CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 2/98

JOAQUIM AUGUSTO DE FREITAS	First Applicant
INDEPENDENT ASSOCIATION OF ADVOCATES OF SOUTH AFRICA	Second Applicant
versus	
THE SOCIETY OF ADVOCATES OF NATAL	Respondent
THE NATAL LAW SOCIETY	Intervening Party

Heard on : 21 May 1998

Decided on : 15 September 1998

JUDGMENT

LANGA DP:

[1] This is an application for leave to appeal directly to this Court against the order of a full bench of the Natal High Court:[1]

[1] *Society of Advocates of Natal v De Freitas and Another (Natal Law Society Intervening)* 1997 (4) SA 1134 (N) at 1174.

(i) suspending the first applicant from practice as an advocate for a period of six months, in consequence of a finding by the High Court that he was guilty of unprofessional conduct in that, contrary to the so-called "referral rule", he accepted work direct from members of the public without the intervention of an attorney; and

(ii) dismissing the second applicant's counter-application in which the High Court was requested to make an order declaring, in effect, that advocates who are members of the second applicant, and not of the respondent, are not bound by the referral rule and are therefore entitled to accept work direct from the public without the intervention of an attorney.

[2] The matter had its origins in the High Court in an application by the respondent in September 1996 to strike off the first applicant from the roll of advocates. The second applicant and the Natal Law Society (the intervening party) sought and were granted leave to intervene in those proceedings. The second applicant's counter-application was launched in April 1997.

[3] The present application is concerned with two issues. The first is the constitutionality of section 7(2) of the Admission of Advocates Act[2] (the Advocates' Act) in so far as it entitles the respondent to initiate proceedings of a disciplinary nature against an advocate

[2] Act 74 of 1964.

who is not one of its members. The second issue is whether the referral rule, which prohibits an advocate from accepting work direct from the public without the intervention of an attorney, is an unconstitutional infringement of the advocate's right to practise a profession.

[4] Before application for leave to appeal was made to this Court, applicants approached the High Court for a certificate under rule 18 of the Rules of the Constitutional Court.[3] Under rule 18(e), the High Court was required to certify whether, in respect of each of the issues -

> "(i) the constitutional issue is one of substance on which a ruling by the Court is desirable; and
> (ii) the evidence in the proceedings is sufficient to enable the Court to deal with and dispose of the matter without having to refer the case back to the division concerned for further evidence; and
> (iii) there is a reasonable prospect that the Court will reverse or materially alter the decision given by the division concerned if permission to bring the appeal is given . . . ."

[3] The matter has been dealt with in terms of Constitutional Court Rules, 1995 contained in Government Notice R1584, Regulation Gazette 5394 of 16 September 1994, as amended. These have now been superseded by Constitutional Court Rules, 1998 as promulgated in Government Notice R757, Regulation Gazette 6199 of 29 May 1998.

[5] With regard to the first issue, the High Court unanimously refused to give a positive certificate in respect of rule 18(e)(i) and 18(e)(iii) but certified positively in respect of 18(e)(ii). More specifically, the High Court held that the first issue was not a point of substance upon which a ruling by the Constitutional Court was desirable. The second issue elicited a negative certificate from the majority of the court (Thirion J dissenting) in respect of all three aspects of rule 18(e). It will be convenient to deal with each of the disputed issues separately.

The first issue

[6] The applicants' first challenge relates to the constitutionality of section 7(2) of the Advocates' Act which provides as follows:

> "Subject to the provisions of any other law, an application under paragraph (a), (b), (c) or (d) of subsection (1) for the suspension of any person from practice as an advocate or for the striking off of the name of any person from the roll of advocates may be made by the General Council of the Bar of South Africa or by the Bar Council or the Society of Advocates for the division which made the order for his or her admission to practise as an advocate or where such person usually practises as an advocate or is ordinarily resident, and, in the case of an application made to a division under paragraph (c) of subsection (1), also by the State Attorney referred to in the State Attorney Act, 1957 (Act No. 56 of 1957)."

[7] When the matter was argued in this Court, it was not in dispute that the Society of

Advocates of Natal, the respondent, was in general competent under the section to bring this type of application. What was put in issue by the applicants was the constitutional validity of a provision empowering the respondent to bring disciplinary proceedings against an advocate who was not one of its members.

[8] The broad submission by the applicants in their written argument was that section 7(2) of the Advocates' Act "was promulgated prior to the Constitution and cognisance was at that time and in current times as well, not taken of the constitutional rights of parties threatened with suspension or removal from the roll of advocates." There was no amplification of this submission in the written argument of the applicants. When pressed in argument to identify the constitutional rights of advocates that were infringed by section 7(2), counsel for the applicants contended that the section discriminated against advocates who were not members of the respondent. He was however unable to sustain this argument or to identify any other constitutional right which could be said to have been infringed. The applicants suggested that the infringement lay in the fact that the section grants the respondent jurisdiction over advocates who are not its members. This is not correct. The section does not grant the respondent "jurisdiction" over non-members. What it does is to give the respondent standing to apply to court for an advocate to be disciplined. The disciplinary powers are exercised by the court and not the respondent.

[9] All three judges in the High Court agreed that there was no substance in the argument

that section 7(2) was inconsistent with the Constitution. The standing of the respondent to bring disciplinary matters to the attention of the court did not depend upon section 7(2). Prior to the enactment of the section the courts had recognised the standing of a society of advocates to initiate proceedings before it for the disciplining of an advocate, including an advocate who was not a member of the society.[4] It had also recognised the standing of the Attorney-General,[5] and in one case, of the State Attorney.[6] As Hugo J pointed out in his judgment on the application for a certificate in terms of rule 18, the fact that the respondent is given standing by section 7(2) to bring disciplinary matters to the attention of the court does not necessarily mean that other interested bodies may not do so as well. If the second applicant wishes to assert such a right of standing, the time for it to do so is when the occasion for such application arises. It cannot, however, object to the standing of the respondent which has long been recognised by the courts, and does not depend upon the provisions of section 7(2).

[10] As the applicants have been unable to identify any constitutional right infringed by section 7(2) and there does not appear to me to be any, they do not have any prospect of success

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4 *Johannesburg Bar Council v Stein* 1946 TPD 115; *Society of Advocates of Natal and Another v Knox and Others* 1954 (2) SA 246 (N).

5 *Attorney-General v Tatham* 1916 TPD 160.

on this issue. In the circumstances, their application for leave to appeal on this issue must fail.

The second issue

[6] *State Attorney v L* (1895) 2 OR 214.

[11] The second issue concerns a challenge to the constitutionality of the referral rule. The contentions of the applicants may be summarised as follows. Whilst the effect of the Right of Appearance in Courts Act,[7] is to accord to some attorneys the right of appearance in all courts, advocates are prevented by the referral rule from accepting work directly from the public without the intervention of an attorney. The legislation thus places attorneys in competition with advocates. Because the rule obliges an advocate to rely on a competitor for work, it constitutes a violation of an advocate's constitutional right to practise his or her profession. Applicants claimed that the referral rule was an infringement of sections

[7] Act 62 of 1995.

22[8] and 39(3)[9] of the 1996 Constitution.[10]

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[8] Section 22 provides:

> "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[9] Section 39(3) states:

> "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[10] Constitution of the Republic of South Africa, 1996.

[12] The question whether the referral rule constitutes an infringement of an advocate's constitutional right to practise his or her profession was first raised by the first applicant in his response to the application brought against him by the respondent. That application was launched before the 1996 Constitution came into force.[11] First applicant contended that the referral rule was not binding on him as it was a rule of the respondent, a body of which he was not a member. The second applicant's counter-application, launched in April 1997, was for an order declaring that advocates, alternatively those who were members of the second applicant, had the right to accept instructions from the public without the intervention of an attorney.

[13] In directions given by the President of the Court, the parties were asked to address in their argument the question whether the Constitutional Court has jurisdiction to hear an appeal in this matter and if so, whether the Supreme Court of Appeal (SCA) also has such jurisdiction. Secondly, if both the Constitutional Court and the SCA have jurisdiction, whether this is a matter in which the appeal should be noted directly to the Constitutional Court. This raises the question of the respective jurisdictions of this Court on the one hand and the SCA on the other, as well as

[11] The 1996 Constitution came into force on 4 February 1997.

the question whether the interim Constitution[12] or the 1996 Constitution applies.

[12] Constitution of the Republic of South Africa Act 200 of 1993.

[14] Under the interim Constitution, the Appellate Division[13] had "no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court."[14] It is not necessary to deal with the question whether, under the interim Constitution, a challenge to the referral rule is a matter over which this Court has jurisdiction. The SCA now has jurisdiction under the 1996 Constitution to "decide appeals in any matter. It is the highest court of appeal except in constitutional matters".[15]

[15] The High Court held that the 1996 Constitution was applicable to the counter-application as it was the Constitution in force when the second applicant intervened. With regard to the first applicant, the High Court invoked the provisions of item 17 of schedule 6 of the 1996 Constitution which provide that -

> ". . . proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

The High Court ruled that the interests of justice did require the application of the 1996 Constitution to the first applicant's case.

[16] The applicants presented their argument in this Court on the basis that the 1996

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13 Now the Supreme Court of Appeal.

14 Section 101(5) of the interim Constitution.

15 Section 168(3) of the 1996 Constitution.

Constitution was applicable and that both this Court and the SCA consequently have jurisdiction to hear the appeal. They contended, however, that since an enquiry relating to the constitutionality of the referral rule is a constitutional matter over which this Court has final jurisdiction, it is this Court and not the SCA which is the appropriate forum to deal with the appeal and that it should therefore exercise its discretion to hear the matter directly.

[17] In an application for leave to appeal directly to this Court from a decision of the High Court, it is not sufficient for an applicant merely to establish that an issue is a constitutional matter. It is necessary to demonstrate the existence of factors which would justify an appeal being noted directly to this Court. In this regard, applicants relied on section 167(6) of the 1996 Constitution which provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -
> (a) to bring a matter directly to the Constitutional Court; or
> (b) to appeal directly to the Constitutional Court from any other court."

[18] The effect of section 167(6) was considered by this Court in *S v Pennington and Another*,[16] before the passing of the relevant national legislation and the promulgation of the new rules.[17] Writing for the Court, Chaskalson P stated:

> "Section 167(6) makes clear that the Constitutional Court is to have both original and

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[16] 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC).

[17] The legislation, the Constitutional Court Complementary Act Amendment Act 79 of 1997, has since been passed. See also n 3 above.

> appellate jurisdiction, and the power to control access to it by granting 'leave' only in cases where it is in the interests of justice to do so."[18]

He stated further:

[18] Above n 16 at para 11.

"Leave of this Court is a requirement prescribed by section 167(6). Section 173 of the Constitution allows this Court to 'protect and regulate [its] own process'. 'Leave to appeal' is also a requirement needed to 'protect' the process of this Court against abuse by appeals which have no merit, and it is in the 'interests of justice' that this requirement be imposed . . . ."[19]

[19] Id para 26.

[19] The applicants argued that, having regard to the existence of a number of factors, it was in the interests of justice that the appeal be heard directly by this Court and that leave should therefore be granted. They submitted that the matter was one of urgency because the issue affects the livelihood of some 300 advocates who are members of the second applicant who would be disadvantaged by being forced to operate in terms of the referral rule until the final resolution of the matter. They argued further that the matter has far-reaching implications for the general public who would, so it was contended, benefit from reduced litigation costs should a ruling in favour of the applicants be obtained. I mention in passing that the validity of this contention was rejected by the High Court in its judgment on the main application[20] and also in both the majority and minority judgments on the application for the rule 18 certificate in this matter.[21] The third factor mentioned by the applicants concerned costs of litigation in the proceedings on appeal. It was argued that since this Court has final appellate jurisdiction in constitutional matters, the costs in this matter would be considerably reduced if the appeal were to be dealt with directly by this Court without it first having to be argued before the SCA.

[20] There is no doubt that time, costs and public importance are important considerations. As this Court pointed out in the matter of *Member of the Executive*

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[20] Above n 1 at 1170A-E. See also *The General Council of the Bar of South Africa v Van der Spuy*, Case No 13013/96, unreported judgment handed down in the Transvaal High Court on 12 March 1998 at 90-1.

[21] *De Freitas and Another v The Society of Advocates of Natal*, Case No 2834/96, unreported judgment handed down in the Natal High Court on 18 December 1997.

Council for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party and Others,[22] they are however -

> " . . . not the only factors that have to be taken into account in deciding what is in the interests of justice in any given case. There may be cases where the nature of the dispute is such that it would be appropriate for the SCA to consider the matter before it comes to this Court, and in the interests of justice for it to do so."[23]

[21] In considering the question whether it is in the interests of justice that this Court should exercise its jurisdiction directly, in a matter in which the SCA also has jurisdiction, it is also relevant to have regard to the nature of the issue concerned. In *Amod v Multilateral Motor Vehicle Accidents Fund*,[24] in a constitutional matter which involved the development of the common law, Chaskalson P, writing for the Court, stated:

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22 1998 (7) BCLR 855 (CC).

23 Id para 31.

24 CCT 4/98 delivered on 27 August 1998, as yet unreported.

> "When a constitutional matter is one which turns on the direct application of the Constitution and which does not involve the development of the common law, considerations of costs and time may make it desirable that the appeal be brought directly to this Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance. Assuming . . . that this Court's jurisdiction to develop the common law in constitutional matters is no different to that of the Supreme Court of Appeal, it is a jurisdiction which ought not ordinarily to be exercised without the matter having first been dealt with by the Supreme Court of Appeal."[25]

[22] The referral rule is described by Hugo J, in his judgment on the rule 18(e) application, as a rule of the common law.[26] Thirion J, after undertaking an exhaustive review of its history and development, makes the point that the rule -

> " . . . reflects an existing practice of long standing and on the strength of which court procedure has been arranged and on the strength of which the Legislature has made a

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[25] Id para 33.

[26] Above n 21 at 7.

distinction between the positions of advocate and attorney."[27]

[27] Id 7. See also Attorneys Act 53 of 1979; *Pretoria Balieraad v Beyers* 1966 (1) SA 112 (T) at 115 B-D.

[23] It is therefore clear that the second issue is concerned with a rule of conduct which has been held by the courts to be applicable to members of the advocates' profession. The regulation of the legal profession and deciding on the fitness of members of that profession to practise is a matter in respect of which all the divisions of the Supreme Court, which have now become the SCA and the High Courts, have always exercised their inherent jurisdiction under the common law.[28] It is a matter pre-eminently for the SCA to determine, and it would not ordinarily be appropriate for this Court to deal with such an issue as a constitutional matter without knowing the views of the SCA on the issues that have been raised. Because of the nature of the dispute in the present case, it is appropriate that the appeal be to the SCA and not to this Court.

[24] I express no view on the merits of the appeal or on the question whether or not there are reasonable prospects of success on appeal or on the correctness or otherwise of the High Court's decision to apply the 1996 Constitution rather than the interim Constitution.[29]

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[28] See *De Villiers and Another v McIntyre NO* 1921 AD 425; *Beyers v Pretoria Balieraad* 1966 (2) SA 593 (T) at 605; *Pienaar and Versveld v Incorporated Law Society* 1902 TS 11 at 16; *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T); *Algemene Balieraad van Suid Afrika v Burger en 'n Ander* 1993 (4) SA 510 (T) at 516G; *Van der Spuy* above n 20 at 47.

[29] Above n 16 at para 35; *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC);

These are matters for the court hearing the appeal or the application for leave to appeal to decide, should this matter go further.[30]

1996 (5) BCLR 658 (CC) at paras 13-14; 20 and 68.

[30] Above n 24 at para 16.

[25] My conclusion would be no different if the issues were to be dealt with under the interim Constitution rather than the 1996 Constitution. It is clear that the Appellate Division had the jurisdiction under the interim Constitution to develop the common law in accordance with the provisions of section 35(3).[31] As pointed out in *Amod*:[32]

> "The Supreme Court of Appeal has always had an inherent jurisdiction to develop the common law to meet the needs of a changing society. The circumstances in which it elects to do so and the manner in which it develops the law form part of this jurisdiction. With the coming into force of the interim Constitution, and later the 1996 Constitution, this power must now be exercised in accordance with the 'spirit, purport and objects' of the Bill of Rights."[33]

[26] It follows therefore that the applicants have not established that the interests of justice require this Court to exercise its jurisdiction to hear the appeal in this matter directly, to

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[31] Section 35(3) of the interim Constitution provides:
> "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."

See also *Du Plessis and Others* above n 29 at paras 59 - 64, 87, 137 and 138; *Gardener v Whitaker* 1996 (4) SA 337 (CC); 1996 (6) BCLR 775 (CC) at paras 16 and 17; *Amod* above n 24.

[32] Above n 24.

[33] Id para 22. See also section 39(2) of the 1996 Constitution.

the exclusion of the SCA. The application for leave to appeal to this Court on the second issue must therefore be refused.

Costs

[27] The High Court reserved the costs of the application for the rule 18 certificate for decision by this Court. The matter came to this Court because of a deliberate choice made by the applicants to note their appeal to this Court rather than to the SCA. This decision was opposed by the other parties. That opposition turns out to be correct. There was, however, some uncertainty at that time as to whether the appeal should have been brought to the SCA or this Court.[34] The merits of the appeal have not been canvassed in this judgment. There is a possibility, however, that the dismissal of the application will not be the last word on the matter. On the other hand, it is desirable that finality should be achieved without undue delay. Should the applicants take the matter further, the costs should be costs in the cause. If, on the other hand, the matter is not taken further, it is appropriate that the applicants should pay the costs. If the applicants wish to take the matter further, they must initiate proceedings to do so within one month from the date of this judgment. If they fail to do so, or are unable to secure leave to appeal, they must pay the costs of this application including the costs of the rule 18 proceedings in the High Court.

The order

[34] Above n 24 at paras 10 and 11.

[28] In the result the following order is made:

(i) The application for leave to appeal to this Court is refused;

(ii) Should the applicants take the matter further, the costs will be costs in the cause. If the applicants wish to take the matter further, they must initiate proceedings to do so within one month from the date of this judgment. If they fail to do so, or are unable to secure leave to appeal, applicants must pay the costs of this application including the costs of the rule 18 proceedings in the High Court. Such costs should, in respect of the respondent, include the costs of two counsel.

Chaskalson P, Ackermann J, Didcott J, Goldstone J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Langa DP.

For the Applicants: Dr ED Levin instructed by J Knoetze and Partners.

For the Respondents: Mr MJD Wallis SC, Mr CJ Pammenter SC and Mr G Reddy instructed by Cajee, Essa, Ismail & Thejpal.

For the Intervening Party: Mr AJ Dickson SC instructed by Shepstone & Wylie, Tomlinsons c/o Webber Wentzel Bowens.