# Transformation at the Johannesburg Bar – some thoughts

**By George Kairinos, member of the Johannesburg Bar**

## Introduction

The history of transformation at the Johannesburg Bar ('the Bar') has been long and tumultuous. At one point in this tumultuous history it almost led to a split in the Bar and created much polarity among its members. However and fortunately, the growing pains subsided and the post-apartheid Bar matured into a Bar which was cognisant of its obligation to foster and promote transformation.

Nothing made this mission statement clearer than the 'power sharing' with Advocates for Transformation ('AFT') in the leadership of the Bar at Bar Council level. However, despite the initial success in the drive for transformation, the process appears in recent years to have 'stagnated' somewhat. It cannot therefore be said that the process of transformation has necessarily succeeded or that it is no longer necessary. It is this stagnation of the process of transformation that requires debate and perhaps a re-ignition at this juncture in the ever developing saga of the Bar. It is this stagnation, and possible methods to re-ignite the process in a meaningful and practical way, that form the subject matter of this paper.

## A knight's tale

Before I deal pertinently with the issues at hand allow me a momentary digression for the purposes of illustrative example and to drive home my point (excuse the pun).

Advocacy and forensic litigation can to a certain extent be equated with the jousting tournaments between knights in medieval times. Before the royal courts appeared the medieval knights. They were properly armed, trained and horsed.

Armed with the correct armour and weaponry, the proper and competent training and the necessary education in the ways of the joust, these warriors entered the arena and met in combat. They of course each had their benefactors, for participation in the joust was an expensive undertaking. Armour and weaponry cost money. So too did horses. Even more so the training and education in the ways of the joust.

The knight often represented a particular lord or baron on whose behalf the knight competed. These interests were often financial since the winner's prize was substantial.

How, you may ask, do I equate the art of jousting and the profession of the knight with the art of advocacy and the profession of the advocate? Well let us take it step by step and do the comparative analysis.

The modern advocate too appears before a court in an arena (the courtroom) in a form of 'combat' (albeit merely in the forensic sense). He/she too is best armed with the necessary weapons and armour for the task at hand, namely knowledge of the law and the forensic skills necessary, such as the ability to examine witnesses, lead the correct evidence, discern the importance of particular documents and argue the matter. He/she too, in order to make best use of these weapons and armour, requires extensive training and education. He/she too has a financial benefactor, namely the instructing attorney. He/she too represents somebody's interests, namely the client. He/she too requires the financial resources to establish practice and keep chambers.

The point of the above discourse into the ways of knights and advocates is merely to illustrate that no person in their right mind would want a knight to represent their interests before a court if such knight were not properly educated in the ways of the joust, not properly trained to engage in the combat, not properly armed and armoured and not properly horsed. Why, if such were the case, the baron might just as well have sent one of his servants on a mule to do combat. The contest would be one-sided and the result inevitable. Defeat!

Similarly, it is inconceivable to send an advocate to court, not properly educated in the law or trained in forensic litigation skills. That result too is inevitable. A one sided contest ending usually in defeat. The problem is that such defeat is not the defeat of the advocate as such but more importantly the defeat of the client, whose freedom may be at stake or who stands to endure huge financial loss. This is certainly not in the interests of justice and ultimately the public interest, which is, after all, the paramount interest. Transformation must therefore ultimately result in previously disadvantaged advocates who are properly educated and trained, who are able to obtain and retain benefactors (being the attorneys) and who can properly and competently represent their clients – be they large corporations or the lowliest member of the public.

The question is how to enable the knight to obtain and retain benefactors and how to get the knight into the jousting tournament in order to obtain the necessary experience? How then does one transform the profession without sacrificing public interest on the altar of transformation?

## Transformation

Before one can have a meaningful debate regarding transformation and the way forward, one must first determine precisely what is meant by transformation. I once asked one of our eminent leaders and a leader of the so-called 'black Bar'* Semenya SC, what he meant by 'transformation'. His answer was insightful

* A word of thanks to Kameshni Pillay for raising these with me and thanking her for her unsought but surely tacit permission to use her phraseology. Let me immediately confess that I cannot stand terms such as 'the white Bar' or 'the black Bar' since they seem to reinforce the inability of people to become colour-blind. Unfortunately for the purposes of this paper I must use them for these are the terms commonly used by the membership and I do so merely for descriptive purposes. Personally I believe only in 'the Bar'.

indeed. He stated that 'transformation' in this context was the process by which society becomes colour-blind. He may have added 'gender-blind'. This simple and elegant explanation encapsulates everything that I believe transformation should be.

'Transformation' is defined as 'alteration', 'change', 'conversion', 'revolution' or 'makeover'. I believe that 'conversion' and 'change' are probably the most apt in the circumstances. But 'conversion' from what to what?

The conversion is clearly from a white-male dominated Bar with inherent perceptions of inadequacies in black and female counsel to a Bar that is 'colour-blind' (and indeed 'gender-blind'). That is to say where inherent perceptions are removed and where one does *not* care whether an advocate is black, white, brown, yellow or pink but looks only at their competency, skill and knowledge in forensic litigation.

Whilst transformation is indeed laudable and imperative, I do not believe the lay client would want to sacrifice his case (and suffer extreme financial prejudice or imprisonment) because their counsel was not competent as a counsel, albeit that they had the credentials of being previously disadvantaged. I believe it is in the public interest that the Bar should transform into a Bar which incorporates previously disadvantaged persons who are also competent in the ways of forensic litigation.** That is what the lay public wants. Therefore the role of training and education in the ways of forensic litigation becomes imperative in achieving the mission of transformation. Many of our previously disadvantaged members are shining examples of empowerment through proper training and education.

Training and education are already very strongly catered for at the Bar through its programmes of mentorship, lectures and advocacy training. It is not the intention of this paper to deal with training and education of counsel. I merely refer to these aspects to reinforce the importance of training and education for the purposes of, inter alia, transformation. However, it is my view that whilst such training and education certainly assist previously disadvantaged counsel (and indeed all junior counsel) to gain knowledge of the fundamentals of forensic litigation, they do not assist the previously disadvantaged junior counsel necessarily to obtain and retain work once they have commenced practice.

The current process is akin to deserting previously disadvantaged counsel once they have passed the Bar exam and joined the Bar.

The issue is therefore the following: once the advocate is properly trained, armed and armoured, how does she/he obtain and retain attorneys and clients? It is this issue which I believe has stagnated in the transformation process at the Bar, which needs to be addressed and which is the focus of this paper.

Of course I am not blind to the other problems in transformation of the Bar and the briefing patterns, being the 'systemic disadvantages' under which previously disadvantaged counsel labour and the difficulties associated with changes in attitude. These difficulties, such as the disadvantaged backgrounds from which many previously disadvantaged counsel emanate, the hurdles which they have to overcome to become advocates, and the pervading 'old-style' attitudes they must endure, are not lost upon me. I cannot begin to speak to such issues, not having had to endure them myself. However they are not the focus of this paper, although they too must be addressed by the Bar.

## Obtaining and retaining work

One does not empower an individual by enforcing and cultivating a dependency. Remember this. It becomes important later on in this paper.

At the moment, transformation at the Bar (post the training and education in pupillage) is largely nothing more than subsidising small chambers for previously disadvantaged counsel. There is very little in place post pupillage to ensure continuous training and the acquisition of experience. Unfortunately the profession is a demanding taskmaster and very unforgiving. It creates a catch-22 situation in that junior counsel are not briefed due to lack of experience yet can gain experience only by being briefed and appearing in matters.

Various groups at the Bar have attempted to alleviate this problem in a variety of ways. Some have hosted cocktail parties at which the junior previously disadvantaged members are introduced to attorneys. Others have published brochures waxing lyrically about the competence of their junior previously disadvantaged members and seeking the support of attorneys firms in briefing them.

Certain other programmes have tried to ensure that previously disadvantaged counsel is brought into matters by senior counsel as first or second juniors. Whilst all of these are laudable I do not believe any have really alleviated the problem. There is still a perception amongst attorneys firms that previously disadvantaged counsel are not sufficiently competent to brief in matters. Whilst this perception is unfortunate, it is a reality that needs to be addressed.

Furthermore, even if previously disadvantaged counsel are fortunate enough to obtain briefs from attorney firms, they still have to retain the briefs. It is not sufficient to throw a few crumbs to such counsel and thereafter, having patted oneself on the back for having done one's bit for transformation, to forget about them in the future.

It is my sincere belief that if an attorney briefs a previously disadvantaged counsel, is happy with their work in the matter and their level of competence, irrespective of the result, they too will become 'colour' and 'gender' blind and will brief the counsel on their merit, irrespective of their colour or gender.

The question is, firstly, how to get the attorneys to brief previously disadvantaged counsel and secondly, how to ensure that they persist in briefing such counsel. I suggest two areas which the Transformation Committee needs to investigate seriously and to come up with solutions.

The first is the lack of previously disadvantaged counsel appearing in the magistrates' courts, and the second the need for a better system of ensuring that most junior previously disadvantaged counsel are exposed to working with silks or even senior-juniors.

## The magistrates' courts

In my experience and in my opinion, the best and tested proving ground for junior advocates is the hurly-burly of the magistrates' courts. These courts are often denigrated as being only for attorneys, but nothing is further from the truth. Magistrates' courts

** They are probably just as unhappy with being represented by a white male incompetent advocate but that is a discussion for another day.

offer the best (and cheapest) forums for serious hands-on training of counsel.

Attorneys who may be reluctant to brief counsel in opposed motions or trials in the High Court, because of the serious risk involved in such matters, may be less reluctant to brief previously disadvantaged junior counsel in opposed motions or trials in the magistrates' courts. There is less risk of debilitating adverse costs orders in the magistrates' court should things go wrong, due to the ridiculously low and outdated tariffs applicable in the magistrates' courts. Furthermore, it appears that, with the increase in the jurisdiction of the magistrates' courts to R300 000, there will be an increase in the need for junior counsel in magistrates' court matters.

In my experience (having spent the better part of my first ten years at the Bar in the magistrates' courts), previously disadvantaged counsel (and particularly black counsel) hardly ever appeared in such courts. I hardly ever saw black counsel in trial roll calls or opposed motion courts in the magistrates' courts.

Having discussed this issue with junior counsel it has been confirmed that this is indeed still the situation. If so, this begs the question why previously disadvantaged counsel are not being briefed in the magistrates' courts. I have heard many explanations. One is the perception that certain previously disadvantaged counsel consider it condescending to be briefed in such 'lower' courts. I have overheard a black female junior counsel espousing this very statement, which of course reinforced my perception. I do not know if it is a general view among previously disadvantaged junior counsel. If so, it is worrying indeed and requires serious investigation and education as to the virtues of appearing in the magistrates' courts.

Another explanation is that perhaps previously disadvantaged counsel are just not being briefed in such courts (or indeed any courts). If this is so then the briefing of previously disadvantaged junior counsel by attorneys firms needs (again) to be addressed between the Bar, the law societies and law firms. Either way one needs to find a way to ensure that previously disadvantaged juniors are briefed in magistrates' courts matters where they can 'cut their teeth' so to speak and gain the necessary experience, so that when they are briefed in High Court matters they possess the necessary experience for appearing in such 'higher' courts.

The advantages of appearing in the magistrates' courts are many (assuming the required education and training are present). Attorneys get to know counsel in such courts; they witness counsel dealing with matters; they witness counsel as their opponents; they meet counsel in the corridors of the court. This all entails a modicum of networking which ultimately may lead to briefs from such attorneys. There are many more attorneys and candidate attorneys roving in the magistrates' courts than there are in the High Courts and therefore a better chance of establishing contacts with attorneys in a magistrate's court practice than in the High Courts.

I do not have the answers as to how the Bar will ensure that previously disadvantaged counsel establish magistrate's court practices (at least in their early formative years at the Bar). However at least the perception (if indeed it exists) amongst previously disadvantaged counsel, that the lower courts are not for them, must be dispelled by better education of the benefits of appearing in the magistrates' courts. Furthermore, there has to be better liaison between the Bar and the attorneys firms and persuasion of attorneys firms to brief previously disadvantaged counsel in magistrate's court matters.

At the moment it appears that the attorneys firms believe they are doing their bit for transformation by bringing previously disadvantaged counsel into matters as a token second junior with a senior and senior-junior. Whilst this is indeed laudable, has certain benefits and imparts much experience of preparation of matters and so forth, when it comes to actually preparing junior counsel for appearing on their own or conducting a trial on their own, it imparts very little. Often the second junior ends up being a mere token, with very little work expected of them, and they attend consultations and sit quietly in a corner.

On paper however it looks wonderful. There was a previously disadvantaged counsel on the team. Hoorah! Everybody sits back smugly thinking they have done their bit for transformation. But what about when the matter is over? The junior inevitably goes back to his/her little chamber and contemplates what he/she is to do for the rest of the year.

A more holistic approach is necessary to ensure that the previously disadvantaged junior is able to build up his/her own practice, irrespective of junior briefs. Lest I be misunderstood, junior briefs with silks are indeed laudable and can import much experience and learning to the junior but they are not the be all and end all of establishing a successful network of contacts with attorneys and establishing one's own practice.

I remind the reader what I stated above, that the creation and enforcement of a dependency culture is not conducive to transformation. If transformation encompasses empowerment, then empowerment and transformation are not achieved by creating a dependency on junior briefs and nothing else.

Empowerment and transformation are created by ensuring that counsel can build their own practice and not be solely reliant on seniors and fellow members for work. A successful magistrate's court practice can in due course lead to a successful High Court practice, which in turn can lead to a successful junior practice (ie working with silks) thereby establishing a less reliant and more empowered previously disadvantaged counsel.

## The junior practice***

That being said, there is indeed a substantial benefit to being briefed with silks in a matter. A silk can impart much knowledge and experience to a junior counsel. For example, merely how a silk conducts a consultation, or how she/he requires their brief to be paginated, or other such minor issues, are invaluable in the continuous education of the junior counsel.

Of course much of this type of knowledge and experience can also be gained from working with senior-juniors and I do not limit my comments herein to silks alone but include senior-juniors. Indeed most mentors at the Bar are in fact senior-juniors of approximately ten years or more standing at the Bar. Nevertheless it appears to me that it is often a select few previously disadvantaged juniors who are enjoying the benefits of working with senior members of the Bar and obtaining that knowledge and experience.

This needs to be addressed so that there is an even spread of such junior briefs, at least as second junior in matters.

*** By referring to a 'junior practice' I refer to the practice of being briefed with a senior counsel.

I know that certain larger groups have already established funds from which previously disadvantaged junior counsel are briefed with silks as first or second juniors at an agreed rate subject to a certain maximum per month. The system appears to work well. However, one wonders why the Bar cannot implement a similar system, properly regulated and in terms of which most, if not all, previously disadvantaged counsel can obtain at least one chance in their first few years of working with a silk or senior-junior in a matter.

It appears to me that the only impediment to this is the funding. Members are reluctant to part with a portion of their fees to bring in a second junior and attorneys and more particularly the clients are reluctant to pay for this additional service. Indeed they often cannot understand why they need two counsel let alone three!

Subject to the necessary funding (and I confess I have no knowledge of the amounts available to the Bar Council for such projects), I believe that a roster system of previously disadvantaged counsel can be worked out who can be placed with seniors or senior-juniors in sufficiently large matters, paid for at a certain rate and up to a certain maximum to gain exposure to working with such senior members. Of course an entire set of rules would have to be worked out as to how the system would work in practice.

If there are insufficient funds available for all the previously disadvantaged members (and this can be limited to only members in their first year of practice), then perhaps it would have to be limited to a fixed number per annum. I am not certain how these would be chosen but the committee could determine the fairest way in due course.

The seniors would be required to write a confidential report to the Transformation Committee on how the junior performed and likewise the junior too would be required to report on how they experienced the junior brief. One could even work in a penalty clause that should the junior not have attended consultations or carried out work they were required to, such would forfeit the brief or the remuneration.

Obviously the system would need careful planning and fine-tuning. At this stage it is merely an idea which requires consideration. This system would also prevent junior briefs from operating on a favouritism basis and would hopefully allow all new previously disadvantaged counsel from working with a silk or senior-junior, albeit it for a low rate, in their first year.

The benefits of the experience would far outweigh the low remuneration and of course it would operate on a voluntary basis so that if any junior counsel is not prepared to work for that rate and gain the experience, it is their choice and at least they were offered the chance.

## Conclusion

In conclusion therefore I believe the Bar should investigate:

- The establishment of magistrates' courts practices by previously disadvantaged junior counsel;
- The establishment of a roster of junior briefs paid for by the Bar as set out above. A