REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES/[redacted]
(2) OF INTEREST TO OTHER JUDGES: YES/[redacted]

25 MARCH 2019 **RT SUTHERLAND**

The Declaratory Proceedings - Case No: 2018/2137
Individual Applications: 2018/36880; 2018/32920; 2018/36882; 2018/37067; 2018/36820; 2018/36209; 2018/36823; 2018/21884; 2018/36876; 2018/36318

In re *ex parte* applications for admissions as advocates:

ROELINE GOOSEN	First Applicant
MICHAEL MATIMBA HATLANE	Second Applicant
MKHAYELL SIMPHIWE SABELA	Third Applicant
NARASINGAM RAVONDARAN PILLAY	Fourth Applicant
BUSISIWE MOLEFE	Fifth Applicant
MPHO NEMUTANZHELA	Sixth Applicant
MARSHNI RAJKUMAR	Seventh Applicant
DAVID KGAUGELO MOTLANTHE	Eighth Applicant
NQOBIZITHA MAOHLE MLILO	Ninth Applicant
MAMONEUWA EUNICE MADUNA	Tenth Applicant
LEGAL PRACTICE COUNCIL	Amicus Curiae
KWAZULU-NATAL SOCIETY OF ADVOCATES	Amicus Curiae

PAN AFRICAN BAR ASSOCIATION OF SOUTH AFRICA	Amicus Curiae
JOHANNESBURG SOCIETY OF ADVOCATES	Amicus Curiae
JOHANNESBURG ATTORNEYS' ASSOCIATION	Amicus Curiae
PRETORIA ATTORNEYS' ASSOCIATION	Amicus Curiae
GAUTENG ATTORNEYS' ASSOCIATION	Amicus Curiae
MINISTER OF JUSTICE	Amicus Curiae
GENERAL BAR COUNCIL	Amicus Curiae
PRETORIA SOCIETY OF ADVOCATES	Amicus Curiae
NATIONAL BAR COUNCIL OF SOUTH AFRICA	Amicus Curiae
LUTHFIA FAZEL ELLAHI	Amicus Curiae
LINDA TREVOR MOYA	Amicus Curiae
MABEL NOGWANAMPHANGA MOLEMA	Amicus Curiae
SANELISIWE LINDELWA ZWANE	Amicus Curiae
SHIKUMBELO HELLEN LESHABANA	Amicus Curiae

J U D G M E N T

THE COURT:

Introduction

[1] This judgment addresses a referral to the full court by the Judge President, in terms of section 14(1) (b) of the Superior Courts act 10 of 2013.[1] The relevant portion of the referral reads:

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[1] Section 14 (1)(b) of the Superior Courts Act 10 of 2013: A single judge of a Division may, in consultation with the Judge President or, in the absence of both the Judge President and the Deputy Judge President,

"Legal Issues:

3. Until 01 November 2018, the admission of Advocates was regulated by the Advocates Admissions Act 74 of 1964 ("the old Act"). On this day the Legal Practice Act 28 of 2014 ("the new Act") came into operation which consequently repealed the "old Act". The new Act contains additional requirements which a prospective advocate has to fulfil before he/she may qualify for admission as an Advocate. These requisites are contained in Section 24 and 26 of the new Act and include vocational training, a competency examination and community service.

4. It appears that Section 115 of the Legal Practice Act 28 of 2014 may be ambiguous in the sense that it permits any person who was entitled to be admitted as an advocate under the old Act to be admitted as an advocate in terms of the new Act. The Section is not clear on the issue of compliance with the additional requirements as set out in Sections 24 and 26 therein. The different interpretations of Section 115 have led to conflicting Judgements which could be detrimental to the Advocates profession and the Judiciary if the true intention of the Legislature and meaning of this provision is not clarified.

5. The following issues were raised for the Full Court to consider:

5.1 Should applications for admission as an advocate that were filed prior to the commencement of the new Act on 01 November 2018 be granted or should such applications be considered on the basis of the new requirements as set out in the new Act? In other words, does *section* 115 of the new Act apply to applicants for admission as an advocate, whose applications for admission were pending in any court on 1 November 2018?

5.2 Does Section 115 of the new Act exempt applicants who filed their applications before the commencement of the new Act, from complying with the requirements in terms of the new Act?

5.3 If so, does such exemption apply to all such applicants, *ad infinitum,* and/or should provision be made for a cut off period within which applicants are found to qualify for exemption, should apply for admission?

6. The following additional issues are referred to the Full Court to also determine: –

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the senior available judge, at any time discontinue the hearing of any civil matter which is being heard before him or her and refer it for hearing to the full court of that Division ....

6.1 Whether a person admitted as an attorney of the High Court before 1 November 2018 is required to:

6.1.1 have his or her name removed from the roll of attorneys before undergoing the practical vocational training prescribed for pupils who intend to be admitted and enrolled as advocates as contemplated in Regulation 7 of the Regulations promulgated under the LPA;

6.1.2 undergo the practical vocational training prescribed for pupils before converting his or her enrolment as an attorney to that of an advocate as contemplated in section 32(1)(a) of the LPA;

6.1.3 whether it is competent for the Legal Practice Council to impose as a condition for the conversion of enrolment contemplated in section 32(1)(a) of the new Act, that an attorney who wishes to convert his or her enrolment as an attorney to that of an advocate to undergo the practical vocational training prescribed for pupils who wish to be enrolled as advocates?

[2] In short, the critical questions posed in paragraph 5 of the referral requires 115 of the Legal Practice Act 10 of 2014 (LPA) to be interpreted. The section reads:

"Persons entitled to be admitted and enrolled as advocates, attorneys, conveyancers or notaries

Any person who, immediately before the date referred to in 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 enrolled as such in terms of this Act."

[3] A judgment given by Modiba J and Ramapuputla AJ prompted the Judge President to make the referral to the Full Court. The matters which were called before Modiba J and Ramapuputla AJ were the 10 applications in terms of section 3 of the AAA for admission as advocates. The only factual material put before the Full Court is that in these applications. That material does not afford an appropriate basis to offer answers to the additional questions posed in paragraph 6 of the referral. It was

submitted by several of the *amici curiae* who appeared before us that it would be imprudent to deal with such questions in the absence of a factual context and a live issue. We agree and have not addressed those questions for that reason. However, although it is strictly speaking only potential advocates who are the subject matter of the 10 applications, an interpretation of section 115 shall affect potential attorneys too. Because this implication is unavoidable, this judgment addresses the impact of section 115 on both potential advocates and potential attorneys.

[4] A hearing was held on 13 February 2019. At the invitation of the Judge President in the referral, several *amici curiae* sought admission as amici, without opposition, and addressed the Court in addition to the representatives of the 10 applicants. A wide range of perspectives were aired reflecting a significant divergence of opinion on important aspects of the issues which the questions in the referral address.

[5] At the outset there was an objection to the composition of the Court. Millar AJ is at present a serving member of the Legal Practice Council (LPC) representing the Fidelity Fund. An application was moved on behalf of one of the amici, the GCB, for his recusal. After having heard argument from several counsel representing several Amici and representing the parties, the application for a recusal was dismissed. The reasons for that decision are dealt with in a separate judgment of this court.

[6] At the conclusion of the hearing owing to the needs of urgency in respect of one category of applications for admission, namely, those applications which were instituted

before the 1 November 2018, being the date the LPA came into force, an interim or partial final order was handed down, the balance of the order addressing other categories of applications, to follow when judgment was delivered. That order read:

> 1. Any person who applied for admission to practice whose application was pending on 1 November 2018 is entitled to invoke the provisions of section 115 of the Legal Practice Act 28 of 2014, in order, thereby, to rely on the provisions of the Admission of Advocates Act to be admitted in terms of section 24 of the Legal Practice Act.
>
> 2. The applications of ten applicants in these proceedings shall be enrolled on a Special Motion Roll of this Court on 21 February 2019 for consideration at 9h30 by a court comprising Sutherland and Modiba JJ.

[7] In respect of all other categories of applications for admission to practice which were or shall be instituted on 1 November 2018 or thereafter, in this judgment, a further order is made.

The admission to practice regime of the Legal Practice Act and its antecedents

[8] On 1 November 2018 the LPA came into force and the Admission of Advocates Act 74 of 1964 (AAA) and the Attorneys Act 53 of 1979 (ATT) were repealed. Axiomatically, henceforth, the only route to admission to practice law in South Africa was to be admitted as a "Legal Practitioner" (LP) by a High Court pursuant to section 24(1) and (2) of the LPA.[2] Section 24 of the LPA is the gateway to admission and

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[2] Section 24 (1) Legal Practice act 28 of 2014.
(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;

consequent enrolment and is satisfied by, in turn, satisfying the provisions of section 26(1).[3] The LPA retains the distinction between advocates and attorneys through a subsidiary regime of enrolment performed by the LPC in which the LPC "enrols" LPs on separate attorneys' and advocates' rolls.

[9] The objective and the effect of the LPA is deliberately to revolutionise the regulation of the South African Legal Profession.[4] The LPA regime is a stark contrast from the two former regimes which were distinctly asymmetrical. The gateway to

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(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.

[3] The position of conveyancers and notaries referred to in section 26 can be ignored as they do not impinge on the controversy being addressed.

[4] Section 3 of the LPA sets out its objectives:
The purpose of this Act is to-
(a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld;
(b) broaden access to justice by putting in place-
(i) a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry;
(ii) measures to provide for the rendering of community service by candidate legal practitioners and practising legal practitioners; and
(iii) 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;
(c) create a single unified statutory body to 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;
(d) protect and promote the public interest;
(e) provide for the establishment of an Office of Legal Services Ombud;
(f) provide a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners and candidate legal practitioners; and
(g) create a framework for the-
(i) development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners;
(ii) regulation of the admission and enrolment of legal practitioners; and
(iii) development of adequate training programmes for legal practitioners and candidate legal practitioners.

admission as an advocate was section 3 of the AAA. The gateway to admission as an attorney was section 15 of ATT. Each section provided for admission to practice "on application", but the criteria were different. The material attributes alone are addressed in this judgment. To satisfy the requirements of section 3 of AAA a person had to be 21 years of age, possess an LLB degree and be of good character (ie, to be fit and proper). Significantly, no vocational training or in - service training was required. By contrast, to satisfy the requirements of section 15 of the ATT a person had to be 21 years of age, possess an LLB degree, be of good character and furthermore, serve a prescribed period of articles and pass an examination in prescribed subjects. The LPA unambiguously prescribes vocational training as a *sine qua non* for admission to practice and unequivocally repudiates the anomaly that has existed in respect of advocates under the repealed AAA regime, in terms of which advocates, unlike attorneys, could be unleashed on the litigating public, bereft of any vocational training whatsoever. Thus, an unpalatable anachronism has been extinguished.

Admission to Practice under the LPA regime: Section 26 of the LPA

[10] The minimum requirements for admission to practice under the LPA regime are stipulated in Section 26 (1) of the LPA which provides:

> "Minimum qualifications and practical vocational training
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> (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 67 of 2008); and
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> (c) undergone all the practical vocational training requirements as a candidate legal practitioner prescribed by the Minister, including- 3 (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."

[11] The Minister has yet to prescribe the requirements in section 26(1)(c) and therefore these provisions, at this time, are inoperable and no compliance is possible. The provisions can only be applicable after the Minister has acted and an administrative mechanism has been put in place to administer the necessary logistics implicit in the requirements. For the purposes of this judgment they require no further attention.

[12] Section 26(1)(d) is the principal burden of section 26(1) at this time. Axiomatically, this requirement to be operable required the "Rules" referred to in the section to be in existence. Rules have indeed been promulgated (GN 401 in Gg 41781 of 20/07/2018), which came into effect simultaneously with the LPA coming into force on 1 November 2018. Rule 21 addresses the examination and assessment requirement alluded to in section 26(1)(d).

[13] Rule 21.1 recapitulates that satisfying this requirement is a *sine qua non* for admission as an LP.

[14] Rules 21.2 – 21.4 address the position of LPs who wish to be enrolled as attorneys. Rule 21.2 stipulates what shall be the subject matter of the assessment or examination. Rules 21.3 and 21.4 address the transition from the old ATT regime to the new LPA regime. Although these Rules do not especially allude to section 112 of the LPA, the substance of the Rules fleshes out the substance of section 112 which provides that the training, examination and service requirements which were undergone by a candidate LP who wishes to be enrolled as an attorney before 1 November 2018 are deemed to be compliance with rule 21.1, and logically, in turn compliance with section 26(1)(d). Section 112 provides:

> "Transitional provisions in relation to qualifications
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> (1) Notwithstanding anything to the contrary in this Act-
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> *(a)* (i) the training course presented at a Practical Legal Training School of the Law Society of South Africa, for purposes of the Attorneys Act; or
>
> (ii) any other training course approved by any existing society or the General Council of the Bar, before the date referred to in section 120 (4) for the purpose of training persons to qualify as legal practitioners, must be regarded as having been presented or approved pursuant to the regulations pertaining to practical vocational training in terms of this Act; and
>
> *(b)* any period of practical vocational training undergone with an attorney or advocate before the date referred to in section 120 (4) must be regarded as having been a period of practical vocational training under supervision of a legal practitioner.

> (2) Any person upon whom the degree *baccalaureus procurationis* was conferred by a university of the Republic, is regarded as being qualified to be admitted by the court and enrolled as an attorney by the Council as if he or she held the degree *baccalaureus legum*, if all the other requirements in the Attorneys Act are complied with: Provided that such person has not later than 1 January 1999 registered for the first-mentioned degree.

[15] Therefore, the net effect of section 26(1)(d), read with Section 112 and Rule 21 is to preserve the right of an candidate LP who seeks enrolment as an attorney to rely on pre-LPA vocational training to qualify to be admitted as an LP and for the Court to authorise the LPC to enrol the newly admitted LP as an attorney.[5]

[16] In respect of LPs who wish to be enrolled as advocates, Rules 21.5 – 21.7 perform a similar function, but with one profound distinction. Rule 21.5 prescribes what a potential enrolled advocate must be assessed for. In this rule, the provisions of section 34(2)(a)(i) and (ii) are echoed which provisions distinguish between an advocate who is restricted to take briefs only on referral from an attorney, and an advocate who may take instructions directly from the lay public without the intervention of an instructing attorney (a Trust Account Advocate).[6] Different requirements apply to each. Notably, these requirements differ from what, in Rule 21.2, is prescribed for enrolled attorneys. Rule 21.5 and 21.7 address the transition and deal with the candidate LP having undergone pupillage training under the auspices of the GCB or its constituent

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[5] Section 30 of the LPA regulates an application for enrolment addressed to the LPC.

[6] The scope of referral briefs is wider than attorneys *per se*, and includes designated entities, but that aspect does not detract from the principal divide and can be ignored for the purposes of this analysis. The term "Trust Account Advocate' derives from the defintion in section 1 of the LPA of a "Trust Account Practice" and is the name utilised in the Code of Conduct to distinguish them from other, "referral" advocates. (see: GN 81 of 10 February 2017; GG 40610)

Societies of Advocates, prior to 1 November 2018. In some instances training which started before that date may be completed after that date to constitute compliance.

[17] In respect of both candidates for enrolment as attorneys and as advocates a three-year period of grace is provided for the examinations to be completed, calculated from 1 November 2018.

The transition from the old to the new admission regimes

[18] There are several provisions in the LPA that regulate and manage the transition from the old regimes. Some can be ignored for present purposes as they deal with subject matter that does not trespass into the realm of admission and enrolment: ie, Sections 110, 111, 113,116 and 117.

[19] Section 114 of the LPA preserves the status of all advocates and all attorneys who enjoyed that status as at 31 October 2018 who are deemed to be LPs and enrolled as advocates and attorneys. Self-evidently no Trust Account Advocates could exist before 1 November 2018 and no provision was needed for a transition in respect of that category.

[20] Self-evidently, there is no need by any candidate for admission to practice to invoke section 115, if that candidate could satisfy the criteria for admission by reliance on other provisions in the LPA, including the other transitional provisions. Section 115,

within the context of the comprehensive transition provisions must be understood to be the *route of last resort*.

The meaning and function of section 115

[21] There are two main rival theses about its impact:

21.1 On the one hand, it is argued that a person who wishes to invoke the section may do so at any time, and even many years after 1 November 2018.[7] Such an approach must be reconciled, if that be the case, with public policy considerations about a continuation *ad infinitum* of LPs, who are enrolled as advocates, with no vocational training, a future wholly contrary to the aims and objectives of the LPA.

21.2 On the other hand, the argument is advanced that there is an implied cut-off date, ie, 31 October 2018, the day before the LPA came into force, to invoke the section in an application for admission. This approach must of necessity deal with the anterior issues of vested rights and the implications of the LPA having a retroactive effect on such rights. Were the LPA to have such an effect, its constitutionality would have to be examined.[8]

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[7] This is the approach favoured by Robertson J in *Ex Parte Bakkes (Eastern Cape Division, Grahamstown: Case No 2018/3211 Unreported, 18 January 2019)* and also by the *amici*: the Legal Practice Council, the Johannesburg Bar and others.

[8] This is the approach favoured by the *amici*: the GCB, the Pretoria Bar, the KZN Bar, PABASA and others.

21.3 The first exercise necessary to resolve this controversy is to examine the text of section 115.[9] There are three zones of context that are relevant: the text of the section, the text of the section as a component of the transitional provisions of the LPA and the text of the section in the context of the whole of the LPA including the patent purpose of the LPA.

[22] The work that the text of section 115, itself, performs is, first, to require a court exercising the power in terms of section 24 of the LPA to recognise that a class of candidates exists who, had they sought admission under the AAA or ATT would have succeeded in being admitted as advocates or attorneys. The persons in this category may be "admitted and enrolled as such in terms of *this* Act." This must mean that once an "entitlement" is shown to have been admitted as an advocate and an attorney when the AAA and ATT were in force they will be admitted "in terms of *this* Act (ie the LPA) as

[9] The proper approach to interpretation is that set out by Wallis JA in Natal Joint Municipal Pension Fund v Endumeni Municipality [2002] 2 ALL SA 262 (SCA) at [18]. " Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own.13 It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.* The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself',16 read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

LPs and enrolled as advocates and attorneys by the LPC in accordance with their vocational training credentials. That effect is what results from the use of the phrase "as *such* in terms of this Act'. In short, although the "credentials" for admission are those set out in the AAA and ATT, "admission" is as an LP in terms of the LPA.

[23] The consensus of argument from all parties and from the *amici* is that anyone who had launched an application before 1 November 2018 and had satisfied the criteria in the repealed statutes can safely be regarded as having exhibited an entitlement to admitted as an advocate or attorney. We agree, and hence our interim final order.

[24] However, could this category of applicants have achieved that outcome by mere reliance on section 12(2) of the Interpretation Act 33 of 1957? That section provides:

> "Effect of repeal of a law
> (1) ....
> (2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
> (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege,
> obligation, liability, forfeiture or punishment as is in this subsection mentioned,
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed." (emphasis supplied)

[25] Could it be properly be argued that section 115 is superfluous, if that is all that section 115 could achieve? The answer is no. Section 115 achieves that and more. The section bridges the old and new regimes by stipulating that a person who could have been admitted as an advocate or attorney under the regimes of the AAA or ATT, may be admitted as LPS, (not as Attorneys or as Advocates, as would be the outcome under the old regimes) notwithstanding that they are admitted as such *upon repealed criteria*. This creates a category of LP who is admitted otherwise than in terms of prescripts in section 26(1) of the LPA. Section 115 is not a deeming provision. By contrast, Section 114 (read with section 118) is a deeming provision which translates persons who, as at 31 October 2018, were advocates and attorneys, into LPs.

What does "entitled to be admitted and enrolled" mean?

[26] The word "entitled" is a common enough term. "Entitled to be admitted and enrolled..." is the phrase to be given meaning. The concept of an entitlement is consistent only with the existing possession of a right. The Oxford English Dictionary (OED) defines the term as the giving of a 'rightful claim" to anything.[10] The term "entitled" in the context of the section 115 and indeed the context of the LPA has no convoluted inner obscure meaning. It is simply shorthand for saying that the candidate fulfilled all the AAA or ATT criteria at a time when that candidate could have brought an application; ie before 1 November 2018. As the "right" to which a candidate is "entitled" is extinguished on 31 October 2018, the answer to the question – can one apply after

[10] OED 2nd vol V, (1991) p300.

31 October 2018 is answered purely by whether the substance of the rights in section 3 of AAA and of section 15 of ATT can survive the repeal. It is the function of section 115 to preserve those "entitlements" or "rights".

What "entitlements" under the AAA or ATT exist?

[27] The locus of the controversy about the implications of the meaning of section 115 shifts to an examination of the substance of the "rights" that the candidates can invoke as their "entitlements" under the old regimes in the AAA and the ATT. What those entitlements are must now be examined. Several arguments have been advanced to restrict the meaning of the concept of "entitlements".

[28] It is argued that a person who is merely in possession of an LLB, 21 years old and is merely of good character was not, in terms of section 3 of the AAA, "entitled" to be admitted as an advocate. This condition, so it is argued, might be better described as mere 'eligibility'. The argument runs that only once an eligible person *makes an application* as contemplated by section 3 of the AAA can it be said that a right to admission exists. Yet, even this is argued to be in doubt, because a court has yet to pronounce on the person being 'fit and proper'. But, in our view, the setting up of the criterion of "fit and proper" to be a status *conferred* by a court, and thus, at most, contingent until such pronouncement, is erroneous; the court, in pronouncing that a candidate is fit and proper merely gives judicial recognition to a pre-existing state of affairs.

[29] The notion is then advanced that the correct analysis ought to be that an eligible person has a *right to apply*. But that also seems inadequate, because even a rogue could be said to have a right to apply, even if a dismissal of the application is inevitable. The making of an application whilst the regimes of the AAA and ATT were in force cannot be a pre-requisite of an entitlement. In our view, the step to "apply" is a mere procedural device, axiomatically necessary to facilitate the *exercise* of a right but not being a *constituent* of the right being claimed or asserted. If as a fact, a person has met all the requirements set out in the AAA or ATT, a "right" to admission exists, premised simply on that. The application is a mere assertion of the right. This is the better interpretation to cast onto "entitlement" in this context.

Applications instituted after 31 October: can they invoke section 115?

[30] Those conclusions open the door to the notion that applications to be instituted after 1 November 2018, can invoke section 115 unless there is a reason why the LPA does not contemplate the invoking of section 115 in an application instituted after that date.

Old style candidate-Attorneys

[31] To begin with the position of candidates who were 'entitled' to admission as an attorney: what can such a candidate claim as an entitlement emanating from the

satisfaction of the requirements of section 15 of ATT? Section 15(1)(VI) and (2) are significant. The relevant portions of section 15 read:

> "Unless cause to the contrary to its satisfaction is shown the court shall on application in accordance with this Act, admit and enrol any person as an attorney if –
>
> (1) (b) the court is satisfied that such person has satisfied the following requirements ...., namely that such person-
>
> (vi) Completed his or her service under articles or contract of service.... within the period of three years preceding his or her application to the court or within the further period allowed by the court in terms of subsection (2)
>
> (2) The court may at its discretion, on the application of any person and on good cause shown, allow a further period for admission as an attorney, subject to such conditions, if any, as it may deem fit, including a condition relating to further service under articles or contract of service."

[32] The consequences of these provisions mean that if the candidate has served out articles and passed the examination, that candidate is put on terms to apply for admission within three years. But if the period elapses, a court may condone that elapse and admit the candidate. An important aspect of any such condonation is that in terms of section 15(2) a court may, as it deems fit, impose further service.

[33] In concrete terms, the implications are these:

33.1 A person who completed articles before 1 November 2018 and had passed the exam had the right to apply within three years of that date.

33.2 If that person was late, admission may still follow, subject merely to what is, in effect, a refresher period of service.

33.3 That is the entitlement which accrued on 31 October 2018 and continues *ad infinitum.*

33.4 The result is that the date of 1 November 2018 is insignificant.

Old style applicants for admission as advocates

[34] The provisions of section 3 of the AAA contain nothing similar. Self-evidently, there was no pressing need, as there was no risk of sacrificing service credentials. However, what are the implications of the silence?

[35] Thus, in the context of these statutory provisions, the question arises: if a person graduates prior to 1 November 2018, is 21 years of age, and is of good character, does the absence of similar express provisions of the kind found in section 15 of the ATT mean that there can be no reliance the "entitlements" of section 3 of the AAA after 31 October 2018? Put differently, what indication is there, if any, in the LPA, or elsewhere, that these section 3 rights to admission are extinguished?

[36] The LPA is replete with provisions that prescribe vocational training as *sine qua non* of admission to practice in the reformed Legal Profession. What inferences are warranted from that legislative design? Among the clear relevant considerations are these:

36.1 In the new LPA structure of a single profession, the principle of substantive equivalence is achieved between the two branches, due regard being had to their own peculiar needs.

36.2 The notion of allowing the un-trained "advocate" to continue to enter the profession is an anomaly the LPA aimed to extinguish.

36.3 Why would the public interest considerations protecting the litigating public from untrained persons not trump the presumption of preservation of a vested right?

36.4 Fair notice had been given since the enactment of the LPA in 2014, four years past. No-one has been taken by surprise.

[37] These considerations have nevertheless to grapple with the absence of an *express* cut-off date for the anomaly to cease, and, in turn, have to grapple with the presumption of the preservation of vested rights except where the *clearest indication to the contrary* is expressed in the statute.[11]

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[11] Nkabinde v Judicial Service Commission [2014] 4 All SA 637 at [79] – [84], esp at:

[80] Therefore, a statute is presumed not to apply retrospectively, unless it is expressly or by necessary implication provided otherwise in the relevant legislation. It is, accordingly, presumed that the Legislature only intends to regulate future matters, and that unless a contrary intention appears from new legislation, which repeals previous legislation, it is presumed that no repeal of an existing statute has been enacted in relation to transactions completed prior to such existing statute being repealed.

[81 The justification for the presumption against the retrospective application of legislation is premised upon the reluctance of the courts to interfere with vested rights. In the seminal authority in this respect, Innes CJ stated in the case of *Curtis v Johannesburg Municipality*:

[38] As to the task of placing a construction upon section 115, the dictum of Cameron J *in NCA v Opperman 2013 (2) SA 1 (CC)* is apposite.

> "[99] A longstanding precept of interpretation is that every word must be given a meaning. Words in an enactment should not be treated as tautologous or superfluous. This is for good reason. Interpretation is a cooperative venture between legislature and judge, bounded by mutually understood rules, in which the latter seeks to give meaning to the text enacted by the former. The mutual suppositions, and the constraints of principle and constitutional precept on the judge's role, enable the joint process to reach a coherent and practical outcome. For this, it has to be assumed that the legislature's enacted text includes only words that matter. For to enact words that do not would violate the most basic supposition of the shared enterprise. Hence none can be ignored.
>
> [100] The shared enterprise is imperilled if this precept is too readily ignored. It could seem to license judges to pick and choose among words and phrases, and to omit those considered inconvenient. That cannot be. Everything the legislature has enacted must be included in the meaning assigned to the whole. The rule performs a boundary-setting function. Its observance shows that judges are staying within their assigned role of interpretation, and not straying outside it into amendment, enactment or innovation. As this court pointed out in its very first judgment, if the language used by the lawgiver is ignored in favour of other pursuits, 'the result is not interpretation but divination'. Though said in a different context, the point is that constitutionalism has not upended the basic rules of interpretation.
>
> [101] ....[104]

> "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted so as not to take away rights actually vested at the time of their promulgation."

However, Innes CJ also noted that one of the exceptions to the general presumption against retrospectivity, falls within the sphere of procedural matters to the extent that acts committed prior to the commencement of a statutorily prescribed procedure are adjudicated in terms of the new procedure. The learned Chief Justice stated in this respect as follows:

> "Every law regulating procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective application would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date of promulgation, and even though the suit may have been pending. To the extent to which it does that but to no greater extent, a law dealing with procedure is retrospective."

> [105] .....There is then no particular constitutional imperative to squeeze a meaning from the provision. Rather, we must accept the words of the provision for what they say, even at the cost of accepting that the provision is ineffectual. It is better, in my view, to acknowledge the drafting error, and to leave parliament to correct it.

[39] Moreover, specifically as regards rights potentially affected by later legislation, in the decision in *State v Mlungu 1995 (3) SA 867 (CC)* at [64] – [65] the following caution was expressed:

> " [64] As stated in the preamble, the Constitution creates a new legal order in South Africa. The afterword recites *inter alia* that the Constitution is a bridge from a past characterised by injustice to a future founded on the recognition of human rights. But the Constitution cannot wipe out all traces of the past in one blow, and does not attempt to do so. It was necessary for the Constitution to consider how far the new legal order, especially the fundamental rights provisions of chap 3, should affect actions taken or acts performed under the old legal order before the Constitution came into force. This is a perennial legal problem, which arises whenever a new statute repeals an old one. Sometimes repealing statutes contain provisions which give a clear answer to the problem. All too often they do not, and canons of statutory interpretation have been developed over the years to assist in solving the problem. In general, our Courts have held that in the absence of a discernible contrary intention, it is presumed that a new statute is not intended to have retroactive or retrospective effect. This is not the place for a detailed analysis of the presumption, but a reminder of its scope may help to explain the purpose of s 241(8).
>
> [65] First, there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or *vice versa*, ie which affects transactions completed before the new statute came into operation. See *Van Lear v Van Lear (supra*). It is legislation which enacts that 'as at a past date the law shall be taken to have been that which it was not'. See *Shewan Tomes & Co Ltd v Commissioner of Customs and Excise* 1955 (4) SA 305 (A) at 311H, *per* Schreiner ACJ. There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, eg by invalidating current contracts or impairing existing property rights. See Cape Town Municipality v F Robb & Co Ltd 1966 (4) SA 345 (C) at 351, *per* Corbett J. The general

> rule therefore is that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing."

[40] Care is needed in the interpretation of section 115 to avoid the predicament illustrated in the Canadian case of *Veale v Law Society of Alberta; Attorney General of Alberta intervener [2002] 89 CRR 68,* a decision of the Queen's Bench of the Province of Alberta. In that case, the Law society had after lengthy and public deliberation resolved to tighten up on the threshold requirements for admission to practice of persons who obtained law degrees from universities outside Canada. Having imposed a higher threshold, ie the passing of 10 more rather than only 4 more courses, to procure accreditation, the legislation regulating the transition provided for a grace period during which graduates of foreign universities would be able to rely on the repealed threshold requirements. Veale, who was vaguely aware of the developments, registered to take a degree at the University of Wales in the expectation that he would be allowed to rely on the lower threshold for admission. He discovered after registration that his circumstances were not covered by the grace provisions. He thereupon alleged his Charter rights were violated. Veale succeeded on the basis that he had a vested right that was retrospectively eradicated. Although holding that there were instances where a vested right could be eradicated without violating the Charter, the Court held that a value judgment was required about the type of right supposedly extinguished. Veale's rights were held to be such a right worthy of preservation because the implications of not being able to rely on the old threshold meant that his period of study would be extended for another 1-2 years. The critical rationale was that the objects of the amended legislation were not thwarted by the preservation of the right in question and

thus, on a proportionality test, the legislation was not rationally connected with its objective. Moreover, to deprive a person of a vested right was offensive to the idea of "fundamental justice"[12]

[41] The Canadian Court expressly addressed the sound policy choice made in the amending legislation to raise the threshold for admission to the profession, because experience had shown that foreign graduates were struggling to pass the Law Society's professional entrance examinations. This consideration resonates with the public policy considerations, addressed above why vocational training under the LPA regime is regarded as critical pre-entry requirements, but in the result, as in *Veale's* example, do not necessarily trump the preservation of vested rights.

[42] An historical traverse of the legislation regulating admission to practice over the past century is instructive. The occurrence of providing, from time to time, for transitions in legislative regimes regulating admission to practice is not a novelty. The legislature has, relatively frequently, enacted legislation from time to time, prescribing the requirements for admission of both attorneys and advocates. In each instance with the passage of a new piece of legislation there has been a provision functionally similar to section 115 of the LPA.

[43] Previous legislation[13] as does the LPA, makes use of the word "entitled" when referring to the retention of the right to be admitted, extant prior to the coming into

[12] Veale (supra); at [78] ff.

operation of the subsequent legislation. The legislation relating to admission of attorneys differs from that relating to the admission of advocates.

[44] In respect of the admission of attorneys, Section 34(2)(a) of the Attorneys Notaries and Conveyancers Admission Act 23 of 1934 (the 1934 Act) provides that it does not:

> "Disentitle any person who, prior to the commencement of this Act was entitled to be admitted by any court as an attorney, notary or conveyancer, from being so admitted".

In other words, the right to be admitted once it had vested, was retained beyond the date of the coming into operation of the subsequent Act. Similarly, section 86(2)(a) of the ATT (the 1979 Act) provides that:

> "Any person referred to in subsection 1 of section 34 of the Attorneys, Notaries and Conveyancers Admission Act, 1934 (Act No. 23 of 1934), who in terms of that subsection was immediately prior to the commencement of this Act entitled to be admitted and enrolled as an attorney shall continue to be so entitled".

[45] The 1934 Act frames the retention of the right to be admitted or entitlement in the positive by excluding the "disentitlement". The ATT (the 1979 Act) achieves the same purpose but in a different manner. The ATT frames the retention of the right in the positive by expressing it as an ongoing "entitlement".

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[13] See in this regard section 2 of the Admission of Advocates Act 19 of 1921, the 1921 Act) section 2 of the Natal Conveyancers Act 24 of 1926, (the 1926 act); section 1 of the natal Advocates and Attorneys Preservation of Rights Act 27 of 1939 (the 1939 Act); section 32bis (3) of the Attorneys Admission Amendment and Legal Practitioners Fidelity Fund Act 19 of 1941 (the 1941Act) and section 13 of the AAA..

[46] Significantly both statutes contain provisions that not only provide for the retention of the right to be admitted, ie, the "entitlement" but also for a specific exclusion from the effect of those statutes as having the effect of a "disentitlement" to be admitted under the new legislation. In other words, the imposition of new or additional requirements for the entitlement to apply for admission would have no bearing on those who were "entitled" or continue to be "entitled" and those who were not "disentitled".

[47] In respect of the admission of advocates, in none of the prior legislation is the "entitlement" expressed in the same way by the legislature as it was in respect of the admission of attorneys. In the 1921 Act, section 2 provides:

> "...:Provided further, that the provisions of this section shall not apply to any person whose name has at any time before the commencement of this Act, he being then a British subject domiciled in the Union of South Africa, been enrolled at an institution which makes provision for a course of study the successful conclusion of which would, but for this Act, have entitled him to be admitted and enrolled as an advocate without further examination."

[48] In the AAA (the1964 Act) the Rules made under section 2 of the 1921 Act (ie Rules in respect of the admission of advocates) were in terms of section 13(1) of the AAA decreed to remain in force for a period of just under 10 years from the time that the AAA (1964 Act) was assented to on 18 June 1964 up to and including 31 December 1974. In this instance, the legislature, although also referring to "entitled" in the past tense (reference being by way of incorporation), prospectively limited the exercise of the right for a specific period. This choice in the AAA of an express legislative expression

providing for a cut-off date is significant because it contrasts with the absence of such a choice in section 115 the LPA.

[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, 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 an 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.

Conclusions

[53] The questions posed in paragraph 5 of the referral are therefore answered thus:

53.1 **Question**: Should applications for admission as an Advocate that were filed prior to the commencement of the new Act on 01 November 2018 be granted or should such applications be considered on the basis of the new requirements as set out in the new Act? In other words, does section 115 of the new Act apply to applicants for admission as an advocate, whose applications for admission were pending in any Court on 1 November 2018?

Answer: Yes; persons who applied prior to 1 November 2018, may invoke section 115 to rely on the criteria in the former Admission of Advocates Act and the former Attorneys Act to be admitted as legal practitioners.

53.2 **Question:** Does Section 115 of the new Act exempt applicants who filed their applications before the commencement of the new Act, from complying with the requirements in terms of the new Act?

Answer: Yes.

53.3 **Question:** If so, does such exemption apply to all such applicants *ad infinitum* and/or should provision be made for a cut off period within which applicants are found to qualify for exemption, should apply for admission?

Answer: There is no cut-off date and the entitlements remain available *ad infinitum.*

[54] **The Order**

An expanded order is given incorporating the interim order, as follows:

(1) Any person who applied for admission to practice, whose application was pending on 1 November 2018 is entitled to invoke the provisions of section 115 of the Legal Practice Act 28 of 2014, in order, thereby, to rely on the provisions of the Admission of Advocates Act 74 of 1964 to be admitted in terms of section 24 of the Legal Practice Act

(2) Any person who applied for admission to practice, whose application was pending on 1 November 2018 is entitled to invoke the provisions of section 115 of the Legal Practice Act 28 of 2014, in order, thereby, to rely on the provisions of the Attorneys Act 53 of 1979 to be admitted in terms of section 24 of the Legal Practice Act

(3) Any person, who applies for admission to practice, on or after 1 November 2018, who wishes to rely upon the requirements as set out in section 3 of the Admission of Advocates Act 74 of 1964 or section 15 of the Attorneys Act 53 of 1979, is entitled to invoke the provisions of section 115 of the Legal Practice Act 28 of 2014, in order, thereby, to rely on the provisions of the Admission of Advocates Act or the Attorneys Act to be admitted in terms of section 24 of the Legal Practice Act.

(4) The appropriate formulation of an order admitting an applicant for admission as a legal practitioner in any of the categories mentioned in (1) (2) and (3) is thus:

> "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].

Lastly, we wish to express our gratitude to each of the counsel who, on behalf of the *amici curiae,* presented argument to us, which has enabled us to address the several dimensions of the controversy.

RT SUTHERLAND
Judge of the High Court
Gauteng Local Division, Johannesburg

L MODIBA
Judge of the High Court
Gauteng Local Division, Johannesburg

A MILLAR
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Date of hearing: 13 February 2019

Date of judgment: 25 March 2019

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