

DE FREITAS AND ANOTHER v SOCIETY OF ADVOCATES OF NATAL (THE NATAL LAW SOCIETY INTERVENING)

CCT 2/98

Explanatory Note

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This case involved an application for leave to appeal directly to the Constitutional Court against a judgment of the Natal High Court. The application was in respect of two issues. Firstly, there was a constitutional challenge to an Act of Parliament which enables certain interested parties to come to court to bring disciplinary proceedings against an advocate. Secondly, there was a constitutional challenge to a rule of legal practice that prevents advocates from accepting work direct from the public rather than through an attorney (the “referral rule”). The application for leave to appeal failed on both issues.

The Society of Advocates of Natal, a voluntary association, brought an application in the Natal High Court to strike Mr De Freitas, a practising advocate, off the roll of advocates. The Society alleged that Mr De Freitas acted unprofessionally, in that he violated the referral rule. Mr De Freitas responded that the rule violates his constitutional right as an advocate to practise his profession.

The Independent Association of Advocates of South Africa (IAASA), a voluntary body of which Mr De Freitas is a member, was allowed to intervene in the proceedings in the High Court. It asked the court for an order declaring that the referral rule was not applicable to its members, but that if it did apply, it should be struck down as unconstitutional.

The High Court upheld the referral rule. It held that a violation of the rule amounted to unprofessional conduct which justified disciplinary proceedings against any advocate. Mr De Freitas was found guilty and suspended from practice for a period of six months. The High Court noted that this long established referral rule regulates the relationship between attorneys and advocates, and their respective roles in the legal profession. It is also a rule upon which court procedure has been formulated. Furthermore, there are statutory checks and balances to protect the public in their direct dealings with attorneys; no such protection would exist were the public to deal directly with advocates without the intervention of an attorney. The court therefore held that the referral rule was reasonable and justifiable, in the interests of the legal profession and the public, and had to be retained.

The applicants, Mr De Freitas and the IAASA, applied for leave to appeal directly to the Constitutional Court. Their application involved two issues.

Firstly, they challenged the constitutionality of a provision of the Admission of Advocates Act. They argued that this provision is unconstitutional because it grants “jurisdiction” to the Society of Advocates to bring disciplinary proceedings against an advocate like Mr De Freitas who is not a member of the Society.

In a unanimous judgment, the Deputy President of the Constitutional Court, Justice Langa, refused the application for leave to appeal on this issue because the parties were unable to identify any constitutional right that was alleged to be infringed. Justice Langa also expressed the view that the provision in the Act does not afford the Society “jurisdiction” over non-members. Instead, it merely enables certain interested parties, such as the Society, to come to court and apply for any advocate to be disciplined. The disciplinary powers are exercised by the courts and not the Society.

Secondly, the applicants challenged the constitutionality of the referral rule. They claimed that the rule violates an advocate’s constitutional right to practise his or her profession. Justice Langa held that this issue fell within the jurisdiction of both the Constitutional Court and the Supreme Court of Appeal. The question was *which court* was to hear the appeal. Justice Langa concluded that it would not be appropriate for the Constitutional Court to deal with this issue without first hearing the views of the Supreme Court of Appeal, because that court has the inherent jurisdiction to regulate the legal profession.

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