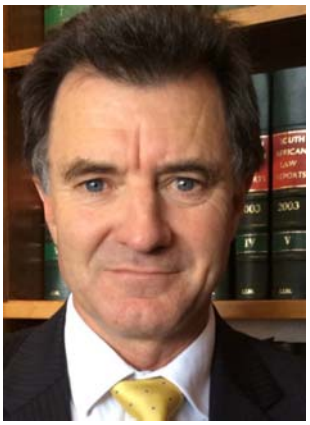

Bars must look inward to chart the way forward

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IN THE LAST WHILE I had occasion twice to be reminded of the great privilege that comes with practising trial advocacy as a sole practitioner while at the same time being a member of a society of advocates. I was also recently confronted with the realisation that we cannot take for granted that this will forever remain the case.

The first reminder involved a difficult arbitration which ran for several weeks. It was hard-fought within the confines of the arbitration venue but, outside of it, characterised by the civility and collegiality one sometimes takes for granted. There were no histrionics. There was never for one moment a reason to call the probity of counsel into question. The fact that all the counsel involved in the matter were from the same Bar did not, perhaps, make this inevitable, but it certainly played a significant part in the efficient and pleasant conduct of the litigation. Following the curtailed conclusion of the matter I was able to take off, at short notice, a few days away. I did not need to approach partners or an employer for permission. I simply drew a line through my diary and instructed my secretary to take messages.

The second reminder occurred recently when the Bars were, collectively, in a position to issue a strong statement in support of the unprecedented decision by the Chief Justice, the Heads of Courts and other senior judges to call a press conference to highlight and warn against the public attacks against sections of the Judiciary, by prominent individuals within the ruling party and its alliance partners, following the arrival in, and hasty departure from, South Africa, by the President of Sudan, Mr Omar Hassan al-Bashir. This was possible because the approximately 2 500 practising advocates who are members of the nine Bars throughout the country were able to speak publicly, at short notice, through the GCB, with one voice, in support of the rule of law and the continued independence of the Judiciary.

So much for the comforting reminders. Another event also, however, brought home the fact that old truisms about the Bars are perhaps no longer universally embraced. I attended the GCB's Young Leaders' Symposium, this year hosted by the Johannesburg Bar, on Saturday, 4 July (*see [page no] if this issue*). Topics for discussion amongst our leaders of the future, drawn from all our Bars, included '*Access to justice*' and '*What can future leaders do to further the interest of the Bar*' in the context of the Legal Practice Act. Throughout the day, however, the debate amongst the delegates, returned repeatedly to two themes: first, that the Bars are not doing enough to ensure that PDI juniors get more work; and second, scepticism as to the continued *raison d'être* of the Bars under the regime to be established for all legal practitioners by the Legal Practice Act ('LPA').

It was a sobering experience. The developments which have taken place over the last six months or so following the coming into effect of Chapter 10 of the LPA and the consequent establishment of the National Forum are mentioned in the annual report tabled at the AGM in July The report is published elsewhere in this edition of The Advocate (*see [pg no]*). Beyond its right to nominate six members to the National Forum, the GCB is not again mentioned in the LPA. Nor is any of its 9 nine constituent Bars. If the Bars are to continue to play the role we do currently – training, nurturing and mentoring new members and our junior Bar; providing guidance and assistance to the junior Bar through more senior practitioners; fostering collegiality and ethical conduct amongst practising advocates; disciplining those members who fall foul of our ethical standards; speaking with one voice when occasion demands it in support of an independent judiciary and the rule of law – we may have to do a better job than we appear to have done to date at reminding, in particular, our junior members, of the value of the Bars and the value of being a member of a Bar. We may also have to reconsider how better to respond to the demands amongst many junior members for more and better quality work and a faster transfer of skills.

TRADITIONALLY, those who decided to come to the Bar at a relatively young age, without first having practised as an attorney and built up expertise and a network of relationships and contacts amongst the attorneys' fraternity, glumly accepted that their early years at the Bar were likely to leave a great deal of time for pursuing new hobbies, provided they were not expensive. Building a reputation at the Bar, and consequently the financial rewards, often came but slowly. For a junior advocate it was frequently the attorney against whom he or she had tasted success in a low-value running-down Magistrate's Court trial from whom the first High Court trial brief arrived. Trust, and treasure, was accumulated over time. For many, that was just the way it was.

The way it was may no longer be viable. Fewer of our young members have the financial resources or backing to sustain the lengthy apprenticeship at the Bar which may have been the norm previously. The advent of our democracy has prompted an urgent need to fast-track the entry of young Black and female advocates and for us to do what we can to ensure that their practices are sustainable. It has also created an expectation that we should be doing so.

Much has already been achieved in pursuit of this goal: The leadership at many Bars periodically visits local universities to popularise a career at the Bar, particularly amongst black and female students. The admissions policy of many Bars seeks to ensure that PDI's comprise at least 50% of the pupillage intake. Transformation Funds at many Bars make available substantial transformation 'bursaries' to PDI students for the first year of practice. Junior counsel at many Bars are relieved of the obligation to pay Bar dues for the first year's practice. Maternity policies at many Bars provide that female members are paid a stipend for the period they are away from the Bar on maternity leave which covers their office expenses, and permits them to practise from home during this period. The housing policies of most Bars have moved away from the allocation of chambers strictly on the basis of seniority and this is now done with reference to the demographic make-up of a particular floor or group, resulting in young black and female advocates frequently being allocated desirable chambers ahead of more senior white colleagues. Some Bars have a second PDI programme which encourages silks to engage an additional PDI advocate and divert a third of the silk's fee to the PDI junior, thereby costing the client nothing but exposing the PDI advocate to work at a higher level and providing him or her with an income. Mentoring programmes for all junior counsel, including PDI advocates, are a feature at most Bars. Many Bars actively seek to promote the Model Briefing Policy, by periodically engaging with the larger firms of attorneys and encouraging them to identify and brief promising black, female and disabled counsel in their particular field of practice.

On the evidence of the observations by many of the delegates attending the Young Leaders Symposium, however, this might not be sufficient. We may have to think more creatively about how we as Bars can better respond to the demands of the junior Bar in particular. One promising avenue is to hold the Department of Justice and Correctional Services more strictly to account in implementing its own Framework for the Transformation of the State Legal Service. This policy framework was promulgated some years ago and, *inter alia*, sets targets to alter the State Attorney's briefing patterns so as to ensure that 70%, in value, of the instructions emanating from the State Attorney goes to PDI's.

The State is the single largest user of our services. Although in formal communications the Department maintains that these targets are being met, anecdotal feedback from our PDI members suggests that the State Attorney falls well short of these targets. At the time of writing I had arranged a meeting with the Project Leader on Transformation of the State Legal Services and Acting Chief Director of Legal Services to discuss these and other issues. Nonetheless, as Bars we can and should do more. In particular, we have to find ways to improve briefing patterns in the private sector.

Those young members of our Bars, impatient with the speed at which things appear to be moving and for that reason considering whether membership of a Bar is worth it, may, however, also wish to reflect. The Bars are often caricatured, even by some of our members, as stuffy old boys' clubs comprised largely of white men, protecting old privileges. The reality is somewhat different. White males still predominate in number but, for some years now, the GCB and all Bars have been co-governed and all Bar structures subscribe to the agreed 50/50 principle of governance.

MOREOVER, we all perhaps need reminding that the Bars both play an important part in fostering the parochial interests of our profession, and also serve a higher calling. As to the latter, the Bars create an indispensable environment for independent thinking and fearless representation of unpopular causes, and they are the best incubator of an accomplished and independent Judiciary. These are not small matters.

As one of our best, Sir Sidney Kentridge QC, expressed it nearly 25 years ago:

> *'I believe that all of us advocates, through our membership of our profession and the nature of our work in the Courts, have helped to maintain the idea of the rule of law as a counter-balance to naked executive power. The rule of law I believe is upheld not only in great cases or in political cases, but in the day-to-day work of lawyers for the defence in every kind of case. … In contrast to the advocates' profession, in the 1950s and 1960s there were few attorneys prepared to take on political cases. Why this contrast? Again, not because by nature we are morally superior to our colleagues at the Side-Bar. It was because we were independent practitioners, members of a profession which inculcates into its members certain standards of objectivity and of public duty.*
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> *… The South African Bar … requires its members to observe the so-called Cab Rank Rule* (which) *requires that a member of the Bar should be prepared to accept at a reasonable fee any brief in a Court in which he ordinarily appears … This rule has real content. It is not a general rule of the legal profession. It is a rule of the Bar.*
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> *… The independent Bar, inseparably from the independent bench, is the protection of the citizen against the State. Unless, under the new constitution which is coming, the government does not seek to extend its own powers, to have its own way, at the expense of the ordinary citizen – unless, that is, it proves to be unlike every other government in the world – the separate Bar will be needed as much in the future as it is now.*
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> *…* [T]*here is no reason why the independent Bar should not continue to exist, and to play the same valuable part in the legal process as it has in the past. It will attract able practitioners of all races with a taste for advocacy, not necessarily immediately they have left university but after some experience as attorneys or, perhaps, in academic law. Far from being a hindrance to justice, it will be one of the guarantees of justice. It is a real protection for every citizen that there is a body of independent and able advocates ready to defend them in the Court. And if the independence of the Judiciary is to be preserved, the Bar should in general continue to be the main if not the only source from which Judges are selected.'*[1]

The 'Cab Rank' rule is merely one of the rules which are fundamental to the genuine protection of the weak and unpopular in society, which will doubtless be lost were the independent Bar to disappear or becomes emasculated. It:

> *'… is less a rule than an ethos that barristers understand and follow and it provides a protection for them in taking on unpopular cases, which are the ones that matter. No one gives a jot about barristers representing a client accepted by society. The rule exists for outlaws and unpopular causes.'* [2]

In an address to the Johannesburg Bar in 1997 at an occasion honouring his appointment as Chief Justice, the late Ismail Mohamed CJ said this of his, sometimes troubled, years at the Bar:

> *'There were … influences and traditions at the Bar which never died and which must be crucial for the commitment made by the new Constitution to bring real justice, dignity and freedom to all the citizens of this potentially extremely exciting country, of so much promise and richness; so much romance and cruelty. I am infinitely richer for the opportunity to be exposed to these influences and traditions.'* [3]

As these observations remind us, an independent Bar remains a crucial component of our Constitutional democracy. Any doubts about that should be dispelled. In important ways an independent Bar of practising advocates is fundamental to the continued independence of the bench and the fostering of the rule of law in the country. We should all remember that.

As to purely parochial considerations of self-interest: In the post-LPA era the loss, or even weakening, of an independent Bar would quite likely result in a considerable deterioration in the position of much of the junior Bar. While it does not preclude them, the LPA creates no legislative entitlement for associations of advocates. In a Bar-less future, it is likely that a series of super chambers would spring up, populated by a number of heavy-weight silks and some handpicked juniors, leaving the rest to fend for themselves as best they can. That is not a future anyone should contemplate with equanimity. A

Endnotes

1 Consultus (October 1991).
2 Wallis JA in a lecture delivered in the UK in 2010.
3 As reported in the South African Law Journal (1997), Vol. 114, at 606.