The authority of Full Benches in other divisions

By **HJ Benade,** Free State Bar, Bloemfontein

Is a single judge from one division bound by the decision of a Full Bench from another division? Logic would so dictate, one might initially think. And such inclination might seem in line with the Constitutional Court's admonition that '… courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals' [per Kriegler J in *Ex Parte Minister of Safety & Security : In re S v Walters* 2002 (4) SA 613 (CC) at 646F], and the Supreme Court of Appeal's reminder to lower courts to 'accept loyally the decision of the higher tiers' [*S v Kgafela* 2003 (5) SA 339 (SCA) at 341C *and Blaauwberg Meat Wholesalers v Anglodutch Meats (Exports)* 2004 (3) SA 160 (SCA) at 168B].

But are Full Benches of other divisions 'higher tribunals' or 'higher tiers' with 'binding force' for single judges?

Not according to legal history and established practice. In *National Chemsearch (SA) v Borrowman* 1979 (3) SA 1092 (TPD) at 1100E an unanimous Full Bench pointed out that: '(o)f course, in our practice, *stare decisis* is applied in the provincial divisions on a purely provincial basis, ….'. In *Lobley v Lobley* 1940 CPD 420 at 434 a two Bench regarded itself as not bound by the three Bench decision in point in *Pugh v Pugh* 1910 TPD 792. Likewise, Thring J regarded him in *MV Heavy Metal Palm Base Maritime SDN BHD v Dahlia Maritime Ltd* 1998 (4) SA 479 (CPD) at 486B not bound by a Full Bench decision in point in *October International Navigation Inc v MV Fayrouz IV* 1988 (4) SA 675 (N).

In fact, a decision by a single judge of the same division is accorded higher authority than that of a Full Bench of another division. A decision in point by a sister in the same division is binding on a single judge 'unless the Court is completely satisfied that such previous decision is wrong, and has been arrived at by some oversight or misunderstanding, and that a palpable mistake has been made' [per Price and Rumpff JJ in *R v Philips Dairy (Pty) Ltd* 1955 (4) SA 120 (TPD) at 122C–D. Also *Bonnet v Department of Agricultural Credit and Land Tenure* 1974 (3) SA 737 (TPD) *at* 743A]. Whilst a decision in point of a Full Bench of another decision is not binding on a single judge, but only have 'strong persuasive value' [See *MV Heavy Metal Palm Base Maritime SDN BHD v Dahlia Maritime Ltd* 1998 (4) SA 479 (CPD) at 486B and *S v Jafta* 2005 (1) SA 108 (ECD) at 131B–C.]

Briefing patterns – matter of great concern

By **MN Hinana**, Mthatha Bar

In December 2011 *Advocate,* Steve Biko is quoted as follows:

> 'We have set out on a quest for true humanity, and somewhere on the distant horizon we can see the glittering prize… in time we shall be in a position to bestow upon South Africa the greatest gift possible – a more human face.'

I believe that until such time that we see (as South Africans) beyond the colour of our skin, the transformation of this country will be compromised. Once we see beyond the colour of our skin, South Africa will see the glittering prize.

The former Transkei homeland had 28 districts (before 1994, even to date) with the Mthatha High Court serving all inhabitants (this is still the situation). It must be stated emphatically that the better part of the former homeland is rural and a number of people are illiterate. Financial institutions, eg banks, serve those needy people in the area. Some rural towns do not have banks, eg Mqanduli, Libode, Ngqeleni and Elliotdale. More often than not, those financial institutions would litigate against people in the former homeland. It is surprising that when civil proceedings are instituted in Mthatha High Court against or on behalf of those financial institutions, such instructions are exclusively allocated to white firms (that will in turn brief white advocates). In most cases, local white firms would act as correspondents of firms from other places like Gauteng. The local firms (maybe on instructions from those firms) would appoint white advocates exclusively.

Ever since I practised in Mthatha as an advocate, black advocates have never been briefed in commercial litigation (maybe because of the colour of their skin). In cases before Mthatha High Court, briefs from financial institutions are meant for white counterparts. In some few cases, legal practitioners from outside would come to Mthatha and represent those banks. Strangely, local firms (white firms) are correspondents. It is no secret that black firms of attorneys do not get work from financial institutions (maybe because of the colour associated with their directors).

This disturbs me because it seems as if even though these financial institutions service 98% of blacks within the former Transkei, when it comes to litigation, they prefer white counterparts. I am in no way suggesting that white counterparts should not be briefed, but it raises some eyebrows when it comes to briefing. Maybe financial institutions in Mthatha (and elsewhere) do not have confidence in black practitioners. In fact a number of white firms in the former Transkei would hardly (I mean hardly) brief a black advocate. White firms prefer their white counterparts. It becomes worse when black firms prefer white counterparts (very serious).

Indeed, briefing patterns are a major cause for disharmony. I accept that a client decides who to be instructed, but why is it