

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 592/87

In the matter of :

VICTOR DAY DLAMINI

1ST APPLICANT

THULANI MASINA

2ND APPLICANT

vs

THE ATTORNEY GENERAL

OF SWAZILAND

RESPONDENT

CORAM:

DUNN A.J.

FOR THE APPLICANTS:

MR. LITTLER

FOR THE RESPONDENT:

MR. DWAMENA

JUDGEMENT

(7.8.87)

DUNN, A.J.

The two applicants in this matter are attorneys of this court who sat for and were unsuccessful in the practical examination for the admission of conveyancers which was held on the 29th April and 12th June 1987. The applicants approached this court on notice of motion on the 26th June 1987 and a rule nisi was issued calling upon the respondent to show cause on the 17th July 1987 why:-

1. The conveyancing examination conducted by the respondent on the 29th April 1987 and 12th June 1987 should not be set aside as null and void and of no legal force or effect.

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2. The respondent should not be compelled to consult the Chief Justice with a view to appoint examiners to conduct the examination prescribed under section 33(4)(e) of Act No. 15 of 1964.

3. The respondent should not be ordered to pay the costs of this application de bonis propriis in the event of him opposing this application.

The rule was extended on the 17th July and the matter was finally argued before me on the 5th August 1967.

The applicants set out the circumstances under which they sat for the examination and as to how they were informed after attending the oral examination, that they had been unsuccessful. The following is set out under paragraph 5 of the founding affidavit:-

It is respectfully submitted that the said examination is null and void and of no force and effect in that:

5.1 In terms of the Appointment of Examiners and Conducting of Examination Rules 1976 made under Sections 33(3) and (4) of Act No.15 of 1964, the Chief Justice appoints a person to act as a moderator in the said examination. We are informed by the Registrar of the High Court and verily believe

that the respondent did not communicate with the learned Chief Justice to appoint a moderator in the instant case.

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5.2 The examination was conducted by two examiners and Mr. L. Wimalaratne of the respondents office in contravention of regulation 2(c) of the said rules which provides: "The following persons are hereby appointed to act as examiners for the purpose of conducting examinations on the Lay, practice and procedure in conveyancing: The Attorney-General and/or Deputy Attorney-General together with a duly admitted conveyancer in respect of each examination."

5.3 Some of the candidates who entered the examination did not attend the oral examination and yet they were successful notwithstanding the fact that Regulation 6 of the Legal Practitioners' (Examinations) Regulation 1966 requires a candidate to attend and satisfy the examiners that he or she possesses sufficient practical knowledge in conveyancing at the subsequent oral examination.

The respondent sets out that he appointed Mr. K. Nxumalo as an examiner and Mr. Boshoff as a moderator for purposes of the examination. He denies that Mr. L. Wimalaratne acted as an examiner and avers that Mr. Wimalaratne was present at the oral examination on the 12th June for the sole purpose of performing administrative functions relating to the examination.

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I should, before proceeding to consider the relevant legislation in this matter, point out that I find some of the averments in the affidavits somewhat disturbing, derogatory and to be in bad taste. Great care should be exercised in the choice and use of language in matters placed before the court. The fact that an application is brought as a matter of urgency is no licence for scandalous and unsubstantiated matter to be included in the supporting affidavits. I allowed an application to strike out the offending paragraphs at the hearing and I do not, with the exception of one paragraph which I shall refer to later in this judgement, find it necessary to deal any further with the matter.

Rule 2 of the Appointment of Examiners and Conducting of Examinations Rules, 1976 provides:-
The following persons are hereby appointed to act as examiners for the purpose of conducting examinations on :-

(a) the practical examinations referred to in regulation 3(b) hereof: Three persons to be appointed by the Chief Justice in consultation with the Attorney-General, at least one of whom shall be a practising attorney in Swaziland.

(b) Examinations on the practice, functions and duties of a Notary : The Attorney-General and/or the Deputy Attorney-General together with a duly admitted Notary Public nominated by the Attorney-General in respect of each examination.

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(c) Examinations on the law, practice and procedure of conveyancing : The Attorney-General and/or the Deputy Attorney-General together with a duly admitted Conveyancer nominated by the Attorney-General in respect of each examination.

Rule 3 which is headed "appointment of moderator" reads:-

In each examination referred to in Rule 2 hereof a person appointed by the Chief Justice shall act as moderator in addition to the three examiners.

It was clear at the hearing of the application that there was a serious dispute as to who the examiners were for the examination in question. The applicants averred that Mr. K. Nxumalo, Mr. Boshoff and Mr.

Wimalaratne were the 3 examiners. The respondent contended that he and Mr. K. Nxumalo were examiners and that Mr. Boshoff was the moderator whilst Mr. Wimalaratne performed purely administrative functions. Mr. Littler for the applicants, subsequently abandoned the averment regarding the examiners and accepted the respondent's statement that the respondent and Mr. K. Nxumalo acted as examiners. This then obviated the need for oral evidence.

I will deal now with the first ground in support of the application namely the question of the appointment of the moderator. It was conceded by the respondent that the Chief Justice did not specifically appoint a moderator under Rule 3.

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It was submitted on behalf of the respondent that the Attorney-General was appointed by the Chief Justice under Rule 2 and that he was as such "a person appointed by the Chief Justice" and was empowered to "act as a moderator" in terms of Rule 3. I must confess to being at a total loss as to what to make of this submission.

The appointment of the Attorney-General under Rule 2 was as an examiner and not as a moderator. If it was the intention of the legislature that one of the examiners should act as moderator then such intention should have been clearly expressed under Rule 3. It is clear from a reading of Rule 3 that the moderator is to be a person other than the examiners. As the Attorney-General was not appointed under Rule 3 he could not therefore act, appoint or delegate anybody to act as a moderator. I understand from both Mr. Littler and Mr. Dwamena that no moderator has to their knowledge ever been appointed by the Chief Justice in respect of the examinations for conveyancers and that the practice has all along been for the Attorney-General to appoint the Registrar of Deeds to act as a moderator. This practice does not appear to have been challenged in the past and this might in my view be the real reason for the Attorney-General having appointed a moderator in the examinations in question and not the reason based on the interpretation of Rule 3 which Mr. Dwamena put forward at the hearing.

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The position with the examinations in question is thus, that somebody who was not properly appointed under Rule 3 acted as moderator. The respondent appears to have acted bona fide and in accordance with what had been the standing practice at the time. The question which I should decide in the circumstances is whether the applicants have in anyway been prejudiced in the conduct of the examinations. The applicants have not raised any objection with regard to the nature and content of the examination. The complaint is simply that Mr. Boshoff who acted as moderator was not appointed by the Chief Justice. The applicants attempted in their replying affidavit to widen this objection and in the paragraph which I ordered should be struck out had this to say:-

"We emphatically deny that no prejudice was suffered by the applicants in that, to the best of our knowledge and belief Mr. Boshoff is employed almost exclusively as a conveyancer and does little, if any, other legal work - hence we verily believe that he has a substantial interest in limiting the number of admitted indigenous Swazi conveyancers."

It is not set out in the affidavits precisely when the applicants became aware that the moderator had not been properly appointed under Rule 3. If, as it might well be the position, the applicants were aware of the irregularity and the moderator's alleged bias before sitting for the examination the proper procedure to have followed would have been to refuse to sit for the examination and insist that a proper appointment be made under Rule 3.

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I have serious reservations as to the applicants' bona fides in the launching of this application for it appears to be beyond any doubt that had the applicants been successful in the examination the question of the appointment of the moderator would never have been raised. I do not, in the circumstances, find

that the applicants were in any way prejudiced in the examination.

It is not necessary for me to deal with the ground set out under paragraph 5.3 of the founding affidavit in any great detail. The point taken by the applicants under this paragraph is that some of the candidates who were successful in the examination did not attend the oral examination notwithstanding the fact that Regulation 6 of the Legal Practitioners' (examinations) Regulations 1966 requires a candidate to attend and satisfy the examiners that he or she possesses sufficient practical knowledge in conveyancing. The applicants attended the oral examination and failed to satisfy the examiners that they possessed sufficient practical knowledge of the law practice and procedure of conveyancing. The decision by the examiners not to require the attendance of the successful candidates at the oral examination is set out in the papers as having been based on the performance of such candidates in the written examination. The examiners were satisfied from the written examination that such candidates had sufficient practical knowledge of the law, practice and procedure of conveyancing.

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Regulation 6(2) of the legal Practitioners (examinations) Regulations sets out the provisions which apply to the practical examination which an applicant is required to pass before being admitted and enrolled as a conveyancer. Regulation 6(2)(1) reads:-

the examiners shall put viva voce questions as regards the practice and procedure of conveyancing and of the Deeds Registry and require the candidate to draft such deeds of transfer, mortgage bonds and other documents proper to registry as shall show whether he possesses sufficient knowledge.

Regulation 6(2)iv) reads:-

a candidate who does not satisfactorily answer the questions, whether viva voce or written, nor show that he possesses sufficient practical knowledge, shall not be entitled to a certificate from the examiner that he has passed the examination.

It appears to me that the provisions of Regulation 6(2)(iv) are wide enough to cover the decision by the examiners not to require some of the candidates who had performed well in the written examination to attend the oral examination. As set out earlier, the applicants attended the oral examination and I do not see how, in the circumstances, the position of the other candidates whom the applicants elected not to join in this application can be a ground for declaring the examination null and void.

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The rule issued on the 26th June 1987 is discharged with costs.

I should in conclusion point out that the applicants set out in the founding affidavit that they are "anxious to sit an examination properly set and conducted in terms of the law as soon as is possible." I do not think that any difficulty should arise in this regard for all that is required is for the applicants to give 14 days written notice of their intention to sit for the examination to the Attorney-General who shall thereupon determine a suitable date for such examination. See Rule 4 of the Appointment of Examiners and Conducting of Examinations Rules 1976.

B. DUNN

ACTING JUDGE