

SOUTH AFRICA / JUDGMENT

Nothnagel v South African Legal Practice Council (46574/19) [2021] ZAGPPHC 75 (8 January 2021)

[2021] ZAGPPHC 75

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher, Khwinana

CASE / FILE NUMBER

46574/19

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 46574/19

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED. YES

In the matter between:

DIRK JACOBUS RIVE NOTHNAGEL

APPLICANT

and

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

RESPONDENT

NEUKIRCHER J:

1] This is an application brought by the applicant for his “admission end enrolment as a Legal Practitioner of the Honourable Court.” [1]

2] Prayer 1 of the Notice of Motion reads as follows

“1) The applicant is, in terms of section 24 of the Legal Practice Act 28 of 2014, admitted as a Legal Practitioner and is authorised to be enrolled to practice as such by the Legal Practice Council....”[2]

3] The South African Legal Practice Council (LPC) has opposed this application and has appointed Messrs Rooth and Wessels to act on their behalf.

The facts as set out in the application

4] The applicant, who is in person, states inter alia that:

4.1 “6. I make this Application with the intent to be admitted and practice as a Legal Practitioner / Attorney of the High Court of South Africa, and my name to be enrolled on the Roll of Attorneys of the North Gauteng High Court.”;

4.2 “9. I respectfully submit that I have complied with all the requirements for admission and enrolment as a Legal Practitioner, as will be detailed below.”

5] In the course of setting out how he has fulfilled the requirements of the Legal Practice Act No. 28 of 2014 (the LPA) and its predecessor, the Attorneys Act No. 53 of 1997, the applicant sets out (amongst other important facts) how, when and where he obtained his matriculation, his Baccalaureus Procuratoris (BProc) degree, the successful completion of his articles of clerkship and the completion of the Sandton Law School Practical Legal training course. He has also been to great pains to explain his training and experience gained during his articles of clerkship which were originally entered into on 2 February 1997[3].

6] In fact, the applicant successfully wrote the attorneys admission examinations in August 1997 and February 1998[4] and as a result, he was admitted and enrolled as attorney on 25 March 1999.

7] The applicant then states:

“43. I passed as an Attorney of this Honourable Court in Pretoria Gauteng until 24 August 2010, on which date I was struck from the Roll of Attorneys, pursuant to an Application by the erstwhile Law Society of the Northern Province. This mentioned Application was granted in my absence and on an unopposed basis.

44. During 2015, I lodged an Application in this Honourable Court for my re admission as an Attorney, under case number 74204/2015.

This mentioned Application was brought in terms of Sections 15 and 16 of the erstwhile Attorneys Act 53 of 1979 (as amended). This

Application for readmission was still pending on 1 November 2018 (the date on which the Attorney Act was repealed), until I withdrew

the relevant Application on 20 February 2019... The reason for this withdrawal of the re admission Application will be become

apparent herein later.

45. During 2018 I also lodged an Application for rescission of the initial orders suspending and striking my name from the Roll. This

Application.... was dismissed by this honourable Court during August 2018.”

8] The applicant’s point is that the LPA makes no provision for readmission and reenrolment as an attorney only for admission which differentiates it from the Attorney’s Act[5] and thus he withdrew the previous application for readmission to launch the present application.

9] He submits that he is a fit and proper person as the grounds

“...on which the erstwhile Law Society lodged an application for my suspension is moot, as the relevant application was lodged more than 10 (ten) years ago and all aspects and more were dealt with completely. To this end.... The erstwhile Law Society, as well as the erstwhile Attorney’s Fidelity Fund, lodged criminal complaints against me pursuant to the averments made in the

suspension application and averments arising thereunder. After an exhaustive criminal trial, I was acquitted on the facts by the

Specialized Commercial Crimes Court, Pretoria of all the charges in 2015.”

10] The charge sheet, which is attached to the affidavit, reveals that he was charged with inter alia having a shortfall in his trust account and was accused of theft, failure to keep proper accounting records and failure to keep sufficient funds at hand in his trust account. However, no information is provided in his Founding Affidavit as regards any of the allegations which founded these charges, or his striking off, at all.

11] The applicant was also sequestrated with a final order being granted on 8 December 2010. He states that he did not apply for his rehabilitation but in terms of s127A of the Insolvency Act 24 of 1936 he was automatically rehabilitated on 8 December 2019. He also attaches an affidavit from his trustee Mr. Bothomley, which was

deposed in support of the (now) withdrawn re admission application. In that affidavit the latter confirms that he drafted

and filed the second Amended First and Final liquidation and distribution account with the Master of the High Court, that it is

correct and that:

“35... to the best of my knowledge the Applicant did not incur any further debts after his Sequestration.

36. I have no inherent objection to the Applicant being readmitted as an Attorney of this Court.”

12] In my view, this affidavit is absolutely meaningless it simply confirms the accounting done in the winding up of the applicant’s estate and cannot be used to determine whether in fact the applicant is fit and proper to be readmitted. In fact, what is most interesting is that the affidavit was made to circumvent the possibility that “the Law Society might require my presence at an appearance meeting to be held on 8 February 2016 at their offices in Pretoria” and the affidavit

was made “in lieu of” Mr. Bothomley’s appearance at that meeting. Thus, any possible questions the (then) Law Society may have had could not be asked, which deprived them of any opportunity to make enquiries about whether applicant had in fact made a full surrender of his estate and whether he had fully cooperated with Mr. Bothomley as is required in terms of the Insolvency Act.

14] It bears mentioning that, as part of their opposition, the LPC has provided this court with, not only a comprehensive answering affidavit[6] which deals with the reasons why applicant was previously struck off the roll, but the full set of papers in the previous readmission application. The applicant’s response is by way of a replying affidavit, and a supplementary replying affidavit. The tone and personal attacks on the LPC and their attorneys contained in these documents is unfortunate.

15] He has also taken issue with not only the LPC’s authority to oppose the present application, but Rooth and Wessel’s appointment as attorneys of record.

16] Of course, the LPC is the *custos morum* of the profession. The answering affidavit is deposed to by the Chairperson of the LPC who indicates that she is authorised to oppose the application and to depose to the answering affidavit and that the affidavit provides the views of the LPC. Confirmation of Rooth and Wessels Attorneys mandate is also provided. This court is satisfied that they are properly mandated.

Fit and Proper

17] At the end of the day nothing really turned on this as it is for the applicant to persuade the court that he is fit and proper to be admitted and this he must do in his founding papers. As a result of several question posed by the court during the hearing of this appeal on that issue, the applicant conceded that his application was severely deficient as it failed to set out any facts as to why this court should regard him as a fit and proper person to this end the specific enquiry went to the complete lack of details regarding:

17.1 what charges and complaints were laid which prompted the erstwhile Law Society instituting the striking off application;

17.2 why the applicant did not oppose it;

17.3 what his response to the complaints actually was;

17.4 whether he had demonstrated any remorse for his actions; and

17.5 how he has been professionally rehabilitated sufficient to found the present application.

18] In fact, the applicant conceded that irrespective of whether or not one brings a readmission application[7], or an application for admission[8], the requirement still was to fully disclose any and all material aspects that have a bearing on whether or not the particular applicant is, in fact, fit and proper.

19] The applicant's position was that this court should grant him an indulgence to file a supplementary founding affidavit to remedy the issues that have been raised by the court and to cure any possible deficiencies.

20] However, in my view, it is too late to do that now. All in all, the factors that a court will consider in allowing a further affidavit to be filed are the following:

“...(a) The reason why the evidence was not produced timeously. (b) The degree of materiality of the evidence; (c) The possibility that the “pinch of the shoe”; (d) The balance of prejudice to the applicant if the application is refused and the prejudice to the respondent if it is granted; (e) The stage which the particular litigation has reached; where judgement is delivered, an applicant applies for leave to place further evidence before the court, it may well be that he or she will have a greater burden because of factors such as the increased possibility of prejudice to the respondent, the need for finality, and the undesirability of a reconsideration of the whole case, and perhaps also the convenience of the court; (f) The ‘healing balm’ of an appropriate order as to costs; (g) The general need finality in judicial proceedings; (h) The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his or her client...”[9]

21] In the present matter it is clear that the evidence the applicant wishes to place before court has always been available and it is clear that he deliberately chose not to place it before us. This is despite its evident materiality. It is also clear that the only reason he now seeks an opportunity to place it before us is to “relieve the pinch of the shoe”.

22] The present proceedings were launched on 30 June 2019. It is desirable that they reach finality. There is no prospect of success on the papers that applicant chose to place before us that he can be admitted there are simply far too many questions regarding whether he is fit and proper left unanswered and whether, if admitted, he will conduct himself as an honourable member of the profession[10].

23] Furthermore, the words of Viljoen J in Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd[11] ring true for this matter even though that case was in respect of permitting new matter in a replying affidavit:

“It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit

contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit ...”

24] In the case at hand there is barely a skeleton of a case in the founding affidavit and certainly not one sufficient to establish a true case for the applicant.

25] It has been reaffirmed that where a person applies for his readmission who has previously been struck off the roll on the ground of not being fit and proper to continue to practice:

“[17] ... [t]he 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 ...”[12] and

“[18] In considering whether the onus has been discharged the court must:

‘...have regard to the nature and degree of conduct which occasioned the applicant’s removal from the roll, to the explanation, if any, afforded by him for such conduct which might, inter alia, mitigate or even perhaps aggravate the heinousness of his offence, to his actions in regard to an enquiry into his conduct and proceedings consequent thereon to secure his removal, to the lapse of time between his removal and his application for reinstatement, to his activities subsequent to removal, to the expression of contrition by him and its genuineness, and to his efforts at repairing the harm which his conduct may have occasioned to others.’” [13]

26] Given the complete dearth of information in this founding affidavit regarding any of the aforementioned, the applicant has failed to satisfy me that he is a fit and proper person to be admitted as a Legal Practitioner (attorney) and thus has failed make out a case for his admission on these papers.

Costs

27] It is trite that the LPC, as its predecessor did, acts as the custos morum of the profession. It does not participate in proceedings such as these as an ordinary litigant but as a public duty. Mr. Groome therefore submits that it should be fully indemnified for its costs on an attorney and client scale.[14] Given the lack of the case made out by the applicant, I agree.

Order

28] The order I therefore make is the following:

28.1 the application is dismissed;

28.2 the applicant is ordered to pay the respondent's costs on the attorney and client scale.

NEUKIRCHER J

Judge of the High Court

I agree

KHWINANA AJ

Acting Judge of the High Court

Date of hearing: 26 November 2020

Date of Judgment: 8 January 2021

Hearing conducted via videoconferencing

Delivered: This judgement was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 8 January 2021

Appearance for the applicant: In person

Appearance for the respondent; Mr Groome

Instructed by Rooth & Wessels

[1] This is how the headnote of this application reads

[2] The LPC

[3] And subsequently ceded the cession of articles was registered with the erstwhile Law Society of Northern Province

[4] He passed papers 2,3 and 4 on 13 August 1997 and paper 1 on 17 February 1998

[5] s15(3)

[6] As well as supplementary answering affidavits

[7] In terms of the Attorneys Act

[8] In terms of the provisions of the Legal Practice Act

[10] Law Society, Transvaal v Behrman 1981(4) SA538(A); Swartzberg v Law Society of the Northern Provinces (2008] ZASCA 36; 2008(5)

SA322{SCA) at par[4]

[11] 1974(4) SA362(T) at 368H 3698

[12] Johannesburg Society of Advocates and Another v Nthai and Others (879/2020 and 880/2019 [2020] ZASCA 171 (15 December 2020) quoting Behrman (supra)

[13] Nthai judgment supra quoting Kudo v The Cape Law Society 1972(4) SA342(C) at 345H 346A as quoted with approval in Behrman at 557DE

[14] Botha v Law Society of the Northern Provinces 2009(1) SA 227 (SCA) at 236F; Law Society of the Northern Provinces v Mogami & Others 2010 (1) SA 186 (SCA) at para [31]; Law Society of the Northern Provinces v Sonntag 2012(1) SA 372 (SCA) at par [20]

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