

The Black Lawyers Association, the KwaZulu-Natal Law Society and the Law Society of the Free State recently held their 2012 annual general meetings. Reports on these meetings are below, while those of the Law Society of the Northern Provinces, the Cape Law Society and the National Association of Democratic Lawyers will follow in upcoming issues of *De Rebus*.

Transformation debate continues at BLA AGM

The Black Lawyers Association (BLA) held its annual general meeting on 20 October. The theme of the AGM was 'Transformation debate: What constitutes a transformed judiciary?' and a panel discussion was held to unpack this question. Speakers at the AGM included Supreme Court of Appeal Judge Ronnie Bosielo; Professor Shadrack Gutto of the University of South Africa's Institute for African Renaissance Studies; Marikana Commission of Inquiry spokesperson, Kevin Malunga; and President of the South African Women Lawyers' Association, Noxolo Maduba. The AGM was preceded by a gala dinner at which Chief Justice Mogoeng Mogoeng gave a keynote address.

Chief Justice Mogoeng on the judiciary

Chief Justice Mogoeng spoke on the topic 'Strengthening access to justice for all: Creating a lasting legacy for the people of South Africa', in which he discussed developments in the judiciary in his first year in office. He also shared the office's vision for the judiciary.

He said that a transformed judiciary was one that represented the race and gender demographics of the country without sacrificing the quality of justice. 'It is a judiciary that is alive to the injustices often meted out by courts to black people during the apartheid era, the inaccessibility of courts and real justice to them, the commitment we have since made as a nation to make a decisive break from that institutionalised evil of yesteryear, our constitutional values and the related imperative to bring into being a justice system that South Africans can relate to and proudly call theirs,' he said.

Chief Justice Mogoeng said that a transformed judiciary was in place when –

- judicial officers enjoyed individual and institutional independence;
- judicial officers embraced judicial accountability;
- courts are accessible;
- judicial officers are civil and genuinely respectful to litigants and have embraced the spirit of collegiality; and
- the system does not permit inordinate delays in the finalisation of matters and the delivery of reserved judgments.

Chief Justice Mogoeng said that when the heads of court met in August, for the first time they mapped out a 'decisive and clear programme of action', coupled with timelines on how to 'stem the tide of poor service delivery in all the courts'.

'This was done to give impetus to the resolutions of the July 2011 Access to Justice Conference, which underpinned the need to fundamentally turn the status quo on its

head if we are to deliver the quality justice that our people continue to yearn for so desperately,' he said.

Chief Justice Mogoeng said that the power needed to run courts effectively resided in judicial case management and pilot sites had been set up for the implementation of this in order to enhance court efficiency and effectiveness and to reduce backlogs.

He added that currently the pace of litigation is dictated by litigants as they give one another 'all sorts of indulgences', which often leaves the judicial officer with no choice but to grant a postponement, often occasioned by the failure to prepare properly.

He added that having such a system in place will mean that trial date postponements are rarely requested, documents are exchanged on time, the number of witnesses is reduced and the issues to be traversed are defined with greater clarity.

'With this model, the pace of litigation is brought back into the hands of judicial officers. If we do not implement judicial case management, when the public accuses us of failing the nation we would have no option but to plead guilty as charged,' he said.

Chief Justice Mogoeng added that some elements of judicial case management had been implemented in the Western Cape, North Gauteng, KwaZulu-Natal and North West High Courts, as well as the Labour Courts. He said that existing case flow management structures needed to be strengthened and, where they do not exist, they needed to be established.

Chief Justice Mogoeng also spoke about the National Efficiency Enhancement Committee, which was launched in October. He said that the committee would coordinate and oversee case-flow activities and address performance-related challenges that have proven to be too difficult to resolve at provincial level.

The Chief Justice also spoke on transformation of the judiciary, which is linked to that of the legal profession. In this respect, he lamented the 'paucity of real change' in the country's briefing patterns.

'Transformation of the South African judiciary is our collective responsibility as lawyers and as a nation. We know that the practices of women and black male lawyers were severely undermined by the economic imbalances brought into being by the apartheid system. The Judicial Service Commission and the President are enjoined by the Constitution to ensure that the judiciary "reflects broadly the racial and gender composition of South Africa" when judicial appointments are made,' he said, adding that white lawyers who are still in control of the economy of South Africa channel their instructions and briefs to fellow white people, as does the state attorney.

'Although the state attorney does give some briefs to black advocates, most of the commercial cases of substance are given to white male advocates,' he said.

Chief Justice Mogoeng reiterated the point he made at the Law Society of South Africa's annual general meeting in March that if the nation does not view it as its responsibility too to ensure that women and black practitioners receive a significant and fair share of briefs, the judicial appointing authorities could be left with no choice but not to appoint, or to appoint whoever is available, in order to comply with their constitutional imperatives.

In addition, Chief Justice Mogoeng spoke on the 'proliferation of misconduct cases' involving attorneys and advocates, which he said should be of grave concern to the BLA. He urged the association to find a more effective way to address this proactively, as it had the potential to tarnish the reputation of the profession.

He added: 'It is important that we all work hard to strengthen and maintain the reputation of the legal profession as the honourable profession that it was established to be. We often interview black practitioners with less than commendable disciplinary records and this must come to an end.'

Chief Justice Mogoeng commended the lawyers present for not allowing the BLA to be rendered obsolete and irrelevant. He said: 'I say this because nowadays there is a populist culture that continues to permeate our existence where approval seeking has become the order of the day. People are afraid to stand up for what is right for fear of offending or upsetting a prevalent populist culture or attracting recycled criticism from the usual suspects.'

He urged the BLA not to capitulate to those tendencies and to rather speak out against wrongdoing and acts of corruption – regardless of who is involved and what is at stake – as well as against the deliberate distortion of facts that has 'become common these days in the public domain'. He added that if the BLA did not speak out, it would be guilty of connivance and history would accordingly judge it harshly.

Chief Justice Mogoeng concluded his speech by saying that one could never be an esteemed lawyer if the legal system in which he functions does not enjoy the confidence of the majority of the citizens, including the poor; not just the rich and educated.

Judge Bosielo urges BLA to be proactive

Judge Bosielo spoke about the role of the BLA in a democratic South Africa. He said that the BLA was born of the suffering experienced by black people, including black lawyers, during the apartheid days when black lawyers were deprived of the dignity of being fully fledged lawyers like their white counterparts. He said that once they had graduated from the 'Bantu universities' it was a struggle to find a place to do articles and, once they were admitted to practice, they faced the daunting task of finding sufficient work to sustain their practice.

Judge Bosielo said that post-1994 the reality for the majority of black people is that very little, if anything, has changed. He said that service delivery protests and the 'Marikana

debacle' were 'symptomatic of disgruntled people' – people who feel that they are not enjoying the socio-economic rights promised by the Constitution. He questioned whether the BLA had 'woken up to the new reality that the struggle did not end in 1994, but that it had now morphed into a new struggle', one of economic liberation instead of political liberation. Judge Bosielo added that South African citizens were crying out for assistance from black lawyers to help realise their dreams of a better life. He said: 'The truth is the people who bear the brunt of this deprivation are our people – our grandparents, parents, brothers, sisters, children and grandchildren. These are the people who live with us in the same communities We, as black lawyers, are best suited to understand their plight – for these are our own ..., their plight is ours.'

Judge Bosielo questioned the black lawyers present whether people's expectations for them to 'take up the cudgels and fight their court battles' was misplaced.

'How do we drive our shining [cars] past these tin shacks and remain unmoved and untouched by the plight of our people? How do we turn a blind eye to the poor black children hustled together under a tree desperately trying to access education? How do we, as black lawyers, keep quiet when eight months into the year black children have not been given textbooks in Limpopo? What about the right to education? How do we keep quiet, as black lawyers, when the poorest of the poor ... go without water? Is water not essential to life and human dignity? Where are our consciences as a collective, or is it a case of Animal Farm: Other people are more equal than others?' Judge Bosielo questioned.

Judge Bosielo also asked what role black lawyers had to play in advancing a society from one characterised by inequality and joblessness to an egalitarian one. He questioned where the black lawyers were when people went to the Constitutional Court to fight for their right to water and when poor children in Limpopo were without textbooks. 'Why did we wait for a non-governmental organisation (NGO), Section27, to stand up and fight our own battle?'

He suggested that black lawyers should do a 'critical introspection and self-assessment' and ask themselves why they became lawyers. 'Do they do so for self-enrichment and aggrandisement or to become useful members of society who are there to make their mark and contribution towards improving people's lives?' adding: 'When someone asks you what you have done for your country, what will you say?'

Judge Bosielo said that the BLA was at a crossroads and needed to redefine its mission and vision. 'My view is, without doubt, that the BLA will be betraying the people if it was to fold up now. Our people are still facing enormous challenges. Many of these challenges are beyond them. They need our knowledge, skills, expertise and willingness to help them realise their dreams,' he said.

Judge Bosielo said that there was 'nothing wrong in making money and enjoying it' but, while enjoying their money, black lawyers should not forget their social responsibilities to South African citizens.

Judge Bosielo concluded by saying that there appeared to be an 'unhealthy schism' between practitioners and judges. He said that he was aware that the BLA had complained about some of the JSC's shortlisting of candidates for judicial positions and questioned whose fault it was that there were not enough credible black candidates recommended for the Bench. Judge Bosielo added that the BLA should deploy candidates who could be appointed to the judiciary and urged the organisation to be proactive in respect of judicial vacancies.

Panel discussion on transformation of the judiciary

BLA President Busani Mabunda said that the topic selected for the debate – what constitutes a transformed judiciary – was adopted following the shortlisting of judicial candidates in the North and South Gauteng High Court in August. He said that the two shortlisted candidates for the three vacant positions at this court did not 'broadly reflect the demographics of the country as envisaged by the Constitution'.

The session facilitator was Professor Gutto and the panelists were Judge Bosielo, Mr Malunga and Ms Maduba.

Professor Gutto said that transformation of the judiciary was a concern in South Africa that extended beyond BLA members and black lawyers. He added that the section in the Constitution on the appointment of judicial officers states that any 'appropriately qualified' woman or man may be appointed; however, the term 'appropriately qualified' had not been interrogated sufficiently. Certificates showing academic achievements alone do not make one appropriately qualified to become a judge, nevermind a transformative judge, he said. The Constitution went further to state the need for the judiciary to broadly reflect the race and gender demographics of the country and, in light of the population of the country, the JSC also had to look at the question of language, in terms of access to justice, he said.

Professor Gutto concluded by saying: 'If we talk about transforming the judiciary and do not even consider the integration of the whole judiciary, there is a problem.'

In respect of transformation of the judiciary, Mr Malunga said: 'We have not progressed in the manner that I believe we should have.' He viewed the 'key obstacle' to 'getting to the door of the judiciary' as the perception that candidates were not appropriately qualified or fit and proper. He said that the one could not exist without the other: 'You cannot read s 174(2) without s 174(1). ... In our quest to get our numbers right we have overlooked a very important issue, which is quality. We have focused on building quantity, but we have not focused on building quality within the ranks of organisations such as this one, which would enable people to be eligible beyond reproach to be appointable as judges,' he said.

Mr Malunga said that he did not dispute that there were not enough women judges and questioned whether black lawyers were happy with the notion of people being judges largely because they are women or are black. 'Certainly not', he said in response.

Mr Malunga said that there had been situations in spheres of government where the people at the top had been criticised and asked why they were retaining a certain individual even though he was not performing, adding that a number of them were there largely because of the requirement of representivity. Mr Malunga added that hiring to fill quotas can get 'very dangerous'.

Mr Malunga went on to define what 'appropriately qualified' means. He said that 'qualified' in most dictionaries means –

- fit, by training or experience, for a given purpose;
- competent; or
- eligibility for a competition or its final rounds.

He added that the demographic representivity requirement could not be fulfilled if someone was not appropriately qualified.

"'Fit and proper' ... is a phrase to prevent unsuitable people from running a company or a trust. There is also a benchmark for admitted attorneys, advocates or accountants. ... Likewise, not being fit and proper is a ground for removal [from the roll] for both attorneys and advocates. This is a standard which is there to promote and protect the legal profession, the practitioners and the public,' Mr Malunga said.

He added that 'fit and proper' was not defined in legislation or regulations, but was commonly accepted as entailing integrity, honesty and reliability. 'This is not to say that this standard is not subjected to politics and prejudice in the country,' he said.

Mr Malunga said that in the quest to increase the number of black and women lawyers, sight must not be lost of the fit and proper goal. He added that black lawyers needed to focus on this aspect and rebrand the image of lawyers.

'We are the subject of many jokes that question our *bona fides*. People have low regard for lawyers. We have seen alarm bells ringing where people have been accused of being over-promoted [and of] outstanding judgments by black lawyers; it all leads to whether they were fit and proper to begin with. We have to go beyond whether someone is just a mere LLB degree graduate. The BLA needs to groom candidates for the Bench,' he said.

Mr Malunga concluded by saying that while there were issues relating to numbers, demographics, gender and so forth, black lawyers should not lose sight of the key impediments for which they are often criticised – those of ethics, qualification and the delivery of judgments on time. 'Let us prove ourselves beyond reproach,' he said.

Ms Maduba confined her topic to align with the gender and racial aspects of transformation. She said that transformation was not only about changing the demographics of the Bench but there also needed to be a clear track record of commitment to the values of the Constitution. She said that if the principles in the

Constitution were given due recognition in the process of effecting changes in the judiciary, it must be assumed that an effective, accessible judicial system will come into existence.

Ms Maduba made reference to an article in the September *De Rebus*, which reported on racial and gender statistics of the attorneys' profession (2012 (Sept) *DR* 6). She questioned the reason for the challenge in increasing the number of women judges, especially as, according to the statistics on new admissions, women outnumbered men in terms of enrolment.

Ms Maduba urged the BLA to approach women who could be nominated for specific judicial vacancies, instead of 'sitting back and complaining' that not enough women avail themselves for appointment.

Judge Bosielo said that, as far as he was aware, the majority of women practitioners in the country were not in private practice, as many of them were regional court magistrates. 'This means that they are far removed from what happens in the High Court. They are taken away from the mainstream legal work ... and they forget about insolvency, company law, liquidation [and] merger and acquisition cases.' Judge Bosielo concluded by saying that training for magistrates was needed in civil procedure as, currently, with no training, they were being set up for failure.

President's report

Speaking on the Legal Practice Bill in his annual report, BLA President Mabunda said that there did not seem to be common ground on where the profession should be heading.

Some of the concerns he raised included:

- The General Council of the Bar did not seem to represent the views of the entire advocates' profession as various Bars, Advocates for Transformation and the Independent Association of Advocates of South Africa were likely to submit separate submissions to the Justice Portfolio Committee.
- The attorneys' profession did not agree on a number of issues, including ministerial appointments to the Legal Practice Council.
- The issue of representivity to the council remains moot and unresolved.

Finally, the BLA council will remain the same as this year and there will be no increase in membership fees.

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