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26 January 2018

Your ref: A Cook/CPC/Outstanding accounts

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Dear Ms Cook

IN RE : PAYMENT OF OUTSTANDING ACCOUNTS : 90 DAY RULE

1. Your letter dated 6 November 2017 refers. I apologize for the belated response to your aforementioned letter.

2. The Code of Conduct of the Pretoria Society of Advocates (hereinafter referred to as "the Code of Conduct") regulates the manner in which counsel's fees are paid. Rule 7(6) of the code of conduct provided as follows regarding the payment of counsels' fees:

> *"Counsel may require fees to be paid in advance. If this is not done, fees do not become payable before the end of the period determined by the Society in general meeting, and counsel cannot insist upon payment of fees before that time."*

3. Rule 7.7.2 of the Code of Conduct regulated the time period in which fees are payable in the absence of any specific agreement between the instructing attorney and the counsel to the contrary. Rule 7.7.2 of the Code of Conduct provided as follows:

"Attorneys have to the last day of the third month following upon the month in which the work was carried out and in respect of which an account has been delivered to fully settle the outstanding amount."

4. Counsel was, however, duty bound to allow the instructing attorney an additional period of 7 days in which to settle the full outstanding amount. The 7 day demand period is contained in Rule 7.7.3 of the Code of Conduct. This gave rise to the so-called "97 day rule" for the payment of counsel's fees.

5. It is, however, important to take cognisance of the fact that the formulation of Rule 7.6 entailed a limitation on members to recover payment from attorneys, as it provided that the fees did not become due and payable before the lapse of the time period concerned, i.e. 97 days.

6. Counsel is not registered as a "credit provider", as provided for in the National Credit Act, No 34 of 2005. It furthermore doesn't make any commercial sense to extend credit to our instructing attorneys and their clients for a period of 90 days.

7. Our annual general meeting convened on 27 February 2014, during which it was resolved to amend the aforementioned rules to read as follows:

"7.6 Counsel may require fees to be paid in advance. If this is not done, counsel will agree at the earliest opportunity with the instructing attorney the period within which the fees will be paid, depending on the circumstances of the case. Such an amendment may also be concluded to be applicable in general between counsel and attorney if counsel is briefed repeatedly by the same firm of attorneys."

And:

"7.7.2 Attorneys shall make payment to counsel within the time period agreed upon between attorney and counsel for the work carried out by counsel."

8. The aforementioned amendment (hereinafter referred to as "the 2014 amendment") of the Code of Conduct therefore completely did away with the 97 day rule as alluded to in paragraph 4 *supra*. It is debatable whether the 2014 rule change was ever properly and/or uniformly implemented.

9. The Code of Conduct for legal practitioners was published in General Notice 81 in Government Gazette 40610 of 10 February 2017, as provided for in Section 97(1)(b) of the Legal Practice Act, No 28 of 2014, and will come into operation when the Legal Practice Act comes into operation.

10. Rules 26.6 and 26.7 of the code of conduct for legal practitioners provides as follows regarding the time of payment of fees:

> *"26.6 Unless expressly agreed to the contrary with the instructing attorney, the following standard terms, which counsel must draw to the attention of the instructing attorney, shall be implied in a brief offered to and accepted by counsel:*
>
> *26.6.1 Counsel may, but is not obliged to, afford his or her instructing attorney credit to pay counsel's account from the end of the month in which the fee invoice is rendered, in accordance with any local practice in existence at the time of the commencement of this code of conduct.* ***In the absence of an agreement an attorney shall settle account within 30 days from the end of the month in which the fee invoice is rendered, irrespective of whether or not the attorney has received payment from the client.*** *It is recorded that the purpose of this rule is to allow the attorney sufficient time to collect monies to pay fees that were not already collected in advance of receipt of invoice, and accordingly the attorney is obliged to pay over to counsel any monies collected already from the client in respect of fees for the services upon receipt of invoice."*
>
> And:
>
> *"26.7 Counsel may expressly, in writing or in an e-mail, conclude an agreement with an instructing attorney which includes provision for any or all of the following:*
>
> *26.7.1 That the fees must be paid prior to the performance of any obligation in terms of the brief;*
>
> *26.7.2 That the time for payment may be advanced to an earlier date than would be the standard period in accordance with the standard terms of payment."*

11. Regard being had to the aforementioned it is clear that the legal position that will prevail once the Legal Practice Act comes into operation is that there will be a default period of 30 days for the payment of fees, which may be amended by written agreement.

    11.1 It is however important to take note that the 30 day default period concerned will commence at the end of the month in which the fee invoice is rendered, i.e. not from the date that the work is completed, nor from the end of the month in which the work is done.

    11.2 Rule 31.1 of the Code of Conduct for legal practitioners provides that counsel shall mark a fee as soon as practicable after the specific service has been rendered and shall render an account monthly of all fees owing by every debtor.

12. A Special General Meeting was convened on Thursday, 7 September 2017. At this meeting it was suggested that Rule 7.7.2 of the Code of Conduct be amended to read as follows:

    "Attorneys shall make payment to counsel within the time period agreed upon between attorney and counsel for the work carried out by counsel subject thereto that in the absence of an agreement as to when fees become payable, fees are payable 30 days from the end of the month in which the fee invoice is rendered."

13. The Bar Council adopted the amendment of Rule 7.7.2 at a meeting which was held on Tuesday, 14 November 2017. The Bar Council furthermore resolved to inform the Law Society of the Northern Provinces of the amendments of our rules and Code of Conduct in respect of payment of fees by attorneys, as well as the proposed implementation of the reporting of defaulting attorneys to a credit bureau instead of the defaulters' list.

14. The purpose of this letter is therefore twofold:

    14.1 In the first instance to inform you of the amendment of Rule 7.7.2 of the Code of Conduct; and

    14.2 In the second instance to direct your attention to the fact that we are registered as a participating member of TransUnion Credit Bureau and that we are entitled to report any attorney who defaults in the payment of fees to the said credit bureau, subject to the rules of the said credit bureau.

15. We trust that the aforementioned clarifies your concern. We invite you to discuss any other aspects or concerns that you may have in this regard.

Yours faithfully



MOSS MPHAGA SC
CHAIRPERSON