

SOUTH AFRICA / JUDGMENT

Mdyesha (27320/2016), Ex parte [2016] ZAGPPHC 905; 2018 (4) SA 468 (GP) (4 August 2016)

[2016] ZAGPPHC 905**COURT**

North Gauteng High Court, Pretoria

BEFORE

T.M. Makgoka, D Molefe

CASE / FILE NUMBER

27320/2016

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Source record**HIGH****COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****Reportable****Of****interest to other Judges****CASE****NO: 27320/2016****4/8/2016****In**the ex parte application
of:NASIPHI
NALEDI
MDYESHA Applicant**Heard:**

31 May 2016

Delivered:

4 August 2016

Coram:

Makgoka et Molefe JJ

Summary:Admission as an attorney - section 15(1)(b)(ivA) of the Attorneys Act
53 of 1979 - attendance of practical training course
prior to
registration or service of articles of clerkship- whether strict
compliance is required.

JUDGMENT

MAKGOKA.J

- [1] The issue in this application is whether strict compliance with the provisions of s 15(1)(b) (viA) of the Attorneys Act 53 of 1979 (the Act) is required. That section requires a candidate attorney to attend a practical training during or after serving articles of clerkship. On 31 May 2016, my Sister Molefe J and I admitted the applicant (Ms Mdyesha) as an attorney of this Court, despite she having attended the practical legal training before she entered into a contract of articles of clerkship.
- [2] We reserved judgment on the question raised by the Law Society of the Northern Provinces (the Law Society) as to whether her attendance of the practical legal training before registration of her articles was regular. The facts are as follows. Ms Mdyesha entered into a fixed term contract of employment with a firm of attorneys with effect from 15 January 2014, which had a probation period ending March 2014. It is common cause that this contract does not qualify as a contract of articles of clerkship, and it did not purport to be such. During February 2014, she commenced a six-month attendance of the practical legal training course offered by the Law Society of South Africa's Legal Education and Development (L.E.A.D). This course is approved by the Law Society in terms of s 15(1)(b)(ivA) of the Attorneys Act 53 of 1979 (the Act).
- [3] On 1 April 2014, after the expiry of the probation period in terms of the fixed term contract of employment, referred to above, Ms Mdyesha entered into a contract of articles of clerkship with her principal for two years. That contract was registered by the Law Society on 30 May 2014. In July 2014 she satisfactorily completed the practical training course with full attendance, and was issued a certificate to that effect. Ms Mdyesha successfully completed her period of articles of clerkship on 31 March 2016. During April 2016 she passed the final part of the attorneys entrance examinations prescribed by s 14(1)(a),
- (b) and (c) of the Act, having passed the other parts progressively from February 2015. On 8 April 2016 she applied to this Court for her admission as an attorney.
- [4] On 26 May 2015, upon perusal of her application, the Law Society directed a letter to the Registrar of this Court as follows:

'(T)he applicant attended the practical training course prior to the date of service of articles of clerkship in contravention of the requirement that the course must be attended to during or after the expiry of a contract of articles of articles;

Although the Law Society is of the view that it may not be justified to formally oppose the application, the Law Society requires the Court's guidance in this instance with regard to the question of whether strict compliance with the peremptory requirements of Section 15(1)(b)(ivA) of the Act is required (which appears to be the case)'.

(emphasis in the original text)

[5] Section 15(1)(b)(ivA) of the Act, which governs the admission and re- admission of attorneys, reads as follows:

(1) Unless cause to the contrary to its satisfaction is shown, the court shall on application in accordance with this Act, admit and enroll any person as an attorney if-

(a) ...

(b) the Court is satisfied that such person has satisfied the following requirements or, where applicable, has been exempted therefrom in terms of the provisions of this Act, namely that such person-

(ivA) (aa) during his term of service under articles or contract of service, or after the expiry of his articles or contract of service; or

(bb) after he has been exempted in terms of this Act from service under articles of clerkship,

has attended a training course approved by the society of the province in which he completed his service under articles or contract of service, or, in the case of section 2A(c), has attended a training course approved by the society of the province in which the candidate attorney intends to practice, and has completed such training course to the satisfaction of that society:..'

[6] The section is therefore clearly peremptory: a candidate attorney must attend the legal practical training course during or after the expiry of his or her articles of clerkship, and not before. However, as explained in *Maharaj and others v Rampersad* 1964 (4) SA 638 (A) at 646C, a finding that a legislative provision is peremptory is not the end of the matter. The Court must further enquire whether it was fatal that it had not been complied with. The Appellate Division laid down the following test:

'This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is, and what, according to the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been compliance with the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance.'

[7] As observed by this Court in *Ex Parle Mothu/oe (Law Society of Transvaal InteNening)* 1996 (4) SA 1131 (T) at 1137H-1138F the trend in interpretation is 'away from the strict legalistic to the substantive.' Once it is established that a legislative provision is peremptory and the question arises whether exact compliance therewith is required, the answer is to be sought in the purpose of the statutory requirement which is to be found ascertained from its language read in the context of the statute as a whole.

[8] With regard to the present application, the purpose of s 15(1)(b)(viA) is, among others, to ensure that candidate attorneys

are adequately equipped in the practical aspects of attorney's work before they are admitted to the profession of attorney. This is achieved through serving articles of clerkship and the practical training course. If both are satisfactorily completed, the object of the legislation is achieved, despite the fact that the sequence in which they were completed is not in the order decreed in the section. Would the sequence in which the two were completed have any bearing on the competence of the candidate? Would the adequacy of the minimum practical skills acquired by a candidate be affected by the sequence? In my view, the answer is decidedly No to both questions.

[9] There is another basis on which the Court is entitled to depart from the clear language of a statute. That is where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account. See in this regard, *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC) para

232. See also *S and another v Acting Regional Magistrate, Boksburg and another* 2011 (2) SACR 274 (CC) the Constitutional Court para 22.

[10] The other consideration to be borne in mind when reading s 15(1)(b)(viA) is that of entry into the profession. It is a notorious

fact that thousands of law graduates struggle to obtain articles of clerkship. The majority of those are black graduates from historically disadvantaged universities. In this regard, Lucrecia Seafeld makes the following apt observations:

'The South African system has been notorious for its quality of education and inaccessibility. For those who were able to qualify for entry into universities, the excessive fees at these institutions made it almost impossible to complete a three year degree, not to mention a four year degree.....Most students had to depend on bursaries from private companies and these entities only allocated bursaries to a few black students. The few graduates who are able to finish their academic career face another stumbling block securing articles (of clerkship) that are a necessary requirement for admission to the legal profession. A great disparity exists between the numbers of those who qualify academically and those who obtain articles. Given problems of lack of opportunity and access, a significant percentage of the law graduates will not be able to secure articles of clerkship in the attorneys' profession and will therefore not be able to enter into the profession. Given the historic imbalance in the country, there is no doubt that the worst affected graduates would be those from the historically disadvantaged black universities.'[1]

[11] From the perspective of entry into the profession, for many graduates, the practical legal training course offers a realistic

gateway to obtaining articles of clerkship. It enhances their chances in that regard because potential principals would, logically, prefer candidate attorneys who had completed a practical training course to those who have not. By insisting on registration or service of articles before a candidate attends the practical training course would have the effect that many candidates could

be denied the opportunity to enter the profession. This would obviously lead to a result contrary to the intention of the legislature. In any event, our courts have routinely admitted candidates who had attended the practical training course before they entered into articles of clerkship. See for example, *Ex Parle Ndabanganye* 2004 (3) SA 415 (C) paras 3-5.

[12] At the risk of repetition, to insist on strict compliance with the provisions of section 15(1)(b) (viA) would entail Ms Mdyesha, and many other candidate attorneys in her position, having to repeat the attendance of the practical training course, despite having

substantively and competently completing the course - an absurdity that clearly could not have been contemplated by the legislature. I therefore conclude that the words of s 15(1)(b)(viA) of the Act, clear and unambiguous as they appear to be on the face thereof,

should be read in the light of the purpose of the Act and the consideration that entry into the profession should be eased, and not stifled. I therefore conclude that strict compliance with the peremptory language is not required.

[13] Before I conclude, I have to remark on the the practice of requiring potential candidate attorneys to sign pre-articles contracts with probationary periods before entering into articles of clerkship, as was the case with Ms Mdyesha. In *Ex Parle Mahon* 2010 (2) SA 511 (GNP) para 30, such practice was deprecated by this Court. The Law Society's attention was drawn to the potentially prejudicial

results of this practice as being open to abuse. It does not appear that the Law Society has taken any steps to discourage this practice, as Ms Mdyesha's contract was signed four years after Mahon was decided. Although the judgment was overturned by the Supreme Court of Appeal, the caution by this Court on this aspect was endorsed. See *Law Society of the Northern Provinces v Mahon* 2011 (2) SA 441 (SCA); [2011] 2

All SA 481 (SCA) para 35.

[14] The sum total of all the considerations above is that a candidate attorney may well attend the practical training course before he or she registers or serves articles of clerkship, despite the peremptory provisions of s 15(1)(b)(viA) of the Act. The Court is entitled to condone such non- compliance with the section. It is on that basis that we condoned Ms Mdyesha's attendance of the practical training course before she concluded a contract of articles of clerkship.

T.M. Makgoka

Judge of the High Court

I agree

D Molefe

Date of hearing:

31 May 2016

Judgment

delivered:

4 August 2016

Appearance:

For the Applicant:

Adv. M Lennox

[1] Na'lm A.A.A. (ed) (University of Pennsylvania Press, Philadelphia
2003) Human Rights Under African Constitutions: Realizing the
Promise for Ourselves 330-331.

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Prepared on 9 October 2026 · Esheria