

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REASONS

CASE NO: HC-MD-CIV-MOT-ALP-2017/00403

In the *ex parte* application of:

MWALA KENNETH SIAMBANGO

APPLICANT

Neutral Citation : *Ex parte Siambango* (HC-MD-CIV-MOT-ALP-2017/00403) [2020] NAHCMD 16 (23 January 2020)

CORAM: MASUKU J

Heard: 26 September 2019

Order issued: 04 October 2019

Reasons: 23 January 2020

REASONS FOR JUDGMENT

MASUKU J:

Introduction

[1] On 26 September 2019, this court heard an application for the admission and enrolment of the applicant, Mr. Mwala Kenneth Siambango, as a legal practitioner of this court, in terms of the provisions of s 4 of the Legal Practitioners' Act,¹ ('the Act'). I shall, in the course of this judgment, refer to Mr. Siambango as 'the applicant'.

[2] After a short period of rumination, the court, on 4 October 2019, issued an order for the admission of the applicant as prayed. It was also indicated in the order issued on even date that the reasons for the order would be delivered in due course on 05 March 2020. Following below are the reasons for the order, albeit delivered earlier than the benchmarks for delivery of judgments and/or reasons and also before the date indicated in the court order referred to above.

Background

[3] In his foreword to the first edition of the works entitled, The Civil Practice of the Courts of South Africa, R. P. D. Davies, states the following in the fourth edition at p. xvi, regarding the legal profession:²

'What is the nature of this honourable profession to which we all, Bench, Bar and Side Bar alike, belong? Perhaps its nature has already been revealed by the words 'honourable profession'. First and foremost, it is a profession, not a trade or business. . . Barristers and attorneys are not hucksters, peddling their wares, selling them to the highest bidder; for that reason they are not allowed to turn themselves into limited liability companies, or to tout for work; they are not allowed to advertise, and they may not filch each other's clients. They are as much a part of the court in which they practise as the judges who preside over them. It is an honourable profession and one to which it is an honour to belong. And it is of the highest importance that those who belong to it should always keep the fact clearly before them. Dr. C. H. Van Zyl, in his *Judicial Practice*, quotes these wise words of an English author: "The tone of your professional character, intellectually, morally, will depend upon the estimate which you form of the nature of the duties which you have undertaken, and of the spirit which ought to actuate you"'.

¹ Act No. 15 of 1995.

² Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, Juta & Co, 5th ed, 2009.

[4] The applicant, by application, dated 09 November 2017, moved this court to admit him as a legal practitioner of this court, and as such, that he be inducted, so to speak, into the realms of the honourable profession as described in the immediately preceding paragraph.

[5] This application was lodged together with another, namely that of Mr. Aubrey Ndlovu.³ Because the court, after reading the papers filed of record, in both matters, harboured misgivings about the propriety of granting the applications, the legal practitioners who were to move the applications on the first date stipulated, were informed of the nature and extent of the court's misgivings and they were requested to address the court by filing additional documents, including heads of argument in support of the applications. It is pertinent that the application by Mr. Ndlovu, was not pursued as he decided, in the interregnum, to withdraw same. Nothing more, save where necessary, or appropriate, shall be said regarding this application henceforth.

The role of the Law Society of Namibia

[6] Before dealing with the issues that arise and which were placed in the mix as the court decided the propriety of the application, there is a preliminary issue that needs to be fully addressed and it relates to the role of the Law Society of Namibia, (LSN), particularly in relation to applications for admission and enrolment of legal practitioners.

[7] In terms of the provisions of s 40 of the Act, the LSN is the *custom morum* of the Legal Profession in this Republic. It accordingly bears the duty of regulating and controlling the practising standards as well as the moral and ethical standards of this honourable profession amongst legal practitioners. Recognising this important role, the court, after receipt of the applicant's application (together with that of Mr. Ndlovu), because of the misgivings referred to earlier, requested the LSN to be joined in the proceedings and to assist the court in deciding the propriety of the applicant's application.

³ HC-MD-MOT-ALP-2018/00256.

[8] The misgivings the court harboured, emanated from the fact that the applicant, as it is common cause, was previously convicted of a criminal offence, as will be adverted to later. A conviction returned in such cases, although not a complete bar, obviously serves to besmirch the integrity of an applicant and generally speaking, negatively affects his or her fitness to be admitted into the ranks of the honourable profession.

[9] It was in this connection that the LSN was invited to make submissions to assist the court in delivering on its remit in this matter. The LSN merely filed a letter stating that it had considered the application and had no qualms with the admission and enrolment of the applicant. The court was not taken into the confidence by the LSN by way of stating what considerations informed its decision not to oppose the applicant's admission.

[10] In this regard, it must be stated categorically that in calling upon the LSN to assist in its capacity as the *custos morum*, the court does not require or expect the LSN to blindly agree with the source or nature of the hesitation that may have afflicted the court's mind in dealing with the application. The court is open to consider the LSN's position, whether to oppose or not to oppose in any given case. What is critical though, is that the LSN must, in writing, state a full and comprehensive basis for its adopted position either way.

[11] It is singularly unhelpful for the LSN to merely record its decision not to oppose or even to oppose, without disclosing the reasons for either position, particularly where the court has pertinently raised concerns. In this regard, the court is entitled to consider the LSN's stance by virtue of its statutory position and to take the latter's views seriously, without in any way being seen to blindly pander thereto.

[12] In the instant case, the decision not to give reasons for supporting the applicant's application placed the court in a somewhat invidious position. This is so because the proceedings thereafter seemed to acquire an unsavoury flavour, where it would have appeared that the court had an agenda in terms of which it did not want to admit the applicant and this being so

notwithstanding the non-opposition by the LSN, which is a critical stakeholder in these matters.

[13] It is unseemly that proceedings such as these should be allowed to acquire an adversarial flavour in terms of which the court is, wittingly or unwittingly depicted, seen or regarded by the detached observer, as the applicant's only adversary, hell-bent, as it were on seeing to it that the applicant's application does not see the light of day.

[14] This becomes particularly pronounced where the LSN makes a decision one way or the other but in the absence of reasons therefor. The reasons furnished in support of the LSN's position, serve to assist the court in considering and eventually deciding the matter. In this regard, the LSN is expected to adopt an impartial position and to give insights to the court, that may, in some cases, be within the peculiar knowledge of the LSN. Failure to do so, in my view, amounts to an abdication of responsibility to the court, the profession and the public at large.

[15] This is more telling, considering in particular, that these matters, are invariably moved by applicants on an *ex parte* basis. The silence of the LSN in the issue of reasons for whatever decision they arrive at, is therefor totally out of order and must not be allowed to take root or be repeated. The court is entitled to rely on the LSN in these matters and the especial office the LSN occupies in the eyes of the court must not be whittled away or in any shape or form, diminished.

[16] It must also be stressed that once the LSN is called upon by the court to assist by giving its considered views regarding any matter in applications for admission, besides reducing its position into writing, together with the reasons therefor, the LSN should stand ready to address the court on its position, if requested to do so by the court. That is the solemn duty that officers of the court are expected to perform. The LSN, as a statutory body, mandated to regulate the affairs of the legal profession, is not exempted from assisting the court, but is in fact placed on higher pedestal to enlighten the

court on such matters, whether *suo motu*, or when called upon by the court to do so.

[17] Faced with the curt response from the LSN in the absence of reasons for its decision, the court was compelled to turn its eyes elsewhere to seek assistance that the LSN should have readily offered as per the court's request. The natural destination the court turned to was the Society of Advocates. The court, in this regard, wishes to express its debt of gratitude to the erstwhile President of the Society, Adv. Corbett SC and his colleagues in the Bar Council, for giving the matter the urgent attention and priority it deserved.

[18] It was in this connection that, Mr. T. C. Phatela, a member of the Society of Advocates, was designated by the said Society, to assist the court as *amicus curiae*. He, within very stringent time limits, read the record and filed very comprehensive and useful heads of argument that have served a very useful purpose of guiding the court in exercising its duties and functions under the Act. The court wishes to express its gratitude personally to Mr. Phatela for the assistance rendered so dutifully, as expected by the court of its officers.

Background

[19] This application for admission arises in the following setting, as gleaned from the papers filed of record by the applicant: The applicant is a Namibian male adult, born on 6 September 1972. He attended his tertiary education at the University of the Western Cape and there read for a B Juris and LLB degree, respectively, which he qualified for.

[20] Later, and after completing his studies, he was employed by the Legal Assistance Centre in Windhoek. On 13 February 2003, he was convicted by the Magistrate's Court on two counts of theft of a motor vehicle. This conviction was successfully appealed to this court. On a further appeal to the Supreme Court, the latter court set aside his conviction on both counts but found him guilty of contravening the provisions of s 8(1) of Ordinance 12 of

1956. He was ordered to pay a fine of N\$ 5000 as punishment and in default of which he had to serve two years' imprisonment.

[21] The question that confronts the court presently, is whether the applicant is, in view of his previous conviction, which has not been extinguished in any legally recognised manner, qualifies to be regarded and treated as a 'fit and proper person' to be admitted and enrolled as a legal practitioner – more accurately, as an officer of this court and thus, a member of the 'honourable profession' as described in the introductory part of this judgment.

Fit and proper?

[22] The Legal Practitioners' Act, governs the admission, authorisation and enrolment of legal practitioners in this jurisdiction. Section 4(1) of the Act has the following rendering:

'Subject to the provisions of this Act, the Court shall admit and authorise to practice any person, who upon application made by him or her, satisfies the Court that he or she –

- (a) is a fit and proper person to be so admitted and authorised;
- (b) is duly qualified in accordance with the provisions of section 5; and
- (c) is a Namibian citizen. . .'

[23] There is no debate that the applicant meets the latter requirements set out in (b) and (c) of the above subsection. He is a holder of the qualifications required in terms of (b) and there is no dispute that he is a Namibian citizen. The elephant in the room, so to speak, is whether the applicant meets the criterion of a 'fit and proper' person to be enrolled, as prayed.

[24] It may be construed to be a matter of regret that Parliament did not find it proper or necessary to define the words 'fit and proper' in the definition or other part of the legislation in question. All is not lost though because this court is possessed of the tools in its armoury, to interpret these key words.

This will be done, in part by reference to how other jurisdictions have interpreted these key words.

[25] It must be mentioned that in most jurisdictions, Parliament left the definition of these words to the sagacity of the courts and maybe for good reason because the interpretation of the words may be fluid and defy a precise definition. Courts are eminently placed to decipher what Parliament's intention, in any given case was and the present, is no exception.

[26] Furthermore, these words are unique as they may be interwoven with a particular context, calling upon the court to make a factual enquiry in one part and then a value judgment, in another, based on the particular facts established. To this extent, Parliament may have acted wisely in refraining from providing a definition to these words.

[27] One thing that should be made very clear and very early, is that when regard is had to the requirements of the Act quoted above, fitness and propriety for admission has nothing to do with legal and/or academic qualifications. This is so because the requirement for legal and academic qualifications constitutes a separate requirement from that of being 'fit and proper', as seen above. In other words, the academic and legal qualifications are additional legislative requirements to one being deemed fit and proper for admission and enrolment.

[28] In this regard, the learned author Professor Magda Slabbert,⁴ reasons as follows:

'It seems that it is not sufficient to have a law degree or thorough knowledge of the law to become a legal practitioner. Applicants will be admitted to the legal profession only once they have proven that they are indeed "fit and proper" for the legal profession. The burden of proof is on the Applicant. Membership of the profession is thus subject to character screening, yet what is a "fit and proper" person is not defined or described in legislation or regulations. It is commonly accepted that in order to be a "fit and proper" a person must show integrity, reliability and honesty,

⁴ Professor of Law, UNISA, Department of Jurisprudence, Potchefstroom Electronic Journal, Vol. 14 Nr 4, July 2011.

as these are the characteristics, which could affect the relation between a lawyer and a client or a lawyer and the public. Although the burden of proof is on the applicant to prove (satisfy the court) that he or she is a “fit and proper” person to enter the legal profession, the decision remains essentially a discretionary value judgment on the part of the seniors or the court.’

[29] There are a few nuggets of wisdom that are discernible from the above quotation, in addition to what I have mentioned, namely, that academic and legal qualifications do not *per se* have a bearing on fitness and propriety to be admitted as a legal practitioner. The nuggets are the following:

(a) that the applicant for admission, bears the onus to show that he or she, is a fit and proper person to be so admitted;

(b) that although the overall onus rests on the applicant, as stated in (a) above, the court ultimately exercises a discretionary value judgment on the question of fitness and propriety of an applicant to be admitted and enrolled as a legal practitioner;

(c) that fitness and propriety for admission of an applicant, is intrinsically linked to the applicant’s suitability in terms of his or her integrity, reliability and honesty. See also *Vaasen v Law Society of the Cape*.⁵

[30] In view of the foregoing, it would appear that the concept of a ‘fit and proper’ person, although incapable of being comprehensively and precisely defined, speaks to the high moral rectitude and ethical propriety and fitness of an applicant to be released by the court to serve the unsuspecting but trusting public, which will be expected to entrust and deposit their deepest secrets, invaluable acquirements and at times the entire fruits of their toil, in the discretion, secure vault and able superintendence of a legal practitioner.

[31] In this regard, the characteristics of honesty, integrity, faithfulness, reliability and moral rectitude stand out. The intrinsic qualities required of a legal practitioner to pass the ‘fit and proper’ test have to do with the uprightness of character and moral rectitude of the applicant, in the proper discharge of the functions of their office of a legal profession and as an officer of the court. In this regard, their moral standing, honour, probity,

⁵ 1998 (4) SA 532 (SCA).

dependability, uprightness and thus good reputation, stand them in good stead to be found able to meet the apparently elusive litmus test. Where a black, and not merely a grey *nota*, is recorded against any of these qualities, fitness and propriety will, generally speaking, hardly be found to co-exist in the applicant.

Nature and scope of the enquiry

[32] In his well-manicured heads of argument, Mr. Phatela drew the court's attention to the real nature of the enquiry. In this regard, he helpfully referred the court to *Geach*⁶ where the Supreme Court of Appeal of South Africa, mapped out the enquiry in the following language:

'The enquiry before a court that is called upon to exercise its powers is not what constitutes an appropriate punishment for a past transgression but rather what is required for the protection of the public in the future.'

[33] I agree entirely with the sentiments expressed above because a person in the applicant's shoes would have already been punished for his or her misdeeds, either by having been disbarred or taken through the hot coals of a criminal trial. In the applicant's peculiar case, he was charged, convicted and sentenced to pay a fine, which he did. In that sense, the court imposed a sentence that would have been regarded as sufficient punishment for him to pay his dues in full to society, for his transgressions. To focus entirely on the fact of the past conviction, and close one's eyes to the present, would amount to a case of double jeopardy, in my considered view.

[34] It is accordingly proper that the enquiry should turn to consider whether the applicant is fit and proper to be admitted (or where applicable, to be readmitted), considering his transgression in relation to such matters as the prestige, status, dignity of the profession and the integrity, standards of professional conduct and responsibility of legal practitioners.

⁶ General Bar Council of South Africa v Geach and Others 2013 (2) 52 (SCA) para 67.

[35] Before I deal with this matter, it is imperative that I state that Mr. Phatela, in his heads of argument, took the court on a conducted tour of the courts' shift in the approach to admission of legal practitioners, particularly those who have had a brush with the law. In this regard, he argued that the courts had shifted from the 'character approach' to the 'duty approach'.⁷ I have no qualms with this approach and hereby adopt it in this matter.

[36] In terms of the proper approach, the court should deal with the question of the admission not from the question whether the character of the applicant, namely the applicant's criminal conviction adversely affects the applicant's fitness, but whether it is consistent with the duty of legal practitioners to uphold the law.

[37] In his argument, Mr. Phatela proceeded to argue that the court should look at the applicant at the point of his application – as he is and not as he was. He stated the following in his heads of argument:

'We submit that the court should assess the applicants, at the time when the applicants appear before it, whether at that stage they are fit and proper persons to be permitted to practice as legal practitioners. We submit that there is support for this proposition in the language of section 4(1)(a) of the Legal Practitioners Act. It is framed in the present form and the construction of the role of the court that is most consistent with the language used in the Legal Practitioners Act is couched in the present tense and thus speaking of the immediate future.'

[38] Whilst I agree with the submissions made above, the import of same must not be extended and construed to mean that the court must merely focus on the person before it at the time and gloss over what the applicant may have done that served to place him or her on a collision course with the law. The person before court will be seen from the context of what he or she did in the past; what he or she did after the *coup de grâce* and how he or she is at the moment the application for admission and enrolment is moved. That is the first part of the enquiry.

⁷ *Ex Parte Krause* 1905 TS 221 and *Matthews v Cape Law Society* 1956 (1) SA 807 (C).

[39] In this regard, Mr. Phatela argued and correctly so, that the enquiry constitutes a two-staged approach. The first is a factual one, namely, whether in the light of the conviction, and the disclosure made in the applicant's affidavit, it would be proper to admit him or her as a legal practitioner.

[40] I am also in full agreement with the submission by Mr Phatela, that where the fall from grace results from conduct that reflects negatively on the honesty and integrity of the applicant, the court has to assess whether the applicant, at the time he or she appears before it, has undergone a genuine, complete and permanent reformation. This will be informed by factors such as (a) the nature and particulars of the conduct in question (b) the behaviour of the applicant after such conduct became known; (c) whether it could be accepted with confidence that the applicant is a fit and proper person to be admitted or readmitted, as the case may well be.

[41] I again accept the sentiments expressed in *Ex Parte Krause*⁸ where the court held, in a case where the applicant had been found guilty of attempt to incite murder, that the fact of a criminal conviction, is not *per se* a bar to admission. The question should rather be whether the conviction in question predisposes the applicant to and reflects negatively on his character as being unworthy of joining the ranks of the honourable profession. In the *Krause's* case, his crime was political in nature and not motivated by personal vengeance or gain. The court duly admitted him.

[42] In determining whether the applicant meets the litmus test adverted to above, in the present matter i.e., whether he is a fit and proper person to be admitted, notwithstanding his avowed brush with the law, the court will consider the following factors –

- (a) the nature of his misdemeanour;
- (b) the date when this misdemeanour was committed in relation to when the application is moved;
- (c) the applicant's behaviour since the misdemeanour occurred;
- (d) the vocation in which the applicant has been devoted since the fall from grace;

⁸ 1905 TS 221.

- (e) whether there is any positive certification by an officer of the court in good standing, as to the fitness of the applicant to be admitted and enrolled as a legal practitioner; and
- (f) any other factors relevant that the court may, in its wisdom regard as relevant to the enquiry, whether aggravating or extenuating.

[43] It is important and in fact necessary that an applicant who applies to be admitted but knows that there has been a lapse in conduct expected of members or potential members of the honourable profession, that this disclosure must be made fully and frankly by the said applicant, without being prodded, reminded or requested to disclose same. Where an applicant fails or neglects to take the court in his or her confidence, that has a negative effect on his or her fitness to be admitted.

[44] This is so for two reasons. First, in all *ex parte* applications, the law imposes on applicants what is referred to as *uberrima fides*, namely, utmost good faith. This requires the applicant to fully and frankly disclose all material facts that may have a bearing on the court granting or even refusing the order. This includes the disclosure of facts that may be inimical to the applicant's interests. Failure to so disclose, results in the court refusing the application, or where an interim order has been granted, for same to be discharged because of the hoarding of relevant information.⁹

[45] Secondly, legal practitioners and prospective legal practitioners, are, or will in due course become officers of the court and they are, in that special position, expected to make a completely clean breast to the court on all relevant matters that may even tangentially affect their fitness to be admitted and enrolled as officers of the court. In that regard, the court is entitled, because of their especial position, to act and rely on their word, without more.

[46] Where a prospective legal practitioner withholds germane and relevant information from the court at the point of moving an application for admission, he or she fails before the starting blocks and the court would be well within its

⁹ *Atlantic Management Proprietary Limited v Prosecutor-General of Namibia* (Case No. S/A 53/2017), para 34.

rights to refuse the admission as the withholding of information reflects a serious defect in character, which is wholly unsuitable in officers of the court and it is tantamount to dishonesty.

[47] For his part, the applicant made a full and frank disclosure of his brush with the law in his founding affidavit. He states that having obtained further counsel from a senior member of the Bar, he further filed a supplementary affidavit, laying bare soul before court as it were and chronicled the entire sordid episode and expressed shame and his remorse regarding his conduct. On this score, I cannot fault the applicant. He has played open cards, as it were, with the court and this places him in good stead.

[48] One factor that in my view works in the applicant's favour, is that he explains that he was afflicted by the deceptions of youthful exuberance when he engaged in the conduct in issue and has stated that he has seen the error of his ways and would not repeat such conduct or engage in any similar episode. It is also well to consider in this regard, that a lot of time has passed between the transgression in question in 2003 and the moving of the application, in November 2017. In this time he would be expected to have seen the folly of his ways and to have made good on them.

[49] More importantly, what the applicant has been doing since his fall from grace is impressive. He ultimately joined the Ministry of Justice in 2004 as a Legal Officer and has all this time, been involved in representing indigent members of the public in addressing or redressing their legal travails. On 16 November 2006, he was appointed Legal Aid Counsel, a position he holds to the date of the application. In this position, he has been appearing before this court and other courts, in defence of indigent members of the public.

[50] Furthermore, his immediate supervisor, Ms. Patience Daringo, the Deputy Chief at the Directorate of Legal Aid, who is an officer of this court, painted an impressive picture on the canvass, regarding the behaviour, reformation and dedication to duty by the applicant. She fully supported his application for admission and confirmed that he is, in her opinion, a fit and proper person to be so admitted.

[51] I am, in view of the foregoing, including what the applicant has deposed to under oath, convinced that the applicant has discharged the onus upon him, to show that he is a fit and proper person to be admitted and enrolled, despite his previous fall from grace. Although I cannot predict the future conduct of the applicant, I am satisfied that from the information placed before me, considered in tandem with the relevant case law, that the applicant has, on a balance of probabilities, undergone a genuine, complete and permanent reformation in respect of his previous conduct. The onus, although not in a legal sense, is on him to prove the court's assessment above correct by conducting himself as a worthy member of the profession going forward.

[52] He appears, on a balance, to have successfully exorcised himself of the demons of criminal conduct and irresponsibility that afflicted him as a callow youth. This is so for the reason that since the slippery slope he failed to deal with, he appears to have found traction in the paths of virtue and this is exemplified by the fact that since the incident in question, there has been no complaint of any dishonourable or unworthy conduct that might suggest that he has not changed from his reprobate self.

Conclusion

[53] Having regard to the factors mentioned above and the other arguments helpfully advanced by the applicant's legal practitioner, Mr. Khama and which have been considered in this judgment, I am of the considered view that the applicant can properly be regarded as a fit and proper person to be admitted and that is why I found it fit to grant his application for admission and authorisation to practise as a legal practitioner of this court.

Admonition

[54] I find it proper to issue a word of admonition to the applicant. The court, as stated earlier, is unable to foretell the future, including the conduct of its officers. As to what happens to the applicant and his newly found status, is completely in his hands and under his exclusive control. It will be a sad day if the applicant, for whatever reason, resiles from the comely conduct referred to above and backslides, as it were, into the tentacles of unworthy, dishonourable and miry conduct that might see him disbarred and removed from the prestigious roll of officers of the court.

[55] The court has placed its confidence in the applicant and has offered him an opportunity to join the ranks of the profession and to be an asset to the courts, the legal profession and the general populace of this Republic. The ball, is now in the applicant's court, to show that the confidence so reposed by the court in him, has not been misplaced. This new lease of a professional life, must forever remain indelibly imprinted in the forefront of the applicant's mind henceforth and he should attach high value to it and hold it dear.

[56] The foregoing, constitute the reasons why the court exercised its moral value judgment in the applicant's favour by granting the applicant's application for admission and enrolment unconditionally.

T.S. Masuku
Judge

APPEARANCES:

APPLICANT: D. Khama

Instructed by: Brockerhoff and Associates, Windhoek.

Amicus Curiae T. C. Phatela