

The Bar: facing change

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Chairman: General Council of the Bar of South Africa

WRITING my last contribution to *Consultus* as chairman of the General Council of the Bar has caused me to reflect on the past three years of my chairmanship. It has been exciting, at times exhilarating and always exhausting. It would not have been possible without the constant support and encouragement I have received from all my colleagues at the Bar and for that I take the opportunity of expressing my thanks.

There can hardly have been a better or more interesting time to lead our profession. Virtually everything that has happened, every challenge we have had to face, every opportunity that has opened up, has flowed from the monumental changes taking place in our country. The Bar cannot and should not be insulated from these changes. Nor is it simply a case of seeking to preserve our heritage. We need to use this time of change as an opportunity for re-examination, for taking new initiatives and wherever possible making available our skills to assist in solving the problems which face the justice system in South Africa. A constitutional democracy cannot work effectively without the contribution of able, effective and imaginative lawyers.

Reflections on change inevitably involve reflections on our profession and the structures in which it functions. Is there still a role for the advocates' profession? If so, what is that role? If we are to have a vision to guide us through the seas of change into the future we need to answer these questions.

It is trite to say that advocacy before a court or similar tribunal is the art of persuasion. Traditionally our concept of advocacy has been one involving oral skills in the presentation of evidence, cross-examination and argument. Increasingly, however, those skills need to be exercised in written form whether in the drafting of affidavits or the preparation of written argument. Whilst pur-



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ists may bemoan this change, as at one stage they bemoaned the introduction of heads of argument, there are no signs of a retreat from this position. If anything, the trend is towards more written presentation rather than less.

Advocacy skills

The skills of the advocate are to be deployed in a system built upon the notion of adversarial litigation. That demands far more by way of traditional advocacy skills than other legal systems. Put bluntly, in such a system the skill of the advocate can materially affect the outcome of the litigation. An unskilled advocate may lose a case which should have been won whilst the skilful advocate can win a case which others might think lost.

The focus is of course upon skills. Effective advocacy requires particular skills and talents. As with any other speciality those skills will only be refined and honed by regular exercise. One does not become a concert pianist, a chess grandmaster or international sportsman without hours of practice day in and day out. The same is true of advocacy.

Obviously the Bar provides a place where the exercise of the skills of advocacy on a daily basis is possible. That is not to deny that such skills can be developed in a different environment.

However, in South Africa with its low skills base it is difficult to do so. The advent of full-time litigation departments in our larger firms of attorneys still seems far off. The pressures of operating a successful small firm of attorneys pose enormous difficulties in acquiring the requisite practical skills. Economic factors also play an inhibitory role. Costs at the Bar are generally lower because of its smaller administrative infrastructure.

These are the very reasons why in various jurisdictions around the world where the adversarial system of litigation operates specialist Bars of trial advocates exist even without a formal statutory base. The Bar's function in any system is to provide the environment in which those who wish to practise exclusively as advocates can do so.

A referral profession

In this context much of the debate over the client's access to the Bar is misconceived. In order for the Bar to provide an environment where advocacy skills are nurtured it needs to function as a referral profession. That is what full-time advocacy is about. Anyone who wishes to exercise advocacy skills whilst dealing directly with the public and undertaking all the additional work which that entails is free to do so. The grant of rights of audience in the High Court effectively to all legal practitioners has destroyed the argument from both within and without the Bar that it should cease to be a referral profession.

In South Africa, with its relatively small pool of legal skills, there are powerful reasons for believing that the existence of a specialist Bar operating as a referral profession increases rather than diminishes access to justice. The members of such a body are not beholden to a particular client to the exclusion of

Continued on page 4

Consultus: Reader Survey *Continued from page 2*

readers would particularly like to see in the journal.

- At least 60% of *Consultus* issues are kept for possible future reference.
- More than 96% of respondents were happy with both the cover and lay-

out, with the majority (62%) in favour of more frequent publication of *Consultus*.

- The information gained for advertising purposes will enable *Consultus* to approach prospective advertisers with concrete informa-

tion, e.g. on the use by Bar members of computers, banking and travelling facilities.

The Reader Survey has been a necessary exercise, providing the editorial committee with a clear picture of the needs of readers. We will try to satisfy those needs. 

Consultus: Lesersopname *Vervolg van bladsy 3*

Soos dit 'n professionele tydskrif betaam, blyk dit dat "Balienuus" die mees populêre rubriek is. Ons het egter waardevolle inligting verkry oor onderwerpe wat nie tans of gereeld gedek word nie en wat lesers besonder graag in die tydskrif wil sien.

- Ten minste 60% van *Consultus*-uitgawes word gehou vir toekomstige

verwysing.

- 96% van respondente was tevrede met die buiteblad en die uitleg, met die meerderheid (62%) ten gunste van veelvuldiger publikasies van *Consultus*.
- Die inligting wat vir advertensiedoeleindes ingewin is, sal *Consultus* in staat stel om voornemende ad-

verteerders met konkrete inligting oor byvoorbeeld die gebruik deur baliëde van rekenaars, banke en reisfasiliteite, te nader.

Die lesersopname was 'n noodsaaklike oefening wat die redaksiekomitee 'n duideliker prentjie gee van die behoeftes van lesers. Ons sal probeer om aan daardie behoeftes te voldoen. 

The Bar: facing change *Continued from page 5*

others. Their services are available through small or large firms of attorneys to individuals and giant corporations. They can freely (and must under our rules) take the difficult and unpopular cases which a practitioner subject to the prejudices and pressures of other clients would be compelled to turn away. The history of civil rights litigation in South Africa speaks eloquently of the need for such a resource.

It is this vision of advocacy, as a profession offering specialised legal skills and advice, available to all on a referral basis, which I have tried to pursue. It is not I think a vision which requires to be buttressed by statutory fortifications. That does not mean that there is no reason for differentiating between those lawyers who choose to deal directly with the public in their professional lives and those who do not. The former handle their clients' money and there is a well established need for financial safeguards. The latter do not and are merely paid *ex post facto* for the services they have rendered. My point is simply that in the long term it is the ability to provide a necessary professional service that will ensure the survival of the Bar not the protection of statute or out-moded business practices.

Cause for satisfaction

Looking back in that light over the past three years there can I think be some cause for satisfaction. The advocacy training programme in conjunction with pupillage and the Bar examinations reasserts that advocacy skills are not only the bedrock of our profession but the justification for its very existence. The Bar's involvement in the formation and development of AFSA expands the scope within which disputes can be resolved in our society. The growing role of the Bar in international legal organisations acknowledges the fact that law is increasingly international in its scope. The submissions made on a variety of legislative measures have had and will continue to have an impact.

What then lies ahead? As a profession we have realised that we can no longer function out of the public eye. We will in the future play an increasingly public role. Fortunately we have managed over the past two years to overhaul our organisation and place it on a sound footing under the competent leadership of Elize van den Heever and I am glad to take the opportunity of paying tribute to her and her staff for their work. *Consultus*

itself has undergone both a change of editor and a change of style as it seeks to be more representative of the news and the views of advocates. I believe we are well positioned to meet the challenges that lie ahead.

Those challenges lie in pursuing our vision. Future changes in the structure of our courts brought about by the Hoexter Commission will soon be upon us. Initiatives are under discussion in regard to judicial case management. Advocacy training will advance and must extend to continuing legal education. The current negotiations between the ALS, NADEL and BLA will bring about changes in the attorneys' profession and no doubt new challenges for the Bar as we engage with our colleagues on the matters that concern us all.

Change can be both breathtakingly fast and painfully slow. Either can be frustrating. We must not permit our frustration to lead us to turn our backs on change for in doing so we turn our backs on the future. What we need to do as we approach a new century is to pursue our vision more vigorously and more effectively. If we do that we need have no fear for the future of our profession. 