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SUBMISSION TO THE CAPE LAW SOCIETY REGARDING

THE UPDATING OF THE PRO BONO RULE 21

Executive summary

The US has a long history of pro bono service. They have experience and their initiatives are well developed. At the 2007 Pro Bono Institute Annual Seminar held at the Pro Bono Institute at Georgetown University Law Center in Washington DC, two of the topics singled out for specific discussion were “Maximising the Match: New Solutions to the Misalignment of Need and Resources” and “Serving Micro-Entrepreneurs and Small Businesses.” This submission focuses, though not exclusively, on these two issues.

Edward Nathan Sonnenbergs provides pro bono services in the areas of Khayelitsha and Mitchells Plain, a combined community of 2.2m impoverished people. Yet, it is an ongoing challenge to supply our practitioners with meaningful work. How is this possible? Essentially

I think that part of the answer it is a misalignment of need and resource. In effect, a great many pro bono matters come our way, but a majority of them do not have legal solutions. However, if the rule under which we are currently performing pro bono is broadened, scope will be provided for attorneys to better match their resources with the needs that exist. We respectfully submit that there needs to be an urgent and profound re-thinking of what is meant by pro bono and what is meant by "access to justice". The majority of the people living in Khayelitsha and Mitchells Plain deserve access to justice. Yet many of them are excluded by precisely the rule that is intended to assist them. It is not simply a question of raising the means test. It is a question of broadening the vision of what pro bono is, and how law firms and attorneys can be of assistance. We submit with respect that Rule 21 as it stands is too restrictive. Space needs to be created to assist entrepreneurs and micro-enterprises. Space needs to be created for the training of trainers.

If there are legal resources available, and if there are needs that need to be met, then ways must be found to match the two. Rather than making it more difficult for attorneys to perform their pro bono duties, creative ways should be found to sell the concept to them. Pro bono is not something that can be effectively policed – who is doing it and who is not. This may not even be desirable. What is desirable is creating a pro bono product that will sell itself. In the long run people do not do what they do not want to do. By creating an enabling environment where attorneys feel they can give something back using their skills, pro bono will sell itself.

SUBMISSION TO THE CAPE LAW SOCIETY REGARDING THE UPDATING OF THE PRO BONO RULE 21

1. INTRODUCTION

1.1. The essence of this submission

The essence of this submission is that there is currently a "resource-needs" misalignment, as set out in the Executive Summary. The submission also deals with other aspects of pro bono that require updating, but at its heart is the requirement of an urgent reassessment and broadening of scope of what pro bono means and how it is to be practiced. This submission is made against the background of our experience gained from our pro bono initiative over the last two-and-a-half years. In this time, we have spent just under 4500 hours dealing with about 1300 matters. This submission is not meant to be a detailed redrafting of Rule 21 but rather an attempt to highlight some of the problem areas and provide possible solutions.

A vast majority of the matters we have dealt with have been on behalf of indigent individuals and only a few have been in support of organisations who qualify for pro bono. The range of issues we have dealt with include evictions and other property related matters, wills, estates, maintenance, employment law matters, delict, debt, pensions and social grants.

Of the matters we have received from recognised structures, just under 50% are rejected out of hand as they are not solvable by application of law. Of those we take on, a further 25% fall out after round one, and I would estimate a further 10% fall out after round two - that is to say, upon further examination and obtaining of facts or documentation. In the end a very small percentage of all the pro bono matters we see are capable of being solved by the application of legal principles.

2. THE CURRENT PRO BONO MODEL

2.1. The struggling recognised structures

Under the current pro bono model, regulated by Rule 21 of the Cape Law Society, attorneys receive pro bono matters via recognised structures. The assumption on which this model is based is that there are indeed qualified and functioning recognised structures able to assess clients' legal needs and then refer those clients, who the recognised structure cannot deal with themselves, to an attorney to take the matter further. It is however our experience that many recognised structures are no more than "revolving doors", where clients are received and then simply referred on without further thought to attorneys. This is not the fault of the recognised structures, many of whom work under difficult circumstances as they are under-funded and poorly trained. The recognised structure in Mitchell's Plain from which we most often get referrals is the Mitchell's Plain Advice Office. We have assisted this advice office by providing it with both funding and training. Despite this, the advice office's essential limitations remain in place and there is no reason to believe they will improve in the future. What is in effect happening is that the attorney is, for the most part, doing the work of the recognised structure and provides the filtering process, which was envisaged as being part of the essential task of the recognised structure. Clearly Rule 21, the rule which initiated the pro bono model, was both necessary and laudable. However, it is my submission that the time has come to look at improving on the Rule and, in light of what I have mentioned above, I would like to make the following suggestions.

3. MAXIMISING THE MATCH: THE MISALIGNMENT OF NEED AND RESOURCE

3.1. The problem

On the one hand law firms have resources available and ready to put to use, on the other hand the recognised structures either do not have the work or are referring the wrong type of work. This has been termed a "disconnect" by the US pro bono organisations and practitioners and is in my view the

single biggest challenge we are facing: how do we “connect”? What are the assumptions we are making that lead to this disconnect, and how do we solve the problem?

3.2. Recognised Structures

As already mentioned, the rationale behind recognised structures was that they would act as a filtering system, shielding practitioners, particularly the single practitioner with limited resources, from being inundated with clients approaching them directly off the street. This presupposes a number of facts, including a certain sophistication on the part of recognised structures, which in our experience is largely lacking. That is not to say that there are not recognised structures, such as the Unversity Legal Aid Clinics for example, who have the skills to properly fulfil their roles, but they are the exception rather than the rule.

Perhaps practitioners should be able to elect whether or not they are willing to take matters directly off the street and apply the means test themselves. In addition, clients are asked to jump through yet another hoop before finally being assisted. Consider in this regard that the client has often seen two or three organisations before coming to the attorney, or has approached the attorney first, who sends him back to the recognised structure, which then sends him back to the attorney, for the client to find out he has no case. Access to justice implies, at least as regards the “access” part, some form of expedited procedure. We often deal with clients who have been sent from pillar to post, only to land up with us and be told that there is nothing that can be done.

Something else to consider are “open pro bono days”. Attorneys are trained in isolating and dealing with legal problems. Communities should have at least some degree of direct access to this resource, perhaps in the form of “pro bono open days” where attorneys make themselves available to consult to all-comers, sift matters, apply the means test, and thereby serve the community more broadly, and get quality referrals into their system.

3.3. Means Test

The means test for both organisations and individuals needs to be reconsidered. There are a great many people and organisations deserving of pro bono assistance that do not qualify under the current means test. Of course, any form of a means test is to some extent arbitrary, but if one were to raise the means test by two or three thousand rands for individuals and R500 000.00 for organisations, one would not only cast the net wider, but would undoubtedly attract a better “quality” matter. By this I mean that even a small jump of a couple of thousand rands would immediately include people who are transacting and interacting to a greater degree within a legal framework within society and whose problems would to a great extent be more solvable by application of law.

3.4. Micro- and Small Business

The vast majority of the pro bono matters with which we deal are adversarial in nature. Perhaps that is in the nature of pro bono work, but the balance seems skewed since there are a great number of disadvantaged people who would benefit from sound legal advice pertaining to micro- and small business development. Pro bono work should not, in my view, be exclusively in service to the client in the adversarial arena. It should also be in service to the client in the arena of enabling legislation, helping entrepreneurs to start or grow businesses. If a small entrepreneur cannot advance his business because he does not have the money to obtain good legal advice, then we should be able to assist him. If the broader vision of pro bono is to create a more equitable society with greater access to justice for all, then as much can be achieved by assisting an individual to grow a small business and potentially employ a previously unemployed person, than can be achieved by assisting an individual in, for example, a maintenance matter.

As the rule currently stands there is not enough scope for attorneys to be involved in this type of work. In this regard, for example, there is an organisation by the name of Red Door, which operates as an advisory service in Mitchell's Plain on behalf of the Government, assisting micro- and small enterprise with basic business advice, including legal advice. Most of their clients can not be assisted by us under Rule 21 because of the limitations imposed by the means test.

Pro bono needs to broaden its vision by stating that one provides as much access to justice when one assists an individual to grow a business as one does when assisting an individual in an eviction dispute. Whereas the current Rule 21 does make provision for matters to be recognised as pro bono on a case by case basis, this seems to be laborious and unnecessary. It would be better, perhaps, to draft the Rule more broadly. In this regard I attach for your perusal as Annexure "1" the rule proposed by ProBono.Org on 27 March 2008 to the Pro Bono Sub-Committee of the Law Society of the Northern Provinces (this draft, incidentally, currently enjoys the support of most of the large Johannesburg-based law firms). It is clear that this rule is drafted far more broadly than Rule 21 and provides greater scope for practitioners to render pro bono services. This is not to suggest that the CLS adopt this rule. It is merely to look at an alternative approach to the same problem, and perhaps to take what is good from it.

Perhaps the most important point that needs to be made is this: Why is the current debate – and certainly this has been our experience as practitioners – what work should or shouldn't qualify as pro bono, rather than asking the question to what extent are practitioners in fact discharging their pro bono obligations, and if not, why not?

It would go a long way to making it a more attractive and accessible option for practitioners if they are allowed to perform work of a broader pro bono nature as described above, without derogating from the essential commitment which is to provide free legal services to the poor.

3.5. Taking away work from community-based law firms.

The argument often put forward against the pro bono support of micro-and small business, is that it would take away work from community-based law firms. We believe, based on our experience, that the contrary is true. For example, as a result of our pro bono office in Mitchells Plain, and the inordinate amount of property related matters that come our way, we often refer clients who do not qualify for pro bono and who need property transferred, to local law firms. There is no reason to think the same will not happen when assisting entrepreneurs.

4. TRAINING OF PRACTITIONERS

4.1. Pro-active pro bono

Many of the pro bono problems we have encountered are problems that could have been prevented or solved by the pro bono client had he or she been better informed. Training, not only of recognised structures, but of the broader community itself, in the form of workshops and information campaigns, can and should reside under the heading “Access to Justice”. With a few exceptions, one can hardly gainsay that the vast majority of people living in the area in which we practise pro bono, namely Khayelitsha and Mitchells Plain, are deserving of pro bono assistance. However, and acknowledging that the perspective from which I am making this submission is that of a commercial law firm, our practitioners do not have the experience to train and provide workshops for recognised structures and individuals on topics such as maintenance, debt, and sexual violence against woman and children. The problem lies not so much in knowing the law, but rather in the skill of teaching.

4.2. Training the trainers

In short, our practitioners require training in order to train others. The position of the Law Society on this issue currently is that such training received by practitioners does not qualify as pro bono time that can be logged. It is perhaps time to review this position and to allow a certain amount of hours in a year to be logged pro bono where practitioners receive training in order to act in service of the broader pro bono initiative. This would enable us to provide training to recognised structures and to get very necessary information out into the community. As an example of this, I can do no better than mention the appalling lack of understanding and knowledge of the most rudimentary requirements of the buying and selling of property which leads to untold problems for house sellers or house buyers, with people either losing their property or their money. At the risk of repeating myself, I do feel that we should be spending less time debating what sort of work should qualify as pro bono and more time on how we can get more practitioners involved in doing some form of pro bono work, and that broad legal education is both necessary and in short supply.

5. COSTS

5.1. The problem

With the increase in the amount of pro bono work being done by practitioners, it is becoming more important than ever for the Cape Law Society to provide clear directives on the problematic issue of pro bono and costs. For a summary of the problem, I attach an article which appeared in the *Without Prejudice* of April 2008 (Annexure "2"). In short, the pro bono litigant is placed at a disadvantage. The attorney for the pro bono litigant can only claim such costs as are actually incurred. Since his client has incurred no fees, the attorney can claim no costs (Rule 21 makes allowance for claiming disbursements). If he claims fees, he is no longer acting pro bono, and the matter will lose its pro bono status. This means that the opposing party can litigate with impunity, knowing they are immune to a cost order. The pro bono client does not, however, enjoy this protection and cost orders can be made and enforced against him. Even though he may be indigent, it does not mean he has nothing, and what little he does possess may then be taken from him. This is not to suggest that pro bono clients should be protected from cost orders, but rather that the playing field should be levelled with both parties equally at risk of an adverse cost order.

5.2. A possible solution

One solution to this problem is that attorneys acting pro bono make the following arrangement with their clients: in the event of unsuccessful litigation, no fees will be charged to the client; but in the event of successful litigation, the pro bono attorney will recover from the other side such fees as he incurred, without the matter losing its pro bono status (a type of contingency fee arrangement). He simply asks the Court, based on his agreement with his client, for a cost order. It is worth noting that there are two distinct processes here. The first is a cost order made, enforced, and taxed by operation of law. The second is the recognition of the matter as pro bono. The latter can be done by the CLS without interfering with the law pertaining to costs as it stands. Support for this position can be found in both court rules and legislation.

5.3. Rule 40 of the High Court

Rule 40 of the High Court Rules dealing with *in forma pauperis* instructions does make provision for cost orders. Rule 40(7) states as follows:

> "If upon the conclusion of the proceedings a litigant *in forma pauperis* is awarded costs, his attorney may include in his bill of costs such fees and disbursements to which he would ordinarily have been entitled…"

We support the suggestion made in the attached article that a trust account be opened into which monies pursuant to successful cost orders be deposited for use in future deserving pro bono matters. For example, clients are often not able to afford the cost of a transcription of records in labour reviews and, therefore, have to forego their ability to place their grievance before a court. Such a fund can be judiciously applied in order to assist clients gain greater access to justice.

5.4. Magistrates Court, Rule 53 (5)

This rule, though not exactly the same as the High Court Rule, is clearly intentioned to place the indigent litigant on equal footing with his opponent by not depriving him of a cost order, a potent weapon in litigation.

> "If the *pro Deo* litigant succeeds and is awarded costs against his opponent he shall, subject to taxation, be entitled to include and recover in such costs his attorney's costs and also the court fees and sheriff's charges so remitted and if he shall recover either the principal amount, the interest or the costs, he shall first pay and make good thereout *pro rata* all such costs, fees and charges."

5.5. The Attorneys Act

Law clinics, under the Attorneys Act, also enjoy the advantage of being able to recover Costs. Section 79A of the Act states as follows:

> **79A. Recovery of costs by law clinics.**—(1) Notwithstanding the provisions of section 83 (6) of this Act and section 9 (2) of the Admission of Advocates Act, 1964 (Act No. 74 of 1964), whenever in any legal proceedings or any dispute in respect of which legal services are rendered to a litigant or other person by a law clinic, costs become payable to such litigant or other person in terms of a judgment of the court or a settlement, or otherwise, it shall be deemed that such litigant or other person has ceded his or her rights to such costs to the law clinic.
>
> …
>
> (3) The costs referred to in subsection (1) shall be calculated and the bill of costs concerned, if any, shall be taxed as if the litigant or person to whom legal services were rendered by the law clinic, actually incurred the costs of obtaining the services of the attorney or advocate acting on his or her behalf in the proceedings or dispute concerned.
>
> [S. 79A inserted by s. 20 of Act No. 62 of 2000.]

The notion therefore of awarding costs to a litigant who is being represented free of charge, is not alien in our law, and it is respectfully submitted that it should be recognised for purposes of pro bono as practiced under Rule 21.

6. Recording of Pro Bono Hours

Attention needs to be given to the manner in which pro bono hours logged by practitioners are submitted to the Cape Law Society. The current arrangement is that a practitioner fills in a certificate for every matter and submits this to the Law Society as proof of work done. This assumes that matters come in discreet packages and are opened and closed neatly and at the time can then easily be submitted. The reality, however, is different as practitioners often work on different matters spending fifteen minutes here, half an hour there and may be involved in as many as fifteen matters over a period of time although they may themselves only be responsible for two or three matters. To then require them to submit certificates for each time so logged seems to be an arduous task.

I believe that the Cape Bar has an arrangement where Advocates must submit a signed declaration each year recording the number of hours which they have logged for purposes of pro bono. It would appear that a similar arrangement may be feasible for attorneys. A generic template can simply be drawn up stating that the attorney has conducted his or her pro bono duties under the Rule, recording the number of hours and then affixing their signature. Nothing prevents the Law Society from requiring for purposes of their records that attorneys submit, say, on a quarterly basis their hours logged to date so that Society can update their records.

7. Conclusion

In summary then, the provisions of Rule 21 which I respectfully submit require updating, based on our experience of pro bono, are the following:

7.1. Attorneys should be able to elect whether they want to make use of recognised structures or not, on a case by case basis. This is in the best interest of the client.

7.2. The means test is too restrictive and needs to be increased both for individuals and for organisations.

7.3. A greater scope must be created for practitioners to assist budding entrepreneurs or micro-enterprises allowing the practitioners to add considerable value by the deployment of their specialised skills.

7.4. In order to address the imbalance of proactive (very little) versus reactive (a lot) pro bono work that gets done, resulting in the reduction of unsolvable pro bono problems due to good preventative training, greater flexibility should be given to practitioners to receive training which they then, in turn, can impart to the advice offices and members of the community.

7.5. The issue of costs needs to be addressed, with the Cape Law Society providing a clear directive allowing the enforcement of cost orders against unsuccessful parties even when acting pro bono.

7.6. The issue of how pro bono time is submitted to the Law Society requires review and a simplified approach is suggested.

In conclusion, I would urge the Law Society to view the above submissions as a way in which to address the needs-resource misalignment, and to create a broader, more inclusive, more flexible pro bono rule.

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