



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA DIVISION,)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <u>YES</u> / NO.	
(2) OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO.	
(3) REVISED.	
16/1/2020 DATE	 SIGNATURE

L D RENSBURG

M PATEL

J NICOLSON

L ESSOP

and

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant 69359 / 2019

Applicant 69360 / 2019

Applicant 69361 / 2019

Applicant 69362 / 2019

JUDGEMENT

Before: J HOLLAND-MÜTER A/J:

[1] These matters are all applications for the various Practical Vocational Training Contracts (PVTC) entered into by the applicants to be registered by the Legal Practitioners Council (LPC). The LPC was established in terms of Section 4 of the Legal Practice Act No 28 of 2014 (LPA or the “Act”), a body corporate with full legal capacity and exercises jurisdiction over all legal practitioners as contemplated in the LPA, and came into effect 1 November 2018.

[2] It was decided that, in the interest of the four (4) applications because they are basic the same but for the individual different facts, to be heard together to prevent unnecessary duplication and to provide future guidance on this issue. It is the first application on this specific Rule under the new LPA dispensation and it may be helpful to analyze the legal position.

[3] One of the primary objectives of the LPA is to create a single unified statutory body to regulate the affairs of all legal practitioners.

[4] Candidate attorneys are by virtue of the LPA required to enter into a written Practical Vocational Training Contract (“PVTC” or “contract”) with the attorney who will become the candidate attorney’s principal. This has been a requirement under the previous acts preceding the LPA. See Section 21(1) and (2) of the Attorneys, Notaries and Conveyancers Act 23 of 1934 and Section 9 (1) and (2) of the Attorneys Act, 53 of 1979. The parties are ad idem on this requirement. It is also not in dispute that the written contract has to be registered with the LPC (and its predecessors) within two (2) months from entering into the PVTC.

[5] The four applicants each entered into a written contract with Bowmans Attorneys at the beginning of 2019 and submitted these PVTC to the LPC for registration thereof. I will deal with each application below regarding the facts.

[6] The LPC declined to register the contracts because it holds the view that the four applicants were required to obtain the LPC's written consent *prior* the entering the PVTC with the principals because the applicants did not comply with Rule 22.1.5 of the LPC Rules published in terms of Sections 95 and 109 of the LPA. Although the Council did not oppose the applications, it opted to assist the Court by participating in the application and filed an explanatory affidavit and addressed the Court during the hearing of the applications.

[7] Rule 22.1.5 provides as follows:

“(1) A candidate attorney shall not have any pecuniary interests in the practice and service of an attorney, other than in respect of bona fide remuneration for his or her services as a candidate attorney, and shall not, without prior written consent of the Council, hold or occupy any office in respect of which he or she receives any form of remuneration, directly or indirectly, or engage in any other business other than that of candidate attorney, where holding that office or engaging in that business is likely to interfere with the proper training of the candidate attorney.” (The underlined provision is new to the current Rules and was not part of any of the previous Rules. The impact of this new inserted portion will be discussed below).

(2) If any candidate attorney contravenes the provisions of Rule 22.1.5. the contract concerned shall be void ab initio and service rendered thereunder shall be ineffective unless the court on good cause shown otherwise directs. ”

[8] The four applicants and the LPC exchanged several letters to resolve the issue without success. The LPC obtained a legal opinion but this opinion was never made public to the applicants or to the court.

[9] The applicants are of the view that their respective engagement in other businesses will not likely interfere with their proper training and therefore no consent was necessary from the LPC. The LPC holds a different view. It contends that whether or not the engagement by the applicants in other businesses is likely to interfere with their respective training is for the LPC and not the applicant to be assessed.

[10] In order to assess the situation, the position of the Council and the provisions of Rules applicable needs attention.

10.1 The Council regulates all candidate legal practitioners

(Section 5(d) of the Act);

10.2 The Council is to promote high standards of legal education and training and post-qualification professional development of legal practitioners (Section 5(h) of the Act);

10.3 The insertion of "where holdings that office or engaging in that business is likely to interfere with the proper training of the candidate attorney" has to be considered where applicable. The question is by whom? Is it the LPC or does a candidate attorney have the right to decide on this?

[11] It is a basic Rule of interpretation that every word in a section in legislation or rule in sub-legislation ought to be given the ordinary meaning of the word in the context used and that the legislator (or LPC in this matter when promulgating the Rule), had a specific intention with the specific word.

[12] It is therefore necessary to determine why the new portion was included in the new Rule and how does it differ from the previous dispensation when such provision did not exist? It is also necessary to subject the new Rule for interpretation to determine what is required from a candidate attorney who may be subject to the provisions of the new Rule.

[13] In my view the new Rule provides for two (2) different scenarios namely in the first instance an absolute prohibition to have any pecuniary interest in the attorney practice where the candidate attorney renders the candidate attorney services and (ii) the holding of any other office, whether for remuneration or not, provided such holding of office will not likely interfere with the proper training of the candidate attorney.

2 SCENARIOS:

(i) A candidate attorney shall not have any pecuniary interest in the practice and service of an attorney *other* than in respect of bona fide remuneration for his/her services as a candidate attorney; or

(ii) A candidate attorney shall not, without prior written consent of the Council, hold or occupy any office of which he/she receives any form of remuneration, directly or indirectly; or engage in any other business other than that of candidate attorney, where holding that office or engaging in that business is *likely to interfere* with the proper training of the candidate attorney.

[14] To try and divide scenario (ii) into (a) the situation where remuneration is received for holding such office but that the holding of the office will not likely interfere with the proper training of the candidate attorney and (b) where the holding of the office without any remuneration will most likely not interfere with the proper training of the candidate attorney, is in my view artificial.

[15] The crux of the prohibition is whether the holding of such office may interfere with the proper training of the candidate attorney. The receiving of remuneration in scenario (ii) is mere incidental to the likelihood of interference with the proper training of the candidate attorney. When drafting the Rule it was deemed necessary to distinguish between (1) the absolute prohibition of any pecuniary interest in the attorney practice where the candidate attorney is subject to training and (2) the receiving of remuneration from other sources other than the attorney practice *on condition* that the holding of such office does not interfere with the proper training of the candidate attorney *and on condition* that prior written consent from the Council be obtained. There can in my view be no other interpretation of the Rule in question.

[16] In my view it is clear that a candidate attorney shall not have any pecuniary interest in the practice and service of an attorney other than the remuneration for his/her services as candidate attorney. This is an absolute prohibition and the

Council may not give written consent in this regard. Scenario (i) above.

[17] In scenario (ii) provision is made for a candidate attorney to occupy any office for remuneration or to engage into any other business with the prior written consent of the Council *provided that the holding of such office is not likely to interfere with the proper training of the candidate attorney.* My italics.

→ [18] The question is, with reference to scenario (ii) above, to determine whether the occupying of such office *or* engaging into any other business is likely to interfere with the proper training of the candidate attorney? Is it for the candidate attorney, the principal of the candidate attorney or the Council to make this determination? *In my view it can only be the Council.* The candidate attorney or the principal is not authorized in the Rule to take the decision. To hold otherwise will defeat the object of the Rule. The Council as the guardian of all legal practitioners in the country, has to decide the issue and no one else.

APPLICATION OF THE RULE ON THE FACTS:

[19] RENSBURG:

Rensburg, while still at university, became a director of a non-profit company. The company has been active since 2017 but Rensburg has since September 2018 played no further role in the company although he remained a director. He claims not to have earned any remuneration from his directorship of the company. He signed his PVTC on 16 January 2019 and delivered an affidavit to the Council on 31 January 2019 disclosing his directorship but failed to state that the company was inactive. The PVTC was lodged with the Council on 4 March 2019 (within the required two months after the signing thereof). The Council informed him on 22

March 2019 that it was prima facie of the view that there was a non-compliance with the Rule in question. Rensburg will not be able to write the coming admission examinations during February 2020 if the PVTC is not registered by the Council. Rensburg, like the other applicants, could not resolve the matter with the Council and approached the Court in terms of Rule 22.1.5.2 for relief.

[20] **PATEL:**

Patel was a director of a company before entering into the PVTC with the attorneys on 25 January 2019. He ceased earning any remuneration from the company or being active in the company since November 2018. He disclosed his directorship in the company "*TIE UP N BE TIERRIFIC (Pty) Ltd*" on 10 January 2019 and that the company did not have any other directors. The company's goal was to supply university students with low cost formal attire to dress appropriately for job interviews and employment. It seems that the company ceased operations but was not deregistered since November 2018. He was aware that under the repealed Act it was necessary to apply for such consent prior to entering into a training contract. He however held the view that it was not necessary to obtain prior consent because of the fact that the company no longer operated and, in his view, would not interfere with his proper training. It is with respect not for him to decide whether it will interfere with his training. He was also not able to resolve the dispute with the Council and he will also not be able to sit for the examination during February 2020 should the matter not be resolved.

[21] **NICOLSON:**

Nicolson started to provide administrative assistance to his mother's property company, (Debbie Nicolson, sole owner of Debbie Nicolson Properties (Pty) Ltd)

while still at university. The company operates exclusively in Cape St Francis in the Eastern Cape. He provided administrative assistance to this company after hours in exchange for a monthly payment of R3 000,00 towards his outstanding student loan. He stated that he did not receive any payments during 2019. He considered the payment as his parents' assistance towards his studies and that should he continue to provide this administrative assistance, he will spend approximate 2-3 hours a week on this, normally over weekends and that this will not interfere with his training as candidate attorney. The Council also refused to register his PVTC although it was lodged within two months after entering into on 17 January 2019. He will also miss the coming examinations during February 2020 should his PVTC not be registered in time.

[22] ESSOP:

Essop was a student when she became a director of a company. She did not receive any remuneration for her role and ceased to be active in the company from March 2018. She signed her PVTC on 15 January 2019 and it was lodged within two months thereafter with the Council. She was a director of "*The Consulting Academy (Pty) Ltd*", a company completely student run. The company was incorporated during 2017 with the aim to provide youth based insights and solutions towards companies, employed fellow students at the University of the Witwatersrand, students showing potential as industry leaders in their respective fields of study. The aim was to assist students to become competitive in the economy and to address the high level of unemployment amongst youths. The company also entitled students to source an income to assist with their study fees. When it was clear that the Council viewed this as a contravention of the particular Rule, she resigned as director on 14 June 2019. She stated that she did not earn any income from the company but it was solely to provide assistance to other

students. She is in a similar position **with** regard to the coming examinations as the other applicants for the February 2020 exams should her PVTC not be registered.

RELIEF SOUGHT:

[23] All four applicants seek similar relief from the Court. Their main relief is that the Court find that they were not required to obtain prior written consent from the Council under Rule 22.1.5.1 and that the Council be directed to register their respective PVTC (“contracts”) with effect from the date of signature thereof, in Rensburg’s application on 25 January 2019; in Patel’s application on 25 January 2019; in Nicolson’s application on 17 January 2019 and in Essop’s application on 15 January 2019. In the *alternative* and in the event of the Court not granting the primary relief, all four applicants requested the Court to grant the relief as provided for in Rule 22.1.5.2, being condonation in terms of sub-rule (1) and direct the Gauteng LPC to register the individual contracts of the four applicants with the effective dates as set out above.

[24] I have indicated above that it remains the LPC’s prerogative to decide whether an individual applicant has to obtain prior written consent in terms of the applicable Rule in regard of the second scenario set out in par [13] above. The purpose of the relevant Rule is to ensure that a candidate attorney does not occupy any other office other than that of candidate attorney or engaging in any other business that is likely to interfere with his/her proper training as candidate attorney. The new insertion is to make it possible for an applicant to approach the Court on good cause shown that the non-compliance with Rule 22.1.5.1; and that it does not interfere with the envisaged training and that the PVTC (“contract”) be declared valid and the service rendered be effective. Failure to obtain the

necessary prior written consent of the Council renders the contract *ab initio void* and the service *ineffective*.

[25] I am of the view that the wording in Rule 22.1.5.1 is clear and that a candidate attorney must obtain prior written consent to hold such office and/or to receive remuneration as set out in the Rule. It is not for the candidate attorney to decide whether the holding of such office is likely to interfere with his/her training. If that was allowed, there will be no norm to be applied what is meant with "*likely to interfere with the training of the candidate attorney*" and it will defeat the purpose of the Rule. The purpose of the Rule is clearly to guard against candidate attorneys becoming involved in other business whilst under-going the proper envisaged training as a candidate attorney.

[26] A candidate attorney aggrieved by the refusal of his/her application in this regard by the Council has the relief set out in sub-rule (1) to approach the Court for a declaratory order. It is not condonation which is sought but a declaratory order on good cause shown why the Court should direct otherwise after the Council has considered the initial application and found against the applicant candidate attorney or as in these applications where the candidate attorneys failed or neglected to obtain prior written consent from the Council.

[27] What constitutes good cause is a factual question to be answered in every individual application. What **good cause** is ought to be established on the facts of each case. It is not possible to formulate a definition what good cause is but in each case the court has to examine the circumstances to find whether a valid and justifiable reason exists why the non-compliance can be condoned. See **General Accident Insurance Co of SA Ltd v Zampeli 1988 (4) SA 407 at 410- I**. In cases of flagrant breaches or non-compliances of a rule a Court may refuse such relief where it would defeat the purpose of the Rule. See **Tshivhase Royal**

Council & Another v Tshivhase & Another 1992 (4) SA 323 SE at 329 C-D. These cases did not deal with the present Rule debated before the Court but are handy guidelines as to what may constitute good cause. The Court is given a discretion in the sub-rule to consider good cause. A further aspect to consider is whether there is any prejudice to any party when deciding the issue. **See The Civil Practice of the Supreme Court of South Africa by Herbstein & Van Winsen 4th ed p 560-561.** Again, it is to find guidelines to apply this new Rule.

[28] When applying the above on the facts of each of the applicants. I am of the view that all four were obliged to obtain prior written consent from the Council to remain engaged in their respective prior offices/businesses before entering into the respective PVTC ("contracts"). The Council cannot consider the applications after the contracts were entered into and the contracts are rendered ab initio void and the service rendered is also ineffective.

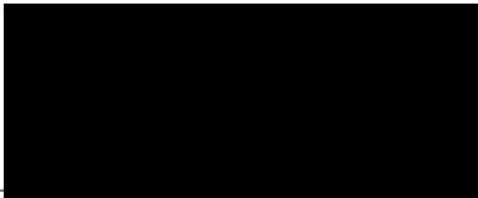
[29] When considering whether the applicants have shown good cause why this court should direct otherwise (as in Rule 22.1.5.2), I am satisfied that none of the four applicants' training will be interfered with as envisaged in the Rule and therefore find that the applicants have all shown good cause for the Court to grant the required relief. There is no indication whatsoever how the applicants' training will be interfered with. The Council did not oppose the individual applications but participated in the proceedings to obtain guidance for future reference.

ODRER:

[30] Having read the papers and hearing council on behalf of the parties, the following order is made:

The Gauteng Legal Practice Council is directed to register the individual Practical Vocational Training Contracts of the four applicants on the respective dates when lodged as set out above. The registration must be made in time to allow the applicants to participate in the examinations set for February 2020. No order with regard to costs is made.

[29] I want to thank both parties for the helpful heads of arguments and the professional manner in which the application was dealt with.



J HOLLAND-MÜTER A/J

Acting Judge of the Pretoria High Court

January 2020.

Heard on 11 December 2019.

Judgement handed down after the recess on 16 January 2020.

On behalf of the applicants:

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