Out with the old and in with the new – understanding the Legal Practice Act

The analogy

The Legal Practice Act 28 of 2014 (LPA), which came into partial operation in February is the product of society changes and input over time. It is the formal beginning of the end for fragmented legislation under which attorneys and advocates currently practice. One such Act dates as far back as 1926. Although it might overlap with recent repealing amendments, s 119 LPA read with its schedule, repeals the whole of the Natal Conveyancers Act 24 of 1926, the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, the Attorneys’ Admission Amendment and Legal Practitioners’ Fidelity Fund Act 19 of 1941, the Admission of Advocates Acts 74 of 1964 of South Africa and the former Transkei, Bophuthatswana, Venda and Ciskei states, the Attorneys Acts of South Africa and Ciskei 53 of 1979 and Venda 42 of 1987, the Attorneys, Notaries and Conveyancers Act of Bophuthatswana 29 of 1984, the Recognition of Foreign Legal Qualifications and Practice Act 114 of 1993 and the Right of Appearance in Courts Act 62 of 1995.

Is this change just for the sake of change or much needed change for the better? In order to understand what is happening to legal practice it helps to compare it with change introduced via computer operating systems. Although some readers might feel slightly threatened by such an analogy, even those readers should benefit from a few observations that one could make to place the LPA changes into perspective.

Observation 1: How operating systems change

Information Technology (IT) in the information age can teach us lessons about life. Recently the IT departments or service providers of many South Africans and South African firms (including law firms and individual legal practitioners) began to update their operating systems. There are many operating systems but this article will use just two of the widely known brands – namely Windows 10 and iOS9 – to make a few observations about...
how change is introduced. To completely understand the LPA one should think of it as a modern operating system for lawyers.

Observation 2:
The difference between a major and a minor change

IT users will notice that Windows 10 and iOS9 are not the first updates. There have been major upgrades in the past such as Windows 8 or iOS8. Each major upgrade is given a new name and usually has many new features. However, as we are so often reminded, the operating systems are never perfect. In fact after launching, users start discovering the problems. The minor updates in between the major ones. These fix the little (or bigger than expected) niggles.

This process can be likened to the Acts that have regulated our professions. Decades ago there was the Attorneys Notaries and Conveyancers Admission Act 23 of 1934. Then in 1979 the Attorneys’ profession received a major overhaul with the Attorneys Act 53 of 1979. Where niggles crept in, they were addressed (as in most legislation) by the amendment Acts. A cursory perusal of the history of those Acts indicate that there were many amendments. The 1934 Act was amended at least in 1938, 1941, 1956, 1964, 1965, 1967 and 1970 long before it was decided to introduce the major new operating system of 1979. The 1979 Act was amended as soon as 1980. In fact the 1979 Act was amended at least once every year for the six years following its introduction. All in all the 1979 Act was amended more than 20 times and the Admission of Advocates Act 74 of 1964 more than ten times before the new legal practitioners’ operating system (LPA) was introduced. What is the point of all this? That operating systems will change. Practical application usually dictates the necessity for adaptations. When a lacuna or amendment need is discovered, one should be careful to judgmentally pronounce that current legislation is drafted worse than previous legislation. More than 30 amendments to the previous operating legislation is a clear indicator that things were not perfectly drafted first time round in 1934, 1964 or 1979. Situations, understanding and perspectives change and as they do new operating systems are explored and adapted where necessary. Already, shortly after the LPA has become law, the need for minor amendments have been noticed. Participants have pointed to certain practical challenges which need to be dealt with. The National Forum (NF) was recently (19 September) addressed by a member of its Rules and Code of Conduct and Governance Committees, Jan Stemmett, on the need for legislative changes to provide for smooth transition from the existing statutory law societies to the new Legal Practice Council and Provincial Councils. These new structures are not yet formed and it is the responsible task of the NF to work towards smooth creation and implementation of the councils that are to take up the cudgels in future.

Observation 3: The more things change the more they stay the same, or not?

On the operating systems I referred to in the first observation many users will not initially notice many of the changes
or improvements and yet they will use the systems regularly. The adage ‘the more things change, the more they stay the same’, comes to mind. It is true that much might stay the same under the new Act. However, the LPA introduces some major changes. Let us list just ten practical changes.

- Country demographics will play a role in shaping the legal profession.
- The provincial approach to regulation will be replaced by a national approach in that the four current law societies are to be replaced by a national Legal Practice Council (LPC) probably with nine Provincial Councils or at some Provincial Councils with service points in provinces where Provincial Councils are not immediately created.
- After decades of self-regulation, non-attorneys will serve on the regulatory structure (LPC).
- The absolute distinction and separation between the various arms of government will be blurred in that the executive via the Minister of Justice and Correctional Services will nominate representatives to serve on the LPC, which regulates the practitioners that will feed the judiciary.
- Currently statutory law societies fulfil a dual role in that they, on the one hand, regulated and, on the other, represented attorneys. The LPC will focus on regulation and discipline and in doing so will probably leave the representative function to others.
- There is a merging of legislation governing at least two legal professions into one Act and one national governing structure for both professions.
- For the first time in modern years, certain advocates will be able to legally take instructions directly from non-attorney members of the public. As part of this, the new concept of advocates managing trust accounts is introduced.
- The LPA introduces a Legal Services Ombud. The powers of the ombud are additional to the other disciplinary mechanisms of the Act.
- Disciplinary committees until now, had purely disciplinary functions that entailed making finding and recommending sanctions to the statutory councils. For any further relief, the complainant had to pursue civil remedies. In terms of s 40 LPA the disciplinary committee may order a legal practitioner to pay compensation and interest to the complainant.
- The name and governance of the Attorneys Fidelity Fund will change. This is a fund that was initially created by parliament on the request of attorneys (then member of Parliament, Mr Nel, as quoted in Hansard 11 March 1941 at 4268, refers to the four law societies as the ‘promoters of the Bill’, which introduced the concept of the fund.) In future the attorneys’ profession will play a smaller role on its board with five legal practitioners (of which, one must be an advocate) and four others (not necessarily legal practitioners) added to form the Board of the Legal Practitioners Fidelity Fund.

These changes are by no means a closed list. There are many others, some fundamental (see s 35 on fees and pre-mandate quotations) and some subtle. These will be explored in further articles.

Observation 4: A move to uniformity but still two platforms?

Software developers often try to get their software to function on different operating systems. In earlier versions of the LPA, one got the sense that the legislature considered getting rid of the distinction between the attorneys’ and advocates’ professions by using the reference to legal practitioner. The LPA, however, retains the distinction (unlike, for example, s 92 of the comparable Namibian Legal Practitioners Act 15 of 1993, which determines that reference in other Namibian laws to advocate, counsel or attorney, must be construed as a reference to legal practitioner).

A legal practitioner wearing half a hat?

The LPA also goes some way to expand the legal operating system platform. Advocates pre-LPA were not supposed to accept instructions directly from the public while attorneys could do so. Attorneys firms had to have trust accounts while advocates were not required to do so.

Wildenboer ‘The origins of the division of the legal profession in South Africa: A brief overview’ (2010) 16(2) Fundamenta 199 points out that according to the Statutes of Batavia attorneys appearing at court in the Cape during the 17th to 19th centuries had to appear bare headed while advocates were allowed to keep their hats on. If that were the case under the LPA, one would see some advocates appearing with half a hat as s 34(2)(a)(ii) of the LPA provides for a class of advocates that may accept instructions directly from the public. In terms of s 34(2)(b)(ii) of the LPA they are required to have trust accounts. The question has no doubt been asked as to what the difference is between an attorney and an advocate who may take direct instructions. If there is no difference, why does the Act make the distinction? More importantly to those involved in building practices or legal teams, can an attorney and advocate form a legal practice partnership? In visiting law society circles, one is sometimes confronted with this question. The very fact that it is being asked, indicates some anticipation by certain attorneys of joint attorney/advocate practices. The LPA does not go that far. Legal partnerships essentially share fees but s 34(5)(b) of the LPA prohibits attorneys to make over, share or divide any portion of their professional fees whether by way of partnership, commission, allowance or otherwise with a non-attorney. Further s 34(4)(a) only allows advocates to practice for own account and prohibits professional fee sharing. (Both categories of practitioners may form part of a law clinic, Legal Aid South Africa or be employed permanently by the state or The South African Human Rights Commission).

Observation 5: The operating system does not immediately enable one to do everything – it requires more

Modern operating systems are amazing but they do not empower the user enough to function effectively. They need software applications, which provide for the details of everyday use. Similarly, the LPA does not focus on the detail needed to implement the Act in a user friendly way. It needs regulations, codes of conduct, input from the Fidelity Fund, the Rules Board, Law Reform Commission and more. This process has commenced. The NF will bear the brunt of the responsibility and it seems to be gaining momentum. Practitioners, whether with the whole, half or without the hat, will do well to monitor the functioning of the NF closely so as not to be caught lacking some other essential clothing.