YOUNG LEADERS' SYMPOSIUM

The Legal Services Charter: black skills development and procurement

By Vuyani Ngalwana, Johannesburg Bar

"So, why are we still lamenting black skills at the Bar some 12 years later? I'll tell you why. The Bar is intent on doing nothing decisive about it. Since the Bar is not a 'paralytic' the only explanation is that it has resolved not to move an inch on transforming itself. And the finger is pointed firmly at silks - particularly white silks - and people in leadership positions at the Bar."

Vuyani Ngalwana is a member of the Johannesburg Bar. He is a founder member of Advocates for Transformation which was founded at the Cape Bar in April 1998. He has recently returned to the Bar after a five-year sojourn in public service as Pension Funds Adjudicator and, before that, Deputy Director of Public Prosecutions: Asset Forfeiture Unit.

What is there to say about the Legal Services Charter apart from - well - that it's a Charter? I think the world has seen more than its fair share of Charters. A motley of United Nations Charters is gathering dust in libraries around the round, only to be dusted off once in a while when a poor sod somewhere in what is euphemistically termed the developing world becomes too smart for his own good.

Our own Freedom Charter promised the world and delivered - well - nothing for the vast majority of South Africans. All you need do is go and live in the township (for those of you who have not had the privilege) for a week and look around you.

My thesis is simple. Charters do not deliver anything. People do. People who are committed to the good cause. People who have a clear vision as regards what that cause is. People who have the integrity and resolve to see things through.

In unpacking my thesis, I shall do so in a tradition resembling that of an Anglican church sermon. The scripture comes from two books (Book 2 and Book 3) of Jean-Jacques Rousseau's seminal work, *The Social Contract* (Maurice Cranston's translation). Book 2 chapter 8 deals with the nature of human beings from which I believe we can learn in our quest for developing black skills in the midst of misplaced and misinformed resistance. The short excerpt to which I want to draw your attention is this:

'Nations, like men, are teachable only in their youth; with age they become incorrigible. Once customs are established and prejudices rooted, reform is a dangerous and fruitless enterprise; a people cannot bear to see its evils touched, even if only to be eradicated; it is like a stupid, pusillanimous invalid who trembles at the sight of a physician.'

It is in the nature of human beings to resist measures designed to achieve the greatest good for the greatest number if such measures are perceived by the minority that has for generations been enjoying the greatest good to the exclusion of the greatest number, to disturb generations of comfortable oligopoly. That, in truth, is why the Bar keeps talking about transformation without anything being done. It is time for decisive action, not for putting measures in place. The Bar has reached an inflection point where its evils must be eradicated so that, at last, black will progressively become synonymous with enterprise and less so with unfounded perceptions of incompetence.

Established customs and prejudices wrought by apartheid (such as the belief that black lawyers are by reason only of their blackness less capable than their white counter-parts), will forever stand in the way of transformation until black skills are developed, put to work and suitably rewarded. The Bar and government must lead by example in this regard.

Black skills in the legal services sector are not altogether absent. I know of many black advocates who are exceedingly capable. What is needed is the cultivation of more black skills and putting those that are already there to work. I can think of no plausible reason why the largest consumer of legal services (namely, government in all its manifestations) should continue to avoid putting to work in large matters the skills lying dormant in black commercial firms across the country, resulting in those firms closing shop or being gormandised by larger white firms. Many senior practitioners in these black firms honed their skills in large white firms where they were put to use and generated enormous fees. Why then should those same skills now be found wanting when offered from Gugulethu, Zola or Soshanguve?

Many black advocates have left practice for salaried employment where none of their litigation skills are put to use, while a handful of white advocates are belching from government and state-owned enterprise briefs. The Bar is hugely to blame for this. Recently, I had occasion to ask a chairman of the Bar Council about the achievements of his council and Bar on the transformation front, from which we here in Johannesburg can learn. He told me about 'measures' they have put in place. The measures to which he pointed were there in 1998 when I was serving on that council. Yet we act surprised that black lawyers do not come to the Bar in droves.

The reasons for this are not hard to find. We have a bizarre rule that requires members to wait 90 days for payment of their fee in Johannesburg. In Cape Town the peremptory waiting period is 60 days. This is absolutely inexplicable and the black Bar bears the brunt of this wretched rule. Yes,

the black Bar! Why would the profession impose such financial strictures on its members? I have heard the arguments advanced for this and, quite frankly, it's all rubbish. How can you claim to be protecting the junior Bar by forbidding juniors' entitlement to their fee until 90 days have lapsed? *Bertelsmann v Per* does not justify this madness.

In commerce, 30 days is the norm, whereafter interest accrues. Members of the Bar cannot even charge interest. Now even the defaulters rule has been cynically emasculated to allow members who are not owed any fee by the defaulting attorney to accept briefs from that attorney. This is utter madness! No Charter can cure that. The 90-day rule must go. The mischief it was intended to address, if it ever did address it at some point, clearly still persists.

Albert Einstein is said to have defined insanity as doing the same thing over and over again and expecting different results. The Bar is not insane, surely. Otherwise, God help us all! So why do we persist with a rule that is clearly not addressing the mischief it was intended to meet?

By comparison, the rules of the Bar for England and Wales do not impose any time period before the expiry of which members are not entitled to fees for services rendered. So why is it necessary for the Bar in South Africa to prescribe how long members should wait for payment of their fee?

There is also no reason why the Bar cannot influence briefing patterns to accelerate black skills development. Silks could pair themselves with black juniors who would do the research and the first draft. Silks would then have to sit down with the junior and discuss his work, pointing out areas in need of improvement and imparting skills. This achieves two things at once: the junior has work from which to learn, and he earns a fee. No Charter will ever achieve that. Commitment by senior members of the Bar to transforming the Bar will. I am sure silks can persuade their attorneys to see the value of this exercise.

The English Bar allows barristers to obtain briefs from 'Licensed Access Clients' without the intervention of an attorney. These are typically professional clients like accountants, engineering firms, regulatory authorities, auditing firms, et cetera. These professional clients obtain a licence from the Bar to brief counsel directly. The arrangement is then governed by a set of rules and regulations. This has the effect of lowering the cost of access to justice in a regulated form.

It appears the GCB was trying to follow this route with the introduction in 2002 of Rule 5.12.3. It, however, stopped short of the required standard in its excoriation of some of the desirable aspects of the English rules. The result is a half-baked croissant that is neither palatable nor objectively workable. The GCB rule leaves the conduct of relationships between counsel and 'licensed access clients' to considerations of 'public interest' in the opinion of the GCB on a case by case basis. That leaves room for subjectivity. For example, why is it in the public interest for counsel to obtain a brief directly from a patent agent without the intervention of an attorney, but not so to obtain a brief directly from the Competition Commission, or SARS, or the Asset Forfeiture Unit, or the Financial Services Board, or the FAIS Ombud, or the Banking Ombudsman, or a legal adviser at a government department?

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The Legal Services Charter is a futile exercise - an act in circumnavigation that will do nothing but generate litigation. What is required, not only to develop black skills but also to put them to use, is decisive and definitive action from the top. The charter serves not only to delay the process of black skills development and use; it is also a distraction from what needs to be done.

Now we fight about whether Chinese people are black, and whether white women were truly disadvantaged. The profession knows what needs to be done. Government knows what needs to be done. We all know who is black and do not need a court to tell us that.

That serves as a segue for the learning that Rousseau offers in Book 3 chapter 1 of *The Social Contract*. In a short treatise on the nature of government and how it can work best, Rousseau offers the following learning:

'Every free action has two causes which concur to produce it, one moral - the will which determines the act, the other physical - the strength which executes it. When I walk towards an object, it is necessary first that I should resolve to go that way and secondly that my feet should carry me. When a paralytic resolves to run and when a fit man resolves not to move, both stay where they are. The body politic has the same two motive powers - and we can make the same distinction between will and strength, the former is *legislative power* and the latter *executive power*. Nothing can be, or should be, done in the body politic without the concurrence of both.'

In simple terms, the *executive* has the duty and strength to do what the *legislature* wills. The Bar has a duty, strength and ability to ensure that what Parliament wills is done. Armed with that information, let us consider what has happened in the past 12 or so years.

In October 1996, the Constitutional Assembly adopted a constitution that decreed black skills development and preferential procurement thereof. The Constitutional Assembly comprised not only representatives of black South Africans who have for generations been denied skills; it also comprised representatives of white thought, fears and insecurities. Both sides saw the necessity and wisdom of decreeing black skills development and procurement. In February 1997, the will of the Constitutional Assembly (broadly constituted) was certified by the Constitutional Court and later given effect to by Parliament in the form of various legislation including the Employment Equity Act by which Parliament expressed its categorical intention that black skills must not only be developed but also put to use commensurate therewith. Section 217 of the Constitution was given life by the Preferential Procurement Policy Framework Act, 2000. So, why are we still lamenting black skills at the Bar some 12 years later?

I'll tell you why. The Bar is intent on doing nothing decisive about it. Since the Bar is not a 'paralytic' the only explanation is that it has resolved not to move an inch on transforming itself. And the finger is pointed firmly at silks - particularly white silks - and people in leadership positions at the Bar. When we all consider this dispassionately and with due regard to the facts, then it becomes clear that the GCB and its constituent Bars have failed black members miserably.

The fight about whether Chinese are black or not, and about whether the applicable targets are those of the DTI's Generic Codes or the Sector Charter should never have occurred. We know what needs to be done. The Bar knows what needs to be done. So does government. So does industry. Charters are a feel-good factor - a conscience-soother - nothing more, nothing less. History has shown us that. Why should we expect any different from the Legal Services Charter?