IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Application: 4835/2015

In the application between:

ITUMELENG INNOCENT MPHATSWE Applicant

and

LAW SOCIETY OF THE FREE STATE Respondent

CORAM: VAN ZYL, J

DELIVERED ON: 20 SEPTEMBER 2017

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[1] This is an application for the admission of the applicant as an attorney of this court. The respondent opposed the application. I previously dismissed the application, with costs, subsequent to which reasons for the order were requested. This judgment contains the reasons for the aforesaid order.

[2] On 23 June 2011 the applicant entered into a written contract of articles for a period of two years to serve under Jacqueline de

Vries as his principal. The said contract of articles was registered on 1 August 2011 by the Chief Executive Officer of the respondent. Appended to the applicant's contract of articles was an affidavit by the applicant`s principal, in which the following was stated in paragraph 5 thereof:

> "Itumeleng Innocent Mphatswe was convicted on a charge of rape on 9 September 2002 by Mafikeng Regional Court and sentenced to sixteen (16) years imprisonment by Mafikeng High Court on the 9th of December 2002. Itumeleng subsequently served eight (8) years imprisonment firstly at Rooigrond Correctional Centre and thereafter Klerksdorp Correctional Centre. He was released on parole on 8 December 2010 due to good behaviour."

His principal further stated in paragraph 6 of her affidavit as follows:

> "I am of the opinion that, although Itumeleng Innocent Mphatswe was convicted of an offence previously, he had served the sentence and is therefore fully rehabilitated and therefore I am of the opinion that is a fit and proper person for purposes of registering him as a Candidate Attorney."

[3] After the applicant completed his articles of clerkship, he was employed by Mphafi Khang Attorneys as an "administrative officer" and passed his Board Exam in August 2014. Pursuant thereto, the applicant filed a previous application for admission as an attorney on 3 November 2014. Although the said application was served on the respondent, it was never issued at court. In response thereto, the respondent stated as follows in a letter dated 29 January 2015:

"Your application was denied.

You can however proceed with your application for admittance, but will the Law Society then oppose such application.

I attach hereto case law *Mtshabe v Society of Good Hope*, which I suggest you study.

Our council resolved that a person serving parole is not a fit and proper person to be admitted in terms of the Attorneys Act, especially because the parole can be cancelled at any stage and are you therefore still serving a sentence."

[4] When the current application was served upon the respondent, its council took a similar stance.

[5] In his founding affidavit the applicant contends that he differs with the reason or explanation provided by the respondent on the following grounds:

1. "The sentence meted out removed me from the community for a specified period of eight (8) years, which removal .... satisfied both the complainant and the community at large."
2. ".... the punishment I received was proportionate to the wrong for which I was convicted and sentenced."
3. "Despite the conviction and sentence I did show remorse hence my subsequent release."
4. ".... I was released on parole due to my good behaviour, thus deemed rehabilitated by the Department of Correctional Services and suitable to be re-integrated back into society."
5. "I was released on the 8th December 2010 and never broke my parole conditions ...."

6. "In essence the Law Society is also punishing me for an offence which I had already been punished for by a competent Court of Law, thereby denying me the opportunity to be a productive member of the society."

[6] The applicant furthermore avers that the facts of the **Mtshabe** - judgment differs from the matter at hand, as the applicant in that matter committed an offence whilst in practice.

[7] It is also the applicant`s contention that the respondent`s decision to deny his application, is inconsistent with its earlier decision to register his contract of articles. The respondent, by registering his contract of articles, issuing him with a certificate of right of appearance and letting him write the Board Exams, also created a legitimate expectation that should the applicant comply with the "rules" (*sic*), he will be deemed a fit and proper person to be admitted as an attorney.

[8] The respondent, in opposing the application, avers that in view of the objectives of the respondent as contained in Section 58 of the Attorneys Act, 53 of 1979 ("the Act"), "the respondent not only owes a duty to the public at large and the profession to ensure that persons who enter into the profession of fit and proper people, but also, more importantly, is obligated to express its views to the above Honourable Court as to whether an applicant for admission to practise as an attorney meets the statutory requirements, particularly in relation to section 16(a) which acquires that such person be a '*fit and proper person to be so admitted ... and enrolled*'."

[9] The respondent, in contending that the applicant is not a fit and proper person to practise as an attorney, *inter alia,* averred the following:

1. A person on parole is for all and intends and purposes "serving" a form of community corrections imposed *in lieu* of sentence and thus is effectively still serving sentence.

2. If a sentenced offender who is subject to transgresses of his parole conditions, a warrant for his arrest and detention may be issued, with the possibility of subsequently being re-incarcerated for the remainder of the period of the sentence.

3. In the respondent's view it is contrary to public policy that a person still serving part of a sentence, but on parole, can be regarded as a fit and proper person to be admitted as an attorney.

[10] In addition to the aforesaid, the respondent also directed the court's attention to the fact that the applicant did not disclose his parole conditions as a result of which it is impossible for the respondent to determine whether such conditions might be in conflict with the requirements of the profession.

[11] The respondent furthermore contended that the application is lacking any basis for the applicant's allegation that he "showed remorse".

[12] In his replying affidavit the applicant again stated that the respondent's opposition to his admission and enrolment as an attorney is inconsistent with its earlier decision in terms whereof it

registered his contract of articles. He furthermore contended that as a candidate attorney he already served the community like any other attorney and, *inter alia,* upheld the integrity and standard of the profession. He also appended a copy of his parole conditions, as well as a letter from Correctional Services stating that the applicant's parole ends on 8 June 2018.

Legal Principles:

[13] In terms of Section 15(1)(a) of the Act the court shall admit an applicant and enrol such person as an attorney if, *inter alia,* "such person, in the discretion of the court, is a fit and proper person to be so admitted and enrolled." The term "fit and proper person" is not defined in the Act, nor in the Admission of Advocates Act, 74 of 1964. The question whether a person is fit and proper is a question of fact, although it involves a value judgment. See **Thukwane v Law Society, Northern Provinces,** 2014 (5) SA 513 (GP) at paragraphs [50] –[57].

[14] Mr Khang, appearing on behalf of the applicant, *inter alia,* relied on the judgment in ***Ex parte* Moseneki,** 1979 (4) SA 884 (TPD) where the following was determined at 888D – 889A:

> "The question that falls to be considered is whether the applicant is in fact a fit and proper person to practise as an attorney.
> In the case of *Ex parte Krause* 1905 TS 221 at 223 INNES CJ stated the ground upon which the Court refuses to place upon the roll of attorneys persons against whose names criminal convictions stand. It is not because a criminal conviction *ipso acto* disqualifies a man from admission to the ranks of the Bar or the Side Bar, nor is it a desire on the part of the

Court again to mark its sense of the enormity of the crime. That has been expiated by punishment as far as its actual commission is concerned. The learned Judge stated the real reason to be the following:

> '... in most cases the fact of the criminal conviction shows the man to be of such a character that he is not worthy to be admitted to the ranks of an honourable profession.'

In the case of *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T) at 107 - 108 RAMSBOTTOM J referred to the last-mentioned case and the cases therein cited and concluded that the sole question that the Court has to decide is whether the facts which have been put before the Court and on which the person concerned was convicted, show him to be of such character that he is not worthy to be in the ranks of an honourable profession.

The offence of which the applicant was convicted was of a very serious nature and may even be regarded as the equivalent of high treason. At the time that offence was committed the applicant would generally speaking not have been a fit and proper person to be taken up in the ranks of an honourable profession; *Incorporated Law Society of Natal v Hassim* 1978 (2) SA 285 (N) and *Hassim (also known as Essack) v Incorporated Law Society, Natal* 1979 (3) SA 298 (A). The authorities are, however, reasonably clear that a person who is not a fit and proper person to practise as an attorney may, after a complete and permanent reformation, become a fit and proper person to practise as an attorney. The *onus* is on an applicant to establish this on a balance of probabilities; *Kudo v Cape Law Society* 1977 (4) SA 659 (A) at 675 and 676. In the case of the applicant there is thus basically one enquiry, namely has there been permanent reformation. If yes, he is a fit and proper person to practise as an attorney unless some cause to the contrary is shown.

In the instant case I am satisfied that the applicant has shown that there has been permanent reformation and that he is a fit and proper person to be admitted an an attorney. No evidence was placed before the Court to show the contrary."

[15] The applicant correctly pointed out that according to Section 4(b) of the Act, any person intending to serve any attorney under the articles of clerkship shall submit proof to the secretary of the Society having jurisdiction in the area in which the service under such articles is to be performed, *inter alia,* that he/she is a fit and proper person. Mr Khang submitted that considering that the affidavit of the applicant's principal was annexed to the submitted contract of the applicant the respondent had knowledge of his criminal conviction and therefore by registering the said contract, it effectively means that the respondent was satisfied that the applicant was a fit and proper person to enter into the attorneys' profession. In the **Thukwane**-judgment, *supra,* the applicant sought a review of the Law Society's decision to register his articles on the ground that he was not a fit and proper person because he had been convicted of murder, robbery and the illegal possession of a firearm, and was still on parole. The court found as follows in paragraphs [58] – [59] of the said judgment:

> "[58] The principles discussed in the aforesaid cases are clearly the same principles and factors which would be relevant in deciding whether a person is a fit and proper person to practise as an attorney and which are presently envisaged by the Act. The question which arises in the present matter is whether the same principles and factors, relevant to the admission, striking-off and the readmission of attorneys, apply equally to the requirement of being a fit and proper person for purposes of the registration of the contract of articles of clerkship.
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> [59] Although a person who applies for the registration of his contract of articles of clerkship has not yet entered the profession and clearly does not yet have the knowledge and experience that would be expected of a person applying for admission as an attorney, and although the facts and

circumstances of the two situations are different, the main consideration is that the person applying for the registration of a contract of articles of clerkship has in reality taken the first step in entering the attorneys' profession. The sole purpose of registering such a contract is to allow that person, after other requirements have been complied with, to enter the attorneys' profession. For this reason alone the core principles and considerations referred to in the cases dealing with the admission, striking-off and readmission of attorneys should apply with equal force. After all, it is mainly the character, the personal qualities and the personal honour of the person in question which are considered in this process. The legislature could not have intended that the question facing the court as to whether a person is fit and proper to be admitted as an attorney in essence entails something different than the question facing the respondent as to whether a contract of articles of clerkship should be registered. After all, both the court and the respondent have to exercise their discretion as to whether the person in question has been shown to possess the required personal characteristics of, *inter alia,* integrity, reliability and honesty, to be allowed into the attorneys' profession."

[16] The applicant consequently submitted that by registering the applicant's contract, with full knowledge of his personal circumstances, the respondent did not only endorse the applicant's principal's view that the applicant has been fully rehabilitated and fit and proper, but also created a legitimate expectation to the applicant that he would be enrolled upon completion of his period and compliance with the necessary requirements.

[17] I respectfully agree with the aforesaid findings in the **Thukwane**-judgment. However, as correctly pointed out by Mr Louw, appearing on behalf of the respondent, emphasis must be placed on the fact that when the applicant submitted his contract of

articles he appended thereto an affidavit by an officer of the court stating that in her opinion he was "a fit and proper person for purposes of registering him as a Candidate Attorney." The respondent's council was entitled to rely on the said affidavit in its decision to register the applicant's contract of articles. There is, however, no way in which the respondent could or would have known that the applicant, at the time of his application for admission as attorney, might not be able to show that he is a fit and proper person to practise as an attorney, despite the contents of the said affidavit. The *onus* is on the applicant to establish this on a balance of probabilities.

[18] In **Swartzberg v Law Society, Northern Provinces,** 2008 (5) SA 322 (SCA) the court determined as follows in paragraphs [14], [15] and [22] of the judgment:

> "[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, the onus is on him to convince the Court on a balance of probabilities that there has been a genuine, complete and permanent reformation on his part; that the defect of character or attitude which led to his being adjudged not fit and proper no longer exists; and that, if he is re-admitted he will in future conduct himself as an honourable member of the profession and will be someone who can be trusted to carry out the duties of an attorney in a satisfactory way as far as members of the public are concerned.
> (*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 Cape Law Society* 1972 (4) SA 342 (C) at 345H - 346A, 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. (*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." (Own emphasis)

[19] Although this is not an application for the readmission of the applicant, there is no sound reason why the same principles are not to apply *mutatis mutandis* in an application for admission in an instance where the applicant has been convicted of a criminal

offence. When the founding affidavit of the applicant is considered, I have to agree with Mr Louw's contention that the applicant did not make out a proper case considering the aforesaid principles and requirements. The applicant rather adopted quite a blasé and indifferent approach to the relevant crime, his conviction and his so-called reformation, simply stating that the sentence fitted the crime as far as a the complainant and public at large are concerned, that he has been rehabilitated because he was released on parole and that he has not breached his parole conditions. The applicant also completely failed to take the court into his confidence and state how he has shown remorse and notwithstanding been challenged on this aspect in the answering affidavit, he chose not to elaborate in his replying affidavit. The applicant also failed to explain the nature and extent of his contrition and his efforts at repairing the harm which his conduct occasioned to the victim and the genuineness thereof so that the court can determine whether he has made a genuine complete and permanent reformation. The applicant instead, in my view, approached the application similarly to an application of an applicant who has not been convicted of an offence, as though the applicant considered the application to be a mere formality. This approach is even more unacceptable when viewed against the background that he previously launched a similar application, which was also denied by the respondent on similar grounds. Despite this knowledge of the respondent`s stance, the applicant still failed to properly address the aforesaid issues.

[20] In the judgment of **Mtshabe v Law Society of the Cape of Good Hope,** 2014 (5) SA 376 (ECM) at paragraphs [49] – [53], the

applicant sought re-admission as an attorney after he was released on parole. The court expressed itself strongly against readmitting an attorney whilst still serving parole.

[21] The fact that an applicant for admission as an attorney has beenplaced on parole by the Department of Correctional Services should be seen in the correct perspective, as stated in paragraph [69] of the **Thukwane**-judgment:

> "The decision to allow a convicted person to conclude his sentence outside of prison and subject to certain conditions is taken by the relevant Parole Board on the basis of certain criteria which obviously differ from the criteria used to establish whether a person is fit and proper to be allowed to have his/her contract of articles of clerkship registered, or to be admitted to practise as an attorney. The granting of parole is not an indication that the applicant should be regarded as a fit and proper person as envisaged by the Act and as was discussed above and their cases referred to." (Own emphasis)

Also see **Northwest Bar Association v Padi; *in re*: *Ex parte* Pardi** (ADM 30/2014) [2015] ZANWHC 65 (10 SEPTEMBER 2015) at paragraph [5].

[22] In the aforesaid **Padi**-judgment, coincidently also a matter where the applicant had been convicted of rape, the court held at paragraph [8] as follows in respect of an application for admission as an advocate:

"... The applicant has a criminal conviction and is currently still on parole, thus still serving a sentence. This in my view disqualifies the applicant for admission as an advocate."

[23] I consequently have to agree with Mr Louw's submission that the applicant has adopted a fairly cold-blooded attitude in his founding affidavit. In my view the applicant completely failed to and/or refrained from placing sufficient facts before the court to show that he is a fit and proper person to be admitted as an attorney.

[24] Mr Khang requested that should I not be satisfied with the merits of the application, I should grant the applicant a postponement with leave to supplement the papers. In my view there is no basis upon which I can or should grant such an order, especially considering, firstly, that this application is already the applicant`s proverbial second bite at the cherry considering the previous similar application which he launched, and secondly, despite the applicant`s knowledge of the respondent`s stance, he still approached court with an application in which he dismally failed to show that he is a fit and proper person to be admitted.

Costs:

[25] Mr Louw submitted that there is no plausible reason why the applicant should not pay the costs of the application. I cannot fault this submission, having regard to the findings I have already made. The respondent was duty bound to oppose this application. In

Vassen v Law Society of the Cape of Good Hope, 1998 (4) SA 532 (SCA) at 538G – 539A the following is stated:

> "In this regard it must be borne in mind that the profession of an attorney, as of any other officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members; and it is the duty of the respondent Society to ensure, as far as it is able, that its members measure up to the high standards demanded of them. ... Here once again the respondent Society has been created to ensure that the reputation of this honourable profession is upheld by all its members so that all members of the public may continue to have every confidence and trust in the profession as a whole."

[26] For these reasons I dismissed the application with costs.

C VAN ZYL, J

On behalf of the applicant: Mr M. Khang
Instructed by:
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On behalf of the respondent: Adv. M. C. Louw
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