

# More recollections

Aaron Mendelow QC  
Johannesburg Bar

WHEN Charles Dickens, who lived between the years 1812 and 1870, wrote "If there were no bad people, there would be no good lawyers", he was merely giving expression to the popular concept of the legal profession which was current at the time, and is, in fact, still current. Only when one is in active practice of the law does one realise that the profession is not only about defending persons accused of having committed crimes, or in the words of "Rumpole", "villains", but that appearing for "bad people" is merely a small part of the practice of many, and in the case of some specialised sections of the profession *no* part at all of that practice. On the contrary, the practice of the law is not the dreary activity conceived by some unenlightened members of the public as a profession in which a practitioner is crushed between the twin millstones of precedent on the one hand, and profit on the other, but is a highly honourable and disciplined profession which produces a camaraderie, a sense of brotherhood, illuminated, often, by the recall of the many legends which surround it. As one who has been proud to have been associated with that profession for some seventy years, I still find the practice of the law challenging, pleasant, and positively enchanting, if only for the opportunity that it offers me to perpetuate some of the legends, for posterity, and to afford a glimpse of some of the "greats" of the past.

Take, for instance, Graham Mackeurtan KC – one of the all time "greats" of the Natal Bar. The story is told that he was appearing in the Appellate Division in Bloemfontein before a Bench presided over by Sir John Wessels, shortly after the latter had published his monumental work of two volumes on the law of contract. Sir John himself was a very kindly man, but he had a habit of putting his questions to

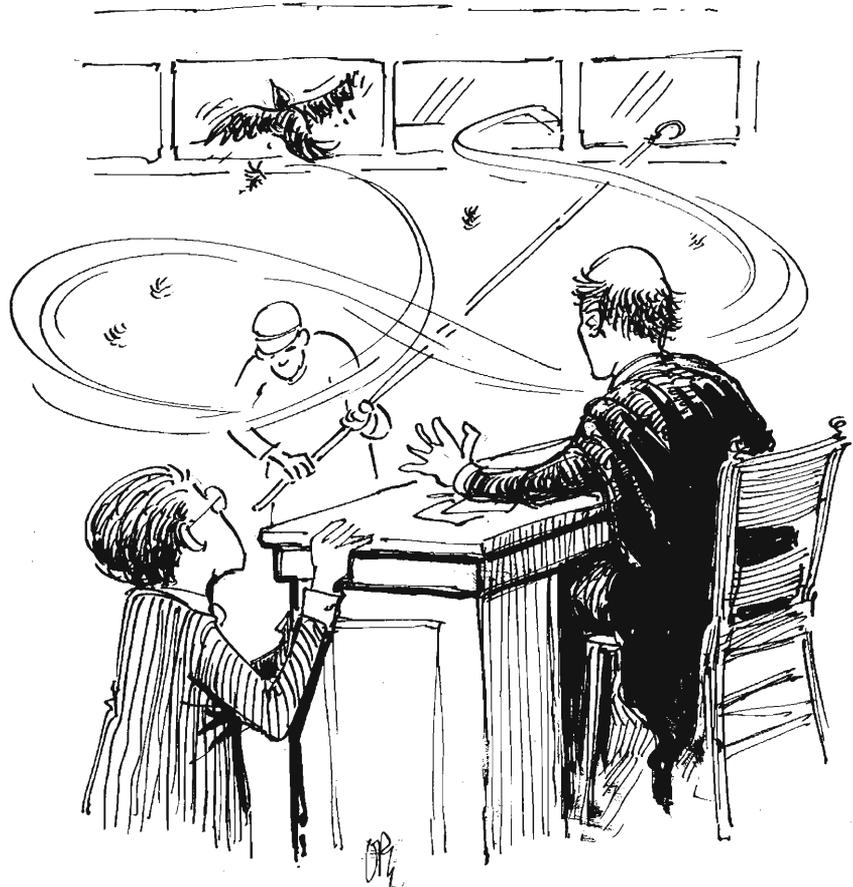
counsel in what was regarded as a "thundering" way, so that one felt that the chandeliers in the court were rocking, the walls reverberating, and generally the atmosphere was stormy. Mackeurtan started his submissions on behalf of the appellant by saying that to constitute a valid contract there had to be an offer and there had to be an acceptance, and that the acceptance in order to be valid had to be in the same terms as the offer, and if it was not in the same terms as the offer, it did not constitute an acceptance of the offer, but constituted a counter-offer.

"Mr Mackeurtan", thundered Sir John Wessels, "you must give this court credit for knowing the elementary principles of the law of contract!". "That, M'Lord",

answered Mackeurtan "was the mistake I made in the court below – I am not making the same mistake again in this court".

## Guardian of "minors"

Another story concerning Mackeurtan occurred one very hot and humid February afternoon in the Supreme Court in Durban. Anybody who is familiar with that court will remember that there was, at that time, no air-conditioning in the court, and how completely unpleasant the conditions could become on such an afternoon, and this was no exception. The learned Judge, said to have been Selke, J, said "Mr Mackeurtan, the conditions in this court have become unbearable. I propose to take a short adjournment and ask the usher to open the small windows



*"...after all, your Lordship is the upper guardian of all minors!"*

at the top of the walls and leading to the ceiling". He then left the Bench and the court usher produced a long pole with a hook at the end of it, and hooked open the tiny little windows at the top of the walls of this court. The court then resumed, and what happened? One of the many mynah birds, which infest Durban, flew in through one of the open little windows, and then tried to get out again but could not find its way, with the result that in its futile attempts to get out of the court room, it kept hurling itself and banging itself against the window frames, again making a noise. Once again the learned Judge said, "Mr Mackeurtan, the conditions have once again become unbearable – I propose to take a short adjournment and ask the usher to dispose of this bird – what do you say?" "Certainly, M'Lord" said Mackeurtan, "I can have nothing whatsoever to say – after all, your Lordship is the upper guardian of all minors!"

### "Nonsense"

Speaking of Wessels, J A, I, personally was appearing in a matter before Blackwell, J, in the Transvaal Provincial Division, and was making a certain submission. Judge Blackwell said, "I remember arguing the very opposite successfully in the Appellate Division". I said, "That is perfectly correct, your Lordship did argue the very opposite in the Appellate Division, but *unsuccessfully* and not successfully". Judge Blackwell said, "Mr Mendelow, I remember Sir John Wessels presided. Have you got the judgment there? As far as I remember, the case was not reported". I said, "Yes, M'Lord, the case was not reported, but I *do* have the judgment here". "Well" said Blackwell, J "what did Sir John say?". I answered, "He said that he did not agree with your Lordship". "Yes" said Blackwell, J "but what were his words?". "Well", I said, "his words were that he did not agree

with your Lordship". "Yes, but if you've got the judgment there" said Blackwell, J, "read me his words". I, having no alternative, picked up the judgment and I said, reading from the judgment, "Mr Blackwell who appeared for the appellant has submitted so and so and so and so. In my opinion, this is arrant nonsense". I must say this for Blackwell, J, he could "take it" as well as "dish it out", and he laughed as loudly as everybody else in the courtroom.

### Preserves

And talking about Blackwell, I recall his farewell dinner, when he retired from the Supreme Court Bench to take up practice at the Rhodesian Bar. It is, of course, a tradition, that a Judge who retires from the Bench does not return to the same Bar from which he was elevated, and that is the way Blackwell, J became a member of the Rhodesian Bar. At that time Sir John Murray had been elevated to the Rhodesian Bar, but he attended this farewell to Blackwell, and we induced Sir John Murray, who was a very gifted after-dinner speaker, to make a farewell toast to Leslie Blackwell. The words that I can recall that were used by Sir John Murray were, "We are here this evening to bid farewell to Leslie, who is retiring from the Transvaal Bench, to practise at the Rhodesian Bar. Judging by the number of titles that are now being dished out in Rhodesia, I have no doubt that it will not take very long for our Leslie to acquire one of these titles. I wonder what he will call himself – (musingly) Lord Salisbury? No, there already is one. Lord Bulawayo? No, that does not sound right. But, whatever title he chooses, and I have no doubt that our Leslie will not find it difficult to choose a title for himself, I am certain that in making his selection, our Leslie will derive a good deal of assistance from a worldwide firm of food preservers, 'Crosse & Blackwell', which bears his name, and call himself, Lord Preserve Us!"

### "Die blêrrie dag"

On another occasion I was appearing before Blackwell, J on the return day of what used to be called a restitution order. In those days a divorce was not >



"...and call himself, Lord Preserve Us!"

granted in the way in which it is granted today – there was an order calling upon the defendant to restore conjugal rights on or before a certain day, failing which to show cause on another day some time ahead of the previous date, why a decree of divorce should not be granted, and this order had to be served personally. I, in my very junior days, got up before Blackwell, J and said the usual formula. “I appear for the plaintiff in the action. This is the return day of a restitution order which has been served personally and the affidavit of non-return has been filed. I now ask for a final order of divorce”. Judge Blackwell said, “There is a letter from the defendant in the file – have you seen it?”. I said, “No, M’Lord, I have not seen it”. Judge Blackwell then said “I’ll read it to you”, and as far as I can recall, he read out: “Die Balju het op my vandag ’n bevel van die hof bestel waarin dit blyk dat my vrou my wil skei. Ek is nie bereid om my vrou te skei nie, en ek wil net die hof laat weet dat die dag wat ek my vrou skei, dit sal dit blêrrie dag wees”. “What do you say to that?” asked Blackwell, J. I said “Well, M’Lord, all I can say is that today is ‘die blêrrie dag’”. Blackwell, with a smile on his face, said “What is it you’re asking for?”, and then proceeded to grant it.

**Checkmate**

Talking about divorces, I recall appearing in a divorce case for a gentleman with a very pronounced German accent, and I called him to the witness stand and proceeded to put the usual questions. “Are you the plaintiff in this action?”. “Yes”. “You married your wife”, mentioning her name, “on”, mentioning the date, “out of community of property?”. “Yes” answered the witness. “Would you please look at this document and tell the court if this is a true and correct copy of your marriage certificate?”. The witness looked at it, and said “Yes, it is”. “Are there any children of this marriage?”. “No” said the witness. I said to him, “Where do you live?”, and he said “In Johannesburg”. I said, “Have you lived in Johannesburg all your life?”, and “Not yet” said the witness.

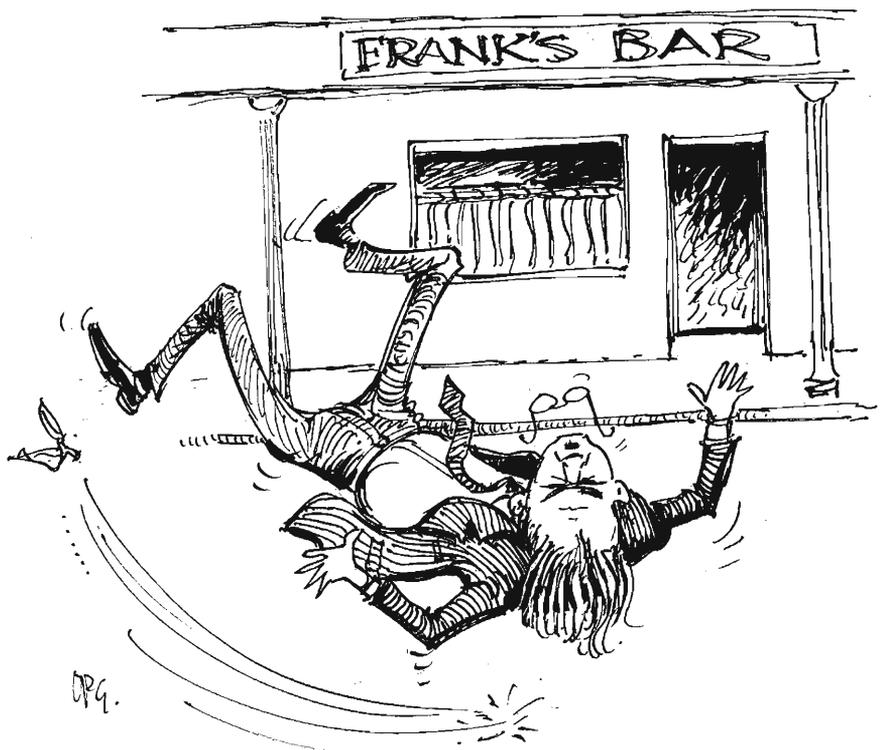
**A matter of name**

I recall an occasion when the late Morgan Evans, who practised at the Johannesburg Bar but not as a member of the Society, was appearing, and the Registrar was one Erasmus, whose enunciation of the English language would not have excited the professors of English at Corpus Christie College at Cambridge. The court was in session – in those days the motion court took place in a tiny little court, which was situated approximately in the area covered today between the two sets of lifts in the present building. The registrar was calling the divorce roll, and called a name that sounded like “*Swart v Swarf*”. A gentleman entered the witness box, and Morgan Evans rose to his feet and announced that he was appearing for the plaintiff. The witness was duly sworn, whereupon Morgan Evans said to him, “Are you the plaintiff in this case?”, and the gentleman in the box said, “Yes”. “You married your wife, so and so, on this and this date, out of community of property?”. “No” said the witness. “Look at this marriage certificate” said Morgan Evans, “is this a true copy of your marriage certificate”, and the witness looked at it and he said “no”. “There are three children of this marriage?”, and the wit-

ness said “no”, whereupon Morgan Evans for the first time looked up and said to the witness, “What are you doing here?”. It then transpired that there was another matter on the roll of *Stewart v Stewart*, and Mr Erasmus had pronounced this name as “*Stewaart v Stewaart*”, and Mr Swart had thought that this was a reference to him.

**Upset on appeal**

Where Innes Chambers are situated today, there used to be three main buildings. On the south-west corner was the National Bank – a beautiful building built according to ruling Victorian architecture, in the centre was a block of rooms, called Estcourt Chambers, and on the eastern side was the business of Herbert Evans & Co, the painting merchants. In the cellar of the National Bank there was a restaurant called “Frank’s Bar”, where one could get a “pub lunch” and a “beer” for the handsome price of a half crown (2/6 pence) (25 cents), and this was much patronised by members of the Bar, who were then housed in Corporation Buildings. As anybody familiar with the neighbourhood will know, Frank’s Bar was directly opposite the Von Brandis side entrance to the Supreme Court. The story



“...his Lordship put his foot on the banana skin ...”

is told that on one occasion the late Maurice Franks and a companion were about to enter Frank's Bar, when they saw emerging from the Von Brandis Street door of the Supreme Court, Van Pittius, J. The latter had had a rather woeful record in the appeal court – many of his judgments had not been upheld. As he emerged from the Supreme Court, he did not notice that there was a banana skin lying in the doorway, his Lordship put his foot on the banana skin and slipped on it and fell out of the door onto the pavement, whereupon Morris Franks remarked to his friend, "Same old story – Van Pittius upset on a peel".

### **Mens rea**

There was a magistrate who had been transferred to the Johannesburg Magisterial district from Germiston. At that time there was still one of the old-fashioned attorneys who wore a cap with a press stud, and a very high Victorian collar, and specialised in Victorian rhetoric and Victorian oratory on behalf of his client, charged with no matter how tri-

fling the offence. On this occasion, I, personally was waiting to be heard, and this attorney commenced his address to this magistrate, who had only arrived there that day. And the words he used, as far as I can recall, were to the following effect: "Your Worship, we are fortunate in South Africa to live in a democracy, and in this democracy we practice Roman-Dutch law. According to Roman-Dutch law, no man can be convicted of any crime unless the act is not only the act of the body, but also the act of the mind – he must have the necessary intention to commit the act before he can be found guilty of the crime – *mens rea*, the Romans called it. Now, your worship, I have listened very patiently to the evidence adduced on behalf of the prosecution, and I have yet to hear a single word which would indicate that the accused had the necessary *mens rea*, and I ask the question, 'where is the *mens rea*?' and I repeat the question, and I make no apology for repeating the question, 'where is the *mens rea*?'", dramatically holding up his hands. The magistrate leaned forward,



Mr.

"...one of the old-fashioned attorneys ..."

and said "Mr So and So, I am sorry I can't help you, I've only just been transferred here this morning".



### **PROKUREURS VAN UPINGTON**

Benodig die dienste van 'n *dinamiese* en *energieke* persoon (prokureur/advokaat) wat beide die straf- en litigasie-afdeling van die firma moet hanteer.

#### *Die suksesvolle applikant moet*

- ten minste vyf (5) jaar ondervinding hê,
- goed tweetalig wees,
- beide landdroshof- en hoërhof-litigasie hanteer,
- beide straf- en siviele appèlle hanteer,
- verhoore in die hoërhof kan waarneem, en
- in gevalle waar van 'n senior advokaat se dienste gebruik gemaak word, optree as junior vir die betrokke senior advokaat. Dit sal dus nodig wees dat die suksesvolle applikant spoedig na sy/haar aanstelling geregtig sal wees om in beide die landdroshof en die hoërhof te verskyn.

*Afhangende van die persoonlike omstandighede van die suksesvolle applikant, bied ons die volgende:*

- 'n Na-belasting vergoedingspakket van tot R100 000 per jaar.
- Direkteurskap-vooruitsigte binne 'n redelike kort tyd vir die regte persoon.

*Versend u volledige CV aan:*

Johann Möller  
Möller Zürich Ingelyf  
Multiprof Sentrum, Markstraat 71  
Posbus 9 & 270, UPINGTON, 8800  
Faks (054) 27312 Tel (054) 24051/4