Independence and the advocates' profession

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"Independence is a cherished quality of the advocates' profession – without it, the practice of Law, the fairness and forceful representation of a client is impossible. Counsel's sole function is to study the facts, research the law and represent his client's interests without fear or favour." (*S v Tromp* 1966(1) SA 646 N at 655 C).

IN order to be able to do so, counsel should never become involved with the affairs of his client, nor should he be hampered by any personal involvement in collecting his fees from the attorney's client.

The independence of the advocate's profession is guaranteed especially by the fact that the profession is a referral profession. The advocate has to be instructed by an attorney. This ensures that he does not have to involve himself with attending to case management, the collection of fees, the keeping of a trust account and the obtaining and service of documents – he can devote his entire time, qualifications, skill and experience to researching the law and preparing the presentation of his client's case in optimal fashion.

Referral profession

The fact that the advocate's profession is a referral profession has been accepted for centuries.

"... in 1888 the Bar Committee... laid down that at least when a contentious matter was involved the barrister could not see a lay client without the intervention of solicitor; in the next 20 years this restriction was extended to cover non-contentious matters as well. Now a barrister is never instructed except through a solicitor; and in 1949 a barrister who appeared in the High Court without instructions from a solicitor was disbarred." (Robert Hazell *The Bar on Trial* 18-19)

"Onder andere is dit vasgestel dat 'n advokaat nie enige geding moet onderneem sonder die tussenkoms van 'n prokureur nie, en nie onderhoude met lede van die publiek moet hou sonder die tussenkoms van 'n prokureur nie, behalwe in uitgesonderde gevalle..." (Per De Wet JP in *Pretoria Balieraad v Beyers* 1966(1) SA 112 (T) at 115D)

"The classes of persons who practised before the old Dutch Courts were very much the same as those who practise today before the South African Courts. The pleader who addressed the Court was not the same as the representative of the litigant, who saw that all the necessary steps in the law-suit were properly taken. In other words, the functions of the advocate were distinct from those of the attorney. Besides these there was the notary, who took part in legal work of a non-litigious nature. These three – the advocate, the attorney and the notary – were officers of the Court, and subject to its direct control. In case of improper conduct they could be deprived of the privilege of appearing before the Court or preparing legal documents." (Wessels *History of the Roman Dutch Law* (1908) 191, quoted in part with approval by Thirion J in *Society of Advocates of Natal v De Freitas & Another (Natal Law Society Intervening)* 1997(4) SA 1134 (N) 1144F-I)

The traditional role of the advocate as a member of a referral profession has become firmly entrenched in South African law. At the latest since 1937, the position has been uniform in all provinces that advocates are forbidden from accepting work directly from clients without the intervention of an attorney, with certain exceptions which are not relevant for the present discourse. The advantage of the divided practice, in which the functions of advocate and attorney are separate and distinct, and in which counsel is not entitled to accept briefs from a lay client – "saves the advocate from the time consuming duty of office administration, having to attend to the clerical side of the legal profession. It leaves the advocate free to concentrate on what has always been the essence of the advocate's practice, namely the giving of opinions and advice, pleading and conducting proceedings in court... it leaves the attorney free to pursue the more practical side of the profession..." (Per Thirion J *De Freitas* supra 1167D-F)

The observations of Corbett C J in *In re Rome* 1991(3) SA 291 A at 306C-D are also appropriate here:

"The advocate has no direct links or longstanding relationship with the lay client – he only acts for the client on brief in a particular matter and is normally precluded by Bar Rules from accepting professional work direct from the client. The attorney is responsible to the advocate for the payment of professional fees due to the latter by the client and for the recovery of these and his own fees and disbursements from the client - the advocate has no direct financial dealings with the client. An attorney is responsible for the keeping of trust funds; an advocate is not." (Cf *De Freitas* 1167G-I)

Unfettered independence

The independence of the profession from the fetters of case administration and fee collecting has since time immemorial been elevated to one of the fundamental ethical principles of the advocate's profession and has been enforced as such by our courts. Cf *Pretoria Balieraad v Beyers* supra; and on appeal *Beyers v Pretoria Balieraad* 1966(2) SA 593 (A); *Olivier v Die Kaap se Balieraad* 1972 (3) SA 485 (A) 490 et seq; *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* 1976(4) SA 350 (T) 357B-E.

Until 1994, the Bars of the various supreme courts were the only professional organisations representing advocates in private practice. These individual Bars are associated under the umbrella of the General Council of the Bar, which retains *locus standi*, together with the individual Bars, to enforce the ethics and discipline of the profession.

In *Algemene Balieraad van Suid-Afrika v Burger & 'n Ander* 1993(4) SA 510 (T) the Full Bench of the Transvaal Provincial Division held expressly that s 7(2) of the Admission of Advocates Act 74 of 1964, granted *locus standi* to the General Council of the Bar and its constituent Bars to launch applications to the High Court to draw attention to serious breaches of the ethics of the profession by individual practitioners. It added that this section imposed a duty in the interest of the proper administration of justice upon the General Council of the Bar to exercise control over the practising profession. At p516G, Eloff JP, stated the following:

> "Daardie subartikel gee myns insiens statutêre beslag aan die behoefte en inherente reg wat die Hof gehad het om, in die uitvoering van sy toesig oor regspraktisyns, iemand te hê wat die gegewens en bewysmateriaal voor hom sal plaas, ingeval daar 'n vraagteken ontstaan oor 'n regspraktisyn se geskiktheid om langer op die rol te bly."

This extract refers to the fact that a serious breach of the ethics of the profession can, and usually does, render the offending practitioner unfit to practise. The High Court, in the exercise of its control over the practitioners appearing before it, takes cognisance of the ethical rules of the profession in determining whether a practitioner is a fit and proper person who should be allowed to continue in practice. Cf *Attorney General v Tatham* 1916 TPD 160; *Johannesburg Bar Council v Stein* 1946 TPD 115; *Beyers* supra and *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) where Van Dijkhorst J states at 852J-853B:

> "Hoewel dit so is dat daar gesag is dat die mening van die Orde en waarskynlik ook sy dissiplinêre komitees wie se verslae deur die Orde aanvaar is, gewig dra by die oorweging van hierdie aansoek, is ek van mening dat dit slegs ter sake behoort te wees by twee vrae, naamlik of die gedrag waaraan die betrokke prokureur hom skuldig gemaak het onprofessioneel is, en wat die straf is wat toegemeet moet word..."

and the learned Judge adds at 854C:

> "Uiteindelik is die beslissing of gedrag onprofessioneel is of nie in hoofsaak 'n kwessie van indruk en aanvoeling met as basis die jarelange ondervinding wat die hof van die praktyk het. (Al is dit soms in wisselwerking en op indirekte wyse). Kyk *Beyers v Pretoria Balieraad*..."

Independent advocates

In 1994 a body calling itself the Independent Association of Advocates of South Africa (IAASA) was formed and arrogated to itself the right to do away with the fundamental rule of ethics that advocates practise as a referral profession. Its own rules of ethics expressly permit an advocate to take a brief from any client with or without the intervention of an attorney. In framing this rule, IAASA principally advanced two arguments, namely:

a) Instructing counsel without the intervention of an attorney would decrease legal costs; and
b) in terms of the Constitution, the necessity to practise as a member of a referral profession placed undue restrictions upon the advocate's right to earn a living.

The attack on the existing division of legal practice was openly propagated, inter alia by a letter published in *Rapport* on 6 August 1995, in which a senior member of IAASA stated that:

> "(dit) is baie duidelik vir my dat die tyd nou oorryp is om die koddige stelsel van 'n "balie" (Advokate) en "sybalie" (Prokureurs) finaal af te skaf."

One of the members of IAASA, De Freitas, acting in accordance with the said society's rules, accepted a brief without the intervention of an attorney and performed work normally reserved for an attorney. On being advised of his actions, the Natal Society of Advocates launched an application for his striking off the roll, in answer to which the abovementioned arguments were raised. Dismissing the financial argument, the court held at p1170 that,

> "if the advocate is going to have to perform the additional function of ascertaining the facts of the case, he is going to charge a fee for the additional work involved."

The constitutional argument, namely that the restriction of the right to accept instructions from laymen, was in conflict with the fundamental right to practise one's chosen profession, was dismissed on the grounds that this restriction has for centuries been inherent in the advocate's practice, and, bearing in mind the division of the functions between the attorney and the advocate, is not an unreasonable restriction at all.

To this, Van Dijkhorst J's statement in the *Kleynhans* case supra at 850G, can be added:

> "Hoewel elke persoon kragtens a 26(1) van die Grondwet die reg het om vryelik aan die ekonomiese verkeer deel te neem, beteken dit allermins dat dit 'n onbeperkte reg is. Jan Rap en sy maat het nie die reg om as neurochirurge te praktiseer sonder enige kwalifikasies nie. Net so min ontneem a 26(1) die gemeenskap die reg om daarop aan te dring dat daar by die professie standaarde gestel word, nie alleen wat bekwaamheid betref nie, maar ook ten aansien van onkreukbare integriteit."

Thirion J at 1968 emphasized that the legislature has, in the Attorney's Act 53 of 1979, introduced important provisions for the protection of a client against the theft of trust monies, which provisions do not exist in the case of the advocate, clearly indicating a recognition on the part of the legislature of the existing division of the profession. >

Rules of Court

In addition, the Rules of Court show that many of these were framed on the premise that whenever an advocate would act in proceedings in the High Court, he would do so on instructions from an attorney.

IAASA brought a counter-application in the *De Freitas* case for an order declaring that an advocate has the right to accept instructions from any person with or without the intervention of an attorney. This counterapplication was dismissed and De Freitas was found guilty of unprofessional conduct. What saved De Freitas from being struck off the roll, in spite of the indication that he generally conducted his practice without being briefed by an attorney, was the fact that the case was a test case. (See *De Freitas* 1173I-J)

Having been found guilty of unprofessional conduct, he was suspended from the practice of an advocate for a period of six months.

This seminal decision has struck an important blow for the recognition of the fact that the essential calling of the advocate does not lie in the creation of a right to compete with the attorney in the market place for clientele, but in the ability to concentrate upon the essence of his profession – researching the law, giving opinions and presenting his client's case in court. Doing so on instructions not of the client, but of the attorney, ensures the true independence of the advocate.

The decision also underlines the fact that in the last instance, the ethics of our profession are determined and applied by the High Court, and are thus part and parcel of our law. One trusts that IAASA has already amended its ethical rules in accordance with the aforesaid judgment. Future transgressions of the rule will, in all probability, not be accorded the same leniency which was extended to De Freitas.

Neither De Freitas nor IAASA applied for leave to appeal to the Supreme Court of Appeal on the merits. Instead they decided to challenge the judgment by way of an approach to the Constitutional Court although no constitutional challenge has been raised in argument before the full Bench. They made an application to the Natal Provincial Division for a certificate in terms of the Constitutional Court rules, but were unsuccessful. They are, however, attempting to get leave to appeal from the Constitutional Court.

Editor's note: Judgment in *The General Council of the Bar of South Africa v Adriaan Secundus van der Spuy SC* (unreported, TPD case no 13013/96) was delivered on 13 March 1998. See page 27 of this issue.

Implications of the Budget on Investment Markets

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THE Budget announcement most likely to affect investment markets significantly was the hike in the tax rate applied to the net rental income and gross interest income of retirement funds. The tax rate increased by almost 50% to 25% and the Retirement Fund industry is certain to fight this increase. The increase will affect most workers indirectly; particularly members of defined contribution retirement schemes, as the net investment return obtained by the fund and ultimately declared to members will be lower. The double whammy for Government on this score is that retirement funds portfolios have shown increased exposure to bonds over the last few years, therefore not only has the rate increased but so has the tax base.

Bond yields reacted negatively to this announcement but have since resumed their downward trend; nevertheless institutional portfolio managers may be more inclined to reduce bond exposure or sell-off at higher yields than were previoulsy anticipated. On balance, bond market fundamentals remain positive but such a sell-off will no doubt be detrimental to the market.

Equities could well take advantage of the above-mentioned tax increase as institutional portfolio managers could look to tilt portfolios towards tax-free investments, namely equities, at the expense of bonds and property. However, investors taking advantage of the higher off-shore investment allowance and partially liquidating local share portfolios could counteract this. Future demands for local shares may also be affected. Generally, the budget should be mildly positive for shares as the Government confirmed its commitment to lower inflation and growth in private consumption expenditure.

The big winner for South African investors and funds is the enhanced ability to invest off-shore. The foreign investment allowance for individuals doubled to R400 000 and investors who did not take advantage of the previous relaxation in this regard should think seriously about moving a portion of their investment portfolios off-shore. The benefits of greater diversification and the resultant lower risk have been widely documented and were borne out last year, as international unit trusts easily outperformed more volatile local general equity funds.

Finally, pension funds, long-term insurance companies and unit trusts can apply to have 15% (previously 10%) of their assets invested off-shore by way of asset swaps. This can only be beneficial to the long-term performance of these funds.