

The advocates' profession in South Africa

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During 1992, at a law students' seminar held at the University of Natal (Durban) I shared a platform with Advocate Malcolm Wallis SC, who was then Chairperson of the Society of Advocates, Natal, and Mr AC Hutchinson, who was then the President of the Association of Law Societies (ALS). I was then holding the portfolio of Professional Affairs in the National Executive Committee of the Black Lawyers Association (BLA). One of the topics for discussion was *Access to the legal profession*.

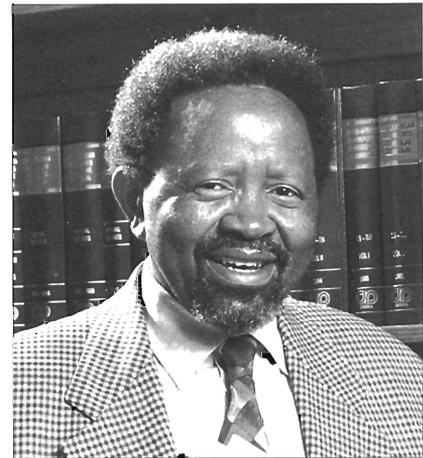
On that occasion I expressed the view that "black" lawyers (lawyers who are of either "African", "Coloured" or "Indian" origin) had certain very serious grouses about the South African legal system and the legal profession. Confining my remarks to the legal profession, both the Bar and the attorney's profession, I pointed out that complaints were related to a range of topics, including difficulty in gaining entry into the law faculties at universities, more especially what are known as the traditionally white universities, a large failure rate amongst "black" law students, more especially "African" students; virtual impossibility of getting articles of clerkship for those who wanted to become attorneys; a high failure rate in qualifying examinations at the end of the periods of articles and pupillage, which failure rate was seen as being higher amongst "black" candidates; a feeling that there were some illusory "standards" in the legal profession,

particularly with regard to qualifying examinations and (in the few instances) where there were applications for silk by "black" advocates. It was generally felt by "black" lawyers and the "black" community that the paucity in the number of "black" lawyers in the entire country was no accident of history but the product of political machination by the "white" political regimes, with the blessings and connivance of the profession and the universities.

The big question was why there were so few "black" lawyers in the country (including the former TVBC* states), a total of about 10% of the entire legal profession at the time. This was awfully disproportionate to the general demographics of the country.

I pointed out, at that seminar, that whilst these perceptions might (remotely) be inaccurate and removed from reality, they were perceptions strongly held by "black" lawyers and the community from which they came. They could not simply be wished away or disappear and the legal profession, let alone the South African society, could not afford to dismiss them as such. No one is prepared to accept the stunted growth of the legal profession amongst black lawyers as being a consequence of any inherent genetic deficiencies on the part of the "black" communities resulting in a general absence of an aptitude for legal subjects. If that is correct, there is need for active intervention, rather passive observation or even concern – in order to cure the disproportion.

We are aware, I take it, of the unfortunate role played by the law socie-



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ties of Transvaal, Cape and Natal, respectively, in application in the cases of *Incorporated Law Society of Transvaal v Mandela* (3) SA 102(T) in Transvaal, *Matthews v Cape Town Law Society* 1956 (1) SA 807(C) in the Cape and *Ex Parte Sello* 1968 (4) SA 468(N) in Natal. Similarly, the silence of the entire legal profession when Mr Godfrey Pitje (later to become the first director of the BLA Legal Education Centre) was found guilty of, and sentenced for, contempt of court, in the Johannesburg Magistrate's Court, for disobeying the presiding magistrate's order forbidding him from using a seat reserved for white legal representatives – he being a "black" candidate attorney (articled clerk) then. It might have been better if the saga had ended in that court. Unfortunately, it did not – it went up to the highest court of the country, the Appellate Division [*R v Pitje* 1960 (4) SA 709(AD)] – where the Transvaal Supreme Court's upholding of the magistrate's decision was confirmed on appeal. At the risk of sounding sensational, I should mention that Mr Pitje was a candidate attorney to the firm of Tambo and Mandela (the latter being the current President of the country).

* The abbreviation for the former Transkei, Venda, Bophuthatswana and Ciskei.

I mention these instances to show that, even if the concerns of “black” lawyers are based on mere perceptions, there are many events and plenty conduct that have the effect of endorsing them. At the seminar in question, my plea to the general profession was that it should:

- (a) realise that it was due to “black” lawyers’ lack of confidence in organs of the profession (the law societies and societies of advocates) that both the BLA and the National Association of Democratic Lawyers (NADEL) were formed; and that
- (b) the cause of the entire legal profession could be well-served by a meeting or a series of meetings between the law societies and the societies of advocates on the one hand, and the BLA and NADEL on the other hand.

I sincerely believed then that discussion at such meetings could, at the very least, serve to eliminate the concerns or perceptions of “black” lawyers. If that had happened, that would have made it possible for the BLA and NADEL, in turn, to disabuse their respective members of their strongly held beliefs. There was also the possibility of the legal profession seeing merit in the complaints, or some of them – all which would surely be a recipe for the beginning of efforts to find solutions to the impasse.

Needless to say that my plea was not heeded, even though it was not rejected by my fellow speakers. It is for that reason that I have decided to accept the editor’s invitation to contribute my and the BLA’s views on the topic that is the title of this article.

To the credit of the attorneys’ side of the legal profession, the ALS and the four law societies have seriously embarked on a course which is destined towards the creation of a single national body governing the attorneys’ side of the legal profession. That that could have begun in 1992, instead of doing so years later, only in 1995, is of less significance now – the entire attorneys’ profession is be-

ginning to act as a unified body. It is hoped that it will soon be possible to realistically think of attorneys being “attorneys” and not “black” or “white” attorneys. Of course, the BLA and NADEL would prefer a single governing body for all lawyers in the country.

From everyone’s knowledge of the political history of this country – even without the examples I have alluded to, it ought to be obvious that no profession that is run, exclusively or almost exclusively, by “white” members of our society can continue without meaningful and visible transformation, in which “black” members of such profession play an equal role. Such a profession cannot expect to enjoy legitimacy in the eyes of the “black” sector of South African society. I do not believe that anyone who genuinely cares about a “new” (I could

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not find a less trendy word) society, where there is true non-racialism, can seriously say he or she does not mind the consequences of continued racial friction.

It would be inappropriate for me not to acknowledge that there are certain issues and principles in both the BLA and NADEL about which many “white” lawyers are unhappy. Whilst it is not for me to list them in this article, I could mention, for instance, the suggestion of a fused bar. Fusion, to most advocates, is almost a swearword. I cannot even begin to discuss this here.

The Bar should seriously consider whether it can afford to be indifferent to changes around it in a changing country. The advocates’ profession cannot exist as a body that does not conform to reasonable expectations of the society in which it exists. It may well be that the advocates’ profession, as it is presently

constituted, believes that its practices and policies are correct in every respect. That, in the view of the majority of “black” lawyers does not justify the current apparent intransigence on the part of the Bar. What harm can discussions, even if tentatively to begin with, do to the Bar? I can see none. It would be a rare situation where nothing is gained by discussing issues of mutual interest.

Whilst I am aware that, in trying to open up healthy communication and debate, I may have upset many of my colleagues at the Bar, a consequence I do not intend but cannot avoid. I believe that it is time that this matter received the attention that it deserves.

The best course, in my view, would be not to engage in a slinging war of words, in this journal or any other, between me and other advocates (or anyone else) who does not like anything I have said in this article. I think that better service can be done to the advocates’ profession, the entire legal profession and the entire South African community by arranging for constructive

debates at properly arranged meetings. Naturally, I do not suggest that reaction to my views or some of them should not be voiced in this or any other journal. I do not profess to be infallible in my thoughts and would not be surprised by criticism by those who wish to express it – as long as that will eventually and sooner than later end up in a constructive national debate of the issues I have raised here and many others I could have mentioned or that other people have in mind.

It may well be that at the end of healthy debates, in appropriate forums, the prevailing views in the advocates’ profession, or most of them, will carry the day – not on the basis of numbers but, rather, of substance in ideas. If that happens, the chances are that the results will be a legitimate product of joint effort by all lawyers (including advocates). Let us try that now. 