BR Southwood SC of the Pretoria Bar was in July 1992 elected Chairman of the General Council of the Bar of South Africa.

Born on 13 October 1946 at Pretoria, Mr Southwood passed the GCE "A" level examination at Mount Pleasant Boys' High School, Salisbury in 1964 and obtained the BA(Law) degree at Stellenbosch University in 1967 and the LLB degree at Unisa in 1970. After qualifying as an attorney, he joined the Pretoria Bar in 1972 and was appointed Senior Counsel in 1985. He was also admitted as an advocate of the High Court of Lesotho.

In the professional field Brian has been Chairman of the Stock Exchange Appeal Board since 1988; was a Member of the Pretoria Bar Council, 1989-1991, and Chairman thereof in 1991; Vice-Chairman of the General Council of the Bar of South Africa, 1991-1992 and became Chairman in 1992. He acted as a judge of the Supreme Court of South Africa in 1988.

Brian has many other interests: Chairman of the Management Council, Pretoria Boys High School, 1987-1992; a keen sportsman: he was a member of Rhodesia Schools Rugby XV, 1964 Craven week; Stellenbosch U19 A2 rugby XV; Stellenbosch U20 touring team; Pretoria Harlequins First XV rugby; Pretoria First XI hockey and reserve league squash. His interests include art, music and reading – particularly history and sport.

His wife, Isabeau, teaches in the Department of Constitutional Law, Unisa and they have a daughter, Fiona, who is a final year BA(Law) student at the University of Stellenbosch, and a son, Mark, who is a second year BCom student at the University of Natal.

Mr Southwood is the first member of the Pretoria Bar to become Chairman of the General Council of the Bar.

Introduction
At present, the two matters giving rise to the greatest concern amongst members of the Bar – particularly amongst new members – are the structure of the legal profession and the related matter of attorneys’ rights of audience in the Supreme Court.

Of these two matters, the attorneys' rights of audience in the Supreme Court has enjoyed the most attention in recent times. Since early 1991 a number of meetings have been held between delegations of the General Council of the Bar ("GCB") (consisting of the Chairman, Vice-Chairman and leaders of the Bars) and of the Association of Law Societies ("ALS") (consisting of senior representatives of the ALS) to discuss the question. Little progress was made at these meetings primarily because of a fundamental difference in approach. The ALS representatives see the rights of audience issue as one that can be resolved in isolation.
without regard to the consequences of the rights of audience being granted to attorneys. The GCB sees the issue as one that is bound up with over and perhaps even more important matters such as the structure of the courts, who is to preside in those courts and the mechanism for making appointments to the Supreme Court bench. The GCB and the ALS also disagree fundamentally about the qualifications of those practitioners who will be entitled to appear in the Supreme Court. The GCB has consistently insisted on the LLB degree as the minimum academic qualification, while the ALS has adopted various stances ranging from every practising attorney – irrespective of his or her academic qualifications – to the BProc degree. The ALS also favours a “grandfather” clause which will permit any attorney – irrespective of his or her academic qualifications – who has practised for a defined period, to appear in the Supreme Court.

Attitude of GCB

It should be mentioned at this juncture that the GCB, contrary to what is commonly believed, is not resistant to changes, provided those changes will really benefit the public and improve the administration of justice generally. The GCB is resistant to changes which merely pay lip-service to these goals and are sought for other reasons. The approach of the GCB is that the facts must be properly investigated before it can be accepted that changes are necessary, and the consequences of the changes must be evaluated before changes are made. One has only to think back to how the fusion argument crumbled in the face of the facts and the arguments presented by someone who had really investigated the divided system in depth. I refer of course to Lord Benson who was Chairman of the Royal Commission on Legal Services 1976-1979. Lord Benson delivered the keynote address at the National Bar Conference held in Cape Town on 5-10 April 1988. After demolishing the arguments for fusion, Lord Benson said the following:

“I’m sorry to be back again, but there was just one point which has been raised which I don’t think I dealt with effectively.

I think it has been suggested that many solicitors would like to retain a strong independent Bar, but they would like the restriction on appearances in the Supreme Court to be removed if their clients wanted it. I hope I shall not in any way express myself offensively if I say I think that is a very naive proposal. We naturally considered it on the Royal Commission, and I just want to draw your attention to four points.

The first is that if it is desired to retain a strong and independent Bar, it is necessary that there be a burden of proper common sense to accept the regulations and disciplines which will sustain it, and one of the essential disciplines is to limit access to the superior courts.

The second point is that if that principle is abandoned, that discipline is abandoned. Solicitors will appear or will prevail upon their clients to allow them to appear in the superior courts on their behalf.

The third point is that the inevitable result of that would be that the simpler cases would be appropriated to aspiring solicitors and the training ground for young barristers will be removed. The future of the Bar would therefore be destroyed.

The fourth point is that it is sometimes easier to explain things by analogy. Let us suppose that a patient goes to his general medical practitioner, and it is perfectly obvious that the man’s leg has to be amputated because he is suffering from poisoning. He may want the general practitioner to do the surgery or he may prevail upon him to do the surgery, but if the general practitioner is foolish enough to do it, there will be a long stream of candidates for the mortuary. (Lord Benson: The Future of the Legal Profession in South Africa: Is fusion the answer? The English Experience (1988) SALJ 421 at 432)

Of course, matters have progressed in the United Kingdom, but at least the fusion argument was laid to rest and the changes that were made took place after proper investigation by qualified people. Why is it that in South Africa changes of a quite radical nature must be made after a chat over a cup of tea?

Litigation costs

So far, the argument for attorneys to have a right of audience has rested on the assumption that litigation will thereby be made cheaper and therefore the courts more accessible to litigants. As far as I am aware, no study has been done by the ALS to support its claim in this regard. No report has ever been made available by the ALS to show that this is so, and the GCB has certainly never been invited to discuss any study and report of this nature. The ALS has not put forward any suggestion that litigation costs will be contained by the attorneys’ tariff – it is in any event common knowledge that attorneys very often contract out of their tariff. The situation is further confused by the recent suggestion (in July 1992) by the Competition Board that all fees should be negotiated. This is obviously acceptable where the negotiating parties are negotiating as equals but one must question the wisdom of this suggestion where very few litigants will be able to negotiate with attorneys as equals. Most litigants will simply not have the knowledge or expertise to be able to negotiate with attorneys about the fees.

Everybody involved in litigation knows that the functions of advocate and attorney are different and that there is very little overlapping or duplication of effort – and that where that happens it is both desirable and necessary. In litigation – as in most other things – two (and sometimes more) heads are better than one. The GCB believes that a proper investigation would show that if attorneys were permitted to appear in the Supreme Court litigation costs would not go down and the Supreme Court would not be more accessible. In fact there is every reason to believe that attorneys would charge higher fees because of their higher office overheads – if for no other reason.

The argument also assumes that the attorney – who will not practise full-time in the courts – will be as efficient in his preparation and presentation of cases as the advocate who does practise full-time. This assumption is questionable to say the least. It hardly needs to be stated that the efficiency of the practitioner is a great determining factor in the cost of litigation.

Commission of enquiry

In the April 1992 edition of Consultus, the Chairman, Milton Seligson SC, referred to the resolution taken by the GCB at its Executive Committee meeting in January 1992 that a commission of enquiry manned by a person or persons having the support of all sections of the community, including the legal profession, should be
appointed as soon as practicable to consider the structure and role of the courts and the legal profession as well as certain other matters.

As the Chairman pointed out, this resolution was taken after a committee of Bar leaders had conducted a wide-ranging enquiry into the present structure of the legal profession and its relationship to the judiciary and the effect of the proposal to allow attorneys to appear in the Supreme Court. And it was taken with due regard to the fact that these are matters of the utmost public importance and should not be dealt with without proper consultation with all interested parties. The Chairman also pointed out that the rights of audience issue cannot be considered in isolation from other questions such as the threshold academic qualifications for practitioners in the superior courts, whether the court system itself should be restructured and who should qualify for appointment to the Supreme Court Bench.

The Chairman also pointed out that the day after the GCB Executive Committee meeting in January 1992, a further meeting was held with representatives of the ALS to discuss the proposal that attorneys be granted the right to appear in the Supreme Court. At this meeting, the GCB proposal that a commission of enquiry be appointed and the representatives of the ALS undertook to consider the proposal and if the ALS approved of it, the specific terms of reference of the commission would be settled after consultation with other interested parties. The Chairman reported that at the time of writing, the GCB was still awaiting the ALS’s response, but that he believed that there was a good prospect that the GCB’s proposal would reach fruition.

At that time the Chairman had met senior officials of the ALS on a number of occasions and had been led to believe that the GCB proposal would be favourably considered. Then, quite suddenly and inexplicably, the Chairman was advised that the ALS would not support the GCB proposal that a commission of enquiry be appointed. No reasons were given for this sudden change of attitude. The ALS also showed no further interest in meeting the GCB to discuss the question of attorneys’ rights of audience further.

On 20 May 1992 a delegation of the GCB consisting of the Chairman, the Vice-Chairman and the Chairman of the Johannesburg Bar met the Minister of Justice in Cape Town. One of the matters discussed at the meeting was the attorneys’ rights of audience in the Supreme Court. The Minister was referred to the resolution of the GCB taken in January 1992 and the apparent willingness of the ALS to support the appointment of a commission of enquiry and the sudden complete loss of interest in the proposal. The Minister was asked whether he could shed any light on the attorneys’ change of attitude and it appeared that someone in the Department of Justice had said to the representatives of the ALS that the Minister would not support the GCB proposal and therefore that the ALS had decided not to consider the matter any further. The Minister assured the GCB delegation that he had not discussed the matter with the ALS and he hastened to assure the delegation that he had not dismissed the proposal, although he felt that some other method should be used to resolve the issue. He suggested what he called a “closed shop” and undertook to discuss this with representatives of the ALS and to advise the GCB of its attitude. To date the Minister has not told the GCB what the attitude of the ALS to his idea of a “closed shop” is. The attitude of the GCB delegation at the meeting was that the GCB resolution should be implemented. No attempt was made at the meeting to define the structure or function of the “closed shop” referred to by the Minister and the GCB delegation did not agree to participate in this “closed shop”.

At the GCB Annual General Meeting held at the end of July 1992, the full council ratified and confirmed the resolution taken at the Executive Committee meeting in January 1992. The GCB view is still that this is the only proper and responsible way to deal with the matters referred to in the resolution. In the GCB press statement issued after the AGM, reference was made to the resolution that a commission of enquiry be appointed.

On 31 July 1992 I addressed a letter to the Minister of Justice referring to the resolution and much of the history referred to above and requested the Minister to support the appointment of a commission of enquiry as contemplated by the resolution. In the letter I informed the Minister that the GCB is firmly of the view that this is the appropriate way to deal with the structure of the courts and the legal profession and the other matters referred to in the resolution. I also informed the Minister that this is the only method which will enjoy the support of all interested parties and will enable a comprehensive investigation of the courts and profession to be carried out. The Minister was also referred to the editorial in the July 1992 edition of De Rebus in which the editor called for the ALS to convene a conference at which all branches of the profession can debate the form which the legal system should take. The editor’s reasoning was that the views expressed at such a conference would carry the greatest possible weight and could not be ignored by practitioners. To date, the letter has not been acknowledged by the Minister of Justice.

**Tinkering with court system**

On 13 August 1992 I attended a meeting organised by the Department of Justice to discuss, *inter alia*, the creation of a family court system and extending Magistrate Court jurisdiction to matrimonial matters. The Minister of Justice was present at this meeting and I again urged him to support the appointment of a commission of enquiry as envisaged by the GCB resolution. I reiterated the GCB’s opposition to the piecemeal tinkering with the court system by the Department of Justice and said that this was most undesirable if it does not enjoy the support of the whole community. The Minister was not prepared to take a final decision in this regard.

On 24 August 1992 I had a meeting with the Minister of Justice at which I again urged him to support the appointment of a commission of enquiry. The Minister again was not prepared to take a final decision in this regard, despite the fact that I informed him that the GCB resolution stood and I as the Chairman am required to do everything necessary to implement the resolution.

The Minister of Justice and the Department of Justice seem committed to following a programme of reforms to the structure of the courts and the profession without always having regard to the views of the broad community and the professions themselves. Two recent examples illustrate how undesirable this is.
**Pro Deo appearances**

The Admission of Advocates Amendment Bill 1992 contemplates an amendment to section 10 of the Admission of Advocates Act 74 of 1964 to enable attorneys from a panel of attorneys nominated by the Law Society to appear in matters heard in the Supreme Court. At the meeting on 24 August 1992 the Minister told me that the object of this amendment is to enable attorneys to appear *pro Deo* in cases where no counsel are available. The Minister told me that the need for the amendment arose because of a difficulty which had arisen in this connection in Natal. Had the facts been investigated before the Bill was prepared, it would have been found that no such difficulty exists in Natal — or anywhere else. The problem referred to occurred some years ago and has not been repeated. There are further aspects of this Bill which are cause for concern. Firstly, the Act as it stands gives the court the power to permit an attorney to discharge the functions of an advocate in any proceedings pending before it if no advocate is available or willing to appear: i.e. the amendment is not necessary for the limited purpose suggested by the Minister. Secondly, the memorandum which accompanies the Bill does not refer to the difficulty allegedly experienced in finding counsel to act *pro Deo*. Instead, it refers to something which has never been raised with the Bar. It reads —

Available advocates do not always have sufficient experience or the capability to appear in certain specialized cases or in cases of a serious and complicated nature in the Supreme Court. In the Bill it is proposed that a court may permit an attorney appointed by the Judge President from a panel of attorneys appointed by the Law Society concerned, to act in any proceedings.

There is simply no factual foundation for this statement. If there is, it has been a carefully guarded secret.

**Civil courts for civil divisions**

The Magistrates’ Courts Amendment Bill 1992 contemplates, *inter alia*, the creation of new “civil courts for civil divisions” (with greatly increased jurisdiction) and the appointment of senior civil magistrates. These new divisional civil courts appear to be nothing other than the Intermediate Courts which were investigated and rejected by the Hoxter Commission. The Bill does not attempt to provide for the appointment of magistrates outside the civil service as promised and appointments are to be made by a Board consisting of officials in the Department of Justice. Of particular concern is the memorandum which outlines the objects of the Bill. According to this memorandum, “the Bill consequently aims to enhance the career of the civil court magistrate by providing for more attractive career opportunities, similar to that of regional magistrates in the criminal courts” apparently because “civil court magistrates presently find themselves with regard to mobility in their careers, to a large extent, in a dead-end street.” It is stated in one sentence of the two and one-third page memorandum that the “extension of jurisdiction should bring about a significant relief to the work load of the Supreme Court”.

**Hostility to advocates’ profession**

There is a widespread and growing perception amongst members of the profession that the Minister of Justice and the Department of Justice are hostile to the advocates’ profession. This is most disturbing and I have considered it necessary to convey this to both the Minister and the Department. The Minister was most concerned about this and was at pains to assure me that this is not correct and that he wants to ensure the continued existence of a strong and independent Bar. I have not yet received an answer from the Department.

**Treatment of profession**

It is a matter for concern that a number of letters and faxes addressed to the Minister and the Department in connection with matters of importance to the profession have not been acknowledged, let alone answered. The manner in which senior practitioners are treated also leaves much to be desired. The applications of the successful silk candidates at the Pretoria Bar during 1991 were sent to the Minister during September 1991. On 18 June 1992, after numerous informal enquiries had been made about the progress of these applications, I addressed a letter to the Minister of Justice requesting that the applications be considered and disposed of at the earliest possible time. This letter was not acknowledged. On 13 August 1992 I asked the Minister of Justice what had happened to the applications and he undertook to investigate the matter. The letters patent were then delivered during the afternoon of 13 August 1992. There was no explanation or apology for the delay in issuing the letters patent, despite the fact that the practitioners concerned have been caused a large amount of inconvenience, not to mention embarrassment.

**Favoured status**

The Department seems to regard the ALS as an extension of the Department and in the recent past a number of meetings have been held by the ALS at the request of the Minister or the Department of Justice. This gives rise to a perception of favoured status being given to the attorneys’ profession, a status which is neither justified nor in the public interest.

**Returning exiles**

Recently the GCB was invited to send representatives to such a meeting in July 1992 at which the entry into the attorneys’ profession of returning exiles with legal qualifications was to be discussed. This obviously does not affect the GCB which had already (during February 1991) and at the request of the Minister of Justice submitted memoranda to the Department of Justice in connection with the entry into the advocates’ profession of returning exiles with legal qualifications. The necessity of attending this meeting was highly questionable to say the least. Nevertheless, the GCB sent representatives to the meeting and they were able to provide the meeting with the memoranda submitted to the Department by the GCB. It is of concern to the GCB that no action has been taken by the Department to implement the suggestions contained in the memoranda and the GCB is most concerned about this as it obviously affects the lives of a number of well-qualified practitioners.
As far as the attorneys' profession is concerned, there have been no meetings between the GCB and ALS since January 1992. The usual meeting with the ALS after the AGM of the GCB was not held. The Chairman was informed that the ALS has nothing to discuss with the GCB.

Attitude of ALS

At the AGM of the GCB the delegates were furnished with a copy of a document entitled "Problems in regard to legal representation and entry into the profession: possible solutions" which was prepared by a senior member of the ALS. This document, which deals inter alia with the problems which the attorneys' profession has in accommodating new graduates in the profession, contains the following paragraph:

The future of the Bar

Steps are under way to allow attorneys to appear in the Supreme Court in appropriate circumstances. These rights of appearance may be granted in the near future. Similar rights have recently been granted to solicitors in England. It may also transpire that CODESA, when compiling a final constitution, may well do away with the old distinction between the Bar and the attorneys' profession. This will bring about a change in the practice of the law.

Probably a de facto Bar will exist, but a need will be created for advocates who previously practised as advocates to join firms of attorneys. The new proposals for entry into the profession make provision for this.

The GCB is not aware of any steps which are under way to allow attorneys to appear in the Supreme Court or that these rights may be granted in the near future. The GCB has not been consulted by the ALS, the Department or the Minister in this regard. The apparent attitude of the ALS that the Bar may be abolished and may be replaced by a de facto Bar is a contradiction of the assurances given by the ALS delegates at the various meetings held during the past year that the ALS supports the continued existence of a strong and independent Bar. The GCB attempted to clarify this contradiction but no satisfactory answer has been received. This gives rise to a clear perception that the ALS is merely paying lip-service to the idea of an independent Bar.

Deadlock not in public interest

The GCB has called publicly for the appointment of an independent commission of enquiry to resolve inter alia the question of the structure and role of the courts and the legal profession. The GCB will accept the findings and recommendations of a properly constituted commission of enquiry which enjoys the support of the profession and all other interested parties. Thus far the GCB has not been able to get the support of the Minister of Justice, the Department of Justice or the ALS all of whom appear to be bent on following their own agendas. This cannot be in the public interest and should not be permitted to continue.

Mr Civil Rights

Seeing that we are due to enter an era in which human rights will frequently engage the attention of our courts, it is interesting to take note of the pivotal role played in this field by Thurgood Marshall who, in 1991, retired as United States Supreme Court Justice at the age of 84, and who is generally referred to as "Mr Civil Rights" in the States.

Marshall was the first black person to be appointed as a judge in the USA and the first black judge to be elevated to the US Supreme Court.

It was Charles Hamilton Houston - also a black person - of Harvard Law School and later of the National Association for the Advancement of Colored People (NAACP), who trained Marshall and other lawyers to become the vanguard of the civil rights movement. Houston, in many civil rights cases argued by him in the State Courts, actually laid the foundation for and created the strategy that culminated in the landmark opinion given by the Supreme Court in the school segregation case of Brown v Board of Education (1954). However, Houston died of heart failure in 1949 at the age of 54 and Marshall took over. He argued the Brown case and won.

This was followed by many other cases involving civil rights, including the well-known Little Rock case which he also handled successfully in the Supreme Court.

In 1961 Marshall was appointed as US second Circuit Judge and in 1967 he was elevated to the US Supreme Court where he stayed until his retirement. Whilst in the Supreme Court, Marshall was responsible for or was associated with numerous key decisions.

The American Bar Association recently established the Thurgood Marshall Award to recognize and encourage persons who have made substantial contributions to the advancement of civil rights, civil liberties and human rights in the United States. Justice Marshall was, appropriately, the first recipient of the award. It was due to be handed to him during the ABA Annual Meeting in August 1992.

(ABA Journal, June 1992)