IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 3345/2017
DATE HEARD: 09/11 & 06/12/2017
DATE DELIVERED: 23/01/2018

In the *Ex Parte* application of:

ELSWORTH JOHN O'CONNOR **APPLICANT**

(ADMISSION AS AN ADVOCATE)

JUDGMENT

ROBERSON J:-

[1] The applicant was admitted as an advocate of the Supreme Court of South Africa on 14 August 1997. On 30 October 2001, by order of this court, his name was struck from the roll of advocates of the High Court of South Africa. The applicant has applied to be readmitted as an advocate of the High Court of South Africa. His application is opposed by the Eastern Cape Society of Advocates (the Society).

[2] The conduct of the applicant which led to the striking of his name from the roll of advocates is set out in the judgment of Jennet J, which was annexed to the applicant's founding affidavit. Mrs Mona Blignaut (now Mrs Adams) asked the applicant to act as her agent in the administration of her late husband's estate. Mrs Adams arranged for the applicant to have signing powers in the estate bank account

and left the administration of the estate in his hands. Jennet J found that the applicant had misappropriated the sums of R17 449.07 and R 120 238.64 from the estate. He further found that the applicant had forged a letter, purporting to be from attorneys Smith Tabata Loon & Connellan, to the effect that they had been instructed by the applicant to draw a liquidation and distribution account in the estate.

[3] In his judgment Jennet J described the manner in which the applicant had conducted the striking off application as cavalier. The application had been referred for oral evidence and the day before the hearing the applicant sent a fax to the Registrar saying that he could not attend court because he was to undergo psychiatric treatment that day. On the day to which the matter was postponed, 30 October 2001, the applicant again sent a fax to the effect that he was appearing in the Magistrate's Court as an accused person. The application thereafter proceeded by default.

[4] The applicant was subsequently charged in the High Court with theft of R120 238.64 and defeating the ends of justice. He pleaded guilty to both charges and on 20 May 2004 was sentenced to six years' imprisonment. His appeal against the sentence was dismissed. He was released on parole during November 2006.

[5] In his founding affidavit the applicant recounted his career history following his admission as an advocate. He served one year of articles of clerkship, assisted with legal work at a firm of attorneys, and was employed as a prosecutor with the Department of Justice from 1997 until 1999. From January 2000 he practised as an independent advocate in Queenstown.

[6] His account of his dealings with and on behalf of Mrs Adams was as follows: she complained to him that the attorneys she had appointed to attend to the administration of the estate, Poswa & Mpambaniso Attorneys, were delaying in finalising estate matters. She instructed the applicant to collect her file from these attorneys and to attend to the administration of the estate. The applicant stated that he intended to collect all the necessary information for the administration of the estate and to hand it over to attorneys to administer the estate. He was aware, so he stated, that he, as an advocate, was prohibited from administering the estate. He accompanied Mrs Adams to Standard Bank, Queenstown, where an estate bank account was opened and he was given signing powers on the account. The sum of R234 000.00, the proceeds of an insurance policy, was deposited into the estate bank account.

[7] At this time, according to the applicant, his creditors were threatening to attach and remove his office furniture because they had not been paid, and his motor vehicle was about to be re-possessed. His income was exceeded by his debts and he was unable to pay his employees. His wife was not employed and was expecting their second child. Although he knew that "it was against all ethical rules and criminal to say the least", he withdrew amounts from the estate bank account and deposited them into his personal bank account. He said that his actions "went against every moral value and principle I had". His dishonesty was discovered when he paid a personal debt owed to an attorney, with an estate cheque. The attorney alerted Mrs Adams and the Master of the High Court.

[8] After his dishonesty was discovered, the applicant tried to conceal his criminal conduct by forging a letter purporting to have been written to him by Smith Tabata Loon and Connellan stating that they had been instructed by him to draw the liquidation and distribution account in the estate. He did this in order to avoid being struck from the roll because that would have been devastating to his mother, and would have harmed his parents' good name in the community. They were both deputy school principals and held in high esteem by the community. A further reason for trying to conceal his criminal conduct was to prevent the legal profession, his clients, his family and his friends from being associated with dishonesty.

[9] Prior to his conviction the applicant repaid the stolen money to Mrs Adams.[1] While in prison he attended anger management and financial management counselling sessions. The applicant in turn presented these management sessions to fellow inmates. He was regularly counselled by his church minister concerning his criminal conduct and his minister contributed towards his reformation and rehabilitation.

[10] Since his release on parole, the applicant has been employed as a teacher at various schools. A teaching diploma was conferred on him during 2010. He stated that in the course of his employment he has been entrusted with finances and has not abused that trust. He has served on a School Governing Body and has been involved in community projects.

[1] There was some debate in the papers about whether or not he had repaid the money but this was not pursued and I accept for the purposes of this judgment that he did repay the money.

[11] The applicant stated that he has been declared physically unfit to fulfil his duties as a teacher and he has applied for early retirement owing to ill-health. If readmitted, he intends to apply to the Society of Advocates for admission to pupillage.

[12] The applicant stated that he thought he had no other option but to steal the money from the estate in order to pay his personal debts and to maintain his and his wife's lifestyle. He is now divorced and lives with his mother. He stated that his financial situation has improved drastically and he is no longer under the financial pressure which led to his dishonest conduct. He is convinced, so he stated, that there exists no likelihood of a repeat of such conduct. He no longer lives above his means and he manages his finances more responsibly.

[13] The applicant acknowledged that his criminal conduct and his conduct in the striking off application fell short of the conduct expected from an advocate and that he was not at that time a fit and proper person to practise. He contended that he has completely reformed and is now a fit and proper person to be readmitted. He has conducted himself without blemish for the past 15 or 16 years. He fully understands the character defect which caused him to be struck off, and has corrected such defect. He described this defect as "my inability to withstand financial pressures and me living beyond my means".

[14] The applicant annexed affidavits from various persons, including his mother, to the effect that he has reformed.

[15] Mr A D Schoeman SC deposed to the answering affidavit on behalf of the Society. He stated that the applicant had opposed the striking off application and had denied the allegations against him, hence the referral for oral evidence. Mr Schoeman pointed out that in opposing that application the applicant lied under oath.

[16] Mr Schoeman further pointed out that the applicant had failed to disclose in his founding affidavit that on 13 August 2000 he had been found in contempt of court for failing to comply with a court order. Mrs Adams had brought an application for an order directing the applicant to deliver certain documents relating to the estate of her late husband. The order was granted but the applicant did not comply and Mrs Adams launched a contempt application. The order reflects that the applicant was found in contempt and was sentenced to six months' imprisonment, wholly suspended on condition that the applicant was to comply with portions of the order on or before 21 September 2000.

[17] I interpose at this stage to mention that we obtained the court file in the contempt application. In her founding affidavit in the main application, which the applicant did not oppose, Mrs Adams set out the difficulties she experienced in retrieving the estate file from the applicant after she discovered, in November 1999, that he had used estate monies to pay a personal debt When she confronted the applicant about what he had done, he assured her that the problem had been resolved. She also annexed a letter from the State Attorney informing her that she had failed to submit a liquidation and distribution account in the estate. On that letter was a note to the effect that the applicant had informed the State Attorney that the liquidation and distribution account had been submitted to the Master of the High

Court the previous week, and that the estate had been a difficult one. Mrs Adams stated that as at the date of her founding affidavit, the liquidation and distribution account had not been submitted to the Master. After Mrs Adams received information from the bank in January 2000 that an estate cheque had been issued for R25 000.00 to an unknown creditor, she consulted an attorney. The applicant's mandate was terminated and the estate bank account was frozen. The attorney unsuccessfully attempted to obtain the estate file from the applicant and the application for delivery of the various documents was launched on 11 May 2000.

[18] The applicant opposed the contempt application. In his answering affidavit he stated, *inter alia*:

> "After paying some creditors of the Estate I realised that I was not sufficiently qualified to administer the estate and decided to forward the complete dossier that I had received from attorneys Poswa & Mpambaniso to attorneys Smith Tabata Loon & Connellan of King William's Town."

He further stated twice that he had not used estate funds to pay his debts.

[19] In his judgment finding the applicant in contempt, Froneman J (as he then was) said:

> "I consider that on the basis of what the respondent says in his opposing affidavit it is clear that he has not complied with the Order and that he deliberately ignored major portions of the Order in absolute disregard for the consequences of his actions."

[20] Returning to Mr Schoeman's affidavit, he stated that it is the view of the Society that because of the nature of the applicant's prior conduct he should not be readmitted to practise. He further stated that it is the view of the Society that there is no basis upon which it could be concluded that the applicant has reformed.

[21] In his replying affidavit, deposed to on 16 October 2017, the applicant admitted lying under oath in the striking off application and reaffirmed his reformation.

[22] He maintained that he did not oppose the main application by Mrs Adams for delivery of documents because he had already handed over all the documents which he had in his possession to her attorneys. He said that he was unable to comply fully with the order. The court had however found him to be in contempt. He informed Mrs Adams' attorneys that he could not comply with the court order and assumed that they had obtained the contents of the file from Poswa Mpambaniso Attorneys, because no steps were taken to put the suspended sentence into operation. He repeated what he had said in his founding affidavit, namely that he did not administer the estate but assisted in collecting the necessary information in order to instruct a firm of attorneys to administer the estate, which process he said had been initiated by Poswa Mpambaniso Attorneys. The applicant did not explain his failure to disclose the contempt finding in his founding affidavit.

[23] The present application was set down for hearing on 9 November 2017. Argument commenced, but before it was concluded we were informed by Mr Paterson SC, who appeared with Ms Stretch for the Society, that new information had come to light during the lunch adjournment which was relevant to the application. It involved pending civil proceedings against the applicant. The matter was postponed to 6 December 2017. The applicant thereafter withdrew the application but the Society delivered a notice that it intended to apply for the setting

aside of the notice of withdrawal and for the dismissal of the application. The applicant reinstated the application and further affidavits were filed.

[24] Mr Schoeman deposed to a supplementary answering affidavit which revealed further non-disclosures by the applicant. The pending civil proceedings were four applications by the applicant for the rescission of default judgments taken against him by Queens College Boys High School (Queens College) in the Queenstown Magistrates Court, for outstanding school fees. The default judgments were granted on 20 November 2013, 14 April 2015, 20 May 2015, and 30 October 2015 respectively. The notices of application for rescission of judgment were dated 9 October 2017. In his founding affidavits the applicant claimed not to have learned of the judgments until 5 October 2017, when he checked his credit profile. He denied that summonses had been served on him or his mother. His defence to the actions was that Queens College was not entitled to institute legal proceedings for school fees before first considering whether or not he qualified for an exemption in accordance with the South African Schools Act 84 of 1996.

[25] The opposing affidavit in the rescission applications was deposed to by the acting headmaster of Queens College, Mr Michael Boy. In addition to taking various points *in limine*, he stated that the applicant had been informed of his right to apply for exemption and was aware of his right. Annexed to the affidavit was correspondence between the school and the applicant, which revealed that the applicant was aware that he was required to apply for exemption, and had in fact applied for exemption but had not followed the correct procedure in his application. In his letter dated 22 July 2015 to the headmaster of Queens College, the applicant

stated that he had difficulty in paying school fees for one of his children because he had four children to care for and his salary was not enough to make ends meet. He requested that fees for his child be waived.

[26] Further documents annexed to Boy's affidavit disclosed that emoluments attachment orders had been issued and served on the applicant's employer, the Department of Education, and that payments had been received by the school from the Department of Education as recently as July 2017. These payments were reflected in a "Detailed Debtor's Report" compiled by the attorneys who acted for the school in the actions against the applicant.

[27] The applicant filed a supplementary affidavit in response to Schoeman's supplementary affidavit. He admitted that the default judgments had been granted and that emoluments attachment orders had been issued. He repeated that he only discovered the judgments on 5 October 2017 and said that he had no knowledge of deductions from his salary. He denied any such deductions. He annexed four salary advices for the months of May, June and September 2016 and October 2017 which reflected that no deductions had been made. He claimed that these were the only salary advices he had received from his employer. The applicant did not deal specifically with the attorney's debtor's report annexed to Boy's affidavit in the rescission application, which clearly revealed that payments had been received from the Department of Education. I should mention at this stage that according to the debtor's report, no payments were reflected as having been received from the Department of Education for the months of May, June and September 2016, and October 2017.

[28] The applicant stated that prior to 16 October 2017 Queens College had not served a notice to oppose the rescission applications. He therefore believed that the applications would proceed on an unopposed basis on 26 October 2017 and would be granted. This is why, when he deposed to his replying affidavit on 16 October 2017, he did not bring the default judgments and the rescission applications to the attention of this court. The notice to oppose the rescission applications was filed on 25 October 2017.

[29] The applicant acknowledged that when the judgments were granted, he experienced difficulty in paying school fees. He is a single parent and does not receive financial assistance from his ex-wife. Further, he did not receive his salary during 2011 and for September 2015. He was of the view that the fact that judgments had been taken against him should not lead to the conclusion that his financial situation is unstable. The judgments were for school fees, and not for material things, therefore, so he stated, it could not be said that he was living beyond his means. His obligations in respect of school fees are now less onerous because he was promoted to Head of Department in August 2015 and his youngest child has been granted a bursary. The letter he wrote to the headmaster dated 22 July 2015 was written prior to his promotion and the awarding of the bursary.

[30] The applicant went into some detail about the merits of his defence to the actions by Queens College but I do not think it necessary for the purposes of this judgment to deal with that material, other than to note that he did not dispute the amounts for which the judgments were granted. The total amount was R52 415.00.

[31] A further affidavit was filed on behalf of the Society, which was deposed to by Ms Michelle Baxter. She is an attorney practising in Queenstown and is a member of the School Governing Body of Queens College. She annexed to her affidavit a letter dated in April 2015, from Global Legal Protection & Outsourcing CC, in association with H Adams Attorneys (the CC) whose address was reflected as 11 Diamond Street, Queenstown. (It is not in dispute that this is the applicant's residential address.) The letter was addressed to the Department of Education and the heading contained the applicant's name, his identity number and his persal number. The letter stated that the CC had been instructed by the applicant to have him placed under administration. The Department was requested to cancel all garnishee or emoluments attachment orders, which were listed in the letter. The list of orders contained the names of the attorneys for the creditors, their reference details, and the amount of the order. The letter was purportedly signed by H Adams.

[32] Ms Baxter also annexed to her affidavit Queen's College ledger accounts in respect of two of the applicant's children, dating from 2013 to October 2017. These documents reflected that on numerous occasions debit orders were unpaid or reversed, and that the applicant had frequently been handed over to attorneys for collection of school fees.

[33] The last affidavit was that of the applicant in response to Ms Baxter's affidavit. He denied knowledge of the letter from the CC and said that the CC had never operated from 11 Diamond Street. He denied being a member of the CC and did not know why it would use his address. He said he had known an attorney named

Hadley Elsworth Adams, who had been struck off the roll of attorneys in June 2013, and who had died in 2014. The applicant denied that he had ever instructed anyone to cancel the emoluments attachment orders and reiterated that there had been no emoluments orders against his salary or deductions from his salary. He again mentioned that according to his salary advices annexed to his earlier affidavit, no deductions had been made.

[34] With regard to the ledger accounts, he denied that Queen's College had ever debited his bank account by way of a debit order or that any debit order was reversed or unpaid. He acknowledged that he may have been handed over to attorneys but had no knowledge of this prior to 5 October 2017.

[35] The applicant disclosed that on 30 November 2017 he received two summonses against him and his ex-wife for payment of outstanding school fees. The total sum claimed is R38 100.00. He has served notices of intention to defend the actions as well as what appears to be an exception to the particulars of claim, on the basis that the particulars of claim do not disclose a cause action. He relies again on the provisions of the South African Schools Act and the obligation of the school first to ascertain whether or not he qualifies for an exemption. He does not deny responsibility for payment of school fees but requires a determination of whether or not he qualifies for an exemption.

THE LAW

[36] In *Swartzberg v Law Society, Northern Provinces* 2008 (5) SA 322 (SCA) at paragraphs [14], [15] and [22] Ponnan JA said the following:

"[14] 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,

> '[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 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.'
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> (Per Corbett JA in *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A) at 557B-C.)

[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 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-346, as quoted with approval in *Behrman* at 557E.)

[22] The fundamental question to be answered in an application of this kind is whether there has been a genuine, complete and permanent reformation on the appellant's part. 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. ……. 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."

DISCUSSION

[37] The applicant's conduct for which he was struck off was in itself extremely serious. By stealing from the estate he also took gross advantage of Mrs Adams' trust in him as a legal practitioner. He accepted an appointment as agent for Mrs Adams when he knew this was prohibited. His dishonest and duplicitous conduct did not end there. He persisted in trying to conceal his dishonesty. When discovered in 1999, he falsely assured Mrs Adams that the problem was resolved. He withheld estate documents, necessitating an application to the High Court. He lied under oath in the contempt application. In 2001, he lied under oath in the striking off application, and did his best to avoid facing up squarely to the application.

[38] The applicant did not make a full disclosure in his founding affidavit. He did not disclose that he had lied under oath in the striking off application and the contempt application. He did not disclose that he had been found in contempt of a court order. He did not explain why he had not disclosed the contempt finding and his attitude towards this finding was almost dismissive, in stark contrast to the language used by Froneman J in his judgment.

[39] In addition to his failure to make a full disclosure, I am of the view that he positively attempted to mislead the court when he said in his founding affidavit that his intention with regard to the estate was to collect the necessary information and hand it over to attorneys to administer the estate. This could not have been his intention because he accompanied Mrs Adams to the bank to open an estate bank account, obtained signing powers, and issued cheques. This statement was also in contradiction to what he said in his answering affidavit in the contempt application,

namely that after he had paid some creditors he realised that he was not sufficiently qualified to administer the estate. This was of course also untrue.

[40] The applicant also appeared not to identify the character defect for which he was struck off, namely gross dishonesty and duplicity. It is significant that he himself identified the defect as "an inability to withstand financial pressures and me living beyond my means." This description does not begin to equate with gross dishonesty and duplicity and rather demonstrates that the applicant has not understood or truly acknowledged the real defect. He did not say, for example, that should he find himself in the same kind of financial predicament again, he would not resort to dishonest conduct. His lack of appreciation of the defect is underscored by his disturbing statement that he thought he had no option other than to steal from the estate in order to pay his debts and to maintain his and his wife's lifestyle. It follows that on this ground alone, and on the papers as they stood on 9 November 2017, the applicant did not discharge the onus to prove that the character defect no longer existed. In fact his persistence in failing to admit his dishonesty from the time it was discovered, and his lack of candour and attempt to mislead the court in this application, rather demonstrated, even at that stage of the hearing, that the defect still exists.

[41] Developments in the application thereafter resoundingly underscored and confirmed this conclusion. The applicant must have had knowledge of the judgments and the emoluments attachment orders when he launched the application. The emoluments attachment orders had been served on the Department of Education and the debtor's report compiled by the attorneys reflected

that payments had been received from the Department of Education. The applicant did not deal with these payments. He instead cunningly selected salary advices which did not reflect a deduction, when indeed no deductions had been made for those particular months. I am satisfied that his denial of knowledge of the judgments was false and that he failed to disclose this very material information in his founding or replying affidavits. I say material because the very basis of his application is that he will no longer be under the financial pressure that he was when he committed the theft. He clearly is unable to pay the school fees and his defence relating to exemption is a smokescreen for this inability. The most recent summonses which he did disclose, confirm this ongoing inability. His assertions of financial stability were false from the start.

[42] Even if the applicant, according to his version, only learned of the judgments on 5 October 2017 and expected his rescission applications to be granted on an unopposed basis, he had the opportunity, once the notice of opposition was received on 25 October 2017, to disclose the judgments prior to 9 November 2017. In any event his reason for not disclosing the judgments was not credible. I am of the view that, given his assertion of financial stability, his failure to disclose the judgments at any stage of the proceedings was a deliberate attempt to mislead the court.

[43] The letter from Global Legal Protection & Outsourcing CC creates enormous suspicion. It was clearly written by someone with an intimate knowledge of the applicant's personal particulars. One wonders why anyone would falsify such a letter. The only person who could have benefited from the letter, if the Department

of Education had cancelled the emoluments attachment orders, was the applicant. However I cannot take it any further than that.

CONCLUSION

[44] The applicant has clearly not discharged the onus on him as set out in *Swartzberg (supra)*. His prior conduct and the dishonest and evasive manner in which he conducted this application demonstrate that he has not reformed and is not a fit and proper person to practise as an advocate.

[46] The application is dismissed with costs on the attorney and client scale.

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J M ROBERSON
JUDGE OF THE HIGH COURT

MSIZI A J

I agree

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N MSIZI
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the Applicant: Adv W H Olivier, instructed by NN Dullabh & Co, Grahamstown

For Eastern Cape Society of Advocates: Adv T J M Paterson SC with Adv S Stretch instructed by Whitesides Attorneys, Grahamstown