

SOUTH AFRICA / JUDGMENT

Modupe (2023/121159), Ex parte [2024] ZAGPJHC 820 (27 August 2024)

[2024] ZAGPJHC 820**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Sutherland, Modiba

CASE / FILE NUMBER

2023/121159

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Source record**FLYNOTES:**

PROFESSION – Admission – Admission
of Advocates Act
– Admission
as legal practitioner and enrolment as advocate – Applicant
relying on section 115 of Legal Practice Act 48
of 2014 (LPA) and
section 3 of the Admission of Advocates Act 74 of 1964 (AAA) –
Persons previously entitled to be
admitted and enrolled as
advocate or attorney – Applicant did not meet requirements
whilst AAA still in force –
Requirements for admission of
LPA apply to him unequivocally – Application dismissed.

REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
Case
Number: 2023-121159
1.
REPORTABLE: YES
2.
OF INTEREST TO OTHER JUDGES: YES
3.
REVISED: NO
27
August 2024
In

the ex parte application
of: MODUPE-OLUWA-JACK
MODUPE
APPLICANT
and
LEGAL
PRACTICE COUNCIL
INTERVENING
PARTY

CORAM: Sutherland DJP, Modiba J

JUDGMENT

Summary:

Application for admission as a legal practitioner and enrolment as an advocate of the High Court of South Africa – whether the applicant is entitled to invoke section 115 of the Legal Practice Act 48 of 2014 and to be admitted in terms of section 3 of the Admission of Advocates Act 74 of 1964 (AAA) and whether the Full Court’s

judgment in *Ex Parte Goosen and Others* 2020 (1) SA 569 (GJ) supports the applicant’s quest to be admitted – both questions answered in the negative as the applicant did not meet the requirements for admission in terms of section 3 of the AAA before 1 November 2018.

MODIBA J (Sutherland DJP concurring)

Introduction

[1]No complexity of a factual or legal nature arises in this application. The facts on which it is premised are common cause. The question raised for determination is very crisp. It is whether the applicant is entitled to be admitted as a legal practitioner and the Legal Practice Council (LPC) authorised to enrol as an advocate of the High Court of South Africa. He contends that he is. He seeks to invoke section 115 of the Legal Practice Act (LPA)[1] read with section 3 of the Admission of Advocates Act (AAA)[2] as purportedly interpreted by this Division’s Full Court in *Ex Parte Goosen* (Goosen)[3]. The LPC contends that the applicant is not entitled to invoke section

115. Since he fails to meet the requirements in sections 24 and 26 of the LPA, the LPC further contends, his application for admission as an advocate falls to be dismissed. For reasons I deal with later, the LPC also seeks punitive costs against the applicant.

[2]The applicant set out a new case in his replying affidavit alleging that by opposing his application for admission, the LPC breached his constitutional right to choose his trade, occupation or profession in terms of section 22 of the Constitution of the Republic of South Africa.[4] This case is dismissed outright. It is impermissibly raised in reply. The applicant has deprived interested parties of the opportunity to participate in these proceedings because did not issue a notice to the Registrar in terms of uniform 16A. More seriously, he did not lay a proper

factual basis for such a legal conclusion.

[3]In his replying affidavit, the applicant also raised two points in limine. He contends that since the LPC did not follow the procedure set out in uniform rule 6 (4) (b), its opposition is not proper before this court. Therefore, the court must simply strike it out. He further contends that in its answering affidavit, the LPC's deponent impermissibly relies on hearsay evidence.

[4]I start by setting out the facts. I then briefly dispose of the points in limine. Thereafter, I consider the parties' respective contentions regarding the applicant's entitlement or lack thereof to be admitted as a legal practitioner against the implicated statutory provisions as well as the judgment in Goosen. Then, I make findings on the merits. Lastly, I consider the issue of costs, and set out this court's order.

Background facts

[5]The applicant is a 47-year-old male South African citizen. He holds an LLB degree, conferred on him by the University of South Africa (UNISA). He commenced his LLB studies in 2016. He completed them in 2023. He therefore obtained his LLB degree over more than four years of study. He has never been admitted as an attorney or advocate previously. It follows that he has never been struck off the roll of legal practitioners or suspended from legal practice in the Republic or elsewhere. He has filed two testimonies confirming that he is a fit and proper person to be admitted as an advocate. One is by the Acting Executive Dean of the College of Law at UNISA. The second is by his Pastor at Rhema Bible Church. He has never been provisionally or finally sequestered. No criminal proceedings are pending against him. He has never been convicted of a criminal offence.

[6]He has met the requirements for service of his application for admission on the relevant Societies of Advocates and the LPC as set out in s24(2(d) of the LPA. On receipt of the application, the LPC considered it. Ordinarily, in the exercise of its regulatory authority and to assist the court, the LPC issues an applicant for admission with a certificate that he or she meets the requirements for admission and further states that it has no objection to an applicant being admitted. However, in this case, since the LPC was not satisfied that the applicant meets the requirements for admission, it did not issue the certificate. It advised the applicant of its reasons and requested him to withdraw the application. He refused. This led the LPC to file a notice of intention to oppose. The applicant did not remove the application from the unopposed roll of 20 March 2024. This prompted the LPC to instruct its legal representative to attend court to secure the removal of the matter from the roll to file an answering affidavit. The court acquiesced the LPC's request and reserved costs for that day's appearance.

[7]This is the ideal point to deal with the applicant's points in limine.

Points in limine

Whether the LPC's opposition is proper

[8]The applicant contends that since he brought the application ex parte, to oppose it, the LPC had to follow the procedure set out in uniform rule 6 (4) (b). During oral argument, he made another submission not set out in his heads of argument. He contended that the LPC is not empowered by statute to oppose this application. It has done so in breach of the principle of legality as set out in Fedsure.[5] Therefore, the applicant further contended that this application ought to be considered on an unopposed basis.

[9]The LPC contends that the nature of its interest in the application is apparent from its mandate as set out in the LPA. Therefore, it is not necessary for a separate application to be brought by the LPC as provided for in uniform rule 6 (4) (b). It further contended that section 6 (1) (v) of the LPA authorises it to oppose these proceedings. Therefore, by so doing, it has not breached the principle of legality.

[10]This issue stands to be resolved by interpreting uniform rule 6 (4) (b) and sections 24

(2) (d), 5 (d) and 6 (1) (v) of the LPA. Uniform rule 6 (4) (b) provides as follows:

“Any person having an interest which may be affected by a decision on an application being brought ex parte, may deliver notice of an application for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which such person desires to be heard, whereupon the registrar must set such application down for hearing at the same time as the initial application.”

[11]Section 24 (2) (d) requires an applicant for admission to serve his application on the LPC. Section 6 (1) (v) of the LPA authorises the LPC to institute and defend legal proceedings. Section 5(d) authorises the LPC to regulate legal practitioners and candidate legal practitioners.

[12]An ex parte application is an application brought without notice either because no person has an interest in the relief sought, giving notice may defeat the purpose of the relief sought, notice cannot be given because the respondent's whereabouts are unknown and leave to file by substituted service is required, and other such applications. If a person who has a material interest in the application acquires notice thereof and wishes to oppose the application, uniform rule 6 (4) (b) provides them with a mechanism for doing so. The person seeking leave to intervene must follow the mechanism provided for in uniform rule 6 (4) (d). This section requires that he delivers a notice of application for leave to oppose, supported by an affidavit in which he sets out his interest in the relief sought. The registrar may set down the application for hearing on the date the ex parte application would be heard.

[13]Concerning the right of a person with an interest to oppose an ex parte application. In Schlesinger[6], the court said the following:

“On principle, however, it seems to me that any person who shows a direct and substantial interest in the proceedings, and whose affidavit indicates that his opposition might contribute something to a just decision of the case, should not be deprived of an opportunity of being heard. In those rare cases where he has notice and wishes to oppose the relief sought at the very outset, I can see no reason why he should not in principle have the right to oppose. As in any other proceedings, he runs the risk of being mulcted in costs should his opposition turn out to be frivolous. In the case now under consideration,

however, the applicant raises serious and material facts relating directly to the question of whether the ex parte application of his wife should be entertained at all, and, if so, whether it should be granted. On this ground too, I have come to the conclusion that his application for leave to intervene should succeed". (Sic)

[14]This rule does nothing more than set out the procedure to be followed when a party with an interest in the relief sought ex parte seeks to oppose it. The LPC is such a party. However, it filed its opposing papers without following this procedure. For the reasons set out below, I find nothing prejudicial to the applicant in the way the LPC is participating in these proceedings.

[15]An application for admission as a legal practitioner is a sui generis application. Due to a long-standing convention, applications for admission are brought ex parte. In addition to enjoying legal capacity in terms of section 6 (1) (v), for two reasons, the LPC also has an interest in the relief sought. Firstly, it has a statutory mandate to regulate all legal practitioners and candidate legal practitioners.[7] This includes ensuring that applicants for admission comply with the requirements for admission. It is for that reason that the LPC assists the court by considering applications for admission. To amplify the fulfilment of its mandate in that regard, service of the application for admission on the LPC in terms of section 24 (2) (d) is a peremptory requirement for admission. By implication, an applicant for admission as a legal practitioner must first satisfy the LPC that he or she meets the prescribed admission requirements.

If the LPC is so satisfied, it will issue a certificate to that effect. The applicant files it when he sets down the application for hearing. The court will not admit an applicant who fails to satisfy it that it has complied with this requirement and has not attached to its application, the certificate issued by the LPC.

[16]Secondly, the order sought, that the applicant be enrolled as an advocate is given effect to by the LPC in fulfilment of the same regulatory mandate set out in section 5 (d). It enrolls admitted legal practitioners on the roll of either advocates or attorneys as the case maybe. It therefore has substantial interest in the proceedings as it may be prejudicially affected by this court's order.[8] Its duty to give effect to the relief sought by enrolling the applicant on the roll of advocates if this court admits him, flows from its section 5 (d) mandate. It therefore meets the trite test for substantive interest in legal proceedings.

[17]The case for the LPC to oppose the application arises from these factors and is properly made out in this application. Having been given notice of the application as required in terms of section 24 (2) (d), the fact that it was brought ex parte should not be a bar to it opposing it. To insist on the LPC following the procedure in uniform rule 6 (4) (b) would elevate substance over form, render the LPC's participation in such applications unnecessarily cumbersome and unduly escalate legal costs.

[18]This court pondered whether; to avoid a pedantic opposition to the LPC's intervention in an application for admission brought ex parte, it should not change the old convention and require that the LPC be cited as a party. Practical and logical as such a change may be, it may affect other parties in ways this court is not mindful of. For example, the LPC's intervention as a party may

have implications for an order as to costs. It is important that the interests of all affected parties, especially the legal profession, be considered when introducing such a change. This issue was raised mero motu by this court. It did not invite interested parties to air their views. It is primarily for this reason that this court did not introduce the mooted change.

[19]The LPC is at liberty to amend its rules to require that it should be cited. This would provide it with an opportunity to invite submissions from all interested parties to consider all relevant factors. In the meantime, whether the LPC rules are ultimately amended or not, this judgment will, until set aside on appeal or a superior court in another matter rules otherwise, stand as authority for the principle that when the LPC seeks to oppose an application for admission brought ex parte, it is not necessary for it to bring an application in terms of uniform rule 6 (4) (b). It may simply intervene as a friend of the court by filing a notice to that effect together with an affidavit in support of its intervention and legal submissions or file a notice of intention to oppose, answering affidavit and legal submissions.

[20]For these reasons, this point in limine falls to be dismissed.

Hearsay evidence

[21]The applicant objects to the LPC's answering affidavit because it contains inadmissible hearsay evidence. He contends that LPC's deponent has no personal knowledge of the facts relating to the application as she is not involved in the administration of admissions. LPC officials who have such knowledge have not filed confirmatory affidavits.

[22]The LPC contends that the application stands to be considered on its answering affidavit as filed because the applicant has not applied to have the alleged hearsay evidence struck off.

[23]I am confounded by this point in limine. This application stands to be determined on the material common cause facts set out in paragraphs 4 and 5 of this judgment. The controversy that arises is of a legal nature. The applicant has not specified the allegations in the answering affidavit it contends constitute hearsay evidence. More so, as contended by the LPC, he has not applied to have it struck off.

[24]This point in limine is frivolous and devoid of merit. It falls to be dismissed.

Merits

[25]Until 1 November 2018, the AAA regulated the admission of advocates. It set out various requirements for their admission. It is common cause that the applicant meets the requirements for admission under that Act. Those requirements are set out in section

3. The relevant parts are as follows:

“3 Admission of persons to practise as advocates

- (1) Subject to the provisions of any other law, any division shall admit to practise and authorize to be enrolled as an advocate any person who upon application made by him satisfies the court-
 - (a) that he is over the age of twenty-one years and is a fit and proper person to be so admitted and authorized;
 - (b) that he is duly qualified;
 - (c) that he is a South African citizen or that he has been lawfully admitted to the Republic for permanent residence therein and is ordinarily resident in the Republic;
 - (d) in the case of any person who has at any time been admitted to practise as an attorney in any court in the Republic or elsewhere, that his name has been removed from the roll of attorneys on his own application; and
- (2) The following persons shall for the purposes of paragraph (b) of subsection (1) be deemed to be duly qualified, namely:
 - (a) Any person who-
 - (i) (aa) has satisfied all the requirements for the degree of *baccalaureus legum* of any university in the Republic after completing a period of study of not less than four years for that degree; or
 - (bb) after he or she has satisfied all the requirements for the degree of bachelor other than the degree of *baccalaureus legum*, of any university in the Republic or after he or she has been admitted to the status of any such degree by any such university, has satisfied all the requirements for the degree of *baccalaureus legum* of any such university after completing a period of study for such degrees of not less than five years in the aggregate;...”

[26]The difficulty confronting the applicant is that on 1 November 2018, the LPA came into operation, prescribing additional requirements. It is convenient to quote the applicable LPA provisions in full.

“24 Admission and enrolment

- (1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.
- (2) The High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she-
 - (a) is duly qualified as set out in section 26;
 - (b) is a-
 - (i) South African citizen; or

- (ii) permanent resident in the Republic;
- (c) is a fit and proper person to be so admitted; and
- (d) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules.
- (3) Subject to subsection (1), the Minister may, in consultation with the Minister of Trade and Industry and after consultation with the Council, and having regard to any relevant international commitments of the Government of the Republic, make regulations in respect of admission and enrolment to-
 - (a) determine the right of foreign legal practitioners to appear in courts in the Republic and to practise as legal practitioners in the Republic; or
 - (b) give effect to any mutual recognition agreement to which the Republic is a party, regulating-
 - (i) the provision of legal services by foreign legal practitioners; or
 - (ii) the admission and enrolment of foreign legal practitioners.”

“26 Minimum qualifications and practical vocational training

- (1) A person qualifies to be admitted and enrolled as a legal practitioner, if that person has-
 - (a) satisfied all the requirements for the LLB degree obtained at any university registered in the Republic, after pursuing for that degree-
 - (i) a course of study of not less than four years; or
 - (ii) a course of study of not less than five years if the LLB degree is preceded by a bachelor's degree other than the LLB degree, as determined in the rules of the university in question and approved by the Council; or
 - (b) subject to section 24 (2) (b), satisfied all the requirements for a law degree obtained in a foreign country, which is equivalent to the LLB degree and recognised by the South African Qualifications Authority established by the National Qualifications Framework Act, 2008 (Act 67 of 2008); and
 - (c) undergone all the practical vocational training requirements as a candidate legal practitioner prescribed by the Minister, including-
 - (i) community service as contemplated in section 29, and
 - (ii) a legal practice management course for candidate legal practitioners who intend to practise as attorneys or as advocates referred to in section 34 (2) (b); and
 - (d) passed a competency-based examination or assessment for candidate legal practitioners as may be determined in the rules.

- (2) An attorney qualifies to be enrolled as a conveyancer, if he or she has passed a competency-based examination or assessment of conveyancers as determined in the rules by the Council.
- (3) An attorney qualifies to be enrolled as a notary, if he or she has passed a competency-based examination or assessment for notaries as determined in the rules by the Council.”

[27]The additional requirements are set out in sections 26 (1) (c) and (d). It is common cause that the applicant has not complied with these requirements. He has not undergone all the practical vocational training requirements as a candidate legal practitioner prescribed by the Minister and passed a competency-based examination or assessment for candidate legal practitioners as may be determined in the rules.

[28]He seeks to avoid these requirements by invoking section

115. It provides as follows:

“Persons entitled to be admitted and enrolled as advocates, attorneys, conveyancers or notaries

Any person who, immediately before the date referred to in section 120 (4), was entitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of this Act.”

[29]The applicant fails on a plain reading of section 115. The date referred to in section 120 (4) is 1 November 2018.[9] It is common cause that he did not meet the requirements for admission in terms of section 3 whilst the AAA was still in force, that is, prior to 1 November 2018. He was therefore not entitled to be admitted in terms of that provision as required by section 115 of the LPA.

[30]His reliance on the remarks in Goosen, emphasised in the quotation below is unsustainable as he is taking the remarks out of context.

“[51] Accordingly, s 115, in our view, must be interpreted to mean that whoever can show that they satisfied the criteria in s 3 of the AAA and, had an application been made whilst the AAA was still in force, were entitled to admission, s 115 can be invoked ad infinitum. This is not a conclusion to be celebrated. It seems to us unfortunate that the framing of the statute must yield to this outcome. It is a paradox that at the very moment that the law has caught up with the informal and extensive training regime undertaken voluntarily by the bar through pupillage training and examinations, in place continuously since at least 1974, there yet remains room indefinitely for an untrained 'advocate' to practise law. The result is at odds with the objectives expressed in the LPA about achieving symmetry in the professional training of LPs who seek enrolment either as advocates or attorneys. This outcome serves neither the legal profession nor the litigating public.”

[31]What the Full Court posited here, is that persons who met requirements to be admitted in terms of section 3 may invoke section 115 even if their application for admission is instituted after 1 November 2018. The applicant does not fall under this category either. His reliance on Veale [10], which was compared in Goosen is also misplaced. Veale is distinguishable on the facts because unlike Veale, the applicant is not asserting an accrued right which was taken away when the LPA came into effect.

[32]Since the applicant did not meet the requirements to be admitted in terms of section 3 of the AAA prior to 1 November 2018, when the LPA came into effect, it did not take away his right to be admitted in terms of section 3 because that right had not vested. Therefore, the requirements for admission set out in sections 24 and 26 of the LPA apply to him unequivocally. For these reasons, this application must fail.

Costs

[33]The LPC seeks costs, including the reserved costs of 20 March 2024, on a punitive scale. This request is appropriately made. The applicant ought to have withdrawn this application on the recommendation of the LPC as it is devoid of any merit. He should not have burdened this court, clogging its already crowded-out rolls. No ambiguity arises from the implicated statutory provisions and the ratio decidendi and orbiter dictum in Goosen or Veale that require this court's clarification. At the very least the applicant ought to have removed the application from the unopposed

roll of 20 March 2024 to avoid the costs of that day being wasted. Further, the LPC should not be out pocketed for opposing this

application on the basis it advised the applicant to withdraw it for lack of merit.

[34]The applicant pleaded with this court not to imposed punitive costs because he is unemployed. While this court sympathises with him, unemployment serves as no justification to cause a statutory body to incur legal costs in the day-to-day business of fulfilling its regulatory mandate. A cost order will not only punish the applicant, but it will also deter future applicants for admission from disregarding the regulatory authority of the LPC without merit and under similar circumstances.

[35]In the premises, the following order is made:

Order

The application is dismissed with costs on the attorney and client scale, including the Legal Practice Council's costs of 20 March 2024.

MODIBA J

JUDGE OF THE HIGH COURT,

JOHANNESBURG

The Applicant: Modupe-Oluwa-Jack Modupe (in person) For the Respondent: C P Fourie
instructed by Fourie Fisser Incorporated Date of hearing: 20 August 2024 Date of judgment: 27
August 2024

Mode of delivery: This judgment is handed down virtually on the MS Teams platform and
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SAFLLI. The date and time for delivery is deemed to be 10 am.

- [1] 28 of 2014.
- [2] 74 of 1964.
- [3] Ex Parte Goosen and Others 2020 (1) SA 569 (GJ).
- [4] 2006.
- [5] Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan
Council and Others [1998] ZACC 17; 1999
(1) SA 374 (CC) 1999 (1) SA P374 at paragraph 59.
- [6] Schlesinger v Schlesinger 1979
(4) SA 342 (W) at p3487-8 F.
- [7] See s5(d).
- [8] Johannesburg Society of Advocates v Nthai 2021
(2) SA 343 (SCA) at [31].
- [9] See Government Gazette No 38022 of 22 September 2014.
- [10] Veale v Law Society of Alberta J [2002] 89 CRR (2d) 68.

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