

# ***Transformation of the legal profession: are we on the right path?***

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***Chairperson: General Council of the Bar of South Africa***

## **Transformation of the Bar**

Last April the black advocates at the Cape Bar indicated their refusal to be members of the Bar council or its committees until that Bar had been transformed. A group known as Advocates for Transformation, with predominantly black members, came into being in Cape Town. They sought, *inter alia*, greater representivity of black and female counsel in the Bar's governing structures.

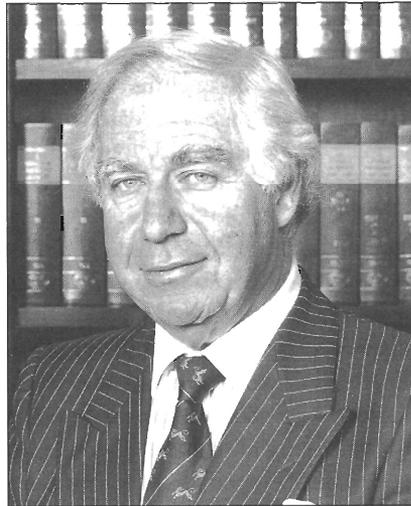
Separate groupings, also known as Advocates for Transformation, then came into existence at the Natal, Pretoria and Johannesburg Bars. By mid-1998 Advocates for Transformation (National) ("AFT") was formed.

On 25 July 1998 representatives of the GCB met a 19 strong delegation of AFT. At this gathering an agreement was reached on the need to constitute a Bar transformation forum by 30 November 1998.

In the meantime local agreements in regard to transformation were reached in KwaZulu Natal, Pretoria and Johannesburg. The Johannesburg and Pretoria arrangements were embodied in constitutional amendments while in KwaZulu Natal an informal agreement was reached. The complexion of these three Bar councils underwent a significant change, both as to colour and gender.

As the Cape Bar, despite wide-ranging negotiations, had not reached agreement with the local Advocates for Transformation by 30 November, the transformation forum could not be constituted.

Fortunately, by March this year our Cape colleagues were able to report that



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a compromise had been arrived at between the Bar council and the local Advocates for Transformation. This led to a special general meeting on 9 April 1999 when the requisite amendments to the Cape Bar's constitution were passed by an overwhelming majority. This resulted in the election on 29 April of a far more representative Bar council.

As by March 1999 all the relevant Bars had reached local transformation agreements it was possible to arrange with AFT for the first meeting of the Bar's transformation forum on 17 April. Prior to this it had been agreed that the GCB and AFT would each have 10 representatives on the forum and that there would be two co-chairs, one from the GCB and one from AFT. It had also been agreed that while the decisions of the forum would not be binding on the GCB or its constituent Bars, should the GCB and AFT members of the forum reach consensus on any specific issues, the GCB representatives would undertake to

do all in their powers to persuade the various Bars to accept and adopt the agreements so reached.

Before this first meeting of the forum it had been agreed that the sole issue for discussion on 17 April would be the governance of the GCB. Early on in the meeting - to the surprise of the GCB representatives - it was made clear that the AFT delegation did not find acceptable the agreements that had been concluded between the four local chapters of AFT and their respective Bar councils. They insisted that, as far as the GCB was concerned, there had to be equal governance, *viz* AFT must have a 50% say in the affairs of the GCB.

In response the following proposal was put to the AFT representatives:

"That, as a matter of principle, the following agreement be reached by the transformation forum:

- (1) that the GCB and AFT recognize that at meetings of the GCB there should be proper representation of black and female advocates during its deliberations;
- (2) that the GCB acknowledges that its constituent Bars should, in nominating their representatives to attend GCB meetings, ensure that black and female advocates represent each bar on an equitable basis;
- (3) that the current members of the executive committee of the GCB accept that one of the seats of the chair, vice-chair or deputy vice-chair of the Council be occupied by a black or female advocate, but that this matter be properly dealt with by the GCB at its AGM on 23 and 24 July 1999."

In addition, the following question was put to AFT:

"Would AFT consider whether it would be agreeable to black advocates being treated as a constituent of the GCB, resulting in the amendment of the GCB constitution to permit four representatives of black advocates at the AGM of the GCB?"

The AFT members then retired to caucus among themselves and returned to inform the GCB delegation that both the proposal made and the question posed were unacceptable to AFT, which insists on nothing less than equal governance.

It was agreed that the GCB would have until 15 May to consider its position and that by 31 May AFT would state in writing why the GCB proposal is not acceptable to it and why, despite the local agreements, AFT insists on equal governance on the GCB, i.e. 50:50 between the GCB and AFT. Each of the Bar councils has been asked for its input by 7 May.

The response of all Bar councils, including those which have been transformed on a basis acceptable to its members, is awaited with interest, as are AFT's written reasons for rejecting the aforementioned proposal.

### The transformation of the Bench

In the *Daily Dispatch* of 22 March 1999 Professor Vuyisile Dlova, the Dean of the Law Faculty at the University of Transkei, is reported as having said the following at a farewell function for a retiring law professor:

"We do want blacks as judges in our law courts but they must be real judges – competent, efficient and knowledgeable. Anything cosmetic is unacceptable."

Those words encapsulate precisely the views of the GCB, which have been conveyed regularly by my predecessor, Malcolm Wallis SC, and myself, in our detailed submissions to the Judicial Service Commission ("JSC"). In fact, I quoted Professor Dlova's very words to the JSC in my 27-page submission of 29 March 1999 – which was accompanied by 86 pages of annexures – for consid-

eration by the JSC at its interviews of nominees for various judicial appointments on 19 to 22 April 1999. I have consistently, in my submissions to the JSC, supported unreservedly the calls for greater representivity – both for blacks and women – on the High Court Bench, but not at the expense of competence.

Having considered the JSC's most recent recommendations to the President after conducting its interviews of a wide variety of candidates, one is constrained to ask whether in fact the JSC has taken heed of Professor Dlova's views. What cannot be gainsaid is that a number of exceptionally well qualified white candidates – mainly from the Bar, and not all male – failed to find favour with the majority of JSC members, while some black nominees of obviously less competence and experience did. Are they being appointed for cosmetic – and therefore unacceptable – reasons? If so, this would mean that the JSC is not doing its job dispassionately, in the public interest, as it is beholden to do. Feelings of disquiet in this regard are heightened by newspaper reports likening the questioning of certain – and clearly not all – candidates to "something approaching an inquisition".

I maintain, as I have done constantly, that it is in the interests of the public and of the administration of justice that by far the majority of judges should be appointed from the ranks of experienced advocates, and preferably silks. That is not to say that attorneys and academics with the requisite ability and experience will never merit appointment to the High Court Bench. We have, however, now arrived at a situation where it is highly unlikely that leading counsel at the Bar will accept nomination for appointment to the Bench, at the very time that their services are sorely needed. Clearly something needs to be done about this unhappy state of affairs.

### Pupillage

Subsequent to the meeting on 2 October 1998 of the GCB executive committee, the National Bar Examination committee, the National Advocacy Training Coordinating committee and others, exco-

decided to appoint a five-person task force (with Archie Findlay SC as its chair) to consider the future of the pupillage system and, *inter alia*: whether we should continue to have a Bar examination at all; and, if so, if it should be held, as now, at the end of pupillage, or whether there should be an entrance examination prior to commencing pupillage.

The task force has produced a position paper which has been sent to various relevant people such as the Chief Justice, the President of the Constitutional Court, the Judges President, the Directors of Public Prosecutions and the deans of all the law faculties and to organisations/groups such as the Law Society of South Africa, AFT, Nadel and the BLA. They have been asked for any comments or suggestions by 31 May 1999. After considering any such input the task force will furnish a final report by 10 July for submission to and consideration by the GCB at its annual general meeting on 23 and 24 July 1999.

If our system of pupillage is to be transformed, and to what extent, only time will tell. 

## African Bar Association

**The Biennial Conference of the African Bar Association will be held in Accra, Ghana, from 27 – 29 June 1999.**

**The conference will be hosted by the Ghana Bar Association:**

**PO Box 4150  
Accra  
Ghana.**

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(Ghana) 226748**