

The National Bar Examination

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IT IS AXIOMATIC that for the proper practice of the advocates' profession there are, essentially, two broad requirements, apart from integrity: they are specialised knowledge and particular skill. The knowledge that is required is knowledge of the substantive and procedural law; the skill involves the ability to apply that knowledge to good effect in practice. During the 1970s the South African Bars introduced a system of pupillage in an endeavour to ensure that persons entering the profession were suitably equipped with the necessary knowledge and skill. During the first few years there was no Bar examination to be passed by a pupil. Unfortunately, however, not all aspirant advocates are thus equipped and, pupillage notwithstanding, a few always fail to attain the standards of knowledge or skill required to justify their being admitted to the Bar and being allowed to practise as members thereof. After the Pretoria Bar had, in 1978, introduced its own Bar examination, in 1980 the General Council of the Bar of South Africa (the GCB) created the National Bar Examination Board (the NBEB) to set and conduct a system of examinations for pupils with the object of testing whether or not they were ready to enter practice after completion of their pupillage. The system has developed over the 35-odd years since its inception and the NBEB has become a respected institution.

Whilst the NBEB reports and is accountable to its parent body, the GCB, it is autonomous inasmuch as the decisions which it takes in all matters regarding the syllabus, standards and conduct of the Bar examinations and who does and who does not pass them, are taken by it free from any undue influence, interference or instruction from the GCB or from any other person or body.

Structure of the NBEB

The NBEB is made up of two categories of members, all of whom are appointed by the GCB.

The first category consists of:

- (a) a national convenor, at present a senior member of the Durban Bar;
- (b) a national pupillage co-ordinator, who is at present a member of the Cape Bar;
- (c) five regional or provincial convenors, all members of the Bar, of whom four each represent the interests of one of the four major Bars which are examination centres, viz Johannesburg, Pretoria, Cape Town and Durban, whilst the fifth represents the interests of all the remaining smaller South African Bars;
- (d) a chief examiner, at present a senior member of the Johannesburg Bar, who represents the examiners generally;

- (e) seven moderators, all of whom are Judges or retired Judges of the Supreme Court of Appeal (the SCA) or of the High Court of South Africa. At present one of the moderators is the President of the SCA, one is a serving judge of appeal in the SCA, one is the serving Deputy Judge-President of a provincial division, one is a retired Deputy Judge-President, one is a retired judge of the High Court and the remaining two are serving judges of the High Court.

Both the President and the serving judge of the SCA were appointed whilst they were judges of provincial divisions. All judges have been drawn from various divisions of the High Court so that they can bring to the NBEB their knowledge and experience of those various divisions.

Some of the board's members have served on it for many years. This is conducive to continuity. Others have been appointed more recently, and have imported new ideas and approaches.

The national pupillage coordinator attends the meetings of the NBEB and liaises with the board so as to ensure harmony between the board's decisions and the national pupillage programme.

The second category of members of the NBEB consists of the various examiners, all members of constituent Bars, who set the question papers in the various subjects on which candidates are examined, and mark the candidates' answer scripts. There are two or more examiners for each subject. Some of them are silks, others are juniors of senior or middle junior status, all drawn from the Pretoria and Johannesburg Bars.

The subjects are:

- (1) legal writing;
- (2) motion court practice and procedure;
- (3) ethics;
- (4) criminal procedure and evidence;
- (5) preparation for and conduct of civil trials.

Examination procedure

The examiners set the question papers in their respective subjects. The draft question papers are then placed before a meeting of the NBEB, which considers and settles them. The examinations are then written by the candidates at each constituent Bar.

Save for legal writing, which lasts eight hours, each written examination lasts for one hour, with additional reading time usually allowed. The former is an 'open book' examination: the rest are not. >

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After the candidates have completed their written examinations and their scripts have been marked by the examiners, the scripts of all candidates who have achieved less than 55% in any subject (a pass-mark being 50%) are sent to a judge-moderator whose function it is to reconsider the marks awarded by the relevant examiner or examiners and to adjust them, either upwards or downwards, if he considers it necessary, so as to ensure a fair and uniform standard of marking throughout the country. Candidates who, after moderation, fail to achieve a pass-mark in any subject other than legal writing are then invited to attend an oral examination in that subject, unless they have failed to attain an aggregate mark of 35% for the four subjects other than legal writing. The oral examinations are held at each of the four examination centres (Johannesburg, Pretoria, Cape Town and Durban) about six weeks after the written examinations. They are conducted by examiners who are drawn from practising members of the Bar at each examination centre. They are presided over by a judge-moderator who has not been involved in the moderation of the written papers. Again, his function is to see to it that the oral examinations are conducted fairly and consistently throughout the country. Observers, usually members of the junior Bar, are permitted to sit in on the oral examinations if they wish.

Even if a candidate fails one or more subjects but is permitted to undergo a further period of pupillage, that candidate is exempted from repeating a subject if he or she attained a mark of 60% or above in the written examination in respect of that subject. This exemption is valid for three years.

Candidates who have failed legal writing are allowed to write a supplementary examination in that subject which, as before, is marked by the Bar's internal examiners and moderated by a judge-moderator.

No member of the NBEB or of the Bar who is involved in setting or conducting the NBEB examinations receives any remuneration for this work.

Pass rate

In recent years the pass rate for candidates sitting the Bar examination has risen, as have the numbers sitting the examination. Whereas previously a typical pass rate was approximately 65% to 70%, it is now in the region of 90%. In the most recent examination, completed in November, 2013, the pass rate was approximately 88%, the total number of candidates who sat the examination being 198. The pass rates for some previous years were:

June, 1995:	58.8%
November, 1995:	65.22%
June, 2000:	63%
November, 2000:	50.5%
2005:	78%
2007:	88.7%
2010:	96.49%
2011:	93.2%
2012:	91%

This improvement in the pass rate is not due to any relaxation in standards, which have been strictly maintained. It is attributable to a number of other factors, chief of which are, first, recent improvements in the pupillage system and in the training in advocacy which is now provided, at no extra cost, to pupils by the Bar; and secondly, the greater selectivity employed by the larger Bars in admitting applicants to pupillage.

Role of the NBEB

The NBEB is, in essence, an examining body. Whilst it liaises regularly and generally with the Bar regarding the training of pupils and their preparation for the Bar examinations, and to this end holds meetings from time to time with those involved in teaching and training, the NBEB has, for obvious reasons, refrained over the years from becoming too closely connected to the training and education of pupils. It has been astute to preserve its independence and, to an appropriate extent, its remoteness from training, so as to avoid the danger of being accused of being too 'cosy' with the trainers and tutors and of being seen or perceived as communicating with or influencing them improperly, or vice versa, to the possible detriment of its objectivity. It is obvious that such accusations could be very harmful to the whole institution of pupillage. This has occasionally given rise in the past to the criticism that the NBEB is out of touch with the pupillage programme and advocacy training. The criticism is not warranted. The board must preserve its proper distance from preparation for the examination and advocacy training: thus, no examiner or judge-moderator may participate in the training or lecturing programme, nor may any examiner examine any candidate who is or has been his pupil.

Other criticisms of the NBEB

The system is not perfect, nor will it ever be so. However, it has been improved and developed over time. Many of the changes which have occurred have come about as a result of the acknowledgment by the NBEB of imperfections in the system which have become apparent to it. If these changes have not been effected as rapidly as some would have wished, it is perhaps because, by its nature, the legal profession is cautious and conservative.

From time to time the cry goes up that the pass rate in the examinations should be higher, that all the written papers ought to be 'open book' examinations, as legal writing presently is, or even that the examination should be done away with altogether. The answer to these protests is, as stated above, that the profession of advocacy has, as one of its essen-

tial requirements, a certain knowledge of the law, both substantive and procedural: skill alone, in the form of speaking ability, articulateness, rhetoric, forensic persuasiveness and the ability to lead and cross-examine witnesses, will not suffice. Some knowledge of the law is supposed to be imparted to students during their university careers. However, the scope and depth of this university-acquired knowledge are regrettably decreasing and becoming of less and less practical use to pupils: some South African universities, for example, offer civil procedure and evidence as merely optional courses, even for an LLB degree. The result is that it is often only during their pupillage that aspirant advocates can really come to grips with the practicality of legal principles for the first time, and see them in application. Partly in an effort to bridge this gap, the NBEB a few years ago introduced a new subject into the curriculum, viz. procedure in the magistrates' courts. It was recently discontinued when the rules of the magistrates' courts were amended so as to bring them largely into line with the rules of the High Court, so that magistrates' court procedure was, in effect, covered in motion court practice and procedure and preparation for and conduct of civil trials.

Unfortunately we inhabit a world which is not perfect, and not all who aspire to the Bar are suited to the life, or are willing or able to put in the work required. Consequently some inevitably do not make the grade and fail to acquire the necessary knowledge during their pupillage. Without the requisite knowledge they are not fit to practise, and it would not be responsible for the Bar to hold them out to the public as being so. Nor is it an answer to say that if they do not know the relevant law they will be able, in practice, to go and look it up in a legal text book or on the Internet. The heart surgeon must know, without leaving the operating theatre to go and look it up, that he ought not to sever a coronary artery accidentally, and that if he should do so the consequences for his patient are likely to be adverse; the civil engineer must

know, without having to go back to his office to look it up, that if he uses the wrong mixture of stone, sand and cement for the concrete in his bridge it is liable to collapse; the pilot must know, without consulting his flying manual, that if he forgets to lower his aircraft's undercarriage on final approach his landing is unlikely to be a smooth one. Apart from other considerations, the likelihood that such experts will be afforded the luxury of time or opportunity to visit a library or to go onto the Internet in the heat of a crisis is, of course, minimal.

Just so, an advocate must surely know at once, almost by instinct, and without having to consult the Rules, for example, that his client is in duty bound to discover a relevant document which is in his possession, no matter how damaging it may be to his case; and should a presiding Judge enquire from him in Court whether or not he has fulfilled the requirements for the final interdict which he seeks, he is unlikely to receive shrift which is other than short if he replies by asking for an adjournment so that he can visit the library.

Conclusion

In any civilised society the maintenance of proper standards of excellence in the professions is essential. The profession of advocacy is no exception. It is not the function of South African universities to produce graduates who are ready-made legal practitioners, nor are they able to do so as matters presently stand. Consequently the burden falls squarely on the profession itself to ensure, in the interests of the litigating public, that the required standards are met and maintained. We consider that, over the last 35 years or so that it has been in existence, the South African Bar's examination system has, by and large, been successful in maintaining those standards. Whether it will continue to be able or allowed to do so in the future remains to be seen. **A**

Press statement by the **GCB**

Intolerance towards gay people in Africa

The General Council of the Bar of South Africa (GCB) notes with concern recent reports of state sanctioned intolerance of gay people in Africa (including in Nigeria and Uganda) and its consequences.

In this context the South African government is reported as having responded that while South Africa acknowledges and respects everyone's rights in the country, it will not follow the UN and the US, who have criticised laws against gay people in Africa.

Our Constitution, which entrenches human dignity, the achievement of equality and the advancement of human rights and freedoms as well as non-sexism as core values, implores the government to uphold and respect such values, not only domestically, but also internationally.

The GCB decries this position. No-one should be punished or discriminated against because of their sexual orientation or association. South Africa is rightly seen as a beacon of hope for the advancement and protection of human rights around the world – including the rights of gay, lesbian, transgendered and intersex people.

The GCB calls on the government to live up to this reputation, to set the right example to its own citizens and to the rest of the world, and to condemn anti-gay legislation and practices wherever they exist. **A**

Ishmael Semanya SC, chairman of the GCB
24 January 2014