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8th Annual

SABWIL HUMAN RIGHTS COURT

(Held on 9 December 2023, Constitutional Court of South Africa, Braamfontein)

Case No: 912 / 2023

In the matter between:

MMOWELLI, MAPULA

Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

1st Respondent

LEGAL REGULATORY COUNCIL

2ND Respondent

and

FRIENDLY FOREIGN LAWYERS

Amicus Curiae

#s22 Case Scenario

This scenario is fictional. The parties set out in this moot problem should not be seen as intending to reflect any real persons or organisations. Kindly assume, for the purposes of this court, that the facts set out below are accepted as correct.

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- 1 The applicant is Ms Mapula Mmowell, born in Mthatha, Eastern Cape. Her father is late, and she is raised by her mother, a spaza shopkeeper. She is the eldest of five and the first law graduate in her family.
- 2 The Respondents are the Minister of Justice and Correctional Services and the Legal Regulatory Council. The Minister files a Notice of Intention to Abide whilst the Legal Regulatory Council opposes the leave to appeal, and relief sought by Mapula to prohibit the consideration of those not permitted to the practice of law from consideration into the training for practice.
- 3 The Friendly Foreign Lawyers joins the proceedings as a friend of the court, advancing the rights of refugees and others living in South Africa who have yet to secure permanent residency or citizenship.
- 4 All her life it is Mapula's dream to advance the rights of those in her community so that basic needs are met. When water and electricity and the like are not accessible, Mapula wants to fight for the rights of those who need her help. To do this she worked tirelessly at her studies. She uses a paraffin lamp at nights

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to study in her shack with her family. Her law degree is funded by the government's programme for university students, with money from public coffers raised through taxation.

5 Wonderfully, with the support of her family and tireless efforts, she is awarded her law degree. She now wishes to train as a legal practitioner. To do this she learns, she must pass complete her practical training and pass examinations set by the Legal Regulatory Council.

6 Excited Mapula applied after completing her academic journey to participate in the candidate legal practitioner programmes taking the joyous steps to her dream of legal practice. Her application to train was denied owing capacity.

7 Mapula knows that several applicants who are not South African citizens and without permanent residence, who are from NonSALand, are accepted into the training programme for legal practitioners. Mapula also has many friends who are not allowed to enter the training programme for candidate legal practitioners

based on lack of capacity. For about every ten applicants only one is chosen

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based on the limited capacity to adequately train all the aspirational legal practitioners given the demand.

- 8 Given the *Rafoneke¹ and Others* Constitutional Court decision in 2022, Mapula is frustrated and feels aggrieved that NonSALand applicants, who cannot practice law in South Africa, can train to be legal practitioners using valuable resources to an impossible end. These training spots and limited resources are better placed in allotments that permit the end, that being, qualified practitioners who advance the Rule of Law. The status quo cannot be in line with the founding values of the Constitution in advancing the Rule of Law and fostering Dignity, Advancement of Human Rights and Freedoms and even the Ubuntu.

- 9 She lodges an urgent application to the Mthatha High Court to set aside the current intake of candidate legal practitioners in the Eastern Cape Mthatha Bar, and for the reconsideration of the candidates on the basis that those not allowed

¹ *Rafoneke and Others v Minister of Justice and Correctional Services and Others (Makombe Intervening)* [2022] ZACC 29

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to practice law, not be considered for the training programme for the candidate legal practitioners. Mapula is of the mind that her right to choose her profession is restricted arbitrarily. Her application is head and dismissed on the basis that the Respondents are well within its powers to regulate the profession and do so rationally.

10 Mapula now lodges an urgent application for direct leave to appeal to the Constitutional Court of South Africa. The 2024 candidate legal practitioners must have certainty as to the way forward. In the court *a quo*, Mapula unsuccessfully challenged the rationality of laws permitting applicants from NonSALand to train when the law prohibits their practice. It was held that her entrenched section 22 right is not impaired unlawfully as it is objectively rational and even if it is not so, this restriction is justifiable in terms of section 36 of Act 108 of 1996.

11 Undaunted, Mapula is firm in her view that these training spots allotted to those not permitted to practice law is a waste of valuable resources and not objectively

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rational which is foul of section 22² of the Constitution of South Africa, Act 108 of 1996. Mapula cannot fathom how it is that she and her friends that toil tireless in challenging environments and given the legacy of Apartheid, with studies funded by public coffers, now must compete for limited training spots with those who cannot even practice law in South Africa.

- 12 The court *a quo*'s decision and status *quo* she believes is an unfair limitation on her right to choose her occupation, as enshrined in section 22. The regulation of the profession impairs her dignity and even that of those who are permitted to train and not practice. Is it not painful and an assault to dignity to train and be thereafter barred from practice? The right to Dignity is enshrined in section 10 of the Constitution and is a founding value that must beat in harmony with section 22.

² 'Every citizen has the right to choose their trade, occupation or trade freely. The practice of a trade, occupation or profession may be regulated by law.'

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- 13 The Legal Regulatory Council admits that there is limited capacity and that one applicant is chosen for every twelve that applies. Still, the assessment considers the need for Blacks and Women in the legal profession given the shocking disparity as White Men dominate legal practice even after all these years of democracy. It concedes that those from NonSALand are not specified in the classification criteria and counted as amongst those who are Black and Women, if apposite.
- 14 This is objectively rational, the Council argues, and even if it is not, it is justifiable. Blacks and Women are essential in the legal profession and even more so for those from NotSALand. This group is a minority and requires special protection so not including them in the training is irrational. The full stop of not permitting this group to practice law is cured by the comma of allowance into other spheres of consultancy and the like. Additionally, the section 29 right to further education is accessible to everyone.

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- 15 The Friendly Foreign Lawyers supports the case of the Council and advances that laws should be as least restrictive as possible. To bar the training opens the floodgates to a restrictive regiment of laws in a country that lauds itself as one with the most advanced constitutional laws in the world that other countries look to for direction.
- 16 The Applicant's case, if granted, sets us into an order of laws that is not transformative, but rather regressive. The impingement to the dignity of those from NotSALand is incalculable. It is rational to teach laws and the practice of laws to anyone to advance the understanding of the laws of the land which all persons must heed. It is the practice of law that is restricted. The case is that whoever wishes to learn about the practice of law, should be permitted. The funding limitations are not one that must offend legal purity with judgments. Ubuntu affirms the status quo. Is the law a lacky to funding? Does the law move dependant on a budget? No, is the case of the Friendly Foreign Lawyers.

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17 Having read through the papers, the Court has asked for written and oral submissions, which, among any other issue the parties wish to canvass, should cover the following questions:

17.1 Is it rationally objective to limit the entry of those wishing to train as legal practitioners to only factors based on merit, gender, race and the like or must citizenship and residency status, considering the decision in *Rafoneka*, affecting the practice of law be considered in the application process?

17.2 What, if any, is the legitimate government purpose achieved by the entry or prohibition of those from NonSALand to train as legal practitioners?

17.3 If it is found that the nationality of the applicant is relevant to the application process, is this simply a ground for consideration or is it definitive to the granting of the candidate legal practitioner programme?
In other words, should a person who is not permitted to practice law be

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excluded absolutely or should this simply be a ground to consider, if at all?

17.4 Are the constitutional founding values and the rights to Dignity and Education implicated and if so, to what extent does this influence the rights of South Africans or those from NonSALand ?

17.5 Is the permissance of those not allowed to practice law, to apply and train as legal practitioners, an internal limitation to the Applicant's section 22, right? If so, is it rationally objective? Is it justifiable by the Council's right to regulation or by the section 36 limitation or both, if at all ?

17.6 What is the appropriate remedy?

The rights to education, dignity, work and the limitations as well as constitutional founding values may or may not be topical. The cases of *Affordable Medicines Trust v Minister of Health* [2005] (6) BCLR 529 (CC), *Rafoneka* (see footnote 1) , *Larbi-Odam v Member of Executive Council* (NWP) [1997] ZACC 16 and

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Prinsloo v Van der Linde [1997] ZACC 5 may be engaged, *inter alia*, to assist the Court



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