Changes to the structure of the judiciary

By Patric M Mtshaulana SC, chair of the General Council of the Bar of South Africa

At its National Conference held in Polokwane, in December 2007, the ANC passed a number of resolutions which have a bearing on the legal profession and the judiciary. Among these were resolutions:

- To establish a single integrated accessible and affordable court system.
- To make the Constitutional Court the highest court (Apex) for all matters, constitutional and non-constitutional with the SCA as the Intermediate Court of Appeal. This resolution is subject to a proviso that this should not result in undue delay of matters.
- To rationalise the High Court system with each province having a High Court.

The resolution to make the Constitutional Court the apex court should be examined by both the judiciary and the legal profession. Both have an obligation to contribute to the debate. There are many arguments for and against the resolution.

The most important issue that requires serious consideration by all is that the SCA will be 100 years in 2010. On 31 May 2010, the country will be celebrating *honderd jaar rechtsleven* - hundred years of our judiciary. Before the country changes the structure of the judiciary, it is important to pause and think, to examine the 100 years of the SCA, to interrogate the achievements of that century as well as to evaluate the failures and shortcomings of the court during that period. The Appellant Division and its successor, the Supreme Court of Appeal, have produced excellent judgments, some of which will stand the test of time. Those judgments are South Africa's cultural legacy which has to be preserved.

In any case, if the Constitutional Court is to be the new Apex Court, the country needs to re-examine critically some provisions of the Constitution. Presently, the Constitution in section 172 allows courts to take decisions which are 'just and equitable'. If the judiciary is to continue to have such far reaching powers, the country may need to prescribe strong requirements for being a judge in the apex court. Least of those requirements would have to be at least ten years as a litigating practitioner. Furthermore, the training of judges may have to take into account the fact that the judiciary is empowered by the Constitution to take political decisions. That fact would have to be a factor taken into account in the training of judges and to sensitise judges to the fact that this has a potential for friction with the executive and the legislature. Judges may have to be taught how to deal with political decisions when these have to be taken.

The fact that the Constitutional Court has a quorum of eight is another serious limitation for the new structure. That is a recipe for delay if the court is for constitutional and non-constitutional matters.

What however needs serious consideration before the judicial structure is reformed on the upper echelons, is the fact that a litigant who starts litigation at the Magistrate's Court has to go through a very long chain passing through the High Court, the Intermediate Court, before reaching the highest court which will be the Constitutional Court. The question the nation has to ask is whether it is appropriate to start reforming the court at the upper echelons.

We need to consider whether the country should not consider merging all the courts at the bottom (High Court, Regional Court, Magistrate's Court and so on and so forth) so that the court which emerges from that merger is a court of first instance. That court would have both civil and criminal jurisdiction and all matters, civil and criminal.

To improve the quality of justice, each such court would be presided over by a High Court judge with the present magistrates acting as puisne judges sitting with him. The Magistrate's Court and the High Court as we know them today would no longer exist. The disadvantage of this suggestion on the other hand is that it may lead to the disappearance of the SCA. However, that could be remedied if the Supreme Court of Appeal and the Constitutional Court were to merge into one Highest Court of the land so that both courts would become one court with the traditions of both preserved in that highest court. The only new court would then be the Intermediate Court.

The advantage of a model like this one is that it improves delivery of justice to the millions of people who appear before the lower courts and it shortens the chain for those matters which have to go to the Highest Court.

From the legal profession perspective, this would put an end to the artificial distinction or division between practitioners who appear in the Magistrate's Court and those who appear before the High Court. It would put an end to the multiplicity of rules before the Magistrates' and High Courts. It would revolutionarise the whole justice system.

In recent months our judiciary has been subjected to a series of tests. A senior judge was and still is facing serious charges and the matter is being handled by a magistrate who is technically his junior. A matter involving the judges of the Constitutional Court was heard by a provincial division. There is challenge to consider whether there should be special procedures to deal with matters of this nature in future and whether judges should be dealt with differently when they have to appear before the courts.

The country also has had a complaint of the Constitutional Court against Hlophe JP and a counter complaint by Hlophe JP against the Constitutional Court. There is a fascinating aspect of this case which may require a decision by the judiciary. As advocates there is a rule that when a judge says anything in chambers, that may not be subject of discussion by counsel outside the chambers of the judge. As a student of criminal law, at the Vrije Universiteit (Amsterdam), my lecturer who was also a judge, 'indoctrinated' us about what he called the *de geheim van de raadkamer* (the sanctity of discussions at the judge's chambers or conference room).

The complaint of the Constitutional Court and of Judge Hlophe has brought into question whether judges amongst themselves have such an ethical rule, namely that discussions taking place in the conference room may not be disclosed outside that conference room, that the public must never be able to

know what part of the judgment was contributed by which judge.

What the complaint teaches us is that the Bar must, going forward, be more strict on the rule, preserving the sanctity of discussions in judges' chambers. Similarly, this complaint should be used by the judiciary to reconsider how strict judges are going to apply the ethical rule, if it exists, to the effect that discussions in the conference chamber are sacrosanct.

Because of various factors, the judiciary as an institution has been subjected to attacks from various quarters. There were demonstrations before various High Courts, such as those related to the matter of the ANC President, Mr Jacob Zuma. As a profession we have no problem in people exercising their right to freedom of expression, but the nature of the demonstrations raise questions whether these demonstrations were mere forms of expression or whether they were aimed and intended to cow down the judiciary into taking decisions in favour of the ANC President. If this was the aim of the demonstrations, we have no choice but to condemn them as an unconstitutional abuse of constitutional freedom. In this respect, one can do no more than remind South Africans of section 20(4)of the German Constitution which reads:

'All Germans shall have the right to resist any person seeking to abolish this constitutional order should no other remedy be possible.'

In our view threatening judges to act in a particular way undermines the judiciary and the whole order and should be resisted by all citizens.

The judiciary is an institution of our democracy, one for which many South Africans gave their lives. The nation has a duty to respect this and all institutions of our democracy. We must all remember that when Nelson Mandela said 'never again,' he meant that we were committing ourselves to die for this Constitution and all its values. We cannot be seen to be fighting to destroy the values that underlie our Constitution. Judicial independence is an important and foundational value of our Constitution, one which our nation must fight to preserve rather than destroy.

One issue of serious importance, however, is that the procedure for the appointment of the Chief Justice needs serious review. The Chief Justice presides over an institution with far reaching powers. The Constitutional Court has the power to overturn decisions of Parliament and the Executive and yet only one person, the President, appoints him. If the Constitutional Court retained its present powers and if it is also going to be part of the judiciary replacing the SCA, the procedure for appointing the Chief Justice needs serious rethinking. The procedure must be more transparent than it is now. This will contribute to strengthening the checks and balances and strengthening the stability of our democracy.

Profile of new GCB chair

Patric M Mtshaulana SC was appointed as chair of the GCB for 2008/9 at the annual general in Johannesburg on 25 July 2008.

Patric Mzolisi Mtshaulana was born in Mount Frere on 5 April 1954. He attended his primary school at Mbonda Bantu Community School, his secondary education at Makaula Secondary School, and his high schooling at Osborne High School, all in Mount Frere.

In 1973 he went to Fort Hare where he graduated in 1976. During his studies at Fort Hare, he came into contact with the Black Consciousness Movement. On 6 April 1973 he attended an address by Onkgopotse Tiro at CU hall. This address made an indelible impression on him.

In 1976, after graduating with BJuris, he became a public prosecutor in Bizana but after the Soweto uprisings he resigned his post to join Umkhonto WeSizwe. He did his training at Nova Katengue Camp in Benguela Province, Angola.

In 1978 he became the head of the political department in Quibaxi in the north of Angola. In 1979, when the first survival camp was opened in Fazenda, also north of Angola, he headed the political department in that environment.

In 1980 he was deployed at the Solomon Mahlangu Freedom College (SOMAFCO) as a teacher. During the period at SOMAFCO he attended several ANC education policy conferences and participated in the experiment to establish a future education system of South Africa. During this time, he developed a special interest in cadre development within the ANC. As chairman of the Morogoro Branch of the ANC youth in 1984/1985 he organised a conference on 'cadre development.' The theme of the conference was 'education and revolution.' The aim of the conference was to inspire cadres, especially students, to prepare themselves for a role in the building of a future South Africa.

From 1986 he studied law in the Netherlands where he completed a degree of *Meester in de Rechten* in 1993. In 1993, he returned to South Africa and worked as lecturer at the University of the North. In 1995 he became a research assistant to the then President of the Constitutional Court. In 1996 he joined the Legal Resources Centre, which gave him an opportunity, while employed by the LRC, to do pupillage. He was admitted as an advocate by Justice Edwin Cameron, who, in welcoming him, reminded him that the struggle was not over yet and that there was still a lot to be done to transform the profession and the judiciary. He joined the Society of Advocates (WLD) on 8 December 1996 and was awarded silk on 25 October 2005.

He has been active in Bar politics since 1998 when he became assistant honorary secretary of the Johannesburg Bar Council, later becoming its secretary. He became the assistant honorary secretary of the General Council of the Bar and later became its secretary. From 2005, he has been the chairman of AFT (WLD). He has been a member of the Johannesburg Bar Council for several years. He is a founder member of the Duma Nokwe Group of Advocates.