

GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA

CHAIRMAN'S REPORT : 2014/2015

This year ushered in a new era in the regulation and administration of all legal practitioners, including the advocates' and attorneys' professions, with the promulgation of the Legal Practice Act, 28 of 2014 ("LPA") on 20 September 2014. The provisions of the LPA come into effect progressively. The first part, chapter 10, established the National Forum ("Forum"), an interim body intended to exist for no more than 3 years, and contains certain transitional provisions. It came into effect on 1 February 2015.

MUCH HAS BEEN SAID and surmised about the LPA. What is certain is that it is now very much a part of our lives. Despite strenuous – albeit belated – efforts, the organised advocates' profession proved unable materially to influence the final iteration of the legislation. Because the structure of the LPA reposes significant legislative authority in the Forum, the final script on how legal practitioners will in the future be regulated has not yet been written. The Bars owe it to our profession, the judiciary and the public who make use of our services to deploy our considerable human resources to ensure the best possible outcome to this process. More later about developments on this front.

Elize van den Heever

Sadly, Elize van den Heever has been in poor health for some time. With her blessing, we have commenced the process of finding a possible successor for her, should she decide to retire. Our prayers and best wishes go out to her. Elize's indisposition has made us all realise just how much we have been reliant on her over the years. Her enforced absence from work these past few months has had an impact on the administration of the GCB in ways large and small. As a consequence, aspects of the organisational side of the AGM this year may be somewhat less fluent than in previous years. This report, too, will lack the up to date and accurate statistics of reports in previous years. My gratitude goes to the rest of the GCB staff – Michelle Ndaba, Susan Molefe and, especially, Tracy Nothnagel, for doing that little bit extra to help fill the void left by Elize's absence.

The Advocate

Another GCB stalwart, Hennie Mellet, past editor of *The Advocate*, retired last year. The announcement came too late for us formally to honour Hennie at our gala dinner in Johannesburg but, with his blessing, we had hoped to do so at our AGM this year. Sadly, Hennie recently advised that, on doctor's advice, he will be unable to travel to Cape Town. At the AGM last year we decided to purchase and award to Hennie at this year's AGM, as a small token of our appreciation and esteem for his many long years of service, a commemorative gold coin. Arrangements will now be made to do this at a more modest ceremony at Hennie's convenience. I am pleased to

report, however, that Frank Snyckers SC arranged a farewell dinner for Hennie, which some members of Exco were able to attend.

Hennie's successor, Philip van der Merwe – past editor of the *De Rebus* magazine for more than 20 years – is settling in well. A successful first edition of *The Advocate* under his editorship was published in April this year. We are delighted to have so experienced and able a successor to Hennie.

Press releases

While the potential changes which the LPA holds for the advocates profession and the organised Bars cannot be understated, the GCB and the Bars continue to be involved in matters affecting the practice of law, and the rule of law – often of a parochial nature, sometimes involving national issues, and occasionally with an international dimension. Guided by a recently-revised policy on when and on what topics to speak publicly, during this past year we issued press statements on, *inter alia*, the jailing of critics of Swaziland's judiciary; the derogatory insults and threats made against Justice Masipa, who had presided in the trial of Oscar Pistorius which generated such interest world-wide; on the mass abductions and killings in Nigeria by Boko Haram and the Nigerian government's response thereto; and on more recent events following the arrival in, and hasty departure from, South Africa by Sudanese President Omar Hassan al-Bashir, despite a Court order directing the South African Government to ensure that he remained within our borders *pro tem*. Conversely, after considerable discussion, we decided against issuing a press statement following the latest outbreak of xenophobic violence in our country a few months ago.

Constitutional Court vacancy

Earlier this year it came to our notice that a permanent vacancy on the Constitutional Court had remained unadvertised for over a year after Justice Skweyiya's tenure had come to an end. Enquiries were directed to the JSC. In response we were informed that a special sitting of the JSC would be convened for the purpose of filling the position. At the time of writing, a short-list of 4 women were to be interviewed by the JSC for this position.

International Conferences

It remains important for the Bars' leadership to maintain contact and a dialogue with independent Bars across the world. Notwithstanding the not-inconsiderable expense, one way of ensuring this is by attending international conferences. McCaps Motimele SC and I attended the World Bar Conference in New Zealand on behalf of the GCB in October last year. McCaps went to the International Bar Association Conference in Tokyo later in the year. Both of us attended the Commonwealth Law Conference in Edinburgh in April and the IBA Bar Leaders Conference in Prague in May this year.

Advocacy Training

The advocacy training committee held another successful week-long workshop at the Wallenburg Centre in Stellenbosch during January. As usual, trainees drawn from not only our country but also from several SADEC countries attended, and the corps of trainers was graced by the presence of several

of our most senior practitioners and judges, as well as prominent barristers from abroad. The Wallenburg week continues to be an exceptional blue ribbon event of which the GCB may be justifiably proud. Our appreciation to Tim Bruinders SC, Jannie van der Merwe and the many others responsible for so ably organising and running this annual event.

Sub-committees

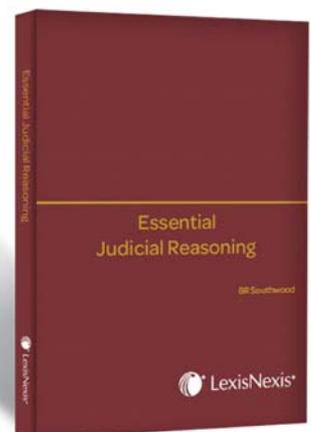
The GCB's various standing sub-committees continue to do sterling work. It is not the task of this report to identify by name all the individuals who give so selflessly of their time, but a special word of mention needs to go to Jannie van der Merwe, chair of the pupillage committee, and his team; to Tim Bruinders SC, chair of the advocacy training committee and those who assist him; to Braam du Plessis SC, chair of the re-constituted human rights committee and its energetic members; and to Archie Findlay SC for his work with the NEBEB. My thanks also to McCaps Motimele SC, deputy chair of the

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GCB, to Craig Watt-Pringle SC, vice chair, and to all the members of Exco, for their support and assistance throughout the year. Thank you also to all Bar chairs, their Bar Councils, and the administrators for helping make my task an easier one. Those many others not mentioned by name here are nonetheless appreciated and also have my gratitude.

Silk

Following the Constitutional Court decision of December 2013 in *Mansingh*, the Minister of Justice in June last year advised the GCB that the nine “batches” of silk applicants from across the country, which were at that point still awaiting approval, would be processed to completion within a month. In the event, batches were only approved incrementally over the next six months. By the end of the year, all but two – both from the Cape Bar – had been approved. In correspondence with the GCB, the Minister advised that the problem with processing the Cape applications lay with the Judge President of the Western Cape High Court. Following a meeting with the Minister, the Judge President in March this year addressed a letter to the Minister advising that he had consulted his senior judges; that they all accepted that the Cape Bar Council had followed a process that was fair and thorough; that no negative comments had been raised in respect of any of the 17 candidates; and that he accepted the Cape Bar’s decision to recommend them for silk.

Following this meeting the Minister addressed letters to me and to the chair of the Cape Bar, recording that he and the Judge President had agreed that the Cape silk applications would now be processed “without any further delay”. Unfortunately, that did not happen. Instead, the Minister subsequently communicated with the Cape Bar concerning a perceived lack of transformation at the Bar arising from information the Minister had evidently received from unnamed individuals. At the time of writing, the Cape Bar was in the process of responding to points raised by the Minister. The chair of the Cape Bar will, I understand, be reporting to him in this regard and engaging with him as regards the Minister’s ongoing failure to process the Cape silk applicants – 10 of which have been outstanding for more than 18 months – despite his undertaking four months ago to do so. The issue is an agenda item for discussion at our AGM.

Application to strike off 3 senior NPA Advocates

Following a request from the National Director of Public Prosecutions (“NDPP”) and trenchant criticism levelled at 3 senior members of the NDPP in judgments of the High Courts and the Supreme Court of Appeal in *Freedom Under Law v National Director of Public Prosecutions* 2014 (1) SA 254 (GNP); *NDPP v Freedom Under Law* 2014 (4) SA 298 (SCA); *Booyesen v Acting National Director of Public Prosecutions & Others* [2014] 2 All SA 391 (KZD); and *Zuma v Democratic Alliance* [2014] ZASCA 101 (28 August 2014), the GCB earlier this year launched an application in the North Gauteng High Court for the striking off and/or suspension from the roll of advocates of the three senior members of the National Prosecuting Authority (“NPA”).

Not-unexpectedly, the application has attracted media interest. It has been characterised by some as a part of the

well-publicised factional battles which appear to be raging within the NPA. It is of course no such thing. While we were not so naïve as to think that the GCB could remain aloof from accusations of this kind, the application was driven by the judicial commentary on these individuals and the obligation which rests on the GCB in terms of sections 7(1) and 7(2) of the Admission of Advocates Act, 74 of 1964, to bring applications of this kind where it is thought necessary to do so. The High Court does not have the machinery to conduct investigations which may be necessary for this purpose. It is incumbent on the Bars to alert the Court to circumstances which may require it to exercise its power to determine whether individuals are fit and proper to continue practising as advocates. At the time of writing, replying affidavits in the application were about to be finalised. The matter will probably be enrolled for hearing later this year or early next year.

An organisation known as the Higher Education Transformation Network (“HETN”) in April resolved that it considers the GCB’s decision to launch the application against the three NPA advocates to be racially motivated. It gave notice that it intends to apply to join the proceedings in support of the three individuals as *amicus curiae*. It also gave notice that it intends lodging a complaint with the International Bar Association (“IBA”) against the GCB on the grounds that we single out only black advocates for applications of this kind. Subsequent to having taken this decision, HETN has set about trying to gather data from the GCB and its constituent Bars to support the charge. At the time of writing, neither its application to join the High Court proceedings nor its complaint to the IBA had yet been launched. The HETN is a litigious and well-resourced, if somewhat quixotic, organisation. At the same time as it took its decision to oppose the GCB’s application against the NPA officials, it also resolved that the Public Protector should be struck off the roll of advocates and invited us to do so. A space to watch ...

Transformation

Transformation remains an important and an often controversial issue for the Bars. The evolution of the legal profession in South Africa from the point of view of gender and race is a large topic. While the complexion of our Bars is changing, viewed as a whole the Bars in South Africa remain under-represented by black people and women. The reasons for this are manifold and complex. There is not the space to discuss them here, but suffice to say that it remains the obligation of every Bar actively to do everything possible to ensure that anachronistic practices and historical impediments to all practising advocates competing on a level playing field, are broken down. Many Bars have in place a raft of transformation initiatives, but we can all, always, do more.

Transformation is an agenda item on this year’s AGM. I propose that in future years it should be a standing item on our agenda and that all Bars should be required to report to the AGM, in writing, on the transformation initiatives undertaken by them during the previous year and on the relative success or failure of these initiatives, so that progress can be monitored and remedial assistance proposed where this is necessary and feasible. Also on the issue of transformation, I am pleased to be able to report that Lexis Nexis has expanded

its sponsorship of PDI juniors and this year donated, to over 50 of our PDI members throughout the country, a laptop/notebook computer with free 3G access and its online research package for 12 months (see 2015 *Advocate* April at 9).

The LPA

Finally, back to the LPA:

At the invitation of the Minister of Justice, the GCB in April, prior to the inaugural meeting of the Forum, held discussions with the LSSA and other bodies represented on the Forum. As a result we were able to agree on consensus candidates to serve as Chair and Vice Chair of the Forum respectively. In the event, the Minister invoked his prerogative to make his own appointments to these positions. Happily, the position of chair went to one of our own, Moroko SC. That of vice chair was awarded to Max Boqwana, currently co-chair of the LSSA. I have extended our congratulations and best wishes to both of them for the duration of their tenures in these very responsible positions.

Following decisions reached at our previous AGM, John Myburgh SC was engaged, on a remunerated basis, to drive and co-ordinate our work on the Forum. The imposition of a special levy to fund the payments to Myburgh SC was recommended and Bars are in the process of giving effect to that resolution. Meetings have been held between Myburgh SC, our six nominees to the Forum and me in order to align our approach. The deputy chair and I have also met separately with Myburgh SC.

Arising from these meetings, work has commenced on identifying a suitable person to promote for the important position of Executive Officer of the Forum in terms of section 98(2)(a) of the LPA. A fee survey has also been circulated to all Bars with a view to establishing a database for purposes, in due course, of making submissions to the Rules Board and, subsequently, the South African Law Reform Commission, on the tariffs of fees for advocates contemplated in sections 35(1) and 35(4) of the LPA.

In addition, proposals have been circulated to all Bars concerning the establishment of sub-committees to prepare reports on the important work with which the Forum is charged. In summary, this includes the following:

- a) The Forum must make recommendations to the Minister of Justice, who must within six months of receiving them, promulgate regulations, on:
 - (i) An election procedure for constituting the Legal Practice Council, the permanent statutory body which will regulate all legal practitioners once the Forum's term expires (section 97(1)(a)(i));
 - (ii) The establishment, composition, powers, functions and manner of election to, the Provincial Councils, which must be established in every province, and to which the Legal Practice Council may delegate such powers and functions which, in the interests of the legal profession, are better performed at provincial level (sections 97(1)(a)(ii) to (iv));

- (iii) The practical vocational training requirements for pupils before they can be admitted as legal practitioners, and the right of appearance of any candidate legal practitioner (including a pupil) in a Court or any other institution (sections 97(1)(a)(v) and (vi));
- (iv) A mechanism to wind up the affairs of the Forum (section 97(1)(a)(vii)).

- b) The Forum is also required to prepare and publish a code of conduct for legal practitioners, candidate legal practitioners (including pupils), and juristic entities (section 97(1)(b)).
- c) The Forum is further required to make rules in respect of the following:
 - (i) A competency-based examination or assessment for candidate legal practitioners, including pupils (section and the manner and form in which complaints of misconduct are to be lodged with the Legal Practice Council (sections 109(2)(a)(v) and (vi));
 - (iv) "Any other matter" in respect of which rules must be made in terms of Chapter 10 (section 109(2)(a)(vii)).

There are, however, certain issues of principle on which the Bars will have to take a position prior to the work of these committees being finalised. These include:

- a) Whether to promote the idea that the existing Bars should in future serve as standing sub-committees of the Provincial Councils established in terms of section 23 of the LPA. (Section 21(1)(d) of the LPA provides that the Legal Practice Council may delegate to the Provincial Councils any of its powers for the purpose of executing the Council's powers and obligations. Section 23(5) provides that Provincial Councils must reflect the proportion of attorneys and advocates in its area of jurisdiction. Sections 23(6) and (7), however, provide that a Provincial Council may establish one or more committees to assist it in the exercise of its powers and the performance of its functions, and that such a committee "may consist of only attorneys or advocates to deal with matters relating exclusively to the attorneys' or advocates' professions, respectively".) These provisions would seem to provide an opportunity for the Bars to continue to serve as fraternities for practising advocates, but to offer services similar to those which they have traditionally provided to practising advocates and members of the public.
- b) Whether to admit as members of our Bars in future the new category of advocate created by section 34(2)(a)(ii) and (2)(b), the so-called "non-referral" advocate, who may render legal services on request directly from members of the public.

I propose that this meeting should resolve to appoint a representative sub-committee to carefully consider these and other issues arising from the LPA, and to provide a written recommendation to all Bars and the GCB for consideration once it has done so. 