Independent advocates: the SCA rules

Contributed by Halima Saldulker, honorary secretary, General Council of the Bar

On 9 March 2001 the SCA dismissed the appeal by the Independent Association of Advocates ("IAASA") and one of its members against the finding by a Natal court that it is unprofessional conduct for an advocate to act without an attorney (*Joaquim Augusto de Freitas v Society of Advocates of Natal* Unreported judgment of the SCA, 9 March 2001).

IAASA and its member (De Freitas) were ordered to pay the costs of the Society of Advocates of Natal (including the costs of two counsel).

Two judgments were delivered, both rejecting the contention that since 1994 the referral principle had become unsuitable. Hefer ACJ (Smalberger ADCJ, Nienaber and Mpati JJA concurring) held in strong terms that "the (referral) practice clearly serves the best interests of the professions and the public in litigious as well as non-litigious matters". This, he said, was supported by the lack of protection for the public if a client pays money to a legal practitioner who has no trust fund.

Hefer ACJ went on to say this about change. "The referral practice was not conceived by the legislature or devised by the courts. It came to us through centuries of experience and development, first in the United Kingdom and later in our own country. It exists in one form or the other in several other Commonwealth countries where there are divided Bars."

He rejected putting a pen through the Bar's referral rules, even if some changes might be justified. "Nor, I venture to suggest, would it be appropriate for the legislature to do so. The rules have been designed by the Bars for practise in a divided profession in what is plainly the public interest."

In a separate judgment (in which the other members of the court beside Hefer ACJ also concurred) Cameron JA agreed that the appeal should be dismissed. He raised however the possibility of what he termed "accommodation" (amelioration?) of the referral rule "along the lines already practised in comparable jurisdiction."

He referred in this regard specifically to the "detailed rules providing for direct access in strictly circumscribed cases" in the UK (the BarDirect model).

Both judgments emphasize (in Cameron JA's words)

"that it is in the public interest that there should be a vigorous and independent Bar serving the public, which subject to judicial supervision, is self-regulated, whose members are in principle available to all, and who in general do not perform administrative and preparatory work in litigation, but concentrate their skills on the craft of forensic practice."

The judgments are a vindication of the Bar's commitment both to its continued existence and its independence. The GCB has already started to examine, as it happens, how absolute the referral principle should be – or whether some amelioration is desirable. That continues.

(The Bar was represented by: Malcolm Wallis SC, Lawrence Broster SC and Halima Saldulker, who acted pro amico). 🕮

About change ...

"... In any event I want to say this about change .... One's general impression of the position in countries such as England, Wales, Ireland, Scotland, New Zealand and various Australian states is that direct access by lay clients to advocates is strictly regulated. One cannot, as IAASA requests us to do in its counter-application, simply put a pen through the Bars' referral rules even though one may feel that changes in certain areas may be justified. It is not for us to take such a bold step. Nor, I venture to suggest would it be appropriate for the legislature to do so. The rules have been designed by the Bars for practice in a divided profession in what is plainly the public interest. Experienced members of the Bars are much more aware than we are of the problems in, and the needs of, the profession and of the available facilities to overcome them. It should be left to them to consider in what respect and to what extent change is required. I say this despite the fact that the courts will be the final arbiters of the validity of any changes that may be effected in so far as they may reflect on the propriety of advocates' conduct. It would be foolish for us to interfere in the way in which IAASA asks us to do knowing full well that, by doing so, we will force South Africa out of step with comparable Commonwealth countries and bring and end to a practice which clearly serves the interest of the public." Per Hefer ACJ in *Joaquim Augusto de Freitas v Society of Advocates of Natal* Unreported judgment of the SCA, 9 March 2001.

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Rosebank Hotel, Johannesburg

Hilton Hotel, Durban, Johannesburg

Cullinan Hotel, Johannesburg/Cape Town

Car hire

Details of corporate rates available from Budget and Avis car rental companies are also available through local Bar secretariats.