

**NON-COMMISSIONED PERSONAL LEGAL OPINION SUBMITTED BY:**

**ADV. CJ RHEEDER, SENIOR STATE ADVOCATE, AFU, DURBAN, ON:**

**THE IMPLICATIONS OF THE LEGAL PRACTICE ACT 28 OF 2014 ON STATE ADVOCATES OF THE NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA FOR THE ATTENTION OF AND CONSIDERATION BY THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**1 THE PURPOSE OF THIS OPINION**

The purpose of this personal legal opinion is *inter alia* to:

- a. provide insight into the current legislation which governs the professions of attorneys and advocates as envisaged by the Attorneys Act, 1979 (Act 53 of 1979) (the Attorneys Act hereinafter); the Admission of Advocates Act, 1964 (Act 74 of 1964) (the Admission of Advocates Act hereinafter) and the Right of Appearance in Courts Act, 1995 (Act No 62 of 1995) (the Right of Appearance in Courts Act hereinafter); and
- b. provide insight into the existing status of persons employed by the NPA in terms of the NPA Act, 1998 (Act No. 32 of 1998) (the NPA Act hereinafter) as prosecutors but holding the job description and title of State Advocates; and
- c. provide insight into the repeal of the Attorneys Act, the Admission of Advocates Act and the Right of Appearance in Courts Act; the timeframe of the repeal of the aforementioned Acts as provided for in section 119 (1) (a) of the Legal Practice Act, 2014 (Act No. 28 of 2014) (the Legal Practice Act hereinafter); and

- d. express an opinion on the legal compliance by the NPA with the aforementioned legislation, which, is deemed prudent by the author to be brought to the attention of the NDPP for his consideration and advice; and
- e. if this opinion is deemed to be sound in law, for the NDPP to take such steps as he may believe to be prudent to protect the institutional integrity and reputation of the NPA, if the possibility exists that the NPA may currently be found wanting to comply with the provisions of the Attorneys Act, the Admission of Advocates Act and ultimately the Legal Practice Act.

## **2 DEFINITIONS**

The definitions that are used herein are extracted from current definitions as they appear in the Attorneys Act, the Admission of Advocates Act and the Legal Practice Act and will be identified as such from the legislation referred to as aforementioned as well as the Right of Appearance in Courts Act. The following definitions are regarded as being of importance for the purpose of this opinion:

- a. Advocate:
  - i. Section 1, Admission of Advocates Act: “advocate” means an advocate of the Supreme Court.
  - ii. Section 1, Attorneys Act: “advocate” means an advocate of the Supreme Court.
  - iii. Section1, Legal Practice Act: “advocate” means a legal practitioner who is admitted and enrolled as such under this Act.

- iv. Section 1, Legal Practice Act: “state advocate” means a person who has been admitted and enrolled as an advocate in terms of this Act, and who is appointed by the National Prosecuting Authority of South Africa as a state advocate in terms of the National Prosecuting Authority Act, 1998 (Act No 32 of 1998).
- v. It must be pointed out at this juncture that the NPA Act does not specifically make provision for the appointment of any person as a state advocate *per se*; the said Act only refers to the appointment of individuals as prosecutors. I do not for the purpose of this opinion deal with the other job descriptions as Deputy Directors, Directors Etc.).
- vi. Section 1, Right of Appearance in Courts Act: “advocate” means any person duly admitted and enrolled as an advocate in terms of-
  - (a) the Admission of Advocates Act, 1964 (Act 74 of 1964); or
  - (b) any law providing for the admission of advocates in any area in the Republic which remained in force by virtue of section 229 of the Constitution;

b. Attorney:

- i. No definition exists in terms of section 1 of the Admission of Advocates Act.
- ii. Section 1, Attorneys Act: “attorney” means any person duly admitted to practice as an attorney in any part of the Republic.

- iii. Section 1, Legal Practice Act: “attorney” means a legal practitioner who is admitted and enrolled as such under this Act.
- iv. Section 1, Legal Practice Act” “state attorney” means a person who has been admitted and enrolled as an attorney in terms of this Act, and who is appointed as a state attorney in terms of the State Attorney Act, 1957 (Act No 56 of 1957).
- v. Section 1, Right of Appearance in Courts Act: “attorney” means any person duly admitted and enrolled as an attorney in terms of-

(a) the Attorneys Act, 1979 (Act 53 of 1979); or

(b) any law providing for the admission of attorneys in any area in the Republic which remained in force by virtue of section 229 of the Constitution;

c. Legal Practitioner:

- i. Being a new term introduced by the Legal Practice Act, it was not provided for in section 1 of the Admission of Advocates Act.
- ii. Similarly, it was not provided for in section 1 of the Attorneys Act.
- iii. Section 1, Legal Practice Act: “legal practitioner” means an advocate or an attorney admitted and enrolled as such in terms of sections 24 and 30 respectively.
- iv. A prosecutor appointed in terms of the NPA Act appears not to be included in the definition of a legal practitioner in the Legal Practice Act.

d. Prosecutor:

- i. Section 1, NPA Act: “prosecutor” means a prosecutor referred to in section 16 (1).
- ii. Section 1 of the Admission of Advocates Act does not provide for the definition of a prosecutor.
- iii. Similarly, there is no definition of a prosecutor provided for in section 1 of the Attorneys Act.
- iv. Section 1 of the Right of Appearance in Courts Act does not provide for the definition of a prosecutor.
- v. The Legal Practice Act does also not provide for the definition of a prosecutor in section 1 thereof.

**3 THE RIGHTS OF APPEARANCE AND PRACTICE OF ADVOCATES AND ATTORNEYS AND THE RIGHTS OF APPEARANCE OF PROSECUTORS**

In this paragraph I shall briefly deal with the rights of appearance and practice of advocates and attorneys under the current legislation as well as the rights of appearance of prosecutors again by extraction from the legislation which is applicable and as follows:

a. Advocates:

- i. Section 2 of the Admission of Advocates Act:

*“2. Persons to be admitted to practice as advocates only under this Act, and manner of making applications*

*(1) After the commencement of this Act no person shall be admitted to practice as an advocate save in accordance with the provisions of this Act.*

*(2) Any application pursuant to the provisions of this Act shall be made in the manner prescribed in the rules."*

ii. Section 6 of the Admission of Advocates Act:

*"6. Advocates entitled to act throughout the Republic*

*Any person who has been or is deemed to have been admitted to practice as an advocate in terms of any provision of this Act, shall be entitled to practice as an advocate throughout the Republic unless his name has been ordered to be struck off the roll of advocates or unless he is subject to an order suspending him from practice as an advocate."*

iii. Section 2 of the Right of Appearance in Courts Act confirms that *"any advocate shall have the right to appear on behalf of any person in any court in the Republic."*

iv. Section 24 (1) of the Legal Practice Act:

*"24. (1) A person may only practice as a legal practitioner if he or she is admitted and enrolled to practice as such in terms of this Act."*

v. Section 25 (1) and (2) of the Legal Practice Act:

*"25. (1) Any person who has been admitted and enrolled to practice as a legal practitioner in terms of this Act, is entitled to practice throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practicing."*

*25. (2) A legal practitioner, whether practicing as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law."*

vi. Section 114 of the Legal Practice Act: *Existing advocates, attorneys, conveyancers and notaries:*

*"114. (1) Any person who has been admitted by the High Court and authorised to be enrolled as an advocate, attorney, conveyancer or notary in terms of any Act in the former [sic] Republic of South Africa and former homelands which is still applicable before the date referred to in section 120 (4), must be regarded as having been admitted to practice and, where applicable, subject to any condition imposed by the High Court, must be enrolled as a legal practitioner, conveyancer or notary in terms of this Act, subject to the terms of any order of court whereby any such person has been suspended from practice as an advocate, attorney, conveyancer or notary."*

b. Attorneys:

i. Subsections (3) and (4) of the Legal Practice Act, make provision for attorneys who wish to appear in the High Court to obtain on application from the Registrar and subject to certain criteria having been met, a certificate to the effect that the applicant has the right to appear in the High Court, Supreme Court of Appeal or the Constitutional Court.

ii. The provisions of subsections (3) and (4) appear to mirror the provisions of sections 3 and 4 of the Right of Appearance in Courts Act.

iii. Despite the future repeal of the Rights of Appearance in Courts Act in its whole, it is clear that the legislature had intended to keep the provisions of sections 3 and 4 of the said Act largely intact.

iv. The general tradition has been that advocates are briefed by attorneys to appear in the High Court on behalf of their clients.

c. Prosecutors

i. Section 20 (5), NPA Act: As a general rule prosecutors are given a delegation to prosecute (the written authorisation) which sets out the area of jurisdiction; the offences; and the court or courts in respect of which they may exercise their powers of prosecution. The delegation to prosecute is furnished by the relevant DPP of that area.

ii. Section 25 (1) of the NPA Act deals with the powers, duties and functions of prosecutors.

iii. Section 25 (2) of the NPA Act is relevant to this opinion in that it makes specific reference to the provisions of the Right of Appearance in Courts Act by providing as follows:

*"25 (2) Notwithstanding the provisions of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995) or any other law, any prosecutor who –*

*(a) has obtained such legal qualifications as the Minister after consultation with the National Director may prescribe; and*



*(b) has at least three years' experience as a prosecutor of a magistrates' court of a regional division, shall, subject to section 20 (6), have the right to appear in any court in the Republic."*

iv. The NPA Act accordingly makes provision for prosecutors to have, subject to certain conditions, the same right of appearance in courts throughout the Republic as the right of appearance afforded to admitted and enrolled advocates and admitted and enrolled attorneys (who are in possession of a certificate by the Registrar) to appear in courts throughout the Republic.

v. It is however clear from the NPA Act, that prosecutors who qualify in terms of the criteria set out in section 25 (2) are not equated to the profession of advocates and attorneys who are governed by the provisions of the Admission of Advocates Act and the Attorneys Act.

vi. It is trite, although the exact number of such prosecutors are not known to the author, that some have been appointed as State Advocates on the establishment of DPP's and whom are neither admitted nor enrolled advocates as envisaged by the Admission of Advocates Act.

vii. Similarly, there are indeed prosecutors appointed as State Advocates on the establishment of the DPP's [or the office of the NDPP for that matter] who are admitted and enrolled advocates and admitted and enrolled attorneys (assumably being in possession of the right of appearance in the High Court) in terms of the Admission of Advocates Act and the Attorneys Act respectively.

viii. For the purposes of this opinion only, I shall refer to prosecutors who have by virtue of the provisions of section 25 (2) of the NPA Act, acquired the right to appear in any court in the Republic but who are neither admitted and enrolled advocates or attorneys of the High Court, as **High Court Prosecutors**.

viii. It has been the experience of the author that some High Court prosecutors, when appearing in criminal trials in the High Court, don the traditional robes of admitted advocates of the High Court.

ix. Accordingly, if the robe is anything to go by, there is nothing which distinguishes High Court Prosecutors from admitted and enrolled advocates of the High Court.

x. It has equally been the experience of the author that some High Court Prosecutors are referred to as “advocate so-and-so”, either in official correspondence or in the media or inadvertently by members of the Bar who labour under the impression that if the robe worn by the High Court Prosecutor is that which is the traditional robe of admitted advocates, such person is indeed an admitted advocate of the High Court.

xi. The practice to wear the traditional robe of an admitted advocate of the High Court has also extended to admitted attorneys of the High Court who have been appointed and held against the post of State Advocates, which again makes it impossible to distinguish the fact that such an attorney is not indeed an admitted advocate of the High Court.

xii. In private practice, admitted attorneys with the right of appearance in the High Court, don the traditional robe of an attorney, whilst wearing

a black jacket underneath and sporting a bib. Accordingly, they are properly distinguished by their attire from those who belong to the profession of advocates and are not mistaken for being advocates by either members of the Bar or the Judiciary.

4. **IT IS A CRIMINAL OFFENCE IN TERMS OF THE ADMISSION OF ADVOCATES ACT AS WELL AS THE LEGAL PRACTICE ACT TO HOLD ONESELF OUT AS AN ADVOCATE**

a. Section 9 (1) and (3), Admission of Advocates Act:

*"9. Offences*

*(1) No person who has not been or is not deemed to have been admitted to practice as an advocate in terms of any provision of this Act or whose name has been removed from the roll of advocates or who is subject to any order suspending him from practice as an advocate, shall in any manner, directly or indirectly, practice as an advocate or hold himself out as, or pretend to be, or make use of any name, title, addition or description implying or tending to induce the belief that he is, an advocate or is recognized by law as such.*

*(2) .....*

*(3) Any person who contravenes any provision of this section shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding twelve months with or without the option of a fine, or to both such fine and imprisonment....."*

b. Section 24 (1) of the Legal Practice Act:

*“24. (1) A person may only practice as a legal practitioner if he or she is admitted and enrolled to practice as such in terms of this Act.”*

c. It is necessary to restate the definition of a legal practitioner as envisaged by the Legal Practice Act here. Section 1, Legal Practice Act: “legal practitioner” means an advocate or an attorney admitted and enrolled as such in terms of sections 24 and 30 respectively.

c. Section 93 (2) of the Legal Practice Act: Any person who contravenes any of the provisions of section 33 commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding two years or to both such fine and imprisonment.

d. Section 93 (3) of the Legal Practice Act: Any person who contravenes any of the provisions of section 34 commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding two years or to both such fine and imprisonment.

e. Section 33 (2) of the Legal Practice Act: No person other than a legal practitioner may hold himself or herself out as a legal practitioner or make any representation or use any type of description indicating or implying that he or she is a legal practitioner.

f. Section 33 (3) of the Legal Practice Act: No person may in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyance or notary, as the case may be.

g. Although it is notable that section 119 (1) (a) repeals both the Admission of Advocates Act and the Attorneys Act in their whole, as well as the Right of

Appearance in Courts Act, it is equally notable that section 119 (b) provides that paragraph (a) takes effect on the date referred to in section 120 (4), which date shall be fixed by the President by proclamation in the Gazette.

h. Section 119 (2) of the Legal Practice Act provides as follows:

*“(2) Any –*

*(a) Regulation made under any law referred to in subsection (1) and in force immediately before the date referred to in section 120 (4); and*

*(b) Rule, code, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document promulgated, issued, given or granted and any other steps taken in terms of any such law immediately before the date referred to in section 120 (4) and having the force of law,*

*Remain in force, except in so far as it is inconsistent with any provisions of this Act, until amended or revoked by the competent authority.”*

i. Accordingly, the provisions of the Admission of Advocates Act, including section 9 relating to offences, remain in force until such time that the President has by proclamation in the Gazette, proclaimed the effective date under which the said Act will be repealed.

j. I am of the respectful opinion that High Court Prosecutors or admitted attorneys of the High Court who are employed as State Advocates may by way of their attire, manner of address or in any other way as envisaged by section 9 of the Admission of Advocates Act appear to be holding themselves

out as admitted advocates of the High Court and in so doing may expose themselves to criminal prosecution, which undoubtedly will affect and have extreme negative repercussions for the integrity and reputation of the NPA.

k. I am too of the respectful opinion that the job title of "State Advocate" by necessary implication makes use of a name, title, addition or description implying or tending to induce the belief that such a State Advocate is an advocate or is recognized by law as such. Accordingly it my respectful opinion that High Court Prosecutors (as well as admitted attorneys of the High Court who have been employed by the NPA as State Advocates) and who hold themselves out as State Advocates are falling foul of the provisions of section 9 of the Admission of Advocates Act and may be liable to criminal prosecution.

l. I restate the first part of section 9 of the Admission of Advocates Act which provides that *"no person who has not been or is not deemed to have been admitted to practice as an advocate in terms of any provision of this Act or whose name has been removed from the roll of advocates or who is subject to any order suspending him from practice as an advocate, shall in any manner, **directly or indirectly**, practice as an advocate"*. My emphasis.

m. It is trite that State Advocates who are admitted and enrolled as advocates in reality practice as advocates for the State and may even be subject to an application to be struck off the roll of advocates. High Court Prosecutors [and admitted attorneys of the High Court who are appointed as State Advocates equally assume the practice of advocates, without having been admitted or enrolled to practice as such. This practice, I believe, is in direct contravention

of section 9 of the Admission of Advocates Act and may attract criminal prosecution.

n. As I will show below, it appears that the legislature and the General Council of the Bar of South Africa have always laboured under the impression that State Advocates are indeed advocates who have been admitted and enrolled to practice as an advocate in terms of the Admission of Advocates Act.

o. I am also of the respectful opinion that the NDPP ought to implement such measures as a matter of expediency to ameliorate the risk of any High Court Prosecutor of falling foul of the provisions of section 9 of the Admission of Advocates Act and by ensuring that any admitted attorney of the High Court who is employed as a State Advocate, does not robe in the traditional robe of an admitted advocate of the High Court as it may induce the belief that such a person is an advocate.

p. Although addressing the issue of the correct robing by admitted attorneys who are employed as State Advocates might be a short term solution in part, the very fact that they are employed as State Advocates, as I will show below, constitutes a misnomer and a potentially unlawful conflation of the professions of advocates and attorneys.

5. **HOW THE LEGAL PRACTICE ACT IMPACTS ON THE FORMS OF LEGAL PRACTICE RELATING TO ADVOCATES, ATTORNEYS AND ULTIMATELY HIGH COURT PROSECUTORS**

a. **Advocates:** Section 34 (6) (d) of the Legal Practice Act regulates the forms of legal practice for advocates when it becomes effective, as follows:

***“Advocates may only practice –***

- (a) *For their own account and as such may not make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance or otherwise;*
- (b) *As part of a law clinic established in terms of subsection (8);*
- (c) *As part of Legal Aid South Africa; or*
- (d) **As an advocate in the full time employment of the State as a state advocate or the Human Rights Commission.**” My emphasis.

b. It is for this reason that I have opined in paragraph 4 n above that it is patently clear that the legislators who were seized with the drafting of the Legal Practice Act as well as members of the General Bar Council of South Africa have always laboured under the impression that an employee of the NPA who has been appointed as a State Advocate are indeed admitted advocates of the High Court as envisaged by the Admission of Advocates Act or when the aforementioned Act becomes repealed by proclamation at a future date, will be admitted advocates/legal practitioners in terms of the Legal Practice Act.

c. It accordingly reinforces my submission that State Advocates are indeed practicing as advocates in the full time employ of the State/NPA. Advocates of the High Court who have been admitted and enrolled as advocates in terms of the Admission of Advocates Act and who have been appointed as State Advocates cannot fall foul of the provisions of section 9 of the Admission of Advocates Act or of section 34 (6) (d) when that section comes into force.

d. I respectfully submit that the aforementioned further reinforces my contention that a State Advocate holds him or herself out as an advocate or induces the belief that he or she is recognized by law as an advocate.



Similarly, an admitted attorney of the High Court who has been appointed as a State Advocate in the employ of the NPA will equally be holding him or herself out as an advocate or by implication induce the belief that he or she is recognized by law as an advocate, thereby falling foul of the provisions of section 9 of the Admission of Advocates Act and opening themselves up for criminal liability.

**e. High Court Prosecutors:** The position of High Court Prosecutors who are not admitted and enrolled as advocates of the High Court as per the Admission of Advocates Act is the worst at risk from being found to fall foul of the provisions of section 9 of the Admission of Advocates Act for the reasons I have alluded to above and their future employment as State Advocates will, I respectfully submit, become impossible by virtue of the provisions of section 34 (6) (d) of the Legal Practice Act.

f. I respectfully further submit that it would be necessary for all current High Court Prosecutors to apply for admission and enrolment as an advocate in terms of the Admission of Advocates Act to ensure that their tenure of employment as State Advocates when section 34 (6) (d) of the Legal Practice Act becomes effective are protected.

g. Once section 34 (6) (d) of the Legal Practice Act takes effect, it will in any event be untenable for any High Court Prosecutor currently appointed as a State Advocate to continue to practice as such as it would conflict with the provisions of the said section of the Legal Practice Act which provides that the position of a State Advocate shall be held by an admitted advocate [whether in terms of the Admission of Advocates Act or the Legal Practice Act] and

does not make provision for a High Court Prosecutor to practice as a State Advocate.

h. **Attorneys:** Admitted attorneys of the High Court who have been employed as State Advocates are equally at risk for being found to fall foul of the provisions of section 9 of the Admission of Advocates Act for the reasons that I have already alluded to above. The tenure of their future employment as State Advocates may equally become impossible by virtue of not only section 34 (6) (d) of the Legal Practice Act, but also by virtue of section 34 (5) (e) of the Legal Practice Act which provides as follows:

***“Attorneys may only practice-***

*(a) For their own account;*

*(b) As part of a commercial juristic entity referred to in subsection (7) and as such, may only make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance or otherwise with an attorney;*

*(c) As part of a law clinic established in terms of subsection (8);*

*(d) As part of Legal Aid South Africa; or*

*(e) As an attorney in the full-time employment of the State as a state attorney or the South African Human Rights Commission.”* My emphasis.

g. I respectfully submit that from the provisions of section 34 (5) (e) it is patently clear that if you choose to be in the full-time employment of the State as an attorney, you will only be able to practice as such as a State Attorney in the office of the State Attorney for each Province. I refer again to the definition of “state attorney” in section 1 of the Legal Practice Act, *supra*.

h. It also reinforces my opinion that it is undesirable for admitted attorneys of the High Court to be employed as State Advocates as this practice may expose them to criminal liability as per the provisions of section 9 of the Admission of Advocates Act and may place the institutional reputation and integrity of the NPA at risk.

i. As a possible solution to this risk, I recommend that measures be taken by the NDPP as a matter of expedience to safeguard existing admitted attorneys of the High Court who have been appointed as State Advocates by ensuring that they take immediate steps to have themselves removed from the roll of attorneys and to make application to be admitted as advocates of the High Court in terms of the Admission of Advocates Act. By doing so, they will not be at risk of violating section 9 of the Admission of Advocates Act and will be adequately protected as admitted advocates when section 34 (6) (d) comes into operation.

j. Once section 34 (5) (e) of the Legal Practice Act takes effect, it will in any event be untenable for any admitted attorney of the High Court currently appointed as a State Advocate to continue to be so appointed as it would conflict with the provisions of section 34 (6) (d) of the Legal Practice Act which provides that the position of a State Advocate shall be held by an admitted advocate [whether in terms of the Admission of Advocates Act or the Legal Practice Act] and does not provide for an admitted attorney to practice as a State Advocate.

6. **HOW DID THE CONFLATION OF THE PROFESSIONS OF ADVOCATES AND ATTORNEYS TAKE PLACE IN THE NPA?**

a. The history of the conflation of the professions of advocates and attorneys are to be found in the recruitment practices of the NPA.

b. As a case in point I will show the requirements for appointment to the post of State Advocate as evidenced by NPA recruitment advertisements of 6 July 2014 below.

**ASSET FORFEITURE UNIT**

**POST: STATE ADVOCATE**

**SALARY:** R 554 025.00 per annum (Total Cost Package) to R 919 116.00 per annum (Total Cost Package) (Level LP-7 to LP 8)

**CENTRE:** Cape Town (Recruit 2014/214)

**REQUIREMENTS:** A four-year legal qualification. Five years' post-qualification legal experience. The right to appear in a high Court as contemplated in section 2 and 3(4) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995) or ability to obtain the right of appearance in terms of the said Act. Admitted as an Attorney (in terms of the Attorney Act 53 of 1979). Professional and able to act independently. Willing to travel, able to work extended hours. Excellent communication and administrative skills. Valid driver's licence. General computer literacy and knowledge of programs in MS Word, Excel, Outlook, Power Point. Able to understand profit and loss calculations and basic business finance.

**DUTIES:** Act as attorney for the Asset Forfeiture Unit. Execute tasks that by law must be performed by attorneys. Attend to diverse types of civil litigation in the High Court, Magistrates Courts as well as appeals from these courts, including appeals to the Supreme Court of Appeal. Dealing with constitutional issues including litigation in the Constitutional Court. Drafting and/ or settling of all types of agreements, rendering of legal opinions, drafting and moving applications. Attending to queries from curators on litigation of Asset Forfeiture matters. Collection of all taxed bills of all costs in favour of the State.

c. From the above it is clear that the NPA sought to procure the services of an admitted attorney of the High Court who either already had the right to appear in the High Court as per the Right of Appearance in Courts Act, or who had the ability to acquire such right.

d. Contrary to the post being advertised as that of a State Advocate, the successful incumbent would be tasked specifically to act as an attorney for the Asset Forfeiture Unit. The anomaly that presents itself in the filling of the post as such is the inescapable conflation of the professions of advocates and the professions of attorneys, which by law is not allowed.

e. I respectfully submit that history has never presented any difficulty for any member of either profession to distinguish between their respective professions or the prohibitions in the respective legislation governing their professions from performing functions which by statute have been reserved for either admitted advocates or admitted attorneys.

f. Appointing an admitted attorney as a "State Advocate" and specifically requiring such an attorney to act as an attorney for the AFU not only falls foul of the provisions of section 9 of the Admission of Advocates Act, but will ultimately also fall foul of the provisions of sections 34 (5) (e) and 34 (6) (d) of the Legal Practice Act.

g. As I have already alluded to above, the job description of "State Advocate" by reasonable necessity implies that such a person is an admitted and enrolled advocate of the High Court or is recognized by law as an advocate. State Advocates essentially practice as advocates in the full-time employ of the NPA.

h. It is trite that advocates are by law prohibited from performing the duties and functions of admitted attorneys.

i. The abovementioned advertisement is but one of the examples of how the NPA, albeit with the best of intentions, created the environment wherein it could be found wanting of observing statutory law. Here is another example:

**SPECIALISED COMMERCIAL CRIME UNIT**

**POST: SENIOR STATE ADVOCATE**

**SALARY:** R 713 583.00 per annum (Total Cost Package) to R 1 115 409.00 per annum (Total Cost Package) (Level LP 9) CENTRE: Mthatha (Recruit 2014/213)

**REQUIREMENTS:** A four year legal qualification. At least eight years' post qualification legal experience. The right to appear in a High Court as contemplated in Section 2 and 3(4) of the Right of Appearance in Courts Act, 1995 (Act No 62 of 1995) or ability to obtain the right of appearance in terms of the said Act. Well developed skills in legal research and legal drafting. Good knowledge of civil and/or criminal procedure. Good interpersonal, analytical, presentation and communication skills.

**DUTIES:** Conduct prosecution of commercial crime cases. Advise the police on the investigation of complex commercial crime cases. Conduct legal research and keep up to date with legal developments. Draft charge sheets and other court documents and represent the State in all courts. Present cases in court, lead witnesses; cross examine and address the court on conviction and sentence. Generally conduct Prosecution on behalf of the State.

j. I hasten to add that from both the advertisements above, the requirement of a four year legal qualification in all probability refers to the current four year LL.B degree.

k. The advertisements neither make it a requirement for appointment as a State Advocate or as a Senior State Advocate that such applicant shall be an admitted advocate of the High Court of South Africa. They simply require the applicant to have already acquired the right to appear in the High Court as per the Right of Appearance in Courts Act, or to have the ability to acquire such right. Admitted and enrolled advocates automatically have the right to appear in the High Court whilst admitted attorneys can acquire the same right too by complying with certain criteria as set out in the Right of Appearance in Courts Act.

l. Accordingly, the pool of potential applicants are widened by inviting by implication not only admitted and enrolled advocates and attorneys [provided

they are in possession of a certificate from the Registrar] of the High Court to apply for appointment as a State Advocate but also prosecutors who meet the requirements of section 25 (2) of the NPA Act for appointment to the post of State Advocate or Senior State Advocate.

m. It is a known fact that prosecutors from the lower courts aspiring for promotion have not felt themselves excluded from applying for the post of State Advocate, because of the provisions of section 25 (2) of the NPA Act and have been successful in their endeavours by being appointed as State Advocates, whilst neither being admitted advocates nor admitted attorneys of the High Court for that matter.

n. It is important for the NPA as employer of choice to provide upward mobility in the careers of employees, but I believe that to do so at the expense of falling foul of the provisions of a statute of Parliament may not be helpful to the successful incumbent.

n. Intrinsically and as alluded to above, the duties which State Advocates perform whilst in the full-time employ of the NPA amount to practicing as an advocate, which brings it within the scope of section 9 of the Admission of Advocates Act and which has now been confirmed by the promulgation of the Legal Practice Act, section 34 (6) (d) having reference.

## 7. **CONCLUSION AND RECOMMENDATION**

a. I have no reason to believe that the NPA at any material time did foresee that the job description and title of State Advocate could in fact be found to be in violation of the provisions of section 9 of the Admission of Advocates Act

where such an incumbent is not an admitted and enrolled advocate of the High Court in terms of the said Act.

b. I am tempted to believe that the NPA in fact never intended for the post of State Advocate to be equated to the profession of an advocate as envisaged by the Admission of Advocates Act. I may very well be wrong in holding this belief.

c. Either way, I believe that any uncertainty regarding the fact that a State Advocate ought to be an admitted advocate of the High Court has now been laid to rest by section 34 (6) (d) of the Legal Practice Act which in no unclear terms have practically reserved such a post to be filled by an admitted advocate/legal practitioner; be it in terms of section 114 of the Legal Practice Act or by virtue of section 24 (1) of the Legal Practice Act.

d. Accordingly I propose:

i. an *en masse* conversion from the profession of attorney if employed as a State Advocate to that of an admitted advocate of the High Court in terms of the Admission of Advocates Act; and

ii. for an audit to be completed in respect of all current High Court Prosecutors who might qualify for admission as an advocate in terms of the aforementioned Act but who have not taken steps as yet to apply for admission to the profession, to take such steps without further delay so as to ensure their competence to practice as a State Advocate when the provisions of section 34 (6) (d) of the Legal Practice Act takes effect.

iii. for the office of the CEO to consider changing the job title and description for those High Court Prosecutors who do not meet the



admission criteria as an advocate of the High Court, so as to provide adequate protection for them from falling foul of the provisions of section 9 of the Admission of Advocates Act and from the provisions of section 33 (2) of the Legal Practice Act when it becomes effective.

e. I believe that there is still adequate time to address the issues raised herein since section 120 (3) of the Legal Practice Act provides that Chapter 2 of the said Act comes into operation three years after the commencement of Chapter 10 or an any earlier date fixed by the President by proclamation in the Gazette.

f. Chapter 10 of the Legal Practice Act provides for the National Forum and Transitional Provisions and Chapter 2 establishes the South African Legal Practice Council.

g. Chapter 3 of the Legal Practice Act provides for the Regulation of Legal Practitioners and Candidate Legal Practitioners and Chapter 4 deals with Professional Conduct and Establishment of Disciplinary Bodies.

h. I believe that Chapters 3 and 4 are of importance for the purposes of this opinion and as alluded to above, will together with the remaining provisions of the Legal Practice Act come into operation on a date, after the commencement of Chapter 2, fixed by the President by proclamation in the Gazette.

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**22 April 2015**