Delivered J/ment on 11/11/14

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG: PRETORIA

(1) REPORTABLE: ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: YES

18/10/14
DATE

SIGNATURE

CASE NO: 54065/2012

11/11/2014

In the matter between:

S.N.J. LETHLAKA **APPLICANT**

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES **RESPONDENT**

JUDGEMENT

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1. This is an application by the applicant for his readmission and enrolment as an attorney. The application was opposed by the respondent, the Law Society of the Northern Provinces (the Law Society). The applicant was admitted and enrolled as an attorney of this court on 11 May 2004. On 17 June 2010 and on the application of the Law Society, the applicant's name was struck from the roll of attorneys.

2. In striking the applicant's name from the roll of attorneys, Ebersohn AJ (as he then was), sitting with Matojane J, inter alia, found the following:

2.1. The applicant last filed his rule 70 certificate regarding his trust account for the year ending 28 February 2006. For the years 2007, 2008, 2009 and 2010 he had failed to file the required certificate with the Law Society.

2.2. For all the aforesaid years the applicant was practising without a Fidelity Fund certificate.

2.3. The aforesaid was a contravention of the provisions of, inter alia, rule 70 and rule 89.11 of the Rules of the Law Society and constituted unprofessional, dishonourable and unworthy conduct. For these contraventions the applicant appeared before a disciplinary committee of the Law Society and pleaded guilty to the charges against him. A fine in the amount of R 3 000, 00 was imposed upon the applicant which fine was suspended for a period of three years on condition that the applicant was not found guilty of a similar charge during the period of suspension. However, the applicant simply continued to practice as an attorney without a Fidelity Fund certificate. At the time of the launching of the application to strike the applicant off the roll of attorneys, he was still practising without a Fidelity Fund certificate and has still not filed the Rule 70 auditor's reports.

2.4. The applicant did not keep proper accounting records in accordance with section 78(4) read with Rules 68.1 and 68.2. Furthermore, there was no proper system for the transfer of fees in contravention of Rule 69.3.3. The transfers from the trust

bank account were not deposited in the business bank account as required by rule 69.5.

2.5. The applicant withdrew funds from his trust banking account by way of a bank card. This constituted a contravention of Rule 69.5. I should mention at this junction that in respect of this issue Ebersohn AJ noted in his judgement that apart from admitting these facts to the auditor appointed by the Law Society to investigate the books of the applicant, the applicant also admitted same during argument before the court. Ebersohn AJ consequently found the applicant's denial in his answering affidavit that he contravened Rule 69.5 to be untrue and without substance. I shall refer to this issue again below.

2.6. The applicant explained his failure to submit Rule 70 auditor's reports by stating that he could not afford to pay an auditor to do the work unless they have been paid up-front. The court found this to be no excuse to not comply with the said requirement.

2.7. The court found that the applicant suffered from a lack of insight as to the seriousness and unacceptability of his conduct. Also that he has shown to have no respect for his professional body and that his allegations regarding the Law Society, by, inter alia, accusing them of being corrupt, were contemptuous in the extreme, without merit and inappropriate.

2.8. The court also found that the applicant had persisted for several years to practice as an attorney whilst willfully transgressing the Rules of the Law Society and the applicable legislation.

2.9. The court found that in the light of the serious transgressions committed by the applicant and also the scandalous allegations made against the Law Society in his affidavit, it was clear that the applicant was not a fit and proper person to continue to practice as an attorney.

2.10. Regarding the question whether the applicant should merely be suspended from practice for a few years, the court found that there was no proof before the court that the applicant would rehabilitate himself within any period of suspension. Consequently the applicant could not be suspended from practice and the public could not be placed at risk.

3. Subsequent to the court striking the applicant off the roll, he brought an application for leave to appeal against the order. That application was heard on 10 August 2010. On 20 August 2010 the court dismissed the application and delivered a written judgement which was attached to the Law Society's answering affidavit in the present proceedings. The applicant relied on, inter alia, the following grounds set out in his application for leave to appeal:

3.1. That the court erred in finding that he was not a fit and proper person to continue practising as an attorney by virtue of having referred to the Law Society as being corrupt, whilst that fact had been fully substantiated;

3.2. that the applicant had submitted proof that he did not withdraw cash from his trust account and that the transfers into his business account were reflected in the bank statements;

3.3. that the Law Society is not allowed, in terms of the Attorneys Act, to prefer one legal practitioner to the exclusion of another of a different nationality as same would be in violation of the Constitution Act, 108 of 1996.

3.4. that the Law Society's application to remove him from the roll of practising attorneys was done with the purpose of silencing him permanently because he had reported "the Council members' deviant conduct", which complaint was dismissed by the Law Society without providing the applicant with proof of the reaction of the attorneys concerned to his complaint.

4. The following submissions of the applicant made from the bar, were also considered by the court in the aforesaid application:

4.1. That the Law Society acted in a corrupt fashion.

4.2. That he lost an attack against the attorneys firm of Rooth and Wessels who had acted in a manner unworthy of attorneys.

4.3. That the Law Society and Rooth and Wessels committed gross acts of discrimination.

4.4. That a second property was sold in execution without a court order. This allegation related to an allegation made by the applicant in a complaint against Rooth and Wessels. I shall refer to this issue again below.

4.5. That the Law Society deliberately neglected its duty in the matter.

4.6. That the Law Society acted contrary to the Constitution and that the applicant therefore had the right to appeal directly to the Constitutional Court.

5. The court stated that it gave serious consideration to all the aforesaid aspects but could find no merit in any of the grounds mentioned in the notice of application, the heads of argument filed by the applicant or his address before court. The court consequently dismissed the application for leave to appeal.

6. The applicant thereupon brought an application to set aside the original order striking him from the roll of attorneys and also for leave to appeal to the Constitutional Court. That application was enrolled for hearing on 10 December 2010 but the court struck the application from the roll with costs due to the fact that the applicant and/or his legal representative failed to appear at the hearing of the application.

7. The applicant then launched a new application for leave to appeal to the Constitutional Court and an application for condonation. The application for condonation was granted at the application for leave to appeal was dismissed by the Constitutional Court on 30 August 2011.

8. On 17 September 2012 the applicant served the current application for his readmission as an attorney on the Law Society. The Law Society opposed the application. During June 2013 the applicant filed a supplementary founding affidavit.

9. In the original founding affidavit the applicant referred to the fact that the Law Society had appointed Mr AT van Rooyen to investigate his financial records. He said that he provided Mr van Rooyen with the bank records of his business account as well as his trust account. He stated that the findings contained in the

report compiled by Mr van Rooyen constituted the sole grounds for striking him from the roll of attorneys. The applicant then stated that Mr van Rooyen had incorrectly stated in his report that he had withdrawn cash from his trust account by using a bank card. He stated that he had only withdrawn cash from his business account.

10. The applicant furthermore stated that he did not appeal the decision to strike him from the roll as he did not have sufficient funds to do so.

11. Then, lastly, the applicant stated the reasons why he should be readmitted as an attorney. He said that he will bring to the attention of the Law Society "knowledge of the status of the trust account at the end of every financial year to prevent suspicion of wrongdoing relating thereto instead of client's fund." (sic) He further stated that his trust account was relatively dormant and money paid into it was for services already rendered and for liabilities already incurred on behalf of "the" client. Lastly the applicant stated that he has "a duty to observe the provisions of the Rules of the Law Society and the Attorneys Act regarding financial disclosure and reporting according to generally accepted accounting practices without exception".

12. In the supplementary founding affidavit the applicant referred to a letter written to him by the Law Society subsequent to them receiving the application for readmission. It is not necessary to refer to the letter of the Law Society in any detail. Broadly speaking the Law Society in that letter informed the applicant that his application for readmission does not make out a proper case for readmission

and several of what the Law Society regarded as shortcomings, were identified. The Law Society advised the applicant to address those issues.

13. In the supplementary founding affidavit the applicant, however, failed to address the issues mentioned by the Law Society. Instead, he took the view that the contents of the letter echoes the prejudice of the Law Society by incorrectly resolving to have his name removed from the roll of attorneys since the decision was based solely on Mr van Rooyen's "false report" regarding the manner in which he conducted his trust account. In this regard he referred to the fact that Mr van Rooyen stated that he had made cash withdrawals from the trust account while in truth it was from the business account.

14. In this regard the applicant, however, failed to present any concrete evidence rebutting the original findings and reasons therefore, which were contained in the report of Mr van Rooyen. Secondly, the applicant also failed to explain his admission in this regard during argument in the court when the original application for his striking off was heard, as was mentioned in the judgement of that court.

15. The applicant went further in his supplementary founding affidavit to refer to his complaints to the Law Society against the firms of Rooth and Wessels and Findlay and Niemeyer Incorporated. The applicant referred to three or four litigation matters in which he apparently represented one of the parties and the other two firms, the other parties. It is not possible to establish exactly what the facts of the disputes between the applicant, on the one hand, and the other two firms, on the other hand, are. The letter of complaint which the applicant apparently wrote to the

Law Society, is for the most, illegible. The response by the Law Society, which is contained in a letter dated 21 November 2007, noted, inter alia, that the powers of the Law Society are of a disciplinary nature and that they cannot intervene on the applicant's behalf. It was also noted that they found no prima facie evidence that the attorneys had made themselves guilty of unprofessional conduct.

16. What is important is that the applicant then went ahead by stating the following in paragraph 5 of his supplementary founding affidavit:

> "5. Notwithstanding the aforesaid copies of evidence against Rooth and Wessels Incorporated and Findlay and Niemeyer Incorporated denoting guilt on their part in terms of Prevention of Organised Crime Act 121 of 1998, respondent has left them to retain those benefits unlawfully acquired. Respondent is guilty in terms of Section 34 of Prevention and Combating of Corrupt Activities Act 12 of 2004 and unconstitutional. Rooth and Wessels Incorporated and Findlay and Niemeyer Incorporated are still practising as attorneys notwithstanding their involvement in organised crime with the knowledge of respondent and contrary to Attorneys Act 53 of 1979". (sic)

17. In paragraph 6 of his supplementary founding affidavit the applicant admitted that he had applied for leave to appeal. This was something which he had denied in his original founding affidavit. The applicant stated that he applied for leave to appeal "as there is evidence of bias against me by the respondent in favour of a clearly criminal conduct of Rooth and Wessels Incorporated and Findlay and Niemeyer Incorporated".

18. The applicant then accused the Law Society of discriminating against him and added that he should have been exempted in terms of Ruled 70 (7) to submit an auditor's report as his trust account had been dormant and inactive.

19. Lastly, the applicant stated that if he were to be re-enrolled as an attorney, he would not practice for his own account but would serve the Legal Aid Justice Centres or the University Law Clinics.

20. It is also necessary to briefly refer to the contents of the applicant's replying affidavit. The applicant continued to refer to the Law Society's conduct as "deviant". He also accused the Law Society of shielding its attorney of record, being Rooth and Wessels, "from guilt in terms of Prevention and Combating of Corrupt Activities Act 12 of 2004". The applicant again made reference to the litigation matters referred to before but it is still not clear what the facts of those matters were. What does appear is that in that matter the client of Rooth and Wessels apparently obtained a court order, inter alia, in respect of costs against the client of the applicant. The applicant then described the taxing of the Bill of costs as constituting the "proceeds of crime". Whatever the facts of those matters, it clearly has no relevance in respect of the question as to whether the applicant is a fit and proper person to practice as an attorney. If anything, the manner in which the applicant approached those issues as well as the nature of the unrestrained language used in describing the conduct of an attorney's firm and that of the Law Society, shows that the applicant lacks some of the important qualities expected of a practising attorney.

21. In his replying affidavit the applicant then baldly and without any factual basis denied most if not all of the allegations which were originally made against him and upon which the court based its order to strike him from the roll. The applicant went further and accused the law society of denying him protection and being biased and not applying their minds to the facts in considering, inter alia, the report of Mr van Rooyen. He accused the Law Society of corrupt conduct and retaining the "proceeds of crime" which he said amounted to racketeering in terms of the Prevention of Organised Crime Act. He again accused the attorneys firms of racketeering since they are knowingly benefiting from the proceeds of crime and he accused the Law Society of being corrupt in protecting the attorneys firms.

22. It also appears from the replying affidavit that in answer to the Law Society's submission that the applicant failed to deal with the reasons why he was struck off the roll, the applicant says that he did not do so because he does not want to practice as an attorney for his own account. He merely wants to serve the Legal Aid Clinics and the Justice Centres. He also stated that he will demonstrate his capacity to be of service to his clients once he is re-enrolled as an attorney.

23. Lastly, and regarding his failure to comply with Rule 70, he accused the Law Society of not being unbiased towards him since they could and should have facilitated him with an application for exemption in terms of Rule 70(7).

The Attorneys Act

24. The Attorneys Act, Act 53 of 1979 ("the Act"), makes provision in section 15 for, inter alia, the readmission of attorneys. Section 15 (3) provides as follows:

"15(3) A court may, on application made in accordance with this Act, readmit and re-enrol any person who was previously admitted and enrolled as an attorney and has been removed from or struck off the roll, as an attorney, if-

(a) such person, in the discretion of the court, is a fit and proper person to be so readmitted and re-enrolled; and

(b) the court is satisfied that he has complied with the provisions of subsection (1) (b) (ii)."

Subsection (1)(b)(ii) is not relevant for present purposes.

25. Section 16 of the Act contains further requirements for, inter alia, a readmission, as follows:

"16 Duty of applicant for admission or readmission and enrolment as attorney to society:

Any person who applies to the court to be admitted or readmitted and enrolled as an attorney, shall satisfy the society of the province wherein he so applies-

(a) that he is a fit and proper person to be so admitted or readmitted and enrolled;

(b) if he has at any time been admitted as an advocate, that his name was subsequently removed from the roll of advocates on his own application; and

(c) if he is a person exempted from service under articles in terms of section 13 (1), that he is still entitled to practise and that his name is still on the roll of solicitors or attorneys of the country or territory referred to in that section, and that no proceedings to have him struck off the roll or suspended from practice are pending;

(d) if his estate has at any time been sequestrated, whether provisionally or finally, that despite such sequestration he is a fit and proper person to be so admitted or readmitted and enrolled."

26. Section 15 and 16 consequently requires an applicant for readmission to, inter alia, prove to the court that he/she is a fit and proper person to be so readmitted and enrolled. A court hearing such an application has to exercise its discretion based on the evidence before it. In **Swartzberg v Law Society, Northern Provinces** 2008 (5) SA 322 (SCA) in paragraphs [14] and [15] the Supreme Court of Appeal found that where a person who has previously been struck off the roll of attorneys on the ground that he was not a fit and proper person to continue to practise as an attorney, applies for his readmission, the onus is on him to convince the Court on a balance of probabilities that there has been a genuine, complete and permanent reformation on his part; that the defect of character or attitude which led to his being adjudged not fit and proper no longer exists; and that, if he is re-admitted he will in future conduct himself as an honourable member of the profession and will be someone who can be trusted to carry out the duties of an attorney in a satisfactory way as far as members of the public are concerned. See also **Law Society, Transvaal v Behrman** 1981 (4) SA 538 (A) per Corbett JA at 557B - C. Furthermore that, in considering whether the onus has been discharged the court must have regard to the nature and degree of the conduct which occasioned the applicant's removal from the roll; to the explanation, if any, afforded by him for such conduct which might, inter alia, mitigate or perhaps even aggravate the heinousness of his offence; to his actions in regard to an enquiry into his conduct and proceedings consequent thereon to secure his removal; to the lapse of time between his removal and his application for reinstatement; to his activities subsequent to removal; to the expression of contrition by him and its genuineness;

and to his efforts at repairing the harm which his conduct may have occasioned to others. See also **Kudo v Cape Law Society** 1972 (4) SA 342 (C) at 345H - 346A, as quoted with approval in Behrman at 557E.

27. Regarding the role of the Court and more particularly the discretion it has to exercise, the following was said in **Ex parte Aarons (Law Society Transvaal, Intervening)** 1985 (3) SA 286 (T) at 290C - G:

> "The amendment effected by Act 108 of 1984 to s 15 of Act 53 of 1979 has unquestionably in my view now conferred a discretion on the Court in deciding whether an applicant, whether for admission or re-admission as an attorney, is a 'fit and proper person'. Section 15(1), dealing with an admission, expressly provides that the Court has a discretion to decide whether the person applying 'is a fit and proper person to be so re-admitted and re-enrolled'. Section 15(3) deals specifically with re-admissions. A discretion in deciding whether an applicant is a 'fit and proper person to be so re-admitted and re-enrolled' is now expressly conferred on the Court. It is also significant that, whereas s 15(1) provides that a Court 'shall' admit and enrol a person as an attorney if the preconditions of ss (a) and (b) are fulfilled, ss (3) provides that a Court 'may' 're-admit and re-enrol any person who was previously admitted and enrolled as an attorney and has been removed from or struck off the roll, as an attorney' if the preconditions of ss (a) and (b) are fulfilled. The fact that the word 'may' is used in s 15(3), whereas 'shall' is used in ss (1) is . . . significant. It shows . . . that the Legislature wanted to differentiate between the Court's functions under ss 15(1) and 15(3), and wished to confer a further discretion on the Court in regard to re-admissions under s 15(3). It seems that, even where the Court is satisfied that s 15(3)(b) has been complied with and that the person applying is, in terms of s 15(3)(a), 'in the discretion of the Court' a 'fit and proper person' the Court still has a residual discretion to refuse re-admission."

28. One of the main features of the present application is that the applicant has shown an inability to appreciate the seriousness and unacceptability of his conduct and

thus the reasons why he was struck off the roll to begin with. He ignored all the findings made by the court except for the one relating to him making cash withdrawals from his trust account. He denied that finding but failed to explain his original admission of the correctness of the complaint. He also failed to present any concrete evidence to support his present denials and contentions.

29. But even if it were to be accepted for purposes of the argument that the applicant had not made cash withdrawals from his trust account, this court still has to consider, inter alia, the other reasons for his removal and more particularly the nature and degree of his conduct which resulted in his removal as well as his statements in his application for readmission.

30. In my view, it is clear that the applicant has not discharged the onus to convince the Court on a balance of probabilities that there has been a genuine, complete and permanent reformation on his part; that the defect of character or attitude which led to his being adjudged not fit and proper no longer exists; and that, if he is re-admitted he will in future conduct himself as an honourable member of the profession and will be someone who can be trusted to carry out the duties of an attorney in a satisfactory way as far as members of the public are concerned. The applicant's failure in this regard is obviously, at least in part, due to the fact that he fails to appreciate the duties and obligations placed on an attorney by the Act and the Rules of the Law Society. He also fails to recognise his own character defects and as a result failed to demonstrate that those character defects no longer exist and that there had been a genuine, complete and permanent reformation on his

part. It is clear that the applicant simply has no insight as to the seriousness and unacceptability of his conduct.

31. In fact, quite the opposite appears to be the case. The applicant failed to make a full and frank disclosure of all the relevant facts; certain statements were factually incorrect; he dealt with only some of the allegations against him and ignored others; and he failed to show any remorse for what he had done wrong. Instead, the applicant tried to defend his view that remorse was not called for and even went further by repeating his accusations, in unrestrained and defamatory terms, that not only two firms of attorneys but also the Law Society are guilty of unlawful conduct of a most serious kind, without presenting a proper factual base for such accusations. In any event, any disputes which he may have with the other two firms of attorneys are clearly irrelevant for purposes of deciding whether he is a fit and proper person to practice as an attorney. Apart from failing to deal with his conduct prior to his removal, he failed to deal with his conduct subsequent to his removal. He also failed to deal with the lapse in time between his removal and his application for readmission. He has also failed to recognise that he acted in an unprofessional, dishonourable and unworthy manner and that, if readmitted, he will in future conduct himself in an honourable manner.

32. A further aspect which may be mentioned is that the present application is for all practical purposes based on the same grounds and allegations submitted by the applicant in the application for his removal as well as in his application for leave to appeal. That application for leave to appeal was dismissed on the basis that no other court can reasonably come to a different conclusion.

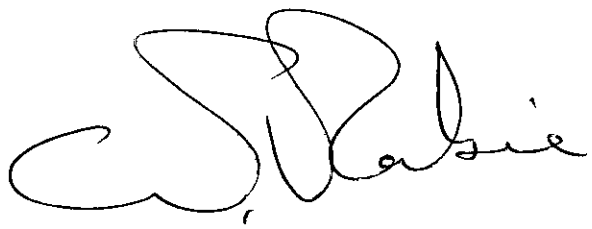
33. As far as costs are concerned all the relevant facts and circumstances should be considered. This includes, inter alia, the fact that the applicant failed to make out a case whatsoever for the relief claimed by him; the role of the Law Society as *custos* of the profession in matters of this nature; and also the manner in which the applicant presented his case. In this regard the allegations against the two firms of attorneys and the Law Society can again be referred to. The applicant in essence repeated the allegations made by him in the original application for his removal. In that application he submitted that there was an irregularity in the application in that Rooth and Wessels Incorporated, who had handled applications of this nature on behalf of the Law Society for decades, should not have been appointed by the Law Society to act in the application for his removal due to the fact that a member of that firm had in the past allegedly acted improperly in matters in which the applicant was involved. Despite conceding during argument in the application for his removal that there was no merit in this point, the applicant again raised the same point in the in the present application and did so in a scandalous and vexatious manner. As mentioned above, he accused the firms of attorneys of being guilty in terms of the provisions of the Prevention of Organised Crime Act; he stated that the Law Society allowed the two firms to retain benefits unlawfully acquired; that the Law Society is guilty in terms of the provisions of the Prevention and Combating of Corrupt Activities Act; that the Law Society's conduct is unconstitutional; that the Law Society's biased; and that the Law Society discriminate against the applicant.

34. The applicant has also failed to pay the Law Society's taxed costs relating to the application for his removal as well as the other applications referred to above and he has persisted in this failure until the present. It was submitted on behalf of the Law Society that the applicant was obliged to furnish this court with full particulars of the amounts taxed and to demonstrate an honest and earnest intention to pay the Law Society's costs in full as soon as possible. I agree with this submission. The applicant's laconic remark that he would pay the Law Society's costs once he is readmitted as an attorney, falls far short of what is expected of an attorney.

35. In the result, the finding of this court is the following:

1. The application is dismissed.

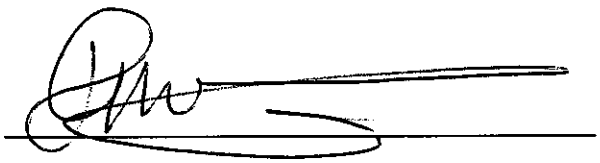
2. The applicant is ordered to pay the respondent's costs of the application on the attorney and client scale.



C.P. RABIE

JUDGE OF THE HIGH COURT

I agree:



J.M. MOJUTO

ACTING JUDGE OF THE HIGH COURT