

27 March 2020

To: All members  
JOHANNESBURG SOCIETY OF ADVOCATES

Dear Colleagues

Re: **LETTERS TO MEMBERS THAT INSTRUCTING ATTORNEYS WILL NOT ASSUME PRIMARY AND UNCONDITIONAL OBLIGATION TO PAY COUNSELS' FEES**

1. In light of the national lockdown announced in response to the COVID-19 pandemic, several attorneys' firms have addressed letters to members of the JSA to the effect that they "... *can no longer assume a primary and unconditional obligation for payment of your fees.*"
2. The letters require members to obtain written confirmation from their instructing attorney that work may continue "... *during the lockdown and in the period immediately thereafter ...*" Members are advised to adhere to this request.
3. Of concern, is that the letters further provide that "(i)n the event that an agreement is reached for work to continue it is on the express understanding that you will be paid if and when (the attorneys' firm) is paid by the client concerned. If this is not acceptable to you, work must immediately cease." (Own underlining.)
4. The underlined conditions sought to be unilaterally imposed by the attorneys on members contravene the tenets of the referral rule, which sustains the independence of counsel who practise in terms of section 34(2)(a)(i) of the Legal Practice Act 28 of 2014 ("**the Act**"). Sections 34(2)(a)(i) and 34(3)(a) of the Act require the briefing of advocates without trust accounts by attorneys.
  - 4.1. Paragraph 27.2 of the Code of Conduct ("**the code**"), published in terms of section 36 of the Act, reads in relevant part: "*Counsel shall accept a brief only from an attorney, and counsel shall not accept a brief directly from any other person or entity for either litigious or non-litigious work of any kind ...*"
  - 4.2. Paragraph 27.4 of the code provides in relevant part: "*Counsel shall receive fees charged only from or through the instructing attorney who gave the brief to counsel ... in discharge of the indebtedness of the attorney.*" (Emphasis added.)
  - 4.3. Paragraph 34 of the code contains the following relevant provisions:
    - "34.2 *Counsel shall render accounts to the instructing attorney ... and shall receive payment only from the instructing attorney ...*
    - 34.3 *Counsel shall not submit an account directly to a client except by agreement with the instructing attorney and client and on condition that the same account is simultaneously submitted to the instructing attorney, nor receive payment directly from a client.*"



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- 4.4. Paragraph 35 of the code states: *“Counsel may sue an attorney ... for fees due and payable to him or her.”*
- 4.5. The provisions of paragraphs 26.5, 26.10.3, 29.6 and 30 of the code make it clear that the agreement to perform the mandate of the brief is between the instructing attorney and the advocate.
- 4.6. In terms of section 36(2) of the Act, the code serves as the prevailing standard of conduct, which legal practitioners and juristic entities must adhere to, and failure to do so constitutes misconduct.
5. The Professional and Fees Committee (**“the committee”**) has been referred to a contribution by Albert Reinecke, Legal Practitioner’s Handbook on Costs, 2nd edition (2011) wherein the author contends in par [32] that the relationship between the instructing attorney and counsel *“... is not one of joint and co-principal liability of the attorney with his client. It is rather an accessory, collegial mandate from counsel to collect and manage payment – tacit to the brief – in terms of the bar rules, being a trade usage of the bifurcated profession. Counsel’s entitlement to a fee stems from work done for his client, not for the attorney, and the attorney should assist counsel with his fee pro amico.”*
6. The committee is respectfully of the view that neither the conclusions by Reinecke, nor the authorities cited by him, correctly reflect the contemporary legal position. Members are therefore directed to comply with the provisions of the code and not to agree to be reliant on payment of the attorneys by their client(s).
7. Members of the JSA, as well as the attorneys who instruct them, are further bound by the GCB Uniform Rules of Conduct and Local Rules and Practice of the Johannesburg Bar. The committee invites members’ attention to the following relevant provisions:
  - 7.1. GCB rule 5.12.1: *“No member shall take instructions or fees except through the medium of an attorney ...”*
  - 7.2. GCB rule 7.8: *“Counsel may not agree with the attorney briefing him that counsel will await payment of the fees payable on that brief until the attorney shall have received them from the lay client.”*
  - 7.3. GCB rule 7.9.1: *“Fees for any professional services may only be paid by or through an attorney ...”*
  - 7.4. JSA rule 1(b).2: *“The practice of advocacy is a referral profession, and accordingly, counsel do not solicit mandates, and only accept mandates on brief from attorneys admitted to practice.”*
  - 7.5. JSA rule 3.1.1: *“Fees become due at the end of the month in which they have been earned and shall be paid no later than 3 months and 7 days thereafter.”*
  - 7.6. JSA rule 3.2(a): *“If any fees which are, in terms of rule 3.1 above, due to a member, remain unpaid on the seventh day of the fourth calendar month calculated from the first day of the month following the month in which the work was done in respect of which the fee is due, such member shall immediately notify the Secretary thereof on the prescribed form.”*

8. Whilst the Bar Council is discussing with the attorneys' firms concerned how best to accommodate their concerns and protect our members' interests, members are directed to adhere to the GCB and JSA rules, subject to paragraph 9 below.
9. Pending an agreement with the attorneys' firms, the committee will condone non-compliance by members with JSA rules 3.1.1 and 3.2(a) and apply the following guidelines:
  - 9.1. All fees billed by members during months in which a lockdown during the National State of Disaster applies (currently March and April 2020) to attorneys' firms which have issued the above or similar letters, will, if so agreed between the instructing attorney and the member concerned, become due at the end of the month in which the work was done, and shall be paid no later than four months and seven days after the end of the month in which the national lockdown is lifted;
  - 9.2. In the event of such agreement, members are only required to notify the Bar Secretariat if fees remain unpaid by attorneys' firms which have issued the above or similar letters, by the seventh day of the month succeeding the period of four months referred to in paragraph 9.1 above.
10. Members are welcome to approach me or any member of the committee for any clarification of the contents hereof they may require.

Yours faithfully



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