Letters/Briewe

Appearance of non-member advocate in Supreme Court

The following letter received from the Professional Sub-Committee of the Johannesburg Bar Council is published for general information:

The [Johannesburg] Bar Council recently received a request from an admitted advocate who was not a member of any society of advocates The "non-member" was a salaried employee of a firm of management consultants. The Bar Council received an enquiry from the "non-member" as to whether or not the Bar would have any objection to the "non-member" appearing in the Supreme Court *qua* advocate, on brief from an attorney, representing a client of the firm of management consultants, of which he was an employee, and for which the "non-member" would receive no additional income over and above her normal salary. This enquiry brought to the fore the propriety of persons whose names are on the Roll of Advocates, practising the profession of advocacy, in circumstances where they are not independent individual private practitioners.

Although the Bar Council was of the view that it had no jurisdiction to grant the individual permission to do what was contemplated, the Bar Council certainly did not approve of such conduct on the basis that a person in the position of the particular "non-member" was not at liberty to practise the profession of advocacy. As a result the full Bar Council ruled as follows:

> "It is improper for a person whose name remains on the roll of advocates and who is not in independent legal practice as an advocate to purport to do advocate's work, particularly if such a person is in fact an employee of a commercial concern. The profession of advocacy requires strict adherence to the principles of independence, and Rule 4.15 (i.e. of the Uniform Rules; the red book), which is designed to ensure such independence, applies to all advocates whether they are members of the Society of Advocates or not. Even if such a person appeared in Court on brief from a practising attorney, the impropriety would remain."

Recognition and Application of Systems of Law in a Charter of Fundamental Rights

In his article in (1993)6 *Consultus* 32 on "The Government's proposals on a charter of fundamental rights: A critical appraisal" HJ Fabricius SC draws attention, inter alia, at 37 to section 28 which, in the Government's proposed charter, appears under the heading "Litigation". It needs to be noted, however, that it is not only in the courts that law is applied. Most estates, for example, are wound up without recourse to litigation, some being wound up in terms of South African law (using this title to mean the law common to all South Africans) and others in terms of indigenous (customary) law. Hence a Charter of Fundamental Rights needs to have provisions for the recognition of different systems of law and for choice of law rules which will operate both in and out of court.

If the framework of the Government's proposed Charter is to be adopted I suggest the following in place of their proposed section 28:

> "28. *The right to the recognition and application of systems of law.*
> Every person shall have the right to the recognition and application of systems of law in accordance with the following provisions.
> (1) South African law, including its rules on conflicts of law, shall be the general law.
> (2) The law of indigenous groups and religious groups shall be recognised and applied in accordance with choice of law rules relating thereto.
> (3) Judicial notice shall be taken of the systems of law referred to in sub-sections (1) and (2) above.
> (4) All legal disputes, other than those settled out of court, shall be settled by a court of law."

Sub-sections (1) and (3) of the above reflect the present position regarding South African law and the law of indigenous groups. (The history of the recognition and application of indigenous law is too long to be reviewed here: as to the present position see (1989) 106 SALJ 166.) The detailed choice of law rules should not be included in the Charter but should be dealt with in legislation. This follows from the fact that experience gained during the operation of the rules first enacted may give rise from time to time to a need for change, and legislation can be

changed more easily than a Charter of Fundamental Rights.

Some readers may wonder whether we have arrived at the position where judicial notice can be taken of the law of religious groups. In this connection it is important to remember that religious freedom is one of the fundamental rights to be provided for and that a provision such as that proposed above does not prevent a court hearing evidence concerning rules which are not otherwise available to it: cf (1957) 74 *SALJ* 313 at 330.

Sub-section (4) of the above proposal replaces the Government's sub-section 28(1) which HJ Fabricius SC, with respect correctly, points out is too wide. Courts exist for the settlement of *legal* disputes. In its note to its section 28 the Government explains that a provision is necessary to ensure that the jurisdiction of the courts is not ousted.

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African Languages for Non-African Practitioners

It often occurs in proceedings that witnesses are African while all the court officials, except the interpreter, are non-African. For the past ten years during which I have had some contact with the conduct of court proceedings, I have noted with grave concern the extent to which justice is miscarried as a result of incorrect and/or imperfect translation of the evidence of African witnesses by interpreters.

This problem is so serious that, save for unopposed divorce matters where the evidence is, by and large, similar and, therefore, can easily be recited by interpreters, in virtually all trials that I have been involved in or in which I have been part of the audience there is bound to be some incorrect and/or imperfect translation. This is particularly disturbing when one considers that most of the witnesses that appear before our courts, especially in criminal matters, are African and give their evidence in African languages. It is pitiful to observe a witness being required to explain something that he/she is supposed to have said when he/she never said it. On saying that he/she never said such a thing, the witness will be confronted with the record which, of course, will reflect the incorrect English version of the interpreter.

This state of affairs may have disastrous and far-reaching effects in that the incorrect and/or imperfect translation may relate to the very facts that are crucial for the determination of the case. The presiding officer's decision may, therefore, come nowhere near a just resolution of the issues between the parties. In the few cases in which the practitioner speaks the language of the witness, interjections by him/her (the practitioner) to a large extent, if not altogether, eliminate the possibility of such miscarriage of justice.

For justice not be "justice in the air", it is time that all practitioners who do not speak the African languages of the areas where they practise took lessons in such languages so that they themselves may be in a position to hear and understand the evidence of witnesses. A pass in an African language, preferably one spoken in the area where one intends practising, should be made compulsory for those who are still aspiring to be practitioners. As to whether such a pass should be at secondary or tertiary level is something that should be open to discussion. This suggestion should apply equally to persons who speak one or more African languages if they are going to practise in areas where African languages that they have no working knowledge of are predominantly spoken.

The implementation of the above suggestion may present difficulties in regions like the PWV where a number of African languages are spoken. These problems are not insurmountable and need to be discussed.

Something also needs to be done about the training of interpreters. Obviously a lot is lacking in the system presently followed in training them. In Transkei where I practise I am not aware of any formal programme of training interpreters. I do not know what the position is in South Africa but I venture to say that even if there is a programme, it does not overcome the problem under discussion. The nature of training or further training is something that should also be open to discussion.

I suggest that the bar and side-bar, whether jointly or separately, should discuss this issue at an appropriate level. Considerations of inconvenience to those practitioners or aspirant practitioners who do not speak the languages of the areas where they practise or intend practising should play a very minor, *if any*, role in the final determination of the matter. I trust that the concern of all practitioners is to strive for justice and not to sacrifice it at the altar of personal convenience.

This issue equally affects judges and magistrates as it affects practitioners. An illustrative example is the case of *S v Mpopo* 1978 (2) SA 424 (A) where the learned presiding judge made adverse remarks on the witness's demeanour basing them on his understanding of the Xhosa language when the witness was speaking seSotho. At the proposed discussions some attention should be given as to how the above proposals should affect judges and magistrates.

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Note:

See also "Speaking in tongues – A Namibian experience" by Stephan du Toit SC in (1992) 5 *Consultus* 148 and "Court interpreting in South Africa" by AA Mahlangu in (1993) 6 *Consultus* 48. – *Editor*

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