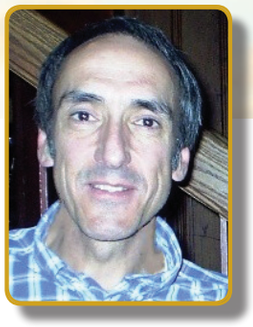
On the **costs** of **access** to **justice**, *solo silks* and *advocates/ attorneys*



By Bert Bester, Johannesburg Bar

In this, the waning afterglow of those halcyon days of liberation and constitutional exuberance, it was probably inevitable that the rather idealistic notion of a 'right to access to justice' would be dragged down into the sewers of reality by the belated realisation that even that ambitious right has, crouched at its heels like a cast-away child, an inseparable counterpart, namely an *obligation*.

Of course, on these fair shores, as with housing, health and education, governmental 'rights' pronunciations remain an exercise in vainglorious political posturing with little or no practical implication. Government, apparently more focused on silky Armani suits, pointy hand-crafted Santorini slip-ons, sleek MX5s and shady arms deals to fund them, by subtle sleight of hand, has deftly palmed off onto select sectors of its citizenry its obligation under that Social Contract punted by Jean-Jacques Rousseau. Here, the obligation to provide access to justice is interpreted so as to mean that, never mind the Saudi sheik's ransom harvested in direct and indirect taxes on legal services, the *lawyers* who provide those very services must, in the front line, facilitate easy access to legal services and thereby to justice. And some of those in our midst, more politicised than the rest, then say that when lawyers do facilitate such access, it is not an act of selfless altruism, but a constitutional, ethical and, wait for it, a *moral* duty! Straining even the boundaries of obsequious pandering to political tastes of the day, some Bars and Societies have even introduced a system of compulsory self-certification of pro bono work, annually published *nogal*, and be damned with those nice little thoughts on charity in Matthew 6, verses 1 through 4 (or, if it is more your flavour, Anguttara-Nikayas, iv. 246). In the result, what used to be a private, deeply satisfying and personal charity, by regulated coercion has been deprived of *liberality* and turned into just another repulsive form of conscription. In other common law jurisdictions, the heat is quite appropriately on government to facilitate access to justice. The lawyerly view there is that, if populist and pharisaic pronouncements on a right to access to justice are to be taken seriously, then government should provide some tangible return on those tax dollars collected on legal services. That government could do either by reinvesting them right back into a meaningful legal assistance for the deserving, or better yet, by scrapping such taxes altogether.

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brought to bear upon the cost of legal services by our archaic civil court rules that stubbornly persist to clutter our procedural landscape? These rules, for example, make no provision for a fast-tracking of disputes of low complexity and of narrow scope; for real-time judicial case management of complex and broad-ranging disputes, etc. Then, of course, other very useful tools, such as pre-trial, extra-curial, oral examinations for discovery and pre-trial examination of adverse witnesses are not provided at all. Such tools serve very well in other jurisdictions, early in the litigation, to expose speculative claims and defences, to distil real disputes from purely tactical denials, to unmask strategic manoeuvring, etc.

They also effectively emasculate the very costly 'trial by ambush' type of litigation that we still seem to favour, and force early resolution of disputes. That must be so, for when no secrets and surprises remain between parties, the true essence of a case must emerge from the often obfuscating clouds of battle-dust raised by posturing and, at times, by the clashing of unyielding, super-inflated legal egos. And when hearing dates and trial courts are allocated only upon certification of the completion of such pre-trial procedures, 'settlement on the steps of court', trial preparation fees and that bane of all litigants and attorneys, namely advocates' first day and disappointment fees, will be eliminated. In jurisdictions such as Canada, it has been estimated that, because of such procedural tools, only a very small fraction (about 6-8% or so) of all actions launched actually require allocation for hearing and adjudication by a court.

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Such defects despite, the fact remains that the overall cost of access to civil litigation and its as yet ill-acknowledged counterpart, the cost of an *exit* from litigation, are two certain deniers of access to justice. For the average person, natural or legal, any conceivable benefit that litigation might have is generally neutralised by its perceived outrageous input cost. That truism is all too often poignantly driven home by gleefully retold tales such as that of Dr Ben Broen who was hit with a fee of about a half a million Rand for a divorce which, on the say-so of his own legal counsel, entailed 'simple legal principles' (www.News24.co.za, 28/07/2007, published at 07:15 am). Perhaps the reasoning of Broen's legal counsel was that, as with taxes, each must pay legal fees, not for actual services or value received, but in accordance with ability. The News24 readers were not told what portion of Dr Broen's estate, in the final reckoning after the exercise of his constitutional right to have a dispute settled by a court of law, he had to fork over to his wife. Of course, if upon his *exit* from that litigious gamble he was then also hit with an adverse costs order (that final dose of saltpetre administered to the wounds inflicted by a loss), that must for Dr Broen have been the catalyst that precipitated his very public refusal to pay the fees of his own legal counsel.

And on the topic of the cost of such an *exit* from justice, a small contribution to the dilemma created by the ever spiralling cost of litigation would be appreciation for the simple fact that litigation input and exit costs are of little moment only for the very wealthy and the very poor. For the ordinary litigant, trapped in the expansive continuum between these economic poles, the reality is very different. For that ordinary litigant, even the alluring lustre of potential success is more often than not, on careful reflection, bleached bloodless by that three-pronged devil's trident: *one*, the award of costs in a successful case will never cover the input costs; *two*, the input costs wagered on the success of a claim never yield complete satisfaction, and often the victory is financially pyrrhic, for example, where the award secured is effectively neutralised by the balance of the input cost over the recovered costs; *three*, losses in litigation and the exit from such lost litigation are governed by that general rule of practice that, to the winners go not only the spoils, but also the costs. Of course, for widely divergent reasons, even good causes and defences are not infrequently lost, and crushingly expensive appeals against such losses are themselves about as certain as an Ekurhuleni public transport schedule. Faced by that reality, even those who are reckless and fool-hardy, rather than venture another gamble on an appeal, would generally simply surrender to the wisdom of the banker's rule (your first loss is your best loss) and stoically suffer the often debilitating consequences of the cost of an exit from that first, forlorn battle.

Regrettably, such exit costs and in particular, that part comprising the opposing advocates' fees, are for many a court and a lawyer a minor, irritating appendage perfunctorily to be dispensed with at the conclusion of every case. Few courts ever really grapple with their obligations in this regard, and with the potential consequences of an adverse costs order on a party. Courts at times pay mere lip-service to their duty to determine whether special circumstances warranted those luxuries in litigation often incurred by a successful litigant and sometimes simply surrender their discretion to perceived practices. (See, for example, *Byk Gulden SA (Pty) Ltd v AB Hassle and Another*; *Bayer (Pty) Ltd v AB Hassle and Another* 1995 BP 182 (CP) at 184A, applied in *Zietsman v Endemol South Africa (Pty) Ltd* 2006 BIP 20 (CP), but rejected on appeal: see 2008 (4) SA 1 SCA.) Such remissness becomes particularly problematic, and in many cases decidedly iniquitous where, for example, the winner employed more than one advocate and their fees are then mechanically awarded. Worse, in purported justification for such awards, courts at times even sagely dispense, without any clarification and in the most trivial of cases, such nonsense as, 'it was a wise and necessary precaution to employ two counsel'. Why, because like two batteries aligned in series, the sum of the intellectual contributions in part would somehow deliver a Gestalt?

No doubt every litigant, if it could afford it, would time and again, even for the most trivial little case, retain a heavenly team of advocates comprising counsel such as those departed greats, Welsh QC, Mahomed SC and, for spice and colour, the inimitable Johnny L Cochrane Jnr (whose incisive and devastating cross-examination, on his own say-so, persistently attracted more comment, but just barely so, than his ultra-fashionable wardrobe: see, generally, his self-adulating autobiography *Journey to Justice* (Ballantine Books, 1996). Of course, if a litigant chooses to litigate in such extravagant and luxurious fashion, that is his or her good right. But should our courts encourage that extravagance by willy-nilly awarding the fees of such a team? In particular, why should a bona fide, but unsuccessful, litigant, especially one who could barely afford to employ, for example, just a very junior advocate, be made to carry the burden of a luxury incurred by the successful party? And, as if to administer the balm to the fragile egos of our flocks of solo silks that these days scramble to compete head-on with non-silks for work, there is another aberration of recent conception: bowing to pressure from such silks, some judges now routinely award 'the costs of a senior counsel.'

Such awards are made, more often than not, without any inquiry

at all into the necessity of the employment of a silk and apparently for no reason other than the fact that a silk was retained! The problem today, however, is that the silk is often no more senior in years of call and experience than his or her non-silk opponent, but nevertheless charges a substantially higher fee for doing the same work.

In a recent report of a sub-committee appointed by the Queensland Bar to review the inequities inherent in their protocol for the selection of silks, barrister Mark Plunkett wrote, quite correctly, that the silk selection protocol there (marred by similar defects and imperfections as in this country) not only drove an ever increasing upward cycle of costs, but had given rise to a trend where a silk was employed, not as a leader, but on his/her own, thus giving rise to 'a cult derogatively referred to as a 'solo silk' practice.' That cult, Plunkett said, had been criticised as demeaning the status of silk as it permitted silks to appear solo even in trivial matters, but without even raising a questioning crease in the judicial brow. In the result, there had been a steady attrition in the standard, the quality and the status of silk. Nevertheless, Plunkett continued, the perceived better skills and experience of a silk, and the standing afforded to them in the courts, enabled silks, from that advantaged platform, to compete for the same work with non-silks, but then to charge a fee for such work at a considerably higher rate than a non-silk. Silks, he pointed out, were traditionally not permitted such solo appearances and it was an implicit prerequisite for the granting of that status that silks would accept instructions only in *genuine* two-counsel cases.

When these salutary practices prevailed, the institution of silk was regarded as a trustworthy institution, well adapted to meet the needs of litigants. However, when the two-counsel rule, that litmus of a true silk's practice, was in the late 1970s abolished, silk suddenly came within the grasp of even the weak, but well-connected, and 'nylons' (to plagiarise Diemont JA *Brushes with the Law* (Human & Rousseau, 1995) began to proliferate at the Bar. In the headlong rush by many to obtain that perceived elevated status, often at all cost, it was perhaps inevitable that the institution of silk would eventually become distorted, and the silk selection protocol marred by blackballing, nepotism, favouritism and unjustifiable quotas. That perversion is, however, not unique to this country and Australia: it was, for example, recognised in various research papers by the UK Office of Fair Trading that in a highly competitive legal practice, the institution of silk had but one remaining true function and that was to restrict competition and to prevent the market forces freely to determine the allocation of resources. The institution of silk, the Office further concluded, reduced choice because the system discouraged the use of highly competent 'junior counsel' (ie, all non-silks) and unfairly diverted work away from such 'junior counsel' who would otherwise have been the counsel of choice. The Office further reported that today, 'the silk system [did] not operate as a genuine quality accreditation scheme', but 'distort[ed] competition among junior and senior barristers' and created a monopoly or a 'job reservation' for silks at the expense of 'junior counsel.' As Plunkett correctly opined, because of this perversion, valid questions arose, such as whether litigants were not now being over-serviced and over-charged by the Bar. Complain though we may, we have now journeyed way too far down this road to revert to the practices of old. But, then, has the time not now come, in the quest to curtail the cost of litigation in some small way to facilitate access to (and exit from) justice, for the representation of a party in court proceedings to be subjected to real scrutiny?

Our general rule is that a successful party is awarded party and party costs. Under rule 69(1), that award includes the fee of one advocate only and a fee for more than one advocate, ie, a departure from the general rule, is allowed only when specifically sanctioned by the court. Case law teaches in this regard that a court may allow such a departure, but only where it is justifiable by special circumstances, such as the importance of the issues at stake, the complexity and the volume of the matter, etc. In like vein, the court may award attorney and client costs, which is of course also a departure from the general rule that a successful party gets party and party costs. But that order too, is warranted only, for example, where there has been reprehensible conduct, etc. The inescapable corollary must then be that where the court awards 'the costs of a senior counsel', special circumstances must also warrant that order.

Moreover, the mere fact that an award of costs would, under rule 69(1), include the fee of one advocate, does not mean that an advocate's fee is automatically guaranteed as of a right. In *Rosenberg v Prima Toy Holders (Pty) Ltd* 1972(3) SA 791 (C), at 794B, Van Winsen J qualified such a broad interpretation of the rule when he held that the Taxing Master had, in terms of rule 69(5), the jurisdiction *to determine not only the quantum of an advocate's fee, but also whether, in the particular circumstances of the case, that advocate's fee should be allowed at all*. Therefore, where one advocate was employed, irrespective of whether that advocate was a silk or a non-silk, and the Taxing Master was of the considered opinion that the employment of a silk or even a senior, non-silk was unreasonable because the case had little volume, involved little case law, etc., he might disallow the actual fee levied and allow only the fee of, for example, a five-year call advocate. Of course, Van Winsen J quite correctly also pointed out that, 'naturally', the Master's exercise of that discretion could be subject to a review by the court.

To venture into equally controversial terrain, rule 69(1), introduced in about 1965, harks back to a now by-gone era, when only advocates enjoyed the right of appearance in the High Court. However, in the legal landscape of today, when a successful litigant had employed both an attorney/advocate and an advocate, the Taxing Master should, in the exercise of his powers as defined in *Rosenberg*, also enquire whether, in the particular circumstances of the case, that advocate's fee should be allowed at all. The reason for that is simple: an attorney/advocate (as held by the Full Bench of the Transvaal Provincial Division in *Jeebhai v Minister of Home Affairs & Another* 2007(4) SA 294 TPD, at 312I) would not have earned a High Court right of appearance (that is, the right to present and conduct a case in that court) if he/she were not experienced. Therefore, it must follow that a successful litigant should hardly be permitted to claim, generally, the fee of an attorney/advocate as well as the fee of an advocate, for the employment of the latter, in addition to that of the attorney/advocate must, in the absence of special circumstances, be an unnecessary luxury. The attorney/advocate could of course claim that special circumstances warranted the employment of an advocate, for example that, whereas the advocate has experience and expertise in a particular area of the law or of a forum, such as the criminal, tax, constitutional, land, commercial or patent courts, the advocate/attorney does not; that the case was so complex and voluminous that the employment of both an advocate and an attorney/advocate was necessary, etc. Perhaps, when confronted by such realities, more advocate/attorneys will be forced from their traditional comfort zones and will be propelled into a mature role and a responsibility in forensic litigation. And clients will perhaps then get what they pay for, not an expensive, but essentially passive, clearing agent who acts as a mere conduit for the channelling of all the real work to advocates. And advocates will be forced to become what they *now* should be in order to ad real value to a case: a consultant specialised in a peculiar area of forensic advocacy.