



## Vexing elements of the LPB

By **IAM Semanya SC**, chairman of the General Council of the Bar of SA

The architectural structure for the practise of law in this country portends to change in lamentable ways were the fifth draft of the Legal Practice Bill to be enacted into law. I deal with a few of the vexing elements.

I deliberately do not address those matters which are manifestly unconstitutional which were raised in our submissions to the Portfolio Committee on Justice and Constitutional Development. One of the issues of grave controversy is that the Bill contemplates that an advocate is able to render legal services upon receipt of a request directly from a member of the public and from another advocate who renders legal services upon a receipt of a brief from an attorney. This is new and worrying.

The referral nature of the advocates' profession, which is the DNA characterising the practise of law as an advocate, is set to blur. Under this regime it will be impossible to police whether an advocate appearing in court does so on instructions received directly from a member of the public or not; whether such an advocate is doing so with or without a fidelity fund certificate; whether such an advocate with a fidelity fund certificate is taking instructions from a briefing attorney; whether such an advocate with a fidelity fund certificate can brief an advocate without a fidelity fund certificate; whether advocates with fidelity fund certificates can form partnerships; whether an advocate with a fidelity fund certificate is able to employ the services of a candidate attorney or is limited only to taking a pupil or whether an infraction by an advocate with a fidelity fund certificate is probed by an attorney or an advocate without a fidelity fund certificate and/or by both.

To have a legal practitioner with a fidelity fund certificate as an attorney and another legal practitioner with a fidelity fund certificate called an advocate appears to be a distinction without a difference. It is hard to conceive of an advocate with a fidelity fund certificate choosing not to do the work of an attorney. The one reason for creating an animal called an advocate with a fidelity fund certificate is that this creature avoids the costs of engaging two legal practitioners that is ordinarily entailed by a bifurcated profession such as ours. This reasoning is obtuse. An advocate with a fidelity fund certificate who does work which an

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attorney does and that which an advocate does will clearly charge for both services rendered. The opportunity for a client in those circumstances to obtain court based specialised skills may be lost whilst still paying for the services of an advocate.

The other argument for this change is that the introduction of an advocate with a fidelity fund certificate will enhance access to justice. This too is untested and spurious. On an assumption that an advocate with a fidelity fund certificate would have done more than the LLB required for admission to be an advocate, meaning he/she would have to do accounting in order to run and maintain a trust account, this will in effect be an attorney by another name without improving any access to justice. Namibia offers a lucid example about the futility of this approach where they have an instructing legal practitioner, who is always one with a fidelity

fund certificate and an instructed legal practitioner, who is one without a fidelity fund certificate. Again a change in nomenclature bringing no difference.

Another area of great concern is the creation of a transitional legal practice council or national consultative forum for the legal profession. For a period of three years this structure will comprise eight attorneys, eight advocates, two teachers of law, two persons designated by the Minister; one designated by Legal Aid South Africa and one designated by the Fidelity Fund Board. This structure is to deal with specific terms of reference which are: to make recommendations to the Minister on an election procedure for purposes of constituting the legal practice council, the establishment of regional councils and their areas of jurisdiction, the composition powers and functions of the regional councils, the manner in which regional councils must be elected, all the practical vocational training requirements that candidate attorneys or pupils must comply with before they can be admitted by the court as legal practitioners, a fee structure of legal practitioners, the right of appearance of a candidate legal practitioner in court, or any other institution, a mechanism to wind up the affairs of the transitional council, all the requirements necessary for the implementation of compulsory post-qualification professional development, to prepare and publish a code of conduct for legal

practitioners, candidate legal practitioners and juristic entities and make rules for the profession.

The reasons for the creation of this structure are not self-evident. It is not immediately obvious why the terms of reference for the transitional structure could not be the subject matter for the legal practice council to investigate, determine and where appropriate make recommendations to the Minister.

Following the resolution of the AGM of the GCB that a meeting be secured with the Minister, the deputy chairperson Jeremy Muller SC and the vice chairperson McCaps Motimele SC and I met with the Deputy Minister of Justice and Constitutional Development and personnel of the department. The single purpose of the meeting was to engage the Minister (who

an hour before the meeting could not attend because of other commitments) on the referral nature of the advocates' profession and why its retention was important for the transformational goals sought to be realised in a constitutional democracy. Despite a cordial reception it was my firm impression that the Deputy Minister was not persuaded that the introduction of an advocate with a fidelity fund certificate was inimical to the core nature of the advocates' profession as a referral profession. The profession must still strive with vigour and zeal to defend the referral character of the advocates' profession. Despite the legacy of apartheid it was still the intrinsic element of our referral profession to have produced across the colour line the five chief justices post our democratic order – all from the Bar. **A**

## General Council of the Bar of South Africa

### Statement of Intent

- 1 The Bar identifies itself fully with the ideals, aspirations and challenges presented by the new democratic South Africa.
- 2 As a body of independent practitioners, the Bar is committed to providing specialised legal representation, at fair fees, to all persons who require such services.
- 3 By providing this representation, as well as facilities for the protection of human rights, access to justice for indigent persons and alternative dispute resolution, the Bar serves all the people of South Africa.
- 4 We shall continue to strive towards the attainment of justice for all according to the Rule of Law and to support reforms designed to achieve this goal.
- 5 The Bar is committed to:
  - The maintenance of an independent judiciary;
  - ensuring that the Bar is representative of all sections of the South African population;
  - providing greater access to justice by the expansion of legal services to all who require them whilst maintaining the high standard, professional integrity and independence which are established hall-marks of the Bar.