

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**Case No: 2024-149523**

**Case No: 2025-033365**

**Case No: 2024-149523**

**In the matter between:**

**DENEYS REITZ t/a DENEYS**

**First Applicant**

**BOWMAN GILFILLAN INCORPORATED**

**Second Applicant**

**WEBBER WENTZEL**

**Third Applicant**

**WERKSMANS INCORPORATED**

**Fourth Applicant**

**and**

**MINISTER OF TRADE, INDUSTRY AND COMPETITION**

**First Respondent**

**SOUTH AFRICAN LEGAL PRACTICE COUNCIL**

**Second Respondent**

**MINISTER OF JUSTICE AND**

**Third Respondent**

# CONSTITUTIONAL DEVELOPMENT

ADVOCATES FOR TRANSFORMATION

Fourth Respondent

AFRICAN LEGAL PROFESSIONALS ASSOCIATION

Fifth Respondent

BASADI BA MOLAO EDUCATION AND TRAINING  
SERVICES (PTY) LTD

Sixth Respondent

BLACK CONVEYANCERS ASSOCIATION

Seventh Respondent

BLACK LAWYERS ASSOCIATION

Eighth Respondent

GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA

Ninth Respondent

NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS

Tenth Respondent

PAN AFRICAN BAR ASSOCIATION OF SOUTH AFRICA

Eleventh Respondent

SOUTH AFRICAN WOMEN LAWYERS ASSOCIATION

Twelfth Respondent

and

JOHANNESBURG SOCIETY OF ADVOCATES

*Amicus Curiae*

AND

Case no: 2025/033365

In the matter between:

SOLIDARITY TRADE UNION

Applicant

and

MINISTER OF TRADE, INDUSTRY AND COMPETITION

First Respondent

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Second Respondent

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**JUDGMENT**

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**THE COURT**

Introduction

- [1] This is a legal challenge to the Legal Sector Code of Good Practice (“the Legal Sector Code”), promulgated by the Minister of Trade, Industry and Competition (“the Minister”) under section 9(1) of the Broad-Based Black Economic Empowerment Act<sup>1</sup> (“B-BBEE Act”), pursuant to his decision dated 20 September 2024.
- [2] Two applications are before this Court in which the applicants seek an order reviewing and setting aside the Minister's decision to publish the Legal Sector Code and declaring the Legal Sector Code invalid, unconstitutional and of no force or effect, together with costs.
- [3] The first application, under case number 149523/2024,<sup>2</sup> was instituted by Deneys Reitz Inc t/a Deneys; Bowman Gilfillan Incorporated;<sup>3</sup> Webber Wentzel and Werksmans Incorporated (“the Deneys application”).<sup>4</sup> The second application, under case number 2025-033365, was instituted by Solidarity Trade Union (“the Solidarity application”). The Deputy Judge

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<sup>1</sup> Act 53 of 2003.

<sup>2</sup> The application initially comprised Part A and Part B. Part A sought interim relief suspending the operation of the Legal Sector Code pending the final determination of Part B. Part A has since been withdrawn. Part B is the application to review and set aside the Legal Sector Code and to declare it unconstitutional, invalid and of no force and effect.

<sup>3</sup> Following a formal application, the citation of the first applicant (Norton Rose Fulbright South Africa Inc) was varied in terms of Rule 42(1)(b) and Rule 32 to Deneys Reitz Inc t/a Deneys.

President directed that the two applications be heard together because they arise from the same decision and raise substantially the same issues. Save for certain issues raised specifically by Solidarity, the relief sought in both applications is materially the same.

## The parties

### Applicants

- [4] The first applicant is Deneys Reitz Inc t/a Deneys ("Deneys"). The second to fourth applicants are Bowman Gilfillan Incorporated ("Bowmans"), Webber Wentzel ("Webber Wentzel") and Werksmans Incorporated ("Werksmans"). They subsequently joined as intervening applicants.
  
- [5] The applicants are all law firms duly registered in terms of the laws of South Africa. They are prominent commercial law firms with substantial local and international operations. Each law firm employs more than 100 partners in South Africa. They fall within the category of Large Legal Sector Measured Entities ("Large LSMEs") as defined in the Legal Sector Code and are among the six largest law firms in South Africa, commonly referred to in the record as the "top six". As such, the applicants form part of the 5% of law firms that are targeted by the Legal Sector Code.
  
- [6] Before turning to the Legal Sector Code, it is necessary to note that the Broad-Based Black Economic Empowerment ("B-BBEE") framework does not compel legal practitioners or law firms to participate in B-BBEE or to achieve a particular B-BBEE status level. Participation in this framework and, more particularly, the Legal Sector Code remains entirely voluntary. Nevertheless, a decision not to participate may have significant commercial consequences for a law firm, as organs of state, public entities, and private-sector clients frequently take B-BBEE status levels into account when making procurement decisions. Deciding not to participate in the framework, or non-compliance, may therefore place a law firm at a competitive disadvantage and exclude it from opportunities where a particular B-BBEE level is prescribed.

- [7] The four applicant law firms operate within the legal sector. Should they elect to be measured for B-BBEE compliance, such measurement must be undertaken in accordance with the Legal Sector Code, issued in terms of section 9 of the B-BBEE Act. The Legal Sector Code is binding on organs of state and public entities in terms of section 10 of the B-BBEE Act. As a sector-specific code, it prescribes the criteria against which law firms are assessed for B-BBEE purposes and requires measured entities to report annually on their compliance with the relevant sector council, which may be established in terms of sections 10(3) and 10(4) of the B-BBEE Act.
- [8] Solidarity (in case number 2025-033365) is a registered trade union. It instituted these proceedings in its own interest; in the interests of its members; and in the public interest. The three respondents in the Solidarity application are: the Minister of Trade, Industry and Competition; the South African Legal Practice Council and the Minister of Justice and Constitutional Development. The South African Women Lawyers Association also opposed the application and filed an answering affidavit.

#### Respondents (in case number 2024-149523)

##### *The first respondent*

- [9] The first respondent is the Minister of Trade, Industry and Competition ("the Minister"). In his representative capacity as head of the Department of Trade, Industry and Competition ("the DTIC"), the Minister is authorised to issue sector codes and is ultimately responsible for their promulgation under the B-BBEE Act. Section 9(1) of the B-BBEE Act authorises the Minister to issue codes of good practice by notice in the Government Gazette. Section 9(5) requires draft codes to be published for public comment before promulgation.
- [10] As will appear more fully later in this judgment, although the applicants pleaded nine grounds of review, the issues narrowed considerably during oral argument. The principal challenge ultimately centred on the contention that the Minister failed to exercise a proper discretion in publishing the Legal

Sector Code. Because that challenge concerns the lawfulness of the Minister's decision to publish the Legal Sector Code, the Minister is central to these proceedings.

### *The second respondent*

- [11] The second respondent is the Legal Practice Council ("the LPC"), a statutory body established in terms of section 4 of the Legal Practice Act<sup>5</sup> ("the LPA") to regulate the affairs of legal practitioners and candidate legal practitioners. Although Deneys initially cited the LPC merely as an interested party and sought no relief against it, this characterisation understates the LPC's role in developing the Legal Sector Code. Because the Legal Sector Code was developed to further the LPC's statutory transformation mandate, the LPC played a central role in the process that culminated in its publication.
- [12] The LPA establishes the LPC as the regulatory body for the legal profession. Its objects extend beyond regulation and include the transformation and restructuring of the profession in accordance with constitutional imperatives. In particular, the LPA seeks to promote a legal profession that broadly reflects South Africa's demographics, ensure equal opportunities for entry into the profession, and advance the empowerment of historically disadvantaged legal practitioners.
- [13] Consistent with these objectives, section 5(a) of the LPA identifies, as one of the LPC's principal objects, the facilitation of a transformed and restructured legal profession, while section 6(1)(b)(v) requires the LPC to develop programmes aimed at empowering historically disadvantaged legal practitioners. Against this statutory backdrop, the LPC became involved in developing the Legal Sector Code.

### *The other respondents*

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<sup>5</sup> 28 of 2014.

- [14] The third respondent is the Minister of Justice and Constitutional Development ("the Minister of Justice"). The Minister is cited in her representative capacity as the head of the Department of Justice and Constitutional Development and because of her interest in the outcome of these proceedings. No relief is sought against this Minister, save for costs in the event of opposition.
- [15] The fourth respondent is Advocates for Transformation, an organisation established to advance transformation within the advocates' profession. The fifth respondent is the African Legal Professionals Association, which did not file a substantive answering affidavit but made common cause with the position adopted by the first respondent. The sixth respondent is Basadi Ba Molao Education and Training Services (Pty) Ltd ("Basadi"), a non-profit organisation dedicated to advancing the interests of women legal practitioners. Basadi's submissions focused principally on the slow pace of transformation within the legal profession, particularly with reference to women.
- [16] The seventh respondent is the Black Conveyancers Association, a voluntary professional association representing Black conveyancers and practitioners in the property and commercial law sectors. This association advocates for the advancement of Black-owned legal firms and contends that these areas of legal practice remain among the least transformed in the profession. The eighth respondent is the Black Lawyers Association, a long-established professional association committed to promoting the interests of Black legal practitioners and advancing transformation in the legal profession.
- [17] The ninth respondent is the General Council of the Bar of South Africa ("the GCB"), the representative body of the organised advocates' profession. The GCB supports the Legal Sector Code as an important mechanism for promoting transformation, particularly through equitable briefing patterns and advancing Black advocates, especially Black women advocates. The tenth respondent is the National Association of Democratic Lawyers ("NADEL"), a professional association whose membership consists predominantly of Black legal practitioners. NADEL's support for the Legal Sector Code is informed

mainly by its members' lived experiences and the practical need to address structural inequalities within the legal profession.

- [18] The eleventh respondent is the Pan-African Bar Association of South Africa ("PABASA"), a professional association representing Black advocates and committed to transforming the legal profession.<sup>6</sup> The twelfth respondent is the South African Women Lawyers Association ("SAWLA"), an organisation established to advance the interests of women in the legal profession. SAWLA's submissions provided valuable insight into the position of women in the legal profession, highlighting both the progress achieved and the challenges that continue to impede substantive equality, particularly in the allocation of legal work. The Johannesburg Society of Advocates was admitted as *amicus curiae*.
- [19] Before turning to the issues for determination, it bears emphasising that the Court has considered all the submissions advanced on behalf of the parties. Given the number of parties in these proceedings, many of the factual and legal contentions converged. To avoid unnecessary repetition, the Court does not attribute every submission to a particular party. Unless the context indicates otherwise, references to the respondents' submissions should be understood as encompassing arguments advanced by one or more respondents. Where a submission is material to the issue under consideration, specific reference is made to the relevant party. Greater emphasis has been placed on the submissions of the applicants, the Minister and the LPC, given their particular relevance to the issues for determination. The LPC played a central role in formulating and developing the Legal Sector Code, but the ultimate statutory power to decide whether to approve and promulgate the Code vests in the Minister under section 9 of the B-BBEE Act. The Court has, however, also derived considerable assistance from the submissions of the remaining respondents, particularly in understanding the factual context in which the Legal Sector Code was developed and the broader issues concerning transformation within the legal profession.

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<sup>6</sup> PABASA, however, filed a notice to withdraw on 4 May 2026.

### Preliminary points

- [20] Two preliminary points were raised. The first concerns Solidarity's locus standi, and the second concerns the non-joinder of the Charter Council.

#### *Locus standi of Solidarity*

- [21] The three respondents in the Solidarity application challenged Solidarity's legal standing to bring these proceedings. The LPC submitted that the Legal Sector Code regulates ownership, management control, skills development and procurement within the legal profession, rather than labour relations, and therefore falls outside the scope of Solidarity's functions and interests as a trade union. The LPC contended that Solidarity had failed to identify any members who are legal practitioners and directly affected by the Legal Sector Code, or to establish that it falls within any of the categories of litigants recognised by section 38 of the Constitution. It further contended that Solidarity is not itself a regulated entity subject to the Legal Sector Code. According to the LPC, Solidarity's challenge amounts to no more than a disagreement with the policy choices reflected in the Legal Sector Code, rather than the vindication of any legally protected right. It accordingly submitted that Solidarity has failed to establish standing in its own interest, on behalf of its members, or in the public interest.
- [22] Solidarity disputes the respondents' contention that it lacks standing to challenge the Legal Sector Code. It submits that the objection is misconceived both in fact and in law. According to Solidarity, a significant number of its members are employed in the legal sector and are directly affected by the Legal Sector Code, which affects their conditions of employment, opportunities for promotion and ownership, and the legal services market in which they operate. It explains that its Legal Network comprises more than 850 members whose rights and interests are directly implicated by the impugned Legal Sector Code. Solidarity further contends that the Legal Sector Code affects its

own interests as a registered trade union by limiting its ability to engage in collective bargaining and consultation with employers on matters regulated by the Employment Equity Act. It also submits that the Legal Sector Code limits constitutional rights, including freedom of association and the right to freely choose legal representation, thereby raising constitutional issues that extend beyond the interests of entities directly regulated by the Code. In those circumstances, Solidarity argues that it has a sufficient and direct interest in the legality of the impugned decision to publish the Legal Sector Code and that the respondents' restrictive approach to standing would improperly insulate exercises of public power from judicial scrutiny and undermine the constitutional principles of legality, accountability and the rule of law.

[23] Solidarity also relies on its position within the statutory framework established by the B-BBEE Act. It submits that the Act expressly recognises organised labour as a legitimate stakeholder in the development and implementation of codes of good practice through its representation on the Broad-Based Black Economic Empowerment Advisory Council, which advises on draft codes (section 6(2)(b) of the B-BBEE Act). Solidarity further refers to its participation in the public consultation preceding the promulgation of the Legal Sector Code, during which it submitted written comments in response to an invitation extended to legal practitioners, stakeholders and users of legal services. It argues that the statutory recognition afforded to organised labour, together with its participation in the consultative process, is difficult to reconcile with the respondents' contention that it lacks a sufficient interest to challenge the lawfulness of the Legal Sector Code once promulgated. It accordingly submits that the preliminary objection to its standing should be dismissed.

[24] Legal standing is not a mere formality. Although section 38 of the Constitution adopts a broad approach to standing, an applicant must still establish that it falls within one or more of the categories recognised by that section. In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*<sup>7</sup> the Constitutional Court emphasised that, while constitutional standing must be generously and broadly construed, a litigant must nonetheless demonstrate a sufficient interest

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<sup>7</sup> 2013 (3) BCLR 251 (CC) paras 35 – 42.

in the relief sought. The Court cautioned that an own-interest litigant cannot establish standing merely by asserting that an exercise of public power is unlawful: the unlawfulness complained of must affect the litigant's own interests or potential interests. The enquiry is therefore not simply whether a constitutional or legality issue has been raised, but whether the applicant has established the requisite interest to invoke the Court's jurisdiction.

- [25] The LPC's objection focuses primarily on whether Solidarity has demonstrated that it represents legal practitioners directly regulated by the Code. However, that approach overlooks the broader constitutional and statutory context in which the present challenge is brought. This is not private litigation concerning the enforcement of contractual or proprietary rights. Rather, it is a challenge to the exercise of public power under the B-BBEE Act. The relief sought includes declarations of constitutional invalidity, together with the review and setting aside of the impugned decision. The challenge is grounded in the principle of legality, the rule of law, and compliance with the constitutional and statutory framework governing the exercise of public power.
- [26] This distinction is significant. Section 38 of the Constitution was deliberately enacted to broaden access to courts in constitutional matters. The Constitution adopts a broader approach to standing than that recognised at common law. Constitutional standing is therefore to be approached generously to ensure that constitutional rights receive the full measure of protection afforded by the Constitution.<sup>8</sup>

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<sup>8</sup> See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 165, where Chaskalson P stated: "I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled." See also *O'Regan J* at para 229: "There can be little doubt that section 7(4) provides for a generous and expanded approach to standing in the constitutional context. The categories of persons who are granted standing to seek relief are far broader than our common law has ever permitted." *O'Regan J* further emphasised at para 231 that standing nevertheless remains a factual enquiry and that "the facts necessary to establish standing should appear from the record before the court."

- [27] Whether a litigant has standing depends on the particular category of standing relied upon and the requirements applicable to that category. Where a litigant claims to act in the public interest, the Court must be satisfied that the proceedings are genuinely brought in the public interest. That enquiry is objective and depends on the circumstances of the particular case. Relevant considerations include whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought; the extent to which it is of general and prospective application; the range of persons affected; their opportunity to place evidence and argument before the Court; their degree of vulnerability; the nature of the right alleged to have been infringed; and the consequences of the alleged infringement.<sup>9</sup> The present matter concerns the validity of a sector code promulgated under national legislation and the lawfulness of the decision by which it was adopted. These issues extend beyond the immediate interests of individual legal practitioners. They implicate broader constitutional concerns relating to legality, accountability and the proper exercise of public power. The challenge therefore raises issues of manifest public importance.
- [28] The LPC's objection sits somewhat uneasily with the statutory framework on which the Legal Sector Code itself is founded. Parliament expressly recognised organised labour as a legitimate participant in the structures responsible for advising on and monitoring the implementation of the B-BBEE framework. Although participation in the consultative process does not, without more, confer standing, Parliament's recognition of organised labour as a legitimate participant in the formulation and development of codes of good practice is a relevant contextual consideration when determining whether such an organisation has a sufficient interest to challenge the legality of measures adopted under that very framework.
- [29] The Constitution also recognises the importance of meaningful public participation in governmental decision-making. Although *Doctors for Life International v Speaker of the National Assembly and Others*<sup>10</sup> concerned the

<sup>9</sup> See *Lawyers for Human Rights v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) paras 16–18, approving the approach proposed by O'Regan J in *Ferreira*.

<sup>10</sup> 2006 (6) SA 416 (CC). ("Doctors for Life")

constitutional obligation resting upon legislatures to facilitate public involvement in the legislative process, the Constitutional Court emphasised that South Africa's constitutional democracy is founded not only on representative democracy but also on participatory democracy. Public participation enhances the legitimacy, accountability and responsiveness of public decision-making, although it does not require that every view advanced during the consultative process ultimately be accepted. While *Doctors for Life* was not concerned with legal standing, it nevertheless underscores the constitutional significance attached to participation in public decision-making processes.<sup>11</sup>

- [30] In the present matter, Solidarity not only asserts an interest in the outcome of the Legal Sector Code but also actively participated in the consultation process preceding its promulgation. As already pointed out, it made submissions during the public participation process relating to the Legal Sector Code and raised several concerns about the constitutional validity of the proposed Legal Sector Code. It further contends that the Legal Sector Code directly affects both its members' interests and its own institutional interests. Its challenge is therefore directed at the legality of a process in which it participated and the lawfulness of the resulting regulatory instrument.
- [31] In the light of these considerations, the respondents' objection cannot be sustained. This matter concerns the legality of the exercise of public power under national legislation and raises constitutional issues extending beyond the interests of entities directly regulated by the Legal Sector Code. Having regard to the statutory framework, Solidarity's participation in the process leading to the promulgation of the Code, and the interests it asserts on behalf of itself and its members, we are satisfied that Solidarity has established standing to pursue the challenge.
- [32] The point *in limine* is accordingly dismissed.

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<sup>11</sup> *Ibid* paras 115–129.

*Non-joinder of the Charter Council*

- [33] The Minister contended that the Charter Council ought to have been joined to these proceedings because it had already been established to oversee and implement the Legal Sector Code and therefore has a direct interest in its continued operation. According to the Minister, any order reviewing and setting aside the Legal Sector Code would necessarily affect the Charter Council's powers and functions.
- [34] NADEL advanced a similar submission. It argues that the Charter Council monitors compliance with the Legal Sector Code; provides guidance on its interpretation; and oversees future revisions. On that basis, the respondents submit that the Charter Council has a direct and substantial interest in the relief sought and that its non-joinder is fatal to the application.
- [35] Deneys disputes those contentions. It submits that these proceedings concern the lawfulness, rationality and constitutionality of the Minister's decision to publish the Legal Sector Code. The decision was the Minister's alone, and it is the lawfulness of that decision that lies at the heart of these proceedings. Deneys further contends that the Charter Council neither made nor participated in the impugned decision. Its legal interest, if any, lies in implementing a lawfully promulgated Legal Sector Code, and its constitution presupposes the existence of such a Code. Deneys accordingly submits that the Charter Council does not have a direct and substantial legal interest in the logically antecedent question whether the Minister lawfully exercised the statutory power to publish the Code.
- [36] Deneys further submits that the Charter Council was established only on 22 April 2025, after the applicants delivered their founding papers on 7 April 2025. Deneys accordingly contends that it could not have joined the Charter Council when these proceedings were instituted. It further submits that the Charter Council has no separate juristic personality and cannot sue or be sued in its

own name. Finally, although members of the Charter Council, including representatives of the Legal Practice Council and Advocates for Transformation, have deposed to affidavits in these proceedings, the Charter Council itself has neither sought leave to intervene nor asserted that it possesses a legal interest requiring its joinder.

- [37] The principles governing joinder are well established. A party must be joined only where it has a direct and substantial interest in the subject matter of the litigation that may be prejudicially affected by the order sought. In *Amalgamated Engineering Union v Minister of Labour*<sup>12</sup> the Appellate Division held that a party whose rights may be affected by a judgment is a necessary party and must be joined to the proceedings. The required interest is a legal interest in the subject matter of the litigation itself, not merely a financial, commercial, administrative, or practical interest in the outcome. In *Gordon v Department of Health, KwaZulu-Natal*,<sup>13</sup> the Supreme Court of Appeal confirmed that the decisive enquiry is whether the absent party has a legal interest in the proceedings that the Court's judgment may prejudicially affect.
- [38] In *Judicial Service Commission v Cape Bar Council*,<sup>14</sup> the Supreme Court of Appeal reaffirmed that joinder is required only as a matter of necessity, not convenience, and cautioned that "the mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea." The Constitutional Court's decision in *Snyders and Others v De Jager*<sup>15</sup> is to the same effect. There, the Court held that the decisive enquiry is whether the absent party has a direct and substantial legal interest in the proceedings, namely whether the order sought will directly affect that party's rights or interests. If so, the party ought to be joined, because a judgment affecting those rights or interests may not properly be granted in its absence without affording it an opportunity to be heard.
- [39] Applying those principles, we are not persuaded that the Charter Council has a direct and substantial legal interest in the subject matter of these

<sup>12</sup> 1949 (3) SA 637 (A).

<sup>13</sup> 2008 (6) SA 522 (SCA) para 9.

<sup>14</sup> 2013 (1) SA 170 (SCA) para 12. ("*Judicial Services Commission*").

<sup>15</sup> 2017 (5) BCLR 604 (CC) para 9.

proceedings. As mentioned earlier in this judgment, although the applicants pleaded numerous grounds of review, the issues ultimately crystallised during oral argument. The central question for determination is whether the Minister lawfully, rationally and constitutionally exercised the statutory power conferred upon him by section 9 of the B-BBEE Act when he published the Legal Sector Code. The Minister took that decision solely in the exercise of statutory public power. The Charter Council did not take it, and no relief is sought against it. The lawfulness of the Minister's decision can therefore be determined fully in the Charter Council's absence.

[40] The respondents' submissions further conflate an interest in the continued operation of the Legal Sector Code with a legal interest in the validity of the Minister's decision to publish it. The distinction is significant. As the Supreme Court of Appeal observed in *Judicial Service Commission v Cape Bar Council*:<sup>16</sup> a party's interest in the outcome of litigation does not, without more, establish the direct and substantial legal interest required for joinder. The Charter Council is a creature of the Legal Sector Code. It derives its powers, functions and very existence exclusively from the Code and has no independent statutory source of authority. Moreover, the decision under review preceded the establishment of the Charter Council. Its existence is therefore both logically and legally dependent on the validity of the Legal Sector Code itself. While the Charter Council may have an operational or administrative interest in the Legal Sector Code's continued existence, that does not amount to a direct and substantial legal interest in the Minister's antecedent decision to promulgate it. Significantly, the Minister of Justice, who bears the responsibility for establishing the Charter Council and is best placed to identify any prejudice arising from its absence, has not suggested that these proceedings suffer from non-joinder.<sup>17</sup>

[41] In conclusion: the respondents have identified no legal right, obligation or interest of the Charter Council that may be prejudicially affected by the relief sought. The Charter Council can contribute nothing to the question whether

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<sup>16</sup> *Judicial Services Commission* para 12

<sup>17</sup> Paragraph 13.2 of the Legal Sector Code.

the Minister lawfully exercised the statutory power conferred by section 9 of the B-BBEE Act; whether the impugned decision was rationally connected to the information before him; or whether the publishing of the Legal Sector Code complied with the constitutional and statutory requirements governing the exercise of public power. If the Minister's decision is found unlawful or unconstitutional, it must be reviewed and set aside. The fact that such an order may have practical consequences for the Charter Council's continued existence or functioning does not elevate its operational or administrative interest to the direct and substantial legal interest required for joinder.

- [42] The point in limine based on the alleged non-joinder of the Charter Council must accordingly fail.

#### State of transformation in the legal sector

- [43] The South African legal profession continues to bear the imprint of an exclusionary past. For much of South Africa's history, the profession operated as a largely closed institution, dominated by White men and largely inaccessible to Black people, especially women. Although the advent of constitutional democracy ushered in a commitment to equality, dignity and transformation, the respondents contend that the profession has yet to overcome the structural consequences of that history. In particular, it is submitted that meaningful disparities persist in ownership, leadership, access to high-value legal work and economic participation, with Black practitioners, and Black women in particular, continuing to encounter systemic barriers to advancement.
- [44] The demographic profile of the legal profession presents a disconcerting picture of persistent disparities in representation, particularly at the levels of ownership and leadership. According to the Law Society of South Africa's 2024/2025 Annual Report, South Africa has 33 929 practising attorneys. Updated LPC statistics indicate that the number increased to 34 967 in 2025. Black practitioners now constitute the majority of practising attorneys, and significant progress has been achieved at entry level; candidate attorneys are

approximately 70% Black. Black practitioners constitute approximately 59% of associates and around 60% of senior associates. Relying on these figures, the respondents accept that considerable progress has been made in broadening access to the profession. They contend, however, that the principal challenge no longer lies in entry into the profession but in progression, retention, ownership and meaningful economic participation. According to the respondents, the demographic profile at junior levels has not translated into comparable representation at the levels of ownership, leadership and economic influence.

- [45] According to the LPC, the structural imbalance is most evident in the country's largest commercial law firms, particularly the applicants. LPC statistics indicate that the six largest firms collectively have 1 111 partners, comprising 802 White, 123 African, 92 Coloured and 68 Indian partners. White partners therefore constitute approximately 72% of all partners, while Black partners collectively account for only approximately one quarter. Even on the applicants' own figures, their equity partnership structures remain between 70% and 75% White-owned, with Black partners holding only between 21% and 27% of the economic interest. Deneys acknowledges Black ownership of only 26.24%, with Black women holding merely 7.01% ownership. The respondents contend that these figures reveal a persistent structural deficit at the level of strategic decision-making, ownership and profit participation.
- [46] The disparities become more pronounced when viewed through the lens of gender. Although Black practitioners collectively constitute the majority within the profession, the LPC points out that Black women remain significantly underrepresented in positions of ownership and leadership. According to the LPC, Black women number only 5 172 practising attorneys nationally, representing approximately 15.2% of the profession. The respondents contend that the demographic profile of large commercial firms shows that the pathway from entry into the profession to positions of ownership and authority remains particularly underdeveloped for Black women, whom the respondents identify as continuing to experience the greatest barriers to meaningful participation in ownership and leadership within the profession.

- [47] The LPC disputes the applicants' suggestion that the lack of Black representation at partnership level is attributable merely to the lengthy pathway to equity partnership, the rigorous standards required for appointment, or individual career choices. It notes that Black practitioners already constitute approximately 59% of associates, while White practitioners account for approximately 40%. If advancement structures were functioning equitably, the LPC argues, that demographic profile ought to be reflected progressively at partnership level. Instead, White practitioners continue to comprise approximately 72% of equity partners. In the LPC's submission, this disparity points towards institutional barriers affecting retention and advancement rather than being explained solely by ordinary career mobility or personal preference.
- [48] The LPC places particular emphasis on the attrition of Black associates shortly before they become eligible for equity partnership. It notes that these practitioners have already demonstrated the ability to succeed in the demanding environment of large commercial firms and have reached the threshold of senior ownership. According to the LPC, the disproportionate departure of Black practitioners at that critical stage of their careers suggests that barriers to transformation cannot be explained solely by entry into the profession. The LPC contends that this pattern of attrition is indicative of institutional and structural barriers affecting retention, progression and advancement to partnership, particularly for Black women. It further criticises the applicants for failing to identify meaningful measures to retain Black practitioners on the pathway to equity partnership.
- [49] Against this backdrop, the LPC argues that the Generic B-BBEE Codes have failed to deliver meaningful transformation in the legal profession. The Generic Codes provide the generally applicable framework for measuring B-BBEE compliance across sectors of the economy, whereas the Legal Sector Code establishes a sector-specific framework tailored to the particular characteristics of the legal profession and the transformation challenges identified within it. The LPC points to the applicant firms' attainment of Level 1 B-BBEE ratings under the Generic Codes despite their overwhelmingly White ownership and leadership. According to the LPC, this demonstrates that compliance with the

Generic Codes may result in a high B-BBEE status without adequately addressing the structural barriers that, in its view, continue to impede transformation within the profession. It therefore rejects the applicants' reliance on their existing B-BBEE status as evidence of successful transformation and contends that the Legal Sector Code was introduced precisely because a more rigorous, sector-specific intervention was required.

- [50] More broadly, the respondents contend that the transformation challenges facing the legal profession extend well beyond questions of ownership. They submit that Black practitioners continue to face structural barriers to securing access to high-value legal work, equitable briefing patterns, progression into leadership and ownership positions, and the long-term sustainability of legal practice. While acknowledging significant progress in broadening access to the profession, they maintain that meaningful transformation in economic participation and positions of influence has not kept pace with that demographic progress. Against that backdrop, they contend that the Legal Sector Code was developed as a sector-specific instrument to address the continuing structural barriers affecting the retention, advancement and meaningful participation of Black legal practitioners, particularly Black women.

### *The need for transformation*

- [51] The imperative to transform the legal profession finds its constitutional foundation in section 9(2) of the Constitution, which recognises that equality is not self-executing and expressly authorises legislative and other measures designed to protect and advance persons disadvantaged by unfair discrimination. The provision embodies the Constitution's commitment to substantive equality and recognises that achieving that objective requires more than the removal of formal barriers to equality. It expressly authorises positive measures designed to redress historical disadvantage and dismantle entrenched patterns of exclusion.
- [52] The Constitutional Court has consistently held that section 9(2) gives effect to the Constitution's commitment to substantive, rather than merely formal,

equality. In *Minister of Finance v Van Heerden*<sup>18</sup> the Court described the pursuit of equality as “going to the bedrock of our constitutional architecture” and emphasised that the Constitution requires measures to redress the consequences of past discrimination. The Court thus rejected a purely formal conception of equality and affirmed that remedial measures form an integral part of the constitutional promise of substantive equality.

- [53] The Constitutional Court explained the rationale for the Constitution’s commitment to substantive equality in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*.<sup>19</sup> In that matter, the Court observed that removing discriminatory laws does not, by itself, eradicate the enduring consequences of past discrimination. Unless those consequences are addressed, inequality may persist long after the laws or practices that produced it have ceased to operate:

“[60] It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.”

- [54] Ngcobo J reaffirmed that understanding of substantive equality in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*.<sup>20</sup> Drawing expressly on *National Coalition*, he emphasised that South Africa’s Constitution differs fundamentally from constitutions founded upon assumptions of formal equality because it recognises that the legacy of systematic discrimination cannot be overcome without positive remedial action. Ngcobo J observed:

“[74] The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional

<sup>18</sup> 2004 (6) SA 121 (CC) para 22 et seq.

<sup>19</sup> 1999 (1) SA 6 (CC) para 60. (“*National Coalition*”)

<sup>20</sup> 2004 (4) SA 490 (CC) para 74. (“*Bato Star*”)

order is committed to the transformation of our society from a grossly unequal society to one 'in which there is equality between men and women and people of all races'. In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a *commitment to end it*."

- [55] In *South African Police Service v Solidarity obo Barnard*,<sup>21</sup> Moseneke ACJ reiterated that South Africa's constitutional commitment to substantive equality must be understood against the backdrop of a society marked by deep historical inequality. The Constitution therefore permits, and in appropriate circumstances requires, measures designed to advance those disadvantaged by past unfair discrimination in order to achieve genuine inclusion and representivity.
- [56] More recently, in *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association*,<sup>22</sup> the Court again described transformation as a constitutional imperative and recognised the legitimacy of measures designed to broaden participation in professions historically characterised by exclusion.
- [57] The thread running through these authorities is clear: the Constitution does not treat transformation as an optional policy preference or political aspiration. Rather, it recognises transformation as an indispensable constitutional means of achieving substantive equality by addressing the enduring consequences of historical discrimination. That constitutional commitment finds legislative expression in the LPA and the B-BBEE Act. The former seeks to transform

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<sup>21</sup> 2014 (6) SA 123 (CC).

<sup>22</sup> 2018 (5) SA 349 (CC): "[1] Restitutionary measures are a vital component of our transformative constitutional order. The drafters of our Constitution were alive to the fact that the abolition of discriminatory laws and the guarantee of equal rights alone would not lead to an egalitarian society envisaged in the Constitution. Something more had to be done in order to dismantle the injustices and inequalities arising from the apartheid legal order. Hence the Bill of Rights, which is a cornerstone of our democratic order, includes remedial measures."

and restructure the legal profession in line with constitutional imperatives, while the latter promotes economic transformation and the meaningful participation of Black people in the economy. The Legal Sector Code must be understood against that constitutional and legislative backdrop.

#### The dispute before this court

- [58] In these proceedings, the applicants were at pains to emphasise what this case is not about. They expressly disavow any opposition to transformation within the legal profession and reject the suggestion that the application is an attempt to preserve privilege or resist transformation. They do not challenge the legitimacy of a Legal Sector Code as a mechanism for advancing transformation within the profession. On the contrary, they state that they welcome the promulgation of a lawful sector-specific code that applies across the profession and imposes realistic and equitable transformation obligations. They further acknowledge that the Minister is entitled to promulgate a sector-specific code that departs from the Generic Codes, provided that those departures are lawfully justified and comply with the requirements of the B-BBEE Act and the “Guidelines for developing and gazetting of sector codes”, also known as “Statement 003”. They further accept that a lawfully promulgated sector code may impose more demanding obligations than those contained in the Generic Codes and may consequently reduce their existing B-BBEE contributor status.
- [59] Against that background, the applicants submitted that the issue before this Court concerns the lawfulness of the Minister's exercise of the power conferred by section 9(1) of the B-BBEE Act, rather than the merits of competing transformation policies. The Court, they say, is not called upon to substitute its own views for those of the executive, but to determine whether the Minister lawfully exercised that statutory power. They contend that the Legal Sector Code departs materially from the Generic Codes without lawful justification, was developed and promulgated in a manner inconsistent with the regulatory framework governing sector codes, and contains targets, methodologies and

measurement criteria that are arbitrary, irrational and unsupported by the information before the decision-maker.

- [60] The applicants further contend that the Legal Sector Code cannot achieve its stated transformation objectives because it exempts approximately 95% of legal firms from its operation. According to the applicants, the Legal Sector Code therefore regulates only a small proportion of the profession, despite evidence that the exempt segment is, on average, less transformed than the firms that remain subject to the Legal Sector Code. They submit that imposing increasingly onerous obligations on the relatively small number of firms already subject to the Legal Sector Code, while exempting the overwhelming majority, lacks a rational connection to the objective of accelerating transformation across the profession.
- [61] The applicants also challenge several substantive features of the Legal Sector Code, including the exclusion of socio-economic development expenditure; bursaries awarded to Black students; skills-development expenditure directed at Black employees with disabilities; and Black non-lawyers from management-control measures. They further challenge the ownership targets and the absence of transitional arrangements following the Code's immediate implementation. According to the applicants, these provisions are inconsistent with the governing regulatory framework, introduce methodologies and obligations not authorised by Statement 003, and impose targets that are, in certain respects, unreasonable, impractical and incapable of achievement within the prescribed timeframes. Collectively, they contend that these defects render the Minister's decision to promulgate the Code unlawful and irrational.
- [62] The respondents emphatically reject the applicants' characterisation of the litigation. They contend that, despite the applicants' repeated protestations of support for transformation, the application directly challenges the principal instrument designed to give effect to transformation within the legal profession. According to the respondents, the applicants seek to portray the dispute as one concerning legality and procedural compliance, when, in substance, they seek to preserve an existing transformation framework that has failed to dismantle entrenched patterns of ownership, control and access to high-value

legal work. They argue that the applicants cannot simultaneously profess support for transformation while seeking an order setting aside, in its entirety, the very sector-specific code intended to achieve that objective.

- [63] The respondents further contend that the applicants' reliance on their existing Level One B-BBEE contributor status illustrates precisely why the Legal Sector Code became necessary. They submit that those favourable ratings were achieved despite comparatively low levels of Black ownership and leadership within the applicant firms. According to NADEL, the ratings were attained largely through expenditure on skills development, socio-economic development initiatives and procurement, as well as through the employment of substantial numbers of Black non-legal support staff, rather than through meaningful transformation of ownership, management and control. On the respondents' case, this demonstrates the limitations of applying the Generic Codes to the legal profession: firms may attain the highest level of B-BBEE recognition without necessarily achieving corresponding transformation in those areas regarded as central to participation and advancement within the profession. The respondents contend that the Legal Sector Code was developed to address those limitations through a sector-specific framework directed more closely at transformation in ownership, leadership, briefing patterns and meaningful economic participation.
- [64] Against that background, the respondents contend that there is a tension between the applicants' stated acceptance of the constitutional imperative of transformation and the legitimacy of a sector-specific code, on the one hand, and the challenge they advance, on the other. In their submission, the applicants seek to impugn the very measures introduced to address the shortcomings they themselves identify in the application of the Generic Codes to the legal profession. That tension is, they contend, compounded by the breadth of the relief sought: although the applicants characterise their challenge as directed at particular features of the Legal Sector Code, the notice of motion seeks an order reviewing and setting aside the Code in its entirety.

- [65] Basadi advances a further criticism. It submits that the applicants' case pays insufficient attention to women's position in the legal profession, particularly Black women. According to Basadi, although the applicants invoke the language of legality, fairness and rationality, their challenge is directed at measures specifically designed to improve the participation of Black women in ownership, leadership, briefing patterns and access to quality legal work. Basadi emphasises that Black women continue to experience structural disadvantage arising from entrenched briefing practices, limited access to economically significant work and longstanding barriers to professional advancement. It further contends that the applicants identify no meaningful alternative mechanism capable of addressing those enduring inequalities. In these circumstances, Basadi submits that the relief sought would undermine one of the central objectives of the Legal Sector Code, namely advancing Black women within the legal profession.
- [66] The parties' submissions make it clear that there is no fundamental disagreement about the constitutional imperative of transformation or the need for continued transformation within the legal profession. Nor is there any real dispute that the B-BBEE Act authorises the promulgation of sector-specific codes to advance that objective. Those questions are therefore not before this Court. Equally, it is not for this Court to determine whether the Legal Sector Code embodies the optimal model for achieving transformation, or whether different policy choices might better advance the objectives of the Act. Parliament has entrusted those matters to the executive.

#### Nine review grounds

- [67] The applicants initially advanced seven independent grounds of review challenging the validity of the Legal Sector Code. After delivery of the Rule 53 record, they relied on two further grounds arising from both the contents of the record and, significantly, from documents they contend ought to have formed part of it. In total, they advanced nine review grounds, each said to constitute

an independent basis on which the Minister's decision to promulgate the Legal Sector Code falls to be reviewed and set aside.

- [68] These grounds include alleged unlawful departures from Statement 003 and the Generic Codes; irrational targets: methodologies and weightings; the absence of an adequate empirical foundation for material aspects of the Code; the lack of transitional arrangements; alleged inconsistency with section 9(2) of the Constitution; the contention that certain provisions are ultra vires the empowering legislation; the absence of a transformation strategy contemplated by the B-BBEE Act; the Minister's alleged failure to independently satisfy himself that the statutory process had been lawfully followed; and the alleged failure to engage meaningfully with the serious concerns identified by his predecessor, Minister Patel. The nature and significance of the concerns raised by Minister Patel will be addressed more fully later in the judgment.
- [69] These grounds raise distinct questions of legality, rationality, procedural fairness and statutory interpretation. During oral argument, however, the applicants' challenge crystallised around the exercise of the Minister's discretion before the Legal Sector Code was promulgated: whether he independently satisfied himself that the statutory requirements governing the adoption of the Code had been met; whether the material departures from the Generic Codes were properly justified; and whether the substantial concerns previously raised by Minister Patel had been adequately addressed. Against that background, the central enquiry is whether the Minister exercised the statutory discretion conferred upon him by the B-BBEE Act in accordance with the requirements of the Constitution and the Act.

#### The scheme and principal features of the Legal Sector Code

- [70] The B-BBEE Act seeks to promote broad-based economic transformation and the meaningful participation of Black people in the economy through changes in ownership and management, increased participation by Black women, skills

development and support for Black-owned enterprises. Section 9 empowers the Minister, by notice in the Government Gazette, to issue codes of good practice prescribing criteria, indicators and weightings for measuring progress towards those objectives.

- [71] The Legal Sector Code was published pursuant to that power on 20 September 2024. In terms of section 10(3) of the Act, it became the applicable B-BBEE measurement framework for enterprises operating within the legal sector, replacing the Generic Codes. The respondents contend that a sector-specific framework is necessary to address the profession's distinctive structure and persistent inequalities in ownership, professional advancement and access to economically significant legal work.
- [72] The Code comprises four principal scorecard elements: Ownership, Management Control, Skills Development, and Preferential Procurement and Enterprise Development. It provides for progressively increasing Black-ownership and Black-women-ownership targets; focuses management control on professional leadership within legal practices; and promotes candidate training, mentorship and specialised legal education. It also establishes a Legal Sector Transformation Fund to support entry and advancement within the profession, with institutional oversight through a Charter Council.
- [73] A central feature is the emphasis on the procurement of legal services and equitable briefing practices. As the JSA explains, the advocates' profession is referral-based, and attorneys therefore play a central role in allocating work. The respondents contend that longstanding briefing patterns have restricted opportunities for Black advocates, particularly Black-women advocates, in specialist and high-value fields. The Code accordingly accords significant weight to their briefing as a means of expanding professional and economic opportunities.
- [74] The respondents also emphasise the intersecting disadvantages of race and gender experienced by Black-women practitioners. As discussed earlier, Basadi identifies unequal briefing patterns, limited access to significant legal work, slower advancement into ownership and leadership, and comparatively

high attrition. The respondents contend that the Code's ownership, procurement, skills-development and funding measures seek collectively to address these barriers.

- [75] This outline provides context for the review without assessing the substantive validity of individual provisions. The consultation, technical work, coordination and departmental evaluation preceding promulgation supplied the Minister with information and advice to inform his decision. Those processes does not, however, displace his statutory responsibility. The central question is whether, informed by that process, the Minister himself exercised the judgment required by section 9(1), consistently with the constraints imposed by the rule of law.

#### The constitutional constraints imposed by the Rule of Law

- [76] Section 9(1) empowers the Minister to issue codes of good practice and sector codes by notice in the Gazette. The power is permissive rather than obligatory: Parliament does not require the Minister to promulgate every proposed sector code submitted to him but entrusts that decision to his discretion. Exercising it requires the Minister to consider the material before him and the purposes of the Act and to determine whether to issue the proposed code. Where departures from the Generic Codes are proposed, those departures form part of the matters relevant to that determination. The power conferred by s 9(1) is thus both discretionary and evaluative.
- [77] The exercise of that discretion is constrained by the Constitution and, in particular, by the rule of law. Section 1(c) proclaims the supremacy of the Constitution and the Rule of Law as founding values of the Republic. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,<sup>23</sup> that Court held that it is "central to the conception of our constitutional order" that the Legislature and Executive "may exercise no power and perform no function beyond that conferred upon them by law". In *Pharmaceutical Manufacturers Association of SA: In re Ex parte*

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<sup>23</sup> 1999 (1) SA 374 (CC) para 58.

*President of the Republic of South Africa*,<sup>24</sup> the Court explained that “[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law”.

- [78] Of particular relevance in the present matter is the principle that a functionary must exercise the statutory discretion Parliament has conferred on them. In *Hofmeyr v Minister of Justice and Another*,<sup>25</sup> the principle was expressed in these terms:

“It is well established that a discretionary power vested in one official must be exercised by that official (or his lawful delegate) and that, although where appropriate he may consult others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else.”

- [79] The Supreme Court of Appeal later endorsed that formulation in *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd*.<sup>26</sup> In that matter the Court accepted that a functionary upon whom a discretionary power is conferred may obtain assistance and act upon the advice of others. It did not require the functionary to personally acquaint himself with every fact on which the advice was based. What was required, where reliance was placed upon advice, was that the functionary “at the least” be aware of the grounds upon which that advice was given. The Court held that the functionary’s lack of knowledge of every fact underlying the advice did not mean the discretion was improperly exercised, particularly where the advice was only one factor in the ultimate decision.

- [80] The distinction is important. The law does not require a Minister personally to perform every task which precedes the exercise of a statutory power and that is also not suggested here. Consultation, technical analysis, departmental work and recommendations may all legitimately inform the decision. What the law requires is that the statutory discretion ultimately be exercised by the functionary upon whom Parliament has conferred it. *Scenematic Fourteen* thus accommodates the practical realities of governmental decision-making while

<sup>24</sup>2000 (2) SA 674 (CC) para 20.

<sup>25</sup>1992 (3) SA 108 (C) at 117F–G.

<sup>26</sup>2005 (6) SA 182 (SCA) para 20. (“*Scenematic Fourteen*”)

preserving the distinction between assistance in the decision-making process and the exercise of the statutory power itself.<sup>27</sup>

- [81] The consultative process in the present matter therefore assumes significance not because consultation or reliance on advice is objectionable, but because it reveals the material on which the Minister's eventual decision was based. It identifies the objections and concerns which emerged during consultation; the proposed departures from the Generic Codes; the concerns raised by Minister Patel; and the recommendations ultimately placed before the Minister. Those matters form part of the factual matrix against which the exercise of the Minister's statutory discretion must be assessed.
- [82] The Rule 53 record is therefore important for the same reason. It enables the reviewing court to identify the material before the decision-maker and assess the lawfulness of the decision under review. The enquiry in the present matter is not directed at reviewing the consultative process as an end in itself. It is directed at determining, from the record and the evidence before this Court, whether the Minister exercised the discretion conferred upon him by s 9(1).
- [83] These principles were recognised long ago in *Shidiack v Union Government (Minister of the Interior)*.<sup>28</sup> There, Innes ACJ explained that, where a matter is left to the discretion of a public officer, a court will not interfere where the officer has "duly and honestly applied himself to the question which has been left to his discretion". Conversely, judicial intervention may be warranted where the functionary "had not applied his mind to the matter or exercised his discretion at all". In *Pharmaceutical Manufacturers* this Court held that, to the extent that *Shidiack* requires public officials to exercise their powers in good faith and in accordance with those requirements, the principle is consistent with the Rule of Law.<sup>29</sup>
- [84] The authorities do not suggest that the Minister was required to act without advice, or that his acceptance of advice or recommendations would, without

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<sup>27</sup> *Scenematic Fourteen* para 20.

<sup>28</sup> 1912 AD 642 at 651.

<sup>29</sup> *Pharmaceutical Manufacturers* paras 82–83

more, establish that he had failed to exercise the discretion conferred upon him. Nor was he required personally to undertake the technical work performed by departmental officials or the bodies involved in developing the proposed Code. *Scenematic Fourteen* makes that clear. The question is narrower: whether, having received the advice, recommendations and other material placed before him, the Minister himself exercised the judgment which s 9(1) entrusted to him.

- [85] The enquiry is therefore confined. It is not whether this Court considers that the Legal Sector Code ought to have been promulgated, whether it would have evaluated the underlying material differently, or whether the Minister was entitled to rely upon the work, advice and recommendations of others: he plainly was. The question is whether the evidence demonstrates that, having received and considered that material, the Minister applied himself to the decision required by s 9(1) and exercised the discretion which Parliament entrusted to him.

#### The Rule 53 Record

- [86] Although the record extends to several thousand pages, the applicants contend that it is materially incomplete. In particular, they point to the absence of the contemporaneous minutes, reports, deliberations and working documents of the Steering Committee and the Technical Committee that played a central role in developing the Legal Sector Code; the records relating to the Legal Practice Council's drafting process preceding the submission of the proposed Code; various annexures to the January 2024 departmental submission, including summaries of stakeholder concerns and legal opinions; the documentary material demonstrating how the concerns raised by former Minister Patel regarding the legality of the proposed Code were considered and addressed, including the responses furnished and the basis upon which the identified legal difficulties were considered resolved; the justification for departures from the Generic Codes; and the records demonstrating how stakeholder objections were considered and resolved before the Code was

ultimately promulgated. The applicants identified these categories of documents in their supplementary founding affidavit and in subsequent correspondence requesting a complete Rule 53 record.

- [87] The deficiencies in the Rule 53 record are significant because they bear directly on the question whether the Minister exercised the independent statutory discretion entrusted to him by section 9(1) of the B-BBEE Act. They affect the Court's ability to determine what material was before the Minister; whether he had access to the information necessary to evaluate the recommendations made to him; whether he considered the concerns and issues that emerged during the consultative process, including those identified by former Minister Patel; and whether he independently satisfied himself that the statutory requirements for the promulgation of the Legal Sector Code had been met. Stated differently, they bear directly on whether the material relevant to the statutory discretion entrusted to the Minister formed part of his evaluative process before he exercised the discretion conferred by section 9(1).

#### The Development and Promulgation of the Legal Sector Code

- [88] Before turning to the central question that ultimately crystallised during oral argument—whether Minister Tau exercised the statutory discretion entrusted to him by section 9(1) of the B-BBEE Act in the manner required by the Constitution—it is necessary to briefly describe the comprehensive statutory process that culminated in the promulgation of the Legal Sector Code. That process provides the factual context for evaluating the Minister's decision. It also provides the context in which Minister Patel's concerns and the Rule 53 record must be considered.
- [89] The Legal Sector Code did not emerge in isolation. Its origins trace to longstanding concerns about transformation within the legal profession. In March 2016, the Law Society of South Africa convened the Summit on Briefing Patterns in the Legal Profession. The Summit identified persistent disparities in the allocation of legal work across the public and private sectors and

highlighted the continued underrepresentation of black practitioners, and black women in particular, in that allocation.

- [90] Following the Summit, a task team developed Procurement Protocols to address those concerns. The Protocols expressly recognised race- and gender-based marginalisation within the profession, the historical advantages enjoyed by white male practitioners and the structural barriers impeding the advancement of black practitioners and women. A number of commercial law firms, including the applicants, became signatories to the Protocols, thereby committing themselves to measures to improve access to legal work, increase the briefing of Black and women practitioners, promote skills development and broader participation within the profession, and strengthen mechanisms for monitoring compliance and accountability. Many of the concepts embodied in the Protocols ultimately found expression in the Legal Sector Code.
- [91] The formal process to develop the Legal Sector Code began in 2020 under the auspices of the LPC, which served as the secretariat for a broadly representative Steering Committee. The Steering Committee comprised representatives of attorneys, advocates, corporate counsel, Legal Aid South Africa, women's organisations, government departments and other representative bodies within the legal profession. Its mandate was to develop an appropriate sector code for the legal profession through an extensive consultative process. Ultimately, the Steering Committee produced four iterations of the proposed Legal Sector Code—three during the internal consultative process and a fourth following public participation.
- [92] The Commission published the first draft of the proposed Legal Sector Code for public comment on 8 November 2020. Two rounds of public participation followed. The first generated 39 written submissions. A revised draft attracted a further 102 submissions received during February and March 2021. The Steering Committee considered those submissions, which resulted in successive amendments before the proposed Code was submitted to the Minister of Justice and Constitutional Development for onward transmission to the Minister of Trade, Industry and Competition.

- [93] On 24 April 2021, the Steering Committee submitted the proposed Legal Sector Code to the Department of Justice and Constitutional Development. The proposed Code, together with an initial Deviation Memorandum intended to justify departures from the Generic Codes of Good Practice, was transmitted to the DTIC on 11 May 2021. According to the respondents, the Deviation Memorandum explained that the distinctive characteristics of the legal profession warranted departures from the Generic Codes. The applicants dispute that contention and maintain that the memorandum relied largely on broad references to demographic statistics and the profession's unique characteristics, without adequately explaining why those characteristics justified the particular departures, methodologies and targets ultimately reflected in the proposed Code.
- [94] A further draft of the proposed Code was published for public comment on 22 July 2022. In accordance with Statement 003, a Technical Committee comprising representatives of the Steering Committee, together with officials from the DTIC and the Department of Justice and Constitutional Development, was established to consider the public submissions received and refine the proposed Code.
- [95] Throughout the consultative process, several stakeholders raised concerns about the proposed Code's legality, practicality, and economic implications. The applicants submitted detailed objections to the exclusion of elements from the Generic Codes, the adoption of different methodologies, the proposed ownership targets and the practical implications for firms that had structured their transformation initiatives around the Generic Codes. Deneys also participated extensively in the consultative process, making repeated submissions on the proposed methodology, scorecard, targets, and deviations. It contends that many of the matters raised during the consultation process remained substantially unaddressed in the final version of the proposed Code.

### Minister Patel's consideration of the proposed legal sector code

- [96] Although officials within the DTIC recommended as early as October 2021 that the proposed Legal Sector Code be gazetted, it was not promulgated at that stage. Minister Patel expressed reservations about several aspects of the proposed Code. These concerns included whether provisions relating to criminal offences and the proposed Charter Council exceeded the powers conferred by the B-BBEE Act, whether the proposed departures from the Generic Codes were adequately justified, and whether the substantial objections raised by the Bars and the larger commercial law firms had been satisfactorily addressed.
- [97] Minister Patel's concerns were neither peripheral nor technical. They related directly to the legality of the proposed Legal Sector Code and to the exercise of the statutory power conferred on him by section 9(1) of the B-BBEE Act. He questioned whether the proposed departures from the Generic Codes had been adequately justified in accordance with Statement 003; whether the Deviation Memorandum sufficiently identified the sectoral characteristics of the legal profession and the empirical material relied on to justify those departures; whether the proposed exclusion of non-legal practitioners from the management control element and the omission of the socio-economic development element had been adequately justified; and whether meaningful consideration had been given to the substantial objections raised during the consultation process, including those advanced by the Bars and the larger commercial law firms. Despite further submissions from departmental officials and discussions with Steering Committee representatives, Minister Patel remained unconvinced that the statutory requirements had been met and declined to approve the proposed Code.
- [98] After Minister Patel refused to approve the proposed Code, the Steering and Technical Committees prepared additional documentation addressing his concerns. In July 2024, an updated Deviation Memorandum was prepared. Thereafter, in August 2024, officials within the DTIC submitted a memorandum recommending that the proposed Code be gazetted and advising the incoming Minister that Minister Patel's previously raised concerns had been addressed.

Those documents, together with the revised proposed Code, formed the material that ultimately came before Minister Tau when he considered whether to exercise the statutory power conferred by section 9(1) of the B-BBEE Act.

[99] The delay in promulgating the proposed Code ultimately resulted in litigation. In February 2024, organisations represented on the Steering Committee instituted proceedings seeking to compel Minister Patel to decide on the proposed Code. In his answering affidavit, Minister Patel maintained that the statutory discretion conferred by section 9(1) vested in the Minister personally, that he remained unconvinced the statutory requirements had been satisfied, and that he was entitled to require further information and material revisions before deciding whether to promulgate the proposed Code.

[100] The significance of this cannot be ignored: it shows that Minister Tau's predecessor, as the holder of the statutory discretion, had already identified serious legal and factual concerns. Whether those concerns were ultimately well-founded is not the issue. The issue is also not whether Minister Patel was correct to withhold his approval or whether Minister Tau was obliged to accept his predecessor's concerns. The point is that these concerns formed part of the factual context in which Minister Tau had to decide whether the statutory conditions governing the promulgation of the legal sector code had been satisfied.

#### Minister Tau's exercise of the statutory discretion

[101] When Minister Tau assumed office in July 2024, he inherited a process spanning several years of consultation, revisions, stakeholder objections and departmental engagement. His predecessor had declined to promulgate the proposed Legal Sector Code pending satisfactory resolution of identified concerns. Against that background, Minister Tau was required to exercise the discretion conferred by section 9(1).

[102] Following his appointment, the Technical Committee prepared an updated Deviation Memorandum with supporting documentation, statistical reports and

legal opinions. The respondents contend that it addressed Minister Patel's concerns about departures from the Generic Codes. The applicants maintain that it remained materially deficient, relying on broad assertions without adequately justifying the particular deviations proposed.

- [103] The updated memorandum and supporting material were submitted to Minister Tau on 15 July 2024. The departmental recommendation for approval followed on 30 August 2024. The Minister approved the legal sector code on 11 September 2024, and the Code was promulgated on 20 September 2024. That decision is the subject of this review.
- [104] Minister Tau accepts that the power to issue a sector code vests in him and requires of him to personally satisfy himself that the statutory requirements had been met. He describes his function as more than a mechanical or "tick-box" exercise. He states that he requested a comprehensive briefing on the Code's history, Minister Patel's concerns and the work undertaken to address them, and that, after considering the material and departmental recommendations, he concluded that the Legal Sector Code complied with the Act.
- [105] The question is whether the evidence demonstrates that he exercised a discretion as required by section 9(1). As Mr Ngcukaitobi emphasised during oral argument, this is "a case about one decision-maker". The enquiry therefore turns to the Minister's account, read with the Rule 53 record.
- [106] An overview of the Minister's affidavit shows that he placed considerable reliance on departmental advice and the process preceding promulgation. He describes his role as considering and publishing the Legal Sector Code once the sector had reached agreement, while matters concerning its detailed content were principally for the legal profession and its representative structures.
- [107] The applicants' complaint is not that no further work was undertaken after Mr Patel's concerns were raised, but that neither the affidavit nor the Rule 53 record explains how Minister Tau evaluated that work and satisfied himself that Minister Patel's concerns had in fact been adequately considered and addressed. They also identify the absence of the records of the Steering

Committee's engagement with Minister Patel and of any meetings between Minister Tau and the Steering or Technical Committees.

- [108] As already explained, the Minister was entitled to rely on the committees' work and departmental advice without repeating that work. Section 9(1), however, requires of him to exercise his own judgment on the material placed before him. Neither his affidavit nor the Rule 53 record demonstrates how he evaluated that material to satisfy himself that Minister Patel's concerns had been adequately addressed and that departures from the Generic Codes were justified in accordance with Statement 003. The record disclose the advice he received and the conclusion he reached, but not the evaluation connecting the two.
- [109] The Minister's own account of the role he understood himself to perform is particularly significant. It is necessary to consider that account as a whole. The Minister's affidavit contains general assertions that he had applied his mind to the matter and was satisfied that the requirements for promulgation had been met. But those assertions must be considered alongside the Minister's own more detailed explanation - repeated several times in the affidavit - of what he understood the respective roles of the legal sector, departmental officials and himself to be.
- [110] The starting point is paragraphs 39 and 40 of the answering affidavit. There the Minister expressly accepts that the power to issue a sector code is conferred upon the Minister and that the Minister must ensure compliance with the empowering provisions of the B-BBEE Act. Importantly, he states that "[t]he Minister is also required to apply his mind to the provisions of a proposed sector code and not perform a tick box exercise". He adds that the Minister "must be satisfied that all procedural requirements have been met and the provisions of the draft sector code are lawful and constitutional". The Minister therefore correctly identifies, at the outset, that the statutory function requires more than the formal act of publication.
- [111] When the Minister turns to describe what he himself did, however, a different picture emerges. In paragraph 46 he states that, upon assuming office, he

“applied [his] mind to the matter, after having been briefed by officials of the Department who were intimately involved with the LSC process”. He explains in paragraph 48 that the submission placed before him advised him of the history of the drafting process, Minister Patel’s concerns, “and that these have now been addressed”. In paragraph 49 he records his satisfaction that the objections and comments which might have stood in the way of gazetting had been fully addressed. In paragraph 50 he states that he “was guided by the officials in the B-BBEE Unit who did a comprehensive review” and who thereafter recommended approval of the Legal Sector Code for gazetting. In paragraph 56 he describes the relevant memoranda as containing “the advice on which I acted in gazetting the final LSC” and states that this advice assisted him in applying his mind to the issues concerning the finalisation and gazetting of the Code.

- [112] The same pattern appears when the Minister deals specifically with the justification for the departures from the Generic Codes. In paragraph 108 he states that, “[h]aving exercised my statutory and constitutional functions, I was satisfied that the deviations are well motivated and justified”. The following paragraphs, however, reveal the basis for that satisfaction. In paragraph 109 he states: “I was advised and accordingly satisfied that all Minister Patel’s concerns have been adequately responded to” and that the sectoral characteristics and empirical research relied upon were supported by objectively verifiable information. In paragraph 110 he again states that he “was advised and am satisfied” that the comments received through the public consultation process had been adequately addressed. In paragraph 111, he states: “I am advised and satisfied that the Steering Committee has provided evidence relied upon to justify the deviations from the Generic Codes.” He adds that the evidence “was considered by all Steering Committee members during the process of developing the draft LSC [legal sector code]”. The affidavit thus identifies the consideration undertaken by the Steering Committee, but these passages do not identify a corresponding evaluation of that evidence undertaken by the Minister himself.

- [113] This assumes greater significance when regard is had to the Minister's express description of his own role later in the affidavit. In paragraph 125 he emphasises that the Legal Sector Code "is a product of long consultations in the legal sector, conducted over a long period of time and finally agreed to by the legal sector". He then states in paragraph 126:

"My role as the Minister of the DTIC is to consider and publish the code, after the sector has agreed on it. My role as the Minister of the DTIC is to recognise and accept what the legal sector has collectively agreed on."

- [114] That statement is immediately followed in paragraph 127 by an even more direct description of his function:

"I have done nothing except to execute my legislative obligation of gazetting the LSC."

- [115] These statements are not isolated. The same understanding of the Minister's role recurs when he responds to the individual grounds of review. In paragraph 207, dealing specifically with the complaint concerning the targets in the Legal Sector Code, the Minister states:

"It is really not my space to be involved in the nitty-gritty of the LSC regarding the optimal targets in the LSC. This is a function of the legal profession and all the stakeholders."

- [116] He explains that stakeholders participated in drafting the Code and that the Technical Committee and Steering Committee considered their comments. He then concludes that a final version of the LSC had been issued "which I was duty-bound to gazette".

- [117] The significance of that statement should not be understated. Section 9(1) does not impose an obligation upon the Minister to promulgate a sector code merely because the sectoral process has culminated in agreement upon one. It confers a discretion upon the Minister. Yet the Minister's own account is that determining the optimal targets was "not my space"; that this was the function of the legal profession and the stakeholders; and that, once the final version emerged from that process, he regarded himself as "duty-bound to gazette" it.

That understanding is difficult to reconcile with the discretionary character of the power conferred by section 9(1).

- [118] Further passages say the same. In paragraph 219 the Minister states that he “was at all times guided by the legal profession under the auspices of the Steering Committee, the LPC which provided support to the Steering Committee, the Line Ministry and the Technical Committee”. In paragraph 229, he describes his role in even more explicit terms:

“I have done what the law requires of me, which is to gazette the LSC at the request of the legal sector, supported by the Line Ministry.”

- [119] In paragraph 230, he adds that, if sections of the legal sector are dissatisfied with portions of the Code, “then it is for the legal sector itself to resolve those differences”.

- [120] The same view appears again in paragraph 240. Responding to the applicants’ allegations concerning the impact of the LSC, the Minister states:

“I cannot comment on the specifics of the impact of the LSC on the Applicant. I have executed my constitutional duties of publishing the LSC in the Gazette, as requested by the legal sector.”

- [121] Once again, the formulation is significant. The substantive instrument is attributed to the legal sector; the Minister describes his constitutional function as publishing it at the sector’s request.

- [122] That understanding becomes particularly pertinent when the Minister returns to the justification for the deviations from the Generic Codes. In paragraph 273 he states:

“I need not spend time and effort in explaining the deviations because I have executed my constitutional functions. The LSC is a product of consultation by the legal sector amongst itself. The Charter Council, which now exists, can deal with how the LSC can be taken forward and refined if necessary.”

- [123] This passage must be read against Minister Patel’s concerns. Those concerns included whether the deviations from the Generic Codes were properly justified

and whether they were supported by material evidence based upon sound economic principles, sectoral characteristics or empirical research. The question whether those deviations were justified was therefore not peripheral to the exercise of the statutory power. It was one of the matters requiring consideration before exercising the power.

- [124] Paragraph 276 is equally revealing. Having stated in paragraph 275 that section 9(3) permits a code of good practice to specify targets consistent with the objectives of the Act, the Minister explains why he published the targets and weightings contained in the LSC:

“I am satisfied that the legal sector, in its wisdom, has decided on the targets and weightings and that these are consistent with the objectives of the Act. Hence, I published the LSC in the Gazette.”

- [125] The formulation is important. The Minister does not say in this passage that, having independently evaluated the evidence, the sectoral characteristics and the justification advanced for the particular targets and weightings, he determined that they were appropriate. Rather, the premise expressly identified is that “the legal sector, in its wisdom, has decided on the targets and weightings”. It is that decision which precedes his statement: “Hence, I published the LSC in the Gazette.”

- [126] The Minister returns to precisely the same theme in paragraph 279:

“I cannot comment on minute details covered in this ground of review. As I have stated repeatedly, the LSC is a product of the legal sector. They embarked on a process that stretched many years and ultimately decided on the type of sector code that they required, and I did my constitutional function of publishing it in the Gazette.”

- [127] The passage is significant not because the Minister was required personally to master every minute detail of the Code. He plainly was not. It is significant because of the distinction which the Minister himself draws between the functions performed: the legal sector “ultimately decided on the type of sector code that they required”, while his function was to publish it.

[128] Finally, in paragraph 286 the Minister states:

“Again, the legal sector has decided on how best it regulate itself through the LSC. I have simply carried out my constitutional functions.”

[129] This is consistent with the Minister’s earlier statements that his role was to “recognise and accept what the legal sector has collectively agreed on”; that he had “done nothing except” execute the legislative obligation of gazetting the Code; that the determination of optimal targets was “not my space”; that the final Code was one which he was “duty-bound to gazette”; and that he gazetted it “at the request of the legal sector”.

[130] In conclusion: the Minister was entrusted with the statutory discretion. The consultative and technical processes could inform its exercise; they could not themselves supply the exercise of that discretion. Yet the Minister’s own affidavit repeatedly attributes the substantive choices embodied in the Legal Sector Code to the legal sector. The sector had “collectively agreed” upon the Code; the targets and weightings were matters for the legal profession and stakeholders; the legal sector “in its wisdom” had decided upon them; the sector had “ultimately decided on the type of sector code that they required”; and the sector had “decided on how best it regulate itself”. His own function is correspondingly described as recognising and accepting what had been agreed upon, gazetting the Code at the sector’s request, and carrying out the constitutional function of publication.

[131] In that light, the Minister’s general statements that he “applied [his] mind” or was “satisfied” do not cure the difficulty. Those conclusions must be supported by an account demonstrating that he in fact exercised the discretion conferred upon him. His affidavit instead demonstrates that, on matters central to the content of the Code, he regarded the substantive determination as belonging principally to the legal sector and understood his own role, once the sectoral process had run its course, to be one of recognition, acceptance and publication.

[132] This conclusion does not rest upon semantics or upon an isolated infelicity in the drafting of the answering affidavit. It emerges from the Minister’s repeated

and consistent description of his role at different points in the affidavit and in response to different grounds of review. Read cumulatively, the passages referred to provide compelling evidence of the Minister's own understanding of the function he performed.

- [133] That understanding is incompatible with the nature of the power conferred by section 9(1). Parliament did not confer on the legal profession, the Steering Committee, the Technical Committee, or departmental officials the power to finally determine whether the proposed Legal Sector Code, in the form presented, should be issued as a code of good practice. Their work was indispensable to the process and could properly inform the Minister's decision. But the Minister ultimately made the evaluative judgment. It required him to decide for himself, on the material before him, whether the proposed Code and its material departures from the Generic Codes were justified and whether the exercise of the section 9(1) power was warranted. On the Minister's own account, that is not the function he understood himself to be performing.
- [134] This conclusion concerns the manner in which the Minister exercised the statutory discretion entrusted to him. It does not determine the substantive validity of the Legal Sector Code, question the legitimacy of its transformative objectives, or detract from the extensive consultative process through which it was developed.
- [135] The Minister's failure to exercise that discretion in accordance with the Constitution and the B-BBEE Act requires remittal for a fresh decision. That consequence is regrettable, given the Code's intended role in advancing transformation within the legal profession. In light of the underlying defect in the decision to promulgate the Code, the substantive merits of the remaining review grounds do not arise for determination in these proceedings.
- [136] Should the Minister decide afresh to promulgate the Code, those challenges may again require judicial determination. This Court expresses no view on their merits. They must, if necessary, be considered in the light of the fresh decision and the reasons supporting it.

[137] The constitutional imperative of transformation and the pressing need to address persistent inequalities within the legal profession remain undiminished. Transformation and the rule of law are mutually reinforcing constitutional commitments: public power exercised to advance transformation must comply with the Constitution and the empowering legislation. Consultation, technical expertise and stakeholder participation may inform the Minister's decision, but they cannot supply the judgment that Parliament has required him to exercise. That responsibility remains his.

[138] For these reasons, the decision to promulgate the Legal Sector Code cannot stand.

#### The appropriate remedy

[139] Having concluded that the Minister did not exercise the statutory discretion conferred by section 9(1) of the B-BBEE Act in accordance with the Constitution, the Court must determine the appropriate remedy.

[140] The applicants sought an order reviewing and setting aside the Minister's decision to promulgate the Legal Sector Code. They also sought declaratory relief as to the Code's validity. In light of the conclusion reached in this judgment, it is unnecessary to determine the remaining grounds of review relating to the Code's substantive legality. Those issues were fully argued before this Court and raise important questions concerning the interpretation of the B-BBEE Act, the Generic Codes of Good Practice and the Legal Sector Code itself. Having concluded that the review succeeds because the statutory discretion entrusted to the Minister was not exercised as required by the Constitution, it would be inappropriate to express views on issues that may arise in a different factual and legal context once the statutory discretion has been lawfully exercised.

[141] The constitutional defect identified in this judgment therefore lies neither in the transformative objectives of the Legal Sector Code nor in the extensive consultative process that preceded its promulgation. As already pointed out,

the defect lies in how the Minister exercised the statutory discretion Parliament entrusted to it.

- [142] Section 172(1)(b) of the Constitution confers a broad remedial discretion on a court deciding a constitutional matter. The overriding enquiry is whether the order granted is just and equitable. Equally well established is the principle that, where Parliament has entrusted a discretionary power to a particular functionary, courts should ordinarily remit the matter to that functionary once the impugned decision has been set aside. Substitution is reserved for exceptional circumstances because Parliament has entrusted the evaluative judgment required by the legislation to the holder of the statutory power, not to the court.
- [143] This Court has also not concluded that the Legal Sector Code is incapable of lawful promulgation. Nor has it determined that the Code's substantive provisions are inconsistent with either the Constitution or the B-BBEE Act. It has concluded only that the statutory discretion required before the Code could lawfully be promulgated was not exercised in accordance with the Constitution. That defect can be remedied only by requiring the Minister to exercise that discretion afresh.
- [144] In doing so, the Minister is not required to recommence the entire process that led to the development of the Legal Sector Code. Nothing in this judgment invalidates the extensive consultative work already undertaken, the technical expertise brought to bear by the Steering Committee and the Technical Committee, or the valuable contributions made by the many stakeholders who participated in the process. Those remain part of the material that may properly inform the Minister's decision. The constitutional requirement is simply that the Minister himself must independently evaluate that material, apply his own judgment to the statutory questions entrusted to him by section 9(1), and satisfy himself that the requirements for the promulgation of the Legal Sector Code have been met.
- [145] It is appropriate to add one final observation. This Court is acutely conscious that the Legal Sector Code was developed to advance the constitutional

imperative of transformation within the legal profession. The evidence before this Court demonstrates that meaningful transformation remains both necessary and urgent. It is therefore regrettable that the Court cannot, at this stage, determine the substantive challenges to the Code itself. The importance of the Code's transformative objectives cannot, however, displace the constitutional requirements governing the exercise of public power. The Constitution requires that such power be exercised in accordance with the Rule of Law

- [146] The appropriate remedy is therefore to review and set aside the Minister's decision to promulgate the Legal Sector Code and to remit the matter to the Minister for reconsideration in accordance with this judgment.

### Costs

- [147] It remains to consider costs. These proceedings concern the lawfulness of the Minister's exercise of public power under section 9(1) of the B-BBEE Act. The applicants have substantially succeeded in establishing that the Minister did not exercise the statutory discretion conferred on him in accordance with the requirements of the Constitution and the B-BBEE Act. Moreover, in *Biowatch Trust v Registrar, Genetic Resources and Others*,<sup>30</sup> the Constitutional Court held that, in constitutional litigation between a private party and the State, a successful private litigant should ordinarily be awarded its costs against the State. Consistent with that principle, the applicants are entitled to their costs against the Minister.
- [148] The relief granted is directed against the Minister. Although the remaining respondents participated in the proceedings and made submissions concerning the development of the Legal Sector Code and the transformation of the legal profession, no relief is granted against them. Accordingly, there is no basis for a costs order against those respondents.

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<sup>30</sup> *Supra*.

[149] The first respondent must accordingly pay the applicants' costs (in both applications), including the costs of two counsel, where so employed. The matter's significance and complexity of the issues justify counsel's fees on Scale C.

Order: Case no 2024-149523

1. The decision of the Minister of Trade, Industry and Competition, published under Government Notice 5221 in Government Gazette 51271 of 20 September 2024, promulgating the Legal Sector Code in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act 53 of 2003, is reviewed and set aside.
2. The matter is remitted to the Minister of Trade, Industry and Competition for reconsideration.
3. The Minister of Trade, Industry and Competition, is ordered to pay the costs of the applicants, including the costs of two counsel where so employed on scale C.
4. No order as to costs in respect of the remainder of the respondents.

Order Case No 2025-033365

1. The decision of the Minister of Trade, Industry and Competition, published under Government Notice 5221 in Government Gazette 51271 of 20 September 2024, promulgating the Legal Sector Code in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act 53 of 2003, is reviewed and set aside.
2. The matter is remitted to the Minister of Trade, Industry and Competition for reconsideration.
3. The Minister of Trade, Industry and Competition, is ordered to pay the costs of the applicant, including the costs of two counsel where so employed on scale C.

4. No order as to costs in respect of the remainder of the respondents.



**JANSE VAN NIEUWENHUIZEN, N**

JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA



**BASSON, AC**

JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA



**MOKOSE, S**

JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

Date of hearing:

8 May 2026

Order made:

7 October 2026

Appearances:

1<sup>st</sup> Applicant: Adv Bham SC  
 Adv Sisilana SC  
 Adv Mbikiwa

Instructed by: Deneys Reitz

2<sup>nd</sup> - 4<sup>th</sup> Applicant Adv Ngcukaitobi SC  
 Adv Bleazard  
 Adv Makhotsa  
 Adv Lengane  
 Adv Davis

Instructed by: Adams & Adams Inc

1<sup>st</sup> Respondent Adv Nalane SC  
 Adv Ramatselela

Instructed by: The State Attorney, Pretoria

2<sup>nd</sup> Respondent Adv Bokaba SC  
 Adv Ramogale  
 Adv Mokgoroane

Instructed by: Damons Magardie Richardson Attorneys

3<sup>rd</sup> Respondent Adv Matebese SC  
 Adv Magano  
 Adv Chabalala  
 Adv Khatle

Instructed by: The State Attorney, Pretoria

- 4<sup>th</sup> Respondent      Adv Motau SC  
                               Adv Salukazana  
                               Adv Kruger  
 Instructed by:      Mothle Jooma Sabdia Inc
- 5<sup>th</sup> Respondent      No appearance
- 6<sup>th</sup> Respondent      Adv Sello SC  
 Instructed by:      Matshego Ramagaga Attorneys Inc
- 7<sup>th</sup> Respondent      Adv Sikhakhane SC  
                               Adv Mpofu  
 Instructed by:      Ngeno and Mteto Inc
- 8<sup>th</sup> Respondent      Adv Dewrance SC  
                               Adv Ramaili SC  
                               Adv Morris  
                               Adv Makhaye  
                               Adv Kubheka  
 Instructed by:      Mogaswa and Associates Inc
- 9<sup>th</sup> Respondent      Adv Arendse SC  
 Instructed by:      Mothle Jooma Sabdia Inc
- 10<sup>th</sup> Respondent      Adv Ipser  
                               Adv Brown  
                               Adv Rowji  
 Instructed by:      Mpakati Inc Attorneys

|                             |                                                                 |
|-----------------------------|-----------------------------------------------------------------|
| 11 <sup>th</sup> Respondent | No appearance                                                   |
| 12 <sup>th</sup> Respondent | Adv Baloyi SC<br>Adv Manganye<br>Adv Ncalo<br>Adv Pillay        |
| Instructed by:              | Lebese Attorneys                                                |
| <i>Amicus Curiae</i>        | Adv Hofmeyer SC<br>Adv McConnachie<br>Adv Naidoo<br>Adv Malinga |
| Instructed by:              | Saney Mbatha & Associates Inc                                   |
| Solidarity                  | Adv Bekker SC<br>Adv Groenewald                                 |
| Instructed by:              | Serfontein Viljoen & Swart                                      |