Future Leaders Symposium

Port Elizabeth, 13 and 14 July 2012

By MG Swanepoel SC, chairperson of the organising committee of the Eastern Cape Society of Advocates

Stormy weather greeted delegates upon their arrival in Port Elizabeth for the annual future leaders symposium held at a beachfront hotel on 13 and 14 July 2012. It was easy to determine who came from inland areas: despite the pouring rain, delegates from the drier areas promptly ventured off on a pre-dinner beachfront walk. Dark clouds left them undaunted.

The GCB chair, Gerrit Pretorius SC, welcomed all at the evening dinner. An overview of the four topics was given. The topics reflected the rather turbulent times, which pace Bob Dylan '*are a-changin*,' namely:

1) ***The role of advocates to ensure the upholding of the rule of law.***
2) ***Ethics: has the bar been lowered?***
3) **Quo vadis *advocates? Should we be ready for change?*** and
4) ***Press freedom: intervention or real freedom?***

Judge Frank Kroon addressed the first topic. After commenting on what the concept of the rule of law entailed in theory and in practice, referring to the fundamental role of the Constitution in ensuring an efficient, equitable and ethical public administration which respected fundamental rights and was accountable to the broader public, he placed emphasis on the public administration of laws by courts of law. Access to the court and the independence of the judiciary were two issues arising from this central theme.

Various role players featured in the 'rule of law's basic family,' including advocates. The role (or duty) of the Bar to ensure accessibility to the courts, as envisaged by section 34 of the Constitution, was then discussed. The Bar was urged to do what it could to promote such accessibility: (a) in addition to its compliance with the Competition Act, vigilantly to exercise its fee-review powers where this was called for, to avoid the situation where the Bar generally placed itself beyond the reach of our citizenry, (b) to discipline members who charged improper fees, (c) to adhere to the 'cab rank' rule where applicable, (d) to set time aside for pro bono work, (e) to waive fees, either wholly or in part when that would be the proper course, (f) to undertake work for the Legal Aid Board, (g) to act, without pay, on the Small Claims Courts.

Judge Kroon then referred to the importance of an independent judiciary as envisaged by section 165 of the Constitution to ensure the upholding of the rule of law. The Bar had a role to play when scurrilous attacks were made on individual judges and also needed to join with the judiciary by making its voice known in opposition to steps that threatened the independence of the judiciary.

The importance of advocates maintaining high standards in the presentation of cases and argument in court was emphasised, and it was suggested that specific attention be given to this branch of the law in the Bar's advocacy training programme.

Advocates themselves had to ensure their independence. The judge levelled criticism at state regulation and control of the affairs of the legal profession. He alluded to the small minority of Bar members that would serve on the South African Legal Practice Council, which, together with regional councils, were to replace the law societies and Bar councils which were to be dissolved. The far-reaching changes proposed by the proposed Legal Practice Bill were discussed concisely. Judge Kroon stated that the Bar should persist in its stance that the independence of the two legal professions should be fully recognised and respected. Such provisions of the Bill which offended the principle of the rule of law and its concomitant, the independence of the profession, should be challenged on constitutional grounds. Insofar as the envisaged new Protection of State Information legislation compromised the press, an ally in maintaining the rule of law in its function of informing the public about government's conduct, in any of its spheres, the Bar also had to speak out.

Are we still members of an honourable profession? Is it still an honour to belong to the advocates' profession, and does the public still respect advocates? Has the conduct of certain members recently done damage to the reputation of the profession? Which role has greed played in undermining our profession? Do our members sometimes forget their role as officers of the court and that they are not mere hirelings of their clients (especially those with deep pockets, or state departments funded by the taxpayer)?

These vexed issues gave rise to the deliberately suggestive topic: ***Ethics: has the bar been lowered?***

Judge Glenn Goosen, who previously served on the ethics committee of the GCB, commented that the topic called for an assessment of the prevailing value system. Even in the mid-sixteen hundreds John Cook commented critically on unacceptable values in England, such as greedy legal representatives pursuing cases for self-serving purposes, turning their backs on '*poor men's causes*' in the process and pursuing unjust causes.

The importance of good men and women at individual Bars who should not keep quiet, and of Bar councils doing their jobs and fulfilling their duties diligently, was emphasised. Ethical values had to be embraced on all levels, individually and collectively. The importance of practical training programmes and mentorship to instil sound ethical values in practice in new members was highlighted.

Whether the setting of examinations, testimonials and academic qualifications still sufficed to determine whether the advocate-applicants were truly '*fit and proper persons*' had to be questioned. Perhaps this assessment might more prudently be made only *after* the candidates for admission had undergone a period of vocational training, forming part of carefully designed, supervised programmes.

The disciplinary processes of the Bar had to be such that public confidence was engendered. Such disciplinary processes had to be speeded up and be more transparent.

With reference to the proposed Legal Practice Bill, which made provision for the appointment of disciplinary committees, Judge Goosen commented that policies had to be in place insofar as disciplinary matters were concerned, which could readily be implemented during the envisaged transitional phase. There was to be no delay in the formulation of the envisaged Code of Conduct. Care had to be taken that no hiatus occurred during the implementation stage of the new dispensation.

Changes in the nature of legal practice had been experienced, particularly in overseas dispensations. However, legal-ethical education to counter rampant unbridled commercialism and to re-instil idealism and the pursuit of sound ethical values, had a definite role to play. Commercialism or economic rationalism could not be ignored, but the ascendancy of mercantilism was not to be allowed to 'snuff out' the nobility of a legal calling.

The sea appeared to look particularly bleak when the expected legal sea-change awaiting the legal profession came up for discussion. Why should the Bar councils be disbanded? Does the State want to exercise control over our profession, or not? If so, why, and why now? How will the implementation of the Legal Practice Bill affect the way we practise; our Bars; our overheads; our ethical rules and disciplinary matters? Has the way in which we have been practising perhaps contributed to the need for change?

It was the turn of Dumisa Ntsebeza SC to take the baton, and he immediately tackled the admittedly 'loaded' question: **'Quo vadis *advocates? Should we be ready for change?*'** He commenced by referring to a statement attributed to archbishop Desmond Tutu, that perceptions were facts to those who believed them. He then referred to the Legal Practitioners Bill (the Bill) and emphasised the preamble of the Bill, which he described as aspirational. The express link with the constitutional imperatives was emphasised.

Ntsebeza SC emphasised the importance of section 3 of the Bill, which contained an '*aspirational clause*,' providing that the legislative framework should be transformed and restructured in a manner which embraced the values underpinning the Constitution. He highlighted the provisions of section 3(b), namely the purpose to broaden access to justice by determining fees that were affordable and within reach of the citizenry; to establish measures to provide for the rendering of community service by candidate legal practitioners and practising legal practitioners as well as measures aimed at providing equal opportunities for all aspirant legal practitioners.

Whilst referring to the different constitutions at the various Bars and law societies, he sought to contextualise the purpose stated in section 3(c) of the Bill, namely the creation of a single unified statutory body to regulate the affairs of all legal practitioners in pursuit of the goal of a unified, accountable, efficient and independent legal profession. He was at pains to emphasise the word '*independent*.' Further emphasis was placed on the stated purpose to protect and promote the public interest. He then responded to those who maintained that the Bill was unconstitutional and referred to an opinion which had been obtained by the GCB in which a contrary view was expressed, albeit qualified in some respects.

Ntsebeza SC referred to the failure expressly to acknowledge the need for change in the constitutions of the various Bars and law societies. He remarked that the GCB's constitution was only amended in 2009 to reflect '*an expression of aspiration*,' but commented that this had occurred only fourteen years after the onset of the new Constitution. As a representative of AFT, he emphasised the fact that AFT fully recognised the need for change and contrasted the preamble of the constitution of AFT with that of the GCB.

Ntsebeza SC made it clear that whilst AFT had decided to be broadly supportive of the Bill, this certainly did not mean that AFT would not express a firm view in respect of such clauses or provisions with which it had difficulties. There was certainly no '*sweetheart union*' between AFT and the Minister of Justice. Emphasis was placed on the fact that the values of the Constitution had to be embraced. In his view, it was inappropriate to approach the Bill only from a reactionary point of view, ignoring the positive links with the Constitution and in particular the positive, aspirational goals.

He questioned why it had taken so long, after the onset of the new Constitution, for the organised professions of attorneys and advocates to agree on an acceptable Bill regulating the industry as a single unified body. He suggested that perceived self-interest might have given rise to a degree of obstructionism, which might in turn have been ascribable to the adversarial experience or background of legal practitioners.

Change was necessary and in the public interest, according to Ntsebeza SC. He commented on his own period of pupillage at the Cape Town Bar, which he had experienced negatively, especially as he was expected to perform pupillage despite having served as an acting judge prior to that. He contrasted his own treatment with the treatment of other counsel from the established profession and expressed the view that his treatment reflected a perpetuation of the past, which only changed after he had successfully qualified, when affairs became more transparent at that Bar.

He also criticised the Cape Town Bar for at some stage having proposing a particular percentage of black representivity, which he personally perceived as condescending and arbitrary at the time.

He expressed the wish that the profession should change voluntarily and that legislation ought not to be required to initiate change. Counsel from previously advantaged groups had to realise that it was in the interest of the whole profession that they should be proactive, forward-looking and supportive of new members of the Bar and newly appointed members of the Bench.

Senior counsel had to take black practitioners on board as juniors. Established attorneys from white firms had to have structured programmes in place to ensure the transfer of skills to up-and-coming attorneys from the previously disadvantaged groups. It was in the interests of the profession as a whole, particularly the Bench, that there should be a positive approach to the necessary transfer of skills from experienced practitioners to inexperienced practitioners. This applied to both the attorneys' profession and the advocates' profession.

He emphasised that the rules of the GCB allowed for fee-sharing arrangements to ensure that junior counsel can be brought on board so that they might be exposed to more intricate matters. The pool from which representatives for judicial appointment were picked, comprising also academics and attor-

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neys, might soon be drying up, unless competent, experienced advocates also made themselves available for such appointments. A perception which he had heard expressed, that white males should no longer apply for judicial appointment, was unfounded.

He then posed the thought-provoking question to delegates whether our future would be shaped by advocates and attorneys, or by politicians. On the one hand, the '*judicialisation*' of politics had to be guarded against. On the other hand, one obviously had to be wary of the '*politicisation*' of the judiciary. Care should be taken not to politicise the judiciary and judicial appointments. The view which the public had of the Bar was also critical. In this regard, transparency with respect to disciplinary matters was important. He questioned whether the structured advocates' profession was sufficiently accessible to the public and whether regulation was not in fact required in the public interest. In this regard, he described some of the oversight functions as rather '*opaque*.' Self-testimonials, to the effect that standards were being upheld, were not necessarily believed by the public.

He appealed for a constructive initiative, so that the legal professions should seek to speak as far as possible in one voice. This also applied to the Bill. He criticised overly-personal attacks on the Minister of Justice and found some comparisons between apartheid era figures and the Minister unsavoury. Instead of simply being dismissive or critical of the Bill, or making personal attacks on the Minister, constructive submissions should rather be made to ensure that such changes which were necessary to the Bill were made.

In this regard, much progress had been made, according to him, from earlier versions of the Bill to the current version. Instead of populist activism, he believed that the Bar as a body should have done more to have engaged with the government in having the Bill formulated.

More urgency was also required. He referred to instances of racialism in our jurisprudence, and took to task those obstructive to change.

Change was therefore inevitable and necessary, said Ntsebeza SC. He regarded change in a positive light as being reflective of a new hope and a new idealism. The perception that the purpose of the Bill was simply to bring the legal profession under the control of the state, he rejected. He believed that there should be constructive engagement and not '*a lot of shouting from the mountain tops*,' The stance which AFT would accordingly adopted would be one of robust engagement, but the approach would nonetheless be constructive.

The discussion, although serious, left the majority smiling, or perhaps relieved? Did we perceive a slight lifting of the storm clouds at lunch? The sombreness was certainly giving way to a lighter feeling, or was it just perception?

An entertaining Professor Pierre De Vos followed, notwithstanding the deadly serious topic which he agreed to address, which impacts upon all of us living in this ever-changing country: ***'Press freedom: intervention or real freedom?'***

As a point of departure, Professor De Vos referred to the reasons advanced in judgments why freedom of expression and a free media were necessary for the South African society, namely:

(i) for the functioning of the democracy;
(ii) to ensure the 'moral agency' of the public (which extended much further than politics and might be linked to the right to dignity);
(iii) to ensure a free marketplace of ideas, which was conducive to the establishment of truths.

Whether the flow of information would ever be truly free in modern Western civilisation, which invariably comprised various classes, with some able to influence or even '*manufacture*' a '*false kind of truth*,' was contentious.

Further, the balancing act between the flow of information or a free press and individual or personality rights (such as the right to dignity, privacy and equality) would always be problematic. He referred to section 16(2) of the Constitution which made it clear that *some* form of regulation or control was not *per se* unacceptable.

The press ombud did not present a satisfactory solution. The expected dissatisfaction by the press at attempts to introduce parliamentary control was then discussed. More palatable might be a form of '*co-regulation*,' involving members of the public appointed by an independent panel.

After an entertaining discussion of the landscape of press and information regulation, Prof De Vos turned to the 'Secrecy Bill' (The Protection of State Information Bill), which, not unexpectedly, did not impress him. Notwithstanding the threat to democracy by an attempt to '*keep things secret*' and to stifle transparency, he described the Secrecy Bill as having been '*drafted by spies who want to hide their own actions*,' to much laughter of his seemingly converted audience. The attempt to suppress media publications on highly relevant issues such as governmental corruption, premised upon an alleged abuse of information, is nonetheless disconcerting. However, Professor De Vos emphasised the public upheaval which had already been experienced.

He also referred to the hamstrung progress which the contentious piece of draft legislation had experienced to date. He thought the provisions of the Secrecy Bill could in any event be circumvented '*by passing on the information to outsiders to publish the relevant information for you*.' The world had become smaller and information flowed faster – this was reality, and the threat posed by this piece of reactionary legislation might perhaps be over-emphasised.

That a balancing act was required between the freedom of expression on the one hand and the rights of persons and entities on the other hand, was evident. There was nonetheless '*a lot to be lost*' if a subject or topic affecting the rights of others was being reported on '*badly*.' However, the laws of defamation were available for the affronted or injured.

On behalf of the local organising committee, the author would like to thank the exceptionally well-prepared speakers again.

At the end of the conference, the weather was still gloomy, but certainly less ominous.

Perhaps we should all saddle our (m)rules of law; ethically armed, ready to embrace such change which is constitutionally underpinned, in striving for true non-racialism. We should be ready to stand our ground if necessary. However, détente may often be more effective than adversarial skirmishes. When nonetheless required, we must fight valiantly to ensure our independence and the upholding of sound value systems, whilst simultaneously ensuring that we do serve the public and that the legal profession retains its legitimacy in the eyes of the public.

The challenges are there to be faced. A