I take the above heading from an article which appeared in De Rebus, January 1997. In the introduction to the article the editors say —

“Attorneys have long been unhappy with the ‘Blacklist’, a monopolistic tool used by advocates to ensure that their fees are paid. However, they differ on the means that should be employed to get rid of the Blacklist.”

What prompted that article was the rejection at the 1996 AGM of the Law Society of the Transvaal of a proposal that would have permitted of a committee of the Law Society negotiating with the Pretoria and Johannesburg Bar Councils an alternative to the present blacklisting system. What was decisively rejected at the AGM was the proposed basis for such negotiations which involved the acceptance by the attorneys’ profession of principles which in the view of the Bar would constitute an alternative system to ensure payment of counsel’s fees.

Attached to the article is a summary of the views of law society councillor John Neaves who at the AGM spoke to the proposal and Centurion attorney Dr Tim Burrell who spoke against it.

In putting forward his views, John Neaves commences by saying the following:

“The debate was highly emotional with strong views being expressed by those in favour of the proposals as well as by those against the proposals.”

Dr Burrell starts by saying:

“At the AGM of the Transvaal Law Society it was, if nothing else, at least common cause that the blacklisting system is to be abhorred: It has to go.”

Why such strong emotions? And why such pejorative language in the introduction to the De Rebus article and from the mouth of an intellectual property lawyer from whom one would expect a more dispassionate approach? The answer I beg leave to suggest is given by George Colman QC (later Colman J) in an article, “The Cost of Litigation – The True and the False Remedy” which appeared in (1959) 76 SALJ at 390. In responding to an article entitled “Fusion – The Answer to the High Cost of Litigation” George Colman wrote that the author of the article “presents his case with a degree of passion rarely found in the pages of a legal publication” and went on to say —

“What has generated this heat? The answer perhaps is to be seen on page 297, where the writer refers, with some bitterness, to the concept of the solicitor as ‘a lower form of life than the barrister’. The words are taken from Mr CP Harvey’s stimulating and provocative work The Advocate’s Devil. But if one has regard to the vein in which that book was written, one can hardly treat it as authority for the proposition that, among any responsible body of persons, the status of solicitors is so grossly misjudged. The point is worth pursuing, in case there are other solicitors who tend to take seriously what is no more than a threadbare joke heard at some legal dinners. Lest such an error should cloud their judgment on the serious and socially important question of fusion, it should be said without equivocation that, in South Africa, at any rate, both branches of the profession enjoy equal status. Each has its own important and difficult role to play in the administration of justice, and each is governed by a high ethical code. Neither represents a higher or lower form of legal life.”

That such a misconception about the relative status of the two branches of the profession still exists and that at least in part it is responsible for the strength or the feelings evinced in the discussion of what is after all a pragmatic question appears from the following passage in Dr Burrell’s expression of views:

“Why should counsels’ fees be allowed to assume a position which is above the normal working of the law? Why should non-payment by attorneys of counsels’ fees constitute ‘unprofessional conduct’, as the proposal would have it, when, one assumes, the non-payment by attorneys of, for example, medical practitioners’ fees would not? Why are counsels’ fees to be elevated to so pre-eminent a category?

The answer to these questions is that there is no reason. The explanation, for what it may be worth, seems to lie >
deep in the archaic concept that counsel (and counsels' fees) are of an order to which attorneys are subservient.”

It may I think be safely assumed that such thinking colours the views of most if not all of those who would do away with the blacklist, without going on to consider what the possible consequences would be of such a step and the strength of the case which may be put forward in favour of, if not the retention of the blacklist, at least some other mechanism which would assure counsel of being paid. For instance, in a letter published in 1997 March *De Rebus* 156, attorney Mike Rafferty of Bothaville, Free State, and former President of the Free State Law Society writes:

“South African jurists must rid their minds of that ill-conceived and incorrect idea imported from Britain centuries ago that attorneys belong to a ‘side bar’ and that we are inferior to the ‘bar’. After all, many of us today have the same academic qualifications as members of the bar and in fact we are better qualified because of our training under articles and the very stiff practical examination which we have to pass.”

**Attorneys not inferior**

I accept unreservedly that any idea that attorneys are inferior to counsel is not only archaic but self-evidently not so. What George Colman wrote twenty years ago cannot be less true today when, as Mike Rafferty points out, many if not the majority of attorneys have the same qualifications as counsel but attorneys also have the right of audience in the High Court. I add this. In my experience and I think in the experience of my colleagues, there is no uneasiness in the relationship between members of the Bar and attorneys. Considering that when involved together on the same side in litigation the advocate and the attorney is each intent upon doing the best he can for the client, it would be surprising if confidence in each other would not be engendered and bonds of friendship forged. Moreover, what is lost sight of by those still incensed at the supposed superior airs assumed by advocates is that there has been and always will be a movement between the two branches of the profession; attorneys give up practice as such and come to the Bar and vice versa. A further circumstance which now more than ever before should convince attorneys that they are not a lesser breed under the sun is the fact that not only are attorneys now eligible for appointment to the bench but that some who have been appointed generally regarded by attorneys and advocates alike as filling such offices with distinction.

Let us then in a cool and dispassionate manner consider in turn what reason there may be for the abolition of the blacklist without substituting therefor so other system which would assure counsel of payment of his fees, what fun the blacklist serves and whether as I will submit there are sound reasons the blacklist should be retained.

I accept that it is hurtful for an attorney to be told that because he had not paid an advocate his fees, no other advocate belonging to the order will accept his briefs his default has been purged.

However, if such fees were due and payable, I suggest that the consequence is not, unusually harsh. Says Dr Burrell, however, why not make use of the ordinary laws of the land; these are reasonably satisfactory “when a dispute to the payment of moneys arises between A and B”.

**Procedures**

The short answer to Dr Burrell is that the function of the blacklist is not to resolve disputes between counsel and attorneys as to whether or not fees are due. Rule 7.8 of the Rules of the Johannesburg Society of Advocates which is quoted in the article in *De Rebus* prescribes what is to happen when a member of the Society reports to the Secretary the fact that fees due to him are unpaid after the expiration of 97 days from the end of the month in which the became due. It is as follows:

“On receiving such notice of default the Secretary she immediately notify the practitioner concerned that he is in default and that failing payment within seven days of such notification he will be barred. If within that period the fees are not paid and there is no bona fide dispute between the member and the practitioner, which shall have been notified to the Secretary, and if the Secretary shall have received no written request for the exercise by the Bar Council of the hereinafter mentioned right to grant an extension, the Secretary shall notify each member in writing the fact of such default. From the date of such notification and until such fees together with all fees which shall have been notified the Secretary by members as being owing to them by the said practitioner shall have been paid, the said practitioner shall be barred. Provided that the Bar Council may in its discretion grant to the practitioner in question on his application an extension time for payment.”

I draw attention to the saving provision “and there is no bona fide dispute between the member and the practitioner”. If there is such a dispute there are procedures in existence for such to be resolved. The Johannesburg Bar has an ombudsman who endeavours to resolve any such dispute amicably. Should he fail so to do and the matter has to be adjudicated upon, arrangements are made for a member of the attorneys’ profession to take part in the adjudication. So far as I am aware, these procedures have not given rise to complaint among the attorneys, but if I am wrong in this and misgivings do exist as to the impartiality of those who decide such matters, I am sure that the Bar would be willing to make the necessary changes.

It should not be thought that an advocate who in obedience to the rule notifies the Secretary of the Society of the name of the defaulter does so with any pleasure. The stresses which may be involved on counsel in reporting are poignantly expressed by Horace Kent, who although he practised as an advocate, was not a member of the Order, in a letter published in 27 (1910) *SALJ* at 427:

“Many members of the bar have relatives and intimate friends at the side-bar, from whom they derive much of their practice. Does anyone suppose that if A is owed fees, by, say, his brother or bosom friend B, and the latter is in default for
seven days, A is likely to ‘blacklist’ and ruin his brother or friend and perhaps his own practice too? Then, again, take the case of a young practitioner who has received his maiden brief from some eminent firm. At the end of the month the fee list is diffidently despatched, but, alas! seven days pass away and no cheque arrives. Under the rule the young practitioner: ‘is bound to notify the secretary or treasurer’; the eminent firm is called upon to pay within three days or be ‘blacklisted’, and with that little episode vanishes the seductive vista which the maiden brief opened of success, fame, wealth in the foreground and the ‘woolsock’ of the Union – the Chief Justiceship of the Appellate Court – in the distance.”

However, it is must be remembered that there is provision in Rule 7.8.12, for the Bar council in its discretion to grant to a petitioner an extension of time for payment. That provision is frequently invoked and I believe sympathetically applied.

What also should be remembered is that the procedure for blacklisting is in lieu of the right of counsel to sue for his fees. According to the rules of the Order, counsel may not sue without the permission of the Bar council and such permission is granted only exceptionally. So, unpleasant as being blacklisted may be for an attorney, at least he or she is saved the embarrassment of being the defendant in civil litigation and possibly being called upon to undergo examination in the Section 65 Court.

What is its function?
If then the blacklist is not designed to bludgeon attorneys into paying the fees charged by counsel, however unreasonable, what is its function? On a superficial approach, the answer may seem to be to enforce payment of debts due to counsel, in other words, to serve as a debt collecting procedure. To a degree this is true, but I suggest it is only one facet of its true function. As is understood by John Neaves, the existence of the blacklist or of some other system which gives advocates comfort that their fees will be paid as and when they are due is a sine qua non of the continued existence of the advocates’ profession as it is presently constituted under the aegis of the General Council of the Bar and its various constituent societies. I speak not of advocates who choose to practise independently.

The different roles of the advocate and the attorney are succinctly described by Corbett CJ in his judgment in the case of In Re Rome 1991 (3) SA 291 (A) at 306B:

“The advocate is, broadly speaking, the specialist in forensic skills and in giving expert advice on legal matters, whereas the attorney has more general skills and is often, in addition, qualified in conveyancing and notarial practice. The attorney has direct links (often of a permanent or long-standing nature) with the lay client seeking legal assistance or advice and, where necessary or expedient, the attorney briefs an advocate on behalf of his client. The advocate has no direct links or long-standing relationship with the lay client: he only acts for the client on brief in a particular matter and is normally precluded by Bar rules from accepting professional work direct from the client. The attorney is responsible to the advocate for the payment of professional fees due to the latter by the client and for the recovery of these and his own fees and disbursements from the client. The advocate has no direct financial dealings with the client.”

The case of Bertelsmann v Per 1996 (3) SA 375 (t) even if correctly decided, is not an authority to the contrary.

I suggest that it is intrinsic to the relationship between the advocate and the attorney and each of them with the lay client that the advocate makes no arrangements with the lay client for payment of fees and relies upon the attorney to see that he receives what is due to him.

Once this is granted, it is readily understood that some mechanism is necessary in order to ensure that attorneys will have funds at their disposal to discharge counsel’s fees when such fall due. This they would generally do by not instructing counsel in any matter unless they have money on hand from the client. And when the client pays money to an attorney to pay counsel is this not money held in trust? One sees of course that with some clients the attorney may feel justified in engaging counsel without having cover; but then of course the responsibility and risk of so doing in all fairness should attach to the attorney and not to the advocate. After all the advocate is not consulted on the question as to whether credit should be given in any particular case.

In an ideal world one would not need the sanction of the blacklist to ensure that all attorneys would arrange that they were in funds to pay counsel and that they punctiliously pay counsel on due date. The experience of the English Bar however demonstrates that such is not the world in which we live. The failure by English solicitors to pay counsel is a perennial problem in England, where it is traditional also that barristers should not sue for their fees. If it comes to the knowledge of a barrister that his fees have been collected by a solicitor who has not paid them over to him, he may invoke the assistance of the Law Society who will consider such conduct unprofessional. It is of interest that some years ago when this topic was discussed at a meeting of the English Bar, someone suggested that the South African system of blacklisting be introduced.

Essential
By asserting that in order to give efficiency to the arrangement whereunder the attorney and not the lay client is responsible for payment of counsel’s fees, the existence of the blacklist or a substitute therefor is essential, I do not mean to suggest that in the absence of such no attorneys would discharge their obligations. Quite obviously this is not so. Many attorneys pay counsel long before the fee is overdue, some on receipt of counsel’s brief. Nor do I suggest that the sanction of the blacklist is necessary in order that fees be collected. On the contrary, the rule is invoked in what must be a small percentage of matters in which fees are due to counsel. However, apart from the relatively small number of instances where the blacklist ensures payment to counsel of his fees, the fact of its existence gives credence to the rule that it is the attorney and not the lay...
client who undertakes liability to counsel for his fees and that the attorney is under a duty to pay such. Indeed, by briefing counsel, does not the attorney impliedly hold out to counsel that the attorney has funds to pay his fees or at least that the attorney has assumed the risk of the lay clients not paying? And if the answer to this question is in the affirmative, it surely provides the reason for the existence of the rule for which Dr Burrell seeks and for which he gives the fallacious explanation that the rule exists because there is a notion among counsel that they belong to an Order to which attorneys are subservient.

At a time when the Bar had the exclusive right of audience before the High Courts, it could more plausibly have been argued that the implications of an attorney being put upon the blacklist were Draconian. Even then I would have responded by saying that in a world where strikes and lock-outs are regarded as acceptable industrial practices and where persons whose names are listed by credit monitors are refused credit even by medical practitioners, the practical reasons for the retention of the blacklist outweigh the unfortunate consequences which might occasionally occur. Now that attorneys have the right of audience in the High Courts and there exists in addition a so-called independent bar, the claim that blacklist is "a monopolistic tool" rings hollow.

And what about this further thought? In the summary of his views attached to the De Rebus article, John Neaves expresses the view that it would be unfortunate if counsel were to be obliged to take work from members of the public without the interposition of attorneys and goes on to say:

"In my view, this would be not only to the detriment of the public but also to the detriment of the attorneys’ profession – in particular the smaller firms who cannot employ in-house counsel and who cannot provide the multitude of services presently available to the attorney and his client through the use of counsel. Attorneys have a choice as to whether they accept the principle that they contract with counsel as principals or whether they will live with some system which gives the advocates comfort that their fees will be paid as and when they are due. The alternative is that the advocates will abandon their rules and compete with attorneys as attorneys, the consequence of which will be that clients will lose their access to the combined and independent resources of counsel. The attorneys who do not wish to be responsible for the payment of counsel’s fees or be governed by the blacklisting system can, if they wish, instruct the independent advocates who, as far as I am aware, have no recognised professional body governing their conduct."

I do not need to recapitulate the reasons why the organisation of the advocates’ profession in societies with their own rules of conduct should continue. The very fact that notwithstanding its loss of sole right of audience in the High Courts the advocates’ profession continues to exist and the service of advocates belonging to the societies continue to be used by attorneys is proof enough that the advocates’ profession as presently organised serves a purpose. If this is acknowledged, surely those who on behalf of their clients wish to continue to make use of the services of counsel belonging to the societies should have no objection to the existence of the 90 day rule and those who do not are not affected by the 90 day rule. Why then should any members of the attorneys’ profession wish to change the status quo?

ASSOCIATION OF ARBITRATORS

The Association has been presenting correspondence courses in arbitration since 1985. The qualifications gained by those studying these courses are well respected in the legal fraternity locally and internationally. We have pleasure in announcing that all our courses will be repeated in 1998. The course which has particular relevance to advocates is as follows:

HIGHER DIPLOMA IN ARBITRATION

This course has been designed specifically for those who wish to practise as arbitrators and for those who wish to qualify for Fellow status of the Association. The Chartered Institute of Arbitrators, London, recognises the Higher Diploma as fulfilling its requirements for Part One, and Paper A and B of Part Two of its Fellowship Examination.

ENQUIRIES

For further information regarding the above and other courses offered by the Association, kindly contact the Association at:

PO Box 653141
Benmore
2010

Telephone: (011) 320 0591/2
Fax: (011) 320 0593
E-mail: arbitrators@icon.co.za