GAUTENG Gaa ATTORNEYS ASSOCIATION

From:

The Executive Committee of the GAA

Per Email: chantelle@gaa.org.za

tiaan@joubertlaw.co.za

Date: 4 May 2020

THE OFFICE OF THE JUDGE PRESIDENT
THE HONOURABLE JUDGE PRESIDENT D MLAMBO
Per email: nwallkinshaw@judiciary.org.za

Judge President,

RE: COURT OPERERATIONS IN VIEW OF ALLEVIATED COVID-19 RESTRICTIONS FROM LEVEL 5 TO 4

1. We refer to your request dated 30 April and thank you for your invitation.

2 We are the Gauteng Attorneys' Association and we comprise the Johannesburg, Pretoria, Soweto, and the West Rand Attorneys' Associations. We are the largest federation of voluntary associations of attorneys in South Africa and have approximately 6,000 members across Gauteng. All attorneys however benefit from the work we do, not just our members. We have obtained input from many of our members across the province, ranging from general practitioners to specialist attorneys, regarding your request.

3. Although we are concerned as to the constitutionality and democratic validity of emergency measures taken by Government, and the subsequent regulations, we will seize the opportunity to assist the judiciary with its request.

4. We humbly submit that any directives should not only address the current problems which have arisen as a result of the national state of emergency, but also future changes to court functions, and how attorneys will litigate, having regard to, *inter alia*, electronic filing and Audio Visual Remand Centres (AVR). Necessity is the mother of invention.

5. We have endeavored to identify problem areas, as well provide suggestions, where applicable. The majority of concerns raised are in relation to CaseLines. Although we applaud the necessity of an electronic filing system such as CaseLines, there are serious shortcomings, as set out below.

6. We would greatly appreciate it to be included in any future discussions between CaseLine management & technicians and the judiciary regarding updates to the system. We endeavor to provide positive input to enable our members to obtain the benefit this system may provide.

7. **Litigation – High Courts & Magistrates' Courts**

7.1 The Magistrates' courts are not as electronically advanced as the High Courts in Gauteng. The aforesaid courts need to be assisted to carry out all of their functions electronically. This will restore the ability for people of South Africa to have access to courts and justice – as the great majority of claims are handled in the lower courts. Right now, because the Magistrates' Courts are operating on limited capacity, thousands are being denied access.

7.2 The Gauteng High court already issued a directive dealing with all matters electronically, including trials, judicial case management and motions.

7.3 Most legal practitioners have found the current directives to be practical, although it may take a while to implement and to iron out any problems. It has resulted in already congested court rolls to at least proceed. Many Gauteng-based aattorneys have already started to prepare their offices to comply therewith. The directives

allow for all matters to proceed electronically and are not prejudicial towards litigants who are proceeding on trials that are already enrolled.

7.4 The regulations do not allow for trials on Level 4, and up and until Level 2, only 70% of trials can proceed. It is unclear how the courts will decide which trials are more important than others. Thus which plaintiffs or defendants are more "in need of their compensation claimed" and may be found unconstitutional and biased.

7.5 The regulations do not address the Magistrates' courts at all, in particular how summonses are to be issued. In respect of issuing of summonses and other court proceedings in Magistrates' courts, to limit the number of persons at court at any time we suggest that:

For purposes of issuing summonses and motions, warrants in execution, and subpoenas, all attorneys deliver their summonses and motions to court, in a box, to be placed in a designated area, clearly marked with:

a. A list of the matters in the box to be issued (names of parties)
b. The firms' contact details;
c. The date on which the box was delivered to the Registrar / clerk of the court office;

The registrar and/or clerk of the court can issue the summonses and motions manually over a 3 day period and once issued deposit the documents back in the same box for Attorneys to collect in a designated area, which will restrict the number of persons at court.

We realise that this is a crude method, but effective method, until such time as the Magistrates' Courts are capable of dealing with matters electronically, like the High Courts.

7.6 **Issuing of summonses:**

Regarding issuing of summonses at Gauteng High Courts our members mailed summonses to be issued by the Gauteng High Courts before the lockdown period, the week before when access to court was already limited. The Registrars did not respond to those emails and therefore the following questions arise:

a. how are case numbers issued by the Registrars on the summonses and applications mailed to the Registrars to be issued?;
b. The directive indicates that the "date that the mail was sent shall be the day of issuing of summons," however attorneys do not receive a response or a case number from court;
c. A case number needs to be issued, as attorneys cannot serve without a case number and how shall court be able to prevent fraud in respect of case numbers if the registrar does not print the summons, provide a case number, sign the summons and then send it back to the attorney?;
d. As the system is presently operating, any attorney can "mail" any summons to court and deliver it to sheriff, but there is no proof that the summons was properly issued AND that the Registrar has record of the case number issued and the matter;
e. Do the registrars keep record, ie. a list of the "cases issued electronically", as in future the public shall not be able to obtain the case number should an interested party need to draw a file;
f. How should attorneys serve and file without a physical case number?
g. Are clerks and or registrars authorised to decide which process is urgent? If so, what is their guideline to decide?

7.7 **Request for archived files:**

No provision is made for files to be drawn in the Gauteng High Court, Pretoria, only for Gauteng High Court, Johannesburg. Which registrar must be contacted to request archived files in Pretoria?

7.8 **CaseLines regarding trial matters:**

When mailing the registrars to open a CaseLine for motions not all mails received a response. The contact number for CaseLine queries is not answered. One of our members mailed Miss Thumi Ledwaba to ascertain to whom the practice notes in GAUTENG DIVISION must be mailed, but she responded and referred the member concerned to the unopposed motion court's email and told the member to request the aforesaid court to open a CASELINE for matters enrolled on trial. The motion court staff cannot assist with opening of the CASELINES on trials. Therefore it seems as if a dedicated email address is needed for the queries in respect of CASELINES as well as our requests for CASELINES to be opened.

7.9 **Civil trial settlements:**

No provision is made for a settlement roll contact person on RAF matters and there is only a contact person for other civil trials. Who is appointed to handle the settlements on the RAF matters and to which Registrar should the RAF settlements be mailed? The directive only indicates that no cost orders shall be made. Do we forward the settlements on RAF matters to the same person as with other trials?

7.10 **Extension of CaseLines during lockdown to all matters:**

As the Gauteng High Courts are able to handle all electronic filing system, we request that it be considered that the system be extended to not only urgent matters and matters about to prescribe, but all matters. There is no reason to limit the processes as the system was created for this purpose, to enable attorneys to file remotely. The regulations as they read allows attorneys to travel to court. Extension of the use of CaseLines will prevent unnecessary attendances at court.

8. Neither the directives nor regulations provide for *dies non*. We have to therefore proceed with the litigation process, or we shall be in jeopardy due to non-

compliance with the court rules. As it stands, numerous of our colleagues have been served with notices of Bar during the full lockdown period by malicious and vexatious litigants, to which we had to reply with great difficulty.

9. The court hours of registrars and clerks of the court in matters in which they need to deal with attorneys or counsel should be extended, by instead of closing for attorneys at 13h00, open court for enquiries until 15h00 each day and allow a certain amount of persons at court to clarify any issues and also ensure that there are less people at court at any given time.

10. In respect of summons issued as well as motions, allow the Plaintiff access to the Caseline system, to enable the Plaintiff to open the file on Caseline as soon as summons has been issued. This will enable Legal Practitioners to open all pre-lockdown matters on Caselines which are still running. This will lessen the burden on Court personnel. The registrar of these courts should therefore:

    1. Allow the Plaintiff or Applicant access to the System to open the Caseline.
    2. The registrar must indicate which personnel in their offices must be invited by the attorney opening the Caseline in which matter, for example who needs to be invited in actions and who needs to be invited in motions.
    3. Then as soon at the Plaintiff or applicant receives a Notice of intention to Defend or Oppose, the Plaintiff or Applicant can invite the Defendant or Respondent and can also upload the Defence or Opposing Notice on the Caseline System.
    4. There are a lack of computers at the courts and the Plaintiffs are more than willing to open Caselines on behalf of courts to lessen their burdens.

11. Directives ought to be issued taking into account section 13(1)(a) of the Prescription Act, to expressly state that a lockdown in terms of the Disaster Regulations counts as a 'superior force' for the purposes of prescription, as otherwise it might be the case that (based on a particular interpretation of the law) thousands of claims are in jeopardy due to citizens not being able to launch their cases in courts.

12. **Taxations:**

12.1 Taxations are one of the duties of the registrars of the High Court which is essential to the functioning of the High Court as well as to the functioning of the justice system as a whole in South Africa. The entire justice system is driven by cash flow and if the cash flow is negatively impacted, the system grinds to a halt. Since the justice system is an essential system and it is imperative that it operates effectively, fairly and without bias or prejudice it follows that the cash flow element is also essential in order to drive it. Taxations play an important role driving the cash flow within the justice system. Taxations ensure that litigation not only continue, but that it can be attended to effectively and that no party to litigation is unfairly prejudiced due to the lack of cash flow.

12.2 We are aware that the Risk Adjusted Strategy approach also weighs up the risk involved in a practise or procedure to be implemented before allowing it on a certain level. While it is clear that taxations are essential in terms of a stimulus to the economy and in order to effectively drive the justice system we also need to ensure that there is a low risk of transmission of COVID-19 involved.

12.3 To this end, we have discussed the taxation procedure at length and propose the following low risk solutions:

1. Settled bills which need to be endorsed by a taxing master be submitted to the registrar's office at a designated collection point and once endorsed they may be collected from a designated collection point within a specified number of days (for example 3 days). Alternatively, settled bills may be submitted via Caselines for endorsement purposes.

2. Bills of costs which are unopposed and to be taxed with a consent to taxation should be taxed via Caselines;

3. Bills of costs which are opposed and need to be taxed, should be taxed in the office of a taxing master adhering to strict social distancing rules. Every person entering the taxing master's office must sanitise their hands and exposed arms, wear a face mask and stay within the statutory prescribed distance from each other. Only 3 people to be in the taxing master's office at a time.

4. Should it be feasible for all the parties, including the taxing master, opposed taxations should proceed via electronic means.

5. Settled bills should be submitted at a central point at court, the settlement is then stamped by the Registrar and returned to the central point for collection.

12.4 The chief taxing master at the Pretoria High Court has advised our members that the Pretoria High Court will not be attending to taxations until further notice. This despite that Minister's directive that taxations are essential and permitted. We have been advised that the taxing masters will only be attending to settled bills of costs and endorsing same.

12.5 We had also been advised that a number of taxations or part-heard taxations were and will be postponed *sine die* from the 23rd of March 2020, including over the lockdown period as well as the period until "further notice".

12.6 We are currently not permitted to enter the court building in order to address the taxing masters.

12.7 We request that the following further issues then be dealt with and direction be given:

1. That the JP directs that the taxations should be re-instated in terms of the directive of the Minister and that in the premise legal practitioners should be allowed to enter the court building in order to address the taxing masters; and

2. That all taxations which were postponed from 23rd March 2020 or were part heard prior to that date until the date that taxations are re-instated be allocated preferential taxation dates.

12.8 We are aware that the taxing masters are concerned that they lack the necessary PPE and the attorneys who specialize in legal costs have offered to donate the necessary PPE gear.

13. **Section 60(1) of the Children's Act 38 of 2005**

13.1 One of the fundamental rights in terms of our Constitution is contained in Section 28 of the Constitution. In terms of section 28 every child has inter alia the right to legal representation.

13.2 Section 60(1) of the Children's Act 38 of 2005, deals with the conduct of proceedings in the Children's Court and gives the presiding officer a right to call any person to give evidence in Court. If attorneys cannot properly consult with either the children and/or affected parties, the child's access to Court as stipulated in section 14 of the Children's Act will be severely prejudiced and/or denounced.

13.3 It is thus imperative that in all matters concerning children, in any Court, tribunal, Mediation/arbitration a legal practitioner should be allowed to properly consult with all persons affected by or acting on behalf of a child prior to any proceedings at a place beneficial to all parties involved and in a manner where a child will not be adversely affected (as opposed to appearing in Court before consultation with an attorney).

13.4 In terms of the updated regulations we deliver essential services. How we deliver the essential service should not be prescriptive.

14. **Use of audiovisual remand centres (AVR):**

The majority of Magistrate's Courts do not have access to AVR. A list of all institutions and where such AVR facilities are available should be published, as well as whether they are in working order or what their state of repair or date of completion is. Contact details of the person responsible for the operation of same at the facility should also be provided to enable legal practitioners to confirm beforehand if the facility is in working order.

15. **Fixing of bail by prosecutors:**

15.1 Directions are sought to temporarily expand on Section 59(1)A of the Criminal Procedure Act to include more serious crimes, which would allow the fixing of bail to be finalized at police stations and negating the necessity for all parties involved to travel to the court building.

15.2 Legal practitioners and accused persons must be informed by the relevant prosecutor telephonically, at least 24 hours prior to the date on which they are scheduled to appear in court, that they should not appear, and the date for the next court appearance must be arranged with the relevant legal practitioner to suit the availability of all parties.

16. **Safety measures at courts:**

Prosecutors should stagger the time slots for the matters appearing in their courts, and inform the legal practitioners at what time their matter is likely to be heard at least 24 hours before the date of appearance. This will prevent legal practitioners and accused waiting in congested corridors and courts for hours whilst waiting for their matter to be called, exposing them to possible infection.

17. We are available to assist you with anything you need to restore the ability of attorneys to provide access to justice in Gauteng, and we can liaise with our wide network of colleagues all over South Africa, and the Law Society of South Africa, to assist in other provinces too.

We hope that you will look into the issues raised above and we thank you for the opportunity to make comments.

Yours faithfully,

The Chairperson of the GAA

Chantelle Gladwin-Wood – (Signed electronically)

Direct Email: chantelle@gaa.org.za

The Vice Chairperson of the GAA

Tiaan Joubert– (Signed electronically)

Direct Email: tiaan@joubertlaw.co.za