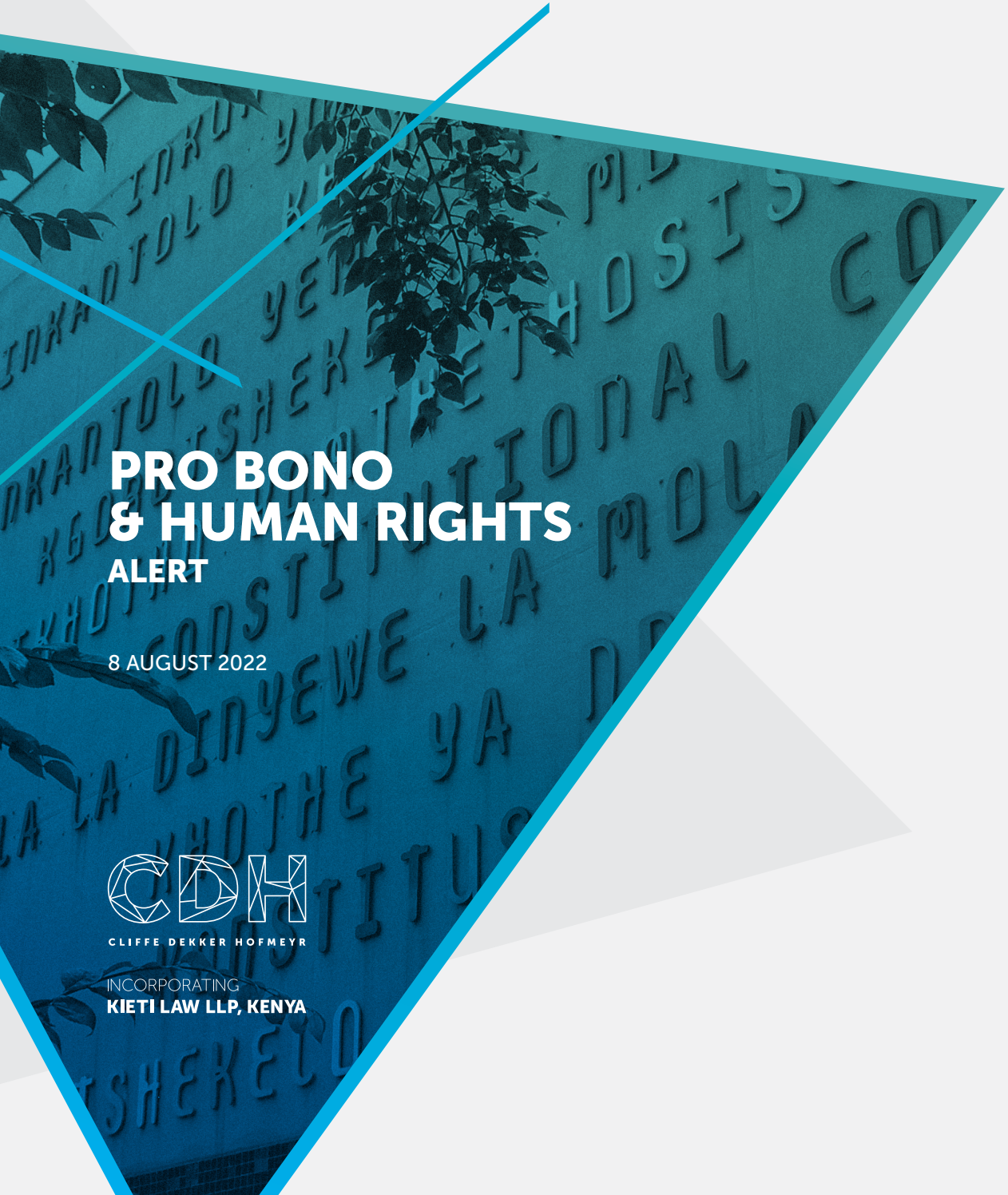

PRO BONO & HUMAN RIGHTS
ALERT

8 AUGUST 2022

CDH
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IN THIS ISSUE

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Moment of reckoning for aspiring foreign lawyers: the Constitutional Court upholds limitation to entry to the legal profession

Analysis of *Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29.

The significance of the legal profession and its role in a democratic dispensation is immeasurable. As a result, the criteria regarding eligibility to participate in this profession remains a highly contested terrain. In a recent appeal against a decision of the High Court, the Constitutional Court (CC) was recently called upon to decide whether the provisions of section 24(2)(b) read with section 115 of the Legal Practice Act 28 of 2014 (LPA), which preclude persons who are neither citizens nor permanent residents from being admitted as legal practitioners, should be declared inconsistent with the Constitution of the Republic of South Africa of 1996 (Constitution) and therefore invalid. The applicants contended that the prohibition contravened their right to equality under section 9(1) of the Constitution, infringed their dignity, and amounted to unfair discrimination in terms of section 9(3) of the Constitution.

The CC handed down judgment on 2 August, 2022 in which it unanimously rejected the applicants' arguments and found that the distinction drawn by section 24(2)(b) between citizens and permanent residents on the one hand and those foreign nationals who are not permanent residents, was rational and fair, thereby dashing the hopes of foreign nationals who ordinarily reside in South Africa and have qualified to practice in South Africa but who don't have permanent residence status of being admitted as legal professionals and practicing as such.

The matter originated from a judgment handed down by the High Court of South Africa, Free State Division, Bloemfontein (High Court) on 16 September 2021. The High Court had declared the provisions of section 24(2)(b) of the LPA unconstitutional and invalid to the extent that they do not allow foreigners who are not permanent residents in South Africa to be admitted and authorised as non-practising legal practitioners. (For a summary of the High Court judgment please refer to our previous article). Other applications dealing with similar issues on behalf of other applicants were consolidated with the matter and heard at the same time. Additionally, a number of parties were either granted leave to intervene or act as *amici curiae*.

ISSUES BEFORE THE COURT

In terms of section 24(1) and (2) of the LPA a person may only be enrolled to be admitted as a legal practitioner if they are a South African citizen or permanent resident. The CC was called upon in the first instance to decide whether this distinction contravened section 9(1) of the Constitution in that the provisions bore no rational connection to a legitimate government purpose. Even if it did pass this test, whether it nevertheless amounted to unfair discrimination in terms of section 9(3) of the Constitution, justifiable in a democracy based on freedom and equality.

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APPLICANTS' SUBMISSIONS

The applicants' main submissions were:

- The impugned provisions create an absolute bar to entry into the profession by persons who hold visas and permits that allow them to lawfully live and work in South Africa.
- The differentiation bears no rational connection to a legitimate governmental purpose because irrespective of the fact that relevant immigration laws allow them to take up employment in the country, they are still not eligible for admission and enrolment as legal practitioners.
- The differentiation amounts to discrimination as their rights to equality and dignity are infringed and the limitation is not justifiable in terms of section 36 of the Constitution. They argued that the LPA has sufficient safeguards for the protection of the public and that the Immigration Act 13 of 2002 (Immigration Act) and Employment Services Act 4 of 2014 (Employment Services Act) both have measures in place to ensure that citizens get preference over foreigners in the labour market.
- Finally, the applicants also contended that the requirements in the LPA should be aligned with comparable jurisdictions in the Southern African Development Community, as permanent residence or citizenship is not a requirement for admission in the legal profession in the region. Instead, it is required that an applicant be ordinarily resident.

To this end the applicants argued that the impugned provisions should be declared invalid; that the declaration of invalidity be suspended for 24 months; and that the words *"or lawfully entitled to live and work in South Africa"* be read into the section 24(1) and (2) requirements as a further qualifying criterion, pending Parliament remedying the constitutional validity. Importantly, the applicants stressed that the relief sought was not designed to permit a blanket admission of all foreign lawyers to the profession – instead, it extended only to those who already hold the right to lawfully work and reside in South Africa.

Although various amici curiae made separate submissions, they had much in common and overlapped with and supported those of the applicants.

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RESPONDENTS' SUBMISSIONS

The Minister of Justice and Correctional Services' (Minister) primary argument was that section 24(2)(b), read with section 115, of the LPA does not constitute a blanket ban on all foreign nationals, but merely precludes foreign nationals who are not permanent residents from practising. The Minister contended that these provisions of the LPA should not be read in isolation but together with other legislation such as the Immigration Act and Employment Services Act which are designated to regulate the employment of foreign nationals.

According to the Minister, this is because the issue of admission of legal practitioners is directly linked to employment and a person's immigration status. The Minister argued that the applicants who entered South Africa with student visas seeking to pursue careers in law ought to have been cognisant of the admission requirements – submitting that the parties accepted the risk that even if they satisfied all the other requirements for admission, they would not be admitted as legal practitioners as they were neither permanent residents nor citizens. The Minister further argued that the differentiation is justifiable, fair and consistent with section 9(5) of the Constitution, and that the preamble of the LPA embraces section 22 of the Constitution which grants citizens the right to choose their trade, occupation and profession freely. In his argument, the Minister highlighted the fact that the practice of law is not listed by the Department of Home Affairs as a critical or rare skill justifying a special dispensation for lawyers – submitting that accordingly there is no need to treat the applicants differently and to offer them any special protection because there are numerous citizens and permanent residents who are suitably qualified and are struggling to secure employment.

The Minister further argued that the applicants conflated practical vocational training and the right to be admitted as a legal practitioner - submitting that the LPA makes no differentiation between citizens and foreign nationals for purposes of practical vocational training as it is an extension of the Bachelor of Laws (LLB). Also noting that the decision to allow nationals already admitted and enrolled as lawyers in designated countries to practise in South Africa is due to reciprocal obligations and is a rational decision or policy adopted by the Government. The Legal Practice Council argued that the LPA regulates entry into the profession considering section 22 of the Constitution and this is the grounds for the differentiation.

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THE SECTION 9(1) ANALYSIS

As to the rationality of the impugned provisions, the CC held that section 24(2) has to be considered with regard to section 22 of the Constitution. Relying on the Supreme Court of Appeal's judgment in *Minister of Home Affairs and Others v Watchenuka and Another* [2004] (2) BCLR 120 (SCA), it confirmed that the right to choose a trade or occupation is restricted to citizens by section 22 of the Constitution. Given that citizens have a right to trade in terms of section 22 of the Constitution, the provisions of section 24(2) of the LPA rightly respects this right. Therefore the legislature was at liberty, so the court held, to decide how to extend admission into the legal profession to non-citizens and it has chosen to draw the line at permanent residents. That the Legislature did not go further to include refugees and asylum seekers could not be challenged by non-citizens under section 22 as they do not enjoy a section 22 right.

LEGITIMATE PURPOSE

On the question as to whether section 4(2) of the of the LPA serves a legitimate purpose, the CC held that the state has no duty to extend the right to freedom of trade, occupation and profession to non-citizens, and that restricting access to a profession constituted a legitimate purpose.

According to the court, the rationale for granting access to the profession to permanent residents is that they have been granted a right to live and work in the country on a permanent basis. The same cannot be said for non-citizens who are refugees or who are on study or work visas. While some of the foreigners in the latter category have been in the country for a long time and have no hope of returning to their own countries, they are offered limited protection that requires them to return to their countries if circumstances change. In addition, the parameters of *"ordinarily resident"* are 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. The reason for the Legislature differentiating between permanent residents and other residents is to protect opportunities for South Africans, which is a policy decision that serves a legitimate governmental purpose.

The CC also considered the obligations of South Africa in terms of the General Agreement on Trade in Services. One of the ways South Africa undertakes services reciprocally is by permitting admitted legal practitioners from designated countries to practise law in South Africa. This is legitimate governmental policy. Furthermore, the court relied on foreign jurisprudence to find that law may be enacted to regulate entry into a profession and that states are entitled to restrict such entry on the basis of citizenship.

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THE SECTION 9(3) UNFAIR DISCRIMINATION ANALYSIS

Although the CC rejected the argument that the differentiation amounted to discrimination on the grounds of social origin, it did find that the differentiation amounted to discrimination on the basis of citizenship, which it held constitutes an analogous ground, because it is based on attributes and characteristics that can in certain circumstances impact the fundamental dignity of persons. It thus constituted discrimination on an analogous ground in terms of section 4(3). The court, however, went on to find that the discrimination was not unfair. Central to this finding was the fact that restriction only prevents non-permanent residents from being admitted as legal practitioners in South Africa but does not operate as a blanket ban to employment in the profession as a whole. Therefore, they are not left destitute with no alternative source of employment. The court accordingly found that the discrimination is not unfair as there is no violation of section 9(3) or section 9(4) and the appeal was dismissed.

GIFT XABA AND SHANDRÉ SMITH

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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