Reportable:	**YES**
Circulate to Judges:	**YES**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates:	**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: 422/2017

In the ex parte application of:

THEUNIS VAN SCHALKWYK **Applicant**

For his readmission as an attorney

DATE OF HEARING : 28 MAY 2021

DATE OF JUDGMENT : 19 AUGUST 2021

FOR THE APPLICANT : ADV T. M. MASIKE

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time of the handing down of judgment is deemed to be 10h00 on 19 AUGUST 2021.

ORDER

(i) The application for readmission as a legal practitioner (attorney) is dismissed.

(ii) There shall be no order as to costs.

(iii) A copy of this judgment must be forwarded to the Director of Public Prosecutions, North West and to the Legal Practice Council, North West.

JUDGMENT

PETERSEN J:

Introduction

[1] This is an application for readmission of the applicant, a former attorney, struck from the roll of attorneys on the 17th June 2010 in the Gauteng Division, Pretoria ("the readmission application").

[2] The applicant was admitted as attorney on the 4th February 2003 in terms of section 15 of the Attorneys Act 53 of 1979 (which Act has since been repealed by the Legal Practice Act 28 of 2014: "the LPA"), and practiced as a sole practitioner under the name and style of Van Schalkwyk Attorneys and Van Schalkwyk, Van der Merwe & Grobler Attorneys Incorporated in Rustenburg. At the time the applicant was struck from the roll of attorneys he had abandoned his practice. The Law Society of the Northern Provinces

("LSNP") filed an application for the striking of the applicant from the roll of attorneys in 2008. During August 2008, the LSNP, filed a supporting affidavit as more claims had been lodged with the attorney's fidelity fund. The applicant failed to file an answering affidavit and the striking off application was unopposed.

The attitude of the Legal Practice Council to the application for readmission

[3] The Legal Practice Council ("the LPC"), North West does not oppose the application for readmission. In correspondence dated the 23rd March 2021 under hand of the Director of the North West Provincial Office of the LPC, directed to the Registrar of this Division, the LPC states as follows:

> "We confirm that the Applicant served a copy of the above application on the North West Provincial Office of the Legal Practice Council in compliance with the provisions of Section 24(2)(d) of the Legal Practice Act, No. 28 of 2014 as amended, read with Rule 17.7 of the Rules promulgated in terms of the Act.
> We further confirm that the National Council of the Legal Practice Council on 13 March 2021, considered the resolution of the Disciplinary Oversight Committee held on 13 February 2021, and held that the Council has no objection to the Applicant being re-admitted to practice and authorised to be enrolled as an attorney.
> The Council further noted that the application is not brought in the Court that heard the suspension application but leaves the matter of jurisdiction for consideration by the Honourable Court.
> Kindly convey the above information to the Honourable Court for consideration."

[4] In *Swartzberg v Law Society of the Northern Provinces* [2008] ZASCA 36; [2008] 3 All SA 438 (SCA); 2008 (5) SA 322 (SCA) at paragraph [18], the Supreme Court of Appeal noted that the attitude of professional bodies concerned is a factor of some importance. The attitude of the LPC in the

present application must be seen against the established principles of the role it plays in applications for admission and readmission.

[5] The LPC stands in a position of authority over its members where it is bound by law to oversee issues which impact on the regulation of the profession of legal practitioners and at its core to exercise its disciplinary powers over its members. The disciplinary component is essential to protect the image of the profession in general as an honourable profession underscored by the highest standard of ethics and to protect the public interest. The disciplinary oversight of the LPC over its members extends to its obligations to the Court when the Court is enjoined to exercise its jurisdiction not only in applications brought before court for striking but equally so and probably more importantly in applications for re-admission.

[6] In the present application, the applicant approaches this Court on an *ex parte* basis. The LPC has a material interest in the matter and should preferably be cited as a respondent as it should not be required to bring an application to intervene in the proceedings, if it were to oppose the application. The LPC is a party with a direct and material interest in the application, particularly in respect of its statutory role and duty towards the Court in matters affecting the profession and the image of the profession. The LPC in the present application for readmission must certify compliance with the provisions of the LPA for readmission of the applicant. As the Court is to consider whether or not the applicant is a fit and proper person to be readmitted to the profession, it is incumbent on the LPC to make that assertion to Court.

[7] In the present application the LPC is aware of the fact that the question of jurisdiction is at issue. In the correspondence sent to the Registrar of this

Court, the LPC incorrectly state that the *"suspension application"* rather than the striking application of the applicant was heard in another Division. The question of jurisdiction is a novel issue following the enactment of the LPA. The LPC has elected to defer the question of jurisdiction to this Court, rather than comply with its obligations to assist the Court with researched submission in this regard. The reasons for the LPC's National Council not opposing the readmission application have not been furnished to this Court. The LPC, it is re-iterated, has a duty towards this Court in that regard.

[8] The LPC is fully at liberty not to oppose the application for re-admission but in so doing its reasons should be fully disclosed to this Court and in the public interest, considering the fact that it is asserting that the applicant is a fit and proper person to be readmitted. This Court is left in the absence of such information to consider the application on the papers as they stand.

Jurisdiction

[9] The issue of jurisdiction of this Court to consider the readmission application was raised with Counsel for the applicant considering the fact that the applicant was struck from the roll of attorneys by the Gauteng Division, Pretoria. The applicant indicates in the founding affidavit that he initially intended launching the application in the Gauteng Division. He, however, contends that on a reading of Rule 17.1.2 of the South African Legal Practice Council Rules, which deals exclusively with readmission of attorneys domiciled in the area of jurisdiction of a particular court, that he is domiciled in this Court's area of jurisdiction and that this Court has the requisite jurisdiction. This submission as gleaned from the first supplementary affidavit of the applicant and is premised on information received from a Mrs Jordaan from the LPC.

[10] The final Rules in terms of section 95 (1), 95 (3) and 109 (2) of the LPA was published in Government Gazette 41781 on 20 July 2018. Part V of the Rules of the Legal Practice Council deals, *inter alia*, with applications for admission and enrolment of legal practitioners. Rule 17(1) deals with persons seeking to be admitted to practise and be enrolled as attorneys or as advocates under the LPA as follows:

"**PART V**

Professional Practice

17. Application for admission and enrolment as legal practitioners [sections 95(1)(k) and (t) read with sections 24(2)(d), 30(1)(a) and 30(b)(iii)]

17.1 A person seeking to be admitted to practise and to be authorised to be enrolled as an attorney or as an advocate under the Act –

17.1.1 must apply to a High Court in terms of the provisions of section 24(2) of the Act; and

17.1.2 must simultaneously lodge an application in terms of sections 30(1)(a) and 30(b)(iii) of the Act with the Council, through the Provincial Council where the applicant intends to practise (or in the case of a person who does not intend to practise, where that person is ordinarily resident), for the enrolment of his or her name on the roll of attorneys or advocates, or on the roll of non-practising attorneys or advocates, as the case may be, which application shall be treated as an application subject to the condition that the applicant is duly admitted by the High Court and authorised to be enrolled as a legal practitioner in terms of section 30 of the Act.

17.2 An application for admission and enrolment in terms of rule 17.1 must be in writing and must be accompanied by an affidavit by the applicant setting

out the following information supported, where applicable, by documentary evidence:

17.2.1 confirmation of the jurisdiction of the Court;

…"

[11] As stated *supra*, the question of jurisdiction in an application for readmission in the present circumstances, is a novel issue. In *Nthai v Pretoria Society of Advocates and Others* (4496/2018) [2019] ZALMPPHC 33 (18 July 2019), the applicant who was struck from the roll of advocates in the Gauteng Division, brought an application for readmission as an advocate in the Limpopo Division. The issue of jurisdiction was raised only in the context of the Johannesburg Society of Advocates ("the JSA") and the Pretoria Society of Advocates ("the PSA") *locus standi* to oppose the application in the Limpopo Division. In that context the Supreme Court of Appeal found that the JSA and PSA had the requisite *locus standi*. No issue was taken, however, with the jurisdiction of the Limpopo Division to entertain the readmission application, either in that Court or the Supreme Court of Appeal, considering the fact that the striking off was granted by the Gauteng Division.

[12] In the present application, the applicant makes the allegation that he is domiciled in this Court's jurisdiction, has applied for readmission in this Division and has lodged the application with the LPC in the North West Province. He is also desirous to practice in the area of jurisdiction of this Court.

[13] The LPA unlike section 15(3) of the repealed Attorneys Admission Act, Act 53 of 1979, does not contain a provision for readmission of an attorney. The provisions of section 24 of the LPA are therefore to be construed as

including an application for readmission. In an application for admission, one of the requirements for admission in a court of a particular Division is that the applicant must be domiciled in that Court's area of jurisdiction. The applicant is domiciled in this Court's area of jurisdiction and on that basis this Court is enjoined with the necessary jurisdiction to consider the application.

Background

[14] To appreciate the extent of the applicant's conduct leading to his name being struck from the roll of attorneys, it is necessary to quote extensively from the striking judgment. It must be emphasized that the applicant elected not to oppose the striking application in the face of very serious allegations.

[15] In respect of the merits of the striking application, the facts and circumstances on which the application was predicated, was set out as follows at paragraph [5] of the judgment in the Gauteng Division:

"5.1 The respondent practiced since 1 January 2008 without possession of a valid Fidelity Fund certificate;

5.2 The respondent failed to lodge his rule 70 auditor reports at the Law Society for the period ending 28 February 2006 and 28 February 2007;

5.3 The respondent failed to lodge his closing auditor's report at the Law Society for the firm Theunis van Schalkwyk Attorneys;

5.4 The respondent failed to lodge his opening auditor report at the Law Society, for the firm Van Schalkwyk, Van der Merwe & Grobler Attorneys Incorporated;

5.5 The respondent abandoned his practice;

5.6 The respondent failed to account in respect of trust monies;

5.7 The respondent delayed payment of trust monies;

5.8 The respondent failed to give proper attention to the matters of his clients;

5.9 The respondent contravened the provisions of Rule 3 of the Law Society Rules; and

5.10 The Law Society has received serious complaints against the respondent."

[16] The most damning statement in the judgment is that the applicant displayed "*a cavalier attitude towards his practice and his obligations as an attorney, …"* The basis for this statement was expounded upon in the judgment as follows at paragraphs [7] to [10]:

"[7] **RULE 70 AUDITOR REPORTS**

7.1 The Respondent failed to lodge his Rule 70 auditor reports for the periods ending 28 February 2006 and 28 February 2007. Same should have been lodged on or before 31 August 2006 and 31 August 2007.

7.2 By failing to submit his Rule 70 auditor's report to the Law Society the Respondent contravened the provisions of Rule 89.11.

7.3 The Respondent closed the firm Theunis van Schalkwyk Attorney on 31 May 2005 but failed to lodge a closing auditor's report with a Law Society. The purpose of the closing auditor's report is to satisfy the Law Society that an attorney, after close of his practice did make the necessary preparation for the responsibility, overtaking and protecting of all trust monies which was held on behalf of clients.

7.4 The Respondent opened his new practice, Van Schalkwyk, Van der Merwe & Grobler Attorneys Incorporated on 1 June 2005. The Respondent failed to lodge the opening auditor's report of the firm. The Respondent was instructed accordingly to the provisions of Rule 70 and a decision of the Law Society's council dated 17 June 2008 to within 6 months after the opening of his practice is to lodge a report from his accountant for the period from the opening date of his new practice to the end of the 3rd full calendar month which follows on the opening date.

7.5 The Respondent's failure to lodge his closing auditor's report at the Law Society amounts to unprofessional, and unworthy actions.

[8] **FIDELITY FUND CERTIFICATES**

8.1 **The Respondent continued to practice without being in possession of a Fidelity Fund Certificate since 1 January 2006, which is in contravention of Rule 83(10) and which is a criminal offence**.

8.2 **The seriousness that the respondent practiced without a fidelity fund certificate cannot be overemphasised**. Firstly, his conduct is in contravention of the Act and the Rules. **Secondly, the trust creditors are at risk who will sustain loss as a result of the theft committed by a practising attorney**.

[9] **THE LAW SOCIETY'S ATTEMPTED INVESTIGATION**

9.1 After the respondent failed to lodge a closing auditor's report for the firm Theunis van Schalkwyk Attorney and an opening auditor's report for the firm Van Schalkwyk, Van Der Merwe & Grobler Attorneys Incorporated with the Law Society, the Law Society instructed a legal consultant, Me. Magda Geringer to visit the Respondent and investigate the accounting notes and the executing of practice matters.

9.2 Geringer completed instruction on 11 September 2006 and reported in writing to the Law Society.

9.3 Geringer visited the Respondent at 257 Beyers Naude Avenue, Rustenburg on 6 June 2006 and 21 July 2006.

9.4 The purpose of Geringer's investigation was to confirm the status of the Respondent's practice after his failure to lodge the auditor's reports with the Law Society.

9.5 The respondent started practising from 11 February 2003 under the name of Theunis van Schalkwyk Attorney but closed this firm on 31 May 2005.

9.6 The Respondent thereafter on 11 April 2005 opened a new firm with the name Van Schalkwyk, Van Der Merwe & Grobler Attorneys Incorporated. The Respondent and van der Merwe was recorded as directors according to the Law Society's records as from 1 June 2005.

9.7 The Respondent took over the firm, Van Schalkwyk, Van der Merwe & Grobler Attorneys Incorporated from Dirk Grobler and included the trust responsibilities. Grobler joined the firm as director from 22 June 2006.

9.8 Van der Merwe and Grobler left the firm on 10 April 2006 and the Respondent has since then practiced as sole practitioner.

9.9 The respondent addressed a letter to the Law Society on 11 April 2006. The Respondent informed the Law Society that he was the only director of the firm and that during 2005 there was a trust shortage.

9.10 <u>The Respondent alleged that it was impossible to audit the firm's accounting notes of the period to 28 February 2005.</u>

9.11 The Respondent addressed a further letter to the Law Society dated 11 May 2006. The Respondent confirmed that he is in the process of closing the practice. He requested an extended period of time for lodging the firm's opening auditor's

report as well as the previous plans closing auditor's report with the Law Society. The reports to date were not lodged.

9.12 Geringer visited the firm on 6 June 2006 and found that it was located in a residential area. She could not locate anyone at the offices.

9.13 The Law Society directed a letter to the respondent dated 19 June 2006 where he was informed that a closing auditor's report for the firm, Theunis van Schalkwyk Attorney must be lodged. The Respondent was also requested to indicate when he will be in a position to lodge the outstanding auditor's report for the firm, Van Schalkwyk, Van der Merwe & Grobler Attorneys Incorporated with the Law Society.

9.14 Geringer left a message on the Respondent's phone on 12 June 2006 to urgently contact her. The Respondent failed to react to her message.

9.15 Geringer visited the Respondent's practice again on 21 June 2006 but found the offices to be vacated. She enquired with the neighbours in regard to the Respondent's whereabouts but they could not provide her with any information.

9.16 Geringer requested balance certificates in respect of the Respondent's trust bank account from First National Bank on 30 July 2006 with no success.

9.17 Geringer confirms that no auditors reports in respect of both firms were lodged with the Law Society and is a contravention of Rule 70.

9.18 The Respondent failed to notify the Law Society of the closing of his practice.

SUMMARY

9.19 The Respondent failed to lodge closing auditor's report for the firm, Theunis van Schalkwyk Attorney with the Law Society and is a contravention of Rule 70.

9.20 The Respondent failed to lodge a opening auditor's report for the firm Van Schalkwyk, Van der Merwe & Grobler Attorneys Incorporated with the Law Society and is a contravention of Rule 70.

9.21 The Respondent failed to lodge the firm's Rule 70 auditor's report for the period ending 28 February 2006 with the Law Society and is a contravention of Rule 70.

9.22 During Geringer's visit to the Respondent's practice it was found that the practice is found vacated and left at 257 Beyers Naude Avenue, Rustenburg. The Respondent failed to notify the Law Society of the closing of his practice and it is alleged that he abandoned his practice.

9.23 The Respondent failed to answer the Law Society's letter dated 19 June 2006 as well as to react to a message left for him.

9.24 Geringer recommended that the Law Society proceed with disciplinary proceedings against the Respondent.

9.25 The Respondent was informed by the Law Society to appear before the disciplinary committee of the Council on 23 August 2006 in respect of his actions.

9.26 The Law Society's notice could not be served on the Respondent as he could not be traced.

9.27 The disciplinary proceedings was thereafter rescheduled for 29 November 2007. The notice wherein stated that the Respondent is called to appear before the disciplinary committee could also not be served on the Respondent as he could not be found.

9.28 The disciplinary proceedings were thereafter postponed and placed on the roll for 7 August 2008. The Sheriff of the High Court was instructed to serve the Law Society's notice on the Respondent but the Sheriff could not find the Respondent and thus was not served once again.

[10] **COMPLAINTS AGAINST RESPONDENT**

DRS. PIENAAR, SNYMAN AND DE KOCK

10.1 The complainants gave two instructions to the Respondent to collect monies on behalf of them. The Respondent collected an amount of R4000.00 but failed to pay same over the complainant. The complainant's attorneys addressed a letter to the Respondent but received no answer thereto.

10.2 **The Respondent addressed a letter to the complainant undertaking to effect immediate payment of the due monies. He failed to attend to the undertaking and Summons was issued against the Respondent**.

MR. M GOSA

10.3 Gosa instructed the Respondent to assist in a divorce matter after his partner was murdered. He deposited an amount of R19,941.64 into the Respondent's trust bank account in respect of fees and disbursements incurred. Gosa received no progress reports from the Respondent and the Respondent failed to properly execute his instruction.

10.4 The Law Society directed the details of the complaint to the Respondent for his comments but the Respondent failed to react or answer thereto.

ME. A LESCH

10.5 Lesch was placed under administration and the Respondent took the matter over from Attorney Grobler. During June 2005 to June 2006 Lesch paid an amount of R2510.00 into the Respondent's trust bank account. The Respondent kept the money and failed to effect any instalments to Lesch's creditors.

10.6 The Law Society directed the details of the complaint to the Respondent for his comments but the Respondent failed to react or answer thereto.

MR. K J MOLOI

10.7 During 2004 Moloi instructed the Respondent to handle a third party claim on his behalf. The matter was settled in the amount of R25 000.00. The Respondent paid only an amount of R10 000.00 to Moloi, the balance of which R15 000.00 is still outstanding.

10.8 The Law Society directed the details of the complaint to the Respondent for his comments but the Respondent failed to react or answer thereto.

ME. F W J OPPERMAN

10.9 Opperman was placed under administration and she made regular payments in the Respondent's trust bank account. Her creditors contacted her and informed her that they have not received any payments from the Respondent.

10.10 Opperman endeavoured to contact the Respondent but by no success. After some time she traced the Respondent and consulted with him. The Respondent could not provide a satisfactory explanation to Opperman in respect of the monies paid to him.

10.11 Opperman inherited money and pay all outstanding creditors. The Respondent still proceeded with monthly deductions from her salary.

10.12 The Law Society directed the details of the complaint to the Respondent for his comments but the Respondent failed to react or answer thereto.

RUDOLPH BOTHA ATTORNEYS

10.13 The respondent appointed Attorney Botha as his correspondent in Lyttleton, Centurion. Attorney Botha could not, after duration of time, get in contact with the Respondent. Attorney Botha acted as the Respondent's correspondent on numerous occasions. In one matter a trial date was allocated in the High Court.

Attorney Botha could not obtain further instructions from Respondent as well as payment of his outstanding statement of account.

10.14 The Law Society directed the details of the complaint to the Respondent for his comments but the Respondent failed to react to the Law Society's letters."

[17] The decision of the Council as set out at paragraph [11] of the judgment was a serious indictment on the character of the applicant. It reads as follows:

"**DECISION OF THE COUNCIL**

[11] The Council considered all the facts available to it concerning the Respondent as set out in the founding affidavit. It is concluded that whether each complaint is considered alone or all the complaints are considered cumulatively, the Respondent had made himself guilty of unprofessional and dishonourable or unworthy conduct and is no longer a fit and proper person to continue to practice as an attorney or as an officer of the Court. The Respondent's conduct clearly revealed character defects which could not be tolerated in a practitioner or officer of the Court and does not meet the standard of behaviour and conduct and reputation which is required of an attorney and of an officer of the Court. By virtue of his conduct and behaviour the Respondent had damaged and affected the good standing and reputation of the profession as a whole. Consequently, his name should not be allowed to remain on the roll of attorneys."

The principles applicable to an application for readmission

[18] Against this background, it is apposite to consider the principles applicable to an application for readmission. In *Johannesburg Society of Advocates and Another v Nthai and Others* (879/2019; 880/2019) [2020] ZASCA 171; 2021 (2) SA 343 (SCA); [2021] 2 All SA 37 (SCA) (15 December 2020) at

paragraphs [17] to [18], the Supreme Court of Appeal re-affirmed the principles applicable to an application for re-admission:

> "[17] … Where a person applies for readmission, who has previously been struck off the roll on the ground of not being fit and proper to continue to practise: [t]he *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 readmitted, 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…' (Per Corbett JA in *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A) at 557B-C.)
>
> [18] 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 even perhaps 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.' (*Kudo v The Cape Law Society* 1972 (4) SA 342 (C) at 345H-346A, as quoted with approval in *Behrman* at 557D-E.)"

[19] In the *Nthai* matter *supra*, the Supreme Court of Appeal with reference to *Swartzberg supra* said the following at paragraph [36] with regard to the nature of an enquiry for readmission:

> "[36] ... The court must be satisfied that the applicant is a fit and proper person and that his readmission would involve no danger to the public or the good name of the profession (*Ex Parte Knox* 1962 (1) SA 778 (N) at 784G-H). The enquiry

into whether an applicant is a fit and proper person to be readmitted is a factual one (*Kudo v The Cape Law Society* 1972 (4) SA 342 (C) at 675G-676). As it was put in *Swartzberg v Law Society of the Northern Provinces*:

> '… This involves an enquiry as to whether the defect of character or attitude which led to him being adjudged not fit and proper no longer exists. (*Aarons* at 294H.) Allied to that is an assessment of the appellant's character reformation and the chances of his successful conformation in the future to the exacting demands of the profession that he seeks to re-enter. It is thus crucial for a court confronted with an application of this kind to determine what the particular defect of character or attitude was. More importantly, it is for the appellant himself to first properly and correctly identify the defect of character or attitude involved and thereafter to act in accordance with that appreciation. For, until and unless there is such a cognitive appreciation on the part of the appellant, it is difficult to see how the defect can be cured or corrected. It seems to me that any true and lasting reformation of necessity depends upon such appreciation.'" (emphasis added)

[20] In *Swartzberg supra*, the court at paragraph [27] expressed itself as follows in respect of the message that would be sent out if it ordered the readmission of the appellant to the profession:

> "[27] The question that now confronts a court is not whether the appellant has been sufficiently punished for his misdeeds. I have little doubt that, if that were the issue, a court may well have been satisfied that he has suffered enough. The issue is rather whether the appellant is a person who can safely be trusted to faithfully discharge all of the duties and obligations relating to the profession of an attorney. 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. For, by granting an application for re-admission, a court pronounces to the world at large that the individual concerned is a fit and proper person."

[21] In applications for readmission where the applicant has been struck from the roll, *inter alia*, for dishonest conduct, the court in *Swartzberg supra* made it clear at paragraph [32] that:

> "Where a person is struck off the roll for the kind of conduct encountered here, he must realise that his prospects of being readmitted to what, after all, is an honourable profession, will be very slim indeed. Only in the most exceptional circumstances, where he has worked to expiate the results of the conduct and to satisfy the court that he has changed completely, will a court consider readmission at all (*Visser v Cape Law Society* 1930 CPD 159 at 160).'

The applicant's evidence

[22] Upon his admission as an attorney on the 04th February 2003, practising under the name and style of Van Schalkwyk Attorneys in Rustenburg, the applicant appointed his wife, Hester Sophia van Schalkwyk to handle the accounting books of the practice and to conduct all the office management functions of the practice. The accounting records of the practice were managed on software known as Mirror Accounting Software for Attorneys, which training on the software was attended by his wife.

[23] As a result of his absence from the office to attend to matters in neighbouring Provinces, he was not always available to sign cheques or conduct electronic transfers, and as a result he arranged with his bank to authorise signing powers for his wife on his trust account. According to the applicant he did not think that it was wrong at the time to authorise signing powers on the trust account by his wife, but in hindsight realises it was wrong.

[24] According to the applicant, as required by the LSNP, he paid an independent auditor to audit his trust account every year in terms of Rule 70 of the LSNP Rules under the Attorneys Act 53 of 1979. He maintains that he received unqualified audit reports for all the years since inception of his practice as Van Schalkwyk Attorneys up to and including the year ending February 2005.

[25] During March to early April 2005, he discovered a trust deficit of approximately R 100 000.00 (one hundred thousand rand) on his trust account. He confronted his wife who failed to provide a satisfactory explanation for the massive deficit on the trust account. On the applicant's evidence, he never doubted that his audit reports would be without any qualifications, as he completely trusted his wife, but realised that his wife had stolen money from the trust account and he was devastated.

[26] According to the applicant he was taken aback as he had submitted his annual Rule 70 report a few weeks prior to identifying the trust deficit, yet his auditor had issued an unqualified report, which implies that the auditor had not identified any irregularities. The applicant is, however, unable to indicate the date on which he submitted the Rule 70 report.

[27] Upon discovery of the trust deficit, the applicant contends that he phoned the LSNP, a day later, and set up an appointment with a Mr. Van Staden, who was the head of Members Affairs at the LSNP at the time. The applicant claims that he disclosed the theft of the trust money to Mr. Van Staden during the meeting and informed Mr. Van Staden that he could not lay criminal charges against his wife, as he had a daughter who was two years old and could not bring himself to the prospect of telling his daughter that he had her mother arrested.

[28] The applicant submits that Mr. Van Staden understood his predicament but maintained that he was responsible to ensure that the deficit was paid back into the trust account. The applicant estimated the deficit to be in the region of R100 000.00 (one hundred thousand rand) and was informed that he had to establish the exact amount stolen to ensure that the exact amount was repaid.

[29] According to the applicant he dismissed his wife from his employ following the discovery of the deficit and barred her from his practice, out of fear that she may tamper with the accounting records. After borrowing money from various persons to repay the deficit, the applicant claims that he duly informed Mr Van Staden, and provided documentary proof thereof. Notably the applicant fails to mention how he established the exact amount of the deficit.

[30] As the applicant's practice grew, he saw the need to appoint another attorney and in fact appointed Ms. Marelize Steyn soon after she was admitted as an attorney. On discovery of the theft from the trust account, and as a result of his court responsibilities, the applicant further appointed Ms. Michelle Rabie, a candidate attorney, to attend to the accounting functions of his practice. According to the applicant, Ms. Rabie upon commencement of her employment at Van Schalkwyk Attorneys, faced serious challenges to obtain information related to the trust account as there had been no handover between herself and his wife. This was brought about by the fact that he was not on speaking terms with his wife and she was barred from attending at his office, which led to his wife's refusal to render any assistance to Ms. Rabie. The problem was exacerbated by Ms. Rabie being accustomed to using the AJS Accounting

program for Attorneys, as opposed to the Mirror Accounting Software for Attorneys used in his practice. At this stage, the exact amount of the deficit was still not known as required by Mr. Van Staden.

[31] The applicant contends that his wife manipulated the transactions in the accounting system to the extent that the auditor who conducted the Rule 70 audit did not notice the trust deficit of approximately R100 000.00 (one hundred thousand rand). The task to unearth the extent of what can only be termed fraud, was left to Ms. Rabie, who was not an accountant. As the practice continued doing business, Ms. Rabie remained tasked with the accounting function of the practice and to ensure that the transactions under her watch were accurate, whilst attempting to deal with the historical transactions under the applicant's wife's watch.

[32] The applicant only disclosed the theft of the trust monies to Ms. Rabie and Ms. Steyn who were employed by Van Schalkwyk Attorneys, a Mr. Jansen van Vuuren, at the time a candidate attorney employed by Combrinck Kgatshe Inc. in Rustenburg, who was one of his close friends and Mr. Dirk Grobler a senior attorney practicing as Dirk Grobler Attorneys.

[33] The applicant established a relationship with Mr. Dirk Grobler, through his now deceased son, Mr. Paul Grobler. He eventually purchased Mr. Grobler's practice from him in an attempt to recoup the deficit in the trust account of his practice, despite advice not to do so.

[34] Mr. Eugene van der Merwe employed by Hannatjie van der Merwe Attorneys, with whom the applicant was acquainted, was not satisfied with his employment conditions. He went on to disclose to him the theft of the trust monies as well and his intentions to purchase Mr. Grobler's practice

to recoup the deficit. The applicant and Mr. Van der Merwe consequently concluded an agreement to the effect that Van Schalkwyk Attorneys had commercial value although it was indebted to repay the loans which were made to repay the stolen trust money. Furthermore, that Mr. Van der Merwe had no capital to invest, but was willing to take responsibility for half of the money which was borrowed to repay the stolen trust money. Mr. Van der Merwe would take responsibility for half of the future liabilities if they purchased the practice of Mr. Dirk Grobler, and if they purchased the practice of Mr. Dirk Grobler and amalgamate it with Van Schalkwyk Attorneys, both Mr. Van der Merwe and himself would have had equal shareholding in the new amalgamated practice. If the transaction to purchase the practice of Mr. Dirk Grobler did not materialise, the *status quo* would have remained, because Van Schalkwyk Attorneys would not have been able to support Mr. Van der Merwe, Ms. Steyn, Ms. Rabie and the applicant.

[35] The applicant and Mr. Van der Merwe subsequently purchased the practice of Mr. Dirk Grobler as a going concern with all the personnel, with the intention to amalgamate it with Van Schalkwyk Attorneys, under the name and style of Van Schalkwyk, Van der Merwe & Grobler Inc. (VVG). The LSNP informed the applicant and Mr. Van Der Merwe that only the surnames of the previous directors of the company may appear in the name of the company. With the intention of giving Mr. Grobler acknowledgment for his practice which he had built up over the years, a decision was taken to offer Mr. Dirk Grobler a 5% shareholding in the new company with the remaining shareholding equally shared between Mr. Van der Merwe and the applicant. Ms. Steyn and Ms. Rabie would have been employed by VVG and both would have had the same responsibilities they had when Van Schalkwyk Attorneys employed them.

[36] At the time of signing the agreement to purchase the practice of Mr. Dirk Grobler, Ms. Rabie and the applicant had not been able to determine the exact trust shortage of Van Schalkwyk Attorneys. The practice of Mr. Dirk Grobler, on his word was said to have more than R140 000.00 (one hundred and forty thousand rand) in the trust account, but he refused the applicant and Van der Merwe any access to the accounting records and files. Upon handing over his practice, Mr. Dirk Grobler transferred approximately R 30 000.00 (thirty thousand rand) to the trust account of VVG.

[37] The amalgamation of Van Schalkwyk Attorneys with Dirk Grobler Attorneys to form VVG Attorneys, was predicated on each having to conduct a closing audit and VVG to conduct an opening audit. The closing audit of Van Schalkwyk Attorneys was at the same time to establish its trust shortage. Once the files were divided amongst the attorneys and work on the files commenced, it was discovered that the cases could not be salvaged as a result of the ineptitude of Mr. Grobler, with clients demanding the results promised to them by the latter. At this point it became apparent that Mr. Grobler had misrepresented the status of the practice which was not viable and the practice through its amalgamation with Van Schalkwyk Attorneys became a liability. It became clear that during the period when negotiations to purchase the practice of Mr. Dirk Grobler commenced until he transferred the R30 000.00 (thirty thousand rand) to the trust account of VVG, he had billed his trust account with approximately R110 000.00 (one hundred and ten thousand rand).

[38] On the recommendation of Mr. Grobler, VVG employed the services of an accountant, Mr. Els. The applicant claims that Mr. Els intimated that the Mirror Accounting Software Program for Attorneys had flaws which, *inter*

alia, automatically deducted any business debit from the trust credit, which was against the rules of the LSNP and therefore illegal. All previous audits of Van Schalkwyk Attorneys were accordingly flawed. By utilising the AJS accounting system, Ms. Rabie made progress in reconciling the transactions of Van Schalkwyk Attorneys, but a deadline granted by the LNSP for the reconciliation could not be met and the LSNP consequently refused to issue a Fidelity Fund Certificate for the year 2006. The failure to obtain the Fidelity Fund Certificate had the effect that all the attorneys in VVG would be engaged in a criminal offence by practicing without a Fidelity Fund Certificate. Following a meeting with Mr. Van der Merwe in December 2005, it was decided to close the practice and Ms. Rabie and Ms. Steyn were accordingly informed that the practice would cease to operate with effect from 1 January 2006.

[39] The applicant contends that he in hindsight realizes where he erred in the running of the VVG practice and relegates his actions to negligence. To this end he submits that he focused on the matters of clients which generated income whilst neglecting the management of the practice. This he says he did as he had debts to repay in respect of the stolen trust money whilst the practice purchased from Mr. Grobler was a financial liability. It is telling that the applicant in hindsight contends that he could have requested the LSNP for assistance with the closing audit of Van Schalkwyk Attorneys. In this regard it is indeed peculiar from the evidence of the applicant, that the very deficit in the trust account to the last rand, has been furnished by the LSNP.

[40] The applicant maintains that from January 2006 until around May 2006, he attempted to close the practice. Following issues with the rental of the premises from which the practice conducted its business, documents and files went missing and the applicant claims he consequently abandoned the

practice around the middle of 2006. At the same time he abandoned the practice he came to hear of a vacancy at Legal Aid South Africa in Rustenburg for a senior attorney in criminal matters in the Regional Court. He applied for the vacancy and was subsequently appointed with effect from June 2006 and left in August 2006. At the beginning of September 2006, he took up employment at Solidarity as a National Organiser in the platinum and granite industries.

[41] The applicant deals with the misconduct that led to the striking application as follows. On his version he admits that he practiced without a Fidelity Fund Certificate in 2006 when he attempted to close the practice, VVG Incorporated Attorneys. He maintains that as part of this exercise, he *inter alia*, attempted to reconcile the accounting books of the practice with a hope to provide the LSNP with the various audit reports that were outstanding and by so doing to get his Fidelity Fund Certificate to start afresh as an attorney. The applicant submits that he was the attorney of record in numerous criminal matters scheduled for court appearances until about May 2006. The majority of these matters were in the Rustenburg Regional Court. He claims that he was compelled by Regional Magistrate, Mr. Nel, who was informed that he held no Fidelity Fund certificate, to attend to the withdrawal of each case, under threat of being held in contempt of court. As a result, he appeared in person in each case on the respective dates the cases were scheduled for court appearances and personally withdrew as attorney on record from each of the said court cases.

[42] The applicant submits that he is aware that his conduct from January 2006 could be construed as practicing without a Fidelity Fund certificate and requests this Court to condone such conduct until about May 2006, as he deemed it necessary acts in an attempt to close the practice of VVG.

[43] The applicant admits that he practiced as an attorney at Legal Aid South Africa without a Fidelity Fund Certificate from June 2006 to August 2006.

[44] The wife of the applicant confirms her employment at Van Schalkwyk Attorneys during 2004 and 2005 and her authorisation to make withdrawals from both the trust account and business account. Mrs. Van Schalkwyk claims that monies withdrawn by her were to pay for cancer treatment of her mother, which the applicant contends he cannot vouch for. Ironically she makes no assertion in her affidavit of the wrongfulness of such conduct.

[45] This Court raised the question of acceptance of responsibility at the initial hearing of the application. In the first supplementary affidavit of the applicant, he tenders an apology to this Court if his founding affidavit created the impression that he was attempting to shift the blame or responsibility for the stolen trust money to his wife or any other person or entity. To this end, he maintains that he was at all relevant times the responsible person in charge of his practice as an attorney and that he failed to exercise his duties and obligations, for which he seeks forgiveness from this Court.

[46] This Court further raised the question of the honesty of the applicant in relation to the stolen trust monies with reference to paragraphs 39 and 40 of the Founding Affidavit which reads as follows:

> "39. I wish to reiterate that this application differs from the majority of readmission cases that I have perused in preparation for this application. In the vast majority of the applications which I have perused, the respective applicants conducted acts of dishonesty.

40. **I respectfully submit that I have not concluded any act of dishonesty**. Even my striking application by the LSNP did not contain any allegation that I was dishonest and subsequently the Honorable Court did not state anything about dishonesty in the judgment of my striking application." (emphasis added)

[47] The applicant in the first supplementary affidavit addressed the concerns of this Court as follows:

> "The Honourable Court stated during the hearing of my application for readmission as attorney on 26 March 2021, that honesty is the most important requirement for being an attorney and I am fully in agreement with this statement by the Honourable Court. I humbly submit that I was grossly negligent in the running of my practice, but I never had any intention to steal the trust money or to be dishonest in any manner. I humbly submit that I have not been struck from the Roll of Attorneys because I had a trust shortage, although the LSNP was fully aware that I had a trust shortage. In this regard I again refer the Honourable Court respectfully to page 266 of my Application where the LSNP in the letter addressed to me states that there was a trust deficit of R100560.00 (One Hundred Thousand Five Hundred and Sixty Rand) on 10 April 2005. The trust shortage is not mentioned in any of the complaints against me by the LSNP. In this regard, I humbly refer the Honourable Court to the judgment of the Honourable Court in the striking application by the LSNP, and more specifically to pages 141 to 144 of this application before the Honourable Court. I also humbly submit that the LSNP has never instituted criminal proceedings against me, although I am aware of several attorneys who are sentenced to imprisonment for stealing trust money. It is my honest belief that the LSNP did not mention the theft of trust money as part of my transgressions in my striking application and that the LSNP did not institute criminal proceedings against me for the theft of trust money, because I was the person who disclosed the theft of trust money and I provided Mr. Van Staden with proof that I have paid the stolen trust money into my trust account. I do admit that the previous paragraph amounts to speculation, but I can think of no other logical explanation as to why the LSNP did not mention the shortage of trust money as

one of my transgressions during my striking application and why no criminal proceedings were instituted against me. **It is indeed so that a negative inference regarding my honesty might be drawn from my transgressions such as the failure to submit the various audit reports and the failure to pay trust money out**. In paragraph 37 of my Supplementary Affidavit I stated inter alia, "… *However, there are some complaints against me that relate to the failure to pay trust money out. It is possible that a negative inference in respect of my honesty could be drawn from this. I reiterate that my failure to pay trust money is not an aspect of dishonesty, but mismanagement of the practice."* (emphasis added)

[48] The applicant embarks on an exposition of the element of fault in seeking to justify his position in respect of the fraud and/or theft of the trust monies:

"I respectfully submit that fault could only take two forms, namely intention and negligence. In *Ex parte Bennett*, 1978 (2) SA 380 (W) at 383 in fin-384D the Honourable Judge Grange said: *'What is an "offence involving dishonesty"? In its ordinary meaning dishonesty in this context denotes: "Lack of probity: disposition to deceive, defraud or steal. Also, a dishonest act." (See Shorter Oxford English Dictionary, sv "dishonesty" 4.) In Brown v R 1908 TS 211 Solomon J said at 212 that in its ordinary sense "dishonest" involves an element of fraud. (Cf R v White 1968 (3) SA 556 (RAD).) In Words and Phrases Legally Defined (2nd ed by J B Saunders; 1976 Supplement at 57) there is a quotation from a judgment of the Canadian Supreme Court:"... 'Dishonest' is a word of such common use that I should not have thought that it could give rise to any serious difficulty, but in construing even plain words regard must be had to the context and circumstances in which they are used: Canadian Indemnity Co v Andrews & George Co Ltd (1953) 1 SCR 19 at 24. However, to try to put a gloss on an old and familiar English word which is in everyday use is often likely to complicate rather than to clarify. 'Dishonest' is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning.* (My emphasis). *It is such a familiar word that there should be no*

difficulty in understanding it. Lynch & Co v United States Fidelity & Guaranty Co (1971) 1 OR 28 per Fraser J at 37, 38." In this context the word "involve" means to contain or include as a part, so that the expression "offence involving dishonesty" means an offence of which dishonesty is an element or ingredient - in the case of a common law offence in terms of its definition, and in the case of a statutory offence in terms of the statute which created it.' The abovementioned citation from *Ex parte Bennett*, was also cited in *La Grange en Andere v Boksburgse Stadsraad en Andere* 1991 (3) SA 222 (W), *Nusca v DA Ponte and Others 1994* (3) SA 251 (BG) and *Estate Agency Affairs Board v McClaggen & Others* (161/2004) [2005] ZASCA 34. In light of the abovementioned cited court cases, I respectfully submit that an act of dishonesty can only be committed if there is intention to commit an act of dishonesty and on the other hand an act of dishonesty cannot be committed as a result of negligence.

[49] After the lengthy exposition as aforesaid, the applicant concludes in the words:

"I respectfully submit that I was never dishonest, because I lacked the intention to be dishonest. However, I do admit that my conduct was grossly negligent. I was grossly negligent when I allowed my wife to withdraw money from my trust account without implementing adequate, or for that matter, any checks, balances and controls and relying solely on the annual audit reports."

[50] To bolster his assertion of being ethical and a man of honour, integrity and high morals, the applicant has attached various supporting affidavits, including those of practicing attorneys, Mr. Janse Van Vuuren and Mr. Itumeleng Pule. Mr. Janse Van Vuuren states as follows:

"*I know the Applicant as an ethical person with honor, integrity and high moral values.*

…

I trust the Applicant."

Mr. Pule, in turn, states as follows:

> "*In all my dealings with the Applicant, the Applicant always behaved with dignity and in an ethical manner*."

[51] The applicant contends that whilst Mr. Janse van Vuuren did not specifically use the word honesty, honesty is an integral part of being "*a person with honor, integrity and high moral values.*" In respect of Mr. Pule's testimonial, the applicant states that whilst Mr. Pule likewise did not specifically use the word honesty, honesty is an integral part of behaving oneself in an ethical manner. The court has regard to the assertions of Mr. Janse van Vuuren and Mr. Pule that they regard the applicant as a fit and a proper person to be an attorney. The ultimate decision in that regard, however, remains the prerogative of this Court.

[52] The applicant further provided supporting affidavits of persons he refers to as non-practicing attorneys and further affidavits supplied by other parties. The persons identified as non-practicing attorneys, Mr. Wedderspoon and Ms. Mametja stated in their Supporting Affidavit, respectively, that:

> "*I got to know the Applicant as an honest person with high ethics."*
> *a*nd
> "*I trust the Applicant completely because I know that the Applicant is an honest person with integrity."*

[53] Whilst the applicant deals with the use of the stolen trust money and whether or not he benefited from same, it respectfully does nothing to advance the application for readmission.

Discussion

[54] In the present application, the applicant whilst not having been convicted of fraud or theft related to trust monies, for the first time, in the readmission application, notwithstanding his attempts at averting the reality, in fact places the blame for his woes and that of Van Schalkwyk Attorneys, predominantly on his wife. The applicant fails, aside from the issues with his wife and the trust account deficit, to deal with the numerous complaints lodged against him as highlighted in the judgment in the striking application, with any particularity. The complaints, aside from the trust deficit, are simply relegated to negligence on the part of the applicant under the umbrella malpractice. The applicant remained indebted to the Legal Practitioners Fidelity Fund ("the LPFF") in the amount of R29 877.87 (twenty nine thousand eight hundred and seventy seven rand eighty seven cents) for legal costs incurred in the application to strike his name from the roll of attorneys. He has made payments to the LPFF which it is claimed have been settled in full.

[55] The applicant contends that the present application differs from the majority of readmission applications which he has read in preparation for this application. He in particular makes the assertion that those applications involved applicants who had made themselves guilty of acts of dishonesty. The high watermark of the applicant's case is that he submits that he has not conducted any act of dishonesty. In this regard the applicant submits the striking application by the LSNP contained no allegation of dishonesty and that the striking judgment was silent in that regard. This assertion by the applicant is factually incorrect. The court in the striking application emphatically found as follows at paragraphs 8.1 and 8.2 of the striking judgment:

"8.1 **The Respondent continued to practice without being in possession of a Fidelity Fund Certificate since 1 January 2006, which is in contravention of Rule 83(10) and which is a criminal offence**.

8.2 **The seriousness that the respondent practiced without a fidelity fund certificate cannot be overemphasised**. Firstly, his conduct is in contravention of the Act and the Rules. **Secondly, the trust creditors are at risk who will sustain loss as a result of the theft committed by a practising attorney**.

[56] This is itself constitutes dishonest conduct as he alleges that he continued to practice under threat of being held in contempt of court, if he did not appear in court to withdrew as attorney of record from all the criminal matters in the Regional Court. The applicant's appearance in court or practice as an attorney, however, did not cease with his withdrawal from the criminal matters in the Regional Court. He in fact perpetuated the facade of being an attorney, entitled to practice, when he with full knowledge of not having a Fidelity Fund Certificate, applied for a position as Senior Attorney at Legal Aid South Africa. The applicant fails to state whether he disclosed this in his application for the said position, which in itself is dishonest conduct. He was duly appointed in the position at Legal Aid South Africa and practised for at least two months before resigning. The striking judgment is further clear that the applicant practicing without a Fidelity Fund Certificate constituted a criminal offence. The plea by the applicant that this Court condones his conduct for the period he appeared in the Regional Court without a Fidelity Fund Certificate cannot be countenanced. The cavalier attitude with which he ran his practice as emphasized in the striking judgment and as he discloses in this application

that he continued to practice without a Fidelity Fund Certificate speaks volumes of his character.

[57] More telling, however, is the finding that the applicant's conduct constituted theft in respect of his trust creditors. The complaints from the applicants clients in the absence of any reasonable explanation from the applicant, who elected not to oppose the striking application, points *prima facie* to the crime of theft rather than negligence in the conduct of his practice.

[58] The fact that the LSNP took no steps to pursue criminal charges against the applicant cannot be discounted. The applicant blows hot and cold in this regard. In one breath he contends that Mr. Van Staden empathized with his position of not wanting to lay charges against his wife based on the fact that they had a two year old child at the time, and in another breath contends the LSNP possibly did not pursue prosecution or rely on the theft of the trust monies in the striking application because he disclosed the theft to Mr. Van Staden. It is mindboggling to this Court why Mr. Van Staden, on the allegations by the applicant, would not pursue criminal charges against the applicant and/or his wife, in the face of *prima facie* evidence. This view of the Court is edified by the applicant's own evidence that he is aware of other attorneys being charged in such circumstances. The circumstances as sketched in the *Nthai* matter are apposite in this regard. The Supreme Court of Appeal referred the alleged criminal conduct of Mr Nthai to the NDPP for consideration of criminal prosecution. This Court is enjoined to do likewise and to make a copy of this judgment available to the DPP North West for consideration of criminal prosecution. The exposition of the element of fault by the applicant in attempting to justify his conduct does not avail the applicant in the present application.

[59] The applicant admits to the allegations as summarised at paragraph [10] *supra*. The applicant, in line with the authorities highlighted, must discharge the very onerous burden to demonstrate to this Court through very convincing evidence that he accepts the full extent of the circumstances that led to his striking, that he has reformed and in fact can be considered a fit and proper person. The finding of the LSNP's Council alluded to with approval in the striking judgment in this regard, is telling. The applicant before this Court deals in great detail with the trust fund deficit, but fails to address the proverbial elephant in the room that:

> "…whether each complaint is considered alone or all the complaints are considered cumulatively, the Respondent had made himself guilty of unprofessional and dishonourable or unworthy conduct and is no longer a fit and proper person to continue to practice as an attorney or as an officer of the Court. The Respondent's conduct clearly revealed character defects which could not be tolerated in a practitioner or officer of the Court and does not meet the standard of behaviour and conduct and reputation which is required of an attorney and of an officer of the Court. By virtue of his conduct and behaviour the Respondent had damaged and affected the good standing and reputation of the profession as a whole. Consequently, his name should not be allowed to remain on the roll of attorneys."

[60] The high watermark of the applicant's case for readmission is found in the following assertion under the heading "GENERAL" in his founding affidavit. It is on these assertions that he as a general rule is called to make his case for readmission:

> "**GENERAL**
>
> 39. I wish to reiterate that this application differs from the majority of readmission cases that I have perused in preparation for this application. In

the vast majority of the applications which I have perused, the respective applicants conducted acts of dishonesty.

40. I respectfully submit that I have not concluded any act of dishonesty. Even my striking application by the LSNP did not contain any allegation that I was dishonest and subsequently the Honorable Court did not state anything about dishonesty in the judgment of my striking application.

41. The application by the LSNP to strike my name from the Roll of Attorneys was based inter alia on my failure to submit a closing audit for Van Schalkwyk Attorneys, my failure to submit an opening audit for VVG, my failure to submit an audit in terms of Rule 70 of the rules under the Attorneys Act 53 of 1979 for the time periods that ended on 28 February 2006 and February 2007 and upon my cavalier attitude coupled with my reckless, alternatively negligent conduct as an attorney.

42. I admit to the allegations mentioned in the previous paragraph. I will deal in more detail with these allegations later in this affidavit.

43. As custodian of the of the attorney profession, the LSNP was exercising its duties and obligations when the LSNP applied for the striking of my name from the Roll of Attorneys.

44. It is further necessary to reiterate that nothing in this affidavit is intended to shift the blame to any other person or entity. Even where I will later in this affidavit refer to the conduct of other people, I am still responsible, because everything that happened was the result of a decision that I have made at some time.

45. I take full responsibility for everything that caused the LSNP to apply to the Honourable Court to strike me from the Roll of Attorneys.

46. In order for the LSNP and the Honorable Court to fully understand the context wherein everything occurred, I deem it necessary to provide details regarding the background of this matter."

[61] The applicant relies on numerous supporting affidavits as set out *supra*. Inasmuch as the character references purport to sketch the applicant as a man of the highest degree of honesty and integrity, the question of reformation lies peculiarly within the knowledge of the applicant and it is he who has to satisfy this Court that he has been reformed. The *uberrima fides* of the said persons does not provide a guarantee that this Court in readmitting the applicant would be protecting the public whom the applicant has wronged before.

[62] Although this Court is concerned with whether there is evidence of reformation of character since the applicant was struck off the roll, it is striking that the applicant persists in this application in characterizing his conduct as not being dishonest and relegating same to mere negligence. It is telling that the applicant with full knowledge of the trust account deficit at Van Schalkwyk Attorneys, nonetheless proceeded to enter into an agreement to form VVG Attorneys. Whatever negligent conduct the applicant alleges in the context of VVG Attorneys cannot be divorced from the *status quo* of Van Schalkwyk Attorneys. The fact that he well knowing of the trust deficit as a result of fraud and theft went on to buy and establish VVG Attorneys, placing all the attorneys in the practice at risk in the process, is indicative of dishonesty and dishonourable conduct in an attempt to conceal the wrongdoing at Van Schalkwyk Attorneys.

[63] The application lacks any substance demonstrative of an appreciation of the character defects highlighted in the striking judgment and more importantly

that there is a full appreciation of the extent of the offending conduct that led to the striking. On a careful reading of the papers the applicant demonstrates a lack of appreciation of the extent of his conduct as set out in meticulous detail in the striking judgment. In *Ex parte Aarons* 1985 (3) SA 286 (T) at 294G-H, Ackermann J said the following regarding the question of character defects:

> "It seems to me to be fundamental to this enquiry to determine what the particular defect of character or attitude was before one can begin to establish whether an applicant has reformed in respect thereof. It is equally important, I believe, to enquire whether the applicant himself properly and correctly identifies and appreciates the defect of character or attitude involved. Unless there is such proper and correct appreciation by the applicant, it is difficult to see how the defect can be corrected or cured or eradicated and how there can be true reformation which is reliable and lasting."

[64] I note that the applicant has in the decade since his striking advanced himself through further studies by obtaining an MBA degree. This achievement aside, it has remained incumbent on the applicant to demonstrate that he has reformed. The evidence in my view falls gravely shy of doing so and rather seeks to justify the applicant's flouting of the Rules of the LSNP and the high ethical standards required of an attorney. More importantly it does not demonstrate the intrinsic values required of an attorney which are attested to in the supporting affidavits. The present application, whilst having to consider the reformation of the applicant, must also have regard to the protection of the interests of the public which this Court is duty bound to uphold.

[65] I cannot find that the applicant has mustered the very high threshold of demonstrating that he is in fact a fit and proper person for readmission to

the profession as a legal practitioner (attorney). Resultantly, the application for readmission as an attorney should fail.

Costs

[66] The application was unopposed and no order as to costs is necessitated thereby.

Order

[67] Consequently, the following order is made:

(i) The application for readmission as a legal practitioner (attorney) is dismissed.

(ii) There shall be no order as to costs.

(iii) A copy of this judgment must be forwarded to the Director of Public Prosecutions, North West and to the Legal Practice Council, North West.

AH PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree

_____
RD HENDRICKS
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG