IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT315/21

In the matter between:

RELEBOHILE CECILIA RAFONEKE	Appellant
and	
MINISTER OF JUSTICE & CORRECTIONAL SERVICES	First Respondent
LEGAL PRACTICE COUNCIL OF SOUTH AFRICA	Second Respondent
MINISTER OF TRADE, INDUSTRY, & COMPETITION	Third Respondent
MINISTER OF LABOUR	Fourth Respondent
MINISTER OF HOME AFFAIRS	Fifth Respondent
and	
SEFOBOKO PHILIP TSUINYANE	Appellant
and	
MINISTER OF JUSTICE & CORRECTIONAL SERVICES	First Respondent
LEGAL PRACTICE COUNCIL OF SOUTH AFRICA	Second Respondent
MINISTER OF TRADE, INDUSTRY, & COMPETITION	Third Respondent
MINISTER OF LABOUR	Fourth Respondent
MINISTER OF HOME AFFAIRS	Fifth Respondent
SCALABRINI CENTRE CAPE TOWN	First Amicus Curiae
INTERNATIONAL COMMISSION OF JURISTS	Second Amicus Curiae

AMICUS CURIAE'S WRITTEN SUBMISSIONS:
INTERNATIONAL COMMISSION OF JURISTS

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INTRODUCTION

1. On 7 February 2022, this Honourable Court admitted the International Commission of Jurists ("ICJ") as the second amicus curiae in this matter.

2. On 8 February 2022, this Court issued directions calling on the second amicus curiae to file written submissions by 17 February 2022.

3. The present submissions are prepared in compliance with the Court's directions and constitute the ICJ's submissions.

4. In sum, the ICJ makes the following submissions:

   4.1. International human rights law and standards are applicable in South Africa pursuant to both South African law and international law. The Constitution requires the courts to consider the ambit of both binding and non-binding international law in interpreting legislation.

   4.2. South Africa has a range of legal obligations in respect of the right to work under international human rights law such that all persons, including non-citizens, have a right to work. In addition, South Africa has a range of legal obligations in respect of the right to equality before the law and equal protection of the law without discrimination and under the non-discrimination principle pursuant to which discrimination against non-citizens in access to work is prohibited as discrimination based on national origin and/or "other status", which, in turn, includes nationality.

4.3. Pursuant to international human rights law, South Africa has a range of legal obligations guaranteeing the right to a fair hearing, including the right to legal counsel of one's own choosing. Restrictions on this right on a discriminatory basis are unlawful.

5. These submissions are elaborated sequentially below.

THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW

6. Section 39(1) of the Constitution enjoins courts "consider international law" in interpreting the rights contained in the Bill of Rights, [1] while Section 39(2) of the Constitution requires courts, when interpreting legislation, to "promote the spirit, purport and objects of the Bill of Rights".[2]

7. Moreover, section 233 of the Constitution enjoins courts and tribunals, when interpreting legislation, to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".[3]

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[1] Constitution, s 39(1):

> "Interpretation of Bill of Rights 39.
> (1) When interpreting the Bill of Rights, a court, tribunal or forum—
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law."

[2] Constitution s 39(2):

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[3] Constitution, s 233:

> "Application of international law

8. Under international human rights law, South Africa has binding obligations of direct relevance to this matter, most particularly under the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the African Charter on Human and People's Rights ("African Charter"). Pursuant to the jurisprudence of this Court, "non-binding" sources of international law, including the General Comments of the United Nations Committee on Economic, Social and Cultural Rights,[4] should also be considered.[5]

9. According to South Africa itself, its "accession of the ICESCR has and will continue to deepen the enforcement of socio-economic rights in the country",[6] and "the Constitution provides for the consultation and inclusion of international law when interpreting statutes".[7] Given South Africa's relatively recent ratification of the ICESCR on 12 January 2015,[8] in its adjudication of this matter, it is apt that this

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> 233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[4] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), para 45: "Although the committee's analysis is intended to explain the scope of states parties' obligations under the Covenant, it is also helpful in plumbing the meaning of "progressive realisation" in the context of our Constitution."

[5] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 187. See also S v Williams 1995 (3) SA 632 (CC) at 639 in which the Court considered the jurisprudence of the United Nations Human Rights Committee, the European Commission and the European Court of Human Rights on the corresponding provisions in these treaties*; Ferreira v Levin NO* 1996 (1) SA 984 (CC) at 1035-6 and 1085; *S v Rens* 1996 (1) SA 1218 (CC) at 1225 in which the Court relied on a decision of the European Court of Human Rights on fairness in appellate proceedings*; Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) at 660-3 in which the international human rights norms were used to uphold a constitutional challenge to imprisonment for judgment debts.

[6] Committee on Economic, Social and Cultural, "Consideration of Reports Submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights", UN Doc. E/C.12/ZAF/1 (2017), para 1. While South Africa's report refers to the country's accesssion to the Covenant, the process is more accurately described as a "ratification".

[7] Id, para 24.

[8] United Nations Treaty Collection, International Covenant on Economic, Social and Cultural Rights, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en.

Court considers particularly closely developments in the enforcement of socio-economic rights and the application of both relevant domestic and international human rights law and standards.[9]

10. In this context, the Vienna Convention on the Law of Treaties ("VCLT") enshrines the *pacta sunt servanda* rule, namely that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" (article 26); and provides that a State "may not invoke the provisions of its internal law as a justification for a failure to perform a treaty" (article 27).[10] This Court has frequently applied the provisions of the VCLT and has recently held that the "main provisions" of the VCLT are binding on South Africa as international customary law.[11]

THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

11. The Constitution guarantees that "everyone is equal before the law and had the right to equal protection and benefit of the law" (Section 9).[12] Discrimination is

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[9] For a detailed analysis of the significance of international law standards in the interpretation of socio-economic rights in South Africa see: International Commission of Jurists, A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa, August 2019, https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf.

[10] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: https://www.refworld.org/docid/3ae6b3a10.html [accessed 28 September 2021].

[11] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018), para 36.

[12] Section 9 reads in full:

> Equality
>
> 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

prohibited on both unlisted and listed grounds, including "social origin".[13]

12. In light of the above, the ICJ submits section 24(2)(b) of the LPA discriminates either on the basis of social origin or on the basis of "other status" as an analogous ground of "nationality"-based discrimination, impairing the dignity of the applicants and similarly situated persons.

13. This position finds support in international law sources binding on South Africa and that, the ICJ submits, the Court should consider in determining the constitutionality of section 24(2)(b) of the LPA.

14. Both the right to equality before the law and the right to equal protection of the law incorporate the principle of non-discrimination.

International Covenant on Civil and Political Rights

15. There is a baseline of universal standards in respect of equality and non-discrimination that are part of general international law and rule of law principles.

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(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[13] Id, s 9(2).

In international human rights law, a succinct expression of the right to equality before the law and equal protection of the law is contained in articles 2(1) and 26 of the ICCPR. Article 26, for example, provides that:[14]

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, ***national or social origin***, property, birth or ***other status*****.**"[15] (Emphasis Added).

16. The United Nations Human Rights Committee, which provides authoritative interpretations of the ICCPR, has repeatedly found that discrimination based on "nationality" may fall foul of the requirements of Article 26 and amount to discrimination based on "other status".[16]

African Charter on Human and People's Rights

17. Various provisions of the African Charter on Human and Peoples' Rights ("African Charter") guarantee the right to equality and the non-discrimination principle. Article 2 of the African Charter protects the right to equality and prohibits discrimination in the following terms:

> "every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any

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[14] This is reflective of article 7 of the Universal Declaration of Human Rights, which was also reinforced in the 1993 Vienna Declaration and Programme of Action agreed to by all States, see: World Conference on Human Rights in Vienna, Vienna Declaration and Programme of Action (25 June 1993), para 5, available: https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx.

[15] See Articles 26 and 2(1) of the ICCPR.

[16] Communication No. 196/1985, I. Gueye et al. v. France (Views adopted on 3 April 1989), in UN doc. GAOR, A/44/40, para 9.4 ("There has been a differentiation by reference to nationality acquired upon independence. In the Committee's opinion, this falls within the reference to "other status" in the second sentence of article 26."); Human Rights Committee, Simunek et al. v. Czech Republic, 19 July 1995, Communication No. 516/1992, para. 11.6; Human Rights Committee, Karakurt v. Austria, 4 Apr. 2002, Communication No. 965/2000, para 8.4 ("it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality. Accordingly, the Committee finds that the author has been the subject of discrimination in violation of article 26."); Human Rights Committee Vandom v. Republic of Korea, 12 July 2018, Communication No. 2273/2013, paras 8.4 and 8.6.

> other opinion, ***national and social origin***, fortune, birth or ***other status***." (Emphasis Added).

18. The African Commission on Human and People's Rights ("African Commission") has affirmed that discriminatory policy impacting on "non-nationals" will fall foul of the Charter's prohibition of discrimination based on "origin":[17]

> "This text obligates States Parties to ensure that persons living on their territory, ***be they their nationals or non-nationals***, enjoy the rights guaranteed in the Charter. In this case, the victims rights to equality before the law were trampled on because of their origin."

19. Importantly for the case at hand, the African Commission came to this conclusion despite acknowledging that "African States in general" are "faced with many challenges, mainly economic" and may, as a result, "often resort to radical measures aimed at protecting their nationals and their [economies] from non-nationals". The African Commission reasons explicitly in this regard that "whatever, the circumstances may be however, such measures should not be taken at the detriment of the enjoyment of human rights".[18]

20. Recently, the African Commission issued a press statement on xenophobic violence in South Africa. It reiterated South Africa's obligation under the African Charter to ensure that: "migrants, foreign nationals, and other individuals who seek refuge in South Africa, enjoy all the rights and freedoms guaranteed in the African Charter, and in accordance with the South African Constitution, and to do so free from discrimination, violence and insecurity". Connecting xenophobia in the country – about which the South African courts have repeatedly raised concern –

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[17] ACHPR, Union Inter-Africaine des Droits de l'Homme et al v. Angola, Communication No. 159/96, decision adopted on 11 November 1997, para. 18.

[18] Id para 16. The original reads "economic" not "economies" and has been corrected for coherence.

[19] to the socio-economic circumstances of the country, it thereafter requested that the South African government:

> "facilitate the establishment of the requisite social and economic conditions and public consciousness that promote tolerance, mutual respect and harmony in local communities ***where non-nationals reside and try to make a living***."

International Covenant on Economic, Social and Cultural Rights

21. Mirroring article 2(1) of the ICCPR in almost identical language, article 2(2) of ICESCR requires States to undertake "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, ***national or social origin***, property, birth or ***other status***."

22. The UN Committee on Economic, Social and Cultural Rights, which provides authoritative interpretations of the ICESCR, has expounded on State parties' non-discrimination obligations under ICESCR in its General Comment 20 on "Non-discrimination in economic, social and cultural rights".[20]

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[19] See as examples: *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014), para 44; *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC) ; (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) (12 December 2006), paras 38, 122.

[20] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: https://www.refworld.org/docid/4a60961f2.html [accessed 2 February 2022].

23. According to the Committee, while discrimination based on “national origin" is defined as discrimination based on a person’s “state, nation or place of origin”,[21] the separate prohibition of discrimination based on “nationality” falls under “other status”.[22] In respect of the prohibition of discrimination based on nationality, the Committee is clear that:

> “The ground of nationality should not bar access to Covenant rights... The Covenant rights ***apply to everyone including non-nationals***, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, ***regardless of legal status and documentation.”***

24. Finally, because of the centrality of the right to equality before the law and equal protection of the law, and the non-discrimination principle in international human rights law,[23] while differentiation between nationals and non-nationals may be permitted where it is “reasonable, objective, proportionate and does not harm human rights”,[24] a State may not in so doing:

> “***subordinate or condition the observance of the principle of equality before the law and non-discrimination to achieving the goals of its public policies***, ***whatever these may be, including those of a migratory nature***. This general principle must be respected and guaranteed always. Any act or omission to the contrary is inconsistent with the international human rights

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[21] Id para 32.

[22] Id para 30.

[23] See para [12] above.

[24] Inter-American Court Advisory Opinion, para 119 American Court. See also para 248, which reads:

> “This Court has already considered that the principle of equality before the law, equal protection before the law and non-discrimination belongs, at the present stage of development of international law, in the domain of jus cogens. Consequently, States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant different treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differentiated treatment is reasonable, objective and fair and does not impair human rights. Consequently, States have an obligation not to introduce discriminatory regulations into their laws; to eliminate regulations of a discriminatory nature; to combat practices of this nature; and to establish norms and other measures recognizing and guaranteeing all persons effective equality before the law.”

instruments."[25]

Conclusion

25. Section of the 9 the Constitution, and indeed the Bill of Rights as a whole, should therefore be interpreted in light of these key principles guaranteed by international human rights law. Three key principles emerge:

4.1 All persons, irrespective of citizenship or documentary status are fully entitled to the protection of their human rights.

4.2 Discrimination based on citizenship, nationality or documentary status may constitute prohibited discrimination on the grounds of "national origin" or "nationality" as specifically listed or, if not listed, in terms of "other status".

4.3 States' obligations pursuant to the right to equality before the law and equal protection of the law without discrimination and to the non-discrimination principle cannot be subordinated to achieve public policy goals, including those of an economic or migratory nature.

26. As will be illustrated below, the right to equality and the prohibition on discrimination have been given further content in international human rights law in respect of the rights to work and to a fair hearing, both of which the ICJ submits are pivotal in this Court's evaluation of the constitutionality of section 24(2)(b) of LPA.

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[25] Inter-American Court of Human Rights, Juridical Condition and Rights of the Undocumented Migrants, Mexico, Advisory Opinion OC-18/03 of 17th September 2003, available at: https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf, para 172.

THE RIGHT TO WORK

27. South Africa has acknowledged the absence of a "designated right to work in the Constitution" while committing itself to the full realization of this right by becoming a party to a range of international treaties that recognize a legally binding right to work. Although the focus in these submissions is the right to work under ICESCR and the African Charter, these are only two of the many international conventions by which South Africa is bound committing it to respect, protect and fulfil the right to work.[26]

28. Indeed, in terms of this full range of international instruments, including the Refugee Convention, South Africa has also explicitly acknowledged that the right to work extends beyond citizens and permanent residents and must be guaranteed to "everyone". It is in this context that the right to dignity should be interpreted to include international human rights law and standards on the right to work, as both this Court and the Supreme Court of Appeal have, to some extent, already implicitly done in some circumstances.[27]

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[26] See as examples: International Convention on the Elimination of All Forms of Discrimination against Women, Article 11; International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(i)-(ii); International Convention on the Rights of Persons with Disabilities, Article 27; Refugee Convention, Article 24. See also, International Labor Organization, Ratifications for South Africa, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888.

[27] Minister of Home Affairs and Others v Watchenuka and Others [2003] ZASCA 142; [2004] 1 All SA 21 (SCA); Environment and Tourism and Others [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA); South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others (CCT 173/13 ; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014). See also, International Commission of Jurists, Promoting Non-Citizens' Right to Work in South Africa, April 2020: https://www.icj.org/wp-content/uploads/2020/04/South-Africa-Non-Citizens-Right-to-Work-Advocacy-Analysis-Brief-2020-ENG-.pdf.

International Covenant on Economic, Social and Cultural Rights: the Right to Work

29. Both the right *to* work and rights *at* work are guaranteed under Articles 6-8 of the ICESCR. The right *to* work should, therefore, importantly, not be thought of and interpreted as a mere duplication of rights at work – referred to in the Constitution and elsewhere in South African law as "labour rights".[28] Not only would such an interpretation contradict the Constitution's own affirmation that "the Bill of Rights does not deny the existence of any other rights or freedoms … to the extent that they are consistent with the Bill",[29] but it would also deprive the government of a clear legal obligation to combat spiralling unemployment, which it openly acknowledges it has.[30]

30. Pursuant to ICESCR, the right to work explicitly includes "the right of everyone

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[28] Constitution, section 23 reads:
"Labour relations 23.
(1) Everyone has the right to fair labour practices.
(2) Every worker has the right—
(a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union; and
(c) to strike.
(3) Every employer has the right—
(a) to form and join an employers' organisation; and
(b) to participate in the activities and programmes of an employers' organisation.
(4) Every trade union and every employers' organisation has the right— (a) to determine its own administration, programmes and activities;
(b) to organise; and
(c) to form and join a federation.
(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[29] Constitution, section 39(3).

[30] See generally, as examples, National Planning Commission, "Our future - make it work: National Development Plan 2030": https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf; White Paper on Reconstruction and Development GN 1954 of 1994, 23 November 1994: https://www.gov.za/sites/default/files/governmentgazetteid16085.pdf.

to the opportunity to gain his living ***by work which he freely chooses*** or accepts" (Article 6), and requires States parties to the ICESCR to "take appropriate steps to safeguard this right". States parties are required by the ICESCR to allow all people to make "a decent living for themselves and their families" (Article 7(a)(ii)), including through such work. In addition, the ICESCR guarantees the right to an adequate standard of living (Article 11), which includes a right to "continuous improvement of living conditions". The right to work is similarly guaranteed under the African Charter and expanded upon in the jurisprudence of the African Commission.[31]

31. The right *to* work has been authoritatively interpreted by the UN Committee on Economic, Social and Cultural Rights ("CESCR"), most specifically in its General Comment 18[32] and General Comment 23.[33] This right is guaranteed under the ICESCR to "everyone" and to all workers, whether they are employed in "informal" or "formal" forms of employment.[34] The CESCR is emphatic that the right to work is to be guaranteed to "all workers in all

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[31] Article 15, which reads:

> "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."

See also African Commission on Human and People's Rights "Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights" (2010), available at: http://www.achpr.org/instruments/economic-social-cultural/, paras 56-59.

[32] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18, available at: https://www.refworld.org/docid/4415453b4.html [accessed 29 June 2020].

[33] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 7 April 2016, E/C.12/GC/23, available at: https://www.refworld.org/docid/5550a0b14.html [accessed 29 June 2020].

[34] Article 15 of the African Charter similarly affords the right to "every individual".

settings".[35]

Non-discrimination and the right to work

32. CESCR has affirmed that the obligation to ensure non-discrimination in the exercise of the right to work is an obligation of immediate effect with which States must ensure immediate compliance rather than one of progressive realization.[36] In General Comment 20 the CESCR notes as follows:

> "***Non-discrimination is an immediate and cross-cutting obligation in the Covenant.*** Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant … discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights…" (Emphasis added).

33. Under the ICESCR, as authoritatively interpreted by the CESCR, therefore, all people, irrespective of citizenship or whether their status is documented under domestic law or not, enjoy the right to work. The CESCR has made clear that:

> "The Covenant rights apply ***to everyone including nonnationals*****,** ***such as refugees, asylum-seekers, stateless persons, migrant workers*** and victims of international trafficking, ***regardless of legal status and documentation*****.**"[37] (Emphasis Added).

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[35] Id, para 5.

[36] Id.

[37] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights* (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, available at: https://www.refworld.org/docid/4a60961f2.html [accessed 28 September 2021].

34. Furthermore, in its General Comment 18 in the direct context of the right to work, the CESCR had highlighted the following:

> "States parties are under the obligation to respect the right to work by ... ***refraining from denying or limiting equal access to decent work for all persons***, especially disadvantaged and marginalized individuals and groups, including prisoners or detainees, members of minorities ***and migrant workers.***"[38] (Emphasis Added).

Non-citizens' right to work in South Africa

35. The clear legal position that the right to work applies to "everyone" is based on the simple fact that ICESCR rights – and States' obligations to give effect to those rights – like the overwhelming majority of constitutional rights in South Africa, are to be guaranteed and belong to "everyone".[39] This Court has consistently taken a similar approach to the interpretation of the term "everyone" as holders of constitutional rights.

36. The Supreme Court of Appeal has emphasized in judgments such *Watchenuka*[40] and *Somali Association*[41] that the right to dignity must be interpreted to include protection for the right to work of non-citizens in South

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[38] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: https://www.refworld.org/docid/453883fa8.html [accessed 28 September 2021].

[39] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) and *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837.

[40] *Minister of Home Affairs and Others v Watchenuka and Others* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA).

[41] *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) at para 43.

Africa. This holding, the ICJ submits, is supported by this Court's finding in *South African Informal Traders Forum*[42] that "the ability ***of people*** to earn money and support themselves and their families is an important component of the right to human dignity".[43]

37. Given the close connection between the right to work and the right to dignity, as this Court has recognized, the Supreme Court of Appeal's finding that "human dignity has no nationality" is consistent with the right to work of non-citizens under international human rights law:

> "Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – ***for whatever reason*** – it must be respected, and is protected, by s 10 of the Bill of Rights."[44] (Emphasis Added)

38. A similar position has been taken by the Inter-American Court of Human Rights in its Advisory Opinion on the "Juridical Condition and Rights of Undocumented Migrants":

> "In this way, the migratory status of a person ***can never be a justification for depriving him*** of the enjoyment and exercise of his human rights, ***including those related to employment***."[45] (Emphasis Added)

39. Crucially, and consistently with this finding, it matters not what the reason for a person's presence in South Africa is, or indeed their documentary status.

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[42] *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others (CCT 173/13 ; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014)*.

[43] Id, para 31.

[44] *Minister of Home Affairs and Others v Watchenuka and Others* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA).

[45] Inter-American Court Advisory Opinion, para 134.

Work, in particular, is so intricately bound up with dignity that the right to work is a constitutionally and internationally protected right of all people including non-citizens. As the CESCR has noted:[46]

> "The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. ***Every individual has the right to be able to work, allowing him/her to live in dignity***. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community." (Emphasis Added).

The Right to Work comprises the right to exercise a profession of one's choice

40. As is clear from ICESCR, the right to work is a right "to gain his living by work which he freely chooses or accepts".[47] Given its generality this includes, the ICJ submits, the right exerciser a profession of one's choice, not merely to engage in whatever labour and opportunities happen to be available.

41. Migration, as the Inter-American Court on Human Rights has acknowledged, may result in "uprootedness of" human beings and "bring about traumas: including:

> "suffering of the abandonment of home at times with family separation or disruption), ***loss of the profession*** and of personal goods, arbitrarinesses and humiliations imposed by frontier authorities and security officers, loss of the mother tongue and of the cultural roots, cultural shock and permanent feeling of injustice."[48] (Emphasis Added).

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[46] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, available at: https://www.refworld.org/docid/4415453b4.html [accessed 2 February 2022], para 1.

[47] ICESCR, Article 6.

[48] Inter-American Court Advisory Opinion, para 14 of the separate concurrence of Judge A.A. Cancado Trindade.

42. The loss of one's profession, or opportunity to work in a particular profession of one's choice, are therefore some of the central harms that the protection of the right to work seeks to avoid. State policies and laws having the effect of preventing specific categories of non-citizens from employment in their chosen professions must tread carefully in order to avoid bringing about additional traumas for the often already traumatized and marginalized non-citizens. As the Constitutional Court has said, emphasizing the right to choose an occupation, albeit in a different context:

> "What is at stake is more than one's right to earn a living, important though that is. ***Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life***. And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence'."[49] (Emphasis Added).

43. As a result, this Court has found that "limitations on the right to freely choose a profession" will not be "lightly tolerated" and must be "in the public interest and not arbitrary or capricious".[50] In this regard, international law standards are useful in determining the permissible regulation of the legal profession.

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[49] *Affordable Medicines Trust and Others v Minister of Health and Another (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005)*, para 59.

[50] Id, para 60.

44. The Singhvi Declaration was drafted at the request of the UN Economic and Social Council.[51] The former UN Sub-Commission of the United Nations on the Prevention of Discrimination and Protection of Minorities adopted a Resolution inviting States to take the principles outlined in this declaration into account in implementing the United Nations Basic Principles on the Independence of the Judiciary.[52]

45. The Singhvi Declaration explicitly indicates that the legal profession must be:

> "***open to all persons with requisite qualifications and no one shall be denied such opportunity*** by reason of race, colour, sex, religion, political or other opinion, ***national,*** linguistic ***or social origin,*** property, income, birth or status." (Emphasis Added).

46. Importantly, the Declaration clarifies further that:

> "***Every person having the necessary qualifications, integrity and good character*** shall be entitled to become a lawyer and to continue to practise as a lawyer ***without discrimination on the ground of*** race, colour, sex, religion or political or other opinion ***national,*** linguistic, or ***social origin,*** property, income, birth or status…"

47. The Singhvi Declaration must be understood in light of the prohibition on discrimination under international law detailed above, based on national or social origin and/or nationality, as the case may be. It must also be considered against the broader backdrop of the protection of the right to work of non-

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[51] Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") , available at: https://www.icj.org/wp-content/uploads/2014/03/SR-Independence-of-Judges-and-Lawyers-Draft-universal-declaration-independence-justice-Singhvi-Declaration-instruments-1989-eng.pdf

[52] UN Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, available at: https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx.

citizens, of which the right to participate in the profession is a component, subject to complying with the requisite qualifications.

48. Finally, it is important to note that there is also foreign law precedent for the declaration of unconstitutionally of precisely the same sort as the applicants in seek in this matter. In *Andrews v Law Society of British Columbia*, more than three decades ago, the Canadian Supreme Court struck down as unconstitutional:

> "a rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group". [53]

49. The provisions of section 42 of the Barristers and Solicitors Act declared invalidated by the Canadian Supreme Court in *Andrews v. Law Society of British Columbia* bears striking resemblance to section 24(2)(b) of the LPA at issue in the present proceedings.

Conclusion

50. In sum, therefore, Section 10 of the Constitution, and indeed the Bill of Rights as a whole, should be interpreted in light of these key principles guaranteed

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[53] *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143.

by international human rights law. The result requires the Court's recognition that:

4.1 The right to work of all persons, irrespective of citizenship, nationality or documentary status is protected under international law.

4.2 Though restrictions or limitations of the right to work are permissible, restricting or denying equal access to work opportunities, including those in the legal profession, based solely on citizenship, nationality or documentary status may fall foul of international law, and will thus require full justification.

51. The consequence of this position is that where, as the government purports to do through section 24(2)(b) of the Legal Practice Act (LPA), a law restricts access to any form of work to non-citizens, such restriction amounts to the limitation of a right that must be reasonable and justifiable in terms of section 36 of the Constitution. As has been indicated above, in determining whether an adequate justification has been presented by the State, the Court should be wary of accepting justifications that stem from economic protectionist policies or migratory policies that impinge on disproportionately – or indeed nearly exclusively – on non-citizens' human rights.

52. Section 24(2)(b) of the LPA provides a particularly inflexible barrier to a large group of non-citizens to be admitted as legal practitioners, as it prohibits non-citizen non-permanent residents completely, without the possibility of

exception, from working on an equal basis with citizens and permanent residents in the legal profession.[54]

THE RIGHT OF CHOICE OF COUNSEL

53. The ICJ submits that consideration must be given to the impact of the impugned provision on the rights of prospective clients, who, but for this

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[54] Act 28 of 2014, s 24 reads in full:

"**Admission and enrolment 24.**

(1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.

(2) The High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she—

(a) is duly qualified as set out in section 26;

(b) is a—

(i) South African citizen; or

(ii) permanent resident in the Republic;

(c) is a fit and proper person to be so admitted; and

(d) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules.

(3) Subject to subsection (1), the Minister may, in consultation with the Minister of Trade and Industry and after consultation with the Council, and having regard to any relevant international commitments of the Government of the Republic, make regulations in respect of admission and enrolment to—

(a) determine the right of foreign legal practitioners to appear in courts in the Republic and to practise as legal practitioners in the Republic; or

(b) give effect to any mutual recognition agreement to which the Republic is a party, regulating—

(i) the provision of legal services by foreign legal practitioners; or

(ii) the admission and enrolment of foreign legal practitioners."

provision, could choose to engage legal services from persons in the position of the applicants.

The Constitutional Right to Choose Counsel

54. Section 34 of the Constitution provides for the right to access to courts, which includes the right to a "fair public hearing".[55] Our Courts' jurisprudence reveals that this right must be interpreted broadly,[56] and has been by this Court, for example, to extend to apply to state funded legal representation in Commissions of Inquiry and potential a range of other civil matters, in exceptional circumstances.[57]

55. Though this right to fair hearing has not thus far been interpreted to include a right to a choice of legal representation, the ICJ submits that there is no reason why, particularly when a client is paying for their own legal representation, section 34 should not entitle a person to legal counsel of their own choosing.

56. This would amount to a similar and sensible extension of the constitutional acknowledgement in section 35(3)(f) of the Constitution of the right of every

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[55] Constitution s 34, reads:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[56] Magidiwana and Another v President of the Republic of South Africa and Others (37904/2013) [2013] ZAGPPHC 292; [2014] 1 All SA 76 (GNP) (14 October 2013), para 66 ("Section 34 has to be interpreted purposively and expansively. Apart from its primary purpose of separation of powers, it carries with it the constitutional values of justice and fairness.").

[57] See generally J Brickill, C Grobler, The Right to Civil Legal Aid in South Africa: Legal Aid South Africa v Magidiwana, 2018, Constitutional Court Review, https://constitutionalcourtreview.co.za/wp-content/uploads/2018/10/9-The-Right-to-Civil-Legal-Aid-in-SA-CCR-VIII-2016.pdf who note the development of a right to 'civil legal aid'.

accused person “to choose, and be represented by, a legal practitioner”[58] and section 35(2)(b) explicitly provides for a right for detained persons “to choose, and to consult with, a legal practitioner”.[59]

57. Finally, the constitutional right to choose counsel is broadly consistent with the constitutional rights to equality and dignity. While the right to choose contributes to furthering equality by potentially maintaining “equality of arms” in legal disputes, it also furthers the right to dignity in the sense that it allows for the autonomous regulation of one’s affairs.[60]

58. Though this right to choose counsel is no doubt not absolute, [61] a limitation or restriction of the right whether in the context of section 34 of section 35 of the Constitution no doubt requires constitutional justification.

International law

[58] Constitution s 35.

[59] Id.

[60] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) , para 49 (“human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible”; Barkhuizen v Napier (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007), para 47 (“elf-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity.”)

[61] In general international reveals that the right to counsel of one’s choosing is not absolute, particularly in the context of state funded counsel. See as examples: Nahamina et al. (Media case), Decision on Withdrawal of Co-Counsel - 23.11.2006 (ICTR-99-52-A) (finding that the right may be overridden be a court if it is in the interests of justice to do so); European Court of Human Rights, Lagerblom v. Sweden, No. 26891/95, 2003, para 54. See also European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to access to justice, https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf pp 84-5.

59. Comparable rights are provided for under international law and standards. Article 14(3)(d) of the ICCPR, for example, provides that:

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be tried in his presence, and to defend himself in person or ***through legal assistance of his own choosing…*****"** (Emphasis Added).

60. Similarly, but more broadly, as it applies beyond the context of criminal charges, article 7(1)(c) of the African Charter provides that:

> "Every individual shall have the right to have his cause heard. This comprises the right to defense, including ***the right to be defended by counsel of his choice.***" (Emphasis added.)

61. Given the broader scope of the article 7(1)(c) of the African Charter, as opposed to the article 14(3)(d) of the ICCPR, the ICJ submits that it is relevant to the interpretation of both sections 34 and section 35 of the Constitution.

62. In order to give further content to a range of articles in the African Charter, including article 7, the African Commission has adopted the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* ("Principles").[62] These Principles emphasize that States must:

> "ensure that an accused person ***or a party to a civil case*** is permitted representation by a lawyer ***of his or her choice, including a foreign lawyer duly accredited to the national bar."***[63] (Emphasis added).

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[62] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the African Commission's activity report at 2nd Summit and Meeting of Heads of State of African Union, Maputo, 4 -12 July 2003, available: https://www.achpr.org/legalinstruments/detail?id=38.

[63] Id, Principle G(b).

63. This Authoritative interpretation of Article 7 of the Charter is instructive in several ways.

64. Firstly, the provision clarifies beyond all doubt that the right to a lawyer of one's own choice under the African Charter applies to both accused persons in criminal trials *and* any party to a civil case.

65. Secondly, the meaning of "duly accredited", in the context of the provision as a whole, clearly implies a set of regulatory provisions governing the accreditation of all lawyers, including "foreign lawyers". Reading this provision otherwise is inconsistent with its plain meaning and unduly restricts the right to choose counsel without justification. It would also render the specific inclusion of the phrase "foreign lawyer" superfluous in contravention of the presumption against superfluity in both domestic and international law.[64] The ICJ, therefore, submits that "duly accredited" should be understood as applying to the common professional qualifications of the lawyer, such as their academic qualifications and their fitness and propriety to hold such office.

66. Thirdly, the inclusion of "foreign lawyer" in this provision also necessarily implies the existence of a regulatory framework, such as the one provided in South Africa by the LPA, which provides criteria by which and a process

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[64] This would contradict the "presumption against superfluity" in legal interpretation. For a recent example see: Commissioner of the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Limited (185/2017) [2018] ZASCA 66 (25 May 2018), para 37. See also Case Of James And Others V. The United Kingdom *(Application no. 8793/79)*, European Court of Human Rights, 21 February 1986, para 62; U Linderfalk, Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making, The European Journal of International Law Vol. 26 no. 1, pp 173-4, 187-8.

through which non-citizen lawyers may be "duly accredited".

67. This provision of the Principles clearly considers and implies a duty on the part of the State to ensure legal processes by which "a foreign lawyer" may be duly accredited. Moreover, the Principles, which at no stage limit the rights of non-citizen lawyers to practise in countries other than that of their national origin, also highlight the need for cross border collaboration amongst legal professionals under Principle J, where it is indicated that States are required to:

4.1 "Ensure that national legislation does not prevent collaboration amongst legal professionals in countries in their region and throughout Africa."

4.2 "Encourage the establishment of agreements amongst states and professional legal associations in their region that permit cross-border collaboration amongst lawyers including legal representation, training and education, and exchange of information and expertise."

4.3 make "every effort" to ensure that the Principles are "incorporated into their domestic legislation by State parties to the Charter and respected by them".[65]

Conclusion

68. The ICJ submits that, on a proper reading, the Principle's articulation of South Africa's legal obligations under article 7 of the African Charter is critical in at least three respects to the matter at hand.

[65] Id, Preamble.

4.1 It confirms that the right to legal counsel of one's choosing must be guaranteed in both the context of civil and criminal cases and, therefore, in the context of the interpretation of both sections 34 and 35 of the Constitution. The corollary of this right is a right for non-citizen legal counsel to practise – and therefore be available to be chosen as legal counsel – expounded in detail above.

4.2 It explicitly affirms that the right to legal counsel of one's choosing applies to both citizen and non-citizen lawyers, both in respect of a prospective clients right to choose legal counsel and in terms of non-citizen lawyer's right to be available to be chosen.

4.3 It implies an obligation on South Africa under the African Charter to ensure a regulatory framework that allows citizen and non-citizen lawyers to be "duly accredited" and therefore become available to be chosen as a legal representative.

69. As it stands, the ICJ submits that South Africa has not only failed to enact legislation to incorporate these principles in its domestic context, but, in fact, that it has enacted legislative provisions in the form of s 24 of the Legal Practice Act that actively undermine its obligations set out in the Principles, and therefore the provisions of the African Charter itself.

70. The ICJ submits, therefore, that interpreted consistently with international human rights law and standards, the South African Constitution includes a right for a party to a hearing to select a legal representative of their choosing. The ICJ submits further that section 24(2)(b) of the LPA's unjustifiably limits rights by placing an absolute bar on the non-citizen, non-permanent residents'

rights to practise law – and therefore be available to be chosen as a preferred legal representative.

71. In simple terms, the only obstacle in the way of the applicants and all similarly situated and otherwise appropriately qualified persons being available to be chosen as legal representatives is the discriminatory, permanent, exceptionless, inadequately justified exclusion of non-citizen, non-permanent residents by section 24(2)(b) of the Legal Practice Act.

GUARDING AGAINST XENOPHOBIA

72. In 2018, the United Nations High Commissioner for Human Rights issued a set of Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations. These principles recommend that States:

> "***Repeal or amend all laws or measures that may give rise to discrimination against migrants***, including direct and indirect discrimination that is based on multiple grounds."[66]

73. Similarly, and in the context of coming to a determination about the right to work of asylum seekers in South Africa, the SCA in *Somali Association* warned the government against "unwittingly fueling xenophobia" through laws and policies which may have ultimately had the aim of "induc[ing] foreign nationals who were destitute to leave our shores". [67]

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[66] Report of the United Nations High Commissioner for Human Rights "Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations" (2018) available at: https://digitallibrary.un.org/record/1472491?ln=en.

[67] Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014), para 44 reads:

74. Also warning against "increasing suffering" caused by xenophobia, as early as 2006, the Constitutional Court in *Union of Refugee Women* held that:[68]

> "Excluding refugees from the right to work as private security providers simply because they are refugees ***will inevitably foster a climate of xenophobia which will be harmful to refugees and inconsistent with the overall vision of our Constitution***."

75. The United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has adopted a definition of xenophobia suggesting that it "denotes behaviour specifically based on the perception that the other is foreign to or originates from outside the community or nation".[69] In the same report, the Special Rapporteur notes a global trend in practices and policies non-citizens "who are being framed as posing a threat to jobs, welfare, and sometimes cultural dominance".[70]

> "When, during argument before us, we enquired of counsel what was to happen to destitute asylum seekers and refugees, no answer was forthcoming. There appeared to be some suggestion that, regrettably, some persons might be left to their destitution. This attitude is unacceptable and contrary to constitutional values. The frustration experienced by the authorities as they deal with a burgeoning asylum seeker and refugee population must not blind them to their constitutional and international obligations. It must especially not be allowed to diminish their humanity. The authorities must also guard against unwittingly fuelling xenophobia. In the present case, one is left with the uneasy feeling that the stance adopted by the authorities in relation to the licensing of spaza shops and tuck-shops was in order to induce foreign nationals who were destitute to leave our shores. The answer to the frustration experienced by the respondents, and in particular by the third respondent's department, is to facilitate and expedite applications for refugee status."

[68] "Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) (12 December 2006), para 122.

[69] Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/HRC/32/50, 13 May 2016: https://undocs.org/A/HRC/32/50.

[70] Id, para 42.

76. The ICJ submits that in addition to unjustifiable rights violations brought about by section 24(2)(b) of the LPA, the provision conveys a broader message to South African society contributing to their framing as "outsiders" who "pose a threat" to South Africa. It does so on the exclusive basis of their citizenship and residence status, and in order to pursue a vague objective that has been insufficiently justified by the Government. The law, therefore, fails to heed the warnings of various South African courts and international human rights authorities, thereby failing to send the appropriate, human rights promoting[71] message to South African society as a whole.

77. In its Advisory Opinion on Migrant Workers Rights, the Inter-American Court of Human Rights clearly and explicitly "rejects the opinion suggesting there should be restrictions and reductions in the rights of the individual when he crosses the borders of his own country and moves abroad as if this journey eroded his human condition and took away a migrant's dignity and, therefore, his rights and freedoms".[72] This Court should do the same, cognizant of the high levels of xenophobia and xenophobic violence in South Africa today.[73]

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[71] Constitution, section 7(2).

[72] Inter-American Court Advisory Opinion, concurring opinion of Judge Sergio García Ramírez, para 23.

[73] See, as examples: Human Rights Watch, "They Have Robbed Me of My Life": Xenophobic Violence Against Non-Nationals in South Africa, 17 September 2020: https://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south; International Commission of Jurists, South Africa: Scrapping of discriminatory provisions against non-citizens in Gauteng Bill a welcome step forward, 12 August 2021: https://www.icj.org/south-africa-scrapping-of-discriminatory-provisions-against-non-citizens-in-gauteng-bill-a-welcome-step-forward/; International Commission of Jurists, South Africa: authorities must take immediate measures to protect social and economic rights before nationwide lockdown commences, 25 March 2020: https://www.icj.org/south-africa-authorities-must-take-immediate-measures-to-protect-social-and-economic-rights-before-nationwide-lockdown-commences/; JC Mubangizi, Xenophobia in the labour market: A South African legal and human rights perspective, International Journal of Discrimination and the Law 2021, Vol. 21(2) 139–156; HSRC, Violence and xenophobia in South Africa: developing consensus, moving to action, 2008: http://www.hsrc.ac.za/en/research-data/view/4048;

REMEDY

The High Court's finding of Unconstitutionality

78. The High Court's finding that this provision is unconstitutional only to the extent that it prevents non-citizens from being admitted and enrolled as "non-practising" legal practitioners, the ICJ submits, does not remedy the plain fact that there is a clear difference between the role and rights of non-practising and practising legal professionals. Allowing the status quo, whereby the applicants and similarly situated persons with similar skills and qualifications continue to work, but at a lower rank and lower pay than their colleagues who are permanent residents or citizens, creates a risk of the exploitation of an already at-risk sector of the population. As the Inter-American Court has warned, albeit in the context of undocumented migrant workers:

> "it is not admissible for a State of employment to protect its national production, in one or several sectors by encouraging or tolerating the employment of undocumented migrant workers in order to exploit them, taking advantage of their condition of vulnerability in relation to the employer in the State or considering them an offer of cheaper labor, either by paying them lower wages, denying or limiting their enjoyment or exercise of one or more of their labor rights, or denying them the possibility of filing a complaint about the violation of their rights before the competent authority."

79. The LPA, read consistently with the High Court's decision, still prevents the applicants and similarly situated persons from a distinct form of work of their choosing. Since "all workers in all settings" are to be guaranteed the right to work, and the right to work should, the ICJ submits, be interpreted to find

protection in South African law through the right to dignity, a justification must still be provided for the limitation of this right as presented by section 24(2)(b).

CONCLUSION

80. For the reasons set out above, the ICJ submits that when due regard is had to its submissions, the appropriate relief in the circumstances would be the invalidation of 24(2)(b) of the LPA.

81. As *amicus curiae*, the ICJ does not seek costs. The ICJ submits that it would also not be appropriate for any adverse costs award to be made against it, as per the *Biowatch* principle.[74]

THABANG POOE

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17 February 2022

[74] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC); *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at paras 56 – 60, 75.

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3. *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC).

4. *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837.

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9. *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) SA 30 (CC) (11 December 2018).

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14. *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA).

15. *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* (CCT 173/13; CCT 174/14) [2014] ZACC 8; 2014 (4) SA 371 (CC).

16. *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23, 2007 (4) SA 395 (CC) (12 December 2006).

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2. Committee on Economic, Social and Cultural, "Consideration of Reports Submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights", UN Doc. E/C.12/ZAF/1 (2017).

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8. Human Rights Committee, Simunek et al. v. Czech Republic, 19 July 1995, Communication No. 516/1992.

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10. International Convention on the Elimination of All Forms of Discrimination against Women, International Convention on the Rights of Persons with Disabilities.

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