IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.783/87

SIBONISO CLEMENT DLAMINI

BEING:	EX-PARTE APPLICATION
CORAM:	HANNAH, C.J.
FOR PETITIONER:	MR. P. SHILUBANE
FOR ATTORNEY-GENERAL:	MR. WIMALARATNE

JUDGMENT

(18/9/87)

Hannah, C.J.

This is, a petition brought pursuant to section 6 and 28 of the Legal Practitioner's Act, 1964 for admission and enrollment of the petitioner as an attorney. The material parts of section 6 are as follows:

"(1) Every person who applies to be admitted and enrolled as an attorney shall produce to the satisfaction of the High Court proof that -

(a) he is a citizen of Swaziland or ordinarily resident in Swaziland and is a fit and proper person to be admitted as an attorney; and

(b) he is of or above the age of twenty-one years; and

(c) he -

(iii) is entitled under this Act to be admitted as an advocate of the Courts of Swaziland and satisfied the High Court that he has not practised as an advocate for a period of three months

immediately preceding his application under this Act for admission as an attorney and has complied with the provisions of this Act in regard to service under articles."

The petitioner fully meets the requirements of (1)(a) and (b) and with regard to (c)(iii) he is entitled to be admitted as an advocate by virtue of the fact that on 11th October, 1980 he was awarded the degree of Bachelor of Laws by the then University of Botswana and Swaziland. The petitioner has also passed the practical examination referred to in section 33(4)(c) of the Act and therefore also meets the requirements of section 8 of the Act. For the past two and a half years he has held the appointment of Master of the High Court and accordingly has not practised as an advocate during the past three months thus meeting that requirement of which lies in his way is whether section 6(1) (c) (iii). The only obstacle/he "has complied with the provisions of (The) Act in regard to service under articles" or, if he has not, whether the Court has power to exempt him from such compliance and, if so, whether such power should be exercised.

Articles are dealt with by section 7 of the Act, the material subsections of which provide:

"(1) A person who is desirous of being admitted as an attorney, and who is not exempted from service under articles by virtue of sub-section (2) and (3), shall be bound by, and duly serve under, articles for a

period determined in accordance with the provisions of the Schedule.

(3) A person who has served as a Magistrate in Swaziland or in the office of the Master of the High Court for a continuous period of five years

or more and has passed any of the examinations prescribed by the Chief Justice under section (33 (2)(b) shall not be required to serve articles in Swaziland."

I have omitted reference to subsection (2) as that is of no relevance dealing, as it does, with persons admitted as an attorney in certain other countries.

In terras of the Schedule the length of the term of articles or pupilage which the petitioner is required to serve is one year but he has not served articles or pupilage for that length of time. Indeed there is a question whether he has served articles or pupilage at all. What happened was this. In May, 1980 the petitioner was engaged as a pupil crown counsel in the Attorney-General's Chambers. He continued as such until 31st December 1980 when he left for the United Kingdom to study for a masters degree in law at the University of London. Upon his return to Swaziland he was employed as a lecturer-in-law at the University of Swaziland from October 1982 until November 1984 and from that date he has held the office of Master of the High Court. Therefore, assuming all else to be in order, the petitioner spent no more than eight months as a pupil crown counsel.

At this point it is necessary to refer to section 21 of the Act which provides that pupilage as crown counsel shall, in certain circumstances, count as articles. The section reads:

"(1) A period served by a pupil crown counsel under a contract of pupilage with the Attorney-General in his chambers shall, for the purposes of this Act, be equivalent to a similar period of regular service under articles of clerkship and, where appropriate, any reference in this Part to an

attorney shall, in relation to such contract of pupilage, be deemed to be a reference to the Attorney-General, and all references in this Part to an articled clerk shall, for the purpose of such contract of pupilage, be deemed to be a reference to a pupil crown counsel.

(2) The Attorney-General shall not have more than four pupil crown counsel at any one time.

(3) A contract of pupilage entered into in terms of this section shall be lodged with the registrar in accordance with the provisions of section 11."

Section 11 deals with lodging articles of clerkship with the Registrar of the High Court. It provides:

"(1) The original articles of clerkship shall within two months of the date of the articles be lodged together with an affidavit, testifying to the signatures and date thereof and where they were executed, and the necessary fees prescribed under section 33 (1) (a), with the registrar who shall thereupon register the articles;

Provided that no such articles shall be accepted by the registrar for registration unless the articles have been duly endorsed by the Attorney-General as required under the provisions of section 10.

(2) If those articles are not registered within that period of two months, the service shall, subject to any relief which the High Court may grant under section 17, be deemed to have commenced only on the date of the registration.

(3) ....."

Pausing here, I make the observation that the position would appear to be that a contract of pupilage must be in writing otherwise it cannot be lodged with the registrar and if not lodged within two months as required, service is deemed to have commenced only on the date of registration save for any relief this Court may grant. Failure to register at all would, therefore, seem to be fatal.

I now return to the facts. Although in his petition the petitioner refers to part completion of a pupilage with the Attorney-General, in a supplementary affidavit he states that more recently he has ascertained that no contract of pupilage was in fact registered by the then Acting Attorney-General and, having regard to the annexures to his affidavit, it appears that although a draft contract of pupilage was drawn up it was never signed either by the Acting Attorney-General or himself. The obstacles that lie in his path to admission are, therefore, the following. Firstly, although it may be assumed that it was intended that he should enter into a contract of pupilage with the Attorney-General and, perhaps, did in fact enter into an oral contract, no written contract was ever made. Secondly, in consequence of the foregoing no contract of pupilage was ever lodged with the registrar. Thirdly, in any event he never completed twelve months pupilage. Mr. Shilubane submits that all these obstacles can be overcome and I shall deal with his submissions and Mr. Wimalaratne's response thereto seriatum.

On the question of pupilage Mr Shilubane submits that nowhere in the Act is there an express requirement that the contract must be in writing. This is undoubtedly correct but, in my view there are two sound reasons for holding that such a

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contract must be in writing. The first and most compelling, and to which I have already alluded, is that such contract must be in writing for if it is not it cannot be lodged as required by section 21 (3). That subsection not only requires the contract to be lodged with the registrar but it requires that it shall be lodged in accordance with the provisions of section 11 and the proviso to subsection (1) of that section provides that no articles, and this must be taken to include contracts of pupilage, shall be accepted by the registrar for registration unless the articles have been duly endorsed by the Attorney-General that the provisions of section 10 of the Act have been complied with. The second reason is that it is plain from the language employed in section 21 that a contract of pupilage is akin to articles of clerkship and articles of clerkship are defined in section 2 of the Act as meaning:

"Contract in writing whereby a person is duly bound to serve an attorney ....."

Mr. Shilubane's next submission is made on the footing that the Act requires a contract of pupilage to be in writing. He argues that even if this be so this Court has power to waive such a requirement and additionally may grant relief under section 17 as to when service under the contract commenced. The general powers of this Court to grant relief to an articled clerk as set out in section 17 of the Act read as follows:

"17 (1) Where any person articled to an attorney has not served under the articles strictly in accordance with the provisions of this Act, the High Court, upon being satisfied that the irregular service was occasioned by sufficient cause, and that the service, though irregular, is substantially equivalent

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to regular service, and that the Attorney-General has had due notice of the application, may, subject to the provisions of the Schedule, at any time during the currency of the articles or, subject to sub-section (3), within two years of the completion of the articles, condone the irregular servive upon such conditions as it may deem fit and treat it as though the service in question had been regular and in conformity with the provisions of the Act.

(2) When any articled clerk wishes to absent himself from the office of the attorney to whom he is articled for any period exceeding six weeks in any one year, the High Court upon being satisfied that the contemplated absence is occasioned by sufficient cause, and that the Attorney-General and that attorney have had due notice of the application, may permit the articled clerk to absent himself from that office:

Provided that any time during which the articled clerk is so absent shall be added to the period for which the articled clerk is bound to serve under articles.

(3) The High Court may, on the application of any person made within two years from the date of the completion of his articles of clerkship referred to in section 7, allow such further period as it may deem fit after the expiration of two years from the completion of his articles of clerkship, within which the applicant may apply for admission as an attorney under section 6(c)(iv) and, if that further period is allowed, the

High Court may, in its discretion, impose such conditions as it may deem fit including a condition relating to the service of further articles.

(4) Where articles of clerkship are or have at any time been cancelled or abandoned before completion thereof, the Hign Court may, in its discretion, on the application of the person who served under those articles and subject to such conditions as the High Court may impose, order that, for the purposes of this Act, the whole or such part of the period served under those articles, as the High Court deems fit, be added to any period served by that person under articles entered into after the first mentioned articles were cancelled or abandoned, and any period so added shall, for the purposes of this Act, be deemed to have been served under the last-mentioned articles and continuously with any period served thereunder."

Mr. Shilubane bases his submission on subsection (1) and cites Ex parte Nupen 1924 TPD 259 in support of his contention that that subsection confers a very wide discretion on the Court. That case dealt with a section of a South African Act similar to section 17 of the Legal Practitioner's Act, 1964 and Mason J.P. said of the section that it undoubted conferred a wide discretion on the Court to grant relief. I respectfully agree. However, it seems to me clearly to be a prerequisite of relief that there has at very least been some kind of service under articles before the discretion can be exercised. In Ex parte Nupen (Supra), for example, articles were entered into but, due to a mistake. were not registered. The Court held that service under the unregistered articles was in fact service although not service strictly within the provisions of the statute. As the irregular service was occasioned by a mistake

and, except for the irregularity, was equivalent to regular service the Court granted relief. That, of course, is a far cry from the facts of the present case.

Another case relied upon by Mr. Shilubane is Ex parte Dwamena 234/84 (unreported) where the petitioner, a member of the English Bar, had worked in the Attorney-General's chambers as a Senior Crown Counsel for a continuous period of more than twelve months but had not entered into a formal contract of pupilage. Hassanali A. C. J. said:

"This in my view satisfies the requirements under section 7 of Act No.15 of 1964. Therefore the formal signing of contract of pupilage is hereby waived and the applicant's service in the chambers is deemed as service of the requisite Articles."

The learned Acting Chief Justice did not, however, indicate from where he considered he derived the power to "waive" the formal contract of pupilage or to "deem" the petitioner's service as Crown Counsel as being service under a contract of pupilage. In the later case of Ex parte Dlamini, (29/85)(unreported). Dunn A.J. declined to follow the decision in Ex parte Dwamena. He said he was unable to find any provision in the Legal Practitioner's Act which empowered the Court to waive the requirement for service

under articles under section 7 (1). He pointed out that "it cannot be argued that non-service under articles amounts to irregular service which the Court could condone under section 17".

Support for this view is to be found in many South African decisions. In Ex parte Grunow 1948 (3) S.A. 558 the petitioner had entered the service of a firm of attorneys with the object of being articled to one of the principals but for certain reasons

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did not sign articles until he had worked for the firm for a period of nine months. During this time he had been engaged in all the work normally done by an articled clerk and had received instruction in all aspects of legal practice. De Beer J. held that the Court was not empowered by the Act nor had it any discretion to recognise any form of service not performed under articles as defined by the Act, namely, "a contract in writing whereby any person is bound to serve an attorney for a specified period". The learned judge said:

"the discretion bestowed on the Court is there clearly confined to articles actually entered into and served under an attorney. This interpretation has been unambiguously and expressly applied in Ex-parte Jackson (1941 TPD 161), which was approved of in Ex-parte de Jager 1943 OPD 92 and in Ex-parte van Rooyen (1946, TPD 73)."

The decisions referred to were also approved in Ex-parte Davids 1957 (4) S.A. 152. In my respectful opinion, Dunn A.J. was correct in holding that relief cannot be granted under section 17 where there has been no service under articles or a written contract of pupilage and, accordingly, I reject Mr. Shilubane's second submission.

Next, Mr. Shilubane is contrained to fall back on the argument that the Court has inherent jurisdiction on all matters which come before it and that even if the petitioner has not complied with the requirements of the Act the Court, in the exercise of its inherent powers, can still admit him as an attorney if it is satisfied that he is suitably qualified. This appeared to me to be a bold proposition but Mr. Shilubane finds some support for it in Pesskin v The Incorporated Law Society 1966 (3) S.A. 719. In that case Claasen J. said at page 723:

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"It was argued that applicant's case may be a hard one and, although well-qualified, his case is not covered by the Act and he must therefore start articles de novo. If that were so and my interpretation of sub-section (4) be wrong, I think I would be prepared to assume jurisdiction under the inherent jurisdiction of the Supreme Court to come to the applicant's relief. This Court has inherent jurisdiction in all matters that come before it, unless its jurisdiction is specifically excluded (Connolly v Ferguson, 1909 T.S. 195 at p.198). This Court has wide powers over its own officers and potential officers. If a person has all the necessary professional and academic qualifications the Court may still decide not to admit him as an attorney. Similarly, I think, if this Court is of the opinion that a person is well-qualified to be admitted, but his case is not specifically covered by the existing legislation, I can see no reason why the Court should not assume jurisdiction and admit such an applicant. After all, the object of the legislation on this subject is to protect the public by not admitting unqualified persons. If a Case is brought before the Court of a well-qualified person, but his case is not covered in all respects by the legislation, the Court may assume jurisdiction."

In my respectful opinion, this passage must however, be read in the light of what was said by James J.P. in Naidoo v Incorporated Law Society, Natal 1972 (4) S.A. 660 at p.663, namely:

"It is true that the Court has an inherent power to regulate the conduct of practitioners and to prescribe the general lines upon which they are permitted to exercise the privileges conferred

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upon them. See Pienaar v Incorporated Law Society, 1902 T.S. at page 16; De Villiers and Another v Mclntyre, N.O. 1921 A.D. 425 at p.435.

It is however, equally true that if the Legislature has, in fact, laid down precise rules which must be complied with by any applicant seeking admission, the Court has no power to make an order which is in conflict with those rules. If any of the rules give the Court a discretion then the Court is free to exercise it, but where no discretion is conferred none can be exercised if it conflicts with the provisions of the statute.

Sec. 3 of Act 23 of 1934 is in unequivocal terms. It lays down that - "no person shall .... be admitted as an attorney ..... unless and until he has complied with the provisions of the Act". There can be no doubt, therefore, that the Legislature intended that applicants for admission should comply with the provisions of the Act and, in my view, no Court has power to override this requirement of the law by claiming to exercise an inherent jurisdiction".

The learned judge then set out those provisions of the South African legislation which deal with the admission of attorneys and concluded as follows:

"From a perusal of these sections it is, to my mind, clear that the Legislature laid down rules which had to be observed by an applicant seeking admission, that it gave the Court the right to exercise a discretion in certain specific cases but no right to exercise a general overriding discretion. Indeed the fact that a discretion was given in specific cases and in specific terms points

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to the Legislature intending that the Court was not entitled to exercise a general overriding discretion and I have no doubt that this is the true position. Accordingly an applicant is obliged to show that he has complied with the requirements of the Act, however liberally applied, and he cannot ask the Court to grant him relief if he has failed to do so."

In my view, these observations apply with equal force in the instant case. The Legislature has laid down in clear terms those matters upon which an applicant for admission as an attorney must satisfy the Court, including, service under articles or a contract of pupilage, has given the Court express power to grant relief in certain circumstances, and in my opinion, the Court is not empowered to cast aside those provisions and in the exercise of its inherent jurisdiction effectively rewrite the Statute. For the foregoing reason I am of the view that the petitioner's failure to enter into a written contract of pupilage is fatal to his application.

Dealing briefly with the second obstacle which lies in the petitioner's path to admission, namely the fact that no contract of pupilage was lodged with the registrar, I am of the opinion that this could have been overcome if a written contract of pupilage had been entered into and a proper application for condonation had been made under section 17. See Ex-parte Nupen (Supra). However, such application should have been brought within the time limits set out in section 17.

The last obstacle arises from the fact that assuming the petitioner had properly entered into a contract of pupilage he only served eight months thereof. Mr. Shilubane submits that despite the requirement in section 7 (1) and the Schedule that a person with the petitioner's qualifications should serve a one year

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pupilage the Court is empowered, in an appropriate case, to waive this requirement by virtue of the provisions of Section 17.

I confess to having great difficulty with this submission. Sub-section 1 of section 17 deals with irregular service and empowers the Court to treat the irregular service as being regular. However, in the present case, assuming the petitioner had surmounted the other obstacles, the service was not irregular but incomplete. There was, in other words, no irregular service which can be treated as regular service in

terms of the section. Subsection 4 is more opposite because it deals with articles of clerkship which have been cancelled or abandoned before completion, which is what happened in the case of the petitioner, but this subsection only empowers the Court to order that the whole or part of those abandoned or incomplete articles be added to any period of articles entered into after the first articles. It does not empower the Court to substitute for the period incompleted other forms of legal experience or training. In my view, therefore, the petititioner can find no remedy for his difficulty in section 17.

Lastly, Mr. Shilubane invites the Court to take a robust view of the matter and, taking account of the fact that the petitioner served eight months pupilage (this being on the assumption that the Court were to find in his favour on the other submissions) and has held the office of Master of the High Court for two of the five years referred to in section 7 (3), to hold that the petitioner has sufficient training and experience so as to fit him to carry on his proposed profession of attorney. There are attractions in taking such a view and clearly this line of approach appealed to Hassanali J. in Ex-parte Dwamena (Supra). But, as I have said, I am of the opinion that the Court is bound by the provisions of the Act and has no power to override the intention of the Legislature as expressed in those provisions.

For the foregoing reasons, I do not consider that the petitioner has made out a case to be admitted as an attorney and the application is accordingly dismissed.

N.R. HANNAH

CHIEF JUSTICE