

Lack of advancement of black and female lawyers in the spotlight

The National Bar Association (NBA) held an international affiliates' meeting with the Law Society of South Africa (LSSA) and the Black Lawyers Association (BLA) in Sandton in May.

The NBA is the United States' (US) oldest and largest national association of predominantly african-american lawyers, judges, educators and law students. It has 84 affiliate chapters throughout the US, Canada, the United Kingdom, Africa and the Caribbean. It represents a professional network of more than 65 000 people.

The theme of the symposium was 'South Africa: Twenty-one-years after Apartheid ended and democracy for all commenced'. Speakers at the conference included Justice Minister, Michael Masutha; Los Angeles Superior Court Judge, Marguerite Downing; Judicial Service Commission (JSC) member and spokesperson, advocate Dumisa Ntsebeza SC and attorney and acting judge, Diana Mabasa. LSSA co-chairperson Busani Mabunda and NBA president Lorraine Meanes gave the welcome address.

The symposium consisted of two panels covering two topics, namely, human trafficking and the barriers and solutions to the advancement of black and female lawyers.

Human trafficking

Doctor Monique Emser, a counter trafficking researcher and activist who compiled the latest LexisNexis Human Trafficking Awareness Index spoke on the key findings of the report (see 2015 (June) *DR* 7 for the analysis of the index).

Dr Emser said the list of human rights violations is long, but one of the most heinous crimes that has, in recent years, recaptured the world's attention is the buying and selling of people for profit, otherwise known as human trafficking.

Dr Emser explained what human trafficking is, saying that trafficking in persons is internationally defined in art 3, para (a) of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, as 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'.

She added that exploitation includes the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

In her concluding remarks, Dr Emser said the index highlighted that human trafficking in Africa is a problem that is exacerbated by conflict, undocumented and forced migration, and intraregional and transnational criminal networks. She said various forms of child trafficking, which include child labour, child soldiers, forced marriage, forced pregnancy and illegal adoptions, when grouped together, exceeded trafficking for commercial sexual exploitation over the January to December 2014 period.

Dr Emser said children throughout Africa remain the most vulnerable and exploited subpopulation.

Political specialist at the US Embassy in Pretoria, Sanjiva Reddy, spoke on the responses and challenges of human trafficking in South Africa. He spoke of the US legislation, the Trafficking Victims Protection Act of 2000 (TVPA) and said the TVPA requires the US Secretary of State to submit an annual report on human trafficking to congress. He added that the goal of the report was to stimulate action and to create partnerships around the world in the fight against modern-day slavery.

Mr Reddy said the TVPA defines 'severe forms of trafficking' in persons as 'sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act is under the age of 18 years; or the recruitment, harbouring, transportation, provision, or obtaining of a person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery'. Mr Reddy highlighted the fact that 'a victim need not be physically transported from one location to another in order for the crime to fall within those definitions' as a lot of trafficking can occur within one country.

Mr Reddy went on to speak about South African legislation pertaining to human trafficking. He said among South Africa's laws to help combat trafficking were the following –

- The Prevention and Combatting of Trafficking in Persons Act 7 of 2013. He said although this law was signed in July 2013, it remained pending finalisation of implementing regulations. Mr Reddy said this leaves South Africa without adequate anti-trafficking prohibitions and impeding overall efforts to combat the crime. He added that the Act has a provision for a maximum fine of R 100 million or life imprisonment (or both) and that it requires annual reports from implementing departments once activated.
- The Criminal Law (Sexual Offenses and Related Matters) Amendment Act 32 of 2007, which prohibits the sex trafficking of children and adults and prescribes penalties of up to 20 years' imprisonment. Mr Reddy said this Act is sufficiently stringent and commensurate with those prescribed for other serious offenses such as rape.
- The Basic Conditions of Employment Act 75 of 1997 prohibits forced labour. The Act carries between three to six years imprisonment penalties for forced labour for children under 15 years of age.

Mr Reddy said all child labour is trafficking. He also said it is not only foreigners that are trafficked and added that South Africans constitute the largest number of human trafficking victims, saying that the majority of victims are labour traffic victims.

Mr Reddy noted that Nigerian syndicates dominate the commercial sex trade in several provinces adding that Chinese, Russian and Bulgarian syndicates were also active. He also said Thai women constituted the largest identified foreign victim group in the country.

Mr Reddy said for the past three years about ten to 15 foreign male forced labour victims are discovered aboard fishing vessels in South African territorial waters a month.

Barriers and solutions to the advancement of black and female lawyers

There were five panellists in the panel discussion on barriers and solutions to the advancement of black and female lawyers, namely, Judge Downing; Esq Lorraine McGowen; former LSSA co-chairperson and former president of the BLA and Law Society of the Northern Provinces (LSNP), Nano Matlala; Mr Ntsebeza; and Ms Mabasa.

Ms Mabasa's speech was based on the survey on the transformation of women in the legal profession done and released by the Centre for Applied Legal Studies (CALS) late last year. She said the report revealed that black women were treated differently and that they received double prejudice because they are women and they are black. Ms Mabasa said black women often face challenges of presumed incompetency and that as a result, they have to work harder than their white counterparts, as well as harder than men, in order to prove themselves. She added that practicing for black women was even harder as they also have to deal with issues of motherhood, which requires them to take some time off work which 'leaves them behind'. (See 2014 (Nov) *DR* 18 for a full report on the survey).

Ms Mabasa said a particular kind of intervention was needed to deal with this kind of harm. She said an intersectional approach combining the effects of race and gender discrimination to assist in the removal of barriers for black women in the legal profession was needed.

Ms Mabasa posed the question whether the Legal Practice Act 28 of 2014 would make a difference and continued to say if the voices of women are included maybe the Act will make a difference but added that thus far, the Act is silent on gender issues.

Mr Matlala said the major law firms in South Africa are, white law firms. 'It has to be conceded that these white law firms employ more black lawyers than one can find in a single black law firm. One may ask how is this possible when whites constitutes 8,9% of the South African population while in Apartheid South Africa these firms did not take into their employment black lawyers after completing articles? Two main reasons among many: (a) to attract government business in accordance with its BEE policy (whereas prior to democracy the opposite prevailed as none of their clients would agree to be served by a black lawyer meaning that the firm would lose business) and (b) Employment Equity Act biased in favour of black persons while in the old order the employment laws solely protected white employees,' he said.

Mr Matlala said it cannot be denied that the black lawyers in white law firms benefit indirectly as 'the holders of instructions are white firms invariably in meaningful and lucrative legal work'. Mr Matlala added: 'These white law firms monopolise all legal work in all South African courts and tribunals. No South African judicial officer, government minister and parliamentarian can gainsay this fact. This has contributed to the exponential growth of white law firms resulting in some such firms being targets of take overs by international law firms. Some have made alliances with international law firms. The number of lawyers found in some of these law firms exceeds 600 when no one black law firm has more than 50 lawyers. The sad story is that currently white law firms have double the number of black lawyers in their midst.'

Mr Matlala said the merger of his firm, Maluleke Seriti Makume Matlala Inc (MSMM Inc) 'in 2002 produced the largest black law firm with over 25 attorneys and ten candidate attorneys.' He added that the firm 'had all the expertise that one can think of in a large white law firm.' Sadly, the merger could not be sustained because all banks refused to give MSMM Inc work and financing. Mr Matlala said the public and private sector also refused to give them business. 'We could not pay competitive salaries to our professionals and general staff and lost them to white law firms and the public sector. I could be speaking of an MSMM Inc of over 150 lawyers today if the firm was financed and attracted meaningful and lucrative work. Today we have less than ten lawyers. What a shame given the fact that the firm has produced more black judges than any other firm in South Africa,' he said.

Mr Matlala said that today, there is not a single black firm that he is aware of that has access to lucrative and meaningful legal work from the private and public sector. 'I am ashamed to state that such meaningful and lucrative legal work is offered to major white law firms. For so long as this state of affairs prevails we should forget about growth and profitability of black law firms. It is not an understatement to say this is the end of the supply chain of the judiciary from black law firms and a denial of opportunities to black law firms as espoused in the preamble to our Constitution and a contravention of section 9(2) of the Bill of rights,' he said. He added that the preamble to the Constitution is rendered meaningless and a dream to black law firms as a result of the persistent and consistent continuation of doing business under Apartheid conditions.

Regarding the Legal Practice Act, Mr Matlala said the Act is aimed at regulating the profession and the provision of legal services. He added that its main aim is the protection of the public and the profession and that it does not cover economic issues.

Mr Matlala said Apartheid damaged South African citizens, both white and black, psychologically, making society believe that white people are better than black people.

Mr Ntsebeza spoke about statistics pertaining to the Bench. He compared the number of black and female judges on the Bench in 1994 to the latest statistics and said progress had been made, albeit not in the right pace.

Mr Ntsebeza said in 1994 there were 167 judges, of these, two were women – who were both white – one was in the appellant division while the other was in the Cape Town High Court. He added that there were three black judges and the rest were all white male. ‘Black in South Africa means African, Coloured and Indian. Although a subsequent judgment in the labour Court found that Asians and Chinese also fall under black,’ he said.

Mr Ntsebeza said those judges were appointed from the ranks of advocate. ‘These silks were usually white and male hence the judiciary was predominantly white male. The JSC had a duty to transform the judiciary. Government then decided that judges could be appointed from academics and attorneys,’ he said, adding that the pool is now drying up or has already dried up again.

Mr Ntsebeza said the situation regarding black people on the Bench has not changed much. He said the JSC exhausted what it had in the academics. He posed a question as to why the pool was drying up and said it is a vicious cycle that starts with education. ‘Those lawyers from whom we would expect to get practitioners, if they are black female, they are likely to have gone to the worst universities in the country. There is a more likely chance for the black students to go to these kind of universities. Although we have all the well-known universities, we still find students going to universities where they live. So the solution starts at proper legal education and getting government to provide resources towards legal education,’ he said.

Mr Ntsebeza added: ‘There was a time when we thought we could speed up the process of getting law students qualified. We moved from the usual five-year LLB to four years. But everyone was complaining about the calibre of education and skills students were equipped with. The reason for this is because the best LLB graduates came from traditional white universities. Government must commit more resources in assisting legal education especially in the black universities so that they can also compete with the others when it comes to legal education.’

Mr Ntsebeza said the training of attorneys via their candidate attorney clerkship was also not the same for everyone. He said that work coming in at law firms must be shared with the candidate attorneys and that they must also get a chance to work on cases. He added that they must not just be hired to make tea.

Mr Ntsebeza said as a member of the JSC, he is asked why the JSC always recommends white people. He said: 'Well, I tell them it is because they are properly qualified and are fit and proper I tell them that we are not going to push people simply because they are black or female.'

He concluded his speech by urging attorneys to take on a number of junior female lawyers and train them and also offer them mentorship.

The legal system in the United States

Ms McGowen and Judge Downing spoke on achieving parity in the legal profession. Ms McGowen provided statistics on the number of women in law firms in the US. She spoke about the struggles for diversity and inclusion particularly for black women in the legal profession. She said many of the struggles experienced by South African black lawyers were also experienced in the US adding that the ones in the US have been longer lasting than those in South Africa. Ms McGowen said today less than 1% of partners throughout the US are african-american women and less than 2% are african-american (males included). She added that the minority population of partners generally is about 5%. This number includes Hispanics. She added that the problem starts at tertiary level as the population for african-americans attending law school is decreasing.

Speaking on some of the solutions, Ms McGowen gave an example of negativity towards black lawyers. She said that two of the same documents were circulated with spelling errors to approximately 100 partners at major firms. The only difference between the documents was that the one indicated that it was written by a black person, 'Leroy Smith' while the other was written by a 'John Smith' who was presumed to be white. The comments against the white person were motivational and welcomed him to the profession and recommended some reading to improve his language while the comments against the black person included that practice was not for him and that he should rather leave the profession as poor writing was unacceptable. She said that this was a rude awakening.

Ms McGowen said a study by the American Bar Association done in the 1980's revealed that 80% of female attorneys leave the profession within the first eight years of their legal career. The study was repeated in 2000, which revealed that 50% of female attorneys leave the profession within the first five years.

Ms McGowen said the best solution was partnerships. 'Partnerships of three groups of people within the law firms. The leadership of the firms need to have an aggressive stand and not only look at the numbers but also at addressing the retention of the lawyers. You can do that by establishing real practical sponsorship programmes of the women and black attorneys one on one. Having a senior attorney in the room helping with development and engaging with them throughout their career and also playing a mentorship role and telling the juniors about what it takes to succeed in that area of law. They must also look at who is doing the work and get the younger attorneys to assist actively in all the matters,' she said.

Ms McGowen said symposiums such as this one with all the different key players in the profession were needed so that members of the profession can meet and resolve issues and to share ideas being developed and implemented within their firms.

Judge Downing said 54% of the women in California graduate from law school but only 38% of them pass through the Californian State Bar.

She added that there are approximately two million practising lawyers in the state of California and each year approximately 4 000 to 5 000 new lawyers start practising. 'There are about 23% women judicial officers in California and about 13 to 14% of those judges are black women,' she said.

Judge Downing said black women were not sufficiently represented in the judiciary in California. She added that because of the misrepresentation, a California Young Lawyers Association was established. Its role is to train young lawyers who are 35 years or younger or who have been in the profession for less than five years. She said they also have mentorship programmes where they start mentoring law students to make sure that they make it out of law school.

Judge Downing said another factor that is seen to slow down women in the profession is the fact that women become mothers and often have to step off the partnership track while they give birth and care for their children. 'When we talk about multiple children, we take ourselves out of competition for eight to ten years depending on the path we take. So what happens is that women go into solo firms so that they can control when they work and don't work, or they become government lawyers or they practice for non-profit or legal aid services where they are given leeway instead of at big law firms where they would have to make the firm a lot of money and bill a lot of hours,' she said.

She added that what happens is that when they are ready to become judges, all the time that they spent out of practice and spent not doing the traditional thing such as trying cases, works against them.

Judge Downing said in her state, all the black judges, 23 of them, meet once a month for dinner where they talk about the politics involved in being in a minority. She said they also contact lawyers who have applied for the Bench and talk to and encourage them to go through with the interview. They ask them how far their application is and where they are in the process. Judge Downing said part of the problem was that they believe that sometimes lawyers select themselves out and urged black lawyers, especially women, to stop undermining themselves and thinking that they will never make it as a judge. 'We have found that when we reach out personally to the lawyers, they start to see themselves. They believe that "if she is a judge, and she thinks that I can become a judge, then maybe she is right and I can be a judge." When we say we would like to see you apply, it inspires them,' she said.

One of the female delegates raised sexual harassment as a common trend that was faced by women in legal practice and suggested that there should be a law dealing with this including a possible sanction of being barred from practice when found guilty of this nature of misconduct. She said sexual harassment needed to be defined in the Legal Practice Act and added that female practitioners were usually victims of sexual harassment right through the court process from the court registrars right through to the judges. The other delegates, both male and female strongly agreed with her view.

Another delegate suggested that the government should devise procurement policies and ensure that there was equal and fair distribution of government work to all sexes in legal practice.

The Justice Department's view

Minister Masutha gave the keynote address. He said South Africa had come a long way in just two decades from having only one black judge post 1994. Minister Masutha said according to statistics, the state attorney has exceeded the 75% target in terms of awarding legal work to previously disadvantaged individuals but added that word from other legal practitioners is that the courts are filled by the 'white boys club'. Minister Masutha said the contradicting views were concerning and added that he would do his own investigation and get the real picture. Minister Masutha said the question was why change is happening so slowly, and if it was happening at all in some instances.

Minister Masutha said a woman's organisation approached him soon after Judge Masipa delivered judgment in the Oscar Pistorious case. The organisation wanted to mount scathing criticism on the judge but Minister Masutha cautioned it against acting in haste and suggested that even if they choose to criticise on the judgment itself, they should do so in a proper way and avoid the risk of perpetuating assumption that black female judges are incompetent.

'I told them that I can list many court judgments where white males have done far worse, that is if people think the judgment was not what they expected,' he said. He then indicated the Justice Department's intention to appeal the euthanasia decision as Judge Fabricius indicated that the ruling only applied to the deceased (see 2014 (June) DR 4). Minister Masutha said his concern was that the decision was, *inter alia*, against the principle of precedent. 'The judge decided that he is developing a common law and therefore what is also strange is that in his own order he says that the order is limited to this particular case and should not set precedent for others in similar situations in the future. Do judges have a prerogative to decide whether judgment should or should not pursue precedent? Because from what I have learnt from past experience is that judges just deliver their judgments and the rule of precedence takes its natural course. Do not get me wrong, I do not want to come across as being critical of members of the Bench,' he said.

Minister Masutha added that there is 'this fallacy' that to be white, especially white male, you are possessed with these 'holy powers of knowing it all because you were born to be a better person and born to possess all talents'. He added that this was a socio-political construct that is used as a tool for racial and general political domination.

Minister Masutha said the Justice Department holds a position of influence in the justice system and it should reflect on how best it can harness the advantage position in addressing a number of challenges, with transformation being one of the critical challenges. He said that the state has decided that it firstly needs to consolidate the state litigation account by making sure that the entity established to manage that account is the state attorneys office.

Minister Masutha said legislation has been passed that establishes the position of Solicitor-General. 'We think that that office should be elevated to a status of significance and we are looking at an appropriate status such as that of the National Director of Public Prosecutions and of the Public Protector's. We think that it is a very critical role that office needs to play and depending on how effective the office becomes, it could become a game changer,' he said. The Solicitor-General will be the state's chief legal adviser in all civil litigation, similar to the role of the National Director of Public Prosecutions in criminal matters (see 3).

According to Minister Masutha, there was also a need to address the issue of gender and race transformation in briefing patterns. 'We need to ensure that whatever work is there, starting with the public sector, gets to be evenly and fairly distributed across the profession,' he said.

The Minister also indicated government's displeasure at the high rate in which they were losing court cases. He said that one of the reasons was that senior advocates take work even though they do not have the capacity to do it. They then abandon brief and leave the work for junior counsel. Minister Masutha added that in some instances, counsel appear in court unprepared, he added that counsel should rather pass on work to others who have the time and who need the opportunity to deal with these matters.

- Judge Fabricius who gave the ruling in the assisted suicide case has since granted leave to appeal his ruling. The matter will go before the Supreme Court of Appeal. See page 23 of this issue.

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