IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 9435/19

and

IN THE EQUALITY COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: EC12/2019

In the matter between:

THE CAPE BAR	Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
LEGAL PRACTICE COUNCIL	Second Respondent
WESTERN CAPE PROVINCIAL LEGAL PRACTICE COUNCIL	Third Respondent
JEREMY JOHN GAUNTLETT SC QC	Fourth Respondent
KARRISHA PILLAY	Fifth Respondent
LOUISE BUIKMAN SC	Sixth Respondent
ANDRE CLIVE PARIES	Seventh Respondent

REHANA KHAN PARKER	Eighth Respondent
MEERUSHINI GOVENDER	Ninth Respondent
GODWIN THEO BOSSR	Tenth Respondent
MENDEL YRIEL SASS	Eleventh Respondent
ODETTE HELENA GELDENHUYS	Twelfth Respondent
GEORGE MORRISON VAN NIEKERK	Thirteenth Respondent
NCUMISA THOKO MAYOSI	Fourteenth Respondent
THE NATIONAL BAR COUNCIL OF SOUTH AFRICA	First Amicus Curiae
SAKELIGA NPC	Second Amicus Curiae
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Third Amicus Curiae
LAW SOCIETY OF SOUTH AFRICA	Fourth Amicus Curiae
BLACK LAWYERS ASSOCIATION	Fifth Amicus Curiae

Coram: Mabindla-Boqwana and Papier JJ

Delivered electronically by email to the parties and amici, and released to SAFLII on 10 June 2020.

JUDGMENT

MABINDLA-BOQWANA and PAPIER JJ

Introduction

[1] The case before us concerns questions of equality, transformation, restructuring and representation in the provincial governing structures of the legal profession. The applicant ("the Cape Bar") challenges the constitutionality of the Regulations and Rules published under the new Legal Practice Act 28 of 2014 ("the Act"), legislation that ushers in a new

dispensation of transforming, unifying, governing and regulating the legal profession in South Africa.

[2] In the Preamble, the Act records the reality of the legal profession before its coming into operation. The profession was fragmented, regulated by different laws applicable in different parts of the country, and it was divided. The legal profession is not broadly representative of the demographics of South Africa. Opportunities for entry into the legal profession had been for decades restricted by the legislative framework, and social and educational constraints that existed. Most importantly, access to legal services is still not a reality for most South Africans. In order to deal with these challenges, and others, a single statutory dispensation provides a legislative framework geared at, *inter alia*, transforming and restructuring the governance and regulation of the legal profession, that is broadly representative of the demographics of South Africa, under a single national regulatory body, the South African Legal Practice Council ("the Council"). At provincial level the Act provides for Provincial Councils. It is the provisions relating to the composition of Provincial Councils that are the subject of attack by the Cape Bar.

[3] It is without dispute that both the advocates' and the attorneys' professions have been, and are still, dominated by white men. Transformation of the legal profession has been a goal that has eluded the South African society since the dawn of our democracy, and is an area of challenge that our society has struggled to make significant strides in. The first respondent ("the Minister"), sets out the detailed statistics showing the lack of transformation, which do not reflect well on the profession. He also gives a historical account of gender and racial composition in various Bar Councils since the early 1980s to 2000s, to illustrate the slow pace of change.

[4] The Cape Bar has fairly accepted this account and the criticism levelled against it for the skewed representation. It however contends that it is committed to seeing that changing, and this application is necessarily brought with that in mind. This being so, it contends that the Regulations and Rules which were introduced as measures to enable the transformation of the profession, are inimical to that very objective.

[5] The Cape Bar is a constituent member of the General Bar Council of South Africa ("the GCB") and a voluntary association of practising advocates in the Western Cape. It brought the challenge of unfair discrimination in the Equality Court under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("the Equality Act"), and

simultaneously a review under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), alternatively in terms of the doctrine of legality. If the former is found not to apply, it seeks an order for the respective provisions to be declared unlawful and invalid, to the extent they impose inflexible quotas for the composition of the third respondent ("the WC Provincial Council") on the basis of gender and race. Parties agreed to consolidate the matters and we accordingly sit as both the Equality Court and the High Court respectively.

[6] Save for the Minister, the second respondent ("the LPC") and the seventh respondent, Mr Paries, who oppose the application, all other respondents abide the decision of the Court. For convenience we collectively refer to the opposing respondents as "respondents". Various *amici* participated in the proceedings by agreement between the parties. The majority of them support the case of the respondents, but for the Black Lawyers Association ("the BLA") and Sakeliga NPC ("Sakeliga").

[7] The matter was brought as an urgent application, but the parties requested for it to be postponed on various occasions for numerous reasons, including for the further filing of papers, written argument and readiness. By the time the matter was argued before us, urgency was no longer a live issue.

[8] The Cape Bar challenges two sets of provisions governing the elections of Provincial Councils of the Council, namely, Regulations 4 (3) and 4 (4) of the Regulations under section 109 (1) (A) of the Act, as published under GNR. 921 in GG 41879 dated 31 August 2018 by the Minister ("the Regulations"), as well as Rule 16.15.3 of the Rules published in terms of sections 95 (1), 95 (3) and 109 (2) of the Act under GN 401 in GG 41781 dated 20 July 2018 and substituted by General Notice 812 on 21 December 2018 ("the Rules"), read with the ballot paper which is attached to the Council's rules as Schedule 1B. The Regulations require 50% of the Provincial Council to be male and 50% to be female. It also sets out a table of how composition of Provincial Councils will be structured in each province. In essence the provisions create 6 seats for attorneys (8 in Gauteng) and 4 seats for advocates in each Provincial Council. The 4 seats for advocates, in terms of the Rules, must be composed of one white male, one white female, one black male and one black female.

[9] The Cape Bar submits that these provisions comprise a formula which is rigid and, while it is ostensibly aimed at affirming black and female representation in order to rectify past and present discrimination, it caps such representation, which is inimical to that well-intentioned objective. By having this sort of capping, so argues the Cape Bar, one lands up

protecting positions for white and male advocates. In this case a white man received the majority of votes. Had he received the least votes of the other candidates who are not white males, but the most in his category, he would have displaced female and black candidates who obtained more votes, something that has happened in other provinces. The Cape Bar objects to a rigid formula that reserves a seat for a white man regardless of the outcome of the votes and what the electorate says. It must be stated at the outset that the Court is not required to choose the best electoral system available. It is not for the Court to impose a measure that it deems would have been the most appropriate or which it would prefer in the circumstances. The Court is called upon to assess whether the electoral scheme chosen passes constitutional muster. If the Court were to do the former, it would be trenching impermissibly into the province of another arm of the state.

Legal and regulatory framework

[10] The purpose of the Act is, inter alia to:

> "*(a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld; …*
>
> *(b) broaden access to justice by putting in place –*
>
> *.....*
>
> *(iii) measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic;*
>
> *(c) create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession; …"*

[11] The Act establishes the Council as a body that exercises jurisdiction over all legal practitioners and candidate legal practitioners, including advocates and attorneys.[1] Its objects, as listed in section 5, are, among others, to:

> "*(a) facilitate the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent;*
>
> *…*

[1]Section 4 of the Act.

(i) promote access to the legal profession, in pursuit of a legal profession that broadly reflects the demographics of the Republic;

...

(l) give effect to the provisions of this Act in order to achieve the purpose of this Act, as set out in section 3." (Own emphasis)

[12] In terms of section 7 (1) the Council consists of the following members:

"*(1) ....*

(a) 16 legal practitioners, comprising of 10 practising attorneys and six practising advocates, elected in accordance with the procedure prescribed by the Minister –

(i) in terms of section 97(1)(a)(i)[2] or

(ii) in terms of this section, in consultation with the Council, if the procedure referred to in subparagraph (i) requires revision after the commencement of Chapter 2;

(b) two teachers of law, one being a dean of a faculty of law at a university in the Republic and the other being a teacher of law, designated in the prescribed manner;

(c) subject to subsection (3), three fit and proper persons designated by the Minister, who, in the opinion of the Minister and by virtue of their knowledge and experience, are able to assist the Council in achieving its objects;

(d) one person designated by the Legal Aid Board; and

(e) one person designated by the Board[3], who need not necessarily be a legal practitioner.

(2) When constituting the Council the following factors must, as far as is practicable, be taken into account:

(a) the racial and gender composition of South Africa;

(b) the objects of the Council;

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[2] In terms of section 97 (1) (a) (i) of the Act, the National Forum had to, within 24 months after the commencement of Chapter 10 of the Act, make recommendations to the Minister on an election procedure for the purposes of constituting the Council. The National Forum was a body created in terms of section 96 of the Act, whose duration was for a period of three years and would cease to exist upon the commencement of Chapter 2 of the Act, which among others established the Council.

[3] In terms of section 1 of the Act "*Board"* means *"the Legal Practitioners' Fidelity Fund Board established in terms of section 61*".

(c) representation of persons with disabilities;

(d) provincial representation; and

(e) experience and knowledge of –

(i) the provision of legal services;

(ii) the principles of promoting access to justice;

(iii) legal education and training;

(iv) consumer affairs;

(v) civil and criminal proceedings and the functioning of the courts and tribunals in general;

(vi) the maintenance of professional standards of persons who provide legal services;

(vii) the handling of complaints; and

(viii) competition law.

....” (Own emphasis.)

[13] Section 23 deals with the establishment of Provincial Councils, and provides that:

(1) The Council must establish Provincial Councils the areas of jurisdiction of which must correspond with the areas under the jurisdiction of the Divisions of the High Court of South Africa as determined by the Minister, from time to time, in terms of section 6 (3) of the Superior Courts Act, 2013 (Act No. 10 of 2013), and may delegate to the Provincial Councils such powers and functions which, in the interests of the legal profession are better performed at provincial level.

(3) The Provincial Councils must carry out any powers and perform any functions as may be determined by the Council or set out in this Act.

(4) Provincial Councils must be elected in accordance with a procedure determined by the Council in the rules.

(5) Provincial Councils must be constituted in such a manner so as to reflect the proportion of attorneys and advocates in the area of jurisdiction of the Provincial Council concerned.”

[14] Section 97 embodied the terms of reference of the National Forum, and in terms of section 97 (1) (a) (ii) and (iii), the National Forum was obliged to make, inter alia, the following recommendations to the Minister:

"

(ii) the establishment of the Provincial Councils;

(iii) <u>the composition, powers and functions of the Provincial Councils</u>;

...." (Own emphasis.)

[15] In terms of section 97 (1) (c), the National Forum (an interim body established in terms of section 96 of the Act) was empowered to make rules as provided in section 109 (2) for publication in the Government Gazette within 24 months after the commencement of Chapter 10, and also in terms of section 109 (3) of the Act prior to the commencement of Chapter 2. In terms of section 96 of the Act, the National Forum would comprise, amongst others, 16 legal practitioners drawn from a prescribed number of both attorneys and advocates, a teacher of law, a person from Legal Aid, a person from the Legal Practitioners Fidelity Fund Board ("the Fidelity Fund"), and persons designated by the Minister. Most importantly the National Forum was required to reflect the racial and gender composition of South Africa, representation of persons with disabilities and provincial representation.

[16] Section 109 (1) (a) empowers the Minister to make regulations, in consultation with the National Forum, within six months after receiving recommendations from the National Forum in terms of section 97 (1) (a). As previously mentioned, Regulations under section 109 (1) (a) were duly published on 31 August 2018. Regulation 2 deals with the election procedure for election of legal practitioners for purposes of constituting a Council.

[17] Instructively, Annexure B of Regulation 2, dealing with the ballot paper in respect of the advocates for the election of members of the Council, contains the following inscription:

> *"Please note that in order to comply with section 7 (2) (a) of the Legal Practice Act, 2014 (Act No. 28 of 2014) and subject to the availability of the candidates, <u>two black women, two black men, one white woman and one white man with the highest number of votes in their respective categories</u> will constitute the six advocates who will serve as members of the South African Legal Practice Council ('Council')."* (Own emphasis.)

[18] It further repeats the factors listed in section 7 (2) to be considered when the Council is constituted. The term 'Black' is given the same meaning as in section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003 ("BBEEA"), read with the Broad-Based Economic Empowerment Amendment Act 46 of 2013, and that generically refers to Africans, Coloureds and Indians.

[19] Regulation 3 deals with the establishment of Provincial Councils, while Regulation 4 provides for the composition of Provincial Councils. In terms of Regulation 4 (1) Provincial Councils in each of the provinces, except for Gauteng, must consist of ten legal practitioners each. Gauteng will consist of twelve (Regulation 4 (2)).

[20] The impugned Regulations 4 (3) and 4 (4) stipulate the following:

"…

(3) The composition of the Provincial Councils is as set out in the table below.

(4) <u>Fifty percent</u> of the legal practitioners serving on any Provincial Council must be <u>female</u> and <u>fifty per cent must be male</u>.

Table: Composition of Provincial Councils

	Eastern Cape Provincial Council	Free State Provincial Council	Gauteng Provincial Council	KwaZulu-Natal Provincial Council	Limpopo Provincial Council	Mpumalanga Provincial Council	Northern Cape Provincial Council	North West Provincial Council	Western Cape Provincial Council
Attorneys-Black	4	4	4	4	4	4	4	4	4
Attorneys-White	2	2	4	2	2	2	2	2	2
Advocates - Black	2	2	2	2	2	2	2	2	2
Advocates - White	2	2	2	2	2	2	2	2	2
Total Legal Practitioners	10	10	12	10	10	10	10	10	10

(Own emphasis.)

[21] The powers and functions of the Provincial Council are stipulated in Regulation 5 (2). They are mainly administrative and procedural in nature and need not be repeated.

[22] As contemplated in section 23 (4), read with section 95 (1) (j), the Council devised a procedure for the election of Provincial Councils. Rule 16 contains such a procedure. Rule 16.15.3 is the Rule that is being challenged. It states the following:

"*16.15 If the number of eligible candidates who are nominated exceeds the number to be elected as attorney members or as advocate members, as the case may be, the Council must, within 10 days after the last day on which nominations are required to be lodged in terms of rule 16.9, publish on the Council's website and send by email to every legal practitioner eligible to vote, to the legal practitioner's email address or, where the legal practitioner has not appointed an email address, by telefax –*

…

16.15.3 a ballot paper, substantially in the form of Schedule 1A (in the case of the election of attorney members) or Schedule 1B (in the case of the election of advocate members), containing the surnames and forenames in alphabetical order by surname of the nominated candidates and providing the information indicated in Schedule 1A or Schedule 1B, as the case may be, and nothing more; …" (Own emphasis.)

[23] Schedule 1B reads thus:

"*Every advocate who is on the roll of practising advocates and who practises within the area of jurisdiction of the Provincial Council may vote for a maximum of four candidates from the candidates listed below. Please note, however, that in order to achieve an appropriate balance of race and gender in relation to the composition of the Provincial Council, and subject to the availability of candidates, the following individuals will constitute the four advocates who will serve as members of the Provincial Council:*

1 the black woman with the highest number of votes in this category;

2 the black male with the highest number of votes in this category;

3 the white woman with the highest number of votes in this category;

4 the white male with the highest number of votes in this category

…

When voting, please take into account the following considerations in relation to the constitution of the Provincial Council:

(a) the racial and gender composition of South Africa;

(b) representation of persons with disabilities; and

(c) experience and knowledge of —

(i) the provision of legal services;

(ii) the principles of promoting access to justice;

(iii) legal education and training;

(iv) consumer affairs;

(v) civil and criminal proceedings and the functioning of the courts and tribunals in general;

(vi) the maintenance of professional standards of persons who provide legal services;

(vii) the handling of complaints; and

(viii) competition law.

...

Black is used as defined in section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003, read with the Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 as a generic term which means Africans, Coloureds and Indians who are citizens of the Republic of South Africa by birth or descent, or who became citizens of the Republic of South Africa by naturalisation before 27 April 1994 or on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date and such other persons as may be categorised as black persons for purposes of that legislation."

(Own emphasis.)

[24] Of interest, from the above mentioned Regulations and the respective Rules in the case of Provincial Councils, is that they impose quotas in both the composition of the Council and Provincial Councils. The Cape Bar, however, does not attack the Regulations insofar as they create categories, place a cap on the Council based on gender and race and guarantee a seat for white men. It only challenges the provisions relating to Provincial Councils.

[25] Chapter 2, which deals with the establishment, powers and functions of the Council, commenced on 31 October 2018 (except for section 14). The bulk of the Act came into force on 1 November 2018. The Council, referred to as the "LPC" in this judgment, was elected and constituted. Shortly after its institution it commenced with the process of establishing Provincial Councils.

The process leading to the challenge

[26] On 11 November 2018, the LPC advised the legal practitioners that it had resolved to proceed with elections immediately. In January 2019 it invited nominations for election to the Provincial Councils. On 25 February 2019, the LPC provided the legal practitioners with the final list for nominations, advising that voting would be conducted online through an

electronic platform and would commence on 28 February 2019. According to the Cape Bar, this electronic link did not include instructions about the quotas in the Rules and Regulations. This contention is refuted by the LPC and also does not make sense, because the ballot paper itself contains the instructions. The Cape Bar also states that the guidelines that were distributed about the voting process also did not refer to quotas.

[27] On 28 February 2019, legal practitioners were notified that the voting platform would be kept live until 15 March 2019. They were also advised that "*composition of the Provincial Council will [be] as per Regulation 4…Gazette 41879*". The Cape Bar queries that no explanation was given as to what that meant and that it did not mention Rule 16. The LPC extended the voting date to 16 March 2019. The Cape Bar was advised, after making enquiries, that some members could vote manually, but the LPC had not communicated this to members. The Cape Bar is however not challenging the process.

[28] On 13 March 2019, the Cape Bar Council had sent a notice to its members reminding them about the election for the WC Provincial Council. It advised its members, inter alia, as follows:

> *"Considering the experience and knowledge of the candidates, the need for the LPC to reflect the racial and gender composition of South Africa (s 7 (2) (a) of the Legal Practice Act 28 of 2014) and the interests of the members of the Cape Bar in coordinating their voting, the Bar Council endorses the following four candidates:*
>
> 1. *Jeremy Gauntlett SC QC*
> 2. *Louise Buikman SC*
> 3. *Karrisha Pillay*
> 4. *Ncumisa Mayosi*
>
> *The Bar Council cannot bind its members to vote a certain way and does not presume to do so, but we can play a coordinating role which is the reason for this endorsement.*
>
> *…."*

[29] On 18 March 2019, the LPC sent the results to the practitioners, indicating that in respect of advocate nominees, the fourth respondent, Mr Gauntlett SC QC, had received the most votes with the total of 164 votes; the fifth respondent, Ms Pillay (recently appointed as SC), had received the second most votes with a total of 162 votes; the sixth respondent, Ms Buikman SC, had received the third most votes with 149 votes; the fourteenth respondent, Ms Mayosi, had received the fourth most votes with 138 votes; Mr William John Downer SC had

received the fifth most votes with 44 votes; and Mr Paries had received the sixth most votes with 30 votes.

[30] The elected candidates were announced as Ms Pillay in the first place, Mr Paries, second, Ms Buikman, third, and Mr Gauntlett in the fourth place. This, according to the Cape Bar, was done without any explanation, but upon closer scrutiny of the Rules and Regulations they realised that this result flowed from the application of the Rules, which had never been mentioned at any stage before, and had been referred to in passing in communication from the LPC about the Provincial Council elections.

[31] Ms Pillay was declared elected as the black woman (category 1) with most votes in that category, Mr Paries was declared elected as the black man (category 2) with most votes (albeit according to the Cape Bar he only received 30 votes), Ms Buikman was declared elected as the white woman (category 3) with most votes in that category, and Mr Gauntlett was declared elected as the white man (category 4) with most votes in that category.

The Issue

[32] According to the Cape Bar, while it welcomes the mechanism to ensure representation of black people and women on the Provincial Council and the intention behind the Rules and Regulations, following the elections, the practical consequence of the impugned provisions was a perverse one. Instead of increasing representation of categories of people who have historically and continue to suffer disadvantage, the effect was to limit their participation and to ensure representation by categories of people who have suffered no similar disadvantage.

[33] Counsel for the Cape Bar stressed the point that if the purpose of the measure is to encourage transformation and representation, then it has to be a measure targeted at the problem, and the problem is not the disadvantage of white men, they therefore do not need positions protected for them. The problem is particularly acute for black women who suffer the most – the intersection of both race and gender. Therefore, to say that Ms Mayosi, who got far more votes than the persons who came fifth and below, cannot be elected because she is a black woman and there is already one other black woman, is both irrational and discriminates unfairly against her. The Cape Bar queries the election of Mr Paries, who only received 30 votes but displaced Ms Mayosi, who had overwhelming support of her colleagues and got overlooked because she was a black woman and not a black man. It contends that by capping the number of representatives in relation to Black people and women and reserving a

seat for a white man, the electoral scheme is unfairly discriminatory and fails the test devised by the Constitutional Court in *Van Heerden*[4]. We deal with this issue shortly.

[34] With regard to the review, the Cape Bar argues that the Minister's decision to promulgate the Regulations, the National Forum's decision to promulgate the impugned Rules and the LPC's application of the Rules, all constitute administrative action under PAJA. If PAJA applies, condonation is sought under section 7(1) of PAJA, for challenging the Regulations and Rules more than 180 days after they were promulgated. The Cape Bar contends that the scheme is irrational, unreasonable and arbitrary, because it does not ensure representation of Black people and women but instead acts as job reservation for White people and men. Lastly, the Regulations are *ultra vires* because the Minister had no power to determine an election procedure for the Provincial Councils, that power fell to the Council itself in terms of sections 23 (4) and 95 (1) (j). The Cape Bar is of the view that as for the remedy, the court should declare the impugned Regulations and Rules to be unconstitutional and unlawful; find that the latter order does not affect the validity of the decisions taken by the Council; and that Ms Mayosi should replace Mr Parries, as it would reflect the actual democratic mandate of the advocates who voted in the election. It would reflect an order to make specific opportunities and privileges unfairly denied in the circumstances, available to Ms Mayosi.

[35] While the BLA questions the Cape Bar's motives in bringing this application, and is critical of its posture on transformation in general, as well as the remedy it pursues insofar as it seeks the replacement of Mr Paries by Ms Mayosi, the BLA is of the view that the Regulations and the Rules as they stand, perpetuate white male dominance, they do not advance transformation by capping the black and women representation at 50%. The BLA asserts that the quota should be at 75% of black people and women to truly reflect the demographics of the Republic, which is what the Act seeks to achieve.

[36] The Minister, on the other hand, contends that the Regulations promote Black practitioners who constitute a minority in the legal profession, and Black women who constitute an even a smaller minority. They guarantee that Black women will take up a seat on the Provincial Council. The Minister argues further that Ms Mayosi was not denied a seat because she is black women. She did not secure a seat because of the votes. Furthermore, there is no preservation of seats for White men. White men only have one seat despite being

[4] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC)

an overwhelming majority of the legal profession. According to the Minister, the Cape Bar's case is not about protecting White men to the disadvantage of Black women, it is about removing a Black man in place of a Black female. The Regulations ensure equitable representation across racial and gender lines.

[37] As to the discrimination point, the Minister contends that the case should not be about how Ms Mayosi was treated as an individual, but about whether black women as a class have been unfairly discriminated against. In the Minister's submission, black women in the scheme are not victims of discrimination, the Regulations do not single them out in favour of white men, but rather, they apply across the board to all races and genders. Mindful of the fact that black people are in the minority and women in particular in the legal profession, the Regulations seek to benefit them. In the absence of mandatory obligations for their representation, they would have been left out. Ms Mayosi was not denied an opportunity to campaign and canvass for votes. She was permitted, as was anyone, to stand for election. Her inability to make the Provincial Council, does not mean black women as a group have been unfairly discriminated against. Only four seats were available and one of those was for a black woman, which was secured by Ms Pillay, who got the most votes in that category. Mr Paries secured a seat not because as a black man he displaced Ms Mayosi, but because he secured the highest number of votes of the black men that contested. The Minister therefore submits that the measure meets the *Van Heerden* test.

[38] A point was strongly made by Counsel for the Minister in oral argument that the measure had multiple objectives in fulfilling the aims of the Act, which included transformation and restructuring of the legal profession. The Regulations and the Rules are directed at dislodging white dominance, but at the same time white practitioners are to remain as part of the solution to contribute towards the enhancement of the transformation process. White men also constitute a significant segment of the legal profession. Transformation cannot be served without having them at the table.

[39] The objectives of diversity and inclusivity, amongst others, were raised by the LPC in its papers. According to the LPC the issue confronting this Court does not relate to the broad transformation mandate under the Act. It is restricted to and concerned with the governance of the profession and in particular how that governing structure (Provincial Council) is to be populated. The balance between race and gender, which the Rules say must be considered

when voting, is not aimed at promoting or advancing the broader mandate of equality within the profession, it relates to the composition or governance of the Provincial Council.

[40] In its view, the Equality Act and section 9 (2) of the Constitution are not implicated at all, and therefore the *Van Heerden* test has no relevance. It contends that in the first instance, the definition of discrimination as set out in the Equality Act is not met by the Cape Bar, because populating a Provincial Council can never be an imposition of a burden, obligation or disadvantage, or withholding of benefits, opportunities or advantages from any person. Persons are elected to govern the profession collectively by discharging their mandate in terms of Regulation 5. *Van Heerden* concerned a classical discrimination issue as to how a particular scheme affected members of the legislature, pre-1994 and post-1994. In this case the scheme does not distinguish one advocate from the other. It has everything to do with composition. It further contends that the right to vote and to stand for elections is given to every advocate in the province. Rules and Regulations are not about equality under the law of unfair discrimination. They are about a chosen electoral system for the composition of the governance and regulatory structures of the profession, of which the impugned Rules and Regulation are part. The electoral scheme is intended to achieve fair representation of all groups with a stake in the legal profession, with the goal of infusing structures of the profession with a diversity of views, reflective of the South African demographics, as the Act requires it to do. For that reason, the scheme provides for men and women of all races, teachers of law, a person from Legal Aid, the Fidelity Fund and persons designated by the Minister, among others.

[41] Counsel for the LPC made the point that the argument about the minima and maxima as to number of votes, is misplaced, because one can have neither of such when the system only has one vote per category. There are only four seats, and in respect of each category only one seat to work with.

[42] Mr Paries' argument is aligned to that of the Minister. The attorneys' profession as represented by the Law Society of South Africa, makes common cause with the Minister and the LPC, as do the rest of the *amici*, except for Sakeliga and the BLA, as mentioned earlier.

Discussion

[43] Two issues we deal with upfront. The first is that this case is not and should not be seen to be about Ms Mayosi and Mr Paries. It is about the Regulations and the Rules, and the

two advocates happen to be affected by the application of the impugned provisions, following the results of the WC Provincial Council elections.

[44] The second issue, although not germane to the legal issues to be decided in this case, relates to the Cape Bar's contention that it did not know what was contained in the Regulations and Rules before the results were announced. The submission that it only realised after the election that the results were to be allocated according to categories mentioned above cannot be accepted. The advocates were represented on the National Forum by an equal to the number to attorneys who also served on the National Forum, even though there are many more attorneys than advocates practicing in South Africa. The advocates and attorneys all participated in the process, including the work done by the National Forum since its inception on 1 February 2015. The National Forum oversaw the transitional process, and formulated the provisions of the Regulations and the Rules, that assisted the Minister in the process of promulgating the Regulations on 31 August 2018 and the National Forum promulgating the Rules on 20 July 2018.

[45] In addition, the Cape Bar via the GCB participated in the National Forum, and commented on the Regulations and the Rules prior to their promulgation. Furthermore, the Rules and Regulations are unambiguous. It does not avail the Cape Bar to blame the LPC for not having spelt out the system in correspondence when the Regulations and the Rules stipulated it in black and white. Moreover, one of the notices from the LPC advised that the elections would be held in accordance with Regulation 4. Legal practitioners could simply consult the relevant Regulation if they were not familiar with its content. It therefore begs the question why the Cape Bar participated in a process with requirements that stood in stark contrast to its view and that would produce a definite objectionable outcome. It elected not to propose or endorse a black man among the candidates it endorsed as required by the Rules and Regulations. It does not assist the Cape Bar to say its Council or members did not read the Rules. Leaving that issue aside and turning to the impugned provisions.

[46] It seems to us the case turns on the determination of the objectives of the electoral scheme. It is apposite to start by quoting the following passage by Moseneke J (as he then was) in *Van Heerden*[5]*:*

> "*…the long term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this*

[5] Id. fn.4, at para. 44.

vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. In assessing therefore whether a measure will in the long term promote equality, we must bear in mind this constitutional vision. In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened."

[47] The Act charges that when the composition of Council is considered, the racial and gender composition of South Africa is a factor to be considered. The Cape Bar agrees with this, but the point it makes is that the manner in which the Rules and Regulations go about implementing this purpose offends the objects of the Act and, more importantly, the transformational imperatives of the Constitution. It does so, by (a) capping the seats black people and women can occupy to 50%, and (b) reserving a seat for white men who are not historically disadvantaged, thereby blocking opportunities for groupings who suffer from continuing disadvantage. It therefore lends itself to irrationality, arbitrariness and unreasonableness.

[48] It matters not what motivates the Cape Bar's applications. Sceptical as the respondents may be, the applications must be scrutinised carefully on merit. We must examine whether the scheme put in place to govern the provincial structures in the legal profession passes constitutional muster.

The Equality challenge

[49] The first question is whether a *prima facie* case of discrimination has been established.[6] The Equality Act defines discrimination as:

"*…any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –*

(a) imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds."

[6] Section 13 of the Equality Act.

[50] The Cape Bar asserts that it has established a *prima facie* case of discrimination. It contends that the Rules and Regulations plainly meet the general definition of discrimination in their application to Ms Mayosi, and fit squarely within the practices stipulated in the Equality Act as unfair discrimination. They further constitute direct discrimination on the intersecting grounds of race and gender as envisaged in sections 7 and 8 of the Equality Act, as they deny access to opportunities on the basis of race or gender, because they depart from the ordinary and standard democratic position of a person with the most votes being the one to serve on a body (in this case the Provincial Council). The Rules and Regulations and their application constitute discrimination because they are laws, rules, or policies that withhold a benefit, opportunity or advantage on grounds of gender and race. The rule or policy has withheld a benefit or an opportunity from black women because they can only hold one seat. The same could be said about the position of black people in general, which include black men and women in general and white women.

[51] It further submits that this departure from the electoral system constitutes discrimination which requires justification. The intent and effect of the Rules and Regulations, according to the Cape Bar, mean that the person who receives the most votes will not be elected because they are a wrong race and a wrong gender. In other words, because Ms Mayosi is a black woman (a category whose vacancy had already been filled by Ms Pillay, another black woman who got the highest number of votes in the designated category), she cannot be elected, even though she received more votes than Mr Paries (who is a black man).

[52] There is doubt as to whether occupying a seat in the body seized with the administration of the legal profession such as the Provincial Council constitutes a "benefit", it may perhaps be viewed as an "opportunity", not in the employment or commercial sense, but in the sense of an "opportunity" to serve the profession or applying one's skills and experience in making a difference. The Cape Bar says it is a prestigious position, which affords one with a professional advantage and/or sincere desire to serve the profession.

[53] While that is so, it is also important to note, that in the context of the Act, the appointment of a Council member (by extension a Provincial Council member) does not give rise to a contract of employment, or access to work, briefs or instructions. Nor does a council member earn a salary; employment benefits and the like as would an employee. Council members are appointed to execute their statutory and fiduciary duties and obligations to

transform, restructure and regulate the legal profession, in accordance with the values, rights, obligations and aspirations contained in our Constitution and the Act.

[54] Restricting advocates to competing in silos of race and gender, according to the Cape Bar, constitutes differentiation. The seats are not open for everyone to contest, in other words one cannot contest outside their pre-determined category. Assuming on behalf of the Cape Bar that a case of *prima facie* discrimination, which is a low threshold[7], has been met, it is for the Minister and the LPC to show that discrimination did not take place as alleged, or that the conduct is not based on prohibited grounds.[8] The occurrence of discrimination is denied by the respondents on the basis that everyone has been treated equally. It can be assumed on behalf of the Cape Bar that the requirement of different races and genders competing in different categories constitutes discrimination, not only of black women, but of both races and genders.

[55] If discrimination occurred on a prohibited ground, the Minister and the LPC may defend it on grounds that it is permissible under section 14 (1) of the Equality Act, or it is fair under section 14 (2) of that Act. Section 14 (1) provides:

> "*It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons*."

[56] This is largely similar to section 9 (2) of the Constitution which states, inter alia, that:

> "… *To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken*."

[57] Section 14 (2) serves as a defence to a claim of unfair discrimination in the same way as section 9 (2). That is where the test devised in *Van Heerden* finds application. The Court in *Van Heerden* said that when a measure is challenged for violating an equality provision, its

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[7] See *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) at paras 67 and 68. This was also confirmed in the decision of *Manong and Associates (Pty) Ltd v City Manager, City of Cape Town, and Others* 2009 (1) SA 644 (EqC) at para 12, where Moosa J stated that "[*i*]*n terms of s 13 of PEPUDA all complainant is required to do in order to discharge its onus is to make out* a *prima facie case of discrimination based on race. In that event the burden of proof shifts to the respondents who must show either discrimination did not take place or that the impugned conduct is not based on race... [T]he rebuttable presumption of unfair discrimination which is an evidential burden assists complainant to cross the hurdle from prima facie proof to proof on the balance of probabilities."* (See also *Osman v Minister of Safety and Security and Others* 2011 JDR 0228 (WCC) at p24.

[8] Section 13 (1) (a) and (b) of the Equality Act.

defender may meet the challenge by showing it as that which is contemplated in section 9 (2)[9] of the Constitution *"in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination*." The test to determine whether a measure falls within section 9 (2) is threefold: (a) whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; (b) whether the measure is designed to protect or advance such persons; and (c) whether the measure promotes the achievement of equality (at para 37). According to the Cape Bar none of these are fulfilled.

[58] The case in *Van Heerden* was about whether a rule in the Political Office-Bearers Pension Fund, providing for lower employer contribution rates in respect of a certain category of parliamentarians, was unconstitutional for being discriminatory and offending equality rights. According to Moseneke J, who penned the majority judgement, the legal efficacy of the scheme should be judged by whether an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion. The existence of a tiny minority of those who were not unfairly discriminated against in the past, but who benefited from the differential scheme, did not affect the validity of the scheme. Secondly, the remedial measures adopted must be reasonably capable of attaining the desired outcome. If they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who were disadvantaged by unfair discrimination, then they would not constitute measures contemplated by section 9 (2). There is no necessity to predict the precise outcome of the future. Such would defeat the object of section 9 (2). Thirdly, to determine whether the measure will promote the achievement of equality requires an appreciation of the effect of the measure in a broader society (at paras 40 to 44).

[59] The Court was satisfied that the evidence in *Van Heerden* showed a clear connection between the membership differentiation made by the scheme, and relative need for each category for increased pension benefits. It found the scheme was designed to distribute pension benefits on an equitable basis, with the purpose of diminishing the inequality between privileged and disadvantaged parliamentarians. It promoted the achievement of equality, reflected a clear and rational consideration of the need of the members of the fund, and served the purpose of advancing persons disadvantaged by unfair discrimination.

[9] Id. fn 4 at para. 37.

[60] The uniqueness of the present case is that it is characterised on the terms that the measure put in place discriminates against those it was meant to serve or advance (i.e. blacks and women) similar to what was held in *Insolvency Practitioners* [10]. This is unusual because in other cases, including *Van Heerden,* the complainants were from a class that was previously favoured or individuals within that class who felt excluded by measures sought to advance those previously excluded. Ironically, in this case, the chosen scheme seeks to include those individuals.

[61] We disagree with the LPC that questions of equality and *Van Heerden* are not implicated in this case. Once race and gender composition are to be employed as factors to be considered in how a body is constituted, transformational measures are implicated.

[62] In *Van Heerden,* Moseneke J found that a measure will fall under section 9 (2) of the Constitution if "*an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion*." (at para 40).

[63] Three of the seats in the Provincial Council are reserved for members of groups disadvantaged by unfair discrimination, or the members of such groups or categories of persons, in the form of a black woman, a black man and a white woman. It may be argued that the overwhelming majority (i.e. 75%) of the members targeted by the scheme are black people and women. The scheme appears to be targeted at a disadvantaged group at least in the main. It guarantees three seats for black people and women (together) in a profession that is overwhelmingly dominated by white men. As the Minister puts it, without regulatory interference, white practitioners may likely choose their white colleagues, particularly men, which may lead to undue preferences and disadvantage other blacks and women.

[64] A point can be made thus, that as in *Van Heerden,* while the scheme favoured persons designated as previously disadvantaged by unfair exclusion, white men also benefit by gaining a seat, but that should not invalidate the scheme concerned. They do not benefit unduly because of the sheer numbers they enjoy in the profession, but are given one seat despite being a majority. In other words, they do not benefit because of being a larger group in the profession in comparison to others.

[65] The Cape Bar says white men must not be guaranteed a seat at all, because they do not need protection, the system has always protected them. It is instructive that in *Insolvency*

[10] *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC) at para 42.

Practitioners[11] a policy with a category that included white men was found to be targeting persons who were disadvantaged by unfair discrimination, but fell short on the second and third *Van Heerden* requirements.

[66] As to the second requirement in *Van Heerden*, the scheme is designed to ensure that black people and women have a seat in the Provincial Council. In an open contest they may be outvoted by white men. Clearly, the Regulations and Rules advance or benefit the interests of those who have been disadvantaged by unfair discrimination. They cannot be viewed as arbitrary or displaying naked preference. The scheme is designed to allocate seats on an equitable basis. The advancement of minority groups within the profession is no doubt promotion of the achievement of equality.

[67] In *Insolvency Practitioners* it was not the inclusion of white practitioners that invalidated the policy, but it was found from the information on record, that the policy was unlikely to transform the insolvency industry (at para 40). It was paucity of information as to how the list would be applied that made the policy fall foul of the second *Van Heerden* requirement. The policy also did not pass the second and third *Van Heerden* requirements because in "*appointing one practitioner in alphabetical order it entrenches the status quo. Since white males are in the majority, most appointments would go to them*" (at para 41). Because disadvantaged groups in their respective category (category D), were lumped with white men who constituted a large majority in the industry, affording everyone equal opportunity in that context would not be meaningful. The measure there also discriminated against other black people on the basis that they became citizens on or after 27 April 1994. Effectively also punishing young people, by placing all those born on or after 27 April 1994 in category D (which is not the case in the present matter). It is in that context we read the statement by the Court in paragraph 42 of *Insolvency Practitioners* that "[*a*] *section 9 (2) measure may not discriminate against persons belonging to the disadvantaged group whose interests it seeks to advance.*"

[68] Perhaps we should pause to mention that as the LPC has submitted, what the Court is concerned with in these proceedings, is not the broad transformational goal of the legal profession that the Act is aimed at, but rather the composition of the governing structures of the profession. Indeed, the ideal goal of the legal profession reflecting the demographics of South Africa is directed at the population of the broader legal profession and not directly at

[11] Id. fn. 10 at para 40

the governing structures, *per se*. That is not to say the governing or regulatory bodies should not be structured as such. The question is whether that is the mandatory necessity of the Act, invalidating any other racial and gender composition devised.

[69] Mokgoro J (in one of the minority judgments) differed as to the applicability of section 9 (2) in *Van Heerden*, although she also found that the measure was not unfairly discriminatory and agreed that the appeal be upheld. She did so for different reasons, which we propose to explore. Sachs J in a separate judgment found the majority and minority judgments (including that of Ngcobo J) as mirroring each other and being virtually identical in relation to philosophy, approach, evaluation of relevant material and ultimate outcome (at para 135). Mokgoro J notably observed in *Van Heerden*:

> *"If the aim of the section is to advance persons or groups previously disadvantaged by unfair discrimination, the section should be used for that purpose alone. To do otherwise would be to allow the section to be used to enact measures which should not be tested under section 9 (2) because they benefit persons who do not belong to groups previously disadvantaged by unfair discrimination."*

This seems to be consistent with the Cape Bar's view.

[70] Although she left open the question whether every person who benefits from the scheme must be from the previously disadvantaged group, she was of the view that the evidence in that case did not show that the advanced group was in the overwhelming majority (at para 88 and 93). She raised a point that section 9 (2) cannot be used to advance a purpose other than to remedy disadvantage caused by past unfair discrimination. She observed that "*a measure might resemble a restitutionary measure because it is aimed at creating equity between groups of persons but falls short of protection in terms of section 9 (2). This could be the case when any of the three requirements identified by Moseneke J are not fulfilled. In view of the approach I take of the group targeted for disadvantage in the past, the inclusion of those not so targeted affects the group in a way that disqualifies it for advancement under a s 9 (2) remedial measure. Such a measure may, generally on the basis of justification in terms of s 9 (3) and particularly in view of the objective of the measure, pass muster. The evidence for advancement of the group or for justification may be the same or it may be different, depending on the circumstances of each case. It would be untenable to strike the measure down only because it does not fall under s 9 (2) when it could be decided under s 9 (3). Doing so would frustrate any programme designed for the achievement of equity.*

[71] A point was also made by Ngcobo J, in *Van Heerden* that the fact that a remedial measure does not come under section 9 (2), does not mean it violates the equality clause. Principles underlying remedial equality do not operate only in the context of section 9 (2), the constitutional validity must still be determined in light of the equality guarantee.[12]

[72] Having found that the pension fund rule involved in that case fell short of the requirements of section 9 (2), Mokgoro J went on to test the measure against section 9 (3)[13] of the Constitution, referring to *Harksen*[14], as to the factors to be considered in determining whether discrimination is unfair[15]:

> *" (a) [T]he position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;*
>
> *(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. In Hugo, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair; (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."*

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[12] Id. fn 4 at para 109.

[13] Section 9 (3) of the Constitution of the Republic of South Africa, Act 108 of 1996, provides:
"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."

[14] In *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 51.

[15] Id. fn 4 at para 99.

[73] Assuming that we were wrong as to the *Van Heerden* test being met, section 14 (2)[16] of the Equality Act remains available to the Minister and the LPC. Indeed the Cape Bar accepted this in its written argument, but asserted that the scheme fails the test on that score too.

[74] In this case, the complaint is brought by the Bar, of which 75% are white men, who did not suffer from patterns of disadvantage as a group. They bring the complaint challenging the scheme which they say did not favour black women, (which they cannot be barred from doing) because it capped their representation to one seat whilst also guaranteeing white men a seat. We have assumed on behalf of the Cape Bar that there is discrimination based on race and gender. Whilst the capping of race and gender is 50% each, when white women are included as part of the disadvantaged group, that disadvantaged group as a unit holds 75% of the seats of the provincial governing bodies.

[75] The Cape Bar submits that Ms Mayosi's dignity was impaired because after having received overwhelming votes, she was told that she could not serve because she was a woman. As submitted by the LPC, it is noteworthy that Ms Mayosi is not a complainant in these proceedings. She is merely cited as a respondent who abides the decision of the Court. It is not fair and correct to focus on Ms Mayosi as a person. What the Court should be concerned with is whether black women as a group are being impacted in the manner suggested by the Cape Bar. Ms Mayosi is indeed a well-respected advocate at the Bar and she would undoubtedly have been a valuable member of the WC Provincial Council, particularly in a province where there are only 14 African black women advocates at the Cape Bar, a lamentable situation, in urgent need of remediation.

[76] The fact that black women, white women and black men made themselves available for election on the basis of the published impugned Regulations and Rules, cannot in our view, amount to the impairment of human dignity or the infringements of any constitutional rights, in circumstances where any candidate was not elected in their specific category of participation. There was only one seat for each category and not more.

[77] The Council of the Cape Bar knowingly recommended and endorsed two black women to compete against each other. They should have known that only one of them would

[16] Section 14 (2) provides that: "*In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account: (a) The context; (b) the factors referred to in subsection (3); (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned*."

qualify for a seat, as clearly stipulated in the Rules. Something that ought not to have been done given the fact that the Cape Bar did not agree with the Rules, and the result would clearly have left out one of the black women. This is not something that should have come as a surprise. It is not clear why no black male candidate was endorsed from the ranks of the members of the Cape Bar in compliance with the Rules.

[78] While it is so that the impugned provisions guarantee a seat for a white man, one has to also look at the other objectives that the Act seeks to achieve, as articulated by Counsel for the Minister, which include both transformation and restructuring of the legal profession. In this regard, black people and women are not denied seats, but seats are designated to each category for an important societal goal. The measure is not aimed at impairing black and women advocates. It is aimed at creating equity within a body or provincial bodies that regulate the profession. The scheme was instituted to benefit a group of diverse advocates in terms of race and gender as one component of the composition of the Provincial Council, in a new era, which the Act seeks to advance. The LPC in its papers makes this point.

[79] One objective is to diminish dominance of the governing structures by white male advocates, by guaranteeing a seat for black and women advocates regardless of their numbers in the profession, and another is to recognise that white men constitute an important segment of the legal profession. As correctly submitted by Counsel for the Minister, they relatively speaking, have the advantage in terms of work, skills and resources, among others, owing to opportunities afforded to them in the past to the exclusion of others and accordingly need to be part of the governing structures of the legal profession, not by luck but by design. Reconciliation is also, in our view, an ongoing imperative that diversity is intended to encourage and advance. In other words, by ensuring that as all other significant partners in the profession, they remain at the discussion table. This is amongst others a recognition of the contribution they can make and role they can play as part of society in bringing about the aims of the Act. Indeed, the issue of a transformed profession is one which everyone talks about, but results are few and far between, especially in the Western Cape.

[80] The scheme is not intended to prefer white men at all, but designed to make them equal contributors and partners in the governance of the legal profession. All councillors have an equal opportunity to foster the aims, objectives and aspirations of the Act and Constitution, which promotes transformation and restructuring of, and reconciliation in the legal profession. This is a legitimate objective, in our view, in terms of section 14 (2) of the

Equality Act read with section 9 (3) of the Constitution. The electoral scheme in no way unjustifiably or disadvantageously targets black people and women, nor does it seek to impair them. We take note of the LPC's view that the Provincial Council's powers and functions are very much administrative, as articulated in the Regulations, unlike the Council, which has a broad mandate of facilitating "*the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent*."[17] It must be remembered that the Council "*may delegate to the Provincial Councils such powers and functions which, in the interests of the legal profession are better performed at provincial level*", as per section 23 (1) of the Act.

[81] The goals of diversity, inclusivity and ongoing reconciliation are for the societal good. White male practitioners are part of the profession and a large segment in it. For transformation to succeed they should collectively participate in, and contribute towards the achievement of our constitutional and statutory objectives. It cannot be inimical for a regulatory body tasked with fulfilling the aims of the Act, which include transforming of the profession, to include white men as a category crucial to fulfilling that task, given the situational context of the stubborn realities of the legal profession. Diversity, inclusivity, and reconciliation are also crucial elements of transformation.

[82] It is striking that insofar as the capping is concerned, Regulation 4 and the Rules that deal with the election of the Provincial Councils, are largely similar to Regulation 2 that is concerned with the election procedure of legal practitioners for purposes of constituting the Council itself. Annexure B-Ballot Paper of the Regulations, dealing with advocates, notably states, inter alia, that the Council will be constituted by two black women, two black men, one white woman and one white man with the highest number of votes in their respective categories as already stated.

[83] The same requirement applies to attorneys as per Annexure A. It therefore appears that even the Council is elected in the same way as Provincial Councils, in that a number of candidates in accordance with their race and gender are specified and those with the highest number in their categories will constitute the Council, and this according to the Annexure is to comply with section 7 (2) (a) of the Act, doubtless the requirement that race and gender composition should be taken into account. Curiously, this is not impugned.

[17] Section 5 (a) of the Act.

The use of quotas

[84] We do not read the judgments from our courts to have prohibited quotas in all situations. As Madlanga J observed (in the minority judgment) in *Insolvency Practitioners*, the Constitutional Court, "*has in the past pointed towards the possibility of the use of quotas being constitutionally impermissible under certain legislation*."[18] Having found it unnecessary to engage in a debate as to whether under section 9(2), quotas are similarly outlawed, he referred to the words of Moseneke J in *Van Heerden*[19] where he emphasised a "situation-sensitive" approach. Madlanga J cautioned that... "*before invalidating a measure meant to achieve substantive equality for being rigid, it must be looked at in context or in a 'situation-sensitive' manner. It can never be a one-size fits all.*"[20]

[85] The Constitutional Court has spoken extensively in a number of decisions with regard to the achievement of substantive equality, a constitutional obligation in terms of section 9(2) of our Constitution. It is important to note that none of the authorities we have been referred to, dealt with the application of section 9(2), in the context of the appointment of a council member to a statutory body to perform the function of administering, transforming, restructuring and regulating a profession. That is a crucial distinction between this matter and those other considered authorities. It must be remembered that the scheme is directed at the governing structures of the legal profession and is not about the distribution of work and briefs to individual practitioners. *Insolvency Practitioners*[21] dealt with the appointment of practitioners to generate fees and earn a living, the *Van Heerden*[22] matter as already stated related to certain political office-bearers' pension fund, which provided for differentiated employer contributions in respect of members of Parliament and other political office-bearers between 1994 and 1999[23].

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[18] Id. fn 10 at para 79. Moseneke ACJ, writing for the majority in *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC), observed that the "*distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by section 15 (3) of the* [Employment Equity] *Act. The same section endorses numerical goals in pursuit of work place representivity and equity. They serve as a flexible employment guideline to a designated employer."*
[19] Id. fn 4 at para 27.
[20] Id. fn 10 at para 80.
[21] Id. fn 10.
[22] Id. fn 4.
[23] Id. fn 4 at para 1.

[86] The matter of *Barnard*[24] dealt with a decision of the national commissioner of the police service ("the national commissioner"), who refused to promote an employee of the police service, Captain Renate M Barnard ("Ms Barnard"). It is noteworthy that Ms Barnard was interviewed by a racially diverse panel[25]. The case related to the promotion of an applicant in the context of an existing employer and employee relationship[26]. The national commissioner's decision not to appoint Ms Barnard was found to be rational and reasonable.[27] Moseneke ACJ went on to say that the national commissioner "*exercised his discretion not to appoint Ms Barnard, even though she had obtained the highest score, because her appointment would have worsened the representivity in salary level 9 and the post was not critical for service delivery. Again, in his discretion, he chose not to appoint Mr Mogadima or Captain Ledwaba (Mr Ledwaba) even though their appointment would have improved representivity.' I cannot find anything that makes his exercise of discretion unlawful*."[28] A point missed by the Cape Bar and notably significant, in our view, is that, in *Solidarity*[29] the majority judgment held a view that the *Barnard* principle was not limited to white candidates but could also apply to black candidates. It also emphasised the importance of achieving inclusivity of all racial groups and both genders in the workplace. In that case it was found that the overrepresentation argument relied upon by the Minister lacked a proper basis because the Department only used the national demographic profile and did not take into account the regional active population, as it was obliged to do in terms of the Employment Equity Act 55 of 1998 ("the EE Act"). It is however important to distinguish the *Barnard* and *Solidarity* decisions from this case as their context was based on the EE Act, which specifically prohibits the use of quotas. The importance of inclusivity and diversity, albeit in the workplace, is underscored in *Solidarity*.

Administrative Action/ Exercise of public power

[87] It will be recalled that the Cape Bar argued that the Minister's decision to promulgate the impugned Regulations, the National Forum's decision to issue the impugned Rules, and the LPC's application of the impugned Rules, all constitute administrative action which is subject to review under PAJA. Because this question has limited practical consequences, we

[24] *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC)
[25] Id. fn 24 at para 8.
[26] Id. fn 24 at para 44.
[27] Id. fn 24 at paras 69-70.
[28] Id. fn 24 at para 62.
[29] *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) at para 40.

will not spend much time on it; this is because, as the Cape Bar contended, if the impugned actions are found not to be administrative action, they remain an exercise of public power which may be reviewed under the legality principle. We accept that in certain instances regulation-making power may constitute administrative action.[30] The resolution of this question is not straightforward. Counsel for the Cape Bar argued that while there are aspects of the Regulations which are policy based, most parts are prosaic in nature, dealing with matters of process, i.e. the running of elections. The same is argued as regards the Rules. The Minister however holds the view that from their plain reading, Regulation 4 (3) and Regulation 4 (4), which regulate the composition of the Provincial Council, displays nothing administrative in nature.

[88] In *Grey's Marine*[31], the Supreme Court of Appeal ("the SCA") held that:

> *" Administrative action is … in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.[32]"*

[89] The SCA further held that:

> *" In making that determination '(a) series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is.'"[33]*

[90] As stated in sections 6 (1) (b) (ii) and 6 (5) (h) of the Act for example, the Minister, receives advice, annual reports, recommendations from the LPC, among others. The LPC and statutory structures established in terms of the Act exercise administrative functions in carrying out the application of policy, not the Minister. The LPC sources its power to make the Rules from the Act. In our assessment both Regulations 4 (3) and 4 (4) which relate to the composition of the representative advocates to be elected to the Provincial Councils do

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[30] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC), read with *Mostert NO v Registrar of Pension Funds and Others 2018 (2) SA 53 (SCA)* at para 8.

[31] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA).

[32] Id. fn 31 at para 24, in which paras 136 and 146 in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) was referenced.

[33] Id. fn 31 at para 25.

not appear to be dealing with matters that are administrative in nature. It may be argued that the Rules on the other hand by the mere fact of regulating the voting process involve implementation of policy. This being so, PAJA may well be applicable insofar as the Rules are concerned. However, due to their being closely related to the impugned Regulations, and the fact that upon scrutiny the impugned Rule16.15.3 read with Schedule 1B seems to contain matters not purely prosaic but policy related. It categorises voting based on race and gender and also replicates policy requirements, we are therefore not persuaded that PAJA is applicable in this instance. The effect of this finding is that the Cape Bar does not have to concern itself with its application for condonation for its non-compliance with the provision in section 7 (1) of PAJA, for the late filing its application. Notwithstanding our misgivings as regards the application of PAJA in these circumstances, the Minister and LPC exercised public power, reviewable in terms of section 2[34] of the Constitution. It is trite that the exercise of public power must be in compliance with all constitutional requirements. Ngcobo J, in *Affordable Medicines,* stated the following:

> *"The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."*[35] (Footnotes omitted.)

[91] We now turn to deal with contentions raised under the topic of legality.

Ultra vires

[92] The Cape Bar contends that the Minister acted ultra vires his powers, as the Regulations create a framework for an election procedure, which is impermissible. His powers, according to the Cape Bar, were limited to "*establishing the Provincial Councils*", but not the "*election procedure*". This power, so the argument goes, fell to the LPC in terms of Section 23 (4) and 95 (1) (j) of the Act.

[93] With regard to the *ultra vires* principle, Ngcobo J in *Affordable Medicines*[36], stated:

> *"… If, in making regulations, the Minister exceeds the powers conferred by the empowering provisions of the [relevant Act], the Minister acts ultra vires (beyond the powers) and in*

[34] The Constitution of the Republic of South Africa, Act 108 of 1996 (as amended) – Section 2:
"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".
[35] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 49.
[36] Id. fn 35 at para 50.

> *breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid."* (Footnote omitted.)

[94] In terms of section 94 of the Act, the Minister is empowered to make Regulations. Section 95 empowers the LPC to make Rules, while section 97 empowered the National Forum to make recommendations to the Minister as regards, among others, *"the composition, powers and functions of the Provincial Councils*[37]*".* The Minister was obliged to act on the recommendations made to him by the National Forum, within six months of receiving the recommendations, in consultation with the National Forum[38]. The Minister promulgated the impugned Regulations as was required to "*give effect to the recommendations of the National Forum*"[39]. In the circumstances of this case, and based on the legislative provisions referenced above, we are of the view that the Minister acted within the confines of the Constitution and the Act, and his powers and functions were accordingly executed intra vires.

Arbitrariness

[95] For arbitrariness to be established there must be an absence of reasons or reasons which do not justify the action taken.[40] The Cape Bar contends that the electoral system cannot justify measures which have as their effect the capping of positions available to black people and women, and a system of 'job' reservation for white people and men. It relies on the *Insolvency Practitioners* decision, where the Court observed that though the measure had the *"… laudable purpose of transforming the insolvency industry, which everyone agrees needs to be transformed, the implementation of the policy contains arbitrary terms".* [41]

[96] The arbitrariness referred to in the *Insolvency Practitioners* matter related to the fact that the impugned transformation policy only applied to those black people who became citizens before 27 April 1994, who therefore enjoyed the benefits of the policy. No reasons were advanced for such restriction. Black people who became citizens on 27 April 1994 and thereafter were denied such benefits for no apparent reason. The unequal application of the policy (the emphasis being the differential treatment of black people simply based on the date

[37] Section 97 (1) (a) (iii).
[38] Section 109 (1) (a).
[39] Ibid.
[40] Id. fn 10 at para 55.
[41] Id. fn 10 para 50.

they became citizens) was consequently found to be arbitrary and led to impermissible differentiation. [42]

[97] Same cannot be said for this case - the Minister and LPC provided reasons to justify the promulgation of the Regulations and the Rules. There is no unequal treatment of persons similarly placed. Similarly, there is no naked preference of white men.

Rationality

[98] Rationality is a standard lower than arbitrariness. "*All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained*."[43] The choice as to the suitable means belongs to the executive. This injunction was appositely set out by Ngcobo CJ *in Albutt*[44], in the following terms:

> *"The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. <u>What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved</u>. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution".* (Own emphasis.)

[99] As Sachs J stated in *Van Heerden* "*[t]he fact that the same remedial purpose could be achieved in different ways, even if there are better ways, would not be sufficient to invalidate it*[45]." In this case, the election of candidates to a Provincial Council is part of the establishment of the statutory body for the governance, administration, regulation and transformation of the legal profession. Counsel for the Cape Bar argued that there was

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[42] Id. fn 10 at paras 50-52.
[43] Id. fn 10 at para 55.
[44] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at paras 49 - 51.
[45] Id. fn 4 para 153

divergence between the Minister and the LPC as to the rationale for the Rules and Regulations. The Minister explained the purpose of the Act and Regulations as follows:

> *"The purpose of the Act is to change a stubbornly untransformed profession through legislative intervention."*
>
> and
>
> *"The Regulations are necessary to ensure continued representation of Black women and men, a minority at the Bar, on the respective Provincial Councils. The reality is that Black advocates are a minority at the Bar and in the absence of mandatory obligations for their representation on the Provincial Councils, history informs us that they will simply be left out."*

[100] The LPC on the other hand explained the purpose of the electoral scheme for the election of the Provincial Council as follows:

> *"... the electoral scheme devised for the constitution of the LPC and the Provincial Councils is intended to achieve the fair representation of all groups with the goal being to infuse the regulatory structures of the profession with a diversity of view, reflective of the South African demographics, ..."*

[101] Schedule 1B (Part B) of the Ballot paper for the election of legal practitioners to the Provincial Council records on the Ballot paper that the reason is *"*[*i*]*n order to achieve an appropriate balance of race and gender in relation to the composition of the Provincial Council, ...".*

[102] We do not read the stated objectives as contradicting each other, nor is the one explanation mutually destructive of the other. They both talk to the objects the Act. As we have already indicated, we disagree with the LPC that the Rules and Regulations do not implicate issues of equality. While that is so, the purpose it attributes to the scheme is consistent with the purpose of the Act.

[103] There can be no doubt, as conceded by the Cape Bar, that the profession is untransformed and "*that the electoral system is an attempt to take steps to address disadvantage and accommodate diversity"* (at least in part according to it). Given our history, it is a matter of fact that black people and women have been excluded and marginalised for decades, and we are yet to reach the stage where we need not have to rely on legislation to ensure representivity, inclusivity and diversity on structures of governance. In our view, what is hardwired into the electoral system is 75% representation of historically disadvantaged groups of advocate members in terms of race and gender, to serve on the WC Provincial Council, with the objective of, among others, inclusivity. Black women are not

being denied or excluded from participating, they are included and guaranteed one out of four seats. Had it not been for the measure they would have had a limited chance of participating, given that they are in the minority in the legal profession. Further, the Regulations and the Rules were intended to ensure that there was equitable representation of all races and genders, and that was achieved.

[104] The creation of a transformed and diverse Provincial Council, in our view, is manifestly part of building and restructuring the legal profession, a microcosm of the broader South African society, ravaged by a system of apartheid. As stated by Froneman J in *Albutt*,[46] ours is a participatory democracy and a project aimed at achieving national unity. Transforming and restructuring the governing structures of the profession in a manner representative of all races and genders, we venture to say, does promote the ongoing constitutional goal. The Council of the regulator and councilors are obliged and have a fiduciary duty to give meaning, form, and content to their statutory and constitutional mandate. We appreciate the fact that the Cape Bar attacks the lawfulness of the impugned provisions as they stand. While they cannot be estopped from doing so, it is significant that the rationale of the impugned provisions is the product of the deliberations of which they were part.

[105] Nonetheless, a rational link has been amply demonstrated, in our view, between the purpose and the means chosen to achieve that purpose. The impugned Regulations, Rules, and the application thereof rationally achieve representivity in terms of race and gender, embrace inclusivity and entrench diversity for the WC Provincial Council that has been established for the purpose of administering and contributing towards the transformation of the legal profession.

Reasonableness

[106] To be successful on this ground the Cape Bar must show that the issuance of the Regulations and the Rules was so unreasonable that no reasonable decision maker could have reached the same decision[47]. This ground must also fail, in our view, for the same reasons articulated above. It is not unreasonable that a decision maker, seeking to give expression to

[46] Id. fn 44 at para 90. See also *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 121; and *Matatiele Municipality and Others v President of the RSA and Others (No 2)* 2007 (6) SA 477 (CC) at para 40.

[47] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 45.

the aims of the Act, which include the taking into account of race and gender as factors in the composition of the Provincial Council, would adopt the impugned Regulations and Rules to do so. It must also be remembered that there are only four positions to work with. Within those parameters it is not unreasonable to designate 50% of the seats to each gender and each race, most importantly, to assign majority of those seats to legal practitioners who were previously disadvantaged.

Conclusion and Costs

[107] Considering all the factors mentioned above in respect of both the equality challenge and the review, we are of the view that both applications must fail. This is a matter of constitutional importance. The Minister and the LPC did not quarrel with the applicability of the *Biowatch*[48] principle if the Cape Bar were to be unsuccessful. Accordingly, each party would be responsible to pay its own costs.

[108] As a concluding remark, it is perhaps fitting for all to be reminded that the election of black women to the governing structures of the profession is not in and of itself sufficient to fulfil the transformation objective of the legal profession. Transformation is an imperative that that must extend beyond that, to addressing matters that include briefing patterns, attraction, retention and offering support to black and women legal practitioners, among others.

Order

[109] For the reasons outlined above, the followed order is made:

1. The application brought under case number 9435/19 in the High Court is dismissed.
2. The application brought under case number EC 12/2019 in the Equality Court is dismissed.
3. There is no order as to costs in respect of both applications.

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

N P MABINDLA-BOQWANA

Judge of the High Court and Equality Court

T PAPIER

Judge of the High Court and Equality Court

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