

SOUTH AFRICA / JUDGMENT

Mukwevho v Legal Practice Council (48650/2021) [2022] ZAGPPHC 962 (6 December 2022)

[2022] ZAGPPHC 962

COURT

North Gauteng High Court, Pretoria

BEFORE

S. Potterill, A. Cajee

CASE / FILE NUMBER

48650/2021

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

Case

Number: 48650/2021

REPORTABLE:

NO.
OF
INTEREST TO OTHER JUDGES: NO.
REVISED.
2022-12-06
In

the matter between:

GIFT
MPHO
MUKWEVHO Applicant
and
LEGAL
PRACTICE
COUNCIL Respondent

JUDGMENT

POTTERILL J

- [1] The applicant in an amended notice of motion is applying for condonation for the late filing of his application to be admitted and enrolled as a legal practitioner practising as an attorney. The applicant also seeks to be enrolled and admitted as an attorney in terms of the Legal Practice Act 28 of 2014 [the LPA].
- [2] The Legal Practice Council [LPC] did not oppose the condonation. It did oppose the admission and enrolment as an attorney on the basis that the applicant is not a fit and proper person to be enrolled as a legal practitioner in contravention of section 24(2)(c) of the LPA.
- [3] Section 24(2)(c) of the LPA should be read together with Rule 17.2.14.2 which provides that each application for admission should contain a statement of confirmation that the applicant is a fit and proper person to be admitted including a statement as to whether:

“the Applicant has been subjected to previous disciplinary proceedings by the Council or any law society, university, or employer, or whether any such disciplinary proceedings are pending. If there have been any proceedings as contemplated in this sub-rule, or if any such proceedings are pending, the Applicant shall set out full details thereof.”

- [4] It is common cause that in the original founding affidavit the applicant did not disclose that he had two disciplinary hearings against him. In fact, he declared as follows:

“11.1.2 There are no previous disciplinary proceedings against me by the then

Law Society of the Northern Provinces (Gauteng Provincial Council), the University of Limpopo or my Principal pending or about to be instituted against me nor have such proceedings ever been instituted against me. I respectfully submit that I have complied with Rule 17.2.14.2 of Rules promulgated in terms of the Act.”

- [5] In the amended notice of motion an affidavit serving as “supplementary affidavit and confirmatory affidavit” is attached. In paragraphs 1.8 and 1.9 he sought to disclose the pending disciplinary before the Road Accident Fund [the RAF], his former employer. He then also discloses the charges against him by his former principal where he was a candidate attorney

from September 2011 to November 2012. This affidavit proffers an explanation for the non-disclosure of the disciplinary hearing by Mr Durand, his first principal, as “a bona fide omission” because the LPC was aware of this disciplinary hearing and dismissal prior to the LPC authorising and registering his contract with his second principal. No explanation is forthcoming as to why the RAF disciplinary hearing was omitted in the founding affidavit.

[6] The chronology in this matter is relevant. The applicant issued his application for admission on 28 September 2021, set down for hearing on 4 November 2021. On 5 October 2021 the LPC sent an e-mail to the applicant with requests to correct mistakes and errors. But, more importantly to clearly record that save for the disciplinary proceedings instituted against him by his first principal [Durand] no other disciplinary hearings were instituted or were pending. On 12 October 2021 the LPC sent a further e-mail to the applicant advising him that he failed to disclose the outcome of the disciplinary proceedings against him by RAF. The applicant was informed that his failure to disclose the disciplinary hearings was a serious omission which affected the applicant's integrity to such an extent that he was not fit and proper. He was advised to refer his application to the Admissions and Practical Vocational Training Committee for consideration. On 29 October 2021 the LPC requested the applicant to remove the application from the roll, but he refused to. The court postponed the matter

sine die for the LPC to consider the RAF disciplinary hearing and address the court thereon.

[7] The applicant refused to remove the application and filed a further supplementary affidavit with the purpose to explain in sufficient details the disciplinary hearing before the RAF. In this affidavit the merits pertaining to the disciplinary hearing is explained. He further submitted:

"19. I humbly submit that the nature of the charges against me were operational in nature and do not indicate a moral failure or lack of integrity on my character."

"I further submit that I am fit and proper person to be admitted as a legal practitioner ... I have referred my dismissal by RAF to the Commission for Conciliation, Mediation and Arbitration (CCMA)."

[8] In the LPC's answering affidavit it set out that in an ex parte application the applicant has a duty to be honest, display integrity and complete bona fides. The two supplementary affidavits were filed as "damage control" in an attempt to salvage the founding affidavit that did not disclose the disciplinary hearings. In paragraph 11.1.2 the applicant under oath expressing that there were no pending disciplinary hearings were simply false. At paragraph 8 he mentioned the articles of clerkship he entered into, without disclosing the contract with the previous employer. It was argued that this fact was omitted not to bring to light the disciplinary proceedings and measures that were taken against him. This amounted to a clear misrepresentation by omission to conceal his previous delinquent behaviour. On behalf of the LPC it was argued that the applicant's explanation of a bona fide error or mistake cannot reasonably be entertained.

[9] The second supplementary affidavit sought to disclose the outcome of the hearing. But, the applicant should have taken the Court into his confidence already in the founding affidavit. The two supplementary affidavits filed were filed to undo the material non-disclosure in the founding affidavit. There was no basis to allow these affidavits and the court should not accept these affidavits. Even more so because the applicant did not provide any explanation to show good cause as to why these affidavits should be accepted and entertained by the court.

- [10] The explanation proffered by the applicant that the LPC knew of the disciplinary hearing by his first employer and therefore he did not declare it in his founding affidavit is not a reasonable explanation and is rejected. The court needs to know about disciplinary hearings, it is after all the court who has to exercise the discretion to admit the applicant, or not. The character of an attorney would instinctively declare that there was a disciplinary hearing, with a caveat that the LPC is aware of this disciplinary. No attorney would commit perjury by unequivocally stating that there was no disciplinary hearing. This untruthfulness is compounded by not informing the court of the pending disciplinary hearing by the RAF. No explanation for this blatant untruth is forthcoming.
- [11] There is no other inference as that the applicant did not want to take the court into his confidence pertaining to the disciplinary hearings. This inference is fortified by the applicant's omission in paragraph 8 of the founding affidavit where he does not refer to his employment with Mr. Durand which would have brought to light the disciplinary hearing.
- [12] Even if the court accepts the supplementary affidavits, the facts therein support the contention of the LPC that the applicant is not a fit and proper person to enter the profession. The offending conduct of making a dishonest statement is established on a preponderance of probabilities. Good faith is a sine qua non for an application brought ex parte.[1] When any material facts are not disclosed, be it wilfully or negligently[2] omitted a court may on that ground alone dismiss an ex parte application.[3]
- [13] Honesty is considered an important prerequisite for a legal practitioner to be fit and proper. The founding affidavit in paragraph 11.1.2 is untruthful; it emphatically sets out that the applicant was not subjected to previous disciplinary hearings by an employer or has pending disciplinary hearings. Considering that in the most important application, so personal to the applicant; the start of his career, he does not take the court into his confidence, the question begs, why would the applicant take the court into his confidence with less "important" applications. Comparing this conduct against the expected conduct of an attorney, the offending conduct is conduct that can

never be expected of an attorney.[4]

- [14] The attorneys profession is an honourable one and demands "complete honesty, reliability and integrity from its members." [5] I find it necessary to quote paragraph 25 of the respondent's further supplementary affidavit:

"25. I have learnt from the process of this application that the integrity of a legal practitioner goes beyond what one perceives themselves, but to what the practitioner can disclose which is more likely to influence the Court's judgment about integrity of a legal practitioner."

This statement is difficult to understand, but none the less disturbing in that it shows the lack of insight the applicant has with regard to this application. He seemingly thought that the less he discloses the more the Court's judgment on integrity would be influenced. This candidate is not a fit and proper person to be admitted. The argument was that based on this paragraph the court

must find that the applicant had learnt his lesson and it was unlikely that the conduct would be repeated. The tenure of this paragraph does not support such a contention. There is not a single fact to sustain such argument. There also has been no effluxion of time to have this borne out. None of the case law relied on by the applicant is relevant to this application simply because herein dishonesty was proven.

[15] There is no reason to deviate from the normal cost order where the LPC is concerned and the applicant is to carry the costs on an attorney and client scale.[6]

[16] Accordingly the application is dismissed with costs on the scale as between attorney and client.

S. POTTERILL

JUDGE OF THE HIGH COURT

I agree

A. CAJEE

ACTING JUDGE OF THE HIGH COURT

CASE NUMBER: 48650/2021

HEARD ON: 24 November 2022

FOR THE APPLICANT: ADV.

R. BALOYI

INSTRUCTED BY: Mashambe

Inc Attorneys

FOR THE RESPONDENT: ADV.

Z. MAHOMED

INSTRUCTED BY: Mothle

Jooma Sabdia Inc.

DATE OF JUDGMENT: 6

December 2022

[1] Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others 2009

(1) SA 1 (CC) at 115A-E.

[2] National Director of Public Prosecutions v Basson 2002

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- (1) SA 419 (SCA) at 428H-I
- [3] Hassan and Another v Berrange NO 2012
- (6) SA 329 (SCA) at 335G-H
- [4] Jasat v Natal Law Society 2000
- (3) SA 44 (SCA) para [10]
- [5] Vassen v Law Society of the Cape of Good Hope [1998] ZASCA 47; 1998
- (4) SA 532 (SCA) at 538G-H
- [6] Prokureursorde van Transvaal v Kleynhans 1995
- (1) SA 839 (T) at p865
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