

Towards a Legal Practitioners Act

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A major step forward, on the long road to overcoming long-standing divisions in the legal profession, took place on 16 March 1999 when the representatives of the four statutory law societies, the National Association of Democratic Lawyers (NADEL) and the Black Lawyers Association (BLA) adopted the constitution of the Law Society of South Africa at a ceremony in Cape Town.

The formation of the new body was the culmination of more than a year and a half of negotiations following the adoption of a Statement of Principles between the respective parties in July 1996. Those principles had provided for the creation of one national statutory legal structure with nine statutory provincial sub-structures in which the statutory law societies would be represented as to 50%, NADEL would be represented as to 25% and BLA as to 25%. It was also agreed that the governing council of the national body should be a 20-person council comprising ten representatives of the statutory societies, one from each of the nine provinces and the tenth being the co-chair, and five councillors from each of NADEL and BLA, one of whom would be the other co-chair. In addition, it was agreed that the councils of the statutory provincial societies should be altered to provide for representation on the same 50:25:25 principle.

The negotiations, which included canvassing of opinion within the provinces, came close to faltering between the statement of principles in July 1996 and the final adoption of the new constitution in March 1998. It was accepted that the Law Society of South Africa should be an interim body pending the adoption of new legislation to govern the attorneys' profession and that one of the primary tasks of the new organisation was to promote, advance and assist in the drafting of legislation to form the basis of a new Act.

The initial co-chairs of the new organisation were Mrs Esmé du Plessis of Pretoria, representing the statutory side and Dr Willie Seriti, a member of the BLA, representing NADEL and BLA.

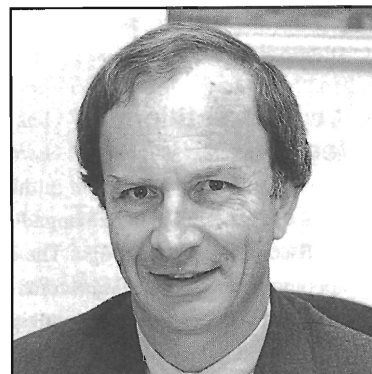
In accordance with the constitution of the body, the full council of twenty members has

met every alternate month and, each of the other months, the management committee has met. The initial meetings were devoted to a process of getting to know one another and familiarising new participants with the functions carried out by the society and the way in which it worked. Inevitably there were misunderstandings and disagreements and it became more and more clear to the participants that unless and until a common goal was settled on by the parties, there would continue to be division in the profession and that the unity, apparently brought about by the formation of the society, would be more of an illusion than a reality.

With this in mind, it was agreed that a legal summit should be held at which the issues to be included in a new Act would be thrashed out between the parties and the contentious issues would be debated fully so as to come up with consensus, if possible, in respect of those matters. In essence, the issues causing division were the scope and function of any new Act, namely whether it should be a new Attorneys' Act or a Legal Practitioners Act, the division of powers between provincial and national structures, the standards for entry into the profession including practical and academic training and the basis for testing the proficiency of candidates for entrance into the profession.

Consensus

In order to facilitate the ultimate holding of the legal summit, a steering committee representing the participating bodies met on a number of occasions in December and January 1999 and ultimately reached considerable consensus on all aspects with the possible exception of the division of powers between the provincial



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and the national bodies. In particular, and most importantly, agreement was reached that:

- 1 The profession favoured a Legal Practitioners Act providing for regulation of all persons who dealt with the public in respect of legal services and leaving scope for the possible inclusion of para-legals, prosecutors and legal academics;
- 2 The profession took the view that the standard entry qualifications for practice in any branch of the profession would be a minimum four year LLB followed by a minimum of one year's practical training which could take the form of attendance at a practical school plus articles or other community service. In respect of practitioners who wished to practise as a referral profession, it was agreed that attendance at a practical school plus pupillage would suffice;
- 3 Examinations may not be the ideal way to test the proficiency of a candidate in respect of any practical training and, for that reason, the Legal Education Committee of the organisation was mandated to consider and report on ways of assessing capability rather than examination in the traditional form.

It has become increasingly apparent, in the period since the annual general meeting of the Society in March 1999 that the implementation of a new Act is a matter of extreme urgency and until such time as this happens, there will continue to be division and uncertainty within the profession. Throughout the process, there has been close liaison between the Society and Ministry of Justice and indications received from the department are that the task team on transformation is currently

preparing legislation for the implementation of a new Legal Practitioners Act. The profession is obviously concerned that its views should be conveyed to the department and incorporated in any such new legislation. The recent change in the Minister of Justice has again thrown the process into uncertainty and as I write this article, arrangements are being made to meet with the new Minister.


Unity of purpose

What is, however, apparent is that, despite

problems which have arisen, the effect of transformation has been to strengthen the unity of purpose within the attorneys' profession. We have found that, by working together with people from other organisations, trust between participants has been built up which has led to a situation where even if there is disagreement, there is trust and a willingness to find ways forward. I am sure that this bodes well for the future of the organisation.

The attorneys' profession, despite the

growing pains, is satisfied that the steps it has taken have been in the right direction. It watches with concern the apparent inability of the GCB to grapple with the same issues.

Again, with this in mind, a meeting between the LSSA and the GCB is currently being arranged at which the LSSA has requested that the only issues to be dealt with are transformation, a new Legal Practitioners Act and the position of the independent advocates. 

Aspects of practice

John Middleton Pretoria Bar

This contribution encompasses the *South African Law Reports* for the period 1 April 1999 to the end of July 1999; the *All South African Law Reports* for the period 4 April to 28 June 1999; the *South African Criminal Law Reports* for the period 1 March to the end of June 1999 and the *Butterworths Constitutional Law Reports* for the period 1 March to the end of May 1999.

Land Claims Court Rules

The Land Claims Court Rules have been amended. The amendments, comprising some 89 pages, appear in Government Notices Nos 345 and 594 published in Government Gazettes Nos 18728 and 20049 of 13 March 1998 and 7 May 1999 respectively. They may also be downloaded from the Internet at website <http://www.law.wits.ac.za/lcc>.

Bond Equipment (Pretoria) (Pty) Ltd v Absa Bank Ltd [1999] 2 SA 63 (W)

In the course of the trial in this matter the defendant gave notice of an intention to amend the plea. This resulted in the postponement of the matter. The plea was, however, not amended. In the course of delivering judgment in this matter which related to delictual liability, Willis AJ was constrained to make the following observation:

"The practice of forcing postponements as a result of last-minute attempts to amend pleadings is, in my view, strongly to be deprecated. It interferes with the smooth flow of litigation which it is the duty of the Courts, counsel and attorneys to uphold. Normally I should be extremely reluc-

tant to make an order for costs on an attorney and client scale. Nevertheless, as a mark of my disapproval of the conduct of the defendant, I shall make such an order in this case."

Singh v North Central and South Central Local Councils [1999] 2 All SA 578 (LCC)

The applicants in this matter had unsuccessfully sought relief in respect of an alleged breach of a settlement agreement relating to the restitution of land rights. In the course of the action the applicants had, in the correspondence which led to the application, launched an unwarranted and scathing attack against the Regional Land Claims Commissioner for KwaZulu-Natal. Legal Aid had been granted to the applicants in terms of section 29(4) of the Restitution of Land Rights Act 22 of 1994. In a judgment relating exclusively to the question of costs in the matter, Dodson J made the following extraordinary order:

"(i) No fees or disbursements, including counsel's fees and disbursements, may be recovered by the applicants, their attorneys or counsel, from the State under any legal aid regime provided for in section 29(4) of the Restitution of Land Rights Act 22 of 1994 in respect of the proceedings before this Court under case number 9/98."

As part of the motivation for this order the learned Judge observed at paragraphs 17 and 18 of this judgment:

"[17] In deciding on the costs order relating to the recovery of legal aid costs, this Court must exercise its wide discretion afresh. There are particular factors which it must consider which are specific to the type of order under consideration here. Firstly and most importantly, when dealing with legal aid, one is dealing not with the costs of another party, but with scarce public funds. Secondly, those funds are made available to lawyers

in the context of a relationship of trust and good faith as between the lawyers and the legal aid grantor. The question which must be asked is whether there was such a serious misuse of those public funds and such an abuse of that relationship of trust, and of the judicial process commenced pursuant to the legal aid instruction, that it would be unconscionable for the applicants' legal representatives to recover their fees and disbursements from the legal aid grantor.

[18] In this particular matter, the funds have been used to wage completely unwarranted litigation against the third respondent which is itself (on the assumption underlying this judgment) the legal aid grantor. In the course of that litigation, they have unjustifiably vilified one of the third respondent's most senior officials. They have burdened the papers with unnecessary material. In a number of the steps taken by them in the course of the proceedings they conducted themselves in the most cavalier manner. They went so far as to breach the express terms of a court order in relation to matter contained in affidavits which they were allowed to file after the conclusion of argument. It is also noteworthy that there is no clear indication of any apology or remorse on the part of the applicants or their legal representatives. In the circumstances, this amounts to a serious abuse of the type to which I have referred in the previous paragraph. It would certainly be unconscionable for the applicant's legal representatives to recover their fees and disbursements from the legal aid grantor."

See also in this regard *Ntuli and Others v Smit and Another* 1999 (2) SA 540 (LCC).

Note

Practice Direction No. 2 of the Constitutional Court, which was reproduced in *Consultus*, June 1999 has now been reported, see 1999 (2) SA 666; 1999 (3) BCLR 260 and 1999 (1) SACR 370. 