

From:

The Executive Committee of the GAA

Per Email: chantelle@gaa.org.za
tiaan@joubertlaw.co.za

Date: 14 APRIL 2020

**THE EXECUTIVE OFFICER
LEGAL PRACTICE COUNCIL**

Per email: charityn@lpc.org.za

RE: COMMENTS ON DRAFT LETTER TO MINISTER

1. We refer to your request for comments regarding your draft letter dated 13 April 2020, to be addressed to the Minister on issues affecting the legal profession during lockdown.
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 the Soweto Legal Fraternity (SLF). We record that we had received your request on even date, by means of social media. It is unfortunate that this kind of request was not addressed to any of the voluntary associations.
3. Your letter is well drafted, but its main focus regarding solutions is on litigation. The Minister needs to consider other fields of specialisation such as conveyancing, intellectual property law, trade mark, patent and copyright law, as these fields have an enormous impact on the economy. Seeing that there is a possibility of lockdown being extended beyond 30 April 2020 and that all legal practitioners, inclusive of specialist attorneys will be affected, our members have requested us to correspond with you for purposes of the Minister considering the following proposals:
4. **Company law:**

- 4.1 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 considering the immediate re-opening of the CIPC's back office with skeleton staff, as an Essential Service to the business community.
- 4.2 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.
- 4.3 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.
- 4.4 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.
5. **Intellectual Property Law:**
- 5.1 The CIPC has implemented measures to safeguard its personnel in the IP Section (Patents, Trade Marks and Registered Designs) of the CIPC.
- 5.2 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.

5.3 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.

5.4 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.

6. **Litigation:**

6.1 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.

6.2 The judiciary should 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.

6.3 It is suggested that both opposed and unopposed motions should 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.

6.3 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.

- 6.4 A period of *dies non* should be considered during this time. Whether the lockdown should be considered as a “superior force” as referred in sect 13(1)(a) of the Prescription Act should similarly follow. It is our submission that the High Court is 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 issued in the High Court and then transferred after lockdown.
- 6.5 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.
- 6.6 The 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.

7. **Property Law/Deeds Office**

- 7.1 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.
- 7.2 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
- 7.3 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.

7.4 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).

7.5 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.

7.6 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.

7.7 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.

7.8 The Legal Practice Council 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.

8. **Deceased Estate / Trust Practitioners**

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

8.2 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.

- 8.3 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.
- 8.4 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.
9. We look forward to the receipt of your favourable response. However should we not your receive confirmation by no later than noon on 15 April 2020, that our comments will be incorporated into your letter to be addressed the Minister, we will be obliged to address the contents of this letter directly to the Minister.

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