
13 April 2020

TO ALL STAKEHOLDERS IN THE LEGAL PROFESSION

1. The Legal Practice Council has been requested by the Minister of Justice and Constitutional Development to provide him with “*an assessment of the current business and economic impact of the measures*” which have had to be implemented pursuant to the declaration of the national state of disaster.
2. The Minister seems to appreciate that the lockdown has a “*direct bearing on viability and financial health of practices both small and big across the nation.*”
3. As a result, the Minister, has requested that our aforementioned assessment also consider the possible future impact of the lockdown measures; what can be done to minimize the overall economic and financial impact on the legal profession; and any thoughts on possible solutions or interventions which could be implemented.
4. As part of the assessment, there should be a consideration of the Court Rules and what can be done to update and keep these Rules relevant to the current unfolding situation.
5. The Legal Practice Council has conducted the following assessment as well as possible solutions set out below with the contribution from the profession itself.

THE IMPACT OF THE LOCKDOWN ON LEGAL PRACTITIONERS’ PRACTICES

6. The impact of the lockdown on legal practitioners can be separated into various categories. The impact of each individual category may not be catastrophic but when considered holistically, as one must, the combined effect will be disastrous for many legal practitioners both from the advocates’ and the attorneys’ professions and will take months, if not years for full recovery.

7. These categories may be loosely described as financial, operational, technological and human resources.

8. Financial consequences:

Attorneys

8.1. 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, office rental, legal practitioner levies and other operational expenses.

8.2. 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.

8.3. If a law firm is not able to function and generate income, its downstream suppliers are also severely impacted. These suppliers include, but are not limited to advocates, correspondent attorneys, courier companies and the sheriffs across the country.

8.4. 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 be able to work remotely. For some firms this has entailed purchasing laptops and data packages for attorneys and secretaries who are considered to be key staff.

8.5. In order to function effectively, particularly for certain types of work such as conveyancing and collections, a printer with scanning facilities is also required.

- 8.6. 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.
- 8.7. 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.
- 8.8. 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

- 8.9. Are not being paid for services and invoices already submitted both prior to and during the lockdown period.
 - 8.10. 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.
 - 8.11. Although precluded from their chambers, advocates are currently not receiving any rebate or payment holiday from their landlords.
9. Operational and Technological Consequences:
- 9.1. The inability to work remotely due to lack of access to computer hardware and/or the IT facilities required.
 - 9.2. Living in an area which does not have the supporting infrastructure to support either the attorney/advocate or the support staff member working remotely.

9.3. 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- he cannot consult properly because that is not an essential service, but he cannot properly do the work of an essential service because he cannot 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.

9.4. 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

9.5. 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.

9.6. 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.

9.7. Conveyancing attorneys and departments are also not able to operate at all during the lockdown.

Advocates

9.8. 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*”.

9.9. 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.

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

10. Human Resources Consequences:

10.1. 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 in South Africa will feel the brunt more harshly than their contemporaries in the United Kingdom or the USA. The reason for this is the pre-existing challenges which the legal practitioners were facing of lack of transformation; skewed briefing patterns; a weak economy, a weak rand; the financial effects of state capture, corruption, and poor governance.

10.2. 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

- 10.3. 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.
- 10.4. 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.
- 10.5. Should debt recovery centers and conveyancing departments in law firms remain closed for a period beyond the lockdown, it is unlikely that most if not all of these firms can continue to bear the associated costs of the salaries of the attorneys and administrative staff. Some firms employ 150 people in these debt recovery centers.
- 10.6. Law firms are also unable to pay the salaries of candidate attorneys and are therefore terminating the services of the candidate attorneys.

Advocates

- 10.7. 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.
- 10.8. 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. Younger and less experienced advocates do not have this luxury unless they have a financial buffer from another source.
- 10.9. 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.

- 10.10. Many young advocates who are owed outstanding fees by state departments are black and women. Transformation in the legal profession is nowhere near where it should be and will be set back further by the lockdown.

POSSIBLE SOLUTIONS

11. The following are possible solutions which the LPC will be submitting to the Minister as measures that will ease the economic burden for all Legal Practitioners:
 - 11.1. All government departments and state-owned entities which owe on invoices for legal practitioners as at 31 March 2020 should make immediate payment of those invoices.
 - 11.2. Legal services should be declared *essential services* for all matters and not limited to specific matters only.
 - 11.3. Legal practitioners should be allowed to access their offices for work, subject to the need for social distancing as well as the need to implement all health measures. Consideration may be given to reduced office hours and strict minimum staff requirements.
 - 11.4. Courts, such as High Courts and Magistrates Courts, should be opened to deal with urgent matters but also with normal opposed and trial matters. Trials and opposed matters may be heard remotely by video conference, as far as is practicable, and steps should be taken to implement video conferencing across all superior, regional and district courts.
 - 11.5. Offices such as the Masters' Office, the Registrar of Deeds, SARS Department, the Sheriffs as well as IT Support, Docex and the Post Office assist legal practitioners with initiating matters and in the proper running of legal services. These offices should therefore also be allowed to operate during the lockdown period, subject to social distancing requirements, strict hygiene measures and minimum staff requirements.

- 11.6. Practitioners should be allowed to institute proceedings and file in courts via email or 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.
- 11.7. 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.
- 11.8. Social Justice Law clinics and legal aid clinics should also be allowed to operate, as during this time, there are many women and children who are facing abuse and require safe havens and for them to be able to receive the requisite legal assistance.
- 11.9. The LPC and PC offices should be allowed to operate during the lockdown subject to social distancing, hygiene requirements and minimum staff requirements.
- 11.10. Rental subsidy: This can be to deserving junior advocates and sole to medium sized attorneys' firms who are unable to practice and who will not be able to make payment of chamber fees / rent and its concomitant payments. This can be a percentage payment of rental / chamber fees for example 50% or any such other amount.
- 11.11. The use of the Attorneys Development Fund to be used to assist legal practitioners who fall within the most vulnerable to assist them during this time.
- 11.12. The LPC will establish and contribute to a benevolent scheme 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.
- 11.13. 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.
- 11.14. All civil actions and opposed motions set down for hearing in the Superior Courts and the Magistrates' Courts during the lock-down period should 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 one or both of the parties to alleviate the bottleneck that would otherwise exist in respect of this category of cases. The electing party/ies would have to bear the initial costs of the arbitration, subject to recovery from the unsuccessful party pursuant to an arbitration award. 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. 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. 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.