

GCB chair's annual report 2008/2009

Extracts from the report by Patric Mtshaulana SC, chair of the General Council of the Bar of South Africa:
Annual general meeting 2008

Resolutions

The AGM passed the following resolutions:

- 1 That the incoming Executive follows up on the meetings between the GCB and Ms Liliana de Marco-Coenen.
- 2 Reynecke SC was to be requested to report at the GCB's next meeting on problems experienced with taxation of fees.
- 3 The Cape Bar was appointed as Model Briefing Policy Committee and was requested to report to the next meeting on its recommendations on the method of measuring the success of the GCB's policy.
- 4 The Johannesburg Bar to host the 2009 Future Leaders' Symposium.
- 5 Vahed SC was to draft a proposed constitutional amendment conferring upon the GCB appeal jurisdiction in all disciplinary matters.
- 6 The incoming Executive is to engage the Director-General of Justice on the employment of in-house counsel by the Department. The Judges Presidents should be kept informed.
- 7 Exco was requested to put to the JSC its concern on the lack of transparency in dealing with complaints by the body.
- 8 On court-based mediation it was resolved that the GCB does not support a process that compels litigants to submit to a mediation and/or conciliation process at litigants' costs.
- 9 That the Chair writes to Imali Manje informing them that the GCB does not support their services to members of the Constituent Bars.
- 10 That a letter congratulating Judges Goldstone and Pillay on their respective appointments be sent by the Chair.
- 11 That the Keble course is approved subject

to a detailed motivation for funding to be submitted to the GCB.

November 2008 Exco meeting

The first Exco meeting was held on 8 November 2008. At this meeting one of the urgent issues considered was whether the position of chair of the GCB was compatible with the position of chair of a branch of AFT. This arose because at the time the GCB chair was also chair of the WLD branch of AFT. After debating the issue it was resolved that in principle the two were not compatible but that the matter be referred to AFT. The matter was resolved when AFT WLD elected Moroka SC as the chair of AFT WLD.

The November meeting also noted that the Department of Justice and Constitutional Development had decided to accept the Budlender Proposal on the Legal Practice Bill. This acceptance was clear from letters from the Director-General of Justice to the profession. The correspondence included an opinion which the profession was informed had been adopted by the Department. The meeting considered complaints that some acting judges, mostly advocates, did not deliver their judgments on time. The matter was referred to the April meeting.

April 2009 Exco meeting

The draft media policy drafted by Glenn Goosen SC was adopted subject to certain amendments and referred to the AGM for adoption. A discussion took place on the effectiveness of the GCB Model Briefing Policy. The meeting considered a constitutional amendment drafted by Vahed SC conferring appeal jurisdiction on the GCB in all disciplinary matters. A matter relating to the unreasonable delay in delivering judgments by acting judges served before the meeting.

The meeting resolved that it is unprofessional conduct for an advocate acting as a judge not to deliver judgment within six months after the stint. The matter was referred to the Ethics Committee to draw a rule to this effect. The meeting nominated Ms Beatrice Mtetwa for recommendation as the 2009 Sydney and Felicia Kentridge Award. Vahed SC reported on the confusion around the renaming of the High Courts Act 30 of 2008. The nub of his report was that a correct reading of section 166 is that the Constitution does not envisage a 'High Court of SA' and that the directives from some courts that the headings to court documents should read: 'In the High Court of SA, Venda,' may be wrong. The meeting suggested that the JPs should be approached and persuaded to adopt the heading: 'In the KZN High Court, Durban.'

The meeting received a report on the progress of the relocation of the GCB secretariat. The appointment of Ms Tracy Burns as accounts/admin assistant was ratified. The matter of the position of AFT and transformation was deferred for discussion at the 2009 AGM.

The Department of Justice Bar

During this year, the Director-General of the Department of Justice and Constitutional Development employed advocates from the Bar (Johannesburg and Pretoria). They are accommodated in state buildings where they occupy chambers and receive briefs from the State Attorney. They receive salaries every month from the Department. They are employed as in-house counsel. The Bar is led by former Judge Hussain who acts as the silk for the Bar and mentors the groups. I deal with the GCB's response to this development later.

Membership

During this period the membership of the GCB grew from 2 045 to 2 103 (2.7% growth).

Legal Aid Board

The GCB met with the Legal Aid Board (LAB) on 17 November 2008 and on 9 June 2009. The meeting in November dealt mainly with issues arising from previous meetings (12 October 2007). The first issue discussed was the proposed increase of the tariffs of the LAB. The GCB indicated that it agreed and welcomed the increase of tariffs. The second was that members of the GCB had to be accredited to get work from the LAB. The GCB had by letter dated 13 November 2007 indicated that while it supported the accreditation of members, it proposed that the applications for accreditation should be done through the secretariat of the Bar. This issue needs the attention of the AGM. The meeting then dealt with the requirement of the LAB that practitioners should have at least two years experience before the LAB can brief them on high court matters. The LAB explained that practitioners with less than two years experience were still entitled to get magistrates' courts work. It was agreed that if the GCB wanted to make submissions relating to this aspect it could do so, but that the proposal should deal with issues of quality control to ensure that the clients of the LAB are not prejudiced. There was a further proposal that the LAB should consider setting a requirement in the accreditation scheme that an advocate must have attended the LSSA/ GCB or similar training before being entitled to be accredited. It was agreed that if there was a complaint relating to a GCB advocate, the LAB would inform the constituent Bar concerned, copying the GCB.

The LAB presented its pro bono policy framework. It was agreed that a project team should be established to conduct a pilot project in Johannesburg and that the LAB would deal with Seta Kolbe SC in this regard. The GCB explained its pro bono policy but stressed that once an advocate had accepted a brief he or she was obliged not to withdraw from the brief after the completion of the required 24 hours stipulated in GCB policy. The LAB raised the issue of continued membership of the GCB practitioners who get employed by the LAB. The LAB expressed its concern for the category of persons who were not able to afford the costs of legal representation but who did not qualify for the legal aid ('not so poor' clients). At the second meeting in June this year the LAB presented its proposal for employees of the LAB to be members of the GCB. The LAB is concerned that advocates employed by the LAB are not

affiliated to any professional body which can exercise disciplinary jurisdiction over them. This proposal is on the agenda. On the 'not so poor' pro bono it was agreed that the LAB, GCB and LSSA set up a joint committee to find solutions jointly. The LAB however presented a proposal to the GCB that the latter organisation recognise as pro bono work hours worked by an advocate employed by the LAB at its rate. Thus if the LAB employs a silk to write an opinion at its rate, the difference between the silk's rate and what the LAB paid him can be recognised as pro bono work. This would enable the LAB to employ seniors in criminal matters which are complicated.

Heads of Court meetings

The establishment of the Judicial Education Institute was discussed at the meeting. The GCB has since nominated Sharise Weiner SC as its representative in the Judicial Education Institute.

JJ Gauntlett SC wrote a letter on behalf of the GCB expressing concern about the appointment of state employees such as members of the staff of the State Attorney and the Asset Forfeiture Unit as acting judges. The GCB objection to these prospective appointments was premised on the imperative to maintain and protect judicial independence in the broader sense of the concept. It relied on the matter of *The Law Society of Lesotho v The Prime Minister and Another*, LAC, 1985-1989, at 129 where the Appeal Court per Schutz JA (Mahomed and Aaron JJA concurring) declared the appointment of a member of the State Attorney-General staff as an acting judge to be unconstitutional. AFT is divided on the matter. There is a strong view that in the interest of transformation, it should be possible to employ black and female state employees as acting judges. There is also a view against employment of state employees as acting judges. The matter is before the JSC.

The GCB requested the Heads of Court to consider the appointment of judges to head commissions of inquiry. The GCB seems to adopt the Australian view that involvement by judges in commissions of inquiry is inconsistent with judicial independence from the executive. I inherited the discussions and I needed time to take a position. My own view is that it is '...consistent with judicial office for a judge to serve...[on a committee or inquiry] if the reason for his or her appointment is the need to harness to the task in question the special skills which a judge should possess: characteristically, the ability to dissect and analyse evidence; appraise witnesses; exercise a fair and balanced judgment; write a clear coherent report, and so on.' (Lord Bingham in 1993; then Master of the Rolls).

One understands the fear that the Executive may seem to use judges as snipers or hit men. But if it is so then there is a bigger problem, namely the judiciary is not independent. You do not solve that problem by not appointing the judges as commissioners.

At the Heads of Court meeting on 6 June 2009 it was reported that the Regional Courts Amendment Act 31 of 2008, had been assented to on 1 November 2008, but that the date of commencement still had to be proclaimed. The Act will confer civil jurisdiction on regional courts including the hearing of divorce matters. Implementation of the Act will require a review of the magistrate's court rules and training of magistrates. The Chief Justice reported on the Judicial Education Institute, a new institution intended to replace the Justice College. On the proposal to celebrate the 100 years of the judiciary, see report below.

100 years of existence of the South African Judiciary (Honderd Jaar Rechtsleven)

At the Heads of Court meeting the GCB chairman referred to the GCB's proposal to initiate a process to mark 100 years of the existence of the South African judiciary in 2010. At the previous meeting on 11 October 2008 the GCB representatives (Binns-Ward SC and Ntsebeza SC) had floated the idea and requested the Heads of Court to consider it and, if agreeable, to nominate one or more of its members to form a committee to help organise the occasion. It had then been agreed that the matter would be discussed at the Heads of Court meeting. It is not clear whether this occurred.

The GCB chair recapped on the rationale for the GCB's proposal, and why it was felt that this was something which the judiciary itself should lead, albeit with support from the GCB, the LSSA and all judges (including lower court judges).

After discussion, the general sense of the meeting was that to mark 100 years of the judiciary as a celebration would be inappropriate, and that the proposal needed to be revised conceptually, but that the Bar should be the driver of the process, in collaboration with the LSSA and representatives of the judiciary. The CJ reported that representatives of the judiciary were shortly to hold an introspective meeting where the matter might be discussed. He undertook to raise the matter at the Heads of Court meeting.

Ngoepe JP undertook to revert to the GCB after the Heads of Court meeting and suggested that the GCB should seek to put together a steering committee comprising representatives of the GCB, LSSA, the magistracy and judges to drive the process.

GCB participation in the programmes of the IBA Monitoring and Outreach Programme

Before the 2008 AGM, my predecessor, Eksteen SC, met Liliana De Marco-Coenen to discuss the role of the GCB in the IBA/ICC Outreach Programme. At the AGM, the GCB Executive was mandated to continue the discussions with her. The GCB took part in two workshops organised by the Outreach Programme. The first one was entitled 'International Criminal Justice in Southern Africa – Relevance, Lessons and Prospects.' The second one was entitled 'Bringing the International Court to South African Legal Professionals'. They were held in December 2008 and August 2009 respectively.

Meeting: Minister of Justice and Constitutional Development

The GCB met the Minister in February 2009. The meeting discussed the employment of in-house counsel by the Department, the employment of former Judge Hussain as a silk without a determination whether the causes for his resignation as a judge in any way relate to his fitness to practise as an advocate.

The Minister was informed that the GCB had not been able to convince the Competition Commission that it was necessary to have some rule to govern fees for advocates, in the public interest. The delegation reported on the GCB's meeting with the Competition Commission. The Minister promised to intervene and to meet his counterpart at DTI and/or the Competition Commission to raise his concerns about the removal of self-regulation of counsel's fees.

On the agenda was the designation of Botswana in terms of the Admission of Advocates Act. This matter was raised by the Attorney-General's office of Botswana. Botswana is the only SACU member which is not designated. I have since written a letter to the Minister requesting him to take action in this regard.

The Minister was requested to speed up the process of amending the Arbitration Act 1965.

The Minister briefed the GCB on the progress of the Superior Courts Bill and the Jurisdiction of Regional Courts Amendment Act. On the Superior Courts Bill, he indicated that there was consensus on the principles to be followed in amending the Supreme Court Act. He emphasised that there would be consultation with the judiciary and the profession. On the Regional Courts Amendment Act, he indicated that the Act had come into

effect and that the Department was in the process of implementing it. He stressed that one of the challenges was the level of skills required to implement the Act. He requested the GCB to provide a list of acting appointments to the regional court from the ranks of its juniors and senior counsel. The GCB Executive took a decision at its April 2009 meeting to provide such a list to the Minister as soon as further discussions had taken place with the Minister.

On the Legal Practice Bill the Minister informed the GCB that he was in the process of forming a task team to develop principles which would guide the Legal Practice Bill process. The Ministry has since produced a Memorandum of Understanding which is presently under discussion. The Memorandum deviates from the Budlender model, which the Department had announced, in November 2008, would be the model it would be following for the Legal Practice Bill.

Robbing by counsel at magistrates' courts

On 11 March 2009 the Cape Bar addressed a letter to the GCB Executive drawing its attention to the fact that certain magistrates in the province insisted that counsel should robe when they appear before them. It seems that the Chief Magistrate has taken the view that 'magistrates must deal with this issue themselves in court until a uniform policy is in place.' This places counsel in the untenable situation that they do not know what to expect and may find that they are expected to put on a gown when they may have left it at home.

International associations

I attended the IBA Conference in Buenos Aires (12-17 October 2008); the 16th Commonwealth Law Conference in Hong Kong (5-9 August 2008); and the 4th Annual Bar Leaders Conference in Paris (20-23 May 2009).

At Buenos-Aires the IBA recommitted itself to the protection of the rule of law by adopting the resolution:

'An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel and degrading treatment or punishment; intimi-

ation or corruption in the electoral process; are all unacceptable.

The Rule of Law is the foundation of a civilized society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect. The IBA calls upon all countries to respect these fundamental principles. It also calls upon its members to speak out in support of the Rule of Law within their respective communities. Members are called upon to note this resolution.'

Another resolution adopted relates to transfer of skills. It reads in part:

Countries that so far have not been willing to open their legal services market to Foreign Lawyers, or that have done so to a limited extent only as regards the scope of practice rights or rights of association with Local Lawyers, may wish to grant Foreign Lawyers access to their legal services market, or to reduce or remove any existing restrictions on such access subject to one or both of the following conditions.'

Both the Buenos Aires and Paris meetings were well organised and well attended. The Africa Forum which is a regional wing of the IBA needs SA's support. Its annual meeting will be held in March 2010 in Cape Town. The meeting is being organised jointly by the Africa Forum, the GCB, the LSSA and the SADC Lawyers' Association. The IBA is trying to strengthen the regional wings. There will be similar meetings in Latin America and Asia.

The Commonwealth Lawyers' Association (CLA) is a smaller meeting. All the lawyers speak English and share legal systems. The problems they experience are also similar. I have referred two papers delivered at the conference to the editor of *Advocate* for publication. One deals with proposals by the CLA on the relationship between Directors of Public Prosecutions and the Ministers of Justice and how to guarantee prosecutorial independence. The other deals with judicial independence. There was also a moot competition between students from Commonwealth countries. SA, represented by students from the University of Pretoria, won the moot competition doing us proud. Mohamed Hussain was elected new president of the Commonwealth Lawyers' Association. The GCB congratulates him and looks forward to his presidency. We wish him and his executive well. The next CLA conference will be in India in 2011. There is a regional conference in Abuja Nigeria in April 2010. 