Gate-keeping the Noble Profession: The Unjustifiable Obstacles to Practicing Law in South Africa as a foreigner

Description

Becoming a lawyer is no easy task. The path is riddled with land mines at every turn. Whether it be getting a law degree, finding articles of clerkship, writing board exams or building a portfolio as an attorney/advocate, there are many challenges that one faces when embarking on this journey. There is however no greater obstacle to entry into this noble profession for non-South Africans in particular than the requirements for admission laid down in section 24 of the Legal Practice Act. In terms of this section, one can only be enrolled as a legal practitioner in South Africa if they are either a South African citizen or permanent resident. In other words, if you do not fall into either of those categories, you cannot enroll or practice as a lawyer in South Africa. An important case dealing with the constitutionality of such requirements recently graced the steps of the South African Constitutional Court. This case was *TM obo MM v Member of the Executive Council for Health and Social Development* *CCT* 270/21. While we wait for the outcome of what would potentially be a landmark judgment, I felt it necessary to share why, in my opinion, the obstacles put before non-South Africans who seek to become and practice as lawyers in South Africa are overly-burdensome and unjustifiable. Further, to canvass possible solutions to the problem.

THE BURDEN OF ADMISSION

The primary reason why the requirement that aspiring legal practitioners must be a South African citizen or permanent resident is unjustifiable is because, simply put, it is unnecessary. It effectively functions as a straw that breaks the camelâ??s back. It provides the icing on a cake that is already a burdensome, nearly impossible process for non-South Africans to be able to practice law in South Africa.

To understand why, letâ??s assume we lived in a world where such a requirement did not exist. This would mean that, in theory, any foreigner would be able to come to South Africa, get a law degree, do their articles of clerkship, and apply for admission as a legal practitioner in South Africa. They would be able to become an associate at a law firm, or join a chambers of their choice as

an advocate. Some may argue that this would effectively mean that South Africans would now be competing with foreigners in a saturated market. As a result, this may add to and compound the unemployment issues plaguing South Africa. Further, this may make the lives of clients difficult if said foreign lawyer suddenly lost their right to live and work in South Africa or ran off back to their home country. At first blush, this kind of reasoning may seem sensible and logical. Not so.

We need to differentiate between the admission/enrollment of foreign legal practitioners and the employment of said foreign legal practitioners. It may well be the case that if the citizenship/permanent residency requirement were to be removed, South Africa may see an influx of newly admitted legal practitioners who are non-South Africans. However, what is unlikely is South Africa also then receiving an influx of newly employed non-South African legal practitioners. The reason for this is simple: work permits.

The requirements for a foreigner to obtain a work permit in South Africa are onerous. Equally so are the corresponding requirements imposed on South African employers seeking to employ a foreigner. Law is not a critical skill. Therefore, aspirant lawyers must take the dreaded work permit route to obtaining employment in South Africa. The Immigration Act sets out the requirements for obtaining a work permit. Among them is the requirement that the employer must prove to the Department of Labour that â??despite diligent search he or she has been unable to employ a person in the Republic with qualifications equivalent to those of the applicantâ?•. In other words, a law firm cannot employ a foreigner when there are other equally deserving South Africans vying for the job. For example, imagine a non-South African law student who graduated with an LLB cum laude, had done vacation work for a prestigious law firm, did a semester at the law clinic, won several moot court competitions, and was an editor for a law review journal. In the most likely of circumstances, they would not be able to get employed by a law firm because of the work permit requirements. Even if they added a masters degree on top of that they would probably not get the job either. The legal market is a fiercely competitive market, and there are numerous South Africans graduating from law school with similar, if not better, qualifications.

Statistics published by the Law Society indicate that in 2018, there were 5,185 graduates from the class of 2017, and there were 6,585 final year students enrolled in South African universities. Despite there being 5,185 graduates from the class of 2017, only 2,863 articles of clerkship were registered. Further, only 280 pupils were registered. Letâ??s not forget that it is not only LLB graduates from 2017 vying for those jobs, but also graduates from 2016 and below, masters students, and people who did not go directly into practice after graduating and went to go work elsewhere. What this means is that of those students who graduated in 2017, it is likely that less than 55% of them went on to become candidate attorneys, and less than 5% of them went on to do pupillage at an advocateâ??s chambers. Now that number may vary given that not all law graduates desire to go into practice after graduating, but nevertheless, it is statistically sufficient enough to prove the point that the legal sector is fiercely competitive. Aspirant lawyers need to do much more than the bare minimum in order to get a job.

Consequently, if it is the case that the legal market is fiercely competitive, and further that thousands of South Africans are struggling to get articles of clerkship and pupillage, then

how much more difficult would it be for non-South Africans? Probably close to impossible. The work permit requirements are clear. The obligations placed on employers before employing a foreigner are clear. In addition to this, the waiting period for a work permit can vary depending on several circumstances. What is the likelihood that, when faced with a non-South African who may very well be better qualified than all of their counterparts, an employer would be willing to push through all the obstacles they would face in employing said foreigner?

Further, if it is the case that very few non-South Africans would get the candidate attorney position or pupillage, the logical conclusion would be that fewer foreigners would be admitted as legal practitioners in South Africa nevertheless. One of the requirements of admission in terms of s26 of the Legal Practice Act is that the aspirant lawyer must undergo practical vocational training. This translates into the 2 year candidate attorney program and the 1 year pupillage program offered by law firms and advocatesâ?? chambers respectively. They must also write certain exams during this period. If a non-South African cannot do that, then they cannot be admitted. They may perhaps be able to return to their home country and do it, but even then they are met with various obstacles in getting their training validly recognized for the purposes of admission. Further, even if they are one of the lucky few who get admitted, they then meet the final boss: the work permit. Even those non-South Africans who become candidate attorneys and pupils are not fully out of the clear yet, because they still have to get a job afterwards. These clerkship and pupillage positions do not guarantee that they will get a job as an associate at the firm or be accepted into that chambers as an advocate afterwards. If not, they will then have to look for a job again, and go through the work permit process again. The end result is that the number of foreigners practicing law in South Africa will only dwindle over the years.

What I have shown above is that even without the citizenship/permanent residency requirement, it is very much unlikely that non-South Africans will have a major effect on unemployment rates of South Africans, particularly in the legal sector. Very little will be achieved in keeping the requirement when compared to removing it. The requirement should be removed to make the lives of those foreigners who somehow manage to leap over all of the obstacles I have explained much easier. Very few would be negatively impacted by that move, if any.

THE EXCLUSION OF IMPORTANT CATEGORIES OF NON-CITIZENS

There is however another reason to remove the citizenship/permanent residency requirement. This requirement negatively affects those whose status in South Africa closely resembles permanent residency. Their stay in South Africa may well be described as permanent, barring the actual title of â??permanent residentâ?• and the visa that accompanies it. This includes refugees and asylum seekers, and people who are on a spousal visa. It also includes people who have been on a work visa for more than 5 years, but their applications for permanent residency are taking much longer than expected. It has been reported that an application for permanent residency can actually take years to get a decision. The same can be said for persons on a spousal visa trying to get permanent residency as well.

The effect on this group of persons is clear. If one flees their country because of an ever

existent dangerous threat on their lives or because of war, they would need to make a livelihood in the countries they have fled to. Imagine that person was a prominent civil rights lawyer in their country of origin who had to deal with several assassination attempts on their life. They would have no choice but to flee to a safe location. If they fled to South Africa and were granted asylum seeker status, how would they make a living in South Africa? It may be possible that they would find non-legal jobs or a job at an NGO that may be able to sustain their lifestyle and that of their family, but there is no valid reason to deny them the opportunity to do what they have been doing for years to the benefit of ordinary South Africans.

The same would apply to someone who fell in love with a South African and moved to South Africa with them, or met them during their studies in South Africa. Itâ??s not always the case that their significant other would be able to leave their home in South Africa and follow them to their country of origin and be able to find a sustainable job. Spousal visa processes might take a long time. Permanent residency processes might take a long time. If a South Africanâ??s spouse has the skills and qualifications to be admitted as a legal practitioner in South Africa and be able to practice, then there is no valid reason to deny them that opportunity.

THE WAY FORWARD

Various suggestions for how to remedy the citizenship/permanent residency requirement were made during the Constitutional Court hearing. One particularly interesting suggestion involved replacing the requirement with a new one that required aspirant lawyers to â??have a right to live and work in South Africaâ?•. There are potential issues with this approach. For example, one can imagine a situation where someone graduates with a law degree, gets accepted for articles of clerkship, writes the board exams and passes, but at the end of the program fails to be retained in the same firm where he worked as a candidate attorney. That person, under this suggested rule, is unable to be admitted as a legal practitioner because they no longer have a right to live and work in South Africa since their work permit expired. Work permits are only valid for the duration of the employment they were offered.
What then becomes of this person? Life would be much easier for them if they could get admitted while on any other visa that allows them to be able to live in South Africa for a specified period of time, get admitted as a legal practitioner, and then be able to look for a job afterwards. Even if they fail, at least they can go elsewhere and follow a path trodden by those who are qualified lawyers in other jurisdictions. There are countries that have provided such pathways.

My point is this: there should be no residency requirement at all for admission as a legal practitioner. This would not open the floodgates to foreigners practicing and being employed as such in South Africa for the reasons I have outlined above. This is arguably an extreme position, so it would be understandable if the Constitutional Court took the position that the person must have a right to live and work in South Africa. My only concern is what this requirement would do to the outliers who find themselves without such a right due to circumstances beyond their control.

Nevertheless, what is beyond a doubt is that the citizenship/permanent residency

requirement is unduly onerous and unnecessary. Whatever aims are behind it may easily be accomplished by the already existing framework of immigration requirements for foreigners to be able to work in South Africa. Furthermore, the requirement excludes persons whose status in South Africa very closely resembles permanent residency.

Conclusively, many injustices will be committed by the continued existence of this requirement. It must be removed.

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Author
mufudzi