



# MAINTAINING APPEARANCES

## Court dress, an enduring rule of etiquette

by SECHABA MOHAPI, Johannesburg Bar

### THE TALE OF KHABAZELA

There once was a Mr Mkhize. He appeared in court for a trust. During his appearance, he made a most unintelligible submission. In support of an application for reconsideration, he and the trust contended that neither client nor attorney had been present in court when the order sought to be reconsidered had been granted. This was despite Mkhize himself having on that occasion been present on “oral instruction” on the trust’s own version. This was odd for it undermines the very essence of briefing counsel to appear in court.<sup>1</sup> It gets worse.

Mkhize had been adorned with silk robes when appearing in the reconsideration matter. Mkhize’s robes attracted judicial suspicion and an enquiry whether he was “silk”. It turned out that he was not and that he had not been entitled to wear the robes. The court reproved: “Mr Mkhize’s very appearance in this court amounted to a misrepresentation, since he appeared in silk robes, and on being questioned, claimed, falsely, that he

had obtained silk in 2021.”<sup>2</sup> Mkhize had lost credibility with the court – something no member of the legal profession desires, for courts place much stock in counsel’s word and for good reason: counsel hold themselves to a high standard of integrity and professional ethics.<sup>3</sup> For this reason, the court should be able to rely implicitly on any assurance given by counsel.<sup>4</sup> Counsel’s word is their bond – this undoubtedly extends to appearing in robes suited to their status.

Having made the serious findings it did against Mkhize, the court decided the matter without his assistance. But that was not the last we heard of Mkhize and silk robes.

About a month later, this time in a disciplinary matter brought by the Legal Practice Council (LPC) against him, the court had to make it quite plain to Mkhize that he had not been entitled to wear silk.<sup>5</sup> Besides, is the convention not that counsel appearing on their own behalf do not robe?<sup>6</sup> This is because when appearing on their own behalf, counsel cannot claim the

Honoré Daumier, *Conversations d'avocats (Deux avocats)*, late 1860s



rights of counsel but will be given only those rights enjoyed by a member of the public, for when not engaged in a case, counsel has no higher right to be present in court than a member of the general public.<sup>7</sup> This is supported by what Cox says of the purpose for our robes in his treatise on the training, practice, rights and duties of the British advocate, that: “In virtue of the robes you wear, all men’s characters and conduct are exposed to your unbridled criticism, and there is no appeal, no redress for them, if they are wronged by you. Both this tremendous power is entrusted to you in the confidence that you will not abuse it; it is given to you, not for your own advantage, but for the advantage of your clients; the privileges are not yours, but theirs, and it is that they might have a full and fair hearing and you are admitted to irresponsible speech. This mighty power, so capable of abuse if misdirected, may be employed most advantageously, if wisely and generously wielded. It may be made the vindicator of truth and righteousness when it can find no voice elsewhere.”<sup>8</sup> James Marchant refers aptly to the robe as a “forensic costume” without which barristers cannot be heard in open court as advocates, except when attending “judges’ chambers” and that “it is not usual to robe [when] appearing before arbitrators or magistrates.”<sup>9</sup>

Mkhize had apparently either been untroubled by findings that he had made a misrepresentation to the court barely a month afore, or he took quite literally the expression “taking silk” the operative word being the “taking,” when this refers to the formal conferral of the special honour of *Senior Consultus*, abbreviated “SC”, whose recipients are colloquially called “silks”.<sup>10</sup>

In true Mkhize fashion, he had, in reaction to the LPC’s application against him, launched urgent proceedings to

interdict the court from hearing the application – a novel if not peculiarly unsustainable application. The matter came before Mbongwe J and I De Vos AJ and the court heard the LPC’s application. The judgment is reported as *Legal Practice Council v Mkhize* 2024 (1) SA 189 (GP), in which the following appears:

“[27] The hearing of 18 July 2023, commenced with Mr Mkhize wearing a senior counsel’s robe. Counsel for the LPC pointed this out and contended that it is a fraud on the Court to represent oneself as a senior counsel when one is not. The following exchange then occurred:

“Mbongwe J: It is disturbing, Mr Mkhize, to hear that you are wearing silk in front of the Court where you are not a silk.

Mr Mkhize: M’Lord, that is also disturbing to my learning colleague because he knows that I am a silk. I have been practising in this division from the year 2010. Even today, I am not having an issue with that.

Mbongwe J: Surely there is a document that they issue for silk.

De Vos AJ: Your letters patent, when were they issued?

Mr Mkhize: They issue documents, and there is a certificate. Yes, there is a patent. It was issued last year in November.

De Vos AJ: The President has not issued letters patent for three years.

Mr Mkhize: Yes.

De Vos AJ: So, you cannot be silk without the letters patent, and the President has not issued these letters, even though there have been recommendations for silk.”

[28] Mr Mkhize then conceded that he did not have letters patent and offered to remove his robes. Subsequent to this exchange, Mr Mkhize was alerted to the fact that he had just made a misrepresentation to the Court. Mr Mkhize’s response, when being confronted with his misrepresentation, was to change his version and say to the court that he was unaware of the requirement of letters patent.”

Ultimately, the court in *Mkhize* removed him from the roll considering numerous complaints that he had accepted briefs and moneys directly from the public whilst he was not a trust account advocate and then had failed to execute mandates. His subsequent application for leave to appeal was refused. Mkhize could no longer maintain appearances. The dissonance between his poor judgment and conduct of litigation on the one hand and his prestigious robes on the other gave him away as the conferment of silk remains a formal honour by the president of the republic of South Africa in recognition of the esteem in which the recipients are held within the profession by reason of their integrity and of their experience and excellence in advocacy.<sup>11</sup> To take liberties with silk robes when one has not been conferred silk misrepresents one’s status to the court and is a matter of grave consequence, as the court cautioned in *Mkhize*.

**... AND THOSE WHO COULD NOT BE 'SEEN'**

*Mkhize* is, however, an extreme case of chutzpah. For the most part, instances where those from our ranks who observed the etiquette of court dress in the breach have been of a risible anecdotal variety.

For instance, in Mr Justice Manfred Nathan's autobiography, *Not Heaven Itself: An Autobiography*, he shares of his cousin Emile Nathan who appeared in court "one cold morning with a bright red winter waistcoat showing underneath his alpaca gown. He rose, and was about to address the Bench" when Chief Justice Innes said, "rather unnecessarily" adds Justice Nathan, "the Court cannot see you, Mr Nathan" – which time-honoured phrase, Justice Nathan explains for the benefit of the uninitiated, means "The Court will not hear you" and which prompted the following exchange:

- "E Nathan: Cannot see me, my lord? Why – why – I am here.  
Innes CJ: No, the Court cannot see you.  
E Nathan: I cannot understand, my lord.  
Innes CJ: Well, if you want to have it quite plain – the Court refuses to give you audience while you wear those clothes."

Someone tugged Emile's gown – relates Justice Nathan – and explained the situation to him. Emile accordingly retired to change the offending waistcoat for something more formal while the Court went on with the next case.<sup>12</sup>

In Mr Justice Diemont's memoir *Brushes with the Law*, he relates the story of the late Harry Scholtz, who once stood up in court wearing cream-coloured shantung (a glossy type of silk with a textured surface) trousers which obviously clashed with his black robes. On that occasion, the then Judge President is said to have meted out the expected reprimand "I can't see you, Mr Scholtz", refusing to hear his case until Scholtz had changed his trousers.<sup>13</sup>

In an anecdote by Professor Ellison Kahn, one John

Blakeway, an attorney, was at the Johannesburg Bar for a while after the war. He was a man of enormous size, says Professor Kahn. One day, when his waistcoat had the last three buttons understandably undone, he appeared before Mr Justice Nemo. Justice Nemo gave him the customary rebuke: "I cannot see you, Mr Blakeway." Blakeway, who for a few seconds had been nonplussed, realised what his Lordship had meant. He responded, "I am profoundly grateful to your Lordship for that description"<sup>14</sup> – a fine self-deprecating quip in reference to his enormous size.

Further afield, Mr Justice Byles, a 19th century judge, once complained to a barrister, Mr Coleridge (who would later become Lord Chief Justice of England) that "I have very little pleasure in listening to the arguments of counsel whose legs are encased in light grey trousers".<sup>15</sup>

By 1844, the common law had recognised and enforced the position that barristers were not to be heard in court without wigs and gown. The first recorded occasion seems to relate to a Mr Bodkin on a bail application "who happened to be in the court at that time but not in his wig and gown" in the case of *R v Whitaker* (1844) 8 JP Jo 390. As a result, he was "neither seen nor heard" by Coleridge J. Fortunately – not least for Mr Whitaker – Mr Bodkin retired and having attired himself in his wig and gown returned to court and obtained bail for his client.<sup>16</sup>

If we can help it, none of us want our court appearances impeded by breaches in etiquette. Having to stand down an appearance to cure an infraction in court dress is not only a time-consuming forfeit of a turn at calling one's matter on the roll, but is also obviously embarrassing. Markedly, only Blakeway had the pluck and wittiness to bring levity to the otherwise awkward situation of not being "seen" by the court.

However, court dress is a well-worn subject in previous issues of this journal. Bert Bester made a learned contribution *On gowns, silk and other colonial relics* in the August 2011 issue;<sup>17</sup> Michael Janisch took a light look at the October 2003 GCB meeting in *Stuff and nonsense in the great robing debate* (and

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Honoré Daumier: *Les Gens De Justice*, c 1840s

Honoré Daumier, *Plea for the defense*, early 1860s



other matters of national importance)<sup>18</sup> as was similarly done by a contributor with the *nom de plume* “Spectator” in obiter on court dress, cloak or mantle, hats and on clothes making the man in the May 1996 issue of this journal’s predecessor, *Consultus*.<sup>19</sup> Nonetheless, the editorial committee decided that the theme of this issue should be “Dressing for Court.” I suspect it might have to do with an apparent drop in etiquette and ethical standards<sup>20</sup> laid most bare in the present digital age of amplified open justice,<sup>21</sup> where proceedings by reason of online streaming potentially make etiquette infractions the subject of instantaneous trending on social media platforms, and bear the scrutiny of an ever-opinionated public audience that has by no means shied away from commenting in the live chat feed of proceedings. It might perhaps have something to do with Chief Justice Zondo’s notice calling for comments on a requirement that advocates robe in the magistrates’ court, which attracted mixed feelings,<sup>22</sup> including a differing view from Madlanga ADCJ on an important consideration whether the Chief Justice is at all empowered so to introduce the requirement.<sup>23</sup> Ultimately, Chief Justice Maya, in a letter addressed to the chairperson of the Legal Practice Council, withdrew the notice on 1 October 2024.

I leave it to others to debate the merits of the proposed reforms, whether we ought additionally to robe in the magistrates’ courts or altogether discard robing. I would urge only as did George Bizos SC at the turn of the century: “Let us reform the Bar so that it may become more effective in our democratic society. Let us not even unwittingly destroy any portion of its essential fabric. If we do, the administration of justice and our society will be the losers.”<sup>24</sup> My own sense is that our observation of the etiquette of court dress helps to reinforce a sense of respect for the profession, it adds to the solemnity of proceedings, it helps to differentiate legal professionals from

members of the public in the court. Save for distinguishing the junior members from leaders of the Bar, the monochromatic courtroom uniform clothes us with equal anonymity that ensures that we are self-effacing. Which anonymity reinforces the idea of impartiality, that the law and justice are the most important pursuits in the court, rather than the personality of any one advocate. Speaking for myself, it is a humbling honour to join the long continuum of countless outstanding lawyers who were once up a time juniors whose skills are worth aspiring to.

In this contribution, I recount a brief history of a garment steeped in tradition, that not only adorns our branch of the legal profession, but that also reflects the rich history of the legal profession and joins our jurisdiction with the rest of the common law world as part of a shared heritage and an enduring etiquette of some seven centuries of observation.

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“SAVE FOR DISTINGUISHING THE JUNIOR MEMBERS FROM LEADERS OF THE BAR, THE MONOCHROMATIC COURTROOM UNIFORM CLOTHES US WITH EQUAL ANONYMITY THAT ENSURES THAT WE ARE SELF-EFFACING.”

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## AN ANCIENT HABIT

A “great self-confident trade-union, whose laws are mainly the *inherited tradition of etiquette* and not formal rules in black and white” are the words that have been used by Lord Reading’s biographer, Walker-Smith to describe the Bar.<sup>25</sup> Part of such “inherited tradition of etiquette” that relates to court dress has vexed lawyers for centuries and it remains a mark of distinction for the courts and their officers. In ancient Rome, the exact manner in which an advocate had to wear their *toga* was prescribed. “The left arm should only be raised so far as to form a right-angle at the elbow, while the edge of the toga should fall in equal lengths on either side.”<sup>26</sup> Tracing the British barrister’s robes to this Roman civil dress, which was the pleader’s uniform, Cohen says the gown of today descends “from even pre-Ciceronian days”.<sup>27</sup>

That same British style of court robes landed in the Cape along with other lasting English influences on the administration of justice that were introduced through the First Charter of Justice on 24 August 1827, including the split of the legal profession into the branches of advocates and attorneys. After all, the transmogrified Cape Supreme Court<sup>28</sup> was constituted of a Chief Justice and three puisne judges appointed from the ranks of barristers from England or Ireland,<sup>29</sup> and advocates admitted to practise in it were to be of the United Kingdom Bar or learned doctors of law of Oxford, Cambridge or Dublin.<sup>30</sup>

It is not surprising, having taken over these cultures of the legal profession and the institution of silk from England, that through the First Charter of Justice,<sup>31</sup> we imported too their respective costumes and with them the accompanying etiquette. As to which James Derriman says: “The costume of the English barrister, as now fixed by custom, comprises a full-cut black gown, lawn ‘bands’ worn in place of a neck-tie, and curled wig.”<sup>32</sup> However, apart from the below image of Bram Fischer QC from Stephen Clingman’s biography<sup>33</sup> and those of South Africa’s first black lawyers,<sup>34</sup> in which they appear robed and wigged, wigs, like juries, have thankfully long fallen into disuse in South Africa. One might have supposed the cause for these early lawyers of South Africa wearing wigs to have been an imported habit by reason of their dual call to the English Bar. However, whilst that might have been true for Henry Sylvester Williams, Alfred Mangena, Richard Msimang, Pixley ka Isaka Seme and George Dick Montsioa, as we know, though Bram read for a postgraduate degree at Oxford as a Rhodes Scholar, he was called to the Johannesburg Bar after South Africa’s independence but before it was a republic on 10 January 1935,<sup>35</sup> and appears never to have been called to the English Bar. This accordingly suggests an alternate and independent reason for the onetime adoption of wigs in South Africa.



Henry Sylvester Williams, first black man to be admitted to the Cape Bar wigged and in his stuff gown.



Bram Fischer QC.

## HISTORY OF THE GOWNS WORN AT THE ENGLISH BAR

Baker says that legal folklore has always fascinated the public and the profession and that a hundred or so books written about the Inns of Court include more than a few accounts on legal dress.<sup>36</sup> He boldly asserts that none of the latter is wholly accurate being founded on gossip and speculation rather than evidence before setting about to put the record straight.<sup>37</sup> “In no respect is the inadequacy of the recorded traditions of the law greater than in the story of the gown worn by junior barristers,” says Baker.<sup>38</sup>

Around the time of Henry VII (1485-1509) the closed robe of general fashion was replaced with an open gown. The barristers followed as well.<sup>39</sup> Sir William Dugdale noted that in Tudor times members of the Middle Temple had “no order for their Apparell: but every man may go as him listeth, so that his Apparell pretend no lightness or wantonness in the wearer; for even as his Apparell doth shew him to be, even so shall be esteemed among them”.<sup>40</sup>

With the advent, in the latter part of the 16th century, of cloaks, breeches and boots in the general fashion of English society, the Inns of Court passed regulations prohibiting those items of dress for their members and requiring members to wear gowns, not only in court or the Inns alone, but also in public. This was the beginning of the regulation of barrister dress.<sup>41</sup> Blok notes that early regulation by the Inns can be traced back to 1547, and that the “dandies of that time still found an outlet for their sartorial expressions”.<sup>42</sup> They adorned their gowns with velvet and lace to such an extent that Mr Justice Wray, the chief justice of the Court of King’s Bench (1574-1592) was moved to intervene, saying: “*Quomodo intrasti, domine, non habens vestem nuptialem?*”<sup>43</sup> Get you from the barre or will put you from the barre for your foolish pride”.<sup>44</sup>

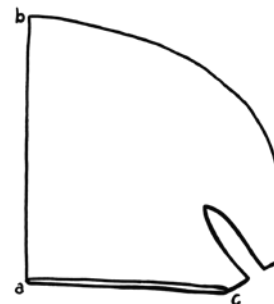
According to Blok, while it became settled that utter barristers were to wear gowns of relatively sober colour, it took another generation or two to settle on relatively standard styles and trim which varied between utter barristers, serjeants, readers of

the Inns, benchers and the nascent rank of King’s Counsel first created in 1604.<sup>45</sup> Differing styles emerged by 1637, the year when the Privy Council ordered that counsel appear before them “in their gowns according to their places”. This was the time of what became known as the “Noble Robe”, so-named by Sir Henry Chauncy in 1656.<sup>46</sup> From 1600 to 1685 the Noble Robe was the principal gown worn by utter barristers.<sup>47</sup>

Everything changed in 1685 with the death of King Charles II.<sup>48</sup> Following his death, the whole royal court including the Bar went into mourning and began wearing black mourning dress.<sup>49</sup> Some commentators claim incorrectly that the Bar began wearing the mourning gown upon the death of Queen Mary II or Queen Anne and it was Sir Frederick Pollock who on one occasion humorously remarked that the Bar “went into mourning for Queen Anne and had remained in mourning ever since”,<sup>50</sup> but these are said to be clearly folklore and “garbled tradition” for there is clear evidence that the mourning gown was adopted by the Bar much earlier in 1685 upon the death of Charles II, says Yazdani.<sup>51</sup> The mourning stuff gown of alpaca (formerly prunello) universally adopted by the Bar in 1685, is the current and now in use gown worn by junior barristers throughout the common law world.<sup>52</sup> It is true that no orders for the Bar to assume court mourning have survived from this period, and that there is no written record of the customary form of mourning for the Bar. There is, however, clear evidence that the present gown was adopted in mourning for Charles II in 1685 and that it was retained ever since.<sup>53</sup>

The mourning gown is a full gown made of a light woollen material called “stuff” from which the terms “stuff gown” and colloquial “stuff gownsman” in contradistinction to “silk” are derived.<sup>54</sup> It is pleated at the yoke like an academic gown with wide bell-shaped sleeves caught up over the elbow with three buttoned tapes.<sup>55</sup>

The stuff gown has “a curious appendage suspended over the back of the left shoulder by a long strip of stuff which hangs in the front”.<sup>56</sup> Blok says that: “[T]hough the appendage has been much distorted over the years, ‘no doubt because no one knew what it was supposed to be’, it is reasonably clear that it is a vestigial mourning hood, part of the general mourning attire adopted by the English Bar in 1685.”<sup>57</sup> It has been an old distortion too because a magazine article of 1893 referred to “two great theories” concerning the sliced little triangle of stuff in respect of which Baker lamented that “nobody has arisen to decide on which side the truth lies”.<sup>58</sup> Below is an annotated drawing of the stuff gown appendage, configured in the upright position in which it is attached at the back of the stuff gown. And further below are fine photographs of the ensemble of a junior’s robes viewed from the front and back from which the appendage at the back of the left shoulder can be seen.



Drawing of a junior advocate’s diminutive hood. The hood is sewn up from ‘c’ to ‘b’ with the line between ‘a’ and ‘c’ kept open, with the hood suspended from ‘b’ (Source: Habit of a Judge)

Sechaba Mohapi



Stuff gown front and back view.



Coloured engravings of the funeral procession of Queen Elizabeth I in 1603 showing the hood being cast over the left shoulder.



Engraving of the funeral procession of Sir Philip Sidney showing the mourners wearing their hoods cast over their heads with the liripipe hanging down behind.

Baker asserts that the appendage is without question a diminutive (medieval) hood, firstly, because of the difficulty with the wallet theory, that the appendage was for receipt of an unnoticed *honorarium* as would be evident to anyone who attempts to perform the feat of depositing a coin inside the orifice, “it is not impossible, but it certainly cannot be done easily or delicately” and “if this were really its purpose it could have been designed in a dozen better ways.”<sup>59</sup>

Secondly, the difficulty with the theory that this appendage derives from the medieval chaperon, which was a band of cloth that hung from the shoulder and to which the bourrelet or padded cap was attached hanging from the back of the wearer when not in use, is that junior barristers did not wear hoods until such time as they were appointed as Serjeants-at-law.<sup>60</sup>

Yazdani says that the black mourning hood was originally worn over the head and that by 1600 it had become customary for the wearer to hang the hood limp over his left shoulder with its *liripipe* hanging freely in front. Above are early illustrations of the gown worn during funeral processions.

The true explanation of these features then is that they are a diminutive representation of the ancient hood and that the strip of cloth is the tippet or *liripipium* which was an important part of the hood as it showed by its length the rank of the wearer as explained by Blackham.<sup>61</sup> Blackham goes on to note that: “French advocates wear over the left shoulder a piece of stuff trimmed with one or more rows of fur according to their university degree. This badge, styled the *chausse*, is the vestigial remnant of the hood which preceded wigs and hats.”<sup>62</sup>

Compared with the stuff gown the silk robe and black cloth court dress worn by King’s Counsel, which is identical to the “working” robes of superior court judges,<sup>63</sup> is of comparatively recent origin as it dates, at the earliest, from the death of Queen Mary the Second.<sup>64</sup> The black silk gown that is exclusive to King’s Counsel, or Senior Counsel in other jurisdictions, came into vogue

about the time of the death of Queen Mary II, consort of William III in 1694, “whose state mourning still to some extent affects the whole Bench and Bar” says Blackham.<sup>65</sup> King William III, it is said, ordered the wearing of the silk robe in mourning for the Queen and it was gradually adopted for regular use.<sup>66</sup>

The black silk gown is quite plain in its appearance and style being a large cape collar and long hanging sleeve panels from above the elbow, with two long streamers inside the gown which hang from the collar.<sup>67</sup>

The silk robe resembles in shape the gown of a master of arts at Oxford and Cambridge (in contradistinction the stuff gown cut is the same as that of bachelor of arts) and the coat over which it is worn came in style during the reign of George III.<sup>68</sup>



Silk gown front and back view.

Frank Snycckers



Portrait of Sir Thomas Street (1629-1696) of the Court of Common Pleas by R White in 1688 wearing square bands that had replaced the large Tudor ruffs for neckwear.



Portrait of Australian barrister Margaret Battye in formal legal dress in the 1930s.

## NECKWEAR

Blackham says that one further survival of old time dress “cherished by the Bar” are the bands “which are an essential feature of the robes which a member of the Bar must wear in order to be ‘visible’ to the bench.”<sup>69</sup> The Bar, however, refuses to give them such an unromantic origin but prefers that they symbolise the twin tables of the Law which Moses brought direct from the Divine presence down the slopes of Mount Sinai, says Blackham.<sup>70</sup>

Two oblong strips of fine white lawn,<sup>71</sup> held in place by strings tied round the collar, similar to those worn by some clerics,<sup>72</sup> are worn in place of the standing ruff that had been worn by judges and counsel in James the First’s time.<sup>73</sup> So, neckwear, never formed part of the traditional judges’ habit and was worn by judges in accordance with the lay fashion of the time. In the 16th century, it had been customary for judges to wear Tudor neck ruffs of varying sizes. The ruffs eventually gave way for point lace bands or square linen collars in about 1640 which evolved into the plain formal white bands that have now become the invariable neckwear of both the bench and Bar.<sup>74</sup>

The origin of the bands is disputed. Apparently, the most “fantastic” explanation is that given by Pearce in the *Guide to the Inns of Court* (1855), who says that they were copied from the clergy from the Jewish rabbis and that they represent the two Tables of the Law, the Ten Commandments, carried from Sinai by Moses.<sup>75</sup> It has also been claimed that the bands are

relics of the amice.<sup>76</sup> Cohen, on the other hand, says that they “developed from the overlapping borders of the mitre, tied under the chin.” Whilst Blackham says that the bands are the ends of a soft white jabot neckband worn before starched collars came into use.<sup>77</sup>

Derriman, with whom I tend to agree, asserts that: “Surely the true origin of the bands is in the square linen collars of the Commonwealth period. Portraits of judges, at least, indicate that they were first adopted in the mid-seventeenth century and have been retained ever since. This date is supported by Inderwick QC, in *The King’s Peace* (1895).”<sup>78</sup> Yazdani agrees. He says that “[o]riginally, the bands were in the form of wide (or square) collars which were tied in the front with lace, but by the late 1680s had converted into their current form of being two rectangles of white linen tied at the throat, and have since then remained an integral element of the dress of judges and barristers, clergy, parliamentary clerks, other public officials and various university graduates and officers”.<sup>79</sup>

Lord Finch of Fordwich CJ of the Court of Common Pleas in 1635, says Yazdani, was the first judge to wear modern-day bands.<sup>80</sup> Bands were thus adopted as part of the habit of English judges in the middle of 17th century and have been retained ever since.<sup>81</sup>

By the 18th century, it became commonplace for judges to wear a lace fall or jabot instead of bands when wearing full dress

at royal courts which had been another innovation resulting from the fashion of the time.<sup>82</sup>

Sir John Baker QC gives the following account of the transformation of the bands in the 19th century: “Until around 1800 the bands were worn so as to conceal the neck-band or collar of the shirt. By 1810 they were generally tied over a white stock, which usually showed the corners of a standing collar beneath. In Victorian times, when the stock was discontinued, the usual neckwear with bands became the upright or wing collar. This collar is usually of starched linen, though impecunious barristers since the 1860s have been known to use paper substitutes. Some late-Victorian judges and counsel used a turn-down collar with bands, and there have been occasional instances in the present century. The turn-down collar is not contrary to the present dress requirements, though the dress sense of the Bench and Bar has generally kept it at bay.”<sup>83</sup> Domestically, the Bar as far as could be ascertained has never had any issue taking to the more practical turn-down collar.

More recently, a “faux” version of a wing collar, women’s collarette with bands or jabot has been introduced which has the appearance of being bands or a jabot, when it is in fact a combination of the prescribed neckwear and a bib appearing as though a white shirt front. They sometimes have strings attached so that the bib section can be held in place by tying on the sides. These are usually worn by female judges, advocates and registrars under a suit jacket and give the appearance of a formal shirt, while hiding ordinary business dress underneath. This item is referred incorrectly by most as a “bib”, which has perhaps also led to the incorrect reference to bands and jabots as “bibs”. They are not. And the popularity of this modern “jabot” has resulted in many not knowing how to wear it, by incorrectly wearing the bib part over the bar jacket when in fact it should be worn underneath the bar jacket to represent the white tunic shirt worn underneath the court jacket.<sup>84</sup>

### THE BRIEF BAG

I suppose that a decent exposition on the history of court dress is incomplete without some mention of what has become an integral part of an advocate’s outfit, the brief bag. Blackham says of the brief bag that: “In the Temple one meets a number of individuals carrying coloured “sacks” bearing embroidered initials. These “Barristers’ bags” though not, strictly speaking, a portion of the livery of the law, are of considerable interest as they have a symbolism of their own. They used to be green but acquired such unpopularity at the trial of Queen Caroline that the colour was changed to blue.”<sup>85</sup>

The brief bag, which, as its name suggests, was originally used to carry briefs to and from court. Jeremy Gauntlett SC KC has made an edifying contribution entitled *Why the Red Bag* in the December 2022 issue of this journal at 71. Nothing, however, appears to be said throughout the annals of this journal about the blue damask bag which custom decrees that we supply to ourselves and in which all hopeful neophytes first carry their stuff gowns on their call to the Bar.

A pupil-mentor once sagely advised a pupil against the temptation of dispensing with acquiring a blue bag, for the simple reason that the value of a blue bag cannot be unappreciated: when a deserving junior still carries it, its facility is to hint to the silks that are impressed by the junior’s



Nevenka Ristic

remarkable work that the junior is deserving of the honour of a red bag. But, “those who make little mark in their profession are doomed to retain the blue bag to the end. Those who emerge into prominence can look forward to a moment at which a red bag will be substituted for a blue. But it may not be acquired by purchase; it can only be bestowed as a gift by some leader who has had personal experience of the junior’s ability and considers that his progress entitled him [her or them] to receive the distinction”.<sup>86</sup>

A note in the *Law Quarterly Review* observes that: “The ‘brief bags’ of blue which are part of the equipment of every newly called barrister may serve to carry their stuff gowns, their wig boxes, and even textbooks or a Law Report, but they do not forever thereafter sufficiently clothe the pride and dignity. The young counsel may hope ultimately to wear a silk gown; he [she or they] may also hope that at an earlier date he [she or they] may be given a Red Bag either by the Leader of his [her

or their] Circuit or by a Queen’s Counsel to whom he [she or they] is the Junior in a substantial case. The possession of a red bag has always in the past been looked upon in the profession as a mark of distinction, an indication that the Junior has rendered exceptional service to his [her or their] Leader either in the House of Lords or in a case of particular complexity. Unfortunately the liberality with which silks have distributed this largesse in recent years has debased the currency and deprived red bags of much, if not all, of their former claim to distinction”.<sup>87</sup>

Brief bags are, therefore, not only an integral part of our outfit but are also, for those who have earned a red bag, a mark of distinction and part of the best traditions of the Bar to encourage forensic excellence. It is said of English jurist, Rufus Isaacs, that his red bag came after an unusually short wait from a deeply gratifying source; that so valuable did Lawson Walton QC find his former pupil’s work in a matter in which he had led the young Isaacs that on 7 May 1891, Walton QC awarded Isaacs the red bag to symbolise, as it still does today, a barrister’s rise to a position of prominence. For whilst juniors supply themselves with blue bags, the red bag can only be presented as an affirmation of progress by a silk.<sup>88</sup>

## CONCLUSION

Court dress is steeped in and regulated by unwritten and longstanding rules of etiquette. Whilst Rule 4.27 of the GCB Uniform Rules of Professional Conduct provides that: “Counsel should robe before the Constitutional Court, the Supreme Court of Appeal, the High Court, Water Court, Income Tax Court, Court of Commission of Patents, the Special Court of Appeal against decisions in terms of the Maintenance and Promotion of Competition Act, the Land Claims Court, the Labour and Labour Appeal Court, all other courts and tribunals of a status similar to the High Courts and such other tribunals as the Bar Council may direct”, this rule notably does not prescribe the manner and elements of robing. The rules assume from established tradition and habit that counsel very well knows the prescribed manner of robing. Chapter 4 of the practice manual on counsel’s dress is also an exception.

Apart from the great deal of sources which can be gleaned on the subject of court dress, the neophyte needs not at all feel at sea for the institution of the Bar imparts a great deal by a process of osmosis.

An advocate, if they are to be effective, is required to make a favourable impression upon the court and the audience. Their attitude, when addressing the judges, is to be respectful, and, importantly, their costume ought to “display neither dandyism nor negligence”.<sup>89</sup>

Alexander Pulling in *The order of the coif* cautioned in the same vein as did George Bizos SC that: “The ancient customs, usages and habits of the Judges and Serjeants of the Coif, like the immemorial forms of our Common Law, have always been respected, and the most sensible of law reformers have been careful to hold them in regard, and to prevent such relics of the past, such landmarks in the history of our legal institutions, being altogether lost sight of. Where ancient forms and observances are altogether ignored, the administration of justice is apt to get out of its course, and such has generally been the case when the ancient usages and traditions of Westminster Hall

are forgotten. Even in the most unsettled times in this country it has been deemed expedient to retain the ancient forms and ceremonies belonging to the law and its administrators so sedulously kept up by our forefathers.”<sup>90</sup> Mentioning examples such as that barristers at a point had been prohibited from having beards, wearing white waistcoats and spotting a flower in their jacket button-holes etc, Lord Pannick’s refrain on reform is that “the rules of the profession demonstrated an idiosyncratic preoccupation with irrelevancies”.<sup>91</sup>

The sombre robes of the Bar suitably symbolise the dignity of the law and the gravity of the profession. Even if curial dress is simplified and decoupled from its colonial origins, observes McQueen, this will not necessarily lead to a less obsessive approach to the question of court dress on the part of advocates and, one would imagine in particular, judges.<sup>92</sup> Certain forms of dress will still be considered to be disrespectful to the court. Certain norms which carry with them a whole range of symbolic import would still be coded into the manner in which advocates are attired. Notwithstanding their disuse of robes by lawyers, the US Civil Trial Manual acknowledges the importance of dress, stating that the “dignity of the profession” commands a particular sartorial response from attorneys and that: “The lawyer historically has not dressed in conservative clothes merely because such an attitude of dress necessarily appealed to him. Rather this form of dress has been an attempt to enhance the prestige and dignity of the profession.”<sup>93</sup>

The question of standard court dress in the courtroom will not simply go away with the abandonment of traditions inherited from our colonial past. Courts will always demand a certain standard of dress to underlie the seriousness and formality of the proceedings being conducted. If it redounds not to any notable deficiency why change horses midstream? The enduring habit and etiquette of court dress, I would urge, should be maintained. A subject that much rather requires the urgent attention of reform is the persistence by some public figures and those who have it in their means in protracted litigation in hopeless cases in what has widely been referred to as “Stalingrad” tactics to describe the deliberate dilatory stratagems that they quite effectively employ through the aid or complacency of their advocates. In *Mkhize*, he is reported to have launched eight salvos of slightly varying proceedings against the LPC, including an application for direct access to the Constitutional Court, every time wasting strained judicial resources in hopeless cases. **A**



**Notes**

- 1 *De Allende v Baralidi t/a Embassy Drive Medical Centre* 2000 (1) SA 390 (T) at 395A-C.
- 2 *N Kodisang Trust v Mohomane and Others* [2023] ZAGPJHC 1061 (16 August 2023).
- 3 See *Ethics: National Bar Examination Syllabus*, 2014 revision by Jason Mitchell and updated by Stuart Scott on 'Counsel's duty not to mislead the court' pp 57-58, available at <https://ethics.bar/wp-content/uploads/2019/03/ethics-study-notes.pdf> (assessed on 13 November 2024).
- 4 *Ex parte Swain* 1973 (2) SA 427 (N) at 434H.
- 5 *Legal Practice Council v Mkhize* 2024 (1) SA 189 (GP).
- 6 Practice Note [1961] 1 All ER 319, cf *Neate v Denman* (1874) LR 18 at 127, where a barrister appearing in person was allowed to appear robed when the question raised by the case was on behalf of the profession.
- 7 *Halsbury's Laws of England* 66 (2015) para 851, on appearances in person.
- 8 Edward Cox *The Advocate, his training, practice, rights and duties* (1852) at 258 (my emphasis).
- 9 James Marchant *Barrister-at-law: An essay on the legal position of counsel in England* (1905) 41.
- 10 Ellison Kahn 'Silks' (1974) 91 SALJ 95-102.
- 11 *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) para 32.
- 12 Manfred Nathan *Not Heaven Itself: An Autobiography* (1944) at 152.
- 13 Marius Diemont *Brushes with the Law* (1995) at 138.
- 14 Ellison Kahn *Law, life & laughter Encore: Legal anecdotes & portraits from Southern Africa* (1999) at 19.
- 15 Gary Slapper *More Weird Cases: Comic and Bizarre Cases from Courtrooms around the World* (2011) at 104.
- 16 Dan Stacey 'Wigs: A Secret History' *Counsel* (30 June 2008).
- 17 At pp 43-45.
- 18 Michael Janisch 'Stuff and nonsense in the great robing debate (and other matters of national importance)' *Advocate* (Dec 2003) 47.
- 19 Spectator 'Obiter' *Consultus* (May 1996) 75-77.
- 20 Rishi Seegobin 'Restoring dignity to our courts: the duties of legal practitioners' *GroundUp* 14 September 2022, republished in *Advocate* (Aug 2023) 63-65.
- 21 *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) para 68, where the Constitutional Court said that 'it should be borne in mind that the electronic media create some special difficulties for the principle of open justice'.
- 22 Vuyani Ngilwana SC 'To robe or not in SA Courts: A colonial vestige or necessary decorum in today's South Africa?' *Anchored in Law* 20 August 2024, featuring links to IAM Semanya SC 'Objection to Robing in Courts' and Alno Smit 'In Defence of Robing'. See also State Advocates and Prosecutors of South Africa's Letter to the Chief Justice dated 25 August 2024, accessed on 12 December 2024 at <https://www.ssapsa.org.za/letter-to-chief-justice>.
- 23 Madlanga ADCJ 'Memorandum on the Proposed Amendment of Norms and Standards on Robing' available online at accessed on 12 December 2024 <https://www.studocu.com/en-za/document/university-of-south-africa/legal-philosophy/511-memorandum-on-the-proposed-amendment-of-norms-and-standards-on-robing/107679755>.
- 24 George Bizos SC 'Let us not change the essential fabric of the Bar' *Consultus* (Dec 1999) 24.
- 25 Derek Walker-Smith *Lord Reading and his cases: the study of a great career* (1934) 20 (my emphasis).
- 26 Slapper *loc cit*.
- 27 Herman Cohen *A History of the English Bar and Attornatus to 1450* (1929) at 355-367.
- 28 H R Hahlo & Ellison Kahn *South Africa: The development of its laws and Constitution* (1960) at 205-206.
- 29 Hilton Fine *The history of the Cape Supreme Court and its role in the development of judicial precedent for the period 1827-1910* (dissertation submitted for the degree Master of Laws, University of Cape Town, 1986) at 33.
- 30 Hahlo & Ellison Kahn *loc cit*.
- 31 Ellison Kahn 'Silk' (1974) 91 SALJ 95-120.
- 32 James Derriman *Pageantry of the law* (1955) 34.
- 33 Stephen Clingman *Bram Fischer: Afrikaner Revolutionary* 2 ed (1998).
- 34 Tembeka Ngcukaitobi *The land is ours: South Africa's first Black lawyers and the birth of Constitutionalism* (2018).
- 35 Clingman *op cit* 96.
- 36 J H Baker 'History of the gowns worn at the English Bar' (1975) 9:1 *Costume* pp 15-21.
- 37 *Ibid* at 15.
- 38 *Ibid*.
- 39 Murry Blok 'A brief history of Court Attire' (2006) 64 *Advocate* (Vancouver) 65-78.
- 40 William Dugdale *Origines Juridicales* 2 ed (1671) 197.
- 41 Blok *op cit* 66. William Dugdale *origines Juridicales* 2 ed (1671) 197.
- 42 Blok *op cit* 66.
- 43 From the Vulgate Matthew 22:12: "How is it you come in here my lord without wedding garments?"
- 44 *Ibid. Diary of John Manningham of the Middle Temple* (1858) 45, quoted in Baker *op cit* 16.
- 45 Blok *op cit* 66.
- 46 *Ibid*.
- 47 Daniel Yazdani *The Habit of the Judge: A history of Court Dress in England & Wales, and Australia* (2019) 114.
- 48 *Ibid*.
- 49 *Ibid*.
- 50 Robert Blackham *Wig and gown: The story of the Temple Gray's and Lincoln's Inn* (1932) 120.
- 51 Yazdani *op cit* 114. See Narcissus Luttrell *A brief historical relation of State Affairs from September 1678 to April 1714* (1857) 299-300.
- 52 *Ibid*.
- 53 Baker *op cit* 18.
- 54 Charles Friedman 'The history of the division of the South African legal profession' *De Rebus* (Feb 1990) 138.
- 55 Yazdani *op cit* 114; Baker *op cit* 15.
- 56 Baker *op cit* 15.
- 57 Blok *op cit* 69.
- 58 Baker *op cit* 15.
- 59 Baker *op cit* 15.
- 60 Yazdani *op cit* 116.
- 61 Blackham *op cit* 183.
- 62 Blackham *op cit* 184.
- 63 Blok *op cit* 69.
- 64 Blackham *op cit* 184.
- 65 Blackham *op cit* 123.
- 66 Blackham *op cit* 184.
- 67 Blok *op cit* 64-65 and 71.
- 68 Blackham *op cit* 123.
- 69 Blackham *op cit* 187.
- 70 *Ibid*.
- 71 Lawn cloth or lawn is a fine plain weave textile, made with fine combed cotton. See "lawn" *Collins Dictionary*.
- 72 Derriman *op cit* 36.
- 73 *Ibid*.
- 74 Yazdani *op cit* 122.
- 75 Derriman *op cit* 36-37.
- 76 Derriman *op cit* 37. The amice is a hood or hood-like cloth, rectangular piece of linen with an embroidered cross, wrapped around the neck, shoulders and breast. Formerly used as a head covering to protect clerics from the elements, it represents "the helmet of salvation" (Eph. 6:17).
- 77 Blackham *op cit* 187.
- 78 F A Inderwick QC *The King's peace: A historical sketch of the English Law Courts* (1895), cited in Derriman *op cit* 37.
- 79 Yazdani *op cit* 123.
- 80 Yazdani *op cit* 123.
- 81 *Ibid*, citing Derriman *op cit* 37.
- 82 Yazdani *op cit* 124.
- 83 *Court dress: a consultation paper issued on behalf of the Lord Chancellor and the Lord Chief Justice* (Aug 1992) appx. 1 para 7.1.3.
- 84 Yazdani *op cit* 124.
- 85 Blackham *op cit* 188.
- 86 The Marquess of Reading *Rufus Isaacs: First Marquess of Reading* (1942) 54.
- 87 'Red Bags' 71 *Law Quarterly Review* (1955) 486-489.
- 88 The Marquess of Reading *loc cit*.
- 89 William Forsyth *Hortensius: An historical essay on the office and duties of an advocate* (1874) 238, these are rules set forth in the *Stylus Curie Parlamenti*, in a chapter *De modo, gestu et habitu quem habere debet advocatus curiæ parlamenti* (on the manner, demeanour, and attire that a lawyer of the parliamentary court should have) at 2-4.
- 90 Alexander Pulling *The order of the coif* (1897) 217.
- 91 David Pannick *Advocates* (1992) 179.
- 92 Rob McQueen 'Of wigs and gowns: A short history of legal and judicial dress in Australia' 16(1) *Law in Context* (1999) 54.
- 93 *Ibid*.