**IN THE HIGH COURT OF SOUTH AFRICA,**
**FREE STATE DIVISION, BLOEMFONTEIN**

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|---|---|
| **Reportable:** | **YES/NO** |
| **Of Interest to other Judges:** | **YES/NO** |
| **Circulate to Magistrates:** | **YES/NO** |

Case No.: 3609/2020

In the matter between: -

**RELEBOHILE CECILIA RAFONEKE** Applicant

and

**MINISTER OF JUSTICE AND CORRECTIONAL SERVICES** 1st Respondent
**LEGAL PRACTICE COUNCIL OF SOUTH AFRICA** 2nd Respondent
**MINISTER OF TRADE INDUSTRY & COMPETITION** 3rd Respondent
**MINISTER OF LABOUR** 4th Respondent
**MINISTER OF HOME AFFAIRS** 5th Respondent

and

Case No.: 4065/2020

In the matter between: -

**SEFOBOKO PHILLIP TSUINYANE** Applicant

and

**MINISTER OF JUSTICE AND CORRECTIONAL SERVICES** 1st Respondent
**LEGAL PRACTICE COUNCIL OF SOUTH AFRICA** 2nd Respondent
**MINISTER OF TRADE INDUSTRY & COMPETITION** 3rd Respondent
**MINISTER OF LABOUR** 4th Respondent
**MINISTER OF HOME AFFAIRS** 5th Respondent

**FREE STATE ASSOCIATION OF ADVOCATES** *Amicus Curiae*

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| **CORAM:** | C. J. MUSI, JP *et* MOLITSOANE, J *et* WRIGHT, AJ |
| **HEARD ON:** | 02 AUGUST 2021 |
| **DELIVERED ON:** | 16 SEPTEMBER 2021 |
| **JUDGMENT BY:** | C. J. MUSI, JP |

*Introduction*

[1] This judgment concerns the constitutionality of section 24(2)(b) read with 115 of the Legal Practice Act[1]. The applicants allege that these sections are unconstitutional. They approached this court, separately, seeking the following relief:

> '1. That Section 24(2)(b) and (3) of the Legal Practice Act No. 28 of 2014 (read with section 115 of that Act) – to the extent that it precludes persons who are neither citizens of nor permanent residents in the Republic of South Africa (and not admitted as legal practitioners in foreign jurisdictions) from being admitted and enrolled as Legal Practitioners of the High Court – be declared inconsistent with the constitution and therefore invalid.
>
> 2. That the first respondent be directed to take the relevant and appropriate steps to cause amendments to be effected to the impugned legislative provisions in conformity with the order of this court.
>
> 3. That pending the amendments envisaged in paragraph 2 above, the applicant, subject to compliance with the other requirements of the Legal Practice Act, may be admitted as a Legal Practitioner.
>
> 4. That any Respondent who opposes this application be ordered to pay the costs hereof.
>
> 5. That such further and/or alternative relief as this Honourable Court may deem fit, be granted to the Applicant.'

[1] No. 28 of 2014.

[2] Although the applications were brought separately, they were heard simultaneously. The applicants initially engaged different law firms but ultimately decided to make use of one firm.

*Preliminary issues*

[3] The applications were properly served on the respondents. On 27 November 2020, the first respondent filed a notice of intention to oppose. On 19 January 2021 he withdrew the notice of intention to oppose and filed a notice to abide.

[4] Due to the importance of the matter we requested the Free State Society of Advocates to avail one of their members to assist us. We thank Mr. Hefer who was assisted by Ms Ngubeni for their assistance.

[5] On 16 July 2021, the first respondent withdrew the notice to abide and simultaneously filed a notice to oppose.[2] This was beneficial because he nearly robbed us of the opportunity to properly consider the government's policy and reasons. I say this because, after the withdrawal of the notice to abide, the fourth and fifth respondents filed their respective explanatory affidavits, which where useful in the adjudication of this matter.

*Background*

[6] The applicants are citizens of the Kingdom of Lesotho. They both studied at the University of the Free State, where they respectively obtained Baccalaureus Legum (LLB) degrees. They entered into contracts of articles of clerkship, completed vocational training and passed the practical examination for attorneys. They applied to be admitted and enrolled as attorneys of this Court. Their applications were dismissed because they were neither South African citizens nor lawfully admitted to this country as permanent residents.[3] They decided to challenge the constitutionality of this impediment.

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[2] The first respondent formally applied for condonation for the late filing of the notice to oppose and answering affidavit. We granted the application.

[3] See Rafoneke and Another v Free State Law Society and Another Free State High Court Case numbers 1442/2017 and 1419/2017 judgment by Mathebula et Loubser JJ delivered on 22 February 2018.

*Ms Rafoneke*

[7] During 2004, Ms Rafoneke applied for a visa to study in the Republic of South Africa. Having been accepted by the University of the Free State, she was issued with a study visa by the South African Department of Home Affairs.

[8] In January 2005, she enrolled to study Baccalaureus Commercii Law (B. Com Law). During 2009, before completing the B. Com Law degree, she registered for the LLB degree. During 2011, she obtained the former degree and during April 2013 the latter degree was conferred upon her.

[9] On 30 July 2014, in pursuance of her desire to practice law in the Republic of South Africa, she entered into a contract of articles of clerkship for two years with Mr Paul Azar, an attorney of the High Court who practices as such at Azar & Havenga Attorneys Bloemfontein. During this period, she attended and successfully completed the Law Society of South Africa's (LSSA) School for Legal Practice course. Additionally, she had the right of appearance in Lower Courts. Furthermore, she wrote and passed all parts of the practical examination for attorneys.

[10] On 27 July 2016, she was issued with a Lesotho Special Permit (LSP) entitling her to temporarily reside and work in the Republic. It expired on 31 December 2019. The LSP does not give the holder thereof the right to apply for permanent residence status in the Republic of South Africa, irrespective of the period of stay in this country.

[11] On 25 September 2019, her employer applied to the Director-General of Home Affairs for a waiver of the Regulation 18(3) certificate requirement for permanent residency. The application was rejected. Mr R Marhule, the Chief Director: Permits at the Department of Home Affairs, gave reasons for the rejection. He advised her employer on the other options open to Ms Rafoneke. He wrote the following:

'Your communication in the above regard dated 25 September 2019 bears reference.

In terms of section 31(2)(c) of the Immigration Act, 2002, (Act No 13 of 2002), "*upon application, the Minister may under terms and conditions determined by him or her* ***for good cause****, waive any prescribed requirement or form.*" With regard to your application made on behalf of Ms Rafoneke for a waiver of the requirements prescribed in Regulation 18(3)(a) of the Immigration Regulations, I regret to inform you that I could not find any good cause why the waiving of the mentioned requirements should be granted.

When applying for a general work visa, the employer is obliged to satisfy the Director-General that the employment of a foreigner would promote economic growth and would not disadvantage a South African citizen or permanent resident. Documentary proof, in the form of a certification by the Department of Labour, as prescribed in Regulation 18(3)(a) of the Immigration Regulations, must be submitted as proof that a diligent search was done and that the employer was unable to employ a citizen or permanent resident with qualifications of skills and experience equivalent to those of the applicant. The certification by the Department of Labour is consistent with the provisions of the Employment Services Act which, inter alia, aims to regulate the employment of foreigners on local employment contracts. It is thus an important tool to identify positions being offered to foreign nationals in the private and public sector, to bench mark the duties that are required to be performed, as well as the skills and qualifications needed to perform these duties, against the curricula vitae of unemployed South African citizens and permanent residents in the same occupational category.

There are two options available for Ms Rafoneke to continue her employment with Fixane Attorneys. The first option is for her to submit an application for a Lesotho Exemption Permit as recently announced by the Minister of Home Affairs. The alternative is for Fixane Attorneys to make the necessary application to the Department of Labour for the certification which is necessary to process Ms Rafoneke's general work visa application, which application must be submitted at the South African Embassy, High Commission or Consulate-General in her country of origin or of permanent residence.'

On 4 February 2020, she applied for a Lesotho Exemption Permit (LEP) which has the same conditions as a LSP. She was issued with a LEP valid from 25 March 2020 to 31 December 2023. The conditions of the LEP are that:

11.1 she may work in the Republic;

11.2 she may not apply for permanent residence irrespective of the period of stay;

11.3 the permit will not be renewable/extendable and

11.4 she may not change the conditions of the permit in the Republic.

[12] She is currently employed at Fixane Attorneys as a legal consultant since March 2018. Her functions are similar to those of candidate attorneys, although she has no right of appearance and may also not consult with clients. She earns R 8 000 per month. She is apprehensive about her employment situation, since her employer might terminate her employment if she does not get admitted as an attorney. She was not issued with a general work visa.

*Mr Tsuinyane*

[13] Mr Tsuinyane was issued with a study visa and commenced his studies at the University of the Free State. The LLB degree was conferred upon him on 17 April 2013. He obtained a Magister Legum (LLM) degree from the same University, on 11 December 2014.

[14] On 20 May 2014 he entered into a contract of articles of clerkship for two years with Mr Matlho, an attorney of the High Court who practiced as such at Mathlo Attorneys, Bloemfontein. On 11 September 2014, Mr Matlho ceded the rest of his articles of clerkship to Mr McDonald Kenosi Moroka.

[15] He attended the LSSA School for Legal Practice course, additionally, he wrote and passed all parts of the attorneys' admission examinations.

[16] On 24 December 2015 he married a South African citizen. They were blessed with two children. As a result of the marriage he was granted permission to reside with his wife and to work here. They bought immovable property in Bloemfontein.

[17] He is currently employed at Moroka Attorneys as a legal researcher and consultant and earns R10 000 per month. This position was created for him and he is apprehensive that the position might become redundant if he is not admitted as an attorney. He has lived in this country since his student days.

[18] On 11 June 2018, he applied to the Minister of Home Affairs to be granted rights of permanent residence in terms sections 31(2)(b) and (c) of the Immigration Act (IA)[4]. The application was rejected for two reasons. First, he did not file a formal application. Second, because a requirement stipulated in the IA may not be waived. It is clear that section 31(2)(c) was not applicable. He was informed that the waiting period to apply for permanent residence status in the spouse category is 5 years in terms of the IA and it cannot be waived.

[19] He launched this application before the 5-year period lapsed.

*Impugned Sections*

[20] Section 24 of the LPA reads as follows:

> '(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.
>
> (3) Subject to subsection (1), the Minister may, in consultation with the Minister of Trade and Industry and after consultation with the Council, and having regard to any relevant international commitments of the Government of the Republic, make regulations in respect of admission and enrolment to—

[4] Section 31(2)(b) and (c) of the Immigration Act No. 13 of 2002 reads as follows:

'Upon application, the Minister may under terms and conditions determined by him or her-

…

*(b)* grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may-

(i) exclude one or more identified foreigners from such categories; and

(ii) for good cause, withdraw such rights from a foreigner or a category of foreigners;

*(c)* for good cause, waive any prescribed requirement or form; and …'

(*a*) determine the right of foreign legal practitioners to appear in courts in the Republic and to practise as legal practitioners in the Republic; or

(*b*) give effect to any mutual recognition agreement to which the Republic is a party, regulating—

(i) the provision of legal services by foreign legal practitioners; or

(ii) the admission and enrolment of foreign legal practitioners.'

[21] Section 115 of the LPA provides:

> 'Any person who, immediately before the date referred to in section 120(4) [1 November 2018], 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.'[5]

[22] During the hearing, the applicants jettisoned their constitutional challenge aimed at section 24(3) of the LPA.

*Submissions*

[23] The applicants argued that section 24(2)(b) read with section 115 of the LPA violates their right to equality because it differentiates between South African citizens and permanent residence on the one hand and foreigners on the other. They contended that there is no rational relationship between the differentiation and a legitimate governmental purpose. They further argued that even if we find that there is a nexus between the differentiation and a governmental purpose it still amounts to discrimination and that the discrimination is unfair and does not withstand constitutional muster.

[24] They submitted that section 115 of the LPA discriminates against them because foreign legal practitioners from designated countries may be admitted and enrolled to practise in South Africa without being citizens or permanent residents, whereas they who studied and trained here may not.

[5] Section 115 preserves the entitlement of, inter alia, non-citizen advocates, attorneys or solicitors from designated countries, who qualified to be admitted prior to 1 November 2018, to be admitted and enrolled as legal practitioners in South Africa. The commencement date of the LPA was 1 November 2018.

[25] The gravamen of their argument is that non-citizens who are temporary residents ought to be treated like citizens and permanent residents. They submitted that the differentiation serves no legitimate government purpose, it is arbitrary and irrational. They contended that the impugned sections unfairly discriminate against non-citizens based on their social origin and nationality. They contended that they should be admitted and enrolled to practise as attorneys in the Republic of South Africa, after fulfilling the requirements in section 24(2)(a)(c) and (d).

[26] The first, fourth and fifth respondents (Ministers) argued that there is a rational connection between the differentiation and the legitimate government purpose it was designed to further or achieve. They and the amicus curiae contended that the applications should be dismissed because the applicants want to circumvent the employment and immigration laws of the country. The Legal Practice Council (Council) made useful submissions but it did not take a definitive stance.

*Equality*

[27] Our democratic state has as its foundation the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.[6] The Bill of Rights which is the cornerstone of our democracy enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.[7]

[28] Section 9 of the Constitution reads as follows:

> ‘(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

[6] Section 1(a) of the Constitution of the Republic of South Africa, 1996.
[7] Section 7 of the Constitution.

(3) 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.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[29] The different stages to follow when an equality attack is mounted against a provision have been set out in **Harksen v Lane**.[8] Goldstone J, tabulated the stages as follows:

'At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

(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 8(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

[8] Harksen v Lane NO and Others 1998 (1) SA 300 (CC) at para 54.

> 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 8(2).

(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 (section 33 of the interim Constitution).'

[30] In **Minister of Finance v Van Heerden**[9] Ngcobo J succinctly explained the stages as follows:

> 'The proper approach to the question whether the impugned rules violate the equality clause involves three basic enquiries: first, whether the impugned rules make a differentiation that bears a rational connection to a legitimate government purpose; and if so, second, whether the differentiation amounts to unfair discrimination; and if so, third, whether the impugned rules can be justified under the limitations provision. If the differentiation bears no such rational connection, there is a violation of section 9(1) and the second enquiry does not arise. Similarly, if the differentiation does not amount to unfair discrimination, the third enquiry does not arise. '[10]

*Analysis*

[31] Section 24(2)(b) differentiates between citizens and permanent residents on the one hand and non-citizens on the other. Whilst section 115 differentiates between non-citizen legal practitioners who have been admitted in designated foreign countries and non-citizens from those countries, who have never been admitted but seek to be admitted and enrolled as legal practitioners in the Republic of South Africa.

[32] The Ministers referred extensively to the provisions of the IA and the Employment Services Act (ESA)[11] in order to show the rational connection between the impugned provisions and the governmental purpose.

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[9] Minister of Finance v Van Heerden 2004 (6) SA 121 (CC).
[10] Ibid. at para 111.
[11] Act 4 of 2014.

[33] I agree with the Ministers that the LPA should not be viewed in isolation. The impugned provision must be adjudged in light of the Constitution and in conjunction with the IA and the ESA.

[34] 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.'

[35] The right in section 22 is granted to citizens. It has been said that 'under the Constitution a foreigner who is inside this country is entitled to all fundamental rights in the Bill of Rights except those expressly limited to South African citizens'.[12]

[36] The LPA regulates the legal profession. In **Affordable Medicines Trust**[13] the Constitutional Court held that:

> 'These two constitutional constraints define the scope of the regulation of the practice of a profession which is permitted under section 22. Legislation that regulates practice will pass constitutional muster if (a) it is rationally related to the achievement of a legitimate government purpose; and (b) it does not infringe any of the rights in the Bill of Rights. What the Constitution therefore requires is that the power to regulate the practice of a profession be exercised in an objectively rational manner. As long as the regulation of the practice, viewed objectively, is rationally related to the legitimate government purpose, a court cannot interfere simply because it disagrees with it or considers the legislation to be inappropriate.'[14]

[37] Section 15(1)(ii)(aa) of the repealed Attorneys Act[15] stated that the Court shall admit and enrol a person who is, *inter alia,* a South African citizen or has been lawfully admitted to the Republic for permanent residence therein and is ordinarily resident in the Republic. These requirements have been retained in the LPA.

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[12] Union of Refugee Women v Director: Security Industry Authority 2007 (4) SA 395 (CC) at para 46.
[13] Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC).
[14] Ibid. at para 77.
[15] Act 53 of 1979.

[38] The LPA was assented to on 20 September 2014 and its commencement date was 1 November 2018. On 6 March 2014, the Law Society of South Africa (LSSA) sent a letter to the office of the Deputy Director-General: Immigration Services advising that it is in favour of the retention of the citizenship or permanent residence requirement for admission as an attorney. It substantiated its view by stating that:

> 'A 'blanket' provision for foreigners to qualify will have a negative impact on many graduates who find it difficult to secure articles of clerkship or community service for purpose of qualification. In some provinces a substantial number of students of LEAD have not found work by the end of the programme (e.g. in Polokwane). In 2011, 3300 LLB students graduated, but 2200 contracts of articles were registered in 2012. We should guard against actions that will limit the transformation of the profession, both in terms of access by law graduate and professional advancement of young South African practitioners…
>
> A legal practitioner providing legal services to local clients, and which may affect local persons other than the clients, must have a permanent presence in South Africa, in cases detrimental or damaging consequences flow from such legal services. The continued presence of the legal practitioner is to protect the clients and the public. In fact, section 15(1)(b) of the Attorneys Act uses the words, 'is a South Africa citizen or has been lawfully admitted to the Republic for permanent residence therein **and is ordinarily resident in the Republic**' [emphasis added]. The permanent residence of the legal practitioner places that practitioner under the regulatory and disciplinary jurisdiction of the statutory Law Societies and the High Courts. Members of the public thus have some redress in cases where the legal practitioner defrauded them or otherwise caused prejudice to them.'

[39] Although the statistics cited by the LSSA are outdated, they indicate that at the time many students graduated but a sizeable number could not secure contracts of articles of clerkship. The statistics also indicate that the LLB degree is conferred upon many law graduates annually. It is therefore rational for the LSSA to take a stance that is in favour of catering for young South Africans or permanent residents to enter the profession without competition from foreigners from the rest of the world.

[40] There is a risk in allowing non-citizens to practise. Society and clients need to be protected. These are in my view not fatal considerations in favour of the retention of the differentiation because citizens and permanent residents can also and do sometimes embezzle clients' money. It is a fact that some, albeit very few, legal practitioners commit acts of dishonesty that put clients at peril. It has been said that:

> 'Once admitted, a legal practitioner is expected to maintain a high standard of personal and professional integrity. If he does not, he risks having his name removed from the roll of practitioners for conduct which is considered unprofessional, dishonourable or unworthy.'[16]

[41] LPA seeks, amongst others, to –

> '(a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the constitution and ensures that the rule of law is upheld;
> (b) broaden access to justice by putting in place - …
> (iii) measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic; …'

[42] In order to have a legal profession that broadly reflects the demographics of the Republic of South Africa it is reasonable and rational for the LPA to regulate entry into the profession in order to meet that stated objective.

[43] The preamble to the IA states that:

> 'in providing for the regulation of admission of foreigners to, their residence in, and a departure from the Republic and four matches connected therewith, the immigration act aims at setting in place a new system of immigration control which ensures that – economic growth is promoted through the employment of needed foreign labour, foreign investment is facilitated, the entry of exceptionally skilled qualified people is enabled, skilled human resources are increased, academic exchanges within the South African development community is facilitated and tourism promoted.'

[16] Lake v Law Society, Zimbabwe 1987 (2) 459 (ZHC) at 465H-I. This applies to legal practitioners of all hues.

[44] The IA defines 'work' as follows:

> ' 'work' includes-
> (a) conducting any activity normally associated with the running of a specific business; or
> (b) being employed or conducting activities consistent with being employed or consistent with the profession of the person, with or without remuneration or reward, with in the Republic'

[45] A legal practitioner who practises as such is working, regardless of whether the practitioner does so for his or her own account or is employed by a firm. In general a work visa may be issued by the Director-General of Home Affairs to a foreigner who complies with the prescribed requirements.[17] A critical skills visa may be issued to an individual possessing such skills or qualifications determined to be critical for the Republic by the Minister.[18]

[46] Section 8 of the ESA states the following:

> '(1) An employer may not employ a foreign national within the territory of the Republic of South Africa prior to such foreign national producing an applicable and valid work permit, issued in terms of the Immigration Act.
> (2) The Minister may, after consulting the board, make regulations to facilitate the employment of foreign nationals, which regulations may include the following measures:
> (a) the employers must satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy, before recruiting a foreign national;
> (b) the employers may make use of public employment services or private employment agencies to assist the employers to recruit a suitable employee who is a South African citizen or permanent resident; …'

[17] Section 19(2) of the IA.
[18] Section 19 (4) of the IA.

[47] Regulation 18(3)(a)[19] provides:

> 'an application for a general work visa shall be accompanied by –
> (a) a certificate from the Department of Labour confirming that –
> (i) despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant;
> (ii) the applicant has qualifications or proven skills and experience in line with the job offer;
> (iii) the salary and benefits of the applicant are not inferior to the average salary and benefit of citizens or permanent residents occupying similar positions in the Republic; and
> (iv) the contract of employment stipulating the conditions of employment signed by both the employer and the applicant is in line with the labour standards in the Republic and is made conditional upon the channel work visa being approved; …'

[48] It is clear from the provisions of the IA, ESA and the LPA that the government's policy position is to make sure that work which does not entail a scarce or critical skill should be preserved for South African citizens or permanent residents. The legal profession is not classified as a rare or critical skill. The applicants did not argue otherwise. The assertion by the first respondent that there are many unemployed law graduates in South Africa who are citizens or permanent residents was also not gainsaid. In my view if foreign nationals are allowed to practise in this country without due regard to the Labour and Immigration laws, the government's objective and the country's laws would be rendered nugatory.

[49] Employers are required to adhere to the provisions of the ESA and the IA when employing foreigners. This court can take judicial notice of the fact that the unemployment rate in this country is very high. Measures aimed at reducing the unemployment rate and also making sure that scarce skills that foreigners can bring are harnessed to achieve economic growth is in my

[19] Regulations promulgated by the Minister of Home Affairs in terms of section 7 of the IA.

judgment rational. There is, in my view, a rational connection between prohibition in section 24(2)(b) and the government's objective.

*Effect of section 115*

[50] The LPA repealed the Advocates Admission Act[20] (AAA) and the Attorneys Act (AA)[21]. In terms of section 5 of the AAA a non-citizen advocate who practised in a designated country could be admitted and authorised to practise in this country. Section 5 provided:

> '(1) Notwithstanding anything to the contrary in this Act contained but subject to the provisions of any other law, any division may admit to practise and authorize to be enrolled as an advocate any person who upon application made by him satisfies the court-
>
> (a) that he has been admitted as an advocate of the Supreme or High Court of any country or territory outside the Republic which the Minister has for the purposes of this section designated by notice in the *Gazette* (in this Act referred to as a designated country or territory);
>
> (b) that he resides and practises as an advocate in the designated country or territory in which he has been so admitted;
>
> (c) that he is a fit and proper person to be so admitted; and
>
> (d) that no proceedings are pending or contemplated to have him suspended from practice or to have him struck off the roll of advocates of the said Supreme or High Court.
>
> (2) Any person who is admitted and authorized to practise and to be enrolled as an advocate in terms of sub-section (1), shall be enrolled as an advocate on the roll of advocates.
>
> (3) Any notice published in the *Gazette* under sub-section (1) whereby any country or territory has been designated for the purposes of this section, may at any time be withdrawn by the Minister by a subsequent notice in the *Gazette*, and thereupon any country or territory referred to in such first mentioned notice shall cease to be a designated country or territory.'

[51] I have already referred to section 15 of the AA that required citizenship or permanent residency for admission as an attorney. Section 17 of the AA read as follows:

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[20] Act 74 of 1964.
[21] Act 53 of 1979.

'Notwithstanding the provisions of this Act, but subject to the provisions of section 19, any person admitted and enrolled as a solicitor or an attorney of the supreme or high court of any country or territory approved for the purposes of this section by regulation made under section 81 (1) (*a*), may be admitted and enrolled by the court as an attorney in the Republic upon satisfying the court that he

(*a*) has been admitted and enrolled as a solicitor or an attorney of that supreme or high court, and that no proceedings are pending to have him or her struck off the roll of solicitors or attorneys or suspended from practice;

(*b*) is resident and practising as a solicitor or an attorney in the country or territory in which he or she has been so admitted and enrolled;

(*b*A) belongs to a class of persons (if any) which has been designated by regulation made under section 81 (1) (*a*); and

(*c*) is a fit and proper person to be admitted and enrolled as an attorney in the Republic.'[22]

[52] The applicants point out that section 17 of the AA did not contain the exclusionary requirement of citizenship or permanent residency contained in section 15 of the AA. They submitted that sections 15 and 17 of the AA, respectively, discriminated against non-citizens who were not permanent residents of the Republic and had not been admitted as attorneys and solicitors in foreign jurisdictions.

[53] They contended that the LPA perpetuates the differentiation between foreign nationals who are similarly placed in terms of 'status' in that:

(a) it precludes foreign nationals (not being permanent residents of South Africa) who have not been admitted as attorneys or solicitors in designated foreign jurisdictions, from admission and enrolment as legal practitioners in South Africa; yet

[22] Section 19 of the AA stated:

'(1) Any person who applies to a court to be

(*a*) admitted as a practitioner, shall at least one month; or

(*b*) readmitted as a practitioner, shall at least three months, before the date of his or her application deliver to the secretary of the society having jurisdiction in the area in which the court to which such application is made, is situated, together with his or her notice of application, a copy of his or her application for admission or readmission and copies of all affidavits, certificates and other documents or papers which are referred to therein or connected therewith.

(2) Upon production to the secretary referred to in subsection (1), of the application, affidavits, certificates, documents and other papers referred to therein, the secretary shall, upon payment of the fees prescribed under section 80, certify on such application that the provisions of this section have been complied with.

(3) Unless such certificate has been obtained, the person concerned shall not make his or her application to the court.'

(b) it entitles non-citizens to be admitted and enrolled as legal practitioners in South Africa, who are admitted as attorneys or solicitors in the designated foreign jurisdictions.

[54] They highlighted that they fall under category (a) of the preceding paragraph. They point out that the differentiation against them is irrational especially in circumstances where they:

(i) have studied and acquired legal qualifications at a South African University;

(ii) registered for and underwent the necessary practical vocational training in South Africa; and

(iii) successfully completed the prescribed competence and admission examinations.

[55] They contended that foreign nationals referred to in (b) are considered worthy of admission as legal practitioners in South Africa by virtue of the mere admission as legal practitioners in those designated foreign jurisdictions.

[56] They argued that there is absolutely no reason why the persons in the category into which they fall should be singled out and be precluded from admission and enrolment as legal practitioners. That being the case, so they argued, there is no lawful and reasonable justification for their exclusion and such exclusion is therefore arbitrary.

[57] I am not convinced that the differentiation is arbitrary. First, the foreign nationals who are admitted to practise in this country must ordinarily reside and practise in their respective countries. Unlike the applicants who reside in the Republic.

[58] Second, they are already admitted as legal practitioners in their respective countries. The entitlement to be admitted and enrolled in this country is as a result of comity and/or reciprocal relations between two or more sovereign states. These kinds of reciprocal arrangements and agreements are commonplace in international relations. It is a policy decision that is taken by

government which is dependent on various factors that influence the decision. It is not the domain of a Court to second-guess a policy decision taken by government to allow practitioners from designated countries to practise in the Republic.

[59] In India their Act[23] specifically makes reference to the principle of reciprocity. Section 47(1) of that Act unequivocally states that:

> 'Where any country, specified by the Central Government in this behalf by notification in the Official Gazette, prevents citizens of India from practising the profession of law or subjects them to unfair discrimination in that country, no subject of any such country shall be entitled to practise the profession of law in India.'

[60] Third this country also has international obligations to comply with. One such obligation is General Agreement on Trade in Services (GATS), which South Africa signed on 15 April 1994, and ratified.[24]

[61] Fourth, the applicants' qualifications, skills, knowledge and competence are not in issue when determining whether they should be admitted and authorised to practise in South Africa. The real issue is whether, for example, a person who has entered the country on a study visa may circumvent the country's immigration and employment laws simply because that person has completed his or her studies, vocational training and board examinations in the Republic.

[62] Fifth, and allied to the fourth point, is the fact that on the applicants' argument, a person who entered this country with a concession to study here would, by virtue of completing his or her studies, be allowed to change his or her status without regard to any other legal impediments.

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[23] The Advocates Act, 1961.

[24] See C Hagenmeier: International Trade in Legal Services: Admission Rules for Foreign Attorneys in South Africa in the light of GATS. https://www.ialsnet.org/meetings/business/HagenmeierCornelius-South Africa.pdf accessed on 25 August 2021. Hagenmeier is very critical of South Africa's protectionist stance and argues for the liberalization of the admission of foreign legal practitioners.

[63] Sixth, to allow a person with a temporary residence permit for a specified period to practise would put members of the public at peril. Such permits lapse and their renewal, if allowed, is subject to Ministerial approval, which is not guaranteed. Clients will be prejudiced during the period between the lodging of the renewal or extension application and its approval. Claims might prescribe. Trials will have to be postponed, taken over by other practitioners or even start afresh at considerable expense and inconvenience. Foreign legal practitioners who are allowed to practise here are not subject to similar restrictions.

[64] The differentiation between non-citizens who are already admitted and enrolled in designated countries and those who are not permanent residents in this country is rational and serves a legitimate government purpose.

*Admission of non-citizens*

[65] There was an issue which was foreshadowed in the papers but not dealt with in the parties' heads of arguments. During the hearing, I requested all the parties to address us on the issue. They duly did. The issue is, can a person – citizen, permanent resident or non-citizen – be admitted as a practitioner without being allowed to practise?

[66] In Ms Rafoneke's replying affidavit to the first respondent's answering affidavit she stated the following:

> 'The first respondent confuses the issue of admission with that of employment. Of course, a foreign national admitted as a legal practitioner must still comply with the relevant requirements of employment in the Republic, including work visas.'

[67] In Mr Tsuinyane's founding affidavit he alleged that the impugned provisions adversely prejudice him because:

> 'It limits my competitiveness in the job market. I cannot secure any employment that requires a candidate to be an admitted attorney. With my current occupation, I do not earn a similar income to that of persons who are professionals in the same position and level of experience as I am; …'

[68] Section 15 of the AA stated that the Court shall admit and enrol a person as an attorney if the stated requirements were met. Section 24(1) of the LPA states that a person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such. Section 24(2) states that the High Court must admit to practise and authorise to be enrolled as a legal practitioner any person who meets the requirements set out in the section.

[69] There is a deliberate and important difference between the two Acts. In terms of the AA the court had to admit and enrol. Currently, the Court only admits but authorises enrolment. The enrolment of an admitted legal practitioner is now done by the Legal Practice Council (Council). The LPA has disaggregated admission and enrolment.

[70] The Court must admit to practise and authorise enrolment. The verb 'practise' is not defined in the LPA. It is defined as 'carry out or perform habitually or constantly… work at, exercise, or pursue a profession, occupation, etc., as law or medicine …'[25] I must make plain that to practise may also mean performing a single isolated act of practising as an attorney or legal practitioner.[26] In **Lake v Law Society, Zimbabwe** the equivalence of the expressions 'to practise' and 'to carry on a business' was accepted after a thorough investigation of the meaning of the phrase 'to practise'.[27] I am convinced of their equivalence in the context of section 24(2) of the LPA. The words 'admit to practise' therefore means that the Court admits the person to work as a legal practitioner.

[71] It does not make sense for the Court to admit a person to practise, as defined in the dictionary and judicially, when that person does not have any intention to practise. It makes sense for the Court to admit a person as a legal practitioner and authorise the Council to enrol him or her as such. This interpretation is consonant with the rest of the provisions of the LPA and the

[25] The new shorter oxford dictionary, Vol 2 Edited by Lesley Brown.
[26] R v Weitz 1930 ELD 311 at 315.
[27] fn 16 at 470 C-G.

rules, for example, the LPA defines an attorney as a legal practitioner who is admitted and enrolled as such under this Act and legal practitioner is defined as an advocate or attorney admitted and enrolled as such in terms of section 24 and 30 respectively.

[72] The objections by the Ministers against admitting non-citizens are to ensure that there is compliance with immigration and employment legislation. What about those persons who want to be admitted but do not want to practise? Put differently, what about persons who want to be admitted here but not work here?

[73] Many citizens may want to be admitted as legal practitioners without any intention to practise. Likewise, non-citizens may want to be admitted without practising in this country. As section 24(2) currently reads it does not provide for such situations. Instead it allows the Court, as illustrated above, to admit the prospective practitioner to work in the Republic. What benefits would non-citizens derive from a dispensation that allows them to be admitted but not allowed to practise?

[74] First and obvious, they may now be admitted and enrolled as non-practising legal practitioners.

[75] Second, in a globalised world where business is done across countries and continents, many non-citizens would want to obtain the qualification, be admitted as non-practising legal practitioners in this country and work in their own countries for multinational companies that do business in South Africa. This will enhance their employability in their own countries.

[76] Third, some non-citizens would want to be admitted as non-practising legal practitioners and work legally in South Africa as legal advisers for insurance companies or companies that have legal sections or divisions. They might want to work for non-governmental organisations or community-based organisations.

[77] Fourth, some non-citizens might want to get admitted as non-practising legal practitioners whilst waiting to be admitted as permanent residents of the Republic. On meeting all the immigration and work requirements, they would then only apply for conversion from non-practising legal practitioners to practising legal practitioners.

[78] Fifth, it would not open the floodgates, as argued by the Council. Non- citizens are currently allowed to study at South African universities and on completion of their studies, enter into contracts of articles of clerkship, complete vocational training and sit for the attorneys' admission examination. After all this, they are prohibited from being admitted as non-practising attorneys for no legitimate reason at all. It is reasonable and rational that their studies and training culminate in admission.

[79] Sixth, allowing non-citizens who meet all the criteria for admission to be admitted and enrolled as non-practising legal practitioners also promotes one of the objectives of the LPA, stated in its preamble, i.e. to remove any unnecessary or artificial barriers for entry into the legal profession.

[80] The Council's role in enrolment is set out in section 30 of the LPA and the Council's Rules. Section 30 reads:

> '(1) (*a*) A person duly admitted by the High Court and authorised to be enrolled to practise as a legal practitioner must apply to the Council in the manner determined in the rules, for the enrolment of his or her name on the Roll.
>
> (*b*) The application referred to in paragraph (a) must—
>
> (i) be accompanied by the fee determined in the rules;
>
> (ii) indicate whether the applicant intends to practise as an attorney or an advocate and, in the case of an advocate, whether he or she intends practising with or without a Fidelity Fund certificate; and
>
> (iii) be submitted to the Council in the manner determined in the rules through the Provincial Council where the legal practitioner intends to practise.
>
> (2) The Council must enrol the applicant as an attorney, advocate, notary or conveyancer, as the case may be, if he or she complies with the provisions of this Act.

(3) The Council must keep a Roll of Legal Practitioners, as determined in the rules, which must reflect—

(*a*) the particulars of practising and non-practising legal practitioners and, in the case of advocates, whether they practise with or without a Fidelity Fund certificate;

(*b*) the name of every person admitted as a legal practitioner in terms of this Act and the particulars of the order of court in terms of which he or she was admitted;…'

[81] In terms of section 32(3) of the LPA the Council may make rules regulating the circumstances under which a legal practitioner can apply for the conversion of his or her enrolment and any requirements such legal practitioner must comply with. Rule 30 read with rule 31 regulate conversions. Rule 31 reads as follows:

'31.1 Any person admitted by the High Court and enrolled to practise as a legal practitioner under the Act or admitted and enrolled as a non-practising legal practitioner may, in the manner prescribed by rule 30.2, apply to the Council through the Provincial Council where the legal practitioner intends to practise, or in the case of an applicant who is a practising legal practitioner intending to convert his or her enrolment to that of a non-practising legal practitioner, where that legal practitioner resides, to convert his or her enrolment as a practising legal practitioner to that of a non-practising legal practitioner, and vice versa.

31.2 The provisions of rule 30.2, apply to an application in terms of rule 31.1, with the changes required by the context.

31.3 The Council may require that information referred to in rule 30.2 be submitted in a form to be determined by the Council.

31.4 The application referred to in rule 31.1 must be signed by the applicant, and must be accompanied by the following:

31.4.1 proof of payment of the prescribed fee;

31.4.2 a certificate signed by the registrar of every High Court to which the applicant applied for admission that no proceedings are pending or are contemplated to strike the name of the applicant off the roll or to suspend the applicant from practice (in the case of a practising legal practitioner).

31.5 **Where the applicant is a practising legal practitioner, and the Council is satisfied that the applicant is entitled to convert his or her enrolment to that of a non-practising legal practitioner, the Council shall remove the name of the applicant from the roll of practising legal practitioners and**

**shall place the name of the applicant on the roll of non-practising legal practitioners.**

**31.6 Where the applicant is a non-practising legal practitioner and the Council is satisfied that the applicant is entitled to convert his or her enrolment to that of a practising legal practitioner, the Council shall remove the name of the applicant from the roll of non-practising legal practitioners and shall place the name of the applicant on the roll of practising legal practitioners.'** (My Emphasis.)

[82] Nothing in the rules proscribe the admission of a person by a High Court and that Court authorising the enrolment of such person as a non-practising legal practitioner. This might, at first glance, seem like a placebo. It has, as illustrated, many practical advantages for non-citizens like the applicants.

[83] They will not be able to practise as attorneys, because 'attorney' is defined as a legal practitioner who is admitted and enrolled as such under this act. That enrolment can only be enrolment to practise as an attorney[28].

[84] In terms of section 33 of the LPA they would not be able to legally work or be paid as practising legal practitioners. Section 33 provides:

'(1) Subject to any other law, no person other than a practising legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward—

(a) appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear; or

(b) draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.

(2) No person other than a legal practitioner may hold himself or herself out as a legal practitioner or make any representation or use any type or description indicating or implying that he or she is a legal practitioner.

(3) No person may, in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary, unless

[28] See section 34(1) of the LPA which states that an Attorney may render legal services at a fee upon receipt of a request directly from the public.

> that person is a practising advocate, attorney, conveyancer or notary, as the case may be.'

[85] Contravention of the provisions of section 33 is a criminal offence, punishable on conviction to a fine or to imprisonment not exceeding two years or to both such fine and imprisonment.[29]

[86] The justification for not allowing non-citizens to be admitted proffered by the Ministers and the Council, do not offer a counterweight against these considerations. The protectionist argument in favour of South African citizens and permanent residents is also not a counterbalancing force. As illustrated above, South African citizens' and permanent residents' interests in entering the job market might not even be threatened by the admission and enrolment as non-practising legal practitioners of non-citizens who are not permanent residents.

[87] In fact, although the unemployment figures are unacceptably high in South Africa, there are relatively few unemployed graduates. A study by Statistics South Africa shows that of the 7,8 million unemployed persons in the second quarter of 2021, as many as 51,5% had education levels below matric, followed by those with matric at 38%. Only 2,4% of unemployed persons were graduates, while 7,7% had other tertiary qualifications as their highest level of education.[30]

[88] The upshot of all this is that an indiscriminate and blanket bar against non-citizens, similarly placed as the applicants, being admitted in this country is irrational. It serves no governmental purpose. It does not take into consideration the unique circumstances of some non-citizens who would want to be admitted as non-practising legal practitioners.

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[29] See section 93(2) of the LPA.

[30] Statistics South Africa; Quarterly Labour Force Survey, Quarter 2: 2021. (*www.statssa.gov.za/?page_id=1854&PPN=P0211* – 27 August 2021)

[89] Both applicants have instruments that allow them to work in this country. I can conceive of no reason why a person on a spousal visa or LEP cannot be admitted as a non-practicing legal practitioner. This will give them an opportunity to better their circumstances. After the waiting period, a person with, for example, a spousal visa can then follow a less cumbersome process by applying for a conversion.

[90] In my judgment section 24 of the LPA does not pass constitutional muster to the extent that it prohibits non-citizens to be admitted and authorised to be enrolled as non-practising legal practitioners.

*Discrimination*

[91] This finding does not spell the end of the matter. The applicants' main contention was that even if there is a rational connection between the impugned sections and the legitimate governmental purpose, the sections unfairly discriminate against them because they want to be admitted to practise in the Republic. They argued that the discrimination is based on social origin, which is a listed ground in section 9(3) of the Constitution. Additionally, they argued that the sections unfairly discriminate against them based on their nationality, which is not a listed ground.

[92] If I find that there was discrimination, I must thereafter enquire whether that discrimination was in the circumstances of this matter unfair.

[93] I turn to consider the assertion that there is discrimination based on social origin. Social origin is not defined. In order to substantiate their assertion that they have been unfairly discriminated against based on their social origin, the applicants argued that because they belong to a particular group which are non-citizens in South Africa they suffer discrimination based on their social origin.

[94] It has been said that social origin includes concepts such as class, clan or family membership.[31] The concept social origin defies uniform definition or characterisation. Internationally, it is predominantly dealt with in the employment law context.

[95] In Australia, it's fair work commission described it as follows:

> 'social origin includes social class, socio-occupational category and caste. Social origin may not be used to deny certain groups of people access to various categories of jobs or limit them to certain types of activities.
>
> A caste is a hereditary social group, consisting of people who generally marry within that group, and have customs and conventions which distinguish it from other such groups.
>
> Social origin includes factors other than country of birth. It refers to elements that a person adopts from the surrounding culture. These include, but are not limited to, language mother tongue/s, life-cycle customs such as initiation into religious community, formation of edible, and such things as diverse as stress and diet.
>
> What determines social origin is not merely self-defined, but also depends upon the way in which a person is recognised by the dominant or maturity group in the community in which that person socialises, lives and works. Consequently, a person may have one social origin in one circumstance and different one in another.'[32]

[96] In Quebec their human Rights Charter refers to 'social condition'. It has been observed that social condition refers to a person's present situation whereas social origin refers to a person's birth and past.[33]In **Quebec v Gauthier**[34] social condition was described as having both an objective and a subjective component. This is similar to the description in the Australian fair work

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[31] Currie & De Waal: The Bill of Rights Handbook, sixth edition Juta 2013 at page 236.

[32] https://www.fwc.gov.au/general-protections-benchbook/otherprotections/discrimination/social-origin accessed on 26 August 2021. See A Capuano: The meaning of "social origin" in International Human Rights Treaties: A Critique of the CESCR's Approach to "Social Origin" Discrimination in the ICESCR- and its (Ir)relevance to National Contexts such as Australia. New Zealand Journal of Employment Relations, 41(3):91-110 for a thorough discussion of the concept.

[33] Prof Lucie Lamarche: Social condition as a prohibited ground of discrimination in human rights legislation: Review of the Quebec Charter of Human Rights and Freedoms November 1999.

[34] Quebec (Comm. Des droit de la personne) (1993) 19 C.H.R.R/ D/312.

commission's definition. William Black describes social condition or origin as a ground to protect poor people.[35]

[97] In this matter the applicants used exactly the same conditions and characteristics to illustrate that they were unfairly discriminated against based on social origin and or their nationality. I accept that there may be intersectionality between different forms of discrimination, e.g. poverty and race and race and gender. Probably between nationality and social origin too. I therefore do not have to give a definitive view on whether they have properly proven that they were discriminated against based on their social origin because they have, in my view, sufficiently proven that they were discriminated against based on their nationality.

[98] This is so because:

> 'There will be discrimination on an unspecified ground if it is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.'[36]

[99] They probably included social origin in order to establish discrimination based on a listed ground in order to shift the onus in terms of section 9(5).

[100] In **Labri-Odam v MEC for Education**[37] the constitutional court definitively determined that discrimination based on citizenship is an analogous or unspecified ground. The court pointed out that:

> 'first, foreign citizens are a minority in all countries, and have little political muscle…
> Second, citizenship is a personal attribute which is difficult to change…
> This general lack of control over one's citizenship has particular resonance in the South African context, where individuals were deprived of rights and benefits, ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race. Many became statutory foreigners in their own country under bantustan policy,

[35] William Black, BC Human Rights Review; Report on Human rights in British Colombia 1964 at page 170.
[36] Harsen v Lane supra at para 47.
[37] Labri-Odam v MEC for Education (North-West Province) 1998 (1) SA 745 (CC).

> and the legislator even managed to create remarkable beings called 'foreign natives'. Such people were treated as instruments of cheap labour to be discarded at will, with scant regard for their rights or the rights of their families.'[38]

[101] I find that the ground of citizenship or permanent residence in the impugned section of the LPA is based on attributes and characteristics which have the potential to impair the fundamental human dignity of non-citizens affected by it. They have in my judgment established discrimination based on nationality. The enquiry does not stop here. I turn to consider whether the discrimination is unfair.

*Is the discrimination unfair?*

[102] In **Hugo,** O'Regan J explained that even though there might be discrimination, the enquiry must still be whether the impact of the discrimination was unfair.[39] She elaborated as follows:

> 'To determine whether the discrimination is unfair it is necessary to recognise that although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality. There are at least two factors relevant to the determination of unfairness: it is necessary to look at the group or groups which have suffered discrimination in the particular case and at the effect of the discrimination on the interests of those concerned. The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair. In determining the effect of the discrimination, the reasons given by the agency responsible for the discrimination will be only of indirect relevance. However, should the discrimination in any particular case be held to be unfair, the reason for the discriminatory act may well be central to an investigation into whether the discrimination is nevertheless justified in terms of s 33 of the interim Constitution.'

[38] Ibid at para 19.
[39] President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC) at para 111.

[103] I accept that the refusal to admit them to practise and authorise their enrolment causes hardship. I accept that their professional and economic development have been stunted. I must also be mindful of the economic and unemployment realities of South Africa and the government's endeavour to address those.

[104] The Department of Employment and Labour has a constitutional duty to ensure that the employment of foreign nationals in South Africa is aligned to the economic growth of the Republic. This must be done in a manner that does not place citizens and permanent residents of South Africa at a disadvantage.

[105] According to the fourth respondent, the Department of Employment and Labour has a database wherein employers are required to register vacancies in their respective firms or companies. The purpose of the database is to ensure that the Department achieves its objective of facilitating employment in South Africa by keeping a proper record of employed and unemployed citizens and permanent residents. The Department then seeks to place citizens and permanent residence in vacancies.

[106] The reality is, authorising the Council to enrol a person as a practising legal practitioner means that the court effectively entitles the person, without more, to work in the country. This in essence means that the Court would be sanctioning an activity that is directly in conflict with governmental policy and the law. The court may not allow people to engage in illegal activities.

[107] This is aptly illustrated by the situation where a person enters the Republic on a study visa. The person registers and completes her or his LLB degree, vocational training and passes the attorneys admissions exam. Admitting and authorising the enrolment of such a person would be tantamount to changing such person's status from student to worker without the intervention of the Department of Home Affairs. The Court would then be part of a process that short-circuits a legal process. That cannot be right.

[108] Section 22 of the Constitution guarantees citizens and by extension permanent residents the right to choose their trade, occupation or profession freely. Non-citizens in the class of the applicants are expressly excluded.

[109] Many democracies limit the right of non-citizens to practise law in those jurisdictions.[40] In the Republic of Kenya, 'no person shall be admitted as an advocate unless he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania'.[41]Foreign advocates my appear under very restricted circumstances, among others, only on the instructions of and with a Kenyan advocate. A foreign advocate is not entitled to sign or file any pleadings in Court.[42]

[110] In Namibia, a person must be a Namibian citizen or must be lawfully admitted to Namibia for permanent residence therein and must be ordinarily resident in Namibia.[43]

[111] Botswana has three admission dispensations. One for citizens; one for Commonwealth citizens and one for non-citizens. The dispensation for non-citizens states:

'A person who is not a citizen of Botswana shall be qualified to be admitted as a legal practitioner if he satisfies the court that he is ordinarily resident in Botswana or intends to reside permanently in Botswana and there is a reciprocal provision in the law of the country of which he is a citizen to permit a citizen of Botswana qualified in terms of the law of that country to be admitted to practise in that country.'[44]

[40] The IBA Global Regulation and Trade in Legal Services Report 2014, contains a very useful compendium of Countries and States that either has a citizenship or permanent resident requirement and those that do not have such requirement.
[41] Section 12 of the Advocates Act 18 of 1989 as amended.
[42] Section 11 of the Advocates Act.
[43] Section 4(1)(c) Legal Practitioners Act 15 of 1995.
[44] Section 6 (1)(c) and (d) of the Legal Practitioners Act, 1996.

[112] Section 24 of India's Advocates Act provides that:

> 'subject to the provisions of this Act, and the rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfils the following, namely;- he is a citizen of India; provided that subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practise law in that other country.'[45]

[113] The applicants can apply to become permanent residents if their entry visa and work permits allows them to do so. In the case of Mr Tsuinyane he qualifies for permanent residency in terms of section 26 of the IA which states that the Director–General may issue a permanent residence permit to a foreigner who:

> '(a) has been the holder of a work visa in terms of this Act for five years and has proven to the satisfaction of the Director-General that he or she has received an offer for permanent employment;
> (b) has been the spouse of a citizen or permanent resident for five years and the director-general is satisfied that a good faith spousal relationship exists: provided that such permanent residence permit shall lapse if any time within two years from the issue of that permanent residence permit the good faith spousal relationship no longer subsists, save for the case of death; …'

[114] Although the LEP issued to Ms Rafoneke does not entitle her to apply for permanent resident status. She is entitled to work in this country during the validity of the permit. Her employer may also apply that a general work visa be issued to her.

*Ruling*

[115] I find that the discrimination in section 24(2)(b) of the LPA is fair. That being the case, there is therefore no need to consider section 36 of the Constitution. I, however, find that section 24(2) of the LPA is inconsistent with the

[45] Supra.

Constitution and invalid to the extent that it does not allow non-citizens to be admitted and authorised to be enrolled as non-practising legal practitioners.

*Remedy*

[116] After considering different remedies I decided that a just and equitable remedy would be a declaration of invalidity and a suspensive order to allow the legislature to cure the defect. Due to the hardships that non-citizens are exposed to and the immediate change in their employability, development and financial position this judgment might bring, I have decided to grant interim relief. The interim relief will benefit non-citizens but would not prejudice the government's policy or the interest of practising legal practitioners.

*Costs*

[105] The parties were correctly of the view that the Biowatch[46]principle should apply. I agree.

*Order*

[106] I make the following order:

1. Section 24(2) of the LPA is declared 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.

2. The declaration of invalidity is suspended for 24 months from the date of this order to allow parliament to rectify the defects as identified in this judgment.

3. During the period of suspension the operation of the order of invalidity of section 24 of the Legal Practice Act No 28 of 2014 shall read as follows:

"**24 Admission and enrolment**

[46] Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).

(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~~] a person as a legal practitioner and authorise the Council to enrol such person as a legal practitioner, conveyancer or notary, if the person 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.

(3) The High Court must admit a non-citizen as a legal practitioner and authorise the Council to enrol such person as a non-practising legal practitioner if he or she has satisfied the requirements in paragraphs (a), (c) and (d) of subsection (2).

(4) Subject to subsection (1), the Minister may, in consultation with the Minister of Trade and Industry and after consultation with the Council, and having regard to any relevant international commitments of the Government of the Republic, make regulations in respect of admission and enrolment to –

(a) determine the right of foreign legal practitioners to appear in courts in the Republic and to practise as legal practitioners in the Republic; or

(b) give effect to any mutual recognition agreement to which the Republic is a party, regulating –

(i) the provision of legal services by foreign legal practitioners; or

(ii) the admission and enrolment of foreign legal practitioners.

4. The first respondent is ordered to pay the applicants' costs.

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**C.J. MUSI, JP**

**I concur.**

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**P.E. MOLITSOANE, J**

**I concur.**

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**G.J.M WRIGHT, AJ**

**Appearances:**

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|---|---|
| For the Applicant: | Adv. M. S. Mazibuko<br>with Adv. P.G. Chaka<br>Instructed by Mazibuko Wesi Inc.<br>Bloemfontein |
| For the 1st, 4th & 5th Respondents: | Adv. K. Moroka SC (Absent during hearing)<br>with Adv. T. Ntoane (Argued on behalf of the first respondent)<br>Instructed by State Attorney<br>Bloemfontein |

| | |
|---|---|
| For the 2nd Respondent: | Adv. N. Snellenburg SC<br>Instructed by Symington & De Kok Attorneys<br>Bloemfontein |
| *Amicus Curiae*: | Adv. J.J.F. Hefer SC<br>with Adv. T. Ngubeni<br>Instructed by FS Association of Advocates<br>Bloemfontein |