Executive committee meeting

Report by Halima Saldulkar, assistant honorary secretary, on the executive committee meeting held on 30 January 1999.

The exco meeting of the GCB was held at the Cullinan Hotel, Sandton, on 30 January 1999. Delegates of all constituent Bars were present.

Even a cursory analysis of the agenda indicated that there are many challenges facing the Bar, for example topics such as the future of the legal profession, a single legal practitioners' Act, an investigation into the National Bar examinations, and the transformation of the legal profession. Strong opinions and considered viewpoints were expressed by delegates on these topics.

The chairman reported on a meeting he attended at the conference of the Society of University Teachers of Law in Bloemfontein at which the creation of a standards generating body for law was discussed. It was resolved that the GCB would nominate a member to represent the GCB on the steering committee of the body.

Problems experienced by the Bars regarding the payment of accounts by the Legal Aid Board were discussed and the chairman resolved to raise this issue with the chairman of the Legal Aid Board in order to facilitate payment to members.

It appears that the spirit of co-operation and enthusiasm that existed amongst the delegates of the GCB and Advocates for Transformation (National) ("AFT") on 25 July 1998 continues. Agreement between the GCB and AFT has been reached on all issues other than the binding nature of decisions.

The GCB also resolved that AFT would be invited to send participating observers to the next exco meeting in April 1999 and to meetings thereafter, including the annual general meeting of the GCB in July 1999.

Problems experienced at the Ciskei and Transkei Bars were articulated and it was resolved that the Ciskei and Transkei pupils could elect to do their pupillage at the Natal and the Eastern Cape Bars respectively. In the interim, each Bar representative would arrange with the chairman of his pupillage committee to send lecture material to the secretariat from where it would be distributed to Bars who need it.

As an interim measure the GCB accepted unreservedly that a member from AFT may sit in as an observer during the oral examination at the discretion of the chairman of a particular Bar.

The North West Bar reported that the tariffs applicable in the High Court in Bophuthatswana were in accordance with the old tariffs and not with the tariff currently applicable in the rest of South Africa. It was resolved that this matter would be raised with the new chairman of the Rules Board, Justice Zandile Ngcobo.

Various applications for striking-off and disciplinary matters were discussed and the Bars were requested to keep the GCB informed of forthcoming developments.

It was generally agreed amongst the delegates that there was a need for an expansion of the GCB executive. Bars were requested to ensure that they had liaison committees to deal with GCB matters and the suggestion for the election of a second vice-chairman will be tabled at the Transformation Forum and submitted as a potential constitutional amendment for adoption at the GCB's July AGM.

With regard to the US/AID placement and subsidy scheme it was reported that it was well underway, but one of the problems experienced with regard to this aid was the insistence that the aid be provided to recent graduates only. The selection process as to which pupils would be provided with the funding had already taken place.

It was agreed that the chairman of the GCB attend the IBA council meeting in Boston on 31 May 1999.

The chairman reported that four issues of *Consultus* will be published during 1999, and the proposal for the upgrading of the computer equipment at the *Consultus* office was accepted.

The Bars noted the recent developments in Zimbabwe which seriously imperils the traditional independence of the judiciary making it appropriate for the GCB to release a press statement in support of the judiciary in Zimbabwe.

The exco meeting concluded with the proposed dates for the next meetings of the GCB, i e an exco meeting in Johannesburg on 17 April 1999, and the AGM in Johannesburg on 23 and 24 July 1999. A vote of thanks was expressed to the GCB secretaries for providing unstinting support in the execution of the decisions taken at all GCB meetings.

The future of the legal profession

Addressing the annual general meeting of the Law Society of the Cape of Good Hope in November 1999 the chairman of the GCB, Peter Hodes SC, commented on various views and proposals in the Justice Vision 2000 *document of the Department of Justice and an issue paper published by the department's policy unit.**

Stressing the fact that the views were his own and not that of the GCB Mr Hodes dealt, inter alia, with the following:

- ***On the creation of a single statutory body for the legal profession.***

We are told by the author of the Department of Justice's paper that transformation means change. It cannot be gainsaid that both branches of the legal profession are keenly aware of the need for transformation, but what is needed is not change for change's sake: indeed what is required is change for the better, in the interests of the search for justice, the very *raison d'etre* of the legal profession. >

* *This was the first occasion on which the AGM of the Cape Law Society was opened by a chairman of the GCB.*– Editor

Met verwysing na die hoofartikel in *De Rebus* waarin die Departement van Justisie se werkstuk bespreek is, moet toenadering tussen prokureurs en advokate verwelkom word as daarmee bedoel word 'n verbetering in verhoudinge tussen die twee takke van die beroep, maar as dit samesmelting beteken, moet dit ernstig bevraagteken word. Mens soek egter vergeefs vir die vermelding van 'n enkele rede ter stawing van die mening dat daar baie te sê is vir die totstandkoming van 'n enkele statutêre beheerliggaam vir die regsberoep. Wat beklemtoon moet word is dat daar geensins aan die hand gedoen word dat die Baliestrukture nie die openbare belang dien nie. Inderdaad wat onmiddellik te bespeur is, is die feit dat die werkstuk versuim om tussen die rol van advokate en prokureurs te onderskei.

We are told that members of the profession who are currently beyond any professional regulation – such as legal advisers, government employees such as prosecutors, so-called "independent advocates" and paralegals will be able to be brought into the fold. But it must be emphasised that these people have no call to be brought into such fold. In the main they are not members of the profession for they have not written the requisite entrance examinations. There is for instance no need to institute a single controlling body so that legal advisers can be encompassed within its provisions. Perhaps what should happen in their case is that those who have passed their attorneys' admission examinations should be catered for in a separate subsection of the Law Society for non-practising attorneys such as is the situation in the accountants' profession. Further, as the position stands at present, it appears that there will in all probability be no need to make special provisions for the so-called independent advocates, for you will remember that in the *De Freitas* case it was found that it was of the essence of the advocates' profession that it is one of referral.That is anathema to the so-called independent advocates whose continued survival must be considered most problematic indeed. If they wished – and had the ability to pass – they could write the National Bar examinations.

Whatever else one may say of them, the one thing that cannot be said of paralegals is that they are members of the profession, for the very simple reason that they are neither attorneys nor advocates. There is also no need for employees of the State, such as prosecutors, who by definition are not in private practice, to be brought within the ambit of a statutorily regulated lawyers' body. No logical reason for this suggestion has ever been proffered.

Is there a real spectre of a conflict of interests should the current *status quo* continue with separate statutory law societies on the one hand, and voluntary organisations in the form of the GCB's constituent Bars on the other?

- ***Oor die noodsaak van 'n onafhanklike Balie***

In verskeie lande in die Gemenebes bestaan daar spesialis Balies wat nie statutêr gereël word nie. Hierdie Balies verskaf die omstandighede waarin diegene wat uitsluitlik as advokate wil praktiseer, dit kan doen. Dit behoef, na my mening, geen betoog nie dat die rol van 'n onafhanklike Balie in die nuwe, demokratiese Suid-Afrika so onontbeerlik as ooit is. Ter stawing hiervan doen ek aan die hand:

1 Die gevolg van ons nuwe handves van menseregte sal wees dat advokate 'n belangrike rol sal speel in die bestryding van die mag van die Staat.
2 Die Staat self sal ook toegang tot werklik onafhanklike advokate benodig, en nie net advokate met die nodige politieke betroubaarheid nie.
3 Soos baie van my kollegas en andere, is ek die mening toegedaan dat dit belangrik is dat regters uit die geledere van praktiserende advokate aangestel word. Dit beteken egter nie dat prokureurs en akademici hulle nie vir benoeming as regters beskikbaar moet stel nie of dat van hulle nie goeie regters sal wees nie. Dit is eenvoudig so dat, oor die algemeen, praktiserende advokate met die nodige ondervinding beter regters uitmaak.
4 Die bestaan van bedrewe advokate het 'n positiewe effek op die gehalte van die regbank en sy uitsprake.

- ***The Bar as a referral profession***

In his address at a Johannesburg Bar dinner in 1997 to celebrate his appointment as Chief Justice of South Africa, Mahomed CJ referred to those traditions of the Bar which managed to live on even in our country's troubled times:

> "The first is the tradition of thorough scholarship, pursuit of forensic excellence, capacity for rational thought, intense intellectual energy and unremitting discipline which barristers have always been expected to apply in the discharge of their briefs.
>
> A second and related tradition was a fierce independence and uncompromising standard of intellectual integrity and capacity for objectivity which informed the best at the Bar."

- ***On professional discipline***

The one area in which I have never heard any criticism levelled at the Bar is in the field of professional discipline. On a daily basis the Bar councils across the country deal with disciplinary complaints against members and, when necessary, impose sentences as severe as suspension from practice or expulsion from a particular society of advocates. By so doing they look after the interests of the public. At the same time they look after the interests of their members. This is something of which we are justly proud. Carrying out both roles does not carry with it any conflict of interest, for the ultimate role of our members and their Bar Councils is service to the public. From my experience of the attorneys' profession and their handling of disciplinary matters, the same holds true for the law societies.

- ***On the so-called "anomalous differences" in the manner in which the various branches of the profession are regulated***

Much is made in the issue paper of the so-called "anomalous differences" in the manner in which the various branches of the profession are regulated. The author suggests that:

> "Now that attorneys have right of appearance in the High Court it seems fair that advocates should be allowed to take instructions directly from clients and in this situation they might well find themselves handling clients' funds."

This despite the *De Freitas* judgment. From what I have said thus far, it is clear that I hold the view that there are no meaningful anomalies to be found in the differences between the two brances of the profession. There appears no warrant for the contention that it is fair that advocates should be allowed to accept instructions directly from

clients. This would put them in competition with the attorneys from whom they receive referrals and, more particularly, will bring to an end their very independence, an indispensable attribute, as pointed out by the Chief Justice.

- ***On the court system***

Some time ago the Hoexter Commission recommended that as a matter of course all appeals should lie to full benches of the provincial divisions and that only with the special leave of the Supreme Court of Appeal itself should one be able to go on appeal to it. That is a proposal that warrants swift acceptance and implementation. The logical result of such a step will be a diminution in number of the appellate judges who will be needed to deal with important matters of law and legal policy.

At the same time one questions the continued state of affairs where we have two highest courts in the land, one the Supreme Court of Appeal and the other the Constitutional Court. In this regard I ask the question: has the time not come to accept that within a laid down period of time these two courts should become one? It would also end the somewhat surrealistic situation that both courts deal with the interpretation of the Constitution and with the development of the common law in the light of the provisions of the Constitution. According to Constitutional Court jurisprudence it is encumbent upon the litigant to wend his weary way, often from the magistrates' court, to the high court, some years later to the Supreme Court of Appeal and, finally, to the Constitutional Court. That cannot be healthy for the administration of justice.

Not all judges are paragons of judicial virtue. The time has surely arrived where, like countries such as Canada, it is accepted that our judges are accountable for their conduct. The Judicial Service Commission has no jurisdiction over a judge once appointed. What we need in South Africa is a body akin to the Canadian federal and provincial judicial councils where complaints can be laid against allegedly misbehaving judges and be properly investigated.* 📖

* *See also p 27 of this issue.*– Editor

IBA conference

Peter Hodes SC, chairman of the General Council of the Bar of South Africa, reports on the IBA conference held in September 1998

The 27th biennial conference of the International Bar Association ("IBA") was held in Vancouver, Canada, during September last year. Some 3 000 lawyers from over 100 countries were present and attended a wide variety of panel discussions, lectures and social gatherings.

Madame Justice Louise Arbour, who some years ago gave the keynote address at a GCB national conference held in Durban, and is now the chief prosecutor of the International War Crimes Tribunals for Yugoslavia and Rwanda, was the guest speaker at the opening ceremony. On this glittering occasion she presented the IBA's Bernard Simons Memorial Award – which honours a lawyer's personal contribution in promoting, protecting and advancing human rights – to Chief Gani Fawehinini, a doughty Nigerian lawyer who has been detained on countless occasions by reason of his role in his country's struggle for fundamental human rights.

What was of special significance was that the first formal meeting of the newly established Forum for Barristers and Advocates was held during this conference. This forum is to function as a focus for barristers and referral advocates within the IBA, to serve their specialised interests and to foster co-operation between them. The GCB was one of the inaugural members who in all represent more than 16 000 advocates and barristers.

The forum had arranged to hold two meetings during the week. The first was a discussion on the role of the barrister and referral advocate in modern legal practice. The three speakers were Heather Hallett QC, the Chairman of the GCB of England and Wales, Chris Pullin QC, the chairman of the Australian Bar Association, and Jacqueline Leong QC, a former chairman of the Hong Kong Bar Association. They discussed the topic from the peculiar point of view of the jurisdictions in which each of them practises. Heather Hallett showed in a trenchant manner why a divided bar is necessary for the continued well-being of the UK's legal system and emphasised that an independent barristers' profession will have an important role to play in a society where multi-disciplinary practices look like becoming the order of the day.

The second event which was scheduled to be held by the forum was a one hour play entitled "The trial of Penn and Mead" which was written and was to be presented by Nigel Pascoe QC, an English silk. It tells the story of a trial by jury at the Old Bailey in 1670 at which was established the absolute independence of a jury to return a true verdict on the evidence in accordance with their oaths, without fear of the consequences. The play was to be followed by a debate on the subject "Does the jury have a place in the legal systems of the 21st century?" The speakers were to be Jerome Shestack, the immediate past President of the American Bar Association, and our own Malcolm Wallis SC (who was elected a co-chairman of the forum). Unfortunately, because of the serious illness of one of Nigel Pascoe's children, this gathering had to be cancelled. It is hoped that what was expected to be a stimulating occasion will be rescheduled for a later IBA conference.

The conference, held in a beautiful city at a lovely time of the year, was an undoubted success. Hopefully more members of the GCB will attend these gatherings in the future. There is much for us to learn on these occasions and many new friendships to be forged. 📖

Legal Aid

Cynthia Pretorius, member of Pretoria Bar legal aid liaison committee, reports as follows:

During June 1996 a legal aid liaison committee was convened by the Pretoria Bar. Its purpose was and is to liaise with the Legal Aid Board in respect to >