

The fusion of the legal profession – a Namibian perspective



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I WAS REQUESTED by the chairman of the General Council of the Bar and the editor of *Advocate* to submit an article outlining the Namibian experience of the legislative fusion of the Bar and the side-bar in the Namibian jurisdiction.

The focus of this article is to summarise how the Namibian legal profession, based on the Legal Practitioners Act 15 of 1995 ('the Act'), operates within the frame work of its fusion, and to highlight, with specific reference to the advocate's profession, certain aspects of this fusion on practice at the Bar. Other relevant and related aspects, such as general changes which have affected the advocates' profession as a result of the Act, are also discussed below.

The Act and its influence

The Act was promulgated in Namibia on 7 September 1995. It essentially transformed the legal practice in Namibia through the repeal of *inter alia* the Admission of Advocates Act 74 of 1964 as amended ('Admission of Advocates Act'), and the Attorneys Act 53 of 1979 as amended ('Attorneys Act').

The Act brought an end to the monopoly that advocates enjoyed in respect of appearances in the High Court of Namibia, and essentially removed the distinction between advocates and attorneys to enable attorneys to appear in the High Court, without the need to instruct advocates. This was done to enable previously disadvantaged legal practitioners to compete for work on a level playing field (since historically

the Bar was comprised predominantly of white Namibians), thereby ameliorating the effects of the apartheid system on previously disadvantaged lawyers in the legal profession.

In terms of the Act, every person shall upon application and upon the fulfilment of certain requirements be admitted and authorised to practise as a 'legal practitioner'¹ in the High Court of Namibia. Upon admission, the name of the legal practitioner is added to the register of legal practitioners by the Registrar of the High Court. In addition, the legal practitioner automatically upon his or her admission becomes a member of the Law Society of Namibia and subject to its rules and regulations.

Admitted legal practitioners are granted a right of audience in the Supreme Court of Namibia after one year of practice, and once a certificate of appearance is issued by the Council of the Law Society.

The further education and training of legal practitioners for purposes of admission and enrolment is also prescribed by the Act. In essence, any person who is fit and proper, who is a Namibian citizen or permanent resident or holder of a valid work permit, and who is duly qualified in terms of the provisions of the Act, may apply for admission and authorisation to practise as a legal practitioner. A person is regarded as duly qualified, firstly, if he or she has completed a degree in law from the University of Namibia or an equivalent qualification in law from a university or comparable educational institution situated outside Namibia prescribed by the Minister of Justice,

and, secondly, after he or she has been certified by the Board of Legal Education ('the board') as having satisfactorily undergone practical legal training at the Justice Training centre ('the JTC') and has passed the Legal Practitioners' Qualifying Examination ('the LPQE').

The Act further prescribes the required post-graduate study and training of candidate legal practitioners for admission to the High Court. With a view to implementing and administering the post-graduate study and training, the Act created the Board which consists of the Chief Justice (chairperson), four persons appointed by the Minister of Justice (one of whom is required to be employed in connection with the training of candidate legal practitioners² at the JTC), a legal practitioner in the full-time employment of the State appointed by the Attorney-General, the Prosecutor-General, the dean of the Faculty of Law at the University of Namibia, and three legal practitioners appointed by the Council of the Law Society of Namibia.

The Board is responsible for inter alia registering candidate legal practitioners for training at the JTC, approval of the syllabus of post-graduate study for purposes of admission and enrolment as a legal practitioner, the laying down of guidelines in relation to the nature of practical training to be provided to candidate legal practitioners and by legal practitioners to whom they are attached, to act as moderator for and to set and hold the LPQE and the examination in conveyancing, to issue certificates to candidate legal practitioners who have passed the LPQE and conveyancing examination, and to investigate and advise upon any legal education pertaining to the legal profession and related matters.

The JTC, also established under the auspices of the Act, was created for the purpose of providing a 12 month course of postgraduate study at the University of Namibia for the training of candidate legal practitioners. Apart from attending lectures at the JTC Centre and passing the LPQE, a candidate legal practitioner is further required to be continuously attached to a practising legal practitioner for a minimum period of nine months during the 12 month postgraduate study, before he or she can apply for admission as a legal practitioner. The course of postgraduate study in essence covers the same subjects which articled clerks were required to prepare for the attorneys' examination in the past.

ANOTHER IMPORTANT change brought about by the Act relates to the discipline of legal practitioners. The Act in this regard established a Disciplinary Committee ('DC') for the purpose of exercising disciplinary control over legal practitioners and candidate legal practitioners. The DC consists of four legal practitioners appointed by the Council of the Law Society ('Council') and one person appointed by the Minister of Justice who acts as the secretary of the DC.

Any person affected by the conduct of a legal practitioner may apply to Council or to the DC directly to require the legal

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practitioner to answer an allegation of dishonourable or unworthy conduct. After investigation of the complaint, the DC will determine whether a prima facie case of dishonourable or unworthy conduct has been made out in the complaint, and if so, the DC will hold a full enquiry and hearing into the complaint. If in the opinion of the DC, no prima facie case is disclosed in the complaint, it may summarily dismiss the complaint without requiring the legal practitioner to answer allegations and without hearing the application. However, the complainant may appeal to the High Court against that decision and the court may either confirm the decision or order the DC to hear the application.

The DC and not Council is the repository of the power to apply to court for the removal and suspension of a legal practitioner if he or she has been

found guilty of unprofessional or dishonourable or unworthy conduct. Council has the power to apply for the removal of a legal practitioner if he or she no longer holds a work permit or is no longer ordinarily resident in Namibia. Council can also apply for the temporary suspension of a legal practitioner (for a period of 30 days or an extended period upon application) if a complaint for unprofessional or dishonourable or unworthy conduct has been lodged with the DC in respect of that legal practitioner and there are reasonable grounds to believe that the legal practitioner is guilty of the aforesaid conduct and that his or her alleged conduct is of such serious nature that it is in the public interest, or the interest of the legal practitioner's clients, that the legal practitioner should be prevented from carrying on his or her practice until the disciplinary proceedings against the legal practitioner have been finalised.

The Act and the Bar

Certain issues which arose with the promulgation of the Act are discussed below and with reference to the transitional and other provisions relating to, inter alia, advocates under the Act, as well as certain provisions which continued to allow the Bar to function in a manner commensurate with the repealed applicable legal provisions relating to advocates as referred to earlier in this article.

At the outset of the promulgation of the Act, there were commonly held prophecies of doom relating to the future of the Bar, mainly due to the ability of attorneys to handle and manage their own litigation in the High Court. There were also widely held concerns surrounding the independence of the Bar in light of, amongst others, its automatic membership of and administrative control by the Law Society of Namibia.

It is important to bear in mind that notwithstanding the removal of the distinction, the Act still recognises advocates. Firstly, the Act provides for automatic enrolment of persons who were enrolled as advocates before the coming into operation of the Act. In this regard, the Act provides that the Re-

gistrar enter into the Roll the name of any person who immediately before the commencement of the Act was an advocate in Namibia under the Admission of Advocates Act, who was admitted and enrolled as such at any time before the period of 12 months preceding the date of commencement of the Act, or was admitted and enrolled as such during the period of 12 months and has complied with the requirements of section 3A(1) of that Act or was exempted therefrom, or was undergoing articles in terms of the Attorneys Act, having had his or her name removed from the roll of advocates.

The Act further provided that a person who was admitted and enrolled as an advocate in terms of the Admission of Advocates Act during the 12 month period preceding the date of commencement of the Act, but who had not complied with the requirements of section 3A(1) of that Act, shall, if he or she, by virtue of the provisions of section 94(3)³ of the Act, complies with those requirements not later than 12 months after its commencement, be enrolled by the Registrar. An advocate or pupil who complies with the above requirements was deemed to be admitted and authorised to practice as a legal practitioner.

Failure to comply with the requirements of section 3A(1) of the Admission of Advocates Act 1964 before the expiration of the twelve month period would result in that person not being enrolled as a legal practitioner in terms of the Act, notwithstanding the fact that he or she was admitted and enrolled as an advocate in terms of that Act unless he or she submits to the Registrar a certificate issued by the Board stating that he or she has satisfactorily undergone practical legal training; and has passed the LPQE.

The Act also provided for a process in terms of which advocates as well as attorneys could apply to Council for an exemption from the requirement of holding a fidelity fund certificate. In this regard the Act provided that a legal practitioner practising or intending to practice on his or her own account, or practising or intending to practice in partnership may apply to Council for an exemption from the requirement of holding a fidelity fund certificate, if such legal practitioner furnishes the Council with a written declaration stating that he or she will not in the conduct of his or her practice accept or receive or hold moneys for or on account of another person, or in the case of a legal practitioner practising or intending to practise in partnership, such legal practitioner furnishes Council with a written declaration signed by every person who is or will be a member of such partnership stating that neither such partnership nor any member thereof will in the conduct of the practice of the partnership accept or receive or hold moneys for or on account of another person.

Council may, in granting the exemption, impose such conditions as it may determine, including a condition requiring the legal practitioner to furnish it with a guarantee of fidelity in favour of the Fidelity Fund, guaranteeing the fidelity of such legal practitioner to an amount determined by Council.

The practical effects of the Act on practice at the Namibian Bar are the following. Every legal practitioner who fulfils the requirements set out in the Act may apply for and become enrolled to practice as a legal practitioner in the High Court, and may appear in the High Court in any matter in which it has jurisdiction, and in the Supreme Court after completion of practice as a legal practitioner for a period of one year. Any

person wishing to practise as a legal practitioner must have an LLB Hons, or equivalent certified by the Minister in the Gazette, and must then enrol in the post-graduate course administered by the JTC, be attached to a practising legal practitioner for a continuous period of 9 months, pass the LPQE and obtain certification from the Board that he or she has passed the examination before he or she applies for admission. Of course, the candidate must also satisfy the court that he or she is fit and proper.

ONCE ADMITTED, the legal practitioner has the option of joining the Bar, which did not cease to exist with the coming into force of the Act as it remained a voluntary association with its own constitution and rules. That legal practitioner must apply for pupillage and complete a minimum of six months pupillage before becoming eligible to write the Bar examination. Once the practitioner has passed the examination he or she applies to the Society of Advocates and upon admission as a member signs the Roll of Advocates. Thereafter, application must be made on a prescribed form to council for an exemption from the requirement of holding a fidelity fund certificate, after which practice as an advocate can commence. Based on our constitution and rules, an advocate may still not accept work directly from clients, and must be instructed by an attorney.

Although still referred to as advocates and attorneys in practice, the correct terminology under the Act is 'legal practitioner,' the difference being whether that legal practitioner is an instructing practitioner or instructed practitioner. By way of example, the prayer for costs in a proceeding will usually include a prayer for the costs of suit to include the costs of an instructing and instructed legal practitioner.

Another area that requires consideration in relation to practice at the Bar, is that of the discipline of legal practitioners. Advocates are subject to the Act and are automatically members of the Law Society. Thus they can be disciplined by the DC and the DC can apply for their suspension or removal from the roll if a complaint is lodged. As an advocate can still be disciplined 'internally' by virtue of the Constitution of the Society of advocates. This is an area where there is an overlap, and an advocate runs the risk of being disciplined twice. So far, due to the beneficial relationship between the Law Society and the Society of Advocates, the Bar has in most cases been allowed to discipline its own in accordance with its own rules. The view is expressed that this aspect should be reconsidered in a possible amendment due to the overlap.

In the Namibian courts, an advocate may find him or herself appearing against an attorney, and quite a number of attorneys have successfully developed their own litigation practice. However, there remains a high demand for the specialised forensic services provided at the Bar because attorneys have continued to brief advocates in matters where they choose not to appear themselves due to time or other constraints.

The standard of service provided by the Bar has therefore created a demand that did not wane with the coming into force of the Act. In Namibia, advocates essentially undertake two sets of examinations and two periods of practical training that place them in a position to develop and maintain their skills in the field of advocacy, with additional knowledge of

the workings of an attorney's practice obtained before admission.

As at 25 September 1995, the Namibian Bar comprised 21 members, with only two black⁴ members. Today there are 40 members, 11 of whom are black. The Bar is growing steadily with only a small percentage of members removing themselves from the Roll of Advocates.

Our skills are also recognised by the Namibian courts with nine erstwhile members having been permanently appointed to the Bench, and the continued use of our members to assist with short term acting appointments in the High Court. Advocates also sit on the council of the Law Society of Namibia and some have served as its chairperson over the years. This is important as the representation of the Bar on Council is necessary for the enhancement of the satisfactory working relationship between the council and the Society of Advocates, which is imperative for the continued existence and growth of the Bar.

In conclusion, for as long as advocates continue to provide the specialised forensic skills they have become known for,

the Bar will continue to exist and thrive because attorneys with busy practices will continue to require the time and skill offered. A proper working relationship and interaction with the Law Society is imperative to the existence of the Bar. This much is clear from the various provisions of the Act set out above. **A**

Endnotes

- 1 The Act defines a legal practitioner as a person who has been admitted and authorised to practise as a legal practitioner or is deemed to have been so admitted and authorised.
- 2 Previously referred to as articled clerks.
- 3 Section 94 of the Legal Practitioners Act deals with repeal of law and savings. Section 94(3) provides that notwithstanding the repeal of the Admission of Advocates Act, section 3A of that Act and any notice issued thereunder shall, until expiration of the period referred to in section 6 (2) of the Act (12 months from date of commencement or such further period determined by the Minister), remain in force and effect in relation to a person who immediately before the commencement of the Act was undergoing pupillage as contemplated in that Act.
- 4 The Act refers to racially advantaged and racially disadvantaged legal practitioners. The Act also provides inter alia that the Council of the Law Society shall comprise of a minimum of 50% racially disadvantaged practitioners, and that the chairpersonship of the Council shall consecutively rotate between a racially disadvantaged and a racially advantaged legal practitioner.

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