

## Challenges facing the Bar

Norman Arendse SC, chair, General Council of the Bar of South Africa

### Introduction

The Bar finds itself at a critical juncture in its history, and is confronted with a number of challenges that are daunting and fraught with political complexities. This is an instance where the Bar may not shirk its responsibilities towards the public, and ultimately the administration of justice.

The Bar has undergone significant changes in recent years, notably in its governing structures both at constituent Bar level, and at national executive committee level. The introduction of black advocates into the governing structures at both constituent Bar and national executive committee level over the past four years has brought about much-needed strategic direction, and has moreover conferred upon the Bar a political acceptability amongst both members of the public and members of the organised profession. A recent amendment, sought to be introduced by Advocates for Transformation (AFT), which seeks to secure for AFT co-, and equal, governance at both constituent Bar and at national executive committee level, is designed to secure this new-found (political) acceptability, and is moreover designed to stabilise the Bar.

That the Bar has played a critically important role within the administration of justice over many years, is self-evident. Under our Constitution, that role has become even more important. Members of the Bar, on a regular basis, confront each other in our courts throughout the land, debating issues of critical constitutional importance – issues ultimately determined by our courts. The level, and quality, of that debate, are more often than not, reflected in many judgments.

The Bar as an institution has many criticisms. Some of the criticisms, particularly in relation to the transformation of the Bar in terms of its race and gender profile, are valid, whilst others reflect a failure to understand the role of the Bar in a democratic society.

The organised profession has in place a programme which, if implemented in a committed way, will result in real, as opposed to cosmetic, transformation within the next few years. Central to that programme (already adopted in March 2002) is the redress of the current race and gender imbalance at the Bar, the need to change (race- and gender-skewed) briefing pat-

terns, and the dismantling of unacceptable practices.

The Bar is perceived by many of our attorney colleagues and some members of the public, as elitist, arrogant and insensitive to the need for social and political transformation. We must change such perceptions, as they are inimical to the future existence of the Bar, and we must do so immediately. Thus, not only must the 'face' of the Bar undergo transformation, but its structures, giving rise to negative perceptions, must undergo fundamental change.

### The need to transform

Given the critically important role played by the Bar in our constitutional democracy, it has become even more important for the Bar to address its own shortcomings, including lack of transformation as regards race and gender. Fortunately, the Bar has fully embraced the need to transform. The commitment of the Bar is recorded in a number of resolutions, making it critically important for those of us in leadership positions to give meaning and effect to those resolutions. The resolutions I refer to relate to, *inter alia*, an admissions policy relating to: pupillage, pupillage itself, and the National Bar Examinations; mentoring; twinning; group associations; and general support for transformation initiatives at constituent Bar level. The implementation of these resolutions is underway, but needs to be monitored on an ongoing basis.

The fact that real transformation cannot take place overnight is no excuse. Unacceptable practices must be eradicated immediately. In this regard, individual members of the Bar have a direct responsibility to ensure that what the Bar does conform to the values enshrined in our Constitution.

In this regard, one expects AFT to play a leading and significant role in ensuring that the Bar transforms as soon as possible. Now that AFT has secured for itself a co-governing role in the affairs of the Bar, it is hoped that the negative perceptions about the Bar will change, and that AFT, as an avowed agent for change, will play the role demanded of it.

### The Bar and the Bench

It is of critical importance in a constitutional democracy that a sound relationship exists between the Bar and the



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Bench, one which is based on mutual trust and respect. The Bar has a long and proud tradition of providing the foremost litigators in our courts, and it is clear that this role will continue into the future. Traditionally however, the Bench had comprised judges who previously had been members of the Bar, and this, no doubt, assisted greatly in ensuring a fairly cordial relationship between the Bar and the Bench. Traditionally also, the Bar and the Bench (until recently), were white and male-dominated. The composition of the Bench has undergone meaningful change since 1994, and the number of black and female judges has increased significantly. The Judicial Services Commission (JSC) has rightly appointed men and women from both the Bar and the attorneys' profession, and from amongst the academics. It goes without saying that the culture and traditions of the Bar are alien to a number of newly appointed judges who come from either the attorneys' profession or academic institutions. There is also a tendency amongst members of the Bar to show some disrespect – even disdain – to newly appointed judges who do not come from the Bar. This tendency has no place in a transformed Bar and must be eradicated immediately. Fortunately, the overwhelming majority of members of the Bar respect the Bench, irrespective of the origins of a particular judge. This is indeed correct and must be encouraged.

Given the tensions that exist in various divisions of our courts throughout the country, the Bar is indeed ideally placed to play a constructive and meaningful role in at least managing (if not eradicating) these tensions. What the Bar can ill-afford, is to exacerbate these tensions by displaying racist attitudes.

### The Bar and the attorneys' profession

The attorneys' profession is as much part of legal practice as is the Bar. Relations in recent months have been strained as a

## New GCB chair: Norman Arendse SC

*A tribute by Dumisa Ntsebeza,  
Cape Bar*

**N**orman Martin Arendse does not need an introduction to anyone who has been involved in various aspects of the legal profession.

He is one of that cadre of practising lawyers in the Western Cape who were fortunate to have been touched by the influence and experience of the late Dullah Omar, whose exploits in law and politics are a rich legacy for all South Africans. Norman Arendse went through Dullah's hands – he practised in his law firm for a while.

Norman Arendse pioneered the work of the Legal Resources Centre in the Eastern Cape before returning to Cape Town in the mid-80s to set up, with Professor Clive Thompson, the Labour Law Unit at the University of Cape Town.

Arendse is by far one of the busiest silks in the country, leading a number of juniors in litigation and opinion work on matters that range from labour law to land reform, administrative and Constitutional law. His busy practice often takes him to countries in the SADC region, notably Namibia and Zimbabwe. In South Africa he appears in all courts, including the Constitutional Court.

He is an accomplished sports administrator, currently holding the position of president of the Western Province Cricket Association. He litigates frequently on the various sporting codes, notably soccer, rugby and cricket. He has represented parties on several commissions, including the TRC and the Hefer Commission. On some commissions he has acted as chairperson.

A past branch executive member of NADEL in the Western Cape, and currently acting chair of Advocates for Transformation (National), Arendse's greatest challenge to date is in the area of contributing to the transformation of the advocates' profession in the country which has to be more race and gender representative, particularly at governance level. His position as interim chair of the GCB places a heavy burden on his shoulders, given the demands of both his busy practice and extra-mural activities, too numerous to mention. □

result of the discussions concerning the proposed Legal Practice Bill – two versions of the Bill are currently on the table of the Minister of Justice. The one is the Law Society of South Africa's version and the other (referred to as the Budlender Bill) is that of the Ministerial Task Team. The latter Bill is one that is acceptable to the Bar, and has already found support amongst the majority of those who served on the Task Team, headed by Geoff Budlender, and established by the former Minister of Justice in April 2002. Some of the points of agreement are:

- one single statutory framework for the legal profession;
- the public interest should be served;
- only enrolled legal practitioners should be entitled to render legal services;
- the role of the High Court in the admission and striking off of practitioners must be retained;
- the retention of the four-year LLB;
- the need for a Legal Services Protector;
- the retention of the Attorneys Fidelity Fund;
- the retention of the Bar as a referral profession; and
- the need to develop paralegals, and their role in the legal system.

The more serious point of disagreement relates to how the new governing structure for the legal profession should be constituted. In terms of the Law Society proposal, the Bar as an institution has no place in the statutory regulation of advocates. The voluntarist nature of the constituent Bars will be abolished, and will be replaced by an integrated statutory structure, regionally-based, and which provides for attorneys and advocates to have separate chambers. The Bar, on the other hand, maintains that its function as a South African institution that regulates the practice of those advocates, by far and away the majority, that choose to join it, requires statutory recognition. It proposes that the constituent Bars, and the General Council of the Bar, obtain accreditation from the National Council, and that its rules and regulations be subject to the oversight authority of the National Council.

It is important that the Bar engages with the attorneys' profession to resolve these issues as soon as possible.

### The Bar and the Competition Commission

Recently, the leadership of the GCB met with members of the Competition Commission to discuss the Commission's attack on certain Bar rules. As stated in the December 2003 issue of *Advocate*,

the Supreme Court of Appeal handed down judgment in the matter of the *Commissioner, Competition Commission v GCB* 2002 (6) SA 606 (SCA). The effect of the judgment was that prohibitions against, *inter alia*, partnerships and indiscriminate chamber location were remitted to the Commissioner for reconsideration. The GCB has since made a general application for the exemption of its professional rules in terms of Schedule 1 of the Competition Act 89 of 1998. Following the meeting with the members of the Commission, it became clear that the Commission's attack was aimed primarily at the rules relating to chamber location and the rules relating to fees. Recently however, a meeting was held with the Deputy Minister of Justice who indicated that he wished to engage the Minister of Trade and Industry to discuss the role of the Competition Commission in relation to the legal profession. It appears that the Deputy Minister is not entirely in agreement that the Competition Commission should approach the rules of the legal profession on the same basis that it approaches the provision of services by other sectors of the economy. The legal profession as a whole has welcomed this initiative, and the Bar looks forward to a process of engagement which is scheduled to commence shortly. In the meantime, however, the Bar has prepared its responses to certain of the issues raised by the Commission, and these will be discussed at the adjourned session of the AGM in November 2004.

### Conclusion

The leadership at the constituent Bars and at national level must gear itself to meet the many challenges that confront the Bar. The Bar must play a proactive role in dealing with some of these challenges, instead of reacting in crisis mode. It is important for the constituent Bars, and those of us concerned with the governance of the profession at national level, to constantly address the issues I refer to above, and to monitor them, on an ongoing basis. The solutions to many of the issues raised are neither easy nor self-evident, but solutions involve a complex interplay between social, political, and economic forces. In attempting to find the solutions to some of these complex issues we should always be mindful of our apartheid past and the extent to which it distorted reality. This does not, however, mean that we cannot forge a new relationship with members of the Bench, the attorneys' profession and members of the public, based on the core values in our Constitution, ie a future based on mutual respect and dignity. □