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THE BOUNDARIES OF **ETHICAL ADVOCACY** IN A CONSTITUTIONAL AGE

by **SECHABA MOHAPI**, Johannesburg Bar

Earlier this year, while attending expert witness handling training in medical negligence at Wallenberg, I had a spirited debate during a tea break with my good friend Maphutha on whether there are limits to advocacy, in other words, whether there are limits to what advocates may submit to court in advancing their client's cases. I maintained that there are. My friend, citing David Pannick KC, argued that there are none. This is my amplified response.

Indeed, in his seminal work, *Advocates*, Lord Pannick posited that an advocate "must advance one point of view, irrespective of its inadequacies. He must belittle other interests, whatever their merits."[1] However, that view belongs, as Owen Rogers once observed, to a bygone era.[2]

THE TWILIGHT OF UNTRAMMELLED ADVOCACY

The recognition of our duty to the course of justice is something that Malcolm Wallis SC (then chairperson of the GCB) urged upon the profession three decades ago, saying that the legal profession could no longer be indifferent to the length and costs of legal proceedings.[3] But if perchance any doubt remained, the Supreme Court of Appeal has made it definitively clear that the old view no longer holds in *Public Protector v Chairperson, Section 194 (1) Committee and Others*.[4]

What might have been regarded as perfectly legitimate tactics when employed by anti-apartheid lawyers against the unjust laws of that oppressive system lose their moral legitimacy in a constitutional dispensation.

REDEFINING THE "STALINGRAD" STRATEGY

The SCA observed that: "As long ago as May 2007, Mr Zuma's then counsel intimated, in response to a query from Hugo J, that he was following a 'Stalingrad strategy' in the conduct of Mr Zuma's defence to the criminal charges that the latter faced."[5]

In a 2020 tribute to George Bizos SC, Mr Justice Kriegler described Bizos as a master of the "*true* Stalingrad tactics" crucially distinguishing Bizos' brilliance from "the tricks engaged in by shysters who prostitute their professional skill

Thomas Quine

to abet clients who have good reason to put off the day of judicial reckoning". Bizos engaged in "*the genuine* Stalingrad exercise" Justice Kriegler observed through "carefully mustering all available forces, planning each phase painstakingly, selecting and getting to hand all appropriate weapons, testing them, priming them, meanwhile identifying the enemy's strengths and its weaknesses – and then doing battle from one strong point to the next, never flagging". His strategy was honourable because it sought the truth through rigour and robust application, not through the exploitation of procedural loopholes or obfuscation.

"It was seldom grand opera, rather deliberate and unrelenting progression, a masterclass in trial advocacy" says Justice Kriegler of Bizos' strategy and that "I often cite his cross-examination technique as exemplary: counsel patiently and unobtrusively, almost conversationally, asking essentially uncontentious peripheral questions, metaphorically closing the doors and windows, sealing all apertures, and then confronting the cornered witness with a meticulously worded *coup de grâce*. A joy to watch, even when it's your witness." So that this strategy was quite distinct from what we have come to know as Stalingrad tactics in recent times.[6]

ADVOCACY UNDER THE CONSTITUTIONAL MANDATE

The theme of this issue, "30 years of the Constitution" – I would suggest – gives us an opportunity to reflect on our contribution to the transformative constitutional project for the past three decades and on how our role must support the administration of justice in a constitutional dispensation.

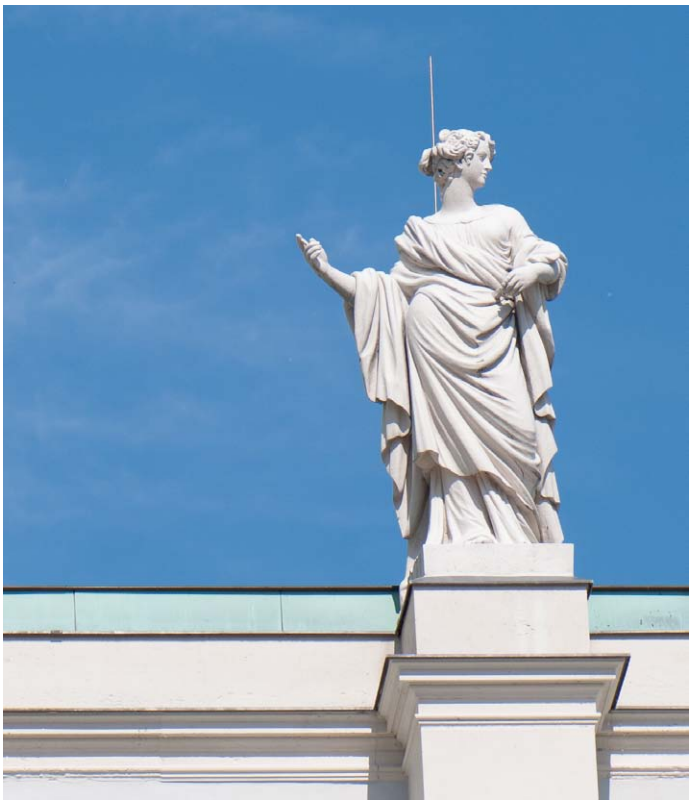
As Justice Yacoob once observed, to win a case through unfair means is not merely "sharp practice"; it is unconstitutional conduct.[7]

I accept that lawyers should not be judged by their clients no less than surgeons are by their patients or journalists by their interviewees, to borrow from a tweet by Lord Wolfson KC quoted with approval by Lord Pannick in his second Hamlyn lecture on the morality of advocacy;[8] after all the UN Basic Principles on the Role of Lawyers adopted in 1990 declares that "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".[9] However, there are some advocates that perhaps inadvertently by their zeal or ideological persuasions do cross the bounds of identifying with their clients' causes.

OUR PARAMOUNT DUTY IS TO THE COURT

Lord Denning best articulated the limits of ethical advocacy in a decision that remains part of the prescribed reading for pupils; *Rondel v Worsley*:[10]

> "A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end. Provided only that he is paid a proper fee, or, in the case of a dock brief, a nominal fee. He must accept the brief and *do all he honourably can on behalf of his client*. I say '*all he honourably can*', because *his duty is not only to his client. He has a duty to the court which is paramount. It is*



> *a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice.* He must not consciously misstate the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. *He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline;* but he cannot be sued in a court of law." (My emphasis.)

It is not uncommon for advocates sometimes in their zeal to advance a client's interests to embrace tactics that are ethically questionable. That is not only dishonourable but is a failing in judgement; it is also an obvious ethical transgression. For whilst great latitude is afforded us to approach the causes of our clients as best we see and can advance them,[11] that latitude is not untrammelled.

Advocates have a pre-eminent responsibility and overarching duty to the court, while zealously representing their clients, to ensure the proper administration of justice. They should always discharge their briefs in the *interests of justice*. If that conflicts with a client's instructions, it is the interests of justice that must prevail. What this entails is, amongst other things, not misleading the court, abusing process, abusing their privilege of free speech by making ungermane credibility attacks, and prolonging cases unnecessarily or detaining courts with patently unsustainable propositions.[12]

So, whilst there is general consensus amongst the vast majority of advocates, as suggested by Lord Pannick KC, that one of their primary duties is to promote their client's interests "by all *legitimate* means,"[13] by parity of reasoning, there is such thing as *illegitimate* means by which one could advance the interests of a client. This qualification aligns with that given by Lord Denning in *Rondel*, that an ethical barrister does "all he *honourably* can". Quite frankly, there is nothing *legitimate*, nothing *honourable* and ethical, about obfuscating, abusing court procedure and deliberately exploiting and prolonging proceedings with the aim to derive some sort of tactical advantage, or to raise untenable points at length, or to embark on lengthy cross-examination on matters that are not at issue.[14] Filibustering has no place in courts of law.

The position is no different across the pond. Scalia and Garner suggest from an American perspective that one must take pains to select the best arguments as part of the expertise expected of a lawyer. They suggest we ponder this:

> "Judges often associate the brevity of the brief [heads of argument] with the quality of the lawyer. Many judges we've spoken with say that good lawyers often come in far below the page limits – and that bad lawyers almost never do. Brevity requires ruthlessness in wringing out of your argument everything that doesn't substantially further your case: entire points that prove to be weak; paragraphs or sentences that are unnecessary elaboration; words and phrases that add nothing but length."[15]

And:

> "Scattershot argument is ineffective. It gives the impression of weakness and desperation, and it insults the intelligence of the court. If you're not going to win on your stronger arguments, you surely won't win on your weaker ones. It is the skill of the lawyer to know which is which. Pick your best independent reasons why you should prevail – preferably no more than three – and develop them fully."[16]

These insights are endorsed by Justice Harms who commends to counsel interested in persuading judges the work of Scalia and Garner.[17] The importance of an advocate's focusing their fire is this:

> "The judges considering your case have many other cases in hand. They are an impatient, unforgiving audience with no desire to spend more time on your case than is necessary to get the right result. Never, never waste the court's time. Having summoned the courage to abandon feeble arguments, do not undo your accomplishment by presenting the points you address in a confused or needlessly expansive manner. They must be presented clearly and briskly and left behind as soon as their content has been conveyed".[18]

This advice is ancient. One of the great Roman orators Quintilian said in a similar vein: "We must not always burden the judge with all the arguments we have discovered, since by doing so we shall at once bore him and render him less

inclined to believe us."[19] Demetrius echoed: "Length dissolves vehemence, and a more forceful effect is attained where much is said in a few words ... Brevity is so useful in ... style that it is often more forceful not to say something."

Speaking of effective advocacy, considering its primary consumers – judges, Justice Harms also wittily warned of a peculiar forgetfulness endemic to judges: "They never argued a bad case; never missed an authority; never made a bad submission; never charged high fees. … Adv Point-taker becomes in his own eyes the Hon Mr Justice Justice-must-be-seen-to-be-done and, in the eyes of the Bar, Mr Justice must-be-seen-to-be-believed; and Adv Langdradig is transformed into Judge Kort-van-draad. The disease is contagious, incurable and sometimes fatal"[20] – an amusing, if not graceful observation in an appeal for empathy for the role of advocates.

There is something else done by some advocates that suborns the interests of justice. It was described by Innes CJ in *Incorporated Law Society v Bevan*[21] as "miserable, pettifogging" point-taking, which, once the facts are investigated is bound to fail. The learned Judge added: "But points of that kind do commend themselves to a certain class of practitioner and do undoubtedly possess an attraction for a certain stamp of mind." Points of the sort described by Innes CJ in *Bevan* do nothing for clients nor to advance the course of justice. They are instead time wasting and undeserving of limited judicial resources.[22] Where a client's case is exclusively shored up on this sort of point, it might altogether be better for the client to receive counsel to settle, lest "a certain stamp of mind" is befittingly ascribed to counsel who argues the case.

Jim Sher

WHAT ETHICAL ADVOCACY ENTAILS

Lord Bingham used these words in praise of excellent advocacy in an address he made at a centenary Bar conference: "Not a question too many. Not a question too few. Every question pertinent, well-thought out, and clear. Questions firmly and politely put, with no hint of intimidation or condescension. Argument succinctly and cogently put." He added: "This was advocacy at its best. But, as we all know, it is not always so."

He also observed: "The Bar cannot, plainly, rely on restrictive rules to protect it in the face of a public view that high quality services need no protection and low quality services deserve none. Nor, equally plainly, can the Bar rest on its reputation as an elite profession, since the public will be rightly intolerant of pretensions to elitism not fully justified by performance."[23]

It was pointed out by Heher JA in *Rösemann*,[24] that the client does not engage an advocate to do or look after the attorney's interests. Instead, "[c]ertain obvious benefits accrue to the client from the strict maintenance of the division of the professions". Those benefits include counsel's independence of thought and action, and candour and objectivity in advice and an effective, efficient and complementary pooling of skills and knowledge in which the client benefits by more than the mere sum of the parts of the legal team.

What makes the calling of an advocate distinct therefore is that we are independent, being once removed from the client; we are expected to be objective enough in our approach to litigation to discern the limits of that which may legitimately be argued to advance a client's cause and that which we cannot. Counsels' misplaced zeal that leads them to embracing unethical tactics can therefore be directly traced back to a failure to maintain objectivity.

"COUNSELS' MISPLACED ZEAL THAT LEADS THEM TO EMBRACING UNETHICAL TACTICS CAN THEREFORE BE DIRECTLY TRACED BACK TO A FAILURE TO MAINTAIN OBJECTIVITY."

So, the duty we owe to our clients, as pointed out by Lord Pannick "is far from absolute".[25] Alongside it, we bear an overarching duty to the court and ought to have an interest in the proper administration of justice, to which our profession is dedicated. We also owe a duty to the court to assist in ensuring that the proper administration of justice is achieved.[26]

HISTORICAL ORIGINS FROM OATHS OF MODERN EXCELLENCE

Advocates have had limits to their role for as long as the profession itself has existed.

Under Roman law, whilst advocates could appear in all cases whether civil or criminal, they had first to take "an oath of good faith". In accordance with this oath, advocates gave an assurance not to undertake the patronage of an unjust lawsuit nor to pursue one when its injustice became evident nor purposely to drag out lawsuits to their own foul profit.[27] Among the Romans this oath had to be given in each individual case according to the formula laid down in the *Codex* III, 1, 14, 4; *Inst* 4, 16,1.

Under Roman-Dutch law, a similar oath was taken at the start of undertaking service in the gown, and had to be renewed every year in succession at a fixed time in terms of the formulae laid down in the instructions to the various courts, for instance, in the *Instruction to Court of Holland* art 71.

H Berganza

> "A PODIUM-THUMPING INSISTENCE TO MAKE UNSUSTAINABLE AND ILL-CONCEIVED PROPOSITIONS IS NOT ONLY BAD FORM BUT IS LIKELY TO HAVE THE OPPOSITE EFFECT TO PERSUADING."

The old authority Van der Linden, in his *Judicieel Praktyk* echoed the position thus: "Nothing ought to be more holy to an advocate, and an attorney, than never to allow himself to be used in the conduct of cases which he knows to be unjust. He thus guards himself against any inroad which is against the first principles of right, or against the common accepted opinion of jurists. He guards against giving colour to an apparent right which in reality is unjust, and by distortions against his better judgment to lead the judge astray from the paths of truth. And in short he counsels his own conscience and asks himself whether the case is just or unjust. Whoever acts thus will never run the risk of knowingly doing an injustice to his fellow men."

It is for these reasons it is the portion of counsel to extract and distil the *essence* of a case and to articulate with *precision* the position of the client. Then, with *conscientious* effort, thorough *preparation* and *application*, once the matter is well thought through, to make every proposition which *can be made* and to do so with courage and insist on the points so laboriously conceived being heard. The point is that the courage must follow conscientious labours, not the other way round.

A podium-thumping insistence to make unsustainable and ill-conceived propositions is not only bad form but is likely to have the opposite effect to persuading. That obviously is not to say that there is no place for firmness and an insistence to make misunderstood points properly heard. The following demonstration was given by Lord Denning in relation to the courage counsel must have when speaking of "The traditions of the Bar" at Wits on 27 August 1954:

"Erskine has shown the way. It was in a celebrated case against a clergyman, the Dean of St. Asaph, who had published a pamphlet on the principles of government; and found himself indicted for seditious libel in consequence of it. Erskine was instructed to defend the Dean at the Shropshire Assizes in the summer of 1784. The judge was a very great judge, Buller, J., who knew Erskine well. Indeed, Erskine had been his pupil. Now it so happened that at that time the judges had a wrong notion of the law of libel. They held that the question of libel or no libel was for the judge and not for the jury; and the only question for the jury was whether the pamphlet was published. This state of the law made it difficult for Erskine to defend the Dean but he was so successful with the jury that, despite the Judge's direction, they did not give a simple verdict of guilty. The foreman said: 'We find him guilty of publishing only.' The Judge was not prepared to accept that verdict and said to the jury: 'You must explain that, one way or the other.' But Erskine then took the bold and unusual course of himself asking the jury: 'is the word 'only' to stand as part of the verdict?' The foreman said: 'Certainly.' This dialogue took place between Erskine and the Judge.

'Erskine: I insist that the verdict shall be recorded.

Buller, J: Then the verdict must be misunderstood; let me understand the jury.

Erskine: The jury do understand their verdict.

Buller, J: Sir, I will not be interrupted.

Erskine: I stand here as an advocate for a brother citizen, and I desire that the word only may be recorded.

Buller, J: Sit down, Sir; remember your duty, or I shall be obliged to proceed in another manner.

[*Which was a broad hint that he would be obliged to commit him for contempt, but Erskine replied:*]

Erskine: Your Lordship may proceed in what manner you think fit: I know my duty as well as your Lordship knows yours. I shall not alter my conduct.'

The Judge gave in. He did not commit Erskine; and eventually the verdict was entered in the form: 'Guilty of publishing, but whether a libel or not, we do not find.' Afterwards, on a hearing before Lord Mansfield in London, the pamphlet was held to be no libel and the Dean was acquitted. Furthermore, there was such an outcry about the state of the law as the judges supposed it to be, that Parliament in 1792 in Fox's Libel Act declared that the judges were wrong and that the question of libel or no libel was for the jury and not for the judge. Parliament said that the law had always been so, despite what the judges had said about it. This was one of the great steps in establishing the freedom of the press in England, and it was largely due to the conduct of Erskine in the case of the Dean of St. Asaph."[28]

CONCLUSION

Ultimately, the survival and success of the Bar depend on its excellence.[29] As we face the modern challenges of efficiency and technological innovation,[30] we must remember that our independence, which we are all expected to bring to bear in the discharge of our briefs, is our greatest asset. When zeal displaces our objectivity, ethics (and excellence) inevitably fail.

In *Rondel*,[31] Lord Denning observed that the barrister must time and time again choose between their duty to the client and their duty to the court and that this is a conflict often difficult to resolve. For better or worse, ultimately, to borrow from Van Zyl, the tone of each of our professional characters, intellectually and morally, will depend on the estimate which we form of the nature of the duties we have to undertake and of the spirit which ought to actuate us.[32]

Notes

1 David Pannick *Advocates* (1993) 1.
2 Owen Rogers 'Ethics of the hopeless case' *Advocate* (Dec 2017) 46-51.
3 Malcom Wallis SC 'The real world of civil litigation' *Advocate* (Nov 1996) 85-84.
4 *Public Protector v Chairperson, Section 194 (1) Committee and Others* 2025 (4) SA 428 (SCA) paras 47-49.
5 *Zuma v Downer and Another* 2024 (2) SA 356 (SCA) para 6.
6 *Moyo and Another v Minister of Justice and Constitutional Development and Others* [2018] ZASCA 100; [2018] 3 All SA 342 (SCA) para 169, where Wallis JA explained: "The term 'Stalingrad defence' has become a term of art in the armoury of criminal defence lawyers. By allowing criminal trials to be postponed pending approaches to the civil courts, justice is delayed and the speedy trials for which the Constitution provides do not take place. I need hardly add that this is of particular benefit to those who are well-resourced and able to secure the services of the best lawyers."
7 Nomfundo Manyathi-Jele 'Can ethics be taught?' *De Rebus* (Apr 2014) 9.
8 David Pannick KC 'The morality of advocacy' *Advocacy* (2023) 85.
9 Principle 18 of the Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
10 *Rondel v Worsley* [1966] 3 All ER 657 (CA) at 665.
11 *R v Matonsi* 1958 (2) SA 450 (A) at 456–457.
12 *Mzayiya v Road Accident Fund* [2021] 1 All SA 517 (ECL) para 83; *R v Simmonds* [1967] 3 All ER 399n.
13 David Pannick *Advocate* (1993) 89-90.
14 See *R v Simmonds* [1967] 3 All ER 399n.
15 Antonin Scalia & Bryan Garner *Making Your Case: The Art of Persuading Judges* (2008) 96-97.
16 At 38.
17 LTC Harms 'Heads of argument in courts of appeal' *Advocate* (Dec 2009) 20.
18 At 39.
19 Marcus Fabius Quintilianus *Institutio Oratoria* 5.12.8.
20 LTC Harms 'What irritates judges?' *Advocate* (Dec 2001) 25.
21 *Incorporated Law Society v Bevan* 1908 TS 725 at 730.
22 Mr Justice Harms says of them "Bad cases are perhaps the greatest source of irritation. Understandably, since they waste time and money. They create unnecessary work. Nothing can be worse than a bad case badly argued, especially if counsel is intent on making a meal (ticket) of it" *Advocate* (Dec 2001) 24.
23 Tom Bingham *The Business of Judging: Selected Essays and Speeches* (2000) 356.
24 *Rösemann v General Council of the Bar of South Africa* 2004 (1) SA 568 (SCA) para 30.
25 David Pannick *Advocate* (1993) 90.
26 *Abse v Smith* [1986] QB 536 at 546.
27 *Voet* 3.1.9, Percival Gane *The Selective Voet: Being the Commentary on the Pandects (Paris Edition of 1829) and the Supplement to that Work by Johannes Van Der Linden* (1958) 505-506.
28 Alfred Denning 'The traditions of the Bar' (1955) 72 *SALJ* 43 at 46-47.
29 Bingham *loc op cit*.
30 David Pannick KC *Advocacy* (2023) 127.
31 At 665.
32 Gideon van Zyl *The theory of judicial practice of South Africa with suitable and copious practical forms*, vol I, 3 ed (1921) 41.