



KGOMOTSO MOROKA SC

REPRESENTIVITY, LONGEVITY AND THE BURDEN OF BEING FIRST

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“Tell me: Are you treated differently by judges now? Are you treated differently by attorneys? Do you get nice work? Are you respected? That really is the measure.”

– Moroka SC on whether Black¹ women are in a better position today:

As the first Black woman to be conferred silk status, Kgomotso Moroka (Mme Moroka to some) represents something that continues to remain elusive for women at the bar today – longevity. In her just-over 40 years in the legal profession, she has served in almost all its layers: as an interpreter, prosecutor, practising attorney, magistrate, member of the Bar and acting judge.

Having completed her schooling in Lesotho and Swaziland, Moroka went on to read for her BProc degree at the University of the North,² which she completed in 1977. This coincided with the first trickle of Black women who had started to enter the formal legal profession, with Zainunnisa ‘Cissie’ Gool being the first Black woman advocate to be called to the Cape Bar in 1962, and Desiree Finca from Mthatha being the first Black woman to be admitted as an attorney in 1967. This was some 40 years after the Women Legal Practice Act of 1923 was promulgated to recognise women as persons who could be admitted to legal practice.

In 1959 the apartheid government extended its segregation policies to higher education. The result was that black students would be allowed to study at the then-classified “white” universities only if they obtained a permit from the relevant minister.

Upon completing her BProc degree, Moroka took the less travelled road to pursue her LLB at the University of the Witwatersrand, which at the time was classified as a “white” institution for which she had to seek special permission from the minister of internal affairs. She recalls that “*it was Helen Suzman who agitated for me to get the permission. And they said no. And she said why? Why can’t black students go to Wits?*” Permission was eventually granted. But it came well into the academic year, forcing her to complete her LLB over three years instead of two.

Having completed her LLB degree in 1980, Moroka set out to do articles. She recalls that at the time, “*all these white law firms had never employed a black woman graduate. And then unfortunately for me ... pregnant ... eight months pregnant ... applying for articles*

... So a number of law firms said 'no'. Moroka's use of the word "unfortunately" when referring to her pregnancy at this point in her career is something that will ring true for many women. Moroka found herself at the sharp intersection of race and gender. The truth is there is never a right time to be pregnant, have a family and a legal career.

The search for articles for a pregnant black woman graduate was difficult as doors shut quickly and hard. But one remained open. Bowman Gilfillan and Blacklock Inc said yes, subject to one caveat – they would require that she complete an IQ test. Moroka was not surprised by this additional step she would have to clear, she had come to understand that there were unspoken biases and low expectations that sought to render her a second-class citizen in her chosen profession. So even though Moroka had two degrees, including one from Wits like the other article candidates, she – alone – sat for a full day's IQ test. That was the door that opened.

Moroka went on to complete her articles at Bowman Gilfillan and Blacklock Inc, and in March 1982, she was admitted as an attorney. Between 1983 and 1988, Moroka went to work first as a prosecutor and then later as a Magistrate in Thaba' Nchu.

MOROKA'S EARLY CAREER AT THE BAR

Moroka returned to Johannesburg to do her pupillage in 1989. At the time, one black woman had joined the JSA a year ahead of her, Mokgadi Lucy Mailula, who later became a Supreme Court of Appeal judge. In her pupillage class, there was one other black woman, Bess Nkabinde, who also later went on to become a Constitutional Court judge. Both Moroka and Bess Nkabinde were admitted as advocates in 1989.

Moroka started her practice initially on the 16th floor and later 14th floor of Schreiner Chambers. She speaks fondly of the camaraderie she enjoyed with other young women at the Bar – like Allyson Crutchfield and Denise Fischer – both of whom are now judges of the high court. She remembers how she would have to balance motherhood and legal practice, running from court to collecting children after school. So with the support of other young women, including Crutchfield and Fischer, she established a "village" in Schreiner Group 16 to help her balance the competing demands.

However, workflow remained a challenge for Moroka. She would have to battle against the problem of skewed briefing patterns. Like many other black practitioners, she had to cut her teeth on Road Accident Fund and labour work. It was not necessarily the work that she enjoyed; it was the work that came. Vincent Maleka SC recounts in his letter nominating Moroka for appointment as senior counsel that *"Moroka suffered extensive patterns of discriminatory briefing patterns against women colleagues, particularly African women at the Johannesburg Bar. Despite such discriminatory practices, Moroka has been able to establish and grow her practice in different fields, including constitutional litigation, telecommunication opinion and litigation work and recently commercial practice."*

Thus, even while swimming upstream at the Bar, Moroka continued to excel and force her way into more and more matters of substance. She played an instrumental role as a junior counsel appointed to represent the Constitutional Assembly to defend the draft text of the Constitution in the first and second Certification of the Constitution cases.³

Bizos SC writing in 2004, in support of Moroka's application

for silk, described how, as a junior counsel, Moroka was involved in several lengthy and difficult matters, including the Goldstone Commission into police violence in Sebokeng, where she spent hours with him in consultations with many victims and witnesses, preparing to cross-examine numerous police officers. She was also centrally involved in the Shell House Inquest conducted by Judge Nugent, where Moroka cross-examined and led several witnesses.

Even as junior counsel, Moroka became widely known as a bold and honest voice on the issue of transformation and the briefing patterns that throttled access to work for anyone who was not white and male at the Bar. She became the general secretary of the Black Lawyers Association in 1996, and in 2001, she was appointed as its deputy chairperson. She would go on later in life to serve as the chairperson of the Johannesburg branch of the Advocates for Transformation.

In 2005, Moroka was appointed as senior counsel, shattering another glass ceiling as, up till then, there had been no Black woman senior counsel in the entire country. To underscore this momentous achievement, there are just under 10 black African women advocates in the JSA, nearly 20 years after she was made silk.

LEGACY AND HER REFLECTIONS ON THE BAR

Moroka SC counts as part of her greatest contribution and legacy her 15 years on the Judicial Service Commission, having been appointed in 1993, in the transitional period by Nelson Mandela. She remembers fondly that Bizos SC was her great ally on the JSC, and they would work together to try and achieve the transformation of the judiciary envisioned in section 174(2) of the Constitution. This was an uphill battle. In 2009, Moroka SC published an article in the *Sunday Times* titled "Prejudice taints the country's pool of potential judges". In it, she explained that the judicial transformation debate cannot be divorced from the debate on the transformation of the Bar, given that judges were traditionally drawn from the ranks of senior counsel. She argued strongly that by depriving women and black people of substantive work, the Bar was also depriving the JSC of a diversity of strong, capable candidates to draw from. She explained at the time that:

"The number of white male senior counsel has grown by 55 over the past seven years (from 274 in 2002 to 329 in 2009), while the number of black female senior counsel (Indian, coloured and African) has increased only by one over the same period (from three in 2002 to four in 2009). This is perhaps a clear indication of the perception that black women are not good enough. But if that is true, then only quality work will make them good enough, surely.

"Only 6% of all white female advocates are senior counsel. One in every four white male advocates is a senior counsel! The message is that one in four white males advocates across the country is good enough to be senior counsel and, by implication, a judge. Just 2.6% of all black female advocates are senior counsel and 10.6% of all black advocates (Indian, coloured and African) are senior counsel. Message: nine out of 10 advocates who are not white are not good enough to be senior counsel. By implication, they are not good enough to be judges."



“EVEN AS JUNIOR COUNSEL, MOROKA BECAME WIDELY KNOWN AS A BOLD AND HONEST VOICE ON THE ISSUE OF TRANSFORMATION AND THE BRIEFING PATTERNS THAT THROTTLED ACCESS TO WORK FOR ANYONE WHO WAS NOT WHITE AND MALE AT THE BAR.”

The fact is a representative and diverse judiciary is crucial because it guarantees diversity of thought in the development of the law, a lack of diversity might impact on deliberations. When individuals see themselves represented by those trusted to resolve disputes, they may be more inclined to trust the outcomes of the judicial system.

As senior counsel, Moroka has given a lot of her time to the various leadership structures of the General Council of the Bar as well as the JSA. In 2015, she was elected as the chairperson of the National Forum in terms of the Legal Practice Act, 2014 and as a safe pair of hands, she was entrusted by the profession to lead the transition from the previous dispensation to the Legal Practice Council.

In relation to her contribution to the law, Moroka SC says that she is proud that *“if you go to the law reports, whether I’ve won the case or not...you’ll always find that I had a woman junior in my team.”* Of course, Moroka SC is being modest. She has been at the helm of significant developments in the law most recently in the ground breaking case leading the applicants’ team in *Mahlangu v Minister of Labour*.⁴ *Mahlangu* is a case recognising the value of domestic workers’ labour. In it, the Constitutional Court declared sections of the Compensation for Occupation Injuries and Disease Act, 1993 unconstitutional for its exclusion of domestic workers employed in private residences.

With regard to the Bar, Moroka SC is hesitant and even ambivalent about her legacy. In response to a question about whether, looking back, the Bar is in a better place, she says:

“There [are] some who are thriving, who are having good practices, who are going to be silks soon [and] there are those who are getting evicted...[there are] a lot of them. There are those who are giving up because it just isn’t working for them. And I suppose people will say to you, ‘But that’s the nature of practice at the Bar. There are those who succeed and those that don’t succeed’. But my answer to that is it ought to be at least the majority who are succeeding and doing well. Because we’ve got so many bright young people. Young women. And men, by the way. But many are struggling.”

There are certainly more Black women in the JSA; that much is evident – some are succeeding. But the high rate of attrition of Black and women advocates gives her great pause. In a poignant moment of reflection about her own journey, Moroka says:

“And so for me the journey, to be truthful, has been a very difficult journey because you are supposedly a trailblazer. You are supposedly supposed to fight and make a difference ... and to have an impact. I’m sitting on my rocking chair, I’m wondering. I’m wondering. Whether it was worth it, whether it was worth the fight. Whether I could have fought it differently. I don’t know. But I don’t get the sense that ‘Wow! We’ve arrived’.”

The truth is some - some have arrived. Many more are left behind. But it was worth it.

In preparation for this article, we met with Moroka SC, four black women advocates, all under 10 years of seniority.⁵ We listened intently as she told us her story and gave us some advice. In speaking to her, we came to fully understand the power of representation. Although there have been women in the legal profession for 100 years, that is not the case for Black women. Our history is far more recent. It is important to acknowledge that Moroka SC existed in spaces that had never seen any who looked and sounded like her. It is easy to be dismissive of that achievement if you have never had to do it alone. Her presence in those spaces was transformative, and it created room for us.

Her parting message: we need to continue agitating in the spaces we occupy to make room for the inclusion of more women. This is the beginning of such agitation. **A**

Notes

- 1 In this article when we refer to “Black” it is used to denote the generic term which means Africans, Coloureds and Indians. To the extent necessary, where we use the term “black African”, it denotes Africans.
- 2 The University of Limpopo.
- 3 The team was led by Advocate George Bizos SC and also consisted of Wim Trengove SC, Marumo Moerane SC and Nona Goso.
- 4 2021 (2) SA 54 (CC).
- 5 Lerato Zikalala, Cingashe Tabata, Yanela Ntloko and Nomonde Nyembe.