

*Perspectives on advocacy training and the need for a continuing legal education programme**

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IN speaking to you I am expressing my personal opinions and what I have to say must not be understood as being indicative of what is happening in any other divisions of the High Court or what is happening or has happened at any other local Bar.

Legal education is about to undergo a fundamental change. The existing post-graduate law degree is being replaced by a four-year undergraduate degree followed by a fifth year of vocational training. I do not know whether the GCB has been asked for an input on this important change. What I do know is that judges in Johannesburg have not been consulted. Whatever form the four year degree takes, the Bar as an end user of what the universities turn out should ensure that, in structuring the vocational training year, the universities teach not only basic advocacy skills but also other disciplines that are presently included in the National Bar Examination. If the GCB can, over the next four years, enlist the co-operation of the universities it could bring about a reduction in the scope of the National Bar Examination resulting in pupils spending more of their pupillage learning their trade instead of studying for their examination.

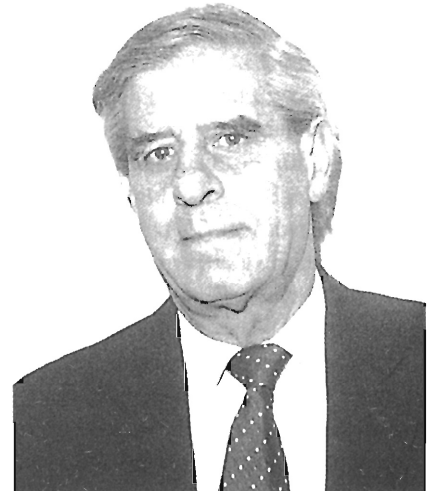
2003 will be the first year in which the Bar's pupil intake will include graduates who have received some form of vocational training. How this will impact on the present advocacy training programme is of course an unknown. In the interim the programme must be continued and developed. It is not, as I see, an end in itself. Its full po-

tential, for reasons that I hope will become apparent, will only be realised if it is linked to a continuing education programme.

Necessary skills

I have read the brief given to pupils participating in the advocacy training programme and spoken to some of those involved in running the programme. The excellence of the programme, in the hands of committed trainers, should ensure that pupils participating in the programme commence practice with basic advocacy skills on which to build a successful practice. As I see it, the programme has two shortcomings. The first is that there does not appear to be any mechanism for testing whether pupils who pass the Bar Examination have, from their pupillage and participation in the programme, acquired a level of advocacy skills entitling them to practise in the High Court. Before certifying a person as fit to practise, she or he should be required to pass a practical examination that would test whether she or he has the necessary advocacy skills to deal with the level of work that is likely to be encountered in the first years of practice. What I would include in such an examination are:

- 1 Moving a number of unopposed applications and divorces, in some of which the papers are defective.
- 2 An opposed provisional sentence in which the pupil is required to settle the reply, draft heads of argument and then argue the plaintiff's case.
- 3 Argument in a civil or criminal appeal including drafting heads of argument.
- 4 A test to determine to what extent a pupil has mastered the skills involved



Judge Ivor Schwartzman

in leading, cross-examining and re-examining a witness.

5 An opening address in a trial.

I hope that in addressing the issue of "Advanced Advocacy Skills" this symposium has answers to what I perceive to be the second and more pressing shortcoming of the programme which is that it is confined to pupils. To date, what the advocacy training programme has not attempted to embrace is the large number of advocates who have been at a Bar for a number of years who have very few, if any, of the skills expected of an advocate appearing in the High Court. They represent those who either escaped the pupillage net or for whom four months of pupillage and the National Bar Examination was an inadequate training ground. This rump of advocates who tarnish the image of the Bar is also responsible for imposing on judges ever increasing burdens. The burden is created because some of them have either not read or understood their brief and most of them have no real understanding of what is required of an advocate in mastering the facts of a case, the legal principles involved and how to apply case law. When it comes to argument there is frequently not a law report in sight and at best

* Extracts from an address delivered at the Advocacy Training Symposium Workshop on appellate advocacy held at Zevenwacht from 11-14 April 1998.

counsel will be armed with a textbook (sometimes out of date) through which they hastily page in the hope of finding something relevant. A typical answer to a difficulty put by court is "I am sorry I cannot take the matter further" or "I have a recollection that there is a case in point but I do not have it with me". In the result judges are frequently faced with the time-consuming task of deciding matters without the benefit of any assistance from counsel. You may possibly wonder how these advocates manage to stay in practice. The answer, and this applies particularly to counsel briefed in the unopposed and opposed motion courts and the civil and criminal appeal courts, is that their attorneys are seldom in court to witness their performance. Apart from the danger they pose to their clients, the danger they pose to newly fledged advocates who will have been through the advocacy training programme is that they may see this rump as role models.

Other hallmarks of this level of advocacy include a case lost because in pleading a cause of action, settling a plea or a set of affidavits, or conducting a trial, legal principles have not been properly understood or analysed; the absence, in most civil trials, of any attempt at an opening address which, apart from the help it would give counsel, could assist the court to know what the case is about and how the plaintiff intends proving its case; and the absence of a chronology so essential where the facts of a case span a period of time.

One way for judges to ease the ever increasing burden of deciding an ineptly or inadequately presented case is to do so on counsel's submissions and the authorities cited or lacked thereof. To do this could, however, be subversive of the interests of justice and, in criminal trials and criminal appeals, could result in a miscarriage of justice.

Dialogue between Bench and Bar

A far reaching, but possibly more effective solution in civil matters, would be to make a cost order disallowing counsel's fees where counsel has been of no real assistance to the court and commu-

nicating the order to the taxing master, the instructing attorneys and the Bar Council. On receipt of such a report the Bar Council could then inform counsel that unless he or she attend a designated training course, membership of the Society will be suspended or terminated. Where an advocate has unnecessarily prolonged proceeding by reason of, inter alia, lack of preparation, laziness or incompetence judges should, as is the case in England, give consideration to ordering counsel to pay any wasted costs so incurred (see *Ridehalgh v Horsefield* (3) WLR 462 (CA) at 481H and 511B-513H).

In criminal trials, where the problem is most acute and where the Bar Council, at the State's cost, appoints counsel to appear for persons charged in the High Court with serious crimes, judges could, with the co-operation of the Bar, become proactive. What I have in mind is a system that entitles a judge, should circumstances require, to report confidentially to the Bar Council on the performance of a particular advocate. If the Bar Council, after affording the member a hearing, so decides, it should inform counsel that he or she will not be given another criminal defence in the High Court until he/she has completed an advocacy training course and appeared in a stated number of cases for the Public Defender. However, without the meaningful co-operation that should, but does not at present exist between Bar and Bench, nothing will change.

I have tried to make it practice to call in junior counsel after a case to compliment them on their performance if it is justified or indicate to them their shortcomings. What I have learnt from these discussions is that the intervention is appreciated and that they are aware of their shortcomings, but feel diffident about approaching their more senior colleagues for guidance and assistance. The difficulty these advocates face can be addressed by getting them to participate in a specially devised programme and by the Bar's devising some means of reviving the collegiality of the Bar.

By reason of their daily interaction with counsel, judges are aware of coun-

sel's shortcomings. Members of the Bar Council, apart from common room or chambers gossip and official complaints, know nothing of these shortcomings. This absence of dialogue leads to tension between Bench and Bar and nothing meaningful being done to address the ever growing problem I have outlined. In these circumstances, I believe that essential to the success of any programme for practising advocates, and this applies equally to the pupil programme, is that the Johannesburg Bar Council enlist the support of what is today a solid core of judges concerned about the need to improve standards who would willingly assist in promoting advocacy skills and continuing legal education.

Commendable, useful and helpful as the teaching of advocacy skills is in equipping a newly admitted advocate to practise at the Bar, it is of little use if the newly admitted advocate is not given the opportunity to practise his or her skills. What we do not have in South Africa is a chambers structure comparable to that which exists in England where the clerk can ensure that newly admitted members of chambers are fed work with which they can cope and which should result in their making a success of their careers.

In the absence of such a structure the problem can be addressed, in part, by introducing a practice of paid devilling - the stressed and overworked junior or silk paying the neophyte a reasonable fee for the work he or she does. Properly supported, paid devilling can contribute to improving standards at the Bar. More importantly, it will provide the disadvantaged membership of the Bar - blacks and women - with an opportunity to prove their worth, not only to their peers, but also to attorneys who would otherwise be unaware of their existence.

Disadvantaged advocates

I would now like to turn briefly to another topic that concerns me and which I believe is relevant to this symposium.

What preceded political transformation in South Africa by a number of years was the significant number of >

black advocates who joined the Johannesburg Bar. Some had the benefit of an education at one of the established universities that used to be reserved for whites. Many were the recipients of the lowest level of school education provided by the State who were then obliged to attend universities created in the name of apartheid, some in remote areas, that provided degree courses far below the standard offered by the former "white universities" and at which they studied through, what was to all of them, a language of second choice. I was shocked to learn from a number of recent graduates from these universities, that throughout their degree course they were not required to look at a law report or a statute and that their knowledge of any subject is limited to their lecture notes and what is to be found in a prescribed textbook. That so many from this disadvantaged background pass the Bar examination is a tribute to their diligence, tenacity and hard work. That so many fail and are required to re-write the examination is no surprise to me. The Bar has done very little to assimilate this influx and what was noticeable for a time was what in England is euphemistically called "ethnic minority sets" and established groups with their token gesture to colour. In the result what has been created over the years is a significant group of black advocates who are isolated from the mainstream of the Bar. I have little doubt that the Bar's laissez faire attitude has been responsible, in part at least, for NADEL/BLA's growth in strength and influence.

A further respect in which some of these advocates are disadvantaged is that they lack language skills in either English or Afrikaans which are still the two languages of the courts, and which skill is so essential to building up a successful practice. I am certain that those running the advocacy training programme are aware of this problem. Members of the Bar are not qualified to teach language skills. What is needed is funding, and someone with the skills necessary to sell the idea to those who need to acquire the skill. Guidance could be obtained from those universi-

ties that have, for a number of years, dealt with this problem. In expressing this opinion I have not lost sight of an advocate's right to use any one of the eleven languages referred to in s 6 of the Constitution. This is an unworkable answer to such an advocate's problem because sooner rather than later English will probably become the language in which all court proceedings are conducted.

Although we have, for the past four years, lived in a society that is by law non-racial, we have not escaped our past and race remains an issue that pervades all efforts to transform our society. Within the Bar's structures the issue of race is starkly illustrated by the fact that today we have two separate advocacy training programmes. Here I am referring to the NADEL/BLA initiative that has American funding, which I understand is under-utilised, that provides training for black lawyers, and the GCB's initiative, which lacks funding, that provides training on a non-exclusive basis and which is assisted by persons and organisations from countries having structures and practices that are similar to ours. Apart from being divisive these parallel programmes are also counter-productive resulting, as they must, in duplication of work and effort and an absence of uniformity in advocacy training.

Last month it was announced that negotiations between the Law Society, NADEL and the BLA had resulted in an agreement to form a single Law Society to represent all attorneys. This is a welcome step forward. What I do not know is what is to happen to the advocate component of NADEL/BLA or how this change will affect the NADEL/BLA training programme. I believe that this announcement poses two challenges for the Bar. The first, which I do not address, is the need to unite the GCB and the advocate component of NADEL/BLA. The second which I have already touched on involves the creation of a single advocacy training programme that should include attorneys who now have the right of audience in the High Court. If the newly structured Law Society gives its sup-

port to the Bar's programmes it could help solve the financial restraints on the development of the Bar's existing programme and solve the problem of the Bench in dealing with attorneys who have no advocacy skills.

The advocacy training programme should, as I have said, not be seen as an end in itself. To effectively restore and thereafter maintain standards it is essential that it be linked to a programme committed to providing continuing legal education, not only for educationally disadvantaged members of the Bar, but also to meet the needs of the whole Bar.

Fields of law

The need for a programme that embraces all levels of the Bar was succinctly spelt out in an article by Jane Creaton, the senior education officer at the Bar Council in England, published in the December 1997 issue of *Counsel* where she said:

"Barristers have specialist knowledge and skills that entitle them to offer legal services to their clients, and they are under a professional obligation to ensure that the quality of these services is maintained. However, the ACLEC report makes it abundantly clear that barristers can no longer rely on professional status alone as proof of their competence.

The Bar must demonstrate a public commitment to a programme of regular, structured educational activity. No scheme of continuing professional development can guarantee that all barristers remain completely up to date, always exercise skills competently or are prepared for every development in the law or in their career. However, an effective scheme can ensure that a framework is in place which enables practitioners to identify developments in the law, practice or the profession and make a speedy and appropriate response." (ACLEC is the acronym for the Lord Chancellor's "Advisory Committee on Legal Education and Conduct").

When they start practising most newly admitted advocates have no specialist knowledge and no skills. In the course

of their pupillage and advocacy training they should be encouraged to identify the fields of law in which they have a particular interest. Having identified the direction they wish their practice to take, they should then, as is now the case in England, be required to complete a minimum number of hours of continuing training in prescribed areas by the end of their third year of practice. What this of course requires is finding the person power to provide the training. If such a programme can be introduced it should also be directed at attracting that rump of advocates to whom I have already referred. What should, however, be regarded as a priority is educating the Bar to the importance of understanding the Constitution and the role it has and will continue to play in the development of our common law.


The need for continuing legal education is not confined to the Bar. It is

also required of the judiciary at both of its levels – the magistracy and the High Court. Such a need has been recognised and is being implemented in many countries, some of whom are represented at this symposium.

With reference to magistrates, who are civil servants within the Department of Justice, the GCB can learn much from the continuing education initiatives of Ms Cecile van Riet, the head of the revitalised Justice College.

Last year responsibility for providing continuing legal education for judges was passed to the Judicial Service Commission, the body responsible for the appointment of judges at all levels. Over the past year it has organised two seminars. Lack of funding has, I believe, inhibited it from doing more at a national level. Until this problem is solved, responsibility, at the level of the High Court, must be assumed by the judges president of the High Court. Judges in

Johannesburg have recognised the need for continuing education and over the past year a number of topics have been identified and discussed at lunch hour meetings. Although this is a start, much more requires to be and must be done to promote the continuing education of judges. The need will become acute when the Judicial Service Commission, in the process of transforming the Bench, recommends the appointment of judges who have potential but who lack a broad experience of the diverse range of cases they will be required to handle.

Postea: In response to this address, a copy of which was circulated to judges of the Witwatersrand Local Division of the High Court, eleven judges of this division attended an advocacy training programme held in July 1998. In September 1998 the Johannesburg Bar Council convened an advocacy training course for practising advocates. 

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