The Bar and the Judicial Service Commission: supplying the demand

During the past two years 25 of 43 (close on 60%) appointments to the high court Bench, including appointments of sitting judges to higher courts within the courts structure, have been of black candidates. Yet the high court remains seriously understaffed of permanent judges. This is evidenced particularly by the perennial problem of backlogs in criminal appeals. In July last year, the KwaZulu-Natal Bar provided 17 silks as acting judges and 21 juniors as state counsel to dispose of 104 criminal appeals. In Johannesburg, during the same period, 18 silks acted as judges to dispose of 110 criminal appeals, and in Pretoria 24 silks acted to dispose of 100 criminal appeals. In October last year, five silks acted in Grahamstown to dispose of criminal appeal backlogs, assisted by seven juniors who were acting as state counsel. Just recently, the Cape Bar agreed to provide silks on Fridays for the rest of the year to address the same problem.

The demand on the Bar to supply appropriate material for permanent judicial appointment has become more complex than in the past. Then it was simply a matter of persuading enough silks to accept appointment. Now, the pattern of appointments has made it clear that the Judicial Service Commission is actively pursuing a policy of, at least pro tem, appointing candidates from previously disadvantaged groups in preference to white males, assuming parity in other respects. Ostensibly paradoxically, the Commission is nonetheless continuously looking for especially well-qualified white candidates. Since the appointment of judges concerns the appointment of candidates primarily skilled in court craft, invariably and understandably the first port of call is the Bar. It now has to provide two categories of candidates: enough senior junior candidates from previously disadvantaged groups with appropriate potential to grow in office and yet sufficient experience to try cases in the meantime; and enough top white (and black) silks who will be able to bear the burden of disposing of more cases than perhaps they would otherwise have.

And so, seeing the nature of the demand, it is very apparent that the Bar needs to look critically at its ability to absorb into and retain within it a broad spectrum of pupil candidates. The South African Bar now numbers 1791. During the past year it has grown by 5,4%, double the rate of the attorneys' profession (2,7%). Some 42,6% of its members comprises previously disadvantaged individuals.

Lord Goldsmith, past chairman of the Bar of England and Wales and now Attorney General in the Blair cabinet, said recently: "We have taken it still to be the long term aim of the profession to ensure the continued existence of a thriving independent Bar providing the highest quality service. We have also taken that to achieve this aim, the Bar must attract the brightest and best students from the complete section of social cultural and racial backgrounds. The Bar must be open to all women and men of ability irrespective of background or financial means."

This is easier said than done on local soil. During the past four years, 55% of pupils who sat for the NBEB examination straight from university, failed. Of them, 72% had degrees from historically black universities.

The Bar has developed plans and strategies to confront the challenge. Nationally, Norman Arendse SC heads a committee that devises policies and recommends them for adoption by local Bars. The five larger local Bars each has its own strategy in place, and is implementing it. Of course there is much difference of opinion as to which plan to adopt, and very often as to the rate of implementation. Sometimes we become frustrated because we seem not to be getting there, or at all events, not fast enough.

In this context the argument has been raised that we are, in effect, chasing our own tail: we take all-comers; then we agonize, threat and bully with the limited resources at our disposal to get them through the NBEB examination; and once in the Bar, we expose ourselves to criticism and sometimes ridicule to get them briefs – in the process eroding the opportunities of those we were able to get there just one pupil intake earlier. What this argument identifies and magnifies for consideration, is the fact that the supply of work for the Bar does not increase in consequence of the Bar increasing; it works the other way around.

There are three basic positions that the Bar will have to adopt. The first is that it has become imperative to extent pupillage to one year. The shrinking of the LLB to four years has foreshadowed it, and the draft Legal Practice Bill envisages it. The concomitant difficulties have been debated many times over, and here the primary issue has been the lack of income. The one-year pupil will be no worse off than in a fifth year LLB, and in any event provision has been made for pupils to accept limited briefs during the second half of pupillage. The Bar has already adopted a year curriculum drafted by John Mullins SC and is ready to implement it. The matter has been referred to the Bars for adoption at the AGM in July.

The second position that the ten individual Bars will have to adopt is that they ought not to accept for pupillage more applicants than they can reasonably accommodate. The ambit of their resources is a matter for the Bars themselves; some are already limiting their pupil intakes on this basis. This position will place an enormous responsibility on Bars' selection criteria, having regard especially to the demands described above. And the third position is that an aspirant pupil should be afforded at least one opportunity of passing the NBEB examination, no matter how poor an LLB he/she offers.

Pro bono work

The acting appointments, including those as state counsel, referred to at the outset, were all done by the Bar on a pro bono basis. In addition, the Free State Bar recently consulted some thirty prisoners who had not yet had their death sentences commuted, and made submissions to the judge president as to appropriate sentences, also on a pro bono basis. There are many other examples at each of the Bars of on-going pro bono work rendered by them, including civil trials and appeals. Elsewhere this issue reports the recent adoption of a national pro bono strategy. All this underscores the extent to which the Bar remains actively engaged in and committed to pro bono work, but it exposes too that the burden is carried by few and is not evenly spread. The adoption of a national strategy should cure this.

Meeting the LSSA

The meeting with the management committee of the LSSA, which is carried in a report elsewhere in this issue, occurred on their initiative. The initiative is commendable, especially since so broad a range of topics were confronted head on. The matter of the Legal Practice Bill remains, of course, the burning issue, in particular the suggestion that the Bar as a self-regulated independent institution should disappear. The Bar has made it clear that it will seek to make common cause where this attainable but that it would of course not agree to its own dissolution. We are optimistic however that cool heads will prevail in the interests of the administration of justice in the broader context.