IN THE HIGH COURT OF LESOTHO
(Sitting as the Constitutional Court)

CONSTITUTIONAL CASE: 03/11

In the matter between:-

MATŜASENG RALEKOALA	**APPLICANT**
And	
MINISTER OF JUSTICE AND HUMAN RIGHTS LAW AND CONSTITUTIONS AFFAIR	**1ST RESPONDENT**
THE LAW SOCIETY	**2ND RESPONDENT**
ATTORNEY GENERAL	**3RD RESPONDENT**
(Mr. LETSIKA as amicus curiae)	

CORAM: **MONAPHATI, MOLETE, JJ et MUSI, AJ**

HEARD ON: 18 JANUARY 2012

JUDGMENT BY: **C. J. MUSI, AJ**

DELIVERED ON: **30 MARCH 2012**

SUMMARY

Constitutional law – Appointing an amicus curiae in terms of the Constitutional Litigation Rules – If no agreement reached by the parties, court to determine rights and privileges of amicus. Amicus may not present new facts to contradict applicant.

Legal Practitioner's Act – Sections 6 (2) (a) and (b), 32 and 34 thereof not unfairly discriminatory against advocates. Limitation justifiable in democratic society. The aforementioned sections do not violate advocates' right to equality entrenched in section 19 of the constitution.

Court of Appeal Rules (19 (1) and (2); 20 (3)). High Court Rules (17 (1) (c) and 20 (1)) and Subordinate Courts Rule (49 (1) (a)) stipulating that advocates may appear only when instructed by attorney – not inconsistent with constitution.

[1] The applicant is a duly admitted and practising advocate in the Berea district, Lesotho. The applicant alleges that his right to practice law in the courts of Lesotho is violated by the provisions of the Legal Practitioners Act 11 of 1983 (the LPA 1983) and the Rules governing procedure in the Court of Appeal, High Court and Subordinate Courts (the courts). He charges that the aforementioned Act and Rules are discriminatory and also violate his entitlement to equality before the law and to equal protection of the law as provided

for in sections 18 and 19 of the Constitution of Lesotho.[1]

[1] Section 18 and 19 read as follows:

"18. (1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such descriptions are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law to the extent that that law makes provision-

(a) with respect to persons who are not citizens of Lesotho, or

(b) for the application, in the case of persons of any such description as is mentioned in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description; or

(c) for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law; or

(d) for the appropriation of public revenues or other public funds; or

(e) whereby persons of any such description as is mentioned in subsection (3) may be made subject to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description is reasonably justifiable in a democratic society.

Nothing in this subsection shall prevent the making of laws in pursuance of the principle of State Policy of promoting a society based on equality and justice for all the citizens of Lesotho and thereby removing any discriminatory law.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards of qualifications (not being standards of qualifications relating to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) to be required of any person who is appointed to any office in the public service, any office in a disciplined force, any office in the service of a local government authority or any office in a body corporate established by law for public purposes.

(6) Subsection (2) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5).

(7) No person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging houses, public restaurants, eating houses, beer halls or places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(8) The provisions of this section shall be without prejudice to the generality of section 19 of this Constitution.

[2] The application was brought directly to this court pursuant to the provisions of section 22 (1) and (3) of the Constitution.[2]

[3] On 25 August 2011 this Court, differently constituted, made the following order:

> "(a)The 2nd Respondent shall appoint one legal counsel to appear *amicus curiae.*
>
> (b) The 3rd Respondent having not appeared may still oppose and appoint own counsel.
>
> (c) The court appoints Mr Q. Letsika as another *amicus curiae*
>
> (d) The court to appoint other *amicus curiae*…"

[4] Neither the court nor the second respondent appointed an *amicus curiae*. Mr Letsika (the *amicus*) lodged written heads of argument and presented oral argument.

[5] The *amicus* also filed an affidavit by Mr Mokaloba, an attorney, wherein he sought to contradict the applicant's and

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Right to equality before the law and the equal protection of the law

19. Every person shall be entitled to equality before the law and to the equal protection of the law.

[2] The relevant part of section 22 reads as follows:

"22. (1) If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that, person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction – and may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 21(inclusive) of this Constitution:

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

the second respondent's factual averments. In the process the *amicus* introduced new facts. The applicant objected and pointed out that such a procedure is contrary to the Constitutional Litigation Rules 2000 (CLR).[3] There is no written consent, as envisage in rule 10 (1) governing the terms, conditions, rights and privileges of an *amicus curiae*. An *amicus curiae* has the right to lodge written submissions if the written argument raises new contentions which may be useful to the court and does not repeat any matter set forth in the argument of the other parties.[4] Unless the court orders otherwise an *amicus curiae* is limited to the record of the application or the facts found proved in the referral proceedings and shall not present oral argument.[5] An *amicus curiae* is entitled to all the documents lodged with the Registrar and to canvas factual material which is relevant to the determination of the issues before the court and which do not specifically appear on the record if such facts are common cause or otherwise incontrovertible or are of an official nature capable of easy verification.[6]

[6] The order appointing Mr Letsika as an *amicus curiae* does not specifically lift the limitation imposed by the rules on *amici curiae*. It must therefore be accepted that Mr Letsika's arguments were all subject to the limitations imposed by the rules. The affidavit filed by Mr Mokaloba was not sanctioned by the court. It was filed by the *amicus* in order to contradict

[3] See generally Constitutional Litigation Rule 10 Issued in Legal Notice NO. 194/ 2000.
[4] Rule 10 (7) of CLR
[5] Rule 10 (8) of CLR
[6] Rule 21 of CLR

the factual averments of the applicant. The applicant did not respond thereto. There is potential, if not real, prejudice to the applicant if such affidavit should be allowed in this manner. It should in my view be disallowed. The arguments of the *amicus* which are based on extraneous factual averments shall only be allowed and referred to in this judgment in as far as it is in accordance with rule 21 of the CLR. The *amicus* was allowed to present oral argument. There was no objection thereto. Neither the applicant nor any of the parties were prejudiced thereby.

[7] The applicant enumerated all the impugned sections of the LPA 1983 and rules of the courts in the notice of motion. In the notice of motion the applicant seeks an order in the following terms:

> "(a) Declaring the following provisions of the Legal Practitioners Act No. 11 of 1983 inconsistent with the provisions of section 18 and 19 of the Constitution, and to that extent void, in that they violate applicant's rights to practise his profession as an advocate in the Courts of Lesotho in that they are discriminatory and violate the principle of equality before the law and equal protection of the law, namely:
>
> i. Section 6 (2) (a) and (b)
> ii. Section 32
> iii. Section 34
>
> (b) Declaring the following Rules of Court inconsistent with the provisions of Section 18 and 19 of the Constitution and to that extent void, in that they violate applicant's rights to practice as an advocate in the Courts of Lesotho in that they are discriminatory and violate the principle of equality before

the law and equal protection of the law, and to that extend void namely:

High Court Rules 1980

i. Rule 17 © to the extend that it reads "only when duly instructed by an attorney."

ii. Rule 20 (1) to the extend that it reads "duly instructed by such attorney."

Magistrate's Court Rule 1996

i. Rule 49 (1) (a) to the extend that it reads "duly instructed by an attorney."

Court of Appeal Rules 2006

i. Rule 19 (1) (c) to the extend that it reads "duly instructed by an attorney"

ii. Rule 19 (2) to the extend that it reads " duly instructed by an attorney"

iii. Rule 20 (3) to the extend that it reads "duly instructed by an attorney'

c. Striking down the said provision and rules in a and b above as unconstitutional.

d. Alternatively to c directing the first and third respondents to cause the amendments of the said provisions and rules within such time as the court may deem necessary failing which prayer c should come into effect.

e. Directing respondents to pay costs of suit in the event of opposition of this matter.

f. Granting applicant such further and/or alternative relief as the court may deem fit."

[8] Section 6 (2) (a) and (b) of the Legal Practitioners Act 1983 (the LPA 1983) reads as follows:

"(2) An advocate shall not –

(a) appear in the Courts of Lesotho otherwise then on the instructions of an attorney admitted to practice in the courts of Lesotho; and that attorney is in possession of a current practising certificate; and

(b) demand or receive money or instructions direct from a client except through his instructing attorneys being attorneys in possession of a current practising certificate."

[9] Section 32 of the LPA 1983 reads as follows:

"An advocate engaged in practice shall not appear in a court in Lesotho, unless, in addition to the other requirements of this Act or any other law, he has been instructed so to appear by the First Law Officer of the Crown or an officer delegated by him or by a practising attorney engaged in full-time practice in Lesotho."

[10] Section 34 of the LPA 1983 reads as follows:

"In addition to any other penalty under this Act, an advocate who appears in a Lesotho court contrary to section 32 and an attorney, notary public or conveyancer who practices as such contrary to section 33 is guilty of an offence and liable to a fine of M5, 000."

[11] It is convenient to quote section 33 of the LPA 1983 which provides that:

"An attorney, notary public or conveyancer engaged in practice outside Lesotho shall not practise as such in Lesotho unless, in addition to the other requirements of this Act or any other law, he has an office in Lesotho and that office is manned full-time by a practising attorney, notary or conveyancer, as the case may be, engaged in full time practice in Lesotho. The Law Society

may, however, relax this requirement with the consent of the First Law Officer of the Crown."

[12] The impugned Subordinate Court rule is, rule 49 (1)(a) which reads as follows:

"A party may institute or defend and may carry to completion any legal proceedings either in person or by an attorney, or advocate duly instructed by an attorney."

[13] The impugned High Court rules are rules 17 (1)(c) and 20. (1). They read as follows:

"17 (1) the following persons are entitled to audience in the High Court

(a) ….

(b) ….

(c) An advocate, only when duly instructed by an attorney…

20 (1) Every pleading shall be signed personally by the party or by an attorney or by an advocate duly instructed by such attorney. Each pleading shall have revenue stamps to the value of M10.00 attached to it."

[14] The Court of Appeal Rules, 2006 which are challenged are rules 19 (1) (c), 19 (2) and 20 (3). They read as follows:

"19 (1) the following persons are entitled to audience in the court-

(a) an appellant or respondent in person

(b) an attorney; and

(c) an advocate duly instructed by an attorney

(2) Notwithstanding the provisions of sub-rule (1) (a), a company or an association shall not be entitled to an audience in the court

> unless it is represented by an attorney or an advocate duly instructed by an attorney.
>
> 20 (3) Where an advocate, duly instructed by an attorney has appeared in the appeal, the amount of fees allowed for costs on a party and party basis shall be such as appears in the Third Schedule attached to the Rules:
>
> > Provided that the Registrar, if he thinks it fit, may depart from any of the provisions of the Schedule…"

[15] The applicant's challenge in essence is aimed at those provisions of the LPA 1983 and the rules of the courts that require an advocate to be instructed by an attorney before he/she may represent a litigant in any court of Lesotho, and secondly, the restriction on advocates not to demand or receive money or instructions directly from a client.

[16] The applicant contends that he has encountered injustice in his practise as an advocate due to some of the statutory provisions regulating his practice. His complaint is that the statutory regime (the LPA 1983 and the rules) require that an advocate be instructed by an attorney to enable him/her to appear in the courts. The rules also prohibit an advocate to sign certain pleadings, especially originating processes and they are tailored in such a way that an office of an advocate may not be used as an address of service of process of court on behalf of a client.

[17] According to the applicant, the LPA 1983 and the rules of the courts have the effect of placing unfair restrictions on an advocate which limits the advocate's right to practice his/her profession. He points out, that attorneys are not subjected to the same restrictions and may appear in all courts of Lesotho without restriction. He also points out that in labour tribunals there is no requirement that an advocate needs to be instructed by an attorney before appearing before such tribunals.

[18] According to him, the split profession, in as far as it gives attorneys a right of audience in all the courts, discriminates against advocates, because attorneys have no obligation to instruct an advocate. The result of this is that an attorney will only brief an advocate in cases in which the attorney might feel he/she may not be able to handle the case because of time constraints or other reasons. The applicant contends that the fact that the law contemplates a referral system without a corresponding obligation on the part of attorneys to refer cases to or instruct advocates makes the referral system a pipe dream.

[19] He avers that in Lesotho, attorneys are allowed to have dual practices, in the sense that they are able to do work as an attorney as well as do the work of an advocate without any restriction, which practice is inconsistent with a divided profession that the Legislature seeks to put in place. To illustrate his point, he mentions two senior attorneys who were appointed King's Counsel immediately after they had

caused their names to be removed from the roll of attorneys and had themselves admitted as advocates. They were then appointed King's Counsel without a waiting period, unlike in other jurisdictions where a waiting period is mandatory.

[20] The applicant alleges that the provisions of the LPA 1983 are overbroad in their restriction on an advocate's ability to improve his position and still retain his profession as an advocate. This is so, according to him, because the act does not provide for an advocate to write the attorney's examination and after passing same to continue practising as an advocate while enjoying the same benefits and responsibilities of an attorney.

[21] The applicant also points out that there have been allegations that as a result of the Legislation imposing a split profession some advocates are resorting to unlawful conduct, by *inter alia,* forging attorney's signatures in order to circumvent the requirement that they must be instructed by an attorney. He attaches a letter written by Mr Letsika to the Law Society of Lesotho wherein he *inter alia* states:

> "In its recent annual general meeting the Law Society of Lesotho requested the council to take steps to deal with the current situation in terms of which advocates masquerade as attorneys when the law is clear in this regard. For the sake of oversimplification, you will no doubt know that all advocates including all members of council, who are supposed to regulate professional conduct and ethical responsibility of the legal profession, essentially consult and take moneys directly from the lay public contrary to the law…

> Of particular interest to the writer hereof is the preposterous manner in which the councils (sic) have dealt with the issue of subscriptions and contribution to the fidelity fund. It is not necessary to articulate and the assumption is that your office knows clearly about the purpose served by the latter fund. However, over the years the attorneys have always been required, rightly so in one's view, to contribute to the fidelity fund. On the contrary advocates have not been required to make a contribution yet the Law Society is fully aware that our 'advocates" do all sorts of things such as consulting lay clients, taking moneys from them and all the times pretend to have been instructed by attorneys when this is not the case in the majority of cases. This, in one's view, borders on extreme professional misconduct or unprofessional conduct.."

[22] These are indeed serious allegations. It is not clear whether they were investigated by the second respondent and if so what the outcome of such investigation was.

[23] The first and third respondents filed an opposing affidavit wherein they admitted all the factual averments of the applicant. They only took issue with the relief sought by the applicant. All the parties, except the *amicus*, therefore agree that the impugned legislation and rules are unconstitutional.

[24] The second respondent did not oppose the application but put additional information on record. It admitted that its general conference resolved in January 2011 that it should attend to the fusion of the profession in accordance with the resolutions that it passed in 1989 and 1993 respectively. The *amicus* argued that the impugned sections and the rules are

not inconsistent with the Constitution because the advocate's profession and the attorney's profession are two different professions governed by separate rules and regulations. He further argued that the applicant's right to equality was not violated because the differentiation is "mere differentiation".

[25] The fact that the government and the applicant are *ad idem* that a piece of legislation is unconstitutional does not signal that the end of the matter. In **Phillips & Another v Director of Public Prosecutions, WLD** it was said that:

> "A declaration that legislation is inconsistent with the Constitution and invalid cannot be made by consent. A declaration in these terms is a substantial intrusion into the domain of the legislature and, as has been mentioned, should be made only by a Court after careful consideration of all the relevant facts."[7]

[26] Although the first and third respondents do not oppose the prayer that the impugned legislation and rules should be declared invalid, it was incumbent on at least the first respondent, as the Minister responsible for the legislation, to put facts before the court sketching the background to the impugned legislation and the reasons why it was put on the statutes books. Such course would have been of considerable assistance to us, especially in respect of the onus to justify a limitation. It is unfortunate that no such facts were put before us by either the first or the third respondent.

[7] 2003 (3) SA 45 (CC) at paragraph 12.

[27] In constitutional matters the court may, where it deems it expedient, take judicial notice of broad social and economic facts and take the necessary steps to inform itself about them. The court must however be aware of the dangers of taking judicial notice. In **R v Edward Books & Art Limited** La Forest J puts it thus:

> "There are, of course, dangers to judicial notice, but the alternatives in a case like this are to make an assumptions without facts or to make a decision dependent on the evidence counsel has chosen to present. But as Marshall CJ long ago reminded us, it is a Constitution we are interpreting. It is undesirable that an Act be found constitutional today and unconstitutional tomorrow simply on the basis of the particular evidence of broad social and economic facts that happens to have been present by counsel. We should avoid this possibility when reasonably possible particularly in these early days of Charter litigation when all are feeling their way regarding the manner in which Charter litigation is to be conducted. Having said this, however, I would not wish to be taken as in any way departing from the proposition that the onus of establishing a limitation under section 1 of the Charter is on the parties seeking to do so, or relieving that party of the duty to present evidence in support of the limitation. The presumption is in favour of the right, not the limitation."[8]

[29] Sections 6(2)(a) and (b), 32 and 34 which prohibit and criminalises appearance by an advocate in courts without being instructed by an attorney were put on the statute books for the first time in the LPA 1983.

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[8] [1986] 2 S.C.R 713 at paragraph 196

[30] The Legislature, it seems, has only given legislative imprimatur to a practice that has long been regulated by the rules of court. It however went further and criminalised conduct that transgressed the rules with regard to appearance in court by advocates without being instructed by an attorney. I digress to look briefly at the historical context.

[31] The subordinate courts were established by Proclamation 58 of 1938.[9] In terms of section 82, as amended, of the Proclamation, the Chief Justice had the power to make rules for the subordinate courts. Section 82 read as follow:

> "The Chief Justice may from time to time, by Notice in the Gazette, make rules regulating and prescribing the practice, procedure, fees, costs and charges of, and the forms to be used in, Subordinate Courts; and all such rules shall have the same force and effect as if they had been contained in this Proclamation."

[32] On 21 May 1943 the Rules of the Subordinate Courts were Gazetted in High Commissioner's Notice of 1943.

[33] Order No. IV Rule 1 (1) provided that:

> "A party may appear and conduct his case either –
>
> (a) in person
>
> (b) by an attorney
>
> (c) by an advocate duly instructed by an attorney."

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[9] See section 3 of the Proclamation which read as follows:

"There shall be and are hereby constituted court subordinate to High Court, to be as "Subordinate Courts" as follows; namely:

1. Subordinate Court of First Class
2. Subordinate Court of Second Class
3. Subordinate Court of Third Class."

[34] Rule 1(1) of order No. IV was reinforced by other rules. In terms of order No. VII rule 2(2) the particulars of claim were to be signed by plaintiff or his attorney. Plaintiff, defendant, applicant, respondent and party included for the purpose of service, notice, appearance, endorsement, signature and payment of moneys out of court or out the hands of the messenger, the attorney appearing for such party.[10] The current rule 49(1)(a) is exactly the same as rule 1(1) of order No. IV. The legal position has, in terms of the rules, been the same since at least 1943 in the subordinate courts *viz* an advocate must be duly instructed by an attorney in order to appear in the subordinate courts on behalf of a client.

[35] The High Court Rules of 1941[11] provided that a notice of motion shall be signed by the applicant or his/her attorney.[12]An attorney had to file a power of attorney to sue before a summons could be issued by the Registrar at the instance of an attorney.[13] Likewise the attorney had to file a power of attorney signed by the appellant if he/she wanted the Registrar to set down an appeal. In terms of Rule 9 (3) thereof:

> "Every attorney instructing counsel to appear on behalf of the respondent at the hearing thereof shall file with the Registrar a power of attorney, signed by the respondent giving such attorney authority to appear in the matter."

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[10] Order No. 1 Rule 3 (1)
[11] See High Commissioner's Notice 8 of 1941
[12] See Rule 3
[13] Rule 9 (1)

In terms of rule 15(2) a defendant could enter appearance either personally or by attorney.

[36] In terms of Rule 25(1) all pleadings other than a summons could be signed by an advocate or an attorney.

[37] It is clear that the pleading initiating action/application proceedings and the defence had to be signed by the attorney or the party personally. These rules were also premised on the fact that attorneys were allowed to act for a party or the party himself/herself with regard, at least, to the originating process. These rules however did not contain any rule similar to rule 17 (1)(c) or 20 (1) of the 1980 rules.

[38] The Court of Appeal Rules, Gazette in terms of High Commissioner's Notice 141 of 1955, also did not contain any rules similar to the ones impugned in this application.

[39] In terms of Proclamation 93 of 1955 advocates and attorneys entitled or admitted to practice in Lesotho had a right of audience in the courts of Lesotho.[14] Proclamation 93 of 1955 did not put any restrictions on an advocate's right of audience.

[40] The Legal Practitioners Act 11 of 1967, which repealed Proclamation 93 of 1955, retained the right of audience of

[14] See article 9 of Proclamation 93 of 1955 (Legal Practitioners) which reads as follows:
"Advocates and attorneys whether entitled to practise as such at the commencement of this Proclamation, or admitted and enrolled in terms of this Proclamation, shall have a right of audience in the Courts of the Territory."

advocates and attorneys in all the courts except Central and Local Courts.[15] This Act also did not put any restriction on an advocate's right of audience.

[41] Section 42 (1) of the LPA 1983 provides as follows:

> "Subject to these Act Legal practitioners whether entitled to practice as such at the commencement of this Act or admitted and enrolled in terms of this Act shall have a right of audience in the Courts of Lesotho."

Legal Practitioner is defined in the LPA 1983 as "a person admitted to practice as an advocate, attorney, notary public or conveyancer in terms of this Act."[16]

[42] Sections 6(2)(a) and (b) and 32 of the LPA, 1983 put restrictions or conditions on an advocate's right to audience.

[43] The legal position and practice in the High Court before 1983 was also the subject of at least two conflicting decisions. In **Mothebesoane v Mothebesoane**, Jacobs C.J. said the following:

> "Summons was issued and the pleadings drawn and signed on behalf of the respondent by Mr. O. K. Mofolo, an attorney of this court, but when the matter came to trial the respondent was represented by Mr. Suttill, an advocate. Whether he was instructed by Mr Mofolo is not clear but I do not think that

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> "Court of the Territory" included the High court but excluded any Basuto court or Court of Appeal established under any law relating to such courts – see article 1 of the Proclamation

15 Section 33 of the Act reads:

> "Advocates and attorneys whether entitled to practice as such at the commencement of this Act or admitted and enrolled in terms of this Act shall have a right of audience in the courts of Lesotho."

16 See section 1 of the LPA 1983.

matters because the practice is firmly established that an advocate can appear in the High Court on behalf of a party in a civil trial even if not instructed by an attorney. Mr. Sello, an attorney of this court, appeared on behalf of the applicant throughout and is also appearing for the applicant in this review." [17]

[44] In **Legal Practitioners Committee v Advocate Rashid Ahmed Karim**.[18] Rooney, J took issue with the statement made by Jacobs, C. J. in **Mothebesoane**. Rooney, J found that, the statement was an *obiter dictum*. He said the following in this regard:

> "The situation with which the learned Chief Justice was faced and upon which he made that comment was not sanctioned by law and in my opinion ought not to have received the tacit approval implied in his statement.[19]

[45] Rooney J found that advocates may not receive instructions directly from lay clients for *inter alia* the following reasons:

I) The Legal Practitioners Act clearly preserved the separate branches of the profession.

II) Rules 9, 13 and 15 of the Rules of Court charged attorneys and not advocates with the responsibility of filing powers of attorney, signing summonses and entering appearances on behalf of defendants in civil suits.

III) Advocates may only appear in the subordinate courts when duly instructed by an attorney. He could find no basis for allowing advocates greater rights in the High

[17] 1971-1973 LLR 211 at 212 B-C
[18] 1979 (1) LLR 300
[19] At 308

Court than those permitted them in the subordinate courts.

IV) The circular dated 29 July 1977 wherein the Chief Justice drew the advocates' attention to the undesirable state of affairs whereby advocates evaded the requirements of the Act by acting as if they were attorneys.

[46] Although the Court of Appeal did not decide the subsequent appeal on this point, it agreed with Rooney J's observations with regard to the role and functions of the different branches of the profession. Maisels P. said the following:

> "I have not in this judgment dealt with that aspect of the appellant's conduct which is concerned with the appellant, as an advocate, having acted as an attorney without being admitted as such. I have not done so because he was not removed from the Roll because of that conduct. I content myself with saying that I agree with Rooney J's observations in this connection. They afford in my judgment valuable and correct guidelines for members of the profession in Lesotho.[20]

[47] Although the Court of Appeal expressed its preference to Rooney J's observations in an *obiter dictum*, it is clear that the Court of Appeal endorsed Rooney J's view that there is a general and accepted rule that:

> "In civil matters ... the general public has access to all attorneys, but, an advocate has not (sic) mandate to act for any person in a cause or matter unless he has first been instructed by an attorney duly admitted to practice before the courts of this country."[21]

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[20] See Karim v Law Society of Lesotho 1979 (2) LLR 431 at 437-438.
[21] Legal Practitioners Committee v Karim at 310

[48] The enactment of the LPA 1983 and the rules of the courts were probably influenced by the divergent views of Jacobs C. J. and Rooney J. The Legislature in all probability took a stance to eradicate any uncertainty that might still have existed by entrenching a split profession – between attorneys and advocates by enacting the impugned sections of the LPA 1983. The 1980 rules introduced for the first time in the High Court the requirements in rule 17(1)(c) and 20(1) which stated in no uncertain terms that an advocate will be entitled to audience in the High Court only when duly instructed by an attorney and that advocates may only sign pleadings when duly instructed by an attorney.

[49] This is in line with the common law - Roman Dutch law and the English Law.[22] In **De Freitas** Thirion, J concluded that:

"In the superior Courts of Holland it was indeed required that the advocate could not appear unless he had been instructed by an attorney."[23] He also concluded that:

"The rule in England is that a barrister may generally act in a professional capacity upon instructions of a solicitor only; that it is against the rules of the profession for a barrister to accept instructions directly from a client without the intervention of a solicitor, and that to do so may result in the disbarment of the barrister. The rule is subject to certain exceptions."[24]

[50] In Lesotho there is no duty on an attorney to brief an advocate. The attorney has right of audience in all the courts

[22] See Society of Advocates of Natal v De Freistas and Another (Natal law Society Intervening) 1997 (4) SA 1134 (N) for a comprehensive survey of the Roman Dutch and English law.
[23] See De Freitas supra at p1155
[24] At paragraph 1154

but an advocate may only appear in courts when duly instructed by attorney. Is this unconstitutional?

[51] A constitution is no ordinary statute. It should be interpreted in a different way to ordinary statutes. The interpretation of the Bill of Rights entails a broadly purposive or teleological approach, involving the recognition and application of constitutional values and not a search for the literal meaning of statutes. There is however a limit to the purposive approach and that is that respect must be paid to the language used by the drafters of the constitution. Its provisions should not be constructed purely on the basis of a notional conception of what must have been intended. The court must therefore apply a purposive and generous approach with due regard to the linguistic context. Constitutional interpretation cannot take place in a vacuum, due regard must be given to the historical and social context which gave rise to the inclusion of a particular right in the constitution. In doing so the court must accept that Parliament was aware of the social and historical context in which it makes its intention known.[25]

[52] Every person in Lesotho is entitled to fundamental human rights which include freedom from discrimination and the

[25] See Sekoati and Others v President of the Court Martial (LT Col G P Lekhanyane) and Others (of A (CIV) No 18/1999 delivered on 22 November 1999 at paragraph 11-14. See also Lesotho National General Insurance v Nkuebe LAC (2000-2004) 799 at pages 801-803

right to equality before the law and the equal protection of the law.[26]

[53] Discrimination is defined in section 18 (3) as:

> "Affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

[54] Different treatment based on a person's profession is not listed in section 18 (3). The applicant will have to show that the ground upon which the differentiation has been effected is one which may give rise to unfair discrimination.[27]

[55] It is clear that section 18 (3) does not contain an exhaustive lists of factors. In **Tseuoa v Minister of Labour and Employment and Others,** Majara, J said:

> "While admittedly, the resultant discriminatory effect of Section 38 A (4) does not fall within the definition provided for under subsection (3) of section 18 of the Constitution, it is nonetheless discriminatory in its effect for the reason of its being prejudicial to a select few such as applicant in casu. For this reason, it is not justifiable. That may well be why even the definition itself contains the phrase "or other status" which in my opinion, was meant to cover other criteria not listed therein or which might not have been foreseeable at the time the definition was given. In

[26] See section 4 (1) (n) and (o) of the constitution
[27] See Harksen v Lane N.O. and Others 1998 (1) SA 300 (CC) at paragraph 91

> this case, the status is that of applicant falling under the private sector in contrast with litigants falling within the public sector."[28]

[56] The "other criteria not listed" referred to by Majara J are not criteria without limit. It must be read as criteria not listed but attributable to opinion and /or status. That in my view is what Majara J meant when she said other criteria not listed. If it is read and understood in that way then it would be in sync with what Gauntlett, JA said in **Road Transport Board v Northern Venture Association** that:

> "Careful consideration of section 18 read as an entirety indicates that it proscribes differentiation for reasons attributable to status…"[29]

[57] The question therefore is whether being a legal practitioner is a status. Status is defined as:

> "… 3 Position or standing in society; rank, profession relative importance; spec. (a) superior social etc. position. Also social status…."[30]

[58] The ordinary grammatical meaning of the word status includes a profession. Being a legal practitioner is a profession. A legal practitioner is defined as:

> "A person admitted to practice as an advocate, attorney, notary public or conveyancer in terms of this Act."[31]

[59] The applicant has shown that advocates are treated differently from attorneys. He has shown that advocates are

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[28].[2007] LSHC 141 judgment delivered 27 November 2007
[29] C of A (CIV) NO 10/ 05 judgment delivered 20 April 2005 at page 10.
[30] The New Shorter Oxford English Dictionary: Clarendon Press. Edited by Desky Brown.
[31] See section 2 of the LPA 1983.

subjected to restrictions to which attorneys are not subjected, for example that advocates may not appear in the courts of Lesotho without being instructed by an attorney, whereas no such restriction is placed on attorneys who have a right of audience in all courts. He has also shown that attorneys are accorded an advantage of demanding or receiving money or instructions directly from client while an advocate may only do so through his/her instructing attorney.[32] I am satisfied that the applicant has established that the ground upon which the differentiation has been effected is one based on status and one which may give rise to unfair discrimination. The question at this stage is not whether it did indeed give rise to unfair discrimination but whether it may give rise to unfair discrimination.

[60] The second stage of the inquiry in this matter is whether there is discrimination and if so whether such discrimination is unfair. Separate but allied to that is whether the differentiation violates the appellant's right to equality before the law and to the equal protection of the law. This is so because the right to freedom from discrimination and the right to equality before the law are different although sometimes interlinked. It has been said that:

> "It is clear that there are significant differences between freedom from discrimination and the right to equality before the law. The expression "discrimination" is carefully defined in section 18 (3) but no meaning has been assigned to the phrases equality before the law "or equal protection of the law." Moreover it is

[32] Section 6 (2) (a) and (b)

> apparent from section 18 (3) that the equality provisions have a wider connotation than those relating to discrimination. While the two sections may overlap in some respects, they generally require different treatment…"[33]

[61] It is perhaps apposite to look at the different roles and functions of advocates and attorneys at this stage before determining, firstly, whether there is unfair discrimination or not and secondly whether the equality provision has been violated. In doing so I am mindful of the fact that the differences have been pointed out in various decisions in Lesotho and South Africa.[34] I will therefore not attempt to reinvent the wheel but mention some differences in order to set a backdrop against which the issues of discrimination and equality will be discussed.

[62] In **Mofana Mafanya v Phakiso Sehleka and Others**[35]. Peete, J, correctly, reaffirmed that the referral system is applicable in Lesotho and that an advocate may not appear in the courts of Lesotho without being instructed by an attorney. He also emphasised that legal practitioners fall into one of two categories, attorneys or advocates.

[63] The impugned sections of the LPA 1983 and the rules envisage the implementation and enforcement of the bifurcated profession. That we are dealing with two distinct

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[33] Per Melunsky JA in Lesotho National General Insurance v Nkuebe LAC (2000-2004) page 799 at paragraph 11.
[34] Legal Practitioners Committee v Advocate Rashid Ahmed Karim supra, Society of Advocates of Natal v De Freitas and Another 1997 (4) SA 1134 (W); De Freitas and Another v Society of Advocates of Natal and Another 2001 (3) SA750 (SCA); Rösemann v General Council of the Bar of South Africa 2004 (1) SA 568 (SCA).
[35] CIV/T/137B/2000 delivered on 13 April 2011

professions is clear if one has regard to the minimum qualifications needed for admission. An LLB for advocates.[36] A matric certificate for attorneys.[37] A person desirous of being admitted as an attorney must serve articles of clerkship under a practising attorney.[38] An advocate does not have to do pupillage or serve articles of clerkship. Advocates and attorneys write different examinations.

[64] A practising attorney must open and keep a separate trust account at a bank within Lesotho in which he/she shall deposit all moneys held and received by him/her in connection with his/her practise on account of any person and he/she must also keep proper books of account containing particulars and information as to moneys received, held or paid by him/her for or an account of any person. An amount standing to the credit of a trust account in the bank shall not form a part of the assets of an attorney and that amount shall not be subject to attachment at the instance of any creditor of the attorney. However an excess, remaining after payment of the claims of all persons whose money have, or should have, been deposited in the trust account shall be considered to form part of the attorney's assets.[39] On the other hand an advocate does not have to open and or keep a trust account. All moneys received by him/her will be deposited into his/her business account, if

[36] Section 6 (1) (c) (iii) of the LPA 1983
[37] Section 10 (b) (i)
[38] A person with a matric certificate must serve 5 years articles. A person with a degree (not honorary) other that an LLB must serve 3 years articles. A person with an LLB must serve 2 years articles. See Part I of the Schedule to the LPA 1983.
[39] See section 27 (1) and (5)

s/he has such an account, and may be attached by creditors.[40]The business account, if there is such, need not be held at a bank in Lesotho.

[65] An attorney may not make over share or divide with any person other than a practising attorney any position of his/her professional fee. This restriction does not apply to advocates.

[66] An attorney practising outside Lesotho may not practice in Lesotho unless he/she has an office in Lesotho that is manned full time by a practising attorney engaged in full-time practice in Lesotho. An advocate practising outside Lesotho does not have the added burden of opening an office or chambers in Lesotho.

[67] In **Rösemann v GCBSA**[41] Heher JA catalogued some of the differences in the professions. I quote it in full because it might, in the interim, assist legal practitioners especially junior practitioners, to discern the dividing lines.

> "[26] A convenient starting point is the reality of two distinct professions engaged in different fields of legal expertise. People choose to become attorneys or advocates not because they are forced to select one profession or the other, but because of the different challenges which they offer: one, the attorney, mainly office-based, people-orientated, usually in partnership with other persons of like inclinations and ambitions, where administrative skills are often important, the other, the advocate, court-based,

[40] See De Feitas and Another v Society of Advocates of Natal supra at paragraph 12 and 13.
[41] Supra at paragraph 26-28

requiring forensic skills, at arm's length from the public, individualistic, concentrating on referred problems and usually little concerned with administration.

[27] The training of each profession is different and results in different skills. That of an attorney demands that a candidate serves lengthy articles and is exposed to a wide range of activities from accounting through drawing commercial documents to corporate takeovers. Insofar as litigation in the High Courts is concerned, the primary emphasis is not on forensic skills, but rather on case management. A candidate attorney is required to undergo a number of practical courses designed for the demands of the profession and which bear hardly at all on the equivalent demands of the profession of the advocate. The upbringing of an advocate, by contrast, is essentially directed to court skills and the paper- work that necessarily precedes the exercise of such skills. Even the extensive ethics training bears little relevance to the practice of any but the profession of advocacy. The result of this divergence is (or should be) the production of two classes of professionals, each skilled in its chosen field, but not substantially equipped to operate in the sphere of the other profession. It hardly needs stressing that attorneys usually provide the infrastructure appropriate to the nature of their practices. An advocate, by contrast, does not keep office hours or provide a secretary in attendance on the public and is not equipped to deal with debtors who arrive to pay or negotiate.

[28] At this point the referral rule and its implications (as to which see *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) at 756C - 760I and 764C - 765A and *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA) at 620C) become significant. An advocate in general takes work

only through the instructions of an attorney. The rule is not a pointless formality or an obstacle to efficient professional practice, nor is it a protective trade practice designed to benefit the advocacy. The rule requires that an attorney initiates the contact between an advocate and his client, negotiates about and receives fees from the client (on his own behalf and that of the advocate), instructs the advocate specifically in relation to each matter affecting the client's interest (other than the way in which the advocate is to carry out his professional duties), oversees each step advised or taken by the advocate, keeps the client informed, is present as far as reasonably possible during interaction between the client and the advocate, may advise the client to take or not take counsel's advice, administers legal proceedings and controls and directs settlement negotiations in communication with his client. An advocate, by contrast, generally does not take instructions directly from his client, does not report directly or account to the client, does not handle the money (or cheques) of his client or of the opposite party, acts only in terms of instructions given to him by the attorney in relation to matters which fall within the accepted skills and practices of his profession and, therefore, does not sign, serve or file documents, notices or pleadings on behalf of his client or receive such from the opposing party or his legal representative unless there is a Rule of Court or established rule of practice to that effect (which is the case with certain High Court pleadings but finds no equivalent in magistrate's court practice). The advocate does not communicate directly with any other person, save opposing legal representatives, on his client's behalf (unless briefed to make representations), does not perform those professional or administrative functions which are carried out by an attorney in or from his office, does not engage in negotiating liability for or the amount of security for costs or contributions towards costs or terms of settlement except with his opposing legal representative and then only subject to the

> approval of his instructing attorney. (This catalogue does not purport to be all-embracing. It is intended only to illustrate the sharpness of the divide and to point the answer to other debates on the same subject.)"

[68] I now revert to the discrimination enquiry. In terms of section 18(1) no law other than one contemplated in sections 18(4) and 18(5) may make any provision that is discriminatory either of itself or in its effect.

[69] If a law is unfairly discriminatory on the basis as defined in section 18 (3) it will be inconsistent with the constitution. On the other hand if on face value it is not in itself unfairly discriminatory but its effect is unfairly discriminatory then it would also be unconstitutional. Whether the effect or impact of the law is unfairly discriminatory will have to be assessed objectively taking into consideration the peculiar facts of each case.[42]

[70] However even if a law is discriminatory in itself or in its effect it may still pass constitutional muster if regard is had to its nature and to the special circumstances pertaining to those persons (discriminated against) or to persons of any other such description the discrimination is reasonably justifiable in a democratic society.[43]

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[42] See Harksen v Lane N.O supra at paragraph 52 for factors which may be considered. See also President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC) at paragraph 41.
[43] See section 18 (4) (e) of the constitution.

[71] Section 18(4)(e) contains in-build criteria to determine whether the discrimination in a particular case is reasonably justifiable in a democratic society. It is a codification of the Oakes test.[44] The Oakes test is applied to determine whether the limitation of a right is demonstrably justifiable in a free and democratic society. In terms of the Oakes test there must be a pressing or substantial objective for the limitation and the means adopted to limit the right must be proportional. The proportionality test has three components:

- 5The means adopted must be rationally connected to the objective
- There must be minimal impairment of the rights
- There must be proportionally between the infringement and the objective.

[72] In assessing what is reasonable regard must be had to the fact that reasonableness will vary depending on the context. In order to achieve its objective or goal the legislature must be given reasonable room to manoeuvre because:

> "It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular activity sought to be regulated and not on an abstract theoretical plane. In interpreting the Constitution, courts must be sensitive to what Frankfurter J. in McGowan, supra, at p.524 calls "the practical living facts" to which a legislature must, respond. That is especially so in a field of so many competing pressures as the one here in question.

[44] R v Oakes (1986) I. S. C. R 103. See also Attorney General of Lesotho v Mopa C of A (CIV) 3/2002 judgment delivered on 11 April 2002.

> By the foregoing, I do not mean to suggest that this Court should, as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought the Charter established the opposite regime. On the other hand, having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which all rights of all can be equally protected." [45]

[73] The right to freedom from discrimination is a very important right. Unfair discrimination demeans people's self-worth and human dignity. It denies people the equal enjoyment of rights and privileges to which they are entitled. In **Hugo** it was said that:

> "At the heart of the prohibition of unfair discrimination lies the recognition that the purpose of our new constitutional democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."[46]

[74] Discrimination or its impact not only affects individuals it may also affect groups. Although the application before us is brought by the applicant in this personal capacity; he belongs to a group: advocates.

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[45] See R v Edward Books and Art Ltd supra at paragraphs 181-182
[46] President of the Republic of South Africa v Hugo supra at paragraph 41.

[75] As I have mentioned above advocates (legal practitioners) are subjected to restrictions which other legal practitioners (attorneys) are not subjected to. The constitution, being a document that endeavours to outlaw all forms of unfair discrimination, enjoins me to adopt a generous and purposive approach. I adopt such approach and find that the LPA 1983 and the rules of the courts discriminate against advocates. The question now is whether the discrimination is reasonably justifiable in a democratic society.

[76] Advocates as a group or as individuals were and are not targeted for discrimination by the legislature. Advocates were always held in high esteem. They were always regarded with reverence for being members of an elite and exceptional group of people. They are respected, as being endowed with fine legal minds and as professionals who will unwaveringly – within ethical limits – protect the interest of their client. It is because of their advocacy skills – which are historically recognised – that only they are singled out for the high honour and dignity of being appointed as King's Counsel. An achievement that most if not all legal practitioners aspire to reach.

[77] Advocates as individuals or as a group have a right not to be discriminated against to the extent that they cannot practice their profession. Historically, advocates were not allowed to represent a litigant in the subordinate courts without being

instructed by an attorney to do so.[47] The High Court rules – if one has regard to the provisions relating to signing of summonses and service address – tacitly or by implication also prohibited advocates to appear in the High Court without being instructed by an attorney. Regardless of the "referral rule" advocates proliferated. There are, according to the second respondent, 150 practicing advocates and 40 practicing attorneys in Lesotho. Their human dignity has not been impaired by the LPA 1983 and rules and they have not been affected adversely in a comparably serious manner.

[78] The rights of advocates have been limited by Parliament. Parliament has the right and duty to protect the public. The impugned provisions of the LPA 1983 and the rules of the courts are quintessentially geared at safeguarding the public. It was done in the public interest. It entrenches the principle that the state has a duty to protect its citizens. It would be irresponsible and indeed reprehensible for the legislature to allow advocates who do not have to open and keep a trust account to receive money from the public. If an advocate receives money from the public such money becomes part of his/her estate. Creditors may attach such money which is generally not the case with moneys held in a proper trust account. The rule has always been that attorneys are responsible for the advocate's fees.

[79] Attorneys – as shown above – are subjected to restrictions that advocates are not subjected to. An attorney must serve

[47] This was the situation from at least 1943.

at least two year's article – after obtaining an LLB degree – in order to ensure that he/she acquires professional competence. That is not the case with advocates.

[80] There is in my view, objectively considered, a substantial and important objective that the legislature achieves by limiting the applicant's right against freedom from discrimination. We must never lose sight of the fact that we are dealing with two professions that are regulated differently in order to achieve a legitimate governmental objective.

[81] In order to safeguard the public the legislature had to put measures in place to ensure that the one branch of the profession that does not have to open and keep a trust account and proper books of account, which may be inspected at anytime by the second respondent, does not receive money directly from the public. The rule that the branch of the profession that is subject to checks and balances with regard to the public's money should receive it and be responsible for the payment of the other (advocates) is in my view rationally connected to the objective.

[82] Although there is discrimination, advocates are allowed to appear in all courts. Advocates become advocates out of choice. They do so knowing well what the restrictions and rules are. The legislation is not overbroad. Counsel could not and did not suggest any alternative ways to achieve the legislature's objective while at the same time infringing the right to a lesser extent. The legislature should interfere as

little as is reasonably possible with a right.[48] This is exactly what was done; the "legislative garment has been tailored to suit its purpose".

[83] As I have said above, the limitation of the right is there to serve the public interest. The problem in Lesotho of advocates taking instructions directly from clients and receiving money from clients is very pervasive. Rooney, J dealt with it as far back as 1979. In 1977 the Chief Justice had to issue a circular to draw the attention of advocates to the unacceptable and undesirable state of affairs. Something had to be done to draw the line. The legislature deemed it prudent to enact the LPA 1983. The benefits to be derived from the strict enforcement of the split profession rule outweighs the advocates' right to freedom from discrimination. If there is no such rule advocates will continue to receive money from the public without any safeguards. In fact, some advocates chose to ignore this rule even on pain of criminal sanction. The criminal sanction in section 34 of the LPA 1983 is a proportionate response. The pervasiveness and relentless pursuance of the transgression warrants the harsher punishment.

[84] In other democracies – notably South Africa and England – the split profession has been maintained. In South Africa advocates may in certain limited instances appear without being instructed by an attorney. In England a qualifying

[48] See R v Edwards Books and Art [1986] 2 S. C. R 713

barrister may in terms of their public access rules also appear without being instructed.[49]

[85] In my view the restrictions imposed on and the resultant discrimination against advocates are reasonably justifiable in a democratic society. Section 18 (1) of the constitution does not apply to the impugned provisions of the LPA 1983 and the rules of courts.

[86] I now turn to the right to equality and the arguments advanced by counsel for the applicant and respondents as to why the split profession violates the advocates' right to equality and the *amicus'* arguments as to why it does not do so.

[87] At the outset I must state that in considering section 19 I am looking at substantive rather than formal equality. It has been said that formal equality means sameness of treatment before the law. The law must therefore treat persons in like circumstances alike. Substantive equality, on the other hand, requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.[50] Currie and de Waal correctly state that:

> "Formal equality does not take actual social and economic disparities between groups and individuals into account. Substantive equality, on the other hand, requires an examination of the actual social and economic conditions of groups and

[49] More about the reforms later
[50] Iain Currie & Johan de Waal: The Bill of Rights handbook 5th ed Juta at p 232-233

> individuals in order to determine whether the Constitution's commitment to equality is being upheld."[51]

[88] In **Lesotho National General Insurance v Nkuebe** Melunsky JA stated that:

> "When a court has to decide whether a part of a statute is inconsistent with the constitution, it is important to draw a distinction between what has been called "mere differentiation", which is often necessary to regulate the affairs of the community in the interest of all its inhabitants, and unfair differentiation. Differentiation which falls into the former category will not normally result in inequality before the law or the unequal protection of the law and will not, therefore, infringe the Constitution. It becomes unfair, however, when there is no rational connection between the differentiation and the purpose for which it appears in legislation."[52]

[89] Differention may be unfair because it is irrational and arbitrary. Even when it is found to be unfair it may still pass constitutional muster if it is reasonable and demonstrably justified in a free and democratic society.[53] Melunsky JA seems to differ with the two stage approach enunciated by Gaunlett JA in **Attorney General v Mopa**. According to Melunsky JA there is, in Lesotho, no two stage inquiry into whether or not legislation is unconstitutional.[54]

[90] The conclusion that I reach in this matter renders it unnecessary for me to decide which of the two approaches

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[51] Ibid 233. This also holds time in respect of Lesotho. See also Attorney General of Lesotho v Mopa supra at page 17.
[52] At paragraph 17
[53] See Attorney General of Lesotho v Mopa at page 18
[54] See Lesotho National General Insurance v Nkuebe at paragraph 8.

to follow. Although I prefer the view espoused by Gauntlett, JA, there is no need for me, in this case, to firmly pin my colours to the mast.

[91] What is clear is that the differentiation must not be irrational or arbitrary and it should serve a legitimate governmental purpose.

[92] I have already pointed out that we are dealing with two separate and distinct branches of the legal profession. Each branch is regulated differently. The admission requirements of each are different. The skills and competencies needed are different.[55] **In Rösemann v General Council of the Bar of South Africa** it was said that the divisions has benefits for the client from the advocate's perspective. Some of these are:

> "(1) the encouragement of independence of thought and action, and candour and objectivity in advice;
>
> (2) The avoidance of emotional involvement or friction with the client, both of which failings can seriously undermine proper professional service; attorneys by contrast often have ongoing business or professional relationships with their clients;
>
> (3) A clear division of responsibility allowing the advocate to serve the client expertly without the likelihood of conflict or compromise with his instructing attorney;
>
> (4) Avoidance of financial involvement with the client and the likelihood of dispute about fees or their recovery;
>
> (5) The receipt of instructions which have been filtered through the attorney for relevance and importance and directed by the

[55] See discussion above

> attorney to an advocate known by the attorney to be skilled in the particular field in which his client requires assistance;
> (6) In a good working relationship between advocate and attorney, an effective, efficient and complementary pooling of skills and knowledge in which the client benefits by more than the mere sum of the parts."[56]

[93] An attorney is obliged to open and keep a trust account. This is to protect the client – who is, in most cases, a member of the public. It goes without saying that the majority of the citizens of this country are poor. Their money should not unnecessarily be put at risk. The applicant states that he contributes towards the fidelity fund.[57] There is nothing in the Law Society Act (LSA) that prevents an advocate from contributing to the fidelity fund. The *amicus* argued that advocates are not obliged to contribute to the fidelity fund. I will accept for present purposes that advocates or at least the applicant contributes to the fund.

[94] In my view the fact that an advocate contributes to the fidelity fund is of no assistance to the applicant. The law society may only pay a member of the public from the fund in certain limited circumstances. Section 5 (2) of the LSA reads as follows:

> "The fund shall be administrated, maintained and managed by or on behalf of the Society for enabling the Society to make such disbursements therefrom as are in the opinion of the Society necessary to defray the expenses incurred by it, and in particular to pay the losses sustained by any person in

[56] Supra at paragraph 30
[57] The Fidelity Fund is established in terms of the law Society Act 13 1983 (LSA)

> consequence of dishonesty or any prejudice by legal practitioners or their servants in the course of their law practice, whether or not at the time of commission of the act or misconduct the practitioner was in possession of a practising certificate, or has since died or has since stopped practice or was a trustee."

[95] If an advocate is paid money by a client, that money forms part of the advocate's estate because he/she does not have a trust account. A creditor may then attach such money. It would then be incumbent on the client to claim such money and be a claimant in inter-pleader proceedings – in the process incurring unnecessary expenses – in order to show that the money is not the advocate's money.

[96] The money being part of the advocate's estate and in his personal account might be used by the advocate as if it is his/her own. The client's money will in any event be in harms way, which would not be the case if the advocate had a trust account. The books of account of an attorney are subject to inspection by the law society. The advocate's business account, being a private account, cannot be subjected to such inspection. Society will rebel against the notion that legal practitioners may take their money and fuse it with their own money without any checks and balances.

[97] Section 42(2) to (5) clearly entrenches the principle that the purpose and objective of the legislature is to protect the public. A legal practitioner employed by a Statutory Corporation (advocate or attorney) may appear before the

courts of Lesotho on behalf of and on the instruction of their employers. An advocate who is an employee of such a corporation may notwithstanding section 6(2) take instructions directly from his/her employer.[58] Likewise an attorney so employed shall not be required to keep a trust account or to hold a practising certificate but he/she shall not do any legal work, as a legal practitioner, for other clients except for his/her employer.[59] The reason why an attorney is not required to keep a trust account, under these circumstances, is simply because he/she will not be entrusted – in the legal sense – with the "client's" money. He/she will be in the full-time employ of his "client". These exceptions or exemptions are a clear indication that the legislature did not act arbitrarily or irrational, on the contrary, they show the rationality of the legislature's actions.

[98] Mr Teele argued that the impugned provisions of the LPA 1983 and the rules of court treat advocates unequally because attorneys may act as advocates while advocates may not act as attorneys. This is only half of the picture. Attorneys always had a right of audience in the High Court of Lesotho. The fact that an attorney has a right of audience does not make him/her an advocate. To be an advocate one needs certain skills and competences which many attorneys do not possess (no malice intended). An attorney who appears frequently in the High Court in civil and/or criminal matters, is still subject to all the rules and regulations

[58] See section 42 (4)
[59] Section 42 (3)

governing attorneys. He/she is not exempted from those rules by virtue of him/her appearing frequently or even exclusively in the High Courts.

[99] The applicant also mentions that in places where there is only one attorney and numerous advocates, that attorney will be unfairly advantaged. That might be so, but he/she has exercised a choice to be an attorney and the advocates have done the same. In any event the attorney will under those circumstances not be able to be everything to every client. The demand will be overwhelming. Such attorney will have to brief counsel. In the process the attorney will brief counsel best suited to argue or advice a particular client on a particular issue. In that sense the client will get the best legal advice. In **President of the Republic of South Africa v Hugo**, Kriegler J said that:

> "One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choice they make about their own identity."[60]

[100] The applicant states that attorneys do attorney's and advocates work without any restriction, which is inconsistent with a split profession. He mentions, by way of example, the case of two senior attorneys who were appointed King's Counsel after they caused their names to be removed from the roll of attorneys and were admitted as advocates. The applicant scores an own-goal. Those attorneys were confronted with a choice either to remain attorneys and not

[60] At paragraph 80.

have the honour and dignity of being King's Counsel bestowed on them or to become advocates and have the honour bestowed on them. They elected to severe ties with the attorney's profession and became advocates.

[101] The applicant also complains that the LPA, 1983 does not make provisions for an advocate to write the attorney's admission examinations and upon being successful to continue practicing as an advocate but enjoying the same benefits and responsibilities of an attorney. This argument is without merit. There are two different professions; governed by different rules. The attorney does not only write an examination after obtaining a LLB degree. He/she must also serve two year's articles in order to gain professional competence.

[102] According to the applicant the disadvantages suffered by an advocate become more prominent when regard is had to the fact that attorneys may be admitted as such when they only possess non legal qualifications such as a Cambridge Overseas certificate, after serving articles. This argument does not take cognisance of the fact that such persons must serve articles for a longer period (5 years) and their competence is tested by way of an examination.

[103] The applicant also argued that the current system only benefits attorneys and is not to the advantage of the public. He does not state how it is to the disadvantage of the public. During argument it was said that the public's right to access

to justice is affected by the current system. It must be remembered that access to justice is not equal to direct access to an advocate. Neither does it mean an advocate must have the right of audience in the courts without being instructed by an attorney. The public can still access justice via an attorney who will, if needs be, brief counsel. In fact the attorney will make sure that the client accesses justice in a cost effective way. Sir David Clementi correctly states that:

> "Access to justice requires not only that the legal advice given is sound, but also the presence of business skills necessary to provide a cost–effective service in a consumer–friendly way.[61]

[104] An attorney who refuses to brief counsel in deserving cases or who prevails on client to do work best left for an advocate would be best advised to heed the words of Lord Benson when he made the following analogy between an attorney and a general practitioner:

> "Let us suppose that a patient goes to his general medical practitioner, and it is perfectly clear that the man's leg has to be amputated because he is suffering from poisoning. He may want the general practitioner to do the surgery or he may prevail upon him to do the surgery, but if the general practitioner is foolish enough to do it, there will be a long stream of candidates for the mortuary."[62]

[105] Having regard to all these factors mentioned above as well as the nature, scope and object of the LPA 1983 and the rules of the courts I am of the view that the applicant's right

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[61] In the foreword to the report referred to in footnote 64 below.
[62] Lord Benson: The future of the Legal Profession in South Africa: Is Fusion the Answer? The English Experience 1988 SALJ vol 105 p421 at 432.

to equality before the law and to the equal protection of the law is not violated by the impugned sections of the LPA 1983 and the rules of the courts. There is “mere differentiation” on rational grounds in order to achieve a legitimate government objective.

[106] In any event even if the right to equality before the law and to the equal protection of the law is limited, it is done in a manner that is demonstrably justified in a free and democratic society, for the reasons already stated in this judgment. The application ought to be dismissed.

[107] The application was not seriously opposed by any of the respondents. The application was brought by the applicant in his own name but is clear that it was brought in the interest of the legal profession as a whole and indeed in the public interest. In my view no order as to costs should be made.

[108] I hasten to mention that the attitude of the first, second and third respondents is a clear indication that Lesotho can no longer withstand and should not resist the need to change the manner in which the legal profession is structured and regulated. It is an idea whose time has come.

[109] In other jurisdictions extensive and comprehensive reforms were already implemented and are in the process of being refined. In England certain barristers may appear on behalf of lay clients without being instructed by a solicitor. Such barrister must *inter alia* have at least 3 years experience;

s/he must have received and completed appropriate training and register with the Bar Counsel as a Public Access Practitioner before accepting a public access instruction. There is also a duty on such barrister to take steps as are reasonably necessary to ascertain whether it would be in the best interest of the client or in the interest of justice for the lay client to instruct a solicitor or other professional. The barrister who accepts a public access instruction must forthwith notify his/her client in writing and in clear and readily understandable terms of the fact that in performing his/her work the barrister will be subject to the requirements of the code of conduct.[63]

[110] The manner in which the legal profession was regulated was also subjected to a review which culminated in the enactment of the Legal Services Act 2007.[64]

[111] In South Africa a comprehensive review of the legal profession was done as a result of which the Legal Practice Bill has been drafted. Although not yet an Act of Parliament it gives a clear indication as to the way forward for the legal profession in that country. The purpose of the Act will *inter alia* be to:

> "1. Provide a legislative framework for the fundamental transformation and restructuring of the legal profession that embraces the values underpinning the constitution.
> 2. Broaden access to justice

[63] See Bar Standards Board – regulating barristers. Consultation Paper on the review of the Public Access Rules published on 1 December 2011.
[64] See Review of the Regulatory Framework for Legal Services of England and Wales Final: Report by Sir David Clementi December 2004.

> 3. Create a single unified statutory body to regulate the affairs of all legal practitioners in pursuit of the goal of a unified, accountable, efficient and independent legal profession to promote the public interest…"[65]

[112] The Attorney General has already indicated that he and the Minister of Justice and Human Rights Law and Constitutional Affairs are prepared to be part of a reform process that will transform the legal profession without compromising its high professional standards.

[113] It is clear that the unlimited right of audience of attorneys in the High Courts is the applicant's main complaint. It is that right of audience, it seems, that strangle most advocates, especially junior ones. In order to get some breathing space some of them resort to illegal activity. This is totally unacceptable behaviour. On the other hand it is clear that such behaviour is caused by their desperate situation. Something must urgently be done to attend to the grievances and asperations of advocates and attorneys in order to have a responsive, transparent, cost-effective and independent legal profession. I hope that the legal profession will rise to the challenge and take up the offer of the first and third respondents.

[114] I accordingly make the following order

(a) The application is dismissed.

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[65] See Legal Practice Bill latest draft as introduced by the Department of Justice and Constitutional Development.

(b) No order as to costs is made.

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C. J. MUSI, AJ

I agree

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MONAPHATI, J

I agree

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MOLETE, J

For the Applicant: Adv Teele K.C & Adv Phafane K.C

Instructed by: T. Matooane & Co

Maseru

For the First and Third Respondents: Adv Makhethe K.C.

For the second Respondent: Adv Rasekoai

a/r