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WE, THE GENERATIONS WHO FOLLOWED

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It is, by now, folklore.

In March 1923, The Women Legal Practitioners Act of 1923 was assented to by the governor-general of the Union of South Africa. Its sole purpose was to enable women to be admitted as legal practitioners in any province of the Union. That it is barely half a page belies the socio-legal contestations and deferred dreams that preceded its commencement on 10 April 1923.

The decision of the legislature to pass the statute will have put to rest Bristowe J's concern in *Schlesin v Incorporated Law Society* 1909 TS 363 that the proper course to be adopted if an innovation was to be made to admit women as practising attorneys was to approach the legislature, and not the courts. It will have also put to rest the quandary at the heart of *Incorporated Law Society v Wookey* 1912 AD 623, where Innes ACJ and De Villiers JP overturned a decision by Maasdorp J that a woman could be enrolled as an attorney in the Cape of Good Hope after a completed service as an articulated clerk. Innes ACJ explained that the case was not only important to Ms Wookey

and others who wanted to follow her example, but to the profession and the public. If Maasdorp J had correctly decided the case, the result would be 'materially to widen the area of women's activities, though that be done by opening to a host of new competitors the doors of an already congested profession. If it was wrongly answered, then the law of the country [would] be denying to one-half of its citizens, on the mere ground of sex, the right of employing their natural abilities in the pursuit of an honourable calling'.

As luck would have it, Maasdorp J was ahead of his time (which means that, though we commend his progressive reasoning today, he was ultimately found to have decided Wookey incorrectly in 1912). It was simple, really: Enactments that dealt with the requirements under which 'persons' could qualify and be enrolled as attorneys had to be taken to mean 'men' only and to exclude women, and until the legislature had clearly and unequivocally made provision for the admission of women as attorneys, the Appellate Division was bound to follow the established practice. Another dream deferred.

It is accordingly no small feat that Irene Antoinette Geffen and Constance Mary Hall were admitted as legal practitioners in 1923 and 1926 respectively. Their entry into the annals of history was and continues to be a rebuttal against the sexist systems that made it impossible for educated, ambitious and capable women to do so previously.

But if white women were previously excluded from the profession because of a reading of enactments that upheld patriarchal ideology, and if Black men struggled to be seen as equal to their white male counterparts because of entrenched racist ideologies despite their admission as practitioners since 1909, what was the reason for the late entry of Black women¹ into the profession almost 40 years after the Women Legal Practitioners Act commenced? And how does this inform our agency as lawyers a century later?

There is no clear answer to the question of why it took four decades for Black women to enter law. The Women Legal Practitioners Act certainly did not prohibit them from doing so. We can only posit that the patriarchal and racial norms of colonial and then apartheid South Africa coalesced in their application to Black women so that, understood in historical context, it only makes sense that the dreams of educated, ambitious and capable Black women who wanted to practise law were deferred for that period of time.

And so it was that in 1962, Zainunnisa ‘Cissie’ Gool became the first Black woman called to the Bar, and that Navanethem ‘Navi’ Pillay and Mabaeng Lenyai ‘Desiree’ Finca went on to be admitted as attorneys in 1967. Born and raised in Mthatha, Ms Finca was inspired to study law after witnessing the career trajectory of Nelson Mandela. Oliver Tambo encouraged her to do her articles under Douglas Lukhele, with Godfrey Pitje on standby for her training when Lukhele had to tend to his practice in Swaziland. She later went into partnership with Pitje, and their firm, Pitje and Finca Attorneys-At-Law, handled cases such as Robert Sobukwe’s application to be admitted as an attorney in 1975.² They instructed Jack Unterhalter to act on his behalf.

Generations of Black women lawyers followed Gool, Pillay and Finca. Individuals such as Victoria Nonyamezelo Mxenge, who was admitted as an attorney in 1981, used the law as a tool to defy apartheid. Hundreds of others who were galvanised by the admission of women into the profession in the 1920s and 1960s carved out their own careers in ways both known and unknown to the public, aiming to meet their career desires along the way.

So, what of these gains? And how do we account for them in the light of continued inequality?

We acknowledge that an attempt to present and understand the milieu that Black women exist in in the profession today will always be incomplete because of our different realities. Though there might be a common thread in the axes of oppression we face, it is also true that we cannot speak for each other, and that our individual voices are our own.

But despite this acknowledgment, it is useful to explore what the numbers say, and how best they can be interpreted to assess the strides we have made, or have yet to make. The next part of this piece will assess the numbers as they are at the Johannesburg Society of Advocates (JSA). We are grateful to Berlina Chautsane and Pam Irvine from the JSA for assisting us.

With that we emphasise that the numbers and assessments below pertain to the Johannesburg Bar.

There are around 1 202 members in the JSA. Of that, roughly 974 members are junior members and 228 are silks. The ratio of silks to juniors is around one to four (for every single silk there are about four juniors). Some might hold the view that the ratio is something to be celebrated in that the JSA has retained a number of silks but has at the same time welcomed a number of juniors, and membership is taken up in most part by juniors.

The statistics, when disaggregated by race, gender,³ and seniority and then by race, gender and seniority combined, however, tell a sad story, and pose the question of whether a large cohort of junior members at the entry level can and should be celebrated when the numbers eventually dwindle as juniors become more senior.

First, of the 1 202 advocates at the JSA, only about 437 identify as women. This is so in a country where women account for the majority of the population at about 51%. We are significantly underrepresented in the Johannesburg Bar and account for only 36.4% of the JSA’s membership.

Second, of the 434 women advocates, only about 33 have acquired silk status. This means that while the general ratio for silks to juniors across the JSA is one silk to four juniors; that ratio is one women silk for every 13 women juniors. This statistic may be interpreted as having two significant consequences: (i) women juniors may have fewer women silks to look up to for mentorship and inspiration; and (ii) fewer women have been conferred silk status than their male counterparts. The Johannesburg Bar on average recommends between eight and 14 people for silk ever year; and women only ever account for about two or three of those numbers.

Third, of the 33 women silks at the Johannesburg Bar, 22 are white; three are Indian; seven are Black African; and only one is Coloured. This means that there are broadly 11 Black women silks at the Johannesburg Bar.

	Silks	Juniors	Silk to Junior ratio
Black African women	7	188	1:29
Indian women	3	47	1:16
Coloured women	1	19	1:19
White women	22	180	1:8

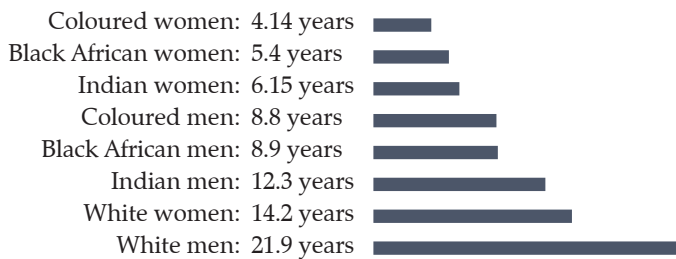
In circumstances where women juniors might want to seek mentorship from those who walk through the world as they do, Black women silks are fewer in number and Black women juniors who may desire to seek mentorship from Black women silks have fewer silks from whom to seek such mentorship.

A question that flows naturally from the disproportionate ratio of Black women silks to juniors against white women silks to juniors is one that asks what happens to women when they reach levels of seniority at the Bar. We expected a high attrition rate for women against that of men, but the statistics do not bear this out. Men are significantly represented in the numbers of those who have left the bar in 2019, 2020 and 2021.⁴

	Black African	White	Indian	Coloured	Total
Women	81	59	20	7	167
Men	142	125	11	4	282
Total	223	184	31	11	449



However, when one averages out the seniority of those leaving, it is clear that Black women are leaving the bar on average sooner than their counterparts – white women – or white men:



Though more white men have left the Bar in higher numbers than Black women, they do so after having enjoyed lengthy careers; they leave for the purposes of retirement. This points to the difficulties that Black women face in being able to maintain practices at the Bar beyond six years.

The JSA has made efforts to address this trend. These efforts include: (i) the creation of the Transformation Fund and work by the transformation committee to implement its policies; (ii) the ‘three-counsel rule’; (iii) Rule 7; and (iv) the expansion of Rule 7.

In 2015, the Transformation Fund was created. Its aim was to use money drawn from defaulting members to aid transformation initiatives. In the same year, the transformation committee was created to implement policies related to the transformation of our profession.

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2015 was a significant turning point due to the embarrassingly low representation of JSA demographics in the ‘Silicosis’ case. The bar council adopted a resolution colloquially known as the ‘three-counsel rule’ to help meet transformation objectives:

1. It shall be unprofessional conduct for lead counsel to accept a brief or remain on brief where:
 - 1.1 there are 3 or more counsel on brief, including lead counsel, for the same client or set of clients in the same matter; and
 - 1.2 no member of the team of counsel is a black person.
- 2 *For the purposes of this rule the term ‘black person’ is a generic term which is used in the same sense as the Employment Equity Act defines ‘black people’.*
- 3 *In giving effect to this rule it shall be the responsibility of lead counsel to take appropriate steps to ensure that black women are identified and given special preference.*

The three-counsel rule attempts to include Black people in complex matters that usually necessitate bigger teams. It: (i) explicitly provides for the advancement of Black people and places the responsibility at the door of those in positions of power in this profession — the leaders of counsel teams; (ii) aims to be intersectional in its approach: focusing not only on racially biased briefing patterns where Black people are concerned but also misogyny experienced by Black women in these teams; and (iii) most importantly, makes the failure to advance transformation a disciplinary issue.

It, by its nature, is adopted when complex matters requiring sizeable counsel teams arise. These cases are a rarity and do not arise in everyday work. Consequently, this rule may have a limited impact. We also cannot speak to whether its aims have been met, given just how vast the experiences of those who have seemingly benefited from it are.

The next initiative came three years later in 2018. Rule 7’s stated objective is to bring ‘more opportunities to our junior members’ and calls upon all members of more than eight years’ standing to, annually, request the transformation committee to recommend a member as junior in a particular matter.

Upon application, the transformation committee will pair a junior up with a person of seniority eight years or above.

The junior’s participation should ideally be funded by the client and could, on application be funded by the transformation committee.

Ideally, it would be juniors between years one and three who would benefit.

The advantage of Rule 7 may lie in its anonymity. For some Black women, approaching others with a request for work is difficult. This rule attempts to enable juniors who would otherwise not be so bold as to ask, to simply be paired. It aims to facilitate juniors' exposure to work that some deem too complex for them. The Rule has the potential for transformational success, and silk candidates are required to state their adherence to it in their applications.

In 2021, the bar council issued a circular that stated that: "With effect from 1 January 2021, all black and women juniors of 5 or fewer years' seniority will automatically be considered for pairings under this Rule. In other words, it is no longer necessary to apply to be placed on a list of juniors who will be considered for Rule 7 pairings."

The amendment adds nuance to the rule by aiming for transformation for women and Black juniors. Even while acknowledging this, however, we note that it is too soon to tell just what the impacts of the rule will be on Black juniors after their third year. If it is true that the attrition rate for Black women is high after six years of practice, it is likely also true that initiatives such as Rule 7 are limited in their success, in that women and Black juniors outside of years one to three have limited policies to draw from outside of it.

The picture above shows an effort over the last decade to ensure transformation takes place. The policies exist at the macro level and aim to sustain the practices of some Black women at the junior level. They are a link in the chain pulling our bar towards equality.

The policies are also but one of the tools available for transformation. The reality is that all persons interact with the world at a structural, interpersonal and personal level. Black women's interpersonal experiences have as much an impact on their experience of the Bar as their interaction with the system within which they practise. Unfortunately, because we live at the intersection of racial discrimination and gender discrimination, we cannot always find allyship in white women, who may experience misogyny but benefit from racial privilege; or Black

men who may experience racism but benefit from misogyny.

As illuminated by the statistics referred to above, a comparison based solely on race or gender lacks the awareness of the fact that Black women are not only women or only Black people: we are both. We are also individuals capable of a full spectrum of human potential and frailty. Like all others, we make mistakes and fail, and unfortunately, maybe unlike others, such failures do not attach to the individual but instead are used as a basis to make assumptions about our entire community. Be that as it may, we have noted efforts across the board, from all gender identities and races to abandon racialised and gendered notions of capabilities and intellect.

We conclude by considering the agency of Black women in law in the light of what we have set out above. Of course, agency is informed by opportunity and, mostly, luck. In the absence of these, we celebrate the ability of women to be resilient and hopeful that the milieu will change, and that their professional dreams will eventually be realised. We reiterate that we cannot speak on behalf of all Black women. A century later, however, we do celebrate you and us and all womenkind for pushing through and issue a rallying call to 'keep going', in whatever form that is revolutionary to you. Phambili. 🙏

Notes

- 1 Blackness in South Africa is a broad socio-political identifier, and we use the term 'Black' as a collective one in this piece. This is also in line with definitions in our employment laws. Where statistics delineate between Black African, Indian and Coloured People, we draw from them and acknowledge that socio-political and economic systems of the past and present entrenched a difference in realities that sometimes necessitates the delineation despite this core group identity.
- 2 Legal Trailblazers Podcast: First African Women To Be Admitted As An Attorney In South Africa' 17 April 2021. See also Document A2618-AC5 Historical Papers, The Library, University of the Witwatersrand (2010) Johannesburg.
- 3 We acknowledge that the analysis is limited to the gender binary of men and women. This is in part due to the fact that it is unclear whether The Johannesburg Bar collects statistics of gender non-binary, multi-gendered or agender persons. We note, however, that in focusing on those who identify as women and men, we do not intend to invisibilise gender non-confirming people.
- 4 The statistics for 2022 have not been disaggregated by race, and those of 2023 are not yet available.

