but will leave you to debate and possibly answer. Initially the Constitutional Court's 11-judge Bench consisted of four serving judges, who were judges prior to 1994. The first judges to that court were appointed in 1994 through the JSC. None of them was appointed to that Bench by or under the apartheid government. The question then is: Was there ever a need to transform the Constitutional Court judiciary? Today, there is in fact none of them who was a judge before 1994. Is there today a need to transform the judiciary of that court? Let me go a step further, all judges at the South Gauteng High Court were appointed after 1994 and through the JSC. There is not a single one, and there has not been any in the last two years, who was appointed prior 1994. Then, the next question: Is there a need to transform that Bench?

This is probably true of most Benches in SA. There is probably no more than a handful of serving judges who were appointed under the old government. Is it racial transformation of the judiciary that we require? Or what else do we require? What do we mean by transformation in this context? Do we have a new, clearly defined meaning or agenda for transformation, presuming that we still pursue it? Who is going to announce the end of the race component of that programme and under what circumstances?
It is necessary to debate these questions intelligently and unemotionally so that we are on the same page when we speak about racial transformation of the judiciary. Or is it more appropriate to talk about assessing the work of the JSC in appointing judges? Unless these questions are faced squarely and answers are sought, there is a danger that we may not realise the moment that may come, if it has not come as yet, when protection of the independence and the impartiality of the courts has become as important as, if not more important than, their transformation. We should be alert for the moment when those who may wish to interfere with and undermine the independence and impartiality of the courts may find it convenient to do so under the guise or in the name of transformation.

Independence of the judiciary

The independence of the judiciary is inextricably linked to the independence of the legal profession. The independence of the courts, and thus of the judiciary, is a constitutional mandate. We therefore cannot and should not have a court or a member of the judiciary that is not independent. The courts (judges) are independent and subject only to the Constitution and the law. They are required to apply these 'impartially and without fear, favour or prejudice'. Judges thus have to be fearless in executing their duties. They should not be partial or inclined to favour any side or party – whether an individual, a corporate entity or statutory body – in disputes before courts. There is a constitutional prohibition against interfering with the function of the courts.

Independence resides in each judicial officer sitting as a court of law. It does not evolve from the head of the court; it is sourced directly for each judicial officer from the Constitution and it evolves from and is protected by it.

Organs of state are obliged by the Constitution to protect the independence, impartiality, dignity, accessibility and effectiveness of the courts. The constitutional obligation in this regard clearly rests on both the executive and the legislature. The primary obligation to uphold these values rests in the first place on the individual officer, who commits to these values in his oath of office.

It may be that to some public officials an oath of office is a mere prerequisite to enter public office. However, to a judicial officer, the taking of that oath is a life-changing moment.

One is thus justly critical of a judge who, having been appointed as such, fails to uphold and support the fundamental dictates of that office. There have unfortunately been instances where the behaviour of individual judges has not served the integrity and

independence of judicial office but rather denigrated and disparaged it. When this happens, public jealousy rightly views the conduct with disdain and disapproval. The controlling body is expected to act with swiftness to express its disapproval and, if necessary, correct errant conduct. In our immediate national confine, I hold the view that the leadership of the judiciary will find it hard and may never be able to justify morally a situation in which one of their own is retained on the public purse for what will soon be six years while not performing the duties for the office for which he is being remunerated.

This and other instances of uncomplimentary behaviour fall into what I categorise as internal weak links. There are external ones as well. The cancer that erodes public confidence in the judiciary is not all within the body. In fact, one would dare say much is outside it.

The judiciary has been a subject of attack from a number of public platforms. It has been accused of being 'counter-revolutionary', of having a particular 'collective mindset' that needs to be changed; of behaving as if it has more power than the democratically elected political representatives (which is not correct). It has been accused of affording an opportunity for those who have lost at the polls to rule through the judiciary.

I am not aware that any of these criticisms has referred to a specific case. It was a generalised attack. The judiciary is not and must not be thought to be above criticism. In execution of their duties, judges generally speak through their judgments, which are delivered publicly. The judgments are recorded and remain open for public scrutiny. The public and academics are welcome to comment on these and critique them. Constructive criticism of judgments strengthens and does not weaken jurisprudence. Judges must therefore welcome constructive, informed and balanced criticism of their judgments. An occasional uninformed criticism should also not cause a storm. At its healthiest, the exercise of judicial independence allows for an atmosphere where, within the appellate structure of the courts, judges criticise each other's judgments for correctness, overturn them or decline to follow them if their correctness is in issue. Counsel are daily encouraged to compare various judgments, even against those from international jurisdictions and point out, without fear of reprisal, which is correct and which is not. This is how our rich jurisprudence, which is revered worldwide, develops. This is not criticism that weakens public confidence; it strengthens it.

The kind of attack that I referred to earlier often comes from high echelons of power in the form of generalised non-specific comments about the judiciary and judgments in general, as if indeed judges have anything close to a 'collective mindset'. If they did, they would not be independent. But like scientists in the same field, they follow each other's judgments, until overturned. This is healthy and leads to legal certainty. This, it is hoped, is not what is referred to as a collective mindset that needs to be corrected or transformed. Judges are part of society and deal with the ills that beset it. They do so impartially, without fear, favour or prejudice. That is their constitutional mandate.

Judges do not create rights and do not make the law; they merely apply it. Judges are merely umpires and have to do so fearlessly. Where they exercise judicial review of legislation and administrative action, they do so within the Constitution and the law. The consequence of their pronouncements cannot and should not be the cause of a generalised, vague and non-specific attack for their position. It will be dangerous to launch a wild and non-specific criticism of the judiciary to a point that may lead to the loss of public confidence in the judiciary. A society with no confidence in the judicial system may tend to take the law into its hands.

Independent legal profession

An independent legal profession is essential for an independent judiciary - just as a transformed legal profession is a *sine qua non* for a transformed judiciary.
One therefore watches with interest the developments around the Legal Practice Bill (B20 of 2012). One has noted concerns of the legal profession about aspects that the profession claims may pose a threat to its independence (such as the powers of the Justice Minister with regard to the composition of the governing council and the fee structure). It is heart-warming to see that the debate is formulated around the examination of constitutionality and not on any narrow one-sided and self-serving consideration. Resort to a test or examination of constitutionality is a healthy development. After all, the Constitution is and should remain our supreme law.

These are however disputes that we shall not enter but shall nevertheless watch with intense interest, albeit from a distance.

Access to justice and tough economic times

If it is true that in a fierce economic battle it is survival of the fittest, where dog eats dog, let it not be so with the need to access justice. I am fully aware that the unfavourable economic situation may threaten the survival of those in the legal profession, especially at the lower end of the economic ladder. The pressure will be higher on small legal firms. I have heard that changes in the operation of the Road Accident Fund are causing many small firms to close down or reconsider their future. It is precisely when times are hard that access to justice becomes critical among the marginalised. I am aware too that the attorneys' profession is almost constantly talking to the Justice Minister or the Rules Board for revision of the fee structure; that process and other legitimate measures in the profession no doubt need to continue. There are however measures that should never be resorted to, even in the fight for survival.

If I may venture a suggestion: The profession would do well to move towards specialisation where everyone becomes an expert in what he offers. We appear to have gone past the days of a small general practitioner who sells his time and charges a fee to every poor person who touches his door, dares to speak to him or ask a question. Such inquiries must simply be referred to an appropriate specialising office or to another specialising colleague. Practitioners in such small general corner shops rarely give any real value and are often forced to exact a fee from those who can hardly afford any.

Specialisation should lead to a situation where each practitioner is an expert in something and gives value to clients in what he does. On the other hand, those who specialise and whose services legitimately command higher fees must still be sensitive to the poor and marginalised.

Legal training

I was previously, while still an attorney, a proponent of the five/four-year undergraduate LLB degree in order to increase entry into the legal profession. Let me be one of those who admit openly: It has not worked and it has not produced the product we expected. I have seen the product arrive raw in our courts, especially via the independent Bar route, where people simply take their LLB certificates and apply for admission as advocates. There is no prior training other than this LLB degree and the product is unleashed on the High Courts. In most cases the product can barely utter a few coherent sentences, never mind articulate the case of his client. Trying to assist the product from the Bench is like pulling out teeth. Often one gets the impression that the poor client would have been better off on his own. We may have produced quantity but certainly not quality. I have read with pain about the finding of a survey that many such products have problems with basic numeracy and literacy. They have problems with counting, reading and reasoning. Many of us had already made that observation. I am therefore in full support of a redesigned LLB. The profession and universities have to go back to the postgraduate LLB with initial non-legal courses. I hope that we do not take long before we reach that goal about which there now appears to be enough, if not overall, consensus.

Conclusion

As we progress with the transformation agenda, we should keep focus on the terrain and not hesitate to ask and debate critical questions. The transformation agenda should not be high-jacked for other motives. The independence of the judiciary and consequently of the legal profession are important for a democratic order and must be jealously guarded. We must promote and advance access to justice, especially for the poor and marginalised, and we should actively guard against the abuse and exploitation of those who struggle to access justice. Finally, the revision of legal qualifications and training must receive urgent attention.

Phineas Mojapelo is Deputy Judge President of the South Gauteng High Court in Johannesburg. This is an edited version of an address to the annual general meeting of the Limpopo Law Council in Polokwane, 7 September 2012.
• A copy of the full speech can be found at www.derebus.org.za under ‘Documents’.