

5 May 2020

To: All members
JOHANNESBURG SOCIETY OF ADVOCATES

Dear Colleagues

Re: REVISED PRACTICE DIRECTIVE OF 17 APRIL 2020 – AFFIDAVITS BY COUNSEL

1. The Professional and Fees Committee of the Johannesburg Bar Council has received several requests for guidance regarding the requirement that members must give an affidavit in respect of admission applications in which they appear as counsel. The affidavit is required by paragraph 94.5 of the Revised Practice Directive of 17 April 2020, which reads:

“The Counsel moving the matter must furnish on CaseLines an affidavit that he or she has examined the original documents relating to the degrees conferred on the candidate for admission and verifies that they appear to be authentic.”

2. Members of the Society are required to seek permission from the committee to depose to an affidavit under General Council of the Bar rule 4.5, which provides:

“4.5 Counsel Giving Evidence or Making Affidavits

- 4.5.1 Counsel must avoid, as far as is possible, putting himself in any position where he may have to make statements or give evidence in relation to matters which are in dispute in the case in which he is appearing.
- 4.5.2 In all cases, before counsel may make an affidavit or volunteer to give evidence concerning matters which became known to him while acting in his professional capacity, permission of the Bar Council must first be sought.”

3. The independence and objectivity of counsel is compromised if he or she has identified with the issues by also being a witness in relation to cases in which they appear. See in this regard *Carolus and Another v Saambou Bank Ltd; Smith v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 348I-J as confirmed in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA) at [38].
4. The committee acknowledges a practice during admission applications, in terms of which counsel informs the court that he or she is in possession of the original documents (of which copies are attached to the affidavits), have checked them and confirms from the bar that the copies in the papers accord with the original documents. This practice does not entail counsel giving evidence regarding the authenticity of the originals, but it is merely a procedural convenience whereby the court saves time by not having to verify the copies against the originals.
5. Historically, the original documents would have been included in the court’s file, but as a result of too many lost originals the practice developed to annex copies thereof to the founding affidavit(s). The above practice occurs in circumstances where the original documents are available in court, with the presiding judge able to immediately call for their production for scrutiny.



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6. The practice directive concerned deviates from the above practice, as it requires counsel to verify in an affidavit that the original documents appear to be authentic. The result is that the applicant is admitted on the strength of counsel's affidavit. Counsel thus becomes a material witness regarding the authenticity of the original documents. This ought not to be expected of counsel, based on the jurisprudence cited above.
7. The directive further gives rise to practical difficulties for counsel. Firstly, access to commissioners of oaths is problematic under the travel and permit restrictions. Secondly, counsel does not readily have access to the original documents with briefs often delivered electronically to comply with the coronavirus regulations.
8. The purpose of paragraph 94.5 is to verify the authenticity of documents used as evidence in the admission applications, as the court does not have access thereto with papers being uploaded electronically. This purpose may be served without requiring counsel to furnish an affidavit.
9. Although all the members of the committee agreed to the above principles, some of them regarded the restrictions imposed on practitioners by the regulations under the National State of Disaster as exceptional grounds for the committee to grant the permission sought in terms of GCB rule 4.5.2. As there was insufficient consensus regarding the decision to be taken by the committee, I escalated the issue to the leadership of the Bar Council.
10. On 30 April 2020 the chairman of the Bar Council, in consultation with other members, addressed an urgent written request to the Judge President of the Gauteng Division of the High Court, who issued the Revised Practice Directive of 17 April 2020, to amend paragraph 94.5 by requiring:
 - 10.1. the applicant's attorney to furnish the affidavit required therein; and
 - 10.2. counsel moving the matter to furnish a practice note confirming whether he or she has verified that the copies attached to the founding affidavit(s) accord with the original documents and whether the applicant's attorney has furnished an affidavit to verify the authenticity of the original documents.
11. At the time of writing this letter the honourable Judge President has not yet replied to the chairman's request referred to in paragraph 10 above. I shall advise members of honourable Judge President Mlambo's decision in this regard as soon as it is received.
12. As time is of the essence, the chairman of the Bar Council and I have decided in terms of GCB rule 4.5 to refuse to grant permission to members to furnish an affidavit. Instead, members are directed to advise their instructing attorney to furnish the requisite affidavit and that the member must furnish a practice note in the terms set out in paragraph 10.2 above. If members deem it necessary, they may apply for condonation for not complying strictly with the requirements of paragraph 94.5.
13. I emphasise that, as officers of the court, it is not our intention to act in contempt of the authority of the head of the Division to regulate its procedures, but to protect the integrity of the profession and the court process. We considered that judges of the Division have in relation to other practice directives, such as paragraphs 67.4 and 79.2, not insisted on an affidavit by counsel, but accepted a certificate.

14. Members are invited to submit a copy of this letter together with their practice note, in order to explain to the presiding judge their failure to comply with paragraph 94.5 and the reasons for counsel not deposing to the requisite affidavit.

Yours faithfully



Adv C F van der Merwe SC
Chair, Professional and Fees Committee