

## From the chairman's report

### Extracts from the annual report of the chairman of the GCB, 2000 – 2001

#### Introduction

The past year has not been uneventful for the South African Bar.

Membership now stands at a current national total of 1 678. In 1945 - the GCB's first year of existence - there were 241 advocates practising in South Africa. The table below gives an interesting reflection of the current distribution, in terms of location and spread of seniority. Measured over the past five years, the net inflow is an average of some 3,8% per cent per annum.

The total pupil intake over the past year was 212 (as compared with 298 last year). The pass rate in respect of the June 2001 examination was 63 per cent, while in the November examination it was 52 per cent (as opposed to 73 per cent in both intakes last year). This is a matter to which I revert below. In the latest June 2001 examination, one of the highest pass rates ever, 75,6 per cent was attained.

It will be seen from the attached schedule of Bar membership that this ranges from a total of 579 at our largest Bar to just six at the smallest. Whilst the two largest Bars have successively host-

ed the GCB AGM in the past two years, it was the smallest Bar which stepped forward this year to volunteer to do so.

It is not just the hospitality of the Northern Cape, experienced on a number of occasions in the past by the GCB, which inclined all Bars to accept its offer to provide the venue for the 56th AGM of the GCB. Our six colleagues in Kimberley serve an area larger than many countries in the world, with an estimated population of almost 4 million inhabitants. Their skills, in court and in chambers, are available to some 200 attorneys in the Northern Cape. From their scant numbers they provide several acting appointments to the high court Bench in Kimberley each year. Without fanfare, from time to time they train pupils, administer ethical rules and conduct disciplinary enquiries, liaise with the judiciary and local attorneys in relation to wider matters concerning the administration of justice, and provide important community leadership in a variety of forms. What the Bar in Kimberley does is an important example of the value of the institution at large: providing the public on a referral

basis with the skills of independent legal professionals, focussed essentially on litigation.

We record our appreciation to the De Beers Fund for contributing to part of the cost of hosting the AGM in Kimberley.

George Bizos SC, addressing in *Consultus* the question "Why the Bar?" nearly two years ago singled out what our smaller Bars offer as an important part of our reason to be. He noted that smaller firms of attorneys (particularly in smaller centres) would find it hard to survive without the capacity to draw upon the Bar.

The GCB's year in fact commenced with a powerful reiteration of this view. Speaking at the GCB dinner in Pretoria in July 2000, following its 55th AGM, former president Nelson Mandela - an honorary life president of the International Bar Association and an honorary Queen's Counsel - said:

"The Bar is an important institution in civil society which deserved to be strengthened. I know from my own life as a lawyer that it can offer access to justice".

On the same occasion the GCB announced the inauguration of the Sydney and Felicia Kentridge Award for service to law in Southern Africa and the Pius Langa Scholarship. The first Kentridge Award was presented by Sir Sydney Kentridge QC on behalf of the GCB (the selection committee comprising former Chief Justice MM Corbett, Michael Katz on behalf of the sponsor, Nedcor, and myself) posthumously to the late Chief Justice Ismail Mahomed, the award being received by his family on his behalf. The Pius Langa Scholarship went to Mzamo Nobatana of the Cape Bar.

The dinner was a glittering event. Attended by a large number of guests, including the President of the Constitutional Court, the Acting Chief Justice, the Minister and Deputy Minister of Justice, the judge president of Gauteng and a number of other judges and other dignitaries, the occasion marked a celebration of the role of the Bar in South Africa's life.

The AGM saw the re-election to the positions of chairman, deputy chairman and vice-chairman of respectively myself, Nirmal Singh SC and Roland

#### General Council of the Bar of South Africa

Membership as at 30 April 2001

Bar	Silks	5 Years or more	Less than 5 years	Non-contributing members	Total
Johannesburg	101	283	158	37	579
Pretoria	63	171	140	17	391
Cape	56	152	89	17	314
Natal	40	100	68	21	229
Port Elizabeth	6	26	12	3	47
Grahamstown	5	17	2	2	26
Free State	5	24	6	6	41
Northern Cape	1	5	-	-	6
North West	2	4	3	1	10
Bisho	1	8	6	-	15
Transkei	-	11	7	2	20
Total	280	801	491	106	1678

Sutherland SC. Haley Saldulker was elected secretary and Mzolisi Patric Mtshaulana stepped into her shoes as assistant secretary. In accordance with the approach adopted in 1999, each executive member has administered specific portfolios on behalf of the GCB. I am particularly grateful to each for the way in which these burdens have been borne, as it has enabled me to devote particular time to serious problems confronting the Bar during the past year. It is to these I now turn.

### The Legal Practice Bill

In my last chairman's report, I warned that matters concerning the future regulation of the profession were likely to come to a head during 2000-2001. So it has come about. In July 2000 a first draft of a Legal Practice Bill (LPB) was circulated for comment by the Policy Unit of the Department of Justice. I prepared immediately a draft response, which was circulated for comment to all Bars. This process resulted in a revised response, which again was circulated to all Bars for adoption or comment. The final product was submitted to the policy unit at the end of September 2001.

We expressed serious concern relating to what we saw as fundamentally repugnant features of the LPB. In the first place, it contemplated a wider legal profession under regulatory control of the executive. Not less than 17 of the projected 20-person council would be chosen in the final instance by the Minister of Justice. Less than half the council would comprise practitioners themselves. No acknowledgment at all was made that the Bar would continue to exist, let alone that Bar councils should be the fundamental regulatory instruments for the advocates' profession. Scant recognition was given to the central role of the courts - at common law, and previously by statute - in regulating legal practitioners. The drafting generally could only be described as inept.

Roland Sutherland and I first met urgently with the policy unit's Cheryl Loots in an endeavour to explain the central concerns. The response varied between the unhelpful and the unyielding. We were told that Bars could continue to exist, if they wished, but there

would be no statutory recognition of them. As a consequence, it seemed important to raise urgently with the minister main issues of principle in relation to which the GCB believed the draft Bill to be at variance with what we understood to be the policy approach he had previously discussed with us. No such meeting could be secured. The holding of the October executive meeting, so that representatives of all the Bars could informally share these fundamental concerns with him, was hoped to provide such an opportunity. Again it was not possible to secure the minister's attendance. What in fact was indicated to us was that there would be no such opportunity prior to the completion of what was termed a consultative process being conducted by the policy unit.

These discouraging developments were reinforced in their effect by the letter prepared at this time (late last year) for the minister by the policy unit and submitted to the Competition Commission. I deal with this in more detail below. Its effect was to indicate a determination to adopt a Bill in terms inimical to the continued existence of the Bar in its current form.

In these circumstances, a crisis meeting of the GCB executive committee and available Bar chairs took place in Johannesburg in November. It was decided that if a meeting with the minister could not be secured, the Bar's concerns needed to be stated publicly and explicitly. This then happened. On 8 January 2001, at the invitation of the editor of the *Sunday Times* I published an exposition of our opposition to the Bill. This was a step we were reluctant to take, but felt that the lack of opportunity to convey our principled opposition required it. The piece aroused a considerable public debate: a number of consequential media interviews followed. Overwhelmingly positive reactions followed; the Bar was respected for its adherence to the view that it was an institution of civil society which (like the universities, the media and the churches) by its very nature played an important role in supporting democracy. Its continued independence was particularly important to the continued independence of the Bench itself.

Simultaneously we sought to estab-

lish common ground with other professional bodies in the wider legal profession. This was an arduous and difficult process. Its success was however considerable: it resulted in a series of summit meetings with the Law Society of South Africa (and its constituent provincial law societies), the Black Lawyers Association, National Association of Democratic Lawyers, Advocates for Transformation and the Criminal Bar Association. Common ground was established in opposition to central aspects of the draft Bill. There was a commitment to finding a solution within the profession to the question of regulation, and a general unhappiness with the manner and content of the consultative process being conducted by the policy unit.

A third dimension of the strategy was to prepare a draft GCB Bill, so that it could not be said that our criticism was purely destructive. It was initially indicated that the LSSA would adopt the same course, but in the event it did not do so. The preparation of a draft GCB Bill again was an arduous process.

In the end, it passed through four drafts, each considered by constituent Bars, and it was presented to the minister in April. At the request of the working forum for the wider profession which had met as I have described, the minister agreed to meet with participants in the debate in April. Minutes before the meeting was due to commence, the LSSA representatives conveyed to us a revised stance - that they would now acquiesce in the draft Bill prepared by the policy unit (it had by then reached a third draft, which remained however unchanged in its fundamental tenets) being submitted (as the minister was then proposing to do) to cabinet for approval and thereafter to parliament. The GCB representatives - Fayeeza Kathree, Chris Loxton SC, G M Malindi, Patric Mtshaulana and myself - were shocked by this development. At the meeting with the minister we adhered to the stance that the policy unit's draft was no suitable subject for approval in principle - firstly it was deeply flawed in key respects; secondly the consultative process had not been accomplished (the judiciary, for instance, had not been consulted in a single respect); and

thirdly not the slightest effort had been made to cost the Bill in its then form. We also subjected the policy unit's draft to particular textual criticism.

We stressed that we wanted to find a solution, not merely identify problems. We proposed as a way forward the convening of a joint drafting body representative of the wider profession and of government; the preparation by this group of a draft Bill, with 31 October 2001 as a target date; and the completion in this way of a proper consultative process.

The minister then formally proposed to the meeting the creation of just such a body (with 15 members, of whom 10 would represent the wider profession); with the widely respected director of the LRC, Mr Geoff Budlender, as its chair; and with an undertaking to make available the services of a senior parliamentary draftsman to assist in the process. This approach was supported by the meeting.

At the time of writing, the working group has met, and continues to meet. Progress is being made. There is in my view good reason to believe that the result will be a Bill which acknowledges the continued existence of the Bar, provides for its continued independence, and a workable system of regulation vesting essential functions in respect of the Bar in Bar councils.

The four major issues remain. The first is who the LPB should include - in particular, whether it should also include (at least for some purposes) prosecutors and paralegals. The second question is who should comprise the contemplated national regulatory council. (There is broad agreement that it should be an independent body, with a majority of its members being practitioners.) A third issue relates to its powers: our stance is that "*original jurisdiction*" should vest (for the different branches of the profession) in the Bar councils and law societies, with the council serving an accreditation, standard-setting and reporting function. The LSSA's position is, as it puts it, "*not fusion but unification*": a single provincial body in respect of all provinces. We say the formal confirmation by the LSSA that fusion is not viable, is significant. "Unification" however is just a confused paraphrase,

and thus equally to be rejected. As I have reported before, *a luta continua*. I record deep appreciation to the GCB plenary team listed above, and to Chris Loxton SC and Andrew Breitenbach for their able assistance at every turn. Of these, there have been many.

### The Competition Commission

In late 1999, the GCB was informed by the Competition Commission both that a complaint had been laid against it by the Independent Advocates Association of South Africa (IAASA) and that it was required in terms of the recently adopted Competition Act 1998 as a professional association to seek exemption in respect of the operation of its rules. The GCB and all its constituent Bars thereupon joined in an application seeking an urgent interim interdict against the Competition Commissioner (citing also the Minister of Justice as a respondent), pending an application to review and rescind the commissioner's decision. (The background to these events, and also the judgment, is discussed by Glenn Turner, a member of the GCB's legal team, on pages 25 to 26 of this issue.) The interim order was conceded. An expedited hearing in respect of the review was thereupon sought and obtained. The hearing took place in March. Shortly before the hearing, the Competition Commissioner formally conceded that his decision was vitiated by irregularity, more particularly in the form of the procedural unfairness related to his reliance on the letter prepared by the policy unit which neither it nor he had disclosed to the GCB for it to answer. The commissioner asked that the matter be referred back to him for a fresh decision. The GCB and constituent Bars however opposed this, pointing to evidence of bias and material incompetence by the commissioner in his handling of the application. The court sustained this attack, and declined to refer the matter back. It granted exemption itself in respect of material rules, but in relation to others it considered either that these on analysis could not be typified as rules requiring exemption, or left it to the GCB to discuss these further. The commissioner has since given notice of an application to seek leave to

appeal. The GCB and constituent Bars are not opposing this application, in view of the obvious need to obtain a final and authoritative determination by the Supreme Court of Appeal. It is hoped that the appeal will be heard before the end of the year.

The exertions of the GCB's legal team - Schalk Burger SC, Glenn Turner and Hamilton Maenetjie, instructed by Aslam Moosajee of Deneys Reitz - are noted with thanks.

### Independent advocates

The Supreme Court of Appeal dismissed the appeal by an independent advocate - thus practising outside the membership (and hence disciplinary control) of any South African Bar - who is a member of IAASA against the judgment handed down by Thirion J in *Society of Advocates, Kwazulu-Natal v De Freitas* 1997 (4) SA 1134 (N). Two judgments were delivered, in both of which other members of the court concurred. Both judgments stressed the need for the profession to be fundamentally independent and self-regulating.

The result in *De Freitas* is an important vindication both of the commitment by the Bar to its continued existence as an independent referral profession, and to the steps it has found itself obliged to take against a number of independent advocates. Their manner of practice - not acting on a referral basis, inevitably performing the work of attorneys and often taking money direct from the public without protection for the latter - has made this unfortunately necessary. It is to the Bars that judges, magistrates, practitioners and the public itself have turned. We must continue in our duty to the court in this regard until either IAASA amends its rules (as we have urged it to do so) or its members are otherwise regulated under the impending new legislation.

Again we record our appreciation to the legal team for the Natal Bar, Malcolm Wallis SC, Laurence Broster SC and Halima Saldulker.

### Public statements

It is important that the GCB from time to time speaks out on matters which concern the administration of justice, human rights or the functioning of the

Bar. Fourteen media statements were issued since I last reported to you (in addition to these a large number of *ex tempore* interviews and comments for radio in particular have taken place). Most of the media statements were also published in *Advocate*.

### International contact

The past year has also seen vigorous international contact for the GCB. Halima Saldulker represented us at an IBA regional meeting in Nairobi in April. I attended the World Bar Leaders meeting in Istanbul at the end of May. See the reports on pages 3 and 37 of this issue.

The IBA has lent powerful support to the wider legal profession in South Africa in its opposition to the draft LPB prepared by the policy unit, explicitly predicated - the policy unit has stated - on legislation for the construction industry, and particularly that for estate agents and quantity surveyors. Similar strong international support has been forthcoming from the United Nations Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy. Dato' Cumaraswamy himself in fact initiated this support (a spokesman for the minister wrongly attributed his intervention to unnamed South African lawyers); the cogently reasoned analysis by the Special Rapporteur is particularly welcome for its citation of a large number of international instruments supporting not only the independence of the legal profession as essential to the independence of the judiciary but the desirability of a fundamentally self-regulating profession.

The GCB itself has again offered its support to the beleaguered legal profession and judiciary in Zimbabwe. Together with the Bar of England and Wales it continues to monitor the situation there. It is also monitoring the situation in Namibia, where the DPP is currently considering a charge of contempt of court laid against the Windhoek Bar Council for its criticism of the failure by the Judge President of the High Court to make any ruling in an urgent application for the *interdictum de homine libero exhibendo*.

Under the energetic new leadership of Sharise Weiner SC, it was possible

for our advocacy training committee to hold a long-planned training session in Lesotho. A joint initiative together with the Bar of England and Wales is under consideration for Namibia.

### Advocates for Transformation

At last year's AGM in Pretoria in July, a means to resolve the three year stand-off with AFT (an informal grouping of some Black members in Johannesburg, Durban and Cape Town) was discussed. The meeting agreed to propose the election of an executive of which half the members would be Black, and to ensure that general meetings were similarly constituted. This was formally proposed to AFT in a letter immediately after the AGM.

The proposal was rejected in November. In February the GCB proposed that a meeting take place between AFT and GCB representatives (Poswa SC and Semenya SC, and Mtshaulana and myself, respectively) at Johannesburg airport, with a view to agreeing a process aimed at resolution of the impasse. Two such meetings took place. It was agreed that a joint committee be appointed to explore solutions. The GCB appointed its representatives (Roland Sutherland SC and Nazeer Cassim SC), but AFT did not. Accordingly no meeting took place. Sutherland and Cassim were nonetheless asked to prepare and circulate a proposed solution.

On 20 April 2001, immediately prior to the meeting with the Minister which I have already discussed, an unscheduled discussion took place between AFT delegates (Justice Poswa SC, Ismail Semenya SC, Norman Arendse SC, Mike Govindasamy and Mathobela Sishuba) and GCB delegates (Chris Loxton SC, GM Malindi, Fayeeza Kathree, Patric Mtshaulana and myself). The thrust of the discussion was that attempts to achieve a resolution were being bogged down in differences as to constitutional mechanisms, when there appeared to be general agreement in two respects: that the GCB must fundamentally be a non-racial body, but one which sought to redress imbalances of race and gender in its membership; and that both sides were willing (for an appropriate peri-

od) to achieve an executive and general meeting of which half the members would be Black.

Since this discussion, the Sutherland/Cassim proposal and now suggested amendments to simplify it have been circulated to all Bars. I hope that our AGM will adopt a resolution with the following key elements:

- (a) a constitutional commitment to non-racialism, but which acknowledges the need to address historical imbalances;
- (b) an amendment to the GCB constitution to expand the executive committee to eight members and to provide that where possible, half the members shall be Black;
- (c) a similar amendment in respect of general meetings, if necessary adjusting the numbers of delegates from the constituent Bars to achieve this.
- (d) a "sunset" provision for (b) and (c) - these to apply for two years, unless amended or extended.

Many members will view with misgiving an arrangement which introduces into our constitution measures of this kind for racial composition of our bodies. The impasse has however now endured for four years. It harms the Bar, and in particularly its unity in the face of current endeavours to impose external regulation upon it. I believe the approach proposed above represents a decisive move. If it leads to the involvement of all colleagues in the governance of the GCB, it will have achieved its purpose. (Obviously constituent Bars, where applicable, will have to give urgent consideration to the need to adjust their internal provisions for governance accordingly.) If it does not have this result it will not be for want of trying by the GCB. We shall be able to point to the constitutional accommodation we have made. At the same time the "where possible" qualification (in (b) and (c) above) will ensure that the functioning of the GCB is not paralysed should co-operation in implementation not be forthcoming. And the situation can be reviewed in two years: the need for the provisions may have fallen away, in which case they can be allowed to lapse, or they can be extended.

It is time, I believe, to take a bold step.

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## From the chairman's report

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### The GCB secretariat

The GCB continues to be fortunate in the service to it of a highly efficient secretariat: Elize van den Heever, Marietjie Böhme and Susan Molefe. We are very grateful to them.

### Retrospect and prospect

It is appropriate to conclude by looking back and looking forward.

The past year, together with my first year as chairman, have seen what I believe can be regarded as positive steps forward:

- (a) A structuring for the first time of the executive committee on the basis of allocated portfolios. This has helped alleviate the geographic spread of executive positions, involve other executive members more closely in the running of the GCB, and devolve functions. I am very grateful to my colleagues on the Executive for their contributions - particularly Nirmal Singh SC in the area of pupillage, advocacy training, and bursaries; Roland Sutherland SC in bearing the brunt of finance, administration and membership matters; Haley Saldulker for her continued dedication in legal aid matters; and Patric Mtshaulana for his involvement in a wide variety of matters almost daily.
- (b) The strengthening of *Advocate* (renamed from *Consultus*) as a means to promote internal debate and to project the cause of the Bar. Hennie Mellet's skills and dedication are particularly appreciated.

- (c) The doubling in both years of our own contributions to the GCB bursary scheme, restructuring of advocacy training and extending it for the first time beyond our borders (to Lesotho), and seeking now to harmonise pupillage, Bar examinations and advocacy training.
- (d) Stating, publicly and emphatically, the case for the Bar. A better public profile for the Bar is vital to its survival and growth. We have too often (through professional reticence or for other reasons) failed to explain ourselves, and the positions we adopt, to the public.
- (e) Enhanced international contact, in the respects described.
- (f) The inauguration of the Pius Langa Scholarship and the Sydney and Felicia Kentridge Award for Service to Law in Southern Africa.
- (g) The national dinner in Pretoria last year, with former President Mandela as a guest speaker.

There remains much to be achieved. We must do our best to resolve the governance issue. Our pupillage, Bar examination and advocacy training need to be harmonised more closely. The fall in the NBEB pass rate is a matter for concern. So in particular is the recent pattern of results in Johannesburg and Umtata. (The report of the NBEB appears on page 36 of this issue.) The process relating to the LPB needs to be followed through, with commitment to the continued existence of an independent Bar. There is a wider commitment for us too - an inaugural meeting of world Bars is scheduled for Edinburgh from 28 to 30 June 2002. We must support this; all Bars need to encourage attendance (and advise the

GCB secretariat accordingly before 30 November 2001). We need to look with fresh eyes at some of our rules. Above all, we need to launch a new *pro bono* initiative, to show the Bar's commitment to access to justice. I shall propose a concrete strategy in this regard to the AGM. We need to support government in its endeavours to improve the administration of justice in general, and the crisis-ridden criminal justice system in particular. Some of us gave our time unpaid to serve in regional courts last year. Next month sees ten Johannesburg silks tackle (as unpaid acting judges) a backlog of criminal appeals. Seventeen Cape silks did this two years ago, and disposed of 154 appeals in two weeks. It is for each Bar to consider what it can best do for its community. This includes seeking external funding for Bar bursaries and scholarships (in addition to which some Bars have done much, and others less).

We need also to improve communication within the wider legal profession, with government and with the judiciary. Particularly useful would be an annual, informal weekend meeting on Chatham House rules (i.e. no external disclosure). I have consulted senior members of the judiciary, and they support the idea. I am currently exploring funding.

The Bar is a challenging profession. We must not be surprised when it demands much of us. It is a vital organ of civil society in a constitutional democracy. Your active support for your council and the GCB itself in the year ahead is really important. Many members over the past year have given unstintingly of their services, for which I record the gratitude of all members of all Bars.



## Obiter ...

### BarDIRECT scheme

The BarDIRECT scheme is a new scheme whereby organisations or individuals who are suitable to instruct barristers because they have expertise in particular areas of the law can apply to the Bar Council of England and Wales to be licensed to instruct barristers directly in those areas. The licence could cover advice or representation or both and permit licensees to instruct

barristers either on their own affairs or on behalf of their clients.

In addition to the BarDIRECT scheme, members of some professional bodies are able to instruct barristers under Direct Professional Access on behalf of both themselves and their clients. Such members can instruct barristers on matters within their normal professional expertise for advice and to appear in tribunals and magistrates'

courts only.

The groups of people who may instruct barristers either on behalf of clients or on their account in any matter for all types of work, include solicitors and other authorised litigators. In limited areas of work licensed conveyancers and foreign lawyers for advice only are *inter alia* entitled to instruct barristers.

