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



Case number: 26189/2019

Date:

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	☒
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	☒
(3) REVISED	☐
27-6-2019	
DATE	SIGNATURE

In the Ex Parte Application of:

THABILE MOKOENA

APPLICANT

(FOR HER ADMISSION AS AN ADVOCATE)

JUDGMENT

TOLMAY, J:

INTRODUCTION:

- [1] The Applicant brought an application for her admission as an advocate in terms of section 115 of the Legal Practice Act 28 of 2016 (the LPA). She also requested to be admitted as an advocate with a trust account as contemplated in section 34(2)(a)(ii) of the LPA.
- [2] The Johannesburg Society of Advocates (JSA) sent a letter to the Applicant's attorney pointing out certain defects in her application, namely that:
- i) she did not allege in her affidavit that she had never been arraigned on a criminal charge and had never been convicted of a criminal offence;
 - ii) no letter of good standing from either the university or work place had been attached; and
 - iii) the annexures to the founding affidavit were not initialled by the Applicant and Commissioner of Oaths.
- [3] These defects were rectified in a supplementary affidavit.
- [4] Neither the Legal Practice Council (LPC), the JSA, or the Pretoria Society of Advocates (PSA) noted any objection to the Applicant's request to be admitted as an "advocate (trust account)".

- [5] It must be noted that the application contained no information whatsoever regarding her entitlement in terms of the LPA to be admitted as such.
- [6] The Court postponed the matter and requested the Applicant's legal representative, the LPC and PSA, (the latter two as *amicus curiae*) to file heads of argument and to address the Court on the question of whether a Court may admit an advocate as an advocate with a trust account.
- [7] The Applicant subsequently abandoned the prayer to be admitted as an advocate with a trust account and did not file any heads of argument. However, the legal issue involved is important and must be addressed. The LPC and PSA did file heads of argument and addressed the Court. The Court is grateful for their assistance.
- [8] The PSA in their practice note, for the first time, raised an issue regarding the validity of Applicant's LLB degree and the date on which it was conferred upon her. This discrepancy was however clarified on production of the original degree certificate.
- [9] The pertinent question in this matter is whether the Court could admit and enrol an advocate and specify that such an Applicant be admitted as an advocate (with a trust account). However the formulation of the appropriate order when admitting legal practitioners and the duties of

the LPC when considering applications for admissions also arose during the arguments before us and it is accordingly appropriate to address these issues too.

- [10] Although the Law Society never had an obligation to peruse or comment on applications to be admitted as advocates, the LPA changed that. Section 3(c) of the LPA states, that one of the purposes of the Act is to create a single unified statutory body, which will regulate the affairs of all legal practitioners and all candidate legal practitioners, in pursuit of the goal of an accountable, efficient and independent legal profession. Section 5(d) states that it is an object of the LPC to regulate legal practitioners. As a result the LPC has a statutory obligation to, not only peruse the applications of all prospective legal practitioners, but also to ensure that those applications comply with the LPA. The LPC accordingly has a duty to inform the Applicant and the Court of any non-compliance by an Applicant and to indicate whether they support the application or not.
- [11] The Societies of Advocates also have a duty as co-custodians of the profession to ensure compliance with the LPA and should peruse applications of legal practitioners who wish to be enrolled as an advocate and inform the Court of they have any objections to the admission of an advocate.
- [12] Section 24 of the LPA regulates the admission and enrolment of legal practitioners and provides as follows:

"(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.

..." [Court's emphasis]

[13] As is provided for in section 24(2)(a) above, the minimum qualifications and practical vocational training is set out in section 26 of the Act and provides for three categories of legal practitioners, namely attorneys, advocates and advocates with a trust account.¹

[14] In the previous dispensation, the Registrar was given leave to enrol a successful Applicant, who was admitted to practice as an

¹ Section 26 Minimum qualifications and practice; 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 No. 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."

(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 No. 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."

attorney, notary, conveyancer or advocate. However, under the LPA, these are two distinct and separate procedures.²

[15] In terms of the LPA, a distinction is made between the admission, which is done by the Court, and enrolment, which is done by the LPC. In this instance, section 30 of the LPA provides as follows:

- “(1) (a) A person duly admitted by the High Court and authorised to be enrolled to practise as a legal practitioner must apply to the Council in the manner determined in the rules, for the enrolment of his or her name on the Roll.
- (b) The application referred to in paragraph (a) must—
- (i) be accompanied by the fee determined in the rules;
- (ii) indicate whether the Applicant intends to practise as an attorney or an Advocate and, in the case of an Advocate, whether he or she intends practising with or without a Fidelity Fund certificate; and

² See also *The South African Legal Practitioner: A commentary on the Legal Practice Act*, Chapter 4, by Ellis, Lamey and Kilbourn.

- (iii) *be submitted to the Council in the manner determined in the rules through the Provincial Council where the legal practitioner intends to practise.*
- (2) *The Council must enrol the Applicant as an attorney, Advocate, notary or conveyancer, as the case may be, if he or she complies with the provisions of this Act.*
- (3) *The Council must keep a Roll of Legal Practitioners, as determined in the rules, which must reflect —*
- (a) *the particulars of practising and non-practising legal practitioners and, in the case of Advocates, whether they practise with or without a Fidelity Fund certificate;*
- ...” [Court’s emphasis]

[16] It is clear from section 30(2) that once the Court has admitted and authorised the enrolment the LPC has no discretion and must enrol the Applicant if he/she has complied with the Act.³

³ See also Regulation 5 of the Regulations of the Legal Practice Act, 28 of 2014, issued by the Minister, for the powers and functions that vests in Provincial Councils

[17] If one then has further regard to section 6(3) of the LPA which specifically sets out the powers and functions of the LPC, it provides that:

“6 (3) *The Council must, subject to this Act —*

(a) enrol a duly admitted legal practitioner as such; and

(b) keep a Roll of legal practitioners and decide on —

(i) the form of the certificates and the Roll to be kept;

(ii) the maintenance of the Roll or issuing of certificates; and

(iii) the reviewing of the Roll and the manner in which alterations may be made to the Roll.”

[18] Rule 17 of the LPA Rules, which governs the procedure for applications for admissions and enrolment of Legal Practitioners is also of importance and , provides as follows:

"17. A person seeking to be admitted to practise and to be authorised to be enrolled as an attorney or as an Advocate under the Act –

17.1.1 must apply to a High Court in terms of the provisions of section 24(2) of the Act; and

17.1.2 must simultaneously lodge an application in terms of sections 30(1)(a) and 30(b)(iii) of the Act with the Council, through the Provincial Council where the Applicant intends to practise (or in the case of a person who does not intend to practise, where that person is ordinarily resident), for the enrolment of his or her name on the roll of attorneys or Advocates, or on the roll of non-practising attorneys or Advocates, as the case may be, which application shall be treated as an application subject to the condition that the Applicant is duly admitted by the High Court and authorised to be enrolled as a legal practitioner in terms of section 30 of the Act.

17.2 An application for admission and enrolment in terms of rule 17.1 must be in writing and must be accompanied by an affidavit by the Applicant setting out the following

information supported, where applicable, by documentary evidence:

....”

- [19] It is clear from the provisions, of the LPA that the LPC (and its respective provincial councils) is the administrative body in which the legislative authority vests to enrol a duly admitted legal practitioner as an attorney, an advocate, notary or conveyancer, as the case may be. The LPA retains the distinction between advocates and attorneys through a subsidiary regime of enrolment performed by the LPC in which the LPC enrolls legal practitioners on separate attorneys' and advocates' rolls.
- [20] It appears from section 24(2) that the Legislature empowered the Court to admit and to authorise the enrolment of a legal practitioner. This is supported by section 30(1)(a) which obliged a person who is admitted by the Court and authorised by the Court to be enrolled to apply to the LPC for enrolment.
- [21] In the recent judgment of **Ex parte Goosen & Others**, the appropriate formulation of the order admitting an Applicant as a legal practitioner has been set out in the judgment as follows:⁴

"The Applicant is admitted to practice as a Legal Practitioner and the Legal Practice Council is authorised to enrol the Applicant as an [Attorney] / [Advocate]."

⁴ (2018/2137) [2019] ZAGPJHC 68 at par [54].

- [22] During argument we have been informed by counsel appearing for the PSA that some Courts have refused to grant the second part of the order that reads "*and the Legal Practice Council is authorised to enrol the Applicant as an [Attorney]/[Advocate].*" There seems to be a view that the LPC is already authorised to enrol an Applicant by virtue of the legislative authority awarded to it by LPC. The view seems to be that it is superfluous for the Court to make such an order. Quite apart from the fact that the aforesaid order was a ruling by a Full court and as a result should be followed by other Courts, it is also the correct order if one takes the wording of section 24(2) and section 30(1)(a) into consideration.
- [23] Rule 17 proceeds to set out all the particulars that must be contained in the application to the Court and the LPC, and various distinctions are made therein of particulars that should be contained in the application in the case of an Applicant wishing to be enrolled as an attorney, or in the case of the Applicant wishing to be enrolled as an advocate. Accordingly, although there are many similarities in an application to be admitted as a legal practitioner, the specific requirements to be enrolled as an advocate or an attorney still differs significantly.
- [24] The PSA argued, and correctly so, that the Court is not authorising the LPC to proceed with the enrolment, or vesting the LPC with the power

to perform its functions which it has, in any event already been vested with, by virtue of the LPA. The Court is confirming that the Applicant satisfied the Court that its application complies with the specific requirements for enrolment as that of an advocate, or that of an attorney, and merely authorises the category of an attorney, or advocate, in which the Applicant may be enrolled by the LPC.

- [25] It is accordingly necessary for the Court to, not only admit the Applicant as a legal practitioner in terms of sections 24 and 26 (and in some transitional instances read with section 115), but also to establish whether the Applicant satisfies the requirements as set out in Rule 17 for enrolment of an attorney, or that of an advocate, and authorises the LPC to enrol the Applicant as such.

- [26] The Court is thus vested with the power to authorise the category in which the Applicant may be enrolled. Therefore, the formulation of the order in the matter of **Ex Parte Goosen** is the order that a Court should make.

- [27] The final question is whether a Court is empowered to admit an advocate as an advocate with a trust account. The legislation already referred to makes it clear that provision is made for three categories of legal practitioners, namely, an attorney, a referral advocate and a "trust account advocate".

[28] The LPA defines a 'trust account practice' as a practice conducted by one or more attorneys who are, or an advocate referred to in section 34(2)(b).⁵ The LPA Rules defines a 'trust account advocate' as an advocate referred to in section 34(2)(b) of the LPA who is, in terms of the LPA required to hold a Fidelity Fund certificate.⁶

[29] With regards to the handling of trust monies, Section 84 of the LPA provides that:

"(1) Every attorney or any Advocate referred to in section 34(2)(b), other than a legal practitioner in the full-time employ of the South African Human Rights Commission or the State as a state attorney or state Advocate and who practises or is deemed to practice —

(a) for his or her own account either alone or in partnership; or

(b) as a director of a practice which is a juristic entity, must be in possession of a Fidelity Fund certificate.

...

(4) A Fidelity Fund certificate must indicate that the legal practitioner concerned is obliged to practise subject to

⁵ Section 1 of the Legal Practice Act, 28 of 2014.
⁶ Rule 1.34 of the LPA Rules.

the provisions of this Act, and the fact that such a legal practitioner holds such a certificate must be endorsed against his or her enrolment by the Council.

...

[30] The application for the issue of Fidelity Fund certificates is addressed in Section 85 and provides as follows:

"(1) (a) A legal practitioner who is obliged in terms of section 84(1) to be in possession of a Fidelity Fund certificate must apply to the Council for such a certificate as determined in the rules.

(b) Every legal practitioner referred to in paragraph (a) who, for the first time, practises as such, must, within the period and after payment of the fee determined by the Council in the rules, complete a legal practice management course approved by the Council determined in the rules.

..."

[31] From the above provisions of the LPA, it is evident that certain requirements need to be met before an advocate can practise as a 'trust account advocate', such as being in possession of a Fidelity Fund certificate, and on having completed a legal practice management course approved by the LPC.

- [32] It is further clear that a Fidelity Fund certificate is obtained by way of application to the LPC, and ultimately forms part of the LPC and its Provincial Councils', administrative functions and duties as is envisaged in the LPA. Accordingly, the Court is not involved in the process of admitting an advocate as a trust account advocate. It is also self-evident that, upon application to the LPC for a Fidelity Fund Certificate, an Applicant should already have been admitted as a legal practitioner by the Court, and enrolled as an advocate by the LPC. An Applicant will not be able to successfully apply for such a certificate if he/she has not yet been admitted and enrolled.
- [33] Section 32 of the LPA governs the process of conversion and as such, the process to be followed in order to practise as a 'trust account advocate' after being duly admitted and enrolled, and provides as follows:
- “(1) (a) *A legal practitioner may, at any time, as determined in the rules and upon payment of the fee determined by the Council in the rules, apply to the Council to convert his or her enrolment as an attorney to that of an Advocate and vice versa.*
- (b) *An Advocate practising as such referred to in section 34(2)(a)(i) may, at any time, as determined in the rules and upon payment of the fee determined by the Council in the rules, apply to*

the Council for the conversion of his or her enrolment to that of an Advocate practising as such referred to in section 34(2)(a)(ii) and vice versa.

- (2) *The Council may impose any conditions as it considers appropriate to give effect to the conversion and the provisions of this Act relating to enrolment.*
- (3) *The Council may make rules setting out the circumstances under which a legal practitioner can apply for the conversion of his or her enrolment and any requirements such legal practitioner must comply with."*

[34] From the above it is evident that a referral advocate who wishes to practise as a 'trust account advocate', must apply to the LPC for his/her conversion of his/her enrolment to that of a 'trust account advocate'.

[35] Only once the Court has admitted an Applicant and the LPC has enrolled him/her as an advocate, may that applicant apply to the LPC in terms of Section 85 (1) for a Fidelity Fund certificate. The Court has no jurisdiction to order/authorise the enrolment of an advocate as a 'trust account advocate'.

[36] Upon obtaining the Fidelity Fund Certificate and provided that the Applicant meets all the necessary requirements as provided for by the provisions, rules and regulations of the LPA, the Applicant can apply to the LPC to be converted from "referral Advocate" to 'trust account advocate' in terms of section 32 of the LPA.

[37] As a result of the aforesaid a Court does not have the necessary jurisdiction to enrol an advocate as an "advocate with a trust account".

[38] The following order is made:

1. The Legal Practice Council and the Pretoria Society of Advocates' are admitted as *amicus curiae*.
2. The Applicant is admitted to practice as a legal practitioner and the Legal Practice Council is authorised to enrol the Applicant as an advocate.



R G TOLMAY

JUDGE OF THE HIGH COURT

I agree:



C I MOOSA

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 12 JUNE 2019

DATE OF JUDGMENT: 27 JUNE 2019

ATTORNEY FOR APPLICANT: MOCHE ATTORNEYS

ADVOCATE FOR APPLICANT: MS T M LETEBELE

ON BEHALF OF LEGAL PRACTICE

COUNCIL: MR L GROOME

ON BEHALF OF PRETORIA SOCIETY

OF ADVOCATES: ADV RICKY ELLIS