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

Case no. 55/15
Date heard: 13/11/18
Date delivered: 23/11/18
Reportable

In the ex parte application of:

NTSIKELELO MDYOGOLO **Applicant**

JUDGMENT

PLASKET, J:

[1] Mr Ntsikelelo Mdygolo, the applicant, applied for his admission as an attorney. We dismissed his application because we found that he was not a fit and proper person to practise as an attorney.[1] Nearly two years after our judgment was delivered, he filed an application for leave to appeal. On the day before the hearing of the matter, he filed an application for condonation for the late filing of the application for leave to appeal.

Background

[2] The applicant disclosed in his application for admission that he had been convicted of three offences. They were: theft in 1991; robbery with aggravating circumstances in 1994; and driving a motor vehicle while his blood-alcohol level exceeded the legal limit in 2010.

[3] He stated in his founding affidavit that he had committed the robbery as a member of and on the orders of his superiors in the Azanian Peoples' Liberation

[1] *Ex parte Mdyogolo* 2017 (1) SA 432 (ECG).

Army (APLA), the armed wing of the Pan Africanist Congress (PAC), as part of the armed struggle for liberation.

[4] His version as to the reason for committing the robbery was proved by objective evidence to be false. One needs say no more than that the robbery was committed on 19 June 1994, while the first democratic elections were held on 27 April 1994. The armed struggle, in other words, was over by the time the applicant committed the robbery. He had thus lied on oath in his application for admission as an attorney.

[5] After considering the law concerning the admission and striking-off of legal practitioners who had committed crimes, our judgment stated:[2]

'[34] More than 22 years have passed since the robbery was committed by the applicant. We are required to consider whether he is now a fit and proper person to be admitted and enrolled as an attorney. In my view, the answer remains in the negative. The character defects that I have mentioned above remain evident. In 2015, in his very application to be admitted as an attorney, he lied about the reason why he committed the robbery. That, apart from being dishonest and completely at odds with the ethical probity expected of an attorney, amounted to a cynical attempt to mislead both the Law Society and the court. This evidences a lack of honesty, integrity and trustworthiness, all of which are essential qualities for any member of the attorneys' profession.

[35] The applicant's application for admission and enrolment must therefore fail as he has not discharged the onus of establishing that he is a fit and proper person to practice as an attorney.'

Condonation and leave to appeal

[6] The application for condonation is thin on detail. Essentially, the applicant stated that he has not had the financial means to pursue an application for leave to appeal. He does not explain how and when that changed because he still appears to be unemployed. Despite the inadequacy of his explanation for the delay, we are of the view that condonation should be granted and the merits of the application for leave to appeal be dealt with.

[7] The application for leave to appeal raises seven grounds of appeal. They are:

(a) that we erred in finding that the applicant was not a fit and proper person and that another court, 'in the special circumstances surrounding this matter' may come

[2] Paras 34-35.

to a different conclusion; (b) that we erred in 'failing to align' ourselves with the attitude adopted by the Law Society of the Cape of Good Hope (the Cape Law Society), which had no objection to the applicant's admission; (c) that we erred 'in failing to take into account the fundamental honesty of the Applicant in his voluntary disclosure that he had a criminal conviction at all' because another court 'might reasonably find that, where no other record of any other criminal conviction existed, the Applicant would have been in a position to avoid any negative comment as to his fitness to be admitted as an attorney if he was genuinely dishonest and simply did not disclose this fact'; (d) that we erred in the exercise of our discretion against the admission of the applicant; (e) that we failed to 'take into account the lapse of twenty-two years as being fundamentally relevant to the consideration whether his previous misdemeanors should carry any weight in the present debate as to his fitness to be admitted as an attorney'; (f) that we placed 'undue weight on the fact that the Applicant failed to give an identical explanation as to why he committed the robbery in 2015' and that another court might find 'that it is understandable that a hard working individual, about to enter professional ranks, would be awfully embarrassed about his past conduct and would naturally, and without intending to deceive, give the facts an exculpatory flavor to avoid embarrassment for himself and his family'; and (g) that we erred in 'not giving emphasis to the fact that the Applicant in this matter differs from Applicants in other matters who have been unable to secure admission as they had been previously struck from the roll', and that another court may admit the Applicant because his misdemeanor was not committed while he was an attorney.

[8] These grounds boil down to four issues, namely whether we erred in finding that the applicant was not a fit and proper person; whether we should have followed Cape Law Society's lead, which had no objection to the applicant's admission; whether we failed to take into account the lapse of 22 years since the robbery was committed; and whether it counts in the applicant's favour that he was not an attorney when his misdemeanour was committed.

Fit and proper person

[9] Grounds of appeal (a), (c), (d) and (f) deal directly with the 'fit and proper person enquiry', the argument being that we erred in concluding that the applicant was not a fit and proper person to be admitted as an attorney. The focus in the

application for leave to appeal is on what is said to be the unique circumstances of this case.

[10] The first issue that we shall deal with is whether we erred in 'failing to take into account the fundamental honesty of the Applicant in his voluntary disclosure that he had criminal convictions at all' when he could have simply failed to disclose them.

[11] I find the suggestion that we should give the applicant credit for disclosing his previous convictions, rather than dishonestly concealing them, to be an astonishing one. It shows a serious misunderstanding of the qualities expected of legal practitioners. The courts, and the public, expect, and are entitled to expect, complete honesty from attorneys and advocates. That is the base-line. An applicant for admission to the profession does not establish that he or she is a fit and proper person by saying 'I could have acted dishonestly, but I did not'. We do not reward people for not committing wrongs: we expect of them that they will not.

[12] It was required of the applicant that he disclose his previous convictions. He had a duty to do so. In *Ex parte Cassim*[3] an applicant for admission as an advocate had failed initially to disclose that he had two previous convictions (for common assault and malicious injury to property). That necessitated the postponement of the application so that he could file a supplementary affidavit disclosing them and explaining his initial failure to do so. Galgut J held:

'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. Any one entering upon these professions must surely know that all material facts must be placed before the Court.'

[13] As a result, I cannot see how the fact that the applicant disclosed his previous convictions, rather than dishonestly concealed them, has any impact on the finding that he is not a fit and proper person to be admitted as an attorney. The issue was never raised prior to the application for leave to appeal but I cannot see its relevance to the facts upon which we decided the application – the applicant's false and

[3] *Ex parte Cassim* 1970 (4) SA 476 (T) at 477F-G. See too *Ex parte Singh* 1964 (2) SA 389 (N) at 389H-390A; *Hayes v The Bar Council* 1981 (3) SA 1070 (RAD) at 1082C.

dishonest explanation for the robbery he committed. Accordingly, there are no reasonable prospects of another court finding that the fact of the applicant's disclosure of his previous convictions will outweigh the false, dishonest explanation for having committed the robbery.

[14] Related to the above ground of appeal is the assertion that we placed 'undue weight on the fact that the Applicant failed to give an identical explanation as to why he committed the robbery in 2015' and that another court might find 'that it is understandable that a hard working individual, about to enter professional ranks, would be awfully embarrassed about his past conduct and would naturally, and without intending to deceive, give the facts an exculpatory flavor to avoid embarrassment for himself and his family'

[15] In respect of the first aspect, I presume that the applicant is alluding to the fact that he gave a completely different version of events to the Truth and Reconciliation Commission (TRC) when he applied for amnesty in respect of the robbery. It is clear from paragraph 34 of our judgment, however, that this played no part in our findings that the applicant was not a fit and proper person: the crux of our decision was that he was not a fit and proper person because he had lied in his application for admission, not because he had lied to the TRC. This ground is bereft of a factual foundation and has no reasonable prospect of success on appeal.

[16] The second aspect seems to me to amount to an assertion that the applicant's lies and misleading of the Cape Law Society and attempt to mislead the court are attributable to a mere 'massaging' of the facts: as a result of embarrassment, the applicant gave an exculpatory version of his involvement in the robbery which is understandable and should not be held against him. The first problem with this argument is that it has no factual basis. It has simply been made up. The applicant had ample opportunity to explain himself. He never suggested that he conducted himself as he did out of embarrassment.

[17] Secondly, it is necessary to be clear on what he did. He lied about the reason for committing the robbery with the clear intention of deceiving the court and the Cape Law Society into believing that the robbery was committed for a political motive in the course of the liberation struggle. This was no 'small white lie' as was suggested in argument but a calculated attempt to deceive.

[18] In *Summerley v Law Society, Northern Provinces*[4] Brand JA stated that the 'attorney's profession is an honourable profession, which demands complete honesty and integrity from its members'. That position has been restated in cases involving attorneys or applicants for admission as attorneys who have lied or misled courts.

[19] In *Society of Advocates of Natal & another v Merret*,[5] for instance, an attorney with right of appearance in the high court had misled a judge. In an application for his name to be struck from the roll of attorneys, the court found that he had misled the judge deliberately and that his attempt to explain his conduct was 'deliberately untruthful'.[6] It followed from these findings, Howard JP held, 'that the respondent is not a fit and proper person to have the right to appear in this Court or to remain on the roll of attorneys'.[7] Having stated that the requirements of honesty and truthfulness apply equally to advocates and attorneys, he concluded that because of the respondent's 'demonstrated lack of integrity' his name had to be struck from the roll of attorneys.[8]

[20] The same result was arrived at in *Wetsgenootskap van die Kaap die Gooie Hoop v Reyneke*.[9] In this matter, an attorney's name was struck from the roll of attorneys because he had contravened a provision of the Insolvency Act 24 of 1936, had lied under oath and had done so with the intention of misleading the court. On appeal, in *Reyneke v Wetsgenootskap van die Kaap die Gooie Hoop*,[10] the court below's order, as well as its factual findings, were confirmed, and Smalberger JA held that even though the appellant's conduct had not prejudiced any of his clients, he had made himself guilty of two serious transgressions that reflected on his honesty and integrity and had compromised his fitness to practice as an attorney.[11]

[21] In my view, the conduct of the applicant in lying under oath in order to deceive the court and the Cape Law Society to allow him entry into the attorneys'

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[4] *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para 21.
[5] *Society of Advocates of Natal & another v Merret* 1997 (4) SA 374 (N).
[6] At 382I-383A.
[7] At 383B.
[8] At 383G.
[9] *Wetsgenootskap van die Kaap die Gooie Hoop v Reyneke* 1990 (4) SA 441 (E).
[10] *Reyneke v Wetsgenootshap van die Kaap die Gooie Hoop* 1994 (1) SA 359 (A).
[11] At 369H-I. See too *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) paras 12-13.

professional is so serious that there is no reasonable prospect of another court concluding that he ought to be admitted to practice as an attorney.

[22] Grounds of appeal (a) and (d) amount to no more than a general assertion that we erred in concluding that the applicant was not a fit and proper person to be admitted to practise as an attorney. In the light of my discussion of and conclusions on the other two grounds – grounds (c) and (f) – that concern the 'fit and proper person enquiry' there is no need to say anything more.

The Cape Law Society

[23] Ground (b) is that we erred in not 'aligning' ourselves with the view taken by the Cape Law Society to the effect that it had no objection to the admission of the applicant because the robbery he had committed was 'politically motivated'. This is dealt with in our judgment in which we stated:[12]

'With the greatest of respect to the Cape Law Society, those who considered the application could not have applied their minds properly. The most perfunctory reading of the founding affidavit would have raised a red flag: the date 27 April 1994 is an iconic date, and is perhaps the most important date in the history of South Africa – the day the new, democratic South Africa was born; as the date of the robbery was nearly two months later, it should have been apparent that the explanation that the applicant committed the offence in the course of the armed struggle was unlikely to be true. At the very least, this issue required thorough investigation before a decision could be taken on it.'

[24] As the view of the Cape Law Society was tainted by the applicant's deception, the fact that it had no objection to the admission of the applicant could carry no weight and could be disregarded. (That is why we requested the Eastern Cape Society of Advocates to appear as an *amicus curiae*.) If we had meekly followed the Cape Law Society's recommendation, we would have committed an irregularity. There is no merit in this ground of appeal, and there is no reasonable prospect of it succeeding on appeal.

The lapse of 22 years since the commission of the robbery

[25] It was submitted that we erred in failing to consider the fact that 22 years had elapsed (at the time the application was argued) since the robbery had been committed.

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[12] Para 38.

[26] This ground misconceives our judgment. We did not refuse the application on the basis that the applicant had committed offences – indeed, we made the point that a conviction per se is not a bar to admission – but because the applicant had lied, when he applied for admission, about the reason for committing the robbery. This is clear from the following passage in the judgment:[13]

'In 2015, in his very application to be admitted as an attorney, he lied about the reason why he committed the robbery. That, apart from being dishonest and completely at odds with the ethical probity expected of an attorney, amounted to a cynical attempt to mislead both the Law Society and the court. This evidences a lack of honesty, integrity and trustworthiness, all of which are essential qualities for any member of the attorneys' profession.'

[27] There is, accordingly, no merit in this ground of appeal and no reasonable prospect of it succeeding on appeal.

The applicant was not an attorney when he committed the misdemeanour

[28] I do not understand this ground of appeal. If a person behaves in the way that the applicant did – by lying in his application for admission as an attorney, with a view to deceiving the court into admitting him – he or she does not discharge the onus of establishing that he or she is a fit and proper person to enter an honourable profession where honesty and integrity are expected and required. In such an event, a court may dismiss an application for admission, as was done in this case. We did so on the basis of the seriousness of the applicant's misconduct. This ground has no reasonable prospect of success on appeal.

Conclusion

[29] We have concluded that none of the grounds of appeal enjoy reasonable prospects of success, whether taken singly or cumulatively, with the result that the application for leave to appeal must fail.

[30] The application for leave to appeal is dismissed.

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C Plasket

Judge of the High Court

[13] Para 34.

I agree.

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N G Beshe

Judge of the High Court

APPEARANCES

For the applicant:	S Cole Instructed by Mili Attorneys, Grahamstown