IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no. 9090/18

In the matter between:

INDEPENDENT INSTITUTE OF EDUCATION (PTY) LTD	Applicant

and

THE KWAZULU-NATAL LAW SOCIETY	First Respondent
THE LAW SOCIETY OF SOUTH AFRICA	Second Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE MINISTER FOR HIGHER EDUCATION AND TRAINING	Fourth Respondent
THE SOUTH AFRICAN QUALIFICATIONS AUTHORITY	Fifth Respondent
THE COUNCIL ON HIGHER EDUCATION AND TRAINING	Sixth Respondent
THE NATIONAL FORUM ON THE LEGAL PROFESSION	Seventh Respondent
THE GENERAL COUNCIL OF THE BAR	Eighth Respondent
THE CAPE LAW SOCIETY	Ninth Respondent
THE LAW SOCIETY OF THE FREE STATE	Tenth Respondent
THE LAW SOCIETY OF THE NORTHERN PROVINCES	Eleventh Respondent
NELSON MANDELA UNIVERSITY	Twelfth Respondent
UNIVERSITY OF KWAZULU-NATAL	Thirteenth Respondent
UNIVERSITY OF PRETORIA	Fourteenth Respondent
UNIVERSITY OF JOHANNESBURG	Fifteenth Respondent
UNIVERSITY OF VENDA	Sixteenth Respondent

RHODES UNIVERSITY	Seventeenth Respondent
UNIVERSITY OF THE WESTERN CAPE	Eighteenth Respondent
UNIVERSITY OF CAPE TOWN	Nineteenth Respondent
UNIVERSITY OF STELLENBOSCH	Twentieth Respondent
UNIVERSITY OF WITWATERSRAND	Twenty-First Respondent
UNIVERSITY OF FORT HARE	Twenty-Second Respondent
NORTH WEST UNIVERSITY	Twenty-Third Respondent
UNIVERSITY OF THE FREE STATE	Twenty-Fourth Respondent
UNIVERSITY OF LIMPOPO	Twenty-Fifth Respondent
UNIVERSITY OF ZULULAND	Twenty-Sixth Respondent
WALTER SISULU UNIVERSITY	Twenty-Seventh Respondent
UNIVERSITY OF SOUTH AFRICA	Twenty-Eighth Respondent

ORDER

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1. The 9th to 11th and 12th to 28th respondents respectively are joined as additional respondents in this matter.
2. Section 26(1)(a) of the Legal Practice Act 28 of 2014 is hereby declared constitutionally invalid insofar as the use of the word “university” to exclude private Higher Education Institutions duly accredited and registered to provide the LLB degree;
3. The students that graduate with an LLB degree offered by the applicant after 1 January 2018, are as qualified to enter the practice of the legal profession as graduates from public universities in South Africa.
4. The applicant is ordered to pay the costs incurred by the first respondent up to and including the adjournment of18 September 2018, such costs to be on the opposed motion scale
5. There is no order as to the costs from 26 September 2018 up to 31October 2018.
6. The third respondent is directed to pay the costs of the applicant from 1 November 2018.

JUDGMENT

Sibiya AJ

Introduction

[1] The application before this court concerns the status of the LLB degree offered by Varsity College. The legislation regulating the admission of legal practitioners for practice as an attorney or advocate allows such admission only to those candidates with an LLB degree from a university.Varsity College, although registered and duly accredited, is not a university.

[2] The applicant, is the Independent Institute of Education (which will be referred to as 'the IIE') and was registered in terms of section 54(1)(c) of the Higher Education Act 101 of 1997 (the Higher Education Act) as amended, in 2007 as a private higher education institution. It provides higher education in 21 campuses throughout South Africa under the following brands: VEGA school, Rosebank College, The Design School Southern Africa and Varsity College.

[3] The IIE offers qualifications at graduate and post graduate level, and is, through its aforesaid registration, entitled to offer diplomas, certificates and degrees in accordance with its accreditation.

[4] In May 2017,the Council on Higher Education, the sixth respondent, which is the body responsible for accrediting programmes of higher education in the country, duly accredited the IIE was to provide the LLB degree (bachelor of laws). This followed after the proposed LLB programme had been assessed and peer reviewed by the Accreditation Committee of the Higher Education Quality Committee of the sixth respondent and found to be on par with the LLB degrees offered by universities.

[5] In October 2017 the IIE was registered to offer the LLB degree at NQF level 8 by the fifth respondent, the South African Qualifications Authority (SAQA), the statutory body responsible for qualification standards set by the Minister of Higher Education, the fourth respondent, in terms of the National Qualifications Framework Act 67 of 2008 (the Framework Act). This followed the IIE's submission for registration that had been submitted in July 2016. On page 3 of the submission,one of the stated purposes of the

qualification is to prepare students for a career in professional legal practice, including practice as an advocate, attorney and prosecutor.

[6] The IIE duly started offering the LLB degree at 6 (six) of its Varsity College campuses in the 2018 academic year, registering approximately 200 first year students. However, as early as 19 January 2018, the first respondent, the KZN Law Society, in response to a query from one of the parents, indicated that the LLB offered by the IIE does not meet the requirements for admission as an attorney in terms of section 2(1) of the Attorneys Act 53 of 1979[1] (the Attorneys Act).

[7] This was because the Attorneys Act provides that an LLB obtained from a university qualifies one for articles of clerkship, which were a prerequisite for admission as an attorney, and neither the applicant nor its Varsity Colleges are a university. Another reason advanced by the KZN Law Society was that as recently as November 2017 the Council on Higher Education had listed all the institutions with an accredited LLB programme and the applicant was not listed as such an institution.

[8] Although the accreditation of the applicant has since been verified and confirmed, and thus is no longer an issue, what remains contentious is the exclusion of the applicant's prospective LLB graduates from qualification as legal practitioners, on the basis that it is not a university. The KZN Law Society maintains that it is merely applying the law as it stands, which it says does not differentiate, while the applicant contends that the law being applied is unconstitutional for excluding the applicants and its LLB students, and should be set aside. That is the case that this court is called to decide.

The nature of the application

[9] Put differently, the issue to be decided is: does section 26(1) of the Legal Practice Act 28 of 2014 (Legal Practice Act) infringe the rights to equality before the law in terms of section 9(1), to freedom of trade, profession and occupation in terms of section 22, and to establish private education institutions in section 29(3) of the

[1] The Attorneys Act has been repealed in its entirety by the Legal Practice Act 28 of 2014, which came into effect on 1 November 2018.

Constitution of the Republic of South Africa, 1996? If so, is such infringement reasonable and justifiable in terms of section 36 of the Constitution?

[10] There is no dispute that the applicant is a duly established private Higher Education Institution, and that it has been registered and accredited by the SAQA to offer the four year LLB degree. It is also not disputed that the applicant's LLB is on par with that offered at universities and that it offered the LLB degree at a first year level in 2018. Finally, that the applicant is not a university as defined in terms of the Higher Education Act.

[11] The issue of constitutionality was not the original case presented for argument by the applicant when it initially brought this application.[2] I will deal with the metamorphosis of the case when I deal with the issue of costs, in the latter part of the judgment. At this stage it is sufficient merely to note that the applicant, first respondent and the Minister of Justice all changed their stances as the case progressed.

[12] Following the judgment of Koen J delivered on 25 September 2018;[3] the applicant issued an Amended Notice of Motion accompanied by a Rule 16A Notice, amending the relief being sought. These notices also served as a makeshift joinder of the ninth to the twenty-eighth respondents, comprising the law societies and public universities. Pursuant to this 'joinder' there has been no opposition in addition to that of the KZN Law Society, other than by the Cape Law Society (ninth respondent), which subsequently withdrew this opposition on 5 December 2018.

[13] The relief sought by the applicant in its Amended Notice of Motion, as further amended on the date of the hearing of this application, is an order:

1. That the 9th to 11th, and 12th to 28th respondents respectively are joined as additional respondents in this matter.

2. Declaring that the reference to the word "university" where it appears in section 26(1) of the Legal Practice Act 28 of 2014:

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[2] The application was initially brought on an urgent basis as a review of the decision of the KZN Law Society to refuse to recognize the IIE'sLLB degree as sufficient for entry into the attorney's profession. In addition the applicant sought a declarator that its LLB degree is duly registered and equivalent to the LLB degree offered by accredited public universities.

[3] Koen J granted an order adjourning the application *sine die*, granting the applicant leave to amend the relief claimed (if so advised) and supplement its papers as it saw fit, and reserving the costs of the application.

(a) is declared unconstitutional and invalid to the extent that it fails to include private Higher Education Institutions registered in terms of the Higher Education Act 101 of 1997 and which are accredited and registered to provide a LLB degree approved by the South African Qualifications Authority;

(b) the declaration of invalidity in paragraph 2(a) is suspended for a period of 12 months to permit Parliament to remedy the defect;

(c) during the period of suspension in 2(b):

(i) the words in section 26(1)(a) are to include, immediately following the words “any university registered in the Republic”, the words, “or any private Higher Education Institution registered in terms of the Higher Education Act101 of 1997 which is registered and accredited to provide a LLB degree recognised by the South African Qualifications Authority established by the National Qualifications Framework Act, Act 67 of 2008” and

(ii) the words in section 26(1)(a)(ii) are to include, immediately following the word “university”, the words “or private Higher Education Institution registered in terms of the Higher Education Act 101 of 1997...”

(iii) should Parliament fail to enact remedial legislation within the period of suspension, the interim reading in remedy set out in paragraph 2(c) shall become final.

3. Declaring that graduates from the applicant’s SAQA approved LLB degree are as qualified to enter the practice of the legal profession as are graduates from the same LLB degree offered at public universities in South Africa which are accredited to do so.

4. Alternatively to paragraph 3 and/or in addition to paragraph 3:

Reviewing and setting aside the decision of the first respondent, the KwaZulu-Natal Law Society, taken on or about 19 January 2018, confirmed during 27 March 2018 to 4 April 2018, and which decision continues notwithstanding the repeal of section 2(1) of the Attorneys Act 53 of 1979, to refuse to recognise the applicant’s LLB degree as sufficient for entry into the attorney’s profession.

5. Directing the third respondent, the Minister of Justice and Constitutional Development to pay the costs of this application including the costs of two counsel, jointly and severally with the KwaZulu-Natal Law Society, the first respondent.

6. Further, other or alternative relief.

[14] At the hearing of this case the applicant pinned its colours to the mast and focussed its argument, both orally as well as in its heads of argument, on the constitutionality challenge. However, ithas not abandoned the review of what it terms

the ‘decision’ of the KZN Law Society, to refuse to recognise the applicant’s LLB degree as sufficient for entry into the attorney’s profession. In fact, the applicant, in the supplementary affidavit filed in October 2018 reserved its rights to appeal the decision of Koen J.

[15] In order to resolve the issue before me the following questions have to be considered:

1. Is the word “university” in the impugned provision capable of an interpretation that includes the applicant?

2. If the word “university” is not capable of such interpretation, does the impugned legislation infringe or limit the rights in section 9, 22 and/or 29(3)?

3. If so, is the limitation reasonable and justifiable in terms of Section 36?

4. If it is not then it is arbitrary and unconstitutional, and falls to be set aside, what then is the appropriate relief?

Meaning of “university”

[16] Section 39 enjoins the courts to read legislation in a manner that most conforms with the Constitution, and only declare legislation unconstitutional if it is incapable of such other interpretation. This was the basis on which the applicant had sought the relief in the original application.However, the KZN Law Society submitted that this step only comes in once there is first a declaration of invalidity, that this is a second/final step after a declaration of invalidity. Koen J made no finding in this regard, merely indicating that the applicant may amend its papers ‘if so advised’.

[17] The applicant referred this court to the case of *Cool Ideas 1186 CC v Hubbard and another*[4] where the Constitutional Court framed the process of statutory interpretation in this way (references removed):

‘[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

[4] 2014 (4) SA 474 (CC).

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'

[18] The ordinary meaning of the word 'university' according to the *Oxford English Dictionary* is 'a high-level educational institution in which students study for degrees and academic research is done'.[5] The LPA does not define 'university', neither did its predecessors, the Attorneys Act and the Admission of Advocates Act 74 of 1964, and rightly so, as this is the purview of the Minister for Higher Education. The primary legislation defining university is the Higher Education Act.

[19] I was urged by the KZN Law Society to not lose sight of the fact that the Higher Education Act has, through the years, maintained the distinction between various types of higher education institutions, and in particular between private higher education institutions and universities.

[20] The latest amendments to the definitions in the Higher Education Act were enacted through the Higher Education Amendment Act 9 of 2016, which came into effect in September 2017 (2017 Amendment). Prior to this amendment, the Higher Education Act, which can be referred to as 'new order legislation' since it was promulgated after the advent of the Constitution, defined 'university' as 'any university established, deemed to be established or declared as a university under this Act'. This means that it wasn't a 'free for all' but that an institution had to be established, deemed or declared prior to being called a 'university'. It further classified 'higher education institution' into 'college', 'technikon' and 'university'.

[21] After the 2017 Amendment, 'university' is defined in the Higher EducationAct as

'a higher education institution providing higher education and with a scope and range of operations, including undergraduate and postgraduate higher education programmes, research and community engagement, which meets the criteria for recognition as a university as prescribed by the Minister under section 69(d) and

(a) …

*(b)*registered as a private university, in terms of this Act.'

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[5]*Paperback Oxford English Dictionary* 7ed (2012).

[22] Although the Minister for Higher Education has not explained the reasons for the distinction between the various higher education institutions in general, and universities in particular, the distinction has survived various amendments and cannot be simply wished away. It was in place even at the first enactment of the Higher Education Act, despite such Act being referred to by the applicant's representative as 'new order' legislation.

[23] For these reasons the answer to the question whether 'university' can be read to include the applicant, must be in the negative. The KZN Law Societycan therefore not be faulted for its failure to give a different and wider meaning to the concept of university. The 'decision' did not ignore the provisions of the Higher EducationAct, it in fact applies them, given that the Act maintains the distinction between various types of higher education institutions.

Does section 26(1) of the LPA infringe or limit the rights in section 9, 22 and 29(3) of the Constitution?

Section 29(3): the right to establish private education institutions

[24] Section 29(3) provides that

'Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –

*(a)*do not discriminate on the basis of race;

*(b)*are registered with the state; and

*(c)*maintain standards that are not inferior to standards at comparable public educational institutions.'

[25] The applicant contends that this right is conferred on it as it is duly registered and accredited in terms of the Higher Education Act, does not discriminate on the basis of race, and provides standards equivalent to those provided at public educational institutions. The applicant further relies, for support of its argument, on the letter from the Minister for Higher Education, in which the Minister confirms that private higher education institutions, once registered, enjoy the same rights as public universities to offer the LLB degree, once accredited. The failure of section 26(1) of the Legal Practice Act to encompass the applicant and its four-year LLB degree violates section 29(3) of the Bill of Rights in failing to give effect to this right.

[26] I find that, having shown that the applicant meets the criteria set out in section 29(3) and those in Chapter 7 of the Higher Education Act, the applicant enjoys the same rights to offer the accredited four year LLB as public universities, and its exclusion from section 26(1)(a) of the Legal Practice Act, limits this right.

Section 9(1) the right to equality before the law

[27] Section 9(1) provides

'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

The applicant contends that there is no rational basis for the distinction between the applicant's LLB students and those from public universities, or that between the applicant and public universities equally authorised to teach the four year LLB degree.

[28] The first respondent argues that the applicant makes no case for the unfair discrimination directly or otherwise on any of the grounds in subsection 9(3) – which discrimination would be automatically unfair. There is no dispute that the applicants and its students have the right to equal protection and benefit of the law. However, such benefit cannot be claimed where the applicant itself has not fully complied with the law.

[29] While the submission by the KZN Law Society is true in principle, the alleged failure to comply with the law is in the failure to apply for registration as a private university in terms of the amendment to the definition of 'university'. This failure is conceded by the applicant, but the reason therefore is given as being that the Minister of Higher Education has not put in place the measures to give effect to this new definition. At the hearing of this matter, it was submitted that the amendment does not apply to the applicant because it was registered prior to the amendment. I find no merit in this argument.

[30] The impugned provision clearly differentiates between public universities and private higher education institutions that have been duly accredited to offer the LLB degree by the relevant structures, in general, and the applicant and its students in particular. In further support of the argument that this limitation is unconstitutional the applicant takes umbrage at the fact that section 26(1)(b) of the Legal Practice Act recognises an LLB obtained from a foreign country provided it is recognised by the

SAQA established by the Framework Act, yet refuses to recognise it's LLB, when it is an institution fully compliant with the South African education legislation.

[31] The thrust of the applicant's argument is that it is inequitable and irrational for the lawmakers to make provision for the recognition of a foreign LLB degree acceptable to SAQA, when the applicant's LLB, is one approved by SAQA, and the applicant is registered in terms of the Higher Education Act in this country, but rejected on the basis that it is not classified as a university.

[32] The relevant test in dealing with section 9(1) was reiterated bythe Constitutional Court in *Weare v Ndebele*[6]as follows:

'The test for determining whether s 9(1) is violated was set out by the court in *Prinsloo v Van der Linde* and *Harksen v Lane.*[7] 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.'[8]

[33] In the present case, there is an obvious differentiation between LLB graduates from univesities and those registered with the applicant. In *Weare* the court made no finding on whether juristic persons, like the applicant, were entitled to rely on the section 9(1) right, and assumed, for the purposes of that judgment that they could indeed bear such right. The issue does not arise in this case as this has not been disputed by any of the respondents.

[34] The applicant argues that there is no rational connection between the differentiation and a legitimate government purpose, particularly in the face of a concession from the Minister of Justice that a legislative omission resulted in the present differentiation. The Minister of Justice has not advanced any government

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[6]See *Weare and another v Ndebele NO and others* 2009 (1) SA 600 (CC) para 46.

[7]See *Prinsloo v Van der Linde and another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) paras24 – 26, interpreting section 8(1) of the Interim Constitution. This interpretation was adopted and applied to section 9(1) in *Harksen v Lane NO and others* [1997] ZACC 12; 1998 (1) SA 300 (CC) para 43; 1997 (11) BCLR 1489 (CC) para 42.

[8]See *Jooste v Score Supermarkets Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC) para 17; 1999 (2) BCLR 139 (CC) para 16; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and others* [1997] ZACC 19; 1998 (2) SA 61 (CC); 1998 (1) BCLR 1 (CC) para 24; *Prinsloo*n7 para 25.

purpose, but the KZN Law Societyargued that such purpose is the regulation of the legal profession, and legal practitioners, and such regulation includes entry into the legal profession. The impugned section, so the respondent argues, sets out the minimum requirements for admission and enrolment as a legal practitioner. This signifies the intention of the legislature and the setting of minimum standards is in the public interest, due to the nature of the duties and responsibilities of legal practitioners.

[35] The minimum standard that is set as a means of regulation is an LLB degree from a university. There is only one LLB degree that is accredited by SAQA and it is the same for public universities as that for the applicant. While the stated purpose of regulation is legitimate, I can find no rational basis for differentiating between persons with the LLB degree obtained from the applicant following the due recognition, accreditation and registration with the relevant education authorities, including SAQA, and those with an LLB degree from public universities. This is particularly because of the confirmation from the sixth respondent (i.e. the Council on Higher Education and Training) that the applicant's four year LLB is on par with that from public universities.

[36] There is no rational link between the impugned provision and the government purpose it seeks to achieve through the differentiation. I accordingly find that the impugned provision limits the provisions of section 9(1) of the Constitution.

Section 22: the right to choose and follow a profession, trade or occupation

[37] Section 22 provides:

'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

[38] The applicant concedes that the right to practice a chosen profession, trade or occupation may be regulated by law. In respect of the applicant, it argues that its trade is that of being a provider of higher education, as a private higher education institution. The applicant argues that it does this in full compliance with the Higher Education Act.

[39] The applicant's LLB students have chosen this degree which has been registered by SAQA for entry into the practice of law, and section 22 guarantees that if they qualify with the LLB degree they are entitled to enter into the profession of law.

[40] The ambit of the right in section 22 was recently interpreted by the Constitutional Court in *South African Diamond Producers Organisation v Minister of Minerals and Energy*,[9]as encompassing two elements: the right to choose, and the right to practise. The court found that (references omitted)

'[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.'

[41] The Minister of Higher Education captures the problem correctly when she states in the letter to the Minister of Justice:

'The problem that section 26(1)(a) of the Legal Practice Act of 2014 creates is that LLB graduates who have obtained their qualification from registered private higher education institutions may not be given an opportunity to practice.'

[42] The KZN Law Society argues that the regulation of the legal profession facilitates the proper exercise of the right and is rational. As already discussed, the purpose of the Legal Practice ACTi's to regulate the legal profession including entry into the profession through setting of minimum standards. These minimum standards include the type of qualification that is required (the LLB degree) and the type of institution that should confer the qualification, in this case being a university.

[43] The KZN Law Society further argues that those desiring to be admitted and enrolled in terms of the Legal Practice Act must do so subject to inherent constraints. In support of this submission I was referred to the case of *S v Lawrence*[10]where the court, dealing with the right as it was contained in the Interim Constitution, found that:

'[32] … In a modern democratic society a right "freely" to engage in economic activity and to earn a livelihood does not imply a right to do so without any constraints whatsoever. As Van

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[9]*South African Diamond Producers Organisation v Minister of Minerals and Energy and others* [2017] ZACC 26; 2017 (6) SA 331 (CC) para 65.

[10] See *S v Lawrence; S v Negal; S v Solberg*[1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 para 32 – 33.

Dijkhorst J said in *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and Others*:[11]

"Section 26(1) goes no further than to enshrine the right freely to be active in the economic sphere wherever one wants – the economic sphere with all its inherent constraints."

[33] Certain occupations call for particular qualifications prescribed by law and one of the constraints of the economic sphere is that persons who lack such qualifications may not engage in such occupations. For instance, nobody is entitled to practise as a doctor or as a lawyer unless he or she holds the prescribed qualifications, and the right to engage "freely" in economic activity should not be construed as conferring such a right on unqualified persons; nor should it be construed as entitling persons to ignore legislation regulating the manner in which particular activities have to be conducted, provided always that such regulations are not arbitrary. Arbitrariness is inconsistent with "values which underlie an open and democratic society based on freedom and equality", and arbitrary restrictions would not pass constitutional scrutiny.'[12]

[44] This submission does not assist the KZN Law Society in circumstances where the qualification being offered by the applicant, i.e. a four year LLB degree approved by SAQA, is indistinguishable from that offered by universities. The only difference that has been presented to me is that the applicant is a private institution of higher education, whereas the other institutions that offer the same qualification are public higher education institutions that have been established or deemed or declared as public universities.

[45] The accreditation body, which is the sixth respondent, has in a letter of 30 January 2018, stated the following:

"The CHE evaluates the quality of the programmes against a common set of criteria for all institutions. In addition, the CHE developed standards for the LLB degree and these standards were used to evaluate the LLB programs during the National Reviews of the LLB degrees. The LLB degree of the IIE has met the criteria for accreditation on 30 March 2017 and the CHE confirmed that the programme has been designed according to the standards developed by the CHE for the LLB degrees.

[11]1996 (3) SA 800 (T) at 813G.
[12]Section 35(1) requires the provisions of the bill of rights to be interpreted so as to promote such values.

The LLB qualification offered by the IIE has been awarded an equivalent accreditation status to that of the LLB qualification offered by universities. It should therefore be regarded on par with the LLB degrees offered by public providers by the national and provincial branches of the Law Society of South Africa."

[46] The nature of the regulation that is created by section 26(1)(a), of limiting the entry into the profession to the LLB degree obtained from a university, when there is no material distinction between what is offered by a university and that offered by the applicant, cannot be said to be anything but arbitrary.

[47] I find therefore, that section 26(1)(a) does limit the right of the applicant and of its LLB students.

Is the limitation of the rights in section 9, 22 and 29(3) justifiable in terms of section 36?

[48] Section 36(1) provides:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

*(a)*the nature of the right;

*(b)*the importance of the purpose of the limitation;

*(c)*the nature and extent of the limitation;

*(d)*the relation between the limitation and its purpose; and

*(e)*less restrictive means to achieve the purpose.'

[49] The Legal Practice Act is a law of general application and I have already made the finding that section 26(1)(a) thereof does in fact limit the rights of the applicant and its LLB students. The Minister of Justice, who is the custodian of the impugned legislation, gives no reason for the limitation of the rights, instead conceding that it resulted from a legislative omission.

[50] It is only the KZN Law Society that seeks to justify the limitation. Whether it is entitled to do so, in the present circumstances, is disputed by the applicant. I can find no bar to the KZN Law Society, a regulatory body charged with ensuring compliance with

the impugned legislation, advancing argument in defence of the legislation especially when the custodian minister abdicates his duty.

[51] While defending the impugned legislation is a noble pursuit in principle, there is no merit to the defence in the present circumstances. The distinction created by section 26(1)(a) between LLB degrees from universities and those from the applicant (i.e. other private higher education institutions who have been duly registered and accredited) creates an unnecessary and unjustifiable limitation to entry into the profession. This is so because the applicant is registered in terms of Chapter 7 of the Higher Education Act as a private higher education institution, to provide higher education at the same standard as public universities. The LLB offered by the applicant has been evaluated and accredited by the same body that accredited the LLB offered by public universities.

[52] I accordingly find that section 26(1)(a) is unconstitutional and invalid to the extent that it excludes the applicant by limiting entry to the profession to LLB degrees obtained from a university.

What is the appropriate relief?

[53] In determining the relief once a declaration of constitutional invalidity has been made, courts are empowered to make an order that is just and equitable. The court must offer relief that is effective for the breaches of constitutional rights.

[54] The Constitutional Court has identified the following options for consideration in determining an appropriate remedy, namely 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 it sees fit or whether to suspend the declaration of invalidity of the impugned provision for a specified period, or 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.[13]

[55] The applicant has urged me to grant effective relief and that such relief should include an order that is narrowly tailored to meet the circumstances of the applicant. In

[13] See *Bheandothersv Magistrate, Khayelitshaandothers; Shibiv Sitholeandothers; SA Human Rights Commission andanothervPresidentoftheRSAandanother* 2005(1)BCLR1(CC),2005 (1) SA 580 (CC).

support of this submission I was referred to the cases of *Bhulwana and Gwadiso*[14]and *Ramuhovhi v President of the RSA*[15]both of which were addressing retrospectivity, which is not an issue in this case, having regard to the circumstances of the applicant.

[56] The circumstances of the applicant that I have taken into account in formulating effective and appropriate relief are that it started offering the LLB degree in 2018, at first year level and this LLB degree is a four-year degree. This means that effectively the first graduates will qualify in 2021, at the earliest.

[57] This case presents a situation where the application has been brought after an acknowledgement by the custodian Minister in relation to the impugned legislation that there was a legislative omission, and that he is in the process of effecting the necessary amendments. The nature of the amendment is explained in the answering affidavit as being 'in broad terms, to recognise LLB degrees offered by private higher education institutions in addition to LLB degrees offered by public higher education institutions, on condition that they are registered with the SA Qualifications Authority'.

[58] This intention, expressed for the first time in a letter written by the Minister of Justice prior to this application, was in response to the letter that was written by the Minister of Higher Education to the Minister of Justice highlighting, two problems with the wording of section 26(1)(a) of the Legal Practice Act. These were identified as being firstly, the unnecessary exclusion of the applicant in circumstances where they have complied with the education legislation and been properly registered and accredited, and secondly, the reference to a university being <u>registered</u> in the Republic when this requirement is inconsistent with the wording of the Higher Education Act which requires the institutions to be 'established', 'converted', 'merged' or 'declared' as a public university.

[59] The crux of the second problem, according to the Minister of Higher Education, is that

'Since a private university has not yet been registered in South Africa and public universities are not "registered", both currently registered private higher education institutions and public universities do not comply with section 26(1)(a) of the Legal Practice Act of 2014'.

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[14] See *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) para 32.

[15] See *Ramuhovhi and others v President of the Republic of South Africa and others* [2017] ZACC 41, 2018 (2) BCLR 217 (CC); 2018 (2) SA 1 (CC) para 57.

[60] The amendment that the Minister of Justice is in the process of effecting is expected to address both these identified problems. This court notes that the shortcomings in the present wording of section 26(1)(a) are beyond those raised in this application, but I have not been called upon to decide that aspect.

[61] Given that the Minister of Justice is already in the process of amending the legislation, as is within the purview of the legislature, I am not convinced that this case calls for a breach of the separation of powers and dictating to parliament what the wording of the amendment should be.

[62] I am also satisfied that there will be no gap if the relevant section is declared constitutionally invalid, as it has been submitted by the applicant that it is the only private higher education institution that is currently authorised to teach the four-year LLB, and if other institutions are subsequently granted this authorisation there would be at least four years prior to its graduates being affected by section 26(1)(a). Furthermore, the declaration of constitutional invalidity has no force until confirmed by the Constitutional Court.

[63] The Minister of Justice has not opposed the relief sought by the applicant despite the significance thereof, and has instead insisted that he will abide by the decision of this court.

Costs

[64] The matter came to court on two previous occasions and on both of these occasions the costs were reserved for determination at this hearing. In order to fully address the issue of costs it is necessary to go through the genesis of this matter.

[65] The application was brought on an urgent basis as a review of the decision by the first respondent to refuse to recognise the applicant’s LLB degree as sufficient for entry into the attorney’s profession. The applicant also sought declaratory relief to the effect that the graduates from its LLB degree are as qualified to enter the legal profession as those from accredited public universities.

[66] The entire basis of the application was that section 2(1) of the Attorneys Act (which was pending repeal at that stage) and section 26(1) of the Legal Practice Actwas

capable of an interpretation that included the applicant and that the refusal of the KZN Law Society to give this interpretation amounts to a reviewable decision.

[67] The applicant's case has undergone a complete transformation, following the answering affidavit filed by the KZN Law Society in response to the original founding affidavit and the judgment of Koen J. In that judgment the court expressed its view that the application raises a constitutional issue, which requires compliance with Rule 16A of the Uniform Rules of Court, which the applicant had made no attempt to comply with.

[68] The applicant is not the only party to have moved goalposts in this matter. The first respondent, in its initial answering affidavit, criticised the applicant for the manner in which it had formulated the case, contending that the KZN Law Society could not be blamed for applying the law, and that the correct route would be to challenge the validity of the legislation being applied.

[69] The first respondent initially opposed the application on the basis that it is merely applying the legislation, and that the applicant cannot ask for a reading-in without first seeking an order of constitutional invalidity of the impugned legislation. This, it was submitted, was because the applicant is not a university as contemplated in the Attorneys Act, the Legal Practice Act or the Higher Education Act.

[70] However, once this had been done the first respondent continued to oppose the application, the new basis being that the applicant's problems were self-created and lay against the Higher Education Act and not the Legal Practice Act, which had by then replaced the Attorneys Act while retaining similar wording. It argued that the applicant had failed to comply with the relevant education legislation which would have resulted in it being designated as a university, and had instead started registering students for the LLB programme.

[71] The Minister of Justice filed an affidavit prior to the judgment of Koen J, on 18 September 2018, in which the deponent on behalf of the Minister admitted that there was a legislative gap, indicated that he was in the process of correcting this gap through an amendment process, and filed a notice to abide the decision of the court.

[72] At the hearing of the matter the Minister of Justice was represent by counsel who did not hold any instructions in relation to the substantive case and could not assist the court with relevant information including the reasons for the impugned provision, the

purpose they were intended to serve and how far the process of amending the legislation was.[16] She could also not indicate what would be a reasonable time to afford the Minister to effect the amendment, but was happy to join forces with and lend support to the argument of the first respondent on the merits.

[73] It was submitted on behalf of the Minister of Justice that the applicant put the cart before the horse in offering the LLB degree without meeting the requirements of the Attorneys Act or even the Higher Education Act for designation as a university. This conduct was inconsistent with the stance taken by the Minister of Justice until that point. This was done without even the filing of heads of argument.

The costs reserved on 25 September 2018

[74] The application that served before KoenJ on 18 September 2018 was brought on an urgent basis. The relief sought was inappropriate, and there had been no joinder of parties that had an interest in the relief sought. The urgency, if any, was not shown to have been caused by any conduct on the part of the first respondent, against whom the substantive relief was sought.

[75] Counsel for the applicant correctly conceded at the hearing of this application that the first respondent was entitled to oppose the relief initially sought, as the first respondent was giving effect to the wording of the statute, and the applicant had not challenged the constitutionality of the statute.

[76] The applicant also conceded in the heads of argument filed for the hearing on 30 October 2018, that 'essentially Koen J upheld this (first respondent's) argument'.

[77] In light of the fact that the application was brought as private litigation in the form of a review, and not a constitutional challenge, there is no reason why the first respondent should not be awarded the costs reserved on 25 September 2018 by Koen J.

Costs reserved on 31 October 2018

[16] *Khosa and others v Minister of Social Development and others* 2004 (6) SA 505 (CC)paras 18 to 19.

[78] The matter was set down again on 30 October 2018.[17]On that occasion the court granted an order, by consent between the applicant, first respondent, the Minister of Justice and the Cape Law Society, adjourning the matter *sine die,* with costs reserved.

[79] It was submitted on behalf of the applicantthat the matter was adjourned on this date to the present hearing, and this was solely because of the KZN Law Society's refusal to withdraw its opposition. No other submissions were made in relation to these costs.

[80] I have had regard to the amended notice of motion,[18] and note that it had called upon parties 'intending to oppose to indicate this intention by 12 October 2018failing which the application would be set down on an unopposed basis on 30 October 2018' (my underlining). The notice further called upon those opposing, to deliver their answering affidavits within 15 days of notifying of their intention to oppose.

[81] The KZN Law Society duly noted its intention to oppose and served the notice within the stipulated period on 09 October 2018. Despite receiving this notice, and prior to the lapse of the period within which an opposing party had to file its answering affidavit, the applicant proceeded to set the matter down for hearing on 30 October 2018. I point out that the applicant was seeking substantive relief against the first respondent, as well as a cost order. It was entitled to oppose the application.

[82] Looking at the documents that had been filed in this application leading to 30 October 2018 I am not persuaded that setting the matter down on the unopposed roll was appropriate, as the first respondent had not withdrawn its opposition. In addition, the ninth respondent had also delivered its intention to oppose, on 26 October 2018, and was duly represented in court on 30 October 2018. It only withdrew its opposition on 5 December 2018.The applicant is not entitled to the costs occasioned by the adjournment on 30 October 2018 as it was the author of its own misfortune.

Costs of 11 December 2018

[17]The Notice of Set Down on page 30 of the Indexed Notices bundle is court stamped 26 October 2018, and does not indicate whether this was on the opposed or unopposed roll.

[18]Amended Notice of Motion is in Volume 5, relevant parts being on pages 354 to 355.

[83] The applicant urged the court to follow the *Biowatch*[19]principle to the effect that costs are not awarded against an unsuccessful litigant in constitutional litigation when litigating against the State and the matter is of general import. The reason for this is so as not to discourage those trying to vindicate their rights. The applicant argued that it was entitled to the costs if successful and indicated that the opposition by the KZN Law Society was frivolous.

[84] The KZN Law Society argued that it was entitled throughout to defend the matter because the applicant never withdrew its review and also persisted in seeking costs against it. It added that its opposition was necessitated further by the failure of the Minister of Justice to defend the impugned legislation or to make the requisite submissions to the court.

[85] The Minister of Justice submitted that he had acted timeously to start the amendment process after this issue was brought to his attention, and he had not delayed. In addition he had always indicated that it would abide the decision of the court.

[86] I am not persuaded that the KZN Law Society acted frivolously or vexatiously in opposing the matter. In addition, the application for review by the applicant against the KZN Law Society was unsuccessful.

[87] However, there is no reason that the applicant should not be awarded its costs. Such costs must be borne by the Minister of Justice, given that he is the custodian of the impugned legislation, and has admitted that constitutional breach occurred as a result of a legislative omission. In addition, his lack of meaningful participation in these proceedings, despite being legally represented throughout, calls for censure through this costs order.

[88] In the result, the following order is made:

1. The 9th to 11th and 12th to 28th respondents respectively are joined as additional respondents in this matter.
2. Section 26(1)(a) of the Legal Practice Act 28 of 2014 is hereby declared constitutionally invalid insofar as the use of the word “university” to exclude

[19]*Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).

private Higher Education Institutions duly accredited and registered to provide the LLB degree;

3. The students that graduate with an LLB degree offered by the applicant after 1 January 2018,are as qualified to enter the practice of the legal profession as the graduates from public universities in South Africa.
4. The applicant is ordered to pay the costs incurred by the first respondent up to and including the adjournment on 18 September 2018, such costs to be on the opposed motion scale
5. There is no order as to the costs from 26 September 2018 up to 31October 2018
6. The third respondent is directed to pay the costs of the applicant from 1 November 2018.

Sibiya AJ

Appearances

Date of Hearing	: 11 December 2018
Date of Judgment	: 22 February 2019
Counsel for Applicant	: Advocate A Gabriel SC with I Veerasamy
Instructed by	: Larson Falconer Hassan Inc.
Counsel for First Respondent	: Advocate T S I Mthembu
Instructed by	: Siva Chetty and Company
Counsel for Third Respondent	: Advocate S Takchund
Instructed by	: State Attorney – Durban