On par?

Kim Hawkey – Editor

Two recent High Court decisions, when read with the Legal Practice Bill (B20 of 2012), may signify a judicial and a legislative intention to level the playing field between attorneys and advocates where justified.

Both of these cases relate to the Right of Appearance in Courts Act 62 of 1995 (the Act), which represented a major milestone in terms of extending attorneys' jurisdiction to practise when it was passed 17 years ago.

The Act conferred on attorneys the right to appear in lieu of counsel in the Supreme Court of Appeal, the Constitutional Court and the High Court, subject to certain conditions.

The exact scope of this right has, however, never been clear-cut and has resulted in a number of conflicting decisions by various divisions of the High Court.

In this issue of *De Rebus* we publish articles on the two recent High Court decisions referred to above, which reflect a welcome move towards the parity of treatment of attorneys and advocates.

In the first of these, *Liberty Group Ltd v Singh and Another* (KZD) (unreported case no 9105/11, 7-6-2012) (Swain J) (see p 18), the KwaZulu-Natal High Court in Durban ruled that an attorney who has been granted the right of appearance in terms of the Act is entitled to appear in all divisions of the High Court and is not limited to appearing in the division in which he was admitted or enrolled to practise.

In the second case, *Stevens NO v Maloyi* (ECP) (unreported case no 1205/08, 26-4-2012) (Tshiki J) (see p 20), the Eastern Cape High Court in Port Elizabeth ruled that there should be no discrimination between attorneys and advocates with the same experience in terms of the amount they can charge for a day's appearance fee for work not done due to the settlement of a matter on the day of the hearing.

In coming to this conclusion, the court (relying on *Stubbs v Johnson Brothers Properties CC and Others* 2004 (1) SA 22 (N)) stated: 'An attorney with the right of appearance in the [High] Court who appears in court in preference to an advocate cannot be expected to be treated any differently from an advocate as regards his or her fees for an appearance.'

The outcome of these two decisions indicates a judicial approach to placing attorneys and advocates on equal footing in circumstances in which it is just to do so.

This thinking is reflected in s 25(2) of the recently published Legal Practice Bill, which provides that all legal practitioners – both advocates and attorneys – may automatically appear in any court in South Africa. This will do away with the existing discrimination against attorneys, who currently have to apply for such right in terms of the Act.

The effect of this provision will be to remove a key distinction between the attorneys' and advocates' branches of the legal profession.

This distinction may further be blurred if s 34(1)(*b*) of the Bill, which relates to the long-standing referral rule, is enacted in its current form.

Section 34 provides for advocates to accept briefs directly from the public; however, the impact of this provision will largely depend on its parameters, which are to be set in regulations by the Justice Minister after consultation with the profession.

These sections of the Bill mark a positive step in terms of access to justice by allowing litigants to brief one legal practitioner rather than two in certain circumstances, with the potential for a concomitant saving in legal costs. However, the exact boundaries of these provisions must be clearly stipulated and any concerns relating to professional conduct must be addressed, with the public interest remaining the overarching consideration.

One major difference between the latest version of the Bill and its early predecessors is that the latter provided for one category of legal practitioner, with no clear distinction between attorneys and advocates, whereas the 2012 Bill, while regulating both branches of the profession, clearly distinguishes between the two.

Despite this change in tack by the Bill's drafters, the provisions of ss 25(2) and 34(1)(*b*), taken together with the reasoning in the *Liberty Group* and *Stevens NO* cases, indirectly open the door to a further watering down of the distinction between the two branches of the profession.

While such decisions are a move in the right direction, by going against previous High Court decisions they have further entrenched uncertainty relating to the right of attorneys to appear in court and the appropriate treatment of each branch of the profession by the courts. It therefore remains unclear whether the other divisions of the High Court will consider themselves bound by these judgments or whether they will instead choose to follow those that came before them.

Ideally this uncertainty should be clarified in the Legal Practice Bill.

However, if distinctions between attorneys and advocates are to remain, it is essential that they are treated equitably, with the courts assessing attorneys in the same way they would advocates; that is, based on the quality of their work and their conduct in court – and not on which branch of the profession they happen to come from.

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