CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 315/21, CCT 321/21 and **CCT 06/22**

In the matter between:

Case CCT 06/22

BRUCE CHAKANYUKA	First Applicant
NYASHA JAMES NYAMUGURE	Second Applicant
DENNIS TATENDA CHADYA	Third Applicant
ASYLUM SEEKER REFUGEE AND MIGRANT COALITION	Fourth Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
LEGAL PRACTICE COUNCIL	Second Respondent
FORTUNATE KUMBIRAI DUNDURU	Third Respondent
RELEBOHILE CECILIA RAFONEKE	Fourth Respondent
SEFOBOKO PHILLIP TSUINYANE	Fifth Respondent

In the matter between:

Cases CCT 315/21 and **CCT 321/21**

RELEBOHILE CECILIA RAFONEKE	First Applicant

SEFOBOKO PHILIP TSUINYANE	Second Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
LEGAL PRACTICE COUNCIL	Second Respondent
MINISTER OF TRADE, INDUSTRY AND COMPETITION	Third Respondent
MINISTER OF LABOUR	Fourth Respondent
MINISTER OF HOME AFFAIRS	Fifth Respondent
and	
DAPHNE MAKOMBE	Intervening Party
and	
SCALABRINI CENTRE OF CAPE TOWN	First Amicus Curiae
THE INTERNATIONAL COMMISSION OF JURISTS	Second Amicus Curiae
PAN-AFRICAN BAR ASSOCIATION OF SOUTH AFRICA	Third Amicus Curiae

Neutral citation:	*Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29
Coram:	Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Tshiqi J and Unterhalter AJ
Judgment:	Tshiqi J (unanimous)
Heard on:	24 February 2022
Decided on:	2 August 2022
Summary:	Legal Practice Act 28 of 2014 — constitutionality of section 24(2) — unfair discrimination — provision is not unconstitutional

ORDER

On appeal from the High Court of South Africa, Free State Division, Bloemfontein the following order is made:

1. The appeal against the order of the High Court of South Africa, Free State Division, Bloemfontein is dismissed.
2. The declaration made by the High Court that section 24(2) of the Legal Practice Act 28 of 2014 is unconstitutional and invalid to the extent that it does not allow foreigners to be admitted and authorised to be enrolled as non-practising legal practitioners is not confirmed.

JUDGMENT

TSHIQI J (Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ and Unterhalter AJ concurring):

Background

At issue in this application is whether the provisions of section 24(2)(b), read with section 115, of the Legal Practice Act[1] (LPA) should be declared inconsistent with the Constitution and therefore invalid. On 16 September 2021, the High Court of South Africa, Free State Division, Bloemfontein (High Court)[2] declared the provisions of section 24(2) unconstitutional and invalid, but only to the extent that they do not allow foreigners who are not permanent residents in South Africa to be admitted and authorised to be enrolled as non-practising legal practitioners. Together with the declaration of invalidity, the High Court made consequential orders relating to the suspension of the declaration of invalidity and the interim relief that will operate during the period of such suspension.

[1] The declaration was sought on the basis that the provisions of section 24(2)(b), read with section 115, of the LPA preclude persons who are neither citizens nor permanent residents of South Africa and who are not admitted as legal practitioners in designated foreign jurisdictions, from being admitted and enrolled as legal practitioners in South Africa. As is evident from a reading of the declaration of invalidity, it does not mirror in exact terms the relief sought by the applicants, as section 24(2) of the LPA was declared unconstitutional only to the extent that it does not allow foreign nationals to be admitted and enrolled as non-practising[3] legal practitioners. The applicants are not content with the extent of the declaration of invalidity, as ordered by the High Court,

[1] 28 of 2014.

[2] *Rafoneke v Minister of Justice and Correctional Services* 2022 (1) SA 610 (FB) (High Court Judgment).

[3] My emphasis; to highlight the limited extent of the declaration.

and therefore do not seek a confirmation of the order but seek leave to appeal against it in terms of section 172(2)(d) of the Constitution, read with rule 16(2) of the Rules of this Court.

[2] Although some of the applications before this Court were brought individually, they were heard as a consolidated matter as several parties, mostly non-citizens and parties who have an interest in the matter, sought leave to intervene on the basis that the issues raised are similar. Additionally, a number of interested parties sought to assist the Court as amici curiae and were subsequently granted leave to do so. The particulars of all the parties concerned, together with the relevant submissions will be detailed below. To the extent that some of the submissions are duplicated or overlap, these will not be repeated.

[3] The first respondent, the Minister of Justice and Correctional Services (Minister), and the second respondent, the Legal Practice Council (LPC), oppose the application for leave to appeal in two respects. They contend that the provisions should not be declared inconsistent with the Constitution at all as they pass constitutional muster. They thus submit that the High Court erred in finding that section 24(2) is invalid to the limited extent that it prohibits non-citizens and people who are not permanent residents from being admitted and authorised to be enrolled as non-practising legal practitioners.

Parties

CCT 315/21 and CCT 321/21

[4] The applicants in this matter are Ms Relebohile Cecilia Rafoneke and Mr Sefoboko Philip Tsuinyane. They are both citizens of the Kingdom of Lesotho. They studied at the University of the Free State (UFS) where they obtained their Baccalaureus Legum (LLB) degrees. They entered into contracts of articles of clerkship with South African law firms and completed their practical vocational training. They passed all the practical examinations required in order to apply for admission as

attorneys and then applied to be admitted as attorneys of the High Court. Their applications were dismissed because they are neither South African citizens nor permanent residents as required by section 24(2)(b) of the LPA. The relevant factual background of each of the two applicants is the following.

Ms Rafoneke

[5] Ms Rafoneke applied for a visa to study in South Africa and upon being accepted at the UFS, she was subsequently granted a study visa by the Department of Home Affairs (Home Affairs). The university had conferred upon her a Bachelor degree in Commerce and Law in 2011 and her LLB in 2013.

[6] Ms Rafoneke attended and successfully completed a practical full-time course offered by the Law Society of South Africa's School for Legal Practice in Bloemfontein from 13 January 2014 to 24 July 2014. The Law Society is the predecessor of the LPC. On 30 July 2014, she entered into a written contract of articles of clerkship with Azar and Havenga Attorneys in Bloemfontein. During the subsistence of her contract, Ms Rafoneke registered with the LPC and was issued with a certificate conferring upon her the right of appearance in terms of section 8 of the Attorneys Act.[4] She subsequently appeared in court on behalf of her principal in various matters subject to the conditions prescribed in the certificate of appearance. In 2015, Ms Rafoneke wrote and passed all the practical attorneys' admission examinations as required by the Attorneys Act.

[7] On 27 July 2016, Ms Rafoneke was issued with a Lesotho Special Permit (Special Permit) by Home Affairs to temporarily reside and take up employment in South Africa. It is important to note that the conditions of the Special Permit do not entitle the holder thereof to apply for permanent residence irrespective of the period of stay in South Africa. As a result of being granted the Special Permit, Ms Rafoneke was able to take up employment with Fixane Attorneys in Bloemfontein in March 2018 and

[4] 53 of 1979. The Attorneys Act was repealed and replaced with the LPA. As some of the litigants commenced with their articles of clerkship before the operation of the LPA, in 2018, the provisions of the Attorneys Act apply to them as it pertained to their registration with the Law Society of South Africa and their admission examinations.

is still in their employ as a consultant. Her Special Permit expired on 31 December 2019 and an application for its renewal has been filed through the new Lesotho Exemption Permits System, which has the same conditions as the Special Permit.[5]

[8] Faced with the difficulty regarding permanent residency, Ms Rafoneke enquired from Home Affairs as to how she could qualify for a permanent residence permit. She was advised that she needed to be in possession of a general work visa for a period of five years before she could qualify to apply for a permanent residence permit. Following this advice, Ms Rafoneke's employer, Fixane Attorneys, applied to the Director-General of Home Affairs on 25 September 2019 for a waiver of the requirement of a certificate for the granting of a work visa as contained in regulation 18(3) of the Immigration Act.[6] The application was refused. In his response, Mr Marhule, the Chief Director of Permits, at Home Affairs advised Ms Rafoneke of other options open to her. He indicated that there was no good cause which warranted the waiving of the requirement. He went on to state that in order for Ms Rafoneke to continue her employment with Fixane Attorneys, she should submit an application in terms of section 31(2)(b) of the Immigration Act.[7] This section provides that the Minister may grant a person the rights of permanent residency for a specified or unspecified period if special circumstances exist. Fixane Attorneys was advised that alternatively they could make an application to the Department of Labour for the certification necessary to process Ms Rafoneke's general work visa application.

[5] High Court Judgment above n 2 at paras 10-1. The conditions are:

> "1.1 The holder thereof is entitled to conduct work/employment in the Republic;
>
> 1.2 The holder thereof may not apply for permanent residence irrespective of the period of stay;
>
> 1.3 The holder thereof will not be able to renew or extend the permit; and
>
> 1.4 The holder thereof may not change the conditions of the permit in the Republic."

[6] 13 of 2002.

[7] This section provides for exemptions to permanent residence, or waiver of certain requirements to be met to qualify for a visa, if good cause is shown and upon application.

[9] After Ms Rafoneke completed her articles of clerkship, she launched an application to the High Court in terms of section 15 of the Attorneys Act to be admitted and enrolled as an attorney of the High Court. Her application was unopposed, but it was dismissed on the basis that, although she had complied with all the other requirements of the Attorneys Act, she was neither a citizen nor permanent resident of South Africa, as required by the Attorneys Act. This was based on the fact that the LPA, in the same way as the Attorneys Act, precludes Ms Rafoneke from being admitted as a practising or non-practising legal practitioner. Furthermore, before the promulgation of the LPA, Ms Rafoneke, was not admitted as a legal practitioner in a country designated by the Minister of Justice under section 17 of the Attorneys Act and section 5 of the Admission of Advocates Act[8] which would ordinarily allow her to practise within South Africa.[9]

Mr Tsuinyane

[10] In January 2010, Mr Tsuinyane was issued with a visa to study in South Africa by Home Affairs, after being accepted at UFS to study towards an LLB degree. The degree was conferred upon him in 2013. He obtained his Magister Legum (LLM) degree a year later, from the same University.

[11] On 20 May 2014, Mr Tsuinyane entered into a written contract of articles of clerkship for a period of two years with Matlho Attorneys, Bloemfontein. Mr Tsuinyane ceded his articles of clerkship on 11 September 2014, and for a period of one year and six months, he served his articles with Moroka Attorneys, Bloemfontein.

[8] 74 of 1964.

[9] Although the Attorneys Act and the Admission of Advocates Act have been repealed, section 115 of the LPA has left the door open for persons admitted as legal practitioners in other jurisdictions to still be admitted as legal practitioners in the Republic. Section 115 states that:

> "Any person who, immediately before the date referred to in section 120(4), was entitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of this Act."

[12] Mr Tsuinyane attended and successfully completed a practical legal training full-time course offered by the Law Society of South Africa, School for Legal Practice in Bloemfontein in 2015. He wrote and passed the attorneys' admission examinations as required by the Attorneys Act.

[13] On 24 December 2015, Mr Tsuinyane married Ms Lebotsa, a South African citizen, and was granted a spousal visa which expired on 30 June 2019. He has continued to live in South Africa for an uninterrupted period of over 10 years. Having completed his articles of clerkship and passed the attorneys admission examinations, on 22 February 2018, Mr Tsuinyane launched an application, which was also unopposed, to be admitted and enrolled as an attorney of the High Court in terms of section 15 of the Attorneys Act. Mr Tsuinyane's application was also dismissed on the same basis as that of Ms Rafoneke. Mr Tsuinyane is currently employed as a legal researcher and consultant at Moroka Attorneys, a position created solely to assist him.

[14] On June 2018, Mr Tsuinyane applied to Home Affairs to be granted the rights of a permanent residence holder in terms of section 31(2)(b) and (c) of the Immigration Act. His application was rejected on the following grounds. First, he was advised that he did not file a formal application which had to be done via a Visa Facilitation Services office. Second, Mr Tsuinyane was informed that, in terms of section 31(2)(c) of the Immigration Act, he had to wait for a period of five years after his marriage before he could qualify to be considered for permanent residence status under the spouse category and that this requirement could not be waived. He launched this application before the five-year period had lapsed.

CCT 06/22

[15] In this matter the applicants are three Zimbabwean nationals. Their factual background is the following.

Mr Bruce Chakanyuka

[16] Mr Chakanyuka was born in Zimbabwe and fled his country of origin as a result of economic and political unrest. He allegedly entered South Africa about December 2007 as an undocumented migrant. In 2009 the Dispensation of Zimbabweans Project, which was designed to regularise the immigration status of undocumented and asylum-seeking Zimbabweans was introduced. Special permits were issued to qualified categories of persons in terms of section 31(2)(b) of the Immigration Act.

[17] About June 2009, Mr Chakanyuka applied for and was issued with a Zimbabwe Special Permit, which upon periodic renewal came to be known as the Zimbabwe Exemption Permit.[10] In 2013, Mr Chakanyuka applied for and was accepted to study towards an LLB degree at the University of South Africa. This was conferred upon him in April 2019. He applied for and was accepted into the pupillage programme for advocates, administered by the Gauteng Society of Advocates. He went through the one-year training from 23 November 2019 to 4 December 2020, and completed all the requirements for admission as a legal practitioner in terms of the LPA. He is unable to be admitted and enrolled as such as he is neither a citizen nor a permanent resident. He is currently employed as a waiter.

Mr Nyasha James Nyamugure

[18] Mr Nyamugure was born in Zimbabwe. He entered South Africa on the strength of a visa to study, after having been accepted at Rhodes University. He then completed various degree programmes, namely a Bachelor of Arts, majoring in Economics and Law, an LLB degree at the same university, and a LLM degree with the University of Stellenbosch.

[10] The conditions of the Zimbabwe Exemption Permit are identical to those of the Lesotho Exemption Permits above n 5.

[19] In his founding affidavit before the High Court, Mr Nyamugure stated that from 23 June 2009 to 26 November 2009 he attended and successfully completed a practical legal training course offered by the Law Society of South Africa at the School for Legal Practice at the University of Cape Town. This was during the period he was studying towards his LLM. In March 2010, he commenced employment with Liquid Platinum (Pty) Limited, a project management company, based in Pietermaritzburg, where he worked as a legal assistant for the remainder of that year. From January 2011 to January 2012, Mr Nyamugure served and completed his articles of clerkship with Drake and Associates, a law firm in Pietermaritzburg. He wrote and passed all the attorneys' admission examinations as required by the Attorneys Act. During the relevant periods, Mr Nyamugure was legally present in South Africa on the strength of study permits, a work permit and presently, and at the time of application to this Court a Zimbabwe Exemption Permit.

[20] On 17 March 2013, Mr Nyamugure applied to Home Affairs for an exemption to permanent residence in terms of section 31(2)(b) of the Immigration Act, but did not receive any response regarding the status of his application. He instructed his attorneys to send a formal notice of an intention to institute legal proceedings against Home Affairs. The notice was sent on 13 May 2014, but the decision to institute legal proceedings was held in abeyance after correspondence was received from Home Affairs indicating that Mr Nyamugure's application was being attended to and that feedback would be forthcoming.

[21] In September 2014, Mr Nyamugure received a letter from the Director-General of Home Affairs advising him that his permanent residence application was rejected. The letter advised that if his application were to be granted, Home Affairs would be circumventing the provisions of the Attorneys Act as--

> "granting an exemption to a foreign national for the sole purpose of gaining admission to practice law in South Africa will circumvent the very provisions of the Attorneys Act which reserves the right to practice law in South Africa to South African citizens and permanent residents".

[22] Dissatisfied with the outcome, Mr Nyamugure addressed several queries to Home Affairs but received no acknowledgement or response. This prompted him to instruct his attorneys to institute review proceedings before the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg. After the exchange of pleadings, Home Affairs agreed to settle the matter and a consent order was granted, in terms of which Home Affairs agreed to grant Mr Nyamugure a permanent residence permit.

[23] Following non-compliance with the order, Mr Nyamugure, on 17 March 2016, served Home Affairs with a copy of the order and requested it to comply. Mr Nyamugure has since instituted contempt of court proceedings before the same court and the matter is still pending.

Mr Dennis Tatenda Chadya

[24] Mr Chadya was born and raised in Zimbabwe. In about 2003 his family migrated to South Africa, settling in Pietermaritzburg, KwaZulu-Natal, leaving him behind in Zimbabwe to complete his high school education. Their migration was fueled to a large extent by political violence due to the fact that Mr Chadya's father was a candidate elect as a Member of Parliament for Zimbabwe's main opposition party, the Movement for Democratic Change. After completing his ordinary and advanced level examinations, Mr Chadya also fled to South Africa to join his family in Pietermaritzburg and was granted an asylum seeker permit.

[25] In 2006, Mr Chadya enrolled to study towards a Bachelor of Arts in Philosophy, Politics and Law with the University of KwaZulu-Natal. A year later he switched and enrolled to study towards an LLB degree which was conferred upon him in 2010. In the same year, he commenced his articles of clerkship with Hay and Scott Attorneys in Pietermaritzburg, after being granted a work visa by Home Affairs. Having completed his articles of clerkship and having passed the attorneys admission examinations,

Mr Chadya complied with all the requirements for admission and enrolment as a legal practitioner, except that he is neither a citizen nor a permanent resident.

[26] About September 2012, Mr Chadya applied for an exemption to permanent residence under section 31(2)(b) of the Immigration Act. He received no response from Home Affairs, despite following up on his application. He launched an application with the High Court of South Africa, Gauteng Division, Pretoria to compel the Minister of Home Affairs to make a decision regarding his application. On 27 March 2014, the Court issued an order compelling the Minister to make a decision. The Minister complied with the order and by letter dated 12 September 2014, informed Mr Chadya that his application had been declined. The Minister advised Mr Chadya that he was of the view that there were no special circumstances which justified granting Mr Chadya a permanent residence permit. Additionally, the Minister relied on the same reasoning expressed when rejecting Mr Nyamugure's application, being that the granting of the permit for the sole purpose of being granted admission to practise law in South Africa would circumvent the provisions of the Attorneys Act.

[27] On 16 June 2015, Mr Chadya married his long-term partner, who is a South African citizen, and resultantly applied for and was issued with a temporary spousal visa. Mr Chadya's spousal visa allows him to live and work in South Africa while residing with his wife. He is currently employed at Hay and Scott Attorneys in the role of a legal advisor. Mr Chadya has filed a notice to abide by this Court's decision.

Ms Daphne Makombe

[28] Ms Makombe applied to this Court for direct access for her matter to be heard together with CCT 315/21, CCT 321/21 and CCT 06/22, alternatively, to be granted leave to intervene in terms of rule 8 of the Rules of this Court. She was the applicant in proceedings which were instituted prior to the hearing of this matter before the High Court of South Africa, Gauteng Division, Pretoria and those proceedings have since been withdrawn. The relief she seeks is similar to that which the applicants seek,

but goes further in that Ms Makombe seeks that the words "lawfully entitled to live and work in South Africa" be read into section 24(2)(b) during the period of suspension. Ms Makombe is a Zimbabwean citizen who has met all the requirements to be admitted as a legal practitioner, conveyancer and notary except that she is not a citizen and is not in possession of a permanent residence permit. Ms Makombe is currently in South Africa as a holder of a Zimbabwe Exemption Permit.

[29] Apart from the applicants who are affected directly by the impugned provisions, several civic society organisations which have an interest in the matter have participated in this application. Some have participated as amici curiae and one of them, the Asylum Seeker Refugee and Migrant Coalition (ASRM Coalition) is the fourth applicant in CCT 06/22.

ASRM Coalition

[30] The ASRM Coalition is a voluntary organisation whose members consist of non-citizens working at various levels in the legal services sector. The membership consists of law students, legal academics, legal advisors, attorneys, advocates, and the like. The ASRM Coalition's primary objective is to combat discrimination against non-citizens through advocacy, intervention and engagement initiatives.

Amici curiae

[31] The first amicus is Scalabrini Centre of Cape Town (Scalabrini), a non-governmental organisation that aims to protect and promote the rights of asylum seekers and refugees. Scalabrini provides litigation services free of charge and is involved in contributing to policy formulation on refugee and asylum issues. It has been a party to litigation in numerous matters ranging from the constitutionality of certain provisions of the Refugees Act[11] to the exclusion of asylum seekers from Covid-19 relief grants.

[11] 130 of 1998.

[32] The second amicus is the International Commission of Jurists (ICJ), a non-governmental organisation which has been operating since 1952 in defending human rights and promoting the rule of law the world over. The ICJ works with governments to improve the implementation of human rights through the engagement of judges and lawyers from all parts of the world who have a deep knowledge of the rule of law and human rights law.

[33] The third amicus is the Pan African Bar Association of South Africa (PABASA), a voluntary national association of advocates, enrolled under the LPA. PABASA was established by a group of advocates who sought to create an environment in which historical issues that confront black and female practitioners could be tackled.

Respondents

[34] As stated, the first and second respondents are the Minister and the LPC, respectively. The Minister is cited in his capacity as the executive authority of the Ministry of Justice and Correctional Services, with the mandate and authority to, inter alia, oversee the administration of justice in South Africa and, initiate and implement legislation, including legislation dealing with the regulation of the legal profession. The LPC is cited in its capacity as a statutory body established in terms of section 4 of the LPA. The LPA has the mandate and authority to, inter alia, regulate the legal profession, its practitioners, access to the profession, the administration of justice, as well the advancement of the rule of law. The third, fourth and fifth respondents[12] are not participating in these proceedings.

Litigation history

High Court

[35] The application brought before the High Court centred around Ms Rafoneke and Mr Tsuinyane, who are the applicants in this Court in CCT 315/21 and CCT 321/21,

[12] The third respondent is the Minister of Trade and Industry, the fourth respondent is the Minister of Labour and the fifth respondent is the Minister of Home Affairs.

respectively. In challenging the constitutionality of sections 24(2)(b) and 115 of the LPA, the applicants argued that the impugned provisions violate their right to equality because these differentiate between South African citizens and permanent residents, on the one hand, and foreigners on the other. They further argued that the provisions differentiate between foreigners who are already admitted as legal practitioners in their designated countries, and those who have not been so admitted. They contended further that there is no rational relationship between the differentiation and a legitimate governmental purpose, submitting that even if the Court were to find that there is a rational relationship, it is not legitimate and the differentiation amounts to discrimination that is unfair. They argued that the provisions unfairly discriminate against them on the basis of their social origin and nationality. The substance of the applicants' arguments before the High Court was that they should be admitted and enrolled to practise as attorneys in South Africa after fulfilling the requirements in section 24(2)(a)(c) and (d) of the LPA.

[36] The respondents argued that there is a rational connection between the differentiation and the legitimate governmental purpose it sought to achieve. They contended that it is clear from the provisions of the Immigration Act, the Employment Services Act,[13] and the LPA that the policy decision is to ensure that work which does not entail a scarce or critical skill be preserved for citizens or permanent residents. Because the legal profession is not classified as a critical skill, allowing non-citizens to practise in the country, without due regard to the employment and immigration laws of the country, would render the policy decision taken in terms of the country's laws nugatory. The respondents therefore submitted that the application should be dismissed because the applicants sought to circumvent employment and immigration laws of the country through their admission as practising attorneys.

[37] The High Court agreed with the submissions made by the respondents that the LPA should not be viewed in isolation and that the impugned provision should be

[13] 4 of 2014.

considered against the backdrop of the Constitution, and in conjunction with the Immigration Act and Employment Services Act. It concluded that the differentiation is indeed rational and serves a legitimate governmental purpose for the reasons advanced by the respondents.[14]

[38] The High Court went further and considered the position of non-practising legal practitioners. It concluded that section 24 of the LPA is inconsistent with the Constitution to the extent that it prohibits non-citizens from being admitted as non-practising legal practitioners.[15] It based this conclusion on its finding that a blanket bar against non-citizens being admitted is irrational, as it does not take into account the unique circumstances of some non-citizens who would want to be admitted as non-practising legal practitioners.[16]

[39] The High Court declared section 24(2) of the LPA unconstitutional and invalid to the extent that it does not allow foreigners to be admitted and authorised to be enrolled as non-practising legal practitioners. The Court ordered that the declaration of invalidity be suspended for 24 months from the date of its order to allow Parliament to rectify the defects identified in its judgment. The High Court stated that a just and equitable remedy in the circumstances would be that during the period of suspension, non-citizens should be provided with interim relief which is to operate during that period. The High Court thus ordered that the LPA would be read in such a manner as to allow non-citizens to be enrolled as non-practising legal practitioners should they comply with all the other requirements.

[14] High Court Judgment above n 2 at para 64.

[15] Id at para 90.

[16] Id at para 88.

This Court

Jurisdiction, leave to appeal and direct access

[40] The High Court, as indicated, declared the provisions of section 24(2) to be unconstitutional and invalid to a limited extent. Although the applicants are not content with the limited nature of the declaration, and consequently seek to challenge it, it is this Court that has the jurisdiction in terms of section 167(5) to make the final decision on this declaration. In addition, permitting a direct appeal to this Court and granting direct access to Ms Daphne Makombe has the advantage of avoiding delays and reducing costs, which is one of the purposes of section 167(6)(b) of the Constitution. The application also implicates the equality clause in section 9 of the Constitution. This Court consequently has jurisdiction to deal with the application. Leave to appeal directly to this Court is granted and so is the application for direct access by the intervening party.

The impugned provisions

[41] Section 24(1) and (2) of the LPA, provides:

> "(1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.
>
> (2) The High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she—
>
> (a) is duly qualified as set out in section 26;
>
> (b) is a—
>
> (i) *South African citizen; or*
>
> (ii) *permanent resident in the Republic*;
>
> (c) is a fit and proper person to be so admitted; and
>
> (d) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules."

Section 115 reads:

> "Any person who, immediately before the date referred to in section 120(4), was entitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of this Act."

[42] It is common cause that the impugned provisions, read together, differentiate between citizens and permanent residents, on the one hand, and non-citizens who are not permanent residents on the other. The differentiation between non-citizens who are permanent residents and those who are not so classified affects other groups of migrants, such as asylum seekers, refugees and undocumented immigrants. The provisions also differentiate between non-citizens admitted as practitioners in designated jurisdictions and non-citizens who have not been so admitted. This however does not necessarily lead one to the conclusion that they do not withstand constitutional scrutiny. The Minister has raised two primary legislative purposes for the impugned provisions: first the reservation of access to the profession to citizens and permanent residents and secondly, the promotion of the administration of justice and the protection of the public from unscrupulous and unqualified legal practitioners. It has to be determined whether the differentiation bears a rational connection to these purposes. If it does not, then there is a violation of section 9(1) of the Constitution. Even if it does, it might nevertheless amount to discrimination. It will then be necessary to determine whether discrimination has been established and if it has, whether such discrimination is unfair.[17] This is the gist of the dispute in this application and I will deal with these considerations in turn.

Submissions

[43] Although the applicants each made separate submissions, they had much in common. As these matters were consolidated, what will be reflected is a summary of all the submissions and, if necessary, I will highlight those that are distinctive.

[17] *Harksen v Lane* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

Applicants

[44] The applicants submit that the impugned provisions create an absolute bar to entry into the profession by persons who hold visas and permits that allow them to live and work in South Africa. A court or functionary seized with an application for admission as a legal practitioner has no discretion to authorise the admission of a duly qualified person who has no citizenship or permanent residence.

[45] The applicants argue that this differentiation bears no rational connection to a legitimate governmental purpose because, irrespective of the fact that the immigration laws allow them to take up employment in the country, they are still not eligible for admission and enrolment as legal practitioners. The applicants argue that should this Court accept the proposition of the Minister that the provisions are meant to optimise opportunities for law graduates who are citizens and permanent residents, it is not a legitimate governmental purpose, and is not likely to be achieved. The applicants submit that this Court should take into account the fact that the relief sought is not designed to permit a blanket admission of foreign lawyers to the profession. Instead, it is restricted only to those who hold the right to work and reside in South Africa but who, due to the onerous legislative requirements of the Immigration Act, can never obtain permanent residency status, and those who can only qualify for permanent residence after a certain period of time.

[46] The applicants further argue that the differentiation amounts to discrimination. They contend that the discrimination is direct, on the ground of social origin and therefore amounts to discrimination on a listed ground. Accordingly, so argued the applicants, unfairness should be presumed. They submit further that the discrimination is based on an analogous ground of nationality or citizenship and thus on an attribute or characteristic that has the potential to impair their dignity and has a severe impact on their ability to obtain employment in the legal profession. The applicants argue that consequently the discrimination amounts to unfair discrimination as their rights to equality and dignity are infringed.

[47] The applicants contend further that the limitation of their rights is not justifiable under section 36 of the Constitution. They submit that even if it were to be accepted that the discrimination is aimed at the stated purposes, there are less restrictive means to achieve those purposes. This, according to the applicants, is because the LPA has sufficient safeguards for the protection of the public. Furthermore, the Immigration Act as well as the Employment Services Act both have measures in place to ensure that citizens get preference over foreigners in the labour market.

[48] The applicants further contend that the requirements contained in the LPA should be aligned with those in comparable jurisdictions, especially the Southern African Development Community. In those jurisdictions, permanent residence or citizenship is not a requirement for admission. What is required, is that an applicant be ordinarily resident. The status of such a person is dealt with exclusively under immigration laws, and there is uniform treatment of citizens and non-citizens alike.

[49] Finally, the applicants have proposed that a declaration of constitutional invalidity should be subject to a 24-month suspension, to allow Parliament to deal with the constitutional defect and that during the period of suspension the provisions should read:

> "(b) is a—
>
> (iv) South African citizen or;
>
> (v) Permanent resident in the Republic or;
>
> (vi) *lawfully entitled to live and work in South Africa*."

[50] The intervening party, Ms Makombe's submissions go further than those of the applicants and focus on the position of attorneys who have qualified as notaries and conveyancers. Her counsel submitted that unlike other lawyers who may well work in other capacities even if they are not admitted, notaries and conveyancers cannot work in those capacities unless they have been admitted and enrolled as attorneys. Their qualifications can therefore not be utilised at all unless they have been so admitted.

The Minister's submissions

[51] The Minister submits that section 24(2)(b) read with section 115 of the LPA, does not constitute a blanket ban on all foreign nationals, it merely precludes foreign nationals who are not permanent residents but only possess for example, study visas or special exemption permits. The Minister contends that the provisions of the LPA should not be read in isolation but together with other legislation designated to regulate the employment of foreign nationals, such as the Immigration Act and the Employment Services Act. He submits that this is because the issue of the admission of legal practitioners is directly linked to employment and a person's immigration status.

[52] The Minister submits that the impugned sections are in line with governmental obligations, which seek to ensure that foreign nationals do not circumvent immigration and labour laws by securing a license to practise law under the auspices of student visas. He argues that allowing the parties, who have unsuccessfully applied for permanent residence or exemption, to be admitted as legal practitioners, amounts to such circumvention.

[53] On the facts, the Minister submits that Ms Rafoneke and Mr Tsuinyane entered South Africa with student visas, seeking to pursue careers in law and ought to have been cognisant of the admission requirements in terms of the then applicable Attorneys Act, alternatively, that they ought to have been aware of the requirements contained in clause 24 of the Legal Practice Bill[18] at the time of commencing their articles of clerkship. The Minister also contends that these parties therefore accepted the risk that even if they satisfied all the other requirements of admission, they would ultimately not be admitted as legal practitioners in the country due to the fact that they were neither citizens nor permanent residents.

[18] 20 of 2012.

[54] The Minister submits that the differentiation is justifiable, fair and consistent with section 9(5) of the Constitution and that to this effect, the preamble of the LPA embraces the provisions of section 22 of the Constitution,[19] as the LPA was promulgated to regulate the legal profession in the public interest.

[55] The Minister avers that the applicants failed to address the considerations outlined by this Court in *Harksen*, relating to the impact of the discrimination, in that they failed to establish that they are a vulnerable group such as refugees, and that a further consideration is that the applicants are gainfully employed in South Africa and have suffered no hardships. Their right to human dignity is therefore not affected.

[56] The Minister also submits that there is no need to treat the applicants differently and to offer them any special protection other than study visas, because the practise of law is not listed by Home Affairs as a critical or rare skill justifying a special dispensation for lawyers. The reason for this is that there are numerous citizens and permanent residents who are suitably qualified and are struggling to secure employment.

[57] The Minister submits that the applicants incorrectly conflate the purpose of practical vocational training and the right to be admitted as a legal practitioner. According to the Minister, the LPA makes no differentiation between citizens and foreign nationals for purposes of practical vocational training as it is an extension of an LLB. To the extent that during the training the person is permitted to perform any work for the public, this is done under the supervision of a duly admitted practitioner, being their principal. The Minister contends that the level of trust and accountability required in the practise of law cannot be achieved if persons are non-citizens or permanent residents.

[19] Section 22 states that:

"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."

[58] The Minister submits that the decision to allow foreign nationals already admitted and enrolled as lawyers in designated countries to practise in South Africa is due to comity or reciprocal relations between States, and is a rational decision or policy adopted by the government. The policy decision is not in the domain of the Court.

The LPC's submissions

[59] The LPC submits that the LPA regulates entry into the profession taking into consideration the provisions of section 22 of the Constitution, and that this is one of the grounds informing the LPA's differentiation between citizens, permanent residents and foreign nationals. The LPC refers to *Final Certification*,[20] where this Court rejected the argument that the confinement of the right to the occupational choice of citizens is constitutionally invalid, as such right is not universally accepted as a fundamental right.

[60] The LPC further relies on *Union of Refugee Women*[21] in contending that the right to choose a vocation does not fall within a sphere of activity protected by a constitutional right that is available to refugees and other foreigners. It argues that it is a well-established principle that no right in the Bill of Rights is superior to others and that the impugned provisions should be considered with this legal principle in mind.

[61] The LPC referred this Court to *Affordable Medicines Trust*,[22] where it held that the Constitution requires that the power to regulate the practice of a profession should be exercised in an objectively rational manner that is related to a legitimate government purpose. It submitted that once the Court finds that this requirement has been satisfied, it should not interfere simply because it disagrees with such regulation or considers it to be inappropriate.

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[20] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24; 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC).

[21] *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC).

[22] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

[62] The LPC contends that the impugned provisions recognise the principles laid down by this Court in *Larbi-Odam*.[23] This Court held that in extending the right to be admitted to the legal profession to permanent residence permit holders, it would make little sense to bar a person who has satisfied immigration laws for permanent residence and is suitably qualified from entering into the profession.

The amici

[63] All the amici support the case for the applicants. Their submissions also overlap with those of the applicants and to that extent, will not be repeated.

Scalabrini

[64] Scalabrini's submissions are aimed at addressing the discriminatory impact of the impugned provisions on asylum seekers and refugees specifically. It submits that the provisions undermine the dignity of this vulnerable group, perpetuate xenophobia against them and contribute to their marginalisation.

[65] Scalabrini urges this Court to take into account that sections 22 and 27 of the Refugees Act entitle refugees to live, study and work in South Africa, without any restrictions, and to consider the challenged provisions in a manner consistent with the rights conferred on refugees in terms of these provisions. It further submits that the Court should not close its eyes to the reality that asylum seekers and refugees face insurmountable difficulties in attempting to secure permanent residency, which is further exacerbated by inadequate administrative support.

[23] *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* [1997] ZACC 16; 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC).

ICJ

[66] The gist of the submissions made by the ICJ is that the International Covenant on Economic, Social and Cultural Rights (ICESCR),[24] the International Covenant on Civil and Political Rights (ICCPR),[25] and the African Charter on Human and Peoples' Rights (African Charter)[26] all impose a duty on State Parties to ensure that all people, irrespective of citizenship or whether their status is documented under domestic law or not, enjoy the right to work.

[67] The ICJ brings the Court's attention to the UN Draft Universal Declaration on the Independence of Justice also known as the Singvhi Declaration.[27] This Draft affirms the right of all persons to "effective access to legal services provided by an independent lawyer of their choice"[28] and should be considered against the backdrop of the protection of the right of non-citizens to work. Referencing sections 34, 35(3)(f) and 35(2)(b) of the Constitution, the ICJ submits that similar rights are provided for under international law as per Article 14(3)(d) of the ICCPR and Article 7(1)(c) of the African Charter. It submits that the prohibition on discrimination on "ethnic or social origin" in the Constitution should be read to encompass the same prohibitions as international law prohibitions on "national and social origin". The ICJ argues further that the LPA places the applicants in a comparable position to that of the asylum seekers in *Somali Association of South Africa*[29] and *Union of Refugee Women*, as the applicants are barred from admission and practise due to the absence of permanent residency or South African citizenship.

[24] International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

[25] International Covenant on Civil and Political Rights, 16 December 1966.

[26] African Charter on Human and Peoples' Rights, 27 June 1981.

[27] UN Draft Universal Declaration on the Independence of Justice by the Special Rapporteur, L.M. Singhvi, 24 August 1987.

[28] Id at General Principle 76.

[29] *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism* [2014] ZASCA 143; 2015 (1) SA 151 (SCA).

PABASA

[68] PABASA aligns itself with the applicants' submissions that the bar to admission to the profession of law graduates qualified in South Africa infringes the right to equality and human dignity. It further submits that this bar frustrates diversity in nationality in the legal profession in the context of the increasingly cross-border and globalised nature of the commercial, public and human rights practice. PABASA avers that the Minister has submitted no evidence to prove that the proportion of foreign graduates with South African law degrees is so great so as to open the floodgates and that foreign nationals lack the requisite commitment to the country. PABASA further submits that the impugned provisions foster and perpetuate notions that non-citizens or non-permanent residents are prone to exposing clients to prejudice and fraud. This according to PABASA perpetuates xenophobia against non-citizens or non-permanent residents.

Analysis

Are the impugned provisions consistent with section 9 of the Constitution?

[69] Section 9(1) of the Constitution provides that "everyone is equal before the law and has the right to equal protection and benefit of the law". Section 9(3) prohibits direct and indirect discrimination by the State against anyone on any of the grounds listed therein. It provides:

> "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

Section 9(5) provides that "discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[70] In *Harksen*, this Court laid down the following helpful test for assessing whether differentiation amounts to discrimination and whether the discrimination is unfair:

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of [section 9(1)]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
>
> (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of [section 9(3) or section 9(4)].
>
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause."[30]

[71] The first question as to whether there is differentiation on the basis of citizenship and permanent residency is not controversial and has been readily conceded by the respondents. It thus has to be answered in the affirmative. The next question is whether the differentiation bears a rational connection to a legitimate government purpose? If the differentiation does not bear a rational connection to a legitimate government

[30] *Harksen* above n 17 at para 54.

purpose, there is a violation of section 9(1). However, even if it does, it might nevertheless amount to discrimination. The Minister has proffered several grounds which he submits render the differentiation rational and collectively serve a legitimate governmental purpose for the differentiation. I deal with these in sequence.

(a) Government's obligations to protect the interests of citizens and permanent residents

[72] South Africa, as a sovereign State, has an obligation to protect the interests of its citizens. It has entrenched the rights of its citizens to choose their trade, occupation or profession freely through section 22 of the Constitution. This section also empowers the State to enact legislation to regulate freedom of trade, occupation and profession. It 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*."

[73] Section 22 is silent regarding non-citizens and, consequently, does not afford that right to them. Section 24(2) of the LPA is legislation that regulates the legal practice, legally related occupations and the profession in general. We know that internationally the practice of reserving the right of occupational choice to citizens is not uncommon in democracies. The second part of section 22 indicates that the right of every citizen to choose their occupation is subject to the recognition of the regulatory competence of the state. The regulatory competence of the state is thus to be exercised in a manner that is consistent with a citizen's right to choose their profession. This regulatory competence cannot be said to extend to non-citizens and their choice of profession as section 22 is a right in the Constitution, that does not extend to them. This was made clear by this Court, in *Final Certification*, where it held that there is no duty to extend the right to freedom of trade, occupation and profession to non-citizens.

Relying on the jurisprudence of the United States Supreme Court,[31] our Supreme Court of Appeal in *Watchenuka*,[32] stated that it is accepted in international law that every sovereign nation has the power to admit foreigners only in such cases and upon such conditions as it may see fit to prescribe, recognising that there are duties that are attached to the State in respect of refugees and asylum seekers.[33] The Supreme Court of Appeal concluded that there is no doubt that the right to choose a trade or occupation is restricted to citizens by section 22 of the Constitution.

[74] I did not understand the complaint to be that a sovereign state has no power to pass laws regulating a certain profession or trade. The complaint seems to be rather focused on whether, in doing so, the State has acted in an objectively rational manner that is related to a legitimate governmental purpose as stated in *Affordable Medicines Trust*.[34] Therefore, as long as the power to regulate is exercised in an objectively rational manner related to a legitimate governmental purpose, a court's interference would not be warranted. It is also helpful to highlight that in *Prinsloo*[35] this Court further stated that

> "[the state] should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."[36]

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[31] *Nishimura Ekiu v. United States* 142 U.S. 651, 12 S. Ct. 336 (1892) at 659. Reference to the United States Supreme Court's jurisprudence was referred to with approval in the *Final Certification* above n 20 at para 21 footnote 31.

[32] *Minister of Home Affairs v Watchenuka* [2003] ZASCA 142; 2004 (4) SA 326 (SCA).

[33] Id at paras 29 and 36.

[34] *Affordable Medicines Trust* above n 22 at para 73.

[35] *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

[36] Id at para 25.

[75] It should thus be determined whether the State, in enacting section 24(2), is effectively regulating the legal profession in an arbitrary manner or manifests "naked preferences" that serve no legitimate governmental purpose. If I conclude that this is so, I would have to conclude that the impugned provisions are inconsistent with section 9(1). I proceed to deal with this question.

[76] In order to assess the rationality of the decision, the provisions of section 24(2) cannot be considered without due regard to section 22 of the Constitution, which, as already stated, empowers the state to regulate the profession and trade. This Court, in *Grootboom*[37] held that no right in the Constitution should be elevated above other rights and that the rights contained in the Bill of Rights are mutually reinforcing. What is significant about the provisions of section 24(2) of the LPA is that, to the extent that it restricts the right to be admitted as a legal practitioner to citizens, it reflects the same restriction contained in section 22 of the Constitution. It should however be highlighted that because citizens have a right of choice under section 22, the State, in enacting legislation, is required to respect this right. There is no issue that the LPA does so. The Legislature is therefore at liberty to decide how far to extend admission into the legal profession to non-citizens and it has chosen to draw the line at permanent residents. That the Legislature has not gone further to include refugees and asylum seekers cannot be challenged by non-citizens under section 22. They do not enjoy a section 22 right.

[77] Quite axiomatically, however, the fact that non-citizens do not have rights that accrue under section 22, does not mean they are not entitled to enter into certain categories of professions in South Africa. But nothing stops the Legislature from barring such entry. That does not mean that in doing so, the Legislature is at liberty to act in any way it chooses. If, for example, the Legislature allowed all non-citizens to be admitted as legal practitioners, save for Japanese citizens, that would be prima facie arbitrary and unlikely to serve any legitimate governmental purpose.

[37] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 23.

[78] For purposes of section 9(1), the question is whether, whilst permitting some non-citizens to be admitted (in this instance, permanent residents) and not others, section 24(2) of the LPA serves a legitimate government purpose. It must be accepted that the State has a right, as stated in *Watchenuka*, to admit foreigners only in such cases and upon such conditions as it may see fit to prescribe. And once it is also accepted as stated in *Final Certification*, that the country has no duty to extend the right to freedom of trade, occupation and profession to non-citizens, it cannot be gainsaid that it may be rational for the State to adopt legislation which has, as its legitimate object, the restriction of access to a profession. And section 24(2) is such legislation.

[79] Section 24(2) is however more expansive than section 22 of the Constitution as it, in regulating entry into the legal profession, also permits permanent residents to be admitted. The expansive nature of the provision is not being attacked, but it has been argued that there is no rational basis for the differentiation between permanent residents and other non-citizens. Counsel for the amici submitted that the protection provided by section 22 of the Constitution and section 24(2) of the LPA should be extended to foreigners who are ordinarily resident in South Africa with the right to work. This group of persons, according to the amici, has the same fixity of connection to South Africa as permanent residents, as the persons in this group regard South Africa as their home and have no hope of ever returning to their countries. This group would include refugees and asylum seekers.

[80] The problem with the submissions in this regard is that the distinction between foreigners who have been granted permanent residence in this country and those who have not, is exactly the fact that these other groups have not been granted the same status as permanent residents. The difference in status carries different rights and corresponding obligations. The rationale for accepting permanent residents is that they have been granted a right to live and work in the country on a permanent basis, subject to the country's immigration laws. The same cannot be said for non-citizens who are refugees, or who are on study or work visas.

[81] Although there may well be some merit to the submission that some of the foreign nationals in these latter categories have been in the country for a long time and have no hope of returning to their home countries, they are offered limited protection that requires them to return to their countries of birth if circumstances change. Some of them may still be eager to go back home, once there is a change in the circumstances that compelled them to flee. Those permitted to study or are given residential status in order to work are permitted to do so for a limited time and purpose. Hence they do not have the fixity of connection to the country and the right to work on a more permanent basis that makes their admission desirable. While this policy may be open to debate, the fact that the Legislature has adopted it is not arbitrary or illegitimate. It is restrictive and protectionist, and those are permissible governmental objectives. The parameters of what would be referred to as "ordinarily resident" is not clear, and it is equally unclear how this test would be used by a court to determine whether a particular applicant qualifies as such.

[82] As the facts in several of the applications show, the circumstances of the respective foreigners are different and their rights to remain in the country legally are located in different permits. Importantly, in Mr Nyamugure's situation, Home Affairs settled the matter and undertook to grant him permanent residence. For reasons not apparent to this Court, it appeared to renege on this undertaking. The simple point is that the Legislature has differentiated between permanent residents and other kinds of residents. It has done so to protect opportunities for South Africans. That is a permissible policy to adopt. There is a proper basis to distinguish the position of permanent residents and other categories of residents. Therefore, the line drawn in the LPA is similarly permissible. This is primarily a policy decision that serves a legitimate government purpose.

[83] It is also important to highlight that section 31(2)(b) of the Immigration Act allows for a foreign national to be granted an exemption to permanent residency where special circumstances exist. This option, as illustrated by the facts in Mr Nyamugure's case, is available. It is uncontroverted that if an applicant is granted the status of

permanent residency, he or she would then qualify for admission in terms of the impugned provision.

[84] As stated above, the expansive nature of the protection offered to permanent residents in terms of section 24(2) of the LPA is not being attacked. Instead we are being asked to hold that the section's failure to encompass other non-citizens is inconsistent with the Constitution. To the extent that the differentiation is challenged on the basis that foreign nationals who have been admitted as legal practitioners in foreign designated jurisdictions are permitted to retain the right to continue practising in the country, it is important to understand that the provision in this regard simply preserves the rights of those practitioners. It does not require that they should be admitted as such in the country. It is a saving provision from prior enactments and thus preserves vested rights but does not accord these rights going forward. These rights arose for reasons of reciprocity under trade and foreign policy commitments.

[85] It is also helpful to consider the obligations of South Africa in terms of the General Agreement on Trade in Services (GATS).[38] It seems that one of the ways in which South Africa undertakes services reciprocally is that it permits admitted legal practitioners from designated countries to practise law in South Africa. It is the foreign admission that qualifies the legal practitioners and it is founded on the basis of the reciprocal duties between the States.

[86] An evaluation of whether the impugned provisions, in reality, translate to the furtherance of the policy stance taken by government must be answered in the affirmative. As said in *Affordable Medicines Trust*, whether this Court views this stance as appropriate is not for the Court to consider, but rather whether objectively viewed, it is rational. It can thus be concluded in this regard that to the extent that section 24(2) mirrors the provisions of section 22, it cannot be said to be unconstitutional, but that to

[38] General Agreement on Trade in Services, 15 April 1994; Particularly Article II which addresses the Most-Favoured Nation principle which states that Member States each 'accord unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.'

the extent that it extends the protection to other non-citizens, this is a governmental policy that cannot be said to be irrational or arbitrary.

[87] A comparison of the South African law with Canadian and Indian jurisprudence on this aspect is helpful. In *Skapinker,*[39] a Canadian case, at issue was a requirement of Ontario's Law Society that members of the bar of Ontario ought to be citizens of Canada. Mr Skapinker, a permanent resident of Canada, who qualified for admission to the Ontario bar in all other respects, was not a citizen of Canada and was, thus, precluded from practising as a lawyer in Ontario. On being refused admission to the bar purely on the basis that he was not a citizen of Canada, Mr Skapinker approached the Canadian courts for a declaration that the citizenship requirement was invalid on the grounds that it violated section 6(2)(b) of the Canadian Charter of Rights and Freedoms by denying him, a permanent resident of Canada, the right to pursue the gaining of a livelihood in Ontario.[40] This argument was accepted by the Ontario Court of Appeal. However, the Supreme Court, in a unanimous decision, rejected it and held that section 6(2)(b) of the Charter did not confer an unqualified right to pursue the gaining of a livelihood in the province.

[88] In India, the Supreme Court in *Bar Council of India*[41] grappled with the question whether foreign law firms or lawyers were permitted to practise in India without fulfilling the requirements of the Advocates Act[42] and the Bar Council of India Rules.[43] The parties who had taken exception to being barred from practicing in India included a number of parties who were both law firms and individual lawyers from the United Kingdom, the United States, France and Australia. To practise law in India, a person has to be an Indian citizen and should possess a degree in law from a recognised university in India. Nationals of other countries could be admitted as advocates in India

[39] *Law society of Upper Canada v Skapinker* [1984] 1 SCR 357.

[40] Part 1 of the Constitution Act, 1982, Canadian Charter of Rights and Freedoms.

[41] *Bar Council of India v A.K. Balaji* C.A. No. – 007875-007879 / 2015.

[42] The Advocates Act, 1961.

[43] Rules made by the Bar Council of India in exercise of its rule-making powers under the Advocates Act, 1961.

only if citizens of India are permitted to practise as such in their countries. An individual who possesses a foreign degree of law from a university outside India requires recognition by the Bar Council of India; this is in line with sections 24 and 29 of the Indian Advocates Act.

[89] The argument advanced by the foreign law firms was, inter alia, that there was no bar to a company carrying on consultancy or support services in the field of protection and management of intellectual, business and industrial proprietary rights or carrying out market service and market research, publication of reports, journals and more. Additionally, a person not appearing before courts or tribunals and not giving legal advice cannot be said to be practising law. Another foreign law firm submitted that there was no violation of the law in giving advice on foreign law even if based in India because even Indian lawyers are permitted to practise outside India. It highlighted that it did not have a law office in India and did not give advice on Indian laws. The High Court of India upheld the arguments advanced by the foreign law firms and lawyers in that the services they offered could not be treated as the practise of law in India. On appeal to the Supreme Court of India, that Court held that the practise of the profession of law includes litigation as well as non-litigious work.[44] The Supreme Court of India cautioned that-

> "[the] Scheme in Chapter-IV of the Advocates Act makes it clear that advocates enrolled with the Bar Council alone are entitled to practice law, except as otherwise provided in any other law. All others can appear only with the permission of the court, authority or person before whom the proceedings are pending. Regulatory mechanism for conduct of advocates applies to non-litigation work also. The prohibition applicable to any person in India, other than [an] advocate enrolled under the Advocates Act, certainly applies to any foreigner also."[45]

The Supreme Court held that as a result foreign lawyers could not practise law in India without observing the principle of reciprocity. Both these cases fortify the reasoning

[44] *Bar Council of India* above n 41 at para 39.

[45] Id at para 40.

that law may be enacted to regulate entry into a profession and States are entitled to restrict such entry on the basis of citizenship.

(b) Optimisation of opportunities for law graduates

[90] The Minister further submitted, as one of the purposes of the provisions, the optimisation of opportunities for law graduates. It is to this that I now turn. The weakness with this proffered purpose is that the very South African State allows non-citizens and non-permanent residents to study law and graduate in universities across the country. They are also permitted to serve articles of clerkship and to undergo pupillage. Although the policy may be attacked on this basis, the counter argument in its favour is that when students who are neither citizens nor permanent residents make the choice to study in the country and then proceed to do vocational training such as articles and pupillage, they make this choice fully conversant with the fact that they are not eligible for admission; or at the very least, they ought to be conversant. This is all the more, given the fact that their respective study visas only allow them to undergo training in their field of study, practical vocational training being one such type of training, and does not grant them the entitlement to be admitted as practising legal professionals. Furthermore, the fact that they are not eligible for admission does not deprive them of the right to be employed in other capacities, provided they are in possession of the necessary documentation that permits them to do so legally.

(c) Inherent risks of fraud and accountability

[91] The Minister has also argued that there are inherent risks of accountability in allowing persons who are neither citizens nor permanent residents to be admitted and practise as lawyers in the country. This argument is fundamentally flawed. The restriction is not applicable to non-citizens from designated countries who already enjoy the right to practise in South Africa. There is no basis to conclude that in respect to them, the risk of accountability is less. My conclusion on the accountability argument by the Minister is that it lacks substance. But that does not affect my main conclusion that the differentiation bears a rational connection to a legitimate government purpose.

[92] This is not the end of the enquiry. As stated in *Harksen*, even if the differentiation bears a rational connection to a legitimate government purpose, it might nonetheless amount to discrimination.

Does the differentiation amount to discrimination?

[93] The first question here is whether the differentiation is on a specified ground. Citizenship is not one of the listed grounds in section 9(3) of the Constitution. This Court said as much in *Larbi-Odam*.[46] The applicants submit that the differentiation on the basis of citizenship is on the listed ground of social origin. I am not persuaded that citizenship may be classified as falling under social origin as the applicants contend. Currie and De Waal[47] suggest that social origin refers to concepts such as class, clan or family membership. Citizenship, on the other hand, defines a relationship between a person and a state. Citizenship may occur by reason of birth, ties of blood, naturalisation and the like. But it is not a matter of social origin but national origin. People of diverse social origins may be citizens of the same state. Just as people of the same social origin may be citizens of different States. The one category does not determine the other. As citizenship is not one of the specified grounds, a further enquiry is required in order to determine whether discrimination has been established.

[94] As stated in *Larbi-Odam*, the further enquiry is whether objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a seriously comparable manner.[48] In *Larbi-Odam*, this Court concluded that it did. It based its reasoning on the fact that foreign citizens are a minority in all countries, and have little political muscle. It will be remembered that *Larbi-Odam* dealt with the rights

[46] *Larbi-Odam* above n 23 at paras 19 – 20.

[47] Currie and De Waal *The Bill of Rights Handbook* 6 ed, (Juta & Co Ltd, Cape Town 2013) at 236, n 129.

[48] *Larbi-Odam* above n 23 at para 19.

of permanent residents in comparison with citizens. The Court associated itself with the views expressed in the Canadian Supreme Court in *Andrews*,[49] which stated:

> "Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending."[50]

[95] This Court also went on to say that the second factor is that citizenship is a personal attribute which is difficult to change. In this regard, it referred to the views expressed in *Andrews* to the effect that the characteristic of citizenship is one typically not within the control of the individual, which is not alterable by conscious action, and in some cases not alterable, except on the basis of unacceptable costs. Based on the above sentiments expressed by this Court in *Larbi-Odam* about the constraints non-citizens suffer in a foreign country, I conclude that differentiation on the basis of citizenship is based on attributes and characteristics that can in certain circumstances impair the fundamental human dignity of persons as human beings or affect them adversely in a seriously comparable manner. I will assume without deciding that the differentiation amounts to discrimination.

Is the discrimination unfair?

[96] As stated in *Harksen*, the test of unfairness primarily focuses on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3) or section 9(4).

[97] Counsel for the applicants submitted that the discrimination impairs the human dignity of the applicants. According to counsel, this is because the impugned provisions restrict the rights of the applicants to be admitted into the legal profession. However,

[49] *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1.

[50] Id at 32.

even if we assume that the right to dignity is engaged, this submission overlooks the fact that the restrictions do not prevent the applicants from ever working in South Africa, and doing so by providing legal services that do not require admission. Section 24(2) of the LPA is narrowly tailored to the admission of legal practitioners. The limitation only restricts them from being admitted as legal practitioners in South Africa. It therefore only reserves the competency or qualification to be an admitted legal practitioner and to practise in that capacity to citizens and permanent residents and does not operate as a blanket ban to employment in the profession as a whole.

[98] In *Watchenuka,* the Supreme Court of Appeal also addressed a different scenario. There every asylum seeker was prevented, by the conditions contained in their permit, from taking up any employment or studying, pending the outcome of their application for asylum. The Supreme Court of Appeal found this to be unacceptable in that the total exclusion from employment rendered an asylum seeker destitute thereby rendering such a person to turn to crime, begging or foraging.[51] In this instance, the impugned provisions do not have that effect.

[99] In *Union of Refugee Women,* this Court in assessing whether the provisions of section 23(1) of the Private Security Industry Regulation Act[52] (Security Act) amounted to unfair discrimination, took into account as some of the relevant factors, the fact that the restriction is not a blanket ban on employment in general but is tailored for the purpose of screening entrants to the industry. Also, this matter is distinguishable from *Union of Refugee Women* in the following respects: Some of the applicants in the present matter are in possession of student visas, are gainfully employed in South Africa, being desirous of pursuing careers in law and have suffered no hardship. On the other hand, the second to thirteenth applicants in *Union of Refugee Women* were all refugees. Secondly, and unlike the applicants in the present matter who were never

[51] *Watchenuka* above n 32 at para 32.

[52] 56 of 2001.

admitted as legal practitioners, the second to sixth applicants in the *Union of Refugee Women* case were initially registered by the Authority as security service providers in terms of section 23 of the Security Act. However, they all received notice of intention to withdraw their registration on the basis that it was granted in error, inasmuch as they were neither citizens nor permanent residents of South Africa, as required by section 23(1)(a) of the Security Act, and they were further asked to file submissions as to why the Authority should not withdraw their registration. The applicants' submissions in that matter stated that, a person who is neither a citizen nor a permanent resident of South Africa may be registered as a security service provider in light of the wording of section 23(6) of the Security Act. Their submissions were unsuccessful and the Authority withdrew the registration accordingly.

[100] Another distinguishing factor is that the Security Act had a provision encapsulated in section 23(6) that despite the requirement of, inter alia, being a citizen of or permanent resident in South Africa, the Authority may on good cause shown and on grounds on which are not in conflict with the purpose of the Security Act and the objects of the Authority, register *any* applicant as a security service provider. This appears to be an exemption clause in that legislation as the power conferred upon the Authority does not refer specifically to foreign nationals, nor does it refer to it being required to engage with another department or body on the matter - it appears to be a wide discretion. On the other hand, in terms of section 24(3) of the LPA, the power afforded to the Minister to make regulations in respect of admission and enrolment of foreign legal practitioners is not so generous.

[101] As previously indicated, the applicants' employability in different capacities that do not require admission as a legal practitioner is not curtailed by section 24(2)(b) of the LPA as currently framed. They are therefore not left destitute with no alternative source of employment. The activity which the applicants seek constitutional protection for is the enjoyment to choose one's vocation and as such this cannot be held to amount to unfair discrimination, as this right does not fall within a sphere of activity protected by a constitutional right available to foreign nationals such as the applicants.

[102] It follows that as the discrimination is not unfair; there is no violation of section 9(3) or section 9(4). In light of this conclusion it is not necessary to determine whether the discrimination is justified. I would thus dismiss the appeal.

Confirmation of the order of invalidity

[101] In light of the above, the application for confirmation of constitutional invalidity falls to be dismissed. I do not see the point in declaring the provisions inconsistent with the Constitution to the extent that non-practising lawyers are not eligible for admission.

Costs

[103] The principles laid down in *Biowatch* are apposite in this matter.

[104] I make the following order:

1. The appeal against the order of the High Court of South Africa, Free State Division, Bloemfontein is dismissed.
2. The declaration made by the High Court that section 24(2) of the Legal Practice Act 28 of 2014 is unconstitutional and invalid to the extent that it does not allow foreigners to be admitted and authorised to be enrolled as non-practising legal practitioners is not confirmed.

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