

REGULATION OF THE BARS - A SOUTH AFRICAN REPORT CARD

To those living in the moment, historical events may seem unexceptional, even mundane, merely part of one's ongoing daily experience. The significance may only be appreciated much later. Today we all stand on the brink of one of these moments in our South African legal profession – namely the implementation of the Legal Practice Act, and the consequent change from a largely split and self-regulated profession, to one which is partially publicly regulated, and partially combined. It has been my personal privilege to be part of a three-year journey as a member of the responsible transitional body, namely the National Forum, that was set up to oversee the transitional phase to the new dispensation and it is equally my privilege and honour to address you on the topic today.

You might need some explanation as regards what constitutes the historical moment and I have set this out in slide 3¹– the chronological progression. You will see that the Legal Practice Act was published on 29 September 2014. On 1 February 2015 (which was the start of my personal journey), parts 1 and 2 of chapter 10 came into effect and that put into effect the National Forum, which is the transitional body which comprised representatives from the various interested bodies and organisations and parties. There are representatives from the Attorneys' profession, the various Law Societies comprising those bodies, and then the Bar. The General Council of the Bar nominated 5 representatives and there are also representatives from 3 other

¹ This is an edited transcript of the speech given by me at the 2018 World Bar Conference at Stellenbosch. It is meant to be read in conjunction with the accompanying power point presentation.

Advocate organisations. Then there is a vast body of unregulated Advocates out there who do not belong to any organisation. This is because of the curiosity of the South African legal landscape that you can be admitted as an Advocate and practice as an Advocate merely upon graduating from University and making an application to Court. The General Council of the Bar and constituent Bars have introduced some more rigorous standards of training which apply to them, but that is only as far as they are concerned.

We are now in 2018, and the National Forum has largely completed its task. It has published a fairly comprehensive code of conduct, and rules and regulations which I will mention again in a little while. In August and September this year, the Legal Practice Council will be elected in accordance with a particular process. On 1 October 2018 which is just around the corner, time wise, the Legal Practice Council will come into existence and on 31 October 2018 the remainder of the Act will come into effect. The Law Societies will cease to perform their functions, as you will see there in slide 3, they will be dissolved, and from this point onwards the Legal Practice Council will perform the regulatory functions; and I emphasise the regulatory functions for the entire legal profession, both Advocates and Attorneys. So, where the Advocates in South Africa were previously self-governed, that will no longer be the case, they will be part of a body known as the Legal Practice Council which will then perform the functions of the Regulator.

As to legal practitioners in South Africa, you will see in slide 4 a geographical spread of those practitioners. Those figures are for actual practicing Advocates and practicing Attorneys. You will see there that the figure is 32 532 for the total of

practicing lawyers, but that figure itself is open to question because it relies upon fairly uncertain statistics sourced from the Department of Justice, (which regrettably has not kept accurate statistics), and also culled from the Attorneys' organisations and the Advocates' organisations. Of that number, about 4000 are Advocates, so the vast majority of those practitioners are Attorneys. The estimate is that there are probably another 10 000 admitted practitioners, with roughly the same split between Attorneys and Advocates, who are not practicing. They will also be brought into the regulatory fold, and as far as the geographical statistics are concerned you will see that Johannesburg has by far the lion's share of the practitioners, at 16 400. Cape Town is next, 5 309 and then Durban is 3 669, if the figures are to be given any credence.

You will see in slide 5 that the new regulatory governing structure will comprise 23 council members, 10 Attorneys, 6 Advocates, 3 Minister designates, 2 Law Teachers, 1 Legal Aid Representative and 1 representative from the Legal Practice Fidelity Fund.

The Legal Practice Fidelity Fund, which is very familiar to South African lawyers, is a very important institution, because it has all the money. Over the years, interest earned from monies in Attorneys' trust accounts has accumulated in a fund. There is a large amount in the fund which is used to pay claims against Attorneys.

The structure underneath the Legal Practice Council is presently proposed to be as follows; there will be an Exco, a Chairperson, a Deputy Chairperson and 5 members and then the regulation will devolve downwards. The idea is to have the various

subcommittees, namely Transformation, Rules, Ethics, Research, Disciplinary, Education/Training, Practice Development, Professional Affairs, Finance, Audit, Risk and Compliance. Devolving further down you will see that there are Provincial Councils. There was some debate at the National Forum as regards the number, because the Act talks about a minimum of 4 but progressing to a maximum of 9. The idea was to try and set up 9 provincial councils right from the outset, so the structure will be in place and they can reach the maximum number of practitioners. Then you will see the various Provincial Councils that are listed there.

Underneath that structure there will be the various subcommittees. Only in the subcommittees is there provision for some type of separate governance for Advocates because the Act says that you can have a subcommittee that comprises purely Advocates, or purely Attorneys, that deals with their own affairs. It is very much a case where separate governance has been subsumed and largely disappeared under the new structure. But there will be a form of local administration, as it were, in respect of the "own affairs" sub-committees.

How much will all of this cost? No one really knows, but it will be expensive. Slide 6 is one of the estimates that was produced in 2016, and this was commissioned from a Professional Service Advisor and you will see the figures that are set out there totalling the large annual amount of around R300 Million. This is only about €20 Million, they tell me, small change for some of the countries represented here today.

In a speech like this with restricted time, there is not an opportunity to delve into all of the details as one would like to. So I have had to select some topics that I think

would be of most interest, and you will see them there on the screen as slides 7 and 8.

First, will we continue to exist as Advocates in South Africa? The good news is yes. The Act specifically makes provision for our continued existence as a referral profession. I might say that there was a move among certain of the Attorneys' representatives during the National Forum process, to move towards a more fusion-type situation, but eventually sense prevailed and we are back to the situation set out in the Act that Advocates as specialist referral practitioners will continue to survive.

There has however been a concession to some public pressure from certain sectors and we now have a new form of practitioner amongst us, who can take instructions directly from members of the public but only if he has a Trust Fund in compliance with the requirements regarding the maintenance of a Trust Fund and a Fidelity Fund Certificate. The Trust Fund Advocate is subject to the same ethical requirements as are the general body of Advocates. It remains to be seen how many legal practitioners will follow this route, but my prediction is that they should be in the minority due to having two sets of requirements with which to comply, namely, those applicable to Advocates and Attorneys. In my view it is certainly not an easy route for people to follow as the requirements regarding Trust Funds are fairly onerous. The problem is that if you do have an Advocate who makes off with someone's money then the public would blame all of the Advocates, if there is press sensationalism, but that is something with which we will have to live under the new dispensation.

Then, very importantly for today's topic of Regulation of the Bars, you will see that Advocates are in the minority. If it comes to voting there is a total of 23 Council members and if the Attorneys and various other stakeholders decide to vote against something, the Advocates would be out voted: that is the reality, the Attorneys have more votes.

The positive news for the independence of the profession however, is that although the Minister has 3 designates, the Minister does not have voting control. The lawyers still have the majority of representatives and one would hope that the Minister designates persons who are lawyers themselves, or who at least know what they are talking about in relation to legal matters.

I do not think that there is any undue reason, at this stage certainly, for concern about Government control of the profession under the new Act. It is not there, statutorily at least. There is more control than previously existed though, in an indirect form. The South African statute talks about regulations that have to be passed arising from recommendations by the National Forum, and that has to be done by the Minister. This raises the question; how will the Minister do this? The Act says that the Minister has to do this "*in consultation*" with the National Forum and the Council in order to give effect to the recommendations. Other sections of the Act refer to "*after consultation*", which has a different meaning. Thankfully that phraseology is not used as often as "*in consultation*".

The present state of our law, as I understand it, is that when the words “*in consultation*” are used this means that it must be with the agreement of the other party. Either side has a right of veto. Where the words “*after consultation*” are used then the Minister theoretically could proceed without the agreement of the other party, but he has to do so in good faith and on reasonable grounds, and that would be objectively justiciable and subject to review proceedings. That is something that I think will take some time to work out. What I can say from my personal experience of the process thus far, is that it has been conducted in the utmost good faith by the various branches of the profession and the Minister's representatives. I think there is very good reason to be optimistic in that regard.

Referring to slide 8, you will see the topic of Education - what is going to happen under the new dispensation? The length of training has settled down, after much debate, to 1 year training for candidate attorneys and 1 year for pupils, with approximately 4 months of common training and specialised pupil training thereafter.

As to costing, the proposed levies on practicing practitioners are set out in slide 8 and you will see there that the projection is approximately R3 500.00 to R5 000.00 per annum, which is relatively modest and that is only made possible by virtue of a fairly healthy annual contribution from the Fidelity Fund. The estimate is that it will be approximately R90 Million to R100 Million per year that the Fidelity Fund would contribute to this process.

The Government regrettably, although it wants more public control, thus far has not come forward with any additional public funds, but hope springs eternal in the human breast. There is some sentiment that perhaps we don't want the money because that may erode the independence of the profession, again that is something that will have to be worked out in the years to come.

For those of you who may be concerned about this from a South African perspective, the existing status of Senior Counsel, for those who already have it, has been retained. It was not possible to agree during the National Forum process as regards what will happen regarding new Silks. There was a feeling amongst some of the Attorneys' representatives that they wanted to be called Senior Counsel even though it was pointed out that "*Counsel*" was traditionally a term reserved for Advocates. There was some sentiment that Attorneys could be given a status equivalent to Senior Counsel and could be called "*SLP's*" – i.e. an acronym for Senior Legal Practitioner until someone pointed out that they might be called "*Slips*". The final situation is that it is left up to the Legal Practice Council itself, once it comes into operation, to determine what will happen as regard "*Silks*": - whether the status will be retained; whether it will be given to Attorneys; or whether it will be reserved only for Advocates.

Fees – a topic of no small concern to some of our members and I would venture to suggest to some people here today judging by the remarks made in relation to the reluctance to accept judicial appointments in other jurisdictions and the problems that judicial officers are facing in other jurisdictions regarding their pensions. Happily, our Judges are in a fortunate position regarding pensions because they

retire on a full Judge's salary provided that they have served a prescribed minimum term. That is another whole topic. Going back to the question of fees, these must be set at a reasonable level in order to maintain standards and is a concern for the Attorneys' profession as well. What the new Act does provide, and this has not been done before, is that it will regulate the fees position between the Advocate and the Attorney and between the Attorney and the client and there will be some form of tariff. What that tariff is, one does not know at this stage and that is something that will be dealt with by the South African Law Reform Commission. Following a long process there will be some tariff that will emerge at some future time. There may well be problems in that regard but again we hope and put faith in all those concerned to arrive at some sort of balance between retaining an incentive to practice, and public access to justice.

The regulatory framework referred to in slide 9 is already in place for the new dispensation. As I have indicated, there is a code of conduct that has been published and I can say from the perspective of my involvement in work-shopping the code of conduct through the rules and governance sub-committee that we have a good product. We took the Advocates' code of conduct and Mr Justice Sutherland re-worked that to modernise it. It was then work-shopped through the National Forum and we now have an improved version of the Advocates' code of conduct which applies uniformly to Attorneys who appear in the High Court, as well as to those Advocates who were previously not subject to that code of conduct. Judicial officers will now have the assurance that anyone who appears before them is subject to a uniform code of conduct that is readily accessible in the Government Gazette. The National Forum has also drafted all the rules and

regulations for the Legal Practice Council in order to enable the Legal Practice Council to function from inception.

The only two aspects that are currently outstanding are first in relation to the situation of the KwaZulu-Natal Governance structure - whether it will be situated in Pietermaritzburg or in Durban, and secondly whether the number of the provincial representatives of Advocates in most provinces should reduce from 4 to 2. It seems that sanity is prevailing in that regard; the matter is presently before the Minister and I am reasonably confident that the number of Advocates at provincial level will be retained at the level that was agreed.

There has also been a fairly intensive process in settling upon the numbers to address the demographics and gender concerns and the various other factors that are listed in Section 7 of the Legal Practice Act. We feel, as the National Forum, that it has been a very difficult task to accommodate all the requirements, but that we have agreed upon the best possible negotiated solution in that regard. We hope that this will assist in the transformation of the legal profession, and that it will go a long way towards redressing the imbalance between the present composition of the various structures, and the wider demographics and gender statistics.

As to the pros and cons, you will see in slides 10 and 11 that there are some negatives: there is uncertainty, the new type of Trust Fund Advocate that poses some dangers and challenges, there is the mention of a fees tariff and the economic implications of that. There is also some erosion of the independence of the

professions; undoubtedly the Government has more of a say, and there is a fear of declining standards under the new dispensation.

On the positive side; there is a better and more universal code of conduct, and the structure is more democratic, transformative and equitable than the old order.

Then finally on the positive side, we believe that the new structure should have greater legitimacy amongst the wider public.

CONCLUSION

My experience over the 3 years in the National Forum has left me feeling that, in keeping with our national DNA as South Africans, we have been bold and brave in forging this new identity. Without a tremendous degree of reasonableness and goodwill between practitioners of all races and gender, this would not have been possible. I am positive that we have achieved a good result and that having shaped the history, we, as South Africans, can successfully implement it.

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