

## *Legitimacy, Transformation and the Need for Change at the Bar*

### **A. Introduction**

Over a period of two weeks I coursed through the country on consultative meetings with constituent Bars with a view to gathering information about juniors' lived experiences and what they want to see change *for the better* at the Bar. Much of what I learnt is, sadly, unsurprising; a few, mostly localised issues, is.

I am grateful to the Chairpersons and Deputy Chairpersons of the constituent Bars for hosting me so warmly at such short notice and for their contribution to the debate. In this contribution, I share with you the issues that juniors have identified as *impeding* their progress and development at the Bar and what they want done about these.

*This is the will of juniors of all races and both genders, not my wish list.*

The significance of these views lies in the fact that juniors comprise over 80% of the Bar. If a demographic this big can be ignored with impunity by the GCB and its constituent Bars, then Eugene Lubbe of the Free State Bar was probably right when he said, reporting on the general sentiment expressed at a recent Future Leaders Symposium, “#GCBMustFall!”

The significance of these views lies also in the fact that this fact-finding exercise has been a long time coming. It was first mooted in July 1998, and again in July 2015. Sadly, nothing seems to have come of it – until now.

The views I have collated here are those that are common across all Bars. For good measure, I also include constituent Bar-specific issues about which those Bars feel very strongly.

The idea is to place these issues and views before the GCB AGM, scheduled for 15 and 16 July 2017 in Port Elizabeth, for discussion and decisive intervention. Some of the views entail amendment of the GCB Constitution. Others entail amendment of the GCB Uniform Rules of Professional Ethics and local Rules.

Despite relatively short notice, these consultative meetings with the Bars were well-attended. Those who were unable to attend, or unwilling to speak openly, were given an opportunity to submit written submissions. I have considered all views.

But before sharing them with you, it is important to remind ourselves, once again, what *Legitimacy* and *Transformation* entail.

## B. Legitimacy

We, as a Bar, have come to be so sceptical of any change *for the better* that some of us have come to expect pushback against anything new by resort to gatekeeping-type arguments. For example, I expect that one of the pushback arguments will be that out of almost 3,000 members of the Bar I consulted with less than 50% and so my findings cannot be a true reflection of the State of the Bar.

Well, let's speak frankly. Given the demographics at the Bar of over 65% white and 50% white male, it is not difficult to see why it is an impossible task to achieve a 50% attendance at a meeting the purpose of which is avowedly to discuss Transformation because Transformation seems (from what I have gathered) to be generally regarded as a Black issue. This is regrettable.

But do numbers confer Legitimacy in this context? If they did, the GCB would never have recognised AFT as a co-governing partner and entrench that partnership in its Constitution. A few white males have pushed this numbers argument and failed. It is right that they failed because in a profession of lawyers the persuasiveness of the argument should always trump brute numbers.

Writing in these pages in December 1999, one of my predecessors said the following about the subject of Legitimacy:

*“What makes something legitimate in South Africa now, I suggest, is its acceptance because it is institutionally respected, not because it is immediately popular. The Constitutional Court’s decisions on the death penalty, and in relation to gay rights, are respected . . . but they are probably not popular. They are nonetheless not considered to be illegitimate, simply because they do not reflect the view of most people. The essence of constitutionalism is indeed that we are ruled by law, not in terms of numbers. The decisions are legitimate because they are respected for their fealty to constitutionalism, not because of a weekly Markinor poll.”*

He is right, of course. Juniors of all races across the country have identified specific GCB Rules and local Rules, the limited scope of the GCB's powers over constituent Bars on Transformation issues and recalcitrant attorneys on matters of fee payments, and the conduct of the State Attorney's Offices as issues that impede their practices most acutely. It was not over a thousand of them who said so. The number was closer to 600, and no I did not keep a record of the count.

But, will the GCB owe fealty to numbers, or to common-sense? Will the GCB and its constituent Bars respect the nonsensical *status quo* or respect *change for the better*? I hope the latter. The Legitimacy of the GCB and the

Bar depends on it, otherwise some may, not without justification, proclaim “#GCBMustFall!” and, with it, the Bar, and get their wish.

### C. Transformation

What is Transformation, really? Is it taking away from White to give to Black? Is it reverse racism? Is it affirmative action?

Judging by the demographics of attendees at these consultative meetings, it is clear that members of the Bar generally regard Transformation as a Black people’s issue. Easily more than 90% (more than 540 out of about 600) of attendees were Black, in the generic sense, even though they comprise only 35% of the Bar. For a Bar that claims to be committed to Transformation, this is a serious indictment.

Transformation, as a former Chair of the GCB tells us, means “**change for the better**”. Transformation issues cut across racial lines. For example,

1. It was a white male junior at the Port Elizabeth Bar who raised the issue that in that region the State Attorney does not brief white males.
2. In Cape Town, it was a white male junior who complained of briefing patterns that are unfairly discriminatory towards outwardly gay males.
3. In Johannesburg it was a second year white woman junior who raised the issue of the 97-day rule as “**the biggest impediment**”, and a white male junior who championed a resolution of the Johannesburg Transformation Committee to delete the rule.
4. In Port Elizabeth, it was a white woman who raised the issue that women are still regarded as not competent in commercial matters and that, for that reason, there has never been a single female Silk in the history of the Port Elizabeth Bar despite it being the fifth largest Bar in the country spotting 18 white male Silks.
5. In the Free State, it was a second year white male junior who asked what the point is of belonging to the Bar when it does nothing to further the interests of its members, leaving them to their own devices to sue attorneys who don’t pay their fees.
6. In Cape Town and Port Elizabeth it was white women juniors who raised the issue of the 60-day rule as “**oppressive**” and suggested that the GCB engage with the Law Society of South Africa on declaring recalcitrant attorneys guilty of unprofessional conduct.

On the evidence, Transformation is not a Black issue. Change *for the better* is not a Black issue. It is a Bar issue. The largest demographic of the Bar says so.

The reason the Bar is now grappling with the Legal Practice Act, and finds itself having to contend with weird and not-so-wonderful interpretations of its provisions by some who seem intent on taking the Bar down a peg or two, is because we have for over two decades been dragging our feet on ***changing for the better***. Even when the State imposes its own version of Transformation upon us we still hang on steadfastly to “our way of life”. This could have been avoided.

But what is the measure of that ***change for the better***? Again, I borrow from Jeremy Gauntlet QC who was Chairperson of the GCB in 1999. His measure is this:

*“Certainly we start with the fact that it is not right that still too few judicial officers and legal practitioners are not male and not black. We must be committed to changing that – and with all deliberate speed. But we must not lose sight of the fact that change must make things better, not worse. If the result is less, not greater access to justice, there will not have been transformation, only transmogrification.”*

Again, he is right of course. On this measure of ***change for the better***, I ask:

1. How do things become worse for the Bar when a rule is removed that requires a junior to wait 60 or 97 days for a fee, when every 30 days s/he has to pay GCB dues, Bar dues, rental for chambers that the Bar forces him/her to hold in a designated precinct?
2. How do things become worse for the Bar when there is a fair spread of commercial work among women and black juniors, so that they too can gain experience, build up a Silk’s practice and ultimately be invited to serve on the bench?
3. How do things become worse for the Bar when it takes up the fight on behalf of juniors who are owed fees by attorneys who play fast and loose, instead of exposing those juniors to victimisation by requiring that they sue the attorney themselves? What exactly are members paying their subscriptions to the GCB and the Bar for if they are to fend for themselves in these circumstances?
4. Is it not ***change for the better*** when each member has the relative certainty, on pain of the entire Bar’s wrath, that his/her rent, Bar dues and other monthly expenses will be paid because his/her fee will be paid at the end of the month?
5. Is it not ***change for the better*** when the white male junior in Port Elizabeth receives his fair number of briefs from the State Attorney in that region?
6. Is it not ***change for the better*** when the white male gay junior in Cape Town receives his fair number of briefs and is not denied briefs by reason of his sexual orientation?

7. Is it not *change for the better* when the white woman junior in Port Elizabeth receives her fair share of commercial briefs so that she can build up a Silk practice?
8. Is it not *change for the better* when more women and more black members build up Silk practices?
9. Is it not *change for the better* when members do not have worry about fees not being paid but rather about the quality of their service?

The answers to these questions should be obvious. It is up to all of us at constituent Bars to vote for *change for the better* on 15 and 16 July 2017 at the GCB AGM in Port Elizabeth. The Bar's Legitimacy depends on it.

#### **D. Issues Commonly Regarded as Impediments**

##### *(i) The 97-day or 60-day Rule: GCB Rule 7.6.1*

Top of the list across **all** Bars, **without exception**, is the issue of the Bar prescribing to members that they are not entitled to claim a fee until the expiry of 97 days or 60 days or some other period. The GCB Rule that is implicated in this regard is GCB Rule 7.6.1. The proviso that members may require fees to be paid in advance is not regarded as a palliative because attorneys invariably use the 97 days or 60 days as the target regardless, especially in dealing with juniors who have no bargaining power. Members want that rule gone.

Thus, the rallying cry across all Bars is **#GCBRule7.6.1MustFall**. Consequentially, so must other related GCB Rules and equivalent constituent Bar rules. Related GCB Rules include: (1) GCB Rule 7.7.2 which prescribes when attorneys must settle a fee in full; (2) GCB Rule 7.7.10 which confers upon the Bar Council, unilaterally and without reference to the member owed, the power to grant an indulgence to the attorney in the form of an extension of time for payment of a fee. At worst, the member should have a say in this decision.

GCB Rule 7.6.1, and its constituent Bar equivalents, should be deleted or replaced with a rule that entitles members to payment of their fees within 30 days of the invoice being submitted. For example, the new rule could read:

*“Fees become due at the end of the month in which they have been earned and shall be paid no later than 30 days thereafter”.*

This is consistent with National Treasury regulation 8.2.3 which reads:

*“Unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days from receipt of an invoice . . .”* (see Treasury Regulations issued in terms of the Public

Finance Management Act, 1 of 1999, Published under: GN R225 in GG 27388 of 15 March 2005.)

This recommendation is also informed by the 2015 National Budget Speech of the Minister of Finance who observed:

*“The non-payment of suppliers on time is a perennial problem that needs serious attention. This practice works against government’s efforts to grow the economy and develop the SMME sector. Payment of suppliers within 30 days will now be included among other SCM requirements in the performance agreements of accounting officers.”*

For most members of the Bar, their practices are akin to sole proprietor SMMEs. Many have left the Bar not because they did not have sustainable practices when judged by how busy they were; they left because of cash-flow problems caused by inordinately late or non-payment of their fees by instructing attorneys. The GCB, and its constituent Bars, must be instrumental in stemming that tide.

In October 2016, the JSA procured an opinion on the lawfulness of a “*blacklist rule*” under the Competition Act. I attach it. The proposed amendment or deletion of GCB Rule 7.6.1 does not constitute a “*blacklist rule*” as there is no provision that members of the Bar must decline to accept briefs from attorneys on a defaulters’ list.

GCB Rule 7.7.2 must simply be deleted. The Bar has no business regulating attorneys. That is the province of the Law Society. The best the Bar can do is engage with the Law Society on the problem of payment of Counsel’s fees.

Juniors in Johannesburg, Pretoria, KwaZulu-Natal and Port Elizabeth have proposed that GCB Rule 7.6.1 be suspended forthwith pending a decision thereon at the GCB AGM in July 2017.

(ii) *The Defaulters Rule: GCB Rule 7.7.17 and Related Rules*

A related issue that has been identified as “**a huge impediment**” is the defaulters rule and the way it works in practice. It is fair to say that the defaulters rule (wrongly termed the “**blacklisting rule**”) is cynical in the extreme. Not only does it permit members to accept briefs from a fee defaulting attorney; it also confers a discretion upon the Bar Council to remove the name of a defaulting attorney from the defaulters’ list without reference to the member who caused that attorney’s name to be placed on the list even though that attorney has still not paid the member’s fees.

This is no blacklist. It is a rule that serves no useful purpose for members. What it does is turn members into unwitting money-lenders at the instance of the Bar Council. But then the Bar Council takes no responsibility for the “**money-lending**” transaction turning sour as it simply tosses the problem back at the junior member to litigate against the attorney. This places the junior in an intolerable situation.

### **#GCBRule7.7.17MustFall.**

So, too, must other related rules. These include: (1) GCB Rule 7.7.7 which says a defaulting attorney will be removed from the defaulters’ list only after paying fees owing to all members at all Bars; (2) GCB Rule 7.7.9 which confers upon the Bar Council the power to publish a defaulters’ list; (3) GCB Rule 7.7.11 which prohibits the compromise of a fee with an attorney on a defaulters’ list; (4) GCB Rule 7.7.12 which prohibits the withdrawal of a notice of indebtedness in respect of an attorney on the defaulters’ list until the attorney has discharged such indebtedness in full. All these rules are meaningless in light of GCB Rule 7.7.17.

A rule that prohibits any member from accepting a brief from an attorney on the defaulters’ list is a prohibited practice under section 4(1)(a) of the Competition Act, among others. It was presumably for that reason that it was deleted many years ago. But then what remains of the defaulters’ list is an empty shell and should also go. That is the argument of the more than 80% demographic of the Bar.

#### *(iii) GCB Role on Transformation*

All Bars have pointed out that the GCB needs to play a greater role in enforcing transformation at constituent Bar level. This entails a constitutional amendment to confer that power on the GCB. Currently, the GCB Constitution confers only disciplinary powers on the GCB, and only at appellate level in respect of members of the Bar.

In Johannesburg it was pointed out that groups are not accountable to the Bar on transformation and that there needs to be a consistent policy on precisely what the Bar’s programme is on transformation across all constituent Bars. The consistency issue was also raised in Pretoria, Cape Town and Mthatha. We cannot have each constituent Bar doing (or not doing) its own thing on such a central issue: ***change for the better.***

#### *(iv) Sexual Harassment*

This was also raised across all Bars. It is a scourge that must stop and the GCB has been called upon to devise mechanisms of combating and extirpating it. When it was strongly raised in Port Elizabeth, I undertook to call

upon members to assist in crafting a uniform policy that can be effectively implemented and monitored. They know who they are.

Troubling, though, is the fact (for fact it is) that victims of this atrocious offence are not willing to step forward so that these matters can be investigated and perpetrators rooted out. I have encouraged members to speak to those with whom they feel comfortable. Ultimately, we shall never be able to root out this evil practice until members come forward and present evidence.

Equally troubling are allegations that members are harassed by some instructing attorneys in return for promises of briefs. It is impossible to get to the bottom of this serious allegation if members are not willing to come forward with evidence. Again, I encourage members to work with us on this. No policy will be effective in the face of a wall of silence.

(v) *Other Identified Impediments*

Other issues that have been identified by all Bars as being impediments to success and development at the Bar are:

- (1) The State Attorney's Fee Parameters, described as “**exploitative**”.
- (2) The State Attorney's briefing of a select few to the exclusion of others.
- (3) RAF briefing the same people, including the “independent Bar”, to the exclusion of others.
- (4) Payment of fees must be enforced at GCB level because the constituent Bars are failing.
- (5) Late payment and non-payment of fees by attorneys must be declared unprofessional conduct.
- (6) The second junior rule (resolution D) piloted in Johannesburg should be applied across all Bars (The rule says where a matter requires the appointment of more than 2 counsel, at least one counsel in the team must be black and preferably a black woman).

**E. Regional Impediments**

The following are issues peculiar to individual Bars and which were identified as impediments there:

- (1) Seniors who do not pay their juniors for devilling must be dealt with: Johannesburg, Mpumalanga, Polokwane, KZN and Port Elizabeth.
- (2) Local State Attorney must primarily brief local Counsel and not parachute outside Counsel even in ordinary matters: Pretoria, Mthatha, Port Elizabeth, Free State.



- (3) Local municipality work consistently goes to the same people and is not spread: Port Elizabeth and Free State
- (4) The State Attorney gives medical negligence cases to the same firm of attorneys which does not brief local Counsel: Mthatha.
- (5) RAF work goes to the same firm of attorneys which does not brief local Counsel: Free State.
- (6) Women are not generally considered competent to do commercial work: Free State and Port Elizabeth.
- (7) The State Attorney no longer briefs junior Counsel in Magistrates Court trials. It briefs private attorneys or does those trials itself, and so juniors have nothing on which to cut their teeth: Port Elizabeth.
- (8) The GCB should play a role in acting appointments: Mthatha
- (9) The practice of calling each other by surname is disrespectful of older colleagues and must be reconsidered: Mthatha
- (10) Judicare should be added to the list of briefing agents recognised by the GCB as it can be a source of much work for juniors: Free State.
- (11) SOE work done by private firms of attorneys must be subjected to a briefing patterns protocol: Mthatha
- (12) The GCB must deal decisively with the lack of equal governance at the Cape Bar with AFT: Cape Town.
- (13) The GCB must establish a Junior Fund for skills transfer, including funding advanced advocacy: Port Elizabeth, Johannesburg, Polokwane, Mpumalanga, Pretoria, Cape Town, Free State.
- (14) The State Attorney refuses to pay for preparation for trial: KZN.
- (15) Arbitrary reduction of fees by the State Attorney: KZN.
- (16) Juniors of less than 3 years should be exempt from GCB subscriptions: Pretoria
- (17) Juniors who can show that they have not received a brief or have not been paid should be exempt from paying GCB and Bar subscriptions: KZN.

## **F. Way Forward**

I end with the Chief Justice's exhortation:

*“[M]ay all of us espouse a real transformation agenda that does not leave anything out. May we remember that transformation in your own life and your commitment to transformation, must be seen in the lives of those around you. May we refuse to be so comfortable in our newfound positions and luxuries, as to find ourselves in a position where our works, particularly in public platforms like this, do not match what we do when those who are here, are not around to see what we're doing. May we depart from hypocrisy, may we always remember that if these*

*young South Africans who are manifesting the kind of militancy we thought had died out, fees must fall, Rhodes must fall, all those kind of movements, may we make sure that we don't betray the Constitutional aspirations of our people to the point where one day, you will be marching to me and saying Mogoeng must fall, because [I failed] when I had the opportunity to ensure that the Courts that Nelson Mandela was complaining about during the Rivonia Trial, have been transformed into the kind of Courts that our Constitution promises to them."*

Indeed, may we all by our deeds avoid the day when throngs of juniors across the colour line sing with one voice, "**GCBMustFall!**" "**BarMustFall!**" The future of the Bar is in our hands. Let us *change for the better* by no later than 16 July 2017.

Vuyani Ngalwana SC  
Chair: GCB of SA  
23 February 2017