Legal Practice Bill:

Discussion paper submitted to the AFT (WLD) Committee on the LPB

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The Legal Practice Bill can be described as a piece of legislation through which the Justice Ministry seeks to create a framework that can serve as a proper platform for the purpose of redressing the imbalances, within the entire legal profession (attorneys and advocates), stemming from the gross lack of transformation that came about as a consequence of our divided and painfully repressive past.

In reaching this goal, it makes provision for the existence of what is termed 'legal practitioners,' meaning the two categories of the Bar (advocates) and attorneys' profession (attorneys), who will be regulated by a single national Legal Practitioners Council.

The Bill allows legal practitioners to belong to voluntary associations such as the Law Society of South Africa (LSSA) and the GCB of SA. Such voluntary associations would be accredited by the Legal Practitioners Council.

The National Legal Practitioners Council would in terms of the Bill, be empowered to regulate discipline, ethics, protection of the public, as well as a uniform system of training, which would be in respect of court procedure and trial advocacy. The category of practitioners who will require Fidelity Fund certificates will still have to undergo the requisite bookkeeping training provided by the LSSA in addition to the above training. The requirements for admission as a legal practitioner, be it for an advocate or an attorney, will also be stipulated and governed in terms of the Bill once enacted. At any rate, the Bill brings nothing new to what we already have in the Attorneys Act 53 of 1979, as well as, the Admission of Advocates Act 74 of 1964, as amended.

In my view, it would be prudent if the Legal Practice Bill would empower the Legal Practitioners Council to deal basically with issues of regulation, and then delegate issues such as discipline, ethics, as well as the training of practitioners, in the hands of the voluntary associations such as the LSSA and GCB. These voluntary associations are best placed and positioned to provide the requisite training for practitioners who belong to such voluntary associations. Regulation could provide for joint training as prescribed. We as advocates have no desire to arrogate to ourselves powers that fall within the purview of the attorneys' profession, since this would be in conflict with section 22 of the Constitution of the RSA, Act 108 of 1996. The legislature would not be able to justify such a violation under section 36 of the Constitution.

In respect of disciplinary proceedings, it is submitted that it would serve both professions best if the LSSA and GCB, were to be allowed to retain their disciplinary jurisdiction and functions, and a structure superimposed above them to exercise appellate jurisdiction before matters reach the High Court in the form of either a suspension, an interdict, or even a striking off application.

This approach will in my view ensure that only matters that are deserving of going to court will ultimately be referred to the courts.

The Bill could stipulate that the Legal Practitioners Council could, for example, recommend continuing education for practitioners, as provided by the GCB to its members, through expert workshops and continuous advocacy training, along a structured and agreed upon program with the other voluntary associations.

The Bill makes provision for the composition of the Legal Practitioners Council to be structured as follows:

- Members nominated from the advocates' profession;
- members nominated from the attorneys' profession;
- members nominated from the ranks of the general public;
- the principle of non-domination of the council by one category of legal practitioners to the detriment of other legal practioners;
- the representation of paralegals in the council.

This is inconsistent and incoherent as the Bill provides for the fusion of the two professions and the disappearance of the distinction. It is also envisaged that the Minister of Justice and Constitutional Development will have wide discretion to overrule nominations by the profession.

Fusion or the existence of two distinct categories of practitioners

The contentious issues that relate to the fusion of the two professions into one, is nothing new in the history of the Republic. It can be traced back to the 1860s when Kotzé CJ, rejected the purported merits emanating from the argument of De Villiers J that the fusion of the two professions into one would have the net effect of lowering the costs of litigation.

In 1913, the Advocates and Attorneys Bill which was published in the Union's Government Gazette of 14 of January 1913, was introduced in Parliament. That Bill was rejected by the legislature at the time.[1]

In 1959, AS Hoppenstein expressed sentiments in favour of fusion as the answer to the high cost of litigation. In 1995 attorneys were granted the right of appearance in the superior courts. In the present climate some of his argument would not hold water.

In addition to the attack on the divided

Bar and attorneys' profession at the instigation of AS Hoppenstein[2], Catus also launched a barrage at the existence of the Bar and the attorneys' profession, by amongst other things, making mention of the fact that the increase in the magistrates' courts jurisdiction with regard to criminal law and civil law matters, had resulted in a drop in the need for junior counsel. These junior counsel had in the past appeared in court in the bulk of those matters that used to feature in the higher courts, but had, as a result of the increase in the jurisdiction of the magistrates' courts, now been relegated to the magistrates' courts, and that work was now being done by attorneys.[3]

In 1966, Scipio in a response to Catus dealt with the fact that fusion of the Bar and the attorneys' profession, and the creation of a separate division of the court in each province could never work. He points out that Catus neglected the fact that even though the workload of the magistrates' courts had gone up as a consequence of the increase in jurisdiction, the workload of the then Supreme Court had also gone up in respect of appeals stemming from the very matters initiated in the magistrates' courts.

Judge Claasen in 1970 argued for the retention of the Bar and the attorneys' profession. He rejected the cost argument and refered to the American system which was completely fused, and where the cost of litigation, as compared to what was then the position in South Africa, was much higher. He argued that this could be attributed to the fact that in a system where fusion prevailed, one would require a lot more manpower to achieve what we were then able to achieve with the limited resources in a divided Bar.

In South Africa, advocates who practise at the Bar are available to the public. Small law firms or the biggest law firms have equal access to the services of counsel. Therefore, in a system that has a Bar and an attorneys' profession, the playing fields are levelled in court on account of the fact that the public, through the attorney, is able to gain access to the best brains that specialise in litigation, which best brains are to be found at the Bar.

It is fair to say that fusion would have the net effect of depriving the South African public of the best skills with regard to litigation in court.

The idea of fusion was also debunked at a symposium on the fusion of the profession held at the University of Pretoria on 15 October 1966. Some of the advantages and disadvantages dealt with at the symposium are the following:

Advantages of fusion

- It was the natural and proper procedure for one man to seek a task through from start to finish.
- In the countries where fusion exists, the system works well and no-one has suggested that the quality, either of the members of the profession or of the justice administered, has suffered as a result of fusion.
- The test of any system is the service it provides to the public. The service in the countries where fusion exists is in no sense inferior to the service provided in other countries, and in the view of some of the delegates it is indeed better.
- In countries where the population is small and scattered fusion of the two branches of the profession is the only possible system.

Disadvantages of fusion

- Except for countries where small and scattered communities made separation impractical, there were no advantages whatsoever in fusion.
- Fusion of the profession does not mean a reduction in the costs of litigation, but possibly the reverse (see the United States example).
- The quality of the work in countries and states where fusion exists, is not of the same level found where the professions are separate.
- A higher quality is found in occupants of the judicial Bench where the professions are separate. As a corollary of this, the respect of the public for the courts in these places, are greater.
- The intimate atmosphere of confidence which exists between the members of the Bench and the Bar is destroyed once fusion has taken place.
- No man can be a jack of all trades, and the separated system enables young attorneys to obtain the services of a specialist in any particular field.

The argument in favour of fusion and any attempts in this regard would have very little chance of success, if any, because fusion would violate section 22 of the Constitution, and this violation would not be justifiable in terms of section 36. It is therefore submitted that there are less invasive means of achieving the legislative purpose of the Bill without destroying the two categories of the legal profession. Fusion, in my view, would have the net effect of destroying the referral profession as we have come to know it, and deprive us of engaging in a profession of our choice, as stipulated in section 22.

Conclusion

In order for the Legal Practice Bill to fulfil its main object, which is the transformation of the two categories of the legal profession in South Africa, the following issues would inter alia have to be addressed by this piece of legislation:

(i) Ensuring that the South African public has access to justice through the provision of legal services in respect of attorneys and advocates at a reasonable price;

(ii) ensuring that persons from previously disadvantaged population groups enter the profession;

(iii) the retention of these very members coming into the legal profession from the previously disadvantaged groups, through reforms that would make it possible for these individuals not to be claimed by the high attrition rate in the two professions that stems from briefing patterns as well as the non-payment of junior advocates of colour by attorneys;

(iv) the maintenance of high standards, through the two categories of the profession;

(v) clear stipulations, in respect of ongoing further education for legal practitioners which should be made mandatory, with the possibility of a score card in this regard;

(vi) ensuring that the best features of the current system are retained, while the bad ones are jettisoned;

(vii) ensuring that the non-payment of counsel's fees for services rendered to attorneys' firms is once more rendered unethical and punishable.

If the Legal Practice Bill manages to deal with these problems at this point in time prior to the situation becoming dire, then we might end up with one of the best regulatory frameworks in the world, if at all not the best.

Endnotes

[1] 1913 (30) 1 *SALJ* 45-46.

[2] 1959 (76) 3 *SALJ* 296-303.

[3] Catus 'The Changing Pattern of the Work in the Courts' 1965 (82) 3 *SALJ* 406-407.