The LPB, costs and fees scrutinised at LSNP workshop

The Law Society of the Northern Provinces (LSNP) held a free workshop for its members on the Legal Practice Bill (the Bill), costs and fees in Pretoria on 1 July where delegates discussed the Bill, the regulation of legal practitioners, the Legal Practitioner's Fidelity Fund as well as the issues of costs and contingency fee agreements.

Speakers at the workshop included the president of the LSNP, Dr Llewelyn Curlewis; LSNP councillor, Jan Stemmett and Chairperson of the Attorneys Fidelity Fund, CP Fourie.

Dr Curlewis gave an introduction on the Bill. He said that the final version of the Bill, which was draft eight, had been approved and passed by the National Assembly on 12 November 2013. Dr Curlewis said that 227 members of the National Assembly voted in favour of the Bill, 81 opposed it and one member abstained. At the time of the workshop, the Bill was with the President for assent.

In his welcome address Dr Curlewis said that the topics for discussion indicated a clear sign of transformation in the justice system and in the traditional manner in which attorneys are used to practising law. He said that numerous teething problems would be encountered with the new legal dispensation, but hopefully eventually there would be success.

Dr Curlewis said that the Bill creates challenges and opportunities, adding that he would focus only on the key issues he deemed to be of paramount importance to practitioners in the future. According to Dr Curlewis, the future of the profession is both radical and progressive and it provides huge opportunities for those who open themselves up to the possibilities.

The Bill

Dr Curlewis said that as far as fees were concerned, there was a slight improvement on the final version in clause 35(3) which now provides that in the case of litigious and non-litigious work, the client can on his or her own initiative, agree on a higher or lower fee than a prescribed fee. Dr Curlewis said that in the previous draft, this applied only to non-litigious work. 'However', he added, 'clause 35 as a whole must still be a problem because the determination of prescribed fees has now been taken out of the hands of the profession'.

'The much debated ministerial powers in terms of s 14 have been retained and it is suggested that mechanisms are incorporated in the Bill to safeguard against powers to be exercised capriciously or arbitrarily. Section 24 suggests the establishment of provincial councils in every province,' he said.

Dr Curlewis said that one of the major changes that have been agreed to by the Portfolio Committee is that advocates can accept instructions direct from the public

provided they have trust accounts. He added that to allow advocates to be briefed directly may not necessarily reduce costs for the public as has been envisaged by the Portfolio Committee, since advocates taking direct instructions would be obligated to have fidelity fund certificates. ‘This implies that they would then require the practice and staff infrastructure necessary to operate and monitor trust accounts. They would also require training in bookkeeping, which advocates are not traditionally required to obtain. The Bill will nonetheless place South Africa on the threshold of a complete renewal of the legal system, according to our previous Minister of Justice, Jeff Radebe. It will probably bring an end to the long tradition of self-regulation by the legal fraternity,’ said Dr Curlewis. He added that the government insists however, that the 120-clause Bill is vital for transformation and improving access to justice, and added that the search for agreement on the Bill could not continue forever.

Regulation of legal practitioners

Speaking on the regulation of legal practitioners, Mr Stemmett said that the Bill would come into operation in three stages. First, the National Forum for Legal Practice would be established, then the Legal Practice Council would come into operation, then the rest of the Bill would come into effect.

Mr Stemmett said that there would be three kinds of legal practitioners:
• Attorneys, who are admitted by the High Court, enrolled by the Legal Practice Council (LPC) and can appear in any court but need a certificate for the High Court, the Supreme Court of Appeal and the Constitutional Court. The attorneys may be briefed by the public and must be in possession of trust accounts and fidelity fund certificates.
• The second type of practitioner will be what he called the ‘advocates +’, who will be admitted by the High Court and enrolled by the LPC. They can appear in any court and may be briefed by the public as well as justice centres. They must also have trust accounts as well as fidelity fund certificates. Mr Stemmett said that this type of advocate was new.
• The third type of practitioner is the advocate as we know it. They will be admitted by the High Court and enrolled by the LPC. They can also appear in any court and can only be briefed by attorneys and justice centres. They cannot be briefed direct by the public.

Mr Stemmett said that the LPC would make rules to determine the conditions and procedures for the registration for practical vocational training of candidate legal practitioners. The LPC would also decide on the remuneration of candidate legal practitioners as well as the assessment for admission. Candidate legal practitioners will be able to appear in any court or tribunal on behalf of their principals, except for the High Court, SCA and Constitutional Court. They will only be able to appear in the Regional Courts after one year’s practical training or practising as an advocate for a year.

Professional conduct and disciplinary bodies

Jaco Fourie, from the LSNP disciplinary department, spoke on professional conduct and the establishment of disciplinary bodies. He analysed chapter four of the Bill which deals with professional conduct and disciplinary bodies, s 36 provides for a code of conduct and s 37 deals with the establishment of disciplinary bodies.

Mr Fourie said that complainants, mainly the public, require an easy to understand, fast and transparent disciplinary process and added that he has doubts whether the system in the Bill will accomplish this. ‘I have concerns that it will be an expensive and anything but a quick procedure. Currently, we have the investigating committee considering the complaints, then we have the disciplinary committee dealing with the charges and then there is the council and the court. When we look at the Bill, we will have the investigating committee and if the complainant is not satisfied with the decision made by the investigating committee, for instance that there is no unprofessional conduct, he may appeal to the appeals tribunal. If the tribunal then decides that the matter should go to a disciplinary committee, it goes to the disciplinary committee and they deal with the matter. The attorney, in all probability, will then not be happy and he, again, may appeal to the tribunal. Then, we have the council and the Ombud, which will function completely independently. So, any aggrieved complainant or attorney can go to the Ombud and then there are the courts. So, this whole process has the potential of being very drawn out and taking a lot of time,’ he said.

‘All complaints must serve before an investigative committee; it has to investigate every single complaint. Depending on the volume of complaints received by the LPC, this has the potential of creating a huge bottleneck in the finalisation of complaints. It can also be a very expensive exercise to have enough committees available to deal with the volume of complaints. This investigating committee can then recommend the matter be referred to a disciplinary committee or alternately that the complaint be dismissed,’ said Mr Fourie.

Mr Fourie noted that the Bill provides that the complainant will be able to apply for an appeal in terms of s 41 regarding the manner or outcome of the investigating committee, adding that he foresees that the appeals tribunal will be flooded with appeals from members of the public.

Mr Fourie stated that s 38 outlines the rules and procedures to be followed in a disciplinary hearing. He pointed out that currently proceedings are closed to the public. After the Bill is enacted, proceedings will be open to the public unless the chairperson directs otherwise. ‘The second difference is that the outcome of these hearings must be published and updated monthly by the council and it must be available for inspection by the public. So in essence, when a complainant lodges a complaint, he waives his right to privacy,’ he said.

According to Mr Fourie, the disciplinary hearings procedure outlined in s 39 will remain the same.

‘Section 40 deals with the procedure after the hearing. The committee has 30 days to reach a decision regarding the hearing and must inform the practitioner of its findings and the right to appeal. Here we find some very big changes as to what we currently have. Once a disciplinary committee finds that the legal practitioner is guilty of misconduct it may, firstly, order the practitioner to pay compensation to the complainant, which order is subject to confirmation by any court with jurisdiction. I can only foresee a lot of problems with this section. In my view it lends itself to abuse,’ he said.

Mr Fourie added that the second difference is that the disciplinary committee can order temporary suspension of the practitioner. ‘I again foresee some problems here. … How will this be enforced?’ he queried. ‘Thirdly, the committee may order the fidelity fund certificate to be withdrawn. … My question is, does this not amount to automatic suspension?’ he asked.

Legal Practitioners’ Fidelity Fund

CP Fourie spoke on the Legal Practitioners’ Fidelity Fund and its Board of Control. He explained that since only chapter ten of the Bill would come into immediate effect after the promulgation date; chapter two would be in operation three years after chapter ten and the remaining provisions would come into operation by promulgation, for at least the next three years the legal profession would operate as it does currently, under the Attorneys Act 53 of 1979 and that nothing would change.

Next Mr Fourie touched on how attorneys would be affected by the Bill. He said that he did not foresee a huge difference in the day-to-day practice at a law firm. He added that the main focus of the Bill was a regulatory structure at national level for both attorneys and advocates. ‘Advocates are against the Bill because they are more or less self-regulated and attorneys think that they are currently over-regulated,’ he said.

According to Mr Fourie, it will be a nightmare for the Legal Practitioner’s Fidelity Fund to get advocates that will be taking briefs directly from the public to comply with the requirements of the fund as they are not used to the extra infrastructure required such as bookkeepers etcetera. ‘Advocates do not usually have offices. I am yet to be convinced and given proper answers as to why it is necessary,’ he said. He noted: ‘If you want to take instructions directly from the public and you need a Fidelity Fund certificate, why not practise as an attorney?’

Mr Fourie said that the fund’s board of control will change to nine members – five of whom must be legal practitioners. It would operate how it is currently operating, except that it will be able to inspect any trust account records. Also, Mr Fourie added that the claim value will be capped at R 5 million, which he said was reasonable as a R 5 million cap can cater for 99% of all the current claims.

Cost and fees at the Bar

Speaking on cost and fees at the Bar, Advocate Quintus Pelser SC quoted what he deemed as the most important subparagraphs of r 7 of the Rules of Professional Conduct of the General Council of the Bar, which deals with fees. He said that he needed to quote the subparagraphs in order to present views on the way forward under the new dispensation. Rule 7 deals with the reasonableness of fees, fees payable only by attorneys and contingency fee agreements. Mr Pelser said that r 7.1.1. states:

'Counsel is entitled to a reasonable fee for all services. In fixing fees, counsel should avoid charges which over-estimate the value of their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his lack of means may require a lower charge, or even none at all. In determining the amount of the fee, it is proper to consider:
(a) the time and labour required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause;
(b) the customary charges by counsel of comparable standing for similar services; and
(c) the amount involved in the controversy and its importance to the client.

No one of the above considerations in itself is controlling. They are mere guides in ascertaining the real value of the service. In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.'

Mr Pelser said that it is probable that most, if not all advocates will continue to deal with costs and fees as close as possible to the present dispensation. He added that in all probability, there will be more interaction between the advocate, the attorney and the client in respect of fees.

He added that it was not possible to give any indication in respect of an advocate who plans to practise with a trust account referred to in s 34(2)(b) on the Bill.

Mr Pelser said that with regards to the capping of fees, the advocates' profession felt that the Justice Minister should not be involved in the determination of a fee structure for legal practitioners as this is viewed as a diminution of the independence of the professions. He added that in terms of the Bar Rules, advocates' fees must be reasonable and the final determination of the reasonableness should continue to be the prerogative of the courts. 'When a party cannot afford the fees charged by an advocate, that advocate may reduce his fees. This has been frequently done,' he said.

Mr Pelser noted that advocates charge on a per hour, per appearance or per day basis. He said that the impact of costs for travelling is minimal. He added that this structure should be retained.

Mr Pelser pointed out that the challenge that advocates will face is the financing of overheads from a lower fee structure, but added that it will be less of a challenge for the Bar than the attorneys, as the attorneys' profession has higher overheads than advocates.

Mr Pelser said that one of the benefits of the new dispensation is that the GCB will not have to discipline the advocates that work from the boot of their car, take money from clients without the intervention of any attorney and often do not deliver any services or deliver services of a low standard.

Costs and fees in the attorneys' profession

Jan Janse van Rensburg spoke on costs and fees in the attorneys' profession. He said that in general, the attorneys' profession can live with the Legal Practice Act once enacted, but that he cannot say the same about s 35. Mr Janse van Rensburg said that s 69(*d*) of the Attorneys Act states: 'The council may prescribe the tariff and fees payable to any practitioner in respect of professional services rendered by him in cases where no tariff is prescribed by any other law'.

He added that it was strange that this section was rarely used by the law societies. Mr Janse van Rensburg said that it would not be possible to prescribe a fixed tariff right across the country. He made an example by quoting the amended r 58 (7) and (8) of the magistrate's court rules which states:
'(7) No attorney or advocate appearing in a case under this rule shall charge a fee of more than R 404 if the claim is undefended of R 929 if it is defended, unless the court in an exceptional case otherwise directs.
(8) No instructing attorney in cases under this rule shall charge a fee of more than R 1 414 if the claim is undefended or R 2 020 if it is defended, unless the court in an exceptional cases otherwise directs.'

Mr Janse van Rensburg said that it would be difficult to find a 'one fit all' fee. He added that one cannot expect an attorney in Sandton to charge the same as the one in a one-room office in Brits charges, as the two were not comparable. He asked how all would be taken into account to come up with a fee that would be used by everyone across the country.

According to Mr Janse van Rensburg, when s 35 eventually comes into effect, he would like to see how they will approach the task of implementing fees. Section 35 states: 'Until the investigation [by the Law Commission] contemplated in subsection (4) has been completed and the recommendations contained therein have been implemented by the Minister, fees in respect of litigious and non-litigious legal services rendered by legal practitioners, juristic entities, law clinics or Legal Aid South Africa referred to in section 34 must be in accordance with the tariffs made by the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985).'

Mr Janse van Rensburg noted that the Rules Board will take into account the complexity and expertise of the legal services rendered, the seniority of the legal practitioner, the volume of work required and the financial implications of the matter when setting the tariffs.

He concluded by saying that he did not see the prescription of fees working, but that some were positive about it.

Contingency fee agreements

Speaking on contingency fee agreements CP Fourie started with what is allowed in terms of case law and what the LSNP had done in respect of contingency fees.

Mr Fourie said that the issue on contingency fees had raised a lot of emotion over the past few years. On 13 February 2013 judgment in two matters, namely, *De la Guerre v Ronald Bobroff & Partners Inc and Others* (GNP) (unreported case no 22645/2011, 13-2-2013) (Fabricius J) and *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party)* 2013 (2) SA 583 (GSJ) dealt with contingency fees.
• See 2014 (May) *DR* 52.

According to Mr Fourie, in the *De la Guerre* matter the following was said: 'It is clear in my view, that contingency fee agreements between a litigant and his attorney were unlawful at common law. At common law a legal practitioner was only entitled to a reasonable fee for work actually done … There is no doubt that the agreement entered into between the Applicant and the First Respondent does not comply with the Act for the reasons set out in the founding affidavit. The agreement is accordingly invalid.'

Mr Fourie said that in the *South African Association of Personal Injury Lawyers* matter, the court held that the South African Law Reform Commission had highlighted the conflict of interests introduced by a contingency fees agreement – the legal practitioner owed a responsibility to the client and a duty to the court, and the practitioner enjoyed a financial interest in the outcome of the matter. The court added that these conflicts had to be managed very carefully.

Mr Fourie said that the court held that 'the Act leaves no room for lawful contingency fees agreements which do not comply with these limitations and requirements'.

'In respect of both these full Bench judgments, leave to appeal was sought but refused. Leave by the Supreme Court of Appeal was refused and then leave was applied to appeal at the Constitutional Court. The SCA refused leave on 11 September 2013 and on 20 February 2014 the application to the Constitutional Court was dismissed with costs,' he said.

According to Mr Fourie, in the *De La Guerre* matter the Constitutional Court said: 'At issue are contingency fees. Under the common law, legal practitioners were not allowed to charge their clients a fee calculated as a percentage of the proceeds the clients might be awarded in litigation. The Act changed this. It makes provision for these fees to be charged in regulated instances and at set percentages. Certain law societies made rulings allowing their members to charge in excess of the percentages set in the Act.

Uncertainty reigned in the attorneys' profession about the correct legal position in relation to contingency fees. Could these fees be charged only under the Act, or also outside its provisions?... Bobroff was one of the firms which charged more than allowed for in the Act, as the rules of its professional association allowed. Ms De La Guerre was charged 30% as a contingency fee, instead of the maximum of 25% allowed under the Act.'

Mr Fourie noted: 'Now where does that leave us? That leaves us with a simple answer: There is no such thing in our law called common law contingency fees. The only way and only basis on which you can charge any contingency fees is in terms of the Contingency Fees Act 66 of 1997. Unfortunately this Act, which is a very short Act, is not very consumer friendly. A lot of questions arise from the Act. A lot of difficulties arise from the understanding and interpretation of the Act'.

Mr Fourie said that s 3(1)(*a*) of the Act provides that contingency fees agreements shall be in writing and in the form prescribed by the Justice Minister, which shall be published in the *Government Gazette*, after consultation with the advocates' and attorneys' professions.

'Now this prescribed fee agreement was in fact published by the Minister and somehow it appears as if not many practitioners are aware of it. This is the only agreement that can be used in terms of the Act. Not a changed one. If that agreement is not complied with, then it is not a valid contingency fees agreement,' he said.

Mr Fourie pointed out that contingency fees, as a principle, was a way to facilitate access to justice. He said that contingency fees needed to be structured in a way which clients were comfortable with and which they could afford.

'If we do not charge contingency fees, we charge on a time basis, but is it the right way? Would you engage the services of someone who cannot tell you what something is going to cost you because they do not know how long it will take? You too would be afraid, because you do not know what it will cost you. Furthermore, when do you charge for your time spent? When you sit behind your desk working on the matter or when you wake up at two in the morning worrying about the matter and you cannot fall asleep until five? Do you bill those hours; if not, why not? My biggest problem with this method is that it rewards inefficiency – the longer you work, the more you get,' he said.

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