THE OPPORTUNITY OF THE LEGAL PRACTICE BILL, 2012

BACKGROUND

1. The Legal Practice Bill, 2012 as announced earlier this year by the Minister for Justice and Constitutional Development claims as its main aim to establish, subject to the Constitution and the rule of law, an independent, demographically representative unified legal profession whose services are less expensive to the people of South Africa than it currently is.
2. However, it propose to retain the distinction between attorneys and advocates now referring to them as legal practitioners practicing with a fidelity fund certificate and legal practitioners practicing without a fidelity fund certificate.
3. Further it proposes a merger of the current LSSA and the BCSA with the attorneys having the dominant representation in this new body to be known as the SALPC (South African Legal Practice Council) that governs the profession and reports to the Minister.
4. Then also there is to be a LSO (Legal Services Ombud), whose primary functions are to develop, maintain and enhance professional conduct (inclusive of independence) by all legal practitioners at all times and in the execution thereof, consults with and may make recommendations to the SALPC but reports to the Minister.
5. The Attorneys' Fidelity Fund and Board are retained the only difference being that it also reports to the Minister.
6. And a transitional mechanism is to be put in place to ensure, essentially, that the proposed merger is completed within a three year period.
7. Then, so it is claimed, the framework for the transformation of the current fragmented, divided, unrepresentative legal profession with its overly and outdated restrictive prescripts and limited access to its services will be in place and South Africans will have easier access to justice i.e. "legal services ... (will be) within the reach of the citizenry".

DISCUSSION

Introduction

8. At the outset it is observed that the LPB, 2012 (Legal Practice Bill) prefers the term "Practice" meaning in our current terminology the "offices/practice of an attorney" or "chambers of counsel (advocate)" thereby suggesting that it envisages to establish another species of corporate bodies. But on perusal it speaks only about "legal practitioner" meaning the professional that attracts personal liability in appropriate circumstances. This interchangeable use of "legal practice" and "legal practitioner" leads to confusion that the Canadians in the province of

Alberta, so it seems, eliminated during the 1980's by referring to their similar legislation as the "Legal Profession Act" – maybe a similar approach should be adopted here.

9. More importantly when transformation of the legal profession in relation to access to justice i.e. legal services, is debated, care should be taken to put it in its correct context. And this, albeit not an exhaustive one, is what this paper proposes and against that background i.e. the proposed context, it makes recommendations to strengthen the LPB, 2012.

The Context

Judiciary

10. The starting point, it is suggested, is to determine "who" or "what" constitutes the "judiciary"? In its dictionary meaning it refers to the judges of a state or country collectively but as an "arm" of government it can only refer to the system through which the Constitution, the rule of law and laws (common and statutory) are interpreted, validated and applied. The Constitution in chapter 8 calls it "Courts and Administration of Justice".
11. Significantly, however, this chapter 8 utilises the term "judiciary" only at two places namely section 174 (2) where race and gender are specifically identified as factors to be considered in the appointment process of judicial officers, and in section 178 (5) where *inter alia* the powers of the JSC is circumscribed. In the first instance it appears that the dictionary meaning of the word is meant but in the second instance, the meaning ascribed must be the judiciary as an "arm" of government since the JSC, constituted without its political members in terms of this subsection, considers matters that can only be described as judicial authority issues and advise parliament thereon.
12. Further it appears that this Chapter 8 excludes from being part of the judiciary, tribunals and forums where independent and impartial adjudication of disputes could also take place, but, it is suggested read together with section 34 with the heading "Access to courts", tribunals and forums of that nature appears to acquire similar status (and therefore authority) then its equivalent "court", and as such appears to form part of the judiciary.
13. The judiciary therefore functions not only in the formally structured courts but as an "arm" of government, at the very least, has a presence all over the South African society where disputes are independently and impartially adjudicated upon in a formal manner.
14. Therefore the term "judiciary" as an "arm" of government needs to be defined in such a manner that it excludes certain "informal" dispute resolution processes in order for the (formal)

"judiciary" not to function on that level. (The circumscription of "judiciary" as set out above will be used throughout this paper.)

Role players

15. In terms of section 178 of Chapter 8 of the Constitution the role players, besides institutions, functioning within and therefore comprising the judiciary as an "arm" of government are:
    a. Judicial officers interchangeably judges;
    b. Practising advocates;
    c. Practising attorneys;
    d. Teachers of law; and
    e. In terms of section 179 of the same Chapter, prosecutors. It is important to remember that "prosecution" is a very specific legal service and it is for that reason that the Constitution recognizes it through this section and deals with it in seven subsections. However since it is a legal service like any other legal services, it is rendered or exercised or executed, subject to judicial authority, through the judiciary to its recipient(s).
16. Significant is the fact that sections 178 (1)(e) and (f) use the word "practising" when it qualifies advocates and attorneys which must be contrasted with the word "practicing" that appears to be favoured by the LPB, 2012. The dictionary meaning of the word as used in the Constitution is pursuing a profession, in this instance either as an advocate or as an attorney. The apparent meaning ascribed by LPB, 2012 is suggested in paragraph 8 above with its attendant problems which becomes murkier by this paragraph.
17. But what it means, constitutionally, is that advocates and attorneys practising as Corporate Lawyers are included as role players within the judiciary (and without stretching the imagination also Prosecutors) because if not, this Chapter 8 would have excluded them by qualifying advocates and attorneys as "litigating" advocates and attorneys.
18. This i.e. as set out above is then also the extent to which the role players within the (formal) judiciary should be limited to.
19. Further what it means is that the Chapter 8 principles applicable on the judiciary, is also applicable on its individual role players otherwise the judiciary that they comprise collectively, cannot function to its optimum.

Vocational Qualifications

20. Currently the controversial four year academic LL.B degree gives a prospective legal professional entrance to either of the advocates' -, attorneys' -, corporate lawyers' -, magistrates' -, arguably judges' -, prosecutors' - or academics' professions.
21. Each of these professions subjects its entrants to vocational training that lasts for a period of time either on a fulltime or part time basis during which period these entrants will either receive a stipend as reward or nothing.
22. And migrating from one profession to the other does not necessarily exempt those electing to do so from having to subject themselves to the vocational training of his/her newly chosen profession.
23. Suffice to say that this haphazard way i.e. the professionally egotistical way of doing things with the attendant negatives as a result thereof, should stop.

Advocates versus Attorneys versus Prosecutors versus Corporate Lawyers versus Magistrates versus Judges versus Academics

24. Various commentators, recently and in the past, exhausted the subject matter of this paragraph already and as such will not be repeated here, suffice to say that the LPB, 2012 affords us the opportunity to address it.

RECOMMENDATION

Amendments

25. The proposed title should be changed to Legal Professions Bill (Act eventually) because various professions constitute the judiciary.
26. The term "judiciary" should be inserted and defined along the lines as proposed herein.
27. Our people know us as lawyers and as such the term "lawyer" should be inserted to replace the proposed "legal practitioner" and defined to include judges, prosecutors, advocates, attorneys, corporate lawyers and researchers of law (as academics or teachers of law wants to be known).
28. The LL.B degree as a minimum academic qualification plus the vocational training offered by each of these individual professions collapsed into a single legal professional qualification provides entrance to the attorneys, attorneys engaged in prosecution (prosecutors) and attorneys engaged as corporate lawyers' professions on successful application to the High Court.

29. The LL.M degree as a minimum academic qualification plus the vocational training of these individual professions collapsed into a single legal professional qualification provides entrance to the advocates, advocates engaged in prosecution (specialist prosecutors), advocates engaged as corporate lawyers (specialist corporate lawyers), advocates engaged as researchers of law and judges professions on successful application to the High Court.
30. This proposed legal professional qualification should run over a maximum period of two years on a fulltime basis and could easily be offered by universities with practitioners from the various professions presenting.
31. On the date of the expiry of the proposed transitional period:
    a. Only current advocates with seven years and more experience will, on successful application to the High Court, be allowed to continue practising as advocates, advocates engaged in prosecution, advocates engaged as corporate lawyers and advocates engaged as researchers of law or convert their registration to attorneys;
    b. All current advocates then with less than seven years experience and without an LL.M degree will, on successful application to the High Court, be allowed to practise as attorneys, attorneys engaged in prosecution and attorneys engaged as corporate lawyers;
    c. All current attorneys with seven years and more experience and an LL.M degree will, on successful application to the High Court, be allowed to convert their registration to advocates if they elect to do so.
32. NOTE: the LL.B degree partially completed or without the legal professional qualification entitles the holder thereof to practise as a legal advisor (current para - legals) for which different legislation, if necessary, should provide for.
33. All lawyers, as defined, practising privately including non - governmental corporate lawyers are subject to the authority of the Lawyers Fidelity Fund and Board (instead of the proposed Attorneys Fidelity Fund and Board) but prosecutors, state attorneys, governmental corporate lawyers and advocates engaged as researchers of law are specifically excluded from the authority of this Fund and Board.
34. Advocates are allowed to form partnerships with each other or with attorneys. Conveyancers and Notaries Public continue as specialists but those professions are also open to advocates as a further area of specialisation.
35. The NDPP and/or his delegate must be given a seat, expressly so on the JSC (Judicial Service Commission) and Legal Professions Council (instead of the Legal Practice Council).

36. Prosecutors, either as attorneys or advocates engaged as such, are subject to the authority of the LSO.
37. Insert in the membership termination section that judicial appointment terminates membership because different legislation, necessarily so, provides for that profession.
38. All references to the Minister must be replaced with the JSC (Judicial Service Commission) because it is important, from a separation of powers perspective, that the eventual Act demonstrates that the Executive and Legislative "arms" of government merely facilitated in the necessary transformation process of the Judiciary as an "arm" of government.

Affected Legislation

39. It would be better if section 178 (1) of Chapter 8 of the Constitution gives the NDPP and/or his/her delegate a seat on the JSC then reading it into the relevant section.
40. Section 22 (5) of the NPA Act should be amended to include the LSO to ensure clear lines of authority for the LSO and NDPP respectively *vis-a-vis* the professional conduct of attorneys or advocates engaged as prosecutors.
41. The distinction between magistrates and judges should disappear as a matter of extreme urgency.
42. Legislation on education and universities in relation to advocates engaged as researchers of law should be amended accordingly.

Some of the Advantages

43. The separation of powers – principle is not only kept intact but enhanced.
44. The judiciary, as an "arm" of government is clearly defined.
45. The judiciary, as in the collective of judges of a state or country, is demystified.
46. The distinction between advocates and attorneys is based on genuine substance i.e. the one being a specialist and the other a general practitioner.
47. Advocates, inclusive of those engaged as corporate lawyers, are hold to account, just like attorneys, inclusive of those engaged as corporate lawyers, to the Lawyers Fidelity Fund and Board, can form partnerships and also practise as Conveyancers and Notaries Public i.e. the "playing fields" are levelled.
48. Prosecution, as a legal service is properly recognised and obliged to play its role within the judiciary as the Constitution demands.

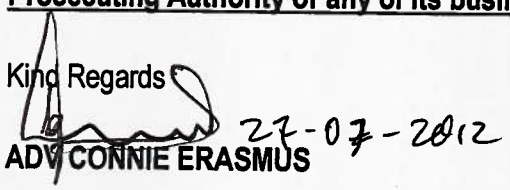
49. Attorneys and advocates engaged as corporate lawyers practising as such either within the private or public sector, are properly recognised and obliged to play their role within the judiciary as the Constitution demands.
50. The new Legal Professional Qualification obviate the need for the continuation of the individual egotistical vocational courses and a simple induction or orientation programme at the relevant firm or institution would suffice i.e. the legal profession receives a product that is fully trained both on academic and professional (operational) levels after a six year period. This means that the newly qualified lawyer either sets up his/her own practise on completion of his/her training or is taken up in an existing firm where s/he adds value immediately.
51. The legal professions are unified in terms of academic and vocational training as well as professional conduct, thereby allowing for a more competitive and as such higher standard of rendering legal services.
52. The community based organisations and non – governmental organisations receives a boost in that incomplete LL.B and LL.B graduates without the legal professional qualification, becomes available to them as Legal Advisors whom must be provided for in different legislation.
53. The judiciary, as an "arm" of government, is strengthened.

CONCLUSION

54. I submit, with the inclusion of this approach in the LPB, 2012 we will go a long way in rendering the legal services that South Africa expects from us.

NOTE: the views expressed herein, are those of the author and not those of the National Prosecuting Authority or any of its business units.

Kind Regards



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