GAUTENG Gaa ATTORNEYS ASSOCIATION

From:

The Executive Committee of the GAA

Per Email: chantelle@gaa.org.za

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Date: 15 APRIL 2020

THE HONOURABLE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
Per email: minister@justice.gov.za

THE HONOURABLE MINISTER OF TRADE AND INDUSTRY
Per email: minister@economic.gov.za

THE HONOURABLE MINISTER OF AGICULTURE AND LAND AFFAIRS
Per email: minister@gaff.gov.za

THE HONOURABLE DEPUTY MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
Per email: deputyminister@justice.gov.za

Honourable Ministers and Deputy Minister,

RE: REGULATIONS REGARDING LEGAL PRACTITIONERS

1. We are addressing this letter to you based on the Minister of Justice and Constitutional Development's request to the Legal Practice Council to address him on issues affecting the legal profession during lockdown. The Legal Practice Council ("LPC") prepared a draft letter to the Minister of Justice and Constitutional Development dated 13 April 2020, which was brought to our attention.

2 We address this letter to you on behalf of the voluntary associations which comprise the Gauteng Attorneys' Association (GAA):

- Pretoria Attorneys' Association (PAA);
- Johannesburg Attorneys' Association (JAA);
- West Rand Attorneys' Association (WRA); and

- Soweto Legal Fraternity (SLF).

3. The various voluntary associations listed above represent approximately 6000 registered attorneys who are our listed members, although approximatly 16 000 attorneys in Gauteng derive the benefit of what we do. Our respective executive members and members are comprised of all races, genders, religions and beliefs. There is no exclusivity, as members of other legal associations such as the Black Lawyers Association, NADEL, etc, are amongst our members.

4. We acknowledge the effort the South African Government is making in keeping its citizens safe from the Covid-19 pandemic. We support same and hereby extend our assistance and co-operation.

5. We had provided the LPC with our submissions and requested the LPC to place our submissions before you. Although our letter was acknowledged by the LPC, we have not received confirmation that the LPC had considered our submissions, and/or provided you with same. Due to time constraints we were not able to properly consult with the LPC and therefore take the liberty to address this letter directly to you.

6. The LPC letter is well drafted, but its main focus regarding solutions is on litigation. We request that you consider other fields of specialisation such as conveyancing, intellectual property law, trade mark, patent and copyright law as well, as these fields have an enormous impact on the economy. We are taking into consideration the possibility of the lockdown being possibly extended beyond 30 April 2020 and that all legal practitioners, inclusive of specialist attorneys will be affected. After proper consultation with our members, the following issues (apart from what is stated in the letter by the LPC addressed to yourself) are of concern.

7. **Company law:**

7.1 Specialist company law attorneys are struggling to transact as a result of the suspension of most of the e-services functions of the Companies and Intellectual Property Commission ("CIPC") on account of the fact that CIPC's offices are closed and have no staff to process applications. It is proposed that the Minister directs the immediate re-implementation *of all e-services transactions and filing of documentation via the dedicated e-mail addresses created by the CIPC* and consider the immediate re-opening of the CIPC's back office with skeleton staff, as an Essential Service to the business community.

7.2 The CIPC is in the more favourable position of having a website where e-services are available so that legal practitioners can work remotely from home.

7.3 We would like you to take all company law specialists into consideration too, as we have received a number of complaints from members who are not able to transact on CIPC's website. Obviously our understanding is that most of CIPC's e-services and other methods of filing have been suspended to avoid backlogs, as there is no staff to process such applications, however either the CIPC' back office must immediately be re-opened or members of CIPC's staff must be given remote access to process applications.

7.4 Company law specialist legal practitioners need to continue operating, albeit remotely and have no means of earning an income if these services are not re-activated as soon as possible and this is having a serious negative impact on their practices.

8. **Intellectual Property Law:**

8.1 The CIPC has implemented measures to safeguard its personnel in the IP Section (Patents, Trade Marks and Registered Designs) of the CIPC.

8.2 It is unfortunate that the measure of choice involves total closure of all facilities, including online facilities, even though an attempt is made to mitigate total closure by way of declaring the closure period as *dies non*. We are concerned that this will create problems of its own, not least of which is the potential logistical nightmare of an anticipated rush on the IP Section e-service portal when the closure period comes to an end. Experience has shown that the IP section e-service portal is not adequately resourced to deal with the very large traffic volumes anticipated. More importantly, the total closure measure fails to take cognizance of the capacity of the e-service portal to facilitate remote operation, not only for IP applicants, but also for IP Section and e-service portal personnel.

8.3 As presently implemented, total closure of all facilities will prejudice not only IP law firms, as has been suggested, but to a far greater extent IP applicants, who rely on online research access to the CIPC IP database to inform business choices and, more importantly, rely on dates of filing of applications and documents to establish IP priority dates, particularly for potentially competing inventions and designs for which dates of filing are of paramount importance.

8.4 As it stands, such competing inventions will automatically be assigned identical filing dates. If the e-service portal were to be functional, such competing applications

would normally be filed on different dates, with the first filed application automatically receiving priority. It is our understanding that the e-service portal, remotely managed and without the need for on-site support personnel (or very few personnel), could be utilised to allow online research and to receive and queue up IP applications and IP application documents, with dates of receipt recorded for purposes of allocating filing dates as and when support personnel become available to attend on-site when the lockdown period ends. Such a measure would also remove the risk of a rush on the e-service portal, as anticipated in the present situation.

9. **Litigation:**

9.1 We had attended virtual meetings with *inter alia* the Honourable Judge President Mlambo and other stakeholders, regarding both High Court and Magistrates Court guidelines. We will expand on our comments as soon as the judiciary has reverted to us. We expect revised practice directives.

9.2 It is our submission that the judiciary consider the lockdown period as an extended recess and consider extending the court term after the lockdown is over. This will enable the court to catch up, and to resume its normal functioning.

9.3 It is suggested that both opposed and unopposed motions be considered on the papers (heads and practice notes), with the facility to submit further heads on issues that counsel may have wished to expand on in oral argument – unless the Judge wishes to hear oral evidence. Recess should be used as a catch up period for trials and opposed motions.

9.3 Not all firms have been able to serve documents electronically, as some firms cannot work remotely during this lockdown. CaseLines, although a noble and revolutionary idea, still has teething problems and many attorneys are still struggling with filing of documents.

9.4 A period of *dies non* should be considered during this time.

9.5 With regard to the proposal that Attorneys and their staff be allowed to return to the office (par 11.3) we believe that this should be subject to screening / testing requirements as people can be asymptomatic and pose a danger to others at the office. Members of the public should still not be allowed to visit Attorneys' offices to consult / serve / deliver documents / commission affidavits.

9.6 The LPC letter mentions trials and opposed motions which should be allowed to proceed. Taxations and unopposed matters (Default Judgments, Section 65, Debt Review, Pre-trial Conferences) can however also proceed remotely.

9.7 Another critical issue that requires serious consideration is how the lock down is affecting the rights of parties to issue summonses in respect of matters that would prescribe during lock down. At present, such parties are (mostly) unable to issue summonses (with few exceptions) and this may mean that their legal claims are rendered nugatory when they prescribe. Whether the lockdown should be considered as a "superior force" as referred in sect 13(1)(a) of the Prescription Act is an question of interpretation that ought not to be left to chance or determination only after lockdown ends – as this may result in thousands of claimants who relied on this interpretation during lockdown finding that their interpretation was incorrect and their claims have prescribed. There are two possible remedies to this situation. It is our submission that the Johannesburg and Pretoria High Courts are geared for the issue of urgent summonses electronically. If COVID-19 lockdown is not interpreted as a "superior force" ito Section 13(1)(a) of the Prescription Act, then all claims that are about to prescribe should be permitted to be issued in the Johannesburg/Pretoria High Courts electronically and then (if appropriate) transferred to the appropriate court with jurisdiction thereafter. It has also been suggested that the Registrars of the Gauteng High Courts could be 'deputized' or delegated the authority to receive summonses issued during lock down to avoid prescription, by the registrars of the other courts in South Africa.

A second possible solution is for the Legislature to amend the Prescription Act to expressly provide that 'superior force' includes the inability to issue summons during lock down.

10. **Property Law/Deeds Office**

10.1 We also address the concerns of our colleagues in the property sector and appeal for measures to stimulate and mobilise the South African real estate sector.

10.2 We attach hereto various letters directed to Minister Patel and others, including those emanating from:

- The Mortgage Origination Regulatory Council of South Africa (MORCSA), dated 3 April 2020;
- The National Property Practitioners Council (NPPC), dated 1 April 2020; and
- The South African Affordable Residential Developers Association (SAARDA), undated; and

- The Black Conveyancers Association, dated 9 April 2020

10.3 We are particularly concerned about the effect of the now extended lockdown period as the lockdown has already placed many companies and individuals in severely distressing situations. We refer to not only our attorneys and conveyancer colleagues, but also to the dire financial implications which the lockdown holds for municipalities, estate agencies and their agents, bond originators and managing agents – all active and crucial stakeholders in the property sector.

10.4 In amplification of the above, we have taken the liberty of canvassing the financial significances of the lockdown with our colleagues and a mere **26 firms** confirmed the following (rounded off for ease of reference):

- Rand Value of Transactions currently in the Deeds Offices amounts to R2,7 billion (two comma seven billion Rand).
- Rand Value of Transactions ready to be lodged amounts R3 billion (three billion Rand).

10.5 The significance of the said figures is obviously the impact that this will have on the collection of transfer duty and Value Added Tax. Added to this is the revenue for the Deeds Offices, due the collection of the Deeds Office's levies.

10.6 It is apparent that the continued lockdown not only has a significant effect on the continued existence of the stakeholders referred to above, but the inability to sell, mortgage and transfer property has a significant impact on the economy and funds flowing into SARS and by implication National Treasury.

10.7 The Estate Agency Affairs Board (EAAB) annual report reflects that a total of 51 430 Fidelity Fund Certificates were issued in 2019. This indicates as a bare minimum the number of individuals who would benefit from the efforts to stimulate and mobilise the real estate sector during the lockdown period.

10.8 The LPC and LSSA will be able to provide details of how many conveyancing firms are affected by the lockdown from their records. If these numbers are taken into account the above figures from a mere 26 firms will place the matter in context.

11. Deceased Estate / Trust Practitioners

11.1 We also address the concerns of our colleagues who work in the area of Deceased and Insolvent Estates and Trusts.

11.2 We are particularly concerned about the effect of the closure of the Masters' Offices on the general public and the inability of the numerous people affected by their closures to obtain the funds that remain suspended due to the failure of these offices to continue to function. It is not only the suspension of funds in the economy that will be affected, but the billions of Rands currently held in the Guardian's Fund.

11.3 It is common knowledge that the Masters' Offices are in control of a huge amount of urgently required funds in that inheritances and distributions are not able to be released into the economy leading to untold economic distress, as well as emotional distress.

11.4 The functioning of these offices, not only affects the attorneys' offices who service their clients in these areas of law, but also the banks, accountants and trust companies operating in this environment.

12. **General**

12.1 Attorneys must be permitted a once-off access to their offices to attend to their duties and collect files in order to be able to work at home.

12.2 The LPC is working with a skeleton staff. This makes it difficult for attorneys to obtain permits on an urgent basis, to enable to them to travel to court.

13. We thank you for engaging with all the relevant associations and are eager to assist in any way possible.

Nkosi Sikelel' iAfrika

Yours faithfully,

The Chairperson of the GAA

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