

SOUTH AFRICA / JUDGMENT

Makgolo v South African Legal Practice Council (37542/2020) [2024]

ZAGPPHC 831 (13 February 2024)

[2024] ZAGPPHC 831

COURT

North Gauteng High Court, Pretoria

BEFORE

van der Westhuizen, Vorster

CASE / FILE NUMBER

37542/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO.: 37542/2020

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

13/02/2024

In

the matter between:

HOPE
KHOTSO TEBOGO DAVID MAKGOLO
Applicant
and
SOUTH
AFRICAN LEGAL PRACTICE COUNCIL
Intervening party
In

re:

The

ex parte application of:

HOPE
TEBOGO DAVID MAKGOLO
Applicant

JUDGMENT

van der Westhuizen, J. (Vorster, AJ concurring)

- [1] This is an opposed application for the admission of the applicant as a legal practitioner and for his enrolment as an attorney of this Honourable Court. The South African Legal Practice Council (SALPC) opposes the application, having been joined as an intervening party. The latter is the *custos morum* of the legal profession, and the guardian of its values and traditions.[1]
- [2] At the time when the applicant entered into a PVT contract as a candidate attorney, the repealed Attorney's Act, 53 of 1979, was in force. The period of articles had not run out prior to the completion of the prescribed two year period. That only occurred after the commencement of the Legal Practice Act, 28 of 2014 during 2018. The applicant accepted that he was obliged to deal with the requirements of both Acts.
- [3] The crucial issue to be determined was whether the applicant complied with all the prescribed requirements and in the particular circumstances, was a fit and proper person to be admitted as a legal practitioner and to be enrolled as an attorney of this Honourable Court. In respect of the foregoing, the SALPC has joined issue with the applicant and has submitted that there was no compliance by the applicant in proving that he is a fit and proper person to be admitted. The SALPC raised various grounds in that regard.
- [4] The applicant contended that he complied with all the formal requirements such as:
- (a) Citizenship and the age requirement;
 - (b) the prescribed qualifications such as matric and a LLB degree;
 - (c) concluding the prescribed PVT contract that was duly registered;
 - (d) the passing of the prescribed legal exams; and
 - (e) completed a programme of structured course work as required. This was done prior to the concluding of the PVT contract.

There is no quarrel with any of the foregoing.

- [5] However, in respect of the requirement of proving that he was a fit and proper person to be admitted as a legal practitioner and consequently to be enrolled as an attorney, the applicant made all the usual allegations relating to: non-sequestration; having no criminal record with no pending criminal proceedings; no civil proceedings instituted or pending and none granted against him; not incurred any administrative penalty nor were any pending or about to be instituted; never been found guilty of any misconduct at disciplinary proceedings while in a previous profession or employment, or while at university; never being struck from the roll as an attorney or advocate by court and that no such proceedings were pending or about to be instituted against the applicant.

- [6] The applicant, in his founding affidavit, obliquely related that unfair dismissal proceedings were lodged with the CCMA against his employer, Ramsay Webber, during his PVT contract period. In that regard, the applicant chose his words carefully when mentioning the unfair dismissal proceedings. No details were provided. The impression created was that those proceedings were still pending and were of no consequence.
- [7] The obligatory confirmatory affidavit by the applicant's principal clearly evidenced that the principal could not support the applicant's application and in particular on whether the applicant was a fit and proper person to be admitted as prayed for. That affidavit set the proverbial cat among the pigeons.
- [8] In a supplementary affidavit, the applicant alleged that he held no other position than candidate attorney, and consequently received no remuneration other than that of candidate attorney. In two replying affidavits, one following after the vexed affidavit by the applicant's principal, and the second in response to the LPC answering affidavit, a different picture is painted: from all being well and proper, to one of turmoil and chaos.
- [9] Both the repealed Attorneys Act and the Legal Practice Act stipulate that a candidate attorney was prohibited to have any pecuniary interest in the practice and service of an attorney, other than the bona fide remuneration for his or her service as a candidate attorney. Such candidate attorney is further prohibited from holding

any other position other than that of candidate attorney, unless he or she has the prior written consent of the principal and the

Council. The absence of such prior consent resulted in the contract being null and void ab initio, unless the court on good cause shown otherwise directed.[2] The effect of the Court directing otherwise does not render the void contract valid, but assumed that there were proper compliance with all requirements, should all else be well. It is essential that the applicant provide good cause for admission. It is not a matter of "condonation" being granted by the Court.

- [10] Although the applicant disclosed in his founding affidavit that prior to the concluding of the PVT contract until the date of deposing to the founding affidavit, he was a director of a company, Itsoseng (Pty) Ltd, he held that position without the written consent of his principal and the SALPC. He attempted to fob off the non-disclosure and his non-obtaining of the required written consent, as not being wilful and not foreseeing any potential prejudice or disrepute to his principal and the legal profession collectively. There is no merit in that stance and submission for what follows.
- [11] The applicant alleged that he disclosed his directorship to his principal at the commencement of his articles. He further alleged that whilst disclosing that fact to his principal, the latter appeared to have no problem therewith. He further stated that the reason why he overlooked resigning as a director, was probably due to him not being "actively involved with the activities of the company". He was nonplussed about the whole issue. This, despite the fact that his PVT contract specifically stipulated the prohibition of

holding positions and being engaging in other businesses whilst under the PVT contract. He would have been acutely aware of that prohibition in his PVT contract when signing it. Whether he obtained any remuneration as a result of his directorship or not, was beside the point. The transgression of the prohibition had legal consequences. It rendered the PVT contract null and void ab initio. It is gleaned from the principal's affidavit that the applicant was pertinently advised that his remaining as director of the company, would have dire consequences for the applicant. The principal accepted the applicant's undertaking to resign forthwith.

- [12] During or about March 2020, the applicant was employed by another company known as "ChessmovesZA". This, despite his awareness of the dire consequences of such employment in view of the prohibition, in his PVT contract and the legal prescriptions in that regard as recorded earlier. Applicant again sought to fob off this flippant attitude by him. He merely denied being involved. That is gainsaid by the promotional material on social media depicting him personally and displaying his personal details thereon. Again the applicant did not have any prior written consent of his principal and the SALPC.
- [13] Furthermore, it was agreed between the applicant and the firm that the working relationship has irretrievably broken down when the applicant was called upon to attend a meeting during May 2020. The applicant thereupon presented a notice of termination of the PVT contract. The applicant was thereupon notified that the agreement was not terminated until the remainder of the agreement was served out. The period would end on 30 June 2020.
- [14] It is further clear from the affidavit of the principal that the applicant:
- (a) was grossly insubordinate;
 - (b) was grossly negligent and posed a risk to the firm and its reputation; he caused a matter to prescribe;
 - (c) continued with poor work performance despite due and diligent process to address the causes of complaint;
 - (d) held or occupied an office in other business other than that of candidate attorney in breach of the legislation and his undertaking recorded earlier;
 - (e) absconded from his work duties as candidate attorney to attend to his other interests;
 - (f) despite numerous warnings, culminating in a final written warning, to toe the line, the applicant was called on to attend disciplinary hearing where he could advance his case. The applicant declined the invitation. The disciplinary hearing proceeded in his absence and he was found guilty. His employment as candidate attorney with the firm was terminated. The applicant was duly advised of the outcome of the disciplinary hearing.
- [15] The applicant requested his principal to sign a supporting affidavit in respect of his application for admission. On being advised to effect certain corrections to his founding affidavit as it did not sufficiently deal with all the facts was immediately met with a CCMA

referral for the termination. That referral was refused and the applicant attempted to rescind the ruling. However, the Commissioner dismissed the applicant's rescission application. That was the end of that matter. The applicant was acutely aware of the dismissal of the rescission application. He did not declare the dismissal in any of his affidavits.

- [16] In an attempt to circumvent the problems he faced, the applicant had the audacity to seek the court's condonation of the prescribed two year period of articles on the basis of having completed a programme of structured course work as required that was done prior to the concluding of the PVT contract. By seeking condonation for serving a lesser period of articles, the applicant believed that the subsequent problems that arose, would be swept under the carpet. That attitude ignored the transgression of holding a position other than that of candidate attorney which rendered the PVT contract null and void ab initio. His remiss to do resign on being advised to do so, is not sufficiently explained by him. That flippant attitude was continued subsequently by holding a post with "ChessmovesZA".
- [17] It follows that the applicant has not shown good cause why the court should direct otherwise in respect of the PVT contract being null and void ab initio. That contract remains null and void ab initio.
- [18] A further concerning issue is that the applicant blatantly alleged that no disciplinary proceedings were instituted against him. The careful choice of words of the applicant in that regard is telling. The applicant's failure to disclose various warnings and a final written warning is serious. His silence on the disciplinary hearing and the outcome is very concerning. So too the non-disclosure of the failed CCMA proceedings.
- [19] In this regard, the written submissions by his counsel in the heads of argument filed on behalf of the applicant is curious. It is submitted that: "It is trite that the characteristics that render a person fit and proper have been variously described, but essentially amount to honesty, reliability and integrity. Notably, applications for admission brought ex parte require the highest form of honesty from an applicant." [3] None of those characteristics were to be found in the applicant's papers. The opposite was proven.
- [20] On a conspectus of all the foregoing, the applicant clearly did not provide good cause for his repeated transgression of the probation against engaging in extra-candidate attorney activities. His reluctance to disclose those facts, combined with the serious omissions of facts as recorded earlier, severely and seriously impact on a character who claims to be a fit and proper person to be admitted as a legal practitioner and to be enrolled as an attorney of this Honourable Court. His integrity has been seriously compromised.
- [21] Furthermore, in our view, the applicant has dismally failed to prove that he is a fit and proper person to be admitted as a legal practitioner and to be permitted to be enrolled and hold the office of an attorney.

[22] It follows that the application for admission as a legal practitioner and to be enrolled as an attorney, cannot succeed.

[23] There remains the issue of costs. This application commenced as an ex parte application. The applicant was acutely aware, at least at the stage when his principal indicated reservations in supporting his

application, that his application would not pass scrutiny. That became clear when the SALPC indicated their concerns and advised that the applicant should rather withdraw his application for admission. The applicant pressed ahead fool hardily. There is no cogent reason for not awarding the SALPC their costs incurred in these proceedings.

The following order is granted:

1. The PVT contract of articles entered into between the applicant and Shawn van Heerden, commencing on 2 July 2018 and ending on 1 July 2020, and its subsequent registration by the South African Legal Practice Council, is declared null and void ab initio;
2. The application for admission as a legal practitioner and to be enrolled as an attorney of this Honourable Court is dismissed;
3. The applicant is to pay the costs of the South African Legal Practice Council.

C J VAN DER WESTHUIZEN

JUDGE OF THE HIGH COURT

On behalf of Applicant: Adv E Nhutsve Instructed by: TLP Shai Attorneys On behalf of
Respondent: Adv I Hlaalethoa Instructed by: Mphokane Attorneys Date of Hearing: 25 January
2024

Judgment

Delivered: 13 February 2024

- [1] Legal Practice Council v van Wyk (3920/2013) [2021] ZAWCHC 223 (4 November 2021)
- [2] Rule 22.1.5 of the Rules of the Legal Practice Council; Section 9 of the repealed Attorneys Act
- [3] Heppell v The Law Society of the Northern Provinces 2017 JDR 1612(SCA) par 12

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