Aspects of practice
Praktyksbrokkies

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Vir die doeleindes van hierdie rubriek is ek gevra om die hofverslae, en vir hierdie uitgawe in besonder die *All South African Law Reports* en *Butterworths Constitutional Law Reports* vir 1997, na te gaan vir aankondigings en beslissings wat op die praktyk en etiese reëls betrekking het. Die seleksie wat volg is my eie en enige wenke vir toekomstige uitgawes sal waardeer word. Die praktyksreëls en gewysdes vir 1998 sal in die November-uitgawe behandel word.

Practice Directions/ Praktyksreëls

Practice Directions relating to:
(a) the postponement of appeals to the Supreme Court of Appeal; and
(b) information pertinent to heads of argument
were issued by the Chief Justice. The full text of this Practice Note is reproduced in 1997 November *Consultus* 113.
1997 (6) BCLR 788 (SCA); 1997 (3) SA 345 (SCA)

Practice Direction No 1 (Land Claims Court) relating to:
(a) the allocation of judges to cases;
(b) the manner in which judges of the Court should be addressed;
(c) the mode of citation;
(d) the protocol of judges of the Court;
(e) robing;
(f) arrangements for interpreting in the Court; and
(g) practitioners: the introduction of themselves to the presiding judge
was issued by the President of the Court. The full text of this Practice Direction is reproduced in 1997 May *Consultus* 33.
1997 (7) BCLR 905 (LCC)

Practice Direction No. 2 (Land Claims Court) relating to:
(a) the number of copies of documents issued out of or filed with the Court; and
(b) the allocation of dates for conferences and hearings by the Court
was issued by the President of the Court. The full text of this Practice Direction is reproduced in 1997 November *Consultus* 133.
1997 (7) BCLR 906 (LCC)

Praktyksreël: Noord-Kaapse Afdeling

Die volgende praktyksreël is deur die Regter-President van die Noord-Kaapse Afdeling van die Hooggeregshof uitgevaardig op 24 Junie 1997:
"Met onmiddellike effek word die volgende praktyksreël vir hierdie (die Noord-Kaapse) Afdeling neergelê:

> Indien die stukke in 'n onbestrede aangeleentheid in die Mosiehof 100 of meer bladsy lank is, word daar voor 12:00 op die Maandag wat die verhoordatum voorafgaan, namens die applikant/eiser betoogshoofde soos bedoel in Reël 3(5) van die Reëls waarby verrigtinge van hierdie Afdeling gereël word (Goewermentskennisgewing R 973 van 3 Mei 1991) by die Griffier ingelewer, en word die stukke behoorlik gepagineer en van 'n indeks voorsien."

Counsel advising/appearing for remuneration without intervention of attorney

The above aspects of practice were the subject of consideration and decision by the Natal Provincial Division of the High Court and are discussed at length elsewhere in this edition of *Consultus* by Bertelsmann SC (see p 66).

Society of Advocates of Natal v De Freitas & Another (Natal Law Society intervening) [1997] 4 All SA 452 (N); 1997 (4) SA 1134 (N)

Pligte van die regsverteenwoordiger ingevolge a 5(3)(f) van die Grondwet 108 van 1996

In bogemelde verband het Cillié R hom soos volg uitgelaat:

> "Ek meen nie dit is nodig om nou uiteen te sit wat presies die volle omvang van die reg tot regsverteenwoordiging deur 'n praktisyn van eie keuse soos vervat in art 35(3)(f) van die Grondwet alles behels nie. Waarvan ek egter oortuig is, is dat die reg tot regsverteenwoordiging soos vervat in gemelde artikel nie inhou dat strafsake na willekeur van die regsverteenwoordiger van die beskuldigde se keuse uitgestel moet word na gelang van sy beskikbaarheid al dan nie. Dit skyn asof die appellant se prokureur in hierdie saak onder die indruk verkeer dat strafsake moet wag totdat hy eendag beskikbaar is of selfs totdat hy voldoende fondse vanaf sy kliënt ontvang het. Niks is verder van die waarheid nie. As 'n strafverhoor vir 'n bepaalde datum neergeplaas is, behoort 'n regsverteenwoordiger, en dit geld vir 'n prokureur en advokaat, sorg te dra dat hy gereed is om dan met die verhoor voort te gaan. So nie, behoort hy nie die opdrag >

te aanvaar nie of moet hy ander reëlings tref vir die verdediging van die beskuldigde. Hy kan nie die opdrag aanvaar en dan verwag dat die hof en getuies hulself na sy beskikbaarheid moet skik nie."

S v Molenbeek & Andere 1997 (12) BCLR 1779 (O); 1997 (2) SACR 346 (0) 351e-h

Pligte van regsverteenwoordiger ten opsigte van appèloorkonde

In bogenoemde verband het Olivier AR hom soos volg uitgelaat:

"Daar is nog een aangeleentheid wat ongelukkig genoem moet word. Dit is die skokkende swak toestand van die rekord wat voor hierdie hof geplaas is. Daar is bykans nie een paragraaf wat nie wemel van tikfoute en taalfoute (wat klaarblyklik nie deur die hof, die getuies of die advokate begaan is nie). Dit is duidelik dat die rekord getik is deur iemand wat nie eens by benadering die tale wat in die hof gebruik is – hoofsaaklik Engels en 'n klein bietjie Afrikaans – verstaan het nie. Dit is egter geen verskoning vir die swak toestand van die rekord nie. Dit is die plig van die appellant se prokureurs, beide ter plaatse en in Bloemfontein, om die rekord deur te lees en hierdie soort foute te herstel, desnoods in samewerking met die eiser se prokureurs. Daardie plig is in die onderhawige geval gruwelik versuim. Ek is van voorneme om 'n bestrawwende kostebevel in dié verband te maak.

Dit is ook verontrustend dat die advokate die rekord gelate aanvaar het en die appèl kom argumenteer het sonder om die onaanvaarbare oorkonde na verweerder se prokureurs terug te verwys en aan te dring op 'n behoorlike reggestelde oorkonde. Advokate is immers, net soos prokureurs, verantwoordelik vir die handhawing van daardie hoë standaarde wat die uiteindelike legitimiteitswaarborg van ons regstelsel is. Die dag mag aanbreek dat die verweerder se advokaat saam met sy opdraggewende prokureurs vir gemelde pligversuim van sy gelde sal moet inboet, te meer wanneer, soos in die onderhawige geval, daar meer as voldoende tyd was, nadat die advokaat opdrag ontvang het om appèlbetoogshoofde voor te berei, om die rekord reg te stel."

Venter v Bophuthatswana Transport Holdings (Edms) Bpk [1997] 2 All SA 257 (HHA) 263

Duty of counsel not to mislead the court

In a recent English decision plaintiff was awarded damages in the county court on account of post-traumatic stress disorder which resulted in persistent and ongoing mental illness. The plaintiff had witnessed the unsuccessful attempts to rescue his daughters from a motor vehicle which had been driven into a river due to the negligence of the defendant who was the nanny of the children in question. Defendant lodged an appeal with the Court of Appeal, Civil Division against, *inter alia,* the finding of the court *a quo* in relation to the consequences of the post-traumatic stress disorder. While this appeal was pending, the plaintiff's wife instituted proceedings in terms of s 8 of the *Children Act 1989* against the plaintiff in another court. (Plaintiff was represented by different counsel in the last-mentioned proceedings.)

The appeal in the motor case was duly argued on the basis of the medical evidence initially presented to the county court. Draft judgments were handed down by the Court of Appeal and the matter adjourned in the hope that certain issues, relating to the correct calculation of past and future earnings, could be settled between the parties, failing which further argument would have to be presented. During the adjournment defendant's counsel received through the post from an anonymous source copies of the judgments from the court hearing the matter in terms of the *Children Act.* These judgments revealed that, *inter alia,* the award of damages by the court *a quo* in the motor case had been based on a false basis in that there had been a known improvement in the plaintiff's condition and prognosis which had not been disclosed to the judge. In effect, the judgments received from the anonymous source revealed that the plaintiff's health had dramatically improved and that he was substantially, if not fully recovered. Defendant applied for and was granted a rehearing of the appeal in the light of this new evidence.

In the course of its judgment the Court of Appeal was obliged to consider, amongst other matters, the duty of counsel in the above circumstances.

Counsel for the plaintiff sought to rely on the distinction between actively misleading and passively standing by and watching the court be misled. (See *Saif Ali v Sydney Mitchell & Co (a firm) (P, third party)* [1978] 3 All ER 1033 [1980] AC 198; *Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289 at 297.) Stuart-Smith LJ found, however, (at 630h) that:

"the court is not being misled by the failure of the defendant to put before it material of which she could or should have been aware, but by the failure of the plaintiff and his advisers to correct an incorrect appreciation which the court will otherwise have as a result of their conduct of the case hitherto."

Regarding the duty of counsel in such circumstances the learned judge found (at 631a-b) that:

"Where there is a danger that the court will be misled, it is the duty of counsel to advise his client that disclosure should be made. ... If the client refuses to accept the advice, then it is not as a rule for counsel to make the disclosure himself; but he can no longer continue to act."

Withdrawal in such circumstances "would immediately have alerted the defendant's advisers, if not also the judge, that something was afoot."

Thorpe LJ held (at 654a-b) that:

"The only difference of opinion that I hold from Stuart-Smith LJ is as to counsel's obligation if his client demurs in the communication of necessary material to the judge. If counsel's duty goes no further than requiring his withdrawal from the

case there seems to me to be a remaining risk of injustice. ... I would hold that in those circumstances counsel has a duty to disclose the relevant material to his opponent and, unless there be agreement between the parties otherwise, to the judge."

Evans LJ held (at 644b-g) that if material comes into counsel's possession that indicated that the evidence which the witnesses had given was false to their knowledge when they gave it; or if subsequent events demonstrated that the evidence they had given could not have been correct, there would have been a duty on counsel to inform the court. His interpretation of the factual position in the case, however, was such that he found that, in the present case no such duty rested upon counsel.

Vernon v Bosley (No 2) [1997] 1 All ER 614

Right of access to information in terms of s 23 of the Interim Constitution v legal professional privilege

Applicant lodged a claim with the respondent local authority for damage caused to his domestic electrical equipment resulting from a power surge after storm damage to the power supply provided by the respondent. In order to deal with applicant's claim, respondent's legal adviser commissioned a report from respondent's electricity division. Relying on s 23 of the Interim Constitution Act 200 of 1993, applicant requested a copy of the said report. Respondent claimed legal professional privilege in respect thereof. It was common cause that the respondent is an 'organ of state' within the meaning of the definition section of the Interim Constitution (s 233 (1) (ix)) and therefore that s 23 was, by virtue of s 7(1) of the Interim Constitution, binding upon it.

Cameron J considered the following dictum of Jones J in *Jeeva & Others v Receiver of Revenue, Port Elizabeth, and Others* 1995 (2) SA 433 (SE) 453C-D:

"The weight of authority is thus overwhelmingly in favour of the view that legal professional privilege has as its true basis a fundamental right to give and take legal advice with complete confidence, without which our adversarial system of litigation cannot operate properly."

He then proceded to make the following finding:

"In my view, this conclusion may be too generally stated. Claims to legal professional privilege differ greatly in their nature, and the ambit of the privilege may be very wide indeed. See Hoffmann & Zeffertt *The South African Law of Evidence* 4ed (1988) at 247-66; see CWH Schmidt *Bewysreg* 3ed (1989) at 524-7. A recourse to privilege in relation to a confidential document drawn up by a client in order to brief his or her advocate, or the advocates opinion in response, may merit very different treatment from other such claims. The present is a case in point. The respondent received a claim from the applicant. Its response was to commission a report from its electricity department. The respondent's deponent asserts that this report was prepared solely in contemplation of possible litigation by the applicant. To uphold a claim of legal professsional privilege in these circumstances would go very far indeed to negate the intended impact of s 23. The commissioning, preparation and delivery of the electricity department's report was not merely the act of a private individual or entity in response to anticipated litigation. It was the act of a public authority which owed a duty to the applicant, as one of its electricity consumers, to ascertain whether he was entitled to compensation. The commissioning of the report was also the fulfilment of a duty to the respondent's other ratepayers and consumers.

The broad public implication of the commissioning of the electricity department's report must therefore be borne in mind when the application of s 23 is sought to be thwarted by a claim of privilege.

In my view, the recourse to privilege cannot in the present circumstances be upheld."

Van Niekerk v Pretoria City Council [1997] 1 All SA 305 (T); 1997 (3) SA 839 (T)

Paragraph 5.18.7 of Legal Aid Guide (1993) not an arbitration clause nor does it preclude recourse to the courts

Paragraph 5.18.7 of the Legal Aid Guide (1993) provides:

"In the event of a dispute between a legal practitioner and the Board over an aspect or item of an account or the refusal by the Board to pay the account or any part thereof, the matter shall be referred to the Provincial Law Society concerned for resolution."

The plaintiff attorney issued summons in the Magistrates' Court against the Legal Aid Board for payment of his fees for services rendered on the instructions of the Board. The learned magistrate dismissed the plaintiff's claim on account of the fact that "there was a perceived arbitration clause".

On appeal, Van Rooyen AJ found (at 598c) that "it would be reading far too much into the relevant clause of the Legal Aid Guide (paragraph 5.18.7 *supra)* to hold that it is an arbitration clause." He continued to find (at 598i-j) that:

"The defendant contends that the clause is nevertheless a mediation clause or an administrative remedy to be exhausted before there can be access to the courts. Nothing in the wording of the clause suggests that it is in any way a bar to resort to the Courts. The clearest language is required before it will be held that resort to the Courts is excluded. See *Grundling v Van Rensburg NO* 1984 (3) SA 202 (W) and the authorities there cited."

(It is to be noted that the learned Judge also suggested (at 597b) that in appropriate circumstances taxation of the account might be the proper remedy for the resolution of such disputes.)

Nyoka v Legal Aid Board [1997] 4 All SA 593 (E)