**IN THE HIGH COURT OF SOUTH AFRICA**

**NORTH WEST DIVISION, MAHIKENG**

CASE NO: ADM 30/2014

In the matter between:-

**THE NORTH WEST BAR ASSOCIATION** Intervening Party

**and**

**KELVIN PADI** Respondent

In re:

In the Ex Parte Application of:-

**KELVIN PADI** Applicant

For his admission and enrolment as an Advocate

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| **DATE OF HEARING** | **:** | **28 AUGUST 2015** |
| **DATE OF JUDGMENT** | **:** | **10 SEPTEMBER 2015** |

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| **COUNSEL FOR THE APPLICANT** | **:** | **ADV. KHAN** |
| **COUNSEL FOR INTERVENING PARTY (RESPONDENT)** | **:** | **ADV. LEVER SC** |
| | | **WITH ADV. D SMIT** |

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**JUDGMENT**

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**HENDRICKS J**

[1] The Applicant applies for admission as an advocate of this Court. He contends that he had satisfied all the requirements for admissions as such and that his name should be enrolled by the Registrar of this Court on the roll of advocates. It transpired that the Applicant has a previous conviction of rape. On 09 December 2002 he was convicted on a charge of rape and sentenced to undergo an effective term of imprisonment of sixteen (16) years. On 18 December 2010, the Applicant was placed on parole. The parole expires on 08 December 2017.

[2] The North West Bar Association ("the Bar") which is the local bar association, successfully applied to intervene in the *ex parte* application for his admission by the Applicant. The Bar opposed the admission of the Applicant as an advocate mainly on two grounds, namely: -

(1) that the application is premature seeing that the Applicant is still on parole and thus still serving his sentence;
and

(2) that the applicant is not a fit and proper person to be admitted to the advocates' profession. I will deal with these two grounds of objection.

[3] However, before doing so, it need to be mentioned that the Applicant did not respond to the allegations raised by the Bar in their affidavit. These allegations remain unchallenged and this Court have to accept it as truthful and reliable for the adjudication of this matter as was enunciated in Plascon Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

[4] In dealing with the first ground of objection, the Bar contends that the Applicant is currently still on parole. As such, he is still under a certain amount of supervision and he consequently does not act independently. The Department of Correctional Services is supervising the Applicant through *inter alia* parole conditions. This means that the Applicant is still serving his sentence. Parole is the provisional release of a prisoner who agrees to certain conditions prior to the completion of his sentence. Central to the concept of parole is the idea that the offender is in the process of being re-integrated into society. It is a conditional process which is not at odds with the objects of incarceration. It is however important to take cognisance of the fact that the sentence which has been imposed, is not discharged by the release on parole, hence the conditional nature of the release on parole. The Bar submitted that, in itself, disqualifies the Applicant from being admitted as an advocate.

[5] In Thukwane v Law Society, Northern Provinces 2014 (5) SA 513 (GP) the following is stated:

> *"[69] The fact that the applicant had been placed on parole by the Department of Correctional Services should therefore*

*be seen in the correct perspective. 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 or 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 in the cases referred to."*

In Mtshabe v Law Society 2014 (5) SA 376 (ECM) at paragraph [52] on page 389 the following is stated: -

*"[52] When the status of a parolee is considered it seems to us wholly contrary to public policy that a person in that position can be regarded as being a fit and proper person to be admitted as a legal practitioner. Although it seems to us to be an absolute bar to readmission we need not decide that it is so, mindful that there may well be circumstances in which a person is on parole for an offence which does not ipso facto render the person unfit to hold office as an attorney."*

I find these dicta also applicable to the case of an application for admission as an advocate

[6] As far as the second ground of objection is concerned, it was contended that the Applicant is not a fit and proper person to be admitted as an advocate. The fact that a person was convicted of an offence does not in itself debar him/her permanently from admission as an advocate

See: Ex Parte Moseneke 1979 (4) SA 884 (T) at 888 E – 889 B. Section 3(1) (a) of the Admission of Advocates Act 74 of 1964 provides:-

> *"…(1) Subject to the provisions of any other law, any division shall admit to practise and authorize to be enrolled as an advocate any person who upon application made by him satisfies the court –*
> *(a) that he is over the age of twenty-one years and is a fit and proper person to be so admitted and authorized;"*

The act does not define the term 'fit and proper'. The following is however stated in Thukwane v Law Society, *supra*, at paragraphs [52] and [53]: -

> *"[52] In this regard the following was said in Kaplan v Incorporated Law Society, Transvaal 1981 (2) SA762 (T) by Boshoff JP at 782B:*
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> *'taken by themselves they have a variety of dictionary meanings which include in the case of "fit", adapted, adjusted, qualified or suited to some purpose, competent and deserving; and in the case of "proper", excellent, admirable, commendable, fine, goodly, of high quality, of good character or standing, honest, respectable, worthy, fit apt, suitable; see, eg, The Oxford English Dictionary sv "fit" and "proper". In the case of SIMANGO V Buitendag NO and Another 1943 WLD 85 at 92 Murray J expressed the view that the term "fit and proper" did not contain two distinct ideas. In*

*none of the cases to which he had referred had it been suggested that "proper" connoted anything more than "fit" or that a "fit and proper" person differed for example from the term such as "good and sufficient cause" in the conveyance or two distinct ideas. But that as it may, it is an expression of wide import and its meaning will have to be determined in the context in which it is used, both in the immediate context of the section and in the general context of the Act having regard to the apparent scope and purpose of the Act and, within limits, its background.'*

*[53] The question is whether a person is fit and proper as envisaged in the Act is a question of fact, although it involves a value judgment. The expression relates to the personal qualities of a person and is of wide import and relates to every aspect of the personality of the particular person."*

[7] Ultimately, it is for this Court to decide whether the applicant is a fit and proper person to be allowed into the profession. In respect of the exercise of a discretionary value judgment by this Court, the finding of Harms ADP in Malan and Another v Law Society, Northern Provinces 2009 (1) SA 216 (SCA) is quite apposite where he stated: -

*"[9] …, the exercise of this discretion is not bound by the rules, and precedents consequently have a limited value. All they do is to indicate how other courts have exercised their discretion in the circumstances of a particular case. Facts are never identical, and the exercise of a discretion need not be the same in similar cases. If the court were bound to follow a precedent in the exercise of its discretion it would mean that the court has no real discretion. (See Naylor and Another v Jansen 2007 (1) SA 16 (SCA) at para 21.)"*

[8] In this matter, 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. From the affidavits filed, I am not convinced that the Applicant has discharged the onus of proving that he is a fit and proper person to be admitted as an advocate.

[9] I am of the view that based on the aforementioned, the application should be dismissed. On behalf of the Bar certain concerns were also raised regarding the conduct of the Applicant during his trial and his non-disclosure of certain information which makes him dishonourable. I find it unnecessary, in the light of what is stated previously, to deal with these and other allegations in any detail at this stage.

Costs

[10] Adv. H Lever SC appearing on behalf of the Bar submitted that the Applicant should pay the costs if this application, which costs should include the costs consequent upon the employment of two counsel, senior and junior. Adv. Khan on behalf of the Applicant submitted that this Court should not order that the costs be borne by the Applicant.
In my view, there is no plausible reason why costs should not follow the result. The Applicant was notified by the Bar of the intended opposition. Allegations were made in the affidavit filed on behalf of the Bar to which the Applicant did not respond. No heads of argument was filed on behalf of the Applicant. In contrast thereto, quite

comprehensive heads of argument were filed by another senior counsel on behalf of the Bar.

[11] It goes without saying that costs were incurred by the Bar to have a firm of attorneys appointed and to instruct counsel, both senior and junior, to write heads of argument and to argue the matter. All these costs could have been avoided had the Applicant heeded to the warning and advice by the Bar not to proceed with this application. I gave it considerable thought whether a punitive costs order is not warranted if regard is had to the conduct of the Applicant with regard to this application. I have however decided not to give such an order; reluctantly though, I must add.

Order:

[12] Resultantly, the following order is made: -

1. The application is dismissed.
2. The Applicant is ordered to pay the costs of this application.
3. Such costs to include the costs consequent upon the employment of two counsel. (Senior and junior).

**R D HENDRICKS**

**JUDGE OF THE HIGH COURT**

I agree

**AM KGOELE**

**JUDGE OF THE HIGH COURT**