

# Chair's report

*Report by Peter Hodes SC, Cape Bar, chair of the General Council of the Bar of South Africa, presented at the annual general meeting in Sandton on 23 July 1999.*

## Membership

Membership of the constituent Bars continues to grow steadily. The table below sets forth the total membership of the Bar as at 30 April of the past five years.

The GCB is acutely aware of the need for the Bar to attract black members. Certain of the Bars have bursary schemes of their own, while the GCB's scheme has in the past been seriously underfunded. Fortunately Sharise Weiner SC, the chairperson of the National Bursary Fund, was able to procure a generous donation to this fund from Mercantile Professional Bank.

This permitted the GCB to make more meaningful bursaries available to needy pupils. From the beginning of this year the position was further ameliorated by the provision of bursaries in terms of the USAID Project.

Some 80 members of the Bar acted on the bench during the year ending 30 April 1999.

## Transformation

On 25 July 1998, immediately after the annual general meeting, representatives of the constituent Bars met with 19 delegates of the recently formed Advocates For Transformation (National) ("AFT"). At this meeting an agreement was reached on the need to constitute a Bar Transformation Forum by 30 November 1998. Thereafter local agreements in regard to transformation were arrived at in KwaZulu Natal, Pretoria and Johannesburg. The Johannesburg and Pretoria arrangements were embodied in constitutional amendments, whereas an informal agreement was concluded in KwaZulu Natal.

By 30 November the Cape Bar, had however, not reached an agreement with the local chapter of AFT, with the result that the Transformation Forum could not be constituted.

Eventually, by March this year a compromise was reached between the Cape Bar

and the local AFT and this resulted in the requisite amendments to the Cape Bar's constitution being passed on 9 April. Later that month a new Bar council was elected.

On 17 April the first meeting of the Bar's Transformation Forum was held, it having been agreed that the GCB and AFT would each have ten representatives on the Forum and that there would be two co-chairs, one from the GCB and the other from AFT. It had also been earlier agreed that while the decisions of the Forum would not be binding on the GCB or its constituent Bars, should the GCB and AFT members of the Forum reach consensus on any specific issues, the GCB representatives would do all in their power to persuade the various Bars to accept and adopt the agreement(s) so reached.

Before this meeting of the Forum it had been agreed that the sole issue for discussion on that day would be the governance of the GCB. To the astonishment of the GCB representatives, the AFT delegation stated unequivocally that they did not find acceptable the agreements which had been reached between the four local chapters of AFT and their respective Bar Councils. The AFT delegates were adamant that there had to be equal governance of the GCB, viz, that AFT would have to have a 50% say in the affairs of the GCB.

In response the following proposal was put to the AFT representatives:

"That, as a matter of principle, the following agreement be reached by the Transformation Forum:

- (1) that the GCB and AFT recognise that at meetings of the GCB there should be proper representation of black and female advocates during its deliberations;
- (2) that the GCB acknowledges that its constituent Bars should, in nominating their representatives to attend GCB meetings, ensure that black and female advocates represent each Bar on an equitable basis;
- (3) that the current members of the executive committee of the GCB accept that one of the seats of the chair, deputy-chair or

vice-chair of the Council be occupied by a black or female advocate, but that this matter be properly dealt with by the GCB at the AGM on 23 and 24 July 1999."

It had earlier that day been agreed at the meeting of the GCB's executive committee to increase the leadership of the GCB by having, in addition to the chairperson, a deputy-chair and vice-chair.

In addition to the above quoted proposal, the following question was also put to AFT:

"Would AFT consider whether it would be agreeable to black advocates being treated as a constituent of the GCB, resulting in the amendment of the GCB's constitution to permit four representatives of black advocates at the AGM of the GCB?"

The AFT delegation retired to caucus and returned to inform the GCB representatives that both the proposal put forward and the question posed were unacceptable to AFT, which insisted on nothing less than equal governance.

It was agreed that the GCB would have until 15 May to consider its position and that by 31 May AFT would state in writing why the GCB proposal is not acceptable to it and why, despite local agreements, AFT insists on equal governance of the GCB, i.e. 50:50 between the GCB and AFT.

By 15 May it was clear from the response of all Bar Councils that the GCB's position had not altered since the Transformation Forum meeting on 17 April. This was conveyed to AFT who, on 31 May, informed the GCB that its above quoted proposal was not acceptable to AFT because it did not afford the latter equal governance of the GCB.

This issue will require careful consideration at the AGM on 23 July.

## Hoexter Commission

In consequence of the third report of the Hoexter Commission, the institution of a pilot project in respect of case management, to be undertaken in the Cape Provincial Division, was eagerly awaited, the Department

MEMBERSHIP FIGURES					
	1995	1996	1997	1998	1999
Juniors (minus 5 years)	558	520	504	520	657
Juniors (plus 5 years)	594	656	700	771	703
Silks	<u>201</u>	<u>217</u>	<u>221</u>	<u>235</u>	<u>254</u>
Totals	1353	1393	1425	1526	1614

of Justice having indicated its acceptance of this proposal. Unfortunately, to date nothing has come of this project. This issue will have to be taken up with the newly appointed Minister of Justice.

### The GCB office

As always, this runs efficiently under the exemplary leadership of Elize van den Heever. Her endeavours and those of her staff as well as the contributions of Timothy Bruinders and Haley Saldulker, have resulted in the smooth running of the office. My sincerest thanks to all of them for their assistance to me during the past year.

### Consultus

At last year's AGM it was decided that, with effect from the beginning of this year, four editions of *Consultus* would appear annually. The first two editions have appeared this year and the improvement in our journal which has been noticed over the past few years has been maintained. For their efforts in this regard we are indebted to Hennie Mellet, the editor, and Linda Pelsler, the assistant editor.

### Relations with the attorneys' profession

On 23 July, the day before last year's AGM, various Bar leaders met with a delegation of the Law Society of South Africa (the "LSSA"). On this occasion it was agreed that the GCB and the LSSA would constitute joint committees to give consideration to and report on the future of the legal profession in South Africa (including the possibility of a single Legal Practitioners' Act) and on legal aid/internship. The GCB duly appointed its members of these joint committees, but unfortunately the LSSA never got around to making its appointments to the committees. During March of this year the LSSA held a Bosberaad which appears to have resulted in the view being adopted that the LSSA did not desire to participate in the proposed joint committees. In fact at the Bosberaad the LSSA determined that it was inappropriate for a new Attorneys Act to be drafted – which was the initial intention – but that what this country requires is a single Legal Practitioners' Act. Eventually on 17 May the LSSA convened a meeting of certain of its representatives with Professor Cheryl Loots of the policy unit of the De-

partment of Justice to discuss the proposed single Legal Practitioners' Act. The GCB was invited to this meeting and was represented by Johan Gautschi SC, the vice-chairman, and Nazeer Cassim SC, the vice-chairman of the Johannesburg Bar Council, and myself. Also present were two representatives of the Corporate Lawyers Association of South Africa. The discussions were inconclusive. The possibility was mooted that a Green Paper be brought out by the Department in regard to the need for a single Legal Practitioners' Act and the possible core contents thereof. To date nothing has come of this. This is a matter of fundamental importance to the future of the Bar and merit an in-depth discussion at the AGM.

Nazeer Cassim's report on this meeting will be made available for consideration at the AGM.

### Independent Association of Advocates

The application launched by the Society of Advocates of Natal against De Freitas received a great deal of publicity. De Freitas was suspended from practice for six months and subsequently applied for leave to appeal to the Constitutional Court from the judgment of the Natal Provincial Division. This application was argued before the Constitutional Court which held that De Freitas should first have applied for leave to appeal to the Supreme Court of Appeal. Thereupon De Freitas applied to the Natal Provincial Division for condonation of his late noting of an application for leave to appeal to the Supreme Court of Appeal. This application was refused. De Freitas applied thereafter to the Supreme Court of Appeal for leave to appeal to it from the judgment of the Natal Provincial Division. The Supreme Court of Appeal has directed that this application for leave to appeal be argued before it (clearly, as is customary in such cases, the appeal will be argued at the same time as the application for leave).

The GCB's application against van der Spuy SC also succeeded, the latter being suspended from practice for six months. He filed applications for leave to appeal both to the Supreme Court of Appeal and to the Constitutional Court, but these applications have been held in abeyance, apparently pending the disposition of the De

Freitas matter. The GCB has launched a further striking-off application against one Rösemann out of the Cape Provincial Division based upon his taking instructions direct from clients without the intercession of an attorney. This matter is to be heard in August. A further striking-off application has been launched by the GCB against another independent advocate, one de Villiers, for, *inter alia*, winding-up certain estates and not accounting for all the proceeds to the beneficiaries.

### Legal Aid and internship

In October last year the Legal Aid Board was reconstituted, in a far more representative guise than its predecessor. Mr Justice Mohamed Navsa was appointed as the chairperson of the Board and Denis Kuny SC was nominated as the GCB's representative on the Board. Kuny SC is on both the Board's executive and finance committees and has been rendering yeoman service in assisting to pick up the pieces. Navsa J has been expending a great deal of energy in attempting to rescue a Legal Aid Board which is in disarray. The Director of the Board, Dr Pretorius, was suspended in April pending a hearing into his alleged improper failure to carry out his duties as Director.

New appointments to the ranks of senior officials of the Board – with a new hierarchy – are, I understand, imminent. Because of the exceptional difficulties encountered with the computer systems, it was impossible for the new Board to determine exactly what the precise state of its finances is. It is sincerely hoped that Navsa J, with the assistance, *inter alia*, of Kuny SC, will be able to lead the Board out of the morass in which it has found itself.

At the same time it is necessary to make mention of the fact that it is the Board's stated intention to depend less and less on *judicare*, although thus far this expressed intention has been but a hope. It has been decided by the Board to constitute five justice centres which will perform both criminal and civil work. When these centres will see the light of day, we do not know.

At my most recent meeting with Dr Omar I raised with him whether we should be taking steps to investigate and report on the question of internship. He suggested that this remain in abeyance until after the election.

In the meantime, at the April exco meeting, it was decided to reconstitute and enlarge the committee to report on both legal aid and internship. This committee is headed by Hilton Epstein SC, formerly the GCB's representative on the Legal Aid Board. The report of this committee is awaited, but is not expected before the AGM.

## The Judicial Service Commission

Since our last AGM the JSC has met twice. In October 1998 it met to consider the appointments of the Judges President of the Cape and Transvaal Provincial Divisions and the Deputy Judge President of the Natal Provincial Division. It also filled one of two vacancies to the Cape Provincial Division and three vacancies to the Transvaal Provincial Division. In the Natal Provincial Division the JSC made one appointment to the Bench.

In April 1999 the JSC made appointments as Deputy Judges President of the Cape and Transvaal Provincial Divisions. The Commission submitted to the President the names of four persons for consideration for appointment to the vacancy in the Constitutional Court resulting from the death of Didcott J. This is a requirement in terms of the Constitution. To the Cape Provincial Division the JSC made two appointments the one being a candidate whose performance while acting on the Bench had not been impressive, a fact which I drew in some detail to the attention of the JSC. Two deserving members of the Bar were overlooked by the JSC. Zondo J, previously of the Labour Court, was appointed as a judge of the Transvaal Provincial Division. In the Free State a not particularly experienced candidate was appointed despite the Bar's nominee having made an outstanding impression at the JSC's hearing, having far greater experience and having acquitted herself very well while filling acting appointments.

As I mentioned in my chairman's contribution in the June 1999 edition of *Consultus*, we have now arrived at a situation where it is highly unlikely that leading counsel at the Bar will accept nomination for appointment to the Bench, at the very time that their services are sorely needed. In my submission to the JSC I quoted from the words Professor Vuyisile Dlova, the Dean of the Law Faculty at the University of Transkei, at a farewell

function for a retiring law professor:

"We do want blacks as judges in our law courts but they must be real judges – competent, efficient and knowledgeable. Anything cosmetic is unacceptable".

The appointments flowing from the JSC hearing in April of this year constrained me to ask, in my contribution, whether in fact the JSC has taken heed of Professor Dlova's words, bearing in mind that a number of exceptionally well qualified white candidates – mainly from the Bar, and not all male – failed to find favour with the majority of the JSC, while some black nominees of obviously less competence and experience did. Feelings of disquiet in this regard were heightened by newspaper reports likening the questioning of certain – but definitely not all – candidates to "something approaching an inquisition".

On 25 April 1998, at the behest of the executive committee, I wrote to the Chief Justice, in his capacity as chair of the JSC, indicating the belief of the GCB that the proceedings of the JSC should generally be wholly open to the public, and asking that this issue receive consideration at the next sitting of the JSC.

On 14 May 1999 I received a response to this letter from the secretary to the JSC, informing me that pursuant to my letter of April 1999 the Commission resolved at its meeting in October 1998 to review its general policy with regard to the transparency of its proceedings and that one of its members prepared a report which was tabled and considered at the JSC's most recent meeting in April this year. At such meeting the JSC decided that its deliberations on judicial appointments should remain confidential. It accepted that the public obviously has an interest in such deliberations, but held the view that is also of paramount public importance that members of the Commission should not be inhibited in those deliberations, bearing in mind that they are deliberations on the personal and professional traits of individual people and not on impersonal principles or policies. It would be invidious, according to the JSC, to express adverse views on the personal traits of individual candidates in public, inasmuch as members of the JSC would either do so and publicly humiliate the candidates concerned or, more likely, refrain from doing so for the sake of the candidates involved. The real

debate, according to the Commission, would then tend to move from the meeting of the Commission into the privacy of the corridors around it. That would obviously be undesirable, said the JSC.

In this regard I should mention that on the information at my disposal a great deal of caucusing does in fact take place outside the confines of the JSC's official hearings deliberations.

## Pupillage

Consideration is being given to the whole question of the National Bar Examination. Whether or not the present examination meets its aims or whether there should rather be an entrance examination or, as has been suggested by some, whether there is any need whatsoever for a Bar examination are questions which have been referred to a task group under the leadership of Archie Findlay SC. This group has brought out a working paper which has been very widely circulated and to which certain responses have been received. We await their final report with interest.

## International conferences

In September Johann Gautschi and I attended the IBA's biennial conference in Vancouver. On that occasion the Forum for Barristers and Advocates held its first gathering, which was successful. I also attended a meeting of Bar Leaders together with the President and Vice-President of the IBA where various matters of interest to Bar Associations and Law Societies were discussed.

## General

I should like to express my gratitude to my vice-chairman, Johann Gautschi, for his continued assistance to me at all times.

My thanks are also due to the National Bar Examination Board and the judges who moderate the written examinations and preside at the oral examinations; the regional pupillage committees as well as the members of the National Advocacy Training Committee and the various trainers, including members of the judiciary, for all their efforts; the various GCB sub-committees and to the chairs of the GCB's constituent Bars as well as to those members of the various Bars who have been of inestimable help to the GCB during the year. 