

in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;"

6 S 44 (1)(b) provided as follows: "(1) Subject to the provisions of ss (2) and (3) of this section and of ss 45 and 46, the rights acquired by registration of a trade mark shall be infringed by – (b) unauthorized use in the course of trade, otherwise than as a trade mark, of a mark so nearly resembling it as to be likely to deceive or cause confusion, if such use is in relation to or in connection with goods or services for which the trade mark is registered and is likely to cause injury or prejudice to the proprietor of the trade mark:" (emphasis added).

7 (1927) 40 *Harvard LR* 813 reprinted in 60 *TMR* 334 (1970)


8 A Federal Anti-Dilution Statute section was promulgated on 16 January 1996 with the introduction of s 43(c) into the Lanham Act which provides for the protection from "dilution of the distinctive quality of (a) famous mark", notwithstanding the absence of a likelihood of confusion, and even where the mark is not registered.

9 Abbe E L Brown *The Increasing Influence of Intellectual Property Cases on the Principles of Statutory Interpretation* [1996] 10 *EIPR* 526.

10 In enacting this provision, South Africa has, at long last given effect to its duty, as a signatory to the Convention of Paris for the Protection of Industrial Property to incorporate the provisions of article 6 *bis* thereof into its national legislation (which provides for protection to be extended by all signatories to well-known trade marks). In this context it should be pointed out,

however, that the Legislature has not, as yet, introduced article 6 *quinquies* into the Trade Marks Act which provides that a trade mark which is registered in any other signatory country shall be registered and protected "*telle quelle*" ("as is") in other member countries.

11 It bears mention that statutory damages have been introduced into the Copyright Act 98 of 1978 as well as the Patents Act 57 of 1978.

12 The Trade Marks Act 62 of 1963 s 16(1) read as follows: "It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would be likely to deceive or cause confusion or would be contrary to law or morality or would be likely to give offence or cause annoyance to any person or class of persons or would otherwise be disentitled to protection in a court of law." 

Advocates' ethics: a need for reform?

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All advocates who wish to practise as members of the Bar are obliged to observe the Uniform Rules of Professional Ethics of the General Council of the Bar. There are, however, many "independent advocates" practising without being monitored by the profession.

These advocates can be divided into two categories. The first category consists of those who were members of constituent Bars, but had left disgruntled about what they regard as the Bars' apparent conservatism and their continued reliance on archaic ethical rules. The second category is that of persons who attempted to enter the advocates' profession, but could not pass the National Bar Examination. The disturbing aspect about this group is that the majority of them are blacks.

In recent days the legal profession has been plunged into a crisis. Complaints have been levelled against members of the attorneys' profession regarding the pilfering of trust funds. It has also been reported that some attorneys and advocates had claimed fees from the Legal Aid Board for days when they had not appeared in court. In addition, there have been calls to request the Heath Special Investigat-

ing Unit to probe allegations against attorneys enriching themselves from the Road Accident Fund.

The Bar and the attorneys' profession are aware of these developments and are also acting against culprits. But what about the "independent advocates"? Besides advocates who are members of the organised Bars, there are approximately 140 advocates practising as "independent advocates." Some of these have constituted themselves into associations claiming to be "independent" from the legal professional bodies. I have in mind associations such as the National Association of Law Societies of South Africa [NALSSA] and the Independent Association of Advocates of South Africa [IAASA]. For the purpose of this article I shall concentrate on the latter.

These voluntary associations would wish to disassociate themselves from the rules governing the profession (see 1999 March *DR* 55). Should we continue to condone this state of affairs? By so doing are we not exposing the public to legal opportunists who are not subject to professional training and discipline? What we need to do instead, is to tighten the rules governing members of the profession.

It is important to consider the recent case of *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577. The facts were as follows: The General Bar Council (GCB) applied in court to have the name of the respondent removed from the roll of practising advocates. He had been admitted in 1950 and had taken silk in 1968. The respondent had been a member of the Johannesburg Bar, which had initiated disciplinary proceedings against him. After being convicted of professional misconduct, he participated in the formation of IAASA. The GCB's application was based on the following grounds:

- 1 The respondent had accepted instructions and fees directly from clients without the intervention of an attorney and had, therefore, violated a fundamental principle of the advocates' profession;
- 2 he had allowed his address to be used for the service of papers for the purpose of litigation; and
- 3 he had performed attorneys' work.

The respondent argued that he had reasonably believed and still believed, that in

Continued on page 36.


acterised as forthright. He is scathing about the executive-mindedness of the judges in *Rossouw v Sachs* 1964 (2) SA 551 (AD), but then proceeds to castigate Sachs for his conduct as a member of an ANC commission in failing to condemn the treatment of one of its members detained without trial and for that reason disapproves his appointment to the Constitutional Court. He considers that the composition of the Constitutional Court is such that it is unlikely to curb the excesses of the government. He does not recoil from saying that there is a perception that the Constitutional Court under the leadership of its President is an ANC or ANC-sympathetic institution.

Unsurprisingly, Van Schalkwyk has no good words to say for affirmative action which

he says has been applied in the appointment of judges of the Supreme Court and of the Constitutional Court. In this regard the editorial committee of this journal and Malcolm Wallis SC, then chairman of the General Council of the Bar, are reproached for seeking to impose censorship in regard to an article written by Van Schalkwyk for the journal. "I refused this censorship and requested that the article be returned to me", says Van Schalkwyk who then proceeds to reprint the article in Chapter 4 of his book, for two reasons he says: "First, it includes the remainder of what I want to say on the topic of affirmative action and secondly, because the circumstances of a censorship are a striking example of the insidious forces of political correctness.*

To say that not everyone will agree with everything put forward by Rex van Schalkwyk is probably the understatement of the year. However, what Judge Van Schalkwyk says needs to be said and I recommend this book.

R L Selvan SC
Johannesburg Bar

* *The author of the book was asked by the editorial committee to change or attenuate a passage in the article which in the committee's view could be regarded as a personal attack on one of the judges of the Constitutional Court. Upon his refusal the committee by a majority decided not to publish the article. – Editor* 

Advocates' ethics

Continued from page 27

terms of the law he had been entitled to act in the manner he had. He submitted that the belief was not unreasonable given the recent far-reaching changes in the law. He further argued that the rules of conduct of IAASA specifically allowed the acceptance of briefs directly from members of the public without the intervention of attorneys, and that none of the acts that he had performed had brought the advocates' profession into disrepute. With regard to his argument on his reasonable belief, the court, correctly, rejected the argument. The court reasoned, that as a senior counsel of long-standing, his belief that he had been entitled to act as he had done, had been wholly unreasonable. The court further rejected his reliance on the rules of conduct of IAASA as misleading, since the respondent had participated in their formulation. The court also took a dim view of his attack on the profession in a newspaper in which he belittled the profession.

The court concluded that, in view of the fact that the respondent had displayed a lack of judgment, rather than dishonesty, he should be suspended from practice for a period of six months, which in my view was very lenient. This is a case in which, in my view, the court should have severely punished the defiant respondent, in order to deter other "independent advocates" from continuing to contravene the Bar's ethical rules.

The punishment is not in line with previous court decisions. For example, in the case


of *Beyers v Pretoria Balieraad* 1966 (2) 592 AD (the facts of this case are more or less similar to that of Van der Spuy) Beyers paid the ultimate price – his name was removed from the roll of advocates – while Van der Spuy walked out of the court with only six months' suspension.

The way forward

It appears to me that we need to devise strategies aimed at bringing the "independent advocates" into the fold of the legal profession. What is, however, an immediate challenge to the constituent Bars and perhaps, the government, is to ensure that all "independent advocates" are properly registered within a period of three years.

If they cannot be accommodated as suggested above, then practice outside the profession should be prohibited. I am not suggesting that the concession given to academics should be done away with. We need keep in mind that some of these "independent advocates" are those who failed the National Bar Examination, and the majority of them are black. A lot of ink has been wasted on the issue of access to the profession, especially by the disadvantaged. I need not repeat it here. On the other hand, we cannot afford to sit idly by and leave the community to be exposed to advocates whose conduct and behaviour are not subjected to regular checks and balances.

In order for the profession to save its le-

gitimacy I conclude by, once more, urging the GCB, the Judicial Service Commission and the Minister of Justice to convene a national conference, where issues regarding the transformation of the legal profession and other related matters can be dealt with head-on. Let us not waste more time. 

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