

GCB chair's annual report 2009/2010

Extracts from the report by Patric Mtshaulana SC

Committees

At the 2009 AGM, the following Executive Committee (the Exco) was constituted: Patric M Mtshaulana SC (chair); Rashid Vahed SC (deputy chair); Seth Nthai SC (vice-chair); Soraya Hassim (honorary secretary); Anthea Platt (deputy honorary secretary); Pops Aboobaker SC; Ashley Binns-Ward SC; Kgomotso D Moroka SC; Gerrit Pretorius SC; Izak Smuts SC and Archie Findlay SC (convenor National Bar Examination Board and ex officio member of the Executive Committee). In October 2009 Binns-Ward SC was elevated to the Bench and Rudi van Rooyen SC was coopted to take his place.

In January 2010 the State Attorney Pretoria submitted a complaint against Seth Nthai SC. The crux of the complaint was that he (Nthai) had met a client of his opponent (Marcenoro, the CEO of the company against whom his client [the Republic of SA] was in litigation) without the permission of his opponent (WWB or their senior counsel) and without the permission of his own attorney (the State Attorney, Pretoria). The second part of the complaint was that he had solicited a bribe. Following this complaint the Pretoria and Johannesburg Bars set up a tribunal to consider the complaint. The tribunal was composed of Van Dijkhorst J (retired) as chair, Louw SC from Pretoria and Bokaba SC from Johannesburg. He was invited to participate in the hearing but declined this invitation. At the end of the hearing the tribunal found that he was guilty of professional misconduct and recommended that he be struck off the roll of advocates. Both the Pretoria and Johannesburg Bars accepted the recommendations of the tribunal and accepted Nthai's resignation. The Pretoria Bar is in the process of finalising the process of bringing an application for striking off the roll.

Ishmael Semenya SC was coopted to take Nthai SC's place as a member of the Exco.

Chairs of subcommittees

The following were elected as convenors or chairs of standing committees:

Tim Bruinders SC (Advocacy Training); Michael Kuper SC (AFSA); Gerrit Pretorius SC (National Bursary Fund Committee); Nirmal Singh SC (Ethics Committee); Roland Sutherland SC (Finance Committee); Brian Spilg SC (Human Rights Committee); Marius Ackermann SC (Laws and Administration); Rudi Van Rooyen SC (Parliamentary Committee); Glenn Goosen SC (Pupillage Committee); JPJ du Plessis (RAF Committee) and Pieter Pauw SC (Rules Committee).

In October 2009 Spilg SC was elevated to the Bench as a judge of the Southern Gauteng High Court. Moroka SC took his place as convenor of the Human Rights Committee.

Representatives of GCB in other bodies

The following were (re)elected as the GCB representatives in vari-

ous bodies: Izak Smuts SC and Mbuyiselo Madlanga SC (Judicial Service Commission SC); Kameshni Pillay (Legal Aid Board); Jacques Malan (Legal Provident Fund); Pops Aboobaker SC (PPS); and Leon Dicker (SALDA Task Team).

Editorial board Advocate

The editorial committee of *Advocate* consisted of Jannie Eksteen SC (chair); Frank Snyckers (deputy chair); Azhar Bham SC; Richard Brooks; Alfred Cockrell; Susannah Cowen; Sandhya Mahabeer; Mahlape Sello; Hennie Mellet (editor); Patric M Mtshaulana SC (GCB chair, ex officio). Jannie Eksteen SC was elevated to the Bench in October 2009, and accordingly resigned as chair of the board. Mtshaulana SC was elected to succeed him as chair.

Legal Practice Bill

On 7 of August 2009, the GCB Executive met the then newly-appointed Minister of Justice and Constitutional Development, Mr J Radebe MP. One of the issues discussed at the meeting was the Legal Practice Bill. The GCB raised some of its concerns and the Minister responded as follows:

'Minister: Can the Department draft a version of the Bill before 22 August 2009 providing that the Executive does not usurp governance of the profession? I do not want to discipline the profession.

Vahed SC: We do not want to be a unified profession.

Jiyane: We will draft the Bill before 22 August 2009.

Minister: Allow for the independence of the Bar and that government will not govern the profession.'

Central to the GCB's submissions are the following:

- An adequate system of administration of justice should guarantee the independence of lawyers in the discharge of their professional duties. There should be no improper restrictions, pressures or interference direct or indirect on lawyers.
- Professional associations of lawyers have a vital role to uphold professional standards and ethics, to protect their members from improper restrictions and infringements, to provide legal services to all in need of them, and to cooperate with government and their institutions in furthering the ends of justice.
- Section 22 of the Constitution protects the right of every South African to choose a profession. The section however empowers the Minister to regulate 'the practice of the profession.'
- The right or power to regulate the practice of a profession does not include the power totally to prohibit the advocates' profession (*Brown v Pretoria Municipality* 1926 TPD 62, *R v Mafutsane* 1936 TPD 18).

Exco has tried to find common ground with the attorneys' profession. To this end, and during our AGM in Cape Town, a meeting was held between the LSSA and the GCB Exco. The two professions committed themselves to working together in the LPB process. On 30 April 2010, the LSSA representatives and those of the GCB met and agreed on some principles. These are:

- 1 Independence of the profession must be entrenched and must be the guiding principle of the Bill. The representatives expressed their support of the Bill to the extent that it does provide for the independence of the profession.
- 2 The representatives agreed that the principle of the independence of the profession will also be captured in the purpose of the Bill (clause 3) by adding a principle: 'to protect and promote the independence of the legal profession.'
- 3 Both the LSSA and the GCB agree that the consequences flow-

ing from striving to uphold the independence of the profession is as follows:

- a. Discipline must remain with the profession and the courts, and the Minister must have no role or say whatsoever.
 - b. The Minister retains regulatory powers (section 22 of the Constitution) in clause 110 of the Bill.
 - c. Entry to and compulsory exit from the profession (ie striking-off or suspension) must be the preserve of the courts.
 - d. The Council's role with regard to enrolment of practitioners must be merely administrative without power or discretion, ie the courts admit a practitioner to the relevant roll and the Council keeps the roll.
 - e. The Minister can have no discretion with regard to the making of appointments to the Council. Subsections 178(1)(e) and (f) of the Constitution with regard to appointments to the JSC might serve as the appropriate model. The component parts of the profession which have nominations to the Council must be responsible for representivity, not the Minister. Only legal practitioners should constitute the Council. No teachers of law, no 'users of legal services' and no 'representatives' of government should be included on the Council. Disciplinary structures such as appeal bodies could however have lay representation.
- 4 Clause 114 of the Bill (the abolition of law societies and the transfer of staff, assets, etc) presents some profound problems and needs more consultation.
- 5 The transitional provisions. The representatives agreed that the LSSA and GCB and their constituent parts should continue to operate in the transition period. The LSSA and GCB should form the transitional council.

The existing rules of conduct for attorneys and advocates should continue (they shall be deemed to be the code of conduct of the Council) in force until the Council repeals or amends them or develop a uniform code.

The LSSA and the GCB were invited to the budget speech of the Minister. On that occasion, the Minister tabled the Draft Legal Practice Bill which had been approved by Cabinet that same morning. The document does not contain most of the things that the GCB would like to see. We have however been informed by Mr Skosana that the Department concedes that fusion in the sense of destroying the advocates' profession is not on the cards. The Minister is committed to protecting the advocates' profession, but what he wants is to regulate the practice of the profession (that is, the professions of attorneys and advocates) in order to deal with challenges that have arisen since 1994 including fees, access to justice and so on and so forth. The atmosphere that exists between the Department and the GCB and between the GCB and the attorney's profession is a very healthy one. I hope that we will be able to have a Legal Practice Bill that will strengthen the advocates' profession.

Employment of State employees as acting judges

A memorandum which fully sets out the GCB's concerns regarding the appointment of public servants as acting judges is published in this issue – see pages 11 to 12. At the budget speech the Minister of Justice and Constitutional Development indicated that he was still studying the GCB memorandum.

Complaint against Advocate Simelane

On the first week of November 2009, I was approached by two colleagues who informed me that they had received an anonymous complaint against Advocate Simelane arising from his conduct in the

Ghinwala Commission of Enquiry. I placed the matter on the agenda of the Exco of the GCB which was to take place in the second week of November. The Exco decided to investigate the matter. The complaint was circulated to the members of the Exco. At about that time, we were informed that the President had decided to appoint Advocate Simelane as the National Director of Public Prosecutions. We then appointed a subcommittee consisting of Pretorius SC, Van Rooyen SC, Bham SC and Tokota SC to study the Ghinwala transcript and to investigate whether or not the complaint which had been lodged against Advocate Simelane had any merit. At the beginning of this year, the committee reported that they had established that Advocate Simelane was still a member of the Johannesburg Bar on leave of absence and that the committee had then decided to refer the matter to the Johannesburg Bar. The Johannesburg Bar has been asked to report to the AGM in July on the outcome of their investigation into the allegations that Advocate Simelane had committed a breach of our rules of ethics.

Proposal on membership of GCB of salaried advocates in the employ of Legal Aid: South Africa

In 2008, when I became chair, I met the management of the Legal Aid Board. They for the first time raised the possibility of the GCB allowing those employees of the Legal Aid Board who have done pupillage and who are employed by the Legal Aid Board to remain members of the GCB. They explained that the advantage of such an arrangement would be to allow those employees to continue to work under the supervision of the Bar and to be bound by the rules of the Bar. They further indicated that that would have the advantage that they would benefit from the Bar's transfer of skills. Mlambo JA, chairman of the LAB, stressed that the right to representation was a constitutional right and that the LAB saw it as its challenge to provide quality representation. For this reason, the LAB wanted to give professional support to the advocates it uses, similar to the support the LSSA gives to attorneys working for the LAB. The March Exco resolved as follows:

- '(1) On the proposal of the LAB that the Bar allows employees of the LAB who have done pupillage to retain their membership of the Bar, it was resolved that the GCB Legal Aid Board Subcommittee be mandated to formulate a proposal by 31 May 2010 for circulation to constituent Bars in preparation for a decision at the AGM.
- (2) Pretorius SC, convenor of the subcommittee was mandated to coopt members onto the subcommittee. In doing so he should ensure that the committee is constituted according to the 50% requirements of the GCB constitution.'

The matter is now to be discussed for finalisation at the AGM.

What is important about the proposal is that it would mean that the Legal Aid Board can employ members of the Bar and those members will be treated as if they have a retainer and would not be allowed to take other matters except with the permission of the Legal Aid Board, which is the briefing client. In effect, these members would be in the same position as a member on retainer. That has the potential to bring the work of the Legal Aid Board back to the Bar because as the Legal Aid has pointed out, people who are employed by the Legal Aid would probably take one or two years doing the work as a retainer, but when they finish their two year contracts, they would probably want to proceed as advocates whereas others would have the opportunity to take the work as successors to those contracts. In this way, the pro deo work would

come back to the Bar.

Acting judicial appointments by advocates and unprofessional conduct

At the AGM the following rule 4.25.1 and 4.25.2 was adopted obligating members who take acting appointments to deliver their judgments within a reasonable period. The Heads of Court adopted a similar rule in April 2010. The GCB rule, which must be read together with the Heads of Court rule provides as follows:

4.2.5.1 It shall constitute unprofessional conduct for a member who has acted as a judge to delay the delivery of judgment unreasonably in a matter heard by the member, which shall be determined from the time of completion of the relevant court proceedings.

4.25.2 For the purposes of 4.25.1 above, unless urgency dictates that judgment should be delivered sooner or the parties to the suit request that the delivery of the judgment be deferred, it shall be deemed to be reasonable for judgment to be delivered by a member within three months of the completion of the relevant court proceedings.

Briefing of in-house counsel by the Department of Justice

In previous years, we have reported that the Department had set up a Civil Litigation Unit consisting of advocates who are employed by the Department and who appear on behalf of the State. The GCB had taken a decision to seek an opinion from senior counsel as to whether it was unethical for members of the Civil Litigation Unit to appear on behalf of the State when they are themselves employed by the State. The GCB has since received two sets of opinions. The first opinion by Wim Trengove SC and Isabel Goodman concluded as follows:

'Conclusion

20. In our view, it is not unethical for advocates employed by the Civil Litigation Unit to appear on behalf of the State. However, it is desirable that the legislature enact legislation to delineate and formalise their functions and duties.

21. It is advisable that members of the Unit be subject to a clear and complete set of ethical rules and disciplinary procedures. We believe that Bar membership would provide adequate oversight in this regard and that the Bar Rules should be amended to allow Unit members to retain membership.'

The other opinion by EW Fagan SC and FB Pelsler concluded as follows:

'Conclusion

38. In our view there can in principle be no objection to the State complementing the functions of the State Attorney by employing State advocates in the Unit. Neither the Unit nor the Bar, nor the administration of justice, would however benefit from the extension of Bar membership to Unit members.'

Exco now regards this issue as closed. It is clear from the two opinions that while it is not unethical for advocates employed by the Civil Litigation Unit to appear on behalf of the State, the State, which employs them and the judges for whom they appear are faced with the difficulty that these advocates are not, professionally, subject to any ethical rules.

Maternity policy

The Cape Bar presented a proposal for a maternity policy for the Bar (published in 2009 December *Advocate* 10). A subcommittee,

presently chaired by Scheepers SC, had been mandated to produce a report. I am hoping that the AGM will come up with a maternity policy.

Relationship between AFT and the GCB

The GCB has an Exco which consists of 50% AFT members who are elected by the general membership and 50% who are nominated by AFT. In the course of the last year, the question arose as to exactly how the nominations by AFT take place. Can AFT nominate someone who is not acceptable to the general membership? Do the other members of the general membership have any say in the nomination of the members of AFT? May AFT members participate in the election of the other members of the Exco?

When the election of or nomination of JSC representatives was discussed, it was also not clear how the two representatives of the advocates' profession in terms of section 178 ought to be nominated. Should AFT nominate one and the general membership the other? If so, can AFT nominate someone who is not acceptable to the general membership and vice versa? Because of those uncertainties, a resolution was taken to form a subcommittee consisting of Vahed SC, Smuts SC, Van Rooyen SC, Muller SC, Pretorius SC, Motimele SC, Ntsebeza SC, Aboobaker SC and Platt. The subcommittee was requested to submit a report on what protocols should be in place to govern the relationship between AFT and non-AFT. The committee was also expected to submit a proposed amendment necessary on the issue of the sunset clause and such other issues that need constitutional amendment to sustain the relationship. At the March Exco, the constituent Bars were asked to agree to reduce the notice period for a constitutional amendment to six weeks to accommodate the 30 April 2010 deadline given to the committee.

Competition Commission: rule 7.1.4 of the Uniform Rules of Ethics

Rule 7.1.4 of the Uniform Rules empowers a Bar Council to lay down a scale of minimum fees for particular services which shall be the fee recommended by the Bar Council as a minimum fee normally charged for such services. The rule provides that such a scale shall be a guide for the convenience of members and it shall not be unprofessional conduct for a member to charge less than the recommended minimum fees.

Other professions such as medical doctors who have similar rules were given penalties by the Competition Commission because the Competition Commission found that such guidelines were uncompetitive. In 2008 the GCB contacted the Competition Commission to ask for an exemption of this particular rule ahead of the general application because of fear that we would be given a penalty. At the time the Competition Commission indicated that it did not foresee that this rule would get exemption because in its view, the rule was uncompetitive. In our meeting with the Minister on 7 August 2009, the matter was put to him and his attention was drawn to the seriousness of a situation that would arise if there are no guidelines for fees at all fixed by the Bar Council. The Minister promised to take the matter up with the Department of Trade and Industry and if necessary with the Competition Commission. In our meeting with him on 7 April 2010, he indicated that he had contacted the Competition Commission and that he had been informed that the Competition Commission is doing its best to attend to the matter. The GCB has received a letter from the Competition Commission in which the Competition Commission is asking for this matter to be speeded up and has asked for a submission from the GCB. The matter will probably not have been resolved by the time of the AGM.

Position of silk

Section 120 of the Legal Practice Bill provides that the Minister may be requested to confer upon a legal practitioner the status of senior legal practitioner. The section further provides that such a request must be in a form and contain such information as the Minister may prescribe. The Minister must then make a copy of such an application available to the Judge President of the High Court having jurisdiction of the area in which the legal practitioner generally practises and to a voluntary association of which the legal practitioner is a member and any other person considered appropriate by the Minister and request his or her comments on the application. The Minister is then empowered to confer the status upon the relevant legal practitioner.

In meetings with the Department, the GCB has pointed out that section 84(2)(k) of the Constitution empowers only the President to confer honours and that the status of senior counsel is an honour conferred by the Head of State in terms of that section. It has been pointed out to the Department that any attempt by the Department to empower the Minister to confer honours is contrary to the provision of section 84(2) of the Constitution.

However, the GCB needs to develop a common procedure for the conferment of silk. It seems that the procedure followed differs from constituent Bar to constituent Bar. The matter was placed before the GCB Exco and it was resolved that the GCB would only discuss the matter after Johannesburg, which had the matter on its agenda, had resolved the procedure in its AGM in November 2009. Johannesburg has since adopted a resolution on a procedure to be followed by Johannesburg. That procedure will be before the AGM for consideration. I hope that that resolution will be considered by the AGM and that in the near future the General Council of the Bar will adopt a Uniform Rule that will apply to all Bars on the issue of the procedure for conferment of silk.

Model briefing patterns

The GCB adopted a model briefing patterns policy a few years ago. At the March 2010 Exco, the matter was discussed and the main question asked was whether the policy was yielding the desired results. Pretoria, Eastern Cape, Transkei, North West, Kimberley, KZN and Johannesburg reported that they model briefing pattern did not work. These Bars were requested to submit at the AGM alternative suggestions as to what would improve the briefing patterns at the Bar. I am hoping that these Bars will submit the reports required so as to address the issue of briefing patterns within the profession.

Scorecard for advocates

In 2008, the attorneys' and advocates' professions adopted a Legal Services Charter. One of the issues in the charter was a scorecard. Although it is difficult to have a scorecard for the Bar, the Bar has nevertheless adopted a scorecard or something similar to a scorecard which would apply to advocates. The Bar chairs were requested to circulate the scorecards to their members so that members can know what is required of them as advocates in terms of their contribution to transformation. Sooner or later the Bar ought to ask the question whether the scorecard in any way contributes to transformation and if it does not, the Bar ought to find alternative ways of ensuring that our profession, does not remain behind on issues regarding transformation.

Equality and diversity

In 2008, the Johannesburg Bar tabled a resolution on equality and

diversity (including sexual harassment). At the March 2010 Exco meeting it was resolved that each Bar adopt a policy on the subject and submit it by 30 April 2010 for discussion at the AGM. The idea is again to develop a broad policy or minimum requirements for such a policy on equality and diversity. Each Bar would then be required to develop its own code or policy which would include the minimum requirements set up by the GCB. It is hoped that the AGM will adopt such a policy so as to avoid a situation where we only deal with the matter of this nature when problems have arisen, whereas members have been left unguided because of the absence of a policy.

Joint training initiative: LSSA/GCB

In 2009, the GCB chair had meetings with Nick Swart of the LSSA to discuss the possibility of a pilot project involving joint training between the GCB and LSSA. The meeting recognised that the two organisations have strengths and weaknesses and that working together could help coordinate the strengths and weaknesses. The GCB is, for example, very strong on training especially on litigation whereas the LSSA has resources which are utilised in the various training colleges it has throughout the country. The proposal had already been adopted by national executive of the LSSA. At the March 2010 Exco, it was agreed to ask Glenn Goosen SC to investigate whether such a joint training initiative is something that the Bar would be prepared to consider and adopt.

GCB logo

The idea of a logo has been in existence within the GCB for some time. The photos of the GCB for the year 1988, show a logo which apparently had been adopted at that particular meeting but was not used thereafter. A file indicates that the GCB has tried several times to discuss the question of having a logo. My experience is that on the international level most professional organisations have a logo. This is important especially when you are sponsoring an event as when we were co-sponsoring the Africa Forum in Cape Town during the course of this year.

For that reason I propose that the AGM should consider very seriously the idea of a logo. We have asked a professional to assist us and he has given us some specimens. We have had serious discussions on the implication of such a logo, and based on those discussions the specimens will be circulated at the AGM. I am hoping that the AGM will adopt a logo for the GCB.

Mediation: amendment of the Uniform Rules of Court

The courts rolls are in some divisions clogged by matters which some believe could be resolved without the need for litigation. The Department of Justice is considering introducing mediation as a compulsory component of the litigation process. That would mean that as part of litigation, parties would at a certain stage be required to get a mediator and to see whether the matter could not be resolved through mediation. This is common in some jurisdictions. In Canada, for example, they have a mediation which is followed by arbitration for certain types of matters. The constituent Bars were requested to consider the merits and de-merits of such a mediation process and to make proposals as to what amendments would be necessary for the Uniform Rules of Court if such mediation were introduced. This matter will be on for discussion at the AGM. 