THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 417/2012

In the matter between:

GENERAL COUNCIL OF THE BAR	**FIRST APPELLANT**
JOHANNESBURG SOCIETY OF ADVOCATES	**SECOND APPELLANT**
v	
URMILLA ROSHNEE DEVI MANSINGH	**FIRST RESPONDENT**
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**SECOND RESPONDENT**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**THIRD RESPONDENT**
INDEPENDENT ASSOCIATION OF ADVOCATES OF SOUTH AFRICA	**FOURTH RESPONDENT**
LAW SOCIETY OF SOUTH AFRICA	**FIFTH RESPONDENT**

Neutral citation: *General Council of the Bar v Mansingh* (417/12) [2013] ZASCA 9 (15 March 2013).

Coram: Brand, Shongwe, Leach JJA, Southwood and Saldulker AJJA

Heard: **18 February 2013**

Delivered: **15 March 2013**

Summary: **Constitution – s 84(2)(*k*) – whether President's power to 'confer honours' contemplated in the section includes the authority to appoint senior counsel – held that on the interpretation of the section in its historical perspective it includes that authority and that there is nothing in the broader context which is at odds with that interpretation.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Phatudi J sitting as court of first instance):

(a) The appeal is upheld.

(b) The order of the court a quo is set aside and replaced with the following:

'The application is dismissed. First and second respondents are ordered to pay the applicant's costs.'

JUDGMENT

BRAND JA (SHONGWE, LEACH JJA, SOUTHWOOD and SALDULKER AJJA concurring):

[1] The first respondent, Ms Urmilla Mansingh (Mansingh), is a practising advocate and a member of the Johannesburg Society of Advocates (JSA). Proceedings started when she brought an application in the North Gauteng High Court, Pretoria for a declarator that s 84(2)(*k*) of the Constitution does not authorise the President of the Republic to confer the status of senior counsel on practising advocates. On the papers reference is often made to the institution of senior counsel as 'silk' and to those who hold that status as SCs or silks. The reference to silk, of course, derives from the fabric of the gowns traditionally worn by senior counsel. Though, as the court a quo rightly pointed out, silk has since largely been replaced by ersatz material, I nonetheless propose to follow that nomenclature, because I find it convenient to do so.

[2] As respondents to her application, Mansingh cited six parties. They were:

- The President of the Republic (the President).
- The Minister of Justice and Constitutional Development (the Minister).
- The General Council of the Bar (GCB), which is an affiliation of the ten Societies of Advocates, roughly corresponding to the different High Courts, in South Africa.

- The JSA, of which Mansingh, as I have said, is a member.
- The Independent Association of Advocates of South Africa (IAASA), whose members comprise practising advocates who are not members of the Societies of Advocates constituting the GCB.
- The Law Society of South Africa (the Law Society), which essentially represents the attorneys' profession in this country.

[3] In the court a quo all the respondents, save for the Law Society, opposed the application. The position taken by the Law Society in its answering affidavit appeared to be somewhat ambivalent. Though it sought to avoid the fray by abiding the decision of the court, it nonetheless stated its view that the title of 'senior' should not be conferred on either advocates or attorneys. Eventually Mansingh's contentions found favour with Phatudi J in the court a quo. Hence he granted the declarator sought. Costs of the application were awarded in favour of Mansingh, but against the President and the Minister only, which corresponded with the costs order for which she asked. The judgment of the court a quo has since been reported as *Mansingh v President of the Republic of South Africa and others* 2012 (3) SA 192 (GNP). The appeal against that judgment is with the leave of the court a quo. It is by the GCB and the JSA only. Since the arguments presented by the two appellants essentially went along the same lines, I propose to ascribe those arguments to 'the appellants'. Apart from the Law Society, the other erstwhile respondents in the court a quo, including the President and the Minister, abide the decision of this court on appeal. Whatever the outcome of the appeal, the costs order in the court a quo against the President and the Minister must therefore stand. As to the Law Society, its stance became somewhat bolder on appeal, in that it was no longer content to abide the decision of the court, but actively supported Mansingh's case by advancing separate arguments of its own.

[4] The issue raised by the appeal is of narrow ambit. They turn exclusively on the interpretation of s 84 of the Constitution. The relevant part of this section provides:

'Powers and functions of President:

(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for –

(a) . . .

. . .

(*k*) conferring honours.'

[5] Mansingh's case, which received the approval of the court a quo, is that s 84(2)(*k*) of the Constitution does not include the power to confer the status of senior counsel or silk on practising advocates. The appellants' counter-argument is that it does. An alternative argument raised by the appellants is that even if the conferral of silk cannot be accommodated under the honours power in s 84(2)(*k*), it is authorised by s 84(1) as an auxiliary power necessary to carry out a function of the President as Head of State. Although this alternative argument was raised on the appellants' papers and advanced on their behalf at the hearing of the application, it was not considered in the judgment of the court a quo. On appeal the rival cases remained the same.

[6] Before I come to the interpretation of s 84 I find it appropriate, at the outset, to clear the decks, as it were, of matters not pertinent in this case. The question we have to decide, as I have said, turns on whether the President has the power to confer silk. Questions relating to whether the institution of silk is a 'good thing or a bad thing' and whether it is an institution that should be abolished or retained, are not on the agenda. I say this because Mansingh made it clear, at a fairly early stage of her founding affidavit that, as a matter of principle and for considerations of policy, she is opposed to the institution of silk; that in consequence, she actively sought its abolition. In support of these contentions, she argued that practising advocates, like herself, who apply for silk, but who are unsuccessful in their applications, suffer real disadvantage in their practices and great distress. In her replying affidavit she pursued this thesis with even greater fervour. In the process she referred to meetings of some members of the JSA who supported the abolition of silk. She also quoted at some length from publications, both locally and abroad, in support of the proposition that the

institution of silk is not needed and actually does harm. These publications, by way of illustration, express the view that the institution of silk 'is an odd system in which a professional person's career is blighted not by the dissatisfaction of his clients but by the exercise of ministerial patronage'; that '[n]o one denies that the refusal of silk has profound economic consequences for the barrister concerned'; and that the institution of silk 'continues to exemplify the costly and anachronistic rituals of the Bar . . ..'

[7] In view of these deviations from the real issue I emphasize the rather obvious proposition that we should strictly confine the focus of our deliberation to the issue before us and that the issue whether or not the institution of silk is worthy of protection, is not one of those. Neither is the related issue whether or not the President should or ought to have the power to confer the status of silk on practising advocates. At the risk of repetition; the sole issue before us is whether the President has the power to do so under the Constitution. A further debate we do not have to embark upon relates to the essential import of silk. The appellants contend, and it is not disputed by Mansingh or the Law Society, that what lies at the heart of the conferral of silk is the recognition by the President as the head of State, of the esteem in which the recipients of silk are held in their profession by reason of their integrity and of their experience and excellence in advocacy. Or, as it was formulated more than a century ago by Lord Watson in *Attorney General for the Dominion of Canada v The Province of Ontario* [1898] AC 247 (PC) at 252:

'The . . . position occupied by Queens' Counsel is . . . that it is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred.'

[8] Other matters raised on the papers, albeit rather obliquely, concern the fairness and transparency of the procedures for the appointment of senior counsel. Again; although these matters appear to be the subject of ongoing debate, both here and overseas, they are not germane to this case. For present purposes, I believe we must accept, because it is not in dispute, that while each of the GCB's constituent Bars have designed its own procedure which ultimately leads to the grant of silk, these procedures have certain elements in common. In all cases the process starts with an application for appointment by the candidate

for silk to his or her Bar. The application is then considered by a committee of silks of that Bar. Thereafter the names of the approved candidates are presented to the Judge President of the particular High Court who makes a recommendation to the Minister. The Minister in turn makes a recommendation to the President, who confers the status of silk. Judges President are not bound by the decisions of the Bar to recommend the successful candidates to the Minister. In this way, so the appellants contend, the procedure endeavours to provide for a system of peer review as well as an evaluation by the judges of the High Court in which the applicant for silk usually appears.

[9] Appointments by the President are noted in a presidential minute with the counter-signature of the Minister. Mansingh did not take issue with the procedure. Her contention was that what is borne out by the procedure is that the criteria for the conferral of silk are determined and assessed by the Bar and that the President effectively does no more than to confirm their assessment. The President, she argued, is not in a position to draw the merit-based professional distinctions on which the system is founded. I believe, however, that the objection misses the point. It starts out from the premise that the appointment of silk purports to be a certification of professional quality by the President. This is not so. As I have said, it is common cause that the appointment of silk amounts to a recognition by the President of the esteem in which the recipients are held by their peers. That recognition, so the appellants contended, constitutes an 'honour' contemplated by s 84(2)(*k*). With that rather lengthy prelude I can now revert to the issue in this case which essentially revolves around a proper interpretation of s 84(2)(*k*) of the Constitution.

[10] The method of interpreting the Constitution has been established in several judgments of the Constitutional Court. In sum, these judgments hold that the language of the constitutional text must be interpreted purposively and in context (see eg *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and another* 2011 (1) SA 327 (CC) para 32 fn 34). Though the court must thus seek to give effect to the object and purpose of the provision, it is limited by the language used. The court is not permitted to impose a meaning on the text that it is not capable of bearing (*South African Airways*

(Pty) Ltd v Aviation Union of South Africa and others 2011 (3) SA 148 (SCA) para 29). Another way of stating this limitation is that a purposive interpretation may not be unduly strained (*Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* 2001 (1) SA 545 (CC) para 24).

[11] On the other hand, constitutional interpretation must avoid 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene' (*Johannesburg Municipality v Gauteng Development Tribunal and others* 2010 (2) SA 554 (SCA) para 39). In this regard it has been accepted in principle that the contextual scene includes the historical context of the provision (see *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and others* 2000 (1) SA 661 (CC) para 44). It has also been accepted that the historical context includes reports of technical committees that assisted the Constitutional Assembly in the actual formulation of the Constitution (see *S v Makwanyane and another* 1995 (3) SA 391 (CC) para 17).

[12] On application of this approach to the interpretation of s 84(2)(*k*), the first step is to establish the literal meaning of 'honours'. According to the Oxford English Dictionary (online), 'honours' (that is the plural form of the noun) includes the meaning of 'something conferred or done as a token of respect or distinction; a mark or manifestation of high regard . . ..' (See also Shorter Oxford English Dictionary on Historical Principles 5 ed.) If we accept, as we must because it is not in dispute, that the appointment of silk amounts to a public recognition by the President of the professional eminence in which the recipient is held, I believe it follows that on a purely linguistic basis, the concept of honours bears a meaning wide enough to include the conferral of silk. This meaning, so the appellants contended, is also supported by the historical context as well as the reports of the technical committees that informed and advised the Constitutional Assembly in formulating our Constitution.

[13] In view of these contentions I turn first to the historical context. From this perspective, it is clear that the institution of senior counsel is part of our heritage as a former British colony. It is well established that in England the appointment by the monarch of King's or Queen's counsel was made by the exercise of the prerogative powers of the Crown. As succinctly stated by Schreiner JA in *Sachs v Dönges, NO* 1950 (2) SA 265 (A) at 306-307 the term 'prerogative powers' is ordinarily used to describe a compendium of residual, non-statutory powers of the Crown. By their nature these powers consisted of a diverse and heterogeneous collection ranging from declaration of war to pardon of prisoners (see eg H R Hahlo and Ellison Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 171). Yet, as Schreiner JA also explained in *Sachs*, textbook writers have, for the sake of analytic convenience, classified and labelled these miscellaneous powers under different headings. One of the ranges of powers subsequently classified and labelled was the prerogative power of the monarch to confer honours.

[14] With reference to the background of the appointment of silks, Sir John Baker (J H Baker *the Common Law Tradition*: *Lawyers, Books and the Law* at 92 – 96) recounts that the institution started to emerge in the 16th century. Originally it was an office of which the incumbent was obliged to advise the Crown. But with the passage of time, so Baker says, the status of Queen's Counsel 'came to be seen as a bestowal of rank on an individual rather than an engagement to render services to the Crown'. By the middle of the 19th century, Queen's Counsel no longer had any connection with Crown business, though they were still disqualified from appearing against the Crown without a licence signed by the monarch. But by 1871, so Baker says, the requirement of a licence was also abolished. In the end, so Baker concludes his historical survey, the rank of Queen's Counsel had completely lost its character as an office and became a rank of distinction. In the same vein, Joseph Chitty's *A Treatise on the Law of the Prerogatives of the Crown* (1820) at 118 said:

'To the Crown belongs also the prerogative of raising practitioners in the courts of justice to a superior eminence, by constituting them sergeants . . . or by granting letters patent of precedence to such barristers as his Majesty thinks proper to honour with that mark of distinction . . . .'

[15] In *Lenoir v Ritchie* [1879] 3 SCR 575 the question pertinently arose before the Supreme Court of Canada whether it can be said that the Crown appointed silks in the exercise of the royal prerogative to confer honours. The three judges who pertinently considered this issue answered the question posed in the affirmative. Thus it was held by Taschereau J (para 62):

'It is trite to say that the Sovereign is the fountain of honors and dignities. "The Crown alone," says *Chitty*, "can create and confer dignities and honors. The King is not only the fountain but the parent of them". . . It must also be admitted that, in the exercise of that prerogative the Crown has the right to appoint King's or Queen's Counsel, and to grant Letters of Precedence to . . . such barristers as His Majesty thinks proper to honor with that mark of distinction . . . .'

(See also to the same effect para 52 (per Henry J) and para 85 (per Gwynne J).)

[16] About ten years later the Privy Council had to resolve what amounted to substantially the same issue in *Attorney General for Dominion of Canada v Attorney General for the Province of Ontario* [1898] AC 247. The question arose in the context of legislation by the province of Ontario which allowed its Lieutenant-Governor to appoint QCs to its provincial courts. While it was common cause that the province had no power to exercise the prerogative of conferring honours – which was reserved to the Governor General of Canada as representative of the Queen – the province contended that the conferral of silk amounted to the appointment to an office which fell within the scope of provincial authority. In the event, the Privy Council held that the appointment of Queen's Counsel indeed amounted to the conferral of honours, but that it also constituted the appointment to an office. The underlying reasons for this finding appears, for instance, from the following statement by Lord Watson (at 252):

'The exact position occupied by a Queen's Counsel duly appointed is a subject which might admit of a great deal of discussion. It is in the nature of an office under the Crown, although any duties which it entails are almost as unsubstantial as its emoluments; and it is also in the nature of an honour or dignity to this extent, that it is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred.'

[17] Whatever the position might have been in earlier times, the viewpoint that became generally accepted in England and Canada towards the end of the 19th

century was that silks were appointed by the Queen in the exercise of her prerogative to confer honours. That acceptance happened to coincide with the emergence of the institution of silk in this country. The early history of the institution in South Africa is somewhat obscure, not only by dearth of any judicial pronouncement but also because academic articles on the subject, such as the one by Prof Ellison Kahn ('Silks' (1974) 91 *SALJ* 95) and the one by Prof M T W Arnheim ('Silk, Stuff and Nonsense' (1984) 101 *SALJ* 376) prove to be more narrative in nature than based on real in-depth research. Yet it appears from the article by Prof Kahn (at 96-99) that silks were appointed in the Cape from the 1880s, in Natal from the 1990s and that by Union of the former British colonies in 1910 'all four colonies were wedded to the institution of senior counsel'. It is further noted by Prof Kahn (at 96) that from 1910 senior counsel were appointed by the Governor General.

[18] Where the power of the Governor General to do so was derived from is a matter of inference rather than direct authority. In this regard s 8 of the Union of South Africa Act 1909 (also known as the 'Union Constitution') provided that the executive authority of the Union vested in the King, and was to be exercised by His Majesty in person or by the Governor General as his representative. This section was repealed by the Status of the Union Act 69 of 1934. Section 4 of the Status Act conferred the executive government of the Union on the King or the Governor General as his representative, acting on the advice of the South African Cabinet. It can be accepted on good authority that the executive powers thus conferred included the prerogative powers of the King (see eg *Sachs v Dönges* at 308). As to the ambit of these prerogative powers, this court early on adopted the approach that it was determined by English law. The reason for this approach appears from the statement by Innes CJ in *Union Government v Tonkin* 1918 AD 533 at 539 that:

'The King's prerogative, save where duly modified, is the same in every part of the Empire . . . .'

[19] The Governor General's power to appoint senior counsel plainly did not derive from any South African statute. Hence the irresistible inference is that the Governor General's authority to do so could only have been derived from an

exercise of the royal prerogative (that he inherited from the King) to confer honours which – in accordance with English legal tradition – included the power to appoint senior counsel. I am aware of the contrary view expressed by W P M Kennedy and H J Schlossberg *The Law and Custom of the South African Constitution* (1935) at 128 that:

'The appointment [of senior counsel] must not be regarded as one conferring an honour from the crown. It is an executive act concerning the internal government of the country, necessary for certain executive purposes, but what they are is impossible to say.'

I also appreciate that this view was reiterated by the author Schlossberg, after he changed his name to May (H J May *The South African Constitution* (1955) at 179) and that it was referred to with apparent approval by Prof Kahn ('Silks' at 104). Nonetheless, in the light of the conclusion I arrived at earlier by way of deductive reasoning – ie that the Governor General's power to appoint silks could only have stemmed from the royal prerogative to confer honours – I believe that the view expressed by these authors, which is unsupported by any authority, cannot be sustained.

[20] In 1961 South Africa became a Republic. With that the Union Constitution was repealed and replaced by the Constitution of the Republic of South Africa Act 32 of 1961, s 7 of which explicitly dealt with the prerogative powers of the head of State. In relevant part it provided:

'7. (1) The Head of the Republic shall be the State President.

(2) . . .

(3) He shall, subject to the provisions of this Act, have the power – . . .

(*a*) . . .

(*b*) . . .

(*c*) to confer honours . . .

(*d*) . . .

(4) The State President shall in addition as head of the State have such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative.'

[21] For the first time in our history the 1961 Constitution therefore contained a partial codification of prerogative powers. Partial because of the catch-all phrase in s 7(4) which preserved those prerogative powers that remained uncodified. In

1961 the institution of silk also underwent a change of nomenclature consonant with the change of external status from a self-governing dominion of the British Commonwealth to a Republic. Although the procedure for appointment of silks remained substantially the same, new recipients would henceforth be called senior counsel, abbreviated SC. At the same time, existing silks were allowed to retain the title QC.

[22] In 1983 the 1961 Constitution was repealed and replaced by the Constitution of the Republic of South Africa Act 110 of 1983, which was a decisive move away from the Westminster model. The separation of the offices of head of State and Head of Government, which lies at the heart of the Westminster system, was abandoned in favour of a combination of the two roles in the office of State President. For present purposes, the position regarding the prerogative powers of the executive, however, remained virtually unchanged. Section 6 of the 1983 Constitution adopted the same model as s 7 of its predecessor. While s 6(3) codified some of the former prerogative powers, including the power to confer honours, s 6(4) – which was similarly worded to s 7(4) of the 1961 Constitution – preserved those prerogative powers that were not codified in s 6(3).

[23] On the papers it is common cause that, acting in terms of s 7 of the 1961 Constitution and later in terms of s 6 of the 1983 Constitution, the State President continued to confer silk until the repeal of the latter by the interim Constitution, Act 200 of 1993. What is more, the procedure for the appointment of silk did not change after 1960. Letters patent were still signed by the head of State and counter signed by the Minister of Justice save, of course, that the head of State was no longer the Governor General, but the State President. By the nature of things the question whether, under the 1961 and 1983 Constitutions the State President granted silk by virtue of his power to confer honours or in terms of his residual prerogative powers, did not arise. It simply did not matter. He had the power either way. Yet, I believe that if the question did arise, the answer would have been that the State President acted by virtue of the specifically codified power to confer honours. I say that because the clear intent was to preserve the practice that prevailed before 1961.

[24] The partial codification of prerogative powers which occurred in the 1961 and the 1983 Constitutions was completed in the (1993) interim Constitution. In the same way as s 84(2) of the (1996) Constitution – that I have quoted by way of introduction – s 82(1) of the interim Constitution made no express reference to prerogative powers at all. Yet, along the lines of the 1961 and the 1983 Constitutions, s 82(1) specifically bestowed powers on the head of State which clearly owed their origin to the royal prerogative. These included, for instance, the power to pardon and reprieve offenders and the power to confer honours. The cardinal difference is, however, that unlike its predecessors, s 82(1) of the interim Constitution did not contain a catch-all provision which preserved unlisted prerogative powers. This approach, as we know, has also been adopted in s 84(2) of our Constitution. The effect of the change was summarised thus in *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC) para 8:

'Two conclusions can be drawn from the foregoing. First, the powers of the President which are contained in s 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 s 82(1).'

[25] These consequences were no doubt intended. That much is borne out by the reports of the panel of experts that informed and advised the Constitutional Assembly in the formulation of the final Constitution. In their report of 4 September 1995 the experts inter alia stated:

'• In order to give effect to the notion of constitutional supremacy, it should be made clear that the Constitution is the source of all executive powers and that they may all be tested against the Constitution

. . .

• It is in this regard that the so-called prerogatives become relevant. . . .
• Prerogatives stem from the (English) common law. They form part of the previous dispensation in South Africa, when Parliament was sovereign. They originated in England in a time in which the powers of the monarch were virtually unchecked.
• . . .

- The most important prerogatives were the power to assent to legislation, dissolve Parliament, dismiss a government, appoint ministers, stop prosecutions, bestow honours, pardon criminals and declare war and peace.
- Many of these fitted logically into the English system of government. Over time some of them were laid down in legislation – which excluded reliance on the common law.
- . . .
- The Constitution (and subsequent legislation) is now the only source of executive power. No extra-constitutional powers exist. The exercise of all executive powers should in future be justiciable because the Constitution is supreme. The term "prerogative" should perhaps be avoided altogether, because it is a legal term which refers to powers "outside" the control of law.
- Executive powers should be dealt with in a manner clearly indicating present practice. If the new Constitution contains a formulation which does not correspond with the actual practice . . . "unconstitutionality" may result or previous "conventions" are again invoked. The supremacy of the Constitution may be undermined. Unnecessary grounds for litigation may result.'

[26] The general intent of the drafters of the Constitution therefore seems to be plain. Insofar as executive powers derived from the royal prerogative were not incompatible with the new constitutional order they should be codified and maintained. Conversely stated, the intention was not to abolish prerogative powers or to diminish the function of the head of State previously derived from the royal prerogative, but to codify these powers insofar as they are not inimical to the constitutional state and to render the exercise of these powers subject to the Constitution. In this light the historical perspective therefore seems to support the appellants' argument that the power 'to confer honours' contemplated in s 84(2)(*k*) of the Constitution must be afforded its traditional content, which included the power to appoint silks.

[27] That brings me to the next inquiry, namely whether there is anything in the broader context that indicates a meaning of s 84(2)(*k*) which is at odds with the one revealed by the historical perspective. In this regard the court a quo found

the historical perspective of lesser – if any – importance because, so it held (in para 20), our Constitution was intended, as appears from its preamble, 'to sever relations with the past'. In consequence, so the court a quo continued (para 23):

'I do not agree . . . that the prerogatives of the monarchs and the State Presidents respectively are codified in the Constitution. The drafters' idea of breaking with the past stems, in my view, from an aversion to adopting concepts in the Constitution which are not based on the will of the people of South Africa.'

And, so the court concluded (para 46):

'The *Lenoir* case [therefore] finds no application within our democratic autochthonous Constitution in that "in England, the sovereign . . . uses the prerogatives to confer honours".'

[28] In my view this line of reasoning departs from the wrong premise, hence it arrives at the wrong conclusion. Although it can be accepted as a general principle that the Constitution intended a break with the unacceptable features of the past, that principle can hardly find application in a case where the very language used indicates an intent to preserve past practices. The fact that s 84(2) confers some of the former royal prerogative powers on the President and that they include the power to confer honours, is beyond debate (see eg also *President of the Republic of South Africa v Hugo* paras 5-7). The only question relates to the content of that power: does the codified prerogative power to confer honours include the power to appoint silks? The answer to that question does not depend on the court's abstract perception of 'the will of the people' but on the proper interpretation of 'honours', inter alia, against its historical background and it is to that historical background that the *Lenoir* case and other authorities that I have referred to are highly relevant.

[29] A further argument why the power to confer honours no longer includes the appointment of silk, which found favour with the court a quo, refers to the list of honours enumerated in the website of the Presidency under the rubric 'National Orders' (see paras 29-39). The list incorporates, for example, the order of Mendi, the order of the Baobab, the order of Luthuli, and so forth, but not the institution of silk. On this basis the court a quo held (para 37) that 'I am of the view . . . that non-inclusion of the conferment of senior counsel status on the

Presidency's website indicates that it is not one such "honour" as envisaged in terms of s 84(2)(*k*)'. Moreover, what these national orders have in common, so the court a quo held, is that they are awarded 'for services distinguished as beyond the ordinary call of duty'. It is an 'honour awarded for exceptional and distinguished contribution in community service'. The appointment of silk, on the other hand, so the court concluded (paras 29 and 38) does not require services of practising advocates beyond the call of duty or that they must have done something good beyond human expectation. In consequence, the institution of silk cannot be regarded as an honour for purposes of s 84(2)(*k*).

[30] I do not agree with this line of reasoning. The mere fact that silk is not included in the national orders on the website of the Presidency plainly does not in itself exclude silk from 'honours'. President Zuma, in his answering affidavit, deposed to the fact that he regards silk as an honour; that the website of the Presidency is created and managed by his administrative personnel; and that his administrative personnel cannot possibly define the contents of his constitutional powers to confer honours. Moreover, I can see no reason in principle why the term 'honours' in s 84(2)(*k*) should be limited to national orders. On the contrary, as the President said in his answering affidavit, the meaning of honours is wide enough to take many forms. Once this is accepted, the enquiry whether silk constitutes honours cannot be answered with reference to the characteristics of national orders. One cannot answer the question whether apples and pears are both fruit by looking at the characteristics of an apple, which is a fruit, and conclude that a pear is not a fruit because it does not share the characteristics of an apple.

[31] Finally, the court a quo appears to have been swayed by the argument that s 84(2)(*k*) does not propose a system of awarding any professional who has achieved advanced status in his or her profession a status of seniority. If it were so, the argument went, the President would also have to confer honours of seniority on accountants, doctors, attorneys and the like (see para 47). Again I find this argument unpersuasive. While the historical context supports the appointment of senior counsel as being included in the President's power to confer honours, the same cannot be said of other professions. The reason for this

historical distinction is probably that the legal profession and its institutions have traditionally been regarded as integrally related to the administration of justice which in turn is properly the concern of the head of State. I appreciate that our institutions can and must develop in the light of the needs of our own social context. If there is found to be a need of appointment by the President of, say, senior attorneys, it will have to be considered whether that institution can be brought under s 84(2)(*k*) of the Constitution – despite the fact that it is not historically supported – or whether special legislation will be required.

[32] In this Court counsel for Mansingh introduced a further contention that had not been raised before, neither on her papers nor in argument before the court a quo. It rested on s 9 and s 22 of the Constitution which, respectively, guarantee the right to equality and the right of every citizen to choose his trade, occupation or profession freely. In developing this argument counsel for Mansingh also relied on the decision by the Constitutional Court in *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC) paras 62-66 to the effect that this guarantee embraces not only the choice of profession but also by necessary implication its practice. According to this argument, s 84(2)(*k*) must be construed to exclude the power to appoint silk, because the institution of silk itself infringes the rights of non-silks in terms of s 9 and s 22 of the Constitution.

[33] I think these contentions demonstrate confused reasoning. If the institution of silk can be said to infringe either s 9 or s 22 of the Constitution, the whole institution is unconstitutional and that is the end of the matter. The question whether an interpretation of the power contemplated in s 84(2)(*k*) allows the President to confer silk does not arise. Even if the President has the power to do so, he cannot make an appointment which impacts on the constitutional rights of others. What is more, because these contentions had not been raised earlier, they are devoid of any basis of fact. Consequently it is not clear how the institution of silk in itself can be said to impact on the rights guaranteed by s 9 or s 22. What is it in the institution of silk that offends the non-silks' right to equality or the way in which they conduct their advocates' practices? One can only speculate that these objections hark back to Mansingh's objections to silk as an institution, for example, that in practice silks are afforded certain privileges and

that some work is reserved for silks only. I cannot see how these practices can be said to violate the constitutional rights of non-silks. But if they do, the objection, so it seems, should be directed against the practices which are not inherent in the honour of receiving silk – rather than against the institution of silk itself.

[34] It follows that, in my view, there is nothing in the broader context which compels a meaning of 'honours' that deviates from the one clearly indicated by the historical background of the provision. I therefore conclude that the power to confer honours bestowed upon the President by s 84(2)(*k*), includes the authority to confer the status of senior counsel on practising advocates. In the result the appeal must be upheld while the order of the court a quo is to be set aside. With regard to the matter of costs, this is one of those rare occasions where not one of the parties asked for the costs of appeal in its favour. As to the costs in the court a quo, the appellants did not ask for any order against Mansingh. In consequence there will be no order in their favour either in this court or in the court a quo. But, as I have said by way of introduction, costs in the court a quo were awarded in favour of Mansingh against the President and the Minister. Since no appeal had been lodged against that court order, it must stand, despite the fact that all the respondents should, in my view, have succeeded in warding off the declarator sought.

[35] In the result:

(a) The appeal is upheld.

(b) The order of the court a quo is set aside and replaced with the following: 'The application is dismissed. First and second respondents are ordered to pay the applicant's costs.'

F D J BRAND
JUDGE OF APPEAL

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