The Legal Practice Bill

By Rashid Vahed SC, chair of the General Council of the Bar of South Africa

The future of our profession hangs in the balance and the Legal Practice Bill ('LPB') must remain the focus of my contribution to *Advocate*. I suspect that it will continue to enjoy that focus in future issues as well because I am of the view that every member must be fully appraised of the developments (or lack thereof).

On 24 November 2010 the GCB's negotiating team met with representatives of the Department of Justice (DoJ) lead by the DoJ's Mr JB Skosana. Arising out of that discussion I wrote to the Minister on 1 December 2010 and the full text of that letter is reproduced below. On 10 December 2010 Mr Skosana acknowledged receipt of my letter to the Minister.

On 3 February 2011, I again wrote to Mr Skosana in the following terms:

'I refer to my email to you dated 1 December 2010 enclosing my detailed letter to the Minister and to your response dated 10 December 2010, both of which are appended below.

Please be advised that I look forward to the "*…Minister's response to the letter or his reply…*" and his "*…[guidance] on how the concerns raised in the letter need to be addressed…*" as promised by you.

I note also your advice on 10 December that the Bill served before Cabinet on 8 December. What you did not tell me, and which I discovered elsewhere, was that on that day Cabinet approved the Bill for submission to Parliament. That appears to have happened notwithstanding the serious concerns and submissions raised on behalf of the GCB in my aforesaid letter.

I would be grateful if you could advise me as to where the Department is in the process and at the same time furnish me with a copy of the Bill as approved by Cabinet for submission to Parliament.'

To date I have heard nothing further.

The text of my letter of 1 December 2010 to the Minister reads as follows:

'The Honourable

The Minister of Justice & Constitutional Development

Your Reference: Mr J B Skosana

Dear Minister Radebe

THE TRANSITIONAL APPROACH ON THE LEGAL PRACTICE BILL

1. I write to you in response to a meeting held between the General Council of the Bar ('GCB') and the Department's ('DoJ') Mr J B Skosana and his team on 24 November 2010. Subsequent to that meeting, and at 18h07 on 25 November 2010, Mr Skosana furnished the GCB with a 'Discussion Document' outlining what he referred to as the Transitional Approach on the Legal Practice Bill. He requested that we respond in writing as urgently as possible.
2. It will be recalled that on 5 May 2010 you sought approval from a morning meeting of Cabinet to place a version of the Legal Practice Bill before Parliament, and having obtained that approval, presented it to Parliament during the course of your speech on the afternoon of the same day. The GCB had only received a copy of the Bill on 21 April 2010 and was informed at a meeting on 24 April 2010 that the events of 5 May 2010 would occur. A committee of the GCB did what it could in the time available and prepared a brief memorandum which was submitted to the DoJ on 3 May 2010. Unsurprisingly the contents of the GCB memorandum were not reflected in any changes at all to the draft Bill submitted on 5 May 2010.
3. At the annual general meeting of the GCB in July 2010 Mr Skosana (who kindly attended at our invitation) advised the GCB that the Bill was with the law advisers who would comment on it with regard to its constitutionality; after which there would be an opportunity for consultation with the profession regarding its contents.
4. It transpires that there have been exchanges between the law advisers and the DoJ since about July on the questions of the constitutionality of the Bill, the consistency of the Bill with the body of South African law, and the consistency of the Bill with government policy.
5. It was quite fortuitous that the GCB arranged a meeting with the DoJ on 24 November 2010. Although it appears that the final meeting of the Executive Committee of the DoJ dealing with the Bill took place only on 22 November 2010, the DoJ had already held a meeting with the Law Society of South Africa ('LSSA') some three weeks (or more) before our meeting of 24 November 2010. At that meeting (of which we were unaware) the LSSA was consulted with regard to a plan of action which was put to us only on 24 November 2010.
6. It was explained to us that there is a substantial backlog of Bills awaiting Parliament's consideration. A decision has accordingly been made that all additional Bills which are to serve before Parliament in 2011 must receive Cabinet sanction (for that purpose) at the last Cabinet meeting of this year, which is due to be held (we think) on 3 December 2010. Any Bill which does not make it through that Cabinet meeting will have to stand over until 2012. We were told that the DoJ is anxious to ensure that the Legal Practice Bill serves before Parliament in 2011. It therefore intends to put its case before the Cabinet at its December meeting.
7. The existing draft Bill is regarded as fundamentally flawed both by the GCB and the LSSA. We feel confident in expressing ourselves about the views of the LSSA because that organisation has delivered the product of its (presently incomplete) revision of the Bill to the DoJ, and we have been provided with a copy of it.
8. We intend no disrespect to those who have been responsible for the drafting of the Bill when we say that the outcome is poor. It is an attempt, we think, at accommodating views expressed over many years by the two professions, and perhaps internally by departmental officials. We suspect that these often conflicting views have generated a succession of amendments, with the result that even if one accepts what appears to be the structure contemplated by its drafters, the provisions of the Bill miss its intended targets in a number of respects.
9. We suspect that it is on account of the Bill's long gestation period that even the order of sections has become so muddled that an

attempt to gain an insight into the overall structure from a single careful reading is likely to produce some bewilderment.

10. Whilst there is so much emphasis these days (and has been so much emphasis in recent times) on regulation for the purpose of achieving access to justice and access to the legal professions, it should not be overlooked that one of the central requirements of the Legal Practice Bill from the outset has been the need to ensure that the practice of all lawyers is regulated.
11. Of course the difficulty is that whereas all attorneys have hitherto been subject to regulation (under statutory authority), that has not been the position with regard to advocates. Only those advocates who have chosen to belong to voluntary associations have been subject to any form of regulation beyond the courts. (It has been the consistent view of the GCB that advocates who belong to the so-called'Independent Bars' have not been properly regulated and that advocates who belong not even to those institutions but who practise nevertheless are not subject to any regulation at all, save when it has proved possible to engage the courts with regard to their conduct. Then there are the many so-called advocates who have been admitted as such, and who have never practised.)
12. A chasm so often lies between good policies and implementation. We think that the only way to avoid that outcome is the recognition of two bodies falling under the Legal Practice Council (or whatever name is accorded to that umbrella body) ('LPC'), one to regulate the day to day affairs and discipline of the advocates, and the other to do the same for the attorneys. Both such bodies must function under the auspices of the LPC which must be responsible for overall policy and setting the standards which are common to the two professions; as well as ensuring that the two regulatory bodies which fall under it actually do perform their allotted functions.
13. In our opinion we as advocates have little to contribute to the day to day regulation of the practice of attorneys. We can of course speak with more conviction when we say that attorneys have little if anything to contribute to the day to day regulation of practice in the referral profession. Cynics would of course say the only interest the attorneys have in being involved in controlling advocates lies in the perceived advantage of being able to secure commercial terms which favour the attorneys' profession at the expense of the advocates' profession. The numerical superiority of the attorneys' profession cannot be overlooked.
14. The GCB is committed to approach the Legal Practice Bill in a positive frame of mind. We are thus committed to doing our best to persuade all involved that we can in fact achieve the best of both worlds through a properly drafted and constructed Legal Practice Bill on terms which not only best serve the public interest and the viability and independence of the professions, but which also render it reasonable to suppose that proper and full implementation is an achievable goal.
15. However the way forward, seen from the DoJ's perspective, is quite unaffected by our views. It seems (although it was not said so expressly) that the law advisers found nothing unconstitutional about the provisions currently seen in the LPB. However they have criticised the Bill for what we are told are 'technical' (drafting?) reasons, and also for more substantial reasons because the Bill raises questions which it ought to be answering. (The example given was that it was all very well to provide for you to appoint members of the LPC from 'nominations' received from various quarters, but who exactly is going to make those nominations and how are the nominations going to be decided upon?)
16. It was explained to us that the DoJ has decided that there are three courses available to you:

    (a) Stop the train. That means redrafting the Bill after debating all the unresolved issues and reaching conclusions properly reflected in a new Bill.

    (b) Proceed with the Bill as it is, but subject to corrections where 'technical' faults have been identified.

    (c) Adopt a middle course.

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17. As we understand what was conveyed to us on 24 November 2010 the DoJ has decided to adopt a middle course. It involves fixing up the 'technical' errors in the Bill, and inserting what would probably be a transitional chapter in it, and asking Parliament to pass the Act upon the basis that the new transitional chapter will be brought into operation first.
18. The new transitional chapter would establish a Transitional South African Legal Practice Council the task of which would be to make recommendations to you with regard to a number of terms of reference. Subject to sanction by you, the recommendations would then be expressed in regulations. These would, in conjunction with the remainder of the Act, put the legislation in a condition to be implemented. The idea is that the Transitional Legal Practice Council will have 18 months within which to do its work and you would have another six months within which to promulgate regulations, whereafter the remaining provisions of the Act will be brought into operation.
19. Our expressions of dismay at the prospect of the Act being passed in its current form were met with the response that if the work of the Transitional Council were to reveal that it is necessary to amend the Act before bringing it into operation, that could be done.
20. The 'Discussion Document' referred to in paragraph 1 above was sent to us to give us an idea of what is proposed as a transitional phase.
21. We are most concerned about the prospect of the Act being passed in its current form. The changes to it which have been proposed by the LSSA, some aspects of which we would probably support, would in themselves require substantial amendments to the Act. Given the current structure of the Act (which is poor, as we have mentioned earlier) if the LSSA's proposals were to be accepted in full the Act would require to be completely re-written in order to be an accessible piece of legislation. It is much the same with the changes which would be called for if our proposals were to be accepted, although we think we could simplify the legislation by a considerable margin in the course of such a re-write.
22. It stands to reason, we respectfully submit, that if Parliament is persuaded to pass an Act in the form of the current Bill, it is not going to take it kindly if it is asked to pass a set of amendments which is so substantial as to imply that Parliament did not do its

job properly in the first place. Accordingly the course presently chosen by the DoJ holds considerable 'political' difficulties.

23. We accordingly do not support the proposed course. The alternative of 'stopping the train' is the only one which will enable you to present an acceptable and viable piece of legislation to Parliament. The GCB of course expresses its regret at the delay to the process, but we respectfully point out that whilst delay has been the operative or dominant factor until the beginning of this year, what we would regard as inappropriate haste has characterised the events of 2010. The GCB expresses its willingness to support your decision that something must now be done, but given the importance of the legislation and its ramifications for the proper administration of justice in this country, delay until the 2012 session of Parliament is not only justified, but eminently desirable.
24. It is also necessary for us to point out that the GCB takes the view that there has not been proper consultation with regard to what is proposed to be put before Parliament. The process conveyed to us on 24 November 2010 involves the submission of an amended Bill in a form which we have not yet seen and will not see before the Cabinet considers its decision to put the matter to Parliament. The full implications of what is proposed to be put to Parliament cannot be assessed upon the basis of the document which we now have. The so-called 'technical' faults in the Bill identified by the law advisers will inevitably have more significance than their categorisation as 'technical' suggests. But most importantly we have not yet been afforded the opportunity of consultation with regard to the Bill submitted in May 2010. That is presumably because the internal process Mr Skosana told us of at our annual general meeting in July only terminated on 22 November 2010. We are accordingly severely prejudiced.
25. In short the GCB's position, with all due respect, is that if you proceed as suggested at the meeting with the DoJ on 24 November 2010 you do so without the GCB's support. However if you insist on doing so then we must point out that the terms of reference of the Transitional Council require much more and meaningful consultation. What has happened in that regard over the past weeks is woefully inadequate.

Yours faithfully,

RAK Vahed SC; Chairman General Council of the Bar of SA

The GCB's Advanced Advocacy Training Course

Reports on the training course at the Wallenberg Centre, Stellenbosch University, 10-15 January 2011

Improving the performance skills of advocates

By Rudi van Rooyen SC, Cape Bar

From 10 to 15 January 2011 the Advocacy Training Committee of the GCB presented its inaugural advanced advocacy course at the Wallenberg Centre, Stellenbosch University. The course was the first of its kind in South Africa and will be held annually.

The purpose of the course is to improve trial advocacy skills. It is aimed at junior advocates of five to 12 years' standing.

The need for such a course and its positive effect have been demonstrated by similar courses presented by the UK and Australian Bars, both of which South African judges and counsel have contributed to for a number of years.

Role players

Participants were limited to 36 junior advocates to ensure intense training of a high quality. A number of junior attorneys were also invited to participate. Each group was managed on a day-to-day basis by a dedicated tutor who conducted training together with trainers who rotated between groups.

Presentations and demonstrations in plenary were conducted by judges, senior counsel, accountants and an expert in performance skills.

On the final day judges presided over mock trials and junior members of the Cape Bar acted as witnesses.

Programme

The programme consisted of the following: Monday, orientation/case analysis; Tuesday, opening address/witness handling; Wednesday, witness handling; Thursday, closing address/ethics; Friday, expert witnesses; Saturday, trial.

With the exception of the ethics and expert witness components, the same set of facts was used for all the sessions, including the trials on the final day.

A typical day consisted of individual group sessions from 9h00 to 16h00 with lunch and two tea-breaks. From 16h00 to approximately 18h30, presentations and demonstrations took place in plenary.

Group sessions

The tutors (each dedicated to a particular group) were Schalk Burger SC, Guy Hoffman SC, John Mullins SC, Sven Olivier SC, Rudi van Rooyen SC and Christopher Whitcutt.

The trainers (who rotated between groups) were Kriegler J, Bertelsmann J, Wallis J, Gorven J, Edwin Glasgow QC (UK), Desmond Browne QC (UK), Anesta Weekes QC (UK), Phil Greenwood SC (Australia), Amber Darr (Pakistan), Rashid Vahed SC, Sharise Weiner SC, Vincent Maleka SC, David Unterhalter SC, Danny Berger SC, Richard Goodman SC and Alasdair Sholto-Douglas SC.

Conduct of a Trial: Each participant presented an opening and a closing address and was given several opportunities to lead witnesses in chief and to cross-examine. A video recording was made of every performance. After a performance, the participant was reviewed by a tutor/trainer and immediately thereafter the participant, accompanied by another tutor/trainer, reviewed and discussed the performance in the video room allocated to each group. Prior to the commencement of the course, the participants prepared written heads of argument and during one of the sessions, a tutor/trainer was allocated to each participant for discussion of the heads of argument on a one-on-one basis.

Ethics: Nine ethics questions were prepared by Danny Berger SC who, prior to discussion them within a group context, led a discussion attended by tutors. The questions were interesting and challenging and the extent to which participants, tutors and trainers alike grappled with the issues, illustrated the importance of debate of such issues at this level.

Experts: The expert witnesses dealt with accounting issues relating to financial state-