

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case no: 9435/19

IN THE EQUALITY COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case no: EC12/2019

In the matter between:

THE CAPE BAR

Applicant

and

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

First Respondent

LEGAL PRACTICE COUNCIL

Second Respondent

**WESTERN CAPE PROVINCIAL
LEGAL PRACTICE COUNCIL**

Third Respondent

JEREMY JOHN GAUNTLETT SC QC

Fourth Respondent

KARRISHA PILLAY

Fifth Respondent

LOUISE BUIKMAN SC

Sixth Respondent

ANDRE CLIVE PARIES

Seventh Respondent

REGHANA KHAN PARKER

Eighth Respondent

MEERUSHNI GOVENDER

Ninth Respondent

GODWIN THEO BOSSR	Tenth Respondent
MENDEL YRIEL SASS	Eleventh Respondent
ODETTE HELENA GELDENHUYS	Twelfth Respondent
GEORGE MORRISON VAN NIEKERK	Thirteenth Respondent
NCUMISA THOKO MAYOSI	Fourteenth Respondent

SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I the undersigned,

JANINE KIM MYBURGH

do hereby declare under oath and state as follows:

1. I am a member of the South African Legal Practice Council ("the LPC" or "Second Respondent").
2. I am duly authorized to depose to this affidavit.
3. The facts in this affidavit are within my personal knowledge and to the best of my belief, both true and correct unless the converse otherwise appears.
4. Where I make submissions of law I do so on the basis of legal advice, which advice I accept.

5. I have read the founding affidavit deposed to by **ANDREW MARK BREITENBACH** in both the High Court and the Equality Court applications. Because the issues are identical, and the matter turns largely on a question of law, this answering affidavit serves as an answer to the founding affidavit in both applications.

INTRODUCTION

The Cape Bar's contentions in relation to the Western Cape Provincial Council Elections

7. As I understand it, the purpose of the application by the Applicant (or "the Cape Bar") is to address what it characterises as a serious irregularity in the election of members to the Third Respondent ("the Provincial Council") as a result of the LPC's Regulations which prescribe certain quotas in relation to each seat on the Provincial Council.
8. In particular, the Applicant questions the election to the Provincial Council of the Seventh Respondent ("Paries"), who is a black male. It asserts that the Fourteenth Respondent ("Mayosi"), a black female, should instead have been elected based simply on the fact that she obtained more votes than Paries.
9. The Applicant asserts that the election of Paries should be set aside and Mayosi declared as a member of the Provincial Council.

10. The Applicant contends that Mayosi was not elected due to the unlawful capping of the number of black women advocates who may serve on the Provincial Council.
11. The Applicant also seeks to have the provisions of the Rules and Regulations which led to the non-election of Mayosi to the Provincial Council, declared unlawful and invalid, though with prospective effect only (save in regard to Mayosi's non-election).

The Regulations

12. The Regulations that the Applicant challenges in this application are Regulations 4(3) and 4(4) of the Regulations made in terms of section 109 (1)(a) of the Legal Practice Act 28 of 2014 ("the LPA")¹. For the purposes of this affidavit, the aforementioned regulations shall be referred to collectively as "the Regulations".
13. The Applicant contends that the Regulations are irregular because they impose an inflexible quota for the composition of the elected members of the Provincial Council based on gender and race, and because they limit the maximum number of black and female members of the Provincial Council to 50% of the total number of members of the Council. Consequently the Applicant seeks to review and set aside the Regulations.

¹ Published under Government Notice R9 21 of 2018 in Government Gazette 41879 of 31 August 2018

14. The Applicant also seeks to declare Rule 16.15.3 of the Rules of the LPC and Schedule 1B thereto, as published in the General Notice 401 in Government Gazette 41781 of 20 July 2018, as amended ("the rules"), as unlawful and invalid to the extent that these rules impose caps based on gender and race, and/or limit to 50% the maximum number of black and female members of the Provincial Council. The Applicant seeks to review and have these rules set aside.
15. Regulation 4(4) provides as follows:

" 50% of legal practitioners serving on any Provincial Council must be female and 50% must be male".
16. It will be argued at the hearing of this matter that there is nothing legally offensive or unlawful in any statutory instrument providing that a certain number of members constituting a governing body should come from a designated group of people or a certain category of members of society. Therefore, designating that a Provincial Council of the LPC must comprise of 50% females and 50% males is not unlawful.

LEGAL FRAMEWORK

The Legal Practice Act

17. Section 22 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") guarantees that each citizen has a right to choose their trade,

occupation or profession freely. It provides, further, that "*the practice of a trade, occupation or profession may be regulated by law*".

18. The legislation envisaged by section 22 above in the context of the legal profession is the LPA. The LPA has as one of its main objectives the transformation and restructuring of the legal profession in line with constitutional imperatives.

19. The preamble to the LPA states *inter alia* that:

"The legal profession is not broadly representative of the demographics of South Africa"

and that:

"Opportunities for entry into the legal profession are restricted in terms of the current legislative framework."

As a matter of fact this is undoubtedly so.

20. The aim of the LPA, *inter alia* is:

"To provide a legislative framework for the transformation and restructuring of the legal profession into a profession which is broadly representative of the Republic of South Africa's demographics under a single regulatory body; ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld; ensure that legal services are accessible; regulate the legal profession, in the public interest, by means of a single statute; remove any

unnecessary or artificial barriers for entry into the legal profession; strengthen the independence of the legal profession and ensure the accountability of the legal profession to the public.” [Emphasis added]

The Legal Practice Council

21. The LPC is a national statutory body established in terms of Chapter 2 of the LPA, specifically section 4. The LPC regulates the affairs of all legal practitioners and candidate legal practitioners in South Africa.
22. Section 5 of the LPA provides for the objects of LPC which are the following:
 - “a) facilitate the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent;*
 - (b) ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice;*
 - (c) promote and protect the public interest;*
 - (d) regulate all legal practitioners and all candidate legal practitioners;*
 - (e) preserve and uphold the independence of the legal profession;*
 - (f) enhance and maintain the integrity and status of the legal profession;*

(g) determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners;

(h) promote high standards of legal education and training, and compulsory post-qualification professional development;

(i) promote access to the legal profession, in pursuit of a legal profession that broadly reflects the demographics of the Republic;

(j) ensure accessible and sustainable training of law graduates aspiring to be admitted and enrolled as legal practitioners;

(k) uphold and advance the rule of law, the administration of justice, and the Constitution of the Republic; and

(l) give effect to the provisions of this Act in order to achieve the purpose of this Act, as set out in section 3."

23. Section 7 of the LPA deals with the composition of the Council and provides that the Council consists of the following members:

"(a) 16 legal practitioners, comprising of 10 practising attorneys and six practising advocates, elected in accordance with the procedure prescribed by the Minister...

(b) **two teachers of law, one being a dean of a faculty of law at a university in the Republic and the other being a teacher of law, designated in the prescribed manner;**

(c) **subject to subsection (3), three fit and proper persons designated by the Minister, who, in the opinion of the Minister and by virtue of their knowledge and experience, are able to assist the Council in achieving its objects;**

(d) **one person designated by Legal Aid South Africa; and**

(e) **one person designated by the Board, who need not necessarily be a legal practitioner."**

24. When constituting the Council, the following factors must, as far as is practicable, be taken into account:

(a) the racial and gender composition of South Africa;

(b) the objects of the Council;

(c) representation of persons with disabilities.

25. It will be argued at the hearing of this application that Regulations 4(3) and 4(4) have as their aim the implementation of one of the primary objects of the LPA, namely to ensure that the composition of the governance structures of the legal profession reflect the demographics of South Africa. They are therefore rational.

WHAT THIS CASE IS ABOUT

26. At its core, this case concerns the system regulating the election of representatives and other stakeholders to the governance structures of the profession. It is not about discrimination on either race or gender grounds.
27. I am advised that an electoral system is a set of sectoral laws, principles and mechanisms which specify the methods by which votes are translated into seats in the process of electing representatives to those seats.
28. I am advised, further, that the aim of an electoral system is the election of representatives in terms of a set of rules. An elected body can only have a limited number of members. What the optimal number is, is a policy choice that is decided by the legislature.
29. The electoral system used in South Africa is known as the list proportional representation (PR) system,² which is the most widespread of electoral systems in the world.³
30. The aim of the list PR system is to ensure that the composition of a representative chamber should closely reflect the viewpoints, interests and demographic composition of the electorate.

² South Africa is one of approximately 87 countries in the world that use the list proportional representation (PR) system

³ Other types of electoral systems include the single transferable vote (STV), mixed member proportional representation, fair majority voting, proportional approval voting, evaluative proportional representation, biproportional apportionment.

31. The position in South Africa is unique on account of its chequered history. Thus, various legislative and regulatory measures have been enacted in order to ensure the restructuring and transformation of the legal profession in order that the composition of the governance structures of the profession reflects the demographics of South Africa.
32. The LPC and provincial councils, like the national electoral system, have a limited number of members. They have an inflexible quota in respect of all categories of stakeholders. This is comprehensively provided for in section 7 of the LPA.
33. Schedule 1B (Part B) of the Ballot paper for the election of legal practitioners to the Provincial Council is clear that:

"In order to achieve an appropriate balance of race and gender in relation to the composition of the Provincial Council, and subject to the availability of candidates, the following individuals will constitute the four advocates who will serve as members of the Provincial Council:
 1. *The Black woman with the highest number of votes in this category;*
 2. *The Black male with the highest number of votes in this category;*
 3. *The White woman with the highest number of votes in this category;*
 4. *The White male with the highest number of votes in this category."*
34. The ballot further enjoins legal practitioners:

"When voting, [to] please take into account the following considerations in relation to the constitution of the Provincial Council:

- a) *The racial and gender composition of South Africa;*
- b) *Representation of persons with disabilities; and*
- c) *Experience and knowledge of-*
 - (i) *The provision of legal services;*
 - (ii) *The principles of promoting access to justice;*
 - (iii) *Legal education and training;*
 - (iv) *Consumer affairs;*
 - (v) *Civil and criminal proceedings and the functioning of the courts and tribunals in general."*

35. The ballot paper gives expression to the need to ensure representation across the board, be it in the form of gender, race, persons living with disabilities and specialisation in different areas of the law.

36. The persons elected to the Provincial Council must be representative of the demographics, not merely of the Cape Bar, but of the whole country. This is in keeping with the aims and objectives of the LPA and its constitutional imperatives.

The Applicant incorrectly apprehends that the four candidates with the highest number of votes should be elected to the Provincial Council. However, the ballot and Regulations make it clear that it is the candidate with the highest number of votes in each category who should be elected onto the Council.

RATIONALITY

37. The case on behalf of the LPC is that the electoral scheme devised to populate the LPC and the Provincial Councils does not have as its purpose the advancement of gender and race equality. The electoral scheme does not therefore implicate the provisions of section 9 ("Equality clause") of the Constitution.
38. Instead, the electoral scheme devised for the constitution of the LPC and the Provincial Councils is intended to achieve the fair representation of all groups with the goal being to infuse the regulatory structures of the profession with a diversity of view, reflective of the South African demographics, as the LPA requires it to do.
39. For that reason the electoral scheme provides for,
 - (a) provincial representation (see section 7 (2) (d) of the LPA);

- (b) the election of teachers of law. This has nothing to do with their numerical strength but is designed to enrich the governance of the profession from the academia (section 7 (1)(b) of the LPA);
- (c) seats reserved for the quota of attorneys as opposed to advocates. This has nothing to do with equality. Numerically attorneys are a larger group of practitioners than advocates (section 7 (1) (a) of the LPA);
- (d) seats reserved for persons designated by the Minister. This is intended to reflect the policy positions of the government in the governance of the profession (section 7 (1) (c) of the LPA);
- (e) a quota of one person on the LPC representing Legal Aid South Africa. This is designed to ensure input in advancing access to justice. (section 7(1)(d) of the LPA);
- (f) a quota of one person designated by the Legal Practitioners' Fidelity Fund Board who need not necessarily be a legal practitioner. This is to ensure that the voice of non-legal practitioners may be represented (section 7(1)(e) of the LPA).

40. As is apparent from its provisions a primary object of LPA is the restructuring and transformation of the legal profession so as to ensure that it reflects the demographics of South Africa. This is in accordance with its constitutional imperative. It is not intended to achieve equality based solely on race and

gender, but the fair representation of all groups who have a stake in the profession, across the board.

41. Electoral systems generally are meant to achieve representativity, be it of a category; ideology; faith; regionality; political interest, etc. They are not instruments for the advancement of equality. It is sufficient that each voter, regardless of race or gender has an equal vote. The LPA gives each member of the legal profession an equal vote.
42. Section 46 of the Constitution deals with the composition and election of members to the National Assembly and provides that the National Assembly should consist of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that—
 - (a) is prescribed by national legislation;
 - (b) is based on the national common voters roll;
 - (c) provides for a minimum voting age of 18 years; and
 - (d) results, in general, in proportional representation.
43. Section 60 of the Constitution pertains to the composition of the National Council of Provinces and prescribes that the delegation from each province be comprised as follows –
 - (a) Four delegates consisting of the Premier of the province, and three other special delegates; and

(b) Six permanent delegates appointed in terms of section 61(2).

44. The underlying purpose of a system of proportional representation is to ensure the equitable representation of minorities in the organs of government.
45. If the electoral scheme provided for in the LPA and the Regulations was predicated on the strength of numbers, the probability is that most advocates on the Provincial Council would be white males as white males constitute the largest group within the advocates profession. They make up just under 50% of the advocates in South Africa.⁴ That would run counter to the achievement of the objects of the LPA.
46. There is therefore a rational connection and link between the measures employed by the LPC in the design of its electoral system and corresponding Regulations and its mandate in terms of the LPA and the Constitution.

THE RELIEF

47. The relief the Applicant seeks is the removal of a black male advocate from the governance structure of advocates in the Western Cape where there are admitted black male advocates. Black male advocates would be without a voice: This is irrational.

⁴ As at 30 April 2017: of the 2 915 Advocates in South Africa, 1 392 are white males. Further, at the Cape Bar, as at 30 April 2017: 275 out of the 474 advocates were white males while *only 10 are black females*.

48. The fallacy of the Applicant's case is that it fails to recognise that Pillay received more votes than Mayosi, and both are black female advocates. Mayosi was not included or excluded necessarily by the support of votes.
49. Mayosi was not discriminated against on the grounds of her race or gender. She had no right to be elected; neither did anyone of those who were elected. No individuals rights or freedoms are implicated, and neither is anyone discriminated against.
50. The distortion in the Applicant's relief is that it will create a differentiation amongst black females, namely Africans, Indians and Coloureds because the emphasis by the Applicant on Mayosi is that she is a female of African extraction.
51. The ballot makes it clear that:

"Black is used as defined in section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003, read with the Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 as a generic term which means Africans, Coloureds and Indians who are citizens of the Republic of South Africa by birth or by descent, or who became citizens of the Republic of South Africa by naturalisation before 27 April 1994 or on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date and such other person as may be categorised as black persons for purposes of that legislation." [Emphasis added]

52. The object of the LPA is not to achieve equality. For that reason, it creates inflexible quotas e.g. 10 practising attorneys, 6 practising advocates etc. One cannot have more than the prescribed number of persons designated in one category. In other words, there cannot be more than 10 practising attorneys. That is an inflexible quota, yet the Applicant does not complain about that but only about the quota of black female advocates.

53. Quotas are not inimical measures when it comes to elected and representative bodies.

THE TEST

54. The impugned regulations and rules pass constitutional muster.

55. There is a rational connection between the objects of the LPA and the means by which those objects are sought to be realised.

56. It is trite law that the means adopted by a particular legislative scheme does not have to be the best one. It suffices that it is rational to the object sought to be achieved, where the object is a legitimate government purpose.

57. The overall object of the LPA is:

(a) representativity;

(b) plurality of voice;

(c) a balance of sectors of the legal profession; and

- (d) ultimately public interest.

THE IMPUGNED RULE

58. Rule 16.15.3 of the rules of the LPC forms part of the rules of the LPC which regulate the election of provincial councils. It provides for a ballot paper, substantially in the form of Schedule 1A (in the case of the election of attorney members) or Schedule 1B (in the case of the election of advocate members), containing the surnames, names and phone numbers in alphabetical order by surname of the nominated candidates and providing the information indicated in schedule 1A or schedule 1B, as the case may be, and nothing more.
59. Schedule 1B provides, *inter alia*, that every advocate who is on the roll of practising advocates and who practices within the area of jurisdiction of the provincial council may vote for a maximum of four candidates.
60. Schedule 1B provides, further, that in order to achieve an appropriate balance of race and gender in relation to the composition of the provincial council, and subject to the availability of candidates, the individuals who will constitute the 4(four) advocates who will serve as members of the provincial council are as follows: one black woman with the highest number of votes in this category, the black male with the highest number of votes in this category; the white woman with the highest number of votes in this category; and the white male with the highest number of votes in this category.

61. It will be submitted that rule 16.15.3 is constitutionally and legally sound and is a measure meant to ensure fair representation of the various groups who make up the demographic of the Republic of South Africa.
62. I respectfully submit that Mayosi has not been discriminated against on any ground whatsoever.
63. The regulations and rules prescribe that 50% of the members of a council must be black and 50% must be female. The outcome of this requirement has been achieved in respect of the composition of the Provincial Council in that in the end two females were elected, being the Fifth and Sixth Respondents. Two blacks were elected, being the Fifth and Seventh respondents. This is a fair reflection of the demographics of the country and ensures the representation of all groups in a legally inoffensive manner.
64. If Mayosi were to replace Paries as demanded by the Applicant, the result would be that there would be three females and one male. There would therefore be a disproportionate representation of females. That would offend against regulation 4(4) which provides that 50% of the legal practitioners serving on any provincial council must be female and 50% must be male. Black male advocates would have no voice.
65. I submit that there is nothing legally and constitutionally offensive in providing for equal representation of males and females and of blacks and whites nor is there anything legally and constitutionally offensive in the manner in which the election was conducted.

66. The facts in this matter are largely common cause. The issue is about the interpretation of the effect of the Regulations in relation to the election of legal practitioners to the Provincial Council.

67. I shall now deal with the specific allegations in the founding affidavit ad seriatim.

AD PARAGRAPHS 1 - 2

68. I admit the allegations in these paragraphs.

AD PARAGRAPH 3

69. I deny that the allegations are true and correct in all respects. Where I admit allegations I will do so specifically.

AD PARAGRAPH 4

70. I deny that there was any irregularity, whether serious or otherwise, in the election of the members of the Provincial Council.

71. I further deny that the failure to declare Mayosi elected was due to any unlawfulness in any manner whatsoever.

72. I further deny that there is any unlawful capping of the number of black women advocates who may serve on the Provincial Council.
73. In amplification of the above denial, I aver that the Regulations and Rules provide for an electoral system which seeks fairly to reflect the demographics of South Africa and achieve the fair representation of all groups and persons who have a stake in the governance of the profession. There is no unlawful capping. Of the two black advocates one must be male and the other female. This is precisely how the Provincial Council is currently constituted.
74. I admit that Mayosi received more votes than Paries. However, this is not a comparison of like for like. In relation to the category of female black advocates, she did not receive the highest number of votes. Pillay, a black advocate, received 162 votes while Mayosi received 138 votes. The Applicant should therefore be comparing Mayosi and Pillay, and not Mayosi and Paries.
75. The rules make it clear that in electing members of the Council the black woman with the highest number of votes in the category of advocates will be elected. Therefore, Pillay was correctly elected in terms of the rules and regulations. Mayosi did not receive the highest number of votes in the category of black women advocates.

AD PARAGRAPH 5

76. I deny that the rules and regulations which led to the non-election of Mayosi are unlawful and invalid.

77. The Applicant fails to demonstrate which provision of law is contravened by the Rules and Regulations.

AD PARAGRAPHS 6-10

78. I admit the allegations in these paragraphs.

AD PARAGRAPH 11

79. I take note of the allegations in this paragraph.

AD PARAGRAPHS 12 TO 26

80. Save to state that notwithstanding the allegation by the Applicant that the Fourth Respondent would have been the only *Black African* member of the Provincial Council, it suffices to state there are three Black women who were elected to the Provincial Council, namely:

Karrisha Pillay;

Rehana Khan Parker; and

Meerushini Govender.

81. Save as aforesaid, I admit the allegations in these paragraphs.

AD PARAGRAPH 27

82. I deny that Mayosi has been discriminated against or passed over.
83. Mayosi has no legal right to be elected to the Provincial Council, even in the face of the fact that she obtained more votes than Paries.
84. Mayosi has not been discriminated against on any basis.
85. The only reason that she was not elected is that she did not obtain the highest number of votes in the category of black women advocates.
86. The votes cast in favour of the black female advocate and all other advocates were so cast by the advocates that make up the Cape Bar. The failure by the advocates of the Cape Bar to cast enough votes for Mayosi is not a result of unlawful conduct on the part of the LPC.
87. If Mayosi had received more votes than Karrisha Pillay, she would have been elected to the Western Cape Provincial Council.

AD PARAGRAPH 28

88. Save to state that Mayosi has no legal entitlement to be elected to the Provincial Council, the contents of this paragraph are noted.

AD PARAGRAPH 29

89. I deny that the results of the elections are unlawful to the extent that Mayosi was unelected and Paries elected. No individual has a right to be elected.

AD PARAGRAPH 30

90. I deny that only the racial and gender quotas are inflexible. All categories represented are inflexible.

91. In amplification of this denial, I aver that the quotas were applied precisely in the manner in which they are drafted. There is nothing legally wrong in terms of the manner in which the quotas are drafted. They are in line with the legitimate objects of the LPA, which is to achieve a fair representation of the demographics in the country.

92. The Applicant complains that the electoral system has the inflexible result that the four advocate representatives on the Provincial Council must consist of one white male, one white female, one black male and one black female. This contention is misguided in that it assumes that the number of votes only should determine the outcome of the elections. If this was so, the elections results could

result in no female person, either black or white, being elected. It could also result in no black person, either male or female, being elected. This would defeat the purpose of having a balance in gender and race in the governance structure of the profession.

AD PARAGRAPH 31

93. The Applicant seems concerned with one candidate only, Mayosi, who happens to be black and female, while seemingly ignoring that there is another candidate, Karrisha Pillay, who received the highest number of votes in the black female advocate category. Black female advocates have representation.
94. Once elected, every candidate owes their fiduciary duty to the LPC or provincial council and not the category or quota from which they have been elected.
95. The quotas are there simply to achieve representativity.
96. Save as aforesaid, the contents of this paragraph are noted.

AD PARAGRAPH 32

97. This case is not about equality but representativity.

98. It will be submitted that to insist that only a so-called democratic result should be followed, will defeat the aim of ensuring that the governance structures of the profession reflect the demographics of the country.
99. Save as aforesaid, the contents of this paragraph are noted.

AD PARAGRAPH 33

100. I deny the allegations in this paragraph.
101. It will be submitted administrative action must adversely affect the rights of a person and have a direct, external effect. The rules and regulations do not adversely affect the rights of anyone. No one has a right to be elected to the Provincial Council.
102. Furthermore, no one is compelled to be nominated to the Provincial Council. It is a privilege which legal practitioners enjoy. They are free to nominate a candidate and elect him/her and to stand for election if nominated.
103. It will be submitted at the hearing of this application that the rules, regulations and the application thereof are neither unlawful nor irrational. The LPA enjoins the LPC to take measures to transform the legal profession in a manner which reflects the diversity and demographics of the people of South Africa. This is precisely what the regulations and rules have sought to, and do, achieve.

104. It is neither unlawful nor irrational to prescribe quotas in the composition of provincial councils.

105. Save as aforesaid, the contents of this paragraph are denied.

AD PARAGRAPH 34.1

106. The contents of this paragraph are denied.

107. In amplification of this denial, I aver that the regulations and the rules do not have a perverse effect of limiting to 50% the representation on the Provincial Council of women and black people.

108. The regulations apply across the board by prescribing the composition of the category of the four advocate representatives. They provide that the black woman with the highest number of votes in this category will be elected, and so will the black male with the highest number of votes, a white woman with the highest number of votes as well as a white male with the highest number of votes in each category.

109. This outcome is not perverse. If the quotas are not fixed there is no guarantee that women and black people will gain representation on the council.

AD PARAGRAPH 34.2

110. The LPC does not oppose the application for condonation.

AD PARAGRAPHS 35 - 36

111. I deny that the applicant is entitled to the relief sought.

112. The Applicant loses sight of the fact that that if the impugned Regulations were to be struck down the result would affect the elections and results of all other provinces, without regard to the fact that the elections of those other provinces have had no complaints or constitutional challenge.

AD PARAGRAPH 37

113. I deny that the result is not lawful.

114. I further deny that the result is discriminatory and does not respect democratic principles.

115. In amplification of this denial, I aver that democratic principles are not unfettered. Even the electoral system of our country is a proportional representation system, which means that it is not a winner takes all system.

AD PARAGRAPH 38

116. I deny that the Applicant is entitled to the relief sought, even in the limited manner in which the relief is framed.

AD PARAGRAPH 39

117. I deny that the actions taken by the LPC constitute unlawful or unconstitutional affirmative action measures.

118. The Applicant has failed to demonstrate in what respect those measures are unlawful and unconstitutional.

AD PARAGRAPH 40

119. I deny that there is any violation of the provisions of the Equality Act.

AD PARAGRAPH 41

120. I note the allegations in this paragraph.

AD PARAGRAPHS 42 - 53, 55 - 60, 65 - 70, 72 - 73, 79, 81, 84 - 85, 88 - 93

121. I admit the allegations in these paragraphs to the extent that they correctly outline the history of the LPA and the elections of the provincial Councils. It is incorrect to

suggest that the Minister's power to make regulations is limited in the manner suggested by the Applicant.

AD PARAGRAPH 54

122. I deny that the provincial election procedures were conducted irregularly as regards the Western Cape Provincial Council.

123. I admit the remainder of the allegations in this paragraph.

AD PARAGRAPH 61

124. As I have stated above, I deny that there is anything unlawful about the imposition of the quotas, which categorise candidates according to race and gender and requires one representative from each category.

125. The ballot paper makes it clear that the quota is used in order to achieve an appropriate balance of race and gender in relation to the composition of the Provincial Council. This balance cannot be achieved by simply leaving it to the casting of votes and electing those who have received the highest number of votes.

AD PARAGRAPH 62

126. I deny that the quota has had a perverse effect, in pursuit of an affirmative action measure, of reserving 50% of the places for advocates on the Provincial Council for white people and men.
127. It is not unlawful that 50% of the places for advocates is reserved for white people and men. The electoral system is not about the reservation of seats for various groups, it is about ensuring that all groups have representation.
128. The number of votes only cannot adequately address the lack of racial and gender balance in governance structures.
129. The Applicant focuses on one candidate, namely Mayosi, simply because in this round of elections she is a black woman and happens to have obtained more votes than Paries. It would be perverse to twist, chop and change the regulations and rules simply because a certain outcome has not been achieved.
130. In the next round of elections, the result could be that only white males achieve the highest number of votes. If no categories are used to ensure that there is equitable representation, the purpose of the LPA could easily be defeated.

AD PARAGRAPH 64

131. I deny the contents of this paragraph. The object sought to be achieved is rationally connected to the means used to achieve it.

AD PARAGRAPHS 71 AND 74

132. I deny the allegations in this paragraph.

AD PARAGRAPHS 75 - 78, 80

133. I do not understand the Applicant to be challenging the manner in which the elections were run but only the outcome thereof.

134. The allegations in this paragraph do not go to the complaint made by the Applicant. It is therefore unnecessary for the court to deal with them.

AD PARAGRAPH 86

135. I deny that the advocate members of the Provincial Council were shuffled.

AD PARAGRAPH 87

136. I deny the allegations in this paragraph

AD PARAGRAPHS 94 - 98

137. I have no knowledge of the allegations in these paragraphs and cannot admit or deny same.

AD PARAGRAPH 99

138. The stated purpose of the regulations and rules is to create balance. The regulations do not limit participation by previously disadvantaged people.

139. Save as aforesaid, the contents of this paragraph are denied.

AD PARAGRAPH 100

140. What the Applicant characterises as perverse is that candidates who did not receive the highest number of votes were not elected whereas candidates who received less votes were in certain instances elected. This is not perverse at all. As the ballot paper makes it explicitly clear, candidates are to be voted for in terms of the category into which they fall.

141. The contents of this paragraph are denied.

AD PARAGRAPHS 101 - 102

142. Again, the Applicant misses the point by emphasising the number of votes as the pre-eminent criterion which should be used, when the regulations and rules

specifically designate categories, namely black females, black males, white males and white females as distinct and separate.

143. The number of votes alone will not serve to achieve a fair balance in the composition of race and gender. This is a policy position which the law adopted in enacting the regulations and rules in furtherance of the transformation objective of the LPA.
144. Save as aforesaid, the contents of this paragraph and sub paragraphs are denied.

AD PARAGRAPH 103

145. I categorically deny that there is any perverse effect whatsoever.
146. In amplification of this denial, I aver that the regulations and rules have been applied in the manner in which they have been drafted. To suggest that in Limpopo two black women with greater number of votes were replaced by one white man who just received four votes is a mischaracterisation of the rules and regulations. The two black women were contesting in their own category and so was the white male. In any event the aim is to have all groups represented.
147. The ballot paper makes it absolutely clear that the candidate who receives the most votes in their category will be elected. It is a distortion to suggest that the white male replaced two black women. In the other provinces as well, it is a

distortion to suggest that some candidates replaced others because each candidate contests in their own category.

148. Save as aforesaid, I deny the allegations in this paragraph.

AD PARAGRAPHS 104 - 105

149. The characterisation of the results as being perverse is misplaced.

150. The allegations in these paragraphs are denied.

AD PARAGRAPH 106

151. I deny the allegations in this paragraph.

152. In all provinces there are black males, black females, white males and white females. The manner in which the regulations and rules are framed is perfectly suited to achieving balance in terms of gender and race so that all sections of the legal community have a voice.

AD PARAGRAPH 107

153. I deny the allegations in this paragraph.

AD PARAGRAPH 108

154. I deny the allegations in this paragraph.
155. The Applicant has not pointed out which provision of which law is violated by the rules and regulations. Neither has the Applicant pointed out which provision of the Constitution has been violated and in what manner.

AD PARAGRAPH 108.1

156. The object of the LPA electoral system is to achieve representativity and not equality.

AD PARAGRAPH 108.2

157. The Applicant has failed to demonstrate which law or constitutional prescript is violated by the regulations. The characterisation by the applicant of what it calls absolute limits is misplaced. There are only four seats available for advocates. The Applicant does not seem to deny that measures have to be taken to ensure representativity.
158. What the Applicant seems to argue with is that there should be no limits at all and the only determinant for a candidate to be elected should be the number of votes received. This cannot be correct. There is an absolute cap in respect of all categories e.g two law teachers only, one of whom must be a dean.

159. The allegations in this paragraph are denied.

AD PARAGRAPH 108.3

160. I deny that the regulations and rules impose quotas in an unlawful manner.

161. I deny that they protect positions for white people and males and that they cap the number of black people and women on the provincial Council. I have already explained that to adopt this position, as the Applicant does, is to take too narrow a view of the purpose of the LPA, and the relevant regulations and rules.

AD PARAGRAPH 108.4

162. I deny the allegations in this paragraph.

163. Applicant contends that there was absolutely no need to reserve positions for white people and men in order to ensure the representation of, and by historically disadvantaged classes of practitioners on the Provincial Council. This is misguided. South Africa is composed of both blacks and whites and men and women. To suggest that no positions at all should have been reserved for white people and men, would go against the letter and spirit of LPA which seeks to create governance structures which reflect the demographics of South Africa.

164. As I have stated above the regulations and rules do not constitute administrative action. Neither do they violate any law.

AD PARAGRAPH 108.5

165. I deny the allegations in this paragraph.

166. Again, the Applicant is isolating Paries and suggests that he was irregularly elected. Paries falls into the category of a black male advocate. If he is excluded there will be no voice for this category of legal practitioner.

AD PARAGRAPH 108.6

167. I deny the allegations in this paragraph.

168. The measures are designed to achieve representativity.

AD PARAGRAPH 108.7

169. I deny the allegations in this paragraph. There is no discrimination against anyone because the regulations and rules provide for equal representation of all the race groups in South Africa.

170. If the provision discriminated against women and black people in some cases, there would not have been a requirement that one black woman and one black male should be elected.

AD PARAGRAPH 108.8

171. I deny the allegations in this paragraph.

AD PARAGRAPH 109

172. I deny the allegations in this paragraph.

173. The Minister has broad powers to make any regulations in connection with the LPA in terms of section 94(1)(o) and (p). The Minister can make regulations relating to any other matter in respect of which regulations may or must be made in terms of the LPA or any other ancillary or administrative matter that is necessary to be prescribed for the proper implementation or administration of the LPA.

AD PARAGRAPH 110

174. I deny that the quota provisions fall foul of the Equality Act.

AD PARAGRAPHS 111 - 121

175. The LPC does not oppose this part of the relief.

AD PARAGRAPH 122 - 129

176. Save to deny the allegation that the relief sought will not affect the results of the past elections of the Provincial Councils in other provinces, I note this part of the relief.

AD PARAGRAPH 130

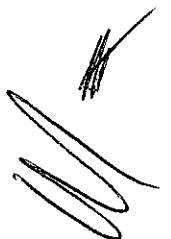
177. I deny that there is any justification for the substitution of the seventh respondent with the fourteenth respondent. I deny the remainder of the allegations in this paragraph.

AD PARAGRAPH 131

178. I deny the allegations in this paragraph.

AD PARAGRAPHS 132 – 145

179. I need not respond to these allegations as a date has been arranged for the hearing of the matter.



AD PARAGRAPH 146

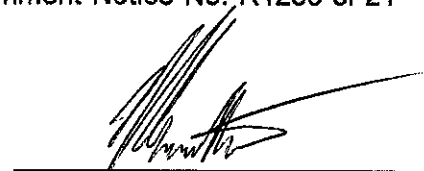
180. In the circumstances the LPC prays that the application should be dismissed with costs, including the costs of three counsel.

WHEREFORE I pray that the application should dismissed with costs including costs occasioned by the employment of three counsel.



JANINE KIM MYBURGH

I hereby certify that the deponent has declared that he knows and understands the contents of the this affidavit and that to the best of his knowledge and belief it is the truth, which affidavit has been signed and sworn to before me at ^{Bellville} ~~Cape Town~~ on this the 27th day of August 2019, and that the provisions of the regulations as contained in Government Notice No. R1258 of 21 July 1972, as amended have been complied with.



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