



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 11708/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 19 MARCH 2021
SIGNATURE [REDACTED]

In the matter between:

**TEBEILA INSTITUTE OF LEADERSHIP,
EDUCATION, GOVERNANCE AND TRAINING**

Applicant

and

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES
SOUTH AFRICAN LEGAL PRACTICE COUNCIL**

First Respondent

Second Respondent

J U D G M E N T

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020 and revisions thereof. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

- 1.1 This is the judgment in an urgent application whereby the applicant seeks to have a section of the Legal Practice Act, 28 of 2014 (the LPA) declared unconstitutional.
- 1.2 The impugned section is section 25(3)(a)(i) which provides that newly admitted legal practitioners enrolled on the roll of attorneys need to be in practice for a period of three years before attaining right of appearance in the High Court.
- 1.3 Newly admitted legal practitioners enrolled as advocates do not have the same limitation placed on them by the LPA, and have immediate rights of appearance in the High Court upon admission. This distinction, so the applicant argues, is a violation of the right to equality enshrined in section 9 of the Constitution.
- 1.4 What must first be determined is whether the applicant has made out a case that the relief it seeks need to be granted on an urgent basis in order to protect its rights.

[2] The parties

- 2.1 The applicant is Tebeila Institute of Leadership, Education, Governance and Training. It is an educational institute based in the rural area of Limpopo and is actively involved in organising educational training, campaigns, public lectures and career exhibitions in the communities of Limpopo and elsewhere in the country.

2.2 The first respondent is the Minister of Justice and Correctional Services (the Minister) and the second respondent is the Legal Practice Council (the LPC).

2.3 The Minister opposes the application and the LPC has filed an affidavit indicating that it will abide the decision of the court.

[3] Background facts leading up to the application

3.1 On 20 January 2014 a tragedy of shocking proportions occurred at the Mahlodumela Lower Primary School when a six years old learner, Michael Komape, fell into a pit latrine on the school premises and passed away.

3.2 The parents and family of Michael Komape instituted action in the Limpopo Division of this Court in case number 1416/2015.

3.3 On 13 June 2016, Mokgohloa J admitted the applicant and Equal Education as amici curiae in the aforesaid action. They were granted leave to file written submissions and present oral argument at the hearing of the main action. Equal Education was granted leave to lead evidence in respect of issues highlighted in its founding affidavit to its application to be admitted as an amicus curiae.

3.4 The applicant filed no written submissions and, at its own request, was discharged as amicus soon after the trial commenced. This much is clear from paragraph [3] of the judgment of Muller J delivered after the trial on 23 April 2018. Muller J further noted that Equal Education had presented evidence by way of affidavits and its counsel had attended the trial and made valuable submissions at the conclusion of the evidence. It was also awarded its costs by Muller J.

- 3.5 The judgment of Muller J was taken on appeal and the judgment of the Supreme Court of Appeal has been reported as Komape and others v Minister of Basic Education and others 2020 (2) SA 349 (SCA). The applicant did not feature in the appeal.
- 3.6 As appears from the abovementioned judgment, no appeal was lodged against the structural interdict granted by Muller J. The interdict compelled the Minister of Basic Education and the MEC for the Limpopo Department of Education to take certain steps to install at each rural school then equipped with pit latrines in the Limpopo Province, a sufficient number of toilets for each school for use of the learners. Certain ancillary aspects were also dealt with in the interdict.
- 3.7 The structural interdict has not been fully complied with and litigation is currently pending in the Limpopo Court to compel compliance with the interdict. A notice of set down served in February 2021 indicated that this litigation will proceed on 24 May 2021.
- 3.8 On 3 March 2021, the applicant's then attorneys delivered a notice of withdrawal. It is the applicant's case that it then "*urgently requested the service of a number of attorneys who may be willing to do the matter pro bono and to appear on behalf of the applicant on 24 May 2021*".
- 3.9 It is further stated that an attorney willing to appear "*will have to make appearance on 24 May 2021 without the involvement of counsel*". On the same day, 3 March 2021, the applicant was advised to approach a Mr Israel Maenetja with a request that he acts as its attorney. On the same day Mr Maenetja respondent as follows: "*we are willing to assist your institute with legal assistance on a pro bona basis. However, due to the provisions of section 25(3)(a)(i) of the Legal Practice Act 28 of 2014, ... I will*

therefore not be able to appear in Court on 24 May 2021 on behalf of the institute ... we wish you all the best in your case and we are hoping to be of assistance to your institute in future”.

- 3.10 Whilst the applicant accepts that, should an order of Constitutional invalidity be granted in respect of the above section of the LPA, such an order would still need to be confirmed by the Constitutional Court. Even with this in mind, the applicant stated that its only recourse is to this court on an urgent basis and that “... *should this application not be heard after 24 May 2021, the applicant will not get substantial redress in due course*”.

[4] Evaluation

- 4.1 On behalf of the Minister it was submitted that the starting point in the enquiry as to whether this matter should merit a hearing on this court’s urgent motion court roll, is whether, if the order is not granted, the applicant’s rights to participate in the hearing on 24 May 2021 will be unduly infringed or curtailed. I agree with this submission.
- 4.2 The first aspect is then to evaluate the nature of the right which the applicant seeks to enforce or protect. The applicant was previously admitted as an amicus curiae. The role of an amicus has been described as follows in Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and others 2002 (5) SA 713 (CC) at 715F: “*The role of the amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return to the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court ... to provide cogent and helpful submissions that assist the court.*

The amicus must not repeat argument already made but must raise new contentions”.

- 4.3 Having been previously discharged as an amicus at its own request, the applicant has not brought an application to be re-admitted as such. The “right” which it seeks to enforce or protect on an urgent basis, is therefore open to some serious doubt. The extent of such doubt is exemplified by what happened in the SCA in the appeal against Muller J’s judgment. There, another prospective amicus sought to be admitted as such. Its application for admission was refused after the learned judges of appeal had referred to the following dictum of Moseneke DCJ in National Treasury v Opposition to urban Tolling Alliance and Others 2012 (6) SA 223 (CC): *“I do not propose to revisit the ideal attributes of a party that seeks to be admitted as a friend of the court. It is sufficient to observe that an amicus must make submissions that will be useful to the Court and which differ from those of the parties. In other words, the submissions must be directed at assisting the Court to arrive at a proper and just outcome in a matter in which the friend of the court does not have a direct or substantial interest as a party or litigant”.*
- 4.4 Even if the applicant still qualifies as an amicus despite its previous discharge, as it contends it does, not only has no submissions been made by it to the court, but neither has it even indicated what those (new) submissions would be. The applicant has also not indicated why Mr Maenetja could not have formulated those submissions, irrespective of the issue of the alleged Constitutional invalidity of the impugned section. In simple terms, the question of what it is that the applicant says it that it would want to bring to a Court’s attention, has not been answered.

- 4.5 Even if the argument may be that, in order for such submissions to be acceptable to or by a High Court, they must be made by a legal practitioner with the requisite right of appearance, no reason has been furnished why Mr Maenatja could not draft the submissions and they then be settled by an advocate. The applicant's alleged lack of access to such counsel is gainsayed by the facts: in the urgent application before me, the applicant was represented by no less than four advocates, all qualified and acting pro bono. Any one or all of them could have (and notionally still can) complete whatever submissions the applicant would wish to deliver, even if those advocates are unavailable for the hearing of 24 May 2021.
- 4.6 As to the actual appearance in 24 May 2021, the applicant is not in the position of a participating party or an accused person whose rights of access to court might be unduly infringed if it is denied access to legal representation, the applicant seeks to enjoy a privilege as referred to earlier. Even if that privilege or the exercise thereof may be of beneficial use to the court, the applicant has failed to indicate the content of that benefit. In oral argument it was submitted that the extent of any envisaged assistance will only become apparent once the other parties have filed their submissions, but the applicant has failed or refrained, to date at least, to engage with the other parties at all, including the other (existing) amicus. The applicant is therefore asking the court to consider its request for an indulgence to have the matter heard as one of urgency as envisaged in Rule 6(12), without furnishing evidentiary material on which the court must base its decision or exercise its discretion. Counsel for the Minister has, in his written heads of argument, rightly argued in this regard that a discretion to condone non-compliance with the rules (which is what is required in urgent applications) "cannot be exercised in the air".

- 4.7 In this regard, reference was made to the following apposite dictum in State Information Technology Agency SOC Ltd v Gijima Holding (Pty) Ltd 2018 (2) SA 23 (CC) at [49]: “... we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us to do so. That basis may be gleaned from the facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here. That should be the end of the matter”.
- 4.8 Lastly, insofar as it may be argued that the employment of Mr Maenetja with the current disqualification by way of a lack of a right of appearance, might constitute facts upon which this court is called upon to exercise its discretion, this basis is too tenuous to assist the applicant: no particulars have or could be furnished about how many alternate attorneys have been approached on 3 March 2021 before the conclusion had been reached that Mr Maenetja was the only available legal practitioner. No reasons were or could be furnished why the applicant has not to date approached the local attorneys association for assistance, or the pro bono offices at either Polokwane or Pretoria or any of the constituent associations of advocates or Pabasa or any other independent association of advocates, Lawyers for Human Rights or any of the legal clinics of any of the law schools. No reasons have been advanced why such approach in the next two months would not yield results.
- 4.9 The simple allegation that the only practitioner which had been found on 3 March 2021 willing to assist but unable to appear on 24 May 2021, thereby requiring the determination of constitutional validity on an urgent basis, is simply not enough to merit a hearing on the urgent roll. The court’s attention has (very appropriately) been drawn to the following statement in

Hotz and Others v University of Cape Town 2018 (1) SA369 (CC) at [15]:
“*The applicants aver that a significant degree of urgency attends this application because the matter concerns the exercise of constitutional rights and the manner in which the boundaries of the exercise should be interpreted, particularly in the context of student protests’. They have, however, not established urgency*”.

[5] Conclusion

I therefore conclude that the applicant has not established the requisite degree of urgency as claimed by it. Having reached this conclusion, I need not even traverse the failure to comply with rule 16A or whether the applicant has the necessary *locus standi* to request the relief it seeks subsequent to its previous discharge as amicus. The only outstanding issue is that of costs. Counsel for the Minister argued that the Biowatch-exception to the customary rule that costs should follow the event, should not apply in this instance. However, having regard to the nature of the applicant itself, its current reliance on pro bono counsel and apparent impecunity, in the exercise of my discretion, I determine that it would be proper in the circumstances that each party pays its own costs.

[6] Order

1. The matter is struck from the roll.
2. Each party is ordered to pay its own costs.


N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 17 March 2021

Judgment delivered: 19 March 2021

APPEARANCES:

For the Applicant: Adv. S S Tebeila with Adv T A Makola,
Adv L V Mafokane and Adv Lb Moshoeu

Attorney for Applicant: Delport van den Berg Inc., Pretoria

For the 1st Respondent: Adv. V D Mtsweni

Attorney for 1st Respondent: State Attorney, Pretoria

For the 2nd Respondent: Adv. D Bekker (on watching brief)

Attorney for 2nd Respondent: South African Legal Practice Council
c/o Gauteng Legal Practice Council