

SOUTH AFRICA / JUDGMENT

Mahon (21160/08), Ex parte [2009] ZAGPPHC 155; 2010 (2) SA 511 (GNP) (14 October 2009) [2009] ZAGPPHC 155

COURT

North Gauteng High Court, Pretoria

BEFORE

E Bertelsmann, CP Rabie

CASE / FILE NUMBER

21160/08

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH HIGH COURT PRETORIA

Case number 21160/08

Date:14-10-2009

In the ex parte matter of

ROCHELLE MAHON Applicant

For her admission as an attorney of this Court

JUDGEMENT

1. The applicant is an adult female of full legal capacity residing at Unit 111 Feathertree Park, Glover Avenue, Centurion, Gauteng.
2. She applied for her admission as an attorney of this court.
3. Her application was opposed by the Law Society of the Northern Provinces.
4. After argument was heard, the applicant was admitted as an attorney of this court and it was indicated that the court's reasons for doing so would be provided at a later stage.
5. At issue is the question whether the period she served as a candidate attorney from the 3rd January 2006 to May 2006 can be regarded as service substantially equivalent to regular service and therefore capable of being condoned.

6. She also seeks condonation for an extended period of absence from her principal's office, exceeding the statutory leave period of a maximum of 30 days. This latter prayer is neither contentious nor contested.
7. It is common cause that the applicant is an adult South African citizen of full legal capacity; that she has passed an appropriate

matriculation examination and that the LL B degree was conferred upon her during September 2006.

8. Prior to obtaining the LL B degree, the applicant and her principal's firm of attorneys, DM Kisch Incorporated, entered into an agreement dated 27 December 2005 in terms of which the applicant was employed for a probationary period of three months commencing on 3 January 2006 before a formal contract of articles would be signed.
9. In the written agreement the applicant is described as a Candidate Trade Marks Attorney.
10. The clause dealing with her probationary period reads as follows: "There will be a 3-month probationary period, and your Articles agreement will only be signed after the successful completion of the probationary period."

The employment contract is only valid for the duration of your candidature and therefore does not establish any precedent or expectation of future or permanent employment with the Company."

11. While the applicant's assertion that she occupied the position of a candidate attorney and was trained and instructed as such by her principal from the day she joined his professional firm is not in dispute, her position is further complicated by the fact that her "Articles agreement" was in fact not signed after the successful completion of her probationary period. Her principal refused to sign the agreement until she had passed all the subjects required for the completion of the LL B degree, which she only managed to finalize in May 2006, as he wished to enter into a two year contract of articles as provided for in section 2 (1) (a) of the Attorneys Act 53 of 1979 ("the Act").
12. The condition that the applicant should be in a position to enter into a two - year contract of articles before a contract would be signed by her principal is not contained in her employment contract of the 27 December 2007.
13. It is clear that the applicant was given little choice in the matter in this respect and could only accept her fate.
14. Her articles contract was eventually signed on the 28th May 2008. It was duly submitted to the Law Society and registered as such on the 28th May 2006.
15. The applicant was forced to interrupt her service of articles in July 2007 for five weeks because of illness that led to her

hospitalization and required five weeks of recuperation.

16. There is no objection to the condonation of her resultant absence from her principal's offices for a period of more than 30 days in one year.
17. When the applicant commenced her employment with the principal's firm in January 2006, she was not yet bound as a candidate attorney by articles of clerkship as defined by section 1 of the Act, namely by a written contract requiring service under the control of a duly admitted and otherwise qualified attorney.
18. Her formal articles, when eventually entered into, commenced only on the date of signature thereof after due registration with the Law Society as set out above.
19. Section 1 of the Act describes a "candidate attorney" as "any person bound to serve under articles of clerkship".
20. The requirement that articles of clerkship should be entered into in writing, should be registered and be served under the supervision of the Law Society is obviously demanded by the Legislature and the professions to ensure that candidate attorneys are given proper

training by principals that are in good standing with the Society. It is clearly in the public interest that future officers of the Court should be properly trained and assessed as to their intellectual and moral fitness before being admitted to the profession. The Law Society's concerns that there should be no dilution of these basic principles are shared and enforced by the Courts.

21. While a failure to comply with the provisions of the Act in regard to the service of articles will normally prevent the admission of an applicant to the profession, the Act provides that, in suitable circumstances, the Court may recognize articles served other than in strict compliance with the statute as being sufficient to allow the admission of the candidate concerned.

22. Section 13 (2) of the Act reads:

"If any person has not served regularly as a candidate attorney, the court, if satisfied that such irregular service was occasioned by sufficient cause, that such service is substantially equivalent to regular service, and that the society concerned has had due notice of the application, may permit such person, on such conditions as it may deem fit, to apply for admission as an attorney as if he had served regularly under articles or a contract of service."

23. The question whether the applicant's service could be regarded as service "substantially equivalent to regular service" must be considered against the background of the following facts:
 - a) The applicant intended at all times to qualify as an attorney;
 - b) She entered into the employment contract of the 27th December 2006 with the intention to be bound as if she was a candidate attorney already;

- c) Although the principal did not intend to be bound as such to the applicant, the applicant was from the outset bound to perform her work during the so-called probationary period as though she was a candidate attorney;
 - d) The employment contract was entered into with a prominent and internationally renowned firm of attorneys specializing in intellectual property, trade mark and related matters - a firm well-known to the courts for the professional services its directors and professional staff render;
 - e) The fact that the applicant was given training of a quality that was in all respects equivalent to the instruction she received once her contract of articles was signed and registered, was never put in issue;
 - f) Nor was the fact disputed that she served her principal according to the standards expected of and applicable to, and performed the duties of a candidate attorney as if her original contract of employment was a contract of articles;
 - g) Her principal was at all times an officer of this court and fit to perform the function of a principal;
 - h) The control and supervision he exercised over the applicant during the first five months of 2006 was of the same nature, quality and standard as he exercised after the contract of articles was entered into - this fact was also never disputed;
 - i) The applicant could have entered into a valid contract of articles for a longer period than two years in December 2005 with the same principal and the same attorney;
 - j) Although the applicant does not deal with the issue directly, it would appear that she and possibly her principal too, may have been under the impression that the applicant's service prior to the signing of the contract of articles would be recognized as service under articles after the expiry of a two year period calculated from the 3rd January 2006;
 - k) The fact that the original contract of employment was provisional and imposed a probation period upon the applicant was drafted by the principal with the obvious aim to avoid the employment of an articulated clerk who might not prove to be suitable for the position and certainly did not reflect the applicant's wishes;
- I) The applicant has in the meantime left the employer's firm to take up a position with a commercial bank.
24. The applicant has a constitutionally protected right to enter the profession of her choice. Section 22 of the Constitution enshrines

this principle, subject to limitations being imposed upon the freedom of choice by statutes regulating the particular profession. As was pointed out in *Ex parte Ndabangaye* [2004] 1 All SA 229 (C), the curtailment imposed by the Act upon the freedom to enter the attorneys' profession must be interpreted to ensure that the limitation serves a purpose sanctioned by the fundamental right, as set out in *S v Lawrence*; *S v Negal*; *S v Solberg* 1997

(4) SA 1176 (CC). One purpose of the Act is clearly to protect the integrity of the profession and to ensure that the public is protected against unqualified or unscrupulous individuals entering the profession.

25. Another object of the Act is to protect persons entering the profession as articled clerks from exploitation and to ensure that

they receive proper training and instruction.

26. In pursuing the object of the legislature the Act must be applied to ensure that the substantive objects thereof are achieved rather than frustrating their realization by an unduly legalistic approach: *Ex parte Mothui* (Law Society, Transvaal Intervening) 1996

(4) SA 1131 (T).

27. This requires the court to consider the particular facts of each individual case to ensure that substantive justice is done to the applicant in the context of his or her personal circumstances.

28. Applying these principles to the facts recorded above it is clear that substantive justice would not be achieved if the present

application were to be turned down. It would be unfair to the applicant to ignore the fact that she has, de facto, performed the functions of an articled clerk and received appropriate instruction for two full years, even

though her contract was only registered only some five months after she commenced her employment with her principal's firm.

29. It was for these reasons that the application was allowed and condonation of the failure to serve two full years under a duly

registered contract of articles was granted.

30. A note of warning should be sounded, though, that the court may not be as amenable to allow probationary periods served under similar contracts as the one considered in this judgment to be regarded as substantive service in future. Apart from falling foul of the express provisions of the Act, such contracts must be discouraged as they may be regarded as being exploitative of young persons desperate to enter the profession.

31. The Law Society's opposition to this application was clearly reasonable and the court is indebted to Mr Lamey for his carefully

reasoned arguments.

32. No costs order is made.

Signed at Pretoria on this 13 day of October 2009.

E Bertelsmann

Judge of the High Court

I agree. CP Rabie

For Appl: Adv

For the Law Society of the NP: Mr A. T. Lamey

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