Future Leaders Symposium

Durban 5 and 6 July 2013

By **Sarah Linscott**

Silks who attended the symposium. From left to right: Avril Potgieter SC, Andrea Gabriel SC, Marumo Moerane SC, Ahditya Kissoon Singh.

The Future Leaders Symposium 2013 was held at the Maharani Hotel in Durban on 5 and 6 July. It was a GCB initiative but was directly organised by the Kwa-Zulu-Natal Bar. The aim of the symposium was to gather junior members of under ten years call to debate the issues of the day. The range of juniors present ranged from baby juniors only six months into their first year of practice, to juniors who have been in practice for a number of years. Racial and gender head counts are never pleasant but given that one of the main issues facing the profession is that of transformation, it has to be noted that the range of delegates at the symposium reflected a true cross-section of South African society in terms of both race and gender.

The symposium commenced on the Friday night with a cocktail party at the Maharani. The delegates were welcomed by Ahditya Kissoon Singh SC, Moerane SC and Gabriel SC. It was then that the tone for the conference was set. The emphasis was on informality, with a few jokes and one at the expense of those who had had turned up in jacket and tie, but as was pointed out by Gabriel SC while the delegates were encouraged to dress casually, the matters to be discussed the following day were anything but casual.

The three speakers were:

Moerane SC *'Judicial Appointments: Should the Bar be Concerned?'*

Olsen SC *'Will the Legal Practice Bill Affect the Bar?'*

Findlay SC *'Senior Counsel* Quo Vadis?'

The format for the symposium was a presentation followed by breakaway sessions where the delegates, divided into groups, debated the issues raised by the speaker. On return questions were then put to the speaker and debated amongst the delegates and the seniors leading the discussions. This combination of both information and interaction sparked lively debates which were often hilarious.

It is at this point that writing an article about the symposium becomes difficult. The purpose of the symposium was to gather together junior members of the Bar to debate the issues facing our profession as advocates and, as an overarching theme, the future of our Bars as we know them. It was not the intention of the conveners to have us hammer out some sort of manifesto on all of the issues raised by the speakers or debated amongst the delegates. Therefore, what follows are not minutes. Words and phrases such as 'agreed' or 'it was felt that' are used to convey the sense of the discussions. Much was debated but no resolutions were reached. That was never the intention of the conference.

Judicial Appointments: Should the Bar be concerned?

Moerane SC gave an insightful and informative presentation about the process of judicial appointments and his experiences on the Judicial Services Commission. His views on the inner workings of the JSC were particularly interesting. He dealt in detail with the criteria used by the members of the JSC in deciding who should be appointed to the Bench. A complex and painstaking process where there are often many elements to balance in deciding on the appropriate candidate. He confronted openly the criticisms in the media about the perceived untoward influence of the ANC in deciding judicial appointments. He also discussed certain recent controversial appointments (and non-appointments). In his opinion the fears were overstated and there was not such untoward influence. He pointed out that the current system of the appointment of judges was an open and transparent process with the public being given an opportunity to observe the interviews of judges. He concluded with the view that our current system was doing a good job but like all human institutions could always be improved.

Some of the future leaders ...

In the discussion session a large part of the debate was focussed on trying to decide what made a 'good' judge. The trend of judges being appointed from the attorneys' profession and from academia meant that they may not have the technical understanding which would come from a person nominated from the senior ranks of the Bar. Many delegates expressed, perhaps not unsurprisingly, a preference for judges who had come from the Bar. However it was pointed out that many excellent judges were not from that traditional background.

Another discussion ensued as to how difficult it was to gauge whether a candidate would turn out to be 'a good judge' which in turn led to the unpacking of the complex question of what 'fit and proper' meant in the context of an appointment of a judge. It was suggested that some judges simply need time to settle into the position and there may be an interregnum period when their decisions may not be what they should be and appeals become necessary. The difficulty with that as was pointed out is that makes access to justice all that more expensive for the litigant. It was acknowledged that transformation is not an easy process and that there are certainly going to be teething problems along the way. The publication of the Judicial Code of Conduct in 2012 provides practitioners with a mechanism for engaging with judges who they feel are not executing their duties properly. However, as a matter of law, if a judge is wrong the only way to undo that decision is to appeal.

Moerane SC was also very encouraging of members to put themselves forward for acting appointments. Another issue discussed was that in applying for acting appointments the fact that the applicant was a senior junior and not a silk should not discourage the junior from applying to act. It was his view that all members of the Bar should be as actively involved as possible with judicial appointments and the judiciary in general.

Will the Legal Practice Bill affect the Bar?

An important point which is often overlooked in the debate was what it actually meant to be an 'advocate.' The flood of LLB graduates seeking only the title of advocate, entirely permissible in terms of the Admission of Advocates Act, and the growth of the independent Bar has meant that there is a growing number of admitted advocates practising outside the control of the established Bars. In order to be admitted as an attorney the applicant must, in addition to the academic qualification of an LLB, have passed national board exams and undergone practical training as a candidate attorney. In order to practise the attorney must submit to the continuing supervision of the Law Society, be in possession of a valid fidelity fund certificate and audit his or her practice accounts on an annual basis for submission to the Law Society. This type of tight regulation is engineered to protect members of the public in their dealing with attorneys. In addition to this further qualifications to practise as a sole practitioner are required and attending Continuing Professional Development (CPD) courses on changes to the current law are mandatory.

No such regulation exists for advocates. Historically, that duty has fallen to the individual Bars. As any member involved in complaints will tell you, the bulk of the complaints relate to independent advocates. There have been a few high profile cases where independent advocates have been struck off but those have been few and far between. It seems that the advocates who need greater regulation are the ones that fall outside of the established Bars. However, as 'advocates' we are all lumped into the same category.

Olsen SC was part of the task team appointed by the GCB to make representations to the Department of Justice on the Legal Practice Bill. One of the main concerns of the Bar was the loss of its independence. The GCB pushed very hard for separate governing councils regulating advocates and attorneys. The concern being that as attorneys vastly outnumber advocates, we could find ourselves being dictated to by persons who have little understanding of how an advocate's practice works or who may have a vested interest in using their majority to regulate the system in their favour. Olsen SC took the delegates through the major aspects of the Legal Practice Bill and highlighted the numerous political and legal challenges in this complex exercise, balancing interests of practitioners and the public at large. He freely acknowledged that there was a great deal about the Bill that was good and necessary for the both practitioners and the public.

One of his main concerns was the loss of the community that are the individual Bars. We are a minority and are outnumbered. If we are to maintain integrity as Bars we have to think long and hard about what the profession of an advocate is actually all

At the symposium. From left to right: Kerryn Watt, Loren-Joseph Pillay, Shameela Jasat, Sonja Franke, Devon Young.

Prianjali Kissoon Singh presenting Olsen SC with a thank you gift on behalf of the delegates.

about. The clear message from his presentation was that the delegates present must return to their Bars and get involved.

Olsen SC's presentation sparked a very lively debate. One of those present put forward the view that *'we only have ourselves to blame as we have been so ineffective in regulating our own profession.'* It was pointed out that other countries had overhauled their regulation of advocates and that the Bars there had survived. It was generally accepted that regulation was an inevitability but that the mechanisms by which this was to occur were, on the face of it, expensive, unworkable and fraught with implementation problems which could have the result of prejudicing practice as we know it.

Returning to the theme of the breakdown of the community, mention was made of enquiries being made by large litigation firms exploring the option of 'employing advocates.' Olsen SC's concern was that there if this were allowed to happen and large firms absorbed junior counsel into their ranks it could result in Bars withering away. Juniors would have no option as the firms would decline to brief outside their firm. In informal conversations some members did say that enquiries along those lines had been tentatively made of them. Others expressed the view that they had become advocates so as to not be employees and being tempted back into harness at the attorneys' profession was unlikely. In general the idea of being 'employed advocates' was not met with much enthusiasm.

A large part of Olsen SC's address revolved around the importance of junior members becoming more engaged with the Legal Practice Bill and the issues facing our profession in general. It was debated what 'getting involved' actually meant.

Some delegates strongly disagreed with Olsen SC's view that the Legal Practice Bill in any way threatened the profession. One in particular expressed a strong view that practice, as we know it, would not materially change as it was not the object of the Bill to do away with the dual profession. In her view as long as independent litigation specialists are required the Bar will always exist.

Another debate revolved around the access to justice goals of the Legal Practice Bill and the perception that the abolition of dual practice, which some believe is the object of this Bill, would bring down legal fees. The point was made that leaving litigation in the hands of only one person was more often than not a false economy as an attorney, who has many other duties to perform, would not be able to focus on the specialist requirements of preparing a matter for court. It was pointed out that attorneys have had right of appearance in the High Courts for many years now with no appreciable impact on the practice of advocates. *'We're there to take the bullets so they don't have to,'* was one wry comment.

Further, on the topic of access to justice, the point was made that there were a significant number of people in this country, dubbed *'the in-betweeners'* by the delegates, who had real legal problems requiring redress from the courts but who fell between the two stools by not qualifying for legal aid on a means test basis and not being able to fund their own litigation. It was debated about how far the Bar should go in picking up the slack between these two positions. In Olsen SC's view the lack of access to justice in a civil matter because one did not have the money to pay the fees in order to right a wrong that had been done, was tantamount to persons not reporting crimes because they did not believe they would be properly investigated. This was not something that was good for society in general and would only lead to tensions and perhaps people resorting to methods other than the courts to resolve their disputes. This was something that the profession had to address as a whole.

It was generally agreed that the approach to the Legal Practice Bill is largely a question of mindset. It was Olsen SC's view that the Legal Practice Bill is a reality and it is a question of 'when' not 'if' it will be made law. If we are to take that as a given our next step, junior advocates, is to thoroughly investigate and interrogate its provisions in order to determine how best to make it work for us as members of the Bar. It was emphasised that juniors need to have a greater voice in the future of the profession and must take active steps to involve themselves in their Bar councils. That is the only way the community will be preserved.

Senior Counsel: *Quo Vadis?*

This final presentation was given by Findlay SC. In a fascinating talk he sketched out the history of the dual profession in South Africa and the reception into our legal tradition of the honour of silk. It has been a long and winding road and it seems that

LN Ad
Family Law Solutions

there are still a few twists and turns ahead. Findlay SC also shared with the delegates what his status as silk meant to him, the challenges he experienced in applying for it and his view on its meaning in a modern constitutional democracy like our own. Having been a silk since the early '80s and directly involved in recommending members of his own Bar for silk he was the ideal person to place in context the current debate around the concept that is the honour of 'silk'.

The recent SCA decisions on the legality of the State President conferring silk and the Constitutional Court challenge to be heard shortly were briefly discussed. However, the emphasis of the talk and the subsequent discussions was not on the legal intricacies of whether the State President could confer the honour on practitioners. What was roundly debated was the notion of silk and what it meant to the delegates as junior practitioners.

Is it a long service award? Is it a mark of achievement of a certain level of technical skill that warrants greater respect? Is it just about the fees? How are they selected? What are the advantages of taking silk? Can taking silk to early be a bad thing? What does it mean when your application for silk is refused? These were all questions that were roundly debated in the breakaway sessions and before Findlay SC when we returned to the main symposium room.

It does not appear that the views of Mansingh and her compatriots, that the concept that is 'silk' is an outmoded colonial relic, find favour. There was a general consensus that the rank of silk was an important one and worth preserving. Findlay SC shared his experiences of junior members taking silk too early and killing their practices. He himself was talked out of it on his first application. The process by which a person is recommended for silk seemed to be whether the applicant had the technical abilities and whether it was in the applicant's best interests to be elevated. Findlay SC pointed to a number of cases at his Bar where members had to leave the Bar as they were not able to sustain a silk's practice.

He also alluded to the fact that as many judicial appointments are coming from the attorneys' profession and academia, the top of the Bar is *'being blocked by a bunch of old codgers'* (his words not mine). Silks are hanging around longer than they used to it seems and this is having a knock on (or down) effect on those seeking to move up the ranks. He drew a parallel between the engineering profession where the honorific Pr Eng. is conferred upon senior members of the profession of engineering. This is an indicator to the public at large that a decision has been taken by the person's peers that he or she is of sufficient experience and competence to be given the status.

As with all traditions which hark back to earlier eras it is important that we analyse and interrogate the need and efficacy of such traditions. The process by which silk is conferred may require an overhaul but that is an issue of procedure and not substance.

Part honorific, part quality control, part long service award, part peer review the debate clearly revealed that the concept of silk is not an easy one to define. However, on the strength of the discussion, it seems that the future leaders of the Bar present were of the view that it was a vital part of the profession and its hierarchy.

Whilst there may be methods to make the selection criteria of silk more transparent the institution itself and what the initials 'SC' after a practitioner's name signified was sufficient to warrant it being retained. The institution of silk is much more than the sum of its parts.

Conclusion

What does the future hold for the bright young things of the Bar who gathered together at the Maharani Hotel on the 5 and 6 July? Was it just the prospect of a free trip to Durban for the winter sunshine? I don't think so. There was a palpable *esprit de corps* amongst all present. We like what we do. We like being advocates.

The challenges are there and we experience them on a daily basis. The opportunity to meet colleagues comes around all to rarely. We got along like proverbial houses on fire sharing the trials and tribulations of starting practices, dealing with difficult judges and attorneys who don't pay you but above all reminding each other of the profound satisfaction at being the master's of our own ships.

There may be storms ahead (and some ships may be more seaworthy than others) but I am confident that this little flotilla is sailing to a bright and rosy future. *Mutantur omnia nos et mutamur in illis.* (All things change, and we change with them.) A