1 OCTOBER 2021

PRO BONO & HUMAN RIGHTS **ALERT**

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So close yet so far: An analysis of *Rafoneke v Minister of Justice* and the issue of admitting foreigners into the legal profession

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Recently, in *Rafoneke v Minister of Justice* [2021] 3609-2020 (FB) a full bench of the Free State Division of the High Court, Bloemfontein was required to pronounce on the constitutionality of the provisions of the Legal Practice Act 28 of 2014 (LPA) that restrict admission and enrolment into the profession to citizens and permanent residents.

In a valiant attempt at balancing the competing interests at play in the matter, the court held that while it constituted unfair discrimination to prohibit locally trained and qualified foreigners from being admitted and enrolled as (non-practising) legal practitioners, it was fair to prohibit them from being admitted and enrolled as practising legal practitioners. This in deference to the Government's policy objective of protecting employment opportunities for citizens and permanent residents.

The legal issues

Section 24(2)(b) of the LPA restricts the right to be admitted and enrolled as a legal practitioner in South Africa to citizens and permanent residents.

The applicants, both of whom are Kingdom of Lesotho nationals with temporary work permits that entitle them to work in the Republic of South Africa and who studied and qualified to become lawyers in South Africa (but who are not permanent residents), sought to have sections 24(2)(b) and (3) of the LPA, read with section 115, declared unconstitutional.

They argued that section 24(2)(b) violates their right to equality because it differentiates between South African citizens and permanent residents 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 the court found that there is a nexus between the differentiation and a legitimate governmental purpose, it still amounts to discrimination on the grounds of social origin or nationality and that the discrimination is unfair and does not withstand constitutional scrutiny. It was also contended that section 115 of the LPA discriminates against them because foreign legal practitioners from designated countries may be admitted and enrolled to practice in South Africa without being citizens or permanent residents, whereas they, who studied and trained here, may not.

It is important to note that both applicants had met all the requirements to be eligible for admission in terms of the section except for the requirement that they be citizens or permanent residents.

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Despite concerns having been raised that the citizenship or permanent residence requirement may be unconstitutional, Parliament chose to retain this requirement when enacting the LPA, which came into force in November 2018.

Due to the importance of the matter, the court requested the Free State Society of Advocates to avail one of its members to assist the court as a friend of the court.

In defence of the provisions, the three ministers who were joined as respondents (the Minister of Justice and Constitutional Development, the Minister of Home Affairs and the Minister of Labour) averred that there is a rational connection between the differentiation and a legitimate government purpose. Both they and the friend of the court contended that the applications should be dismissed "*because the applicants want to circumvent the employment and immigration laws*" of South Africa. The ministers referred extensively to the provisions of the Immigration Act 13 of 2002 (IA) and the Employment Services Act 4 of 2014 (ESA) to show the alleged rational connection between the impugned provisions and the Government's purpose. The Legal Practice Council (LPC) made submissions but did not take a definitive stance.

Background to section 24 (2)(b) of the LPC

The requirement that in order to be admitted as an attorney a person must be either a citizen or permanent resident is not a new requirement. Section 15(1)(ii)(aa) of the Attorneys Act 53 of 1979 (which was repealed by the LPA) required that in order to be admitted and enrolled by a court a person had to be a South African citizen or have been lawfully admitted to the Republic for permanent residence and be ordinarily resident in the Republic.

Despite concerns having been raised that the citizenship or permanent residence requirement may be unconstitutional, Parliament chose to retain this requirement when enacting the LPA, which came into force in November 2018. In doing so it seems that reliance may have been placed on the following arguments made in favour of its retention in a letter submitted to the office of the Deputy Director-General: Immigration Services by the then Law Society of South Africa (LSSA):

> *"A 'blanket' provision for foreigners to qualify will have a negative impact on many graduates who find it difficult to secure articles or community service for purpose of qualification.*
>
> *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, which may affect local persons other than the clients, must have 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.*
>
> *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."*

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On obtaining permanent resident status they could then apply for conversion from non-practising to practising legal practitioners.

The findings of the court

In reaching its decision the court placed particular emphasis on the wording of section 24(b) of the LPA and the distinction drawn between admission by a court and enrolment to practice by the LPC. In this regard it asked the parties to address it on the question of whether a person – citizen, permanent resident or non-citizen – could be admitted as a practitioner without being allowed to practice.

Relying heavily on the submission by the ministers, it found that the LPA should not be viewed in isolation and that the impugned provisions must be considered in conjunction with the IA and the ESA. Applying the Harksen three-stage equality clause analysis, it found that it was *"rational for the then LSSA and the LPC to take a stance that is in favour of catering for young South Africans or permanent residents to enter the legal profession without competition from foreigners from the rest of the world."*

Apparently persuaded by the ministers' submission that the applicants sought to circumvent the employment and immigration laws of the country, it found that if foreign nationals were allowed to practice in this country both the Government's objectives and these laws *"would be rendered nugatory."* This without considering the argument put forward by the applicants that this submission *"confused the issue of admission with 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."*

Going on to apply the second and third stages of the Harksen test, it found that although the section 24(2)(b) prohibition on foreigners being enrolled to practice did discriminate on an analogous ground, the discrimination was not unfair seemingly because although the applicants could not practice as attorneys they were still entitled to work in the country.

However, in an apparent attempt to find an appropriate balance the court then went on to find that there may be benefits derived by both citizens and non-citizens from a dispensation that allows applicants (including foreigners) who meet all the (other) criteria to be admitted as *"non-practising"* legal practitioners. For example, some non-citizens may want to be admitted as non-practising legal practitioners and work in South Africa as legal advisors or for non-governmental or community-based organisations. Alternatively, they might want to get admitted as non-practising legal practitioners while waiting to be admitted as permanent residents. On obtaining permanent resident status they could then apply for conversion from non-practising to practising legal practitioners. Moreover, the court found that this would promote one of the objectives of the LPA – to remove unnecessary or artificial barriers for entry into the legal profession.

Having considered the statistics of unemployed graduates, the court found that an indiscriminate and blanket bar against non-citizens who find themselves in similar positions to the applicants being admitted in the Republic of South Africa served no governmental purpose and

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While we laud the court's attempt to assist foreigners by striking the balance it did, we believe there were flaws in the court's reasoning.

was irrational. This because only 2,4 % of unemployed persons were graduates. It accordingly found that section 24 of the LPA is unconstitutional to the extent that it prohibits non-citizens from being admitted and being authorized to be enrolled as non-practising legal practitioners.

Comment

While we laud the court's attempt to assist foreigners by striking the balance it did, we believe there were flaws in the court's reasoning. We believe that the court's reasoning in finding that "*prohibiting foreigners from being admitted and enrolled as practising legal practitioners was rational and fair*", was unconvincing. In particular, the finding that allowing them to be enrolled to practice would render our immigration and labour laws nugatory failed to take into account the applicants' argument that once admitted and enrolled they would still have to meet the immigration and ESA requirements before being entitled to work or practice as attorneys.

Second, we believe the court failed to properly consider the impact of not allowing those who have spent years studying law at South African universities, completing their articles of clerkship or pupillage, and studying and writing their board and bar exams to practice. It also failed to properly consider the rationality of allowing them to make use of scare university resources and take up coveted articles of clerkship and pupillage positions, when they would ultimately not be able to practice or render much needed legal services. In our experience many of the people affected by this are foreigners who have lived in the country, sometimes for more than 10 years, on special dispensation permits and who are effectively permanent residents, but who, because of the conditions of these dispensation permits, are denied permanent resident status.

Ultimately the matter will have to be decided by the Constitutional Court in confirmation proceedings in terms of section 172(2)(a) of the Constitution and we await the apex court's final determination of the matter with keen interest.

Jacquie Cassette, Gift Xaba and Shandré Smith

A victory for unmarried fathers

In the High Court the parents, assisted by the Centre for Child Law, sought to have the DHA's refusal to register their daughter's birth reviewed and set aside, to compel the DHA to register their daughter's birth, and challenged the constitutionality of sections 9(2) and 10 of the Act and the DHA's interpretation of the accompanying Regulations.

Previously, when a child was born in South Africa to unmarried parents that child was automatically assigned their mother's surname. Such child could only take their father's surname where their mother and father jointly requested – in the presence of a designated Department of Home Affairs (DHA) official – for the child to bear their father's surname. This prohibited unmarried fathers (even though they may well have been the primary caregivers) from passing their surname to their children if the mother refused her consent or was unable to provide consent where she was absent. Recently the Constitutional Court declared this antiquated approach to the ability of unmarried fathers to pass along their family names as unconstitutional and consequently struck section 10, and the related part of section 9(2), from the Births and Registrations Act 51 of 1992 (Act).

This was brought about by an application to the Eastern Cape High Court by a South African father, and a mother who is a citizen of the Democratic Republic of Congo (DRC) - who was legally absent from South Africa at the time of her daughter's birth - because the father was unable to give notice of and register his daughter's birth under his own surname. The parents' customary law marriage was not registered in the DRC which in turn means their marriage is not recognised in South Africa. Therefore, their daughter was treated as being "*born out of wedlock*" and since the mother's visitor's visa had expired, she was considered legally absent from South Africa and unable to provide her consent to her daughter bearing the surname of her father (as was required by section 10 of the Act). The DHA refused to register their daughter's birth until the mother produced a valid passport and visa or permit, as per the Regulations of the Act.

In the High Court the parents, assisted by the Centre for Child Law, sought to have the DHA's refusal to register their daughter's birth reviewed and set aside, to compel the DHA to register their daughter's birth, and challenged the constitutionality of sections 9(2) and 10 of the Act and the DHA's interpretation of the accompanying Regulations. The High Court granted the parents relief regarding the registration of their daughter's birth. It also found that those sections in the Act could be read to be constitutionally compliant, however the relevant Regulations were declared constitutionally invalid and, in an attempt to maintain the integrity of the Act, proposed to read-in words to cure the defects in those Regulations. An appeal was made to the full bench of the same court on the basis that the reading-in proposed by the lower court did not cure the inability of an unmarried father to register his child's birth under his surname in the absence of the child's mother. The full court then declared section 10 of the Act constitutionally invalid and as an interim remedy proposed additions to the offending section.

A victory for unmarried fathers...*continued*

The Constitutional Court was requested by the Centre for Child Law to confirm the order of constitutional invalidity of section 10 on the basis that it prohibits an unmarried father from giving notice of the birth of his child under his surname in the absence of the child's mother.

Constitutional Court confirmation

The Constitutional Court was requested by the Centre for Child Law to confirm the order of constitutional invalidity of section 10 on the basis that it prohibits an unmarried father from giving notice of the birth of his child under his surname in the absence of the child's mother. The Centre argued that this prohibition discriminated against children who are then unable to fully realise their constitutional rights as documented citizens of South Africa. The respondents were in agreement with the applicant that section 10 of the Act was unconstitutional but argued that this unconstitutionally was due to the fact that it was under-inclusive insofar as it allowed for either parent to register the birth of the child, but the surname was restricted to that of the mother. This in turn infringed on the father's right to equality and the child's right to their father's surname from birth. The respondents submitted that by removing section 10 in its entirety as well as the words "*subject to the provisions of section 10*" from section 9(2) it would enable any father, irrespective of their marital status, to give notice and register the birth of their child.

The majority judgment adopted a gender-neutral and marital-neutral approach by confirming the order of constitutional invalidity of the full bench on the basis that section 10 of the Act unfairly limited the ability of an unmarried father to pass his surname on to his child in terms of the Harksen test. The Harksen test was formulated in a previous judgment of the Constitutional Court to determine whether a piece of legislation propagates unfair discrimination. In this matter the court found that section 10 of the Act irrationally discriminated between categories of people, and in the absence of a legitimate government purpose put forward by the DHA, it was also found to amount to unfair discrimination because it differentiated between people in terms of categories prohibited in the Constitution, known as the "*listed grounds*" of marital status, sex and gender. Additionally, section 10 was found to perpetuate stereotypical gender roles and the assumption that childcare is inherently a mother's duty. The court noted that it is both parents who bear the primary responsibility to care for their child, as is provided for in the Children's Act 38 of 2005.

The majority also found that section 10 perpetuates the notion of "*illegitimacy*" by differentiating between children born in and out of wedlock. The Constitutional Court has previously emphasised that children must be regarded as autonomous, albeit vulnerable, rights-bearers who are not mere extensions of their parents. Therefore, the unfair discrimination of children based on parental marital status, social origin and birth is in conflict with the principle that the best interests of the child are of paramount importance.

The majority accordingly found section 10 of the Act to be manifestly inconsistent with the rights to equality, human dignity and the best interests of the child and should summarily be severed from the Act with immediate effect. The majority recognised that "*South African society is not homogenous, and it must be accepted that the concept of 'marriage' no longer retains its stereotypical meanings.*"

A victory for unmarried fathers...*continued*

Our Pro Bono and Human Rights Practice has been approached on several occasions by unmarried fathers wanting to register their child under their surname, however the offending provisions of sections 9(2) and 10 of the Act rendered this practically impossible.

Minority judgment

The minority judgment however, penned by our Chief Justice, took a strong opposition to this progressive stance. It held that the discrimination against unmarried fathers based on marital status was reasonable, justifiable, and fair. The minority found that the choice of parents to remain unmarried necessarily extended to a father's choice not to commit to parenting his child. In this way we must *"entrust the welfare or protection of the child to the mother as opposed to an unmarried father whose status as such and commitment to the child's wellbeing is unrecorded and cannot therefore be presumed."* The minority would not presume to hold an unmarried father as responsible for his child born out of wedlock as it would an unmarried mother, who is seemingly more accountable by virtue of being a woman.

Our Pro Bono and Human Rights Practice has been approached on several occasions by unmarried fathers wanting to register their child under their surname, however the offending provisions of sections 9(2) and 10 of the Act rendered this practically impossible. This majority judgment goes a long way in enabling fathers to take responsibility for their children, and in so doing moves away from the notion that women and mothers should bear the sole responsibility for childcare.

Shannon O'Brien
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