Welcome changes from the Bar

An editorial under the above heading appeared in 2001 September De Rebus. *It reads as follows:*

"The demise of the advocates' anachronistic compulsory blacklisting rule is greatly to be welcomed. The announcement by the General Council of the Bar at the end of July was the victorious end of a very long battle fought by the attorneys' profession at local, provincial and national level; we share the pleasure expressed by the co-chairpersons of the Law Society of South Africa.

At the same time it is important to note that the victory is not total. According to the GCB's statement, the old Bar rule is substituted by one which requires 'an advocate who is not paid by the instructing attorney to report that fact to his or her colleagues, who may then decide whether or not to accept a future brief from the defaulting attorney.' There is also the threat that xxx[c]ounsel will also in future adopt the practice of other professional practitioners of levying penalty interest on unpaid fees.'

In the circumstances attorneys would do well to consider carefully the recent advice by the president of the Law Society of the Northern Provinces, Nano Matlala, that they should make more use of their own rights of appearance in the high courts. He went on to suggest that, where they choose not to do so, briefing procedures should be tightened up and include an indemnification of the attorney against the payment of counsel's fee where the client defaults. The GCB argues that such an indemnity is unlawful and has called for a meeting with a Mr Matlala.

The GCB's decision on blacklisting was one of a number taken at its recent annual general meeting which, together, signify that body's cautious review of its outdated procedures. The decisions no doubt come – at least in part – in response to the increasing pressure the Bar has been experiencing from not only the attorneys' profession and many of its own members but also such diverse bodies as the Competition Commission, the Supreme Court of Appeal and the Department of Justice with its plans for a Legal Practice Act.

Thus, as suggested by Cameron JA in *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 751 (SCA); 2001 (6) BCLR 531 (SCA), which is discussed [in] this issue, the GCB is looking at the possibility of introducing further exceptions to the referral rule 'to promote access to justice by those who would otherwise be deprived of it.' The need to make changes to its rules must have been brought home to the GCB by the fact that three other judges of appeal, including the Acting Deputy Chief Justice, concurred with Cameron JA's judgment, although it was separate from the main judgment written by the Acting Chief Justice with which they also concurred.

The GCB also resolved immediately 'to effect racial parity and appropriate gender representation in its own structures and called upon its ten member Bars to do likewise. A special general meeting will be held next month (October) to elect an 'expanded national executive.' In doing this the GCB is following the lead set by the attorneys' profession more than three years ago. In this too the GCB's decision – even if belated – is gratifying and we welcome it warmly.

The continued existence of a group of legal practitioners who specialise in appearance and opinion work is important in levelling the playing fields as between big and small firms of attorneys, by providing the latter with the means to service their clients' full legal needs. The attorneys' profession would, we believe, have no objection to such a group voluntarily deciding to take work, generally speaking, only on referral and thereby avoiding the need to keep trust accounts.

We rue the rift between the GCB and the LSSA about the future governance of the legal profession in the ongoing drafting of an acceptable Legal Practice Bill. The rift results from the Bar's insistence on its members continuing to be governed directly by voluntary bar councils rather than by a unitary Legal Practice Council and its substructures, even if private practitioners elect and form the majority of members of that council.

The acceptance of the need for a unitary governance structure is the final step the GCB needs to take for the vast majority of legal practitioners in South Africa to be able to speak as one in ensuring their own continued independent existence and the service of the best interests of the public." 🕮

The Bar responds

The chairman of the GCB, Jeremy Gauntlett SC, responded as follows:

Your editorial 'Welcome changes from the Bar' (2001 September *DR*) is itself welcome: we need more debate (and less sycophancy) within the profession.

But some of the inferences you draw are off-beam. Perhaps this is because none of these were put to the GCB or for that matter, any constituent Bar, for either confirmation or comment beforehand.

The defaulters' rule

The position henceforth is indeed that there will be no blacklist for defaulting attorneys. But counsel will still be under an obligation to report a failure to pay fees to their Bar, which in turn will notify all members. These may then choose whether or not to take a brief from the defaulting attorney. Counsel may also permissibly levy interest by prior agreement with their instructing attorneys. Why this should be described as a 'threat' – is the standard notation by your GP on his or her fee statement a 'threat'? – is not clear. It's an option, for counsel and briefing attorney to work out between them.

You promote – as an appropriate response to this olive branch from the Bar – Mr Matlala's call to members of the Northern Transvaal Law Society to make greater use of their own rights of appearance. Mr Matlala is of course free to represent all his clients before all forums, as indeed has been the case for six years now. But whether this advances the interests of clients is not an enquiry which you raise for consideration: seasoned litigating attorneys will consider this, as they always do, and practising advocates worth their salt will rely on their good judgment.

Retaliation has no proper place in this, it might be hoped.

Why your proposed 'tightening up' on briefing arrangements (always a good thing for clients and practitioners alike) should include 'an indemnification of the attorney against [sic] the payment of counsel's fee where the client defaults' is wholly unclear. Is the client not *the*