IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 9864/2013

In the matter between:

ABUBAKER NOORDIEN	Applicant
And	
THE CAPE BAR COUNCIL	First Respondent
GENERAL COUNCIL OF THE BAR	Second Respondent
CAPE LAW SOCIETY	Third Respondent
LAW SOCIETY OF SOUTH AFRICA	Fourth Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
INDEPENDENT ASSOCIATION OF ADVOCATES OF SOUTH AFRICE	Sixth Respondent

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JUDGMENT: 13 JANUARY 2015

Schippers J:

[1] The applicant is a former independent advocate. He was struck from the roll of advocates by this court on 30 August 2013. The court found that he is not a fit and proper person to practise as an advocate because he lacks the necessary qualities of honesty and integrity; that he had admitted that he was guilty of serious misconduct, more specifically, dishonesty, perjury and lying to a magistrate; and that he had deliberately taken steps to circumvent the referral rule, which is an offence under s 9(2) of the Admission of Advocates Act 74 of 1964 ("*the Admission of Advocates Act*").[1]

[2] In the amended notice of motion (which is extremely confusing) the applicant, who appears in person, seeks some 27 declaratory orders, which include orders declaring that all legal practitioners are equal before the law; that direct and indirect discrimination is prohibited; that the principle of legality, the interests of justice and the rule of law apply in this case; that the Constitution is the supreme law; that all public power is subject to the rule of law; and that the Constitutional Court "*is charged with determining the boundaries when interpreting an Act of Parliament.*"

[3] In essence however, the applicant seeks an order in the following terms: (1) declaring that "*the court process in striking off applications is unconstitutional*"; (2) declaring that the referral rule is unconstitutional on the

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1 *Cape Bar Council v Noordien* (WCC case number 14514/2012 delivered on 13 August 2013 per Yekiso and Cloete JJ) paras 18 and 21.

grounds that it is overbroad, discriminatory and uncompetitive; (3) declaring that ss 83(1) and 83(8) of the Attorneys Act 53 of 1979 (" *the Attorneys Act*") are unconstitutional on the basis that these provisions are unfairly discriminatory, and infringe the rights to dignity, freedom of trade, occupation and profession, and access to court.

Is the *court process* in striking off applications unconstitutional?

[4] It is a settled principle that a constitutional issue must be properly pleaded. A party must place before the court information relevant to the determination of the constitutionality of impugned provisions in a statute.[2] This is not new. The courts have repeatedly stated that pleadings must be lucid, logical and intelligible; and a litigant must plead his cause of action or defence with at least such clarity and precision to enable his opponent to determine the case he is called upon to meet.[3]

[5] The founding affidavit (comprising 174 pages without annexes) says nothing about the respects in which the process in striking off applications is unconstitutional. The provisions of the Constitution which that process allegedly violates are not identified. The respondents have to guess what

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2 *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC) para 22.

3 See *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) paras 35-37 and the authorities collected in para 36.

features of the striking off process are allegedly unconstitutional and then speculate about which provisions of the Constitution might be implicated. In addition, if the process followed in striking off applications limits any right under the Constitution, such limitation may be justifiable under s 36. The respondents would then be entitled to place facts before the court to show that the limitation is justified. However, they cannot do so because the applicant has laid no foundation in his papers for the challenge that the striking off process is unconstitutional.

[6] In short, there is no basis, factual or otherwise, for this challenge.

[7] It is clear from the applicant's papers that his real complaint is that he should not have been struck from the roll of advocates. In the founding affidavit he says,

> "I am placed in the above position by two unappreciative people who feel it to be justified (*sic*) to take a person's career away from him because they do not want to pay at all costs for service rendered to them for a fraction of the price."

[8] The applicant has thus not made out a case to challenge the constitutionality of the process followed in a striking off application and the relief claimed on this ground must fail.

[9] Aside from this, it is clear both from the papers in this case, and the judgment in the striking off application, that the applicant's right to just administrative action under s 33 of the Constitution and the provisions of the Promotion of Administrative Justice Act 3 of 2000, as well as his right of access to court under s 34 of the Constitution, were not threatened at all, let alone infringed.

The attack on the referral rule

[10] The Appellate Division and subsequently the Supreme Court of Appeal (SCA) have held that the referral rule - that advocates may not take instructions directly from lay clients and can do so only with the intervention of an attorney - is fundamental to the advocates' profession.[4]

[11] The applicant admits that he accepted R1500 directly from a member of the public to reinstate her son's bail, without a brief from an attorney. In the founding affidavit he challenges members of the bar to render this service in the regional court for R1500 and says that it is worth at least R10 000. Despite his acknowledgment that the sum of R1500 was a fee, he states,

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[4] *Beyers v Pretoria Balieraad* 1966 (2) SA 593 (A) at 604G-605A; *In re Rome* 1991 (3) SA 291 (A) at 305I-306F; *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) at 756F-G.

> "I can never accept that the above R1500 can be seen as fees but rather, [an] affordable donation for the good deed that was agreed to by myself."

[12] The applicant says that the member of the Cape Bar who investigated the complaint against him, "*had his own agenda*" and that he "*orchestrated and concocted*" the allegations in the complainant's affidavit, to justify the applicant's removal from the roll of advocates. Then it is said that the first respondent, "*is using and abusing the referral rule to get rid of its competition and not really to help the public.*" With reference to *De Freitas*,[5] the applicant submits that the rule is overbroad because there are less invasive means to protect public money. He contends that the referral rule is not in the public interest because it deprives the underprivileged and previously disadvantaged citizens of direct access to the services of an advocate.

[13] In *De Freitas*, the SCA reiterated that the bar in this country is a referral profession (subject to certain exceptions which are not relevant for present purposes) which does not generally permit advocates to accept instructions directly from clients. The referral practice serves the best interests of the professions of advocates and attorneys, and the public, in both litigious and non-litigious matters. The absence of direct and possibly long-standing links between an advocate and his or her client preserves the advocate's independence. Advocates are not required to keep trust banking accounts and a

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5 *De Freitas* n 4.

client who instructs an advocate directly has no protection against attachment by creditors and cannot recover a shortfall in a trust account from the Fidelity Fund.[6] The referral rule was not inconsistent with the right of an accused to engage a legal practitioner of his or her choice, or the right to freely engage in economic activity, under the Interim Constitution.[7]

[14] In a further majority judgment, Cameron JA said that the basis of a claim that the referral rule should be upheld in the public interest should be subjected to exacting scrutiny, particularly because it is not sourced in a statute. The mere fact that there is a divided bar in this country does not logically or necessarily entail the referral rule.[8] However, subject to judicial supervision, it is in the public interest that there should be a vigorous and independent bar which is self-regulated, whose members are in principle available to all and who generally do not perform administrative and preparatory work in litigation but concentrate their skills on the craft of forensic practice.[9] Cameron JA went on to say that the disregard of the referral rule would lead to abuses in the future as regards trust accounts, as advocates are not required or permitted to keep trust banking accounts for the receipt and retention of clients' money. If they purport to do so, our law of trusts precludes the arrangement from being effective to protect the public against appropriation and loss. For so long as the statutory

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6 *De Freitas* n 4 paras 8-10.
7 *De Freitas* n 4 para 13.
8 *De Freitas* n 4 per Cameron JA paras 6-9.
9 *De Freitas* n 4 per Cameron JA paras 11-14.

absence of trust fund protection continues, there is a compelling reason why the courts should enforce the referral rule.[10]

[15] It appears that the applicant's answer to all of this is that the courts have decided that the referral rule "*should fit all*". He submits that this approach can never be correct, and says,

> "It is my mission to prove that the High Court's and the SCA's position thus far is incorrect. I will prove that the provisions of ss 83(1) and 83(8) of the Attorneys Act is (sic) unconstitutional…"

[16] It will be noted that the overriding purpose of the referral rule is to protect members of the public because advocates do not hold trust accounts. It does so effectively. It is not designed or implemented in order to deny disadvantaged citizens access to advocates or to courts. Moreover, the referral rule applies regardless of whether the advocate is a member of an established bar or the independent bar.

[17] There are no facts to support the applicant's claim that the first respondent has invoked the referral rule in order to eliminate competition, and "*not really to help the public.*" On the contrary, in the applicant's case the rule was applied precisely to protect the public. The applicant informed the court in

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10 *De Freitas* n 4 per Cameron JA paras 12-14

his striking off application that his *modus operandi* was this: He took money directly from members of the public (who were obviously unprotected because the applicant had no trust banking account). He then paid an attorney part of the money in order for the latter to pretend that he was the instructing attorney. In the case of both the complainants the attorney had not even met any of them. The attorney furnished an affidavit to the first respondent confirming that he did not instruct the applicant.

[18] The next question is whether the referral rule is overbroad. A challenge to legislation (or a rule) on the basis that it is overbroad is in essence a challenge that a legitimate government purpose served by the legislation could be achieved by less restrictive means. To determine whether a law (or rule) is overbroad, a court must consider the means used in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate to such objectives, the law may be deemed overbroad.[11]

[19] In *De Freitas* the divided nature of the legal profession in this country was recognised and the referral rule upheld, essentially on the basis that the practice of an advocate as a referral profession is both justifiable and manifestly in the public interest. I do not think it can be said that the rule is not aimed specifically at the protection of the public and preventing abuse - permissible

[11] *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1999 (3) SA 617 (CC) para 49.

areas of state control - but that it sweeps within its ambit other constitutionally protected activities.

[20] The impact of the referral rule is thus not disproportionate to its constitutionally legitimate underlying objectives, and the applicant's challenge on the ground that the rule is overbroad, must fail.

[21] What remains is whether the referral rule is unfairly discriminatory.

[22] The applicant contends that the referral rule is unconstitutional because it is, "*based on the unlisted analogous ground of institutionalized or systemic or structural inequality based on class or social status and monopolistic hegemony.*" Then he says,

> "The Geach case constitutes a locus classicus of the unequal and discriminatory effect and extent which the referral rule has in the operation and application thereof, on members of the established traditional bar as opposed to independent advocates that either practise on their own or belong to some so-called rebel bar. In no uncertain terms independent advocates are made to feel that they are not deserving of equal treatment and more particularly, 'concern, respect and consideration' and most importantly, that the law is likely to be used against them more harshly than others who belong to the established traditional bar."

[23] The test for discrimination is settled law. The first stage of the inquiry is whether the impugned provision differentiates between people or categories of people and if so, whether it bears a rational connection to a legitimate government purpose. The second stage is whether the differentiation amounts to unfair discrimination, which involves a two-stage analysis: firstly, whether the differentiation amounts to discrimination (if it is on a listed ground discrimination is established; if not, whether or not there is discrimination depends on whether the ground is based on characteristics which potentially impair fundamental human dignity or affect persons adversely in a comparably serious manner); and secondly, whether the differentiation amounts to unfair discrimination (if it is on unlisted ground, unfairness is presumed; if not, the complainant must establish unfairness).[12]

[24] Although the test was laid down in a case where the constitutional validity of legislation was challenged, it applies where an attack is directed at conduct, or a policy or practice, with the necessary change.[13]

[25] The applicant contends that the referral rule is discriminatory on an unlisted ground.[14] Therefore he must show that the referral rule differentiates

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12 *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 54.

13 *Sali v National Commissioner of the South African Police Service and Others* 2014 (9) BCLR 997 (CC) para 10.

14 The listed grounds are contained in s 9(1) of the Constitution which reads as follows:

between two categories of people; that the differentiation is irrational; that it amounts to discrimination; and that the discrimination is unfair.

[26] The applicant however has not established that the referral rule is discriminatory. To begin with, although the rule differentiates between advocates and attorneys, the differentiation bears a rational connection to legitimate government purposes - the need to regulate the professions and protect the public.

[27] The regulation of a profession is a valid sphere of government activity authorised by the Constitution itself. Section 22 provides that the practice of a trade, occupation or profession may be regulated by law.[15]

[28] As already stated, the SCA in *De Freitas* held that the referral rule is in the public interest for two reasons. First, there should be an independent bar whose members are in principle available to all, and who are specialists in forensic skills and in giving expert advice on legal matters. Second, the referral rule is necessary to protect the public against appropriation and loss of money

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"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."

[15] Section 22 of the Constitution reads as follows:
"**Freedom of trade, occupation and profession**.-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."

paid to advocates who are not required or allowed to keep trust banking accounts.

[29] Neither the referral rule nor its application results in institutionalised or systemic inequality. It is not based on class or social status. It is not designed to, nor does it have the effect of, promoting a monopoly on legal services. The applicant's contention that the *Geach* case[16] is an illustration of the unequal and discriminatory effect of the referral rule, is wrong; and demonstrates the true nature of his complaint. The referral rule was not in issue at all in *Geach*. The applicant's complaint is that having been struck from the roll of advocates, he was treated more harshly than the advocates in *Geach*.

[30] The applicant has thus not made out a case that the referral rule is an infringement of the equality clause contained in s 9 of the Constitution.

The attack on s 83 of the Attorneys Act

[31] Section 83(1) of the Attorneys Act provides that no person other than a practitioner (defined as an attorney, notary or conveyancer) shall practise or

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16 *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA).

hold himself out as a practitioner or perform any act which he is prohibited from performing in terms of any regulations made under s 81(1)(g).[17]

[32] Section 83(8) makes it an offence for a person other than a practising practitioner to draw up certain documents such as agreements relating to immovable property and the dissolution of a partnership, wills, memoranda and articles of association of a company, and documents relating to proceedings in a civil court.[18]

[33] It is difficult to determine from the founding affidavit upon what facts the applicant relies for the attack on s 83 of the Attorneys Act. He says that in criminal cases there is no need for two practitioners; that a divided bar is not necessary to maintain the high standards in the legal services market; and that

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17 Section 83(1) of the Attorneys Act reads:
"No person other than a practitioner shall practise or hold himself or herself out as a practitioner or pretend to be, or make use of any name, title or addition or description implying or creating the impression that he or she is a practitioner or is recognized by law as such or perform any act which he or she is in terms of any regulations made under section 81(1) (g) prohibited from performing.

18 Section 83(8) reads:
"(a) any person, except a practising practitioner, who for or in expectation of any fee, gain or reward, direct or indirect, to himself or herself or to any other person, draws up or prepares or causes to be drawn up or prepared any of the following documents, namely –

i any agreement, deed or writing relating to immovable property or to any right in or to immovable property, other than contracts of lease for periods not exceeding five years, conditions of sale or brokers' notes;
ii any will or other testamentary writing;
iii any memorandum or articles of association or prospectus of any company;
iv any agreement, deed or writing relating to the creation or dissolution of any partnership or any variation of the terms thereof;
v any instrument or document relating to or required or intended for use in any action, suit or other proceeding in a court of civil jurisdiction within the Republic;

shall be guilty of an offence and on conviction liable in respect of each offence to a fine not exceeding R2 000 and in default of payment thereof to imprisonment not exceeding six months.

s 83(1) and (8) of the Attorneys Act is unconstitutional "*because it discriminates against advocates and reserves jobs for attorneys*," as an advocate is not included in the definition of "*practitioner*" in the Attorneys Act.

[34] It thus appears that the basis of the challenge to the impugned provisions of the Attorneys Act is that they uphold the referral rule and prevent the applicant from doing certain work which attorneys may do.

[35] Given that the alleged discrimination is not on a listed ground, to succeed with this challenge the applicant must show that the impugned provisions differentiate between the two classes of professionals, which are not rationally connected to a legitimate government purpose; and that the differentiation amounts to unfair discrimination.

[36] The third and fourth respondents accept that there is differentiation between advocates and attorneys. However, as stated above, there is a rational basis for the differentiation - the need to regulate the legal profession and to protect the public.

[37] The need to regulate advocates and attorneys is self-evident. Each group has its professional bodies which: determine the rules by which members must conduct their practices; take action to ensure that members adhere to the rules;

scrutinise and where appropriate, take action regarding applications for membership of the profession; and generally see to the interests of members and the profession. Broadly speaking, the advocate is a specialist in forensic skills and giving expert advice on legal matters and does not accept work directly from the client. The advocate has no direct financial dealings with the client and may not practise in partnership with another advocate. The attorney has more general skills and is often qualified in conveyancing and notarial practice, has direct links with the client, is allowed to practise in partnership and is responsible to keep trust funds.[19]

[38] As appears from the answering affidavit by Mr David Bekker ("*Bekker*") made on behalf of the third and fourth respondents, services rendered by advocates and attorneys are fundamentally different. For example, advocates play no role at all in the following areas of law which are crucial to the economy: property transfers; negotiation and conclusion of commercial agreements; securitisation; mergers and acquisitions; licensing and sales of businesses; estate planning; tax structuring; notarial work; statutory and commercial due diligence; and the establishment of intellectual property rights.

[39] Bekker states that the organised attorneys' profession unequivocally supports the retention of a divided bar and the referral rule, not for historical

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[19] *In re Rome* n 4 at 305J-306E.

reasons but because experience has shown that the division has a number of important benefits to the public. These include the emergence and development of a body of courtroom specialists in forensic skills, providing members of the public with expert advice across all areas of the law, promoting competition by providing access to such advice other than by establishing large firms, maintaining long-standing relationships with lay clients and ensuring the independence of the bar.

[40] The applicant has also failed to establish unfair discrimination. The differentiation between advocates and attorneys is not based on any characteristic which has the potential to impair the fundamental dignity of persons and does not affect them in a comparably serious manner. Instead, the differentiation is on a professional, not a personal level, and flows from a person's choice to practise as an advocate or attorney.

[41] In this regard the judgment in *CCMA v Law Society, Northern Provinces*[20] is instructive. The case concerned the constitutionality of rule 25(1)(c) of the rules for the conduct of proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA), which precludes members of the Law Society (and advocates) from representing members of the public in certain proceedings before the CCMA. The Law Society contended that the rule

[20] (005/13) [2013] ZASCA 118 (20 September 2013).

unfairly discriminated against its members (and advocates) in violation of s 9(3) of the Constitution.

[42] The SCA said that the jurisprudence of the Constitutional Court amply demonstrates that infringements of equality rights are inextricably linked to infringements of dignity. It held that the Law Society failed to establish any infringement of dignity.[21]

[43] But even if the applicant had established discrimination, it would be justified under s 36 of the Constitution for the reasons set out in *De Freitas*.

[44] As to the challenge to the impugned provisions of the Attorneys Act based on s 22 of the Constitution, the SCA in *De Freitas* held that the right to freely engage in economic activity under the Interim Constitution did not entail regulation of a profession in a way which does not in effect deny that right.[22] Moreover, as in *CCMA v Law Society, Northern Provinces*, the impugned provisions do not regulate entry into the profession neither do they affect the continuing choice of practitioners to remain in the attorney's profession.[23]

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21 *CCMA v Law Society, Northern Provinces* n 20 para 24.
22 *De Freitas* n 4 at 759F.
23 *CCMA v Law Society, Northern Provinces* n 20 para 25.

[45] The applicant's contention that the impugned provisions of the Attorneys Act are an infringement of s 34 of the Constitution is misplaced.[24] Apart from the fact that there is no evidence that either the referral rule or the impugned provisions work hardship on any person, they do not prevent access to courts or tribunals. Instead, they are directed at the protection of the public.

[46] The applicant's challenge to the impugned provisions of the Attorneys Act likewise cannot succeed.

[47] Finally, the applicant's constitutional challenges to the referral rule and the impugned provisions of the Attorneys Act have become wholly academic with the promulgation of the Legal Practice Act 28 of 2014. Although it has not yet come into force, the Legal Practice Act envisages the repeal of both the Admission of Advocates Act and the Attorneys Act in their entirety.[25] As was said in *JT Publishing*,[26] neither the applicant nor anyone else stands to gain the slightest advantage from an order dealing with their moribund and futureless provisions. Moreover, the Legal Practice Act draws a distinction between, and separately defines attorneys and advocates; and does away with the referral rule to the extent that it permits an advocate to render legal services for a fee upon a

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24 Section 34 of the Constitution reads:
"**Access to courts.-**Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum."

25 See section 119(1) of the Legal Practice Act and the Schedule thereto.

26 *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) para 16.

request directly from a member of the public, provided that he or she is in possession of a Fidelity Fund certificate.[27]

Costs

[48] The respondents have asked that the applicant pay the costs of the application, save for the fifth respondent who abides by the decision of the court. There is some force in the third and fourth respondents' argument that the applicant should pay the costs of the application, and that on a punitive scale. The founding papers and the applicant's heads of argument contain scandalous and vexatious material, and gratuitous attacks on members of the bar. I have already referred to the unwarranted attack on the member investigating the applicant's conduct. In the founding affidavit he says, "*I have experience in this court that the advocates of the Bar have no hesitation to deceive the court or to lie to this court.*" In his heads of argument he states that this court "… *continues to avoid its duties under the Constitution by abusing [its] discretion in Applicants' striking off applications.*"

[49] However, although the application is misguided, I do not think it can be said that the constitutional challenges are not genuine or not seriously mounted. Therefore, subject to what is stated below, the general principle that when

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[27] Section 34(2) of the Legal Practice Act.

asserting a constitutional right, a losing non-state litigant should be shielded from the costs consequences of failure, will apply.[28]

[50] What remains is the issue of costs relating to the postponements of the application. The applicant set down the matter for hearing on 1 October 2013. Without warning he removed the matter from the roll and set it down for hearing on 23 October 2013 on the motion court roll. The application came before Davis J who postponed the application for hearing on 24 February 2014, and directed that the costs stand over for later determination.

[51] On 24 February 2014 Blignault J made an order postponing the application to 23 June 2014; interdicting the applicant from practising as an advocate pending his application to the SCA for leave to appeal against the order striking him from the roll of advocates; and directing that all questions of costs stand over for later determination. In his reasons for that order, Blignault J says that the application was postponed at the applicant's request to allow him to get the application in order; and that the interdict was granted because the applicant was not prepared to give an unequivocal undertaking not to practise as an advocate, pending the finalisation of his appeal proceedings.

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[28] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) paras 21-24.

[52] In the circumstances, fairness dictates that the applicant should pay the wasted costs incurred by the first to fourth respondents, occasioned by the postponements of the application on 1 October 2013, 23 October 2013 and 24 February 2014, respectively.

Order

[53] I make the following order:

1. The application is dismissed.

2. The applicant shall pay the wasted costs incurred by the first, second, third and fourth respondents, occasioned by the postponement of the application on 1 October 2013, 23 October 2013 and 24 February 2014 respectively, on a scale as between party and party. Such costs shall include the costs of two counsel where so employed.

SCHIPPERS J

Applicant's attorneys	:	Applicant is representing himself
First respondent's counsel	:	Advocates A Katz SC and W Jonker
First respondent's attorney	:	Bisset Boehmke McBlain Attorneys
Second respondent's counsel	:	Advocates T Masuku and P Magona
Second respondent's attorney	:	Bisset Boehmke McBlain Attorneys
Third respondent's counsel	:	Advocate A Brink
Third respondent's attorney	:	Bisset Boehmke McBlain Attorneys
Fourth respondent's counsel	:	Advocate A Brink
Fourth respondent's attorney	:	Nongogo, Nuku Atttorneys
Fifth respondent's counsel	:	Advocates D Potgieter SC and H Cassim
Fifth respondent's attorney	:	State Attorney