


clients. This would put them in competition with the attorneys from whom they receive referrals and, more particularly, will bring to an end their very independence, an indispensable attribute, as pointed out by the Chief Justice.

#### • On the court system

Some time ago the Hoexter Commission recommended that as a matter of course all appeals should lie to full benches of the provincial divisions and that only with the special leave of the Supreme Court of Appeal itself should one be able to go on appeal to it. That is a proposal that warrants swift acceptance and implementation. The logical result of such a step will be a diminution in number of the appellate judges who will be needed to deal with important matters of law and legal policy.

At the same time one questions the continued state of affairs where we have two highest courts in the land, one the Supreme Court of Appeal and the other the Constitutional Court. In this regard I ask the question: has the time not come to accept that within a laid down period of time these two courts should become one? It would also end the somewhat surrealistic situation that both courts deal with the interpretation of the Constitution and with the development of the common law in the light of the provisions of the Constitution. According to Constitutional Court jurisprudence it is incumbent upon the litigant to wend his weary way, often from the magistrates' court, to the high court, some years later to the Supreme Court of Appeal and, finally, to the Constitutional Court. That cannot be healthy for the administration of justice.

Not all judges are paragons of judicial virtue. The time has surely arrived where, like countries such as Canada, it is accepted that our judges are accountable for their conduct. The Judicial Service Commission has no jurisdiction over a judge once appointed. What we need in South Africa is a body akin to the Canadian federal and provincial judicial councils where complaints can be laid against allegedly misbehaving judges and be properly investigated.\* 

\* See also p 27 of this issue.— Editor

## IBA conference

*Peter Hodes SC, chairman of the General Council of the Bar of South Africa, reports on the IBA conference held in September 1998*

The 27<sup>th</sup> biennial conference of the International Bar Association ("IBA") was held in Vancouver, Canada, during September last year. Some 3 000 lawyers from over 100 countries were present and attended a wide variety of panel discussions, lectures and social gatherings.


Madame Justice Louise Arbour, who some years ago gave the keynote address at a GCB national conference held in Durban, and is now the chief prosecutor of the International War Crimes Tribunals for Yugoslavia and Rwanda, was the guest speaker at the opening ceremony. On this glittering occasion she presented the IBA's Bernard Simons Memorial Award – which honours a lawyer's personal contribution in promoting, protecting and advancing human rights – to Chief Gani Fawehinini, a doughty Nigerian lawyer who has been detained on countless occasions by reason of his role in his country's struggle for fundamental human rights.

What was of special significance was that the first formal meeting of the newly established Forum for Barristers and Advocates was held during this conference. This forum is to function as a focus for barristers and referral advocates within the IBA, to serve their specialised interests and to foster co-operation between them. The GCB was one of the inaugural members who in all represent more than 16 000 advocates and barristers.

The forum had arranged to hold two meetings during the week. The first was a discussion on the role of the barrister and referral advocate in modern legal practice. The three speakers were Heather Hallett QC, the Chairman of the GCB of England and Wales, Chris Pullin QC, the chairman of the Australian Bar Association, and Jacqueline Leong QC, a former chairman

of the Hong Kong Bar Association. They discussed the topic from the peculiar point of view of the jurisdictions in which each of them practises. Heather Hallett showed in a trenchant manner why a divided bar is necessary for the continued well-being of the UK's legal system and emphasised that an independent barristers' profession will have an important role to play in a society where multi-disciplinary practices look like becoming the order of the day.

The second event which was scheduled to be held by the forum was a one hour play entitled "The trial of Penn and Mead" which was written and was to be presented by Nigel Pascoe QC, an English silk. It tells the story of a trial by jury at the Old Bailey in 1670 at which was established the absolute independence of a jury to return a true verdict on the evidence in accordance with their oaths, without fear of the consequences. The play was to be followed by a debate on the subject "Does the jury have a place in the legal systems of the 21<sup>st</sup> century?" The speakers were to be Jerome Shestack, the immediate past President of the American Bar Association, and our own Malcolm Wallis SC (who was elected a co-chairman of the forum). Unfortunately, because of the serious illness of one of Nigel Pascoe's children, this gathering had to be cancelled. It is hoped that what was expected to be a stimulating occasion will be rescheduled for a later IBA conference.

The conference, held in a beautiful city at a lovely time of the year, was an undoubted success. Hopefully more members of the GCB will attend these gatherings in the future. There is much for us to learn on these occasions and many new friendships to be forged. 

## Legal Aid

*Cynthia Pretorius, member of Pretoria Bar legal aid liaison committee, reports as follows:*

During June 1996 a legal aid liaison committee was convened by the Pretoria Bar. Its purpose was and is to liaise with the Legal Aid Board in respect to >

all matters pertaining of legal aid. One of the committee's goals was to try to resolve all the problems surrounding payment of legal aid accounts in civil and criminal matters by the Legal Aid Board. The Legal Aid Board, on the other hand, used the committee to address any problems that it had with the members of the various bars. The committee also represents the General Council of the Bar (GCB) and it was arranged that members of the various bars would send their accounts to the Pretoria Bar who would look into each problem and assist where possible to speed up payment of accounts. From 1996 until 4 June 1998 there were regular monthly meetings of the Legal Aid Liaison Committee. Thereafter the representatives of the Legal Aid Board unfortunately stopped attending these meetings. Meetings were also attended by members of the Law Society and the Criminal Bar.

At one of the earlier meetings it was established that the Pretoria Bar would launch a pilot project for the distribution of High Court legal aid work, the so-called *pro deo* briefs. The *pro deo* Committee consists of elected members of the Bar, the Criminal Bar, attorneys and other professional organisations recognised by the Legal Aid Board. The representatives of the Legal Aid Board were in favour of this way of distribution of High Court matters so that control could be exercised by the professional committee and also by the various branches of the legal profession.

### Forensic survey

The Minister also appointed a Legal Aid Transformation Task Team (LATTT) on which all the role-players are represented. The opinion of LATTT is that the criminal and civil work done by private practitioners should be done by public defenders and in-house counsel or interns after completion of the four year LLB degree. LATTT made it clear that it felt that in this way there could be a 40% saving of costs. The GCB took issue with these figures and has since 16 September 1998 been trying to get the information on which these figures are purportedly based from the Legal Aid Board. The GCB has appointed a forensic accountant to compare the costs for legal aid done by private prac-


tioners compared to work done by salaried personnel. To date the GCB's forensic accountant has not been successful in obtaining these statements from the director of the Legal Aid Board.

On 16 September 1998 a meeting was called by LATTT at the Legal Aid Board's offices in Pretoria. Representatives of the Law Society, legal aid clinics, NADEL, the GCB, the Criminal Bar and the Pretoria Bar attended this meeting. Prof Cheryl Loots of LATTT chaired the meeting. I attended the meeting on behalf of the GCB and the Pretoria Bar. The meeting was called to discuss fees and disbursements payable to legal practitioners in respect of criminal appeals as set out in the dossier prepared by LATTT dated September 1998.

### "Death penalty cases"

At a meeting with Minister Dullah Omar at the end of August 1998, the GCB proposed that the so-called "death penalty cases" be done *pro bono* by the members of the various bars. There are currently 534 such cases and it was suggested that the cases be divided between the various Bars and that practitioners do this work *pro bono* in an effort to save the state money and to show that the GCB is serious in trying to resolve the problems over funding with the Legal Aid Board.

At the beginning of January 1999 the chairman of the Legal Aid Committee in Pretoria was informed by the Legal Aid Board that it had sufficient funds for the "death penalty cases" and it could afford to pay practitioners who do these cases. (At the GCB's executive committee meeting held on 30 January 1999 it was decided to repeat the offer to do these cases *pro bono*. – Editor)

The GCB will continue its efforts to obtain the statements from the director of the Legal Aid Board and ensure that a thorough investigation into the costs of legal aid is carried out. That will enable the GCB to make decisions to position its members in such a way that they will be able to compete with full time employed practitioners in legal aid matters. Such investigation may even assist the state in saving costs in some legal aid matters. 

*In his report to the executive committee of the GCB at the end of January 1999, Johann Gautschi SC, makes some interesting observations:*

There is a view that the move towards salaried staff and away from a judicare system appeared to be the only way in which to manage with a limited budget as it would be cheaper. This emphasises the importance of providing the GCB representatives on the Legal Aid Board with the Bar's perspective. This involves, *inter alia*, recognition of the limitations likely to be inherent in salaried staff representation such as their limited experience (given the salaries they are likely to be paid) and the undesirability and dangers of inadequately experienced representatives acting in more complicated matters. "We should bear in mind the remarks conveyed to me by Dan Brennan QC, vice-chairman of the General Council of the Bar of England and Wales. He pointed out that in the United States the public defender system had been hampered by problems such as an excessive case load for limited staff and related problems such as plea bargaining without proper regard to the client's interests and staff of varied competence.

When analysing financial information and other data (if and when this is received from the Legal Aid Board) to determine whether or not a salaried staff model would in fact be cheaper one must factor in the limited complexity of matters which can or should be handled by public defenders given their levels of competence and experience, and case load.

In evaluating the relative cost effectiveness of different delivery models, we shall also have to examine to what extent adequate allowance is made for all the "hidden" costs and in particular the true cost of providing the necessary infrastructure. The estimates contained in the Legal Aid Board officials' proposal to the January 1998 conference on legal aid may not adequately recognise those costs.

*Continued on p 35.*

*See also p 40 for The Road Accident Fund – comments by Dan Nesor SC on the latest developments.*

was, is toe drie van ons om en by einde 1967 voor 'n kaggelvuur in 'n hotel in Natal oor werk gepraat het: my senior, ons opdraggewende prokureur en ek; en een van die ander twee opgemerk het na aanleiding van 'n opmerking wat ek gemaak het, "Alles goed en wel, vir jou is die beroep 'n stokperdjie". Ek het na asem gesnak, dat enigiemand kon dink mens sal so hard werk aan 'n stokperdjie, en het besluit om aansoek te doen vir senior status – 'n waagstuk, maar minder so in die Vrystaat as elders, en in elk geval was ek jonk genoeg om 'n nuwe rigting in te slaan sou dit nie slaag nie... Die "sy" is toegeken, en het 'n baster opskudding veroorsaak.

Die volgende ramp was toe ons in 1969 Bloemfontein moes verlaat; wat weer eens geen ramp was nie, maar net die regte ding op die regte tyd. Ek was vol hoop dat ek slegs in 'n doodskis ons heerlike huis en skaduryke werf en hartlike tuisstad eendag vir goed sou verlaat, toe die Minister my – nogal in volgens my mening onvleiende woorde, omdat hy my vertel het hy wil 'n "eksperiment" doen – waarnemend op die regbank aangestel het vir 'n halwe termyn in Bloemfontein. Die "eksperiment" het egter gelei tot 'n permanente


aanstelling in Kimberley, nie in Bloemfontein nie. En net toe Kimberley te klein word omdat die meisies een-een matriek gemaak het en uit die nes moes vaar, is ek 'n verplasing na die Kaap aangebied; waar horisonne heerlik gerek het.

### Regstellende aksie

My raad aan diegene – maatskappye, buitelandse instansies, die huidige lede van die Balie – wat wil "regstellende aksie" toepas om sg "voorheen benadeeldes" 'n hupstoot te gee, kom uit my eie agtergrond. Om in 'n pos aangestel te word wat jy nie bekwaam kan vul nie – alte dikwels vanweë gebrek aan opleiding en noodsaaklike ondervinding, nie gebrek aan verstand nie – is waarskynlik die grootste onreg wat mens aangedoen kan word. Wat noodsaaklik is, is nie aanstelling in fênsie poste en/of ampte nie, maar dat geleentehede gebied word om te leer, en om toepaslike praktiese ervaring op te doen. Dis waarskynlik maklik om suksesvol as advokaat te praktiseer met minimale regs kennis en ervaring, in sake wat niks behalwe feitegeskille om die lyf het nie: eenvoudige strafsake oor ongekompliseerde klagtes. "Suksesvol" in die sin dat jy genoeg kan verdien om liggaam en siel aanmekeer te

hou. Maar hoe vervelig, om daartoe beperk te word! Ek kan aan niks meer sielododends dink nie as 'n onafgewisselde diët van geweld en oneerlikheid, moord en diefstal nie. Die huidige stelsel van pupilskap skep myns insiens merendeels onvoldoende geleentheid vir die opdoen van voldoende praktiese ervaring. Die leermeester wie se praktyk wyd genoeg is om teoreties die geleentheid te kan aanbied, sal waarskynlik te besig wees juis vanweë die aard en omvang van sy werk, om aandag aan 'n pupil sowel as die prokureurs en hulle kliënte se belange te gee. Dalk is ek verkeerd – ek het self geen praktiese ervaring van die stelsel nie. Julle jonges sal wel hopelik uitweë kan prakseer.

Ek dink dit was Gary Player wat iets gesê het soos: "The harder I work, the luckier I get".

Mag die geleentehede om so gelukkig te word, om ervaring te kan opdoen deur harde werk en te kan herken wanneer nadele tot voordeel gebruik kan word, gegun word aan die wat dit tot nou tog nog nie in die regs wêreld kan ervaar nie, tot heil van ons regstelsel en daardeur onvermydelik tot heil van ons land. 

## GCB news


continued from p 8.

### Postscript: Legal Aid

*Johann Gautschi SC reports that significant progress has been made since the exco meeting on 30 January 1999.*

- 1 Following on discussions with Judge Navsa on 31 January 1999, all Bars were requested to provide updated information by fax about outstanding fees owed to members by the Legal Aid Board.
- 2 Details of outstanding accounts received from Bars during the course of that week were used by Judge Navsa, assisted by a team of accounting and computer experts from Deloitte and Touche and the Auditor-General's office, to scrutinise the Board's accounting system.
- 3 On 6 February 1999 Peter Hodes SC and I met with Judge Navsa, accompanied by Dennis Kuny SC, the GCB's representative on the Legal Aid Board, and Halima

- Saldulker, his alternate. Judge Navsa explained the nature and magnitude of the problem. He expressed great concern about the vast number of accounts which remained unpaid for so long. He requested that we convey to the members his very sincere regret about this state of affairs and the high priority given to resolving it. Given the steps taken to address the accounting and information technology problems, he hoped that substantial progress would be made by end February 1999 and requested report back from all Bars as to any outstanding fees still owing on that date.
- 4 It certainly seems that with Judge Navsa's "hands on" approach and the tremendous energy with which he is tackling the problem, there is, for the first time in many years, a real prospect of significant progress in receiving payment of outstanding practitioners' accounts.
- 5 During the meeting we reiterated the Bars' support for the Legal Aid Board. We also

conveyed the GCB's wish to be engaged in dialogue with the Board in relation to a variety of matters such as fee negotiations, the proposed legal aid centres, and the host of administrative arrangements canvassed last year at liaison meetings with the Legal Aid Board officials. We were requested to address such matters by way of representations to the Board. 

### IBA: Human Rights Institute

South African Lawyers are well represented in the governing bodies of the Human Rights Institute of the International Bar Association:

*Honorary president* – President Nelson Mandela; *Council member* – Attorney Ashwin Trikamjee; *Co-vice chairman of the Liaison Committee* – Advocate Milton Seligson SC.