

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE

09/11/2012

SIGNATURE



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA**

CASE NO: 50648/2011

HEARD: 08/11/2012

DELIVERED: 09/11/2012

In the matter between:

MUZIWAMADODA CHARLES THEMBEKWAYO

APPLICANT

and

LAW SOCIETY OF THE NORTHERN PROVINCES

RESPONDENT

JUDGMENT

HUGHES AJ

[1] The applicant before court applies for his readmission and enrolment as an attorney. He was originally admitted as an attorney on 09 January 1996 and practised as such until his name was struck from the roll of attorneys on 15 March 2002. He is presently sixty one (61) years old.

[2] The application is opposed by the Law Society of the Northern Provinces (the Law Society). It must be noted that the applicant failed to file heads of argument and neither did he or his representative appear in court on the day that the application was heard. We were not even accorded the courtesy of being furnished with any explanation for this default.

[3] The complaints against the applicant were, briefly the following:

That he had misappropriated trust funds; stole from the trust account; committed fraud; failed to keep proper accounting records for a period of five (5) years; failed to provide the Law Society with an audit certificate; practised without a Fidelity Fund certificate from August 2000 to May 2001; failed to respond to correspondence timorously; failed to comply with an order; failed to account to his client; failed to give proper attention to his

client; he left his office unattended; failed to pay his subscriptions timeously; failed to make a distinction between business and trust monies and he made a misrepresentation to a magistrate concerning certain facts.

[4] The applicant filed his initial application to be readmitted and enrolled in March 2008. In response to his application the Law Society advised the applicant that a warrant for his arrest had been issued on 03 June 2004. This warrant pertained to the criminal charges initiated by the Law Society against the applicant in respect of the transgressions that resulted in the applicant being struck off. On 02 June 2010 the applicant was convicted of fraud and contravention of Section 78(4) read together with Section 1 and Section 83(9) as well as Rule 68.1 of the Attorneys Act 53 Of 1979. He was sentenced to three (3) years imprisonment that was wholly suspended for a period of five (5) years.

[5] To appreciate the transgressions for which the applicant was charged it is prudent to set out the allegation contained in the charge sheet. Firstly, he pleaded guilty to fraud in that he advised his client, Mkhonza, a claimant in

a motor vehicle accident matter, that no monies were received from the MMF (Multilateral Motor Vehicle Accident Fund). It turns out that he had finalised the claim sometime in March 2001 and received payment in the amount of R123 542.00, on behalf of his client, which he utilised for his own benefit. Secondly, he pleaded guilty for failing to properly maintain his law firms financial records and in doing so he contravened Section 78(4) read together with Section 1 and Section 83(9) as well as Rule 68.1 of the Attorneys Act 53 of 1979.

[6] The current application is yet another attempt by the applicant to be readmitted and enrolled as an attorney. The Law Society is opposing this application submitted in its heads of argument that the applicant was "*sentenced in 2010 [and] the three years have not lapsed...it is submitted that the applicant is still serving his sentence.*" Further, "*where a period of suspension has not yet expired, the offender is still serving the sentence and still in the process of rehabilitation.*"

[7] Section 15(3) of the Attorneys Act 53 of 1979 makes provision for the readmission and the enrolment as an attorney:

"(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;"

- [8] Section 15 confers a discretion on the court deciding whether an applicant for readmission and re-enrolment is indeed a fit and proper person to be so admitted. The principle pertaining to an application of this nature has been expounded in **LAW SOCIETY, TRANSVAAL v BEHRMAN 1981 (4) SA 538 (A) at 557B-C** where the court held: *"The onus is on the applicant 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."*

- [9] **PONNAN JA in SWARTZBERG v LAW SOCIETY, NORTHERN PROVINCES 2008 (5) SA 322 at 327 F-H (PARA [15])** quoted with approval from **KUDO v CAPE LAW SOCIETY 1972 (4) SA 342 (C)** at **345H-346A:**

"[15] In considering whether the onus has been discharged the court must *'have regard to the nature and degree of the conduct which occasioned 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 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'.*"

- [10] Though not a prerequisite in these matters, the Law Society has to be satisfied that a person seeking readmission and enrolment as an attorney is indeed a fit and proper person. A court hearing such an application takes cognisance of the Law Society's attitude to an

applicant's application and accords the necessary weight to the Law Society's attitude. (**SWARTZBERG** at **328 Para [18]**).

[11] The crux of the Law Society's opposition is centred upon the fact that the applicant is not a fit and proper person to be readmitted and enrolled in that the sentence of three years imprisonment suspended for five years, was handed down as recently as 02 June 2010 and is still operational. As such the applicant is in essence still serving his sentence.

[12] **S v SCHEEPERS 2006 (1) SACR 72 SCA at 77b-c** dealt with the purpose of a suspended sentence there the court stated: *"(T)he purpose of a suspended sentence is to spare the offender the rigours and humiliation of prison; but the risk that the suspended sentence will be brought into effect is designed to operate as a deterrent."*

[13] In my view the applicant is still under the corrective and rehabilitative process of the sentence imposed and he has thus not completed serving that sentence. In the circumstances, at this point in time, one cannot say with any certainty that he has been deterred and reformed

from reverting to his previous transgressions that resulted in his striking off.

- [14] The duty to place detailed and complete information before the court that the applicant had indeed completely, genuinely and permanently reformed lies with the applicant himself as he is usually the only person privy to such information anyway. **See KAPLAN v INC LAW SOCIETY, TRANSVAAL 1981 (2) SA 762 at 792D-E.**
- [15] In establishing whether the applicant has reformed, I turn to examine the facts placed before us. It is trite that the conviction of fraud involves dishonest behaviour. The applicant deposed to an affidavit on 28 August 2011. This affidavit is used in support of his application. Therein he states that he recognises his short comings; that he is remorseful, and expresses contrition and repentance. However, it is noted that his explanation as to how the proceedings played out in the magistrate's court are in stark contrast to expression. The applicant states that when he became aware of the charges he "*offered to plead guilty to all the charges as they were put to the prosecutor, who would not accept and preferred to go to trial.*" (Paragraph 31.14 of his affidavit). Ironically this is

not reflected in the record. Candour is not a stranger to him.

[16] According to the record, when the trial commenced on 15 May 2009, the prosecution withdrew counts 1, 2, 5, 6, 7, 8 and amended counts 3 and 4 to include the alternative charges, whilst count 9 remained the same. The applicant only pleaded guilty to count 9. He pleaded not guilty to counts 3 and 4 inclusive of the alternative charges. The trial continued for an entire year before the applicant capitulated and pleaded guilty to the alternative charges of counts 3 and 4. At that stage the writing was already on the wall.

[17] Bearing in mind that the applicant had been struck off in March 2002, his conduct in the criminal proceedings illustrates that he does not appreciate the principle of being honest and truthful at all times and that as an officer of the court his first duty is to the court, except on matters privileged. This conduct demonstrates that the applicant has not genuinely, completely and permanently reformed.


[18] "After all, because of the trust and confidence reposed by the public and the courts in practitioners, a court must be

astute to ensure that the re-admission of a particular individual will not harm the prestige and dignity of the profession." **SWARTZBERG supra at 331G-H.**

[19] In the circumstances the applicant has failed to discharge the onus of persuading or convincing me that he is a fit and proper person to be readmitted and enrolled as an attorney. His feeble attempt at readmission must therefore fail with costs on an attorney and client scale, as requested by the Law Society.

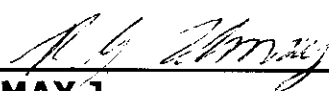
In the result the following order is made:

The application is dismissed with costs on an attorney and client scale.



NORTH GAUTENG HIGH COURT
PRETORIA

I CONCUR



TOLMAY J

NORTH GAUTENG HIGH COURT
PRETORIA