IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 10699/2016

In the matter between:

KHOLO ASHLEY OBOSE Applicant

and

THE CAPE LAW SOCIETY Respondent

Heard on : 21 September 2016

Delivered on: 6 October 2016

JUDGMENT

SCHIPPERS J:

[1] This is an application, in terms of s 15(3) of the Attorneys Act 53 of 1979 ("the Act"), for the applicant's readmission and re-enrolment as an attorney. He was struck from the roll in 2008. The respondent opposes the application

essentially on the basis that the applicant is not a fit and proper person to be readmitted to practise as an attorney.

[2] The applicant is 51 years old and appeared in person. He obtained the B. Proc Degree from the University of the Western Cape in 1999. He was admitted and enrolled as an attorney in the Ciskei in 1991 and in Grahamstown in the Eastern Cape in 1992. He practised for his own account in King William's Town from 1992 to 1999 when he closed down his practice. The founding affidavit states that in 2000 the applicant worked part-time at Vavevi-Ludick Inc, a law firm in Cape Town; that he completed a LL.M degree at the University of Cape Town in 2003 and a second LL.M degree at the University of Stellenbosch in 2008; that in 2004 he unsuccessfully tried to establish a practice in Johannesburg; and that in 2007 he voluntarily applied to the Grahamstown High Court under case number 1492/2007 for the removal of his name from the roll of attorneys ("the 2007 application").

[3] In the 2007 application, the respondent brought a counter-application for an order striking the applicant's name from the roll of attorneys. The court (Jones and Nepgen JJ) held that it was not possible to conclude that the applicant was an attorney in good standing; and that he did not discharge the onus of proving that he was entitled to an order removing his name from the roll of attorneys. The application was therefore postponed *sine die* and the respondent was granted leave to file its opposing affidavits. A day after the notice of opposition was delivered the applicant withdrew the 2007 application.

The striking off application

[4] In 2008 the respondent, then known as the Law Society of the Cape of Good Hope, launched an application in the Grahamstown High Court under

case number 640/2008, to remove the applicant's name from the roll of attorneys ("the striking off application"). The court (Schoeman and Kroon JJ) found that the applicant misappropriated R162 761.23 which he received from Sanlam Insurance on behalf of a client, Mrs Leve, and ordered that his name be struck from the roll of attorneys.

[5] The applicant misappropriated R162 561.23 in the following circumstances. Mrs Leve's daughter died in an accident. In 1995 Sanlam paid her the proceeds of certain life policies in the sum of R162 561.23, as the guardian of the beneficiaries, her grandchildren. She invested that amount with Sanlam and received interest monthly. Mrs Leve instructed the applicant to institute a MVA claim pursuant to her daughter's passing. During their consultations, the applicant asked Mrs Leve about the life insurance policies. She told him that the policies had already been paid out and that R162 561.23 was invested with Sanlam. Despite this, he asked her to give him the policy documents, which she did.

[6] In both the 2007 application and the striking off application it was found that Sanlam had paid the amount of R162 561.23 twice: once when that amount was invested with Sanlam by Mrs Leve in December 1995; and a second time on 18 July 1997, when a cheque from Sanlam for R162 561.23 made out to Mrs Leve, was deposited into a call account of the applicant's firm held with Unibank. Consequently Sanlam retrieved the second payment from the investment account which Mrs Leve had opened in 1995.

[7] The applicant did not dispute that Sanlam had paid out the policies to Mrs Leve in 1995. He admitted that Sanlam paid R162 561.23 into the call account at Unibank on his instructions; that the call account was closed on 6 November

1997; and that an amount of R163 084.52 was paid into his business account on 10 November 1997.

[8] In an affidavit to the attorneys' Fidelity Fund, Mrs Leve said that she did not instruct the applicant to institute any claim against Sanlam; and that he had not paid her any money from the amount which Sanlam had paid into the call account of his firm. In 1999 she unsuccessfully tried to contact him but he had ceased practising in King William's Town. The Fidelity Fund paid Mrs Leve R162 561.23. The applicant did not deal with these allegations in his opposing affidavit in the striking off application. Instead, he referred to Mrs Leve's claim as a "*fairy tale*" which did not warrant a response.

[9] The applicant's explanation as to what happened to the R162 561.23 paid to his firm by Sanlam is contained in his affidavit to the Fidelity Fund. In summary it is this. He acted for a Mrs Leve, a teacher or a nurse, who lived in Ginsberg, in two separate cases: an estate claim in the Bhisho High Court dealing with the Sanlam policies; and an MVA claim in the Umtata High Court. The case against Sanlam was settled, he discussed it with Mrs Leve and they agreed that the money should be invested with Unibank. After some months she approached him and said that she needed money and the investment in Unibank was withdrawn. His firm paid Mrs Leve R100 000 and retained approximately R62 000 for fees in the Sanlam matter and the MVA case then pending in the Umtata High Court. Before the MVA case was finalised, Mrs Leve told him that she needed all her money. He noticed that she did not trust him anymore. He wrote out a cheque to her for the balance, less disbursements and attorney and client costs.

[10] In an affidavit made in the 2007 application, which the applicant asked be incorporated in the striking off application, he referred to his bank statement

(despite his objection to the use of his bank statements on the ground that they allegedly were illegally obtained) and said that R98 948.71 was paid out of his trust account on 18 January 1999. That amount, he submitted, was paid to Mrs Leve, and her claim that he did not pay her had no substance. However, there was no indication as to who received the amount of R98 948.71.

[11] Mrs Leve denied these allegations. She said that she never lived in Ginsberg, was never a teacher or a nurse and had never instructed the applicant to institute a MVA claim for her husband, who died from diabetes much later in 1999. The applicant did not deal with Mrs Leve's allegations in rebuttal, in any of his affidavits.

[12] In short, Mrs Leve stated that the applicant had not paid her R162 561.23 which Sanlam had paid over to him. The applicant's version was that he paid Mrs Leve R100 000 and retained the balance (about R62 000) for fees; and that documentation showed that he had paid her R98 948.71.

[13] The court found that the respondent had proved on a balance of probabilities that the applicant misappropriated the money which he received from Sanlam. The reasons for this finding may be summarised as follows. The applicant, in the 2007 application and the striking off application, never denied Mrs Leve's allegation that she did not instruct him to institute a claim against Sanlam. The relevant policies were paid out to Mrs Leve by Sanlam in December 1995. It was far-fetched that in 1997, after summons had been issued and the case set down for trial, that Sanlam would pay out money that it did not owe. It was more probable that Sanlam had paid the applicant R162 561.23 because policy documents had been submitted for a second time. Further, the applicant failed to produce a case number, or any documentary evidence from the court files to show that such an action had indeed been instituted. The

applicant's claim that he had instituted an action on behalf of Mrs Leve against Sanlam in the Bhisho High Court, was thus false.

[14] The court accepted that the Mrs Leve referred to in the applicant's Fidelity Fund affidavit was the same person who had not received the money which Sanlam had paid into his call account at Unibank on 18 July 1997. The sum of R163 084.52 was transferred from that account and paid into the applicant's business account on 10 November 1997. There was no indication by the applicant when and how this amount was transferred to his trust account, to explain the transfer of R98 948.71 out of his trust account. And it was improbable that if Mrs Leve had insisted on payment of that amount when it was allegedly invested on her behalf with Unibank in July 1997 that it would have been paid out to her only 14 months later, in January 1999. The court accordingly held that the applicant's version that he had paid Mrs Leve R100 000 out of the funds which Sanlam had paid him and retained the balance for fees, likewise was false.

Is the applicant a fit and proper person to be readmitted?

[15] Section 15(3) of the Act provides that a court may readmit and re-enrol as an attorney, any person previously struck off the roll if, in the discretion of the court, such person is a fit and proper person to be readmitted and re-enrolled.[1]

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[1] The relevant provisions of Section 15(3) of the Act read:
"A court may, on application made in accordance with this Act, readmit and re-enrol any person who was previously admitted and enrolled as an attorney and has been removed from or struck off the roll, as an attorney, if-
(a) such person, in the discretion of the court, is a fit and proper person to be so readmitted and re-enrolled; …"

[16] In *Behrman*,[2] Corbett JA tersely described what a person seeking readmission as an attorney must show:

> "Where a person whose name 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 re-admission, 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 readmitted, 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."[3]

[17] In considering whether the onus has been discharged, the court will have regard to the following: the nature and degree of the conduct which resulted in the applicant's removal from the roll and his explanation therefor; his actions in relation to proceedings to secure his removal from the roll; the lapse of time between his removal and his application for reinstatement; his activities after his removal; his expression of contrition and its genuineness; and his efforts at repairing the harm which his conduct has caused to others. These considerations are not exhaustive and the weight to be attached to them will vary with the circumstances of the case.[4]

[18] Before dealing with the applicant's grounds for readmission, there are two troubling aspects of his conduct. The first is his failure to disclose material facts to the court; and the second, his lack of candour.

[19] The applicant failed to disclose the following material facts. He applied to the court which made the order striking him from the roll for leave to appeal,

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2 *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A); *Swartzberg v Law Society of the Northern Provinces* 2008 (5) SA 322 (SCA) para 14.

3 *Behrman* n 2 at 557B-C.

4 *Kudo v Cape Law Society* 1972 (4) SA 342 (C) at 345H-346 A, approved in Behrman at 557E-F.

which was refused. He then applied for leave to appeal to the Supreme Court of Appeal, which was also refused. Next, he applied to the Constitutional Court for leave to appeal. That application was also refused. When asked why he did not disclose those facts in the founding affidavit, the applicant could not explain it and said that the respondent had disclosed it in the answering affidavit. The applicant misses the point. If the respondent had not opposed the application, this court would not have known that the applicant had applied for leave to appeal to both the SCA and the Constitutional Court.

[20] The applicant's lack of candour and failure to disclose material facts is underscored by the fact that he also failed to disclose his unsuccessful applications for leave to appeal, in his application for readmission brought in this court on 30 October 2015 under case number 20993/15 ("the 2015 readmission application"). Worse, the applicant enrolled that application on the unopposed motion roll. Had the respondent not opposed the 2015 readmission application, it is probable that if it had been heard, the court would not have known of the applicant's unsuccessful applications for leave to appeal.

[21] In addition, the applicant failed to disclose the grounds upon which the 2015 readmission application was brought. They are material, because they differ from the grounds upon which he seeks readmission in this application; and have a direct bearing on the question regarding the nature and extent of the conduct resulting in his removal from the roll and his explanation therefor, and whether he is genuinely contrite.

[22] I have read the case file in the 2015 readmission application. The grounds upon which the applicant sought readmission in that application were essentially that he was not given an opportunity to defend himself in a disciplinary hearing and to exercise his right to cross-examine Mrs Leve; no

audited books were presented to the court as there were none; and the non-compliance with the provisions of s 71 of the Act and the respondent's rules were never justified to the court (the applicant gave no details of the rules with which the respondent allegedly did not comply). In this application there is a new explanation for the applicant's removal from the roll: he paid the wrong client, which he attributes to "*improper bookkeeping*." I revert to these aspects below.

[23] Aside from this, the applicant lacks judgment and insight. The order and findings of the court in the striking off application must stand: they have not been set aside on appeal.[5] Despite this, the applicant, in the replying affidavit, states that this court has a basis in law to reconsider the order made by that court. And in a further affidavit in the 2015 readmission application made on 13 November 2015, he stated that the finding of the court in the striking off application was wrong because it was not established that he had misappropriated funds; and it had applied the *Plascon-Evans* rule incorrectly.[6]

[24] I turn now to consider whether the applicant has discharged the onus resting on him. The nature and extent of the conduct which resulted in his removal from the roll of attorneys have been outlined above. It suffices to say that misappropriation of a client's money is serious and warranted removal, as is evidenced by the fact that two appellate courts refused leave to appeal against the order striking him off the roll of attorneys.

[25] As to an attorney's conduct regarding proceedings for his removal, the SCA has affirmed that a striking off application is *sui generis* and in the nature of disciplinary proceedings. Therefore, the attorney is expected to co-operate

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5 *Bezuidenhout v Patensie Sitrus Beherend BPK* 2001 (2) SA 224 (E) at 229B-C; *Jacobs v Baumann NO* (126/08) [2009] ZASCA 43 (8 May 2009) para 20.

6 *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A).

and place the full facts before the court so that the case can be correctly and justly decided. Bald denials, avoidance and obstructionism have no place in such proceedings.[7] In *Mogami*,[8] the SCA noted that it has become a common occurrence for persons accused of wrongdoing not to confront the allegations against them, but to accuse the accuser and seek to break down the institution involved.

[26] The applicant's conduct in relation to his removal from the roll of attorneys can only be described as adversarial and obstructive. He took the point (wrongly) that in light of the 2007 application, the issue concerning his failure to pay Mrs Leve was *res judicata*. As already stated, he referred to the claim by Mrs Leve, a pensioner and former domestic worker, as a fairy tale. In his opposing affidavit he said that Mrs Leve, despite being admonished by the court (in the 2007 application and which is not true), "*to come clean on the matter insists in not doing so*." He accused the respondent of trying to mislead the court, and its deponents, of "*being conservative with the truth*," perjuring themselves and "*telling lies under oath*." He said that the application for his striking was "*based on lies and perjury*." In the replying affidavit the applicant merely compounded his lack of remorse and appreciation for the seriousness of his conduct, which led to his removal from the roll. He apologises for the inappropriate language which he says he used, "*in the heat of the moment.*" However, that cannot be correct. He used that language because, as the applicant himself says, he saw the application for his striking off "*as harassment.*"

[27] I come now to the applicant's explanation for his conduct which resulted in his removal from the roll. He says that in June 2016 in East London, he met

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7 *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 853G-H, affirmed in Law *Society of the Northern Provinces v Sonntag* 2012 (1) SA 372 (SCA) para 17.

8 *Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA) para 26.

a lady who was his personal assistant from 1997 to 1999. During their conversation he raised the issue of Mrs Leve and told her that he been struck off the roll of attorneys. He asked her about her recollection of the matter. She told him that they had dealt with two different Leve claimants: one lived in Ginsberg and the other, in Middeldrift. She remembered the details exactly as one of the Leve's was her paternal relative. The applicant then says,

> "On hearing these facts being stated by my former personal assistant who I know to have a formidable memory of people and events I was shocked. It dawned on me there and then that my recollection was faulty. The explanation given … about the matter before the Umtata High Court related to the other Leve and that (*sic*) my explanation was confused and jumbled up.
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> The truth struck me like the Biblical Saul being struck by lightning in the plains of Damascus. I realised that I paid the wrong client the money. It was a gross violation of the trust which the client had bestowed on me. I was as I recall upset with the (Umtata court) Leve. This negatively affected my judgement towards the matter greatly. I remember just wanting to get rid of her. In the process I made a grave and very serious mistake of paying her somebody else's moneys. We had a "fight" in the Umtata court after the conclusion of the matter. I live with the guilt, and will do so for the rest of my life. I established that Mrs Leve passed on in 2012. I was as such not able to speak to her and ask for an apology. The Fidelity fund as stated above did refund her the misappropriated moneys."

[28] The first difficulty with this explanation is that it is based on pure hearsay and as such, inadmissible as evidence. The applicant has not even identified his personal assistant who allegedly told him that there were two different Leve claimants, let alone filed an affidavit by her. And this when he is seeking readmission as an attorney. The failure to identify the assistant or file an affidavit was drawn to the applicant's attention in the answering affidavit. His answer in reply is startling. He says,

> "… the context is conveniently being ignored by the respondent. The said lady was my employee about sixteen [16] years ago. She owes me no duty at this stage at all and I can make no demands on her … Every employer or former employer, I wish to

> submit, knows of instances where an employee or junior gives information on a confidential basis and seeks guarantees of anonymity … Perhaps if she was my Professional Assistant and therefore an officer of this court had given me this information I would have asked him or her for an affidavit."

[29] Nowhere in the founding affidavit does the applicant even suggest that the information which his former personal assistant had given him was confidential. In any event, there can be nothing confidential about the applicant having acted for two different clients by the name of Leve: he himself said that in his Fidelity Fund affidavit. It is clear from the applicant's reply that he decided that he was not going to identify his former personal assistant, or get an affidavit from her.

[30] When asked by the court to explain his failure to identify his former personal assistant or file her affidavit, his answer was simply that the court routinely accepts hearsay evidence.

[31] The applicant however is mistaken. The starting point is that hearsay evidence is unreliable and therefore inadmissible.[9] However, the Law of Evidence Amendment Act 45 of 1988 ("the Evidence Act") permits hearsay evidence in both civil and criminal proceedings, subject to certain statutory preconditions.[10] These preconditions are designed to ensure that the evidence is

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9 *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A) at 369E-H.

10 Section 3(1) of the Law of Evidence Amendment Act reads:

"Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission of the hearsay evidence in such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

received only if the interests of justice justify its reception; and a court deciding whether it is in the interests of justice to admit hearsay evidence must have regard to every factor that must be taken into account, more specifically those mentioned in s 3(1)(c) of the Evidence Act. Hearsay evidence should be admitted only if it is in the interests of justice to do so, having regard to all those factors cumulatively.[11]

[32] Applying these principles to the facts of this case, these are proceedings for the readmission of a person to a learned, respected and honourable profession in which the candidate pledges total and unquestionable integrity to society, the courts and the profession.[12] The high watermark of the hearsay evidence is that the applicant was told that there were two different Leve claimants. The applicant tenders the evidence to show that he paid the wrong client. The applicant's so-called explanation for not obtaining an affidavit from his former personal assistant, is hopelessly inadequate. The evidence has no probative value: it is nothing more than a statement that the applicant acted for two Leve claimants: a fact which he himself stated in his Fidelity fund affidavit. If the evidence were to be admitted to show that the applicant paid the wrong claimant, the respondent plainly would be prejudiced.

[33] For these reasons, I have come to the conclusion that it is not in the interests of justice to admit as evidence, the statements conveyed to the applicant by his former personal assistant.

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."

11 *S v Molimi* 2008 (2) SACR 76 (CC) para 35.

12 *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 395H-396C, affirmed in *Mafokate v the Law Society of the Northern Provinces* (786/12) [2013] ZASCA 125 (23 September 2013) para 22.

[34] Apart from this, the applicant's new version, comprising the most cursory assertion - that he paid the wrong client - does not withstand scrutiny, and casts serious doubt on his honesty and integrity.

[35] To begin with, the applicant now concedes that he did not pay Mrs Leve and that the Fidelity Fund "*did refund her the misappropriated moneys*." It follows that Mrs Nothandekile Leve's version in her affidavit made on 15 January 2008 (annexed to the 2015 readmission application) outlined above, is correct, as found by the court in the striking off application. What is clear from her affidavit is that she never instructed the applicant to lodge another claim against Sanlam; there was no such case or an MVA claim on her behalf brought in the High Court; the applicant did not pay her a cent of the R162 561.23 that Sanlam had paid over to him; and she never lived in Ginsberg Township, but Debe Marele Location, Debenek.

[36] Save for a bald statement in the founding affidavit that he "*did not have a full and proper sequential recollection of the events*," the applicant has not explained why he attempted to mislead the court in the striking off application, by stating that he had instituted an action against Sanlam on behalf of Mrs Leve in the Bhisho High Court; and an MVA claim in the Umtata High Court. Unsurprisingly, he did not cite a case number or produce a single document or piece of paper to show that those actions were in fact instituted. This, when in his Fidelity Fund affidavit he furnished details of both the attorneys and counsel who allegedly acted in those cases (that affidavit was not annexed to the founding papers in this application, but to the papers in the 2015 readmission application). Further, it is clear from Mrs Leve's affidavit that she instructed another firm of attorneys, Mlonyeni and Lesele Incorporated, who finalised her MVA claim. The applicant's version in his Fidelity Fund affidavit that Mrs Leve's MVA claim was settled for less than the amount sued for; that she was

unhappy with the settlement; and that monies due to her were paid out in due course, is thus false.

[37] In addition, it is highly improbable firstly, that the applicant would have forgotten about the Mrs Leve who supposedly was wrongly paid, when he made his Fidelity Fund affidavit: she was a difficult client with whom he had fought and he wanted to get rid of her. Secondly, it is also improbable that the applicant would not have consulted his former personal assistant regarding Mrs Nothandekile Leve's claim. The applicant seems to have forgotten what he said in his Fidelity Fund affidavit: that his response to Mrs Leve's claim was based inter alia on "*assistance from former employees.*" And thirdly, in his Fidelity Fund affidavit the applicant portrayed Mrs Nothandekile Leve as the difficult client: she had put him under pressure and called at his office 2-3 times per week, did not trust his advice, their relationship became "*decidedly cold*" and she was not happy with the settlement of the MVA claim and counsel had to explain it to her.

[38] In these circumstances, it is improbable that the applicant could have made a mistake concerning Mrs Leve, who was entitled to the money paid to him on her behalf by Sanlam; or that the applicant could have paid the wrong client the money, particularly when on his own version in the Fidelity Fund affidavit, he had acted for more than one Leve.

[39] Aside from all of this, the applicant's new explanation for his conduct is hopelessly inconsistent with a number of affidavits to which he has deposed, and cannot be accepted.

[40] In his Fidelity Fund affidavit, the applicant said that he paid Mrs Leve R100 000 in the Sanlam matter and retained about R62 000 for fees in both that

matter and the pending MVA matter in the Umtata High Court. In an affidavit in the 2007 application, the applicant said that R98 948.71 had been paid out of his trust account, and submitted that that amount had been paid to Mrs Leve.[13] In his opposing affidavit in the striking off application he said that Mrs Leve refused to come clean on the matter. In his affidavit of 13 November 2015 he says that documentary proof (a bank statement showing that R98 948.71 was paid out of his trust account) was submitted to gainsay misappropriation of Mrs Leve's money. In the founding affidavit the applicant now says that he paid the wrong Mrs Leve.

[41] So there are two versions: the first is that the applicant paid Mrs Leve all the money due to her from the funds paid over to him by Sanlam; and the second, that he did not pay her at all. In all his affidavits, the applicant says that the facts to which he deposes are within his personal knowledge, and true and correct. Now in these circumstances, can it be determined from the applicant's say-so which version in his various affidavits is correct? I think not.

[42] What is beyond question however, is the finding of the court in the striking off application - the applicant misappropriated money belonging to Mrs Leve.

[43] This brings me to the issue whether the applicant has genuinely reformed and whether the defect of character which led to his removal from the roll of attorneys, no longer exists. The applicant himself must properly and correctly identify the relevant defect of character and show that he has acted in accordance with that appreciation. Without this there can be no true and lasting reformation.[14]

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13 Judgment in the striking off application paras 15 and 16.
14 *Swartzberg* n 2 para 22.

[44] This issue may be dealt with briefly. The applicant does not appreciate that he misappropriated money belonging to a client, a vulnerable member of society. Instead, he sees his conduct as "*improper bookkeeping*." He says that his knowledge of bookkeeping was basic; that there were errors made when trust monies were paid into his business account; that Mrs Leve's money had been deposited into a wrong account, which violated the respondent's rules, "*and is the basis for the judgment currently against [him]*"; and that he accepts that he concentrated more on generating fees for his firm than keeping proper books. Then, as regards rehabilitation, he says that when he studied at the University of Stellenbosch, he worked part-time for a law firm in Bellville for about six months and was exposed to professional management and running a law practice; that he is prepared to attend a practice management course run by the respondent; that if readmitted, he intends practising as a professional assistant or legal adviser for a number of years; and that getting to know the truth led to long and sustained soul searching.

[45] The applicant also does not accept that misappropriation of money was conclusively proved against him. He was not struck from the roll because Mrs Leve's money was deposited into a wrong account: that was *not* the basis for the judgment in the striking off application. The applicant's characterisation of the misappropriation of funds entrusted to him as improper bookkeeping, is untenable and self-serving. It shows that he has not accepted responsibility for his actions and that he does not truly and deeply accept that his misconduct was wrong.

[46] Moreover, the applicant's claim to sustained soul searching and rehabilitation is false, in light of the facts. In his affidavit of 13 November 2015, he reiterated the stance he has adopted throughout: his removal from the

roll was wrong and he was treated unfairly. In the founding affidavit made on 21 June 2016, the applicant says that if he had kept his books of account electronically, perhaps a paper trail showing how monies were transferred back into his trust account, would have been provided. The applicant however completely misses the point. The absence of a paper trail was indicative of his dishonesty: not improper bookkeeping. He latched on to a payment of R98 948.71 out of his trust account (the recipient is unknown) and submitted that it had been paid to Mrs Leve. The court in the striking off application rejected this version.

[47] Further, the applicant has not presented any evidence, let alone sufficiently compelling evidence, to show genuine and enduring rehabilitation on his part. He has annexed an affidavit by Ms Sazi Phumezo Mnyande, an attorney, who knows him since 1988 when they were prosecutors. Ms Mnyande in summary, states the following. She observed the growth of the applicant's practice in King William's Town from 1993 to 1998. When she got a promotional post in Port Elizabeth, they lost contact until they saw each other in 2007. They had no further contact until Ms Mnyande heard that the applicant was lecturing at Fort Hare University about five years ago. Recently the applicant visited Ms Mnyande at her office in Port Elizabeth and told her that he had been struck from the roll. She is confident that he will not falter again and bring the profession into disrepute. She believes that the applicant will add value to the profession, given his qualifications.

[48] No reliance can however be placed on Ms Mnyande's evidence. She has not been associated with the applicant since his striking from the roll, either in practice as an attorney or otherwise. In fact, her contact with the applicant has been sporadic. In addition, it does not appear from her affidavit that she is aware the reasons for the applicant's removal from the roll, so as to give

informed and relevant evidence concerning his conduct and attitude, since his removal, more specifically whether he is genuinely and permanently reformed; whether he is a person of good character and can be trusted; and whether he is in every way fit to be readmitted as an attorney.

[49] To return to the onus in *Behrman*.[15] The facts show that the applicant has not been sincere, frank and truthful in presenting and discussing the factors relating both to his removal from the roll of attorneys, and his readmission. Although eight years have elapsed since his striking, he has not demonstrated, by his attitude and conduct, genuine remorse, or that he has fully extricated and distanced himself from the conduct and circumstances that led to his removal from the roll. He has taken no steps to reimburse the Fidelity Fund for the loss it sustained in paying out Mrs Leve, or to pay the respondent's costs incurred in the striking off application and the abandoned readmission applications, which according to the papers are substantial. But fundamentally, he has not shown that he is someone in whom members of the public can have well-founded confidence that he will be a person of unquestionable integrity, probity and trustworthiness.

[50] It follows that the applicant is not a fit and proper person to be readmitted to the roll of attorneys, and the application must therefore be dismissed.

Costs

[51] Section 16 of the Act provides that any person who applies to the court to be readmitted and enrolled as an attorney must satisfy the law society in the province in which he applies that he is a fit and proper person to be readmitted and enrolled. Given its duties under the Act to maintain professional and ethical

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[15] *Behrman* n 2 at 557E-F.

standards not only in the interests of the profession, but also in the public interest, and the particular circumstances of this case, the respondent was compelled to oppose the application. Its opposition was both proper and reasonable. Therefore, it should not be mulcted with any costs.[16]

[52] In any event, the usual order in applications of this kind where a law society successfully opposes an application for the readmission of an attorney, is that the applicant pays costs on an attorney and client scale.[17]

[53] I would make the following order:

(a) The application is dismissed.

(b) The applicant shall pay the respondent's costs on the scale as between attorney and client.

SCHIPPERS J

YEKISO J:

[54] I agree. It is so ordered.

YEKISO J

[16] *Swartzberg* n 2 para 48.
[17] *Van Eeden v Die Prokureursorde van Noordelike Provinsies* [2009] 1 All SA 477 (SCA) para 18.