Maternity Matters:
could 9 months end your practice?

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BECAUSE of biology, women at the Bar will face a challenge to their practices that men never will. They may fall pregnant and with their pregnancies, they are likely to take some period of absence from the Bar to care for their babies.

The Bar's current response to this brute fact has been a traditional one. The Johannesburg Bar, for example, provides an exemption from Bar fees for three months and some Groups at the Bar provide an exemption from Group fees for a period of maternity leave – usually in the region of three to four months.

Beyond these two measures, however, very little has been done by the Bar or its Groups to support and accommodate women who practise while pregnant and who take some maternity leave after they give birth.*

Pregnancy and maternity leave affect a woman's practice in a most profound way. Although being pregnant is one of the unique and special joys of womanhood, for a woman advocate, it can also be one of the most frightening prospects during her career at the Bar. My first pregnancy was certainly of that character. I was terrified about the impact it would have on my practice. That fear made me hide the fact of my pregnancy until it was no longer possible to do so at six months. I carried my first child and lived out my maternity leave anxious that people would never treat me as the same advocate again and would always regard the fact that I had child care responsibilities as an unwelcome hindrance to my commitment to the Bar and my work.

I had my first child after only two years at the Bar and my anxieties about her impact on my career were no doubt influenced by how recently I had joined the Bar and how precarious practice is at that stage of one's career. I had my second child in October last year, after seven years at the Bar. My second pregnancy was different from my first. I had more years behind me at the Bar and I had become more comfortable in my practice. The extra five years did not, however, mean that I escaped the prejudices and discrimination associated with pregnancy.

I would like to share some of the responses I received both to my pregnancy and my maternity leave in order to start a debate about how the Bar, and we as advocates, can better accommodate the realities of pregnancy for our women colleagues. In my view, there are some specific and immediate interventions that can be adopted to support women during this period of their practice.

* The Cape Bar's maternity policy, which was adopted in 2009 and reviewed and finally adopted in 2012, also provides, among other things, for a year's leave of absence without any loss of domestic seniority. See December 2009 *Advocate* at pages 10 to 11 – *Editor*.

I am happy to report that there were some occasions on which I received unfaltering support for the impact of my pregnancy on matters in which I was involved. Four examples come to mind. There was the hearing of an arbitration that was scheduled over a year away in order to accommodate my maternity leave. There was the brief I received which began as follows: 'Thank-you for bringing the fact of your pregnancy and its possible impact for this matter to our attention. Congratulations on this wonderful news! We have discussed the matter with the client and are more than happy to brief you now and to manage your absence from practice in due course.' There were the affidavits and heads of argument that my silks and other juniors drafted while I was on maternity leave so that I could remain in the matter on my return. And there was the Supreme Court of Appeal's willingness to set down a matter earlier than it would ordinarily have come up on the roll in order for me to be able to argue the case before going on maternity leave.

But not all the responses were this favourable.

IN THREE separate matters, when the fact of my maternity leave was raised in order to seek a particular allocation of a hearing in the High Court, no accommodation was made.

In the first matter, both parties had filed their heads of argument and they jointly requested the allocation of the hearing before I went on maternity leave so that I could argue the matter. By that stage, I had been involved in the matter for more than a year and the heads of argument from both sides totalled more than 100 pages with extensive references to comparative law. The respondent's heads were also filed six weeks before the requested hearing date. Nonetheless, we were told that the matter could not receive an early allocation and would have to be set down after I had left for maternity leave. This meant new counsel had to be briefed to replace me.

In the second matter, I acted pro bono for an amicus in a matter that commenced in 2009. I had been counsel for the amicus throughout its involvement in the case. There were three parties in the matter and two amici. All but one of the parties supported my client's request that the hearing of the matter be delayed for three months to accommodate my return from maternity leave. This, too, was a case that involved extensive references to foreign law and complex aspects of constitutional law. The court refused to delay the allocation. This refusal came in circumstances in which the case had, by that stage, dragged on for just short of five years.

In the last matter, a hearing date was set for March 2015 and my client requested that it be permitted to file heads of argument at the end of January 2015 in order to ensure that I would be able to work on the heads of argument. I had been involved in the case from inception and the matters were commercially complex and intricate. Although our opponents supported the request, it was refused and we were required to file the heads of argument during December 2014.

Although it is well established that counsel's availability will not be determinative of the allocation of matters in the High Court, it seems to me that maternity leave may deserve different treatment from the High Court when the roll is set. This is because it is one of those factors which, if treated in the same way as all other considerations that may influence counsel's availability, will result in unfair discrimination.

It is women who fall pregnant and who in the vast majority take a leave of absence from the Bar to care for their babies after giving birth. Unless this factor is considered as relevant to the scheduling of matters in the High Court, women will suffer a unique and systemic disadvantage because it is only they, and not their male counterparts, who will have to be replaced on matters. This form of structural discrimination privileges men over women. It creates a Bar that is hostile to women because it is unwilling to accommodate their difference from men.

Unless maternity leave counts as a relevant factor in the allocation of High Court matters, it may even result in women advocates not being briefed on matters in the first place. I had just such an experience during my pregnancy. I was approached to act in a large application in the High Court and to assist, at that stage, with the drafting of an answering affidavit. Although I indicated that I could assist on this immediate piece of work, I disclosed my pregnancy and the fact that I would likely be on maternity leave when the matter came up for hearing. In the light of this disclosure, the attorneys decided not to brief me at all because they did not want to risk having to replace me later. However, if those attorneys knew that my maternity leave would be considered as a relevant factor in the allocation of the matter in the High Court, it may be that they would have retained me.

MY DETRACTORS will say that the obvious solution to this problem is for women to take no or very short periods of maternity leave. But that is no solution at all. If that is the Bar's position then it will be perpetuating the most acute form of gender discrimination. No woman should be forced to choose between giving the care that a mother can give to an infant and maintaining a career at the Bar. To require that of women is to take a step backwards and to apply a man's norm to a woman's reality. If the Bar seeks to achieve gender transformation it must accept that the male norms are not neutral. They are the product of a system which developed without having to consider the impact of pregnancy and maternity leave on practice. Every woman who decides to have a child while practising at the Bar has to confront that impact and so our Rules should be developed to accommodate it too.

These examples of the High Court allocations of my matters highlights another important respect in which maternity leave influences a woman's career at the Bar. In every matter in which a woman is replaced for the period of her maternity leave, she loses income and potentially jeopardises relationships with her attorneys and lay clients. If there was some way that a woman could continue to earn a fee for work during maternity leave for matters on which she was briefed before her maternity leave or was entitled to resume work on the brief after her return from maternity leave, these impacts could be ameliorated.

As it happens, we already have Bar rules that accommodate these two impacts in different settings. We have a rule that permits an advocate to hold a brief for another counsel *sine lucri causa* where the latter is absent because of 'illness or the intervention of unforeseen and unavoidable contingencies'.[1] This rule could easily be adapted to apply in circumstances where a woman is on maternity leave, and her brief is held by another counsel.

Pregnancy should not deny a woman the opportunity to be associated with a reported case if her contribution to it prior to the hearing merits such an association.

We also have a rule that entitles the advocate who is briefed at any stage of a case (bar some minor exceptions), to be briefed at every stage throughout the case.[2] It would require a minor adaptation of this rule to ensure it applied to situations of maternity leave so that a woman returning from maternity leave would be entitled, notwithstanding that leave, to continue to be briefed on the matter even if she had been replaced during the period of her leave.

This rule, like any other, is subject to the wishes of the client and so if the client wished to retain the advocate who had replaced the woman during her maternity leave, that would be the client's prerogative and no rule of our Bar could override that. But establishing the rule is nonetheless important because it regulates our relationships and expectations as colleagues. It would create an entitlement, and accordingly set expectations that when someone is briefed on a matter to replace a woman on maternity leave, that brief has an inbuilt limitation. The woman would be entitled to resume work on the brief, and hence to replace her colleague, when she returned from maternity leave.

DEVELOPING these rules will ensure that we as colleagues are more sensitive to the impact that maternity leave has on women at the Bar. It will hopefully develop a new reference point from which we approach issues of pregnancy and maternity leave. One experience during my pregnancy leaves me convinced that a new reference point is sorely needed.

I had been involved in an arbitration for over a year and had appeared as counsel for one of the parties at a hearing in the matter. After the hearing, our opponents instituted a new reference to arbitration involving the same parties, and a new hearing had to be scheduled for the new reference.

Both sides were represented by senior and junior counsel and the arbitrator was a silk at our Bar. At a pre-arbitration meeting in September 2014, the scheduling of the new hearing was discussed. Our side requested that the hearing be allocated in June 2015 to accommodate my maternity leave. The immediate response from the arbitrator was that June was too far away. The other side's attorney quickly echoed this sentiment by indicating that he couldn't expect his client, who was the claimant in the arbitration, to wait that long. Thereafter, earlier dates were discussed. February was unavailable because of the commitments of counsel for the other side. When dates in March were discussed, the other side's attorney indicated that he would be away for some time in March and thus some of the proposed dates in that month would not be suitable. In the end, dates in April were chosen. After the meeting, my attorney wrote to the arbitrator and the other side requesting that they reconsider the allocation of the hearing in April. The correspondence set out the prejudice to my client of having to replace me in the matter and emphasised that the other side had not claimed any specific prejudice arising from a delay of the hearing until June 2015.

My attorney's request for a reconsideration was also made against the background that in the previous reference to arbitration, our client had agreed to a three-month delay of the scheduled hearing in order to accommodate the other side's change of attorneys and counsel.

The other side's response to this request was troubling. They once again asserted their client's prejudice in having to wait until June (but gave no details of the nature of this prejudice except to say that the client was due money and ought not to have to wait to be paid), recorded that arbitrations are meant to be resolved expeditiously, and then emphasised the limited role I had played in the arbitration. This emphasis was designed to explain that I was easily replaceable.

Some might read this account and side with my opponents and their view that waiting three months to accommodate a junior counsel's maternity leave is asking too much. Others might feel that there's something wrong with factors such as holidays and other work commitments determining the scheduling of an arbitration to the exclusion of any consideration of maternity leave.

As we all know, in the scheme of litigation, three months is a short time. If the other side had at any point articulated a clear case for prejudice as a consequence of the delay of three months in the hearing of the matter, I would not have refer-

red to this experience in this article. But they did not. Instead, they baldly asserted prejudice and spent their energies discounting my role in the matter.

WHEN THE issue of accommodating my maternity leave in the scheduling of the hearing was first raised with the parties, the arbitrator and the other side regarded it as irrelevant. That perspective needs to change. Maternity leave acutely affects women at the Bar; it necessarily impacts on their practices and the clients for whom they act. It must at least be capable of being included in the pot of relevant factors which may influence the scheduling of an arbitration. Arbitration is, after all, a consensual dispute resolution forum. If the fact that one party's legal representative is going to be on holiday is relevant to scheduling the hearing, then how can the maternity leave of another representative not also influence the scheduling?

I have focussed thus far on the impact of maternity leave on a woman's practice at the Bar but there are also ways in which pregnancy itself can have an impact. In the last trimester of my pregnancy, I had four matters set down for hearing in the Supreme Court of Appeal. In three of them, I was the junior and had been involved in the cases for many years. In the last, I was the lead counsel. That was the case to which I referred earlier in which the SCA kindly accommodated my request for the hearing to be scheduled early in order to enable me to argue the case. However, as my third trimester developed, there were concerns about the prospect of an early labour. As a result, I had to pull out of all four appeals. Doing so was one of the most difficult things I've had to do in practice. Appearing before the SCA is one of the most thrilling aspects of an advocate's practice. In all the appeals, I had been intimately involved in the cases from inception and to miss out on the opportunity of witnessing the debate before five judges of the SCA seemed cruel. I was also anxious about letting my colleagues and attorneys down. In the matter where I was lead counsel, passing up the opportunity to argue before that august body was almost unthinkable. But there were risks with attending and being away from my doctor that I was not willing to take and so I pulled out.

Missing out on the debate and the argument in those cases was a relatively short-lived pain. But there was an enduring impact for my practice arising from my failure to attend the hearings. Because I did not attend on the day of argument, the law reports will never associate me with these cases, despite the fact that I was involved in drafting the heads of argument in every one of the matters and in devising the cases from the outset.

Judgments no longer reflect when different counsel prepared the heads of argument from those who appeared at the hearing. All that the judgments reflect are who appeared on the day of argument as representatives of the parties. As advocates, our cases are our currency. In a world in which we cannot advertise or solicit, the reported judgment is like a flyer to briefing attorneys and lay clients alerting them to our expertise. Reputations are built on reported cases.

It seems to me that there is a simple solution to this problem that could apply to all counsel who have been involved in a case but who cannot attend an appeal hearing because of a threatened early pregnancy or, indeed, any other medical condition. Those counsel could be reflected in the judgments as "in absentia". Their names could therefore be included in the list of counsel given to the judges with the appellation that signifies that they could not attend the hearing but were involved in the case.

For all counsel, association with a case through a reported judgment is important to develop their reputations but for women it holds a greater significance. The more women who are reflected as counsel in the matters that get reported, the more comfortable the profession (and lay clients) are likely to become with women managing their cases in court. Our courts remain disproportionately stocked with male counsel despite how many women are now qualifying as advocates. It is common for women advocates who appear in opposed motions and trials to be the only women counsel in court. If we are committed to transforming the gendered appearance of our Bar, then that reality must change. Pregnancy should not deny a woman the opportunity to be associated with a reported case if her contribution to it prior to the hearing merits such an association. If women can be associated with these cases despite their pregnancies, the chances of recalibrating the gender balance of the courtroom increase. This is because the more women who are reflected as counsel in reported cases, the more the profession is likely to trust them in the courtroom.

I suspect that some of my proposals in this article are uncontroversial. No one would, I assume, take issue with the suggestion that counsel be recorded in absentia in judgments when they cannot attend an appellate hearing because their pregnancy precludes them from doing so. Other proposals are not as simple. Should maternity leave be relevant to the allocation of hearings in the High Court when other factors that affect counsel's availability are not? Should a woman be entitled to replace the person who filled her spot on a brief while she was away on maternity leave? Should the *sine lucri causa* rule apply to women on maternity leave? Should maternity leave be relevant to the scheduling of an arbitration when a woman chooses how long she will be away from the Bar caring for her baby?

SOME OF YOU may interpret this article as a plea for an indulgence for women, a request that the Bar become more charitable to its vulnerable women advocates. But that is to misunderstand the message. I am not calling for generosity to women; I am seeking justice for them. Without some amendment to our Rules and the reference point from which we practise, women will suffer a systemic disadvantage because biology made them the bearers of children. And that fact will necessarily influence their careers at the Bar. I remember fearing in my first pregnancy that my child would literally take my practise away from me, not because of anything she did, but because of the profession's attitudes to maternity leave and mothers as advocates. Although my second pregnancy was different and I received support from some quarters, it was not free from prejudice and discrimination. We need to address those realities if women are to claim their proper place in this profession. A

Endnotes

1 Rule 2.5 of the Uniform Professional Rules
2 Rule 5.1.5 of the Uniform Professional Rules