

# The real world of civil litigation

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IN his book on *Advocates* David Pannick QC writes: "The professional function of the advocate is, essentially, one of supreme, even sublime, indifference to much of what happens in real life. He must advance one point of view, irrespective of its inadequacies. He must belittle other interests, whatever their merits. Politely though the task is performed, many barristers spend much of their working day accusing respectable members of the community of being liars. It is not for counsel appearing in court to express equivocation, to recognise ambiguity or to doubt instructions. His client is right and his opponent is wrong. The wider consequences can be left to the judge or the jury to consider."

Most advocates pride themselves on being in touch with the real world. The accusation of indifference, much less sublime indifference, to much of what happens in real life is therefore a painful one. However, that alone is not a reason for dismissing it. Pannick's point is a simple one. In the real world people weigh both sides of the story. They balance factors and make decisions on the basis of the broader picture. To most advocates, however, it is the client's view of reality which is the lodestar. That view alone is advanced in argument. That is the advocate's duty.

## Duty of the advocate revisited

The duty of the advocate to his or her client is virtually sacrosanct. The rules of lawyers' organisations provide that the lawyer's primary obligation is to serve and advance the interests of the client by all lawful and reasonable means available. That rule is regarded as so fundamental that it is rarely questioned. To suggest that it has become a sacred cow is almost heretical.

But if the result of the rule is the indifference of which Pannick writes, should it not be revisited? Around the world, wherever one goes, the costs and delays of civil litigation have become a byword. The accusation of indifference extends not only to our view of the real world but more specifically to the question of cost and delay.

We all know the arguments. Lawyers are highly skilled and hence highly paid. Proper conduct of complex litigation necessarily takes time. In this modern world everything generate more paper. There aren't enough judges and there aren't enough courts. Litigants always start out breathing fire and brimstone but when they get to the doors of the court they blame the lawyer for the cost and the time involved in litigation.

There is truth in all of this. But does it justify an indifference to the problem? Every one of us can tell of cases delayed, of needless expense incurred, of the waste of time and energy and valuable court resources. In every one case the excuse is "I was merely doing my best for my client". The result all too frequently, if I may borrow the title of a recent article by Professor Erasmus (1996 *Stell LR* 116), is "Much ado about not very much".

Elsewhere in *Consultus* there are articles exploring endeavours at reforming civil procedures and court systems elsewhere in the world. All of these are posited on the proposition that the lawyer's rule or duty has brought about results and consequences which are no longer tolerable. Every reform whether it be judicial cases management, greater disclosure requirements, stricter time limits, limiting evidential material or limiting costs operates to restrict the terrain within which the lawyer is free to choose what he or she thinks is in the best interests of the client.


Regrettably too often procedural reform has been simply described as such. It is a process of re-engineering without fundamental adaptation of the model. The foundations of our present model is the lawyer's duty. Has the time come for a new model entirely based upon different duties owed to the public and the court as well as the litigant?


## The civil justice system

Current reforms are beginning to articulate a different philosophical underpinning for the civil justice system. Its role as the chief means of dispute resolution in increasingly complex societies is being challenged. People are beginning to understand that society is not necessarily best served by a more and more elaborate search for that evanescent commodity, the truth. Swift-ness and certainty of dispute resolution are valuable goals



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One trusts, although with a sense of déjà vu, that a further official investigation will be undertaken as a result of the GCB's efforts. Such further investigation is a prerequisite to any reforms aimed at improving access to justice in South Africa. The interim report on the simplification of criminal procedure which was published by the South African Law Commission in 1995 can serve as an example. 

van die Howe (1983) wat oorsake van vertraging asook ondoeltreffendhede in die litigasiestelsel uitgewys het. Heelwat van die Hoexter-kommissie se aanbevelings is egter nog nie uitgevoer nie. Mens vertrou, hoewel met 'n gevoel van déjà vu, dat 'n verdere amptelike ondersoek onderneem sal word as gevolg van die ABR se pogings. Sodanige ondersoek is 'n voorvereiste vir enige hervormings wat gerig is op die verbetering van toegang tot geregtigheid in Suid-Afrika. Die tussentydse verslag oor die vereenvoudiging van die strafprosesreg wat in 1995 deur die SA Regskommissie gepubliseer is, kan as voorbeeld dien. 


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and often more valuable than "the right answer". Resources should be conserved or directed to the productive rather than the unproductive, the future rather than the past.

The exploration of these alternatives and the impact they have on our long cherished beliefs is gaining momentum world wide. As in other areas my sense in discussing this with lawyers from around the world is that South Africa, absorbed in more momentous problems, has been left behind. As it has done in the fields of arbitration and advocacy training the Bar now needs to engage in this debate and make up lost ground.

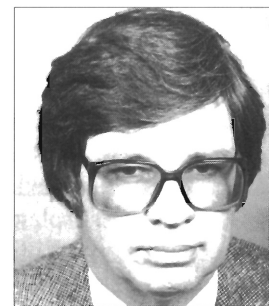
The discussion of these ideas is not novel in South Af-

rica but there are few signs here of the fruit which they have borne elsewhere. The time has come for us to shake off our indifference and do something about these problems. The GCB Executive decided at its recent meeting that advocates in South Africa must be in the forefront of any endeavour to meet these challenges in our society. As a result steps are underway to bring together all interested parties to discuss, debate and, we hope, bring about changes which address the costs and delays of our civil justice system. If in the process we can rebut the charge of indifference to the real world around us we will have achieved much in these dying years of the 20th century. 

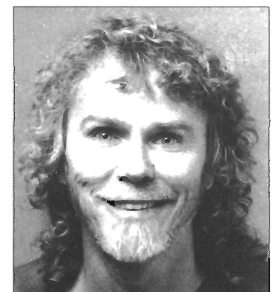
## Juta Prize

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Professors JRL Milton and DJ McQuoid-Mason of the University of Natal were awarded the 1995 Juta Prize for their article "The Faculty of Law, University of Natal: Two in one" (1995) 8 *Consultus* 37



*Prof John Milton*



*Prof David McQuoid-Mason*