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14 February 2014

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NEGOTIATING MANDATE

To: The Chairperson: Select Committee on Justice and Constitutional Development

Name of Bill: **Legal Practice Bill**
Number of Bill: [B20B-2012]
Date of Deliberation **13 February 2014**

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1. **Vote of the Legislature**

The Province votes in favour of the Bill and mandates the Eastern Cape Delegate to the NCOP to negotiate in favour of the Bill within the following parameters-

2. **Clause 1: Definition of "Advocate," "Attorney" and "Conveyancer"**

The term "Advocate" in the Bill is defined as a legal practitioner who is admitted and enrolled as such under this Act;
The term "Attorney" is defined as a legal practitioner who is admitted and enrolled as such under this Act; and

The term "Conveyancer" is defined as any practicing Attorney who is admitted and enrolled to practice as a conveyancer in terms of this Act.

Submission

Although the Bill clearly does not seek to fuse the nature of the profession of an Advocate with that of an Attorney or *vice versa* the above definitions seem to inadvertently fuse the two professions and accordingly must be reviewed as follows-

"Advocate" means a legal practitioner who was duly admitted and enrolled as an advocate in terms of the Admission of Advocates Act, 1964, or who is admitted, enrolled and registered as such under this Act;

"Attorney" means a legal practitioner who was duly admitted and enrolled as an Attorney in terms of the Attorneys Act, 1979, or who is admitted, enrolled and registered as such under this act;

"Conveyancer" means a person who practices as a conveyancer as defined in Section 102 of the Deeds Registries Act, 1937.

3. **Clause 5 : Objects of the Bill**

Although it is stated clearly in under Clause 5 that the bill seeks amongst others to promote public interest our view is that the Bill also seeks to promote the interests of the legal profession. We therefore propose that it must be added under this clause that the Bill also seeks to promote "the interests of the legal profession" due to the fact that the interest of the public is integral to that of the legal profession and *vice versa*. It is a fact that the promotion of the interest of the legal profession will create a profession that has

integrity, subscribing to the highest standard of service delivery and ethics. All of these are not only beneficial to the legal profession, but will promote public interest as well.

4. **Clause 7: Composition of the Council**

Clause 7 (1) (b) provides for the appointment of two teachers of law to serve on the Council, one being a dean of a faculty of law at a University in the Republic and the other being a teacher of law designated in a prescribed manner. This clause is vague due to the fact that there is no clarity as to who may nominate or designate these teachers of law to serve on the Council. We submit that this must be reconstructed as follows-

"Two teachers of law, one being a dean of the faculty of law at a University within the Republic, and the other being a teacher of law at a University in the Republic designated by teachers of law at South African Universities" We make reference to Section 178 (1) (g) of the Constitution of the Republic of South Africa Act 108 of 1996 where a similar construction is used for nominations of persons to serve on the Judicial Service Commission.

5. **Clause 17: Decision of the Council**

Clause 17(1) provides that the majority of members of the Council constitutes a quorum at any meeting of the Council. We suggest that this clause be amended to read as follows-

" A majority view of the members present at a meeting of the Council constitutes a decision of the council" This amendment will also be in line with Clause 20 (9) (d) of the Bill where a similar construction is used.

6. **Clause 40: Proceedings after disciplinary hearings and sanctions**

The power of disciplinary Committees in terms of Clause 40 (3) (a) (i) to order the legal practitioner to pay compensation to a complaint is misplaced and in our view must be removed as the reimbursement of persons who suffer pecuniary loss at the hands of legal practitioners is covered under Clause 55 Furthermore, the fact that disciplinary proceedings are neither civil proceedings nor criminal proceedings but are *sui generis* (of their own kind) by nature should make it clear therefore that a hearing to determine whether or not a legal practitioner is involved in an act of misconduct is not concerned with the question of payment of compensation or damages as such, if any such compensation has to be paid the decision to do so must be sanctioned by a court of law.

6.1 Clause 40 (3) (a) (iii) The disciplinary committee must not be given the power or authority to suspend the legal practitioner from practice as such sanction constitute a drastic step the committee must recommend to the Council which may take any action as contemplated in Clause 40 (3) (iv) (aa) –(cc) therefore that authority to suspend the legal practitioner must be reserved for the court; and

6.2 Clause 40 (3) (v i) In the same vein the disciplinary committee must not be given the power or authority to withdraw the fidelity fund certificate as this also constitutes a drastic step, the committee must recommend to Council and that right must reside with the Council.

7. **Clause 50 (2): The Acting Ombudsman**

We are of the view that the person to be appointed in terms of Clause 50 (2) must be a former Judge and possesses the same attributes, competences, and qualification as the Ombudsman, as he or she will be exercising the same powers as the ombudsman.

7. **Limitation of Liability of the Fund**

Clause 56 (1) (a) provides that the Fund is not liable in respect of any loss suffered by a family member or a member of the household of any Attorney or an Advocate referred to in Clause 34(2) (b) who committed the theft. The term "members of the household" is not defined in the Bill its use is therefore somewhat vague. We propose that this expression be defined for clarity and completeness.

8. **Clause 117: Transitional Provisions relating to existing law societies and voluntary associations for advocates.**

The Clause provides that the existing Law Societies must continue to perform their powers and functions until the commencement of Chapter 2 of the Bill. This can be interpreted to mean that once Chapter 2 of the Bill kicks in, such voluntary association will be automatically abolished and this Clause is therefore unconstitutional as by its very construction violates the right of freedom of association as provided under Section 18 of the South African Constitution Act 108 of 1996.

Comments on the Preamble

9. Under the Preamble to the Bill and under the paragraph beginning-

"AND BEARING IN MIND THAT..."

The expression "national territory" must be replaced by "Republic" so that it will read as follows:

AND BERAING IN MIND THAT-

- The legal profession is regulated by different laws which apply in different parts of the Republic and, as a result thereof, is

fragmented and divided. The term republic must further be defined as:

- **"Republic"** means the Republic of South Africa.

10. **Clause 93 :Offences and penalties**

This whole penalty clause from Clause 93 (1) up to and including Clause 93 (9) must be reviewed and the expression " is guilty of an offence" as used in those clauses must be deleted wherever it appears or is employed throughout the whole penalty clause and be replaced with the expression "commits an offence" and is liable on conviction to fine or imprisonment not exceeding....." For Example, Section 92 (2) reads-

"Any person who contravenes the provisions of Section 33 is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding two years or to both such fine and imprisonment". The clause must be reconstructed and read as follows-

"A person who contravenes the provisions of Section 33 commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding two years or to both such fine and imprisonment."

10.1 Using the expression is guilty of an offence anywhere under the penalty clause places the cart before the horse as it were due to the fact that it is only upon conviction when the accused person is found guilty, otherwise to say a person is guilty before his conviction violates the presumption of innocence as provided for under Section 35 (3) (h) of the South African Constitution Act 108 of 1996 (the Constitution).

12.2 Section 35 of the South African Constitution Act 108 0f 1996 is headed-

35 (1) **Arrested, Detained and Accused persons-**

It provides under Section 35 (3) (h) that –

"Every accused person has a right to a fair trial which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The inclusion of the expression is guilty of an offence in any penalty clause under the new constitutional dispensation therefore violates the above constitutional right.

13. **SUBMISSIONS ON CLAUSE 4:**

Creation of the South African Legal Practice Council *vis-à-vis* the Constitutional imperative for judicial independence and the independence of the legal profession.

Background

13.1 Section 165(2) of the South African Constitution Act 108 of 1996 provides for the independence of our courts which are subject only to the law and the Constitution. The courts must apply the law impartially without fear, favour, or prejudice. It must be noted that although not specifically mentioned in the Constitution, it is a fact that the judiciary depends on an independent, effective, and competent legal profession to enable it to perform its mandate in terms of Section 165(2) above. It is also a fact that effective judicial processes and independent judgments or decisions by the courts cannot be obtained without independent lawyers from which members of the bench or judges will be selected.

Views of Sydney Kentridge

13.2 Sydney Kentridge QC an eminent and respected South African jurist wrote in his article published in the Advocates' journal called *Consultus* in October 1991 about the need for the independence of Advocates and the specialized skills of Attorneys and Advocates and observed that-

13.3 "*...Advocates through the nature of their work in the courts have maintained the rule of law...as a counterbalance to the state's executive powers...during apartheid cases of a political nature often arose...where some individuals came into conflict with the state and found themselves in a criminal or a civil court and ...members of the bar (Advocates) were always available to represent them however unpleasant or politically undesirable this task sometimes seemed to be..*" Kentridge proceeds in his article as follows-

13.4 "*This was possible to do due to the fact that the legal profession was independent and in particular, the profession of that of an Advocate. An Advocate by nature, is a sole practitioner, and his professional ethos requires him to be independent... it is the existence of an Independent Bar which is inseparable from the Independent Bench which protect the citizen against the state*". Kentridge concludes.

Views of George Bizos

14. George Bizos SC a well-known South African Human Rights Lawyer and a Rivonia trial defence Advocate relying on his experience over 40years said in December 1999, the bar should remain an independent referral profession of single practitioners and is quoted hereunder in support of Kentridge's views above:

14.1 "There *are few things as essential to the maintenance of liberty in a state as the existence of an independent body of Advocates ready to appear for every kind of person in every king of case...*
"The Independence of the Bar made it possible for some of us to take cases which we would not have been able to take during apartheid years on those who opposed the government's policies, legislation and practices..."

14.2 Bizos continued, *"Furthermore, the distance placed between the Advocate and the Client with the instructing Attorney between them is a healthy one... because one of the important advantages of Advocates not taking instructions directly from a client and in not handling funds from a client is that a practicing Advocate who is briefed by an Attorney is able to concentrate and devote almost his full time and attention to the case that he has been briefed to conduct at a particular time. If the Advocate had, like an Attorney, to equip, and start running an office the additional cost of doing so will be passed on to the client.* Bizos then cautions us by concluding that- *Let us not even unwittingly destroy any portion of this essential fabric of the profession, If we do, the administration of justice and our society will be losers."*

Views of Former South African Judge of the Supreme Court of Appeal Malcolm Wallis

15. In April 2010, in a paper delivered at the World Bar Conference in Sydney, Australia, Former South African Judge of Appeal, Malcolm Wallis referring to his own experience in South Africa illustrated the role of the Bar and the importance of an independent Bar and his views are quoted below-

15.1 "I started practice at the Bar in 1973 at the height of apartheid in South Africa... I advised and represented trade unions, church organizations, and my local university when they were under attack by the apartheid government. I appeared for detainees held under the 1985 state of emergency... There is also

plenty of work that was done by my colleagues such as Maisels, Fischer, Justice Mahomed, Kentridge, Justice Langa, Justice Chaskalson and Bizos to mention those who may be familiar to you... It was that independence of the profession, nurtured by the fact that every Advocate was available in every case and enable us to fight for the rule of law, to resist apartheid and to use court creatively to bring about change..."

15.2 Wallis Continued *"Large Firms of Attorneys during the time would not take up those kind of political cases for fear of implications arising mainly of a commercial nature that would impact negatively of their firms for handling such cases. It was left to small under resourced Firms of Attorneys to come to the Bar to brief Advocates so as to ensure that their cases were properly contested in courts. It was the availability of Advocates (litigation specialist) who could take up whatever work available that provided an opportunity to ensure that their clients were properly represented in court.*

Independence of the Advocate's Profession

15 The importance of the Independent Bar is therefore apparent from the advices of eminent Jurists such as Kentridge QC, Bizos SC, Smuts SC, I Wallis, and many others. It is important to take heed of the advice of these eminent jurists regarding the need of an independent legal profession and the creation of their Independent Regulatory Boards.

15.1 Under Clause 4 of the Bill, by establishing the Legal Practice's Council the Bill inadvertently tampers with the independence of the legal profession as will further be explained below. It is a fact that the independence of the legal profession in turn, is a pre requisite for the independence of our judiciary in our young democracy.

Views of the International Bar Association

16. The International Bar Association (IBA), in its resolution on the rule of law adopted in September 2005, recorded interalia that-

"An *independent impartial judiciary, the presumption of innocence, the right to fair trial... a strong independent legal profession...is all fundamental principles of the rule of law"*

16.1 Furthermore, the preamble to the International Bar Association's Standards for the Independence of the Legal Profession adopted in 1990 records the following:

"It is imperative to establish an equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restrictions, pressures, or interference, as same is a prerequisite for the establishment and maintenance of the rule of law"

16.2 It must further be noted that for an Advocate to acquire membership to the International Bar Association one of the requirements is the Independence of the Bar in the country which he or she practices. At the World Bar Conference in London in July 2012, delegates were reminded of an incident of the rejection of an application that was made for membership of the International Bar Association by a Member of an Eastern Bar simply because the Eastern Bar was not an Independent Bar as contemplated above. This was due to the constitution of the Eastern Bar which required the Bar to annually report to its Government.

16.3 Our concern is that the same construction is found under Clause 4 of the Bill where the Council is required to report periodically to the minister to eroding its independence as explained above.

The Position in England and Wales

17. It appears the regulatory system proposed under Clause 4 of the Bill has much in common with that established in England and Wales half a

decade ago and has caused a significant burden on the cost of legal practice in those countries and has also proven to be a failure.

17.2 Our Country has an advantage of having recently achieved its democracy in 1994, and has a chance to learn good and bad practices from other democracies. For example, Baroness Deech the chair of the Bar Standards Board in England warned at the World Bar Conference in July 2012, in London that-

"Those of you contemplating a super regulator for the legal profession- don't"

17.3 Michael Todd QC, the retiring chair of the Bar Council of England and Wales, at the end of his term office in November 2012 also stated:

"I think there is a very good case for disbanding the overarching regulator"

17.4 Todd QC went on to criticize the burdensome costs the super regulator model was creating for barristers, their clients and the public purse in England. Our submissions are that these are some of the pitfalls from practical experience in other democracies like ours that need to be considered around the impact of Clause 4 of the Bill that seek to establish a single regulatory board for Advocates and Attorneys. There remain no cogent or compelling reasons why there should be a single regulatory board for the two different professions.

The Common Law (Latimer House) Principles on the 3 Branches of Government vis-à-vis the independence of the judiciary.

18. The link between the independence of the legal profession and the independence of the judiciary is appropriately reflected in the

Commonwealth (Latimer House) principles on the 3 branches of government agreed by the Common Wealth Law Ministers and endorsed by the Common Wealth Heads of Governments in Abuja, Nigeria in 2003. South Africa was a party to the adoption of these principles. Under Objective IV of the principles it is recoded-

"An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary"

Views of the UN Conference on the Prevention of Crime and Treatment of Offenders.

19. At the 8th UN Conference on the Prevention of Crime and the Treatment of Offenders in 1990, a document entitled " Basic Principles on the Role of Lawyers" was adopted. The principles were formulated to assist member states in their task of promoting the rule of law in their respective countries. Under the marginal heading "Professional Associations of Lawyers" the following principles appear at paragraph 24 and 25 thereof-

19.1 Paragraph 24

"Lawyers shall be entitled to form and join self-governing professional associations...to protect their professional integrity. The executive body of the professional association shall be elected by its members and shall exercise its functions without external interference".

It is therefore clear that in contravention of the above principles, Clause 4 of the Bill seeks to introduce a statutorily- imposed regulatory board governing the different professions, and this in our view compromises not only the independence of the legal profession but also flies in the face of the above UN principles.

19.2 Paragraph 25

This paragraph provides that professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal acess to legal services and those lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized international standards and norms.

It is therefore extremely important for all stakeholders involved in the law making process to take consideration of the contents of the above important guiding principles.

Provision of Section22 and 178 of the South African Constitution 108 of 1996.

20. Section 22 of the South African Constitution Provides as follows-

18.1 *"Every citizen has the right to choose their trade, occupation, or profession freely. The practice of a trade, occupation or profession may be regulated by law"*

18.2 Section 178 (1) (e) and (f) of the Constitution recognizes that there are two legal professions in South Africa namely, the Advocates' profession and the Attorneys profession.

Our interpretation of Section 22 of the Constitution is that, the section says a trade, occupation, or profession may be regulated by law and does not say must be regulated by law the latter construction if it were used in the section would have meant that it is mandatory or peremptory to super regulate the profession and this is absolutely not the case.

19 Conclusion

We propose that Clause 4 be reviewed in the light of the above submission and further propose that separate independent regulatory boards be established for the different professions in compliance with the above submissions.

17 /02/2014

HON MAXEGWANA (MPL) **DATE**
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