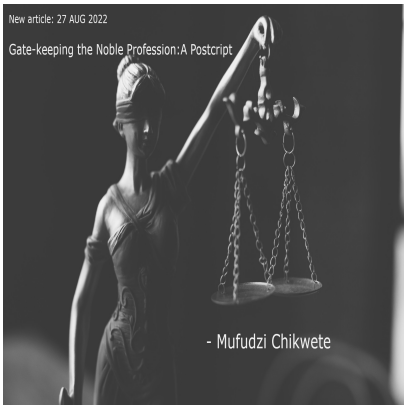

Gate-keeping the Noble Profession: A Postscript

Description

A dark day eclipsed over the lives of non-South African lawyers and law graduates on the 2nd of August 2022. On that day, the Constitutional Court handed down its judgment in *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29, the case that held the ambitions and careers of foreign nationals in the legal profession in the hands of the highest court in the land. All that remained was for the wheels of justice to churn out an outcome that would prove to be a landmark judgment in the lives of foreign nationals in South Africa. Sadly, that outcome did not arrive.

The case concerned a very important matter: whether or not it is unconstitutional for a law to prohibit foreign nationals who are neither citizens nor permanent residents of South Africa from being admitted as legal practitioners in South Africa, let alone being able to practice as such. In other words, it concerned whether a foreign national without a permanent residency status in South Africa can become a lawyer in South Africa. A while ago, I wrote about what hanged in the balance regarding the matter and why, in my opinion, the laws prohibiting foreign nationals from being admitted as legal practitioners were unreasonable and unjustifiable. I wonâ??t delve into too much detail about that here, so I would encourage you to click this link and read that article. My intention here is to focus on the actual judgment itself and its potential repercussions going forward.

In its judgment, the Court found the law in question to not be unconstitutional. In other words, it was permissible for the State to prohibit foreign nationals without a permanent residency status from practicing law in South Africa. Weâ??ll dive into how and why the Court reached the decision that it did, why its reasoning leaves a lot of room for criticism, and what all of this means for the future.

AN ANALYSIS

The core legal issue that the Constitutional Court needed to decide was whether the citizenship/permanent residence requirement for admission as a legal practitioner amounted to unfair discrimination. Answering this legal issue required the Court to open the library containing the rights contained in the Bill of Rights, and to blow the cobwebs off the book on the right to equality. The right to equality is a multifaceted right, and one of its core component parts is unfair discrimination. This

occurs when the State (or private parties like a company, business or organization) differentiates between different categories of people (discriminates) unfairly. For example, imagine a situation where Parliament enacts legislation that only allows doctors to write prescriptions for antibiotics. In so doing, the State differentiates one category of people (doctors) from another (non-doctors). It makes it impossible for non-doctors to write prescriptions for antibiotics. When the State performs this kind of differentiation, the right to equality is triggered and the government policy must be shown to be constitutionally permissible.

When the State discriminates between different categories of people, three things must be shown in order for the Stateâ??s conduct to be constitutionally permissible: (i) the discrimination must serve a legitimate government purpose; (ii) the discrimination must not be unfair; and (iii) even if it is unfair, if the discriminatory policy is shown to be nevertheless reasonable and justifiable, it will stand. This third requirement exists because, in some instances, while discrimination might be unfair, it is nevertheless necessary to strike a balance between different interests in a society (normally government interests in achieving certain aims versus the interests of a certain community in having their rights protected).

When applied here, the State discriminated between persons who are citizens/permanent residents on one hand, and persons who are neither citizens nor permanent residents in South Africa and are purely foreign nationals on the other hand. The former category of persons are able to be admitted as legal practitioners in South Africa and can practice as such. The latter category of persons cannot. Therefore, people who are purely foreign nationals cannot become lawyers in South Africa and they cannot practice as such. They might study here or they might even get practical vocational training at a law firm/advocateâ??s chambers, but they can take no step further than that in their legal career in South Africa. The Court had to decide whether or not this government policy served a legitimate government purpose, amounted to unfair discrimination, and if it did amount to unfair discrimination, whether or not it was nevertheless a reasonable and justifiable government policy.

Regarding whether the policy served a legitimate government purpose, the core finding of the Court was that the government objective being served here is â??protecting opportunities for South Africansâ??. In other words, government sought to ensure that South Africans will have a plethora of opportunities to become lawyers and practice as lawyers in South Africa. One way to do that is to prevent foreign nationals from practicing law in South Africa. This decreases competition in the legal market for jobs. While the Courtâ??s reasoning here is understandable, whether or not the action taken by the State (preventing admission) actually serves the government purpose is questionable. As I explained in my previous article, we need to distinguish between *admission* and *employment*. Allowing foreign nationals to be admitted as legal practitioners in South Africa does not, in any way, affect the job prospects of South Africans. In order to be employed as a legal practitioner, you need a work visa. In order to get a work visa, employers need to prove that there is no equally deserving South African that can take the job. Very onerous obligations are placed on employers in trying to prove that. The work permit requirements make it nearly impossible for foreign nationals to compete with South Africans in the legal market. They can only get a job if there is no other equally deserving South African that can take the job. Furthermore, present realities of the job market are such that employers generally do not like employing foreign nationals because of the obstacles they have to jump over in helping the applicant secure a work visa.

My point is this: preventing foreign nationals from being admitted as legal practitioners in South Africa does not serve the purpose government had in mind (protecting job opportunities for South Africans).

Itâ??s akin to the third blanket that someone uses to keep themselves warm when its 40 degrees Celsius outside. Itâ??s completely unnecessary and does not serve the purpose of keeping you warm because there is already so much more doing that job for you.

Regardless, the Court found that a legitimate government purpose was served. What about whether or not there was unfair discrimination? The Court also here found that there was no unfair discrimination. The primary basis for this finding was that, because the restrictions on admission do not prevent non-South Africans from ever working in South Africa and do not prevent them from providing legal services that donâ??t require admission, there is no unfair discrimination. In the words of the Court, â??they are therefore not left destitute with no alternative source of employmentâ?•.

There is much that is left to be desired by the Courtâ??s reasoning in this instance. While it is true that the admission requirement does not prevent non-South Africans from finding other employment in South Africa, it must be kept in mind that this is only because work permit requirements perform that role already. It places overly burdensome requirements on non-South Africans wishing to work in South Africa. One can only imagine how much more difficult it would be for non-South Africans to compete in the legal job market where there are plenty of candidates who are already qualified lawyers and have worked at a commercial law firm for several years. Majority of in-house jobs require candidates to have experience working at a law firm for a select number of years. But if you canâ??t even be admitted, then you cannot obtain this kind of experience. Working in entry-level jobs such as legal assistant positions and paralegal positions are equally difficult to get into because of the work permit requirements. Anyone who studied a law degree only and did not venture out into other degree programs are left with very little options because they only possess qualifications that are mostly suitable for the legal industry. Even in the legal industry itself, they are handicapped by their inability to be admitted as a legal practitioner.

One major consideration the Court seemed to gloss over is the unfair discrimination faced by foreign nationals whose status closely resembles permanent residency, but cannot fully amount to permanent residency because of major obstacles they face dealing with immigration requirements and Home Affairs. For example, refugees and asylum seekers who had to flee their country because of a threat on their life. Or, someone who married a South African but is struggling to get permanent residency because of how hard it is. Or, someone who has been in the same job for several years with low pay hoping to qualify as a lawyer and work as an associate once their permanent resident papers come out but canâ??t do so because a few years have already passed without a word from Home Affairs. All of these people can do very little about their position because they have been denied admission into the legal profession. Surely, one cannot say that they have not been left destitute?

Even if it is true that they have not been left destitute, what is the quality of work that they are doing now? Did the justices consider what salary these people are earning or whether they are facing hardships in the jobs they have right now? Since when did the mere existence of other employment options equal no unfair discrimination? Does that mean, for example, you can deny someone the opportunity of becoming a doctor because they currently have a job that earns them R500/month? How is it not unfair to allow permanent residents to enjoy the security and comfort of a certain job and not allow non-permanent residents to do the same simply because of their citizenship status, especially in light of the fact that the lives of South Africans will barely be affected by their enjoyment of the same benefits? The Courtâ??s reasoning here, unfortunately, leaves a lot to be desired.

MOVING FORWARD

There is no way to sugarcoat itâ??the gatekeeping strategies that plague the legal profession in South Africa remain. Foreign nationals without a permanent residency status cannot be admitted as legal practitioners in South Africa, and they canâ??t practice as such. Even the suggestion made by the High Court that foreign nationals be given the opportunity to become non-practicing lawyers in South Africa was erased from existence by the Constitutional Court with little to no justification. A cold wind blows over foreign nationals in South Africa because of laws and conduct that oftentimes frustrates them at every turn. Unfortunately, that kind of culture does not seem to be changing anytime soon.

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