#Transformation

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On 8 October 2016, at the Johannesburg Society of Advocates' (the JSA) annual dinner at which the JSA fittingly accorded special honour to former Deputy Chief Justice (the DCJ) Moseneke, the DCJ talked poignantly about the need for Transformation at the Bar. The DCJ described the Bar as "the crucible of excellence". We applauded, almost deliriously, at the aptness of the observation, perhaps driven by an abiding sense of foreboding towards the incursive provisions of the Legal Practice Act into "our way of life".

The speeches and photo-ops with the DCJ soon ended, as they must. The dust caused by the delirium of our applause soon settled, as dust tends to do. We returned to our disparate worlds: the world, on the one hand, of professional Shangri-la for the white male Bar member, anxious only about when he'll find time finally to attend to that urgent commercial brief that has been sitting on his desk for the past two weeks; and the world, on the other, of anxiety for the average black and woman junior worrying about whether the fee that has been outstanding from the State Attorney since March 2015 has finally been paid so that group fees and rent of the past five months can be paid; anxious, too, not to push the State Attorney too hard lest even the trickle of insubstantial briefs dries up altogether.

The "crucible of excellence" soon takes on the appearance of a mirage for most black juniors as they wonder when an opportunity will finally arise for them, too, to hone their craft. Even when that elusive opportunity does arise, anxiety soon dulls the momentary excitement on the realisation that the fee (in Johannesburg) becomes due only three months hence (if paid at all) while his rent, group fees and "Black Tax" are due at the end of each month. Soon the mirage turns to dust, dust turns to mud, and mud turns to quicksand in which the black junior is trapped in a crucible of professional never-never land.

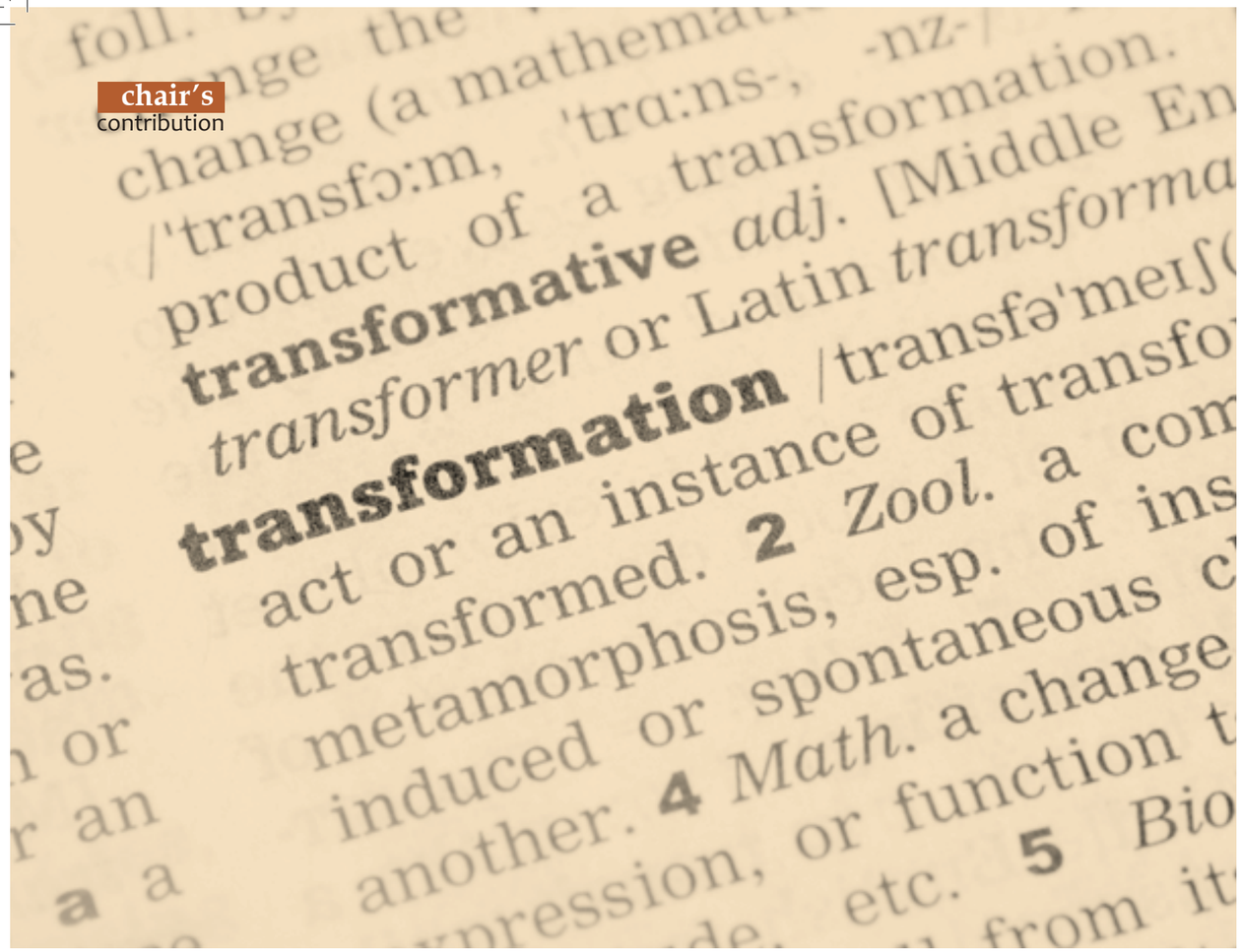
It should not be so, and we all agree that it should not be so. Yet we still hold steadfastly onto anachronistic rules and practices that are an obstacle to black and women members' achieving the excellence that the Bar holds in promise but never delivers to them. This contribution touches on some of these rules and practices and seeks to make out a case for their extirpation.

The DCJ's latest exhortation – and that of the Chair immediately past that "it remains the obligation of every Bar actively to do everything possible to ensure that anachronistic practices and historical impediments to all practising advocates competing on a level playing field, are broken down" – is enough for us to elevate Transformation to hashtag status and tear down those walls.

Transformation will be the central feature of one's tenure, beginning unapologetically by targeting those anachronistic features of the Bar that continue unnecessarily to serve as obstacles to the professional self-advancement of black and women colleagues.

THE TROUBLE WITH OUR APPROACH AND WHAT WE SHOULD DO

Even though Transformation has been the subject of commitment by one's successive predecessors, it is a source of irritation for some colleagues whose attitude is that so-called PDIs should "get over" their victim mentality. This is a selfish and short-sighted view by colleagues who have not experienced the fraught fettle of those whose desire for nothing more than equal opportunity to excel hinges inexorably on the Bar's



changing its ways for the better. That was the definition accorded Transformation by the Bar in 1999. Yet we are still not substantively better than we were back then.

It must be said that the attitude is also an intellectually bankrupt retort that reveals remarkable ignorance of our courts' equality jurisprudence.

One trusts that the GCB executive committee – working in collaboration with Bar Councils of all constituent Bars in the exercise of the powers conferred upon them by their constitutions – will finally help us all travel farther, and irreversibly, on that Transformation path in the next 19 months.

One has – in these pages and elsewhere – been critical of the GCB's approach to Transformation and expressed the view that Transformation lies in what we do rather than in the structures we set up. One has seen no evidence to temper that view.

Demonstrating the futility of structures (seemingly for their own sake) is a report tabled at the 2016 GCB AGM by the GCB's Transformation Committee that it held not a single meeting the entire year from July 2015 to October 2016! What's more, the GCB Transformation Committee – established more than a year ago with a mandate "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" – had not even been constituted as at 10 June 2016.

As one pointed out in an earlier edition of this publication, the Bar knows exactly what the problems are and does not need a committee at GCB level to "collate information" and "make recommendations on . . . corrective measures". The establishment of a Transformation Committee at GCB level to "collate information" that is already known is simply an Aunt Sally proposition.

In fact, in November 1998 the then GCB Chair told us that on 25 July 1998, a structure comprising two senior colleagues was established and given the same mandate that has again been given to the GCB Transformation Committee in July 2015. One has not been able to find any record of "collated information" on Transformation and "recommendations [to] take the process of transformation forward".

This is not a criticism of the colleagues that had been tasked with this Transformation mandate. It is rather a criticism of the approach that we as a Bar have chosen. It requires reconsideration because clearly it does not work.

Since s 6(a) of the GCB Constitution tells us that the GCB has "no jurisdiction over any constituent Bar or its members" except in matters of discipline, it is a wonder what effect recommendations of a Transformation Committee at GCB level could possibly achieve without consequential amendment of the GCB Constitution by deleting s 6(a) – itself an impossible task because s 12 of the GCB Constitution requires the unanimous assent of all constituent Bars (including the offending Bar) for the amendment of s 6(a).

What this means is that the GCB in relation to the constituent Bars plays a role not dissimilar to that of the United Nations, and the GCB Chair a role akin to that of the UN Secretary-General. In order to appreciate the emasculated existence of the GCB to which s 6(a) gives effect (at least on paper), one need only think back to the invasion of Iraq in 2003 – in flagrant breach of a UN Security Council Resolution – and President George W Bush of the US telling the world that the UN is an "ineffective, irrelevant debating society". It is safe to say that for as long as s 6(a) of the GCB Constitution remains, the GCB will – unlike Muhammad Ali – float like a bee and sting like a butterfly on Transformation.

Section 6(a) is in any event a curious provision in a Constitution of what is arguably a federal structure, resulting in the Constitution of a constituent Bar electing members onto its Bar Council on considerations of race while the GCB Constitution entrenches as its objects in s 2(d) "the ideal of non-racialism and non-sexism in an open society". This clearly cannot continue. We cannot have a constituent Bar's Constitution that is at odds with the GCB Constitution at such a fundamental and principled level.

Some of the obstacles to Transformation at the Bar, and which will be placed before the GCB executive committee, include

1. Rule 7.6.1 which prescribes the period before which Counsel's fees "do not become payable";
2. Rules 7.7.1 to 7.7.12 which prescribe when Counsel may claim payment of a fee, prescribe in what circumstances Counsel may place an attorney on a defaulters' list, and prescribe in what circumstances Counsel may compromise a portion of his or her fees with an attorney on the defaulters' list;
3. Rule 7.7.16 which prescribes in what circumstances Counsel may waive his or her fees;
4. Rule 7.7.17 which prescribes that only the Bar Council has the power to remove a defaulting attorney from the defaulters' list without reference to Counsel who placed the attorney there; and
5. Rule 7.9.2 which places the onus on Counsel to sue a defaulting attorney for overdue fees.

Constituent Bars have their own Local Rules keeping step with these inappropriately prescriptive Rules. These Rules demonstrate starkly how the Bar has effectively taken over the essence of each member's private enterprise, taking the Bar back behind the Iron Curtain. In 2016 South Africa this is unduly incursive and wholly irrational. One trusts that the GCB will finally rid itself of anachronistic rules that serve only to prescribe and, in the process, place unnecessary obstacles in the path of black and women members (who bear the brunt of these rules the most) toward realising their true potential. Whatever the mischief (if any) to which these rules are targeted, we cannot continue solving 2016 challenges using 2001 solutions.

THE 2016 GCB AGM

This year's was an eventful AGM for all the wrong reasons. It is no exaggeration to say that the outgoing Chair may have brought the Bar back from the brink, and that one constituent Bar almost pushed us over the precipice.

Scheduled for 16 July 2016 in Bloemfontein, the business of the AGM never got off the ground. At issue was whether delegates from the Cape Bar were properly representative in terms of s 3(c) of the GCB Constitution which requires that "in the case of Bars entitled to be represented by two or more delegates, [each constituent Bar] shall whenever possible ensure that not less than half of its delegates are delegates nominated by the AFT Branch of those Bars".

AFT contended at the commencement of the meeting that the composition of the Cape Bar delegation was not constitutionally compliant as none of the Cape delegation was nominated by AFT. The Cape Bar delegation insisted it was constitutionally compliant. The stalemate could not be resolved even after the Cape delegation had offered to play an observer role and not participate in any vote.

So the AGM was deferred to 1 October 2016 in the hope that in the intervening period a resolution could be found. It was resolved that the executive committee would continue to run the business of the GCB until after the October AGM at which it was hoped elections would then be held. Delegates then went for the obligatory group photo-shoot, freshened up, and reconvened for a formal dinner at which Justice Lex Mpati had us all enthralled with his keynote address.

On 1 October 2016 delegates reconvened near OR Tambo International Airport. This time the Cape Bar delegates came armed with a resolution of their Bar Council that they are not to acquiesce in anything less than full participation rights even

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though AFT again raised the issue of their composition not being compliant with s 3(c) of the GCB Constitution.

They took the view that the Cape AFT branch rendered it "impossible" – in their view within the meaning of s 3(c) of the GCB Constitution – for the Cape Bar to "ensure that not less than half of its delegates are delegates nominated by the AFT Branch" when it refused to participate in local elections for the Bar Council. It was pointed out to the Cape delegation that this conflates the composition of the Cape Bar Council with the composition of a delegation to the GCB AGM but this did not sway them.

After the Chair had in his discretion decided to refer that issue for consideration and decision by the in-coming executive committee (as he is mandated by the GCB Constitution to do) the Cape delegation elected to withdraw from the AGM. The meeting then proceeded. Some of the other important top-of-mind decisions were:

1. A recommendation would be made to the NBEB to replace the Legal Writing Moderator following widespread concern that was raised in respect of the 2015 moderation of the Legal Writing Paper.
2. GCB subscriptions were increased by 8% from 1 September 2016.
3. The Chair needs to follow up with the Ministry of Justice and Correctional Services on the signing of Letters Patent .
4. A meeting needs to be set up with the Acting Chief Litigation Officer on the State Attorney's unilateral imposition of fee parameters for Counsel across the country.
5. Submission of the GCB's report on vocational training and assessment for consideration by the National Forum and other issues under s 97 of the LPA.

CONCLUSION

Let's all get to work on making this "crucible of excellence" accessible and accommodating to all. The nation's founding document demands it of us, and the Bar – described as "a champion of the Rule of Law" by the Chair immediately past – dares not fail the Constitution of the Republic of South Africa. Let us not – as Justice Arthur Chaskalson reportedly remarked – be heard regretting 20 or 30 years from now that "there is none of us who in the past has done all that he or she could do" .

Writing 23 years ago in October 1993, then Chair of the GCB lamented that "[t]he 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." It is a terrible indictment on the Bar that more than 23 years later, even with the looming incursion of the LPA into "our way of life", one is still calling for the removal of obstacles to Transformation. It's time to stop talking. Let's do this thing.

Please see the media statement from the GCB regarding office bearers elected for the incoming term on p 8 of this issue – Philip van der Merwe, Editor.

letters *to the Editor*

As new counsel Sylvester Williams suffered a typical lack of high court briefs

Sir,

The fascinating article by Tembeka Ngcukaitobi (2016 August Advocate 29, No2) on the first black advocate admitted to the Cape Bar, Henry Sylvester Williams, stirred my curiousity to look more closely at his relatively short stint at the Cape Bar, from 1903 to 1905.

In addition to the Supreme Court Reports, the more detailed Cape Times Law Reports were weighty volumes – 1903: 1 219 pages; 1904: 1 012 pages; 1905: – 1 022 pages. They recorded not only civil and criminal trials at the Cape Supreme Court, but also appeals, reviews, applications and unopposed motions, literally thousands of appearances in the less than three years that Williams practised at the Cape Bar.

The names of fewer than fifty advocates appear in all those cases. Some of them must have had flourishing practices and appeared hundreds of times. These including heavyweights Malcolm Searle KC, Beau Upington, J E R "Jackie" de Villiers, Sir Henry Juta KC, Percy Twentyman-Jones, Schreiner KC and Murray Bisset as well as Gardiner, Howel Jones, Buchanan, Burton, Nightingale, Sutton, Close, Melius de Villiers, Pyemont, Rainsford, Dr Greer, Dr Krause, Graham KC, and others

By contrast, Sylvester Wiliams appeared in only a handful of matters in the Supreme Court.

Morgan Evans moved for his admission as an advocate before Chief Justice de Villiers and Judge Kotze on 29 October 1903 (CTR (1903) 999). The following week, on 05 November, Williams tried unsuccessfully to stay execution on a provisional sentence for six months until his client Kahn returned from India (CTR (1903) 1052).

On 15 February 1904 Williams appeared for the defendant Evelyn Eaton in an opposed divorce action, with WP Buchanan for the plaintiff. Williams applied for security for costs of £20, but the trial went ahead. There was evidence of adultery, which the defendant admitted, marital neglect and violence. The court awarded custody of the three children to the plaintiff with access to them for the defendant (CTR (1904) 96).

The next time Williams appeared was on 13 June 1904 before Judge Sir John Buchanan where he obtained an unopposed decree of divorce for Catherine Sophia Caroline Basson (CTR (1904) 471).

On 24 June he was briefed by attorneys Walker and Jacobsohn to appear for the defendant in an encroachment dispute. Unfortunately, the defendant had been barred from pleading, afterwards moved for removal of the bar, but that application was refused. When Williams rose to read the defendant's petition, Judge Hopley interposed that he did not think Williams had any locus standi. Nevertheless, the judge read the petition, but found for the plaintiff (CTR (1904) 501).

On 28 July, Williams was briefed by attorney H J Sonnenburg as junior to Burton in an appeal from the Resident Magistrate of Cape Town. Wilkinson for the respondents was not called upon by the Chief Justice who dismissed the appeal with costs (CTR (1904) 607).

On 24 August, Williams obtained an unopposed decree of divorce for his client Christian Cantum, who gave evidence that his wife committed adultery with Cupido Cupido. (Double trouble!) (CTR (1904) 712).

Two days later, Williams obtained judgment of damages of £25 for his client Martinus Petersen for the negligent death of his client's horse. Eleven witnesses were called. This exchange took place:

Mr Rainsford (for Defendant) – What was the age of the horse?
Witness Samuel Goldberg – I do not know.
R – And yet you place a value on a horse without knowing its age?
SG– We do not go according to age on the Flats.
R – You say you do not attach any importance to the age of horses on the Flats?
SG – That is so. It makes no difference to us what a horse's age is.
Hopley, J – At the age of twenty-one a horse on the Flats can work with as much ease as a five-year-old?
SG – I do not think the horse was twenty-one.
H – When does a horse get old on the Flats?
SG – I do not know, my lord."
(CTR (1904) 718).

On 05 September 1904, D Buchanan for Cohen and Kaplan applied as a matter of urgency for the arrest of the respondent Saed for contempt of court, restraining him from removing certain machinery and stock-in-trade from premises in Hanover Street, District Six. Williams called the respondent to give evidence, but the respondent was ordered to return the goods and pay costs (CTR (1904) 752).

The last case I was able to find where Williams appeared in the Cape Supreme Court was on 25 October 1904 where he obtained an undefended decree of divorce for his client John Lucius Maynard of Sea Point (CTR (1904) 850).

It may be that Williams had a chamber practice and briefs for the Magistrates Court. His lean sprinkling of Supreme Court appearances however mirrors the traditional struggle of newly admitted counsel. Briefing patterns are dictated by many factors, and it may be that the political activism of Williams played a role. How much has changed? What is clear is that an established, entrenched and well-connected number of advocates did not suffer from any shortage of instructions. They were all white males at the Cape Bar, apart from Williams. Of course, what is also quite striking in retrospect is the complete absence of any woman at the Bar. Queen Victoria's 64 years on the throne had obviously not done much for the advancement of women professionals.

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