IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 10641/2020

In the matter between:

GABAIKANGWE EVELYN THENDELE	First Applicant
ZWELIBANZI SOLUMBA THENDELE	Second Applicant
And	
LEGAL PRACTICE COUNCIL	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MINISTER OF HIGHER EDUCATION AND TRAINING	Third Respondent

APPLICANTS' HEAD OF ARGUMENT

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> *"[T]he idea of a Bill of Rights had its origins in South Africa. Not only did the ideas germinate from South African soil, they emanated from a group of black intellectuals and legal practitioners at the beginning of the twentieth century. The idea of a Bill of Rights as a negation of colonial violence. That black lawyers conceived of it in an era of aggressive colonial expansion brings to the fore the shifting uses of law, from its epicentre in Europe to the lands of the colonised. Sometimes it was an antidote to it, as is true today."*[1]

INTRODUCTION

1 The Applicants, Mrs Gabaikangwe Evelyn Thendele and Mr Zwelibanzi Solumba Thendele, approach this Court in order to fulfil their lifelong efforts to becoming attorneys.[2] All attorneys as legal practitioners fall under the ambit and jurisdiction of the Legal Practice Act which expressly sets out that its purpose is to

> *"provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic (of South Africa)*[3]*"*

2 Despite overcoming a number of obstacles, the biggest obstacle in their path towards their chosen profession, lies in the very Act which seeks their inclusion in the profession - certain provisions of the Legal Practice Act ("**the LPA**")[4] read together with the Legal Practice Regulations ("**LP Regulations**")[5] as interpreted by the Legal Practice Council ("**LPC**"), prevent the Applicant's admission solely

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1 T Ngcukaitobi, *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* 2018, p1 to 2.

2 FA, 006-50, para 113.

3 Preamble to the Legal Practice Act 28 of 2014

4 Act 28 of 2014.

5 Regulations published in terms of section 190(1)(a) of the Legal Practice Act, GNR921, Government Gazette 41879, 31 August 2018.

on the basis that the Applicants are *Baccalaureus Procurationis* ("**BProc**) graduates and not Bachelor of Law ("**LLB**") degree graduates; this despite them meeting all other qualifying or admission requirements.

3 More specifically, these obstructive provisions and regulations are:

3.1 Section 26(1)(a) of the LPA read together to with regulation 6 of the LP Regulations;[6] and

3.2 The LPC's interpretation of section 112(2) of the LPA, alternatively the constitutionality of section 112(2) of the LPA.[7]

4 The Applicants' believe the aforementioned provisions and regulations to be unconstitutional, defective, and discriminatory in that they specifically preclude BProc graduates who have met all admission requirements, from being admitted as attorneys. These provisions, alternatively their interpretation, create a *lacuna* and contradiction between the purpose of the Act, and its results.

5 In an effort to complete their professional journey, the Applicants have brought the discrepancies (between the purpose of the Act, and the obstacles presented by its' interpretation) to the attention of both the First and Second Respondents. Furthermore, the Applicants must approach the Honourable Court in order to have the aforementioned offending provisions cured.

6 The First Respondent is the Legal Practice Council, being the relevant statutory body which gives effects to and governs the provisions of the LPA, as well as the

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6 NoM, 006-9, prayer 1.

7 NoM, 006-10, prayers 2 and 3.

profession which the Applicants seek to be admitted into. The First Respondent furthermore arguably derives its' mandate and authority from the LPA which in turn falls under the jurisdiction of the Second Respondent.

7 The Second Respondent is the Minister of Justice and Constitutional Development; under whose purview the Act falls.

8 There is no relief sought against the Third Respondent who was included in this matter for their potential interest in the application and they have not submitted any affidavits in response to any of the allegations made.

9 The First and Second Respondents have both been engaged with in regards to the registration of the Applicants' practical vocational training contracts (PVT Contracts, formerly known as "contracts of articles") so as to complete their journey to becoming admitted attorneys.

10 The Second Respondent, the Minister of Justice, has agreed with the Applicants position. In correspondence between the parties, the Minister has acknowledged and recognised that the provisions of the LPA and its' regulations are discriminatory insofar as they prevent the Applicants' from being admitted on the basis that they are BProc graduates. The Minister has expressly undertaken that an amendment to the Act will be made so as to provide for the admission of qualifying BProc graduates as attorneys. The Minister therefore does not oppose the Applicants' approaching this Court in order to remedy the defective provisions.

11 In terms of the chronology of the litigation of this matter, the Minister's position was received by the Applicants after LPC had filed their answering affidavit, but before the Applicants had filed their replying affidavit. As such, the Applicants attorneys of record corresponded with the LPC to bring the Minister's position to the LPC's attention, and in order clarify and confirm whether the LPC maintained their opposition to the application, and whether it would be necessary for the matter to proceed on an opposed basis (as opposed to bringing an agreed upon draft order before the Court).

12 Despite the Minister's undertaking and despite being made aware of the Minister's undertaking, the LPC has maintained its' opposition to the Applicants' application, although the basis for the opposition is not entirely clear. The LPC opposes the application despite the fact that it had accepted that the provisions may result a difficult and unclear situation, and be prejudicial to candidates in the applicants position, suggesting that the Applicants' approach the High Court to resolve the problem.[8]

13 This lack of clarity and confusion pertaining to the LPC's opposition to this application, is also increased by the fact that the LPC has seemingly agreed to give effect to the relief as sought by the Applicants in their notice of motion – the LPC has agreed to register the Applicants' PVT contracts as of 7 March 2020. As such, and to the extent that this registration has in fact occurred, the Applicants no longer seek an order for the retrospective registration of their practical vocational training contracts.

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[8] FA, 006-27, para 48 and annexure "GET14", 006-97.

14 The Applicants challenge:

14.1 The constitutionality of section 26(1)(a) of the LPA read together to with regulation 6 of the LP Regulations;[9] and

14.2 The LPC's interpretation of section 112(2) of the LPA, alternatively the constitutionality of section 112(2) of the LPA.[10]

15 Further, and to the degree deemed necessary, the Applicants pray that this Honourable Court declare that BProc graduates who registered for a BProc degree in South African university after 1 January 1999 and who fully comply with the requirements of the Attorneys Act may, from the date of an order by this Honourable Court, be admitted as attorneys under the LPA.[11] Additionally, the Applicants ask this Honourable Court to direct the LPC to register the practical vocational training contracts of any other BProc graduates who wish to register such practical vocational training contracts.[12]

16 Therefore, the present application before this Court is somewhat both opposed and unopposed in nature.

17 Importantly, the disputes which the Honourable Court is approached to adjudicate on relate to the constitutionality of the aforementioned offending provisions - until the constitutionality of section 26(1)(a) of the LPA read with

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9 NoM, 006-9, prayer 1.
10 NoM, 006-10, prayers 2 and 3.
11 NoM, 006-10, prayer 4.
12 NoM, 006-10, prayer 5.

regulation 6 and the LPC's interpretation of section 112 of the LPA is determined, the Applicants cannot be admitted as attorneys of this Honourable Court.

18 These heads of argument therefore seek to assist the Honourable Court in the adjudication of the matter by setting out:

18.1 The material facts and the historic context of the BProc degree

18.2 The issues to be determined by the Court,

18.3 How the impugned provisions infringe on various constitutionally protected rights?

18.4 That the infringements are not justifiable in terms of section 36,

18.5 What constitutes appropriate relief *vis some vis* the impugned provisions,

18.6 Section 112 of the LPA,

18.7 Costs,

18.8 Relief sought,

MATERIAL FACTS

19 On 23 May 1997 and 14 May 1999 respectively the First and Second Applicants graduated with *Baccalaureus Procurationis* ("**BProc**") degrees.[13] The applicants attended an uninterrupted training course of the School for Legal Practice with the Law Society of South Africa in 1999.[14]

20 In terms of the repealed Attorneys Act,[15] candidates like the Applicants were permitted to write attorneys admissions exams after having completed at least four months of a training course with a law society[16]. The LPC permitted both Applicants to register for and write the attorneys admission exams.[17]

20.1 The First Applicant has written and passed all her exams.[18]

20.2 The Second Applicant passed three papers and has one examination remaining.[19]

21 In May 2019, the Applicants both applied for employment with law firms in order to complete their practical vocational training (formerly 'articles of clerkship') in order to be admitted as attorneys.[20] The Applicants concluded practical vocational contracts with their supervisors in May 2019.[21] They attempted to

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13 FA, 006-21, para 27 and annexure "GET5", 006-75 and FA, 006-21, para 28 and annexure "GET6", 006-76.

14 FA, 006-22, para 29 and annexure "GET7", 006-77 and FA, 006-23, para 30 and annexure "GET8", 006-79.

15 Section 14(3)(d) of the Attorneys Act 53 of 1979.

16 FA, 006-23, para 33.

17 FA, 006-24, para 37.

18 RA, 012-12, para 33 and annexure "GET22", 012-36.

19 FA, 006-24, para 38.

20 FA, 006-24, para 39.

21 FA, 006-25, para 40.

register their practical vocational training contracts with the LPC but were informed that in terms of the LPA, they no longer qualify to have their contracts registered. This is because, unlike the Attorneys Act, the LPA requires all candidate legal practitioners to be in possession of a Bachelor of Law ("**LLB**") degree,[22] and not (or no longer) a BProc.

22 On 27 May 2019, the Second Applicant wrote a letter to the LPC lamenting that he had been unjustifiably barred from registering his practical vocational training contract based on his possession of a BProc Degree.[23] On 29 May 2019, Mr MJS Grobler, the director of the LPC replied. In the letter, Mr Grobler stated that the Professional Affairs Committee of the LPC had considered the provision of section 112 (2) of the Legal Practice Act and confirmed that the LPC would not be able to register the Second Applicant's contract because he had a BProc degree.[24] This position would apply to the First Applicant as well. Importantly, the LPC conceded that the current provisions could result in "difficult situations" and be "prejudicial to candidates" in the Applicants' position.[25]

23 On 5 August 2019, the Applicants' attorneys wrote to the LPC stating that the refusal to register the practical vocational training contract was both unjust and prejudicial, and further requested that the registration of the applicants' practical vocational training contracts be done within seven days.[26] The LPC did not

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22 FA, 006-25, para 42.
23 FA, 006-25, para 43 and annexure "GET13", 006-92 to 006-96.
24 FA, 006-27, para 47 and annexure "GET14", 006-97.
25 FA, 006-27, para 48 and annexure "GET14", 006-97.
26 FA, 006-27, para 50 and annexure "GET15", 006-98 – 006- 101.

reply.[27] The Applicants attorneys then resent the letter by courier.[28] Subsequently, on 6 September 2019, the Applicants' attorneys addressed yet another letter referencing those which had already been sent.[29]

24 On 13 September 2019, the LPC's Estelle Jordaan, responded to the letters and asked the Applicants' attorneys to consider the provisions of section 26(1) of the LPA. The email states that the LPC is bound by the provisions of the LPA, the rules, and the regulations. Further, the response confirmed that the LPC would not register the Applicants' practical vocational training contracts.[30]

25 Notwithstanding this statement, after the institution of this application, on 7 March 2020, the LPC resolved to register the Applicants' practical vocational training contracts with effect from 7 March 2020, and not November 2019 as had been previously requested. The LPC in papers before this Honourable Court, states that it is debatable whether it should have taken that decision.[31] It should be noted however that the LPC does not attach proof of this resolution to its answering affidavit, nor has it attached the proof of the registration of the practical vocational training contract or the certificate that would permit the Applicants to appear in lower courts. It is on this basis that the Applicants seek confirmation of this registration.

26 But for the registration of her practical vocational training contract, the First Applicant has met all the requirements for admission as an attorney of this

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27 FA, 006-27, para 51.
28 FA, 006-27, para 51 and annexure "GET16", 006-102.
29 FA, 006-28, para 52 and annexure "GET17", 006-103.
30 FA, 006-28, paras 53 to 54 and annexure "GET18", 006-105.
31 AA, 011-39, para 11.8.

Honourable Court.[32] The Second Applicant needs to only pass one attorneys admission application to be similarly situated.[33]

27 In addition to the aforementioned brief set of material facts, what is fundamental to the adjudication of this matter is the understanding of the historical context of BProc degrees within South African society, and how this directly relates to the stated purpose of the LPA, and the transformation of the body of South African legal practitioners.

History of the BProc Degree

28 The context of the history of the BProc Degree is at the crux of this application, and is directly linked to the purpose and object of the LPA. The BProc degree should be understood within the context of the development of South African legal education, and the overarching system of Apartheid which permeated all areas of South African society. It enforced the racial subjugation of black people through its education policies, and continues to have far reaching consequences in society today.

29 Following informal legal teaching offered by practising attorneys in the 1800s, the University of Cape Town introduced the first formal university legal education as a Bachelor of Laws ("UCT LLB") postgraduate degree which followed a Bachelor of Arts or other undergraduate degree in 1859[34].

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32 RA, 012-12, para 35.

33 FA, 006-29, para 55.

34 FA 006-350 para 59.

30 A UCT LLB took two or three years to complete, and qualified graduates to practice in both the higher and lower courts. Subsequently, two other law degrees were offered at South African universities. One was the BProc degree which was a four-year undergraduate degree qualifying graduates for practice as attorneys only. The other was the three-year Baccalaureus Juris ("BJuris"), which qualified graduates for practice only as civil servants (namely, prosecutors and magistrates) in the lower courts.

31 The three-tier system of legal education influenced, entrenched, and perpetuated inequality. The BProc and BJuris degrees were perceived as inferior qualifications to the LLB degree which required an undergraduate degree. Due, in no small part to the racial economic inequalities, the LLB degree was the option elected by white individuals whilst people of colour with fewer financial means were forced to obtain the BProc and BJuris degrees. The BProc was referred to as the "poor man's degree". The degrees were thus considered unequal as evidenced in the different aspects of the legal profession open to graduates.

32 The Apartheid regime used the education system as a primary tool to maintain and advance prejudicial Apartheid policies. Black people were excluded from meaningful participation in all aspects of society. Unsurprisingly then, the structure of the three distinct degrees in legal education was underpinned by the racial discrimination under Apartheid, which prescribed separate education and practice along racial lines, in order to also influence who legal practitioners and administrators of the law could be.

33 The LLB degree was typically offered by historically white universities which were well resourced. People of colour could only be educated in these universities with the permission of the then Minister of Education. Contrarily, the BProc degree was offered by historically black universities which were under-resourced and inconvenient located.

34 All this served to further entrench the impression of inferiority of the BProc degree and the further subjugation of BProc graduates who tended to be people of colour, particularly Black people. This reality led to a skewed racial demographic of the legal profession with a further consequence being the extreme distortion of the representation of the South African population. Simply put, the legal profession did not reflect or represent the population dynamics of South Africa.

35 The BProc degree ceased to be offered in 1999 in South African Law schools. Although the data does not include all universities, the statistics from the then Law Society of South Africa for the year 2000, 2001 and 2002 shows that there were approximately 335, 360 and 482 BProc degrees conferred by South African universities in each respective year which accumulates to a total of 1 177 people.

ISSUES TO BE DETERMINED

Impugned Provisions

36 Before detailing the issues to be determined by this Court, it is necessary to set out provisions themselves together with their legislative context. The relevant impeding provisions are section 112 and section 26(1)(a) of the LPA read together with regulation 6 of the LP Regulations ("**Impugned Provisions**").

37 The LPA came into effect on 1 November 2018. Prior to its enactment the now-repealed Attorneys Act regulated the affairs of attorneys, including their training and admission to the profession. Read with section 11 of the Qualifications Legal Practitioners Amendment Act[35] ("Qualifications Act") the Attorneys Act permitted BProc graduates to be admitted as attorneys. Therefore under the Attorneys Act, BProc graduates seeking to be admitted as attorneys were treated equally to LLB graduates in that there was no difference in the admission requirements based on the two types of degrees.[36]

38 The enactment and commencement of the LPA altered that equality. The LPA effectively repealed the Attorneys Act. However, it did not amend the aforementioned Qualifications Act to align it with itself. In other words, the LPA did not substitute the provisions in the Qualifications Act which made reference to the Attorneys Act with provisions that made reference to the LPA. So, while the Qualifications Act remains valid and in effect in the statute books, it no longer has the effect it previously had: BProc graduates are no longer permitted to be admitted as attorneys.

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35 Section 11 of the Qualifications Legal Practitioners Amendment Act 78 of 1997 reads as follows:

> *"(1) Any person who at the commencement of this Act*
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> *(a) has satisfied the requirements for the degree of baccalaureus procurationis: or*
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> *(b) was registered as a student at any university in the Republic with a view to obtaining the degree of baccalaureus procurationis and has satisfied the requirements for the said degree on or before 31 December 2004,*
>
> *shall for the purposes of sections 2(1)(a), 2A, 4A(b)(ii), 11 (3), 13(3) and 15(1)(b)(iii)(aa) of the Attorneys Act, 1979 (Act 53 of 1979), as amended by this Act, be deemed to have satisfied the requirements of the degree referred to in paragraph (a) of section 2(1) of that Act."* (Emphasis added.)

36 FA, 006-34, para 72.

39 Section 24 of the LPA prescribes the requirements for the admission and enrolment of attorneys; section 24(2)(a) provides that in order to be admitted as an attorney a person must be duly qualified as contemplated by section 26. Section 26(1) of the LPA, provides in relevant part as follows:

> *"A person qualifies to be admitted and enrolled as a legal practitioner, if that person has —*
> *(a) satisfied all the requirements for the LLB degree obtained at any university registered in the Republic, after pursuing for that degree —*
> *(i) a course of study of not less than four years; or*
> *(ii) a course of study of not less than five years if the LLB degree is preceded by a bachelor's degree other than the LLB degree, as determined in the rules of the university in question and approved by the Council; or*
> *. . .*
> *(c) undergone all the practical vocational training requirements as a candidate legal practitioner prescribed by the Minister, including —*
> *(i) community service as contemplated in section 29, and*
> *(ii) a legal practice management course for candidate legal practitioners who intend to practise as attorneys or as advocates referred to in section 34(2)(b)".*

40 In terms of this provision therefore, only LLB graduates are qualified to be admitted and enrolled as legal practitioners. By simply omitting reference to the BProc degree, section 26(1)(a) of the LPA does not permit BProc graduates to be admitted and enrolled as legal practitioners.

41 Regulation 6 of the LP Regulations has the same effect on BProc graduates; instead of prohibiting BProc graduates from being admitted as attorneys, it prohibits them from having their practical vocational training contracts registered. It reads as follows (with own emphasis added):

> *"(1) Any person intending to be admitted and enrolled as an attorney must, after that person has satisfied all the requirements for a degree referred to in sections 26 (1) (a) or (b) of the Act serve under a*

practical vocational training contract with a person referred to in subregulation (5)

. . .

(b) for an uninterrupted period of 12 months if, prior to the registration of a practical vocational training contract, he or she has completed a programme of structured course work, comprising compulsory modules, of not less than 400 notional hours' duration in the aggregate over a period of no longer than six months.

. . . .

(4) Subject to the provisions of the Act, any period of service before a candidate attorney has satisfied the requirements of the degrees referred to in 26(1)(a) or (b) of the Act is not regarded as good or sufficient service in terms of a practical vocational training contract."

42 Regulation 6(1) accordingly circumscribes the registration of practical vocational training contracts to those persons who hold degrees referred to in section 26(1)(*a*) or (*b*) i.e. *only* to LLB graduates (or the equivalent if the law degree has been obtained in a foreign country).

43 Section 112(2) of the LPA reads as follows:

"Any person upon whom the degree baccalaureus procurationis was conferred by a university of the Republic, is regarded as being qualified to be admitted by the court and enrolled as an attorney by the Council as if he or she held the degree baccalaureus legum, if all the other requirements in the Attorneys Act are complied with: Provided that such person has not later than 1 January 1999 registered for the first-mentioned degree.".

44 As mentioned above, BProc degrees ceased to be offered in South African law schools in 1999 and therefore it is probably for this reason that section 112(2) refers to BProc degrees registered before 1 February 1999.

45 The confusion created by the relationship, interpretation and implementation between sections 26 and 112, together with their corresponding regulations; as well as the approach of the LPC, has required that the Applicants approach the Court for assistance.

Questions to be determined

46 There are three questions to be determined by this court:

46.1 First, whether section 26(1)(a) infringes on Applicants' constitutional rights to equality, trade and profession, and education in terms of sections 9, 22 and 29 of the Constitution;

46.2 Second, whether the infringement of the Applicants' constitutional rights to equality, trade and profession, and education (if found to exist) is reasonable and justifiable in terms of section 36 of the Constitution;

46.3 Third, whether section 112(2) should be interpreted in a manner consistent with the Constitution.

47 It is to these issues that we now turn.

INFRINGEMENT OF THE RIGHT TO EQUALITY

48 The Applicants challenge the constitutionality of section 26(1)(a) of the LPA, read together with regulation 6. These provisions are challenged on the basis that there is a distinction between people who have graduated with an LLB degree and those who have graduated with a BProc Degree, like the Applicants.[37] and

[37] FA, 006-56, para 134 to 006-58, para 140.

that the Applicants believe the distinction to be arbitrary and irrational, particularly given the purpose and objects of the LPA.

49 The LPC concedes that the Applicants have rights enumerated in section 9(1). However, the LPC submits that this right cannot be claimed by the Applicants[38] and does not proffer any explanation as to why the Applicants cannot exercise or to use its own words "claim" the right.

50 Further, the LPC alleges that the Applicants do not make out a case for unfair discrimination directly or otherwise on any ground in section 9(3) of the Constitution.[39]

51 Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. It does not set out any restrictions for those relying on the right to equality, and certainly does not state that persons in the applicants' position may not claim the right to equality.

52 In determining whether or not an impugned provision falls short of the standards of Section 9 of the Constitution, the Constitutional Court outlined the relevant inquiries to be made where the validity of an impugned provision in respect of section 9 of the Constitution is challenged. In the matter of *Harksen v Lane*[40], the Constitutional Court said:

> *"(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*

38 AA, 011-40, para 12.4.

39 AA, 011-40, para 12.3.

40 *Harksen v Lane NO*1998 (1) SA 300 (CC).

of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination. (own emphasis added)

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(b)(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.

(b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 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)."[41]

[41] *Harksen v Lane NO*1998 (1) SA 300 (CC), para 53. See also *Phaahla v Minister of Justice and Correctional Services* 2019 (2) SACR 88 (CC), paras 46 to 48; and *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), para 26.

53 The test was reiterated more recently by the Constitutional Court in *Weare v Ndebele*[42]; where the Constitutional Court held that —

> *"[t]he tests for determining whether s 9(1) is violated was set out by the court in* Prinsloo v Van der Linde and Harksen v Lane*. A law may differentiate between classes of persons if the differentiation is rationally linked to the achievement of a legitimate government purpose. The question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious."*[43]

54 In the present case, there is an obvious differentiation between BProc graduates and LLB graduates. The latter may have their practical vocational training contracts registered whilst the former may not. It is therefore clear that section 26(1)(a) of the LPA differentiates between categories of people, or rather LLB graduates and BProc graduates by not affording them the same rights to be admitted as legal practitioners, especially as attorneys.

55 Once the differentiation has been established, the second step of the inquiry is whether the differentiation is rationally connected to a legitimate government purpose. In *Prinsloo,* the Constitutional Court expounded that the State is expected to act in a rational manner where a "mere differentiation" arises.[44]

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42 *Weare and another v Ndebele NO and others* 2009 (1) SA 600 (CC).

43 *Weare and another v Ndebele NO and others* 2009 (1) SA 600 (CC), para 46.

44 *Prinsloo*, para 25, where the Court held that the State —

> *"should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State."*

Further, it has been held that the rationality inquiry is not to be directed to whether there are better means of achieving the object of the differentiation but, rather, should focus solely on whether the differentiation is arbitrary or not rationally connected to a legitimate government purpose.[45]

56 It is submitted that one could argue that the governments' purpose, as reflected in the preamble of the LPA, is that there be transformation of the legal profession in order to more accurately reflect the racial diversity of South Africa

57 Furthermore, the LPC itself highlights that *"equality is one of the cornerstones of our democracy, legal practitioners must also be accorded equality of status and opportunity in the profession and legal professional services must be available to all who need them."*[46]

58 The Applicants submit that there is no rational basis between the differentiation and a legitimate government purpose, particularly if one considers the purpose of the Act, and in the face of the concession from the Minister that *"an amendment will be made to the Legal Practice Act to allow persons with BProc to be admitted as attorneys."*[47]

59 Furthermore, the LPC does not advance any rational purpose but rather it attempts to argue that the differentiation is connected to the purpose of the LPA.[48] This is false. The LPA's primary purpose is transformation, and this

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45 *Phaahla,* para 48 and *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC), para 17

46 AA, 011-32, para 9.4.

47 RA, annexure GET23, 012-37.

48 AA, 011-41, para 12.

differentiation is antithetical and hostile to that purpose. It is submitted that the interpretation and implementation of section 26 does not accord with the purpose of the Act from which it stems, and is not rationally connected thereto. It accordingly violates the right to equality.

60 The repealing of the Attorneys Act and the failure by the LPA to make provision for BProc graduates, created a vacuum with regards to these candidates, one which should have been filled by the LPA *if* it were to be authentic to its purpose. Section 26(1)(a) of the LPA has taken away the right that BProc degree holders had under the repealed Attorneys Act. This vacuum further fails to advance the efforts of previously disadvantaged person and furthermore seeks to disfranchises people in the position of the Applicants. It continues to relegate the Applicants and similarly situated candidates, to a perpetual position outside of or on the outskirts of the legal profession.

61 It cannot be that the intention of legislature was to perpetuate the very gatekeeping which has plagued the legal profession and to further exclude previously disadvantaged people from breaking irrational barriers. The Applicants seek the culmination of their life long efforts to becoming attorneys. The First Respondent's interpretation and implementation of the impugned provisions, and opposition to the application, deprives the Applicants of the attainment of this goal. Indeed, the opposition is devoid of rationality and inimical to the LPA's primary purpose.

62 Section 26(1)(a) of the LPA goes against the very need to transform the legal profession as it means that people cannot be admitted as attorneys unless their

complete LLB degrees in addition to their existing BProc qualifications. That cannot be accepted.

63 The applicants submit for these reasons that there is no rational link between section 26 and the government purpose it seeks to achieve through the differentiation.

64 There is an additional element to the differentiation borne of the context from which the BProc degree emanates. In the matter of *City Council of Pretoria v Walker*[49], the Constitutional Court confirmed that discrimination may be indirect. In that case a municipal policy differentiated between residents in a suburb and those in a township. The Court found that this differentiation amounted to indirect discrimination on the basis of race as townships were historically Black areas with overwhelmingly Black residents and suburbs were historically White areas with overwhelmingly White residents.[50]

65 This case is similar to *Walker*. As set out above, the BProc degree is held in large part by Black people or People of Colour.

65.1 Racial segregation permeated all areas of South African society including education.[51] The BProc degree was offered by historically Black universities while the LLB was offered by historically white

49 *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC).

50 *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), para 38.

51 FA, 006-31, para 61.

universities to which Black people required special permission from the Minister of Education to attend;[52]

65.2 Racial segregation also impacted on and was exacerbated by economic disparity.[53] The BProc degree a four-year undergraduate degree while the LLB was a post-graduate degree.[54] It accordingly was more affordable for People of Colour who had fewer financial means and was considered the "poor man's degree".[55]

66 Therefore, the LPA and does not merely differentiate between LLB graduates and BProc graduates, but it also differentiates between People of Colour and White people, thereby perpetuating the very prejudice which it seeks to erase. It offers White people (or those People of Colour who had the means to obtain LLB degrees from historically White institutions) more advantages than Black people who obtained BProc degrees from historically Black institutions; advantages such as being allowed to be admitted. Plainly put, the consequence of section 26(1)(a) is that it differentiates on the basis of race.

67 The differentiation does not bear a rational connection to a legitimate government purpose. In fact, on the contrary it defeats the legitimate government purpose of the transformation of the legal profession and accordingly violates section 9 of the Constitution.

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52 FA, 006-31, para 62.
53 FA, 006-30, para 60.
54 FA, 006-30, paras 58 and 59.
55 FA, 006-30, para 60.

68 Assuming, however, that section 26(1)(a) read with regulation 6 does or could achieve a government purpose in its current form, it is submitted that the provision nonetheless violates the applicants' right to equality. This is because the differentiation is on a specified ground of discrimination — race. Even if one were to say that the differentiation is not on the basis of race, it is still a legitimate ground of discrimination as it 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".*

69 The consequence of section 26(1)(a) and the prejudice suffered by the Applicants as a result of being barred from being admitted, amounts to a shaming and erasure of the hard work, perseverance, effort, and commitment to justice of and by the Applicants. It treats the Applicants' degrees and their academic and vocational efforts as shameful or inferior[56], and erodes the Applicants sense of self-worth and dignity[57].

70 This section of the LPA therefore perpetuates the idea and perception[58] that the BProc degree, and those who hold it, are somehow unqualified or inferior legal practitioners, completely contradicting the very purpose of the LPA. Therefore, even if one were to accept that the differentiation is not based on race but on the type of qualification, this differentiation still amounts to unfair discrimination in contravention of section 9 of the Constitution.

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56 FA, 006-50, para 111.

57 FA, 006-50, para 111.

58 FA, 006-30, para 60.

71 The correct position should be that people with BProc degrees who have met the requirements for admission, should be allowed to be in the same position as people with LLB degree seeking admission as attorneys.

INFRINGEMENT OF THE RIGHT TO CHOOSE A TRADE, OCCUPATION OR PROFESSION

72 Section 22 of the Constitution provides that *"[e]very citizen has the right to choose their trade, occupation or profession freely"*. The practice of a trade, occupation or profession may, however, be regulated by law.

73 The ambit of the right in section 22 was recently interpreted by the Constitutional Court, in *Diamond Producers*[59], as encompassing two elements: the right to choose, and the right to practise. The Court found that:

> *"[though] both the "choice" of trade and its "practice" are protected by s 22, the level of constitutional scrutiny that attaches to limitations on each of these aspects differs. If a legislative provision would, if analysed objectively, have a negative impact on choice of trade, occupation or profession, it must be tested in terms of the criterion of reasonableness in s 36(1). If, however, the provision only regulates the practice of that trade and does not affect negatively the choice of trade, occupation or profession, the provision will pass constitutional muster so long as it passes the rationality test and does not violate any other rights in the Bill of Rights."*[60]

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59 *South African Diamond Producers Organisation V Minister of Minerals and Energy and others* 2017 (6) SA 331 (CC).

60 *South African Diamond Producers Organisation V Minister of Minerals and Energy and others* 2017 (6) SA 331 (CC), para 65.

74 The first question to answer therefore is whether the Impugned provisions affect the right to choose a profession, or the right to practice that said profession. In this regard, the Constitutional Court provided helpful guidance when it said that:

> *"a law prohibiting certain persons from entering into a specific trade, or providing that certain persons may no longer continue to practise that trade, would limit the choice element of section 22; in these cases, there is a legal barrier to choice. This would be the case where, for instance, a licence is necessary to conduct a particular trade, and that licence is withdrawn."*[61]

75 It is submitted that the Impugned Provisions do both, offending the choice, and the practice. The impugned provisions prohibit certain persons (i.e. BProc graduates) from entering the attorneys' profession. In addition, they also provide that BProc graduates who could in the past, under the Attorneys Act, practice as attorneys, may no longer do so.

76 The irony is that the BProc degree, unlike the LLB or BJuris degree, was a four-year undergraduate degree specifically tailored to those who sought to be admitted as attorneys.[62]

77 The applicants do not seek to evade the other provisions and requirements relating to the entrance into the legal profession - they do not seek an unqualified right and accept the state's prerogative to regulate the profession. To the contrary, what the Applicants seek is to be treated the same as other aspirant attorneys, and to be treated as BProc graduates before them.

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61 *Diamond Producers*, para 68.

62 FA, 006-30, para 59.

78 The limitations to choice of profession imposed by section 26(1)(a) of the LPA is arbitrary and irrational on the basis that its effect contradicts the very purpose of the Act – to transform the legal profession. Such arbitrariness is inconsistent with the values which underlie an open and democratic society based on freedom and equality.

79 It is worth noting that the BProc degree before the enactment of the LPA was deemed sufficient for people who wanted to be admitted as attorneys. This means that the law permitted and enabled them to choose a profession of their choice, whereas now, it does not. Section 26(1)(a) of LPA says to the Applicants that they need to do something more in order to be admitted as attorneys. That cannot be correct. It cannot be constitutional as it creates an unnecessary and unjustifiable limitation to entry into the profession for people who would have otherwise already be included.

80 In addition to being an infringement on the Applicants' right to choose a profession, section 26(1)(a) is also an infringement on the applicants' right to practice a profession. This is simply because without being permitted to register their practical vocational training contracts; the Applicants, and others similarly situated will not be able to be admitted as attorneys as they do not meet one of the requirements for such admission.

81 The consequence for this is irrationality. Rationality is concerned with the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose, the purpose or end itself.[63] The test

[63] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC), para 32.

is simple: do the means adopted achieve the end goal sought. In order to determine this, one must determine the objectives sought, and then assess whether the means adopted would achieve those objectives and ends.

82 First, it is clear that the objective for the LPA (i.e. the 'end' aspired to by the LPA) is to advance transformation of the legal sector, and to reflect the diversity of South African society. Section 3(a) of the LPA provides that the objective for the same is to *"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"*. Section 3(b)(iii) provides that it is to *"broaden access to justice by putting in place 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"*.

83 The means adopted by the LPA and LPC do not achieve this objective. As set out above, due to the racialised nature and history of our education system, BProc graduates are largely People of Colour. By not registering the practical vocational training contracts of BProc graduates the LPC is denying People of Colour, such as the applicants, the opportunity to participate in the profession. Therefore, contrary to *advancing* transformation, the interpretation and conduct of the LPC, and the wording of the LPA rather obstructs it. It entrenches a system of hierarchy and superiority that benefits those who were privileged enough to have had the means and resources to obtain LLBs.

84 Section 26(1)(a) of the LPA places restrictions on candidates like the Applicants. The LPA's refusal to register practical vocational training contract amounts to an

unfair limitation to the Applicants (and other BProc graduates) freedom of trade, occupation and profession.[64]

85 Despite being canvassed with them, the LPC does not have an answer to this issue as raised. All it says is that the applicants' right to choose a profession has not been infringed, without qualifying or explaining more.[65]

86 Accordingly, the Applicants submit that section 26(1)(a) is unconstitutional and invalid to the extent that it excludes BProc graduates and limits entry to the profession for those such as in the position of the Applicants.

INFRINGEMENT OF THE RIGHT TO EDUCATION

87 Finally, the Applicants submit that the Impugned Provisions infringe on their right to education.[66] We submit that vocational training such as practical vocational training constitutes "further education" as contemplated by section 29(1)(b) and that the Impugned Provisions violate such right.

88 Section 29(1)(b) of the Constitution provides that *"[e]veryone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible".*

64 FA, 006-55, para 130.
65 AA, 011-42, para 12.14.
66 FA, 006-52, para 117.

Vocational Training is "further education"

89 It is trite that the textual setting should be borne in mind when an interpretative exercise of constitutional rights is undertaken.[67]

90 Having regard to the textual setting of the right to education found in section 29 of the Constitution, one notes that the right of access to further education is one of four substantive rights guaranteed in this provision.[68] Most relevant for our purposes is section 29(1) which contains two of the four substantive rights. Section 29(1)(a) guarantees the right to basic education and section 29(1)(b) the right to further education. Woolman and Bishop argue that the *"only sensible interpretation of 'further education' in terms of FC s 29(1) is that it denotes all education after basic education."*[69] If further education is everything that basic education is not, a determination of what constitutes further education necessitates a determination of what it is not i.e. what basic education is.

91 In the matter of *Juma Musjid*[70] the Constitutional Court took the view that basic education was education provided to children aged seven to 15.[71] In *Pridwin* the Constitutional Court held that it had found, in *Juma Musjid*, that basic education was that which was provided to children between grades one and nine; it further

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67 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), para 22. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18.

68 Others include: (1) the right to basic education; (2) the right instruction in any official language; and (3) the right to establish independent educational institutions.

69 S Woolman and M Bishop 'Education' in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* (hereinafter "CLOSA"), vol 3, 57-37.

70 *Governing Body of the Juma Musjid Primary School and Others V Essay NO and Others* 201(8) BCLR 761 (CC).

71 *Governing Body of the Juma Musjid Primary School and Others V Essay NO and Others* 2011 (8) BCLR 761 (CC), para 38.

held that it cannot be disputed that basic education includes primary education.[72] In *Moko*, the Constitutional Court said that *Pridwin* did not mean that basic education is only primary education.[73] Importantly, it found that basic education includes secondary education (i.e. education up until grade 12).[74]

92 Following from this, if basic education is that which is provided from grades one to 12, then one can conclude that further education is that which is provided after grade 12. Woolman and Bishop take the view that:

> *"Such education would encompass technical and vocational training as well as traditional tertiary education. It should embrace secondary education and pre-primary education if such schooling is not captured by the extension of the term 'basic education'."*[75]

93 As is made apparent by its name, practical vocational training provided to candidate legal practitioners, prior to their admission as legal practitioners is vocational training. In essence, candidate attorneys are educated on the manner in which to run a practice as an attorney. That this is the very objective of practical vocational training is made clear by rule 17.3.6 of the Legal Practice Council Rules ("**LPC Rules**").[76] This rule provides that a person seeking to be admitted as an attorney must include *"a statement as to the type of legal*

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72 *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC), para 78.

73 *Moko v Acting Principal of Malusi Secondary School and Others* 2021 (3) SA 323 (CC), para 29.

74 *Moko*, para 33.

75 CLOSA, 57-38; emphasis added.

76 The South African Legal Practice Council Rules made under the authority of sections 95(1), 95(3) and 109(2) of the Legal Practice Act, 28 of 2014 (as amended), *Government Gazette* 41781, 20 July 2018.

experience gained by the applicant whilst serving under the contract of practical vocational training" in their admission affidavit.

94 According to rule 22.1.2.4 the commencement of the period of practical vocational training is the date on which the practical vocational training contract has been registered with the LPC.

95 From this it is clear that practical vocational training constitutes further education.[77] The registration of a practical training contract is assumed to be the commencement of that further education. Without the registration of the practical vocational training contract one cannot be said to have commenced the practical vocational training, and would consequently not qualify to be admitted.

96 Therefore, while the applicants have been engaged as candidate attorneys since May 2019, their training has not been accepted as training for the purposes of the LPA as their contracts were not registered in May 2019. This is a consequence of the impugned provisions which do not permit the registration of the applicants' practical vocational training contracts.

97 The LPC has also stated that it will instead register the Applicants' contracts as of 7 March 2020, thereby invalidating the approximately 10 months of training which the Applicants had already served, but has not provided any proof of this registration, and as such, the Applicants cannot be sure that this has in fact occurred. This uncertainty is yet another basis for the Applicants having to approach the Court.

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[77] FA, 006-53, para 122.

Impugned provisions infringe the right to education

98 The Western Cape Division confirmed in *Kanse*[78] that section 29(1)(b), like all other rights, has both a positive and negative dimension.[79] The positive obligation requires the state to take active steps to achieve the realisation of the right. The negative obligation demands that the state refrain from taking steps that would negate the right; it —

> *"arises from the general non-retrogression principle that applies to all socio-economic rights in South African law. For example, a measure which allows a person to be deprived of existing access to housing will violate the negative dimension of the right to housing."*

99 For this reason, in *Watchenuka*[80], the SCA found that a prohibition against studying which had been imposed on asylum seekers, was unlawful.[81]

100 Like a number of socio-economic rights, section 29(1)(b) moderates the obligations placed on the State in in three ways.

100.1 First, it is "access" to further education that is guaranteed and not further education itself;

100.2 Second, the right to further education is to be "progressively" (not immediately) available and accessible; and

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78 *Kanse and Others V Chairman of the Senate of the Stellenbosch University and Others* 2018 (1) BCLR 25 (WCC).

79 *Kanse and Others V Chairman of the Senate of the Stellenbosch University and Others* 2018 (1) BCLR 25 (WCC), para 22.

80 *Minister of Home Affairs and Others v Watchenuka and Others* [2004] 1 All SA 21 (SCA)

81 *Minister of Home Affairs and Others v Watchenuka and Others* [2004] 1 All SA 21 (SCA), para 36.

100.3 Third, the realisation of the right is subject to "reasonable" measures.

101 In this respect, the High Court said in *Kanse*:

> *"Even though the internal limitations of reasonableness and progressive realisation have not been explored in the context of Section 29(1)(b), Courts have dealt with this and have provided guidance which is to be found from the meaning assigned to them when the other socio-economic rights were interpreted.*
>
> *Courts have spoken thus: (a) 'Reasonable measures' generally requires the state to have a program 'capable of facilitating the realisation of a right'. This obligation rests on all the levels of government involved but, in the context of higher education, it rests primarily on the national government and higher education institutions since tertiary education is a functional area of national legislative and executive competence. (b) Progressive realisation calls for the progressive facilitation of accessibility calling for the examination and, where possible, lowering over time legal, administrative, operational and financial hurdles".*[82] (own emphasis added)

102 Before the LPA came into effect on 31 October 2018, the Applicants qualified and had the right, under the Attorneys Act, to have their practical vocational training contracts registered, and enjoyed their right to further education. Following the commencement of the LPA on 1 November 2018 however, the Applicants arbitrarily lost that right. By enacting the LPA with the section 26(1) as it reads, the State took away a right that had been held by the Applicants and breached its negative obligation to "do no harm".

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82 *Kanse*, para 22.

103 The Applicants submit that section 26(1)(a) of the LPA takes away BProc graduates' right to further their education. It does this by excluding the phrase "or BProc degree" from section 26(1)(a) of the LPA and by failing to explicitly state that section 112(2) survives the commencement of the LPA.[83]

104 This exclusion also however has a positive dimension. The preamble of the LPA provides that *"opportunities for entry into the legal profession are restricted to the current legislative framework"* and that the LPA is enacted to *"remove any unnecessary or artificial barriers for entry into the legal profession".*

105 Instead of removing these barriers however, the LPA creates barriers where none existed before. It removed the protections and opportunities provided by the Attorneys Act to the Applicants, and added restrictions which deprive the Applicants of realising their right to further education.[84]

106 The Applicants submit that under the repealed Attorneys Act, BProc graduates would have been able to participate in practical vocational training and that they would have been allowed to register their contracts. This enabled BProc graduates to become admitted attorneys and to transform the legal profession demographically in line with the preamble and purpose of the LPA.[85]

107 The situation is different under the present iteration of the LPA. The Applicants are unable to register their contracts with far reaching consequences for the entire profession. Although the First Respondent states that is has now

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83 FA, 006-53, para 122.

84 FA, 006-54, para 123.

85 FA, 006-54, para 126.

registered the Applicant's contracts, the First Respondent maintains that it is debatable whether that should have taken that decision in the first place, this despite the fact that the Minister has expressly stated that the LPA should be amended to reflect qualified persons such as the Applicants.

108 In this regard, if this Honourable Court accepts that the First Respondent has the power to register the Applicant's practical vocational contracts, we ask the Court to order that the First Respondent be ordered to also register the practical vocational training contracts of other similarly *qualifying* BProc graduates, who seek to have their contracts registered in the future in order to be admitted as attorneys. It is submitted that such an order would be in line with the transformation goals of the LPA considering the history of the BProc degree.

109 The Applicants submit that the refusal to register the practical vocational training contracts of similarly qualifying BProc graduates constitutes the continued and systematic exclusion of Black legal professionals from becoming admitted legal practitioners and being enrolled as such by the First Respondent.[86]

THE INFRINGEMENTS ARE NOT JUSTIFIABLE IN TERMS OF SECTION 36.

110 The Applicants submit that section 26(1)(a) infringes on their rights enshrined in section 9, section 22 and section 29(2) of the Constitution. It is further submitted that these infringements cannot be said to be reasonably limited in terms of section 36 of the Constitution. The LPC however disagrees. It submits that if this Honourable Court finds that *"differentiation or discrimination to exist. it is*

[86] FA, 006-47, para 100.

reasonable and justifiable in terms of section 36 of the Constitution".[87] The LPC again makes this assertion without justifying or explaining their position.

111 It is unclear how an entity like the LPC can make such broad submissions without proffering any foundation or a proposition in support thereof. Notably, it fails to advance any section 36 justification or proposition for this Court or the Applicants to consider. We submit that the reasons for the LPC's failure to advance any justification is because it is acutely aware that there is none, and it cannot escape the unavoidable fact that there is no justification for this violation, and no merit in the LPC's continued opposition to the Applicants' application.

112 The LPA is a law of general application. The Applicants have submitted that section 26(1)(a) does in fact limit rights enshrined in section 9, 22 and 29 of the Constitution. The Minister, who is the custodian of the impugned legislation, has accepted the Applicants' position, agrees that it resulted from a legislative omission and that it requires an amendment.

113 The distinction created by section 26(1)(a) between LLB graduates and BProc graduates creates an unnecessary and unjustifiable limitation to entry into the profession. It is accordingly submitted that section 26(1)(a) is unconstitutional and invalid to the extent that to excludes candidates such as the Applicants by limiting entry for BProc graduates into the profession. Such limitation cannot be saved or justified by section 36.

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87 AA, 011-41, para 12.9.

APPROPRIATE RELIEF IN RESPECT OF IMPUGNED PROVISIONS

114 If this Honourable Court finds that section 26(1)(a) of the LPA read with regulation 6 of the LP Regulation is unconstitutional, then the next step and question focuses on what the appropriate remedy should be. In determining what relief is appropriate once a declaration of constitutional invalidity has been made, Courts are empowered to give a remedy and make an order that is just and equitable in the circumstances. The Court must however offer relief that is effective for the breaches of constitutional rights.[88]

115 The Constitutional Court has identified the following options for consideration in determining an appropriate remedy. These are namely:

114.1. whether the Court should simply strike the impugned provisions down and leave it to the legislature to deal with the gap that would result as the legislature sees fit;

114.2. whether it should suspend the declaration of invalidity of the impugned provision for a specified period, or

114.3. whether the law should be developed in accordance with the spirit, purport and objects of the Bill of Rights or whether to replace the impugned provision.[89]

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88 *Independent Institute of Education (Pty) Ltd v The KwaZulu-Natal Law Society and Others* 2019 (4) SA 200 (KZP), para 53.

89 *Bhe and others v Magistrate, Khayelitsha and others; SA human Rights Commission and another v President of the RSA and others* 2005 (1) SA 580 (CC), para 105.

116 The Applicants submit that this Court should grant effective relief and that such relief should include an order that is narrowly tailored to meet the circumstances of the Applicants and people who are similarly situated.

117 In this matter, the Applicants submit that this Honourable Court should first declare section 26(1)(a) to be unconstitutional and invalid. Further, the Court should read into section 26(1)(a) the phrase "or BProc degree" after every appearance of the phrase "LLB degree" up until such a time as the legislature corrects the constitutional invalidity as similarly proposed and offered by the Minister, and that it be afforded 24 months to do so. In the event that the legislature fails to correct the constitutional invalidity, the Applicants submit that the reading-in be made final. The reading in will cure the prejudice and infringements caused by the exclusion of BProc graduates, and permit them to have their practical vocational training contracts registered, so as to later be admitted as attorneys.

118 As mentioned above, the proposed remedy is supported by the Minister.[90] Given that the Minister indicates that an amendment is beckoning, the Applicants submit that dictating to parliament what the wording of the amendment should be does not breach or offend the separation of powers.

119 It is further submitted that the proposed interim reading-in as a remedy is not an undue encroachment on the powers of the legislature. The interim reading-in envisaged in this matter pays due respect to the doctrine of separation of powers by allowing Parliament to conduct the thorough process of consideration and

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90 RA, annexure "GET30", 012-57.

constitutionally required consultation to properly cure the constitutional defect as it sees fit. It is also furthermore mandated by the Minister responsible for this Act.

120 The Applicants submit that should the interim-reading-in not be granted, then there will be a gap and no effective relief in the matter.

INTERPRETATION OF SECTION 112 OF THE LPA

121 The Applicants now move to the consideration of section 112(2) of the LPA.

122 The Applicants seek relief in respect of section 112(2) due to the need for legal certainty, and the inconsistent and confusing stance taken by the LPC.

123 Section 112 relates to ***Transitional Provisions in relation to qualifications,*** and subsection (2) states that

> *"...Any person upon whom the degree baccalaureus procurationis was conferred by a university of the Republic, is regarded as being qualified to be admitted by the court and enrolled as an attorney by the Council as if he or she held the degree baccalaureus legum, if all the other requirements in the Attorneys Act are complied with: Provided that such person has not later than 1 January 1999 registered for the first-mentioned degree."*

124 On the one hand, the LPC takes the stance that section 112(2) of the LPA prohibits BProc graduates from getting admitted as attorneys. This is evidenced by the LPC response to the Applicants' attempt to have their practical vocational training contracts registered where LPC refused to do so basing its refusal on

section 112(2).[91] However, the LPC did not (*a*) provide the Applicants with their interpretation of section 112(2) nor (*b*) provide the Applicants with any explanation as to why section 112(2) was used as the basis for the refusal.

125 On the other hand, the LPC takes the stance that the LPA does not prohibit their admission. In its answering affidavit the LPC states that —

> *"all applicants who are holders of a BProc degree, have not been discriminated against as the provisions of Sections 112 and 115 allows for such candidates to still be admitted as legal practitioners should they be able to comply the requirements of the applicable law"*.[92]

126 As such, the Applicants were left to guess for themselves what interpretation the LPC adopted in refusing the registration of the applicants' practical vocational training contracts on the basis of section 112, and then conversely stating that sections 112 and 115 facilitate the Applicants admission. That interpretation is set out in founding affidavit[93] but is neither admitted nor disputed by the LPC.[94]

127 Section 39(2) of the Constitution dictates that *"when interpreting any legislation. every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights"*. This means that every opportunity which Courts have to interpret legislation must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself.

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91 FA, annexure "GET14", 006-97 and AA, 011-37, para 11.4.

92 AA, 011-41 to 011-42, para 12.12.

93 FA, 006-44, para 94 to 006-45, para 96.

94 The LPC did not provide ad seriatim responses to the applicants' founding affidavit.

128 The Applicants' "section 112 argument" centres on this — giving an interpretation to a legislative provision (particularly where there are concerns about its consistency) must not be done within the framework of another piece of legislation but, with the framework of the Bill of Rights. This should be done in recognition of the ever abiding guiding or instructive hand of our Constitution[95] and the need for legal certainty.

129 Section 112(2) permits the admission of BProc graduates. It may however be interpreted in two ways.

130 First, one may adopt an interpretation that BProc graduates who registered their degree before 1 January 1999 and who met all the requirements to be admitted as attorneys in terms of the Attorneys Act before 1 November 2018 may, after 1 November 2018, apply to be admitted as attorneys and must be so admitted.[96] If this interpretation is upheld, the Applicants and people in the position of the Applicants would <u>not be able to be admitted</u> as they had not yet qualified for admission before 1 November 2018.[97]

129.1. This interpretation closes the door on the Applicants and people like the Applicants. It seems that this is the interpretation adopted by the First Respondent.[98]

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95 *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* 2020 (2) SA 325 (CC), para 2.

96 FA, 006-44, para 94.

97 FA, 006-44, para 95.

98 FA, 006-45, para 96.

131 The ambiguity however may be resolved by applying *"a mandatory constitutional canon of statutory interpretation"*,[99] - a second interpretation. According to this canon where the language of a statute is reasonably capable of more than one interpretation, a Court must prefer a meaning that brings the legislation within constitutional bounds, over the construction that leads to inconsistency with the Constitution.[100] In *Hyundai*[101] this principle was formulated in these terms:

> *"The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."*[102]

132 Additionally, the Constitutional Court held:

> *"Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."*[103]

133 The Applicants submit that section 112(2) can be interpreted in this second way, so as to be constitutionally compliant. It is a well-established canon of statutory construction that *"every part of a statute should be construed so as to be*

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99 *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC), para 43.

100 *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* 2016 (6) SA 596 (CC), para 99.

101 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd in re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O*. 2001 (1) SA 545 (CC) (Hyundai).

102 Hyundai para 22.

103 *Hyundai*, para 23.

consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature".[104] Statutes dealing with the same subject matter, or which are in *pari materia*, should be construed together and harmoniously.[105]

134 This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.[106]

135 In *Ruta*,[107] the Constitutional Court noted that *"[w]ell established interpretive doctrine enjoins us to read the statutes alongside each other, so as to make sense of their provisions together."*[108]

136 It is now trite that Courts must properly contextualise statutory provisions when ascribing meaning to words therein.[109] Courts must have due regard to the context in which the words appear, even where *"the words are be construed are clear and unambiguous".*[110]

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104 *Chotabhai v Union Government (Minister of Justice)* 1911 AD 13 at para 24 and confirmed by the Constitutional Court in Independent *Institute of Education*, para 38.

105 *Independent Institute of Education,* para 38.

106 *Independent Institute of Education,* para 38.

107 *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC).

108 *Ruta*, paras 41 to 46.

109 *Independent Institute of Education,* para 41.

110 *Independent Institute of Education,* para 41.

137 In Independent Institute of Education, the Constitutional Court held that —

> *"[t]his Court has taken a broad approach to contextualising legislative provisions - having regard to both the internal and external context in statutory interpretation. A contextual approach requires that legislative provisions are interpreted in light of the text of the legislation as a whole (internal context). This Court has also recognised that context includes, amongst others, the mischief which the legislation aims to address, the social and historical background of the legislation, and, most pertinently for the purposes of this case, other legislation (external context)."*[111]

138 The Applicants submits that section 112(2) uses the present tense in reference to the requirements of the Attorneys Act instead of the past tense. It states that BProc graduates may be admitted *"if all the other requirements in the Attorneys Act <u>are</u> complied with".*[112] The Applicants submit that the point at which the requirements are complied with can only be the point at which the BProc graduate — like the Applicants — applies for admission as an attorney.[113] Section 112(2) only came into effect on 1 November 2018, and the application for admission can only be after 1 November 2018. Therefore, BProc graduates can be admitted if they met the requirements of the Attorneys Act *<u>after</u>* 1 November 2018.[114]

139 The Applicant submits that this interpretation is the least invasive of individual rights and is most consistent with the Constitution. The Constitutional Court has

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111 *Independent Institute of Education*, para 42.
112 FA, 006-46, para 99.2.
113 FA, 006-46, para 99.2.
114 FA, 006-46, para 99.2.

held that legislation must be through the prism of the Bill of Rights.[115] In *Hyundai*, the Constitutional Court held that section 39(2) requires that all legislative provisions must be read *"so far as is possible, in conformity with the Constitution"*.[116] Thus, an interpretation which is constitutionally compliant must be preferred over an interpretation which is not.[117]

140 Moreover, the Applicants submit that the LPA must be interpreted purposively. The LPA's long title, and the objective of the LPA is to transform the legal profession. An interpretation that would deprive some qualifying law graduates from participating in the profession does not advance that objective. The interpretation advanced by the Applicants facilitates the inclusion of all qualifying law graduates and indeed advances the objectives of the LPA.[118] It is furthermore submitted that this interpretation would not open any "floodgates" as the qualifying group of candidates, inclusive of the Applicants, are a specific group of people.

141 To this end, the Applicants submit that section 112(2) can (and should) be interpreted in a manner consistent with the Constitution.

142 If this Honourable Court is not inclined to agree with this interpretation of section 112(2), the Applicants submit that the section is unconstitutional because it shuts

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115 *Hyundai,* para 21. This limitation was further explained by this Court, per Sachs J, in *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC), para 20 in which it was said:

"Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution."

116 *Hyundai,* para 22

117 *Hyundai*, para 23.

118 FA, 006-46 to 006-47, para 99.4.

the door of admission to the Applicants and similarly situated candidates. The shutting of this door infringes on rights of equality, and freedom of trade and profession as articulated above and in relation to section 26(1)(a) of the Constitution.

143 If section 112(2) is declared unconstitutional and invalid then the Applicants seek a reading- in order so that the phrase "*as at the date of application for admission as attorney*" be read into section 112(2) of the LPA after the phrase *"all the other requirements in the Attorneys Act are complied with"*, up until such a time as the legislature corrects the constitutional invalidity and that the legislature be afforded 24 months to do so. In the event that the legislature fails to correct the constitutional invalidity within this time period, the Applicants will seek that the reading-in be made final.[119]

COSTS

144 The Applicants seek costs against the LPC. The LPC initially refused to register the Applicants practical vocational training contracts and then directed the Applicants to approach this Honourable Court. The Applicants are not people of excessive means to use their resources litigating, but they have been forced to do so by virtue of the fact that the legislation is unconstitutional and is being interpreted and relied on in a manner that exacerbates its unconstitutionality, by the LPC.[120] The Applicants have had to approach a public interest litigation

119 FA, 006-59, para 144.

120 FA, 006-61, para 151.

organisation (Centre for Applied Legal Studies) to represent them and to provide assistance with litigating this matter.

145 Having advised the Applicants to approach this Court, the LPC then opposes the relief sought by the Applicants. It does so in circumstances where the Minister, the executive official responsible for the LPA does not. The Applicants' attorneys approached the LPC with the Minister's acknowledgment that the legislation needed to be amended, in order to have the matter potentially proceed before Court on an unopposed basis. The LPC was informed of the Minister's stance and asked if it might align its approach to that of the Minister. It has refused to do so and has instead maintained its opposition and forced the Applicants into approaching the Court on an opposed basis.

146 It was not until this application was launched that the LPC resolved to register the applicants' practical vocational training contracts. Had these proceedings not been instituted it is likely that LPC would have persisted in its stance that the Applicants cannot be registered, a stance it repeated in writing twice: once to the Applicants and again to the Applicants' attorneys.

147 There is nothing in the LPA which precludes the LPC from itself approaching this Honourable Court to have these provisions declared unconstitutional, particularly if one considers that the LPC are the 'custodians' of the LPA, and the LPA's purpose is to transform the legal profession.

148 The LPA empowers the LPC in section 6(1)(a)(v) to institute legal proceedings and by section 6(1)(b)(ii) to advise the Minister regarding matters concerning the legal profession and legal practice. The LPC could have exercised these powers

to engage with the Minister, who has already demonstrated readiness to amend the legislation, to commence a process to amend these provisions. It could have also brought this application itself in order to further the purpose of the LPA which it its power. It has elected not to do so.[121]

149 Having failed to exercise its own powers, the LPC asks this Honourable Court to grant costs against the applicants on a punitive scale — on the attorney and client scale.[122] It does not submit reasons or set out why, or what the Applicants are alleged to have done which would warrant an award on such a scale.

150 The purpose of an award for costs is to indemnify a successful party who has incurred expenses in instituting or defending an action. An order for cost on an attorney and client scale is usually granted where a Court marks its disapproval of the conduct of the losing party. The Constitutional Court in *Public Protector*[123] held that a punitive cost order is given when a court disapproves of a litigant's fraudulent, dishonest, or mala fides (bad faith) conduct, vexatious conduct, and conduct that amounts to an abuse of the process of court.[124]

151 In the most recent unanimous Constitutional Court judgment of *Mkhatshwa and Others v Mkhatshwa and Others*[125], that Court confirms its' earlier decision of *Public Protector*[126] which states that :

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121 FA, 006-61, para 152.

122 RA, 011-47, para 13.1.

123 *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC)

124 *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC), para 223. See also *Public Protector v Commissioner for the South African Revenue Service* [2020] ZACC 28, para 32.

125 Mkhatshwa and Others v Mkhatshwa and Others [2021] ZACC 15

126 Public Protector v South African Reserve Bank [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) (SARB)

"The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

152 The Applicants submit that they have not been reckless in bringing is application[127], and have sought, at every instance, to avoid unnecessary litigation.

153 It is submitted that should the Honourable Court find that the Applicants' litigious conduct and history falls within this definition, that the Court has the discretion to grant a costs order on a punitive scale which discretion is further confirmed by *Ferreira v Levin NO and Others*[128].

154 Furthermore, In the matter of *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*[129] the learned Judge states that:

"A litigant's right to recover the costs of an opposed application from his opponent will, in general, depend upon whether he was in the right, either in making the application or in opposing it as the case may be (provided always there are no grounds for exercising a judicial discretion to deprive him of these costs). The form in which this rule is usually stated is that

127 RA, 012-30, para 147.

128 Ferreira v Levin NO and Others [1996] ZACC 27; 1996 (2) SA 621 (CC) at 624B—C (par [3]).

129 Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd1948 (1) SA 839 (A) at 863

the successful party is entitled to his costs unless the Court for good reason in the exercise of its discretion deprives him of those costs.[130]"

155 The Applicants additionally submit that the LPC is not protected by the *Biowatch* principle[131] as it is not seeking to protect or vindicate any constitutional rights or protections. It is the Applicants, instead who are and should be protected by the *Biowatch* principle as they seek to vindicate constitutional rights.

156 The Applicants submit that if they are not successful in this application, they should not be mulcted with costs as a cost order has the effect of dissuading members of public from bringing applications concerning human rights violations. This position is vindicated if one considers that the Minister has agreed with and conceded to the relief as sought by the Applicants. In short, the Applicants submit that they are and should protected by the *Biowatch* principle.

RELIEF

157 In the premises the Applicants seek an order:

157.1 Declaring that section 26(1)(a) of the LPA read together to with regulation 6 of the regulations published in terms of section 109(1)(a) of the LPA to be unconstitutional and invalid, and reading into section 26(1)(a) after every appearance of the phrase "LLB Degree" the

130 As quoted in Thusi v Minister of Home Affairs and Others (7802/09) [2010] ZAKZPHC 87; 2011 (2) SA 561 (KZP) (23 December 2010).

131 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), para 21.

following phrase: “or BProc degree” until such time as the legislature corrects the omission.

157.2 Declaring that BProc graduates who meet the additional admission requirements are eligible for admission and enrolment as legal practitioners, specifically attorneys, in terms of the LPA.

157.3 Alternatively, declaring section 112(2) of the LPA unconstitutional and invalid and reading into section 112(2) after the phrase *“all other requirements in the Attorneys Act are complied with”* the phrase *“as at the date of application for admission as attorney”* until such time as the legislature corrects the omission

157.4 Directing the First respondent to register the practical vocational training contracts of any other BProc graduates who wish to register such practical vocational training contracts.

157.5 The applicants abandon prayer 6 in the Notion of Motion as the LPC has indicated in its answering affidavit that it has registered the applicants’ practical vocational training contracts on 7 March 2020, however the Applicants seek that the Court directs the First Respondent to provide proof of registration of the Applicants’ practical vocational training contracts.

157.6 Cost of this application on a scale as deemed appropriate, including the costs of two counsel.

157.7 Further and alternative relief.

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Applicants' counsel

Chambers, Sandton

26 July 2021

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5 The South African Legal Practice Council Rules made under the authority of sections 95(1), 95(3) and 109(2) of the Legal Practice Act, 28 of 2014 (as amended), *Government Gazette* 41781, 20 July 2018.

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7 *Bhe and others v Magistrate, Khayelitsha and others; SA human Rights Commission and another v President of the RSA and others* 2005 (1) SA 580 (CC)

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9 *Chotabhai v Union Government (Minister of Justice)* 1911 AD 13

10 *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC)

11 *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC)

12 Ferreira v Levin NO and Others [1996] ZACC 27

13 *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC)

14 *Governing Body of the Juma Musjid Primary School and Others V Essay NO and Others* 2011 (8) BCLR 761 (CC)

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