

Race and Gender Transformation of the Bar and Bench: Is an All-Black Bar the Answer?

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This paper reflects largely, the opinion and thinking of my colleague at the Johannesburg Bar, and my leader as Chairman of the General Council of the Bar of South Africa. Vuyani Ngalwana SC is unable to be with us to deliver his paper within the allocated slot. Like a disciplined member of the Black Bar (one is one by virtue of being black, more like black consciousness, whether *uya thanda noma awuthandi*) I obliged when he asked me to read it in his stead.

Ngalwana SC has generously permitted me to add and/or subtract, if I so wished, to and from his paper. I have done so in relevant parts. You shall be able to pick up the two styles and identify the scribe thereto as I go along.

The topic to which I agreed to speak did not include consideration of the Bench. So, I'm afraid I shan't say much in that regard, preferring rather to sail the relatively more placid waters of the Bar.

Although one has no judicial ambitions, one must still tread very carefully in one's comments on judicial politics. As Judges are human and are therefore prone to bleeding when pricked, one would be naïve to expect a stray word to go unnoticed – with unhappy consequences.

So I shall leave that poisoned chalice to the next speaker. I'm sure he or she will be considerably more tempered than I can ever hope to be when addressing matters of race, gender and inequality.

There is another reason for steering clear of Bench politics and focusing my attention on the Bar. My brushes with the Bench have been fleeting at best, in the sense that I appear before Judges – occasionally – and have on occasion been afforded the opportunity to pretend to be one of their number. (In South Africa some lawyers are invited to act as Judges. The Constitution permits it – s175(2))

By contrast, I am steeped in the politics of the Bar, and have been for more than 25 years, beginning when I was a final year law student in 1992 having decided that is where I was headed. So, I feel rather more qualified to speak to Transformation of the Bar than of the Bench.

I do so somewhat reluctantly because I'm not sure this is an appropriate topic in a setting such as this. This is a trenchantly South African problem to be resolved by South Africans, not by talking about it but by doing what needs to be done. South Africans know what needs to be done. We have talked about it for over 25 years and agree. It is the doing that is elusive, and that lies in sheer unwillingness.

But what is Transformation in this context? I share the definition of one of my predecessors that Transformation means “**Changing for the Better**”.¹

In 25 years what has the Bar achieved by way of Changing for the Better?

¹ December 1999 *Consultus* 4

My view is that in this regard the Bar (at least in South Africa) has proven itself adept at holding meetings and symposia, taking resolutions, establishing committees and making platitudinous statements such as acknowledging and recognising the slow progress in Transformation but doing nothing of substance to move apace on it. I have come to recognise these for what they are: stalling tactics.

Let me pause here to point out that for those of you who may be unfamiliar with the players in the Transformation landscape in South Africa, you will in this address hear of (1) AFT – short for Advocates for Transformation which was formed in Cape Town in April 1998 by progressive members of the Bar of all races to foster “**Change for the Better**” in the practice of law; (2) NADEL – short for National Association of Democratic Lawyers which was formed in 1987 and (3) BLA – short for Black Lawyers Association formed in 1977 following the apartheid government’s removal of black attorneys from what it termed “*white areas*” under the infamous Group Areas Act)

The Group Areas Act No. 41 of 1950 prevented black lawyers from practicing in major cities in terms of the Group Areas Act in its numerous forms, namely, Act 41 of 1950, Act 77 of 1957 and 36 of 1966. The Law Society of the Transvaal did not intervene to protect the rights of the black lawyers who wanted to practice in city centres, such as Johannesburg.

The face of this resistance is one Godfrey Mokgonane Pitje (“Pitje”). There were several others before him I have no doubt. Who is Pitje? He was born in 1917 in Nebo, Sekhukhuneland in now Limpopo Province. He became

a teacher and graduated with a Bachelor of Arts degree from Fort Hare University, and later appointed to teach anthropology.

At Fort Hare University he joined the ANC Youth League and in 1949 became its President, and a Member of the ANC NEC. He was succeeded by one Nelson Mandela as ANC Youth League President in 1951.

In a pleasant twist of fate Pitje was to again meet with this Mandela chap when the latter signed him up for articles of clerkship in the law firm, Mandela & Tambo Attorneys. He was admitted as an attorney in 1959.

Why am I telling you about Pitje? Depending where you sit, Pitje, like Steven Biko had a mind of his own. He was loath to be told what to do by anyone. He was always in “trouble” with the then regime.

It was soon after his admission as an attorney that we now have the celebrated case of *R v Pitje* 1960 (4) SA 709 (A). This case outlines in detail the harsh realities and blatant discrimination that black practitioners endured.

Pitje, in defiance refused to take a seat on the side reserved for black practitioners in Court. He insisted on sitting where other practitioners sat. There was an altercation with a white court official. Pitje ended behind bars for “contempt”. The court system did their part to humiliate and dehumanise black practitioners.

Pitje fought his conviction right up to the Appellate Division, the highest Court in South Africa then. He lost. Yes, the Courts were in it as well.

Pitje became the founding president of the BLA. It celebrated 40 years of existence in 2017.

The Transformation struggle is far from over. The resistance to transform has now assumed some sophistry. It is no longer as blatant as it was during Pitje's time. Carefully listen to the following:

As recently as February 2018, following AFT-sponsored amendments to the GCB Constitution and Rules, the largest Bar now wants **“mediation in respect of the amendment of the GCB Constitution”**. This, in the characterisation of Martin Luther King Jr of similar stalling efforts, is a **“tranquillising drug of gradualism”**.²

What will such mediation achieve that 25 years of patient engagement has failed to achieve? Nothing, and this chronology should put the question beyond doubt. I demonstrate this by looking at what the Bar has achieved by way of Transformation from 1993 to 2018. I do so by highlighting transformation events in each of those years, whether the event is a speech, a resolution, a meeting, a symposium, a statement of intent, or an actual deed.

1993: October – **“The pace [of Transformation] is too slow. We must take urgent steps to hasten it. We must do so for the sake of the Bar and its credibility.”** (GCB Chair, writing in *Consultus*)

1994: July – The GCB issues a Statement of Intent committing itself to, among other things, **“ensuring that the Bar is representative of all sections of the South African population.”**

² “I Have a Dream” speech, 28 August 1963

1995: April – “The GCB is at present addressing ways of resolving the problem . . . of firms which dominate commercial litigation . . . adopting a briefing practice which excludes black members of the Bar from access to that commercial work [because] they do themselves no credit and the country a disservice.” (GCB Chair, writing in *Consultus*).

1996: July – The GCB AGM adopts Transformation policy decisions including appointment of specialised committees to investigate and prepare position papers on Transformation issues promoted by NADEL and the Dept of Justice.

1997: July – A report on the GCB AGM held in Port Elizabeth describes as “**a sign of progress**” an AGM at which all delegates are male of whom only 3 are black. No women.

1998: April – AFT (Cape) is formed in Cape Town by progressive members (not only black members as reported).

July – AFT (National) is formed.

July – Transformation takes centre stage at the GCB AGM at the instance of AFT (National). GCB and AFT (National) “**agree on the need for transformation**”. The GCB AGM appoints 2 senior

members to collate Transformation issues and route them through to “**an appropriate forum**” to be established by 30 November 1998.

1999: April – The GCB proposes to AFT that AFT becomes a constituent member instead of enjoying a 50% representation on the GCB. AFT rejects this proposal and is asked to explain in writing.

December – Transformation is defined as “**change for the better**”. (GCB Chair, writing in *Consultus*).

2000: July – The GCB AGM adopts the “GCB 2000 Strategy” on Transformation. The GCB Chair cautions that “**[w]e should have no illusions that endeavours to make the Bar more representative, and to be the kind of professional organisation which accords with the transformed nature of our society generally, will succeed overnight.**”

2001: January – “**There must be transformation, but it must be transformation in the rigorous sense used by Australia’s High Court Judge Michael Kirby – not simply change, but change for the better. This means a profession more representative of the face of South Africa . . .**” (GCB Chair, writing in *The Sunday Times*)

July – The GCB AGM resolves to invite AFT, BAFO, BLA and Nadel to discuss Transformation at a GCB executive committee meeting

scheduled for 28 October 2001 and which would be converted to a special GCB general meeting for that purpose.

October – AFT members serve on the GCB executive for the first time.

2002: July – GCB AGM resolves that it recognises the skewed briefing patterns against black and women members. It requests all constituent Bars to **“take innovative and practical measures to address this”** and report on progress at the GCB executive meeting scheduled for October. A report on the October executive meeting simply says briefing patterns was the subject matter **“of animated and informative discussion”**.

2003: July – At its AGM the GCB invites the Chief State Law Advisor to talk briefing patterns. It is resolved that the GCB will prepare a GCB/State Attorney Protocol regulating the process.

2004: December – **“The commitment of the Bar [to transformation] is recorded in a number of resolutions, making it critically important for those of us in leadership positions to give meaning and effect to those resolutions.”** (GCB Chair, writing in *Advocate*)

2005: July – The GCB again re-commits itself at the AGM in Port Elizabeth to Transformation.

- 2006: March – a NBEB symposium is held at the Sandton Convention Centre following a high failure rate of black pupils.
- 2007: March – The GCB holds a Transformation Symposium attended by all constituent Bars.
- 2008: July – The GCB again commits itself to Transformation at its AGM. The GCB Chair reports that the Model Briefing Policy adopted in 2006/2007 was delegated to constituent Bars for implementation and that they in turn reported “**mixed success**” in the implementation.
- 2009: July – The Cape Bar is appointed Model Briefing Policy Committee and requested to report back on recommendations at the next GCB meeting.
- 2010: July – GCB AGM resolves to amend its constitution to reflect equal governance with AFT.
- 2011: Lull. Nothing happens. No speech. No meeting. No resolution. Nothing.
- 2012: Lull. Nothing.
- 2013: July – The GCB issues a Statement of Intent in which it “**identifies itself fully with the ideals, aspirations and challenges presented**

by the new democratic South Africa” and commits itself to **“ensuring that the Bar is representative of all sections of the South African population.”** It is exactly the same Statement of Intent it issued in July 1994.

2014: August – GCB Chair reports that the GCB granted 12 bursaries from its National Bursary Fund in the sum of R286,500.

2015: July – GCB AGM establishes a Transformation Committee **“to collate information from all Constituent Bars, monitor the implementation of the respective transformation initiatives, report thereon and make recommendations on what corrective measures may be undertaken”**. This is exactly the same mandate to which the GCB AGM committed itself in July 1998. Yet by July 2016, according to a report dated 10 June 2016, the GCB Transformation Committee had not been populated and had not held a meeting.

July – GCB AGM also acknowledges that the Bar **“remains significantly untransformed in terms of, inter alia, its empowerment culture, representivity, racial and gender barriers, in work flow, skills transfer and the practice of window dressing”**. This is the same resolution taken at the July 2002 GCB AGM.

2016: June – AFT (National) submits proposals for amendments of the GCB Constitution, including Clause 9 on language policy so that only English becomes the language of communication thus moving away from the policy that recognises only Afrikaans and English as languages of communication.

July – GCB AGM rejects AFT (National) proposed amendments.

2017: April – AFT (National) gives 3 months' notice for amendments to the GCB Constitution and Rules.

July – GCB AGM adopts rule amendment on payment of Counsel's fees at the instance of AFT (National). Rule 7.6 now reads:

“Counsel shall be entitled, as a condition of accepting a brief, to require his or her instructing attorney to pay Counsel's account in advance, or at the end of the month in which Counsel's account is rendered to the instructing attorney, or within 30 days from the end of the month in which Counsel's account is rendered to the instructing attorney.”

GCB AGM adopts amendment of Rule 7.9.1 at the instance of Pretoria AFT. It now reads:

“Fees for any professional services may only be paid by or through an attorney, or by the Legal Aid Board, or the Road

Accident Fund provided that the instructing attorney consents thereto in writing.”

December – Non-AFT GCB EXCO members, Pretoria Bar, KZN Bar, Free State Bar, Cape Bar reject all rule amendments proposed by AFT (National), including Rule 7.6 that had already been adopted by the GCB AGM in July 2017. They also reject amendments to the GCB Constitution. All AFT members of the GCB EXCO support all amendments which are passed as the GCB AGM had resolved that the GCB EXCO would make the final decision on these matters.

2018: February – The Johannesburg Bar resolves to call for mediation between itself and the GCB on the amendment of the GCB Constitution. Its Chairman invites other Bars to join in solidarity. Four other Bars (out of 12) send me one-page letters supporting the mediation proposal.

Given the narcoleptic pace of Transformation over these past 25 years, the mediation proposal constitutes in my view yet another stalling tactic. I say, to quote Martin Luther King Jr, **“this is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism”**. As the highlights over these past 25 years show so vividly, more talk and no substantive action will buy us another 25 years of the same.

The question that then arises is this: Is an all-black Bar the answer? These past 25 years demonstrate clearly that the Bar is not united on the Transformation issue. We pretend to be on the same side but we're not. Black lawyers and some progressive white lawyers recognised this in 1987 and formed NADEL. Since then there has been some movement on the Transformation front. Black lawyers did the same in 1977 out of frustration with the lethargy of the mainly white attorneys organisations.

The English electorate recognised not so long ago that the European Union formation does not work for them and so they opted out. The sky has not yet fallen. To pretend (and hope) that doing the same thing going forward and expect a different result than the result we have had for the past 25 years is insane. I am not insane. I know no colleague who is. I say it is time for all truly progressive advocates – led by those who bear the brunt of prejudice at the Bar and therefore understand the urgency – to form a new organisation and fail on their own terms. Flogging the same prostate horse will not suddenly produce a thoroughbred.

The Government is failing black lawyers.

It is some 23 years since the advent of a democratic order. No significant change has been achieved with regard to the advancement of black lawyers in a country where the majority of the population is black, and led by a black government.

For me the problem lies less with the non-black attorneys and their non-black clients. They may well be resisting Transformation. This may also be as a result of racism. They may also see Transformation as a threat to

their very being and livelihood. I do not spend my time obsessing about what non-black people do or not do in this regard. The same I cannot say about black attorneys and their black clients, the largest of which is the government and its various departments and State Owned Enterprises. The State is no doubt the largest litigator in our courts. Government legal work can keep each and every black lawyer busy every day of the working week. This problem I accept is not at policy level. There are numerous government directives in that regard. The problem is that no one actually bothers to monitor those that government has charged with the implementation of those policy. There is no willingness to hold the Heads of Legal Services in government and the State Attorneys accountable for non-implementation. That is what keeps me tossing and turning at night.

For 23 three years black lawyers have been fighting for a share of the multi-million rand legal work outsourced by government to their non-black colleagues. The Black Lawyers Association (BLA) is reported as having said during a protest at the Union Buildings sometime in 2017 that legal briefs given by government to black advocates were *“merely the crumbs that had fallen from the trays of fully-fed white male advocates”*.

BLA President Lutendo Sigogo, is reported to have said that, *“during apartheid, black lawyers and advocates were not treated as equals, were not respected, and were denied the opportunity to service government and corporate South Africa. He said further that this had not changed for black legal practitioners under the current government. Sigogo is right.*

"Our optimism is fading away and in its place comes a mirage which will do nothing to us but exhaust us like it ruthlessly does to a hopeful thirsty desert animal," said Sigogo.

"We are here today, 23 years after the inauguration of a democratic country, it is totally unacceptable that black legal practitioners of 2017 are faced with the same challenges experienced by legal practitioners of apartheid." "We do not receive legal work from government".

"The continued reluctance to give legal work to black legal practitioners represented the continuation of the dehumanisation of black South Africans", concluded Sigogo.

The BLA have also asked President Jacob Zuma to establish a judicial commission of inquiry to establish the root causes of this preference by state departments, parastatals and municipalities to continue utilising the services of non-black legal practitioners above their black counterparts. IT IS GOING TO BE A LONG WAIT.

I take nothing from my non-black colleagues. It is not their fault that they are loved and perceived as of superior disposition by a majority black government in general and its Legal Services departments in particular.

It is not my non-black colleagues' fault that a majority non-white government in general and its Legal Services departments in particular suffers from an inferiority complex and self-hate to always believe that *Sehla re sa Mosotho ke Lekgowa*.

The government is non-white “led”, it is in “power” or so we are made to believe. If true, Why is it that we are having these conversations 23 years post *uhuru*?

A breakaway Black Bar?

A few issues to ponder.

1. What or how will a breakaway Bar Black look like?
2. What will its objectives be?
3. How will it change the current material condition of black lawyer?
4. Will a Breakaway Black Bar muster sufficient government and its departments’ support given the lethargy that currently obtains?

WATCH THIS SPACE.

31 March 2018