GAUTENG Gaa ATTORNEYS ASSOCIATION

From:

The Executive Committee of the GAA

Per Email: chantelle@gaa.org.za

tiaan@joubertlaw.co.za

Date: 28 APRIL 2020

THE ACTING DIRECTOR GENERAL
ADV JB SKOSANA
Per email: jskosana@justice.gov.za

Director General,

RE: REGULATIONS REGARDING LEGAL PRACTITIONERS

1. We refer to the Minister of Justice and Constitutional Development's request dated 27 April 2020, to the Legal Practice Council to address him on inputs on the draft regulations. Whilst we appreciate the urgency in the implementation of the amended regulations, the time afforded to the legal practioners for comment is far too short for a comprehensive analysis of the draft that has been submitted to us for comment and that we hope that you will be open to further comment as to the impracticalities become apparent once put into operation.

2 We are the Gauteng Attorneys' Association and we comprise of the Johannesburg, Pretoria, Soweto, and the West Rand Attorneys' Associations.

3. We attach our representations made previously, as they remain relevant today, in relation to the manner in which attorneys ought to be regulated by the lock down.

4. It should be remembered that attorneys provide essential services not only to government offices that provide essential services (like courts, and the Deeds

Offices) but that we also provide other services that are essential and ought to be specifically regarded as essential:

4.1 **CIPC & intellectual property**

Filing resolutions for liquidation/business rescue with CIPC – this cannot be done currently as CIPC is closed – this is endangering thousands of businesses and jobs into the situation where the legal mechanisms that exist for them to be 'saved' are not available. This needs to be rectified immediately. We can assist through our CIPC committee as we have experts on the subject of company law and practice, who can help understand and rectify the issues at CIPC to get this critical mechanism to save business and jobs, up and running. It is also our submission that the functions of CIPC, including IP functions, and other essential e-services should be phased in from 4 May 2020.

We also request clarity as to whether the offices and services of CIPC fall under draft regulation O(2)(c) as " any other services designated by the Executive Authority, Heads of Court….".

4.2 **Litigation – High Courts & Magistrates' Courts**

The Magistrate's courts are not as evolved electronically as the High Courts in Gauteng. They 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 Magistrate's Courts are operating on limited capacity, thousands are being denied this.

4.3 The Gauteng High court already issued a directive dealing with ALL matters electronically, including trials, JCM's and motions.

4.3.1 This direction is workable, although it may take a week or two to implement and to crease out any problems but at least the already congested court rolls can proceed. Most of the Pretoria and Johannesburg attorneys already started to prepare the offices to comply therewith. This directive allows for ALL matters to proceed electronically and is not prejudicial towards litigants who are proceeding on trials that is already enrolled.

4.3.2 These regulations does not allow for trials on Level 4 and up and until Level 2 only 70% of trials can proceed. It is unclear how will the courts 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.

4.3.3 The regulations does not address the magistrate courts at all, in particular how summonses, warrants and other court documents are to be issued.

4.3.4 in respect of issuing of summonses and other court proceedings to limit the number of persons at court at any time we suggest that:

To issue the summonses and motions, warrants in execution, subpoenas, all the attorneys deliver their summonses and motions to court, in a box, to a designated place, 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 put it back in the same box and place in Court for Attorneys to collect at a designated area, limiting the persons at court.

4.4. Neither the directives nor regulations provide for *dies non*. Therefore we have to proceed with the litigation process or we shall be in jeopardy due to non-compliance with the court rules. As it is numerous of our colleagues was served with notice of Bar during the full lockdown by malicious and vexatious litigants, to which we had to reply with great difficulty.

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

4.6 In respect of summons issued as well as motions, allow the Plaintiff access to the Caseline system to enable them 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 matters for example who needs to be invited in trials 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, they can invite the Defendant or Respondent and can also upload the Defence or Opposing Notice on the Caseline System.
4. there is a lack of computers at the courts and the Plaintiffs are more than willing to open the caselines on behalf of court to lessen their burdens.

4.7 Section 13(1)(a) of the Prescription Act ought to be amended, alternatively directives be provided, to expressly state that a lockdown in terms of the Disaster Regulations counts as '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.

4.8 **RAF matters**

Finding a resolution for the RAF, which is currently closed, as litigation will proceed against them, and as litigants to the Court, it will be essential that they are allowed to continue operations as follows:

i) Providing instructions to litigants;

ii) Processing of payments; and

iii) Settling of matters.

It is also our submission that the functions of RAF should be phased in from 4 May 2020.

4.9 **Criminal matters**

Attorneys need to visit their clients in jail/at police stations and consult with them, to assist with bail and other issues, such as parole. Attorneys must be allowed to move around WITHOUT permits, because we never know when we will get a call asking for urgent help and we simply can't get permits in time. The LPC (that issues permits) has publicly stated that it didn't anticipate the number of permits needed and was flooded. Attorneys are also called to court urgently and in many provinces it is reported that they have waited over a week for a permit – which of course is simply untenable. Several attorneys have been arrested going to police stations to help their clients because they were regarded as being in violation of the lock down regulations – this is utterly unacceptable as this is a denial of the right to justice guaranteed by the Constitution.

4.10 **Permits**

If the use of permits is continued, other organisations with greater resources than the LPC ought to be roped in to assist with issuing permits, so that they can reach those who need them quicker. The idea of needing an urgent case number to obtain a permit is non-sensical, as attorneys need to attend to many other urgent things that are essential services, but not court related. For example, if an attorney is called to do a will urgently for someone who is terminally ill, they can't assist if they can't travel. That person might then die without a valid will and that will cause problems in terms of the value of the estate being tied up and not reaching those who most desperately need it, making our economic situation worse.

Candidate attorneys gain invaluable experience doing things like bail applications and should be allowed to go to courts, etc. (at present it is only attorneys allowed). Candidates are cheaper than attorneys and so by not allowing candidates to move around you are excluding the population from receiving more affordable legal services.

4.11 The regulations need to be clarified on the additional issues regarding permits:

4.11.1 Do attorneys still need travel permits, or is a "catch-all" permission granted in level 4?

4.11.2 Are permits general, or should permits be granted for specific fields of specialisation?

4.11.3 Are attorneys issued with a permit, performing an essential service, subject to curfew?

4.11.4 Are heads of law firms still allowed to issue permits, as set out in the first set of regulations, which was not repealed by the second set of regulations?

4.12 **Definitions**

"Head of institutions" holds two definitions which should either be combined or stated in the alternative. "Head of Institution" should amended to read "Head of Practice" in order to avoid confusion and ambiguity with "Head of Institution" in the context of the Director of a Provincial Legal Council.

The above should be read with paragraph 23 (a) - "Head of Institution" and should be amended to read "Head of Practice" in order to avoid the same ambiguity mentioned above.

4.13 **Use of audiovisual remand centres:**

A list of all institutions is requested where such AVR facilities are available should be published and forwarded to all legal practitioners, 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.

4.14 **Fixing of bail by prosecutors:**

Section 59(1)A might be temporarily expanded 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.

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.

4.15 **Legal practitioners:**

An identity card issued by the relevant legal practice council, or local attorneys association, together with a driver's license or ID card, will suffice as a permit to perform essential services.

4.16 **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.

4.17 **Master's office – level 4**

Processing applications by trustees and liquidators where urgent extension of powers/consent is required to prevent *inter alia* irrecoverable losses to assets.

Attending to applicants in terms of section 42(2) and 34(4) of the Administrations of Estate Act.

Attending to urgent requests from executors to make interim payments to beneficiaries to enable them to purchase essential goods.

Attending to any other urgent matter(s) which reasonably needs to be addressed taking into account the limited services as set out above, the lockdown regulations and purpose of the lockdown.

Clarification is required whether the Master's offices fall under draft regulation O(2)(c) as " any other services designated by the Executive Authority, Heads of Court….".

4.18 **"Enforcement officer".**

Effectively this will have the effect that attorneys need to obtain a permit from the LPC as well as the "enforcement officer".

What is of concern is that legal practitioners will only be able to commute between their places of residence and the court where appointed to perform essential services. This will effectively entail that legal practitioners will only be allowed to perform these functions with a permit together with a confirmation of an enforcement officer.

It is untenable to obtain a permit and an enforcement letter in each and every matter. It does not resolve the issue that the LPC has a discretion to issue the permit on and when it is necessary. This will also overburden the "enforcement officers"

4.19 **Labour law/CCMA**

Legal practitioners who practice exclusively within the labour law and employment law arena is materially prejudiced by the limited scope in which the current directives define the professional services that attorneys and advocates render in the labour dispute resolution forums. It specifically fails to address the legal practitioner's functions in the Labour Court and the CCMA as well as various Bargaining councils. The services of labour law practitioners extend beyond the scope of the current definition of "professional services" and/or the definition of "essential services".

The services performed by legal practitioners in the labour law arenas include:

- Advising employers and employees and encourage the settlement of disputes by conciliatory methods.
- To provide, if deemed necessary, non-litigious legal assistance to the public in connection with matters affecting employer/employee relations,
- To represent clients at the different Bargaining Councils as well as the Commission for Conciliation, Mediation and Arbitration in arbitrations (which is distinct from litigation in the Labour Court).

Accordingly directives must be adapted and extended to include the legal practitioner's ability to perform services that relate not only to enrolled "court" work but address the demand for professional legal services in the quasi-judicial services rendered by the practitioner in the CCMA, Bargaining Councils. In this regard the CCMA has commenced with the enrolment of matters for the first week of May and practitioners do not have any particular and definitive directives form either the CCMA or the Labour Court.

In the absence of clear directives it will be impossible for legal practitioners to render the following necessary services (which are not "professional legal work") as defined in the amended Court Directives):

1. Attending Bargaining Councils, CCMA matters
2. Attending of disciplinary hearings at the workplace
3. Attending consultation meetings with employer and its employees and representative trade unions.
4. Implementation and advising clients relating to OHS Act.
5. The evaluation of workplaces relating to the safety protocols for COVID 19.
6. Facilitators need to be appointed and obtained from the CCMA to assist with clients in discussions who wish to start a retrenchment process within the ambit of Section 189A of the LRA.

4.20 **Deeds office**

We had addressed our concerns regarding the deeds office thoroughly in our previous correspondence dated 17 April 2020, which letter is attached hereto for your convenience.

The draft regulations do not deal with the deeds office in any manner and it is thus assumed that the deeds offices will be a level 4 service and that our conveyancing

members will be entitled to service the deeds office in all respects, as highlighted in our attached letter.

The same principals regarding permits will thus apply.

5. We are the largest federation of voluntary associations of attorneys in South Africa have approximately 6,000 members across Gauteng, although all attorneys benefit from the work we do, not just our members.

6. We are available up 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