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

HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NO: 1637/17

In the matter between:

NORTHERN CAPE SOCIETY OF ADVOCATES Applicant

v

MOSES SIPHO MZIAKO Respondent

Judgment: Tlaletsi JP
Heard on: 19 April 2018
Decided on: 01 June 2018
Coram: Tlaletsi JP, Williams ADJP

JUDGMENT

TLALETSI JP (Williams ADJP concurring)

Introduction

[1] This is an application by the Northern Cape Society of Advocates to have the name of the respondent, Mr Moses Sipho Mziako, struck off the roll of advocates held by the Director General of Justice in terms of s 8 of the

Admission of Advocates Act[1] (the Act) and that he be ordered to pay the costs of this application on the scale of attorney and own client.

[2] An interim order interdicting and restraining the respondent from practising as an advocate pending the finalisation of the application was granted on 21 July 2017[2]. The operation of the interim order has been extended several times mainly at the instance of the respondent, the reason being, *inter alia*, that his counsel was not available.

Factual Background

[3] The factual background leading to the present application is largely common cause. The respondent was admitted as an advocate of this Court on 30 August 2013 in terms of s 5 of the Act. In his application for admission as an advocate, the respondent stated that he resides at number: 30 FG Mankhanyi Street, Valspan Township: Jan Kempdorp. In addition he *inter alia* made the following averments which are partly the basis of the present application:

> *"5.*
>
> *I am a law abiding citizen and have no record or pending criminal case against me. I am not a practicing attorney and at no time was I struck off the Roll of Advocates or Attorneys.*
>
> *6.*
>
> *I am truthfully and faithfully unaware of any circumstances or any reason thereof that could prevent the above Honourable Court to grant me such order to practice as an Advocate."*

And that:

> *"10.1 My estate has never been sequestrated nor is there any proceedings contemplated and/or pending for sequestrating my estate."*
>
> *10.2 I submit that I am a fit and proper person to be admitted as an Advocate and I am unaware of any fact that may adversely affect my status of being fit and proper person."* [Emphasis provided]

It is common cause that the respondent's application for admission as an advocate was not opposed by the applicant. The applicant through its secretary issued a letter to the Registrar indicating that the society had no

[1] Act 74 of 1964
[2] The interim order was granted in terms of Part "A" of the application and the main application is part "B"

information that indicate that the respondent is not a fit and proper person to be admitted as an advocate.

[4] It would appear that the respondent commenced practice as an advocate in the Pretoria area and was not affiliated to any Bar or an Association affiliated to the General Council of the Bar of South Africa. What triggered the process that led to the current proceedings is a complaint by Mr J R Jantjies, a Senior Magistrate in Ga-Rankuwa, Gauteng Province. The Senior Magistrate had some concerns regarding the respondent's admission as an advocate. He wrote to the former Judge President of this Division on 30 May 2017 stating, *inter alia*, that the respondent failed to disclose in his supporting affidavit for admission as an advocate of this Court that he had been convicted of a number of counts of fraud, theft and corruption in the Regional Court, Pretoria; that he was sentenced to 25 years imprisonment which was on appeal to the then Transvaal Provincial Division reduced to 18 years and that he served the reduced sentence. My predecessor referred the Senior Magistrate's complaint to the applicant for investigation and to take whatever steps they deem necessary under the circumstances.

[5] The applicant sought assistance of the North West Bar Association in its investigations against the respondent. It happened that on 21 June 2017 the respondent was at the North West Division of the High Court, Mahikeng to handle a bail appeal matter. He was confronted by Mr JHR Pistor SC, the chairperson of that Bar. The latter asked him if he is the person referred to in the letter from the Senior Magistrate and whether he has a record of previous criminal convictions. The respondent answered both questions in the affirmative.

[6] It since came to light from the investigations conducted by the applicant that during 2011 the respondent launched an application in the KwaZulu-Natal High Court to have him admitted as an advocate and his application was allocated case number 4908/11. During the screening period the Society of Advocates of KwaZulu-Natal issued a letter dated 15 June 2011 to both the Registrar and the respondent requesting certain specified information about

the respondent as it was of the view that his application was still deficient after he filed a supplementary affidavit as requested.

[7] The information required was intended to assist in determining whether the respondent was a fit and proper person to be admitted as an advocate especially that he had indicated in his supplementary affidavit that he is "*unaware of any fact that may adversely affect [his] status of being a fit and proper person*". Further information required from the respondent was, *inter alia*, the following:

7.1 Full disclosure of information relating to the Government Gazette record that on 26 July 2007 judgment was obtained by ABSA bank in the then Bophuthatswana Provincial Division in which immovable property in the Rustenburg District was attached.

7.2 Full disclosure relating to a judgment in favour of Changing Tides 17 (Pty) Ltd N.O. against him and one ME Mziako and the subsequent dismissal of his application for leave to appeal.

7.3 To disclose any further court actions against him.

7.4 To confirm if he is the person who was convicted and ultimately sentenced to 18 years imprisonment for fraud, theft and corruption; that he must provide a copy of the entire record of his criminal trial and any subsequent appeals; a record of all the Department of Correctional Services' recommendations concerning his sentence; copies of the reports and recommendations by his parole officers and superiors that led to his release from prison.

7.5 That since it appeared that the respondent had never resided in KwaZulu-Natal, he must confirm that he has never made an application to be admitted as an advocate in any other province of South Africa where such an application was either refused or not proceeded with for any reason, and to make a full disclosure of exactly what transpired.

The letter concluded that the Society would reconsider its position regarding the applicant's application for admission upon him filing a supplementary affidavit and providing the required information. The only reasonable conclusion in these circumstances is that the KwaZulu-Natal Association of Advocates was not supporting the respondent's application unless the issues raised in the letter were satisfactorily sorted out.

[8] On 23 June 2011 the Chairperson of the Society of Advocates of KwaZulu-Natal wrote to the Pretoria Society of Advocates alerting them of the respondent's application for admission as an advocate in KwaZulu-Natal High Court. The letter provided background information and expressed a suspicion that the respondent is unlikely to proceed with the application as he did with his application to the North Gauteng High Court, Pretoria under case no 57340/10 which was set down for hearing on 22 November 2010.

[9] It is common cause, and as suspected by the Society of Advocates of KwaZulu-Natal, that the respondent did not pursue his application for admission to the KwaZulu-Natal High Court. He in fact withdrew the application. The date of hearing of the application was 27 June 2011.

[10] On 24 June 2011 the General Council of the Bar of South Africa circulated the letter from the Society of Advocates of KwaZulu-Natal to the Registrar and the respondent to its constituent Bars in the Republic with a view to alert them about the respondent should he bring his application for admission as an advocate in any other Division of the High Court in the Republic. I pause to deal with the parties' contentions.

Parties' Contentions

[11] The applicant contends that the respondent intentionally failed to divulge any particulars regarding his criminal record in his founding affidavit used in

support of his application for admission as an advocate by this Court; that he wilfully and intentionally lied under oath and thereby committed perjury by stating in the said application that *"I am a law abiding citizen and have no record or pending criminal case against me"*; that he wilfully and intentionally misled the Court and in fact committed fraud upon the Court by stating that "*I am truthfully and faithfully unaware of any circumstances or any reason thereof (sic) that could prevent the above Honourable Court to grant me such order to practice as an Advocate".*

[12] The applicant contends further that in view of the above facts, the respondent has shown such a degree of dishonesty that he could never, under these circumstances, have been considered to be a fit and proper person to be admitted as an advocate of the High Court of South Africa; that when the applicant issued a letter indicating to the Court on 28 August 2013 that it had no information to the effect that the respondent is not a fit and proper person to be admitted as an advocate it was unaware of the facts that have now come to the fore; that had the applicant or any of its members been aware of these facts it would have definitely opposed the respondent's application for admission as an advocate by this Court; and that his application undoubtedly would have been unsuccessful.

The Points *In Limine*

[13] At the hearing of the application two points *in limine* were raised on behalf of the respondent. It was contended that this Court lacks the necessary jurisdiction to entertain this application in that the respondent, though admitted by this Court to practice as an advocate, conducts his practice in Pretoria, which is outside the jurisdiction of this Court. Secondly, it was contended, it had to be the Society of Advocates in Pretoria where the complaint came from and not the applicant that should launch the application against the respondent.

[14] It is apposite to dispose of the points *in limine* at this stage as I find them to be without merit. Section 7 of the Act provides that:

"7. Suspension of advocates from practise and the removal of their names from the roll of advocates

(1) Subject to the provisions of any other law, a court of any division may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates -

(a) in the case of a person who was admitted to practise as an advocate in terms of sub-section (1) of section three or is deemed to have been so admitted -

(i) if he has ceased to be a South African citizen; or

(ii) in the case of a person who is not a South African citizen as contemplated in subparagraph (iii), , if he has failed to obtain a certificate of naturalization in terms of the South African Citizenship Act, 1949 (Act No. 44 of 1949), within a period of six years from the date upon which before or after the commencement of this sub-paragraph he was admitted to the Republic for permanent residence therein or within such further period as the court either before or after the expiration of the said period for good cause may allow; or

(b)

(Section 7(1)(b) substituted by section 2 of Act 73 of 1965 and deleted by s. 2 of Act 33 of 1995))

(c) in the case of a person who was admitted to practise as an advocate in terms of section five, if it appears to the court that he has ceased to reside or to practise as an advocate in the designated country or territory in which he resided and practised at the time of his admission to practise as an advocate of the Supreme Court or that that country or territory has ceased to be a designated country or territory for the purposes of the said section; or

(d) if the court is satisfied that he is not a fit and proper person to continue to practise as an advocate; or

(e) on his own application.

(2) Subject to the provisions of any other law, an application under paragraph (a), (b), (c) or (d) of subsection (1) for the suspension of any person from practice as an advocate or for the striking off of the name of any person from the roll of advocates may be made by the General Council of the Bar of South Africa or by the Bar Council or the Society of Advocates for the division which made the order for his or her

admission to practise as an advocate or where such person usually practises as an advocate or is ordinarily resident, and, in the case of an application made to a division other than the South-West Africa Division of the Supreme Court of South Africa under paragraph (c) of sub-section (1), also by the State Attorney referred to in the State Attorney Act, 1957 (Act No. 56 of 1957),

(3) Any person having chambers in any place shall be deemed for the purposes of sub-section (2) to be a person usually practising in that place.

(4) Any person who has been suspended from practice as an advocate under this Act or any other law, whether before or after the commencement of this Act, shall for the duration of such suspension, and any person whose name has been ordered under this Act or any other law to be struck off the roll of advocates, shall, while his name remains removed from the said roll, not be entitled to practise as an advocate.

(5) Upon receipt of the order of a court of any division whereby the name of any person has been ordered under this Act or any other law to be struck off the roll of advocates, the Director-general : Justice shall cause the name of such person to be removed from the said roll." [Emphasis added]

[15] The Act empowers a court of any division to suspend from practice or strike off the roll of advocates upon application by, *inter alia*, the General Council of the Bar of South Africa or by the Bar Council of the Society of Advocates for the division which made the order for his or her admission to practice as an advocate or where such person usually practices as an advocate or is ordinarily resident. The respondent was admitted to practice as an advocate by this division and as such this Court has jurisdiction to entertain this matter. Similarly, the applicant is a Society of Advocates for this division as defined in s 7(2) of the Act and as such has the *locus standi* to bring this application.[3]

[16] The points *in limine* regarding the applicant's *locus standi* to launch this application and further that this Court lacks jurisdiction to entertain the application should therefore fail.

The Merits

[17] The respondent is opposing the application to strike his name off the roll of advocates on three grounds. Firstly, that an advocate can only be struck off

[3] **Algemene Balieraad van Suid-Afrika v Burger en `n ander** 1993 (4) SA 510 (T) at 516I – 517A.

the roll of advocates upon misconduct or criminal offences committed post admission. He contends that since his admission as an advocate there has never been any complaints of misconduct or criminal convictions against him and as such there is no basis for his name to be struck off the roll of advocates. Secondly, he contends that a criminal record is not *per se a* bar to admission as an advocate. Thirdly, the respondent contends that the applicant was negligent in not opposing his application for admission as an advocate and cannot now approach this Court seeking an order that his name be struck off the roll of advocates.

Is the relief sought incompetent?

[18] In terms of the first defence, the respondent in essence contends that the relief sought by the applicant, of having his name struck off the roll of advocates, is incompetent and that the applicant should instead have applied for the rescission of the order admitting him as an advocate of this Court and not that his name be struck from the roll of advocates.

[19] Section 7(1)(d) empowers a court of any division upon application to suspend any person from practice as an advocate or order that the name of any person be struck of the roll of advocates if the court is satisfied that he is not a fit and proper person to continue to practise as an advocate.

[20] It is for the party seeking relief in terms of s 7(1) to place facts that will satisfy the Court that the respondent party is not a fit and proper person to continue to practice as an advocate. The issue is therefore not whether is it competent for a Court to order striking off the roll or suspension from practice as an advocate, but whether a case for the suspension or striking of the party's name from the roll on the basis that he is not a fit and proper person to continue to practice as an advocate has been made out. It depends on the type of application and the facts placed before Court for the relief sought. A party may still apply for rescission of the court order admitting a party as an advocate. For the rescission of the order to be granted certain essential requirements provided by Rule 42(1)(a), must be satisfied before a Court can grant the order for rescission. It does not follow that just because certain facts

may prove that a party is not a fit and proper person to be admitted as an advocate they may not be used if it is later discovered that they were withheld from the Court hearing an application for admission, in a subsequent application to have such a party suspended or struck of the roll of advocates.

[21] In **Kekana v Society of Advocates of South Africa**[4] it was held that:

"In terms of sec 7(1) of the Admission of Advocates Act 74 of 1964, as amended, the Court may suspend any person from practice, or order that the name of any person be struck off the roll, if it is satisfied that he is not a fit and proper person to continue to practise as an advocate. The way in which the Court had to deal with an application for the removal of an attorney's name from the roll under a similar provision in the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, as amended, (before that Act was repealed), was considered in Nyembezi v Law Society, Natal 1981(2) SA 752 (A) at 756H-758C. It emerges from the judgment that the Court first has to decide whether the alleged offending conduct has been established on a preponderance of probability and, if so, whether the person in question is a fit and proper person to practise as an attorney. Although the last finding to some extent involves a value judgment, it is in essence one of making an objective finding of fact and discretion does not enter the picture. But, once there is a finding that he is not a fit and proper person to practise, he may in the Court's discretion either be suspended or struck off the roll.

This is plainly how an application for the removal of a person's name from the roll of advocates must also be handled."[5]

[22] At the time when the order admitting and directing the enrolment of the respondent as an advocate the Court made an order based on the uncontested facts that were placed before it. There was nothing before Court that would have indicated that the respondent may not be admitted as an advocate. The Court, as it is the practice, relied on the fact that the respondent was expected to be honest and truthful to the Court. It is for that reason that the order made on that day states *"It APPEARING that MOSES SIPHO MZIAKO is duly qualified in terms of the Admission of Advocates Act,*

[4] 1998 (4) SA 649 (SCA) at 654 B - F

[5] See also: **Fine v Society of Advocates of South Africa** (Witwatersrand Division) 1983 (4) SA 488 (A) at 494G-H.

1964 (Act 74 of 1964) to be admitted and authorised to practise and to be enrolled as an advocate of the High court of South Africa… " The circumstances that made it possible for the respondent to be admitted as an advocate may change and it is for that reason that the legislature made room for a Court to determine whether he/she is a fit and proper person to continue to practise as an advocate.

[23] The respondent's contention that the relief that the applicant should have sought is rescission and not striking off the roll loses sight of the nature of the proceedings instituted in terms of s 7(1) of the Act. The issue was succinctly described by Kroon J in the **General Council of the Bar of South Africa v Matthys**[6] as follows:

"[4](1) The proceedings are not ordinary civil proceedings, but are sui generis in nature: they are proceedings, of a disciplinary nature, of the Court itself, not those of the parties; the Court exercises its inherent right to control and discipline the practitioners who practice within its jurisdiction; the applicant, in bringing the application, acts pursuant to its duty as custos morum of the profession; in the interests of the Court, the public at large and the profession, its role is to bring evidence of a practitioner's misconduct before the Court, for the latter to exercise its disciplinary powers; the proceedings are not subject to all the strict rules of the ordinary adversarial process. Society of Advocates of South Africa (Witwatersrand Division) v Edeling 1998 (2) SA 852 (W) at 8591 et seq.

(2) Evidence which would have been inadmissible in 'civil proceedings' may be considered in disciplinary proceedings against a practitioner in the High Court. Incorporated Law Society, Transvaal v Meyer and Another 1981 (3) SA 962 (T) at 968F."

[24] The further submission on behalf of the respondent that the applicant has failed to make an averment to the effect that the Court has jurisdiction in its founding affidavit is therefore without merit. This case is distinguishable from cases where a party was admitted as an advocate when he/she did not have

[6] 2002 (5) SA 1 (E) at p5; Society **of Advocates of South Africa (Witwatersrand Division) v Edeling** 1998 (2) SA 852 (W) at p861; Ex **Parte Ngwenya: In re Ngwenya v Society of Advocates, Pretoria and Another** 2006 (2) SA 88 (W) para 62.

the prescribed academic qualifications. In *casu* the respondent's academic qualifications are not questioned. It is his character that is in issue. I now proceed to consider the facts placed on record from which it has to be determined whether the respondent is a fit and proper person to continue to practise as an advocate.

Is the respondent a fit and proper person to continue to practise as an advocate?

[25] The circumstances relating to the respondent's previous convictions were aptly captured in the judgment on appeal by Hartzenberg J in **Mziako v S**[7] as follows:

> *[1] The appellant was charged with a number of counts of fraud, theft and corruption in the Regional Court, Pretoria. He was found guilty on 13 counts of fraud, 11 counts of theft of motor vehicles, one count of theft of a motor vehicle engine and five counts of corruption. On 30 August 1995 he was sentenced as follows: four years' imprisonment on each of the 13 counts of fraud, five years' imprisonment on each of the 11 counts of theft of motor vehicles, three years' imprisonment on the conviction of theft of the motor vehicle engine and three years' imprisonment on each of the five counts of corruption. The total sentence of imprisonment amounted to 125 years. The magistrate took the cumulative effect into account and ordered that in terms of section 280 (2) of Act 51 of 1977 "the serving of the periods of imprisonment on the various counts must run concurrently to such an extent that the accused will serve an effective period 25 years imprisonment".*
>
> *[2] The appellant immediately noted an appeal. He encountered various obstacles. He did not make it easy for himself in that he brought numerous applications in person. Some of them had to do with his appeal but others related to other relief sought by the appellant. To put it mildly, the appellant was a regular litigant in the motion court. One of the quaintest applications with which I had to deal was his unsuccessful application to be admitted as a conveyancer for the registration of a single transfer. He is not an attorney nor has he written any conveyancing examinations, not to mention the question of his previous convictions as a negative factor in respect of the question whether he is a fit and proper person to be admitted as a conveyancer. I must say though that on each occasion that he appeared before me he was very polite and soft spoken.*
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> *[3] Swart J dealt with some of the applications and as a result of his judgment and order the appeal eventually became ripe for hearing. See Mziako v Director of Public Prosecutions, Transvaal and another, 2001 (2) SACR 231 (T). In this regard it is of interest to bear in mind that the appellant was arrested on 21 April 1993 and remained in prison as an awaiting trial prisoner until he was sentenced on 30 August 1995 and has been in prison ever since, despite various applications to be let out on bail before and after conviction. The record of the*

[7] **Mziako v S** [2007] JOL 19263 (T)

proceedings in the court a quo comprises thousands of pages and the judgment alone runs into 610 pages.

[4] Although the appellant's appeal was initially both against conviction and sentence it is clear that the appellant and the state came to an agreement to the effect that if he abandons his appeal against the convictions the state will support his appeal against sentence. He withdrew his appeal against the convictions, in my view wisely so. The state case against him was overwhelming. The situation is that between June 1990 and April 1993 the appellant conducted a nefarious business consisting of persuading financial institutions that hire-purchase agreements with various individuals, mostly relatives or acquaintances of his, were bona fide agreements where in fact the agreements were only utilized to get physical possession of the vehicles. The vehicles were resold both within and outside the country. The identity of quite a number of the vehicles was changed and false clearances were obtained by bribing the relevant officials. In a few instances he swindled owners of second hand vehicles out of the possession of the vehicles and appropriated the vehicles. Except in the case of count 28, which was withdrawn, the State led the evidence of all the relevant witnesses. The magistrate evaluated the evidence carefully and gave the appellant the benefit of the doubt generously. The appellant was acquitted on a number of the charges. The judgment is painstakingly thorough and in my view unassailable.

[5] When the magistrate imposed the sentence an equally through evaluation of all the relevant factors was made. At that stage the appellant was 44 years old, married and had three children. He had been found guilty of fraud on four previous occasions ie during 1981, 1984 and twice during 1987. The period of suspension, of a sentence of imprisonment imposed during 1988, had not yet expired when the first of these offences were committed. The magistrate refused to regard the ease with which the appellant defrauded the financial institutions as a mitigating factor and in my view correctly so. He said that he took the fact that the accused had been in prison for more than two years, awaiting trial, into account, as a mitigating factor."

[26] It is therefore common cause that the respondent has a record of serious criminal convictions involving dishonesty. The respondent asserts in his affidavit opposing this application that a record of a criminal conviction does not prohibit a person from being admitted as an advocate and that *"a criminal record is not an insurmountable obstacle to a successful application for admission*." This remark says a lot about the character of the respondent and his ability to appreciate the requirement of honesty for a person practising as an advocate. The fact that the crimes of fraud, theft of motor vehicles and corruption were carefully planned and manipulated is clear from the judgment of Hartzenberg J referred to above. A diligent and honest advocate in the position of the respondent would have known that these are serious crimes involving dishonesty of the highest order and that taken together with his other

four previous convictions of fraud, it would take a miracle, if possible, to satisfy a court that he is a fit and proper person to either be admitted or allowed to continue to practise as an advocate. It is telling therefore that the respondent can make this assertion under oath.

[27] In **General Council of the Bar of South Africa v Matthys**[8] it was emphasised that the respondent's conduct is relevant in determining whether he is a fit and proper person. The court went on to hold:

"[34] At the outset, it should be noted that it is permissible for the Court, when assessing the effect that the respondent's conduct has on the question whether he is a fit and proper person to practise as an advocate, to have regard to the explanations tendered by the respondent for his conduct, either to the applicant when it called for an explanation or in the papers filed by the respondent in the application. Thus, in Kekana at 655D-G and 656B it was held that a practitioner's perjury in resisting an application for his striking-off and the fact that he gave false information to a committee of the Society of Advocates of which he was a member bore on the question whether the practitioner had the personal integrity and scrupulous demanded of an advocate. See, too, Joubert (ed) The Law of South Africa Vol 14 (first re-issue) para 269, where the following passage occurs:

'The decisions are not unanimous on the question whether, in an application for the suspension or disbarment of an advocate, the Court is limited to a consideration of the specific charges brought against him or whether the conduct of the respondent in relation to the application made against him, and the facts emerging from his explanation to the Court, may be taken into account in determining whether he is a fit and proper person to continue to practise as an advocate.
It is submitted that in determining whether an advocate is a fit and proper person to continue to practise, all relevant facts proved should be taken into account whether they form the subject of specific charges against the respondent or are contained in the respondent's answer. The fact that the Court finds that he has given false evidence is part of the material facts.'"

[28] In **Kekana** it was held that:

"This is why there is a serious objection to allowing an advocate to continue practising once he has revealed himself as a person who is prepared to lie under oath. Legal practitioners occupy a unique position. On the one hand they serve the interests of their clients, which require a case to be presented fearlessly and

[8] Supra at p21 - 22

vigorously. On the other hand, as officers of the court, they serve the interests of justice itself by acting as a bulwark against the admission of fabricated evidence. Both professions have strict ethical rules aimed at preventing their members from becoming parties to the deception of the Court. Unfortunately the observance of the rules is not assured because what happens between legal representatives and their clients or witnesses is not a matter for public scrutiny. The preservation of a high standard of professional ethics having thus been left almost entirely in the hands of individual practitioners, it stands to reason, firstly, that absolute personal integrity and scrupulous honesty are demanded of each of them and, secondly, that a practitioner who lacks these qualities cannot be expected to play his part."[9]

[29] The respondent cannot claim ignorance of the duty to disclose his previous convictions to Court because Harzenberg J made it known to him in his judgment (para 2) when he applied to be admitted as a conveyancer for the registration of a single transfer. The learned Judge remarked that *"He is not an attorney nor has he written any conveyancing examinations, not to mention the question of his previous convictions as a negative factor in respect of the question whether he is a fit and proper person to be admitted as a conveyancer."*

[30] It is therefore startling to say the least, for the respondent to state in his affidavit that *"The admission of Advocates Act does not provide that any Applicant to be admitted as an Advocate should divulge the criminal record, if any. I challenge the Applicant to prove me otherwise in this regard."* Even though the Act does not make specific reference to a record of criminal convictions, the respondent is expected to know that a record of criminal convictions plays an important role in determining whether a person is a fit and proper person to be admitted to practise as an advocate.

[31] In ***Ex Parte* Cassim**[10] the Court had an opportunity to consider a failure to disclose previous convictions of common assault and of defacing Post Office property and held that:

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[9] Supra: at 655H-656B.
[10] 1970 (4) SA 476 (T) p 477E-H.

"The two offences which I have mentioned do not seem to us to indicate that the applicant was guilty of dishonest conduct, disgraceful conduct or dishonourable conduct. The main difficulty is his failure to disclose these facts in the petition when it was originally filed. In his supplementary papers he has stated that he thought that these two previous convictions were not material and not relevant. The Court finds it difficult to accept that he could have thought so. The profession of barrister and attorney requires the utmost good faith from practitioners and from all aspirant practitioners and there can be no doubt that the convictions were relevant. Anyone entering upon these professions must surely know that all material facts must be placed before the Court. I can hardly believe that any practitioner would categorise these offences – especially the second one – as not material. "

What makes the respondent's situation more serious is that even post admission, he still persists that the Act does not make the disclosure of criminal convictions obligatory and has the confidence to challenge the applicant to prove the contrary.

[32] It is significant that the respondent's application for admission as an advocate at the High Court was met with a huge hurdle which he found difficult to overcome. The Society of Advocates of KwaZulu-Natal was aware that a person with names identical to those of the respondent had a history of difficulties with the law. He was called upon to make a full disclosure if he is that person and provide the entire record of the criminal trial and any subsequent appeals or other applications relating to his convictions and his *curriculum vitae* disclosing all his employment an occupational history. The respondent was called upon to *"establish inter alia that, despite his conviction, he has genuinely, completely and permanently reformed himself of his criminal character and that he is in fact a fit and proper person to be admitted as an advocate."* The respondent was specifically required to explain why his criminal conviction was not disclosed by him in his founding affidavit.

[33] It is common cause that the respondent did not respond to the letter from the Society of Advocates of KwaZulu-Natal nor provided the information requested from him. Instead, the respondent elected to abandon his application for admission. Clearly the respondent knew or was made aware

that he had to disclose the record of his previous convictions. The respondent has also conceded that he brought a similar application at the Gauteng Division of the High Court, Pretoria and withdrew his application on the day of the hearing when the Society of Advocates in Pretoria indicated their opposition to the application. If he indeed believed that he could still be admitted as an advocate despite his serious previous convictions, he would have proceeded with his applications and raised the spurious arguments he is now raising in opposition of this application to those courts. He failed to do so, because he knew that it would be difficult to persuade the Court that he deserves to be admitted as an advocate despite a long list of previous convictions involving dishonesty to his name.

[34] It is clear from the conduct of the respondent that he engaged in forum shopping with the sole aim that he might find a court that is not made aware of his record of criminal convictions and be successfully admitted as advocate. He did not voluntarily disclose to the courts where he made his aborted applications for admissions as an advocate and that he had a record of previous convictions. It is only when the record of his previous convictions was discovered that he withdrew his applications.

[35] The respondent contends that the Chairperson of the applicant who deposed to the founding affidavit is the one who lied and/or misleads this Court when he states that respondent averred in his application for admission that he has no "*criminal record*." This is in reference to paragraph 5 where he stated: *"I am a law abiding citizen and have no record or pending criminal case against me."* The respondent's response under oath is that *"I never said I have no criminal record but I have no record in which I was referring to sequestration or under debt counselling."* The respondent is not being honest to this Court because the reference to the record is made in the context of reference to criminal cases or conduct. His denial once again says much about the respondent's character as an advocate whose integrity and honesty should not be questionable. He is deliberately making a false statement under oath in order to protect his interests and be allowed to practise as an advocate. This false statement which is made post his admission is on its own sufficient

to have him disbarred as an advocate. It shows that he is a person who is prepared to mislead the Court for his personal benefit. It would be difficult for the Court to rely on what he says. In **Ex Parte Swain**[11] it held that:

"Furthermore, it is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court. The applicant has demonstrated that he is unable to measure up to the required standard in this matter."

[36] The respondent carefully crafted the statement by omitting the word 'criminal' before the word 'record' so that to an unsuspecting reader he says he does not have a criminal record. His knee-jerk reaction that he is referring to a record of civil cases is also false because he had civil judgments against him. He failed to disclose them in his application for admission in these proceedings. It is also significant that the respondent deliberately omitted the customary allegation that he has never applied to be admitted either as an advocate or attorney anywhere in the Republic. He knew that doing so would have opened a can of worms and that he would have been expected to explain.

[37] The respondent contends that the applicant received a circular from the General Council of the Bar warning them about him and alerting them to the objections raised by the Society of Advocates of KwaZulu-Natal. He says the applicant has itself to blame for not objecting to his application for admission when it had an opportunity to do so. He avers that the applicant should not be allowed to raise the issues relating to him being a fit and proper person post his admission, and that he should be allowed to practise as an advocate.

[11] 1973 (2) SA 427 (N) at 434H.

[38] The respondent's attitude to the issues raised about his failure to disclose his criminal record puts to question him being a fit and proper person to continue to practise as an advocate. There is an *onus* on the applicant for admission as an advocate or attorney to make a full disclosure of both positive and negative information about him/her that is necessary for a Court to make an objective finding whether he/she is a fit and proper person to be admitted as an advocate or an attorney. The duty to disclose fully is more obligatory where previous criminal convictions and pending cases are involved. It is expected of an applicant for admission to disclose his/her full occupational history, where he has been or lived until his application for admission as such.

[39] It would be wrong to have the respondent benefit from an administrative oversight by the applicant's secretary by not remembering or connecting the respondent to the circular from the General Council of the Bar particularly in circumstances where the respondent deliberately failed to disclose his serious criminal record and the fact that he served a lengthy prison term because of his criminal conduct.

[40] The respondent's failure to make a disclosure of his record to the court that granted his application for admission as an advocate, taken together with his persistence that he is not obliged to disclose his criminal record and that when he mentioned that he has *"no record"* he was not referring to a criminal record, his forum shopping, and his general conduct in opposing this application is, in my view, sufficient proof that he is not a fit and proper person to continue to practise as an advocate.

[41] At this stage it is not only the fact that the criminal convictions exist, but that the respondent deliberately failed to disclose them. It matters not whether they might be 20 years old or have been expunged. They remain relevant to an inquiry whether an applicant in his position is a fit and proper person to continue to practise as an advocate. Although the respondent contends that there has never been a complaint against him since his admission as an advocate and that he is also a lay preacher, I still have doubts about his reformation. The least that he could have done to show that he is reformed

would have been to disclose his previous convictions to the courts and not engage in a well calculated forum shopping until he was admitted by this Court. His applications to Gauteng, KwaZulu-Natal and this Court also raise doubt as to whether he indeed resided in these places within such a short period.

[42] The respondent, even at this late stage, had an opportunity to demonstrate that despite his convictions, he has genuinely, completely and permanently reformed himself of his criminal character and that is he is a fit and proper person to continue to practise as an advocate. He has failed to do so. I have doubts whether the respondent's conduct would ever change. His actions are so serious that they rule out any thought of having him suspended from practise. Suspending him from practising will expose the public to serious risk. The integrity of the legal profession which should be guarded will be dealt a serious blow.

[43] There is no reason in law why the respondent should not be ordered to pay the costs of this application on the scale of attorney and own client. Such an order should include the costs of the interim relief that was granted against the respondent. Such costs are justified because the applicant has a public duty to approach the Court in circumstances of a respondent who has been admitted to practise as an advocate through dishonesty and who persists that he should be allowed to practise as an advocate despite his unethical conduct. The respondent's conduct on the facts of this case justifies such an order.

[44] Had it not been for the bravery of Mr J R Jantjies to conduct his investigations and bring the respondent's circumstances to the attention of the Judges President, the respondent's misdemeanour would have taken longer to detect. The learned Senior Magistrate deserves to be commended for his wise initiative.

[45] In conclusion I am satisfied that a case has been made to demonstrate that the respondent is not a fit and proper person to continue to practise as an

advocate. His name should therefore be struck off the roll of advocates kept by the Director General of the Department of Justice.

[46] In the result it is ordered as follows-:

a) The *rule nisi* issued on 21 July 2017 is confirmed.

b) The name of the respondent, **Moses Sipho Mziako** is struck off the roll of advocates which is kept by the Director General: Department of Justice, in terms of section 8 of the Admission of Advocates Act 74 of 1964.

c) The respondent is to pay the costs of this application including the costs in respect of Part A of the application on a scale as between attorney and own client.

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LP Tlaletsi
Judge President.

Williams ADJP concurs in the judgment of Tlaletsi JP.

APPEARANCES:

For the Applicant:	A G van Tonder
Instructed by:	Haarhoffs Inc. Kimberley
For the Respondent:	C.M.T Molopyane
Instructed by:	Mzuzu Attorneys Kimberley.