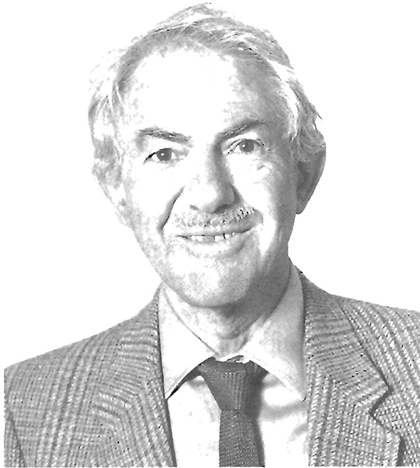
The legitimate expectations of a candidate taking the Bar examination

Ronnie Selvan SC
Johannesburg Bar



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Mkwentla v The General Council of the Bar of South Africa (unreported judgment, WLD, case no 95/02253) WLD 1995 and *Matime v General Council of the Bar & Others* (unreported judgment, WLD, case no 97/30282) 24 February 1998 WLD

IN the year 1980, some seven years after the institution of the system of pupillage by the General Council of the Bar ("the GCB") the National Bar Examination was introduced. This innovation did not meet with the wholehearted approval of those about to undertake pupillage at the time, some of whom regarded it as a capricious introduction by the authorities of a new hazard in the way of their attaining membership of one of the constituent Bars. By now the Bar examinations are accepted with the same stoicism that is required to meet life's other vicissitudes, but as the above two cases demonstrate, not every examination candidate is resigned to the results.

Matime

In the more recent case, that of Matime, on his fifth attempt the applicant failed Criminal Procedure and Evidence, attaining a mark of 48%. He was invited to attend an oral examination where the mark afforded him was 35%. So he failed the examination.

His application for an order setting aside the result of the examination, which came before Eloff JP, failed for a number of reasons. Firstly, it was held by the Judge President that the decision by the National Bar Examination Board was not reviewable. It was not a body fulfilling an administrative or quasi judicial function. While the learned judge did not rule out the possibility that this notwithstanding the applicant may have had a contractual right to be dealt with fairly, no basis was laid for such contention in the founding affidavit and in argument the applicant did not rely upon any contractual claim.

Secodly, it was found that the applicant did not succeed in showing that his version of what took place at the oral examination was correct. For understandable reasons – the application was brought nearly a year after the date of the examination – the examiners could not be expected to have a clear recollection of the oral examination of one candidate among many: but two of the examiners who filed affidavits had a recollection that the applicant fared poorly and deposed that if he had answered the questions in the manner set out in his founding affidavit, he would have received a better mark. Thirdly, the judge considered that the extent of the delay in bringing the application was such that on that ground alone, it was fatal to his prospects of success.

Mkwentla

In *Mkwentla* the applicant essayed to have set aside his failure in the written examinations in the subjects of motion court practice and procedure, legal writing and criminal procedure and evidence. The presiding judge, Zulman J (as he then was), held that there was much substance in the point made by counsel for the GCB that '... "the correct jurisprudential niche" of the applicant's complaints does not lie in review but rather lies in contract involving the contention that an implied or tacit term of the contract has been breached', as in such cases as *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645-6. This was because the GCB is a voluntary association without a statutory foundation which does not exercise monopolistic control over the advocates' profession and although it may perform a public service, it does not discharge public duties or exercise public powers. Nonetheless, the judge assumed in favour of the applicant without deciding the point that the court indeed had jurisdiction to review the decision of the examiners. On that assumption he considered that the test as to whether the court would interfere was not whether the examiners and the applicant were merely wrong without being grossly wrong, but whether objectively viewed, there could be attributed to the examiners' 'legal misconduct' within the meaning of the tests formulated in a case such as *Dickenson & Brown v Fishers Executors* 1915 AD 166 and discussed in *Hyperchemicals International (Pty) Limited & Another v Maybaker Agcrichem (Pty) Ltd & Another* 1992 (1) SA 98 (W) at 94F-100D.

After an excursus in the course whereof he succinctly set out the history of the Bar examination, what papers are set and the standards required, the judge came to the conclusion that the examiners were perfectly correct in the way in which they marked the applicant's papers and that their mark allocation could not be reasonably assailed in any respect. To illustrate his conclusion, the judge gave the example of the answers by the applicant to one question in each of the three papers. From such examples it was evident that in the words of the judge >

'... the Applicant failed for the single reason that he did not deserve to pass'.

From the judgment in *Mkwentla's* case it may be concluded that probably a candidate who fails in an examination set by the National Examination Board constituted by the GCB does not have the right to ask the court to review the decision of examiners appointed by the National Bar Examination Board constituted by the GCB, but that if there is such a jurisdiction, the test to be applied is the same as that applicable to the decision of an arbitrator, namely whether the examiners have been guilty of legal misconduct or worse. However, it seems that Zulman J would have been prepared to approach the matter on the basis that candidates could ask for the court's intervention on the grounds of breach of an implied or tacit term of a contract; and it is not to be inferred from the judgment of Eloff JP in *Matime's* case that he would have held that the court had no jurisdiction to consider the applicant's complaints if the applicant had made out a case of breach of contract.

Whether, if the questions are approached on the basis of breach of contract the test is any different from that applied in *Mkwentla's* case is to be doubted. See *Blacker v University of Cape Town & Another* 1993 (4) SA 402 (C) at 407E-F. However, it may well be that if denied the inquisitorial features of a review an aggrieved candidate would not make out even a *prima facie* case.

A regrettable feature in *Mkwentla's* case and to a lesser degree in *Matime's* case is that the Applicant attributed to the examiners racial bias. Mkwentla alleged in his founding affidavit that the examiners, the moderators, the National Bar Examination Board and the General Council of the Bar were actuated by improper purposes in failing him, namely:

"(a) to foster racial discrimination;

(b) to prevent me from practising my chosen profession."

That charge was rejected by the judge who said:

"In my view it is particularly important in the South Africa of today to have regard to the following statements contained in the affidavit of Mr Wallis SC in answer to the scurrilous allegations contained in the concluding paragraphs of the applicant's founding affidavit. They are the following:

'The allegations contained in paragraphs 19, 20, 21, 22 and 23 of the founding affidavit are:

(a) entirely lacking in any factual foundation;

(b) utterly scandalous and outrageous;

(c) deliberately and wilfully insulting in regard to the examiners and moderators, the members of the National Bar Examination Board and the Respondent.'

I wish to deal briefly and separately with the question of alleged racial discrimination in view of its extreme sensitivity at this time of South Africa's history.

The Respondent does not classify or categorise its members by race or gender and it regards it as abhorrent to do so.

In the examination in question 98 candidates wrote the examination of whom 26 failed and one withdrew. Whilst we do not ask candidates their race and keep no record of it, I am able to say that amongst those who passed there were a number of black candidates and amongst those who failed where were a number of white candidates.

Indeed, insofar as I have been able to ascertain on enquiry in the two National Bar Examinations which the Applicant has written and failed it appears that some 23 black candidates passed the examination and some 52 white candidates failed.

There are a number of members of the Bar who are black and this number is growing which I and my Executive regard as a healthy and desirable feature in South Africa.

I utterly reject the suggestion that the examiners or moderators are in any way influenced by racial factors in performing their tasks and submit that it is a most improper slur for the Applicant to have cast on the individuals concerned.

The Applicant refers in paragraph 20.2 of his founding affidavit to his political history entirely ignoring the fact that these matters would have been completely unknown to the examiners, the moderators and the other members of the National Bar Examination Board and the Respondent. How he can suggest that they were taken into account to "oppress him" is beyond me.

In regard to the claim advanced in paragraph 22 of the Applicant's affidavit there is of course nothing in law to prevent him from practising as an advocate outside the Bar as indeed some advocates choose to do.

The suggestion that any member of the Bar or indeed any of the examiners of the National Bar Examination Board would fear, or have any reason to fear, competition from the Applicant or would use the Bar examination as an instrument either of exclusion or of oppression is fantastical.

The nature of the allegations made by the Applicant is such that in my respectful submission they justify a special order for costs being made against him.

I am in full agreement with the argument of Mr Kuper SC to the effect that the "vituperative attack launched on the examiners and moderators" of the GCB are baseless and that the allegations of improper purpose and in particular racial discrimination are unsubstantiated. Furthermore the reliance upon the applicant's political background is irrelevant, fails to establish racial discrimination, refers to facts which would, rightly have been unknown to the examiners or moderators and the allegation of bias in a form of pecuniary interest is of no substance.

In my view and more particularly because of the aforementioned attack upon the examiners and moderators of the GCB I believe that the application should not only be dismissed with costs but that an order for costs so as to include costs of two counsel is warranted in the circumstances. I believe that the GCB was fully justified in instructing one of its senior members to represent it together with junior counsel in these proceedings involving a most serious and totally unwarranted attack upon it."

In *Matime* the assertion of racial prejudice, raised by the applicant for the first time in his replying affidavit, was held to be irrelevant and not to be founded on reality. The examination panel consisted of a High Court judge who was chairman and three advocates of whom two were senior counsel. Also present, as is customary, were two members of the Bar who sat as observers. Of them the Judge President said -

'The four examiners and two observers are honourable persons, who bear the applicant no ill will. Their skill and integrity is beyond doubt.'