

GCB *ad hoc* committee on the Legal Practice Bill

Report for constituent Bars on the regulation and governance of the advocates' profession under the Legal Practice Bill

By **IAM Semanya SC**, chair of the General Council of the Bar

Introduction

- 1 The GCB has had an *ad hoc* committee in place for some years, responsible for engaging with the Department of Justice and Constitutional Development ('DOJ') and the attorneys' profession (represented by the LSSA) in connection with the Legal Practice Bill. The committee is led by the current chairman of the GCB from time to time.
- 2 The Legal Practice Bill has generated wide comment and raised significant concerns from and within various structures of the legal professions and other interested parties. This report is confined to only one aspect of the Bill, namely the role of practising lawyers in the regulation and governance of the advocates' profession under a new dispensation, and its content is restricted to the essentials. There is a widely held view that the long term viability of the advocates' profession (and perhaps also its more immediate viability) is likely to hinge upon the governance and regulatory structure subject to which advocates will practise in the future. For that reason it is important that all members of the Bar should be aware of where we stand at present on this issue.
- 3 There appears to be a broad consensus at the Bar that it is appropriate that there be a professional body on which both attorneys and advocates are represented, which will play a role in the affairs of both the attorneys' and advocates' professions. This body is the proposed Legal Practice Council.
- 4 Early proposals with regard to the restructuring of the affairs of practising lawyers in South Africa involved what might be called 'naked fusion'. For so long as that was the case the role for a Legal Practice Council in the governance and regulation of lawyers was clear. It would have control subject only to the provisions of the legislation which would establish it. Different models were proposed later. The Legal Practice Bill which has been placed before Parliament provides for a single profession made up of 'legal practitioners', but for two modes of practice, one with and one without a fidelity fund certificate. Thus, notionally in any event, attorneys and advocates are retained. The question then arises as to whether, and to what extent, attorneys and advocates respectively should have the power and right to govern and regulate themselves.
- 5 We believe that the dominant view amongst advocates in South Africa may be stated simply (if not simplistically, for which we apologise) as follows:
 - (a) As a matter of fact South Africa has at all material times had two legal professions, a division of lawyers which serves the country *inter alia* by providing a resource available to all comers. That situation would not prevail to nearly the same

extent in a fused profession, where the client affiliations which characterise the attorneys' profession would restrict access to scarce legal resources. The maintenance of a viable advocates' profession is in the national interest for that reason and many others.

(b) Our courts have consistently regarded the advocates' profession as separate and distinct from that of the attorneys, and that distinction is recognised in the Constitution.

(c) Section 22 of the Constitution, which provides that the practice of a profession may be regulated by law, cannot be read to convey that the regulatory impact of law on all professions must be the same. A legal profession must be independent; its independence is essential not only to the performance of its own functions, and to the protection and advancement of the rule of law, but also to the ultimate independence of the judiciary.

(d) Self-regulation is an indispensable feature of the independence of a legal profession.

(e) Advocates should accordingly have the right to govern and regulate themselves, subject only to the overriding power of the courts.

(f) Co-governance of the advocates' profession by advocates and attorneys is not self-governance or self-regulation. Logic dictates that. And questions of independence aside, given that attorneys outnumber advocates, and that attorneys are in a commercial sense the customers of advocates, one can hardly have confidence in the fact that a governance and regulatory regime in effect controlled by attorneys will look to the continued viability of the advocates' profession.

- 6 This report is generated by the fact that the information available to the *ad hoc* committee suggests that the amended Bill to be put before Parliament following the recent Parliamentary Portfolio Committee hearings is likely to be one which offends the dominant view at the Bar which we have attempted to describe immediately above. We are led to believe that the Minister intends to see the Bill through Parliament before the elections due in 2014.

Provisions of the Bill

- 7 Clauses 4, 5 and 6 of the Bill have the effect that the Legal Practice Council ('LPC') exercises jurisdiction over all legal practitioners and has the power and duty to regulate all legal practitioners. In terms of clause 7 of the Bill, the LPC consists of 21 members, 16 legal practitioners and 5 others. Of the 16 legal practitioners 10 are attorneys and 6 are

- advocates. They are elected in accordance with a procedure determined by the LPC and it seems to be clear that all the members of the LPC who are legal practitioners will be elected on a voters roll common to advocates and attorneys. (That is certainly how the LSSA views the matter.)
- 8 In terms of clause 17 a decision of the LPC is the decision of the majority of members present at a meeting, and the chairperson has a casting vote.
 - 9 The LPC may delegate any of its powers to one of its members, a committee of the LPC, its executive committee, or a regional council. Clause 21 is to that effect, and it provides further that the LPC can vary or revoke decisions taken under delegated powers.
 - 10 Clause 23 obliges the LPC to establish regional councils and contemplates the LPC delegating to such regional councils powers and functions 'better performed at regional level.' The LPC must determine how regional councils are elected, but insofar as regional councils are comprised of legal practitioners, the membership of a regional council must reflect the composition of the LPC itself.
 - 11 Putting aside the question of state involvement in the regulation and governance of the proposed legal profession (a subject with which this report does not deal), the position is that the ultimate 'legislative' power with regard to the conduct of all legal practitioners will vest in the LPC, and the day to day regulation and governance of the practice of an advocate (ie what is done by the current Bar councils with Bar resources) will be undertaken by a regional council of legal practitioners. Attorneys will be in the majority in both instances.
 - 12 During the course of discussions representatives of the DOJ have pointed out that the Bill does not affect the right of advocates to form voluntary associations. But no explanation has been offered as to what the purpose of such a voluntary association would be, given that all the powers exercised, and all the regulatory and governing functions performed by, the current voluntary associations will now vest in the regional councils and the LPC itself.

A brief account of the Bars' response to the current Bill

- 13 In 2010 the *ad hoc* committee put it to the DOJ that it was necessary that the advocates and attorneys should each regulate and govern themselves, that they should have the statutory power to do so, and that this could be achieved by establishing a council of attorneys and a council of advocates occupying a position below the LPC. The LPC would deal with matters common to the professions, as would its regional councils. The attorneys' and advocates' councils, and their respective regional councils, would deal with the regulation and governance of the professions.
- 14 This proposal was rejected by both the DOJ and the LSSA. In the course of discussions with the LSSA last year, the *ad hoc* committee agreed to explore the possibility of a structure which would empower the advocate members of the LPC to make the decisions of the LPC relating to certain core matters of concern only to advocates. At the regional level the regional councils would be divided into attorneys' and advocates' chambers, and the day to day regulation and governance of the professions at regional level would be conducted by these chambers. When this proposal was put to the DOJ (in effect jointly by the LSSA and the GCB committee) at a subsequent

meeting, the leader of the DOJ's delegation expressed a level of satisfaction with the proposal. The attorneys appeared happy with it.

- 15 The *ad hoc* committee then reported to the GCB which sought input from the Bars which revealed that it was necessary for the GCB to obtain a mandate. A weekend meeting was held at which each Bar was represented. The executive committee of the GCB was also represented. The meeting did not endorse the proposal previously discussed with the DOJ and the LSSA, but instead endorsed a proposal (with a dissent from one member of the Exco of the GCB) that the LPC itself should have two chambers, one comprised of attorneys and one of advocates; that the two chambers should determine and be responsible for the regulatory regime, and governance, of the profession it represented; and that each chamber should delegate to its own regional councils (which in the case of advocates would be placed at the seat of each High Court) the power and duty of governing under the regime thus established.
- 16 This proposal, accompanied by a proposal that there should be equal representation of advocates and attorneys on the LPC, was put to the Parliamentary Portfolio Committee on behalf of the GCB.
- 17 The mandate of the *ad hoc* committee in its exchanges with the DOJ and the LSSA was engagement with a view to achieving the commitment of those bodies to the best outcome (from the Bar's perspective) to which they could be persuaded. This was also the approach of the Bar meeting referred to above. This approach recognises that neither the provisions of the Constitution nor our common law puts the Bar beyond regulation, but seeks to achieve the requisite degree of independence for the Bar within the framework of the DOJ's political will to restructure the regulatory regimes governing the legal professions in South Africa. The two-chamber proposal put by the GCB to the Parliamentary Portfolio Committee was accepted by the Bars as one which meets the minimum standard of self-regulation required for independence. (It is stressed that this observation is made within the confines of the subject addressed in this report. State and third party involvement in, and other provisions of the LPB affecting, the regulation of the professions are not dealt with here.)

The response of the DOJ to the Bars' submissions

- 18 The DOJ seems to have interpreted the Bars' suggestion that there should be 'chambers' within the LPC as a suggestion that advocates should be given a veto right in respect of matters peculiar to advocates. The Department's response is that the LPC can achieve that, presumably by delegating such matters to a committee of advocates. The DOJ does not deal with the fact that the LPC will not be obliged to do that, and that it can revoke any such delegation and take over the function itself at any time.
- 19 In response to the GCB's proposal that regional councils of advocates and attorneys should be separate, the DOJ states that the model, in reality, '*boils down to the retention of the current arrangements. The Department is of the view that this will perpetuate the issues that the Bill seeks to transform.*' The DOJ adds the observation that it accepts that the LPC will have to accommodate the differences between attorneys and advocates when determining the powers of regional councils.

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- 20 Precisely the same response is given by the DOJ to a proposal put by the LSSA that regional councils should comprise separate chambers of attorneys and advocates.
- 21 In response to the GCB's proposal of equal representation on the LPC the DOJ states that there 'are more attorneys than advocates in the country,' and no more.
- 22 The responses of the DOJ to the various submissions made to the Portfolio Committee were furnished to the *ad hoc* committee by the LSSA, which presumably received the document from the DOJ.

Recent meeting with the LSSA

23 The *ad hoc* committee had a meeting with the LSSA on 20 April 2013. The representatives of the LSSA expressed the view that the Bill to be placed before Parliament will not deviate, insofar as governance issues are concerned, from the one currently before Parliament. The door appears to be closed on further discussion with the LSSA on the provisions of the

LPB affecting the issue of governance. The *ad hoc* committee of the GCB has itself received no indication that the DOJ (or the Minister) proposes to deviate from the stance which we have described above.

24 The *ad hoc* committee accordingly finds itself in a position where, unless new initiatives are undertaken, it can do little more than make a contribution to preparation for the enactment of the Bill, and especially for implementation of the transitional provisions set out in chapter 10 of the Bill.

25 In anticipation of that process it has been raised in discussions between representatives of the LSSA and the GCB *ad hoc* committee that details of the following aspects, in particular, ought to be explored:

- (a) the quality of law degrees; (b) vocational training; (c) continued professional development; (d) assessment; (e) foreign qualifications; (f) the referral rule; (g) capping of fees; (h) conversion of registration; (i) remuneration of candidate legal practitioners. **A**

Annual general meeting of the GCB

By **Francois Botes**, Pretoria Bar

The Pretoria Bar hosted the 68th Annual General Meeting of the GCB on 19 July 2013. Delegates from all the constituent Bars of the GCB attended the meeting at the Royal Elephant Hotel and Conference Centre in Centurion. Members attended an informal welcoming function on Thursday evening, 18 July 2013, in the cellar of the Royal Elephant Hotel. This function created an ideal platform for members to familiarise themselves with the important issues and challenges that the Bar is dealing with. It soon became evident (just before midnight) that our colleagues had solutions to all the prevailing challenges that we are currently facing and with the assistance of Bacchus, the challenges occasioned by the notorious Legal Practice Bill seemed to be an easy hurdle to overcome. The fact of the matter is, however, that members enjoyed the opportunity to interact with each other on an informal basis.

The formal proceedings commenced early on Friday, 19 July 2013. Two colleagues from the Namibian Society of Advocates also attended the meeting as observers.

The highlight of the occasion was the gala dinner which was held at the same venue. The guests of honour were Justice Zak Yacoob, who recently retired from the Constitutional Court, and Mrs Yacoob. The Sydney and Felicia Kentridge Award for Service to Law was awarded to Justice Yacoob by the GCB at the dinner. The award is presented annually to a person who has made an exceptional contribution to the development of the law in Southern Africa.

The GCB chairman, Ishmael Semenya SC, elaborated on Justice Yacoob's career and directed members' attention to the sterling contribution that he had made as a member of the Constitutional Court. He said that Justice Yacoob would be remembered as a humble man who overcame enormous challenges, excelled to the highest office of jurisprudence in South Africa, and commanded the respect of all members of the legal fraternity.



GCB chair Ishmael Semenya SC (right) awarding the Sydney and Felicia Kentridge Award for Service to Law to Justice Zak Yacoob.

The gala dinner in honour of Justice Yacoob was attended by several eminent jurists, including Constitutional Court Justice Edwin Cameron, George Bizos SC, Judge K Mthiyane, Deputy President of the SCA, Judge Mlambo, Judge President of the North and South Gauteng High Court and Judge Ledwaba, Deputy Judge President of the North Gauteng High Court.

In reply Justice Yacoob paid tribute to former President Nelson Mandela and elaborated on his life and career as jurist. After Judge Yacoob's address, Mrs Yacoob received a bouquet of flowers. She received a standing ovation from all the delegates. The gala dinner afforded old friends and colleagues an opportunity to enjoy each other's company and to reminisce. It was a privilege and honour for the Pretoria Bar Society to host the meeting.

At the conclusion of the meeting Ishmael Semenya SC was re-elected as chairman of the GCB for 2013/14 with the following members of his executive: Jeremy Muller SC (deputy chairman), McCaps Motimele SC (vice chairman), Anthea Platt (honorary secretary), Johanni Barnardt (assistant honorary secretary), Tayob Aboobaker SC, Andrea Gabriel SC, Nana Makhubela, Abraham Louw SC, Craig Watt-Pringle SC, and Archie Findlay SC (*ex officio* as convenor of the National Bar Examination Board). **A**