



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

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: YES /NO (2) OF INTEREST TO OTHER JUDGES: YES /NO (3) REVISED DATE: 15 May 2024 SIGNATURE:.....
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Case No. 051162/2024

In the matter between:

MATLHWANA, MATSOBANE SHAUN

Applicant

And

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

First Respondent

**THE CHIEF EXECUTIVE OFFICER OF THE SOUTH
AFRICAN LEGAL PRACTICE COUNCIL**

Second Respondent

**GAUTENG PROVINCIAL DIRECTOR: SOUTH
AFRICAN LEGAL PRACTICE COUNCIL**

Third Respondent

NAICKER, SHIVANI N.O

Fourth Respondent

LAW SOCIETY OF SOUTH AFRICA

Fifth Respondent

BLACK LAWYERS ASSOCIATION

Sixth Respondent

Coram: Millar J

Heard on: 14 May 2024

Delivered: 15 May 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 15h30 on 15 May 2024.

ORDER

It is Ordered:

- [1] The applicant's non-compliance with the Uniform Rules of Court is hereby condoned and the matter is heard on an urgent basis in terms of rule 6(12)(a) of the Uniform Rules.
- [2] The First and/or Third Respondents' decision not to register the applicant's Cession of the PVT Contract is declared unlawful and reviewed and set aside.
- [3] The Applicant's cession of his PVT contract is deemed to have been duly registered on 18 January 2024.
- [4] The First Respondent is ordered to pay the costs of the application on an attorney and client scale, which costs include the costs of two counsel.

JUDGMENT

MILLAR J

- [1] The applicant is a candidate legal practitioner who has brought an urgent application seeking *inter alia* to review and set aside the failure of the Gauteng Provincial Office of the Legal Practice Council¹ to register a cession of his Practical Vocational Training Contract (PVT) on 17 January 2024. The applicant also seeks an order for the registration of such cession.
- [2] The facts underpinning this application are common cause between the parties. On 1 February 2022, the applicant entered into a PVT Contract with Mr. Mkhabela in which he undertook to serve Mr. Mkhabela as a Candidate Attorney for a period of 24 months². This period would be completed on 31 January 2024.
- [3] On 20 December 2023, some 22 months and 19 days into his PVT Contract, the applicant resigned from Mr. Mkhabela's employment. On 17 January 2024, he entered into a Cession Agreement in respect of his PVT Contract with Mr. Diaho. On 18 January 2024, the applicant lodged a Cession Agreement duly signed and completed in all respects with the Gauteng Provincial Office of the Legal Practice Council (LPC). The Cession was lodged for the purpose of registration so that the applicant could continue his practical vocational training as a candidate attorney and complete the 24-month period of such training for which he had originally contracted.
- [4] The applicant heard nothing from the LPC. It did not acknowledge receipt of the Cession and it also did not communicate whether the Cession had indeed been registered or not.

¹ Established in terms of the Legal Practice Act (LPA) 28 of 2014 which came into operation on 1 November 2018. The Gauteng Provincial Council of which the third respondent is the director perform the functions it does by virtue of authority to do so delegated to it by in terms of section 21(1)(d) read together with section 23.

² Regulation 6(1)(a) of the Regulations promulgated under the LPA provide that : "*any person intending to be admitted and enrolled as an attorney must, after that person has satisfied all the requirements for a degree referred to in Sections 26(1)(a) or (b) of the Act serve under a practical vocational training contract with a person referred to in sub-regulation (5) – (a) for an uninterrupted period of 24 months*".

- [5] On 3 April 2024, the applicant having by now completed in the aggregate 24 months of practical vocational training with Mr. Mkhabela and Mr. Diaho respectively, made application for his admission as a legal practitioner.
- [6] The application was served on the LPC that day and enrolled for hearing, taking into account that it was required to lie for inspection before the LPC for a period of 30 days, on 16 May 2024.
- [7] On 30 April 2024, when the applicant had heard nothing from the LPC, he contacted them to enquire whether they intended to take issue with any aspect of his application. They then for the first time responded and requested that he withdraw the admission application.
- [8] The reason proffered for making this request was that:
- “The cession agreement that was entered into during January 2024 was not registered by the Legal Practice Council as there was a 14 day gap between the date you left Mr. Mkhabela and the date you commenced with Mr. Diaho resulting in interrupted service therefore you cannot rely on the period served under Mr. Diaho as the cession agreement was not registered.”*
- [9] The next step taken by the LPC was the delivery on 7 May 2024, of a notice of intention to oppose the application for admission. The present application was launched 2 days thereafter.
- [10] The LPC somewhat surprisingly and in view of its failure to notify the applicant of its refusal to register the Cession or to notify him of any concern it had with his application for admission until 30 April 2024, took issue with the fact that the present application was brought as one of urgency. It was argued for the LPC, that if there was urgency, then this was entirely self-created as the applicant *“did nothing, after lodging the purported cession agreement three months ago, to follow up on and procure registration of the purported cession agreement, until last week.”* The LPC also took issue with the fact that the applicant had proceeded to bring an application for admission in circumstances where he was not in possession of all the necessary documentation.

- [11] There is no explanation by the LPC for why it neither acknowledged receipt of the Cession Agreement when it was lodged with them on 17 January 2024, or any notification to the applicant that it did not intend to register the Cession together with the reasons for this. Furthermore, there is no explanation why only on 30 April 2024, some 3 days before the expiry of the 30 day period for which the application had to lie for inspection, that it was only after enquiry by the applicant that he was notified of the decision of the LPC and the reasons for the decision.
- [12] It is self-evident that if the LPC had communicated its decision to the applicant within a reasonable period of time, after he had lodged the Cession for registration, the present urgent application may have been avoided. The urgency in the present matter arises in direct consequence of the conduct of the LPC. It is the Regulator of the Legal Profession and the party to whom the applicant looks for guidance for professional conduct. For the applicant, the present matter is no mere legal skirmish. The outcome of this application informs whether or not he is even able to approach the Court for admission.
- [13] In *Affordable Medicines Trust and Others v Minister of Health of RSA and Another*³, it was held:

“What is at stake is more than one’s right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One’s work is part of one’s identity and is constitutive of one’s dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. ‘it is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person’s existence’”.

³ 2006 (3) SA 247 (CC) at para [59].

- [14] The applicant finds himself before the Court in direct consequence of the conduct of the LPC and given what is at stake for him, I find that the matter is indeed urgent.
- [15] The crisp issue to be decided in this application is whether or not the LPC was entitled to refuse to register the Cession of the applicant's PVT Contract from Mr. Mkhabela to Mr. Diaho and following on from this, whether or not, having regard to the evident "*break in service*" of 2 weeks it was entitled to do so.
- [16] Rule 22.1.6⁴, the rule provides:
- [16.1] In terms of rule 22.1.6.1 that a practical vocational training contract may with the consent of the principal and the candidate attorney concerned be ceded to any other principal willing to accept such cession;
- [16.2] In terms of rule 22.1.6.2, that in the event of the death, mental illness, insolvency, conviction of a crime, suspension from practice, striking off the roll or discontinuation of practice of the principal under whom the candidate attorney is serving, or the debarring of that principal from engaging or continuing to engage a candidate attorney, or any other cause, direct that the practical vocational training contract concerned be ceded to any other principal willing to accept such cession, and all service completed under the ceded contract shall be effective for purposes of the Act and the rules.
- [16.3] In terms of rule 22.1.6.4, that an agreement for the cession of a practical vocational training contract shall be registered within 2 months from the date on which the service of the candidate attorney concerned may have terminated with the cedent, or within such further period as a court on good cause would allow.

⁴ Of the rules promulgated in terms of the LPA, deals with the cession of a practical vocational training contract.

[16.4] In terms of rule 22.1.6.4, besides providing for the time period within which the cession is to be lodged, provides further:

[16.4.1] in terms of rule 22.1.6.4.1 that an affidavit be lodged by the cedent stating whether the provisions of the Act and rules relating to the service of the candidate attorney with him were complied with and the date of on which such candidate's services were terminated and;

[16.4.2] in terms of rule 22.1.6.4.2 an affidavit by the cessionary stating the date on which the candidate attorney assumed duty with the cessionary.

- [17] Insofar as the obligations of the LPC are concerned once they have received the cession agreement and affidavit, rule 22.1.6.5.1 requires it to examine the agreement and affidavits (referred to in rule 22.1.6.4) and; in terms of rule 22.1.6.5.2. if it is satisfied that the cession is in order and it has no objection thereto, to register the cession and notify both the cessionary attorney and the candidate attorney concerned in writing of such registration.
- [18] Insofar as the requirements set out in rule 22.1.6.4 and 5 are concerned, rule 22.1.6.6 provides that in the circumstances referred to in rule 22.1.6.2 – where, for the reasons set out in that rule, there is no cedent, provision is made for a third party to sign the affidavit in order to effect the cession.
- [19] What is readily apparent from the scheme of the rules is that what is required of the LPC in registering the cession of a PVT Contract is to make sure that the requirements of the rules insofar as the submission of requisite documents referred to in rules are submitted and properly completed. Insofar as rule 22.1.6.5 and its sub rules are concerned, the obligation upon the LPC is to ensure that there has been compliance with the rules.
- [20] It does not behove the LPC to argue, as it has done in the present matter, that the consequence of a break in service of 2 weeks is tantamount to a termination or abandonment of the PVT Contract by the applicant. The rules

themselves provide that there may be circumstances in which there would be an interruption in service such as for example the death of a principal as provided for in rule 22.1.6.2. The rules themselves provide for a Cession in such circumstances, rule 22.1.6.6 enabling the LPC to accept a Cession signed by a third party.

- [21] The rule cannot be interpreted in the manner that the LPC contends it must be. To do so would create the anomalous situation where a Candidate Attorney whose Principal has suffered a misfortune is in a better position and can be assisted by the LPC to register a Cession of the PVT Contract but where the Principal has suffered no misfortune, the Candidate Attorney is in a more onerous position.
- [22] In the circumstances of the present matter, notwithstanding that the applicant left the service of Mr. Mkhabela on 20 December 2023, the fact that he signed a cession and the required affidavit in order to effect cession of the applicant's contract to Mr. Diaho, demonstrates clearly that it was never within the contemplation of either the applicant or Mr. Mkhabela for that matter, that the applicant's PVT training was terminated or abandoned by him as provided for in rule 22.1.7. If it had been within the contemplation of Mr. Mkhabela, he would in terms of the rule, have been required to notify the LPC in writing of that fact. It is common cause that he did not.
- [23] Additionally, it was argued, that insofar as a cession provided for in rule 22.1.6.1 clearly and unequivocally related to a "transfer of rights and obligations" whereas termination as provided for in rule 22.1.7.2 relates to "cancellation or abandonment". Two separate and distinct concepts and in respect of which on the facts in the present application, there is no suggestion that it was ever within the contemplation of either Mr. Mkhabela or the applicant that there was to be any cancellation or abandonment of the PVT Contract.
- [24] It was argued for the LPC that the present application was in any event a *brutum fulmen* in that the applicant would not in any event be entitled to admission in consequence of the break in service. The basis of this argument was that regulation 6(1)(a) requires that in order to be admitted, the applicant

was required to serve a “*uninterrupted period of 24 months.*” This regulation however must be read subject to the provisions of rule 22.1.6 and the objects of the LPA. The regulation properly interpreted does not mean uninterrupted in the sense of the period being continuous and contiguous – if that were so, it would render the provisions of rule 22.1.6.2 superfluous and would mean that any applicant in respect of whom there was any broken service for whatever reason would be disqualified.

- [25] The applicant does not seek credit for the period of the break in service in order to claim the completion of 24 months of PVT but relies on the subsequent service with Mr. Diaho which should have been considered had the LPC registered the Cession timeously.⁵
- [26] In the present application, although it did not form the basis for the initial decision communicated on 30 April 2024, the LPC also took issue with the fact that the applicant had entered into a secondment agreement with Mr. Diaho in terms of which he would be seconded to another firm of attorneys in order to gain experience in the field of competition law. The applicant, quite rightly in my view, argued that any concern which the LPC may have had with the secondment of the applicant could only arise if his Cession to Mr. Diaho had in fact been registered.
- [27] If his Contract had been abandoned or terminated as the LPC argued, and for that reason a Cession could not be registered, then on that basis, the LPC had no authority to interrogate the reason for the secondment and whether or not it was permissible under a PVT Contract. This issue relates to whether or not the applicant complied with his obligations in terms of the Act with regards to completion of his PVT training and was on that basis an issue more properly to be raised before the Court hearing his application for admission that this Court.
- [28] Of course, even on the applicant’s version, without the Cession being registered, he is unable to proceed with his application for admission and the issue relating to the secondment and for that matter also whether or not the

⁵ *Law Society of the Northern Provinces v Mahon* (2011) 2 SA 441 (SCA) at para [13].

common cause, two week break in service, also ventilated as an issue before the Court for decision.

- [29] For this reason, I decline to make any finding on the issue of the secondment, save to state that it is not uncommon that Candidate Legal Practitioners, whether as Candidate Attorneys or Pupil Advocates, are often seconded to other firms of attorneys / advocates so that they may gain exposure to areas of practice which their principal may not be engaged in for their benefit. This in no way detracts from the training they receive or their respective obligations.
- [30] Turning now to the grounds of review, the applicant argues that the failure and refusal of the LPC to register the Cession of his PVT Contract, is an administrative decision falling within the ambit of the Promotion of Administrative Justice Act (PAJA).⁶ It was argued for the applicant that the decision to refuse registration of the Cession falls squarely within s 1⁷ of PAJA.
- [31] It was argued by the LPC that its failure to register the Cession is not administrative action and that there was no decision-making function exercised by it. It was argued that the acts of the LPC in this regard were purely clerical.⁸ This is precisely the point that was argued for the applicant – that the LPC was required to register the Cession but that any determination of its validity insofar as meeting the requirements of regulation 6 (1)(a) is concerned is something that more properly was to be dealt with by the Court from whom the applicant would seek admission.
- [32] The decision to refuse registration on substantive grounds as it did on 30 April 2024, means that a decision was taken which falls squarely within the ambit of PAJA. It is on that basis that I find the decision to be reviewable under PAJA.
- [33] It was argued that the decision of the LPC was reviewable on the following basis:

⁶ No. 3 of 2000.

⁷ *Minister of Defence and Military Veterans v Motau & Others* (2014) 5 SA 69 (CC) at para 33.

⁸ *Nedbank Ltd v Mendelow N.O and Another* 2013 (6) SA 130 (SCA) at para [25].

[31.1] That the action was procedurally unfair.⁹

[31.2] The decision was materially influenced by an error of law¹⁰ and

[31.3] the action was not taken¹¹ rationally to the purpose for which it was taken and or the purpose of the empowering provision.”¹²

[34] I propose dealing with each of these in turn.

[32.1] That the action was procedurally unfair.

[32.1.1] In the present matter, the LPC neither notified the applicant of its decision, furnished him with any reason for the decision until 30 April 2024. This was 3,5 months after the cession had been submitted for registration and only 16 days before the hearing of his application for admission. Notwithstanding the obligation on the LPC to furnish reasons for the decision, the only reason given was that communicated on 30 April 2024, as set out in para 8 above.

[32.1.2] It was argued by the applicant that in conducting itself in this way by withholding alternatively the registration of the cession or the decision not to register the cession and the reasons therefore to the proverbial eleventh hour of his application for admission was prejudicial and tantamount to an ambush and patently procedurally unfair.

⁹ Section 6(2)(c) of PAJA.

¹⁰ Section 6(2)(d) of PAJA.

¹¹ Section 6(2)(f)(ii) (aa).

¹² Section 6(2)(f)(ii) (bb).

[32.1.3] The LPC has placed nothing before the Court which in any way disturbs the submission being as it is, founded upon what is common cause between the parties.

[32.2] The decision was materially influenced by an error of law.

[32.2.1] It was argued by the applicant that the LPC in failing to register the Cession has misconstrued the provisions of rule 22.1.6. For the reasons that have been set out above, I find that the LPC's interpretation of the rule and application of it to exclude persons such as the applicant, who may have had broken service, from registering a cession of their contract when the rule itself specifically provides for the registration of cessions in certain circumstances where broken service is permitted and that a Cession of the PVT Contract notwithstanding such broken service can be registered.

[32.2.2] In *Genesis Medical Scheme v Registrar of Medical Schemes and Another*¹³ it was held by the Constitutional Court that an error of law must be so material that the proper application of the law would render the decision so taken as being reviewable. To my mind, this is apposite to the present case.

[32.3] The action was not taken rationally to the purpose for which it was taken and/or the purpose of the empowering provision.

[32.3.1] The main purpose of rule 22.1.6 is to fairly and practically cater for instances where Candidate Attorneys such as the applicant find themselves for whatever reason, in a position where they are no longer able or willing to

¹³ 2017 (6) SA 1 (CC) at para [96] – [101].

continue with their PVT training with their initial principal and seek to complete that training with another principal.

- [32.3.2] It was argued on the part of the LPC that broken service was not permitted because once a PVC Contract had terminated (*ipso facto* a break in service so it was argued) meant that there was no extant Contract that could be ceded and that for that reason alone, there was no obligation upon the LPC to register the Cession.
- [32.3.3] The LPC sought to rely on *De Kock & Others v Legal Practice Council Gauteng, Provincial Office*¹⁴ as authority for this proposition. The present matter is however distinguishable. In *De Kock & Others*, the applicants sought an order compelling the registration of cessions of contract outside of the 2-month period referred to in rule 22.1.6.4. In the present instance, the applicant had within a few weeks commenced employment and submitted his Cession to the LPC for registration.
- [32.3.4] In *De Kock & Others* it was found that: “A cession can only take place if the contract that is ceded is still in existence at the time of the cession and a cession has the affect of transferring the ceded rights immediately from the cedent to the cessionary.” The PVT Contract is not an ordinary commercial contract, for the reasons I have set out above.
- [32.3.5] It is a special type of contract which finds like in the LPA and which must of necessity be interpreted consonant with the purpose for which the LPA was promulgated. To do otherwise as I have said, would result in the

¹⁴ [2020] JOL 47771(GP).

absurd situation where broken service would be condoned if the principal suffered a misfortune but would not be condoned if he did not.

- [32.3.6] Whether or not there has indeed been proper and satisfactory service under the PVT Contract whether continuously or broken, is more properly a matter to be decided by the Court hearing an application for admission. Such a Court would be in a position to review the entirety of the period for which the Candidate Attorney had served and all the circumstances relating thereto and to then decide whether or not that Candidate Attorney has met the requirement for admission.
- [32.3.7] It is simply not open to the LPC to adopt an interpretation of the rules which has as its consequence the arbitrary exclusion of certain persons from pursuing entry into the legal profession.
- [32.3.8] It is not possible to enumerate all the reasons why this may occur. The reasons for this may be benign in that the Candidate Attorney wishes to obtain experience in areas of law in which the principal does not practice or less benign where for example, the work environment and the relationship between the Candidate Attorney and the Principal have irretrievably been broken down.
- [32.3.9] Circumstances in which the maintenance of an ongoing working relationship is to be preserved while a Candidate Attorney is then required to secure an alternative Principal and to then start working for that principal the day after he or she leaves the employ of the first Principal is wholly impractical and may well, dependent upon the circumstances, be prejudicial.

[32.3.10] Having regard to the scheme of the LPA and the purpose for which the LPC is established – to “*promote access to the legal profession*”¹⁵ and to “*ensure accessible and sustainable training of law graduates aspiring to be admitted and enrolled as legal practitioners*”¹⁶ and to “*achieve the purpose*”¹⁷ of the LPA as set out in section 3(b)(iii) which enjoins the LPC to “*broaden access to justice by putting in place – measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic.*”

[32.3.11] It was argued on behalf of the applicant that properly construed, the two month period referred to in rule 22.1.6.4 in considering the purpose for which the rule was made must mean that a Candidate Attorney is afforded an opportunity, if the circumstances require it, to find a new Principal who would accept Cession of the PVT Contract.

[35] For the reasons that I have set out above, I find that the applicant has made out a case for the order sought. Since his application for admission is enrolled for hearing tomorrow and to obviate any prejudice with further delays on the part of the LPC I intend to make an order deeming¹⁸ the Cession to have been registered on 18 January 2024 when it was delivered to the LPC.

[36] In regard to costs, these ordinarily follow the result. It was argued on behalf of the applicant that given the nature and importance of the matter, that it was a wise and reasonable precaution for him to have engaged the services of two counsel in this matter. The applicant further argued that given the particular circumstances under which the LPC had conducted itself, that the Court as a mark of its displeasure make a punitive order for costs against the LPC. The

¹⁵ Section 5(i) of the LPA.

¹⁶ Section 5(j) of the LPA.

¹⁷ Section 5(l) of the LPA.

¹⁸ In terms of section 8(1)(c)(ii)(bb) of PAJA.

LPC for its part argued that there is a general rule that the LPC is entitled to its costs even if unsuccessful and usually on an attorney and client scale.¹⁹

[37] Having regard to the particular facts and circumstances in this matter, I am not persuaded that the applicant, a Candidate Attorney, ought to be deprived of his costs in view of the fact that he has been successful in the application. The approach adopted by the LPC is not in keeping with its statutory obligations and is to be deprecated. It is for this reason that I make the costs order that I do.

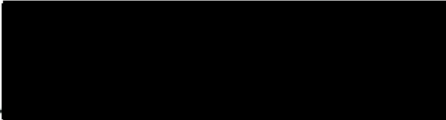
[38] In the circumstances, it is ordered:

[36.1] The applicant's non-compliance with the Uniform Rules of Court is hereby condoned and the matter is heard on an urgent basis in terms of rule 6(12)(a) of the Uniform Rules.

[36.2] The First and/or Third Respondents' decision not to register the applicant's Cession of the PVT Contract is declared unlawful and is reviewed and set aside.

[36.5] The Applicant's cession of his PVT contract is deemed to have been duly registered on 18 January 2024.

[36.6] The First Respondent is ordered to pay the costs of the application on an attorney and client scale, which costs include the costs of two counsel.


A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

¹⁹ Law Society of the Northern Provinces v Dube [2012] 4 (SA) 351 (SCA) para [33].

HEARD ON:	14 MAY 2024
JUDGMENT DELIVERED ON:	15 MAY 2024
COUNSEL FOR THE APPLICANT:	ADV. L MOELA ADV. M KIANGI
INSTRUCTED BY:	DIAHO ATTORNEYS INC
REFERENCE:	MR E DIAHO

COUNSEL FOR THE 1 st to 4 th RESPONDENTS:	MR. R STOCKER
INSTRUCTED BY:	ROOTH & WESSELS INC
REFERENCE:	MR. GROOME

NO APPEARANCE FOR THE 5th or 6th RESPONDENTS