

Social media for attorneys and Minister Sexwale on the rule of law at LSNP AGM

The Law Society of the Northern Provinces (LSNP) held its annual general meeting in Sun City on 10 November 2012. On the agenda was an opening address by Minister of Human Settlements, Tokyo Sexwale, and presentations on the small claims court, the Legal Practice Bill (B20 of 2012) and social media for the legal profession.

Minister Sexwale on the rule of law and the Legal Practice Bill

Minister Sexwale said that although South Africans live in a democratic society premised on the rule of law and where the Constitution is supreme, legal activism should remain as relevant as it was during apartheid.

‘Legal practitioners can never take a vacation or retire from the responsibilities of ensuring that good governance and good law have steadfast proponents and defenders,’ he said in this regard.

Minister Sexwale said that the Constitutional Court was, ‘without any argument’, the final arbiter in interpreting the Constitution, adding that this needed to be reiterated ‘as a reminder to all, particularly nowadays in the climate of ongoing tensions within society in respect of individual rights, social rights, the powers of legislators, the authority of the executive and the independence of the judiciary’.

He added that although such tension in a democracy should be seen as healthy and necessary, it should be accompanied by maturity and be without threats, intimidation and violence. ‘Ours is a constitutional democracy where all enjoy the freedom to exercise their rights. Therefore there ought to be no prevarication about this fundamental principle. As Nelson Mandela puts it in his celebrated work *Long Walk to Freedom*, “with freedom comes responsibilities”,’ he said.

Minister Sexwale said while there may be different views on the Legal Practice Bill, attention needed to be paid to the overall positive spirit of the Bill. ‘In this respect, of particular importance is clause 5(a), which states the objective of “the realisation of the goal of a transformed and restructured legal profession that is unified, accountable, efficient and independent”,’ he said.

The Minister emphasised the importance of acting ethically as the legal fraternity is a pool from which members of the Bench are chosen: ‘Future judges and appointees to commissions, tribunals and so on are often selected from this fraternity; therefore it is imperative that members of the fraternity should be equal to the challenge posed by rule 89 of the Law Society [of the Northern Provinces], which enjoins members not to make themselves guilty of “unprofessional or dishonourable or unworthy conduct,” as the effects of such conduct may affect the upward mobility of the persons concerned when they have to be considered for higher office.’

Minister Sexwale added: ‘The same could be said of members harbouring prejudices, which are difficult to unlearn. Unfortunately prejudices may follow a particular member into high office and ... disempowers him or her from becoming a good judicial officer, something detrimental to the Bench, the administration of justice and the quality [of] judgments.’

Regarding transformation, the Minister said it was ‘noteworthy’ that although efforts had been undertaken by the legal fraternity to create one legal profession and one law society, greater endeavours were required to achieve ‘maximum unity in contrast to percentages allocated to statutory and non-statutory components of the law society’. He added that it was ‘desirable’ for the National Association of Democratic Lawyers and the Black Lawyers Association to be more united as this would go a long way towards the realisation of the overall unity of the legal profession.

Minister Sexwale also encouraged training and mentorship of young entrants into the legal profession, which he said was a crucial part of community service and transformation. He added that such programmes should be treated with the appropriate seriousness to avoid the criticisms that some new entrants are not adequately trained to match the standards of the profession.

In terms of access to justice, he said: ‘It is inescapable to make a comment about the need for justice to be seen to be accessible to the common man and to ordinary citizens who may not have the means. Justice should not be seen to favour citizens who have deep pockets or long cheque books. The danger is that the majority may lose confidence not only in the administration of justice but in the rule of law itself.’

In conclusion, Minister Sexwale said that South Africa faced many problems in the political and socio-economic environment and citizens in several communities were increasingly expressing their frustration by taking matters into their hands and acting unlawfully.

He said: 'Increasingly, working people, since Marikana, are engaging in wildcat strikes to the detriment of the hard-won victories associated with the collective labour bargaining system. This new trend, if it continues at this rate, could pose a serious risk and should be a source of worry to all concerned. Although we live in a world of many countries, out there in the world there is no country whose vision and mission is to solve our problems for us. We cannot outsource our difficulties; only we, South Africans as a collective, should find common and lasting solutions. We have the people, the will and the goodwill to do so.'

Small claims court challenges

In a presentation on small claims courts, the Justice Department's chief director of court services, Pieter du Randt, said that in the department's quest to have a small claims court in each of the 384 magisterial districts in the country, it urgently needed to open 132 more courts. Mr du Randt said that the 'main stumbling block' that the department faced was that there were not enough commissioners to sit at these courts. He said that of the 1 477 commissioners countrywide, 211 were female. 'It cannot be left that way,' he said, adding that more effort needed to be made to recruit as many women commissioners as possible.

Mr du Randt said that the establishment of small claims courts (SCCs) had led to 69 vacancies countrywide and added that training for commissioners was necessary. He urged the attorneys at the AGM to make themselves available for mentorship programmes.

Mr du Randt added that SCCs were vital to maintaining democracy as they provide a speedy, efficient and cost-effective service. He added that the court's maximum jurisdiction in civil claims was R 12 000, which meant that the name 'small claims court' was misleading as most people in South Africa did not earn R 12 000 a month.

Social media for lawyers

Speaking on social media for the legal profession, Emma Sadleir, an associate at law firm Webber Wentzel, said that attorneys may find themselves making use of social networking websites such as Facebook, Twitter, LinkedIn, blogs and YouTube. She added that she believed it was important that all attorneys get involved in social networking and that a law firm should at least have a website.

She said that, at the time of her presentation, Facebook had reached 5,33 million users in South Africa, with just over 2,590 million of them female. Ms Sadleir said that Facebook was generally perceived as a personal social network that could contribute to increasing a law firm's reach. She added that it was an 'excellent tool' for talent acquisition and could also be used as a networking tool for existing employees of larger firms.

Ms Sadleir said that there were 1 933 732 LinkedIn users in South Africa, adding that LinkedIn was the world's 'largest professional network', with 175 million members in 200 countries. She said that the network's focus was on business and law firms can have a company page, which can be followed and shared with professional contacts. She added that LinkedIn was generally the first result that Google picked up in a search, which was an advantage for law firms or attorneys who have this type of account.

Between March 2011 and August 2012, more than 61 854 042 tweets were sent in South Africa by the 2,5 million Twitter users in the country, Ms Sadleir said, adding that of these users, 314 727 were male, 271 856 female and the remainder were brands and companies.

Ms Sadleir also spoke about international trends, noting that leaders at several top-100 firms were for the first time hiring full-time social media specialists to manage firms' social media accounts. In the United States, she said, 20% of law firms had a full-time social media specialist and 40% said that blogging and social networking initiatives had helped their firms land new work.

Ms Sadleir said that tweeting from courts was also becoming popular and it was beneficial for attorneys to have an online presence even if they did not plan to use it actively. In this respect, she gave the example of attorneys following ongoing court cases on Twitter 'as it was almost as good as being in court'.

Benefits

Ms Sadleir said that engaging in social media could raise the profile and awareness of attorneys and/or their practices. It also increased law firm engagement with clients as the use of social media by clients could result in a corresponding expectation that these channels of communication should be available in relation to legal services. She said that social media also provided an opportunity for attorneys to speak directly to their clients.

Ms Sadleir added that other benefits included –

- no geographical barriers, which enabled reaching a wider audience than via more traditional forms of communication;
- it is an efficient marketing tool for the promotion of legal services as the ‘unprecedented reach of social [media] networks and blogs has been a career game-changer’ for many attorneys; and
- it is cost effective as it is ‘relatively cheap’ to set up.

Risks

Ms Sadleir also spoke on the risks of social media use. On this topic, she said that American journalist and author, Katie Couric, had summed up social media well when she said: ‘The great thing about social media is that it gives everyone a voice. The bad thing about social media is it gives everyone a voice.’

She added that there are currently no special laws or rules in South Africa that apply to social media but the same ethical obligations and principles that attorneys adhere to apply to their conduct in the online environment, adding that social media comments must be treated in the same way as comments made in any other public forum.

Ms Sadleir said that it is often unclear where personal and professional boundaries lie in respect of social media and where professional obligations start and end. She added that the disclaimer people often placed on their Twitter accounts, namely ‘I tweet in my personal capacity’, did not provide adequate protection as a person’s tweet would automatically be associated with his employer if his employer is known. Ms Sadleir also discussed a few case studies, including:

- *Cairns v Modi* [2012] EWHC 756 (QB):

In the United Kingdom’s first Twitter libel case, former New Zealand cricketer Christopher Cairns sued the former Indian Premier League (IPL) chairperson, Lalit Modi, over a defamatory tweet posted in 2010. In the tweet, the defendant accused Mr Cairns of match-fixing, adding that it was the reason for barring him from the IPL auction list. Mr Cairns brought the matter to court, claiming the allegations threatened to reduce his cricketing achievements to ‘dust’.

The judge found that the defendant ‘singularly failed to provide any reliable evidence’ that the applicant was involved in match-fixing or spot-fixing or even that there were strong grounds for suspecting this. The applicant was successful and was awarded £ 90 000 in damages.

- Fined for revealing the identity of a rape victim on Twitter:

A Football player was convicted of rape and nine of his fans were fined after revealing online the identity of the woman raped by him. The woman’s name was circulated on social networking websites. The defendants claimed that they had been unaware that naming her was a criminal offence. The law in the United Kingdom gives victims and alleged victims of rape and other sexual offences lifelong anonymity. The defendants were each ordered to pay the rape victim £ 624.

- *R v Stacey* (Swansea Crown Court) (unreported case no A20120033, 30-3-2012) (Williams J):

Mr Stacey was sentenced to 56 days in prison after pleading guilty to using threatening, abusive or insulting words and for inciting racial hatred over abusive tweets. The student posted racial tweets about a football player after he collapsed on the pitch during a match. In his defence, Mr Stacey said that he was under the influence of alcohol when he posted the tweets. An appeal against this order was dismissed.

Employment law and social media

Ms Sadleir also touched on the interaction between employment law and social media. She questioned whether an employee’s social media update could be attributed to his employer. She said that even if an employee had a disclaimer that he tweets in his personal capacity, if he brings his employer’s reputation into disrepute, he could be dismissed or suspended. Ms Sadleir added that this was the current trend in cases before the Commission for Conciliation, Mediation and Arbitration pertaining to dismissals as a result of social media abuse and misuse (see 2012 (Dec) DR 6).

Ms Sadleir said that there were 'huge risks' that came with an online presence, adding that social media was such an important forum that employers had to embrace it and learn how to manage it.

Guidance for attorneys

On the request of the outgoing President of the LSNP, Jan Janse van Rensburg, Ms Sadleir considered the guidelines for advertising and marketing by attorneys practising in the society's jurisdiction in light of the online environment.

Ms Sadleir said that there were a number of rules that attorneys needed to consider and said that any content generated by attorneys for social media purposes would constitute 'advertisements' for the purpose of the guidelines. She highlighted the following rules:

- Rule 3.3: This rule states that making unsolicited material available to any person who has an existing attorney/client relationship with another attorney, with a view to establishing an attorney/client relationship with such person, is touting.

Ms Sadleir questioned whether 'following' an attorney on Twitter constituted soliciting. 'Surely they cannot solicit what [an attorney has] to say to them,' she said.

- Rule 5.3: This rule states that publicity may not refer to the extent of an attorney's achievements and success.

Ms Sadleir asked the audience how many of them with an online presence had not 'gushed' about successful cases online, adding that the rule was incompatible with today's times. If the rule remained, she suggested wider publication, as attorneys needed to be aware of it.

- Rule 5.4.1: This rule states that an attorney may refer to the name of a client in the public media only with the client's consent on that client's behalf. An attorney may not refer to the name of a client in an advertisement of his practice.

Ms Sadleir said that the rule was contradictory as the second part of it did not give an attorney consent to mention his client even if he receives the client's consent because any comment on social media constitutes an advertisement.

- Rule 13.2: This section states that an attorney must not enter into correspondence with listeners, viewers or readers who are not already his clients with a view to attracting or inviting instructions.

Ms Sadleir said that this rule was 'wholly incompatible with the online environment' because 'the very nature of a forum like Twitter is interactive'.

- Rule 13.4: This rule states that an attorney may (and indeed is encouraged to) communicate with his clients either verbally or in writing with a view to advising them of the latest developments in the law or in regard to a specific area of the law and with a view to obtaining instructions for professional business in relation to those developments.

Ms Sadleir said that this rule was complicated because on social media platforms attorneys communicate with people who may not be their clients. She said that if an attorney can communicate with clients only, this was restrictive and limited freedom of speech in the online environment.

Ms Sadleir concluded with three recommendations –

- the Law Society of South Africa (LSSA) should follow in the footsteps of the Law Society of England and Wales and publish a practice note on social media for attorneys. She added that attorneys were in the dark about what they can and cannot do online and need to know to what extent what they say is attributable to their law firms in the interest of avoiding reputational risks;
- advertising guidelines should be updated to enable attorneys to participate meaningfully in the social media environment; and
- the LSSA should encourage law firms to have social media policies governing their employees' online conduct.

The guidelines can be found at

www.northernlaw.co.za/Documents/marketing_rules/Advertising_guidelines.pdf

President's report

In his report to the AGM, Mr Janse van Rensburg said that the Consumer Protection Act 68 of 2008 could be perceived as a threat to the attorneys' profession in that it gave another body jurisdiction over attorneys despite the regulatory functions performed by the law societies, as complaints could be lodged against attorneys in terms of the Act. He added that the LSNP had prepared an application for exemption from the Act.

Regarding disciplinary matters, Mr Janse van Rensburg said that during the 2011/12 period, 8 029 files were opened and investigated in respect of alleged unprofessional, unworthy or dishonourable conduct by practitioners. Of these, 1 037 were written inquiries from the public, while the complaints pertained to issues such as proper attention not being given to clients, delaying or failing to pay trust money, unreasonably high fees and touting.

In total, 203 disciplinary meetings were held in which 605 attorneys and four candidate attorneys appeared. Sixty attorneys were struck off the roll, 45 were suspended by the High Court and two were interdicted or prohibited from practising for their own account.

2013 membership fees

The new membership fees will be

R 1 311 (incl VAT).

New LSNP council

President – Busani Mabunda

Vice-president – Llewelyn Curlewis

Vice-president – Strike Madiba

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Sandile Beauchamp

Dave Bennett

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