



GCB chairman's annual report 2012/2013

Report to the 68th annual general meeting of the General Council of the Bar of South Africa by **Ishmael Semanya SC**, chairman

It was a turbulent year. In contrast to tradition, I pen this report by expressing my deepest gratitude to many individuals¹ who have managed to help keep afloat the GCB in these uncertain times. Uncertain because the practice of law, if the intentions of government reflected in the Legal Practice Bill are to prevail, faces a threat that may alter the entire fabric of legal practice in this country. About this, I say more later.

I express my personal regret at the unprecedented development with the deputy chairperson² resigning his position with the resultant diminution of the intellectual platform that has come to characterise the robust debate obtaining at this level of the governance of the profession. In mitigation, however, I welcome the fact that his resignation was in furtherance of a common purpose with those who remained – the unstinting zeal of everyone to defend the independence of the advocates' profession and the protection of the rule of law. It is always healthy for the competition in the realm of ideas to be fierce and unfettered; and conviction to be principled and buttressed by integrity, as I believe was the case in this instance.

This year also saw the passing of former Chief Justice Arthur Chaskalson. Without him, the template on which the South African constitutional jurisprudence is founded; the transition of our legal system from an ominous divisive past to a constitutional democracy to which the world looks with envy; the crystal clarity with which some of the most complex constitutional principles were articulated in the judgments of the constitutional court; the courage with which excess of executive power was addressed with poignant independence; the defence of an independent judiciary and of the legal profession, would not have been possible, or at least would not have been achieved with the same punctiliousness that had come to characterise the former Chief Justice.

We are a body of 2 471 (1 379 of whom are white male; 390 white female; 320 black male; 101 black female; 50 coloured male; 41 coloured female; 120 Indian male and 70 Indian female) members strong as at 30 April 2013. The clarion call for the acceleration of our transformation initiatives is loud and clear – 19 years in our democratic discourse should reflect better than these statistics. Comforting is that of the 184 pupils admitted and 176 who sat for the exams, there was a posting of a 91% pass rate. Trial advocacy training sessions, the flagship, predictably kept its shine with the annual Wallenberg Programme being the jewel on the crown. Some of our members³ were recommended for judicial appointment. Our congratulations are extended to each one of them and proper recognition must also

go to the Bars for enriching our judiciary with the talent all these honourable men and women bring to the Bench. A judge of the Constitutional Court, Yacoob J, retired leaving his difficult-to-emulate-fingerprints on the judgments of that court. Ngoepe JP retired – his contribution to the South and North Gauteng High Courts and inputs in the work of the JSC have left their own indelible mark. Congratulations are also extended to those who have ascended another rung on the judicial ladder: Moshidi J and Wepener J, Electoral Court; Jappie J, Deputy Judge President KZN; Waglay J, Judge President Labour Court; Saldulker J and Willis J, Supreme Court of Appeal; Davis J, Judge President, Competition Appeal Court; Ledwaba J, Deputy Judge President North Gauteng High Court. Our presence and involvement in the International Bar Association, the Southern African Commonwealth Association, International Advocacy Training and the Commonwealth Lawyers Conference have maintained the kinship and the common defence of the rule of law which must continue to be maintained going forward.

Legal Practice Bill

During the weekend of 2-3 February 2013 the GCB organised a Legal Practice Bill retreat at the Leriba Lodge. At the conclusion of the workshop, the GCB adopted a resolution in terms of which the advocates' profession expressed its support for parts of the Bill, noting that the Bill sought legitimately to address the fact that the practice of law was regulated by different laws which applied in different parts of the national territory as a result of a fragmented legal system of the past; the fact that access to affordable legal services was not a reality for most South Africans; that the advocates' and the attorneys' professions were not representative of the demographics of South Africa, and that access to legal services was limited. The GCB welcomed the introduction of the Bill as a means to address the imperfections inherited from our past. The GCB welcomed the acknowledgment in the Bill of the right of advocates to practise their profession as well as the object of the Bill to strengthen the independence of the legal profession and to ensure that the Rule of Law is upheld.

The GCB also resolved to work with the government and legislature, the LSSA, BLA, Nadel and all other stakeholders in order to address the concerns that we have as a profession and for that purpose to engage in frank and robust discussion with the legislative and executive arms of government based on the principles that advocates do and should have rights to freedom of association, in particular the right to organise themselves in their own bodies; that advocates should be recognised as a

distinct profession within the wider realm of legal practice and should be able to administer a system of pupillage or any practical training required for admission to the profession, and promote access to the profession by historically disadvantaged individuals. The GCB also reiterated the principle that the advocates' profession should be able to formulate and administer a set of rules of conduct for its members and a disciplinary system where infraction or misconduct was reported; be able to employ personnel and own assets for the administration of the profession and to ensure the fees charged by its members were reasonable.

The vexed question of what impact the Legal Practice Bill will have on the profession begs for our continued vigilance. In *Legal Brief Today*, 26 June 2013, it is reported that politicians appear to be agreed that advocates will in future be allowed to receive briefs directly from the public. It is also stated that members of the National Assembly's Justice and Constitutional Development Committee have reached an in-principle agreement on a proposal seeking to enable an advocate in possession of a Fidelity Fund Certificate to receive briefs directly from the members of the public. This is described as '*a major breakthrough*.' The report also states that '*progress has also been made on the potentially contentious issue of responsibility for determining a fee structure for legal practitioners*.' The report provoked a response from me addressed to the chairperson of the Parliamentary Standing Committee on Justice and Constitutional Development. I wrote: 'If the report is correct, it will *de facto* and *de jure* obliterate the advocates' profession as we know it. It will mean that the referral character of the advocates' profession is undone. This will signal the single anti-transformation measure ever to happen in the legal profession. Without being alarmist, any scant scrutiny of our judiciary since the democratic order will show by example that all the black Chief Justices (Mahomed CJ, Langa CJ, Ngcobo CJ, Mogoeng CJ) were members of the Bar. I can cite numerous black individuals who populate our Bench who come from the Bar. This has been possible, inter alia, because the rules of the Bar prohibit any form of partnership between members so that all advocates compete as equals. In contrast black attorneys' firms, despite nineteen years of democratic order, have not managed to compete with their white counterparts who now even have international partners.

The reason for this is precisely a structural one – the ability of attorneys to aggregate and acquire a dominant position in competition with small black law firms who do not have the capital to offer meaningful competition. I compete on equal turf with all the white silks in the country, a statement that cannot be said by a single black attorney relative to his or her white counterpart. South Africa does not want to see that problem replicate even amongst advocates.'

Swanepoel SC commendably expresses the views of the Eastern Cape Bar members which are shared by all of us that the GCB must persist in its attempts constructively to engage with the Department of Justice to drive home the core principles of who we are. He makes the point that an independent legal profession is demanded by the Rule of Law under our Constitution; that advocates form an essential part of that legal profession; that the Executive may regulate the profession and not govern it. He laments the fact that the regulatory structure proposed in the Bill is still not costed; that the constitutional right to access to justice is not assisted by the inadequacy of the legal

aid in the country and the vague legislative content pertaining to legal requirements or qualification, standards and vocational training, by way of examples. All these matters still demand that we fight any threat to the independence of our profession.

LLB degree

On the horizon are promising developments relating to a proposed summit on the LLB degree. The degree is currently a four year degree and has proved to be inadequate to prepare students for the demands of practice. The thinking is to recommend to make the LLB a five year degree. The GCB is one of the members of the National Task Team to monitor and facilitate on-going liaison between universities and the profession to realise that change.

Competition Commission

On 3 September 2012 we met with the Competition Commission in an endeavour to resolve various competition issues which have been raised with the various constituent Bars. The issues relate to the GCB's application for exemption of its rules in terms of schedule 1 of the Competition Act. This engagement still continues. On 27 May 2013 we were advised by the Competition Commission that it was busy finalising its findings in relation to the exemptions application. On the light side, the complaint relating to the allegation that the institution of silk is anti-competitive has been dismissed. The constitutionality of the senior counsel status is before the Constitutional Court and is to be argued shortly. The GCB was invited by the University of Cape Town to a workshop on gender transformation in the judiciary and Tanya Golden represented us – my thanks to Tanya.

NEEC

On 13 October 2012 and in a meeting with the Chief Justice, a National Efficiency Enhancement Committee – NEEC, was established to replace the committee which the Chief Justice previously shared with the organised legal profession. The GCB is to nominate two persons who will serve permanently on the NEEC. This structure will prove important in communicating the interests of the profession to the Office of the Chief Justice – which is now a department. I have been invited to serve on an *ad-hoc* committee tasked to prepare for a national conference in 2014 for the South African Judicial Education Institute. This is the platform that will prove critical in our quest to pool a number of previously disadvantaged persons and women for judicial training.

Financial matters

Our financial statements for the year ended 30 April 2013 have been finalised and raised no particular concern. The GCB finalised eight appeals emanating from the decisions of the various constituent Bars during the past financial year. There are five further applications for leave to appeal which have been referred to retired judges to provide us with an opinion on whether those applications have any prospects of success as required by the rules adopted in the AGM of July 2012. In three of those applications, leave to appeal was granted and another two are still pending. I express my indebtedness to the judges who have willingly assisted us in this regard.

A media release announced the award of the Sydney and Felicia Kentridge Award for Service to Law in Southern Africa to

former Chief Justice Sandile Ngcobo. Another entailed a tribute to the late former Chief Justice Arthur Chaskalson, noting that the late Chief Justice's contribution to the legal fraternity had left an indelible mark in defence of an independent legal profession, for which we owed our eternal gratitude to him. The conduct of the Zimbabwean Government in the arrest of Ms Beatrice Mtetwa, a renowned Zimbabwean Human Rights Lawyer, was also decried.

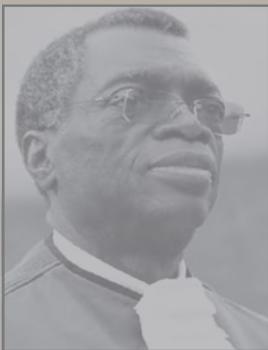
With the Legal Practice Bill being passed into law, in whatever shape, there appears to be one consequence at the Bar we cannot avoid. It is the fact that the practice of law in the country will require statutory registration. The one impact of this is that the independent advocates will fall under the same regulatory framework as the members of the Bar. I highlight this fact which has direct implications for one of the rules of the Bar which is at the core of our architecture – the rule that no member can practise from a building not approved by the relevant Bar Council. This rule, if not applied or applied to the independent advocates, will present its own difficulties. The most significant of that problem would be the resources, financial and human, necessary to address a number of practitioners that is probably twice that of the members of the Bar. On the other hand, to relinquish the rule will be perilous to the Bar. LET'S KEEP THINKING ... **A**

Endnotes

- ¹ My highest appreciation for the support and work of the Executive Committee; Pieter Pauw SC, convener and his team of the Rules Committee in Johannesburg; Nirmal Singh SC, the Ethics Sub-Committee in KZN; Parliamentary Committee in Cape Town – commenting on various Bills bearing relevance to the profession; Brahm du Plessis SC, chair for the newly constituted Human Rights Committee of the Johannesburg Bar and his team; Nante Diedericks SC, chair for the Road Accident Fund Committee at the Pretoria Bar; Gerrit Pretorius SC as convener, and his team for the Bursary Committee; Leon Dicker, convener of the Laws and Administration Committee of the Pretoria Bar; Thami Ncongwane SC, convener for the Finance Committee and his team; Timothy Bruinders SC, convener for the Advocacy Training Committee; Jannie van der Merwe, National Pupillage Coordinator; Rudi van Rooyen SC, as convener and his team on the Ad hoc committee on the Legal Practice Bill; the team compiling our submissions to the Judicial Commission; our representatives on various bodies – Kameshnie Pillay, Legal Aid South Africa; Pops Aboobaker SC, Professional Provident Society; Jacques Malan, Legal Provident Fund; Michael Kuper SC, director of AFSA; Hennie Mellet and his team for Advocate; the Secretariat, Elize Van den Heever and her team, Tracy Nothnagel and Susan Molefe, without whom the GCB is impossible to be and to have ever been and most certainly whose input will inspire the growth of the organisation from year to year in the future.
- ² The resignation by Advocate Izak Smuts SC. Izak Smuts also resigned as a representative of the advocates' profession on the Judicial Service Commission.
- ³ MJ Lowe SC (Eastern Cape); DS Fourie (North and South Gauteng Court); O Rogers SC and A Schippers SC (Western Cape); M Madlanga SC (Constitutional Court) and GC Wright (North and South Gauteng divisions).

Stop press: Media statement

Tribute by the General Council of the Bar of South Africa to the late former Chief Justice Pius Langa



The GCB is saddened to learn of the death of former Chief Justice Pius Langa who died today [24 July 2013] at the age of 74.

The former Chief Justice was born in Bushbuckridge on 25 March 1939. His legal career took off in 1977, after obtaining BJuris and LLB degrees from the University of South Africa. He was admitted in that year as an advocate of the Supreme Court of South Africa, practised at the Natal Bar and in early 1994, attained the rank of senior counsel.

Justice Langa had a distinguished career. When the Constitutional Court was established with the advent of a new democratic order in 1994, Justice Langa was appointed, together with ten others as the first judges of the new court. He became its Deputy President in August 1997 and in November 2001, assumed the position of Deputy Chief Justice of South Africa. He was appointed as Chief Justice and head of the Constitutional Court in June 2005 and served on that court with distinction until his retirement in October 2009.

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Justice Langa was founder member of the National Democratic Lawyers (NADEL) and served as its president from 1988 until 1994. He has served on the boards and as trustee of various law-related institutions. He was also the Commissioner of the pre-Constitutional Human Rights Commission (later known as the Human Rights Committee).

Justice Langa has left an indelible mark in the constitutional jurisprudence of our country. He has helped South Africa to carve for itself a respected place in the world constitutional democracies. His humility as a person will be difficult to match. His legal acumen will remain a beacon for every lawyer to emulate and his legacy one that we as lawyers and as nation must protect.

The former Chief Justice was a recipient of the Sydney and Felicia Kentridge Award, a prestigious award conferred by the GCB to a person in recognition of dedication and excellence in service to law in Southern Africa.

The GCB extends its sincere condolences to the family of Justice Langa – a true son of Africa.

May his soul rest in peace. **A**

Ishmael Semenya SC, chairman of the GCB
24 July 2013