
To: The Honorable Minister of Justice & Constitutional Development

**RE: THE IMPACT OF COVID-19 ON THE LEGAL PROFESSION AND THE CURRENT
LOCKDOWN**

1. We refer to your letter dated 7 April 2020.
2. At the outset, we would like to thank you for the opportunity to share our view regarding the effect that the COVID-19 lockdown is having on the legal profession. We have consulted widely with stakeholders within the profession concerning the effect particularly on the current business and economic impact on the profession. We must add that it is having a negative impact on the viability and financial health of practices both small and big across the nation.
3. Submissions were received from legal practitioners directly, voluntary associations representing legal practitioners, the Sheriff's Board, the Mortgage Origination Regulatory Council of South Africa and the National Property Practitioners Council. Whilst divergent views emerged on possible solutions to address the impact, there has been an overall consensus on the impact of the lockdown which is set out more fully below.
4. We consulted on and received various proposals on what can be done to minimize the overall economic and financial impact on the legal profession during this imminent lockdown. We are mindful that the Government does not have the necessary means or capacity to address the financial challenges that legal practitioners are facing.

5. Consideration has also been given to the possible amendments of the Court Rules or practice directives to alleviate the pressure legal practitioners and the public at large face during the lockdown.
6. Finally and most importantly, as a profession, we acknowledge, appreciate and fully support all the difficult but decisive decisions which our President and Government has made in order to mitigate the effects of Covid-19.
7. We are also mindful of the fact that the legal sector is a cog in the economy of the country and the proposals which we present during the lockdown period have been heavily and thoroughly considered. We, as legal practitioners are aware of our obligations which includes those whose livelihoods are directly connected to the legal profession; to uphold and advance the rule of law, the administration of justice, and the Constitution in a manner which does not detract from the Government's strategy, but in a complementary and facilitative manner.

THE IMPACT OF THE LOCKDOWN ON LEGAL PRACTITIONERS' PRACTICES

8. The impact of the lockdown on legal practitioners can be categorized under various sectors of the legal profession. The impact of each individual category may not be catastrophic but when considered holistically, it would be detrimental for many legal practitioners, both from the advocates' and the attorneys' professions. It may take months, if not years for their practices to recover.
9. These categories may be loosely described as financial, operational, technological and human resources. In this section we have summarized all the comments received as Council is of the view that it correctly reflects a consensus view.

10. Financial consequences:

Attorneys

- 10.1. Revenue for attorneys comprises fees billed and collected. The expenses for a law firm remain unchanged during lockdown and approximately 80% of these expenses are allocated towards salaries and office rental. The balance is used for legal practitioner levies and other operational expenses.
- 10.2. Most firms have already experienced a downturn in revenue during the lockdown and expect it to continue. One of the reasons is clients are either shutdown or working with limited staff. A few law firms, ranging in size from small to large, have received letters from their clients informing them that their clients are not able to pay their accounts during the lockdown. An additional reason is the closure of the institutions which handle legal disputes and processes thereby curtailing the finalization of historic disputes.
- 10.3. If a law firm is not able to function and generate income, its downstream suppliers and affected stakeholders are also severely impacted. These include, but are not limited to advocates, correspondent attorneys, courier companies, the sheriffs and estate agents across the country.
- 10.4. The cost of equipping all staff members to be able to work remotely (the cost of computing hardware as well as the IT facilities required) is prohibitive, especially on such short notice. Therefore, law firms (who can afford to) have confined themselves to equipping key staff members to work remotely. For some firms this has entailed purchasing laptops and data packages for attorneys and secretaries who are key staff.

- 10.5. In order to function effectively, particularly for certain types of work such as conveyancing and collections, a printer with scanning facilities is also required.
- 10.6. For most of the small firms (with less than 5 lawyers and 4 support staff) and sole proprietors the cost of working remotely is prohibitive.
- 10.7. Those who specialize in criminal law are unable to operate at all since most of their work is trial work and court appearances. They are confined to bail hearings and these are also limited. Additional difficulties are experienced by practitioners when they are seeking permits for bail applications by virtue of the restrictive nature of the permit requirements for practitioners.
- 10.8. Some of the medium and larger firms have bursary funds and social development payments which they make on an annual basis, and pro bono initiatives. Their ability to continue with these programs will place an enormous burden on their cash flow which will now be redirected to the fixed financial expenses of the firm. The impact of this will be felt by those who usually or would have benefitted from these social development payments and pro bono initiatives.

Advocates

- 10.9. Advocates are typically more dependent than attorneys on court work, both for criminal and civil matters. The closure of the courts and adjournment of trials will have a direct negative impact on these advocates particularly if they do not perform additional services such as drafting.
- 10.10. Are not being paid for services and invoices already submitted both prior to and during the lockdown period.

- 10.11. Have fixed business expenses which remain unchanged during the lockdown, namely, rent, secretary's salaries, group fees, office expenses, professional indemnity insurance payments, and legal practitioner levies.
 - 10.12. Although precluded from their chambers, advocates are currently not receiving any rebate or payment holiday from their landlords.
 - 10.13. Not all senior members of the Bar can be said to have funds in reserve, although their financial obligations may be more substantial.
11. Operational and Technological Consequences:
- 11.1. The inability to work remotely due to lack of access to computer hardware and/or the IT facilities required.
 - 11.2. Living in an area which does not have the supporting infrastructure to support either the attorney/advocate or the support staff member working remotely.
 - 11.3. Both attorneys and advocates are hindered by the Directions in relation to permits for legal practitioners in the way they may consult with the client for matters relating only to *essential services*. The essential nature of the service that justifies the request for a permit from the local Provincial Office can only be determined after consultation with client wherein the urgency is established. In terms of the Directions the permit will only be granted once the case is enrolled. This places the legal practitioner in a "catch-22" situation in that, on the one hand, he/she cannot consult properly because that is not an essential service, and, on the other hand, he/she cannot properly do the work of an essential service as he/she is unable to consult properly in the first place. This makes it more likely that a larger number of matters enrolled as urgent during the lockdown period will be dismissed for not being so as legal practitioners

are not being allowed properly to do the necessary and relevant preparatory work before launching an urgent application.

- 11.4. Legal practitioners are also having trouble with having affidavits commissioned since this can only be done by the police during lockdown. Clients experience problems having the affidavits commissioned and then finding a way to get the commissioned affidavit returned to the attorney. Particularly clients who are indigent and have no access to computers. This results in legal matters which are regarded as urgent and essential not being processed and set down as quickly as they would if the legal practitioners were allowed more flexibility with regard to movement to and from their offices and the court.

Attorneys

- 11.5. The restrictions on access to courts, and the related third-party service providers has dramatically impacted the functioning of most if not all attorneys' firms, regardless of size. This will have an adverse knock-on effect once the lockdown has been lifted. The bottle neck at the Registrar's, Masters and Deeds office will then become apparent and will add to inefficiencies and in many cases economic distress and further injustice for members of the public that the legal profession serves.
- 11.6. The medium to larger firms which employ many administrative employees in their debt recovery contact centers have found that these departments have been unable to continue functioning or to operate at all during the lockdown.
- 11.7. Conveyancing attorneys and departments are also not able to operate at all during the lockdown.

11.8. Specialist company and intellectual property law attorneys are unable to operate as a result of the suspension of most of the e-service functions of the Companies and Intellectual Property Commission (“CIPC”), notwithstanding the fact that this portal is largely designed and has the capacity to facilitate remote operation and use by all parties.

Advocates

11.9. Those who can work remotely are limited to drafting, dictating, and typing if they are not engaged in a matter that is regarded as an “*essential legal service*”. Even this work can only be done in a limited fashion during the lockdown, as a properly drafted document requires a consideration of documentary material, legislation and conferences with the attorney and client.

11.10. The most vulnerable members of the referral advocates, the young and newly admitted advocates, who are not yet known in the “*market*” have effectively ceased practice. They consist largely of women and/or black and/or previously disadvantaged professionals.

11.11. Without an income or reserves, the younger advocates will not be able to even consider practicing remotely since they will not be able to afford airtime or data to do so.

12. Human Resources Consequences:

12.1. When considering the impact of Covid-19 on the legal profession from a human resources aspect, we must take into account that the legal practitioners, will feel the brunt more harshly as a result of the pre-existing challenges which the legal practitioners faced consequent to the ugly history as a country.

12.2. The consequence is that unless financial aid is provided to legal practitioners, particularly sole practitioners and junior advocates, most legal practitioners in those categories will close their practices during or within a few months after the lockdown has been lifted.

Attorneys

12.3. If the ability of a law firm, regardless of its size, to generate an income is severely constrained, then it will have to reduce costs and the biggest cost is always salaries. Inevitably pay cuts, job reduction and retrenchments will be a necessary measure to ensure the continued survival of the firm.

12.4. Unfortunately, such reduction in costs may not be enough to ensure the continued survival of the firm and we are likely to witness the closure of several law firms over the next few months if no financial aid is forthcoming.

12.5. Should debt recovery centers and conveyancing departments in law firms remain closed during and for a period beyond the lockdown, it is unlikely that most if not all these firms can continue to bear the associated costs of the salaries of the attorneys and administrative staff. Some firms employ up to 150 people in these debt recovery centers.

12.6. Law firms are also unable to pay the salaries of candidate attorneys and are therefore terminating the services of the candidate attorneys.

Advocates

12.7. If advocates do not receive payment of their outstanding invoices for work done prior to lockdown or during lockdown, they will be unable to meet their business financial obligations let alone their personal financial obligations. The inescapable result will

be the closing of many advocates chambers as well as the concomitant job losses for the support staff that work with advocates individually and for advocate groups.

- 12.8. A few of the older and more experienced advocates may have built in financial reserves which will allow them to weather the storm of the lockdown without receiving any briefs during this period. They will be the exception rather than the rule. The majority of advocates will be affected by their inability to generate an income during the lockdown.
- 12.9. The role of advocates to the administration of justice is indispensable and the civil and criminal justice systems will be dysfunctional if the number of practicing advocates is suddenly and drastically reduced.
- 12.10. Many young advocates who are owed outstanding fees by state departments are black and/or women. Transformation in the legal profession is nowhere near where it should be and will be set back further by the lockdown.

POSSIBLE SOLUTIONS

13. As stated above, the legal profession gratefully acknowledges and supports the mitigatory measures which the Government has deemed necessary to curb the spread of Covid-19 in order to save lives. We also acknowledge that any relaxation or termination of the lockdown will be guided by the necessary scientific and medical research and evidence. We fully support the focus on the value of life over profit and agree that a premature lifting of the lockdown would be disastrous for the people of our country.
14. We recommend probable and possible solutions given the national state of disaster and understanding the need for a continued lockdown. We have further summarized the proposals

made by the legal practitioners in an annexure to this letter. The reason for this is that we have considered their views and after consultation with the Council have come up with possible solutions from the range provided.

15. The following are possible solutions which the LPC recommends in order to alleviate the financial pressures of the legal practitioners and direct and indirect stakeholders namely:

15.1. All Government departments, municipalities and state-owned entities which owe on invoices for legal practitioners as at 30 April 2020 should make immediate payment of those invoices. In addition, these entities should ensure that going forward, legal practitioners' invoices are always paid within 14 days of receipt.

15.2. The LPC is strongly considering establishing and contributing to a benevolent scheme in terms of section 6(1)(a)(xv) of the Legal Practice Act 28 of 2014, the purpose of which will be to ameliorate the financial hardship which will be faced by affected legal practitioners. The LPC will invite other role players and stakeholders within the profession to contribute to this benevolent scheme.

15.3. Legal Practitioners will also be advised of which financial aid relief schemes they may apply to for financial assistance and the qualifying criteria for such funds. Where possible and practicable, the LPC will also make recommendations on behalf of legal practitioners to certain relief schemes.

16. The following measures could be implemented during the lockdown to ensure the continued operation of the Courts, legal practitioners and associated institutions. This will also contribute to the administration of justice and more importantly, limited access to courts during the lockdown.

- 16.1. 'Access' to Courts, such as the High Courts, Labour Courts and Magistrates Courts, should be allowed to deal with urgent matters but also with normal opposed, trial and appeal matters. Such 'access' should be conducted *remotely via audio or video* hearing in accordance with Practice Directives issued by the Chief Justice and the Judiciary in this regard.
- 16.2. Practitioners should be allowed to institute proceedings and file in courts *remotely, via email or the case lines systems* (if this is fully operational and properly functioning). Steps should be taken for email and case line systems to be implemented nationally across all Courts.
- 16.3. It is proposed that all civil actions and opposed motions set down for hearing for three days or more in the Superior Courts, Labour Courts and the Magistrates' Courts during the 2020 calendar year be allowed to proceed as arbitrations (actions as trials and opposed motions to be decided on the papers or oral evidence if justified) at the election of both of the parties to alleviate the bottle-neck that would otherwise exist, in the Courts, in respect of this category of cases. A further reason for this is that it would limit the contact hearings and thus assist in limiting the spread of COVID 19.
 - 16.3.1. The parties would have to bear the initial costs of the arbitration, subject to recovery from the unsuccessful party pursuant to an arbitration award.
 - 16.3.2. If the parties cannot agree upon the identity of the arbitrator then the arbitrator could be as appointed by the LPC from the ranks of senior practitioners, or retired Judges.

16.3.3. The arbitration award should be subject to an automatic right of appeal to a single Judge of the High Court and thereafter further appeals could follow only on leave to appeal according to the normal High Court rules.

16.3.4. This would require an amendment to the Arbitration Act, the Superior Courts Act and the Uniform Rules, and the Magistrates Court Act and Rules, to operate as an exception to deal with that category of cases.

17. We propose the following legislative amendments to facilitate the rendering of essential legal services, the functioning of the Courts and legal sector's contribution to the economy during the lockdown:

17.1. Commissioning of affidavits should be allowed *via video call or teleconference* so that it limits the contact between deponent and commissioner of oaths. This can be done through the relaxation of the Justices of the Peace Act of 1963.

17.2. We have also provided a draft practice directive type document which can be used during the lockdown period which will facilitate how Courts can function with minimal interaction. Copies of these proposed drafts are attached for the High Court, Labour Court and Magistrate Court in order to assist the Chief Justice and the Judiciary.

17.3. The Directions regarding permits should be amended to allow the senior partner in a law firm or the head of a Bar Council to be authorized as the head of the institution to issue the permit to the legal practitioner as required by the lockdown regulations.

18. We hope the above is of assistance to you and we thank you for affording us the opportunity to provide input on behalf of the legal profession and its stakeholders. We assure you of our continued support in the fight against the COVID 19 and we are happy to assist at any time during this period of the National State of Disaster.

Yours sincerely



HK Matolo - Dlepu
Chairperson: Legal Practice Council
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