COMMENTARY ON
THE DRAFT LEGAL SECTOR CODE

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AfriForum

Part of the Solidarity Movement

Contents

1. Introduction

1.1 AfriForum non-profit organisation (NPO) is a civil rights movement that, *inter alia,* protects and advances the interest of its members and their constitutional rights in particular. In this capacity AfriForum is regularly called upon to approach the court system through appointed legal representatives.

1.2 AfriForum has approximately 270 000 members. These members are located across the Republic of South Africa.

1.3 Some of AfriForum's members are involved in the legal industry themselves, whether as legal practitioners or employees in the sector.

1.4 AfriForum is accordingly submitting this comment opposing the draft legal sector code as it believes that its implementation would have a devastating effect on the legal industry and the ability of the public to freely consult or appoint the legal representatives of their choice. Practitioners will also be curtailed in their ability to earn a living.

2. A legal sector code is not necessary

2.1 Although AfriForum does not dispute the existence of inequalities of the past, it is worth mentioning that the legal sector has already made huge strides within the context of empowerment without being legally compelled to do so. A number of the most prominent litigators in the country have appointed panels of attorneys (who in turn appoint counsel) and in the process of such appointments have insisted on applying BBBEE criteria.

2.2 These large-scale litigators include the Road Accident Fund, most local municipalities, other organs of state on a national and provincial level as well as commercial banks.

2.3 The Road Accident Fund litigation, for instance, makes up approximately 80% of the Trial Court roll in the Gauteng High Courts. This litigation alone provides a huge pool of work in which black legal practitioners enjoy preference.

2.4 It is getting more difficult for white entrants, including white women, to enter the legal sector and to establish viable practices because, except for assignments from smaller private clients, in the bulk of litigation black legal practitioners are already much more likely to be employed or engaged.

2.5 AfriForum accordingly objects in totality to the imposition of a sector code. It will clarify its objections to the proposed code in further detail hereunder.

3. Violation of constitutional rights

3.1 The proposed code violates various constitutional rights of practitioners as well as clients of those practitioners. It is well known, and in fact even recognised in the proposed code, that a large number of legal practitioners practise under their own name. This is the case with practising advocates as well as a large number of attorneys who are sole practitioners.

3.2 When these individuals are forced to convey information on their annual income and financial matters, they are in actual fact compelled to convey details of their personal finances to the regulating authorities. This is a grave invasion of privacy and violates Section 14 of the Constitution of the Republic of South Africa.

3.3 The measures also drastically infringe on the freedom of trade and occupation as enshrined in Section 22 of the Constitution.

3.4 In relation to criminal matters, Section 35(2)(b) of the Constitution guarantees any person who is detained the right to freely choose his or her legal representative. Such a person can thus not be compelled or persuaded by any measure, legislative or otherwise, to exercise this selection on the basis of race.

3.5 It has been a fundamental principle of our legal system that anyone, irrespective of race, upbringing, culture and belief should be able to obtain the services of whoever that person believes to be the best suited to represent his or her case to a Court or Tribunal.

3.6 For this reason, the ethical rules of the General Society of Advocates compel counsel to accept briefs if a matter falls within their competence, they are not overloaded with work and their fees can be afforded by the client.

3.7 Representation of choice must be available for actual justice to take place.

3.8 It is also worth mentioning that the cost of litigation remains extremely high, and in fact out of reach for a vast component of the South African society. Over time, numerous measures have been adopted in an attempt to make access to courts more financially attainable. These measures, *inter alia,* included granting attorneys right of appearance in higher courts.

3.9 The proposed code would have a detrimental effect if, for instance, a client wished to engage with white senior counsel of his or her choosing and would then be forced to engage

other counsel in the form of a person of colour as well (who also has to be paid) merely because of the industry being regulated. The same applies to his or her choice of attorneys.

3.10 Access to justice will be hindered by the proposed measures.

3.11 Because South Africans from all walks of life get entangled in legal matters, out of their own free will or not, this further contributes to the already diverse number of legal practitioners from all races receiving instructions. In the legal industry, irrespective of the race of the practitioner concerned, it will primarily be the reputation of practitioners that results in them having a successful practice. There already exists a huge number of reputable legal practitioners from all races and backgrounds.

4. Importance of non-racialism

"I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

– Martin Luther King Jr

4.1 The principle of non-racialism permeates the Freedom Charter:

> … South Africa belongs to all who live in it, black and white.
>
> The rights of the people shall be the same, regardless of race …
>
> All laws which discriminate on grounds of race, colour and belief shall be repealed.
>
> Restriction of land ownership on a racial basis shall be ended, …

4.2 In 1991 the ANC produced a document entitled *Constitutional Principles for a Democratic South Africa*, which proclaimed the following: "A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination, are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all. It presupposes a South Africa in which every individual has an equal chance, irrespective of his or her birth or colour. It recognises the worth of each individual."

4.3 The value of non-racialism was finally legally enshrined in the first section of our Constitution:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. […]

4.4 Constitutional Court jurisprudence has the following to say about non-racialism:

"The long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity."[1]

"No members of a racial group should be made to feel that they do not deserve equal 'concern, respect and consideration' and that the law is likely to be used against them more harshly than others belonging to other race groups."[2]

"To achieve the magnificent breadth of the Constitution's promise of full equality and freedom from disadvantage, we must foresee a time when we can look beyond race."[3]

4.5 South Africans fought and died for the value of non-racialism to be entrenched in our Constitution. Once we acknowledge that racial preference has been the source of many of our problems, we must realise that it cannot form part of our solutions.

5. Rationality of code

5.1 It is evident from the draft legal sector code that no cognisance was taken of the composition nor of the uniqueness of the legal sector. In light of the fact that equality as well as access to justice are central constitutional pillars of our judicial system, it is important to carefully consider these unique properties and such specific composition.

5.2 It is submitted that the Legal Practice Council is obligated to conduct a thorough nation-wide study and investigation, to obtain the inputs from all judges, magistrates, lawyers, advocates, candidate legal practitioners and students involved in the sector. Pursuant hereto statistics regarding their race, gender and positions should be drawn up before drafting a proposed code. A mere public participation process where comments are called for does not suffice in constitutional terms. Without such a study, the Legal Practice Council fails in its duty of ensuring proper public participation. Any subsequent decision on a new sector code, regardless of which sector code, would be irrational and procedurally flawed.

5.3 Merely through superficial *prima facie* research does it become clear that the Council did not properly consider the demographics of South Africa, and more specifically the demographics of each province where the Council has provincial structures in place. According to the *LSSA*

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1 *Minister of Finance v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC) (29 July 2004). See para 44.

2 *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998). See para 81.

3 *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014). See para 81.

STATISTICS FOR LEGAL PROFESSION 2017/2018,[4] for example, the Council claims that there already appear to be differences regarding the composition and unique characteristics of the legal sector. The proposed sector code of the Council does not provide any material reasons why the generic scorecard should be deviated from and why it is necessary to act on certain elements and use the unique characteristics of the sector. To rely only on unsubstantiated allegations such as that the legal sector "remains largely homogeneous and dominated by white men", or "a review of the South African legal profession shows that there are not enough large black-owned law firms in the country that are in size, scale and service offerings [able to compete] with established white-controlled practices […]", is not sufficient; indeed, it constitutes shallow and lazy policy making.

5.4 For example, according to the last official census data of 2011, only 9,6% of South Africans speak English as their home language. In other words, 90,4% of the country's population's home language is not English. The proposed language policy of the Council does not provide any reason as to why English should be adopted as the official and only language, apart from the provision in paragraph 5.6 that English was allegedly adopted as the court language.

6. General remarks

6.1 The code in question is vague as to whether nett income or gross income will be the determining factor in the classification of legal practitioners and/or their firms. It is submitted that it would make more sense to base the criteria on nett income.

6.2 The proposed sector code requires full payroll access. It has already been mentioned that in the case of single practitioners (and even partnerships of attorneys) this will be a severe incursion into their personal finances and privacy. The same applies to the privacy of the employees concerned.

6.3 In general, the code appears to be severely restrictive in respect of white practitioners. This group is already negatively affected because the bulk of large-scale litigants have some form of procurement policy which contains BBBEE criteria and thus excludes them.

6.4 It is furthermore troubling that in respect of voting rights and economic interests only black women are considered. White women are not considered to be part of transformation objectives at all.

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[4] Available at https://www.lssa.org.za/wp-content/uploads/2019/11/LSSA-STATS-DOC-2017-18.pdf.

6.5 Similarly, in respect of voting rights and economic interests, only black people with a disability are considered. White people with a disability have completely been neglected in the proposed code. It is well known that the disabled (of all races) remain a sector of society that is extremely vulnerable and open to discrimination.

6.6 Some of the proposed criteria appear to be divorced from reality. There are, for instance, requirements that advocates of a certain standing and income should take in two to three black pupils. Additionally, or in the alternative, huge amounts of money have to be invested in empowerment, or hundreds of hours of *pro bono* work must be done. Smaller firms cannot afford this.

6.7 As a rule of thumb, most counsel have two or three pupils (of any race) to train in their entire career. The placement of these pupils is facilitated by the Law Society in question and the practitioner personally has little control over this aspect. Pupils are not awarded to senior counsel because the practice of the senior counsel will significantly differ from the practice of a junior counsel who has just entered practice. Accordingly, the requirement of simultaneously having to train three black pupils is divorced from reality.

6.8 It is submitted that the code will be difficult, if not impossible, to impose, regulate and comply with because it is not in touch with the realities on ground level in the legal sector.

7. Conclusion

7.1 AfriForum respectfully contends that the code should not be adopted at all, or alternatively, at the very least that far more additional input should be obtained from the legal sector and other stakeholders.