




**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG HIGH COURT DIVISION, PRETORIA**

**Case No: 36664/19**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. ✓
8/11/19	
DATE	SIGNATURE

In the *ex-parte* application of:

**ERNST GILLON MALHERBE**

Applicant

(For his admission for enrolment as an Advocate of the High Court)

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**JUDGMENT**

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**Constantinides AJ**

[1] This is an application in terms of which the Applicant is seeking the following order:

[1.1] The Applicant be admitted and enrolled as an Advocate of the High Court of South Africa;

[1.2] The Applicant be and is hereby authorised to rely on the provisions of the Admission of Advocate's Act 74 of 1964 to be admitted as an

Advocate of the High Court of South Africa;

- [1.3] The Applicant be and is hereby authorised to rely on the provisions of the Admission of Advocate's Act 74 of 1964 to be admitted in terms of Section 24 of the Legal Practice Act 28 of 2014; and
- [1.4] The Applicant be authorized to be enrolled with the Legal Practice Council as an Advocate of the High Court of South Africa in terms of Section 34(2)(a)(i) of the Legal Practice Act 28 of 2014; and
- [1.5] Further and/or alternative relief.
- [2] This application was opposed by the Legal Practice Council.
- [3] In essence the Applicant seeks his admission as an Advocate and in effect requires the court to deal with his application as if the Legal Practice Amendment Act 16 of 2017 ("LPA") had never come into effect<sup>1</sup>
- [4] The Legal Practice Act was promulgated on the 1<sup>st</sup> of November 2018 and was published under proclamation number R31 of 2018 in the Government Gazette of 29 October 2018.<sup>2</sup> The Admission of Advocate's Act 74 of 1964 ("AAA") and the Attorneys Act 53 of 1979 ("ATT") were repealed.
- [5] Section 115 of the LPA made provision for a transitional period for persons entitled to be admitted and enrolled as advocates, attorneys, conveyancers and notaries as follows:

*"Any person who, immediately before the date referred to 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*

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<sup>1</sup> Pg. 19, para 8.10 of the Record.

<sup>2</sup> South African Legal practice council's ("LPC") updated heads para 2.4 Pg. 3.

*enrolled as such in terms of this Act.”<sup>3</sup>*

[6] Therefore Section 115 of the LPA applied to prospective practitioners who had *de facto* met all the requirements of the AAA or ATT before the 1<sup>st</sup> of November 2018. The aforesaid was canvassed extensively in the matter of *Ex parte Goosen*<sup>4</sup>.”

[7] The Legal Practice Council's ("LPC") updated Heads of Argument summarizes the position relating to the entitlement and admission and enrolment as an Advocate before the 1<sup>st</sup> of November 2018 as follows:

*“The entitlement to admission and enrolment as an Advocate immediately before 1 November 2018 was regulated by Section 3 of the AAA, which required that an Applicant:*

*2.8.1 is over the age of 21 years and is a fit and proper person to be so admitted and authorised;*

*2.8.2 has satisfied **all the requirements for the LLB Degree** (emphasis added); and*

*2.8.3 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.”<sup>5</sup>*

[8] On the 1<sup>st</sup> of November 2018 when the LPA was promulgated, the Applicant had not yet satisfied all the requirements for the LLB Degree. He achieved this milestone at the end of November 2018 and the degree, as pointed out by the LPC was conferred upon him on the 4<sup>th</sup> April 2019.<sup>6</sup>

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<sup>3</sup> Ibid para 2.6 Pp3-4.

<sup>4</sup> 2019 (3) SA 489 (GJ) at para 29.

<sup>5</sup> Paras 2.8, page 4 of South African Legal Practice Council's Updated Heads of Argument.

<sup>6</sup> Record, page 41.

- [9] During the period, March 2016 to November 2018, the Applicant completed all the necessary practical vocational training and other requirements in terms of the ATT and/or the LPA. He also attended the practical legal training school while enrolled as a Candidate Attorney and passed that examination and course. Therefore, upon satisfaction of all the requirements of the LLB degree, in terms of the LPA he would be eligible to be admitted as a Legal Practitioner to be enrolled to practice as an Attorney. However, the Applicant wants to be admitted to practice as an Advocate. The Applicant's Counsel submitted that the Applicant has completed 80% of his practical vocational training and passed the Bar examinations and proof of same was attached to his Supplementary Affidavit that was handed up from the Bar.
- [10] Counsel submitted, in the alternative, that in the event this court was disinclined to grant the relief sought by the Applicant on these papers, that the matter be postponed *sine die* to afford the Applicant leave to supplement his papers.
- [11] The Applicant's case is that he will suffer "*grave prejudice*" as he can only be admitted in February 2020. He stated that the requirements of the LPA are "*far more onerous and the net effect is that an additional 12 – 18 months will be added to [his] journey of being admitted as an advocate*".<sup>7</sup>
- [12] In this regard Rule 21(1) of the LPA provides:
- "A person wishing to qualify to be admitted and enrolled as a Legal Practitioner will be required to pass a competency based assessment in terms of this Rule 21, read with any Rule made by the Council or the National Forum concerning levels of competence required for the admission and enrolment of Legal Practitioners;"*

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<sup>7</sup> Pg. 31 of the Founding Affidavit.

[13] In the LPA's updated Heads of Argument the following is stated:

"3.3 ... even after admission the LPA ensures that Legal Practitioners who wish to change their selected vocation, from attorney to advocate and vice versa are required to be appropriately trained before they will be entitled to conversion of their enrolment in terms of Section 32<sup>8</sup>.

[14] An attorney applying for conversion must, *inter alia*, satisfy the Council that he/she has undergone such specialised training in advocacy as is required by pupils for admission as advocates. An advocate applying for conversion must, *inter alia*, satisfy the Council that he/she has passed the examination required to be passed by attorneys so as to reflect that the applicant has the required knowledge of accounting for the keeping of accounting records and has attended a legal practice management course."<sup>9</sup>

[15] Section 115 of the LPA recognises the class of candidates who would have qualified for all the criteria necessary in terms of the AAA or ATT at the time when they could have launched their application i.e. prior to the 1<sup>st</sup> November 2018.<sup>10</sup>

[16] It is common cause that in the present matter the Applicant would not have qualified and would not have been entitled to be admitted as an attorney, or advocate prior to 1 November 2018 as he had not fulfilled the criteria or satisfied all the requirements for the LLB Degree.

[17] The Applicant states that he was prejudiced due to the fact that he had arranged his affairs in accordance with the AAA and therefore had a vested right which, it was submitted, had been contravened by the LPA.

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<sup>8</sup> LPC's updated heads of argument Pg. 6.

<sup>9</sup> Ibid Footnote 10 Pg. 6.

<sup>10</sup> Goosen Ibid para 26.

The crux of this complaint was that the LPA's provisions were retrospective and that this was constitutionally offensive in that such retrospective legislation, which *ex post facto* deems the law at a particular time to be what it was not, offends against the principle of legality and the rule of law which lies at the heart of our constitutional dispensation. It was submitted that the prejudice to the subject of such legislation was heightened where, as in this case, it purported to attach adverse consequences to transactions which have been completed and arising from which persons have acquired vested rights before such promulgation.<sup>11</sup> Counsel for the Applicant pointed out however, that the Applicant's constitutionality argument was in no way to be construed as a direct constitutional challenge to the LPA.

The Applicant's argument is misconceived. In the first place it is incorrect to suggest that the Constitution outlaws the promulgation of retrospective legislation. In *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service and Another*, Fabricius J held that:

*"...There is nothing in our Constitution which prohibits parliament from passing retroactive or retrospective legislation. There is nothing in other jurisdictions of similar constitutional structure that prohibits such passing. Also, and more significantly, there is nothing internal in the Rule of Law which renders retrospective legislation per se unconstitutional."<sup>12</sup>*

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<sup>11</sup> *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service and Another* 2017 (6) SA 435 (GP).

<sup>12</sup> *Supra* at para 102

*In the case of Masemola v Special Pensions Appeal Board and Another*<sup>13</sup> the Constitutional Court distinguished between the concepts of retrospectivity and retroactivity and stated the following:

*"A retrospective provision operates for the future only but imposes new results in respect of past events. A retroactive provision operates as of a time prior to the enactment of the provision itself and changes the law applicable with effect from a past date."*<sup>14</sup>

More fundamentally however in this case is the fact that on 1 November 2018, the Applicant had no right that could be affected retrospectively or retroactively.

In the case of *Ex Parte Goosen and others*<sup>15</sup> Sutherland J stated:

*"[49] At least insofar as the AAA and the ATT are concerned, the applicable provisions differ in that the AAA fixes the pre-existing entitlement to apply for admission in time whereas the ATT envisages a continuing or ongoing entitlement to apply for admission. Textually section 115 of the LPA neither provides in explicit terms for a continuing entitlement nor for the exclusion of the disentitlement to apply for admission. It also does not expressly provide for a time period within which the right is to be exercised.*

*[50] The use in the previous regulatory statutes of time limits for the limitation on the preservation of rights derived from repealed statutes is a strong indication that the LPA ought not to be construed, without more, to have intended a cut- off date for advocates, no less to make a distinction between the preservation of the vested rights or entitlements of persons who had the credentials to be admitted as attorneys and those persons who had the credentials to be admitted as advocates.*

*[51] Accordingly, section 115, in our view, must be interpreted to mean that whoever can show that they satisfied the criteria in section 3 of the AAA and,*

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<sup>13</sup> [2019] ZACC 39.

<sup>14</sup> Ibid at para 34 Pg. 16.

<sup>15</sup> [2019] 2 All SA 70.

*had an application been made whilst the AAA was still in force, were entitled to admission, section 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 practice 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.*

*[52] We are of the view that the Minister of Justice and Correctional Services should have regard to these considerations and contemplate amending legislation. Accordingly, a copy of this judgment shall be forwarded to the Ministry."*

- [18] As to the Applicant's argument that he had an established vested right to be admitted, he sought reliance on, amongst others, the Canadian case of *Veale v Law Society of Alberta; Attorney General of Alberta intervener*<sup>16</sup>. That case and the others referred to by the Applicant in his heads of argument, do not support his case. The Applicant had no vested right entitling him to be admitted as an advocate on 1 November 2018. Veale succeeded on the basis that he had a vested right that was retrospectively eradicated.

## **CONCLUSION**

- [19] The Applicant's application was stillborn from the outset as he had not satisfied all the requirements for the LLB degree when the LPA was promulgated on 1 November 2018. He was aware of discussions and public consultations around a new Legal Practice Bill which would substantially alter the existing dispensation. He could not on any conceivable basis have any reasonable expectation that such Bill would not affect his position or plans.

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<sup>16</sup> [2002] 89 CRR 68.

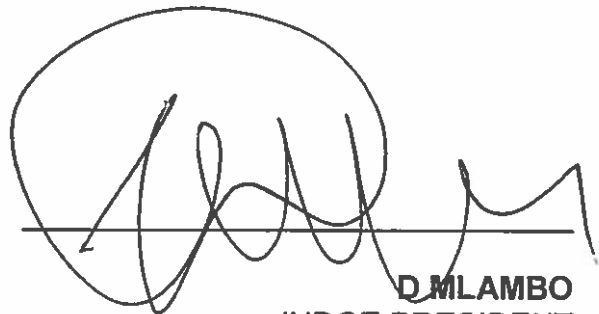


[20] It was contended that no costs order be made because of a *bona fide* constitutional challenge. However, there was no such challenge here and there is no sound reason why costs should not follow the result<sup>17</sup>.


**ORDER**

[21] Therefore the following order is made:

[21.1] The application is dismissed with costs.



D MLAMBO  
JUDGE PRESIDENT  
GAUTENG HIGH COURTS



HJ FABRICIUS  
JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION

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<sup>17</sup> See regard *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138 and *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).

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**H CONSTANTINIDES**  
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION

**Counsel for the Applicant:**

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**Instructed by:**

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**Instructed by:**

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**Date of hearing:**

17 October 2019

**Date of judgment:**