



STATEMENT ON JUDGE MOTHA BRIEFING PATTERNS DIRECTIVE

The Pan African Bar Association of South Africa (PABASA) is a voluntary association of independent advocates as envisaged in s. 34(2)(a) of the Legal Practice Act 28 of 2014 (LPA).

We associate ourselves with the objectives of the LPA and the Legal Practice Council as the first post-apartheid society of independent advocates. Through our Pius Langa School of Advocacy – the only full-time advocacy training school in South Africa – we seek to assist in the training and development of advocates to meet the demands of our relatively new society and to assist in ensuring access to justice by all. Our members are committed to carrying out community service as envisaged in the LPA, developing high levels of legal skills among our members, producing excellence in the craft of advocacy, and promoting and upholding the highest professional and ethical standards. These are our guiding principles, as are non-racism, non-sexism, non-binarism, non-gender conformism, mutual collegial respect, and respect for clients and their confidentiality.

We at PABASA regard with the utmost importance the continuing advocacy training of advocates in all its vast expanse. This is because we believe that an Independent and Competent Judiciary can only spring from an independent and competent pool of legal practitioners. But we know from experience that there is no better teacher than practical experience in one's chosen field of work. It is for this reason that we believe that the continuing sourcing of quality legal services (qualitative briefing patterns) mainly from one race will tend to concentrate experience in that race. The inevitable result is the exclusion of other races from the pool of experienced lawyers eligible for a Competent and Independent Judiciary.

In short, there is a direct correlation between qualitative briefing patterns and a Competent, Independent and Diverse Judiciary. Indeed, section 174(2) of the Constitution requires that the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judges are appointed. When quality legal work is concentrated in members of one race, where are members of the

PAN AFRICAN BAR ASSOCIATION OF SOUTH AFRICA

Reg No. 2019/238808/08

82 Maude Street, Sandton, Gauteng, South Africa

T +27 10 900 2170

WWW.PABASA.CO.ZA



other race expected to gain the kind of quality experience that will equip them for a Competent, Independent and racially Diverse Judiciary?

It is this context that we believe is lost in the public excoriation of Justice Mandlenkosi Motha's directive as regards the composition of legal teams that appeared before him on 23 January 2024 in a case concerning Black Economic Empowerment. The criticism, with respect, is misdirected and lacks context.

Here is the broader context within which Justice Motha's directive must be viewed, and which opponents of transformation in the legal profession ignore.

On 10 October 2016, the Judge President of the Gauteng High Courts (Pretoria and Johannesburg) issued a directive to all Gauteng Judges' secretaries. The directive, titled "DATA COLLECTION – BRIEFING PATTERNS" attached a "data collection questionnaire" to be completed by each Judge's Secretary for each MOTION COURT matter and affixed by the motions clerk to the inside of the front cover of the court file. The questionnaire collected data on (1) name of the parties, (2) name of each party's firm of attorneys, (3) name of each party's counsel, (4) race of counsel, (5) gender of counsel, (6) outcome of the case.

The self-evident purpose of the directive was to gather statistics on briefing patterns in the Gauteng High Courts. It was not intended to force litigants to brief any particular race of counsel, nor is it capable of such interpretation.

The questionnaire was to be completed "**as far as possible upon receipt of the file and then further when the matter appears in court**". This was an independent effort by the Judge President to ascertain at the coal face the briefing patterns in the Gauteng province. This should come as no surprise given the direct correlation between qualitative briefing patterns and a Competent, Independent and Diverse Judiciary. The department of justice has been issuing its own briefing patterns statistics which do not seem to bear any relation to what we see and experience in practice. So, the Gauteng Judge President's directive was for us a welcome independent intervention. Sadly, it appears not to have achieved its purpose. Whether that is because it was honoured more in its breach than compliance with it by counsel refusing to provide the information is unclear.



We see Justice Motha’s directive that counsel address him on the composition of their legal teams in an opposed motion case involving Black Economic Empowerment as an extension of the Judge President’s effort in gathering statistics on briefing patterns in the province furthermore, it should also be seen against the background of the Preamble of the Legal Practice Act which aims **“to provide a legislative framework for the transformation and restructuring of the legal profession that is broadly representative of the demographics of South Africa”**. The concern of the Judge is indicative of his concern for the lack of transformation in the Legal Profession and it should not be frowned upon, instead it should have been welcomed as an opportunity to debate this subject. It is not “judicial overreach”. Without independent statistics on briefing patterns in the courts, the public will forever be in the dark regarding the factors that go into the appointment of Judge as suitable for appointment. It is unfortunate that counsel in the case before Justice Motha flatly refused to comply with the Judge’s directive. This sets an undesirable precedent that legal practitioners can now comply with judicial directives they agree with and refuse to comply with those they do not like.

It is not only in the interests of achieving a Competent, Independent and Diverse Judiciary that such independent statistics be collated; it is also in the public interest to do so. A diverse Judiciary is good for the legitimacy of the Courts.

Issued by: Chairperson of PABASA and NEC (26 February 2024)