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IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
(REPUBLIC OF SOUTH AFRICA)

DATE: 09 FEBRUARY 2012  
CASE NO: 20879/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	<input checked="" type="checkbox"/> YES <input checked="" type="checkbox"/> NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	<input checked="" type="checkbox"/> YES <input checked="" type="checkbox"/> NO
(3) REVISED	
09/02/2012 DATE	 SIGNATURE

In the matter between:

URMILLA ROSHNEE DEVI MANSINGH

Applicant

AND

PRESIDENT OF REPUBLIC OF  
SOUTH AFRICA

First Respondent

MINISTER OF JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT

Second Respondent

GENERAL COUNCIL OF THE BAR  
OF SOUTH AFRICA

Third Respondent

JOHANNESBURG SOCIETY OF  
ADVOCATES

Fourth Respondent

INDEPENDENT ASSOCIATION OF  
ADVOCATES OF SOUTH AFRICA

Fifth Respondent

LAW SOCIETY OF  
SOUTH AFRICA

Sixth Respondent

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## JUDGMENT

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**PHATUDI, J**

### **INTRODUCTION**

[1] The applicant, an admitted practising advocate and a member of the Johannesburg Society of Advocates (JSA) seeks an order ‘declaring that the first respondent has no power in terms of [section] 84(2)(k) of the Constitution [of the Republic of South Africa (Act 108 of 1996)] or otherwise to confer the status of senior counsel on practising advocates ...’<sup>1</sup>The applicant further seeks ‘costs against the President (first respondent) and the Minister (second respondent) only ...’. She does not ‘regard it appropriate to seek costs against the professional bodies cited as other respondents<sup>2</sup> in this application, even if they should choose to oppose the application.’<sup>3</sup>

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<sup>1</sup> Notice of Motion page 2

<sup>2</sup> The third – sixth respondents

<sup>3</sup> FA para 11 pay 10

[2] All respondents, save the sixth, oppose the application. The sixth respondent (LSSA) places on record their attitude towards the issue of senior counsel status which is a kernel of this application. They, however, state that they 'will abide by the decision of the ... court'.<sup>4</sup> It must be borne in mind that LSSA has six constituent members, namely: Four statutory Law Societies<sup>5</sup>, Black Lawyers Association (BLA) and National Association of Democratic Lawyers (NADEL).

[3] Lawyers for equality (Law equality), a voluntary association, applied to be admitted as *amicus curiae*. They, in essence, support the applicant and endorse the sixth respondents' sentiments. Their application is opposed by the third respondent (GCB). Unfortunately no one appeared in the two days of hearing of this application on behalf of the *amicus curiae*. I thought they would be of help to me and the court. Counsel for the President<sup>6</sup> submits that the Court and I are on our own.

[4] The only issue that requires determination is whether the President's responsibility of 'conferring honours'<sup>7</sup> include the power to confer the status of senior council<sup>8</sup> on practising advocates. The applicant contends, on the one hand, that 'the President [of the Republic of South Africa] (the President) has no power to confer the status of senior counsel (also known as silk) on practising advocates'<sup>9</sup> and that there is no other legal source that empowers the President to confer senior counsel status. On the other hand, the respondents contend that the President's power to confer the

<sup>4</sup> Nics Swart AA para 6 page 697.

<sup>5</sup> Cape Law Society; Kwa-Zulu Natal Law Society; Law Society of the Free State and the Law Society of the Northern Province.

<sup>6</sup> Adv IAM Semanya SC

<sup>7</sup> Paragraph 84(2)(k) of the Constitution

<sup>8</sup> "S.C." or silk – originally QC, KC

<sup>9</sup> FA para 3 page 8.

status of senior counsel on practising advocates falls within the ambit of section 84(2) (k) of the Constitution.

### **THE PAST**

[5] I find it inevitable to briefly set out the historical background of the institution of senior counsel or silk. MTW Arnheim, in his article, **Silk, Stuff and Nonsense** states that ‘the title “senior counsel” or, to be more precise, “senior consultus”, is self explanatory ...’<sup>10</sup> He alludes to the monarch’s royal personage and the power coupled with the prerogatives they had in appointing “Queen’s Counsel” at the time they ruled within Southern Africa.

[6] He states that ‘the earliest “Queens Counsel” were appointed in the reign of the first Elizabeth, at a time when the Crown felt that it could not entirely rely on the advice of the then senior barristers ... who tended to oppose the interest of the Crown especially in the all-important sphere of land law’<sup>11</sup>. The Crown decided to appoint from senior barristers, Counsel who would advice, represent and protect the interest of the Crown on land laws. It is further stated that ‘silk ... had to obtain leave to appear against the crown ...’<sup>12</sup> The Counsel appointed by the Crown were named “Queen’s Counsel” (QC).

[7] The title QC would change to King Counsel (KC) and vice versa depending on the gender of the occupant of the throne. This is illustrated by Arnheim who states that ‘all silks changed from QC to KC on 22 January 1901 when King Edward VII took over after the death of Queen Victoria’. It is further illustrated that ‘all silks changed from KC to QC on 6 February 1952 when

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<sup>10</sup> Arnheim pg 377

<sup>11</sup> Page 377

<sup>12</sup> Arnheim page 378

the death of King George VI brought Queen Elizabeth II to the throne'.<sup>13</sup> Not to belabour the point, a silk is appointed to act as a counsel to the Crown, regardless of who the monarch of the day is, and his proper title is neither QC nor KC but simply “**one of Her Majesty’s counsel** or **one of His Majesty’s counsel**”, as the case may be.<sup>14</sup>

[8] In his article, **The History of the Division of the South African Legal Profession**,<sup>15</sup> Charles Friedman (Friedman) demonstrates on how the term King’s Counsel came about. He states that the first Kings Counsel in England was appointed in 1604. The appointment “carried a salary of £40 per annum.”<sup>16</sup> He further states that the term “silk” was taken from the material of a King’s Counsel’s gown (which incidentally is now nylon) compared with the stuff or wool gown of other barristers<sup>17</sup>

[9] The institution of awarding silk in South Africa has been “adopted” pre 1961 by way of the Queen’s prerogatives. When South Africa became a Republic in 1961, the QC kept their patents. New appointments were made by the State President and named Senior Counsel (SC). This was a prerogative power bestowed on State President by the Constitution (The Republic of South Africa Constitution Act 32 of 1961, (1961 Constitution)) that provides that the ‘[State President] shall, ... have power<sup>18</sup>

- a) ...
- c) to confer honours<sup>19</sup>

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<sup>13</sup> Page 378  
<sup>14</sup> Page 378-379  
<sup>15</sup> De Rebus, February 1990  
<sup>16</sup> Page 265 AA)  
<sup>17</sup> Page 265  
<sup>18</sup> My underline  
<sup>19</sup> Section 7(3)(c) of Act 32 of 1961

[10] Added thereto, section 7(4) provides that ‘the State President shall in addition as head of state have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative.’ These provisions were adopted verbatim in Republic of South Africa Constitution Act 110 of 1983 (1983 Constitution). Section 6(3) provided that ‘the State President shall ... have power<sup>20</sup>

- a) ...
- b) to confer honours’

[11] Similar to section 7(4) of 1961 Constitution, section 6(4) of 1983 Constitution provides that ‘the State President shall, in addition as head of the state, have such powers and functions as were immediately before the commencement of this Act possessed by the State President by way of prerogative.’

[12] The provision of section 82(1) of the Constitution of the Republic of South Africa Act 200 of 1993 provides that ‘the President shall be competent to exercise and perform the following powers and functions, namely:

- (a) ...
- (e) to confer honours;

It must be borne in mind that the clause: “...powers and functions as were immediately prior to the commencement of this Act possessed by the Queen/State President by way of prerogatives” was excluded.

[13] The powers and functions of the President are succinctly set out in section 84 of the Republic of South Africa Act 108 of 1996 (the Constitution). Section 84(1) provides that ‘the President has the powers entrusted by the Constitution and legislation<sup>21</sup>, including those necessary to perform

<sup>20</sup> My underline

<sup>21</sup> Underline and bold is my emphasis

the functions of Head of State and head of the national executive. Section 84(2) provides that 'the president is responsible<sup>22</sup> for

- a) ...
- k) Conferring Honours.'

[14] It is common cause that

14.1 the South African system has changed from pre 1961 monarchy to parliamentary sovereignty in 1961 and finally to constitutional democracy (1993 and 1996)

14.2 in the 1961 and 1983 Acts respectively, the State President, as Head of State, retained "such powers and functions as were possessed by the Queen prior to 1961 Act by way of prerogatives".<sup>23</sup>

14.3 the 1993 and 1996 Constitutions did not retain the said powers and functions the Queen/State President possessed by way of prerogatives.

14.4 the President has only such powers as are bestowed on him by the Constitution or by legislation consistent with the Constitution.

[15] The appointment of Queen's Counsel was the Queen regnant's prerogative. Queen Elizabeth I appointed QC at the time when "the Crown felt that it could not entirely rely on the advice of the then senior barristers, the serjeants, with tendencies to oppose the interest of the Crown, especially in the all-

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<sup>22</sup> My underline

<sup>23</sup> Section 7(4) of 1961 Act and 6(4) of 1983 Act

important sphere of land law”.<sup>24</sup> The creation of QC was with “sole original function ... to advice and represent the Crown on legal issues.”<sup>25</sup> Friedman<sup>26</sup> echoes that’ that “a King Counsel, the first of whom was appointed in 1604, [was] to represent the crown in cases in which it was interested and which appointment carried a salary of £40 per annum.”

[16] It is apparent from the history set out above that the prerogative of appointing KC or QC was solely on the monarch. The appointments were made solely with the purpose to advice and or represent the Crown in cases of the Crown’s interest. The title of such appointee would either be KC or QC. As shown earlier, KC or QC was appointed to act as Counsel and to counsel only the Crown. Counsel would seek leave to counsel any other person other than the Crown. As a result thereof, the appointee would be addressed as **“one of His or Her Majesty’s Counsel.”**<sup>27</sup> I as well, addressed all Senior Counsel during the proceedings as “one of His Majesty’s Counsel” though the applicant’s counsel prefers to be addressed “one of His President’s Counsel”. He further submits that he would prefer to be addressed as President’s Counsel than Senior Counsel if I find that the President has the power to confer the status.

[17] It is trite that prior to 1961, South Africa had a Queen up to the creation of Union of Crowns between Britain and South Africa with a result of a King or Queen of South Africa being the same person as the British head of State. The King or Queen had the power to appoint KC or QC, as the case would be, was still appointed solely with the purpose

<sup>24</sup> MTW Arnheim in his *Silk Stuff & Nonsense* 1984 vol 101 SAY @ page 378

<sup>25</sup> *Ibid*

<sup>26</sup> C Friedman – In *History of the division of the SA Legal Profession De Rebus* 1990 @ page 1387

<sup>27</sup> Page 189 – Arnheim – *opcit* page 379



to act as Counsel and to counsel or represent the Crown in cases of interest to the Crown. It has been demonstrated that the 1961 Constitution and 1983 Constitution empowered the State President in addition to the powers the President had as the Head of State, to have such powers and functions as were possessed by the Queen and State President by way of prerogatives prior to commencement of 1961 and 1983 Constitutions respectively (the prerogative clause).<sup>28</sup>

[18] It is trite that the prerogatives clause has been excluded from the Constitution. “One of His President’s Counsel”<sup>29</sup> submits that the reading of section 84 of the constitution points to the fact that many of those powers which were originally known as Crown/Royal/Executive prerogatives have now been constitutionalised.<sup>30</sup> Counsel for the forth respondent<sup>31</sup> submits that it was an oversight on the part of the drafter of the constitution not to include the provisions enacted under section 6(4) of the 1983 Constitution. The third respondent’s counsel<sup>32</sup> submits that section 84 of the Constitution codifies the powers and functions of Head of State which were previously exercised by the Head of State under the former constitutions.<sup>33</sup> He further submits that the powers and functions excluded in the constitution are those that are no longer reconcilable with the fundamental structures and principles of the constitution. He further thereto submits that the powers and functions codified include the Royal prerogative. Those prerogatives included the conferring of silk on senior advocates. He lastly on this point, submits that the said prerogative has been grounded in the constitution especially under section 84(2) (k) i.e.

<sup>28</sup> Section 7(4) of Act 32 of 1961 of section 6(4) of Act 110 of 1983

<sup>29</sup> Adv IAM Semenya SC

<sup>30</sup> First & second respondents heads of argument, page 7 para 24(f)

<sup>31</sup> Adv WH Trengrove SC

<sup>32</sup> Adv WHG Van der Linde SC

<sup>33</sup> 1961 and 1983

“conferring honours”. Added thereto, counsel submits that this institution does have a particular origin and it sits in a particular setting and the context be taken into account. He further submits that the State President(s) pre 1994 acted the same way as the monarchs did pre 1961. They all had prerogative powers which included the power to confer silk.

[19] I asked counsel to address me on whether the monarchs’ prerogatives were not too personal and subjective in appointing the King or Queen’s counsel as the monarchs required the “best” or counsel most “feared” to protect, represent and advice the Crown on issues of interest to the Crown or whether the said appointment could be said be an honour considering the Constitution. The Fourth respondent’s counsel submits that that’ was regarded as an honour which was expressly enacted in the 1961 and the 1983 Constitution. He opines that the drafters of the final Constitution would either have intended that the power to confer silk be deliberately excluded or it slipped away by accident. He further submits that some academics thought it a good idea to exclude the prerogative of, among others, conferring the status of Senior Counsel. He, however, opines that the drafters intended continuation of the President’s power to confer silk. He refers me to the President’s minute no 171 dated 26 March 2003. The minute states that ‘under section 84(2)(k) of the Constitution of the Republic of South Africa,(Act 108 of 1996), I hereby appoint the following persons as Senior Counsel for the Republic of South Africa...’<sup>34</sup>

[20] Counsel for the sixth respondent submits that it could not have been the intention of the drafters of the Constitution to constitutionalise the conferring of silk under section 84(2). He states that the preamble of

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<sup>34</sup> First and second respondents’ annexure J22 at page 237

the Constitution is cutting the relations with the past. Counsel for the fourth respondent firstly refers me to the historical background from an article **The Rank of Queen's Counsel**<sup>35</sup> He further refers me to the judgment in **Peter H Lenoir et al v Joseph Norman Ritchie**<sup>36</sup> (Lenoir case) where the court, as he submits, "made it absolutely clear that the award of silk was an honour. He quotes paragraph 52 thereof, where it is stated that '[i]n England, the sovereign, as a general rule, uses the prerogatives to confer honours and dignities upon eminent and deserving barristers, noted for the exhibition of superior legal talents and abilities and public service ...' He further quotes from paragraph 85 where it was held that 'the right to appoint Queen's counsel is a branch of the Royal Prerogative, that it, (equally with the power to grant letter Patent of Precedence, to make Sergeants-at-law, Judges, Knights, Baronets and other superior titles of dignity and honour) flows from the fountain of honour which has its seat and source in the person of royalty. In England... a Queen's counsel is the standing counsel of the Queen, retained by her to be of her counsel in all matters in which he may require his services."

[21] Counsel submits that the appointment of silk started as an office and continued to exist as an honour which appointment was made by the monarch under the prerogative to award honours. He demonstrates with an aid of a schedule he handed up, how these prerogatives were inherited by the 1961 and 1983 Constitution from the Monarch's. He states that the said prerogatives were not repeated in the interim and final Constitution. He further thereto refers me to the memorandum dated 7 September 1995 where it is stated that "the treatment of those powers previously referred to as prerogatives cannot exist under the new constitution. Any

<sup>35</sup> Penned by Baker (The author's full names are not clear from the article. I rely on Mr Trengrove's submission of his name as Baker)

<sup>36</sup> The Supreme Court of Canada (1879) 3 SCR 575: heard on 30 January 1879 and judgment delivered on 4 November 1879

reference to such concept should be avoided. All powers have to be constitutionalised”.

[22] In my evaluation of the historical background, especially how the institution of KC/QC or Silk was first established, it is clear that the Monarch needed barristers who would advise the Crown in all important spheres of the law and to represent the Crown in protecting the interest of the Crown in land laws. The appointed Q.C., who would be known as “one of His/Her Majesty’s Counsel, would first obtain leave to appear against Crown. It is apparent from the history set out by various jurists that the QC function was to advise the crown and not act against without leave. Baker in his article, states that the Queen Elizabeth I was unwilling to appoint Bacon because he had opposed the government. Bacon’s later appointment was “motivated by the desire to ensure that a newly risen star should not use his talents against the crown. Bacon was appoint but not with full benefits.<sup>37</sup> This is an indication that the QC was appointed as a “shield” of the Crown’s interest in the land laws. The appointment of QC was a matter of the Royal’s prerogatives, as Baker puts it, “that such persons ... shall be appointed to be one of His Majesty’s Counsel at law by letters patent under the seal of England shall have presidency in all places before sergeants at law that are not the King’s sergeants”.

[23] The Crown, in “fear” of loosing cases of interest to its land rights, thought of securing the barristers who are articulate and clear in law to be on its side. The main function of such appointed barrister was to advice the crown on land laws. The barristers appointed as Q.C were respected by the Crown. The barristers felt honoured by the appointment to the

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<sup>37</sup> The patent and annual fee of £40

office and by being the bearers of patent. The appointment of Q.C was the King/Queen's prerogative power. This prerogative power to appoint the Q.C was enacted in the 1961 Constitution under section 7(4). The said prerogatives were incorporated in the 1983 Constitution under section 6(4) and not in the interim and final Constitution. I agree with the Fourth and sixth respondent's counsel that the final constitution makes a clean break with the past. I am of the view that it was not an oversight on the part of the drafters on behalf of South Africans by not including the said prerogatives in adopting the Constitution. I do not agree with the Third respondent's counsel that the prerogatives the Monarchs and the State President's respectively are codified in the Constitution. The drafter's thought of having a break with the past is, in my view, an avoidance of adopting concepts into the Constitution which are not based on the will of the people of South Africa. It was probably in avoidance of creating an allochthonous constitution. The Constitution is drafted and adopted by South Africans in order to build a united and democratic South Africa. This renders the South African Constitution, autochthonous.

### **THE PRESENT**

[24] Section 84(2)(k) of the Constitution provides that the President is responsible for conferring honours.(my emphasis) The question to decide is whether the President has the power to award silk to practising advocates. Counsel for the President stretches it further that the court is to determine the scope, ambit and breath of the word honour as found in section 84(2)(k) of the constitution. Lastly, the court is to determine what the word "honour" entails as it appears in the Constitution.

[25] It is common cause that the Constitution is the supreme law of the Republic and does not permit the exercise of public power that is not authorised by the Constitution or any other law. It is further common cause that the President alone has the powers entrusted by the Constitution and legislation as worded in terms of section 84(1). Further thereto, the President, as the Head of State, is responsible for performing the functions enlisted in section 84(2).

[26] The applicant submits that the dictionary definitions of the word “honour” are not particularly helpful in determining the scope of the honour-conferring power of the head of state in our democratic dispensation. The applicant further submits that the phrase “conferring honours” under section 84(2) (k) cannot mean any act by the President which result in an individual being accorded an honour which he did not earn. She lastly submits that conferring the status of senior counsel on practising advocates by the President cannot be regarded as an “honour”.

[27] The respondents submit in rebuttal that the court must apply the purposive interpretation in the constitutional context in interpreting the word “honour” as phrased in section 84(2)(k). He further submits that the past 50 years background be taken into account in determining the intended meaning in that the conferral by the President of senior counsel status on practising advocates is wide enough to include the concept of honour.

[28] The word “honour” is defined in Shorter Oxford English Dictionary on Historical Principles<sup>38</sup>, as

1 High respect, esteem, deferential admiration; an expression of this; glory, credit, reputation, good name

2 Nobleness of mind or spirit; magnanimity; uprightness; adherence to what is due or correct according to some conventional or accepted standard of conduct

3 Exalted rank or position; distinction ...: a title of respect given to a country court etc Judge ...

4 A thing conferred or done as a mark of respect or distinction, esp a title of rank ...

5 A source or cause of distinction; a person who or thing which does credit to another...”

[29] In my view, the word “Honour” can, on the one hand, be defined as having a respect<sup>39</sup> over another person who did something good beyond human expectation. In this context, honour has an element of “admiration.” On the other hand, a person may feel honoured to unexpectedly be chosen to be in a team of someone respectable or to be granted a particular honourable and respectable status. The respect the chosen may have over such a respectable person may mean that one

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<sup>38</sup> Fifth edition, volume 1 A-M

<sup>39</sup> Respect as taking a hat off for a person

would not like to compete with such a person and would always wish to be on that person's side. In this context, "fear," is an element.

[30] Confer is defined as

"1 ...

5 Give, grant or bestow (a title, degree, favour, honour<sup>40</sup> etc).<sup>41</sup>"

In simpler terms, confer is merely to "grant a title or honour" to a person.

[31] The interpretation of phrases in the Constitution must be done in a manner that is compatible with the fundamental values embodied in it. The phrase embodied in section 84(2) (k) of the Constitution is no exception.

[32] The applicant submits that an "honour" for purpose of section 84(2) (k) is a recognition from the head of state for distinguished service to the country.<sup>42</sup> She refers to the Presidency's website<sup>43</sup> where it is stated that honours that may be conferred by the President as national orders is, among others, Order of Luthuli, which is awarded to South Africans who made meaningful contribution to the struggle for democracy, human rights, nation building, justice, peace and conflict resolution. Order of Luthuli is one of the "honours" the President confers on lawyers who have rendered distinguished service to the country.

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<sup>40</sup> Honour is my insertion

<sup>41</sup> Shorter Oxford English Dictionary (op cit) vol 1 A-M

<sup>42</sup> FA pg 22 para 41

<sup>43</sup> [www.thepresidency.gov.za](http://www.thepresidency.gov.za)



[33] The applicant further submits that the conferral of the status of senior counsel is not mentioned on the Presidency's website as part of the system of national orders. She submits that "silk" is not an 'honour' as contemplated in section 84(2)(k) and is not viewed as such by the President.

[34] In rebuttal thereto, the President states that to read [the word] "honour" in section 84(2)(k) of the Constitution as excluding the conferment of senior counsel status to deserving practising advocates is, to do unnecessary violence to the values of the constitution...<sup>44</sup> He further states, as advised, that "the contention that conferment of senior counsel status to practising advocates who qualify is not an "honour" offends against the ordinary construction of the word "honour".<sup>45</sup> The President submits that the argument advanced by the applicant that the presidency's website listing National Orders and not including the conferment of senior counsel status as one such honour indicates that the senior counsel status is not an "honour" is unfortunately misplaced".<sup>46</sup> He states further that the framers of the Constitution must have been comfortable that the power of the President to confer honours includes the power of the President, among other honours, to confer senior counsel status to practising advocates who qualify."<sup>47</sup>

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\* P.AA, p 219 para 5.9  
\* P.AA, p 219 para 5.11  
\* AA p220 para 6.1  
\* AA page 221 para 6.6

[35] The question that arise is how does a practising advocate qualify to be conferred a status of senior counsel. It is noted that “advocates who qualify” to be conferred the status of senior counsel, apply to be so “honoured”. The application procedure used by the Johannesburg Bar Council is that:

35.1 The candidates are invited to apply for silk. The applicant must discuss his/her proposed application informally with the Leader of the Bar.

35.2 The Bar council considers the application based on the candidate’s practice which should consist of good quality work. If the application succeeds, the Chairperson of the Bar discusses the recommended application(s) with the Judge President.

35.3 If the Judge President approves of the application(s), he forwards the recommendation to the Minister of Justice and to the President.<sup>48</sup>

[36] On perusal of the Presidency website, it is clear that the presidency ‘[sought] to move away from the past and the President’s Advisory Council on National Orders was given a task and responsibility to review the system of National Orders and awards.’ This is a clear indication that the presidency recognised the injustices of the past South Africa by moving away from such

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<sup>48</sup> Third respondent AA para 64-68

practices and to lay the foundation for a democratic and open society based on the will of the people. The collective outcome of the President's Advisory Council on National Orders together with a panel of academics and specialists resulted in the commissioning and ultimate design of the new National Orders. The new National Orders have been concerned in the spirit of rebirth.

[37] Considering the submissions made by the parties, I am of the view that the argument advanced by the applicant that non inclusion of conferment of senior counsel status on the presidency website is not one such "honour" as envisaged in terms of section 84(2)(k), is correct. I am further of the view that the submission is not misplaced. The Order of the Baobab, for instance, is awarded to South African citizens for services distinguished beyond the ordinary call of duty. It is an "honour" awarded for exceptional and distinguished contribution in community service. I am reluctant to accept that the framers of our autochthonous Constitution were comfortable that the President is empowered in terms of section 84(2) (k) to confer the status of senior counsel on practising advocates.

[38] Are the services and contributions made by practising advocates exceptional or beyond the ordinary call of duty that warrant an award of

the status of senior counsel? Can an award of the status of senior counsel be equated with, for instance, Order of Luthuli or Order of the Baobab, the latter being awarded to South African citizens with distinguished service that is way above or beyond the ordinary call of duty?

[39] I enquired from third and fourth respondents' counsel if the services of the practising advocates were beyond the ordinary call of duty that warrant such an award or did they serve the people of South Africa exceptionally or beyond the ordinary call of duty. I further enquired if such advocates have done the *pro bono* work beyond the ordinary quota expected of the legal practitioner?

[40] None of the respondents answered the question to persuade me that the conferral of senior counsel is indeed an "honour". They indicate that an "honour" on the part of the advocates is assessed on the "good quality work" and on "a person of perceived ability, leadership qualities and maturity of judgment". Their emphasis is on "a person of integrity and with honourable conduct".<sup>49</sup>

[41] The President submits that 'there are other forms of "honour" bestowed on individuals who distinguish themselves in one or other manner.' He illustrates

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<sup>49</sup> "Go tlotla"

that [he has] in terms of section 84(2)(k) of the Constitution, conferred honours on members of the South African Police Services... who has served during the FIFA World Cup 2010... and who has displayed an irreproachable character and exemplary conduct during that event'.<sup>50</sup> The award or medal referred to is the **“Soccer World Cup 2010 Support Medal, 11 June to 11 July 2010.”** The President deemed it desirable to commemorate the successful Soccer World Cup 2010 international event. He as a result, deemed it appropriate to distinguish the said period in a suitable manner. The President then Gazetted<sup>51</sup> ‘...by virtue of the powers vested in me in terms of section 84(2) (k) of the Constitution ... read together with section 44(2) of the South African Police Services Act, (Act 68 of 1995); I hereby institute a medal, which shall be known as the “Soccer World Cup 2010 Support Medal”, which shall be reserved exclusively for that purpose,...

[42] Section 44(1) of the South African Police Services Act (SAPS) provides that ‘the National or Provincial Commissioner may, after consultation with the Minister or member of the Executive Council, make an appropriate award to any member or other person for meritorious services in the interest of the Service’. Subsection (2) provides that ‘the President may institute, constitute and create decorations and medals, as well as bars, clasps and ribbons in respect of such decorations and medals, which may be awarded by the President, the Minister or the member of the Executive Council, subject to such conditions as the President may

<sup>50</sup> AA p220 para 6.3  
<sup>51</sup> Government Gazette 34106 of 15 March 2011.

determine, to any member or other person who has rendered exceptional service to the Service.’

[43] It is common cause that the President is empowered and entrusted by the Constitution and legislation to perform the functions of the Head of State. He as well has the required authority to exercise and perform the power and function for conferring honours.<sup>52</sup> It is further common cause that the 2010 World Cup is an international event which South Africans in particular, were overwhelmed to host successfully. Certain members of SAPS, reservists and other civilians acted beyond their ordinary call of duty by ensuring and assuring the people in South Africa of their safety by displaying an irreproachable character and exemplary conduct during the event. It is on this premise the President deemed it appropriate to honour those people by instituting a medal known as the “Soccer World Cup 2010 Support Medal”. In my view, the President acted correctly as empowered by the Constitution and legislation in honouring those people by instituting the medal.

[44] Considering all the above, It is clear that the members of SAPS who have been honoured by being awarded the Soccer World Cup 2010 Support Medal, did not apply to be so honoured. It is on that basis I am of

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<sup>52</sup> Section 84(2)(K)

the view that an honour is earned while serving the country exceptionally beyond the ordinary call of duty. It is noted that practising advocates who wish to be “honoured” by being awarded the status of senior counsel, apply first to the Bar Council they are affiliated to. The Bar Council submits the recommended names to the Judge President of the particular division who makes the recommendation to the Minister of Justice. The Minister of Justice in turn makes the recommendation to the President, who confers the status of senior counsel.

[45] There is no legislation, including the Admission of Advocates Act 74 of 1964 (Advocates Act) that empowers the President to institute, constitute and award the status of senior counsel to practising advocates or any legal practitioner who has displayed “good quality work” to the legal profession. The term “Senior Counsel” is not even defined in the Advocates Act. The term only appears in section 8A that provides that ‘[t]he President may at the request of any person appointed as a Senior Counsel of the Republic while in the service of the State, withdraw such appointment, and thereupon such person shall revert to the status which he had as an advocate immediately prior to that appointment’. Reference to “any person appointed as a Senior Counsel,” refers, in my view, to the Senior Counsel appointed by the King/Queen or the State Presidents in terms of the previous Acts by way

of their prerogatives. Counsel for the sixth respondent<sup>53</sup> submits that Kenya Advocates Act incorporates the award of Senior Counsel Ship. Counsel submits that the status is awarded to “great lawyers” who have served the community and have been presidents of the Law Society. He further submits that such lawyers are considered to have served the community and legible for an award of Senior Counsel. In South Africa there is no legislation in place that covers the conferment of honours on practising advocates.

[46] The Constitutional Court in **President of the Republic of South Africa & Another v Hugo**<sup>54</sup> considered on appeal the nature of the powers granted to the President by section 82(1)(k) of the interim Constitution. The judgment of the majority penned by Goldstone J noted that ‘Section 82(1) contains powers which historically are the non-statutory or prerogative powers which have traditionally inhered in the English monarch. ...In South Africa, prior to 1993, some, but not all, of those powers have been codified in earlier constitutions. Those that remained non-statutory<sup>55</sup> were dealt with by reference to the exercise of the prerogative by the English monarch.’<sup>56</sup> The court held that ‘there is no express reference to prerogative powers and those powers of the President

<sup>53</sup> Mr Nano Matlala. Argument advanced from the bar. No HOA were submitted  
<sup>54</sup> 1997(4)SA 1 CC  
<sup>55</sup> My underline  
<sup>56</sup> Paragraph [5] at page 6



which originated from the royal prerogatives are to be found in section 82(1).<sup>57</sup> It is further held that ‘two conclusions can be drawn from the foregoing. First, the powers of the President which are contained in section 82(1) of the interim constitution have their origin in the prerogative powers exercised under former constitutions by South African heads of State. Second, there are no powers derived from the royal prerogative which are conferred upon the President other than those enumerated in section 82(1).’<sup>58</sup> Section 82(1) of the interim Constitution is almost a replica of section 84(2) of the final Constitution. Section 82(1) (e) of the interim constitution is a replica of section 84(2) (k) of the Constitution. The words of Goldstone J that “there are no powers derived from the royal prerogative which are conferred upon the President other than those enumerated in the constitution” requires no qualification. It must, however, be borne in mind that the prerogative referred to is a ‘special right or privilege exercised by a monarch or Head of State over all other people, which overrides the law and is in theory subject to no restriction’.<sup>59</sup> The President’s power is entrusted only by the Constitution and legislation. The **Lenoir case** finds no application within our democratic autochthonous Constitution in that “in England, the sovereign... uses the prerogatives to confer honours”<sup>60</sup>

<sup>57</sup> Paragraph [7] at page 8 (considering further the exclusion of the prerogative clause)  
<sup>58</sup> Paragraph [8] at page 8  
<sup>59</sup> As defined in The New Shorter Oxford English Dictionary  
<sup>60</sup> Op cit

[47] I do not think that section 84(2) (k) proposes a system of awarding any professional who attained an advanced skill in forensic work in his or her profession a status of seniority. If conferring honours envisaged in terms of section 84(2)(k) does include awarding the seniority status to the legal profession, I am afraid, the President will be responsible for conferring honours of seniority to accountants, doctors, auditors, to mention but a few, of 12 years experience with trace records of “good quality work”.

[48] Counsel for the fifth respondent submits that the institution of “Senior Counsel” should be retained because senior counsel “intimidates” judges when advancing arguments in court.<sup>61</sup> She persists with her submission notwithstanding my several enquiries of her usage of the word instead of the word “persuades”. Do practising advocates really apply for the status of senior counsel with the purpose of intimidating judges? Do Judges President and Minister of Justice and Constitutional Development really recommend to the President to appoint Senior Counsel to intimidate judges?

[49] In my final analysis, the appointment of practising advocates as senior counsel does not amount to the conferring of an honour within the

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<sup>61</sup> Adv Van Veenendal submits orally No HOZ were prepared and handed in.

meaning of section 84(2)(k) of the Constitution of the Republic of South Africa.

[50] I cannot agree more with the President's counsel<sup>62</sup> that the institution of silk promotes the culture of hard work. It inspires the young advocates and instils the culture of hard work within the legal practitioners and the profession. The reward of hard work is more work and the reward of "good quality work" is respect from fellow countrymen. The respect from fellow countrymen is an honour. An honour is earned.

#### **THE FUTURE**

[51] The future is uncertain. The Legal Practice Bill is still in the making. The version of the Bill, (as I am made to believe, is as at December 2010) provides under section 95 that "[t]he Minister must, after consultation with the council, prescribe the manner of application, procedure and criteria for the conferring of senior status on legal practitioners". Fortunately, I am neither required to determine the future of the status of senior counsel nor to pre-empt how it will be handled. The ball is in the capable hands of the Legislature and the Legal Profession.

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<sup>62</sup> Adv IAM Semanya SC

**CONCLUSION**

[52] It is indeed correct that granting the relief sought will imply that all awards of Senior Counsel's status made since the advent of the interim Constitution on 27 April 1994 are invalid. The applicant states that that does not follow that such awards should be set aside. Fortunately, once more, I am not required to consider this aspect because the applicant does not seek such relief in these proceedings. This is a matter I again leave in the capable hands of the Legal Profession or another forum.

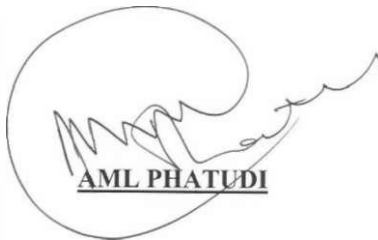
[52] It is trite that costs follow the event. Counsel for the applicant submits that he and his team act *pro amico*. They are, as a result, only entitled to disbursements incurred.

[53] I, in the result, make the following order:

**ORDER**

**53.1** The first respondent has no power in terms of section 84(2) (k) of the Constitution of the Republic of South Africa to confer the status of senior counsel on practising advocates.

**53.2** First and Second respondents are ordered to pay the applicant's costs.



**AML PHATUDI**

**JUDGE OF THE NORTH GAUTENG HIGH COURT**

HEARD ON:  
DATE OF JUDGMENT:

**COUNSEL FOR APPLICANT:** Adv. Nazeer Cassim SC

Adv. Owen Rogers SC  
Adv. Eduard Fagan SC  
Adv. MJ Ramaepadi

INSTRUCTED BY: SADER ATTORNEYS, JHB

**COUNSEL FOR FIRST AND SECOND RESPONDENTS:** Adv. IAM Semanya  
SC

Adv. Z Gumede

INSTRUCTED BY: STATE ATTORNEY, PTA

**COUNSEL FOR THIRD RESPONDENT:** Adv. WHG Van der Linde SC  
Adv. JMA Cane SC  
Adv. A Stein  
Adv. K McLean

INSTRUCTED BY: GILDENHUYS LESSING MALATJI INC

**COUNSEL FOR FOURTH RESPONDENT:** Adv. WH Trengrove SC  
Adv. APH Cockrell SC  
Adv. FA Snyckers SC  
Adv. NH Maenetje SC  
Adv. S Cohen  
Adv. MFM Sikhakhane

INSTRUCTED BY: MKHABELA HUNTLEY ANDEKEYE INC, PTA

**COUNSEL FOR FIFTH RESPONDENT:** Adv. M Klein

INSTRUCTED BY: WERNER ROOS IMMELMAN, PTA

**COUNSEL FOR SIXTH RESPONDENT:** MOTLE JOOMA & SABDIA INC, PTA