

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 76/03

H E T H MABASO

Applicant

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES
(incorporated as the Law Society of the Transvaal)

First Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

Second Respondent

Heard on : 6 May 2004

Decided on : 5 October 2004

JUDGMENT

O'REGAN J:

[1] The applicant seeks special leave to appeal against a judgment and order of the Supreme Court of Appeal (the SCA) handed down on 28 November 2003. The first respondent is the Law Society of the Northern Provinces, an association of attorneys incorporated as the Law Society of the Transvaal. It applied successfully to the Pretoria High Court (the High Court) for an order removing the applicant's name from the roll of attorneys on the ground that the enrolment of the applicant by the registrar of the High Court in terms of section 20 of the Attorneys Act, 53 of 1979 (the Act)

was incompetent. The applicant launched a conditional counter-claim in the High Court seeking a declaration that section 20 of the Act is inconsistent with the Constitution. That counter-claim failed in the High Court. The applicant then sought leave to appeal to the SCA. He did not prosecute this application timeously or properly and the SCA refused his application for condonation. The SCA also concluded that it need not consider the question of the constitutionality of section 20.

[2] Section 20 provides a short-cut procedure whereby attorneys who have been admitted and enrolled by a High Court in one province “under” the Act may be enrolled by the registrar of a High Court in another province without launching a full application in that High Court.¹ However, section 20 does not permit attorneys

¹ Section 20 provides as follows:

“(1) Any person admitted and enrolled as an attorney, or a notary or conveyancer under this Act may in the manner prescribed by subsection (2), apply to the registrar of any court other than the court by which he was so admitted and enrolled to have his name placed on the roll of attorneys or of notaries or of conveyancers, as the case may be, of the court for which such registrar has been appointed.

(2) An application referred to in subsection (1) shall be in writing and be signed by the applicant and shall be accompanied by –

(a) an affidavit stating the name of every court in which the applicant is enrolled in terms of this Act;

(b) a certificate signed by the registrar of every court in which the applicant is so enrolled that his name is still upon the roll of such court;

(c) a certificate signed by the secretary of the society of each province in which the applicant is so enrolled that no proceedings are pending or contemplated to strike his name off the roll or to suspend him from practice;

(d) proof to the satisfaction of the registrar that a copy of the application and copies of the documents referred to in paragraphs (a), (b) and (c) have been served on the secretary of the society of the province in which such other court is situated; and

(e) proof to the satisfaction of the registrar that the fees prescribed by section 80(h) have been paid.

(3) A registrar receiving an application referred to in subsection (1), shall place the name of the applicant on the roll of attorneys or of notaries or of conveyancers, as the case may be, kept by him in terms of section 21, unless an objection in writing against it is lodged with him by the secretary of the society concerned within 21 days from the date of receipt of the application by the registrar.

admitted to practice under other legislation to follow this procedure. Attorneys, such as the applicant, who are admitted under the former Bophuthatswana legislation may therefore not avail themselves of the short-cut provided for by section 20. This differentiation, the applicant argues, constitutes unfair discrimination as contemplated by section 9 of the Constitution and to this extent section 20 should be declared to be inconsistent with the Constitution.

[3] The ordinary procedure for admission and enrolment as an attorney is a substantive *ex parte* application under section 15 of the Act.² A court considering

(4) When the name of a practitioner has in terms of subsection (3) been placed by the registrar upon the roll of attorneys or of notaries or of conveyancers, as the case may be, he shall be entitled to practise and shall have all the rights and privileges and be subject to all the obligations which he would have had and to which he would have been subject if he had been admitted and enrolled by that court.

(5) A notary or conveyancer shall not be enrolled in terms of this section unless he is also thus enrolled as an attorney.”

² Section 15(1) of the Attorneys Act, 53 of 1979 provides as follows:

“Unless cause to the contrary to its satisfaction is shown, the court shall on application in accordance with this Act, admit and enrol any person as an attorney if –

(a) such person, in the discretion of the court, is a fit and proper person to be so admitted and enrolled; and

(b) the court is satisfied that such person has satisfied the following requirements or, where applicable, has been exempted therefrom in terms of the provisions of this Act, namely that such person –

- (i) is 21 years of age or older;
- (ii) (aa) is a South African citizen or has been lawfully admitted to the Republic for permanent residence therein and is ordinarily resident in the Republic; or
(bb) is a citizen of a state the territory of which formerly formed part of the Republic, and belongs to such category of persons, and complies with such conditions, as may be determined by the Minister, after consultation with the presidents of the various societies, by notice in the Gazette;
- (iii) (aa) has satisfied all the requirements for the degree referred to in paragraph (a) of section 2(1), or for the degrees referred to in paragraph (aA) of that section, after pursuing for that degree or degrees a course of study referred to in paragraph (a) or (aA) of that section, as the case may be; or
(bb) has satisfied all the requirements for a degree or degrees referred to in paragraph (aB) or section 2(1) in respect of which a certification in accordance with that paragraph has been done; or

such an application must be satisfied that all the requirements set out in the Act have been met, and, in particular, that the applicant is “a fit and proper person to be so admitted and enrolled”. This application is a more costly and time-consuming procedure than the procedure provided for in section 20.

Facts

[4] The applicant was admitted as an attorney by the Bophuthatswana High Court on 14 June 2001 after serving his period of articles in terms of the Attorneys, Notaries and Conveyancers Act, 29 of 1984 of the former Bophuthatswana. During August 2001, the applicant lodged an application with the registrar of the KwaZulu-Natal High Court in terms of which he sought enrolment as an attorney in KwaZulu-Natal under section 20 of the Attorneys Act. No objection was lodged to the application and on 18 September 2001 the applicant was so enrolled. On 10 October 2001, the applicant launched an incomplete application for enrolment as an attorney with the

(cc) has previously been admitted as an advocate;

(iv) has passed the practical examinations referred to in section 14(1)(a), (b) and (c);

(ivA) (aa) during his term of service under articles or contract of service, or after the expiry of his articles or contract of service; or
(bb) after he has been exempted in terms of this Act from service under articles of clerkship,

has attended a training course approved by the society of the province in which he completed his service under articles or contract of service, or, in the case of section 2A(c), has attended a training course approved by the society of the province in which the candidate attorney intends to practice, and has completed such training course to the satisfaction of that society: Provided that this subparagraph shall not apply to a person who attended a training course referred to in section 2(1A)(a) or 2A(a)(i) and who has completed such course to the satisfaction of the society concerned; and

(v) [deleted by s.3 of Act No. 33 of 1995];

(vi) completed his service under articles or contract of service, or has complied with the provisions of section 2(1A), within the period of three years preceding his application to the court or within the further period allowed by the court in terms of subsection (2).”

registrar of the High Court. The defects in the application were drawn to the attention of the applicant, and he then supplemented the application on 19 October 2001.

[5] The first respondent considered the application and concluded that it was not necessary at that stage to investigate the series of complaints of unprofessional conduct that had been made against the applicant between 1998 and 2000, as section 20 of the Act did not apply to a person who had been admitted in terms of the Bophuthatswana legislation. The applicant was requested to appear before a meeting of the Council of the first respondent on 5 November 2001, which he did.

[6] At that meeting, the applicant was advised by the first respondent that it could not support his application and that he could only be enrolled in the northern provinces if he launched a substantive application for admission in terms of section 15 of the Act, at which stage the first respondent would assess the application on its merits and consider whether he was a fit and proper person to be admitted. The following day the first respondent wrote to the applicant setting out this attitude. On the same day the first respondent also lodged an objection with the registrar of the High Court in terms of section 20(3) of the Act. The registrar acknowledged receipt of the objection on the same day.

[7] On 9 November 2001, the applicant approached the registrar of the High Court and asked for his name to be placed on the roll of attorneys in terms of section 20 of the Act. For some reason, at the time that he made that application, the first

respondent's letter of objection did not appear in the court file, and the registrar enrolled the applicant as an attorney. When it discovered this in December 2001, the first respondent immediately wrote to the registrar asking for an explanation for the enrolment of the applicant in the light of its objection to his being enrolled. The first respondent then launched urgent proceedings in the High Court on 1 March 2003 seeking an order setting aside the enrolment of the applicant.

[8] As stated above, the High Court granted an order in the terms sought by the first respondent. The High Court found that, on the facts, the first respondent had lodged an objection to the enrolment of the applicant in terms of section 20 of the Act; and that, as a matter of law, the filing of an objection by the relevant Law Society precluded the registrar from enrolling an attorney in terms of section 20 and required, instead, the would-be enrollee to launch a substantive application in the High Court for admission and enrolment. The High Court also dismissed the applicant's constitutional challenge to section 20. De Vos J reasoned in this regard as follows:

“I cannot see how the differentiation that is made between a person who was admitted in Bophuthatswana and now wants to become an attorney in the Transvaal, from any other person in South Africa, can ever be described as discrimination. The fact of the matter is the respondent can apply in terms of section 15 of the act to this court to be so admitted. The mere fact that the administrative process in terms of section 20 [of the Act] is not available to him, is as far as I am concerned, not discrimination let alone unfair discrimination.”³

³ *Law Society of the Northern Provinces v H E T Mabaso* Case No 6114/02 an unreported judgment of the High Court dated 19 March 2003, at p 9 of the typescript judgment.

[9] The applicant then sought leave to appeal to the SCA and that was granted by the High Court. He lodged his notice of appeal on 21 May 2002, whereupon he was required within three months to lodge the record of the proceedings in the High Court.⁴ This the applicant failed to do. He was granted an extension to do so by the registrar of the SCA, but once again failed to lodge the record within the stipulated period. His appeal then lapsed.

[10] However, some time later, the applicant lodged an incomplete record together with an application for condonation for the late filing of the record and for the reinstatement of the appeal. Despite his attention being drawn to the defects in the record, the applicant did not remedy them. Finally, the first respondent's attorneys prepared and lodged the missing parts of the record. The applicant also lodged his heads of argument some four months late. After considering the explanation tendered by the applicant for his non-compliance, the SCA concluded that his applications for condonation should not be granted. In his judgment, Mpati DP, on behalf of a unanimous court, then went on to consider the merits of the application for leave to appeal and concluded that they bore no prospects of success in relation to whether the registrar's enrolment of the applicant was competent. In relation to the constitutional relief sought by the applicant in respect of section 20 of the Act, Mpati DP concluded that, as

⁴ Rule 8(1) of the Supreme Court of Appeal rules.

“there are no prospects of success on appeal, it is not necessary to consider the correctness or otherwise of the finding of the court *a quo* in relation to the constitutional issue.”⁵

[11] The applicant now seeks leave to appeal to this Court against the judgment and order made by the SCA. Before turning to the questions that his application raises, I should point out that the applicant launched the application in this Court on 31 December 2003 in terms of rule 20 of the rules of this Court promulgated on 29 May 1998.⁶ However, at the time he launched his application these rules had been superseded by rules promulgated on 31 October 2003,⁷ which came into effect on 1 December 2003. Under the new rules, applications for leave to appeal against the decisions of all courts are regulated by rule 19. In the circumstances, the application was procedurally flawed. Given the fact that the new rules had only just been published and brought into force, and the fact that the first respondent has suffered no prejudice as a result of the applicant's incorrect procedure, the Court is prepared to condone his error.

[12] This is not the only procedural defect in his application. Whenever the constitutionality of an Act of Parliament is challenged, rule 5 requires the party challenging the constitutionality within five days of lodging his application with the registrar of this Court to take steps to join the authority responsible for the

⁵ At para 15 of the judgment.

⁶ Published in Government Notice R757, 29 May 1998.

⁷ Published in Government Notice R1675, 31 October 2003.

administration of that law.⁸ The applicant failed to join the Minister for Justice and Constitutional Development who is responsible for the administration of the Act. Rule 5 is a new rule. The former rule required only service of the application on the Minister which the applicant did.⁹

[13] Rule 5 is an important rule. In a constitutional democracy, a court should not declare the acts of another arm of government to be inconsistent with the Constitution without ensuring that that arm of government is given a proper opportunity to consider the constitutional challenge and to make such representations to the court as it considers fit. There are at least two reasons for this. First, the Minister responsible for administering the legislation may well be able to place pertinent facts and submissions before the court necessary for the proper determination of the constitutional issue. Secondly, a constitutional democracy such as ours requires that the different arms of government respect and acknowledge their different constitutional functions. Rule 5, therefore, is a manifestation of the respect which this Court must pay to the other arms of government. It cannot lightly be waived. It is not

⁸ Rule 5 provides that:

“(1) In any matter, including any appeal, where there is a dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct, or in any inquiry into the constitutionality of any law, including any Act of Parliament or that of a provincial legislature, and the authority responsible for the executive or administrative act or conduct or the threatening thereof or for the administration of any such law is not cited as a party to the case, the party challenging the constitutionality of such act or conduct or law shall, within five days of lodging with the Registrar a document in which such contention is raised for the first time in the proceedings before the Court, take steps to join the authority concerned as a party to the proceedings.

(2) No order declaring such act, conduct or law to be unconstitutional shall be made by the Court in such matter unless the provisions of this rule have been complied with.”

⁹ See rule 6(2) of the rules of this Court, promulgated on 29 May 1998. It is clear from the record that the applicant served a copy of his application to this Court on the Minister for Justice and Constitutional Development on 31 December 2003.

necessary to decide in this case in what circumstances, if any, this Court or the Chief Justice could condone non-compliance with this rule in terms of rule 32.¹⁰

[14] In the special circumstances of this case, the registrar has provided the Minister for Justice and Constitutional Development with a copy of the full record in the case as well as the written submissions lodged by the parties and given her an opportunity to indicate whether she wishes to intervene as a party. In a written notice to this Court, the Minister has consented to being joined as a party in the proceedings, and has indicated that she will abide any judgment given by the Court on the constitutional issue. The Minister is therefore joined as second respondent in the matter. In the circumstances, the applicant's failure to take steps to join the Minister has been cured. It should be emphasised that this Court will not ordinarily take steps to remedy the failure by an applicant to comply with rule 5. It has done so in this case, only because the rule has just been introduced and the applicant did take steps to comply with the former rule.

Issues to be decided

[15] The relief sought by the applicant is twofold: first, an order setting aside the order made by the High Court removing his name from the roll of attorneys; and second, a declaration of constitutional invalidity of section 20 of the Act. In order to

¹⁰ Rule 32 provides as follows:

“The Court or the Chief Justice may –
(1) of their own accord or on application and on sufficient cause shown, extend or reduce any time period prescribed in these rules and may condone non-compliance with these rules; and
(2) give such directions in matters of practice, procedure and the disposal of any appeal, application or other matter as the Court or Chief Justice may consider just and expedient.”

obtain this relief, he has sought leave to appeal against the order of the SCA refusing condonation for his failure to comply with the rules of the SCA in prosecuting his application for leave to appeal. The first question that arises for consideration is whether the applicant is correct in seeking leave to appeal against the decision of the SCA or whether he should be seeking leave to appeal against the order of the High Court to this Court.

Appeals to this Court in circumstances where the SCA has refused condonation for a failure to comply with its rules

[16] Although the substance of the applicant's appeal concerns the decision of the High Court, the applicant sought leave to appeal in terms of the old (and no longer applicable) rule 20 against the judgment of the SCA refusing him condonation for his failure to comply with the rules of the SCA. In its judgment, the SCA did not deal with the constitutional issue because it did not consider it necessary to do so. The rule now applicable is the new rule 19 which governs all appeals to this Court. In the past appeals from courts other than the SCA were governed by rule 18, and appeals from the SCA were governed by rule 20. The new rule 19 provides that:

“(1) The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.

(2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the

other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave.”

[17] Rule 19 needs to be read in the light of chapter 8 of the Constitution. That chapter makes it clear that High Courts and the Supreme Court of Appeal have jurisdiction to decide constitutional matters (other than those in respect of which this Court has exclusive jurisdiction).¹¹ An appeal against a decision of the High Court on a constitutional matter may thus be brought first to the Supreme Court of Appeal and then to the Constitutional Court, which is the highest court on constitutional matters, or, when it is in the interests of justice to do so, and the Constitutional Court grants leave, directly to this Court.¹²

[18] It is clear from the text of rule 19, however, that where an application for leave to appeal to the SCA is refused by the President of the SCA, a refusal which is ordinarily unaccompanied by reasons,¹³ any subsequent appeal to this Court is considered to be an appeal, not against the decision of the SCA, but against the High Court decision, and the time for lodging the appeal is duly extended. This is consistent with the jurisprudence of this Court under the earlier rules.¹⁴ The question that arises is whether, under this rule, when the SCA has refused an application for

¹¹ See section 167(4) of the Constitution which sets out those matters in respect of which the Constitutional Court has exclusive jurisdiction.

¹² See section 167(6) of the Constitution.

¹³ See *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC).

¹⁴ *Swartbooi and Others v Brink and Another (1)* 2003 (5) BCLR 497 (CC) at paras 3-4.

condonation without any consideration of the constitutional matter in issue, the appeal that is then brought to this Court should be an appeal against the SCA judgment refusing condonation or an appeal against the High Court judgment in which the constitutional matter was considered.

[19] This Court has not considered an application for leave to appeal under the new rule 19 where the order made by the SCA was an order refusing condonation to the applicant.¹⁵ This issue raises some difficulties. On the one hand, as will be made clear, the refusal of condonation constitutes the exercise of discretion by a court which for good reason may ordinarily only be overturned on appeal in narrow circumstances. On the other hand, the Constitution makes it plain that appeals on constitutional matters lie to the SCA and to this Court. This Court has the important constitutional role of ensuring that constitutional matters, where appropriate, are determined. Accordingly, the ordinary rules regulating appeals against decisions refusing condonation might frustrate this Court in the performance of its constitutional role.

[20] The rules of the SCA provide that it may condone the failure to comply with its rules,¹⁶ and condonation will ordinarily only be granted when sufficient cause is shown.¹⁷ It is trite law that a court considering whether or not to grant condonation

¹⁵ Such an application was considered but not decided under the old rules in *S v Basson* 2004 (6) BCLR 620 (CC) at paras 79-81.

¹⁶ Rules 11 and 12 of the Supreme Court of Appeal rules.

¹⁷ See *Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Auby and Pastellides (Pty) Ltd v Glen Anil Investments (Pty) Ltd* 1960 (4) SA 865 (A) at 869H; and *Van der Berg v Coopers and Lybrand Trust (Pty) Ltd and Others* 2001 (2) SA 242 (SCA) at 255B-C.

exercises a discretion.¹⁸ The discretion must, of course, be exercised judicially on a consideration of all the facts and “in essence it is a matter of fairness to both sides.”¹⁹ It is clear that the SCA may decide an application for condonation without considering the merits of the case, though it does so only where there is a gross and flagrant failure to comply with its rules.²⁰ Ordinarily, the approach of an appellate court to the exercise of such a discretion is that it will not set aside the decision of the lower court

“merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.”²¹

[21] In this case, it is clear that there were material and gross defects in the manner in which the applicant prosecuted his appeal in the SCA. Moreover, despite being asked to do so, he failed to rectify those defects or provide a satisfactory explanation for his failure. The SCA refused the application for condonation without even considering the question of the constitutionality of section 20 of the Act. In the light of the manner in which the applicant prosecuted his appeal in the SCA, I cannot but

¹⁸ *Louw v Louw* 1965 (3) SA 750 (E) at 751G.

¹⁹ *S v Yusuf* 1968 (2) SA 52 (A) at 53H per Holmes JA.

²⁰ *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 687A; *Darries v Sheriff, Magistrates' Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 41C-D.

²¹ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11. See, however, *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361 which acknowledges that the extent of review by an appellate court will depend on the precise character of the discretion concerned. See also the discussion of discretion in *Media Workers Association of South Africa and Others v Press Corporation of South Africa* 1992 (4) SA 791 (A) at 800.

conclude that the SCA acted judicially in refusing condonation to the applicant. On the ordinary approach, then, this would not be a matter in which an appellate court would grant leave to appeal.

[22] On the other hand, it is clear that the applicant wishes to pursue an appeal against the order and judgment of the High Court. The grounds of appeal he seeks to argue are the same in this Court as in the SCA. In formulating his application for leave to appeal as an appeal against the SCA, however, the applicant has to contend that the SCA's refusal of condonation was incorrect. On ordinary principles, he could succeed only if he could show that the SCA did not act judicially when it refused him condonation. Where the SCA did act judicially, the applicant would be prevented from approaching this Court to vindicate his constitutional rights.

[23] Such a conclusion would be at odds with the appellate court structure provided for in chapter 8 of the Constitution. As stated above, sections 167(3) and 168(3) of the Constitution²² contemplate that in constitutional matters, appeals may lie both to the SCA and to this Court in turn. Where an appeal to the SCA has failed because the

²² Section 167(3) provides:

“The Constitutional Court —

- (a) is the highest court in all constitutional matters;
- (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.”

Section 168(3) provides:

“The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only —

- (a) appeals;
- (b) issues connected with appeals; and
- (c) any other matter that may be referred to it in the circumstances defined by an Act of Parliament.”

SCA has refused condonation for a failure to comply with its rules, without a consideration of the constitutional matter, it is our view that whatever the position may have been under the old rules, something which the Court has not yet determined,²³ the new procedure under rule 19 should be construed to require an applicant to apply for leave to appeal to this Court against the decision of the High Court, rather than the decision of the SCA refusing condonation. This approach would protect the inherent power of the SCA, as confirmed by the Constitution, “to protect and regulate [its] own process”.²⁴ It would avoid this Court having regularly to second-guess the SCA when it refuses condonation which might undermine the SCA’s autonomous regulation of its own process.

[24] Were the proper refusal of condonation by the SCA to constitute a bar to any approach to this Court on appeal, the ability of this Court to perform the constitutional task conferred upon it by chapter 8 of the Constitution might well be frustrated. Under rule 19, then, an applicant refused condonation by the SCA should ordinarily seek leave to appeal to this Court directly against the judgment of the High Court and not ordinarily seek leave to appeal against the judgment of the SCA refusing condonation.

[25] Under the new rule, all appeals are to be dealt with in terms of rule 19, and it is quite clear that simultaneous and separate appeals to this Court in the same matter

²³ This is a matter yet to be determined. See *S v Basson* above n 15 at para 81.

²⁴ See section 173 of the Constitution.

against orders of the High Court and the SCA dealing with the same issue are ordinarily not competent.²⁵ Simultaneous appeals against judgments of the High Court and the SCA on the same matter were also not competent under the old rules. In *S v Basson*,²⁶ the applicant sought leave to appeal to this Court simultaneously under both rule 20 (against the decision of the SCA) and under rule 18 (against the decision of the High Court). The applicant stated that the rule 18 application was launched to cure any potential defect in the rule 20 appeal. The rule 18 application was dismissed on the ground that an applicant was not permitted to cure substantive defects in the rule 20 application, by lodging a second and simultaneous appeal.

[26] In considering an application for leave to appeal against a judgment of the High Court where the SCA has refused an application for condonation in respect of an appeal, this Court will consider as in all applications for leave to appeal whether it is in the interests of justice to grant leave to appeal.²⁷ Guiding principles for determining the interests of justice have been established by this Court in a string of cases.²⁸ Relevant factors include the importance of the determination of the constitutional issue, the question of whether the matter has been considered by the

²⁵ See judgment in *Western Areas Ltd and Others v S* 2004 (8) BCLR 819 (CC).

²⁶ Above n 15.

²⁷ This is the principle established in section 167(6) of the Constitution to govern applications for leave to appeal to this Court.

²⁸ See, for example, *S v Pennington* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at para 44; *MEC for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32; *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 10; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at paras 15-19; *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 8; *MEC for Health, KwaZulu-Natal v Premier, Kwa-Zulu Natal: in re Treatment Action Campaign and Others* 2002 (5) SA 717 (CC); 2002 (10) BCLR 1028 (CC) at paras 7-12.

SCA, the nature of the order appealed against, and the prospects of success. It is clear, though, that not one of the factors is necessarily determinative on its own.

[27] A further factor relevant to determining whether leave to appeal should be granted will be the circumstances in which the SCA has refused the application for condonation. It will often not be in the interests of justice for this Court to grant leave to appeal against such a decision of the SCA because there will often be no prospect that the appeal will be successful. And where there has been a flagrant and gross breach of the rules of the SCA by the litigant, that too will militate against the grant of leave by this Court. It will only be in the interests of justice for leave to be granted in such cases where it is clear that the constitutional issue is of some importance, and that there are reasonable prospects of success in relation to the appeal on the constitutional issue.

[28] In the light of the foregoing, and particularly given the fact that the applicant sought to comply with rules recently repealed, the Court is prepared to treat this application as an application for leave to appeal against the decision of the High Court under the new rules and to condone the applicant's failure to comply with those rules. I turn now to the question whether it is in the interests of justice to grant the application for leave to appeal.

The issues in the application for leave to appeal

[29] The application for leave to appeal involves two issues. The first is concerned with the order made by the High Court in favour of the first respondent which required the registrar of the High Court to remove the applicant's name from the roll of attorneys, on the ground that it had been enrolled erroneously by the registrar despite an objection to the enrolment by the first respondent. In this regard, the relief sought by the applicant is that the order of the High Court removing his name from the roll of attorneys in the northern provinces be set aside. The second issue relates to the constitutionality of section 20 of the Act. I deal with these two issues separately.

[30] As to the first issue, it is common cause on the papers that the removal of his name from the roll does not constitute an absolute bar to the applicant's being enrolled as an attorney. He is entitled to launch a substantive application in the High Court in terms of section 15 of the Act for admission and enrolment.²⁹ Moreover, a reading of section 20(3) of the Act³⁰ makes it plain that once there is an objection to the enrolment of a person by a law society, the registrar may not enquire into the objection, but is prevented from enrolling the person on the roll of attorneys. If the section 20 application fails, an obvious remedy for the applicant is to approach a court in terms of section 15 of the Act.

[31] There is an important reason for this rule. Law societies are empowered by the Act to play an important role in ensuring that legal practitioners conduct themselves

²⁹ See n 2 above.

³⁰ Section 20 is cited in full at n 1 above.

with integrity.³¹ They do so in the public interest. Where a law society has grounds for concern over the fitness of a candidate to be enrolled as an attorney, a court will be astute to ensure that those concerns are properly investigated before requiring a person to be admitted. It is clear from the record that the first respondent has received a series of complaints as to the applicant's fitness to be admitted as an attorney and that it wishes to launch an investigation of those complaints at the proper time. In the circumstances of this case, therefore, it would be inappropriate for the applicant to be granted the substantive relief he seeks without allowing the law society an opportunity to conduct the necessary investigation into the complaints it has received against the applicant. In doing so, of course, the law society must act fairly and give the applicant due opportunity to respond to the complaints. Accordingly, I conclude that the interests of justice do not justify granting leave to the applicant to appeal against the order of the High Court insofar as it relates to the order made by the High Court effectively removing the applicant's name from the roll of attorneys for the northern provinces. In the circumstances, it is not necessary to decide whether the appeal on this footing raised a constitutional matter or not.

[32] The second issue upon which the applicant seeks relief arises from the applicant's counter-claim in which he sought an order declaring section 20 of the Act to be inconsistent with the Constitution and invalid. He contended that the provision is unfairly discriminatory to the extent that it prevents attorneys who have been admitted as attorneys under Bophuthatswana legislation from using the short-cut route

³¹ See, for example, sections 16, 19, 22, 24, 28, 42, and 56 of the Act.

to enrolment as an attorney in other High Courts provided by section 20. The counter-claim was dismissed on the merits by the High Court as not constituting unfair discrimination and the SCA held that it did not need to consider the issue.

[33] The determination of the constitutional challenge to section 20 is of importance to the broader public, and particularly to the legal profession. As argued by the applicant, section 20 deprives those attorneys who were admitted in South Africa, but under legislation other than the Act, of the right to seek enrolment in other parts of the country under the short-cut procedure provided by section 20. Ensuring equitable access to the attorneys' profession is a matter of great importance. If the applicant is correct in his assertion that section 20 is unconstitutional in its impact, and unfairly discriminates against certain groups of practitioners, that is a matter that should be resolved by a court. Indeed, the SCA noted its concerns regarding the impact of the provisions in the penultimate paragraph of the judgment in the following terms:

“I would, however, recommend that legislative attention be given to the issue as soon as possible so as to ensure uniformity and certainty in the attorneys' profession.”³²

[34] Moreover, the constitutional challenge had been considered and rejected by the High Court, so the undesirability of deciding a constitutional challenge without the benefit of the views of the court of first instance does not arise. Indeed, given the fact that the High Court had concluded that section 20 was not in breach of the Constitution, the fact that the SCA clearly had reservations about the propriety of

³² See para 15 of the SCA judgment.

section 20, and the fact that the SCA did not deal with the matter, legal uncertainty is exacerbated rather than avoided. In the circumstances, then, the fact that the SCA did act judicially in refusing the application for condonation by the applicant does not outweigh the considerations which suggest that it is in the interests of justice for this Court to grant leave to the applicant against the judgment of the High Court. Accordingly, leave is granted to the applicant to appeal to this Court on the question of the constitutionality of section 20 of the Act. I now turn to consider the constitutional challenge to section 20.

The constitutional challenge to section 20

[35] Section 20(1) provides that:

“Any person admitted and enrolled as an attorney . . . under this Act may in the manner prescribed by subsection (2), apply to the registrar of any court other than the court by which he was so admitted and enrolled to have his name placed on the roll of attorneys . . . of the court for which such registrar has been appointed.”

The applicant's complaint is that as he was admitted in terms of the Attorneys, Notaries and Conveyancers Act, 20 of 1984 (Bophuthatswana), the provisions of section 20 did not apply to him as he had not been admitted and enrolled under “this Act”, that is the Attorneys Act, 53 of 1979. On his argument, the Act therefore unfairly discriminates between those who were admitted as attorneys under the 1979 Act and those admitted in South Africa but under other legislation.

[36] Section 1 of the Constitution describes South Africa as “one, sovereign, democratic state”. This statement has a particular importance given the history of South Africa in which the pre-democratic government granted “independence” to certain “homelands” which were part of South Africa as an aspect of its policy of grand apartheid. Those areas of the country which were formerly “homelands”, in general, still remain underdeveloped and poor. The legislative bodies established in the “homelands” enacted legislation to admit attorneys. The effect of section 20 is to say to those attorneys who were admitted in areas that were formerly “homelands” that they are not entitled to be treated in the same fashion as attorneys admitted elsewhere.

[37] The applicant argues that in excluding those attorneys admitted under legislation that derived from former “homeland” administrations, section 20 constitutes unfair discrimination as contemplated in section 9(3) of the Constitution.

Section 9(3) provides that:

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

The applicant argued that section 20 discriminates on the grounds of ethnic or social origin in that it distinguishes between those attorneys admitted in former “homelands”, and those admitted under the Act. A person who was admitted in a “homeland”, he argued, was a person of a different social origin from a person

admitted under the Act. I do not consider it necessary in this case to decide whether this argument is correct for it is clear from section 9(3) that it does not contain an exhaustive list of prohibited grounds of unfair discrimination.

[38] The differentiation drawn in the Act between those who were admitted under the Act itself, and those admitted under other legislation enacted in the former “homelands” needs to be evaluated in the light of the history of the “homelands”. They were invented and established by the pre-democratic government, as part of apartheid policy, in an attempt to allocate small and generally poor areas of South Africa to black people. The disastrous and impoverishing effects of this policy are well-known. In excluding attorneys admitted under “homeland” legislation from benefiting under the provisions of section 20, the Act clearly discriminates between those attorneys admitted in terms of “homeland” legislation and those admitted in terms of the Act. This discrimination reinforces and perpetuates a pattern of disadvantage which exists between “homeland” areas and the rest of South Africa. Accordingly, the discrimination has the potential to impair the fundamental human dignity of those adversely affected.³³ Our Constitution expressly seeks to avoid the perpetuation of such patterns of disadvantage and the concomitant impairment of human dignity.

³³ See *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 31-33; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 53; 1997 (11) BCLR 1489 (CC) at para 52; *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC) at paras 19-20.

[39] The first respondent sought to rely on *S v Makwanyane and Another*³⁴ in which an argument was presented to the Court that the fact that the death penalty had been abolished in some of the “homelands” meant that the retention of the death penalty in the areas that had constituted South Africa constituted a breach of the right to equality before the law. This argument was rejected by Chaskalson P in his judgment in which he reasoned as follows;

“If the disparity had been the result of legislation enacted after the Constitution had come into force, the challenge to the validity of s 277 on these grounds may well have been tenable. Criminal law and procedure is a national competence and the national Government could not without very convincing reasons have established a ‘safe haven’ in part of one of the provinces in which the death penalty would not be enforced. The disparity is not, however, the result of the legislative policy of the new Parliament, but a consequence of the Constitution, which brings together again in one country the parts that had been separated under apartheid. The purpose of s 229 was to ensure an orderly transition, and an inevitable consequence of its provisions is that there will be disparities in the law reflecting pre-existing regional variations, and this will continue until a uniform system of law has been established by the national and provincial Legislatures within their fields of competence as contemplated by chap 15 of the Constitution.

[32] The requirement of s 229 that existing laws shall continue to be in force, *subject to the Constitution*, makes the Constitution applicable to existing laws within each of the geographic areas. These laws have to meet all the standards prescribed by chap 3, and this no doubt calls for consistency and parity of laws within the boundaries of each of the different geographic areas. . . . It follows that disparities between the legal orders in different parts of the country, consequent upon the provisions of s 229 of the Constitution, cannot for that reason alone be said to constitute a breach of the equal protection provisions of s 8, or to render the laws such that they are not of general application.”³⁵

³⁴ 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

³⁵ Id at paras 31-32.

[40] The differentiation at issue in *Makwanyane* was between different sentences imposed in different parts of the country. Those prejudiced were not the occupants of former “homelands”, but those who lived in the former South Africa, the more privileged part of our country. The only question was whether the different sentencing provisions constituted a breach of equality before the law. The Court concluded that it was inevitable that there would be different legislative provisions operative in different parts of the country given our constitutional history. However, the Court was not concerned with the issue of unfair discrimination which raises quite different concerns.

[41] The principle in *Makwanyane* thus does not suggest that legislative differentiation, arising as it may from different legislative provisions enacted by different legislatures in the past, may not give rise to unfair discrimination in our new democratic order. The judgment is emphatic that legislative provisions must pass the test of chapter 3 (the Bill of Rights in the interim Constitution).³⁶ Where the difference between the legislative provisions amounts to unfair discrimination, the provision will be in breach of the Bill of Rights and appropriate relief must follow. Whether the differentiation amounts to unfair discrimination or not will depend upon a contextual analysis of the relevant provisions. In this case, I am of the view that a provision which prevents practitioners admitted in the former “homelands” from utilising a short-cut procedure for enrolment in another province, does reinforce a

³⁶ Act 200 of 1993.

pattern of stigma which the Constitution prohibits. However, that will not be the case with all differential legislative provisions. Each case will have to be considered on its merits.

[42] Ten years into our new constitutional order, citizens are entitled to have any unfairly discriminatory differentiation between the different legislative schemes removed from the statute books. Where it remains on the statute books, victims of the unfair discrimination are entitled to seek and obtain relief. For these reasons, I conclude that the discrimination occasioned by section 20 is unfair.

[43] Although the record and the written submissions were served upon the Minister, she chose to abide the decision of the Court and made no representations to the Court to suggest that it was her view that the provision constituted a justifiable limitation on the right to be free from unfair discrimination in terms of section 36 of the Constitution. Nor is there any basis, of which I am aware, for concluding that the limitation is justifiable. In the circumstances, it must be held that section 20 of the Act is inconsistent with the Constitution and invalid to the extent that it discriminates between attorneys admitted in South Africa under the Act and those admitted under the legislation of the former "homelands".

First respondent's application to place further information before the Court

[44] On 1 June 2004, nearly four weeks after oral argument had been heard in this matter, the first respondent lodged a further affidavit with the Court in which it sought permission to place further evidence before the Court. It need hardly be said that an

application to lodge what constitutes new evidence before an appellate court after argument has been heard is an extraordinary step. Such applications will not be granted by a court in the absence of powerful reasons requiring the admission of the evidence. On 7 June 2004, the Court issued an order refusing to admit the further evidence and indicated that reasons for this would be given in its judgment on the application for leave to appeal.

[45] The evidence in the affidavit sought to suggest that section 20 of the Act should not be declared unconstitutional on the ground that the differentiation in the Act was not unfair because the Bophuthatswana Law Society is not operating effectively or at all. It is quite clear that such evidence does not fall within the terms of rule 31(1).³⁷ That rule permits parties to lodge factual material that is either common cause or otherwise incontrovertible, or of an official, scientific, technical or statistical nature capable of easy verification.

[46] Indeed the evidence tendered by the first respondent is very likely to be controversial, and to the extent that it is critical of the performance of the Bophuthatswana Law Society, could only ever be admitted by a court were the Bophuthatswana Law Society to be given an opportunity to respond to it. However,

³⁷ Rule 31(1) provides that:

“Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material which is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts

—
(a) are common cause or otherwise incontrovertible; or
(b) are of an official, scientific, technical or statistical nature capable of easy verification.”

that is not necessary in this case. Even if it were to be correct that the Bophuthatswana Law Society is not operating effectively, the scheme of section 20 makes it plain that the law society in whose area an applicant seeks enrolment is entitled to object to that enrolment. The interests of the first respondent are therefore adequately protected within section 20 itself. Once an objection has been lodged by a law society in terms of section 20(3), the section 20 procedure may not be followed and an applicant would ordinarily be required to launch a substantive application to court in terms of section 15 to obtain enrolment. For these reasons, the Court is of the view that the application to submit what constituted further evidence should not be granted at this stage of the proceedings.

Remedy

[47] Section 172(1) of the Constitution requires a court that finds a provision in a law to be inconsistent with the Constitution to declare that provision invalid to the extent of its inconsistency. The Court must therefore declare section 20 invalid to the extent of its inconsistency with the Constitution. Where possible, however, the Court must tailor its declaration of invalidity to target the precise cause of the constitutional inconsistency. The applicant argued that if the words “under this Act” were severed from section 20 and the words “by any court in the Republic of South Africa” were read into the provision instead, the constitutional complaint would be removed.

[48] The remedial proposal made by the applicant does target the unconstitutionality identified, but it may not be sufficient to cover those attorneys who were admitted in

the former “homelands” before 1994, depending upon the meaning given to “in the Republic of South Africa”. To avoid any uncertainty, the words read into the section should be “by any court in the Republic of South Africa or by any court in the former territories of Transkei, Ciskei, Bophuthatswana and Venda”.

[49] This declaration of invalidity will take effect from 27 April 1994. However, no consequential relief will be afforded to the applicant at this stage for the reasons given earlier in this judgment.

[50] In the light of the fact that the application has been only partially successful, and in the light of the fact that the applicant represented himself in the proceedings in this Court, it is not appropriate to make a costs order. No costs order will therefore be made.

Order

[51] The following order is therefore made:

1. The Minister for Justice and Constitutional Development is joined as the second respondent.
2. The applicant’s failure to comply with the provisions of rule 19 is condoned.
3. The first respondent’s application to place further evidence before this Court is dismissed.
4. The application for leave to appeal against the decision of the Supreme Court of Appeal is dismissed.

5. The application for leave to appeal against the decision of the High Court in relation to the orders made in terms of paragraphs 2 and 3 of the notice of motion in the High Court is dismissed.
6. The application for leave to appeal against the decision of the High Court dismissing the counter-claim made by the applicant is granted.
7. It is declared that the inclusion of the words “under this Act” in section 20(1) of the Attorneys Act, 53 of 1979 is inconsistent with the Constitution and invalid.
8. It is declared that the omission of the words “by any court in the Republic of South Africa or by any court in the former territories of Transkei, Ciskei, Bophuthatswana and Venda” from section 20(1) of the Attorneys Act, 53 of 1979 is inconsistent with the Constitution and invalid.
9. It is declared that section 20(1) of the Attorneys Act, 53 of 1979 is to be read as follows: “Any person admitted and enrolled as an attorney, or a notary or conveyancer by any court in the Republic of South Africa or by any court in the former territories of Transkei, Ciskei, Bophuthatswana and Venda may in the manner prescribed by subsection (2) apply to the registrar of any court other than the court by which he was so admitted and enrolled to have his name placed on the roll of attorneys or of notaries or of conveyancers, as the case may be, of the court for which such registrar has been appointed.”

Chaskalson CJ, Langa DCJ, Mokgoro J, Moseneke J, Ngcobo J, Sachs J, Skweyiya J,
van der Westhuizen J and Yacoob J concur in the judgment of O'Regan J.

For the applicant:

Represented in person.

For the first respondent:

A T Lamey instructed by Rooth and
Wessels Inc.