

Justice Minister says legal profession must take responsibility



Minister of Justice and Constitutional Development, Jeff Radebe, during his keynote address at the 2011 LSSA AGM.

Minister of Justice and Constitutional Development, Jeff Radebe, used the opportunity of the opening address of the 2011 annual general meeting of the Law Society of South Africa (LSSA) to call on the legal profession to take responsibility for its role in transformation, access to justice and finalisation of the Legal Practice Bill.

The Minister made it clear that transformation of the profession was still top of the Justice Department's agenda and that the controversial Legal Practice Bill, which the Minister said would go to parliament later this month, was aimed in part to advance transformation and its counterpart – access to justice for the country's citizens.

Minister Radebe reiterated that he planned to fast track the Bill, which over the years has passed through the hands of four of his predecessors without being enacted. The Minister said it was not, however, only government that was responsible for the delay of the statute's enactment, but that the legal profession was also partly to blame.

'What is evident from this long race with relation to the Legal Practice Bill is that the legal profession is equally responsible for the delay towards the finalisation of this very important legal instrument,' he said.

The Bill will be sent to parliament after the local government elections on 18 May and is one of three Bills aimed at transforming the legal sphere. The other two are the Constitution Seventeenth Amendment Bill and the Superior Courts Bill.

Minister Radebe said that over the years several drafts of the Bill were prepared and many debates and discussions between the judiciary and the legal profession had taken place 'with no apparent end in sight'.

Although several compromises were made, there was still no consensus on some aspects of the Bill, and the Minister said he did not believe additional time would settle their differences.

'I must state that despite all efforts, compromises from either side have not yielded consensus on some of the principles contained in the Bill, and I am confident that no amount of additional time would yield different results,' the Minister said.

The Minister said compromises to date included the review of –

- the initially envisaged unified legal profession with no distinction between attorneys and advocates, only legal practitioners;
- the referral/briefing system, in terms of which advocates must be briefed by attorneys, thereby removing the current practice that advocates can take briefs directly from the public in certain circumstances; and
- the Minister's appointment of members of the South African Legal Practice Council (LPC), the statutory body which is to regulate the profession, and the Transitional South African Legal Practice Council (TC), which will govern the profession for two years until the LPC comes into being.

The Minister added that the latter was done to allay any fears or perceptions that the Minister's role in the appointment procedure might jeopardise the independence of the profession.

'The composition of the Transitional Council, and ultimately the council, is further corroboration that we, as government, have no intention whatsoever of controlling the profession or undermining its independence,' he said. The Minister did, however, add the disclaimer that certain omissions from the

current Bill would be 'resuscitated at the opportune time', in particular the referral policy, which he said placed an 'onerous' financial burden on consumers, who in effect had to pay two legal practitioners for the services of one.

The Minister said that despite these compromises, the profession remained stubborn regarding certain aspects of the Bill.

'It appears ... that the profession could not resist the temptation to stick to its past, especially with regard to its governance structures,' the Minister said. He added that the time had come for the Bill to move forward and that the profession would have another opportunity to make input during the parliamentary process.

The latest version of the Bill, which was approved by cabinet in December 2010, did not incorporate many of the suggestions made by the LSSA and instead has assigned greater responsibility to the TC, which will consist of representatives of the current formations in the legal profession, including eight attorneys and eight advocates.

Minister Radebe said the reason for this radical change, rather than passing the buck, was that it would give the profession 'greater responsibility' in finalising aspects where no consensus has been reached so far. These were aspects, the Minister said, that 'can only be resolved by the profession itself if meaningful progress is to be made'.

The Minister also spoke in his address of the importance of transformation in the legal profession for judicial transformation, as the former was the main feeder to the latter.

'This chain link shows that we will not succeed to transform the judiciary if its feeder regime is not transformed.'

Citing recent statistics, Minister Radebe again said the profession needed to take responsibility for its role in transformation.

Only 27% of the 20 158 attorneys were black and women were 'acutely under represented', which he said was indicative of the unavailability of articles in well established firms.

'This is an indictment on the profession which cannot be addressed by legislation alone but requires drastic measures by the profession itself,' he said.

In conclusion, the Minister said that the issue of high legal fees needed to be considered. The Minister also commended the LSSA for embracing and encouraging *pro bono* work and thanked those legal practitioners who served in the small claims courts with no remuneration.

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The Legal Practice Bill: Major implications for the legal profession



Lawrence Bassett from the Justice Department; LSSA councillor Jan Stemmett; former co-chairperson of the LSSA Max Boqwana, LSSA councillors CP Fourie, newly elected co-chairperson of the LSSA and president of the Black Lawyers Association Nano Matlala; Jacob Skosana, from the Justice Department; and LSSA councillor Mohamed Husain discussing the controversial Legal Practice Bill at the LSSA AGM.

The Legal Practice Bill was a common thread throughout the recent 2011 annual general meeting of the Law Society of South Africa (LSSA). In a session that stimulated much discussion and debate, the Justice Department's two latest versions of the Bill (dated April and December 2010 respectively) were compared.

Johannesburg attorney and LSSA council member Mohamed Husain took delegates through the two Bills, highlighting changes between the earlier version and the later one, which was approved by cabinet in December. In addition, a panel of departmental representatives and representatives from the profession discussed various aspects of the Bill that would impact on the profession during the transition stage and beyond. The panel was made up of the department's chief director of policy development, Jacob Skosana; chief director of legislative development at the department, Lawrence Bassett; newly elected co-chairperson of the LSSA and president of the Black Lawyers Association, Nano Matlala; former co-chairperson of the LSSA, Max Boqwana; and LSSA councillors CP Fourie and Jan Stemmett. Namibian advocate Esi Schimming-Chase also gave a perspective on the fused legal profession in Namibia.

Mr Husain said that the Bill, which has been in the pipeline for over a decade, had a 'long and chequered past' and that time had not resulted in consensus on all aspects of the Bill. Despite this, the department now has a close to final version of the Bill and has

indicated that it will go to parliament later this month. At the time of the AGM at the end of March, the draft legislation was going through the certification process, which involved 'tying up loose ends' and 'cleaning it up', the department's representatives said. They added that the profession and other interested parties would have a further opportunity to give input on the Bill during the parliamentary process.

Mr Husain said that one of the biggest changes between the old (April 2010) Bill and the new (December 2010) Bill was that most of the 'contentious issues' had been transferred to the Transitional South African Legal Practice Council (TC) to settle during the transitional period – envisaged to be two years – before the South African Legal Practice Council (the council) comes into being. This allows for certain parts of the Bill to be implemented despite no consensus on certain aspects being reached, as the TC was envisaged to deal with any outstanding issues.

The TC has 18 months to make recommendations to the Justice Minister on these aspects, and the Minister must within six months thereafter make regulations on these issues. Should the TC, however, fail to make recommendations in the stipulated time frame, the Minister is empowered to make regulations. Some of the issues the TC will have to deal with are –

- the election procedure for the first council;
- the establishment of the first regional councils and their jurisdiction, powers, duties and functions;

- the process to abolish the law societies;
- practical vocational training requirements for candidate attorneys and pupils; and
- a mechanism to determine a fee structure, including for contingency fees.

Some of the other changes from the old to the new Bill are:

- The controversial provision that the Minister appoint councillors for both the TC and the council has been removed. Now TC councillors will be nominated by the various legal professional organisations, including the LSSA bodies and the General Council of the Bar, and the TC, in turn, will recommend an election procedure for the councillors of the first council.
- The definition of 'conveyancer', which in the old Bill was an 'attorney' registered and enrolled to practice as a conveyancer, now reads in the new Bill 'any person' so registered and enrolled. The department representatives did, however, indicate that this may have been an oversight.
- The definition of 'legal services', which in the old Bill was extensively defined, is not defined in the new Bill.
- The purpose of the Act is wider in the new version and now includes as a purpose, to put in place a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are affordable and in reach of the citizenry.
- Sections 5(a) and (b) are new additions to the Bill relating to the objects of the council. Section 5(a) relates to the realisation of a transformed legal profession and s 5(b)

places an obligation on the council to ensure that legal fees are reasonable and promote access to justice.

- Advocates no longer have a loaded vote. In the old Bill, advocates' individual votes were counted as two votes in matters affecting the affairs of advocates.
- The new Bill retains the referral nature of the profession. Whereas the old Bill allowed advocates to accept briefs directly from the public in certain circumstances, this has been removed from the new Bill.
- The President, after consultation with the council, will now appoint the Legal Services Ombud, whereas under the old Bill the President would appoint the ombud on the Minister's recommendation. The ombud also no longer needs to be a retired judge of the High Court.
- Another introduction in the new Bill, which Mr Husain described as 'fairly radical', was that the interest on trust accounts opened

in terms of s 88(4)(a) – the equivalent of s 78(2A) of the Attorneys Act 53 of 1979 – must be paid to the Fidelity Fund. This means that clients will not be entitled to interest earned on deposits paid to attorneys, for example, for property transactions. In addition, attorneys will have to open trust accounts at a bank that the Fidelity Fund has made an arrangement with regarding interest and other issues.

Mr Husain said that there were many positive aspects to the new Bill, which was 'a huge improvement' from the earlier draft, although he acknowledged that it would not 'satisfy everyone as a whole'.

Ms Schimming-Chase, spoke about Namibia's experience of combining the legal profession under one body. She said that, after 15 years of a fused profession, the 'prognosis' was that 'it was still a work in progress'. She said that South Africa could expect 'growing pains', conflict and imper-

fections in the legislation. But she advised South Africans to 'use the conflict' to produce a better Legal Practice Act.

Mr Skosana and Mr Bassett said that the session was useful to them as it had highlighted some of the technical aspects of the Bill that could be addressed during the certification process. Mr Skosana concluded with some advice for members of the profession, saying delegates should start 'thinking along the lines of the transitional council and of people to put forward to drive this process'. He said that the profession remained in 'the driving seat' and that it should be prepared for the parliamentary process. 'Don't wait for the parliamentary process, so that when called (for input) in terms of the public process you are ready,' he said.

Nomfundo Manyathi, Mapula Sedutla and Kim Hawkey

Professional rules stand despite Competition Commission ruling

The Competition Commission's rejection of the Law Society of South Africa's (LSSA) exemption application in respect of certain of the provincial law societies' rules was one of the topics for discussion at the LSSA's annual general meeting.

The LSSA's legal representatives in the matter, Nkondo Hlatshwayo and Shawn van der Meulen, shed light on what the commission's decision meant for practising attorneys and the current status of the rules in question.

In March the commission gazetted its rejection of the LSSA's application for exemption for rules in the following categories –

- professional fees guidelines,
- reserved work,
- organisational forms and multidisciplinary practices, and
- advertising, marketing and touting.

The Competition Act 89 of 1998 (the Act) makes

provision for professional associations to apply for exemption of its rules if they potentially prevent or lessen competition in a market, but are nevertheless necessary to maintain professional standards or the ordinary functioning of the profession in question.

In a presentation to delegates, Mr van der Meulen pointed out that the ruling came at a time when the profession was facing an overhaul both in terms of the enactment of the Legal Practice Bill (LPB) and the implementation of a uniform set of rules of practice, which are currently being finalised and will replace the four statutory law societies' individual sets of rules. This meant that a number of the rules that fell foul of the commission's requirements would soon be amended, replaced or removed in their entirety. The commission has also indicated that it is satisfied that the LPB and the draft set of uniform rules satisfy its concerns regarding professional fees guidelines and restrictions on advertising, marketing and touting.

The two areas that remain of

concern, namely reserved work and multidisciplinary practices, will continue to be the subject of engagement between the LSSA and the commission until the end of June 2011.

In the meantime, Mr van der Meulen made it clear that the current rules remained valid.

In terms of the Act, conduct is not considered to contravene its provisions until the Competition Tribunal makes such a finding.

'A dismissed application is not the same as a finding of the tribunal. The tribunal could disagree with the commission and the LSSA is free to assert that, notwithstanding the exemption application, the rules are not anti-competitive,' Mr van der Meulen explained to delegates.

'Until such time that the commission or a third party challenges the rules before the tribunal, and the tribunal makes an order that the rules amount to a contravention of the Act, they are valid and enforceable,' he added.

In addition, in an agreement reached between the LSSA and the commission, the LSSA will request the provincial law

societies not to prosecute attorneys for any contraventions of the rules that remain under discussion until the LPB comes into force. The commission, in turn, will not investigate or prosecute any complaints it receives against attorneys from the public in respect of conduct governed by those rules.

This will not, however, prevent a member of the public referring a complaint directly to the tribunal, although Mr van der Meulen said that it would be extremely difficult to proceed with such a complaint without the commission's backing.

The LSSA, at the time of going to print, had not yet made a decision whether or not to apply for an appeal or review of the commission's ruling.

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