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[2004] EWHC 1735 (QB) and *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156 (QB)), the defendant failed to appear in court; and their failure to dispute the claim, combined with some evidence adduced by the claimants towards proving falsity, was taken by the judge as conclusive (on the usual balance of probabilities). But if it is true, as Tugendhat J opined in *Adelson v Anderson* [2011] EWHC 2497 (QB), that '[a] claimant is obliged to prove falsity if he seeks a declaration of falsity under the Defamation Act, 1996' (para 77), then the nature of the action has been substantially altered. Indeed, for the proposed alternative remedy to make sense, the burden of proving that the statement was false as well as defamatory should lie on the claimant. This immediately evokes American law, which did to a very large extent shift the burden of proof after *New York Times v Sullivan* 376 US 254 (1964) (see e.g. M A Franklin & D J Bussel 'The plaintiff's burden in defamation: Awareness and falsity' (1984) 25 *William and Mary LR* 825). Indeed, all the doctrinal references cited in the opinion (see para 63) are American, even though no mention was made of this fundamental discrepancy between the two systems. One South African case at Provincial Division level was also cited in support of the remedy: *University of Pretoria v South Africans for the Abolition of Vivisection* 2007 (3) SA 395 (O). This is however frail authority, not only because the case failed to distinguish with any degree of precision between issues of truth and the *Bogoshi* defence of 'reasonable publication', but especially because the judge appeared content to infer falsity (rather than animus iniuriandi) from the fact that he did not believe the defendant to have verified their information. Thus, rightly or wrongly, falsity was taken in that case to be apparent on the face of the record. No general doctrine can be built on such an unrepresentative case. While a remedy like a declaration of falsity might appear attractive in principle, it is difficult to see how it could be accommodated within South African law without radically altering the way the law of defamation, and generally of iniuria, is structured.

APERSPECTIVE ON GENDER TRANSFORMATION OF THE SOUTH AFRICAN JUDICIARY

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INTRODUCTION

Carmel Rickard observed rather cynically yet accurately in 1999 that 'a funny thing happened on the way to judicial transformation: women dropped off the agenda' (Carmel Rickard 'Women are still not contenders' *Sunday Times*, 18 April 1999). Since that time, successive Chief Justices have emphasised the importance of a more diverse judiciary. For example, in 2003, then-Chief Justice Chaskalson ('Address at the opening of the judges' conference' (2003) 120 *SALJ* 657 at 662) observed that

'[t]he impartiality of the judiciary is more likely to be respected by the public if it is seen to be drawn from all sectors of the community than will be the case if it is drawn from one race and one gender as, for all practical purposes, was the case prior to 1994. It is not only the Constitution and our commitment to establishing a non racial society, but equity and common sense as well, that demands this to be done.'

In this short note, I consider whether Rickard's assessment still holds true today. In doing so, the constitutional selection criteria (the merit requirement in s 174(1) of the Constitution of the Republic of South Africa, 1996 and the diversity provision in s 174(2)) are explored within the context of transformation of the judiciary. The meaning of the contentious concepts of diversity and representivity, which are often used interchangeably, will also be considered. Justifications for increasing the number of women judges are offered, with specific focus on why 'difference' is a particularly relevant justification in the South African context. The note concludes with a brief assessment of the Judicial Service Commission's ('JSC') record in gender transformation.

TRANSFORMATION: DIVERSITY AND MERIT

Introduction

Transformation is a primary theme of post-apartheid South Africa. Its meaning, function and purpose are highly contested, which has resulted in stimulating engagement with the concept (see eg Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146; Catherine Albertyn & Beth Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248; H Botha 'Metaphoric reasoning and transformative constitutionalism' 2003 *TSAR* 20; D Moseneke 'Transformative adjudication' (2002) 18 *SAJHR* 309; Theunis Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference' (2009) 20 *Stellenbosch LR* 258). Despite these contestations, there is general agreement that transformation lies at the heart of the constitutional enterprise, which at its core was designed to facilitate a fundamental change in unjust political, economic and social relations in South Africa. The Constitution promises to heal the divisions and remedy the injustices of the past, and looks towards a better and brighter future in which all South Africans irrespective of race, gender or creed can share equally (see the Preamble to the Constitution).

Transformation is also a primary theme in respect of the judiciary. Much has been written about the impact of the new constitutional order on the performance of the judicial function, in particular the need for 'transformative adjudication'. This adjudication speaks both to method and outcome in decision-making (see eg Moseneke *op cit*; Pius Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch LR* 351). Another aspect of the judiciary's transformation relates to the need for the judiciary to be more representative in terms of gender and race. In this regard, s 174(2) of the

Constitution requires that the need for the judiciary to reflect broadly the racial and gender composition of South Africa should be a factor in the selection of judicial officers. The terms 'representivity' and 'diversity' are often, and confusingly, used interchangeably to describe this requirement. Defining these concepts is challenging — as Catherine Albertyn ('Judicial diversity' in Morné Olivier & Cora Hoexter (eds) *The Judiciary in South Africa* (forthcoming ch 8)) observes, 'there is no clear consensus on the actual meaning and role of representivity, its relationship to the idea of diversity, and their place and effects in transforming the judiciary'.

Irrespective of terminology, the diversity provision, read in context, calls, in part at least, for some form of affirmative action to redress the overwhelming domination of the judiciary by one particular minority section of the population during apartheid. The merit requirement stipulated in s 174(1) is a complicating factor in our understanding of the diversity provision. There is contestation about the way the two provisions relate to each other as criteria for judicial selection, particularly the relative weight to be attached to each requirement and the extent to which merit is (or should be) qualified by the diversity provision. Here the JSC, as the body responsible for the selection of judges of the High Courts and Supreme Court of Appeal, and compiling short lists of candidates for appointment to the Constitutional Court, should take the lead in interpreting and applying both selection criteria.

The diversity and merit provisions, and the role of the JSC in giving content and meaning to them, will now be discussed in more detail.

The spectrum: from representation to representivity to diversity

There is no doubt that s 174(2) is capable of different interpretations. As I have stated above, the most commonly used terms to describe this provision are 'diversity' and 'representivity'. Not only are these concepts difficult to define, but it is difficult to differentiate definitively between them. This is because there is little (if any) agreement on a common reference point to serve as a basis for comparison.

It is convenient at this juncture to introduce the idea of a scale or spectrum that represents the overarching concept of judicial diversity. Located at different points on this spectrum are diversity in a broad sense, representivity and representation. Many *potential* meanings could theoretically be assigned to the diversity provision, but not all of them would be appropriate or suitable, taking into account the South African context.

At one end of the spectrum lies representation, which is the narrowest or thinnest form of judicial diversity. This would equate the diversity provision to changing only the face and look of the judiciary to reflect the racial and gender composition of the country. The emphasis would therefore be on quantitative and not qualitative considerations. It would be akin to some sort of a quota system. Playing the 'numbers game', however, could create a range of potential problems, not least of which is that race and gender could become ends in themselves without any interrogation of, or engagement

with, that which lies deeper than pigmentation or sex. It also ignores institutional change which goes to the heart of the way that the judiciary operates as an institution, and which should form part of any transformation project, as argued below.

Some think that transformation of the judiciary is, or should be, primarily or only about representation. This is understandable considering the regrettable domination of the apartheid judiciary by white males, who were the visible face of legalised racial oppression in court. Clearly, at the advent of the new constitutional dispensation, a judiciary which continued to be overwhelmingly dominated by a minority section of the national population could not count on the acceptance, respect and confidence of the majority of the population. Public confidence and respect impact significantly on the legitimacy of the judiciary as an institution. Geoff Budlender ('Transforming the judiciary: the politics of the judiciary in a democratic South Africa' (2005) 122 *SALJ* 717) observes that

'[t]he need for a broadly representative judiciary is underlined in a society such as ours, which is still so deeply divided on racial grounds. This means a judiciary which broadly reflects who we are, and who all of us are, both majorities and minorities . . .'

Increasing the number of black and women judges is, and should be, an important marker of transformation, as the diversity provision recognises. It is a form of redress to remedy the injustices of the past, in particular the absence of black people and women from the judiciary. But, as I have explained, merely changing the face and look of the judiciary will not — on its own — yield the positive changes promised by the Constitution. Transformation is not only about demographic change of the judiciary, but also, and perhaps more significantly, about a deeper, substantive change. A richer, more layered conception of transformation is preferable — one that recognises the importance of an attitudinal shift away from apartheid-era executive-mindedness towards transformative, value-laden and constitution-based adjudication.

One of the most problematic aspects of representation is the implied expectation or even assumption that all members of a particular race and/or gender group have the same identity 'package'. This implies that membership of a particular race or gender presupposes an identical set of outlooks, value systems, personal experiences and so forth, resulting in them judging in an identical way, both in process and outcome. This notion of 'sameness' ignores individual differences between people; it simply cannot be assumed that all women or black people share a single common experience or outlook. The multiplicity and intersectionality of identity means that all of the unique experiences and perspectives that shape and define a person cannot neatly be compacted into a one-size-fits-all package. Any attempt to categorise an individual's identity would be misplaced due to its fluid and dynamic nature. Clearly, similarity in look does not necessarily translate into similarity in outlook. And membership of a particular group does not guarantee a particular outcome.

This ties in with another potential danger of representation: that judges could be perceived as acting as 'constituency representatives' of their particular race or gender, thereby making them advocates for that constituency's specific interests. In its extreme form, this could mean, for example, that a woman judge would make her decisions based solely on what would be in the best interests of her constituency. This is clearly not what the diversity provision envisages; it does not equate to constituency representation.

At the other end of the spectrum lies diversity in its strongest or broadest sense, which does not take race and gender as lodestars, but gives equal consideration in judicial selection to an unlimited range of factors, including judicial philosophy, professional background and expertise, political views, cultural heritage, language, religious affiliations, geographical factors and suchlike. Race and gender, therefore, would be equal considerations along with others, but would not receive any preference.

It seems to me, for the reasons given below, that the meaning that best fits the diversity provision would be located on the spectrum somewhere between these two extremes. Although interpreting the diversity provision as sanctioning a broad form of judicial diversity would likely be the best way to achieve the substantive transformation of the bench, it is unlikely that this is what the constitutional drafters had intended. I would argue for an understanding of the diversity provision that goes broader than representation, but narrower than strong diversity. Representivity would prioritise race and gender to some extent, but not at the expense of merit and some form of diversity in the broad sense. Whilst pursuing representivity, there is considerable scope for the selection of black and women candidates from different professional backgrounds, with divergent moral and political views, personal value systems, and so on. By not excluding aspects of broad diversity from representivity, it increases the chances of accomplishing the attitudinal adjustment on the part of judges that would facilitate the substantive transformation of the bench explained above. To paraphrase Justice L'Heureux-Dubé (Claire L'Heureux-Dubé 'Outsiders on the bench: The continuing struggle for equality' (2001) 16 *Wisconsin Women's LJ* 15 at 30), what we need is a change in attitudes, not simply a change in chromosomes or pigmentation.

The characteristics of a judge apparently listed by the late former Chief Justice Mahomed reinforces this notion of attitudinal change (see John Milton 'Appointing judges: The approach of the Judicial Service Commission' (1998) unpublished paper on file with the author: for the interesting history behind this paper, see Susannah Cowen 'Judicial selection in South Africa' Research report prepared for the Democratic Governance and Rights Unit, UCT (2010) at 95–6 available at <http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf>):

'When we talk of transformation we do not simply talk about the personnel, we talk about their value systems, their approach to justice, their capacity for justice, their understanding of the direction of the Constitution.'

The interpretation given to the forerunner of the present diversity provision, contained in the Constitution of the Republic of South Africa Act 200 of 1993 ('the interim Constitution'), seems to support the idea of broader representivity, rather than representation. The interim Constitution, in addition to the merit requirements, stated that the goal in respect of the composition of the Constitutional Court was an independent, competent court representative in respect of race and gender (s 99(2)). Thus, judicial diversity was linked to competence and independence as considerations in selection. In this way, the path was paved for what Albertyn (op cit) calls a 'merit based equal opportunities framework' within which black people and women could be appointed to the bench without compromising competence and other merit requirements.

The JSC's policies and guidelines to select the Constitutional Court's founding bench further reinforces the view that at least representivity (perhaps even some form of broad diversity?) was being pursued. The Guidelines for Questioning Candidates for Nomination to the Constitutional Court of 1994 ('the 1994 Guidelines'), explicitly rejected a quota system:

'[Section 99(2)] cannot be understood to refer to a need to constitute a court which represents the races and the genders in direct proportion to their share of the national population. If the Constitution-makers had had such a need in mind, they would have enacted a system of proportional representation, such as that which governs election to the national and provincial legislatures. And they would certainly not have required four of the eleven members of the Court to be drawn from the existing judiciary.'

And further, the 1994 Guidelines described 'diversity' as a quality

'without which the Court is unlikely to be able to do justice to all the citizens of this country. It is not an independent requirement, super-imposed upon the constitutional requirement of competence; properly understood it is a component of competence — the Court will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection. It is for this reason that if the Court does not meet the standard set by the Constitutional instruction, it will lack the confidence of the nation, and consequently lack legitimacy.'

The 1994 Guidelines therefore explicitly established 'diversity' as a pre-requisite for the delivery of justice, and a 'component of competence', thereby unequivocally linking diversity with merit. This is an important point to bear in mind when considering the relationship between the merit and diversity provisions in the Constitution.

The change envisaged by the new constitutional order was to be reflected in the Constitutional Court's diversity, not only in race and gender composition, but also in the different kinds of professional and personal experiences, skill sets and outlooks of the judges. The African National Congress ('ANC') noted the need for Constitutional Court judges 'to be drawn from all sections of the community on the basis of integrity skills, life experience and wisdom' (ANC 'The Bill of Rights' in *Ready to Govern* (1992) available at <http://>

www.anc.org.za/show.php?id=227#B). And the 1994 Guidelines accentuated the need for a court with ‘a sufficient *diversity of outlook* to ensure vigorous debate within the Court on the important questions of principle entrusted to its decision’ (emphasis supplied). This generous interpretation of the interim constitution’s diversity provision resulted in a first Constitutional Court that comprised six white men, three black men, and two women (one black and one white) from a diversity of professional backgrounds — the bench, the bar and academia.

In respect of the other courts, the vision articulated at the time for the transformation of the judiciary corresponded closely to that for the Constitutional Court, as outlined above (ANC ‘The Rule of Law’ in *Ready to Govern* op cit):

‘The bench will be transformed in such a way as to consist of men and women drawn from all sections of South African society. This will be done without interfering with its independence and with a view to ensuring that justice is manifestly seen to be done in a non-racial and non-sexist way and that the wisdom, experience and competent judicial skills of all South Africans are represented.’

The merit requirement

Another factor that militates against representation is the Constitution’s merit requirement which, in s 174(1), requires that judges should be ‘appropriately qualified’ and ‘fit and proper’. This is an absolute requirement for judicial selection and appointment, and a person cannot be selected and appointed as a judge if they do not comply with this requirement. François du Bois ‘Judicial selection in post-apartheid South Africa’ in Kate Malleson & Peter H Russell *Appointing Judges in an Age of Judicial Power: Critical Perspectives From Around the World* (2006) 298) quotes former Chief Justice Chaskalson as saying that ‘there is “a certain level of technical ability which is required of a judge and a person who does not meet that technical level ought not to be appointed”’.

Commentators like former Constitutional Court justice Johann Kriegler (‘Can judicial independence survive transformation?’ Unpublished lecture, University of the Witwatersrand, 18 August 2009 available at <http://constitutionallyspeaking.co.za/can-judicial-independence-survive-transformation-a-public-lecture-delivered-by-judge-johann-kriegler-at-the-wits-school-of-law/>, accessed on 6 October 2012) believe that merit has been compromised in recent selections and that

‘[t]his ethnic/gender balance criterion has become the be-all and end-all when the JSC makes its selections. And if it isn’t the be-all and end-all, at the very least it has been elevated to the overriding, fundamental requirement.’

Clearly, the relationship between these requirements is a matter of contention, as is the precise meaning of merit. Du Bois (op cit) has opined that it is the search for ‘demographic diversity’ that counts above Chaskalson’s minimum merit threshold of a ‘certain level of technical ability’. He also contends

that balance between the two provisions might perhaps not be uppermost in the mind of the JSC in judicial selection, because (ibid at 287)

‘[a]s products of the pursuit of transformation, reflecting this goal in their very constitution, [the JSC] can be expected to take representativity [sic] as a lodestar. Instead of balancing merit against diversity, they may transform its meaning, and sometimes prefer the latter to the former.’

This accords in part with my own view that the meaning of merit is not fixed, but is dependent on a number of interrelated variables. Maleson argues that the construction of merit is a dynamic process that can only be determined with reference to the potential candidate pool (Kate Maleson ‘Rethinking the merit principle in judicial selection’ (2006) 33 *Journal of Law and Society* 126). I would go further and suggest that in the South African context, the meaning of merit, the functions of the position, the candidate pool and the goal of representivity are all interrelated. The meaning of merit, therefore, does not necessarily have to be derived solely from the functions of the position. Other factors can also be considered as components of merit in addition to appropriate legal experience and technical ability, including the considerations contained in s 174(2). In this way, a closer interrelationship, or perhaps even a ‘blend’, between the s 174 requirements is achieved. The recent ‘criteria’ formulated by the JSC (‘Summary of the criteria used by the Judicial Service Commission when considering candidates for judicial appointments’ of 10 September 2010) (‘the 2010 Guidelines’) certainly seem to point towards a ‘blending’ of merit and diversity. The questions that make up the ‘supplementary criteria’ in these 2010 Guidelines are:

1. Is the proposed appointee a person of integrity?
2. Is the proposed appointee a person with the necessary energy and motivation?
3. Is the proposed appointee a competent person?
 - a. Technically competent.
 - b. Capacity to give expression to the values of the Constitution.
4. Is the proposed appointee an experienced person?
 - a. Technically experienced.
 - b. Experienced in regard to values and needs of the community.
5. Does the proposed appointee possess appropriate potential?
6. Symbolism. What message is given to the community at large by a particular appointment?

These questions offer the JSC a more concrete yardstick for measuring the extent to which a candidate meets the constitutional selection criteria. However, the questions draw no clear distinction between merit and diversity, and sometimes they seem to mix them.

Despite these ‘criteria’, it is not absolutely clear how the JSC *practically* applies the constitutional requirements in the selection of judges. The JSC’s selection record, despite many inconsistencies and anomalies, shows at least that black people or women will not always as a *matter of course* receive preference. But when will they receive preference? A ‘supplementary crite-

tion' of particular relevance in this regard is symbolism. As a former JSC member explains (see M T K Moerane 'The meaning of transformation of the judiciary in the new South African context' (2003) 120 *SALJ* 709),

'the fact that a particular appointment will have a symbolic value that gives a positive message to the community at large, may tip the scales in favour of a particular candidate especially where there is competition for a vacancy. A hypothetical example would be the appointment of an Indian female judge to a Division where there were no female judges at all and wherein Indians were by law previously denied the right of residence.'

Past practice shows that the JSC attaches significant value to this element. In the Free State, Natal and the Western Cape high courts especially, the appointment of women candidates of black and Indian descent has been regarded as particularly symbolic, and has probably in some cases given them an 'edge' over white male candidates who might have been more technically qualified and experienced. For example, symbolism was likely an important — if not decisive — factor in the JSC's decision in 2003 to select Roseni Allie, described as a 'suburban attorney' by Du Bois (op cit at 298), to fill a vacancy on the Cape bench. With her appointment, she became the first black woman in that court. Geoff Budlender SC, a highly prominent human rights litigator and anti-apartheid activist, and white male, competed for the same vacancy but was not selected.

JUSTIFYING THE NEED FOR MORE WOMEN JUDGES: FOCUSING ON DIFFERENCE

There are many justifications in support of gender and racial diversity, all of which, Albertyn (op cit) contends,

'cluster around a number of cascading and overlapping reasons: (a) institutional legitimacy and public confidence, (b) justice and equity, and (c) quality of decision-making. While the first set of justifications links diversity to the credibility and legitimacy of the judiciary, the second speaks to the fairness and equity of representation and inclusion (the "right thing to do") and the third addresses the manner in which diversity might enhance the quality of decision-making, either in process or its outcomes. Emerging from this a fourth, and perhaps qualitatively different and more transformative (rather than inclusive), understanding of diversity which interrogates the meaning of diversity and difference, and the accepted norms, values and modes of reasoning of the judiciary.'

Albertyn's categorisation points to the intersectionality of these justifications. The first two are most commonly advanced, and they are compelling justifications for gender and racial diversity. Legitimacy is often cited as the most credible justification, but to my mind the equality argument is just as persuasive. In this note I focus on 'difference', which allows for 'different voices' to be heard in the 'market place of ideas' (see generally K Mason 'Unconscious judicial prejudice' (2001) 75 *The Australian LJ* 676 at 687). This ties in particularly with Albertyn's third and fourth justifications. In South African social and legal culture, the notion of difference features promi-

nently. Difference is acknowledged in the founding provisions of the Constitution, and the Constitutional Court has affirmed its importance in our society in a number of cases. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), for example, Sachs J explained that

‘[w]hat the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. . . . What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the *acceptance of the principle of difference* itself.’ (Emphasis supplied.)

The ‘justification of difference’ implies, in the judicial context, that different people could bring different perspectives to judging. But this does not mean, for example, that a black judge will unavoidably judge differently from a white male judge. Albertyn (op cit) correctly notes that ‘[r]ace and gender are not inevitable indicators of outcomes’. Subject to the earlier caution expressed against essentialism, the ‘difference’ argument has merit as a justification for increased gender diversity. Women judges *could* bring an alternative dimension to judging, most likely in human-rights cases involving discrimination against women or other marginalised groups or individuals, or cases of domestic or spousal abuse. In these cases, the perspectives that could be offered by women judges based on their own situation within patriarchal societal and institutional structures could prove invaluable. Potentially, women judges could have a particularly positive impact in courts requiring group-based decision-making, such as appellate courts. One benefit of having women appellate judges is that it enables male judges to engage with, and consider the opinions of, their female counterparts whose life experiences and situation will be different from their own. Because of some women’s personal experiences of patriarchy and marginalisation, they could potentially offer a deeper appreciation for, and understanding of, the challenges faced by society’s marginalised groups. This could facilitate a more inclusive and possibly balanced decision-making process which might increase the likelihood of a just, fair and legitimate outcome.

Although there is no conclusive evidence to suggest that women judges or judges from a particular racial or ethnic group necessarily rule differently from their fellow judges, it does not detract from the fact that their opinions matter and that they could influence decision-making in a positive manner. Judicial thinking and the performance of the judicial function should not be the exclusive domain of a single, privileged group with a single, privileged perspective of life and law. (This refers generally to the stereotypical ‘male, pale and stale’ judge, who is assumed to be heterosexual, married, to have a particular class background and education and so forth, which culminates in a particular type or way of thinking about life and law). Van Marle & Bonthuys (‘Feminist theories and concepts’ in Elsje Bonthuys & Catherine Albertyn (eds) *Gender, Law and Justice* (2007) 21) note that

‘[p]atriarchal interpretations of justice and equality exclude qualities like emotion, relationships and care, which characterise the lives of women, while valorising abstraction and independence, which are associated with male behaviour in the public sphere’.

Arguably, women judges could be particularly well-placed to challenge these male-centred assumptions and structures of reasoning in law, although, again, not inevitably so. In a similar vein, another potential benefit of women judges centres around the exercise of judicial authority. Stereotypically, men are seen as embodying authority, and women not, which impacts negatively on how women are perceived as judges. Stereotypes describe not only how (and what) people from certain groups are, but also how they are expected to behave (Van Marle & Bonthuys *ibid* at 26). Because the law is essentially abstract, the judge is viewed as the physical embodiment of the law. There is an idea of the judge as a neutral being that symbolises the law — a super-human being, who is able to set aside all emotion and experience of the world in order to reach a state of detached objectivity (see Elsje Bonthuys ‘The personal and the judicial: sex, gender and impartiality’ (2008) 24 *SAJHR* 239 at 246). This super-judge in his robe and (formerly) wig represents the ‘public’ face of judging. Because the law is associated with the ‘male and “higher” values of objectivity, impartiality, reason and intellectual-ity’ (Van Marle & Bonthuys *op cit* at 29) — and not with emotion, connection to others, intuition or other so-called ‘soft’ characteristics — ‘traditional’ thinking dictates that there is no room for the private in the public act of judging. Bonthuys (*op cit* at 240) opines that ‘[t]he association of the public virtues and public spaces with stereotypical masculinity and the private sphere with femininity is obvious, as are the fact that these two spheres do not carry equal social weight’.

This dichotomy of authority has the result that men are probably more likely to be selected as judges because of the high value which judicial selectors place on the ability to appear authoritative. Men reap a ‘patriarchal dividend’ from this perceived dichotomy, which is highly problematic. The notion that authority looks and acts in one way only — a masculine way — is a sexist and gender-stereotypical social construction. Women can capably exercise judicial authority, but not necessarily in a way that conforms to the stereotypical way that men exercise authority, or are presumed to exercise authority. This is about more than symbolism. Authority can be exercised in different ways without detracting from its substance. Women exercising judicial authority in a way that is less conventionally masculine, but equally or more effective, could dispel unjustified myths around authority, and could also impact positively on the power inequalities inherent in the adversarial process by making the exercise of judicial power less threatening and intimidating to litigants and others involved in proceedings. Dual symbolic and substantive benefits could therefore flow from the visible exercise of authority by women.

Do these gender stereotypes mean that if women want to be judges, they have to take on the persona of men (see Erika Rackley ‘Representations of

the (woman) judge: Hercules, the little mermaid, and the vain and naked Emperor' (2002) 22 *Legal Studies* 602)? Baroness Hale (Brenda Hale 'Equality and the judiciary: why should we want more women judges?' (2001) *Public Law* 489 at 497) believes that the judiciary is still a male-dominated world 'which women are allowed to join provided that they pretend to be men'. She states (ibid at 498) that '[i]n order to become a judge a woman has to give up her own voice and adopt that of a man — like the little mermaid who had to give up her voice to be near her prince'.

Surely judges should not be required to deny or reject their gender, race or other aspect of identity when they engage in judicial work? As L'Heureux-Dubé states, '[w]omen and other outsiders should not be required to leave their life experiences at the foot of the stairs outside the courthouse as they enter the world of the judiciary' (op cit at 29). Judges cannot possibly be required to be blank slates. Detractors point out that the life experiences of judges should be irrelevant to decision-making and deliberation because of judicial impartiality; judges should decide their cases without bias of any kind. However, it is fallacious to suggest that life experience necessarily impacts on a judge's impartiality; a judge must always be impartial, irrespective of his or her background or life experience. A particular kind of life experience, or a judge's gender or sexual orientation, therefore, does not necessarily make that judge biased, or predisposed towards bias. Cameron AJ (as he then was) in *South African Commercial Catering and Allied Workers Union (SACCAWU) v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) para 13, positioned life experience in the context of judicial impartiality as follows:

'"[A]bsolute neutrality" is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties.'

However, the 'different voices' do not have complete carte blanche in decision-making. Baroness Hale states that '[o]ur loyalty is to the law and not to our race and gender' (op cit at 499). And in the South African context, Albie Sachs (*Advancing Human Rights in South Africa* (1992) ch 5) makes it clear that race and gender must 'defer to the Constitution', because

'[i]n the end, non-racial and non-sexist judgments are possible through a commitment to the values of the Constitution: the new constitution requires judges whose decisions are based upon loyalty to the constitution [and the principles of natural justice] and not allegiance to any race, class and gender'.

Sachs's observation reaffirms the important point made earlier that the diversity provision does not mean that judges 'represent' a particular constituency. The benefit of a bench comprising a mix of races and genders lies not in it 'representing' constituencies, but that collectively it is likely to be more accepting and understanding of the diverse cultures and groupings within society and their needs, because of its own experience of past disadvantage and/or discrimination.

In this last section, the discussion turns to the JSC's record in respect of gender transformation of the judiciary.

GENDER TRANSFORMATION AND THE JSC: A BROKEN RECORD?

Since its inception, the JSC has been extensively criticised for its apparent lack of focus on gender transformation. In October 2012, the Democratic Governance and Rights Unit ('DGRU'), on behalf of itself and Sonke Gender Justice Network ('Sonke'), laid a complaint against the JSC, the President, the Minister of Justice and the Chief Justice with the Commission for Gender Equality, calling on the Commission to investigate the lack of gender transformation in the judiciary (see <http://www.dgru.uct.ac.za/news/?id=35&t=int>, accessed on 10 December 2012). A representative of the DGRU said that '[o]n the basis of our research, it is self-evident that there is a glass ceiling for potential women judges. There is systematic discrimination that goes to the heart of our constitutional values'

Statistically, it is clear that women are lagging behind. Only around 23 per cent of judges are women. In both South Africa's top courts, where one might have expected greater gender representivity, only seven out of 24 judges of the Supreme Court of Appeal ('SCA'), and two out of eleven Constitutional Court justices are women. The situation in the high courts is no better: in the Cape High Court, only eight of the 28 judges are women; and in Gauteng, women judges number eighteen out of 79. These statistics show that the judiciary remains overwhelmingly male. At least the situation is better than that in the United Kingdom, where only five of the 54 most senior judges are women; in their Supreme Court there is only one woman out of twelve judges.

Following the October 2011 interview round, during which only fourteen of the 43 nominated candidates were women, and only five appointed, the JSC expressed concern about the low number of women candidates being nominated for judicial vacancies ('Lack of female judges worries JSC' *Mail & Guardian*, 25 October 2011). Similarly, during the October 2012 round, the JSC interviewed 22 candidates, of whom seven were women. Of these, only three were selected for appointment. Clearly, gender diversity demands special attention from the JSC. Former Constitutional Court justice Yvonne Mokgoro (Yvonne Mokgoro 'Judicial appointments' (2010) 23 *Advocate* 43 at 45) has suggested that

'it may not be constitutionally unreasonable for the JSC to take a most drastic corrective action, devoting a particular session to the consideration of women only for judicial appointment, advancing the currently much needed gender balance in the judiciary and doing so having invited nominations for women only'.

This approach might be regarded as extreme by some, but perhaps the shortage of women judges justifies extreme action. There is precedent: in 2005, the JSC interviewed only women candidates for a vacancy on the

Constitutional Court, albeit only after the withdrawal of the only male shortlisted candidate (see <http://mg.co.za/article/2005-10-18-judge-withdraws-bid-for-constitutional-court>, accessed on 10 January 2013).

A significant problem remains the low number of qualified women candidates who make themselves available for nomination. Many reasons account for this, and it should be acknowledged that there are many barriers to women lawyers becoming judges. In addition to institutional, systemic and structural patriarchy, coupled with sexism, that are endemic to the legal profession (see generally Ruth Cowan 'Women's representation on the courts in the Republic of South Africa' (2006) 6 *University of Maryland LJ of Race, Religion, Gender and Class* 291 at 305–15), the JSC has not always made women candidates feel particularly welcome. Some questioning at public interviews has exhibited gender and sex bias. For example, Annemarie de Vos, a lesbian judge interviewed for promotion to the position of Deputy Judge-President of the Pretoria High Court, was questioned in great detail about her sexual orientation, particularly its effect on how other judges might perceive her as a judicial leader. The questioning was clearly inappropriate and irrelevant to the selection criteria. Another observation by a commissioner during the same interview indicates the level of gender insensitivity that existed in the JSC at the time: in response to an observation by Judge de Vos that some of the older male judges had been sexist in their dealings with her, the male commissioner interjected: 'sexy or sexist'? (Judge de Vos has since resigned as a judge.) When a female, South African-trained lawyer based in the USA was interviewed for a position in the Constitutional Court in 2005, she was asked what it would take for her to return to South Africa. Before she could respond, a commissioner interjected with the suggestion that she should find a South African boyfriend (Bonthuys *op cit* at 250). In another instance in 2007, a female Muslim judge, who had applied for a transfer to another division in order to be closer to her family, was asked by the head of that court whether the transfer might make it easier for her to find a husband (see <http://www.iol.co.za/news/south-africa/racism-call-advocate-seeks-bench-post-1.322935?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 10 January 2013). These regrettable instances evince a level of insensitivity and ignorance that is inappropriate to judicial selection, particularly considering the deplorable number of women judges.

Similar discriminatory questions about domestic arrangements have been posed to women candidates over the years. An unmarried female candidate who cares for her mother was asked what arrangements she would make to take care of her mother in the event of her being appointed a judge, as she would be working long hours. A similar question was asked of Constitutional Court Justice Kate O'Regan, who had young children at the time of her interview in 1994. Who would look after her children if she had to work long hours, she was asked? I know of no instance where male candidates have been asked similar questions.

Another potential barrier is the JSC's custom of only shortlisting those nominees who have held acting judgeships for interview. There are difficul-

ties associated with acting judgeships, particularly from a judicial independence perspective. However, it has as good as become a prerequisite for permanent appointment as a judge. The Minister of Justice appoints acting judges on the advice of a court's 'senior judge' (s 175), who is in effect always the judge president of the division. This 'senior judge' almost has a decisive say in determining who is appointed as an acting judge; the Minister of Justice generally follows their recommendation. In practice, invariably only those known to the judge president, most likely advocates or attorneys who do litigation work, are offered acting judgeships. Research by the DGRU showed that only fourteen out of the 93 acting judges countrywide in the month of August 2012 were female. In the SCA, of the eight judges appointed acting judges for the first term of 2013, only two are women (see <http://www.justice.gov.za/sca/roll.html>, accessed on 10 December 2012).

At present, the JSC plays no formal role in the appointment of acting judges. Although it would not be practicable or desirable for it to be involved in the appointment of every acting judge due to the frequency and unpredictable timing of these appointments, it would be advisable for the JSC to have the ability to advise the judges president and the Minister of Justice of potential candidates to sit as acting judges. This would ameliorate to some extent the gatekeeper-like consequences of the judge president and minister's control over acting judgeships.

Another pernicious barrier in respect of the Constitutional Court is the apparent lack of will and resolve on the part of the 'appointing authority' (to use interim Constitution's terminology) to increase the number of women on that court. Constitutionally, the President, as head of the national executive, makes the appointment after consulting the Chief Justice and leaders of parties represented in the National Assembly (s174(4)). In 2012, SCA judge Mandisa Maya was one of four candidates recommended by the JSC for appointment to the Constitutional Court to replace former Chief Justice Ngcobo, whose term had come to an end. Despite calls from the main opposition party and women's organisations to appoint Maya, Judge Ray Zondo, former head of the Labour Appeal Court, who had acted in the vacancy for almost the entire preceding year, was appointed. Similarly, in 2009, a list of seven names, including those of three women, was forwarded to the President to fill four vacancies on the court left by the retirement of three founding members of the court, including Justices Kate O'Regan and Yvonne Mokgoro. However, only one woman, Judge Sisi Khampepe from the Gauteng High Court, was appointed. Clearly, this shows that there is a significant problem with, and numerous barriers to, increasing gender diversity in South Africa.

To its credit, the JSC, since its formation, has attempted to increase the number of black and women judges by broadening the pool of candidates from which judges are selected. This means that advocates who are not senior counsel, attorneys, academics and even magistrates and government lawyers have been considered for judicial appointment. Concerns have been expressed recently that this extended pool appears to be drying up or has

already dried up, which will increase the JSC's difficulty in finding black and women candidates. During the early years of the new dispensation, many academics were appointed to the bench, but recently judges have been drawn more heavily from the traditional pool of lawyers in private practice. It is not unreasonable to suggest that the larger the pool, the greater the likelihood of good judges. There are many exceptional potential female judges in academia, and this pool should be drawn upon more heavily.

For many years now, aspirant women judges have been targeted for special training to prepare them for judicial office. Kathleen Satchwell, a high court judge, has criticised this scheme as sexist, saying that '[i]f you are a woman you have to go on a course to become a judge, but a man can simply serve as an acting judge and apply for the job' (<http://www.iol.co.za/news/crime-courts/women-judges-not-respected-1.1373310#.UHHeo448uYE>, accessed on 10 December 2012). This type of programme could create the perception that women are not up to the task of judging without special training, as Judge Satchwell's comments indicate. However, the annual aspirant training programme organised by the recently established Judicial Education Institute of South Africa (see the South African Judicial Education Institute Act 14 of 2008) stipulates that gender, age, previous disadvantage and potential are factors that the selection committee consider in selecting candidates who will attend. The training is therefore focused not on aspirant women judges specifically, although these programmes could be helpful in bringing them to the attention of judges president for appointment as acting judges.

CONCLUSION

In this note I have advanced an interpretation of the diversity provision that is wider than representation and narrower than broad diversity. The essence of representivity is that it allows for both personnel and institutional change of the judiciary. In other words, the diversity provision permits not only a change in the gender and racial composition of the bench, but also a consequential positive change in the way that the judiciary operates as an institution.

In respect of gender transformation, I have argued that 'difference' is a particularly important justification for increased gender diversity, considering the South African context. And although there is no conclusive evidence to suggest that women inevitably *decide* cases differently from men, their presence on the bench can make a difference in other significant ways, as explained. In particular, women judges could be particularly well-placed to challenge male-centred assumptions and structures of reasoning in law, although not inevitably so.

On a more practical level, more clarity is needed on how the JSC interprets and applies the selection criteria, in particular the meaning, scope and purpose of the diversity provision, and its interrelationship with the merit requirement. I have suggested that merit and diversity are entirely reconcilable, even overlapping, selection criteria that could potentially be

integrated into one 'blended' criterion. The JSC's 2010 Guidelines, which do not clearly distinguish between the merit and demography requirements, appear to support such an interpretation.

In respect of gender transformation particularly, mere talk by the JSC of increasing the number of women judges is insufficient. Rickard's assessment in 1999 will remain accurate until the JSC develops a strategic plan to increase gender diversity. The muted reaction of the JSC to the nomination of only male candidates in 2012 to replace Justice Yacoob calls into question its commitment to gender transformation.

Women lawyers who meet the requirements for appointment should be encouraged by their colleagues to make themselves available for nomination. The pool of women candidates from which to draw excellent judges is strong and deep; it simply needs to be accessed.

OBSERVATIONS ON THE IMPACT OF THE 2008 COMPANIES ACT ON THE DOCTRINE OF CONSTRUCTIVE NOTICE AND THE *TURQUAND* RULE

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INTRODUCTION

Prior to 1 April 2011, the date on which the Companies Act 71 of 2008 ('the Act') came into force, authority to enter into a contract on behalf of a company was governed by generally applicable agency principles supplemented by the common-law doctrine of constructive notice and the common-law *Turquand* rule. This note seeks to highlight some of the problems brought about by the changes made to the law in this regard by the Act. The note is not an exhaustive treatise on the matter, but rather as an attempt to elicit thought and comment on important provisions of the Act. The note does not deal with the situation where authority to contract on behalf of the company is lacking because the contract is beyond the company's capacity. It is assumed, therefore, that the contract in question in this note is within the company's capacity.

Before addressing some of the relevant provisions of the Act, a brief outline of the *Turquand* rule and the doctrine of constructive notice in our common law is necessary in order to understand the problems to which I have alluded.

THE COMMON LAW

In terms of the common law, a person dealing with a company cannot assert as against the company that he did not know the contents of the public documents of the company (see *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826 at 832 and 839; 1927 All ER Rep 421 (CA) 423 at 424 and