

GAUTENG LEGISLATURE: *SUB JUDICE* RULE

Report by PAUL PRETORIUS SC Johannesburg Bar

The legislature of the Gauteng province adopted a set of rules for the conduct of its business on 5 December 1994. These rules are still in the process of being refined.

Concern as to the possible implications of Rule 72 was expressed in the editorial of the April 1995 edition of *Consultus* (*Consultus* Vol 8 No 1, 4). Other parties also expressed concern regarding the potential abandonment by the Gauteng Legislature of the *sub judice* rule. In response, the Gauteng Legislature held a public hearing on 10 August 1995. Interested parties, including the Society of Advocates, were invited to make submissions on this question in writing and/or in person at the hearing.

The Society of Advocates of the Witwatersrand Local Division has mandated a committee of four people to liaise with the Gauteng Legislature on questions such as these. The committee is chaired by Paul Pretorius SC and its members are J Kentridge, M Kriegler and D Unterhalter. In response to the invitation from the Gauteng Legislature, the committee met to consider the contents of Rule 72. The committee also gave careful consideration to the contents of the April 1995 *Consultus* editorial. A short memorandum, drafted by Unterhalter, was the product of the deliberations of that committee. The memorandum, which is reproduced below, was sent to the Gauteng Legislature two days before the hearing.

J Kentridge attended the hearing at 9 am on Thursday 10 August 1995 at the Gauteng Legislature. Kentridge took the members of the Legislature through the contents of the memorandum, and highlighted the particular concerns of the Society of Advocates regarding judicial independence. She emphasised that the *sub judice* rule is

important both with respect to civil and criminal trials. She also explained that the rule does not simply protect the dignity of judicial officers as an end in itself, but is more broadly concerned with the right of litigants to a fair trial, whether criminal or civil. Members of the Gauteng Legislature questioned Kentridge for some two hours on issues arising from the memorandum. The members of the Legislature were very interested in the views expressed and appeared to accept that Rule 72 as it stood needed modification. It is not known, however, whether and in what ways the rule has been modified.

M E M O R A N D U M

1. *The Provincial Legislature of Gauteng has sought the Bar's comments on its formulation of the sub judice rule.*
2. *Rule 72 of the Legislature's rules for the conduct of its business reads as follows:*
"Matters sub judice
A member may refer to any matter on which a judicial decision is pending, provided that an individual's constitutional right to a fair trial may not be prejudiced. (See: s 25(3) of the Constitution)."
3. *Our suggestion is that the Rule would be more happily framed as follows:*
"*In the interests of preserving the rights of litigants to a fair trial, members shall refrain from comment upon matters pending before the courts which interferes with the proper administration of justice.*"
Our formulation is prohibitory rather than enabling. This is to be preferred in that it carves out a limited area of restraint, whilst recognising the value of free speech, most especially in the conduct of a Legislature's business.

4. *Our formulation of the Rule seeks to emphasise the mischief that ought properly to be excluded from debates in the Legislature. It is the interests of litigants and their right to a fair trial that warrant respect by members of a Legislature. While judges are expected to maintain their independence and fidelity to the Constitution, parties involved in a trial and the witnesses who testify may be swayed by comment that is directed to the issues in the trial.*
5. *A litigant should not be deterred from bringing a case just because that case invites censure from members of a Legislature. Furthermore, witnesses should be able to give their evidence untrammelled by the powerful voices within the Legislature.*
6. *Without some measure of insulation from comment, the course of a trial and indeed its outcome may be affected by extraneous comment, irrelevant to the merits of the case. That influence is inimical to a fair trial, whether a criminal trial or a civil trial.*
7. *Another concern is the influence that comments may have upon the independence of the judiciary. A judge is appointed to exercise the office to which that judge is appointed in an independent fashion, and a judge who deferred to the opinion of the Legislature would be failing in his or her duty. Deference is nevertheless due to the judiciary's constitutional duty to dispense justice. The independence of the judiciary is itself vital to preserving the rights of all persons to a fair trial, whether civil or criminal. Comment by members of the Legislature should not seek to interfere with the independence of the judiciary or the proper exercise of judicial office. □*