REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

17/5/2019 RT SUTHERLAND

The Declaratory Proceedings - Case No: 2019/2137
Individual Applications: 2018/36880; 2018/32920; 2018/36882; 2018/37067; 2018/36820; 2018/36209; 2018/36823; 2018/21884; 2018/36876; 2018/36318

In re *ex parte* applications for admissions as advocates:

ROELINE GOOSEN	First Applicant
MICHAEL MATIMBA HATLANE	Second Applicant
MKHAYELL SIMPHIWE SABELA	Third Applicant
NARASINGAM RAVONDARAN PILLAY	Fourth Applicant
BUSISIWE MOLEFE	Fifth Applicant
MPHO NEMUTANZHELA	Sixth Applicant
MARSHNI RAJKUMAR	Seventh Applicant
DAVID KGAUGELO MOTLANTHE	Eighth Applicant
NQOBIZITHA MAOHLE MLILO	Ninth Applicant
MAMONEUWA EUNICE MADUNA	Tenth Applicant
LEGAL PRACTICE COUNCIL	Amicus Curiae
KWAZULU-NATAL SOCIETY OF ADVOCATES	Amicus Curiae

PAN AFRICAN BAR ASSOCIATION	
OF SOUTH AFRICA	Amicus Curiae
JOHANNESBURG SOCIETY OF ADVOCATES	Amicus Curiae
JOHANNESBURG ATTORNEYS' ASSOCIATION	Amicus Curiae
PRETORIA ATTORNEYS' ASSOCIATION	Amicus Curiae
GAUTENG ATTORNEYS' ASSOCIATION	Amicus Curiae
MINISTER OF JUSTICE	Amicus Curiae
GENERAL BAR COUNCIL	Amicus Curiae
PRETORIA SOCIETY OF ADVOCATES	Amicus Curiae
NATIONAL BAR COUNCIL OF SOUTH AFRICA	Amicus Curiae
LUTHFIA FAZEL ELLAHI	Amicus Curiae
LINDA TREVOR MOYA	Amicus Curiae
MABEL NOGWANAMPHANGA MOLEMA	Amicus Curiae
SANELISIWE LINDELWA ZWANE	Amicus Curiae
SHIKUMBELO HELLEN LESHABANA	Amicus Curiae

J U D G M E N T ***(RECUSAL)***

THE COURT:

Introduction

[1] This judgment addresses a preliminary controversy that arose in the matter of *Ex Parte Goosen & Others,* Case no 2019/2137 before a Full Court of the Division. The controversy was an application that one of the judges, Millar AJ, recuse himself. An order was made dismissing the application for recusal and Millar AJ continued to sit. The

judgment on the merits in that matter has been given separately. This judgment gives the reasons for the dismissal of the recusal application.

[2] The Full Court was composed of Sutherland and Modiba JJ and Millar AJ. When the judge president acting in terms of section 14(1) of the Superior Courts Act 10 of 2013, convened the Full Court, the composition of the bench was decided by him.

[3] The matter of *Ex Parte Goosen and others* concerned a controversy regarding the proper interpretation of a point of law. The law in question was the Legal Practice Act 28 of 2014. The controversy arose when certain applications came before the Gauteng Local Division for admission to practice in terms of section 3 of the Advocates Admission Act 74 of 1964 (AAA). The Judge President articulated the terms of reference for the issues to be considered by the Full Court thus:

> "Legal Issues:
>
> 3. Until 01 November 2018, the admission of Advocates was regulated by the Advocates Admissions Act 74 of 1964 ("the old Act"). On this day the Legal Practice Act 28 of 2014 ("the new Act") came into operation which consequently repealed the "old Act". The new Act contains additional requirements which a prospective advocate has to fulfil before he/she may qualify for admission as an Advocate. These requisites are contained in Section 24 and 26 of the new Act and Include vocational training, a competency examination and community service.
>
> 4. It appears that Section 115 of the Legal Practice Act 28 of 2014 may be ambiguous in the sense that it permits any person who was entitled to be admitted as an advocate under the old Act to be admitted as an advocate in terms of the new Act. The Section is not clear on the issue of compliance with the additional requirements as set out in

Sections 24 and 26 therein. The different interpretations of Section 115 have led to conflicting Judgements which could be detrimental to the Advocates profession and the Judiciary if the true intention of the Legislature and meaning of this provision is not clarified.

5. The following issues were raised for the Full Court to consider:

5.1 Should applications for admission as an advocate that were filed prior to the commencement of the new Act on 01 November 2018 be granted or should such applications be considered on the basis of the new requirements as set out in the new Act? In other words, does *section* 115 of the new Act apply to applicants for admission as an advocate, whose applications for admission were pending in any court on 1 November 2018?

5.2 Does Section 115 of the new Act exempt applicants who filed their applications before the commencement of the new Act, from complying with the requirements in terms of the new Act?

5.3 If so, does such exemption apply to all such applicants, *ad infinitum,* and/or should provision be made for a cut off period within which applicants are found to qualify for exemption, should apply for admission?

6. The following additional issues are referred to the Full Court to also determine: –

6.1 Whether a person admitted as an attorney of the High Court before 1 November 2018 is required to:

6.1.1 have his or her name removed from the roll of attorneys before undergoing the practical vocational training prescribed for pupils who intend to be admitted and enrolled as advocates as contemplated in Regulation 7 of the Regulations promulgated under the LPA;

> 6.1.2 undergo the practical vocational training prescribed for pupils before converting his or her enrolment as an attorney to that of an advocate as contemplated in section 32(1)(a) of the LPA;
>
> 6.1.3 whether it is competent for the Legal Practice Council to impose as a condition for the conversion of enrolment contemplated in section 32(1)(a) of the new Act, that an attorney who wishes to convert his or her enrolment as an attorney to that of an advocate to undergo the practical vocational training prescribed for pupils who wish to be enrolled as advocates?"

[4] In the referral, the Judge President invited several entities concerned with the regulation of the Legal Profession, as cited above, to assist the Full Court as *Amici Curiae*. These invitations constitute invitations by the Court, notwithstanding the fact that the Judge President did not himself sit in the matter. Among the *amici* was the Legal Practice Council (LPC). Submissions were made on behalf of the LPC on the questions of law. These submissions were prepared by counsel: Adv H Maenetje and Adv R Tshetlo and argued by Adv Tshetlo. It was unnecessary for any *amici* to adduce any evidence and the issues at stake were purely questions of interpretation of the LPA.

[5] Millar AJ is a practising attorney. He is also a sitting member of the LPC. The capacity in which he sits on the LPC is as an *ex officio* representative of the Attorneys Fidelity Fund. That membership is part-time and unremunerated.

[6] Mr Mullins, for the GCB, at the hearing, moved for Millar AJ to recuse himself in order, so it was contended, to avoid the perception of bias arising from a conflict of interest derived from his membership of an *amicus* appearing in the matter. The application

disavowed the existence of any actual bias and was premised purely on the need for any perception of bias to be avoided.

[7] The fact that Millar AJ is a member of the LPC was probably well known by the Legal Profession, and his membership of the Full Court was made known when its composition was communicated to the parties and to the *amici*. In any event, the fact of his position on the LPC was expressly disclosed to the parties and to the *amici* immediately prior to the hearing on 13 February 2019.

[8] The application for a recusal was not supported by any of the ten applicants who were the parties before court. Counsel for the first applicant, Goosen, expressly disavowed any support for the recusal application and argued that Millar AJ continue to sit.

[9] Other than the Pretoria Bar, the other *amici* did not support the application for recusal. Some *amici* took up the stance that disclosure of the membership of the LPC was sufficient to eliminate any lack of transparency. They were content that Millar J continue to sit.

The Law on recusal by a judge

[10] The Code of conduct[1] for judges addresses recusal thus:

> "Article 13: Recusal
>
> A judge must recuse him- or herself from a case if there is a-
>
> *(a)* real or reasonably perceived conflict of interest or

[1] R865: GG35802, 18 October 2012.

(b) reasonable suspicion of bias based upon objective facts,
and shall not recuse him- or herself on insubstantial grounds.

Notes:

Note 13(i): Recusal is a matter regulated by the constitutional fair trial requirement, the common law and case law.

Note 13(ii): A judge hears and decides cases allocated to him or her, unless disqualified therefrom. Sensitivity, distaste for the litigation or annoyance at the suggestion to recuse him- or herself are not grounds for recusal.

Note 13(iii): A judge's ruling on an application for recusal and the reasons for the ruling must be stated in open court. A judge must, unless there are exceptional circumstances, gives reasons for the decision.

Note 13(iv): If a judge is of the view that there are no grounds for recusal but believes that there are facts which, if known to a party, might result in an application for recusal, such facts must be made known timeously to the parties, either by informing counsel in chambers or in open court, and the parties are to be given adequate time to consider the matter.

Note 13(v): Whether a judge ought to recuse him- or herself is a matter to be decided by the judge concerned and a judge ought not to defer to the opinion of the parties or their legal representatives."

[11] Article 13 of the Code reflects the effect of our case law on the question. The leading authority is the decision in *President of the Republic of South Africa and Others v South African Rugby Football Union & Others* 1999 (4) SA 347 (CC). The test was addressed at [35] – [48]. In summary, the Constitutional Court emphasised that the presence of impartiality by a judge to be a 'cornerstone of any fair and just legal system'. The question to be posed is whether a reasonable apprehension of bias on the part of the judge exists. There is an anterior presumption that a judge is impartial (this plainly

must apply to an acting judge too[2]). The test must therefore be objective and an onus to establish the pertinent facts and the inference rightfully to be drawn, rests on the person who alleges it.

[12] The Constitutional Court expressed itself thus at [45]:

> 'From all of the authorities to which we have been referred by counsel and which we have consulted, it appears that the test for apprehended bias is objective and that the *onus* of establishing it rests upon the applicant. The test for bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in a dissenting judgment by De Grandpr, J in *Committee for Justice and Liberty et al v National Energy Board:*
>
> > '. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude".'
>
> In R v S (RD) Cory J, after referring to that passage, pointed out that the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. The same consideration was mentioned by Lord Browne-Wilkinson in *Pinochet:*
>
> > 'Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg v Gough,* or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the Judge was not impartial.'
>
> An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application.

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[2] Examples of cases where an acting judge has been the subject of a recusal application include: Moch v Nedtravel 1996 (3) SA 1 (A); Locabail (UK) v Bayfield Properties Ltd and Another et al [2000] 1 ALL ER 65 (CA).

It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test.'

[13] More recently, the Constitutional Court, in applying this norm, said the following, per Ngcobo CJ in *Bernert v ABSA Bank* 2011 (3) SA 92 (CC) at [31] – [33]:

'[31] What must be stressed here is that which this court has stressed before: the presumption of impartiality and the double requirement of reasonableness. The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer. This presumption must be understood in the context of the oath of office that judicial officers are required to take, as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law 'impartially and without fear, favour or prejudice'. Their oath of office requires them to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'. And the requirement of impartiality is also implicit, if not explicit, in s 34 of the Constitution which guarantees the right to have disputes decided 'in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. This presumption therefore flows directly from the Constitution.

[32] As is apparent from the Constitution, the very nature of the judicial function requires judicial officers to be impartial. Therefore, the authority of the judicial process depends upon the presumption of impartiality. As Blackstone aptly observed, '(t)he law will not suppose a possibility of bias or favour in a judge, who [has] already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea'. And, as this court observed in *SARFU II*, judicial officers, through their training and experience, have the ability to carry out their oath of office, and it 'must be assumed that they can disabuse their minds of any irrelevant personal beliefs and predispositions'. Hence the presumption of impartiality.

[33] But, as this court pointed out in both *SARFU II* and *SACCAWU*, this presumption can be displaced by cogent evidence that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias. The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased. This is a consideration a reasonable litigant would take into account. The presumption is crucial in

deciding whether a reasonable litigant would entertain a reasonable apprehension that the judicial officer was, or might be, biased.'

[14] Accordingly, it is self-evident that the fate of a recusal application depends on the totality of the relevant facts in a given case. This means that the person who is 'reasonably' aggrieved by the presence of a particular judge would also have to have been 'properly informed' as to the relevant facts and take an objective, view of those facts.

The circumstances relevant to the LPC *qua* amicus in this case

[15] The role of an *amicus curiae* is not one that can simply be grasped by appending that label to a person. The term *'amicus curiae'* has been used variably to describe quite distinct roles in litigation.[3] Often it has been used interchangeably with what in South Africa is better designated as *Pro Bono* counsel, and in the past *Pro Deo* counsel in which an indigent party is represented by such counsel. In contemporary litigation around the world, public interest organisations have taken the initiative to join in litigation where they, representing particular interests, wish to contribute an *a priori* perspective to the debate on the formulation of what are, frequently, novel legal propositions or policy choices.[4] In

[3] See: S Chandra Mohan The Amicus Curiae: Friends no more? *Singapore Journal of Legal Studies 2010(2) 352-374; online access at https: //ink.library.smu,edu.sg/sol_research/975* (pp 1-24) in which a wide survey of the multiple roles described as amici curiae is undertaken.

[4] See: Christina Murray Litigating in the Public Interest: Intervention and the Amicus Curiae 1994 SAJHR 241-259. See too, *Mapp v Ohio* 367 US 643(1961), a classic example of this type of "amicus". In that case the American Civil Liberties Union joined as an amicus to deal with the question of illegally procured evidence in a criminal trial.

Minister of Health & Others v Treatment Action Campaign and Others CCT 2002, 5 July 2002,[5] the Constitutional Court described the role of an *amicus curiae* thus;

> "[5] The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence."
> (underlining supplied)

[16] In a matter such as *Ex Parte Goosen,* it is the court itself, who sought wider input than the narrow self-interested views of the parties in an *ex parte* application. The Court sought assistance to ensure no likely argument goes un-presented and to that end invited persons or entities who are likely to be able to assist the Court with possible insights derived from the perspectives they have of the issues at stake. That is the role performed by all the *amici* in this case.[6]

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[5] This *Cause Celebre* is reported in its various parts as follows - Case no 1: 2002 (5) SA 703 (CC); Case no 2: 2002 (5) SA 721 (CC) and the decision dealing specifically with the admission of amici has not been captured in the Law Reports and is accessible only on the Constitutional Court website.

[6] This role is to be contrasted with the role performed by the 'amici' *in S v Boesman* 1990 (2) SACR 389 (ECD).At issue between the State and the Accused was whether an advocate representing an accused should be forced to give evidence about that client. The Eastern Cape Bar sought to join as 'amici curiae' to offer argument to substantiate a stance adopted by the Bar that no such compulsion should exist. The application was granted and had a material effect on the outcome, reversing the initial view held by the court. (This decision can be further contrasted with the view adopted in Connock's (SA) Motor Co Ltd v Pretorius 1939 TPD 355 in which a request to perform such a role by the then Government Attorney on the grounds that the administration of justice was implicated in an otherwise private civil dispute was refused. It is doubtful if *Connock's case* is still good law.)

[17] The specific role performed by a person, in responding to the request to act as one of several *amici,* must be examined as one of the relevant facts. An *amicus* is not a party in the litigation.[7] No order is sought against it, and it may not pray for an order in its own favour. It has in this sense no 'interest' in the outcome as would a party. It is nevertheless "bound' by the judgment in the same way every person over whom the court has jurisdiction is bound. The LPC's role as *amicus* was just as every other *amicus.*

[18] In a case such as this, in which no additional facts are laid before the Court, an *amicus's* role is limited to a contribution of an opinion about the law from a perspective of an informed person. The LPC has not, (as far as the Court has been told, nor was it any part of the contention advanced by Mr Mullins) resolved to take an "official view" on the legal questions posed in the referral. Doubtless, the implications of one or another approach to the interpretation of the many provisions in the LPA will have practical effects in which the LPC, as a regulatory body, has a practical interest. That interest in the accurate interpretation of the legal issue is not 'self-interest', rather it is, simply, an interest in the correct application of the law which it as a regulatory body must apply.

[19] In such a role, ie as an invited presenter of argument, two questions arise.

1.1. First, does an *amicus* who is invited to participate by a court have standing to apply for the recusal of a member of that bench?

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[7] See the view expressed by Mohan (Supra) at p14: "The amicus is this not an advocate or intervenor or a party to the proceedings. In the Commonwealth countries courts designed other institutions if they require third parties interests to be represented or watched over."

1.2. Second, can an "association' as evidenced in this case between a member of a bench and an *amicus* give rise to a taint that warrants a recusal?

Standing by an *amicus* to apply for a recusal

[20] There would seem to be sound policy considerations that confine standing in regard to recusal of a judge to a party and not extend standing to an *amicus* of the kind who appeared in this matter. No example of such an application on behalf of an *amicus*, invited by a court to offer assistance, has been found in the researches undertaken for the purposes of this judgment.

Is there a *reasonable* apprehension of bias?

[21] Independently of the lack of standing, satisfaction of the test for bias is addressed.

[22] The question can posed thus: Could there be an apprehension, reasonably held, that Millar AJ, (an attorney in private practice, who, in a part-time and unremunerated capacity serves the legal profession as a non-executive member of the LPC, which institution, at the request of the court, has briefed counsel to contribute to a debate on a point of law) is likely to be biased about the views expressed on behalf of the LPC about that point of law?

[23] The fact that several of the *amici* and the parties themselves did not think so is not evidence that the perspective is unreasonable. Nevertheless, it may be appropriate, in a given case, to give those views weight.

[24] In our view, the application made by Mr Mullins for the GCB, errs on the side of undue fastidiousness.

[25] It is unnecessary for a judge to occupy a place of utter isolation from an issue or from even a party for that matter. Judges do not recuse themselves when the banking Institution who keeps their money is sued and comes before them. Similarly, holding shares in a public company quoted on the stock exchange does not trigger bias or a perception of bias unless the value of the shareholding is substantial and likely to be affected by a judgment.

[26] In the absence of the LPC having a view on an issue at stake, it cannot be said that a member of the LPC acting in a judicial role, could be compromised.[8] Millar AJ is, in any event, not bound by the views of the LPC in his personal capacity or his professional capacity as an attorney, still less in his capacity as an acting judge. The application does not rely on the LPC having a view, other than self-evidently its counsel advising it of *their* view in composing the argument presented.

[27] What exists is 'mere' association. More is needed. The association must be of a nature to contaminate the expectation of a fair and unbiased decision

[28] The facts and circumstances in *Goosen* can be sharply contrasted with that in the leading case on 'association' - *R v Bow Street Metropolitan Stipendary Magistrate and Others Ex Part Pinochet Ugarte* [1999] 1 ALL ER 577(HL) (the Pinochet case). Lord

[8] Cf. *S v Boesman (Supra).*

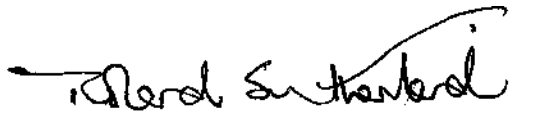
Hoffmann was held to have erred in not recusing himself in the Court of Appeal under circumstances where he and his wife had a connection to Amnesty International, a charity, which held views adverse to Mr Pinochet's interests, and, had on its own initiative, sought to be, and had been admitted, as an *amicus* in the matter brought before the Court of Appeal. No similar predicament exists in this matter; the LPC has no view about the ten applicants who are the parties and its concerns are related solely to what meaning can be attributed to the provisions of the LPC.

[29] There is in our view, an absence of the type of "connection" described in *Ebner v official Trustee in Bankruptcy* (2000) HCA 63; 205 CLR 337 at [8]. There it was held that:

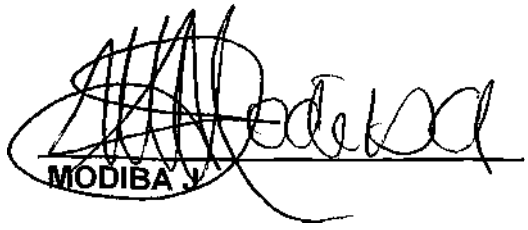
> "There must be an articulation of a logical connection between the matter and the feared deviation from the course of deciding the case on the merits. The bare assertion that a judge ...has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the *nature of the interest and the asserted connection with the possibility of departure from impartial decision making is articulated.*" (Emphasis supplied)

Conclusions

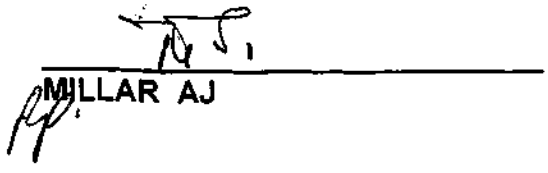
[30] Accordingly, the recusal application was without merit and accordingly refused.



SUTHERLAND J



MODIBA J



MILLAR AJ

Date of Hearing: 13 February 2019

Date of order: 13 February 2019

Date reasons filed: 17 May 2019

For the Applicants:

First Applicant : Roeline Goosen: Adv I. Strydom
Instructed by: Mr E.R. Hart

Second Applicant: Michael Matimba Hatlane
Instructed by: V.C. Mathevula Inc

Third Applicant: Mkhayeli Simphiwe Sabela: Adv S. Alcock
Instructed by: Rabora Mulele Attorneys

Fourth Applicant: Narasingam Ravondaran Pillay
Instructed by: Khumalo Attorneys

Fifth Applicant: Busisiwe Molefe: Adv J. Vilakazi
Instructed by: Lennon Moleele & Partners

Sixth Applicant: Mpho Nemutanzhela:
Instructed by: Mphagi Attorneys

Seventh Applicant: Marshni Rajkumar: Adv T. Chavalala
Instructed by: Shepstone & Wylie Attorneys

Eight Applicant: David Kgaugelo Motlanthe
Instructed by: T.P. Phalane Attorneys

Ninth Applicant: Nqobizitha Moahle Mlilo: Adv F.L. Hlabangana

Instructed by: Nkabinde Masibonge Mzwakali Attorneys

Tenth Applicant: Mamoneuwa Eunice Maduna
Instructed by: C.V. Chauke Attorneys

Amicus Curiae:

Legal Practice Council: Adv R.T. Tsheto

Kwazulu-Natal Society of Advocates:

Adv A.A. Gabriel SC, Adv J. Veerasamy and Adv N. Matshotyana

Pan African Bar Association of South Africa:

Adv G. Malindi SC, Adv S. Kazee and Adv M. Skhakane

Johannesburg Society of Advocates: Adv O. Mooki SC and Adv N.L. Dyirakumunda

Johannesburg Attorneys' Association: Adv D. Mokale

Pretoria Attorneys' Association: Adv D. Mokale

Gauteng Attorneys' Association: Adv D. Mokale

The Minister of Justice: Adv V. Soni SC

General Bar Council: Adv J.F. Mullins SC, Adv P. Ellis SC and Adv T. Phelane

Pretoria Society of Advocates: Adv A.T. Ncongwane SC and Adv N. Komar

National Bar Council of South Africa: Adv Megan else

Luthfia Fazel Ellahi: Adv Megan Else

Linda Trevor Moya

Mabel Nogwanamphanga Molema

Sanelisiwe Lindelwa Zwane

Shikumbelo Hellen Leshabana