CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 48/01

ADRIAAN SECUNDUS VAN DER SPUY	Applicant
versus	
THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA	Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Intervening Party
ADVOCATES FOR TRANSFORMATION	Second Intervening Party
THE LAW SOCIETY OF SOUTH AFRICA	Third Intervening Party

Heard on : 16 May 2002

Decided on : 18 July 2002

JUDGMENT

LANGA DCJ:

Background

[1] The applicant is an advocate of the High Court of South Africa and a member of the Independent Advocates Association of South Africa (IAASA). On 2 April 1998, the High Court in Pretoria found the applicant guilty of unprofessional conduct and suspended him from practice for a period of six months. The judgment, which is reported as *General Council of the Bar v Van*

der Spuy,[1] was delivered pursuant to a complaint brought by the respondent, the General Council of the Bar of South Africa (GCB), that the applicant had breached the "referral rule". The rule prohibits advocates from taking instructions and fees for their work directly from members of the public and requires advocates to be briefed by an attorney.

[2] An application for leave to appeal to the Supreme Court of Appeal (SCA) was refused by the High Court. On 19 September 2001 the SCA dismissed the applicant's petition for special leave to appeal to it. No further steps were taken by the applicant in relation to the case; in particular, the applicant did not make an application to appeal to this Court.

[1] 1999 (1) SA 577 (T).

[3] The present matter is an application for direct access to this Court under rule 17 of the Constitutional Court Rules.[2] In papers filed with this Court, the applicant seeks a declaration to the effect that the referral rule of the GCB is inconsistent with the Constitution in that it violates

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[2] Rule 17(1) and (2) provide that:

> "(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion which shall be supported by an affidavit which shall set forth the facts upon which the applicant relies for relief.
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> (2) An application in terms of subrule (1) shall be lodged with the registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out–
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> (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
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> (b) the nature of the relief sought and the grounds upon which such relief is based;
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> (c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot,
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> (d) how such evidence should be adduced and conflicts of facts resolved."

sections 22,[3] 34[4] and 35(2)(b)[5] of the Constitution.

[4] Following directions issued by the Chief Justice, the application was brought to the attention of various parties with an interest in the outcome of the case and they were invited to

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3 Section 22 of the Constitution states:
"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."

4 Section 34 of the Constitution states:
"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

5 Section 35(2)(b) of the Constitution states:
"Everyone who is detained, including every sentenced prisoner, has the right –
to choose, and to consult with, a legal practitioner, and to be informed of this right promptly".

intervene if they so wished. The application, which has understandably evoked considerable interest among legal practitioners, is opposed by the GCB on the grounds that the applicant has failed (a) to show why direct access should be granted and (b) to present a plausible case on the merits. Submissions were also made by the Minister of Justice and Constitutional Development (the Minister), Advocates for Transformation and the Law Society of South Africa, all of whom intervened in the proceedings. IAASA, the Commercial Lawyers Association of South Africa and Advocate Rajkumar also signified in writing their interest in the matter, while the South African Criminal Bar Association abided the decision of this Court.

[5] When the matter was argued in this Court, it was stated on behalf of the applicant that although the written application challenged the constitutionality of the referral rule of the respondent, the real challenge was to the referral rule of the common law. Oral submissions on behalf of the applicant proceeded on that basis.

Direct Access

[6] Rule 17 gives effect to section 167(6) of the Constitution which permits direct access where this is "in the interests of justice and with leave of the Constitutional Court". The rule requires an applicant to allege the facts upon which relief is sought and also to indicate why it is in the interests of justice that direct access be granted. A determination of what is in the interests of justice in any particular case involves the weighing up and balancing of a variety of factors which include -

> ". . . the importance of the constitutional issues, the saving in time and costs that might result . . ., the urgency, if any, in having a final determination of the matters in issue . . .,

and on the other hand, the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the [high court and the] SCA [are] bypassed."[6]

[6] See *MEC for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998(7) BCLR 855 (CC); 1998 (4) SA 1157 (CC) at para 32. Although the case dealt with an application for a direct appeal under rule 18, the principles referred to are also relevant to an application for direct access under rule 17. See also *Executive Council, Western Cape v Minister for Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others* 1999 (12) BCLR 1360 (CC); 2000 (1) SA 661 (CC) para 10.

[7] Direct access is an extraordinary procedure, generally only granted in exceptional circumstances.[7] In *Bruce and Another v Fleecytex Johannesburg CC and Others* some of the considerations relevant to direct access were articulated by this Court as follows:

> "This Court is the highest court on all constitutional matters. If, as a matter of course, constitutional matters could be brought directly to it, we could be called upon to deal with disputed facts on which evidence might be necessary, to decide constitutional issues which are not decisive of the litigation and which might prove to be purely academic, and to hear cases without the benefit of the views of other courts having constitutional jurisdiction. These factors have been referred to in decisions given by this Court on applications for direct access under the interim Constitution, and are clearly relevant to

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7 *S v Zuma and Others* 1995 (4) BCLR 401 (CC); 1995 (2) SA 642 (CC) para 11; *Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice intervening)* 1996 (6) BCLR 745 (CC); 1996 (4) SA 331 (CC) para 6; *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1996 (12) BCLR 1573 (CC); 1997 (2) SA 621 (CC) para 16; *Hekpoort Environmental Preservation Society and Another v The Minister of Land Affairs and Others* 1997 (11) BCLR 1537 (CC); 1998 (1) SA 349 (CC) para 6; *Christian Education South Africa v The Minister of Education* 1998 (12) BCLR 1449 (CC); 1999 (2) SA 83 (CC) para 4; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (4) BCLR 415 (CC); 1998 (2) SA 1143 (CC) para 4.

the granting of direct access under the 1996 Constitution."[8]

[8] *Bruce and Another v Fleecytex* id para 7(footnote omitted).

[8] The issue before the High Court in the *Van der Spuy* matter was the constitutionality of the referral rule. After the SCA refused to entertain the applicant's appeal, it was open to him to lodge an application for leave to appeal to this Court under Rule 20[9] on this constitutional issue. He did not do so and no explanation has been given for this failure.

[9] This constitutional issue has been canvassed in a number of cases, including *De Freitas and Another v Society of Advocates of Natal and Another*,[10] in which the applicant appeared as counsel for the appellant and IAASA was a co-appellant. Although the SCA upheld the High Court's judgment on appeal in the *De Freitas* matter, no further appeal was made to this Court. The GCB has, with good reason, suggested that the current application is an attempt at a disguised appeal against the decision in *De Freitas*. Whatever the motivation, the effect of acceding to this application would be to avoid the consequences of the applicant's unexplained

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9 Rule 20(2) and (3)(a) of the Rules of the Constitutional Court state:

> "(2) A litigant who is aggrieved by the decision of the Supreme Court of Appeal on a constitutional matter and who wishes to appeal against it to the Court shall, within 15 days of the judgment against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the registrar of the Court an application for leave to appeal.
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> (3)(a) The application referred to in subrule (2) shall be in writing, signed by the appellant, and shall set out the constitutional matter raised in the case, the decision against which the appeal is made and the grounds on which such decision is disputed."

10 2001 (6) BCLR 531 (SCA); 2001 (3) SA 750 (SCA).

failure to pursue his case to its logical end after the SCA's refusal to entertain the appeal against the *Van der Spuy* judgment of the Pretoria High Court.

[10] If the constitutional issues in *Van der Spuy* and *De Freitas* had come before this Court in the form of an appeal, this Court would have been in a position to evaluate the evidence put before the high courts and the SCA. However it is now being requested to consider the matter as a matter of first instance without the benefit of a record.

[11] Furthermore there are new issues that have been raised in the submissions before the Court which were not raised nor dealt with in *Van der Spuy* or *De Freitas*. These issues involve disputes of fact which are relevant to a proper adjudication of the question and to any determination on the merits.

[12] In his affidavit, the Minister avers that the referral rule has the effect of prejudicing the entry of young black and female persons into the advocates' profession. In disputing this on behalf of the GCB, its chairman states in his affidavit that the "difficulties faced by young practitioners, and the need for the Bar, in particular, to remedy its imbalance as regards race and gender, are complex issues" and that the GCB would have to present facts relevant to this issue if the Court were to proceed to determine it. In an affidavit filed on behalf of the Advocates for Transformation (Western Cape) its chairman states that–

> ". . . it is readily conceded that black and female entrants to the advocates' profession, face a range of difficulties in establishing their practices, not faced by their white male counterparts. Whilst the cause of such difficulties can properly be ascribed in some

> measure to the *application* of the referral rule, I think it can safely be said, that the rule itself does not impede entry and that the abolition of the referral rule will not eliminate or attenuate the said problems. To put it differently, it is somewhat of a myth to think that if the referral rule is abolished, then the floodgates of work will open up for struggling black and female advocates."

[13] These contentions were relied upon in submissions to this Court. It was also contended that the referral rule unreasonably increases the costs of litigation. The relevant facts in regard to both issues are disputed. As a general rule, such disputes should be dealt with in the light of evidence properly tendered to a high court, and not by this Court as a court of first instance on the basis of assertions made in support of an application for direct access.

[14] High courts have jurisdiction to determine constitutional matters[11] and are the appropriate forums in which such litigation should be initiated. If the decision of a high court is to be challenged, and there are no circumstances justifying a direct appeal to this Court, the ordinary route is to appeal to a full bench of a high court or to the SCA. Only thereafter, if necessary, would resort to this Court be appropriate. The reasons for this were explained by this Court in *De Freitas* when, after pointing out that a decision in that matter involved the development of the common law, special leave to appeal directly to this Court was refused. The Court reasoned that:

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[11] Section 169 of the Constitution.

> "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. 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."[12] (footnote omitted).

[15] The applicant also contends that the referral rule breaches the provisions of the Competition Act 89 of 1998. This issue is the subject of litigation involving the Competition Commission and the GCB and is pending before the SCA.

[16] The GCB states that a considerable body of evidence dealing with the referral rule is contained in the record in the pending appeal on the competition issue. That evidence would also be relevant to the issues raised by the applicant in the present case. In addition, the GCB indicates it would want to place evidence before the court dealing with other issues raised by the applicant and the Minister.

[17] The referral issue is a matter of considerable importance to both the legal profession and the general public. This much was made clear in all the submissions made to the Court. The

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12 *De Freitas and Another v Society of Advocates of Natal (Natal Law Society intervening)* 1998 (11) BCLR 1345 (CC) para 23.

debate has been raging for some years about the place, if any, the referral rule ought to occupy in present day legal practice in South Africa, its relevance to access to justice, the extent to which it should be enforced and who should enforce or police it. However, it is also clear from the submissions before us that the debate is an aspect of a broader debate about the transformation of the legal profession generally and its place in the constitutional order.

[18] Although there is general acknowledgment of the necessity to find an acceptable solution to the difficulties facing the legal profession, there is no unanimity with regard to the nature of the problem and its solution. What is clear is that both the narrow and the broader issues are currently being canvassed and debated in a number of forums, more particularly within and amongst all the branches of the legal profession. The Legal Practice Bill, which is being promoted by the Minister, is currently under consideration and it is envisaged that the process will culminate in legislation which will deal, amongst other things, with issues such as the referral rule and the transformation of the legal profession generally.

[19] While such considerations might not be sufficient to refuse direct access where a litigant complains of a grave or flagrant violation of his or her rights, they nevertheless remain relevant to determining the interests of justice. These considerations, taken together with the undesirability of this Court considering matters that give rise to factual disputes as a court of first and final instance, are sufficient to indicate that it would not be in the interests of justice for this Court to grant direct access in this case.

[20] In the circumstances, the application must accordingly fail.

Order

[21] The following order is made:

1. The application for direct access is dismissed.

2. There is no order made for costs.

Chaskalson CJ, Ackermann J, Goldstone J, Kriegler J, Madala J, Ngcobo J, O'Regan J, Sachs J and Skweyiya AJ concur in the judgment of Langa DCJ.

For the Applicant:	Advocate M. Klein and Attorney J. Nascimento instructed by the Jose Nascimento Attorneys, Johannesburg
For the Respondent:	Advocate M. Seligson SC, Advocate H. K. Salduker and Advocate A. Cockrell instructed by Deneys Reitz Attorneys, Johannesburg
For the 1st Intervenor:	Attorney G. M. Budlender instructed by the State Attorney, Johannesburg
For the 2nd Intervenor:	Advocate N. Arendse SC, Advocate A. Schippers, Advocate N. Bawa and Advocate R. Paschke instructed by Hofmeyr Herbstein & Gihwala Inc.