CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 43/13
[2013] ZACC 40

In the matter between:

URMILLA ROSHNEE DEVI MANSINGH	Applicant
and	
GENERAL COUNCIL OF THE BAR	First Respondent
JOHANNESBURG SOCIETY OF ADVOCATES	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
INDEPENDENT ASSOCIATION OF ADVOCATES OF SOUTH AFRICA	Fifth Respondent
LAW SOCIETY OF SOUTH AFRICA	Sixth Respondent

Heard on : 22 August 2013

Decided on : 28 November 2013

JUDGMENT

NKABINDE J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This is an application for leave to appeal against the decision of the Supreme Court of Appeal[1] setting aside the order of the North Gauteng High Court, Pretoria[2] (High Court). The applicant successfully launched proceedings in the High Court, and obtained declaratory relief that section 84(2)(k) of the Constitution does not authorise the President of the Republic (President) to confer the status of senior counsel on advocates. The High Court ordered the President and the Minister of Justice and Constitutional Development (Minister) to pay the applicant's costs. It granted leave to the General Council of the Bar (GCB) and the Johannesburg Society of Advocates (JSA)[3] who, after unsuccessfully seeking leave to appeal directly to this Court,[4] appealed to the Supreme Court of Appeal. The Supreme Court of Appeal reversed the High Court's decision and concluded that the Constitution does empower the President to confer, as an honour, senior counsel status on advocates.

[1] *General Council of the Bar and Another v Mansingh and Others* [2013] ZASCA 9; 2013 (3) SA 294 (SCA) (Supreme Court of Appeal judgment). The applicant does not seek leave to appeal against the order of the Supreme Court of Appeal insofar as it ordered the President and Minister of Justice and Constitutional Development to pay the costs of the application dismissed by the Supreme Court of Appeal.

[2] *Mansingh v President of the Republic of South Africa and Others* [2012] ZAGPPHC 3; 2012 (3) SA 192 (GNP) (High Court judgment).

[3] In the High Court, the GCB and JSA were cited as the third and fourth respondents, respectively. The President, Minister, Independent Association of Advocates of South Africa (IAASA) and the Law Society of South Africa (LSSA) were cited as the first, second, fifth and sixth respondents, respectively. The President and the Minister abided the decision of the Court on appeal.

[4] The application for leave to appeal directly to this Court was dismissed, in terms of an order issued on 19 March 2012, because it was not in the interests of justice for this Court to hear the matter in light of the pending litigation before the Supreme Court of Appeal.

[2] At the heart of the dispute lies the correct interpretation of section 84(2)(k),[5] in particular, whether the President has the power under that section to confer silk or senior counsel[6] (SC) status on advocates. It must be acknowledged at the outset that this case is not about whether the institution of silk or SC status is good or bad, or whether it is worthy of protection. Nor is it about the merits of the applicant's own unsuccessful applications for SC status.

Parties

[3] The applicant, Ms Urmilla Roshnee Devi Mansingh, is a practising advocate and member of the JSA.[7] The GCB and JSA, first and second respondents respectively (collectively referred to as respondents), are professional legal associations with corporate personality whose membership primarily consists of practising advocates.

Historical context and constitutional scheme

[4] It is convenient to set out briefly the historical background on the powers of the President regarding the conferral of honours and the constitutional framework.[8] Prior

[5] Section 84 of the Constitution deals with the powers and functions of the President and provides, in subsection (2)(k), that "[t]he President is responsible for conferring honours."

[6] That is, the internal division of the Bar into senior and junior advocates.

[7] The applicant was admitted in terms of the Admission of Advocates Act 74 of 1964. Advocate Mansingh is also a practising barrister and member of the Bar of England and Wales.

[8] For a useful analysis of the historical development of the institution of silk in this country, see the Supreme Court of Appeal judgment above n 1 at para 17, where the Court noted:

> "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 . . . prove to be more narrative in nature than based on real in-depth research. Yet it appears . . . that silks were appointed in the Cape from the 1880s, in Natal from the [1900s] and that by Union of the former British colonies in 1910 'all four colonies were wedded to the institution of senior counsel'."

to 1994, following the Westminster model, the "royal prerogative" was a source of power for South African heads of state derived not from the Constitution or other statutes but from the common law.[9] Historically, the conferral of silk was considered an exercise of the "honours prerogative" under the English law received into South African law under the Union Constitution of 1910.[10] Section 7 of the Republic of South Africa Constitution Act[11] went further and expressly reserved this aspect of the prerogative power for the President.[12] These specific powers of the Crown have been described as a partial codification of the prerogative powers.[13] Section 6 of the

---

See also Arnheim "Silk, Stuff and Nonsense" (1984) 101 *SALJ* 376; Kahn "Silks" (1974) 91 *SALJ* 95 at 96-9; and May *The South African Constitution* 3 ed (Juta & Co., Ltd, Cape Town 1955) at 176-9.

[9] See *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at paras 31-2.

[10] Union of South Africa Act, 1909 (Union Constitution). Kahn notes that from 1910 silks were appointed by the Governor General. But the source of the Governor General's power to do so is a matter of inference. Section 8 of the Union Constitution provided that the executive authority of the Union vested in the King, and was exercised by His Majesty, in person, or by the Governor General, as his representative. The executive powers conferred included the prerogative powers of the King. I am persuaded by the finding of the Supreme Court of Appeal that the Governor General's power to appoint senior counsel did not derive from any South African statute and that the authority to do so could only have been derived from an exercise of the royal prerogative to confer honours. See Kahn above n 8 and *Sachs v Donges, N.O.* 1950 (2) SA 265 (A) at 308 and *Union Government v Tonkin* 1918 AD 533.

[11] 32 of 1961.

[12] Section 7 of the 1961 Constitution provided, in relevant part:

> "(1) The head of the Republic shall be the State President.
>
> . . .
>
> (3) He shall, subject to the provisions of this Act, have power—
>
> . . .
>
> (c) *to confer honours*;
>
> . . .
>
> (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." (Emphasis added.)

[13] Supreme Court of Appeal judgment above n 1 at paras 21-2.

Republic of South Africa Constitution Act[14] retained the prerogative powers of the executive in terms similar to those of its predecessor, section 7(3) and (4).

[5] The powers and functions of the President in the interim Constitution[15] were set out in section 82(1).[16] This section provided, in subsection (1)(e), that the President was competent to exercise the power "to confer honours". The section 82(1) powers had their origin in the prerogative powers exercised under the Constitutions of 1910,

[14] 110 of 1983. Section 6 of the 1983 Constitution provided, in relevant part:

> "(3) The State President shall, subject to the provisions of this Act, have power—
>
> . . .
>
> (b) *to confer honours*;
>
> . . .
>
> (4) 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." (Emphasis added.)

[15] The Constitution of the Republic of South Africa Act 200 of 1993.

[16] Section 82(1) of the interim Constitution read:

> "The President shall be competent to exercise and perform the following powers and functions, namely—
>
> (a) to assent to, sign and promulgate Bills duly passed by Parliament;
>
> (b) in the event of a procedural shortcoming in the legislative process, to refer a Bill passed by Parliament back for further consideration by Parliament;
>
> (c) to convene meetings of the Cabinet;
>
> (d) to refer disputes of a constitutional nature between parties represented in Parliament or between organs of state at any level of government to the Constitutional Court or other appropriate institution, commission or body for resolution;
>
> (e) to confer honours;
>
> (f) to appoint, accredit, receive and recognise ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;
>
> (g) to appoint commissions of enquiry;
>
> (h) to make such appointments as may be necessary under powers conferred upon him or her by this Constitution or any other law;
>
> (i) to negotiate and sign international agreements;
>
> (j) to proclaim referenda and plebiscites in terms of this Constitution or an Act of Parliament; and
>
> (k) to pardon or reprieve offenders, either unconditionally or subject to such conditions as he or she may deem fit, and to remit any fines, penalties or forfeitures."

1961 and 1983 by South African heads of State. Other than the powers in that section, there were no other powers conferred upon the President derived from the royal prerogative.[17]

[6] Similarly, Chapter 5 of the Constitution[18] provides for the powers and functions of the President and the national executive. Section 84 of the Constitution provides, in relevant part:

> "(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—
>
> . . .
>
> (k) conferring honours."

Litigation background

High Court

[7] The applicant sought relief declaring that section 84(2)(k) does not authorise the President to confer SC status or silk on advocates.[19] The High Court, relying on its interpretation of the 1961 and 1983 Constitutions, found that the President, acting as Head of State, retained under those constitutions "such powers and functions as

[17] In this regard see *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 8. The 1983 Constitution made specific mention of some of the powers now contained in section 84 of the Constitution. These included, inter alia, the power to confer honours, pardon and reprieve offenders, and to enter into and ratify international treaties. This codification, completed with the interim Constitution, means that there is no express reference to prerogative powers and that those powers of the President which originated from the royal prerogatives are to be found in section 84. See *Hugo* at paras 6-7.

[18] The Constitution of the Republic of South Africa, 1996.

[19] High Court judgment above n 2 at paras 1 and 53.1.

were possessed by the Queen and State President by way of prerogatives prior to the commencement of the 1961 and 1983 Constitutions, respectively".[20] The Court analysed the origins of the institution of silk and attached weight to the fact that the prerogative of appointing King's Counsel (KC) or Queen's Counsel (QC)[21] rested solely with the monarch.[22] It recognised that the Constitution "makes a clean break with the past" and held that the appointment of silk does not fall within the meaning of "conferring honours" in terms of section 84(2)(k).[23]

Supreme Court of Appeal

[8] On appeal by the respondents, the Supreme Court of Appeal, per Brand JA, defined the issue in narrow terms, finding that the question whether SC status could be conferred by the President turned exclusively on the interpretation of section 84 of the Constitution.[24] The Court upheld the appeal. It held that section 84(2)(k) empowers the President to confer, as an honour, SC status on advocates. The Court held that there is nothing in the historical or broader context that is at odds with the interpretation that section 84(2)(k) includes the authority to confer SC status on practising advocates.[25]

[20] Id at para 17.

[21] In England the rank QC, formerly KC, is awarded to advocates and attorneys (barristers and solicitors) who have demonstrated particular skill and expertise in the conduct of advocacy. It has been awarded in various forms, including the rank of QC *honoris causa* (meaning "for the sake of honour" or simply "as an honour") as opposed to the award of QC status as a substantive, professional rank. Honours are awarded to deserving and high-achieving people from every section of the community, for merit, service and bravery.

[22] High Court judgment above n 2 at para 16.

[23] Id at paras 23 and 49.

[24] Supreme Court of Appeal judgment above n 1 at para 4.

[25] Id at paras 27, 30 and 34.

[9] The Court held that constitutional provisions must be construed purposively and in a contextual manner and that courts are simultaneously constrained by the language used. It held that courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained"[26] but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene", which includes the political and constitutional history leading up to the enactment of a particular provision.[27] The Supreme Court of Appeal held 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."[28]

[10] The High Court relied on National Orders, for example the Order of the Baobab and the Order of Luthuli, to determine the characteristics of an honour. But the Supreme Court of Appeal held that there is no basis to treat this class of honours as definitive of what is capable of being described as an honour in the constitutional sense.[29] The respondents raised the alternative argument that even if the conferral of silk cannot be accommodated under the honours power in section 84(2)(k), it is authorised by section 84(1) as an auxiliary power necessary to carry out a function of

[26] Id at para 10, referring to *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* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

[27] Id at para 11, referring to *Johannesburg Municipality v Gauteng Development Tribunal and Others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* 1950 (4) SA 653 (A) at 664G-H.

[28] Id at para 7.

[29] Id at para 30.

the President as Head of State. The Supreme Court of Appeal made no finding on this. The Court stated that it follows, on a purely linguistic basis, that the concept of honours bears a meaning wide enough to include the conferral of silk. It upheld the appeal, set aside the declaratory relief granted by the High Court and replaced it with an order dismissing the application.

In this Court

[11] The applicant seeks leave to appeal against the decision of the Supreme Court of Appeal. Contending that the interpretation by the High Court is correct, she submits that the interim Constitution did not preserve the former prerogative powers encapsulated in the 1961 and 1983 Constitutions. The applicant argues that the President, acting as Head of State under the interim Constitution, enjoyed the power to confer honours and that the Constitution adopts the same approach in section 84(2). This power to confer honours, she contends, does not extend to granting silk or SC status.

[12] The respondents oppose the application and contend that the Supreme Court of Appeal's interpretation is correct, that the appeal has no prospects of success and that leave to appeal should be refused. They raise the alternative argument that under section 84(1) of the Constitution the conferral of silk could be understood as an auxiliary power necessary to carry out a function of the President as Head of State. In the view I take of the matter, it will not be necessary to decide this.

Issues

[13] The central issue is whether the President's power to confer honours under section 84(2)(k) includes the power to confer silk on advocates. This raises the question whether the conferral of the status of silk is an honour. A determination of this issue and the question that arises therefrom requires an interpretation of the word "honours".

Should leave to appeal be granted?

[14] The issue raised concerns the President's power under the Constitution to confer honours on advocates. Fundamental to the principle of legality is the proper source of the public power exercised by the President under the Constitution.[30] The interpretation of the Constitution is of considerable importance beyond the parties before this Court.[31] It is thus in the interests of justice to grant leave to appeal.

Does the power under section 84(2)(k) include the conferral of silk?

[15] In deciding whether the President's power to confer honours under section 84(2)(k) includes the power to confer silk, it is important to understand the meaning of the phrase "honour". The applicant raised various arguments in support of her submission that the interpretation adopted by the Supreme Court of Appeal was

[30] See *Minister for Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25; 2010 (4) SA 82 (CC); 2010 (2) BCLR 140 (CC) at para 27. As this Court stated in *Competition Commission v Loungefoam (Pty) Ltd and Others* [2012] ZACC 15; 2012 (9) BCLR 907 (CC) at para 16, issues concerning the power and functions of an organ of state are indisputably constitutional matters.

[31] The application is brought not only in the applicant's personal interest or the interests of the group to which she belongs – a group of advocates and attorneys opposed to the institution of silk – but also in the interest of the public at large.

incorrect.[32] Most of those contentions are based on factual allegations that have no relevance to the issue at hand. The irrelevance of these factual allegations was conceded by the applicant in oral argument.

[16] It is necessary to establish the correct interpretive approach. The Constitution is the supreme law of the Republic.[33] This Court has given approval to an interpretive approach that, while paying due regard to the language and the context, is generous and purposive and gives expression to the underlying values of the Constitution.[34] The President's power to confer honours, as with all other exercises of public power, is subject to the rule of law and, as a matter of course, must be defined within permissible constitutional boundaries. This Court is charged with determining the boundaries when interpreting the section.

[17] The applicant challenges the Supreme Court of Appeal's approach, contending that the Court asked the wrong question. She incorrectly contends that there is no purposive interpretation that would "necessitate" including silk within the concept of honours. The Supreme Court of Appeal held that the ordinary meaning of the term "honours" is "wide enough" to encompass the award of silk. There is, in my view, no

[32] The factual allegations include arguments regarding presidential credentials for the exercise of the power, the nature of SC status (to the extent that it represents professional advancement), selection criteria, the exercise of the power in the conferral of silk, the merits and demerits of the practice and the benefits associated with the conferral.

[33] Section 2 of the Constitution.

[34] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (4) BCLR 441 (CC) at para 46. See *Minister of Home Affairs and Another v Fisher and Another* [1979] 3 All ER 21 (PC) at 25H, cited in *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 14. See also *Viking Pony Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) at para 32 and Supreme Court of Appeal judgment above n 1 at para 10.

difficulty with the approach taken by the Supreme Court of Appeal, including its remark that, when adopting the purposive and contextual approaches, courts are simultaneously constrained by the plain language used in the section.[35] The constitutional context preceding the enactment of the provision in question is also important in determining the scope and purpose of the provision.

Meaning, ambit and scope of "honours"

[18] Although it is not sufficient to focus only on the textual meaning of the phrase, the text is the starting point of construction.[36] As the Supreme Court of Appeal correctly found, the phrase connotes "something conferred or done as a token of respect or distinction; a mark or manifestation of high regard."[37] This meaning is consistent with the dictionary definition of the word "honour", to which the dictionary adds "especially a position or title of rank, a degree of nobility, a dignity."[38]

[19] The applicant however argues that dictionary definitions are of little assistance. She contends that the correct enquiry is not whether the word's meaning is wide enough to include a particular practice, but only whether that *practice* falls within the word's ordinary meaning.

[35] Supreme Court of Appeal judgment above n 1 at para 29.

[36] See *Matatiele Municipality and Others v President of the Republic of South Africa and Others (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) at para 37.

[37] Supreme Court of Appeal judgment above n 1 at para 12.

[38] New Shorter Oxford English Dictionary (Clarendon Press, Oxford 2004).

[20] The applicant further argues that the concept of an "honour" must be interpreted on the basis of general characteristics drawn from the current list of National Orders. She contends that since the institution of silk does not share these characteristics, it is not an "honour". I do not agree. This interpretation ignores the textual meaning of the word "honours". That meaning is indeed wide.

[21] The applicant maintains that the phrase "conferring honours" cannot mean an act of the President that results in an individual being accorded greater respect or honour by society than he or she had before. She argues, therefore, that section 84(2)(k) empowers the President to express the country's admiration or thanks for some past act or achievement, considered to be of such significance as to be worthy of recognition by the country as a whole. The applicant limits the power further by characterising, for example, the purpose,[39] form[40] and intention[41] with which the honour-conferring power is exercised. Although the applicant admits that the honours "are not a closed list of honours", she does not clarify the proposed narrowly defined power of conferring honours. Nor does she say why the phrase "honours", when properly construed, may not be used for accomplishment in other areas.

[39] The achievement, she argues, would be one which has benefited the country at large or is such as to warrant the admiration of the country as a whole.

[40] The achievement would typically be one of extraordinary significance, awarded in circumstances where the recipient has gone beyond the call of duty.

[41] The system would be entirely non-mercenary and is not intended to confer private advantage on the recipient.

[22] The narrowly defined power suggested by the applicant also ignores the contextual scene. The history of the power to confer honours is relevant to its present-day meaning. While the historical context may not be decisive, it is valuable in determining the meaning of the term "honours". However, sight should not be lost of the fact that the Constitution made a clean break from the past and that ordinarily its text must thus be interpreted on its own terms. These remarks were echoed by this Court in *First Certification*[42] in relation to the power to pardon in section 84(2)(j) of the Constitution. The Court said:

> "The power of the South African Head of State to pardon was originally derived from royal prerogatives. It does not, however, follow that the power given in the NT [New Text] 84(2)(j) is identical in all respects to the ancient royal prerogatives. Regardless of the historical origins of the concept, the President derives this power not from antiquity but from the NT itself. It is [the] Constitution that proclaims its own supremacy. Should the exercise of the power in any particular instance be such as to undermine any provision of the NT, that conduct would be reviewable."[43] (Footnote omitted.)

[23] Historically, the conferral of silk was considered an exercise of the "honours prerogative" under the English law, which was received into South African law under the Union Constitution. The Head of State possessed both a codified honour-conferring power and an unspecified, residual prerogative power. The section 82(1) powers of the interim Constitution had their origin in the prerogative powers exercised under the 1961 and 1983 Constitutions by South African Heads of State.[44]

---

[42] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification*).

[43] Id at para 116. See also *Hugo* above n 17 at para 13.

[44] See the discussion of South Africa's constitutional background at [4]-[5] above.

These powers included the power to confer honours. However, as with the interim Constitution, which did not preserve the residual prerogative powers in a catch-all provision and which vested the President with the former prerogative powers of the Crown,[45] the Constitution makes no express reference to prerogative powers.

[24] The Constitution, under section 84(2), codifies some of the powers that were formerly prerogative powers of the Crown. There are no compelling purposive or historical reasons why the President's powers should be shackled to the prerogative powers. That would bind him to the past, rather than allow him to break with it to the extent necessary under our new democratic dispensation.

[25] It is noteworthy that the President, in performing the functions as Head of State, in contrast to those as head of the executive, acts alone. This much is clear from the wording of section 84(2).[46] As the Constitution is the primary source of presidential power, the President may exercise only those powers conferred on him or her by the Constitution, or by law that is consistent with the Constitution.[47] It sets out that when exercising presidential power, the President does so either as Head of State or head of the national executive. Any conduct beyond that envisaged by the Constitution will be beyond his powers and invalid.

---

[45] The former prerogative powers are contained in sections 7(4) and 6(4) of the 1961 and 1983 Constitutions respectively.

[46] While the President must make the final decision when acting as Head of State, this Court has held that "it is not inappropriate for him or her to act upon the advice of the Cabinet and advisers." See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 41.

[47] See *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 17-20.

[26] The Supreme Court of Appeal also relied on the report of the panel of experts that informed and advised the Constitutional Assembly in the formulation of the Constitution. The Court remarked:

> "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 section 84(2)(k) of the Constitution must be afforded its traditional content, which included the power to appoint silks.*"[48] (Emphasis added.)

[27] It is well-established that courts need not look to the drafter's intention when engaging in constitutional (or statutory) interpretation.[49] However, as stated above, we must adopt a purposive reading of section 84(2)(k). When there is documentary evidence regarding that purpose, we may, in appropriate circumstances, have regard to such evidence – the *travaux préparatoires*.[50] To the extent that the intention of the

[48] Supreme Court of Appeal judgment above n 1 at para 26.

[49] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at paras 17-26.

[50] The "*travaux préparatoires*" (preparatory works) constitute the official documents recording the negotiations, drafting and discussions during the process of creating a legal instrument or constitution.

panel of experts is relevant, it supports the reasoning set out above.[51] Indeed, as this Court, per Chaskalson P, pointed out in *S v Makwanyane*:[52]

> "Our Constitution was the product of negotiations conducted at the Multi-Party Negotiating Process. The final draft adopted by the forum of the Multi-Party Negotiating Process was, with few changes, adopted by Parliament. The Multi-Party Negotiating Process was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the *travaux préparatoires* relied upon by the international tribunals. Such background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it."[53]

The Court further remarked:

> "Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence. It is sufficient to say that *where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution*. These conditions are satisfied in the present case."[54] (Emphasis added.)

[51] See *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 12-9.

[52] Id.

[53] Id at para 17.

[54] Id at para 19.

[28] The President's section 84(2) powers should also be viewed against the background of the executive functions set out in section 83[55] of the Constitution, which acts as a catch-all provision to ensure that the President has all the power necessary to carry out the functions that he or she is given under the Constitution or legislation.[56] The President, acting as Head of State and head of the national executive, is duty-bound to uphold the Constitution as the supreme law of the Republic, to promote the unity of the nation and to advance the interests of the Republic.[57] The wording of section 84(2) is both permissive and broad, affording a wide discretion to the President. As the President holds a position both as Head of State and as head of the national executive, he or she has power to confer honours on any category of persons. Counsel for the JSA made this point during the hearing, and I cannot find fault with that line of argument. The applicant fails to explain why these permissive powers should be limited in the way she contends. The contextual setting of the power to confer silk thus plays an important role in determining what constitutes an "honour" in terms of section 84(2)(k).

Is silk or SC status an honour?

[29] The concept of "honours" is linguistically wide enough to include the award of silk status. A purposive reading of section 84(2)(k), taken together with the historical

[55] Section 83 provides that the President—

> "(a) is the Head of State and head of the national executive;
>
> (b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and
>
> (c) promotes the unity of the nation and that which will advance the Republic."

[56] See Murray and Stacey "The President and the National Executive" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (RS 5) at 18-6.

[57] *Hugo* above n 17 at para 65.

context, reaches the same conclusion. This is so because the award simply honours its recipients for attaining a high level of professional skill and excellence.[58]

[30] The applicant contends that the Supreme Court of Appeal erred in failing to consider properly the true character of SC status as a certification of professional quality, when the Court viewed it as a form of recognition of the regard in which certain advocates are held by their peers. Silk or SC status, she argues, is awarded by letters patent, which are a classical form of certification of professional quality. The characterisation of the conferral of silk as a certificate of excellence issued by the President at the instance of the Bar is without merit.

[31] The applicant relied on a number of authorities[59] (foreign and domestic) for the proposition that the "granting of the patent of appointment as senior counsel is not an honour, no more than was the granting of the patent of appointment as Queen's or King's Counsel in the past. Technically, it remains as it was: an executive act for administrative purposes."[60] However, this assertion fails to capture the true nature of the President's honour-conferring power.

[58] Supreme Court of Appeal judgment above n 1 at para 12. Senior counsel status or silk, according to the JSA, is to be understood as a high honour conferred on an individual by the Head of State. The Bar states that this dimension of silk is at the heart of the concept and ought not in any way to be undervalued. The recommendation by the Bar to the President is conveyed through the intermediation of the Judge President and the Minister. According to the Cape Bar Council's Guidelines for Silk Applications – 2010, the conferral of silk is recommended only for applicants who are regarded as deserving of senior status by reason of their notable and widely recognised industry, professional competence and advanced ability, as well as their established reputation for personal and professional integrity.

[59] See authorities referred to at n 8 above.

[60] Kahn above n 8 at 104.

[32] The conferral of silk may assist in the administration of justice by aiding in the proper functioning of the legal system.[61] And this Court cannot ignore the reality that applicants for SC status initiate the process and that some may consider appointment an important step in their professional advancement. But that is not all. The respondents emphasise that being appointed silk serves as recognition by the President of the esteem in which the recipients are held "by reason of their integrity and of their experience and excellence in advocacy."[62]

[33] The applicant has not provided sufficient basis for excluding the conferral of silk from the ambit of the President's power under section 84(2)(k). She has not pointed to any features of the institution that warrant its exclusion from the broad understanding of "honours" adopted above. The applicant's argument that the correct enquiry is not whether the word's meaning is wide enough to include a particular practice, but only whether that practice falls within the word's ordinary meaning, misses the point. It cannot be gainsaid, when regard is had to the literal meaning of the word "honours", that the President's power to confer honours is wide enough to include the conferral of silk or the National Orders.

[61] According to Kennedy and Schlosberg, writing in 1935, the appointment of senior counsel amounts to an executive act, which appointment must not be regarded as one conferring honour from the Crown. They argue it amounts to "an executive act concerning the internal government of the country, necessary for certain executive purposes, but what they are it is impossible to say". Kennedy and Schlosberg *The Law and Custom of the South African Constitution* (Oxford University Press, London 1935) at 128. Historically, other commentators have suggested that the position of QC was, in principle, the same as that of the Attorney-General (or Director of Public Prosecutions) to the extent that such advocate held an office or position under the Crown. See Author Unknown "Notes" (1901) 18 *SALJ* 117 at 117. The Supreme Court of Appeal, too, noted that the legal profession and its institutions have traditionally been regarded as integrally related to the administration of justice. Supreme Court of Appeal judgment above n 1 at para 31.

[62] Supreme Court of Appeal judgment above n 1 at para 7.

[34] The applicant relies on the Canadian cases *Lenoir*[63] and *Ontario*.[64] As correctly argued by the JSA, the Privy Council in *Ontario* held that the status of QC was both an honour and an office. This reasoning was consistent with the finding of the Canadian Supreme Court in *Lenoir* that the appointment of silk amounted to the conferral of an honour. The applicant contends that the conferral of silk falls sufficiently within the definitional scope of a title pertaining to an "office" – a position, duty or post held for professional reasons – to exclude it from being designated an honour. Her argument is premised on the understanding that historically there were prerogative powers to confer offices, and prerogative powers to confer honours.

[35] The Constitution only codifies the latter, she contends, and does not therefore empower the President to confer silk because silk amounts to an appointment to office. The respondents on the other hand submit that, properly construed, one's appointment as a silk falls comfortably within the realm of an honour, in the sense that its conferral amounts to an appreciation by an advocate's peers of his or her forensic skill as well as the esteem in which he or she is held. At its best, the applicant's case acknowledges the composite nature of the award of silk, and these authorities simply provide further support for this finding.

[63] *Lenoir v Ritchie* [1879] 3 SCR 575.

[64] *Attorney-General for the Dominion of Canada v Attorney-General for the Province of Ontario* [1898] AC 247 (*Ontario*).

[36] It is further contended by the applicant that section 84(2)(k) must be interpreted with due regard to the values of human dignity, equality and the rule of law. The applicant argues that a construction authorising the President to act in a manner inimical to these values should be avoided. Notionally, the applicant's argument is correct. However she concedes, correctly in my view, that the purported right-infringing effects of the institution of silk are not issues with which we are concerned here.

[37] The Supreme Court of Appeal was correct in the way it disposed of the applicant's reliance on sections 9[65] and 22[66] of the Constitution. It noted that, if silk indeed infringed those rights, that would be dispositive of the matter and there would be no need to enquire into the power of the President to confer the honour of silk. In any event, the applicant's contention concerning the alleged infringement of the Bill of Rights is an entirely separate question to whether the President in fact

[65] Section 9 provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[66] Section 22 provides:

> "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

possesses such power. Crucially, whether and to what extent the institution has an effect on rights cannot determine whether and to what extent it may properly be regarded as an "honour".

Conclusion

[38] I conclude that the President's power to confer honours in terms of section 84(2)(k) includes the authority to confer SC status or silk on advocates. The appeal must therefore be dismissed.

Order

[39] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

For the Applicant:	Advocate N Cassim SC, Advocate E Fagan SC and Advocate M Ramaepadi instructed by Saders Attorneys.
For the First Respondent:	Advocate W van der Linde SC, Advocate I Maleka SC, Advocate A Stein and Advocate K McLean instructed by Gildenhuys Lessing Malatji Inc.
For the Second Respondent:	Advocate W Trengove SC, Advocate A Cockrell SC, Advocate S Cowen and Advocate M Sikhakhane instructed by Mkhabela Huntley Adekeye Inc.