The underrepresentation of blacks and women at the Bar

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"The third difficulty arises from the structure of the Bar and the Bench. It is overwhelmingly white and male. This compromises the effectiveness of these institutions in the perception of those affected by their claim to render substantive, procedural and distributive justice. Imaginative, creative and vigorous procedures need imperatively to be devised and executed to correct the balance and to identify and harness the potential of those black persons and women unfairly prejudiced in the recruitment of legal talent to the Bar and the Bench" (Chief Justice Ismail Mahomed 1997 November *Consultus* 119).

THE most recent statistics[1] confirm the Chief Justice's observation that the Bar and the Bench indeed remain predominately white and male, although it needs to be said at the outset that since the establishment of the Judicial Service Commission (JSC), the number of women and black persons[2] appointed to the Bench has increased significantly.

Why the need for change?

The crucial question is how, and whether, the "correct balance" can be achieved. There are essentially two routes one can follow. In the first place, one can leave it to the dictates of "natural forces" to redress the imbalance. The basis of such an approach would be that the formal and artificial impediments of apartheid have now been removed from the statute books and everyone is regarded as equal before the law, and there is accordingly no reason why women and black persons cannot join the Bar in numbers. This is a conservative approach that is hardly likely to lead to a rush of black persons and women advocates joining the Bar.

The second approach (which we advocate) is the more "imaginative", "creative" and "vigorous" approach referred to by the Chief Justice in his address. This approach involves the constituent Bars and General Council of the Bar (GCB) encouraging, promoting, assisting and supporting the admission of black persons and women advocates to the constituent Bars in a strategically focused and dedicated way.

The reason why this development is necessary is because (ultimately) it is of crucial importance for the future of the administration of justice in this country. Before the dawn of the new constitutional dispensation in this country, only practising advocates had the right of audience in the High Court and, more importantly, judges of the High Court were drawn only from the ranks of practising advocates.

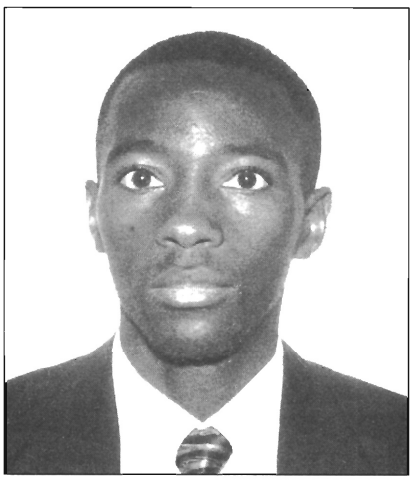
For obvious reasons, until recently, judges of the High Court comprised almost exclusively white and male judges. This has had a debilitating effect on the administration of justice in this country. The majority of black persons showed little or no respect for the Bench – however independent and impartial it endeavoured or appeared to be. The inevitable result was that the administration of justice was brought into disrepute.

The new order

Under the new constitutional dispensation, it is provided that any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. The Constitution also provides that the judiciary needs to reflect broadly the racial and gender composition of South Africa when the JSC appoints judicial officers to the Bench.

The JSC is established by s178(1) of the Constitution and s174(6) provides that the President must appoint the judges for all courts (other than the Constitutional Court) on the advice of the JSC. The JSC consists, inter alia, of two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President.

Of course, under the new order, there is no longer the direct correlation between the Bench and the (senior) Bar. Indeed, the Constitution makes it clear that any appropriately qualified woman or man who is a fit and proper person may be appointed. Thus we see these days the ap-



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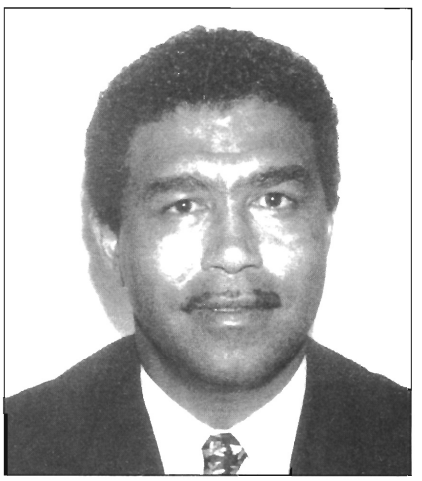

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pointment to the Bench of men and women attorneys and academics. It appears (at least for the foreseeable future) that not many of these "appropriately qualified" women and black persons to be appointed as judicial officers are likely to come from the ranks of the Bar. What appears certain, however, is that the overwhelming majority of persons to be appointed as judicial officers will be drawn from the ranks of the Bar. (Indeed, we share the belief that practice at the Bar best qualifies a person [man or woman] to take up a position as an independent and impartial judicial officer.) If this is indeed the case then the current racial and gender imbalance manifesting itself at the Bar generally may precipitate a constitutional crisis at some point. This crisis must be averted at all costs otherwise there is a real danger that the constitutional objective that the judiciary needs to reflect broadly the racial and gender composition of South Africa may not be realised.

There are thus compelling reasons (relating both to the national and public interest and the requirements of our Constitution) why our constituent Bars need (urgently) to address this racial and gender imbalance and why the complexion and composition of the Bar and various Bar Councils need to be changed.

Change: on a voluntary or compulsory basis

The process of transformation or change in any organisation is a difficult, complex and very sensitive issue. The difficulty is compounded by the fact that the Bar is not an employment agency. It is a voluntary association of persons practising as advocates in terms of a written constitution. The management of the Bar vests in the Bar Council chosen annually by members of the Bar. It has wide powers, inter alia, in respect of rules of professional conduct and etiquette and the enforcement of discipline.

Some may question why the Bar and the Bar Councils should be compelled or required to change their composition and complexion. Is it for moral, political, economic or constitutional reasons? Surely the formal equality of all before the law guaranteed under the Constitution ought to be enough to ensure that change eventually takes place. There will, however, be those (and we number amongst them) who argue that the current race and gender imbalance at the Bar is a direct result of years of systematic race and gender discrimination on the part of certain Bar Councils, particularly in regard to admission policies. Those practices must be eradicated root and branch and have no place in a democratic society founded on human dignity, the achievement of equality and the advancement of human rights and freedoms.

The constituent Bars and the GCB can (and do) play a key role in effecting real and effective change in this country. The power and influence of the constituent Bars and the GCB are self-evident. Significantly, the Constitution recognises the leading role of the organised advocates' profession and provides for it to have a seat on the powerful JSC. Practising advocates become judges of the ordinary courts and the Constitutional Court. In any society founded on a written constitution, lawyers and judges play a critical role in the interpretation of that constitution.

The structure and composition of the Bar thus impact directly on the composition of the Bench. A critical question is whether one redresses the race and gender imbalance on a voluntary basis or whether one does so by compulsion via, for example, legislation. Clearly, the preferred way to address (and deal with) the problem is to do so on a voluntary basis. (Indeed, one is concerned that the Bar should continue to cultivate and nurture those invaluable characteristics of impartiality and independence so unique to the Bar.)

Should the voluntarist approach fail to produce the desired results within a certain period, then it is inevitable (assuming that the legal profession remains divided) that Parliament intervene and does so in the national interest.

The challenges facing the profession

The first one is to provide access for women and black persons to join the Bar. The second challenge which is inextricably linked with the first one, is to maintain and support black persons and women at the Bar long enough for these persons to be given opportunities to realise their God-given talents and harness their potential.

A number of areas which impede and hamper access by women and black persons to the Bar can be identified.

These include:

(i) The domination of the environment at the Bar by white males. This has the effect that women and black persons feel "alienated".

(ii) The expense of practising at the Bar. This problem has been debated on a regular basis.

(iii) The language requirements of English and (especially) Afrikaans. Section 6(1) of the Constitution provides for the equal status of all languages, including English and Afrikaans. Given the very recent background of inferior gutter education provided under apartheid, it is very often the case that black persons (in particular African persons) have great difficulty in coming to terms with the English and (especially) Afrikaans languages. All law reports, journals, books and computer software are written in the English and Afrikaans languages. It must be a daunting prospect for any young black aspirant advocate to come to the Bar and be confronted with a mass of material in a language foreign to him or her. This barrier cannot be under-estimated.

(iv) The current system of operation of pupillage requires revision and restructuring. As things stand, the overwhelming number of pupils doing pupillage (at the Cape Bar anyway) are white and male. The imbalance at the Bar cannot be redressed if this state of affairs continues. The number of white and male pupils must be limited until such time as there is some indication based on empirical data that the racial and gender balance has been achieved. Many will (quite understandably) regard this as a radical proposal and immediately consider the potential for constitutional challenge. However, it is our view that in a rational debate, this proposal can be justified on constitutional grounds. We furthermore propose that women and >

black law graduates be specifically targeted by the constituent Bar Councils and the GCB and be encouraged to come and do their pupillage at the Bar. Pupillage for law graduates will take the form of attending a practical course over a period of one full year, which course will be run jointly by the constituent Bar Councils and the GCB in conjunction with the Department of Justice. Funding will be provided by established members of the Bar and by the Department of Justice. It is envisaged that established practising advocates will make themselves available on a roster basis to provide practical training in dedicated areas of the law in which they have the appropriate expertise. At the end of the course certificates of competence will be issued by the relevant Bar Councils or GCB.

(v) A problem that has been identified by some women and black pupils we have interviewed relates to the Bar exams. It is particularly difficult for some pupils who recently graduated and who have come to the Bar without any practical experience. They find the Bar exams a daunting prospect and are easily deterred from continuing their pupillage at a very early stage. In our experience, the drop-out rate for both women and black persons during the pupillage stage is quite high. In our view, the proposal regarding pupillage referred to above, can perhaps meet this difficulty.

(vi) The simple knowledge (amongst law graduates) of the existence of the Bar as a career option is (surprisingly) lacking. We have been quite amazed when making enquiries at the various law schools that there is little or no knowledge of the existence of the Bar and what the profession has to offer. The issue of recruitment of law graduates to join the Bar has been identified by the Cape Bar Council (and endorsed by the GCB). For example, we propose that the constituent Bars and the GCB should at least twice a year, address intermediate and final year law students at the various law schools throughout the country to inform these students of the profession. We furthermore propose that the advocates' profession be offered as a *caput* in either the intermediate or final year LLB course at the respective law schools. In this regard, the constituent Bar Councils and the GCB need to interact with the deans of the various law faculties.

Maintaining and retaining black persons and women at the Bar: some proposals

(i) Once access has been provided for women and black persons to join the Bar, a related difficulty is to maintain and retain black persons and women in practice at the Bar. The main difficulty is the expense of keeping chambers. Rent and other infrastructural expenses are prohibitive and ordinarily cannot be afforded by a newly-admitted member of the Bar, be he or she white or black, male or female. In this regard it is proposed that the constituent Bars make provision for newly-admitted advocates to make application to have their rentals or bar dues or floor dues either waived for a period of up to six months or a year, or for rentals or bar dues or floor dues to be drastically reduced - depending on the merits of each individual application. It is already the case at some Bars (at the Cape Bar for example) that newly-admitted advocates are allowed to share chambers in order to offset the high rentals. We are of the view that established practising advocates at the Bar should also share their chambers with newly-admitted advocates for a limited period of time until they find their feet.

(ii) In order that women and black persons continue to practise at the Bar, it is of critical importance that pro deo and *amicus curiae* work be referred to these persons on a regular and preferential basis for at least a period of six months to a year. The appropriate arrangements should be made with the Legal Aid Board, for legal aid (civil) work to be referred on an on-going basis to newly-admitted women and black advocates in order to sustain them for a period of at least six months to a year. (We understand that the GCB has already entered into discussions with the Department of Justice to provide for newly-admitted advocates to act as public defenders or public prosecutors for a limited period of time.)

(iii) A practice has already developed whereby work from various state departments and government ministries has been channelled by the State Attorney's office to women and black persons practising at the Bar. This is a very encouraging development which has to be continued. Already one notices that in some major cases experienced and highly-skilled white senior advocates are being assisted by black persons or women junior advocates.

(iv) The constituent Bars and the GCB should also appeal directly to black and women empowerment groups in business and commerce to actively support women and black persons at the Bar.

(v) The constituent Bars and the GCB should also appeal directly to white (or predominantly) white law firms to actively support women and black persons at the Bar.

(vi) Silks and senior juniors at the Bar should also be encouraged to "twin" with (newly-admitted) women and black advocates in order to provide them with the necessary and appropriate forensic skills and experience. Twinning and mentoring can play a critical role in the future development of women and black persons practising at the Bar. It is of critical importance that established practising advocates share their experiences and skills with newly-qualified women and black persons. We have pointed out above that it is in both the national and public interest to do so. We now have a democracy based on a written constitution which provides fertile ground for litigation and which also provides for accused persons to be legally represented in criminal proceedings at all levels of our criminal court structure. Our constitutional dispensation therefore will increasingly place a burden on the constituent Bars and

the GCB to make available qualified advocates to perform this task. We have no doubt in our minds that the constituent Bars and the GCB can rise to this challenge.

Restructuring the Bar

We are of the view, however, that these challenges will not be (successfully) met by the constituent Bars and the GCB unless the Bar Councils and the GCB are restructured. Quite simply, the various Bar Councils and the GCB are overwhelmingly white and male and, quite frankly, it is very difficult to imagine their effectively representing the interests of women and black persons. The best (and only) solution is that black persons and women be allowed to represent and promote themselves.

We propose that the constituent Bars and the GCB effect the appropriate constitutional amendments as soon as possible to provide for significant direct representation of black persons and women on the respective Bar Councils and the GCB. Related to the issue under discussion is the efficiency of the Bar Council system. The management of the Bar vests in the Bar Councils. What is of grave concern to us is that the Bar Council comprises elected members of the Bar who have the enormous responsibility of running and managing a very important institution purely on a part-time basis. This is unacceptable. The Bar Council needs to be restructured along more professional and business lines. In this regard, we propose that a starting point would be the appointment of a full-time, suitably-qualified chief executive officer (preferably a black person or a woman) together with the appointment of professional staff, to oversee the operational side of the Bar Council.

A restructured Bar Council should purely be a policy-making body.

Conclusion

Space does not allow us to expand and elaborate upon some of our ideas which many readers may find somewhat controversial. We feel, however, that we wish to make a meaningful contribution to the debate, a debate which needs to come to some conclusion as soon as possible. Concrete action must be taken so that we can begin to meet the challenges laid down by our Constitution to make the Bar and the Bench truly representative of the racial and gender composition of our country.

Footnotes

1 These are current statistics supplied by the GCB. Johannesburg Bar: 484 advocates of whom 14% are black advocates and 1.4% are black female advocates. KZN-Natal Bar: 181 advocates of whom 32% are black advocates and 12.15% are female advocates. Cape Bar: 290 advocates of whom 5.5% are black advocates and less than 1% (there are 4) black female advocates. The race and gender breakdown for the other Bars were not provided.

2 The reference to "black persons" is used in the generic sense and collectively refers to African, Coloured and Indian persons. Although all women have been discriminated against in the past (an still are), black women have also suffered discrimination on account of their *race*. Because black women in particular have suffered the worst forms of discrimination, we advocate that they be accorded preferential treatment. Although the article only deals with black persons and women, our criticism applies equally to all other previously disadvantaged groups such as those with disabilities or those discriminated against on account of their sexual orientation, religion etc.

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jurisprudential, moral and arguably even spiritual challenges provoked by what Bram Fischer did and said and by what different parts of organised society effectively said and did to him? Undeniably.

But that admission should not be any source for despair. It was not for Bram, during his quite remarkable life as a jurist, a thinker and an activist deeply concerned with the destiny of his country and its people. Imperfection in a very necessary and significant sense is inherent in the human condition; in the growth which comes from the exercise of our freedom; in the very quality and meaning of that freedom which necessarily involves a choice of potential alternatives and not staticity or finality and perhaps in the interface between the finite and the infinite. Indeed it is precisely this consciousness of imperfection, and the enjoyment of a creative freedom which propels the pursuit of perfection, giving energy and romance to the pursuer, and meaning to the pursuit as new vistas of beauty and sparkling mystery unfold themselves in the wonder and the excitement of the unfinished symphony of life.

But the excitement of this pursuit into the future is immeasurably enhanced by the truths absorbed from the past and the present. For lawyers these include the insistence, at all times, that the attainment of justice must be the rationale for all law; that law cannot be distanced from justice and morality without losing its claim to legitimacy; that the ethical objectives of the law contain the life blood of a nation; that justice must not only be procedurally fair but substantially fair in its execution; that the law must be seen to be fair in its impact on the life of the humblest citizen in search of protection against injustice; that the law is accessible, intelligible, visible and affordable; and that any retreat from these truths imperils the very existence and status of a defensible civilization, first by corrosively destroying within it the source of the energy which sustains it and second by provoking disdain, disorder and rebellion from those it seeks to discipline.

End notes

1 Quoted in Stephen Clingman *Bram Fischer – Afrikaner Revolutionary* 355-6.

2 *Society of Advocates of South Africa v Fischer* 1966 (1) SA 133 (T) at 135.

3 See Clingman supra at 409-10.

4 Oxford University Press (1951) 202.

5 "Positivism and Fidelity to Law" (1958) *Harvard Law Review* 630; *Morality of Law* (1965) 46FF; Ghandi *The Law and Lawyers Section V*; Dworkin *Taking Rights Seriously*.

6 Oberlandesgericht Bamberg July 27 1949, 5 *Süddeutsche Juristen – Zeitung* 207 Germany 1950; also referred to in *Harvard Law Review* 1005-1006.

7 "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* 593.

8 *Principles of Social and Political Theory* supra 202.