GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA v VAN DER SPUY 1999 (1) SA 577 (T)

Citation	1999 (1) SA 577 (T)
Case No	13013/96
Court	Transvaal Provincial Division
Judge	Swart J, Du Plessis J
Heard	September 22, 1997
Judgment	March 23, 1998
Counsel	E Bertelsmann (wtih him RJ Raath) for the applicant M Klein for the respondent
Annotations	Link to Case Annotations

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Flynote : Sleutelwoorde

Advocate - Misconduct - Disciplinary proceedings - Application for removal of advocate's name from roll of advocates - Advocate found guilty of professional misconduct for accepting instructions and fees directly from clients without intervention of attorney; allowing his address to be used for service of papers or as client's address for purposes of C litigation; performing attorney's work; and transgressing ss 83(1) and 83(8) of Attorneys Act 53 of 1979 - As senior counsel of long standing, his stated belief of entitlement to act in manner complained of wholly unreasonable - Reliance on rules of Independent Association of Advocates of South Africa (IAASA) allowing such conduct D misleading since, as founder member and IAASA council member, advocate at least co-responsible for drafting such rules - Proceedings in instant case not conducted in bona fide manner - His letter published in weekend newspaper maligning advocates' profession in eyes of public - Although ambit and continued existence of rule E preventing advocates from taking direct instructions from lay clients subject of debate, such rule existing and to be adhered to - Advocate's failure to appreciate that no society able to allow individuals to decide whether or not they agree with particular rule and, if not, to disregard it leading to conclusion that he was not fit and proper person to continue to practise as advocate - Advocate suspended from practice for six months. F

Headnote : Kopnota

In an application for the striking off of the respondent's name from the roll of advocates of the High Court of South Africa the Court found that the respondent had been guilty of professional misconduct in that *(a)* he had accepted instructions and fees directly from clients without the intervention of an attorney; *(b)* he had allowed his G address to be used for the service of papers or as the client's address for the purposes of litigation; and *(c)* he had performed attorneys' work. He was also held to have transgressed the provisions of ss 83(1) and 83(8) of the Attorneys Act 53 of 1979. (At 610I/J--611B.)

The respondent had been admitted as an advocate in 1950 and had been senior counsel since 1968. After being convicted of professional misconduct by the disciplinary subcommittee of one of the applicant's constituent Bars, H he had joined a voluntary association, the Independent

Association of Advocates of South Africa (IAASA), as a founder member. With regard to the question whether or not he was a fit and proper person to continue to practise as an advocate and whether he should be suspended from practice or whether his name should be struck from the roll, the respondent argued that he had reasonably believed, and still believed, that in terms of the law of South I Africa he had been entitled to act in the manner he had. It was submitted that the belief was not unreasonable given the recent far-reaching changes in the law. Furthermore, the rules of conduct of IAASA specifically allowed the acceptance of briefs directly from members of the lay public without the intervention of attorneys. He also submitted that there was no reason to J

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doubt his *bona fides* and that none of the acts he had performed had brought the advocates' profession into A disrepute.
Held, that, as senior counsel of long standing, the respondent's belief that he had been entitled to act as he had done had been wholly unreasonable. His reliance on the rules of conduct of the IAASA was wholly misleading in that, as a founder member and council member, he had been at least co-responsible for their formulation. (At 611G/H--612A.) B
Held, further, that it would be unrealistically charitable to the respondent to say that the proceedings in the present matter had been conducted on a *bona fide* basis. Nor could his conduct be attributed to a mere misconstruction of the legal and ethical position. Moreover, his harping on the rights of the underprivileged to reduced costs of C litigation (by not having to pay fees to both an attorney and an advocate) smacked of being sanctimonious in the light of his disciplinary conviction of unprofessional conduct for proposing a fee of R180 000 when a fee of R45 000 had been appropriate. (At 611A--C/D.)
Held, further, that the respondent's letter, published in a weekend newspaper in August 1995, had been an express attack on the advocates' profession couched in belittling, insulting and extravagant terms. His description of the D profession as an outmoded legal order aimed at protecting an elite cartel by forcing the public to use attorneys to gain access to the 'heilige voorportale van die advokatuur' could only have served to malign the profession in the eyes of the public. (At 611G--I/J.)
Held, further, that, although the papers showed that both the ambit and continued existence of the rule that E advocates could not take direct instructions from lay clients were the subject of continued debate, it had been held by the Appellate Division in *Beyers v Pretoria Balieraad* 1966 (2) SA 593 that the rule existed, that advocates had to adhere to it and that those who did not were guilty of unprofessional conduct. (At 613A/B--C.)
Held, further, that it was the respondent's failure to appreciate that no society could allow each individual to decide F whether or not he or she agreed with a particular rule and, if he or she did not, to disregard it that led to the conclusion that he was not a fit and proper person to continue to practise as an advocate. (At 613D/E--E/F.)
Held, further, that, in view of the fact that the respondent had displayed a lack of the judgment required for the practice of an advocate, rather than dishonesty, he should be suspended from practice for a period of six months. (At 613F--I.) G

Cases Considered

Annotations

Reported cases

Algemene Balieraad van Suid-Afrika v Burger en 'n Ander 1993 (4) SA 510 (T): applied H

Attorney-General v Tatham 1916 TPD 160: dictum at 169 distinguished

Bertelsmann v Per 1996 (2) SA 375 (T): distinguished

Beyers v Pretoria Balieraad 1966 (2) SA 593 (A): applied

Ex parte C J Brand (1887) 2 SAR 183: referred to

Hurter v Hough en 'n Ander 1989 (3) SA 545 (C): referred to

Johannesburg Bar Council v Stein 1946 TPD 115: referred to I

Minister of Finance and Another v Law Society, Transvaal 1991 (4) SA 544 (A): distinguished

Pretoria Balieraad v Beyers 1966 (1) SA 112 (T): applied

Prokureursorde van Transvaal v Kleynhans 1995 (1) SA 839 (T): dicta at 850F--I and 853F--H applied

R v Cornelius 1945 TPD 258: referred to

R v Zeiss 1961 (1) SA 610 (T): dictum at 611E--612D applied J

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Society of Advocates of Natal v De Freitas and Another (Natal Law Society Intervening) 1997 (4) SA 1134 A (N): applied

Society of Advocates of South Africa (Witwatersrand Division) v Cigler 1976 (4) SA 350 (T): considered.

Statutes Considered

Statutes

The Attorneys Act 53 of 1979, ss 83(1), 83(8): see *Juta's Statutes of South Africa 1997* vol 5 at 3-122--3-123. B

Case Information

Application for the removal of the respondent's name from the roll of advocates. The facts appear from the judgment of Swart J.

E Bertelsmann SC (with him *R J Raath*) for the applicant.

M Klein for the respondent. C

Cur adv vult.

Postea (March 23).

Judgment

Swart J : Apart from applying for alternative relief, the applicant applied for orders that the name of the respondent be struck off the roll of advocates of the High Court of South Africa and that the respondent be D ordered to pay the costs of the application on the scale of attorney and own client.

The application was opposed.

The applicant, the General Council of the Bar of South Africa, is an umbrella organisation of the various constituent Bars of South Africa. The applicant is a voluntary organisation representing every constituent Bar of E South Africa and is an *universitas* with legal personality. The objects of the applicant, as appears from the applicant's constitution, are, *inter alia*, to deal with all matters affecting the profession and to take action thereon and to uphold the interests of advocates in South Africa. The applicant alleges that it acts herein not only in terms F of the powers conferred upon it by its own constitution, but also in terms of s 7(2) of the Admission of Advocates Act 74 of 1964.

The respondent is an advocate of this Court. The respondent was admitted as such on 16 March 1950. On 5 July 1968 the respondent was granted the status of senior counsel. The respondent originally practised as a member of G the Pretoria Bar and thereafter as a member of the Johannesburg Bar. Both these Bars are constituent members of the applicant. The respondent was convicted of professional misconduct by a disciplinary sub-committee of the Bar Council of the Society of Advocates (Witwatersrand Division). At a certain stage thereafter the respondent joined another voluntary association called the Association of Independent Advocates of H South Africa.

The misconduct relied upon by the applicant for the orders sought is set out in the founding affidavit and replied to in the answering affidavit. In addition the applicant filed a replying affidavit. In the latter reliance is placed upon further examples of misconduct. The replying affidavit was filed out of time, which was originally objected to. I Ultimately the objection to the filing of the replying affidavit was not persisted in and the respondent did not seek to deal with any of the allegations in the replying affidavit by way of further affidavits. In addition the president for the time being of the Law Society of the Transvaal, Pieter Christiaan Langenhoven, filed an affidavit. The Law Society did not seek to J

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participate in the proceedings as a party but its council had decided that the president should place considerations A before the Court on an *amicus curiae* basis.

The details of the alleged misconduct of the respondent relied upon by the applicant and the disputes thereanent arising from the papers are as follows: B

[1] *(a)* The applicant alleges that it is a fundamental principle of the advocates' profession, as practised in South Africa (and in all Commonwealth jurisdictions where the division of the legal profession into advocates and attorneys has been maintained), that the advocates' profession is a referral profession and that advocates do C not accept briefs directly from members of the public. Apart from certain examples quoted (which I do not think are germane to the present matter), the applicant alleges that it is a fundamental rule of the ethical code of the organised advocates' profession that no member may accept a brief from any person other than an attorney. No member of a constituent Bar may, in addition, accept fees from a client directly without the D intervention of the instructing attorney.

(b) The respondent replies as follows:

(i) The so-called 'constituent Bars' of the applicant do not represent the bulk of the advocates' profession in South Africa. Neither the applicant nor its 'constituent Bars' constitute the E representatives of the advocates' profession. Neither the applicant nor its 'constituent Bars' have any statutory power to regulate the advocates' profession. The applicant does not have the authority to deal with all matters affecting the profession of advocates and to take action thereon. The F applicant is nothing more than a voluntary association and has no statutory powers to deal with all matters affecting the profession of advocates or to take action thereon.

(ii) The Independent Association of Advocates of South Africa ('IAASA') is a voluntary association and a well-organised professional body of advocates with a constitution and a code of professional G conduct and ethical rules. Respondent denies that their members practice without having become members of the organised profession. Rule No 15 of the Code of Professional Conduct and Ethics of IAASA provides that members of IAASA are entitled to accept instructions directly from the public without the intervention of an attorney. The advocates' profession is not a referral profession H and is not a referral profession in all Commonwealth jurisdictions. There is nothing inherently unethical in an advocate accepting instructions directly from a client without the intervention of an attorney. It is solely by choice and not by reason of any rule of law or ethical rule that advocates have not accepted briefs directly from members of the public. At the time of the reception in this I country of the law of Holland the advocates in Holland were entitled to and did receive instructions and fees directly from lay clients without the intervention of an attorney. This is still the position in Holland. In terms of s 2 of the Right of Appearance in Courts Act 62 of 1995, an advocate has the unqualified right to appear on behalf of 'any person' in any court J

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in the Republic of South Africa. Implicit in such right is the right to receive instructions from the A person who requests an advocate to appear on his or its behalf. The right afforded in the section is not conditional upon the advocate in question receiving instructions from an attorney.

(c) In its replying affidavit the applicant points out that it is a matter of established principles in our case law B that advocates should not accept direct briefs and should not embark on the work normally done by attorneys, whatever may in the past have been or at present may be the case in Holland. The applicant's deponent also points out that in the discharge of his functions as chairman of the applicant he has been in the C position for the past two and a half years to examine the position in other jurisdictions and to discuss those matters with Bar leaders, particularly those from Commonwealth countries such as England, Scotland, Australia, Northern Ireland, New Zealand and Hong Kong. In all those countries there is a separate Bar which operates as a referral profession, irrespective of whether it is given legal recognition as a separate D profession from that of an attorney. In Australia all legal practitioners can act as both solicitors and barristers but independent Bars, whose members practice solely as barristers accepting instructions only from solicitors, exist in New South Wales, Queensland, Victoria, South Australia and Western Australia. The same prevails in New Zealand, where there is a *de facto*, though not a *de iure*, Bar. E

[2] *(a)* Applicant alleges that should an advocate be in breach of the above-mentioned ethical rules and accept a fee directly from his client for work which he ordinarily performs in his profession as advocate, he would also find himself in breach of the provisions of s 78 of the Attorneys Admission Act 53 of 1979, read with F the provisions of s 83(8), (9) and (10) of that Act.

(b) The respondent's reply is, in essence, that the provisions do not apply to an advocate and that he has never, directly or indirectly, purported to act or to practise as an attorney, notary or conveyancer.

(c) Applicant replies that advocates cannot form a special class of people not affected by the provisions of G the Attorneys Admission Act although performing the same functions as an attorney. It is not possible to practise by way of the acceptance of briefs directly from the public without performing the functions of an attorney and the respondent's own actions in this regard, to which reference has been made in the founding affidavit, bear this out. H

[3] *(a)* Applicant believes that the respondent, together with other independent advocates, accepts instructions to perform and that he does perform work which would normally be performed by an attorney. This constitutes a contravention of the aforesaid sections of Act 53 of 1979 as neither the respondent nor any of the so-called independent advocates keeps a trust account. No advocate can in any event act as an attorney I while remaining on the roll of advocates of this Court.

(b) The respondent answers that he has never accepted instructions to perform and has never performed work which would normally be done 'exclusively by an attorney'. He is not an attorney, notary or J

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conveyancer and is accordingly not obliged to keep a trust account. The respondent denies having A contravened the Act by failing to keep a trust account.

(c) In the replying affidavit it is stated on behalf of applicant that the denial in respect of work done 'exclusively' by an attorney is wrong; for example, taking the initial instructions from the client and B corresponding with the other party's attorney or being the person upon whom documents are served all constitute the work of an attorney. The point applicant makes in its founding affidavit is that, where a client deals directly with an attorney, the client has the protection of a trust account and the Fidelity Fund. No such protection exists

when the client pays an advocate directly. C

[4] *(a)* Applicant refers to a letter which was published in the *Rapport* newspaper of 6 August 1995, a copy of which is annexed marked annexure MW3. Applicant submits that respondent has, to the best of the deponent's knowledge, never denied the fact that he is the author of the letter, nor has he withdrawn the D contents thereof. Indeed, he has in fact proceeded to act in accordance with the intentions expressed therein. By acting so, the applicant alleges the respondent has transgressed the ethical rules relating to his profession to such an extent that he is no longer a fit and proper person to practise as an advocate of this Court. This letter reads as follows: E

'Gewone burger het reg tot 'n advokaat Adv Attie van der Spuy (SC), Parktown, skryf:

As raadslid van die Vereniging van Onafhanklike Advokate van Suid-Afrika wat op 16 Maart 1993 wanhopig en ontnugter uit die Vereniging van Advokate van Johannesburg bedank het, is dit baie duidelik vir my dat die tyd nou oorryp is om die F koddige stelsel van ''balie'' (advokate) en ''sybalie'' (prokureurs) finaal af te skaf.

Die skynheilige poging van die voorsitter van die Balieraad en die Vereniging van Prokureurs om mekaar oor en weer te piets oor die ''reg van bekwame en ervare prokureurs om in die Hooggeregshof te verskyn'' sou lagwekkend gewees het as dit nie so tragies is nie. Want die gewone Suid-Afrikaner het, volgens art 22 en 17 van ons Grondwet, die reg tot G vrye toegang tot alle howe en derhalwe tot alle regspraktisyns in alle howe.

Dis 'n skreiende skande dat die advokatuur vir hom 'n fort gebou het wat jy alleen deur 'n prokureur (teen betaling van 'n buitensporige fooi aan prokureur, korrespondent, junior en senior advokaat) kan binnedring. Hoekom kan die geringste burger nie die hoogste advokaat se dienste bekom sonder al hierdie rompslomp nie? H

Nee, kom ons sien nou af van 'n uitgediende regsorde wat daarop bereken is om die advokatuur as 'n elitistiese monopolie of kartel te beskerm teen die arme publiek deur 'n prokureursorde wat die arme publiek noodwendig moet gebruik om by die heilige voorportale van die advokatuur uit te kom.

Oom Koos Marais van Alldays bel my en sê: ''Weet jy, Attie, dit kos my mooi R300 plus R450 plus R750 plus R1 250 = I R2 750 om 'n opinie van advokaat Boerpampoen SC te kry? Dis nou vir my prokureur op Alldays; sy korrespondent; sy junior en die senior! Wat is jou fooi man?'' ''Nee, oom Koos, net R1 250.'' ''Nou te moe*(r)* met julle professie!''

Kom ons maak een balie vir alle Suid-Afrikaners.'

(b) Although conceding that it is critical of the so-called 'referral system', 'whereby members of the public are compelled to incur J

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unnecessary legal expenses in order to gain access to the services of an advocate', the respondent denies A that such criticism implies that he holds the ethical and/or statutory rules relating to the profession of advocates in disrespect. 'IAASA has a comprehensive code of professional conduct and ethics to which I adhere. I further deny the applicant's allegation that I have ''transgressed'' the ethical rules relating to the B profession and I point out that the very purpose of annexure MW3 and various other letters to the media which will be available at the hearing was to campaign for a reduction of legal costs and a reformation of the present costly legal system.' (No such further letters were presented during argument.) C

[5] Applicant then proceeds to refer to some of the respondent's actions:

(a) Applicant alleges that during or about June 1995 the respondent received instructions from a close corporation known as Marcus Motor Scrap Yard CC as well as a certain Hendrika Gezina du Preez and W Esterhuizen in a dispute between them and the Town Council of Midrand. D

Respondent answers, admitting having received instructions from Marcus Motor Scrap Yard CC (in which an attorney was employed, see MW5) and Mr Marcus du Preez personally, who lodged the application personally (see MW6). Respondent adds:

'I acted as counsel for the clients. I never held myself out to be an attorney. Legal argument will be

presented by counsel E that an advocate can act for clients by writing letters and that advocates have done this up to date. The conduct might be against certain Bar Council rules but is not unprofessional.'

Annexure MW5 is a notice of motion in the matter of *Marcus Motor Scrap Yard CC v Stadsraad, Midrand*. It is signed by attorney Papadopolou-Gordon and reads in part: F

'En neem verder kennis dat vir doeleindes van hierdie aansoek applikant 'n adres volgens die Hofreëls verskaf synde die adres van per adres Adv A S van der Spuy SC, Wellingtonweg 30, Parktown, Johannesburg (Tel: 488-9777; Faks 414-4156) en per adres Prokureurs Papadopolou-Gordon, 11 Rovere Gebou, hoek van Vermeulen en Zederbergstrate, G Arcadia, Pretoria (Aandag: Jacques Terblanche).'

Annexure MW6 is a notice of motion in the matter of Marcus Johannes du Preez. It is signed by him personally and he gives his address as c/o Papadopolou-Gordon for the attention of Jacques Terblanche at the aforementioned address. The respondent admits having received instructions but does not expressly deal with the H question from whom he received the instructions. The applicant in reply points out that applicant's case is not that respondent has held himself out as being an attorney, but that he has accepted instructions on a basis which dispenses with the services of an attorney and necessarily entails that he does work which is ordinarily performed I by an attorney. Applicant denies that counsel 'can act for clients by writing letters'.

(b) Applicant proceeds to state that these instructions were apparently given to the respondent directly, without the intervention of an attorney and with the request to perform all tasks and functions which J

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would normally be performed by an attorney on his own accord. A

The respondent admits the direct instruction by Marcus du Preez, Hendrika du Preez and M W Esterhuizen. He then denies the contents of this paragraph and avers that it is not supported by proof that a request was made that he should perform all tasks and functions which would normally be performed by an attorney 'and B I aver that, should such request have been made, then I would have told the clients that I am not an attorney but I am an advocate who acts within common law principles'. In response to this the replying affidavit reads:

'Whilst respondent does deny that he accepted responsibility for the performance of ''all'' tasks and functions which C would normally be performed by an attorney, it is quite clear that he nowhere in his lengthy answering affidavit denies that he has done work normally performed by an attorney. Indeed, the two cases in which he appeared and which gave rise to this application could not have got to court unless he had done so.'

(c) Applicant goes on to state that on 22 June 1995 respondent addressed a letter to the attorney acting on D behalf of the Midrand Town Council, a certain Pistorius, at that stage a director of the attorneys' firm Mendel Cohen and Partners of Pretoria. This letter is typed under the letterhead of Advocate A S (Attie) van der Spuy SC with address at 43 Empire Suites, 30 Wellington Road, Parktown. The letter is ostensibly E signed by the respondent personally. The introductory paragraph reads:

'Soos u weet tree ek as advokaat op vir bovermelde persone en instansies (the individuals and close corporation mentioned above) in die hangende saak tussen gemelde persone en instansies (behoudens Mnr du Preez persoonlik) en u kliënt, die Midrand Stadsraad.' F

The letter refers to instructions from the said clients relating to certain scrap vehicles and/or spare parts on certain premises. The letter contains a demand for the delivery of the said items and ends:

'Graag verneem ek so gou as moontlik van u in bostaande verband.'

Respondent's answer reads: G

'I admit the contents of this letter and I aver that I acted in good faith and as an advocate who had appeared against the deponent Pistorius' client. I was apprising Mr Pistorius of the legal position and I asked his views on my clients' alleged rights. I did not hold myself out as an attorney. I aver that I might have contravened rules of the Johannesburg Bar, but that does not make me unprofessional. I aver that the Johannesburg Bar has changed its rules and that not all the rules H are in line with our Constitution and the

common law.'

Applicant in reply submits that annexure MW4 and the negotiations at which it is aimed clearly fall squarely within the ambit of attorney's work.

(d) The applicant refers to the aforementioned two notices of motion and the fact that in one of them I respondent had allowed his address to be used in terms of the Rules of Court.

Respondent's answer reads:

'Save for stating that the said close corporation in fact chose the address of an attorney in Pretoria (see MW5, pp 3 and 4) and that the said close corporation also gave, for convenience only, my address in Johannesburg to J

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the respondent City Council of Midrand, I myself nowhere mentioned my chambers and address under Rule 6(5)*(b)*.' A

In reply applicant submits that the tenor of annexure MW5 had to be evaluated within the context of annexure MW4 as both these documents concern the same dispute between the same parties. Whilst the respondent apparently wishes to exonerate himself by the bland denial that he himself nowhere mentioned B his chambers as an address under Rule 6(5) *(b)*, it is to be noted that respondent does not hold it out as a mistake, nor does he suggest that he was unaware of this appearing in a document which must have been prepared by him as no attorney had been instructed by the clients. On the face of it the attorney is merely acting as a 'correspondent' for the respondent. C

(e) The aforesaid applications were heard and dismissed on 1 August 1995. The applicant states that the urgent applications were sequels to litigation which had been conducted by way of illiquid proceedings under case No 19778/91 in this Division. During 1995 when the matter was ripe for trial, it became apparent that D respondent was representing the first, second and third defendants in the said case without the assistance of an attorney. Applicant refers to a pre-trial conference and minute marked annexure MW8. The minutes read:

'Names eerste, tweede en derde verweerders: Advokaat A S van der Spuy SC.' E

Plaintiff handed over a request for further particulars which was accepted by advocate A S Van der Spuy SC. Plaintiff requested from the defendants an address within an 8 km radius from the Supreme Court for the service of papers. 'Verweerders antwoord dat hulle sodanige adres op Maandag, 29 Mei 1995 om 16:00 F aan eiser sal verskaf.' The minutes do not disclose that the defendants were represented by an attorney as well. The minutes indicate that they were signed on behalf of plaintiff by plaintiff's attorney and on behalf of the sheriff by his attorney. Provision is made for signature on behalf of first, second and third defendants by Papadopolou-Gordon, but the signature appended looks more like an initial. The minutes are, however, in G addition, signed by the respondent. Applicant refers to annexure MW9, an affidavit by attorney Pistorius. He attended the pre-trial conference with advocate Cor Grobler on behalf of plaintiff. He confirms specifically that he requested the respondent to provide an address for service of papers on behalf of the H defendants as aforesaid, as up to that stage no attorney's address had been provided for service upon the defendants of any notices or process in those proceedings.

In his answering affidavit respondent acknowledges appearing in Court and in the pre-trial conference on behalf of defendants without a brief from an attorney. At the hearing Heyns J was purportedly made aware I by him that he appeared without a brief from an attorney and indicated to respondent in Chambers that he did not find that to be irregular or illegal. At the pre-trial conference it was clearly conveyed and accepted that respondent acted without the instructions or benefit of the assistance of an attorney. 'I did accept documents at the J

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pre-trial. The clients asked me to represent them as their advocate, not as their attorney. They did not have A an attorney and could not afford an attorney.' As far as the affidavit of Pistorius goes, respondent points out that it does not confirm the 'specific request' referred to therein. However, save as above, respondent admits the allegations in para 16.6. This seems to be an admission, as stated by Pistorius, that he specifically B requested the respondent to provide an address as discussed above. In any event Pistorius states that he has read the founding affidavit and confirms it as far as it relates to him. The respondent admits that when the urgent applications were called on 1 August 1995, he was not instructed by an attorney and when the C Deputy Judge-President enquired whether he had been instructed by an attorney, confirmed in open Court that he was acting on his own and claimed that he was entitled to do so. The respondent adds that both Van der Walt DJP and Joffe J, to whom the matters were referred, must have known that he appeared directly and without being briefed by an attorney. It is not clear why this rider is added. In para 17 of the founding D affidavit applicant's chairman states:

'Although I do not have personal knowledge thereof, I believe that the respondent did not act *pro amico* in those proceedings and received his fees directly from his clients.'

This is admitted by the respondent. E

The applicant states that the urgent applications were heard and dismissed on 1 August 1995 and Van der Walt DJP then referred the matter to the Johannesburg Bar Council for investigation by way of a letter written by the Registrar, annexure MW7. This was addressed to the chairperson of the Johannesburg Bar. In the letter the Registrar *inter alia* states: F

'Dit wil voorkom of Adv Van der Spuy moontlik onprofessioneel optree deur sy adres vir betekening te verskaf en ook direk tariewe namens kliënt te skryf en direk opdrag namens kliënt te neem al het hy 'n prokureur op die stukke.

Dit wil voorkom of Adv Van der Spuy, deur sy optrede, werk doen wat uiteraard by 'n prokureur tuis hoort. G

(Sien *Pretoria Balieraad v Beyers* 1966 (1) op 112--17 veral op 115--14.)'

Respondent states that legal argument will be presented that there never was any unprofessional conduct on his side, nor was there a proper investigation into the matter. He denies having acted as an attorney. Legal H argument will be presented showing that he did not act like the said *Beyers* in the case quoted and that his case is totally distinguishable from the said case.

(f) Applicant alleges that the respondent has blatantly disregarded the ethical rules of the advocates' I profession and has done so with full knowledge of the implications thereof. In the light of the aforegoing and in the light of the fact that the respondent is also guilty of a transgression of the provisions of the Attorneys Act, it is submitted on behalf of the applicant that the respondent is no longer a fit and proper person to practise as an advocate of this Court.

'This state of affairs is in my respectful submission exacerbated by the provocative way in which the respondent openly exhorts other advocates to J

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disregard the rules of professional ethics. The respondent has thereby knowingly endangered the legal profession, the A practise of law in the above honourable Court and the interests of justice as well as the interests of the litigating public.'

The respondent denies these allegations. He denies that he openly or otherwise exhorted other advocates to disregard the rules of professional ethics. He states in addition: B

'I deny specifically that it is unethical or improper for an advocate to receive his fees directly from his client. As already mentioned, advocates in Holland have always received their fees directly from their clients. The so-called rule against receiving fees directly from clients is nothing more than an in-house rule of the

applicant and its ''constituent Bars''.' C

Applicant replies to the denial of having exhorted other advocates and to having endangered the legal profession. Applicant points out that respondent is a member of IAASA, which espouses the taking of instructions from the public. In his letter he expressly espouses an abolition of the separation between attorney and advocate. D

'In effect he and his colleagues in IAASA are seeking to bring this about by disregarding the distinction which in the applicant's submission is impermissible.'

[6] In the replying affidavit it is stated on behalf of applicant that since the receipt of the answering affidavit certain further information has become available to the applicant concerning the respondent's conduct. I have E already mentioned that respondent did not seek to answer these allegations. These are the following:

(a) Advocate D R Harms, a practising member of the Pretoria Bar, signed an affidavit stating that on 15 October 1996 he appeared for the applicants before Preiss J in case No 18815/96 in this Division. One of F the documents before Court was a letter written by the respondent in this application, a copy of which advocate Harms annexed as DRH2. In consequence of that letter Preiss J referred the papers to the Pretoria Bar Council for its attention. As a result of the matter coming to the attention of the Pretoria Bar Council, advocate Harms informed the council that he had been involved in a previous application where the G respondent in this case had played a similar role on behalf of the respondents in that matter. The papers in that matter (case No 9828/96) contained a letter from the respondent dated 5 June 1996, a copy of which was annexed as annexure DRH4. Advocate Harms states that in both cases there was no opposition by or representation of the respondents at the hearing of the applications. No attorney was involved on behalf of H the respondents in those actions and they were solely represented by the respondent in these proceedings. He confirms that the documents annexed to his affidavit and the information in his affidavit were not available to the applicant in this application and only became available after 15 October 1996. I

Annexure DRH2 is a letter on the letterhead of Adv A S van der Spuy SC, but with a different address. It was ostensibly personally signed by the respondent. The letter was addressed to the Acting Registrar of Close Corporations in relation to an objection by BMW AG against a close corporation called CMW Used Spares CC. The J

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respondent states that he has been consulted by the close corporation in regard to a letter from the Acting A Registrar of Close Corporations and states that he has been requested to reply thereto. The letter, on various grounds supported by reference to authority, disputes the validity of the demand addressed to the close corporation. The letter states that respondent's client is not disposed to change its name because B heavy costs are involved, not only in reprinting accounts, letter heads, books, etc, but also on account of the loss that will be entailed in respect of a clientele which had been built up over many years. Respondent requests that these facts be drawn to the attention of Adams and Adams, acting on behalf of BMW AG. The letter ends: 'Your prompt reply to the above by return will be appreciated.' C

Annexure DRH4 is a letter with a similar letterhead and ostensibly signed by the respondent. It is addressed to Adams and Adams in connection with *Mercedes Benz AG v Merc-o-matic*. The letter refers to faxes of Adams and Adams of 29 and 30 May 1996 and also of 4 June 1996. The letter refers to an extension of D time needed by respondent to explain to 'my client' the full implications of the proposed settlement. The letter proceeds that respondent had been advised by his client to accept the offer of settlement in terms of the letters faxed to respondent. For the sake of clarity the terms of settlement are recorded. E

[7] In addition to filing an answer to applicant's averments, respondent raises a number of independent defences. I summarise them as follows:

(a) The retention of the so-called 'referral system' is not in the public interest in that it deprives the underprivileged and previously disadvantaged majority of citizens of ready and direct access to the services F of an advocate in civil and criminal matters. The Legal Aid Board cannot abridge this problem. The referral system entails that lay clients are compelled to pay the fees of two legal practitioners. Since the underprivileged and previously disadvantaged majority of citizens in the Republic of South Africa cannot G afford to pay the fees of two legal practitioners, they are effectively prevented from gaining access to the services of an advocate. Neither the applicant nor its 'constituent Bars' are really and truly concerned about H (or considered) the interests of the public in deciding not to allow the public direct access to the advocacy. The adherence by the applicant and its 'constituent Bars' to the 'referral system' *inter alia* prompted the formation of IAASA, which has taken the initiative by allowing members of the public direct access to its members.

(b) The existence of the Bar is being threatened by the fact that attorneys have now been given rights of audience in the Supreme Court in terms of s 3 of Act 62 of 1995. The demise of the Bar is not in the I interest of the public and s 2 of the said Act was purposely enacted to allow advocates to appear directly for any person, thus buttressing the Bar against such demise.

(c) In terms of s 26 of the Constitution of the Republic of South Africa Act 200 of 1993, every person has the right to 'freely engage in economic activity and to pursue a livelihood anywhere in the national J

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territory'. Attorneys, having been granted rights of audience in the Supreme Court, are now competing A directly with advocates for the provision of all legal services formerly exclusively rendered by advocates. Many advocates have either already left or are on the point of leaving the profession due to the fact that they are now competing with attorneys. To make an advocate dependent upon instructions from his direct B competition for the practice of his profession is unconstitutional. The so-called 'referral system' leaves an advocate entirely dependent on his direct competition, ie an attorney, for the practice of his profession. The so-called referral system is accordingly unconstitutional. C

(d) There are other unconstitutional aspects of the domestic rules of ethical conduct of the constituent Bars. They impinge upon s 17 (freedom of association); s 22 (access to court, which means direct access to all practitioners of law in all courts) and s 25 (which grants to any accused the right of choice of any legal practitioner).

(e) The applicant and its 'constituent Bars' have in the past frequently amended their in-house rules of D professional and ethical conduct and claim to have the right to amend the rules of professional and ethical conduct at will. The applicant and its 'constituent Bars' have, pursuant to the granting of rights of audience in the High Court to attorneys, recently conducted a wide-ranging review of their ethical rules from which E proposals arose that members of the constituent Bars be allowed to take instructions and receive fees directly from certain clients without the intervention of an attorney. Reference is made to a memorandum attached as annexure D.

In para A of the memorandum it is stated that careful consideration should be given before adopting the F reaction of affording the public direct and equal access to advocates and that the ethical committee believes that the Bars should, at present, remain referral institutions. A proposal was contained that it may well be appropriate for the junior Bar to take matrimonial work directly and to be entitled to advertise for it. The respondent concludes from this: G

> 'It is clear from the statement quoted in this paragraph that members of the ''constituent Bars'' want desperately to adhere to the so-called ''referral system'' solely by choice and to preserve a distance between the lay public and counsel and not because it is inherently unethical for an advocate to accept instructions directly from a lay member of the public without the intervention of an attorney.' H

(f) The Cape Bar has a rule permitting direct briefing in respect of opinions. In England and Wales the Bar allows direct access by other professionals such as accountants, surveyors, architects and engineers.

(g) Respondent states: I

'The real reason for the bringing of this application is that the applicant and its ''constituent Bars'' are intolerant of IAASA and its members and wish to continue to dominate the advocate's profession by intimidating IAASA and its members.'

(h) Respondent believes that the advocates' profession is a profession of service to the public, a noble and honourable profession and J

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that his conduct falls within the four corners of the rules of the profession. If he has erred, he states that he A has been allowed by at least three Judges and almost a dozen magistrates to appear in the courts without a brief from an attorney 'and I say that as an alternative to the above (striking off), I will accept a caution or even a reprimand as a proper punishment for my transgressions, if ever they were such'. He asks that the B application be dismissed with attorney and own client costs. The reason given is that respondent nominated an attorney for purposes of Rule 6(5)*(b)* and he briefed counsel directly, whose fees would be payable by respondent. He points out that, prior to proceeding with this application, applicant and/or the Johannesburg C Bar Council to whom all relevant documents were referred by the Registrar and by respondent, did not accord him the basic right of refuting the charge that he was 'openly doing attorneys' work'. They in fact disregarded his rights under the rule of natural justice, *audi alteram partem*. D

The applicant in its replying affidavit advanced a number of contentions against those advanced by respondent, including the fact that annexure D *supra* was a preliminary document for purposes of discussion. This was circulated to all constituent Bars, none of which supported a departure from the principle that the Bar is a referral profession. I will revert to the applicant's contentions later as far as may be necessary. E

[8] Mr Pieter Christiaan Langenhoven stated that the Law Society of the Transvaal has become aware of the proceedings in this matter and that he has perused the papers. He deposes to the following:

(a) The activities and conduct of the attorneys' profession are prescribed by law and regulated by a law F society.

(b) The relationship between attorneys and advocates became entrenched over a period of many years, but was shaped in the main by the rules of the various Bar associations imposed on advocates who became members of such associations. G

(c) Previously advocates who practised without being members of a Bar association were by and large limited to members of Parliament and members of law faculties of universities whose briefs were limited and usually pertained to academic matters. By and large the impact of these matters was small and did not intrude on the accepted fields of practice of either the advocates or the attorneys. H

(d) In general, where a member of the public had need for legal assistance the procedure became accepted that the client approached an attorney, the attorney briefed an advocate, the advocate drew pleadings and other necessary documents, the advocate assisted by the attorney conducted the court proceedings and the attorney attended to the payment of advocates' fees. I

(e) The financial arrangements were made between the attorney and his client and moneys paid to the attorney immediately became trust moneys subject to stringent rules applied by the society.

(f) This arrangement led to the independence of the advocate's conduct of the case,

unfettered by considerations such as direct intervention by the client or financial considerations. It resulted in the J

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supervisory authority of the attorney who can withdraw a mandate at the instructions of his client. There A was the advantage of the rules regulating the control of trust moneys by attorneys and the supervision exercised over the attorney by the relevant law society. Another characteristic was the adherence to rules of ethical conduct by both attorneys and advocates. B

(g) Mr Langenhoven states in paras 11 and 12 of his affidavit:

'11. The development of the independent Bar has impacted negatively on all of the above characteristics. The first complaints which reached the Law Society were of a general nature and, though the extent thereof were sufficient to arouse the attention of the Council, to date it has not yet become necessary to inquire into the nature and impact of any C one allegation made against any advocate who is not a member of a Bar association on the ground that such advocates may in fact conduct themselves as attorneys without regulation and in contravention of the Act. It is however accepted that there is cause for serious concern regarding this development.

12. The reasons for this concern are the following: D

12.1 Funds which are received by an attorney for use during the course of intended litigation in respect of his own fees and future expenses (or for any other reason) must be dealt with as trust moneys and deposited in a separate trust account. This account is protected by a fidelity fund created in terms of the Act. Advocates are not required to have separate trust accounts. E

12.2 One attorney reported to the Law Society that he had been requested by an advocate to do what is necessary to prepare a collision case for trial and he wanted guidance on what risks he ran if he accepted such an instruction. This gives rise to the suspicion that advocates do not have the necessary infrastructure to enable them to do the work that is normally expected of the attorney. F

12.3 If complaints are filed against attorneys (or advocates who are members of Bar associations) there is an effective procedure to attend to the complaint. The same cannot be said of advocates who are not members of Bar associations.

12.4 It seems as if the ''independent route'' is becoming more and more acceptable to advocates who cannot pass a Bar examination or prospective attorneys who cannot find articles or cannot pass the attorneys' admission G examination. This could lead to an established practice which will enable the members of the independent Bar to set up an attorneys office and do all the work which is usually entrusted to or reserved for attorneys without any of the stringent controls imposed on attorneys by the Act or the Societies. H

12.5 Attorneys enjoy no special privilege when the question of professional negligence arises. Advocates may have a special status. It may be in the public interest for this to remain. The law of delict may have to be suitably adjusted in this regard.

The development of the independent Bar is viewed with concern by the Law Society. The problematic aspect is the lack I of regulation, particularly in the area of financial arrangements and ethical conduct. The hallmark of any profession is its self-regulatory nature whether imposed by statute or voluntarily. These aspects need immediate and effective attention.'

Thus far the facts, except that I should add that Mr Van Rensburg, a practising attorney in Bloemfontein, deposes to an affidavit to which was annexed a copy of a document which he obtained from the Registrar of J

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the Supreme Court of South Africa, Appellate Division. The document is a notice of application for leave to appeal A which was signed by the appellant personally. The notice states that further notice should be taken that the appellant will be assisted herein, and in any subsequent proceedings if needed, by her counsel, namely advocate A S van der Spuy SC of Wellington Road, Parktown (full address, telephone number and facsimile number provided). B The notice concludes:

'If any address for record in Bloemfontein is required, *be pleased to inform appellant's said counsel* who will immediately arrange such address without delay.

To reduce costs, appellant hereby files by courier and not by attorney the original plus two copies of the petition in the above honourable Court, and serves one copy upon the Registrar of the Court *a quo*, and upon the Johannesburg attorneys for the respondent respectively.'

The respondent, in assisting the appellant, was acting and would be acting without the assistance of an attorney.

I now turn to counsels' submissions. I find it convenient to do so within the framework of submissions presented on behalf of respondent.

(1) It was argued on behalf of respondent that IAASA is, like the various constituent societies of advocates of the applicant, a voluntary association of advocates and is equal in status to the applicant, which is also a voluntary association. The constituent societies of advocates of the applicant each have their own ethical code and are allegedly at liberty to adopt their own ethical rules. The applicant and the other societies of advocates which are affiliated to the applicant cannot and do not claim to have the exclusive right to lay down rules of professional conduct. They have accepted IAASA's right to regulate its own members. This Court cannot be asked to arbitrate on conflicting morals which are not legal issues or, as in this case, do not amount to patently dishonest or dishonourable behaviour.

I do not know whether such is the intention, but if this line of argument is intended to convey that the applicant does not have the *locus standi* to bring this application or that the Court is not entitled to hear the application as a disciplinary matter, the argument is unfounded and clearly wrong. In any event, it is as well to have clarity at the outset concerning the functions of the applicant and of the Court in similar matters.

In *Algemene Balieraad van Suid-Afrika v Burger en 'n Ander* 1993 (4) SA 510 (T) the Judge-President, with reference to s 7(2) of Act 74 of 1964, said at 516G--G:

'Daardie subartikel gee myns insiens statutêre beslag aan die behoefte en inherente reg wat die Hof gehad het om, in die uitvoering van sy toesig oor regspraktisyns, iemand te hê wat die gegewens en bewysmateriaal voor hom sal plaas, ingeval daar 'n vraagteken ontstaan oor 'n regspraktisyn se geskiktheid om langer op die rol te bly.'

The same judgment reads at 516I--517B:

'Met die daarstelling in 1964 van die Wet op Advokate het die Wetgewer uitdruklik aan die behoefte onder bespreking voldoen deur om aan die ABR, asook enige vereniging van advokate van die Afdeling van die Hooggeregshof

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waarin die betrokke advokaat praktiseer, die reg te gee om 'n skrappingsaansoek te loods. Vir hierdie doel was dit nie a tersake of die ABR of die vereniging van advokate kragtens sy grondwet die bevoegdheid het om so 'n oorspronklike dissiplinêre stap te neem nie. Artikel 7(2) skep daardie bevoegdheid. Net soos ons Howe voor die daarstelling van die Wet die bestaan en status van die professionele liggame by dissiplinêre optrede erken en aanvaar het, doen die Wetgewer dit nou.

Dit sal gesien word dat die Wetgewer nie met art 7(2) bepaal het wanneer die ABR kan optree nie. Dit moet aanvaar word dat dit beskou was dat daar omstandighede mag wees wanneer die ABR die inisiatief behoort te neem.'

At 517D--E the Judge-President states that s 7(2) creates a right which is coupled with a duty. 'Dit is 'n plig wat in die belang van behoorlike regsadministrasie uitgeoefen moet word.'

Pursuant to the provisions of s 7(1)*(d)* of Act 74 of 1964 a Court of any Division may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates if the Court is satisfied that he is not a fit and proper person to continue to practise as an advocate. From these provisions and from a host of authorities, whether stated directly or by inference, I see the position of the Court in disciplinary proceedings as follows: The Court has an inherent right of control over the officers of its Court,

including advocates. The Court, in deciding that an advocate is not a fit and proper person, exercises a judicial discretion to that effect. The Court will take cognisance of the rules of conduct prescribed and developed over E years of practice by the societies of advocates of the organised Bar and will attempt, as far as possible, to uphold those rules. The same applies as far as the ethical rules of conduct are concerned. The Court, however, is not bound by these rules and remains the ultimate arbiter of the ethical rules of conduct of the profession with which F the Court is closely associated. See, for example, *Attorney-General v Tatham* 1916 TPD 160, *Johannesburg Bar Council v Stein* 1946 TPD 115, *Hurter v Hough en 'n Ander* 1989 (3) SA 545 (C), *Ex parte C J Brand* (1887) 2 SAR 183, *Pretoria Balieraad v Beyers* 1966 (1) SA 112 (T), *Beyers v Pretoria Balieraad* 1966 (2) SA 593 (A) and *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T). G

For the purposes of application of the above-mentioned approach, I accept that the existence of the applicant or its constituent Bars is, as such, no obstacle to other voluntary associations of advocates coming into existence. I also accept that the rules of conduct and ethical rules of the applicant and its constituent Bars cannot, as such, bind H non-members. The latter would conceivably be members of other associations of advocates, counsel enrolled and admitted and practising, but without membership of any association of advocates and counsel enrolled who are not practising and have not joined any association of advocates. I bear in mind, however, that the constituent Bars of I the applicant consist of the vast majority of practising advocates. Respondent in his answering affidavit said that there are at present 6 903 advocates on the roll of advocates and that as at 18 April 1996 1 260 were members of the constituent Bars of the applicant. Applicant in its replying affidavit states: J

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> 'Of the advocates in private practice in South Africa 1 463 are members of the constituent Bars of the applicant, 217 are A apparently members of IAASA and a handful practise without membership of any society or association.'

Mr *Klein*, who appeared for respondent and made an affidavit in support of his answering affidavit, confirmed that IAASA has 217 members. Whatever the exact figures, it is clear that the vast majority of practising advocates B belong to the constituent Bars of the applicant which have always been regarded as the organised profession. Moreover, their rules of conduct and ethical rules have evolved over long periods of time, the majority of such constituent Bars having been in existence for long periods of time. IAASA was formed in 1994. The Court in C disciplinary matters has always, without being bound thereby, taken cognisance of such rules of conduct and ethical rules and there is no reason why, in now considering the ethical rules of IAASA, the Court should not once again take cognisance of the first-mentioned rules. This does not entail that I disregard the ethical rules of D IAASA.

(2) Mr *Klein* made a number of submissions concerning the development of the advocates' profession until 1994. One of the aspects thereof can, I think, be conveniently isolated for separate discussion. It is contended on behalf of respondent that the applicant's view of the profession as a referral profession and that no advocate may accept a brief, or the payment of a fee, from a client without the intervention of an attorney, is based on a fatal E misconstruction of the Roman-Dutch law.

The submission is that in Roman-Dutch law there were different relationships between the client and his attorney, on the one hand, and the client and his advocate, on the other hand. The former was one of *mandatum* and the latter was one of *patronus vis-à-vis* client. In essence the client approached the advocate and made supplication F for his protection before the law. The role of the attorney appointed as principal by the client was to assist the advocate during the course of the case. In Holland advocates were in certain instances able to do cases on their own and without assistance; advocates were required to act in *pro Deo* and in *in forma pauperis* cases and not G always with the assistance of an attorney and, where a litigant appeared in court in person, an advocate was appointed for him or her forthwith. Reliance is placed on *Voet* III.1.1, III.3.1, III.3.2, III.3.9; Van Leeuwen *Commentaries on the Law of Holland* bk V.IV.3, 5 and 6; and Huber *Jurisprudence of My Time* bk IV ch 17 para 1 and ch 18 paras 2 and 19. The

argument is, in addition, that South African courts have maintained the H Roman-Dutch position. We were referred to *Minister of Finance and Another v Law Society, Transvaal* 1991 (4) SA 544 (A) and *Bertelsmann v Per* 1996 (2) SA 375 (T).

I do not find the reference to the common law writers conclusive or even useful in answering the question which is now before Court, that is whether it is unprofessional conduct for an advocate under present circumstances to I accept instructions and fees directly from a client. The latter question is not the one which is discussed in the passages we have been referred to. In such passages the question of fees is not even discussed. In Roman-Dutch law there was a clear distinction between the profession of the advocate and the profession of the attorney. See Joubert (ed) *The Law of South Africa* vol 14 para 246. There are certain J

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indications that clients could appoint advocates. Huber *Jurisprudence of My Time (Gane's* translation) states in A bk IV chap 19 that the offices of advocate and attorney are in Frisian law conjoint, though the names still indicate that their functions are clearly distinguished. Chapter 18 of the same book, s 2 reads:

> 'We said that an advocate is requested to act by one of the parties, for advocates are not appointed by mandate, but at B the request and supplication not of principles, but of clients. ''Clients'' is a name given to those who make such a request, and means a person who is taken under protection.'

Section 19 of the same book at 88 reads in part as follows:

> 'Following on what has been said both of advocates and attorneys, the distinction between them must now be noted. C This consists principally in three points, already touched upon above. Firstly, an advocate is called in by his client; an attorney receives a mandate from the principal. . . .'

The Selective Voet, being the *Commentary on the Pandects*, translated by Percival Gane, bk III.3.1 reads in part:

> 'It is true that of old by a privilege of Mary of Burgundy it was left to the discretion of Hollander litigants whether they would D manage their business in judicial proceedings by themselves or by an attorney. Nevertheless if we look at our customs today, no one can take care of his own case in a judicial proceeding, but all are bound in the lower tribunals to conduct their business through an attorney, and in the Higher Courts to employ the services at once of an advocate and E an attorney in cases of greater importance, but of one of the other in more trivial cases; lest they should go down rather from ignorance of the affairs of courts than from the lack of justice in their cases.'

See as well Van Leeuwen's *Roman Dutch Law (Kotze's* translation) 2nd ed vol 2 bk V.IV to the effect that in certain smaller cases either an advocate or attorney alone could deal with the case. F

It is by no means clear, however, that as a matter of practice the client in fact appointed the advocate. The role of attorneys and advocates in the common law bears many striking resemblances to the present position. It seems clear to me that the attorney, appointed by mandate, was in charge of the case. See *Huber (op cit* bk IV chap 17 s 11): G

> 'The duty of an attorney is to defend his principal's interest as he would his own, not only from the point of view of fidelity, but also because, after the delivery of a claim and answer, he is really in law looked upon as and held to be owner of the case; so that, according at least to the Imperial law, judgment is even pronounced against him. But on a careful consideration of our practice, I think that nowadays an attorney is not owner of the case, but that he everywhere holds H the bare capacity of a mandatory, without any effects of ownership in the action or case.'

This would surely entail in practice, in many cases, that a client would be advised to appoint an advocate, or would desire the appointment of an advocate without knowing whom to appoint, with the result that the attorney would in fact do so. See again *Van Leeuwen (op cit* bk V.IV.3): I

> 'Before the inferior tribunals the attorneys alone conduct and defend the case; except where in matters of great importance, and for better security, they engage an advocate to assist them, which they are at liberty to do.'

What does seem clear to me (and which is of more relevance to the present proceedings) is that, except in the stated examples of smaller J

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cases, the advocate, whoever may have appointed him, did not act for the client without the intervention of an A attorney.

After this matter had been argued and judgment reserved, the judgment of the Full Court of the Natal Provincial Division in the matter between the *Society of Advocates of Natal v Joaquim Augusto de Freitas and the Independent Association of Advocates of South Africa* in case No 2834/96 was delivered on 25 September B 1997.* As far as I know, the judgment has not yet been reported. After an in-depth analysis of the common law writers on the relationship between the two branches of the legal profession as practised before the Court of Holland, Thirion J concluded that his review of the authorities bears out Wessels' summary in his history of the C *Roman Dutch Law* at 191:

> 'The classes of persons who practised before the old Dutch courts were very much the same as those who practise to-day before the South African courts. The pleader who addressed the court was not the same as the representative of the litigant, who saw that all the necessary steps in the law-suit were properly taken. In other words, the functions of the D advocate were distinct from those of the attorney.'

Thirion J goes on to state at 13 of the judgment (at 1144I--1145A of the report):

> 'The old authorities bear out, in particular *Wessels*' statement that ''the pleader who addressed the court was not the E same as the representative of the litigant''. It was the attorney and not the advocate who had to have a power of attorney as proof that he had been duly instructed by the litigant. Although the advocate conducted the case in court, it was the attorney who was overall in charge of the litigation as the representative of the litigant. As the authorities show there were many functions in connection with the case which had to be performed by the attorney and not by the advocate. It would seem to me to follow that an advocate could not appear on his own and without the assistance of an attorney.' F

I agree with this exposition of the common law.

If it were to be accepted that the common law supports the stance of the respondent and of IAASA (which I do not think it does), there is a further flaw in that it is presented as an argument in isolation and without raising the G question whether subsequent developments in South Africa, particularly at the hand of English law and practice, have not rendered the purported common law rules nugatory. If respondent's view of the common law is correct, I do not think, as will appear, that it accords with the relevant South African law.

I also do not think that the two South African authorities relied upon on behalf of respondent sustain his cause. The H matter of *Minister of Finance and Another v Law Society, Transvaal (supra*) dealt with the question whether certain moneys received by an attorney for disbursements amounted to 'consideration' for taxation purposes. The judgment reads at 556I--557B: I

> 'The moneys now in question are in nowise paid to the attorney, notary or conveyancer for a service rendered by him. They are paid in respect of the service rendered by counsel, correspondent attorney, notary or conveyancer, expert

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> witness, deputy sheriff or messenger of the court, as the case may be, on behalf of the client. The moneys may not be A claimed from the client by the instructing attorney, notary or conveyancer save in respect of the service performed by the third party. In no way does the fee or other amount accrue to and in no way is it received by the attorney, notary or conveyancer for a service rendered by him. The fact that because of a professional practice or a contract the attorney, notary or conveyancer may be personally liable to pay for the service performed by the third party in no way has as a B consequence that the attorney, notary or conveyancer himself performs *that* service. The respondent correctly accepts that the fee charged by an attorney, notary or conveyancer for the work performed by him in relation to instructing counsel or other third party is properly to be regarded as part of the fee of such attorney, notary or conveyancer and that the levy would be payable thereon.' C

Bertelsmann v Per (supra) was an appeal to this Division pursuant to an exception before the magistrate. The magistrate found that the exception could not be decided without hearing evidence. The issue was whether an attorney was liable for fees charged by the advocate whom

he had instructed. On appeal Southwood J (at D 380E--381D) referred with approval to the submissions of advocate R S Welsh QC in *Minister of Finance and Another v Law Society, Transvaal (supra*). These submissions read in part (see at 380F--I):

> 'The advocate only has one client and that is the litigant for whom he acts. That fact should not be obscured by the machinery created by the payment of his fee: (1) In Roman-Dutch law, counsel was entitled to sue his client for his fee. E (2) English law does not recognise any contractual relationship between a barrister and either his instructing solicitor or his client. He can accordingly sue neither. The solicitor is bound to pay the barrister's fees only under the rules of etiquette of his profession. *Halsbury's Laws of England* 4th ed vol 4 at 664 paras 1198 and 1201. (3) The Cape practice in the previous century was initially for counsel's fees to be prepaid. That practice was, however, ultimately found to be F impractical. The practice increasingly became for counsel to look to his instructing attorney for his fee. That practice has by now probably hardened into law, which would mean that the advocate is today entitled to sue either his client or his instructing attorney for his fee once the necessary permission has been obtained from his professional body. . . . (4) The practice that has developed whereby the attorney impliedly agrees to stand good for payment of the fee owed by the G client to counsel does not mean that the attorney has replaced the client as contracting party *vis-...-vis* counsel. There is no reason to infer that the contractual relationship between counsel and client recognised in Roman-Dutch law has changed in any way. It remains open to counsel to sue his client. . . .'

In the latter case Southwood J was not satisfied that the term contended for, that the attorney is liable for H counsel's fees, must be implied in the contract as a matter of law. It would depend upon the existence of a professional practice or trade usage which would have to be established by evidence. The said decisions, however, did not purport to deal with who would instruct counsel and whether the rules of professional ethics of the I advocate's profession permitted counsel to accept instructions directly from the client or to obtain payment directly from the client.

The submission continues that a conspectus of past cases would indicate that the courts have also been loath to prescribe certain conduct for advocates. The explanation, so it is submitted, is that in Holland advocates were in certain instances able to do cases on their own, J

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advocates were required to act in *pro Deo* and *in forma pauperis* cases, not always with the assistance of an A attorney and where a litigant appeared in court in person an advocate was appointed for him/her forthwith.

I do not follow this line of reasoning. The explanations proffered have nothing to do with the allegation that past cases indicate that the courts have been loath to prescribe certain conduct for advocates. The alleged explanation B is in line with certain exceptions which apply today, for example legal aid work. These matters are referred to in para 12 of the replying affidavit. Applicant points out that it is correct that members of the Bar can be placed on rosters established by the Legal Aid Board for the allocation of criminal defences under s 25 of the Constitution. C This, like the *pro Deo* system, is based on a long-standing exception to the general rule which traces its history back to the 'dock brief' system and is directed solely at assisting in providing legal representation in criminal cases of a more serious nature where the accused personally is not in a position to afford such representation.

Applicant states: D

> 'The applicant does not regard the system as ideal but in order to meet a greater public need permits its members to participate therein to assist indigent accused persons. The fact that advocates appeared without the assistance of attorneys was one of the central criticisms of the old *pro Deo* system.'

The applicant states that the Legal Aid Board is in the process of establishing committees of legal practitioners in E each major centre which will establish and supervise the system by which legal aid criminal work is distributed.

> 'If problems emerge from the direct instructions of advocates in this type of work the applicant will become aware of them through these committees on which the constituent Bars are represented and will deal with them accordingly. F This system is obviously very different from one in which the advocate can take instructions and payment directly from a lay client.'

Regarding the question of obtaining payment directly from the Legal Aid Board, applicant states

that the rule change did not permit the Legal Aid Board to instruct advocates directly in civil matters but permitted advocates G instructed by attorneys in legal aid matters to claim their fees directly from the Legal Aid Board.

> 'In fact this did not resolve the problem and the Legal Aid Board now refuses to pay counsel directly in civil cases and insists on paying the instructing attorney.' H

The relationship between the Court and the professions in disciplinary matters has already been referred to.

It is contended on behalf of respondent that in the Cape and Transvaal advocates were entitled to render opinions directly to clients for which they could charge a fee. *Attorney-General v Tatham* 1916 TPD 160. At present I members of the Cape Bar still render opinions in certain matters directly to clients. I think this reliance on *Attorney-General v Tatham* is outdated. It was pointed out in *Pretoria Balieraad v Beyers* 1966 (1) SA 112 (T) that great changes had taken place since 1916.

The respondent, as stated, also relies on the fact that members of the Cape Bar still render opinions in certain matters directly to clients. The J

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details of this practice were unfortunately not canvassed in the papers. I am under the impression that the A exception exists only in the case of corporate clients and not lay clients. If the practice is allowed by the Cape Bar, I can only infer that the Cape Bar has investigated the matter and has decided that there are sufficient valid grounds to treat the practice as an exception which is not in conflict with the general rule that an advocate does B not accept a brief without the intervention of an attorney. It is common cause that there are certain other exceptions to the rule as well. There are valid reasons for their existence. They do not detract from the value and the validity of the general rules. I do not think this particular general rule should be construed on the basis of the limited number of exceptions thereto. C

(3) The next submissions related to the subsequent development of the advocates' profession until 1994. These submissions did not seek to trace the actual developments regarding the advocates' profession since reception of the Roman-Dutch law up to 1994, but were limited to the following: D

The advocates' profession in South Africa is largely self-regulatory, in the sense that no statutory or other body has the power to prescribe rules of professional conduct to members of the advocates' profession. The practice, in the past, has been for voluntary associations of advocates to regulate the conduct of their members by laying down E rules of professional conduct. In the present application, the applicant contends that the prohibition of direct access to counsel by a client is a fundamental rule of the ethical code of the organised advocates' profession, an ethical rule and an established principle of our case law. It was submitted that the applicant seems to follow the reasoning in the 'much vaunted' *Beyers* decisions in *Pretoria Balieraad v Beyers* and *Beyers v Pretoria* F *Balieraad (supra*). It was submitted that reliance on these judgments would be prone to a number of pitfalls. It is not clear to me whether this submission is made as a prelude to a subsequent submission that the legal and practical position has altered since these judgments or whether the submission is that the *Beyers* judgments are G wrong or not applicable to the position of the respondent. I shall revert to whether, in fact, the legal and practical position has altered since these judgments. Subject to that discussion and quite apart from the fact that this Court is bound by both judgments, I cannot see that the judgments are wrong or not applicable to the position of the respondent.

In the Transvaal matter the Full Court held at 116--17: H

> 'Onder die omstandighede vind ek dit onnodig dat getuienis gehoor moet word in verband met die bestrede aantygings. Dit blyk vir my duidelik dat die respondent nie 'n geskikte persoon is om toegelaat te word om verder as advokaat te praktiseer nie.'

In coming to this conclusion De Wet JP stated the following at 115B--C: I

'Sedert die jaar 1916 (the decision of *Attorney-General v Tatham* 1916 TPD 160) het groot veranderings plaasgevind. Sover hierdie Afdeling betref behoort die groot meerderheid van praktiserende advokate aan die Verenigings van Advokate òf van die Transvaal òf van Johannesburg. Daar is vasgestelde reëls van gedrag wat advokate verwag word om te gehoorsaam. Die Verenigings word deur die Hof erken (*Johannesburg Bar Council v Stein* 1946 TPD 115) en ook deur J

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wetgewing (*ibid*; en sien ook art 23*(a)* van Wet 32 van 1944 waar bepaal word dat 'n regterlike amptenaar wangedrag of A oneerbare praktyk in die geval van 'n advokaat moet rapporteer aan die sekretaris van die plaaslike Balieraad).'

De Wet JP then referred to the various charges brought against the respondent. They were that he accepted a brief and consulted with members of the public without the intervention of an attorney and that he interfered with B work which should have been done by an attorney. The second charge was that he allowed his own office to be used as an address for the service of documents. The third charge related to certain newspaper reports to the effect that respondent addressed a large number of mine workers in public and allowed photos of himself to be C taken with members of the committee. The Court also came to the conclusion that certain conduct of the respondent exhibited an attempt to thwart the Bar Council and the Court.

As far as the first charge is concerned, the judgment reads at 115D--F:

'Die algemene gedragsreëls wat neergelê word deur die Verenigings in die Transvaal is aan die Regters bekend, wat D almal voorheen lede was van een of ander van die Verenigings. Onder andere is dit vasgestel dat 'n advokaat nie enige geding moet onderneem sonder die tussenkoms van 'n prokureur nie, en nie onderhoude met lede van die publiek moet hou sonder die tussenkoms van 'n prokureur nie behalwe in uitgesonderde gevalle, wat hier nie van toepassing is nie. Die gedragsreëls in verband met advokate behoort sover moontlik en dienlik deur die Hof E gehandhaaf te word. Die skeiding van die twee takke van die regsprofessie behels wederkerige pligte, en as 'n lid van die een tak inmeng met 'n funksie wat aan die ander tak behoort sal samewerking tussen die twee takke onmoontlik word. Na my mening is die hele gedrag van respondent, soos hierbo uiteengesit, 'n inmenging met werk wat deur 'n prokureur behoort gedoen te word. Dit sluit ook in die manier waarin sekuriteit geëis word en geneem was wat na my F mening uiters onbetaamlik was. Daarbenewens kom dit my voor dat die vasgestelde fooi buitensporig was, selfs as inaggeneem word dat die respondent sê dat dit verwag was dat dit 'n langdurige en ingewikkelde saak sou wees.'

Regarding the second charge, the Court held at 115G:

'Die tweede klagte teen respondent is dat hy sy eie kantoor laat gebruik het as die adres waar dokumente bestel kon G word in verband met gedinge waarin Botha betrokke was. Hierdie klagte word nie ontken nie en dit is na my mening uiters onbehoorlik dat 'n advokaat sy kantoor vir sulke doeleindes laat gebruik, en daarbenewens is dit ook 'n inmenging met die funksie van 'n prokureur.

The Court's findings concerning the first and second charges are directly applicable to the facts of this case. H

It was submitted that the Appellate Division decision did not take the rule that advocates did not work except through the intervention of an attorney further. As far as both decisions go, it was submitted that the finding that Beyers was not a fit and proper person to continue practising was the result of the cumulative effect of all of Beyers' conduct. I

The heads of argument filed on behalf of Beyers in the Appellate Division disclose certain remarkable analogies with the argument on behalf of respondent in this case. The first-mentioned arguments did not prevail. The Appellate Division agreed that *Beyers*' conduct had been unprofessional in a number of respects, including his role in public concerning the mine workers, his attempts at thwarting the investigation of the Bar Council and the manner in which particularly Botha fell a J

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victim to Beyers in connection with the security. It is true that regard was had to the cumulative effect. At A 606B--D the judgment reads:

'Al sou dit gesê kan word dat, as elkeen van die verskillende klagtes waaruit die gewraakte gedrag bestaan

in isolasie geneem word, dit alleenstaande nie 'n bevinding van onprofessionele gedrag regverdig nie, maar as die kumulatiewe effect van almal saam as 'n geheel geneem word, dan vind ek dit onmoontlik, inagnemende die aard van die saak en B die wye diskresie wat die Hof *a quo* in hierdie geval het, om van die bevinding van daardie Hof in die uitoefening van sy diskresie te verskil.

Alhoewel die appellant swaar getref word deur die bevel wat hom sy broodwinning ontneem, verg die gedrag waaraan hy hom skuldig gemaak het ernstige optrede teen hom. Ek dink nie dit kan gesê word dat sy gedrag nie 'n skrapping C van sy naam van die Rol van Advokate regverdig nie, en dat die Hof *a quo* sy diskresie hier nie behoorlik uitgeoefen het nie.'

It seems to me that the cumulative effect played a bigger role in upholding the order for the removal of Beyers' name from the roll. However, what is of importance is that the analogous conduct of respondent in this matter was found to be unprofessional. Van Blerk JA referred to the judgment of the Court *a quo* in which reference was D made to *Attorney-General v Tatham (supra*) and to what De Wet JP said concerning big developments since 1916 (see *supra*). Van Blerk JA stated at 605B--H:

'Soos reeds hierbo aangetoon, het appellant nie die aantyging dat hy dié reël verontagsaam het, weerspreek nie. Dit is E myns insiens heeltemal duidelik uit die stukke dat hy onderneem het om met die saak voort te gaan sonder opdrag van 'n prokureur. Gepaard hiermee gaan sy gedrag soos weerspieël deur die dokumente wat hyself opgestel het, asook sy poging om die aansoek te dwarsboom. Hierby kom sy verontagsaming van dié aan hom bekende sienswyse wat die Hooggeregshof toegedaan is in verband met sy doenigheid met mynwerkersvergaderings blykens F koerantpublisiteit wat aan hom gegee word. Dan is daar die beskikbaarstelling van sy kantoor as 'n adres vir die bestelling van prosesstukke.

Die vraag is of die gedrag, wat kortliks hierbo geskets is, neerkom op onprofessionele gedrag en of dit gesê kan word dat dit die appellant ongeskik maak om toegelaat te word om langer as advokaat te praktiseer. Of gedrag G onprofessioneel is of nie, is in hoofsaak 'n kwessie van indruk en aanvoeling en soos Appèlregter Solomon in *De Villiers and Another v McIntyre NO* 1921 AD 425 op 435, sê:

''No hard and fast line has been laid down as to what constitutes such unprofessional conduct as justifies the intervention of the Court. . . .''

Die verrigtinge waardeur 'n antwoord op die vraag versoek word, het gegaan oor 'n ondersoek wat van huishoudelike H aard is, en waarin die Balieraad slegs inligting aangaande beweerde onprofessionele gedrag van die appellant aan die Hof voorgelê het, en dit verder aan die Hof, wat dissiplinêre jurisdiksie het, oorgelaat het om te bepaal hoe of teen die appellant opgetree sal word. (Vgl *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 op 409.)

Dit is by uitstek 'n saak wat berus by die diskresie van die Hof *a quo*, en hierdie Hof sal slegs dan teen die beslissing I van daardie Hof ingryp as laasgenoemde Hof sy diskresie arbitrêr of volgens 'n verkeerde beginsel uitgeoefen het, òf as die Hof nie met 'n ope gemoed tot 'n onbevange oordeel geraak het, òf as daar geen grondige redes vir die Hof se optrede bestaan nie. (Sien *Ex parte Neethling and Others* 1951 (4) SA 331 (A) op 335.)'

There is consequently no merit in the submission that the rule that J

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advocates did not take work except through the intervention of an attorney was not taken further by the Appellate A Division.

(4) The next line of submissions was that, in any event, subsequent to the *Beyers* judgments the legal and practical position has altered. Various submissions were made, which I think can be dealt with separately. B

The first issue relates to the position of the applicant and IAASA. The argument runs as follows. IAASA was formed in 1994 and is, like the various constituent societies of advocates of the applicant, a voluntary association of advocates. The constituent Bars of the applicant each have their own ethical code and are allegedly at liberty to adopt their own ethical rules. The applicant and its constituent Bars cannot have the exclusive right to lay down C rules of professional conduct. They have allegedly accepted IAASA's right to regulate its members. In the present application there is no evidence before the Court as to the content of the rules of professional conduct of the applicant or, for that matter, any of the other constituent Bars of the applicant. It is further allegedly common D cause between the parties that the applicant cannot prescribe rules of professional conduct to its constituent societies, which are fully autonomous bodies with the power to adopt their own rules of professional conduct. According to respondent's heads of

argument:

> '26. For all one knows, one or more of the constituent societies of advocates of the GCB may already have formulated a rule permitting its members to accept briefs directly from a client without the intervention of an attorney.' E

It would appear from annexure D at p 140 that the concept of direct access by a client to an advocate is not as much of an anathema to the applicant as one might believe. Reliance is placed on the fact that the Cape Society of Advocates permits its members to accept a brief from a legal adviser employed by a corporation to furnish an F opinion. An attorney cannot practise as an attorney while he is in the employ of a corporation. When an advocate accepts a brief from a legal adviser of a corporation, he does so without the intervention of an attorney or other third party and deals directly with the client. He further receives payment of his fees directly from the corporate G client without the intervention of an attorney. A corporation has a separate legal personality and is, to all intents and purposes, not different from a natural person. A corporation is, accordingly, a member of the 'lay public' and the distinction which the applicant seeks to draw between the situation where a legal advisor of a corporation H briefs an advocate on behalf of his employer and where a member of the lay public briefs an advocate directly is non-existent. The applicant has consequently been inclined to split hairs. The applicant does not call upon the Court to enforce one of its own rules of professional conduct but refers instead to extremely vague terms. The applicant has failed to prove the existence of such a principle or ethical rule, the existence of which is disputed by the I respondent. IAASA, which also forms part of the organised advocates' profession, also has its own ethical code. It follows that the organised advocates' profession as such does not have a single ethical code and, accordingly, the applicant has failed to prove the existence of the code or the rule referred to above. In any event the rule contended for in *Beyers*' case has never been elevated beyond being a rule of ethics. The so-called J

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'referral system', in terms of which an advocate is required to be briefed by an attorney, does not form part of our A common law and the applicant seeks to elevate one of its own household rules to a rule of general application. Whatever tacit approval may have been given to this line of reasoning in the Beyers judgments has been undone by the reasoning of the Court in Minister of Finance and Another v Law Society, Transvaal (supra) and in Bertelsman v Per (supra). B

This line of reasoning is simplistic and wholly untenable. This clearly appears not only from what has been stated above, but from the following:

(a) It is surprising to hear a senior advocate of many years standing arguing that there is no evidence before C Court as to the content of the rules of professional conduct of applicant or its constituent Bars and that for all one knows one or more of the constituent Bars may already have formulated a rule permitting its members to accept briefs directly from a client without the intervention of an attorney. The applicant's chairman expressly states that there is such a rule and that it has not been changed by any of the D relevant societies of advocates. The Court, as has in the past been done, moreover takes judicial notice that there is such a rule of many years standing which has invariably been acknowledged until IAASA, as respondent states, took the initiative to make its own rules. The Court has acknowledged and acted E upon the aforesaid rules of professional conduct.

(b) Respondent's view of the structure of the applicant and its constituent Bars and of the relationship between those Bars and IAASA is simplistic and belittling of the organised profession and of the relationship between the Court and the organised profession. The very fact that the applicant is an F umbrella body of its constituent Bars denotes the improbability that each of these Bars could do exactly as it pleases. The fact of the inter-relationship between the Court and the profession and the fact that the Court is the ultimate arbiter of ethical conduct, also flies in the face of such a proposition. Reliance upon G annexure D is misplaced. Applicant makes it clear that it

was a discussion document but that not one of the Bars had seen its way open to change the rules. It was a discussion prompted by what may have been seen as wrong and unfair in the Government allowing attorneys to appear in the Supreme Court, but it was nothing more than that. The rule stands. H

(c) There is also no question of the relevant rule having been adopted capriciously or for the mere convenience of the applicant and its Bars. It is a rule which has historically evolved due to the fact that we have a divided Bar, in which the English practice played a distinct role. It has been recognised as I such by the Courts. Under the circumstances it is, to say the least, startling that it was argued by respondent that applicant has failed to prove the existence of such a principle or ethical rule or that there is any relevance in the contention that the rule contended for in *Beyers*' case has never been elevated beyond being a rule of ethics. The very fact that it J

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is a rule of ethics must play an important role in the function of the Court as ultimate arbiter and A disciplinarian where it is alleged that such rule has been transgressed.

(d) Apart from the illogical and untenable denial of the existence of the relevant rule, the respondent seeks to negate it on the basis that IAASA has a similar status to the applicant and its constituent Bars, has the B same rights to make rules and has in fact made a rule that advocates may take instructions and receive payment of fees directly from clients. The result would then be that, not only would applicant be disentitled to put facts of a transgression of the rule before Court, the Court would also be disentitled to C exercise a disciplinary function, whatever its views of the matter may be, simply because IAASA has adopted its own rules. This is illogical and is a negation of the function of the Court. In doing so, IAASA has set itself up as the organised profession, which it is not. It has, moreover, done so without approaching the Court for a declaratory order for such a radical divergence from the accepted practice D and ethical rules.

(e) IAASA, by arrogating to itself a maverick stance which flies in the face of accepted practice and ethics, cannot usurp the functions of the Court. The ultimate question is which rule the Court should uphold for E purposes of this application. I have no doubt that the rules of the applicant and its constituent Bars should be upheld. I have already referred to the unreported decision in the matter of the Society of Advocates of Natal as applicant and Joaquim Augusto de Freitas and the Independent Association of Advocates of South Africa as respondents. The first respondent was a practising advocate and a F member of the second respondent, as the respondent in this matter is. The applicant in that matter brought an application for an order striking the name of the first respondent off the roll of advocates on the ground that he is not a fit and proper person to continue to practise as an advocate. The second G respondent obtained leave of the Court to intervene in the application as a second respondent. Second respondent brought a counter-application for an order declaring that 'any advocate has, alternatively advocates who are members of IAASA have, the right to accept instructions from any person with or without the intervention of an attorney, to perform any of the functions of an advocate'. The first H respondent was suspended from practice for a period of six months and the counter-application was dismissed. In doing so Thirion J, who delivered the judgment of the Full Court, considered whether the rule (contended for by applicant in this matter) should be upheld and decided that the Court should do so. I The reasons for this decision are set out at pp 42--9 of the judgment. I do not intend repeating these reasons. I agree with those reasons and refer to the concluding paragraph (see at 1171B--D of the report):

'In my view, the rule in question that an advocate does not accept instructions from a client without the intervention of an attorney is a rule which reflects an existing practice of long standing and on the strength of J

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> which Court procedure has been arranged and on the strength of which the Legislature has made a distinction A between the positions of advocate and attorney. This is in itself good reason for sustaining it. The rule is one which is justifiable in the interests of the legal profession and of the public. It is not unreasonable. It should be sustained.'
>
> The fact that in certain cases a brief on opinion may be taken from the legal advisor of a corporation B does not detract from this conclusion. It is an exception which is warranted because the corporation represented by its legal advisor is not only in a position to properly instruct an advocate, but is in a position to deal with an advocate at arm's length, which the lay client can seldom do. C

(5) Another development subsequent to the *Beyers'* cases relied upon by respondent is the Rights of Appearance in Courts Act 62 of 1995. Section 2 reads:

> 'Any advocate shall have the right to appear on behalf of any person in any court in the Republic.' D

The respondent contends that s 2 now prescribes that, whatever the ethical rule may have been, counsel can now take instructions directly from the public. Respondent contends that if it was not so s 2 is redundant because that is precisely the situation that has hitherto existed in the common law. E

There is no merit in this contention. It was rejected in the *Society of Advocates of Natal* matter. See pp 49--51 (at 1171F--1172F of the report). By restating the rights of counsel to appear in court and extending certain rights of appearance to attorneys, the Legislature could never have intended to abrogate the rules of professional conduct and ethics of existing societies of advocates and the courts' upholding of that rule in such sparse terms. If F that had been intended, it would have been stated much more directly. The Legislature is aware of, *inter alia*, the *Beyers* decisions.

(6) The last developments subsequent to the *Beyers* decisions upon which respondent relies for change are those contained in the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) and the G Constitution (the Constitution of the Republic of South Africa Act 108 of 1996).

In the answering affidavit respondent refers to ss 17, 22 and 25 of the interim Constitution as being other unconstitutional aspects of the domestic rules of ethical conduct of the constituent Bars when elevated to legal H rules. Section 17 provides that every person shall have the right to freedom of association. These provisions are inapplicable to the present dispute. Section 22 provides that every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum. These I provisions are also inapplicable to the present dispute. Section 25(1)*(c)* is relied upon insofar as it provides that every person who is detained has the right to consult with a legal practitioner of his or her choice. This is obviously only the case where a detained person can pay for such services. The provision can, in my view, not be interpreted as to negate the rules of professional conduct and ethical rules of the profession. Reliance is also J

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placed on s 26(1) of the interim Constitution, in terms of which every person shall have the right to freely engage A in economic activity and to pursue a livelihood anywhere in the national territory. There are similar provisions in the Constitution (Act 108 of 1996). See ss 18, 34, 35(2) *(b)* and 22. The latter provides that every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may B be regulated by law. I find no equivalent of s 26 in the new Constitution. This has presumably been substituted by s 9(2), which provides that equality includes the full and equal enjoyment of all rights and freedoms. However, as regards the right to freely engage in economic activity, the rider to this right has been judicially defined along the C following lines. Laws, where they allow for the maintenance of standards, minimum qualifications and the unassailable integrity of the

profession are to be upheld. Laws regulating the qualifications for admission or a profession will be upheld where this is in the public interest and where such a law is certain and does not allow D arbitrary conduct by the controlling body. A law will not be upheld where in reality it amounts to a denial of a person's right to practise a profession. It is argued that the rule against receiving work directly from clients is arbitrary and capricious and an effective denial of the right of most junior advocates to practise law. E

The latter argument can be disposed of first. I fail to see how upholding the Bar as a referral profession leads to an effective denial of the right of junior advocates or any advocates to practise law. There is no evidence that inroads on the advocates' profession caused by attorneys appearing in the Supreme Court have progressed to the F point where an advocate can practise as such only where he is entitled to take briefs from the public. As a matter of fact, I do not think there is any factual basis for the allegation that the rule in question impinges on any of respondent's constitutional rights. I think the applicant is right in submitting that the argument that the bypassing of attorneys in litigious matters will save the public money is fallacious. It is based upon the assumption that the G administrative contribution of attorneys in the conduct of cases is pure fiction and leads only to additional expense. The suggestion that the granting of the right of audience to attorneys would decrease the cost of litigation was rejected by the Milne Commission. The respondent, as senior counsel of many years standing, must obviously have H been aware of this fact. His attack upon the financial implications of the divided Bar must be seen in this light. If there is any attorney's work to be done, the advocate who accepts direct instructions without the intervention of an attorney will obviously have to do the attorney's work as well or cause it to be done. It is barely imaginable that an I advocate will not mark a fee for the totality of the work done by him. The further proposition that it is unconstitutional to expect advocates to be briefed by their competitors who themselves have a right of audience similarly provides no factual basis. I think the applicant is correct in submitting that instances abound where specialists in a profession are instructed by generally qualified competitors who could perform the same work, but choose to defer to J

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the expertise of a colleague who concentrates all his energies and activities upon acquiring a specialised A knowledge of the field in which he is active.

In any event, the suggestion that the imposition of professional and ethical rules upon members of the legal profession is unconstitutional was dismissed out of hand by this Court in *Prokureursorde van Transvaal v* B *Kleynhans* 1995 (1) SA 839 (T). The Law Society, acting in terms of s 22 of the Attorneys Act 53 of 1979, applied for an order removing the name of the respondent from the roll of attorneys. It was submitted on behalf of the respondent that the said s 22 was unconstitutional in that an order pursuant thereto would impinge upon the right of attorneys, including respondent, to freely engage in economic activity and to pursue a livelihood anywhere C in the national territory. (Section 26(1) of the interim Constitution.)

The judgment reads as follows at 850F--I:

> 'Hoewel elke persoon kragtens art 26(1) van die Grondwet die reg het om vryelik aan die ekonomiese verkeer deel te neem, beteken dit allermins dat dit 'n onbeperkte reg is. Jan Rap en sy maat het nie die reg om as neurochirurge te D praktiseer sonder enige kwalifikasies nie. Net so min ontneem art 26(1) die gemeenskap die reg om daarop aan te dring dat daar by die professies standaarde gestel word, nie alleenlik wat bekwaamheid betref nie maar ook ten aansien van onkreukbare integriteit.
>
> Indien so 'n beperking op die algemene reg wat vervat is in art 26(1) nie vir iemand aksiomaties is nie, kan dit in elk E geval gevind word in art 33(1) as synde algemeen geldende reg wat redelik en regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid en wat nie die wesenlike inhoud van die reg verskans in art 26(1) ontken nie. Vereistes wat algemeen geldende kwalifikasies en norme vir die professies daarstel kan myns insiens nie as onbestaanbaar met die bepalings van art 26(1) beskou word nie. Artikel 33(3) van die Grondwet verleen F aan sulke vereistes bestaansreg.'

The Court further held that, apart from s 22, the Court has inherent jurisdiction to judge the suitability of attorneys.

(7) Submissions were made on behalf of respondent concerning the receipt of moneys by an

advocate. G

It was submitted that advance payment for services to be rendered is not unethical and where work is accepted directly from a client, payment from the same source will be a natural concomitant. Reference was again made to payment by the Legal Aid Board (already discussed above), members of the Cape Bar being paid directly by corporations by whom they are briefed on opinion and dock defences. Reference was again made to the common H law. It was submitted that on the applicant's case there is no 'rule' that an advocate may not receive payment of his fee directly from the client and that there is nothing improper in an advocate receiving payment directly from a client as opposed to payment by an attorney.

The astonishing submission was made that it had not been proved by the applicant that the respondent did, in fact, I receive payment of fees directly from a client as opposed to via an attorney. In para 17 of the supporting affidavit applicant's chairman says that he believes that the respondent did not act *pro amico* in the proceedings referred to 'and received his fees directly from his clients'. In para 45 of the answering J

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affidavit these allegations are admitted without qualification. Respondent does not say that he had been prepaid for A his services. As a matter of fact, no details concerning his fees are given.

The present state of our law is that, subject to exceptions referred to above, an advocate may not accept instructions directly from a lay client. It is not necessary to decide whether an agreement between an advocate B and his client that the former's fees are to be paid in advance might in law be possible. However, as our law presently stands, such an agreement, is highly undesirable. The practice insofar as it is relevant, flowing from the fact of a divided Bar, is and has been that the advocate in the first instance looks to the attorney for payment of C his fees. To take payment directly from the client negates the essential role of the attorney as the principal representative of the client with a general duty to attend to the interests of the client, including liaising on behalf of the client with the advocate concerning his fees. To negate the role of the attorney would be to deprive the lay client of essential protection. In view of the fact that respondent states that where work is accepted directly from D a client, payment from the same source will be a natural concomitant, it will also be a natural concomitant that the advocate will take a deposit to cover his fees and possible expenses. Respondent has not stated whether this was done. If such deposit is taken, it does not go into a legally designated trust fund, does not constitute trust E moneys which do not fall into the estate of the advocate and which are protected against the advocate's creditors and the client does not have recourse to a fidelity fund in case of theft. In addition, the advocate is not liable to keep proper books of account and the client does not enjoy the protection which he has *vis-à-vis* an attorney in that the Law Society is entitled to inspect his books. F

(8) In para 12 of the founding affidavit applicant alleges that should an advocate, in breach of their ethical rules, accept a fee directly from his client for work which he ordinarily performs in his profession as advocate, he would also find himself in breach of the provisions of s 78 of the Attorneys Act 53 of 1979 read with the provisions of s G 83(8), (9) and (10) of that Act. Section 78 deals with trust accounts. Section 83(8) (as far as it is relevant) provides that any person, except a practising practitioner, who for or in expectation of any fee, gain or reward, directly or indirectly, to himself or to any other person, draws up or prepares or causes to be drawn up or prepared any of the following documents, namely H

> '(v) any instrument or document relating to or acquired or intended for use in any action, suit or other proceeding in a court of civil jurisdiction within the Republic,
>
> shall be guilty of an offence and on conviction liable in respect of each offence to a fine not exceeding R2 000 and in default of payment thereof to imprisonment not exceeding six months'. I

Subsection (9) provides that any practitioner who does not comply with certain of the provisions of s 78 shall be guilty of an offence. Subsection (10) provides that any person who directly or indirectly purports to act as a practitioner or to practise on his own account or in partnership

without being in possession of a fidelity fund certificate shall be guilty of J

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an offence. Reference to the facts of the matter prove that respondent prepared documents as described in s A 83(8)*(a)*(v) above. In addition, s 83(1) of the Act would be applicable if it is held that the respondent performed the relevant acts pertaining to the profession of an attorney for a fee, gain or reward. Section 83(1) reads: B

> 'No person other than a practitioner shall practise or hold himself out as a practitioner or pretend to be, or make use of any name, title or addition or description implying or creating the impression that he is a practitioner or is recognised by law as such or performs any act which he is in terms of any regulations made under s 81(1)*(g)* prohibited from performing.'

This is also the attitude of respondent, who argues that the word 'practise' in s 83(1) of the said Act means the C performing of acts pertaining to the profession of an attorney for fee, gain or reward. See *R v Cornelius* 1945 TPD 258 and *R v Zeiss* 1961 (1) SA 610 (T) at 613B--E. The only relevant provision for the purposes of s 83(1) is that of practising as a practitioner (attorney) without being one. The concept 'practising' denotes the repetitive D performance of the relevant acts. See *Zeiss*' case *supra* at 611E--612D. The respondent, in my view, did attorneys' work as part and parcel of taking briefs directly from the client. Respondent did not state that this happened on isolated occasions. The probabilities, if regard is had to the conduct of respondent referred to above, E is that he did so as a matter of practice. However, it was submitted on behalf of the respondent that he was not guilty of any contravention of the provisions of the aforesaid Act. It was further submitted that in the present application there is no evidence that the respondent performed any of the acts complained of for fee, gain or reward. In argument it was pointed out that in para 17 of applicant's replying affidavit the applicant merely states F 'that he has accepted instructions on a basis which dispenses with the services of an attorney and (that) necessarily entails that he does work which is ordinarily preformed by an attorney'. The submission is that no evidential material has been placed before the Court from which it can be inferred, as a matter of probability, that G the respondent was being paid for the services which he rendered. I quote paras 62 and 63 of respondent's heads of argument:

> '62. The applicant does not allege that the respondent received a fee, gain or reward and that it was accordingly not necessary for the respondent to deny that he did so. The fact that whether or not the respondent received a fee, gain or H reward is a matter peculiarly within the respondent's knowledge does not relieve the applicant of the burden of proving that the respondent did so. The respondent could find no authority which stated that the respondent was compelled to enlighten the applicant in this regard.
>
> 63. In the premises, all that the applicant has proved is that the respondent performed certain acts. It does, with respect, I not follow that the respondent probably charged a fee for performing such acts. He may or he may not have, the probabilities are equal.'

It was submitted that the applicant has failed to discharge the *onus* of proving that respondent has practised as an attorney in contravention of s 83(1) of the said Act or performed any of the other acts prohibited by J

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the said section. The heads of argument also read that note should be taken of s 83(12)*(f)*, which rules that s 83(8) A is not applicable to any practising advocate.

This is a scandalous argument, particularly coming from a senior advocate of long years standing. It needs to be pointed out that the respondent was present when the argument was presented. Not only was he present, he sat B next to counsel appearing for him, was fully robed and prompted counsel. The respondent may not have had the duty to enlighten the applicant, but as an officer of the Court he certainly did have that duty towards the Court. This is not a civil claim between plaintiff and defendant but a disciplinary proceeding in terms of which the C applicant placed facts before the Court and the Court must come to a conclusion. This conclusion should be based on the truth and respondent should not be playing a coy game raising technical

issues in order to obfuscate the true issues before Court. Respondent admits that it is a matter peculiarly within respondent's knowledge. Instead of D contending that the applicant has not been relieved of his burden of proof, the respondent should have played open cards with the Court. In the matter of *Prokureursorde van Transvaal v Kleynhans (supra*) the following is said at 853F--H, which I think is applicable in this case:

> 'Die respondent het die onderhawige verrigtinge benader soos 'n strafsaak. Dikwels is feitelike stellings breedweg E ontken sonder verdere verduideliking en is van die applikant geverg dat hy dit moet bewys. Hierdie benadering is verkeerd. Die Hof is besig met 'n ondersoek van dissiplinêre aard. Die verrigtinge is *sui generis*. . . .
>
> Uit die aard van die dissiplinêre verrigtinge vloei voort dat van 'n respondent verwag word om mee te werk en die nodige toeligting te verskaf waar nodig ten einde die volle feite voor die Hof te plaas sodat 'n korrekte en regverdige beoordeling F van die geval kan plaasvind. Blote breë ontkennings, ontwykings en obstruksionisme hoort nie tuis by dissiplinêre verrigtinge nie.'

In addition the reference to s 83(12)*(f)* has been over-simplified. The provision reads that ss (8) shall not apply to any practising advocate 'insofar as he would be entitled but for the passing of this Act to draw or prepare any of G the aforesaid documents in the ordinary course of his profession'.

I have already inferred (*supra*) that respondent charged a comprehensive fee for all the work he did. It is, as has been pointed out above, not part of an advocate's work to receive instructions directly from a lay client. That being H so, work performed by an advocate on instructions received directly from a client cannot be done 'in the ordinary course' of an advocate's profession. When receiving instructions directly from a lay client the advocate necessarily performs attorney's work for which he receives a fee. I consequently find that he did transgress the provisions of the Attorneys Act as aforesaid. Alternatively, if this finding is wrong, the respondent is still guilty of I professional misconduct in that he had done attorney's work.

I consequently make the following findings:

1. Respondent is guilty of professional misconduct in that:

   (a) he accepted instructions and fees directly from clients without the intervention of an attorney; J

   (b) he allowed his address to be used for the service of papers or as the address of the client for A purposes of litigation;

   (c) he performed attorney's work.

2. The respondent transgressed the provisions of ss 83(1) and 83(8) of the Attorneys Act 53 of 1979.

I must now consider whether the Court is satisfied that the respondent is not a fit and proper person to continue to B practise as an advocate and whether he should be suspended from practice or whether it should be ordered that his name be struck off the roll of advocates.

The respondent's argument in this connection runs as follows. It appears *ex facie* respondent's opposing affidavit that he reasonably believed (and still believes) that he was entitled, in terms of the law of South Africa, to act in C the manner that he did. Moreover, the respondent has fully set out the basis for his reason to believe that he was entitled to act as he did. This belief was not unreasonable, especially when viewed against the background of the recent and far-reaching changes in the law. The respondent also relied on the rules of conduct of IAASA, which D specifically allow the acceptance of a brief directly from a member of the lay public without the intervention of an attorney in doing what he did. There is no reason on the papers to doubt the *bona fides* of the respondent. The applicant, in persisting with its contention that the respondent's name should be struck off the roll of advocates, is E asking the Court to impose the ultimate penalty upon respondent for misconstruing the legal and/or ethical position. There are no serious imputations in the applicant's papers of dishonesty or actively misleading any Court

on the part of the respondent. It is trite that in almost every striking-off application reported thus far the practitioner, when struck off, was found to have been guilty of the former or the latter. None of the acts F performed by the respondent brought the advocate's profession into disrepute. In the premises, so the submission concludes, it has not been shown that the respondent is not a fit and proper person to continue to practise as an advocate, alternatively that the striking off of his name from the roll of advocates or his suspension from practice G is not justified in all these circumstances and that a warning would be the appropriate sanction.

My reaction to the foregoing, is as follows:

(1) The belief of the respondent that he was entitled to act as he did was wholly unreasonable, particularly considering the fact that he is a senior counsel of long standing. The fact that the belief could never have been H regarded as reasonable appears from the arguments presented on behalf of respondent himself.

(2) The allegation that respondent relied on the rules of conduct of IAASA is wholly misleading. The Court was informed during argument that the respondent was a founder member of IAASA. It appears from the affidavit of I Mr *Klein* that the respondent is one of the non-executive council members of IAASA. The respondent was obviously at least co-responsible for formulating rule 15 of IAASA's rules of conduct.

(3) It is not clear what respondent means by contending that on the papers there is no reason to doubt his *bona fides*. I find it hard to J

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believe that someone in the position of respondent could have believed that he was entitled to act as he did. For A reasons which appear abundantly herein I think, in addition, that it would be unrealistically charitable to respondent to say that the matter has been conducted before us on a *bona fide* basis. I cannot see how respondent's conduct can be attributed to a mere misconstruction of the legal and ethical position. I rather have the impression that the B respondent, having finally fallen out with the Johannesburg Bar, closed his eyes in embracing the new creed of advocacy which was pursued as a crusade against the applicant and its constituent Bars. Moreover, respondent's harping on the rights of the underprivileged to reduced costs of litigation smacks of being sanctimonious in the light C of a disciplinary conviction of unprofessional conduct in proposing a fee of R180 000 while only R45 000 was appropriate.

(4) I agree that there is no serious imputation in the applicant's papers of dishonesty or actively misleading any D court on the part of the respondent. It is not the only ground upon which the name of an advocate can be struck off. See, for example, the *Beyers* decision in the TPD and *Society of Advocates of SA (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T). The headnote in that matter reads in part:

> 'In disciplinary proceedings instituted against an advocate in the Supreme Court the question is not one of punishing a E transgressor. It is one of upholding the Rules of the Society of Advocates. The fact that an advocate has breached the Rules of the Society, even in isolated instances, may very well be relevant to the Court's decision as to whether he is a fit and proper person to practise as an advocate, and so is a finding whether he treats the Rules of the Society with respect or with contempt. Breaches of the Rules may cause an injustice and even an unfair trial. It is for these reasons F that Courts have in the past always assisted Societies of Advocates in upholding and enforcing their Rules.'

The latter must, of course, be considered against the background that the respondent, at the relevant time, was not a member of one of applicant's constituent Bars. G

(5) I do not agree that none of the acts performed by the respondent brought the advocates' profession into disrepute. His letter in *Rapport* of 6 August 1995 was not only an express attack upon the advocates' profession but it was done in belittling, insulting and extravagant terms. In a letter referring to him as advocate, respondent H publicly exhorted against the Bar: 'Kom ons maak een balie vir alle Suid-Afrikaners.' He also implies that the Johannesburg Bar was at fault, leading to his resignation 'wanhopig en ontnugter', whilst the decision that he had been guilty of professional misconduct was never taken on review or set aside. The public statement by a

senior advocate that the profession is ''n uitgediende regsorde wat daarop bereken is om die advokaat as 'n elitistiese I monopolie of kartel te beskerm teen die arme publiek deur 'n prokureursorde wat die arme publiek noodwendig moet gebruik om by die heilige voorportale van die advokatuur uit te kom' can only serve to malign the profession in the eyes of the public. The respondent pre-empted the same route by becoming and remaining a founder member of IAASA in open conflict with the established J

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order and did so without considering that the dignified and professional approach to the profession and the Court A would have been a prior application for a declaratory order. See as well the remarks of Mr Langenhoven, the president of the Law Society.

The papers do show that both the ambit and continued existence of the rule that advocates may not take direct instructions from lay clients are the subject of continued debate. It is not necessary for us to enter the debate. The B highest Court of the land has held that the rule exists and must be adhered to by advocates. It held that advocates who do not adhere to the rule are guilty of unprofessional conduct. (See *Beyers v Pretoria Balieraad (supra*).) Advocates who are of the view that the rule should be changed cannot simply ignore the rule. They are C perfectly entitled to campaign that the rule be changed. They are also entitled to criticise the applicant and its constituent Bars in the process, but until such time as the rule is changed (if it is changed) they must adhere to it. They may test the rule in the courts of the land, but pending the result of such testing they must adhere to the rule. I would have expected senior counsel to appreciate this, and the reason for it. The respondent did not, and D apparently does not, appreciate it, and I shall spell it out: No civilised society can allow each individual to decide whether he or she agrees with a particular rule and, if he does not agree with it, to disregard it. It is pertinently the respondent's failure to appreciate this that leads me to the conclusion that he is not a fit and proper person to E continue to practise as an advocate. I am fortified in this conclusion by the manner in which the case was conducted by the respondent and by the intemperate manner in which he sought to debate the issue at hand. The respondent's argument that the rules of IAASA allow him to do what he did is an effort to hoist himself by his own F petard. It is an edeavour to make a new rule when the existing rule does not suit him.

In view thereof that the respondent did not exhibit dishonesty but rather a lack of the judgment required for the practice of an advocate, I am of the view that the respondent's name need not be permanently removed from the roll of advocates. A suspension from practice will probably be sufficient to instill in the respondent the realisation G that it is one thing to disagree with the rules of the profession and quite another to simply disregard them. The totality of respondent's conduct is, in my view, more blameworthy than that of first respondent in the *Society of Advocates of Natal* matter. However, having come to the conclusion that removal is not warranted, I must guard against imposing a period of suspension which may, in effect, constitute similar punishment. H

The following order is made:

1. The respondent is suspended from the practice as an advocate for a period of six months.
2. The respondent is ordered to pay the costs of the applicant, which costs shall include the costs of two I counsel and which costs shall be payable on the scale as between attorney and client.

Du Plessis J concurred.

Applicant's Attorneys: *Rooth & Wessels*. Respondent's Attorneys: *N D Leathern*.

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* *Reported as *Society of Advocates of Natal v De Freitas and Another (Natal Law Society Intervening)* 1997 (4) SA 1134 (N) - Eds.