Public sector lawyers – lawyers first, public sector employees second

During the inaugural annual GovLaw conference last year, it was decided that there was a need for legal advisers to share ideas and discuss issues related to day-to-day activities.

On 14 and 15 May the second GovLaw conference for government and special operations executives was held in Pretoria.

Some of the topics discussed were the Legal Practice Bill (B20 of 2012), unnecessary litigation, governance and service delivery.

Professionalism and establishing a national association

Jacques Wolmarans, chief state law adviser at the Office of the Premier in KwaZulu-Natal, said that, at last year's conference, it was confirmed that lawyers working for government were not just public servants, but remained officers of the court and should strive to maintain freedom, independence, integrity, impartiality and non-partisanship. Public sector lawyers serving the executive and the legislature must guard against being overly 'executive-minded' in their approach, he said.

Mr Wolmarans told delegates that, as lawyers working in the public sector, their employers must recognise that public sector lawyers are first lawyers and second public sector employees. This means that their roles and responsibilities as lawyers supersede those as public sector employees, he said, adding: 'As public sector lawyers, we must firstly, and always, serve and uphold the values and principles of constitutionalism and the rule of law in providing professional and non-partisan legal services and legal advice to government. We must ensure that we understand and apply these principles at all times.'

Mr Wolmarans noted that legal activism was important and lawyers in the public sector must play an activist role and promote professionalism and empowerment of public sector lawyers. The only way to achieve this, in an organised manner, is by establishing one or more professional associations for lawyers specifically in the public sector, he said.

'Except for the KwaZulu-Natal Association of Public Sector Lawyers [KAPSL], no similar body currently exists anywhere in the country to cater specifically for lawyers working in the public sector,' he said, adding that KAPSL was an independent voluntary professional association regulated by its own constitution and members voluntarily bound themselves to a higher standard of conduct and ethics in the public sector.

According to Mr Wolmarans, there appeared to be a lack of interest in establishing an informal or formal collaboration of public sector lawyers. Possible reasons could be apathy; lack of time; fear; and, possibly, certain provisions of the Legal Practice Bill.

Mr Wolmarans said that aspects of the Bill interfered with the freedom of association of existing associations. He referred to a speech by late former Chief Justice Arthur Chaskalson to the Cape Law Society annual general meeting in November 2012 (see 2013 (Jan/Feb) *DR* 13), in which he said: 'The Bill does not respect the freedom of lawyers to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity.'

Mr Wolmarans said that the Bill possibly created a psychological restraint in the minds of lawyers working in the public sector in terms of joining or forming professional associations.

He said: 'We, as public sector lawyers, need to preserve and protect our independence and can best do this through our own independent voluntary professional association. It is important to note that no employee organisation or trade union currently represents lawyers specifically as a group or category in the public sector.'

Mr Wolmarans told delegates that if the public sector was organised in an association, it could have made well-considered input and could have represented a united front when public comments were sought on the document released by the Justice Department titled 'A framework for the transformation of the state legal service', which aims to address the requirement by the government for efficient, coordinated legal services to promote the values and obligations arising from the Constitution.

'If implemented, this policy framework … could have far-reaching consequences and implications, especially for the provincial and local spheres of government and all legal personnel serving the executive branch of government. But, because we have not yet organised ourselves, we, as public sector lawyers, missed an important opportunity to put ourselves on the map. Decisions that directly affect us are being taken for us, because we do not have an association which speaks for us,' he said.

Litigation

Okgabile Dibetso-Bodibe, chief state law adviser at the Office of the Premier at the North-West provincial government, addressed delegates on government litigation and its impact on the public as litigants.

The following was asked by Ms Dibetso-Bodibe: 'Should civil litigation cost much more and take much longer than the ordinary citizens of this country expect, even in the advent of the Constitution and its entrenched Bill of Rights?'

She said that communities were the subject of litigation with government and government, being the biggest litigant, wielded 'financial muscle' against plaintiffs in matters against government.

‘We can no longer legislate laws and forget that the Constitution is the supreme law above government and parliament and the provincial legislatures,’ she said.

Public interest litigation

Ms Dibetso-Bodibe said that the beneficiaries of public interest litigation were the poor, vulnerable and marginalised sections of the community, who rarely had the money to pay for legal fees.

Public interest litigation can be entertained in terms of the Constitution, and s 34, read with s 38, provides an explicit guarantee of the right of access to justice coupled with relaxed *locus standi*, she added.

Ms Dibetso-Bodibe referred to several ‘groundbreaking’ cases with regard to public interest litigation, including:

• *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC).

• *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

Unnecessary litigation

According to Ms Dibetso-Bodibe, public sector attorneys sometimes did not realise that they were litigating against the community that pays taxes, stating that they should spend taxpayers’ money wisely.

‘This unnecessary litigation takes place when we, as government, do not understand who we are as litigant. We should be model litigants and behave as such.’

Ms Dibetso-Bodibe added that bad cases should not be unnecessarily pursued.

‘We should not litigate for the sake of litigating. Do not use delaying tactics when litigating and avoid personality-driven cases. Fight fairly. Every matter does not necessarily require a court order. If you can settle at the earliest point in time, then do that. Do not institute and/or pursue appeals unless the state believes that there exists a reasonable prospect for success.’

Inevitable litigation

Ms Dibetso-Bodibe said that the state was obliged to act as a model litigant in paying due regard to the expectations of the community and the court.

When litigation is inevitable, she advised delegates to –

• act consistently in handling claims;
• deal with claims promptly;
• focus on the core issues involved;
• ensure all relevant documents are presented to the courts;
• keep costs to a minimum;
• pay legitimate claims without litigation, including making partial settlements or interim payments where liability has been established; and
• manage litigation in a timely manner.

In conclusion, Ms Dibetso-Bodibe said: 'The reality of the judicial case flow management is that it is no longer viable to simply leave the management of a litigation matter to the parties to frame the dispute and conduct the case with minimal, if any, intervention from the Bench. The … public legal sector should be transformed to provide legal services of the highest standard to protect and safeguard the interest of the state and promote access to justice for all.'

Promoting good governance

Deputy Public Protector Kevin Malunga addressed delegates on the role of the Office of the Public Protector in promoting good governance in the public service.

Mr Malunga referred to the pillars of good governance, and spoke about accountability in respect of the Office of the Public Protector in particular.

'The idea is that there is a certain reporting line, where you can check whether the Public Protector is not encroaching on the mandate of, for example, the Auditor-General, the National Prosecuting Authority or the Special Investigating Unit [SIU]. There are a lot of areas of jurisdiction that are shared and it is perfectly normal for a parliamentarian to ask if one is not encroaching on the other.'

Other pillars of good governance he referred to included –

• constitutional compliance and the rule of law;
• participation;
• checks and balances that include constrained and diffused power;
• transparency, backed by freedom of the media;
• equality and inclusiveness;
• attention to human development;
• integrity with no tolerance of corruption in dealing with state resources; and
• credibility, legitimacy and a conciliatory approach to conflicts between government and citizens.

Mr Malunga said that the Public Protector was a national ombudsman-like institution and had moved away from being a 'mere complaints department' to an 'architect of good governance'.

The Public Protector has a reactive and a proactive mandate to ensure that state affairs are conducted with integrity and general good governance, he added.

Mr Malunga referred to s 182 of the Constitution and said that the mandate of the Office of the Public Protector covered all organs of state at national and provincial levels, including local government, and extended to state-owned enterprises, statutory bodies and public institutions. However, court decisions were excluded.

In a question-and-answer session following Mr Malunga's presentation, senior counsel at the SIU, Warren Moore, commented that the SIU and the Office of the Public Protector complemented each other and worked together in many instances. However, he said that there was no duplication of work.

Mr Moore said: 'The SIU works by proclamation by the President to investigate a case. The SIU can do a wider or a more extensive investigation and it can go to court to, in some cases, claim damages. If the SIU works on the same case as the Public Protector, they keep in constant contact with one another and when the Public Protector releases its report, then the SIU makes sure not to duplicate its work and the SIU goes on with its investigation. We are complementary units and we have a good relationship with the Public Protector'.

Mr Malunga agreed with these comments.

Legal Practice Bill

Jan Stemmett, former co-chairperson of the Law Society of South Africa (LSSA), and Busani Mabunda, chairperson of the LSSA's Constitutional Affairs and Human Rights Committee, discussed the Legal Practice Bill, as well as the Justice Portfolio Committee's public hearings on the Bill in February (see 2013 (Apr) *DR* 22).

'The parliamentary portfolio committee will have due regard to all the submissions when looking at the way forward. There are amendments that will be anticipated flowing from the draft Bill as presented by the Department of Justice and Constitutional Development,' Mr Mabunda said.

According to Mr Mabunda, the Bill is not purely about attorneys and advocates, but is also about society and the impact the profession has on society in general.

In respect of legal advisers, Mr Mabunda told delegates: 'It could have been of assistance if we had looked at the possible effect or impact that the Legal Practice Act would have on legal advisers within the framework of the national government, as well as state-owned entities.'

• Views shared at the conference were those of the speakers and not their employers.

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