

Supplement to Consultus, April 1991

Unfair attack on advocates' profession: The true picture

After going to press a rather disturbing and totally unfair editorial on the advocates' profession appeared in the *Sunday Times* of 17 March 1991. Reactions to the editorial in the form of letters were sent to the Editor of the *Sunday Times* by Milton Seligson SC, Chairman of the General Council of the Bar of South Africa, JF Myburgh SC, Chairman of the Johannesburg Bar Council and Brian Southwood SC, Chairman of the Pretoria Bar

Council. Myburgh's letter appeared in full in the *Sunday Times* of 24 March 1991 and a shortened version of Seligson's letter appeared in the same issue of this newspaper. Southwood's letter was returned by the Editor together with a note stating that the length of the letter is "simply unmanageable in a newspaper".

Since the editorial is available in so many important respects and since it undeservedly casts a shadow over

our profession, it is considered to be in the public interest that Seligson's and Southwood's letters also be published *in toto* so that our readers can judge for themselves. To enable readers to understand the arguments advanced in the letters the editorial is also reproduced below.

– Editor: *Consultus*

Pretoria
28 March 1991

Sunday Times

THE PAPER FOR THE PEOPLE

Break the cartel

WHEN a barrister can claim a fee equivalent to R66 000 a month in a country where the majority of the population live on the brink of starvation, and where the average income per person is about R5 000 a year, the law, its administration, and its officers cannot long escape falling into contempt.

The fees paid by the SAP to the advocates who appeared before the Harms Commission, totalling R1,67-million for seven months' work, have rightly been condemned as outrageous.

So far, the criticism has focused mainly on the burden on the public purse. That is the least of it.

The South African Bar has become a self-serving cartel, setting its own fees, immune to market forces,

protected from competition, and hostile to the claims of the side-bar – whose members are frequently better qualified – to appear before the higher courts.

The result is that justice is often so delayed as not to be justice at all, litigation has become so expensive as to be mainly the preserve of government departments, public corporations, and millionaires, the Bench is understaffed, the criminal courts are clogged and the public – the black public in particular – has resorted on a large scale to private vengeance.

Simple answers are not available, especially not in the face of opposition from a clever brotherhood of professionals, but any remedy surely begins by breaking the cartel that forbids qualified attorneys to compete with barristers. That should be done immediately, by legislation.

The Editor
The Sunday Times
PO Box 1090
JOHANNESBURG
2000

21 March 1991

Sir

“In my capacity as Chairman of the General Council of the Bar of South Africa, the national governing body of the Bar in South Africa, I wish to reply to your editorial published on 17 March 1991 under the heading “Break the cartel”. This article contains a vicious and ill-considered attack on the South African Bar and cannot go unchallenged.

The editorial gives the impression that the fee of R66 000 per month paid to senior advocates who represented the SAP before the Harms Commission is the usual charge of the average advocate and that the ordinary person can no longer afford the services of the Bar. This is wholly misleading. Day after day advocates at various levels of seniority appear on behalf of individuals in the Magistrate’s and Supreme Courts and in a variety of other tribunals and provide non-litigious legal services at rates which are far less than the figure quoted, and which are comparable to those charged by specialists in other professions. The clients whom the average advocate represents and advises, are more often than not members of the general public. The vast majority of advocates earn nowhere near R66 000 per month, as a recent study by the Human Sciences Research Council confirms.

It must be known to you that a committee of the Pretoria Bar Council, with a senior attorney as a member, held an inquiry into the fees charged by counsel appearing before the Harms Commission. While holding that in the special circumstances the fees in question were not unreasonable, the committee directed that certain substantial amounts should be repaid by counsel.

You profess in your editorial to be a “free marketeer”. Yet you seem to suggest that there should be a limit on what advocates are entitled to earn related to the overall average income in this country. Do you suggest that other professions – including the attorneys whose cause you plead – should be similarly restricted?

You castigate the Bar as “a

self-serving cartel” which is hostile to the claims of attorneys, whose members you aver are “frequently better qualified”, to appear before the higher Courts. You conveniently ignore the fact that attorneys are not precluded from appearing on behalf of a client before a Commission of Inquiry. In this case they *chose* not to do so – obviously they and the client decided that the services of counsel were necessary and preferable. Nor is it ever obligatory to use the services of senior counsel; competent and considerably less expensive legal assistance can be provided by junior counsel if the instructing attorney and client desire it.

It is in fact the rule rather than the exception, even when attorneys have a right of audience, as in the Magistrate’s and Regional Courts and tribunals such as the Special Income Tax Court and Industrial Courts, that they do not avail themselves of this right and prefer to brief counsel. This practice reflects the simple truth that attorneys regard advocates as specialists in the litigation process whose services are available at lower cost to the client than would be the case if the attorney conducted the case personally.

Your intemperate diatribe against the Bar does a disservice to a profession which has made a significant contribution and has played an historic role in the struggle to maintain the rule of law in South Africa. Vital legal services have been rendered by members of the Bar which have benefited not only the wealthy and powerful, but also the poor and underprivileged sections of the community. Members of the Bar have traditionally performed onerous and extensive *pro bono* services at no, or reduced charge (such as in *pro deo* defences).

The so-called “cab-rank rule” obliges an advocate to accept a brief offered to him in the field in which he professes to practice, without regard to the wealth or standing of the client, the unpopularity of his cause or the heinousness of his crime. This principle (which does not apply to the attorneys’ profession) has ensured that attorneys are able to brief specialist advocates of their choice on behalf of their clients and that political dissidents have not gone unrepresented.

The Bar has also for many years been the resource from which

Supreme Court judges have been appointed. The existence in South Africa of a strong, independent judiciary with a highly developed system of jurisprudence owes much to the rigorous legal training, analytical skills and independence of mind acquired in a career at the Bar.

Your editorial exhibits an almost hysterical hostility to the Bar by attributing to it every imaginable ill that has befallen the legal system in these troubled times. You aver that the Bar is responsible for delays in justice; the high cost of litigation; the understaffing of the Bench; the clogging of the criminal Courts; and even the resort by the public, and the black public in particular, to private vengeance. Thinking people will find this unsubstantiated charge nothing short of preposterous.

You suggest that the panacea for all the ills you ascribe to the Bar is to permit “qualified attorneys to compete with barristers”. This is a totally illogical conclusion in view of the attorneys’ own preference for briefing counsel in litigious matters, even where they (the attorneys) are entitled to appear, it is difficult to understand how widening their rights of audience will miraculously solve all the problems to which you refer.

The high cost of litigation is a worldwide problem. It is experienced also in countries like the USA, Canada and parts of Australia where there is a fused profession without a separate Bar. What is needed in this country is a properly funded legal aid system, wider use of legal insurance schemes and reformed Court procedures for streamlining and expediting litigation. These are all solutions which the General Council of the Bar is actively pursuing.

I suggest that your irrational and emotional attack on the Bar engenders more heat than light and makes no contribution to the real issue of whether the continuation of a strong, independent Bar providing specialist legal skills to all sections of the community is in the public interest.

You owe it to the public, no less than the legal profession, to publish this letter in full.”

Yours faithfully,

Milton Seligson, SC
Chairman,
General Council of the Bar
of South Africa.

The Editor
The Sunday Times
PO Box 1090
JOHANNESBURG
2000

21 March 1991

Sir,

Your leader "Break the cartel"
of Sunday 17 March 1991.

"Your leader "Break the cartel" of Sunday 17 March 1991 is a malicious and unwarranted attack on the advocates profession and a blatant attempt to bring the profession into disrepute. This is clear from your use of emotive language (labelling the profession as a cartel, which it is not) your use of logical non-sequiturs and your distortion of the facts. One would expect a newspaper like the *Sunday Times* to research the facts carefully and present a reasoned and considered argument when asking for nothing less than the destruction of a profession – particularly when that profession has served, and continues to serve, the country well and provides the skilled manpower necessary for the bench. Your article does little credit to your newspaper and makes no contribution to responsible public debate.

It is wrong to suggest (as you do) that all advocates charge fees of R66 000 per month. Apparently you are not aware that advocates normally do not charge monthly fees and that is simply because it is very unusual for an advocate to be retained for a period of longer than a month – let alone for months or even a year. Advocates normally charge daily fees for consultations, preparation and appearances.

You are obviously referring to the fees of the advocates who appeared on behalf of the South African Police and the individual members of the South African Police before the Harms Commission of Enquiry. However, you omit to say that the fee of R66 000 was charged by a senior advocate who, as you should be aware, is a very senior and experienced member of the profession. Such senior advocates are normally only employed by clients when the amount of work involved in the case and/or the complexity of the legal and factual questions justifies the employment of such senior practitioners. You also do not tell your readers that the fee was agreed to by

the advocate and the attorney representing the client with the full knowledge and consent of the client. Furthermore, you omit to tell your readers that the employment of the advocates in question was highly unusual, for the reason that they were required to hold themselves exclusively available to the client for the duration of the Harms Commission of Enquiry which, initially, was expected to be longer than a year. Significantly, you do not mention the fact that attorneys are entitled to appear before tribunals such as commissions of enquiry, and yet the attorney elected not to do so. With the full concurrence of his client, he elected to appoint senior and junior counsel to represent his client's interests. Apparently you are not aware of the fact that other advocates were available to represent the South African Police and its members, and that some of them would probably have charged lower fees for the case – but that the client appointed the counsel of his choice (as he was entitled to) and was prepared to pay the fees agreed to by the advocates and the attorneys. Apparently, you are not aware of the fact that fees of advocates (including senior advocates) vary greatly, depending upon their standing and seniority at the bar, as well as the special skills and knowledge which they have.

It is wrong to suggest (as you do) that there has been universal condemnation of the fees charged by the advocates representing the South African Police and its members before the Harms Commission. The most important omission in your leader is that neither the client, nor the attorneys who instructed those advocates, complained about the fees being unreasonable. You also omit to mention that the Bar Council of the Pretoria Bar – which for the purposes of the Enquiry included a very senior attorney, the Vice-President of the Transvaal Law Society – investigated the reasonableness of the fees charged by the advocates who appeared for the South African Police and its members and found that in the circumstances of the particular case, the monthly fees charged by the advocates were reasonable. Another omission from your leader is the fact that the same Bar Council found that certain other fees charged by the advocates were not reasonable and/or permissible and ordered that those fees be repaid. As far as I have been able to ascertain, the attorneys

profession, which has expert knowledge of fees charged by advocates, has not condemned the fees charged by the advocates concerned. The reported statement that the fees were outrageous was ascribed to one person, who, clearly, did not have full knowledge of the facts.

It bears repeating that advocates are bound by a very strict body of rules which regulates their professional conduct. With regard to fees, advocates are obliged to charge fees that are reasonable. In determining a reasonable fee, an advocate must take into account a number of factors (namely, the time and labour required; the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; the customary charges by counsel of comparable standing for similar services and the amount involved in the controversy and its importance to the client, none of which is decisive) and then to agree on the fee with his instructing attorney. It is considered that the agreement with the instructing attorney (who represents the interests of his client) is the best method of ensuring that a reasonable fee is charged in every case. However, not even an agreement with the instructing attorney can justify an excessive fee. If such a fee is charged, even by agreement, it can still be reduced by the Bar Council.

It also bears repeating that advocates' fees can be investigated and if necessary reduced by the Bar Council, whether or not there is a complaint that the fees are unreasonable. Usually, the Bar Council will hold an enquiry into the reasonableness of an advocate's fees if the instructing attorney or his client lodges a complaint about those fees. However, the Bar Council is entitled to initiate an enquiry without such a complaint being lodged. These fee enquiries are conducted by the Bar Council concerned which, for the purposes of the enquiry, includes a representative of the local Law Society.

It is not without significance that, notwithstanding the literally hundreds of thousands of cases in which advocates appear each year, a very small number of complaints about advocates' fees is received by the Bar Councils.

It is wrong to describe the South African Bar as a cartel. As you should be aware, a cartel is an arrangement whereby people (normally manufacturers of goods) fix prices. Firstly, there is no such thing as the South

African Bar. There are a number of different bars or societies of advocates which are usually situated at the seat of a provincial or local division of the Supreme Court. These bars make up the constituent and associated members of the General Council of the Bar which is an organisation which was formed to deal with matters affecting the profession generally and uphold the interests of advocates in South Africa. However, the General Council of the Bar has very limited powers (primarily of an appellate nature) in respect of its members, and it is expressly provided in its constitution that save for these powers, the General Council of the Bar has no jurisdiction over its members. In particular, it must be noted that neither the individual bars have, nor the General Council of the Bar has, the power to "set fees". There are no minimum fees prescribed for advocates at the bars, and they are simply obliged to agree on fees which are reasonable in all the circumstances of the case.

It is wrong to suggest (as you do) that advocates are immune to market forces and are protected from competition. There are so many advocates at the bar that an attorney is able to select the advocate who will properly represent his client at a negotiated fee. This occurs in literally hundreds of cases and if an attorney has a client with limited means, this is not an obstacle to his being represented by an advocate. In deserving cases, an advocate will appear for a client on a contingency basis: ie on the basis that he will only charge a fee if the client is successful in the case. Requests from attorneys that advocates represent their clients on a contingency basis are readily granted by the Bar Council. It is also possible for the advocate to waive his fee altogether, and this is also done

in deserving cases. In economic times such as the present when the amount of work available has diminished dramatically and many advocates, like other people, are battling to make ends meet, your statement that they are immune to market forces can only be regarded as laughable.

It is wrong to say (as you do) that members of the attorneys profession are better qualified to appear before the higher courts. Let the facts speak for themselves. Attorneys, particularly those who specialise in the fields concerned, are entitled to appear before the following tribunals (the list is not exhaustive) which are all special courts of the Supreme Court, or are endowed by statute with the same status: the Special Court for hearing Income Tax Appeals; the Court of the Commissioner of Patents; the Water Court; the Registrar of Trade Marks; yet they rarely do. In virtually all cases, these attorneys choose to brief advocates to appear before these tribunals. The same situation prevails in the Magistrates Court, although a small number of attorneys does specialise in appearing in the criminal courts. When enquiries are made as to why attorneys do not appear themselves, we are often told that it does not pay them to do so – which is understandable because of their high office overheads. However, their attitude is more often likely to be that they prefer to let the experts present these cases.

Your list of ills in the administration of justice simply does not follow from anything that the advocates profession is or does. If delays occur, such as you suggest, these are as likely to be caused by the client and/or their attorneys – not because of the availability of an advocate. Clients with bad cases frequently employ delaying tactics to prevent judgments being given against them. It is a distortion

of fact to say that litigation is "mainly the preserve of government departments, public corporations and millionaires". Most litigation in South Africa takes place in the lower courts where private individuals are involved. Even in the Supreme Court, most parties are private individuals, and it could never be said that they are mainly millionaires.

Which bench is understaffed? In the profession we do not hear complaints about too few judges. If the criminal courts are clogged, it is due to the current economic and political climate in which the crime rate has risen to astronomic proportions. It is probably political factors, too, which have caused the Black public to resort to public vengeance.

You are correct when you say that simple answers are not available. For example, if attorneys are suddenly entitled "to compete with barristers" will the reverse apply? Will advocates now be entitled to do work formerly reserved for attorneys: conveyancing; drawing of contracts and other commercial documents; drawing of wills and administration of estates – just to mention a few? In other words, must there be a fusion of the two professions? This is a subject which has been discussed by all the parties concerned at great length over a long period and which was put to rest some years ago when all concerned in the debate acknowledged that this was not desirable. Now in the passage of a few short paragraphs, you seek to bring about a complete restructuring of the legal profession.

It is a cardinal principle in law that the other side should be heard. I trust that you will also permit the advocates profession to be heard by publishing this letter in full."

Yours faithfully,

BR Southwood SC

Chairman: Pretoria Bar Council