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

Case no. 55/15
Date heard: 18/10/16
Date delivered: 28/10/16
Reportable

In the ex parte application of:

NTSIKELEO MDYOGOLO **Applicant**

(EASTERN CAPE SOCIETY OF ADVOCATES as Amicus Curiae)

JUDGMENT

PLASKET, J:

[1] The applicant has applied to be admitted and enrolled as an attorney of this court. Section 15(1)(b) of the Attorneys Act 53 of 1979 vests the power in this court of admission and enrolment of an applicant provided that he or she satisfies certain listed qualifications, while s 15(1)(a) provides that a person may only be admitted and enrolled if he or she, 'in the discretion of the court, is a fit and proper person to be so admitted and enrolled'. An onus rests on an applicant to satisfy the court that he or she is, indeed, a fit and proper person.[1]

[2] The applicant in this matter has established the requirements set out in s 15(1)(b) of the Act. The only issue to be decided is whether he has discharged the onus of establishing that he is a fit and proper person. That arises as a result of his

[1]*Kudo v Cape Law Society* 1977 (4) SA 659 (A) at 676D-E.

disclosure of three previous convictions for criminal offences. One of those is central to this judgment.

[3] The first was a conviction of theft committed in 1991. The applicant stole a cassette tape from a shop. He was sentenced to two months imprisonment. The third was committed in 2010. The applicant was convicted of driving a motor vehicle while his blood alcohol level exceeded the legal limit. He was sentenced to a fine of R1 500.

[4] In between these two events, on 19 June 1994, the applicant committed a robbery with aggravating circumstances when he and at least one other person, armed with a semi-automatic rifle, robbed a petrol filling station in Fort Beaufort.

[5] I shall return to the facts relating to this robbery and the applicant's explanation for having committed it. First, however, it is necessary to outline the background to the hearing of this application.

Background

[6] This matter came before me on 10 March 2015. I postponed it *sine die*[2] and directed the applicant to supplement his papers with documents such as the judgments on conviction and sentence in the robbery trial and his application to the Truth and Reconciliation Commission (TRC) for amnesty as well as that body's decision.[3] I also requested the Cape Law Society 'to appear in order to place its views before the court when the matter is heard'.[4]

[7] In a supplementary affidavit, the applicant stated that the records from his trial were no longer available as, in terms of the usual practice, they had been destroyed ten years after sentence. He said that his amnesty application was not pursued because he was released on parole and that he was 'not able to furnish the outcome of such amnesty application as it was finalised prior to closure of the TRC process'.

[2]Order dated 10 March 2015, para 1.
[3]Order dated 10 March 2015, para 2.
[4]Order dated 10 March 2015, para 4.

[8] In September 2015, the Cape Law Society filed an affidavit. Ms Nolita Kose, a councillor of the Cape Law Society, deposed to the affidavit in which she presented the view of the Cape Law Society on the applicant's application for admission. She said:

'6. The issue was raised in the Candidate Attorneys Committee meeting and they noted that the shoplifting offence occurred more than 20 years ago.

7. In respect of the armed robbery charge the Candidate Attorneys Committee also noted that the offence was politically motivated. They understood that the Applicant did not apply for amnesty via the Truth and Reconciliation Commission and a reason for not doing so was that he was released on parole.

8. Having regard to previous convictions referred to herein above and the lapse of time, the Candidate Attorneys Committee was of the view that the facts relating to the offences would not preclude the Applicant from being admitted as an attorney and practising as such.

9. In respect of the drunken driving charge the Candidate Attorneys Committee had regard to the fact that the Applicant was stopped at a road block and that the offence of driving the motor vehicle under the influence of intoxicating liquor did not lead to a motor vehicle accident or an injury to any person.

10. The Candidate Attorneys Committee accordingly recommended that Council endorse the application of the Applicant to be admitted as an attorney of the Above Honourable Court.

11. The said decision of the Candidate Attorneys Committee was referred to Council at its meeting of 31 August 2015 who in turn approved the recommendation of the Candidate Attorneys Committee.

12. The Cape Law Society accordingly endorses the Applicant's Application for his admission as an attorney of the Above Honourable Court.'

[9] In a supplementary affidavit dated 9 May 2016 the applicant provided a copy of his application for amnesty to the TRC.

[10] In the light of the Cape Law Society's attitude to the matter and my concerns about the explanation given by the applicant about the motivation for the robbery, I requested the Eastern Cape Society of Advocates to appear as *amicus curiae*. We express our gratitude to Mr Paterson who appeared on the Society's behalf. He filed

a very useful affidavit deposed to by Mr Craig Paterson, a historian at Rhodes University, as well as heads of argument.

<u>The robbery</u>

[11] I intend to deal only with the applicant's conviction in respect of the charge of robbery with aggravating circumstances. (I note, however, that from his application for amnesty that I shall refer to below, he appears to have been convicted, in addition, of the unlawful possession of a firearm and ammunition.)

[12] He stated in his affidavit that, during the 1990s he was a member of the Azanian Peoples' Liberation Army (APLA), which was the military wing of the Pan Africanist Congress (PAC). One of APLA's methods of fundraising for the PAC, he stated, was by committing robberies – that 'Robbery in the name of "repossession" became one of the prominent methods used (repossession of the wealth of the African People back to its rightful owners)' and that the aim was to 'facilitate a way forward towards achieving its aims and objectives in a "Struggle for Liberation"'.

[13] Having first stated that he operated 'under the instructions and orders of the High Command of APLA', that he had to obey orders and that 1994 had been declared 'a year of the great offensive' by APLA's chief of staff, he described his involvement in the robbery thus:

'On or about the 19th June 1994 I and other comrades went to a BP Garage in Fort Beaufort and made a hold-up, and I was carrying an R4 rifle. We managed to get petrol and money.'

[14] He appears to have been arrested soon after the robbery, was charged and released on bail. He must have breached his bail because he said:

'On my release on bail I decided to integrate to SANDF (South African National Defence Force) where I was arrested again for the same charge in 1997. The police took me to Grahamstown Regional Court where, on admission of guilt, I was convicted for Robbery with aggravating circumstances and sentenced for 10 (TEN) years imprisonment.'

[15] While serving his sentence, the applicant applied to the TRC for amnesty. A copy of his application has now been provided. In terms of s 18 of the Promotion of

National Unity and Reconciliation Act 34 of 1995, persons could apply to the Amnesty Committee of the TRC for amnesty in respect of 'any act, omission or offence on the ground that it is an act associated with a political objective'. The Amnesty Committee was empowered to grant amnesty if it was satisfied that the application complied with the Act's requirements; the 'act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past. . .'; and the applicant for amnesty had made a full disclosure of all relevant facts.[5] Only acts of this nature committed at any time between 1 March 1960 and a cut-off date of 11 May 1994 qualified for amnesty.[6] (This date, the day after the inauguration of President Nelson Mandela as the county's first democratically chosen President, was an extension of an earlier date that was intended for the most part as an inducement to draw the so-called white-right into the democratic fold.[7])

[16] In his application for amnesty, the applicant was required to furnish particulars of the act concerned, including details such as dates, places, the nature of the act and the names of other people involved. He described the act as a robbery 'committed with the aim of arresting APLA members and exposing their operations in the Eastern Cape', stating that this was '[o]rganised by the policeman Welile Ngobeni and two PAC watch dogs, Vuyeni Mbinda and Luvuyo Mate on the 18 June 1994 in Fort Beaufort'.

[17] He said that he had been invited to a party in Mdantsane where he was 'made drunk and taken to Fort Beaufort'. He described the robbery as follows:

'After couple of hours the policeman Welile Ngobeni asked me to accompany him to town. In a garage there in town he stopped his car. He said he is not going to pay the people and drew his rifle out and went on pouring petrol after giving me the rifle in a very quick way. Since I was drunk I had fallen to that booby trap, I went to the people of the garage to stop them not to call the police as ordered by Welile. Even the garage people told me to write a note and I did because I was drunk.'

[5]Section 20. On the reasons why amnesty was made available for those who made full disclosure of their politically motivated misdeeds, and the purpose and structure of the TRC, see *Azanian Peoples' Organisation (AZAPO) & others v President of the Republic of South Africa & others* 1996 (4) SA 671 (CC), paras 1-5.

[6]Section 20(2) read with s 22(2) of Schedule 6 of the Constitution.

[7]Davenport *The Transfer of Power in South Africa* at 102.

[18] He claimed to have been a victim of the robbery in the sense that he had been used 'as an evident path to arresting APLA members'. When required to state the political object that was sought to be achieved, he said:

'It was to arrest me and other APLA members and to reveal their operations as planned by the police and their double agents. The aim was to destroy the image of my organisation the way it happened and the way it was planned. It seemed so difficult to arrest me so they decided to use that funny method to arrest me, after having fed me with lots of liquor, all kinds, beer, brandy and wine.'

[19] He claimed that the robbery was 'an underground operation of the South African Police old service members just to get rid of freedom fighters especially APLA members using their double agents'.

[20] Attached to the affidavit of Mr Craig Paterson are two contemporary articles which appeared in the *Daily Dispatch* newspaper concerning the robbery. The first stated:

'Two men, one toting a SANDF-issue R5 semi-automatic rifle, locked a Fort Beaufort petrol attendant in his office at the weekend and then calmly served motorists pocketing almost R2 000.

Before they left they fired two rounds through the office window, narrowly missing the attendant.

A police spokesperson said they had arrived at BRM Motors at 3:15 am yesterday. While the attendant was filling their tank the men climbed out and demanded money.

After taking cash and the keys they locked the attendant in his night office before heading for the concourse to "help" unwitting motorist waiting for service.

The men left with R1 900.'

[21] The second article reported on the arrest of two men, one of whom was a policeman. When the men were arrested, the police found and seized 'a suitcase of clothing, a variety of cooldrinks, several cans of oil, and an R4 rifle with 24 rounds of ammunition'. It was alleged that the clothing, cooldrinks and oil had been stolen in the robbery and that the R4 rifle was probably a firearm that had been stolen.

[22] It is clear from the three accounts of the robbery that they differ fundamentally from each other; and that the applicant's explanation given in 2015 that he committed the robbery as part of the armed struggle is at odds with what he said in his amnesty application – that the police got him drunk and used him in a planned operation to discredit the PAC.

[23] These explanations must be placed in their proper historical context. Mr Paterson stated in his affidavit that when the government of the day and the African National Congress (ANC) signed the Pretoria Minute on 6 August 1990, the effect was the suspension of the armed struggle against the government waged by the ANC's military wing, Umkhonto we Sizwe. APLA continued with its armed struggle and, indeed, sought to escalate its armed activities. As a result of talks between the government and the PAC brokered by the Zimbabwean Minister of Defence in November 1993, the PAC agreed to a moratorium on violence on the part of APLA.

[24] The PAC was one of the many parties that took part in the first democratic elections in the history of the country on 27 April 1994. It won five seats.[8] Despite the moratorium on violence, APLA continued to exist, although a process of integrating its members into the SANDF commenced. It was formally disbanded on 31 July 1994.

[25] This is consistent with what is said by Mr Luthando Richmond Mbinda, the president of the PAC, in an affidavit that forms part of the papers. He stated that he knew the applicant personally and that he had indeed been a member of APLA. He also said:

'I am aware of the fact that the Court wants to know whether the PAC during 1994 was still continuing with the armed struggle or not. I do not intend to discuss the PAC's political stand in respect of the armed struggle but, indeed, the PAC suspended the armed struggle in 1994 and was engaged in a voting process and integration of forces.'

[26] On 27 April 1994, the interim Constitution came into force as, in its own words, 'a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the

[8] Davenport and Saunders *South Africa: A Modern History* (5 ed) at 568.

recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.[9]

[27] Certain stark realities emerge from this short history: by 19 June 1994 when the applicant took part in the robbery, the armed struggle was over, liberation had been achieved and a democratically elected parliament, which included members of the PAC, made laws in terms of the interim Constitution. Even if the applicant had succeeded in convincing the Amnesty Committee that his criminal act was politically motivated, which I doubt, he still would not have qualified for amnesty because his crime was committed after the cut-off date. His account of the robbery in his amnesty application is both bizarre and nonsensical. It is indicative of a person who is unwilling to take responsibility for his actions, and of a person who is willing to fabricate a version in the hope that it benefit him.

[28] From the facts I have set out, it must be concluded that the applicant's explanation – that he committed the robbery in the furtherance of the PAC's struggle for liberation – is false. His application for admission must be decided on this basis.

<u>The law</u>

[29] In *Summerley v Law Society, Northern Provinces*[10] Brand JA stated that the 'attorney's profession is an honourable profession, which demands complete honesty and integrity from its members'. The importance of this proposition lies in the fact that, when a court is called upon to determine whether a person is a fit and proper person to become or remain an attorney, it is required to weigh up the conduct that is alleged to disqualify the person against the conduct expected of an attorney.[11]

[30] That involves a holistic assessment of the conduct of the applicant in its proper context.[12] It is important to bear in mind that the mere fact that a person has

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[9]Interim Constitution, epilogue. See too Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 at 31-33.
[10]*Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA), para 21.
[11]*Jasat v Natal Law Society* 2000 (3) SA 44 (SCA), para 10.
[12]*Mtshabe v Law Society of the Cape of Good Hope* 2014 (5) SA 376 (ECM), para 7. (Even though *Mtshabe's* case concerned an application for the re-admission of an attorney whose name had been

committed an offence is not a bar to his or her admission or a trigger for his or her name to be struck from the roll. *Incorporated Law Society, Transvaal v Mandela*[13] is a good example. Despite Mr Mandela having been convicted of the offence of advocating and encouraging the disobeying of laws (such as the pass laws) during the Defiance Campaign,[14] Ramsbottom J (with the concurrence of Roper J) dismissed an application for his name to be struck from the roll of attorneys. He held:[15]

‘The sole question that the Court has to decide is whether the facts which have been put before us and on which the respondent was convicted show him to be of such character that he is not worthy to remain in the ranks of an honourable profession. To that question there can, in my opinion, be only one answer. Nothing has been put before us which suggests in the slightest degree that the respondent has been guilty of conduct of a dishonest, disgraceful, or dishonourable kind; nothing that he has done reflects upon his character or shows him to be unworthy to remain in the ranks of an honourable profession. In advocating the plan of action, the respondent was obviously motivated by a desire to serve his fellow non-Europeans. The intention was to bring about the repeal of certain laws which the respondent regarded as unjust. The method of producing that result which the respondent advocated is an unlawful one, and by advocating that method the respondent contravened the statute; for that offence he has been punished. But his offence was not of a “personally disgraceful character”, and there is nothing in his conduct which, in my judgment, renders him unfit to be an attorney.’

[31] In *Ex parte Krause*[16] Innes CJ held that it was not the mere fact of a criminal conviction that was relevant to whether a person should not be admitted as an advocate or attorney. But, he held, ‘in most cases the fact of the criminal conviction shows the man to be of such a character that he is not worthy to be admitted to the ranks of an honourable profession’.

[32] It is undoubtedly so that the applicant’s participation in a robbery in which he was armed with a semi-automatic rifle is indicative of a grave character flaw. In June 1994, he could not have been regarded as a fit and proper person to practice as an

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struck from the roll of attorneys, the basic approach remains the same in an application such as this for admission.)

[13] *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T).

[14] On the Defiance Campaign, see Davenport and Saunders (note 8) at 383-387. See too Dugard *Human Rights and the South African Legal Order* at 101-102 and 212-213.

[15] At 108C-F.

[16] *Ex parte Krause* 1905 TS 221 at 223. See too *Ex parte Moseneke* 1979 (4) SA 884 (T).

attorney. The version of events that he placed before the TRC in 1998 – a version he gave under oath – was clearly mendacious, and transparently so. That too is indicative of a person who is not fit and proper.

[33] Prior to his incarceration, the applicant must have failed to appear and have forfeited his bail. I say this because it is clear from his founding affidavit that he was arrested soon after the robbery and charged. He went on to say that on his 'release on bail I decided to integrate to' the SANDF 'where I was arrested again for the same charge in 1997'. That too is indicative of the fact that at that time, he was still not a fit and proper person.[17]

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

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

<u>The Cape Law Society</u>

[36] It is, unfortunately, necessary to say something of the Cape Law Society's handling of this matter.

[17] *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 (1) SA 133 (T); *Rice v Society of Advocates of SA (Witwatersrand Division)* 2004 (5) SA 537 (W).

[37] When the matter was first before the court, on 10 March 2015, I made an order in terms of which the Cape Law Society was 'requested to appear in order to place its views before the court when the matter is heard. . .'. The Cape Law Society did not take part in the proceedings as requested but filed an affidavit, to which I have referred above, in which it endorsed the application. In so doing it must have satisfied itself that the applicant was a fit and proper person. Its basis for reaching this conclusion in respect of the robbery conviction was that 'the offence was politically motivated'.

[38] With the greatest of respect to the Cape Law Society, those who considered the application could not have applied their minds properly. The most perfunctory reading of the founding affidavit would have raised a red flag: the date 27 April 1994 is an iconic date, and is perhaps the most important date in the history of South Africa – the day the new, democratic South Africa was born; as the date of the robbery was nearly two months later, it should have been apparent that the explanation that the applicant committed the offence in the course of the armed struggle was unlikely to be true. At the very least, this issue required thorough investigation before a decision could be taken on it. (The Law Society's approach in *Ex parte Moseneke*[18] is instructive and exemplary. This was a case in which our esteemed and recently retired Deputy Chief Justice was considered by the Law Society, after thorough assessment, to be a fit and proper person to be admitted as an attorney, despite having been convicted of the statutory offence of sabotage and thereafter serving a sentence of imprisonment on Robben Island. Once it had satisfied itself of this, the Law Society briefed senior and junior counsel to appear and to support the application. This in turn, it seems to me, was important in making it possible for the court to find that the applicant was, indeed, a fit and proper person, and to admit him as an attorney.)

[39] In *Mtshabe v Law Society of the Cape of Good Hope*[19] Goosen J considered the way in which a Law Society is required to deal with matters involving the admission or re-admission of people to the attorneys' profession. He held that it had a duty to 'develop and maintain professional and ethical standards not only in the

[18] Note 16.
[19] Note 12.

interests of the profession as a whole, but also in the interests of the public'.[20] He proceeded to say:[21]

'[62] Proceedings for the admission or readmission of an attorney, although not strictly disciplinary in nature, are likewise proceedings which necessarily require the participation of a relevant law society. In such proceedings although the law society concerned is a necessary party and is ordinarily cited as a respondent, the particular role that it plays in relation to the court proceedings goes beyond that of an ordinary party to legal proceedings. In such instances the law society also stands as amicus curiae in relation to the court seized with the matter. This is so because an application for admission or readmission cannot be made without certain jurisdictional facts having been established. In the case of an admission the law society is required to certify that the applicant has complied with all of the formal requirements necessary for admission and that in its view there is no bar to the admission of the practitioner concerned. In the case of an application for readmission as an attorney the law society concerned is required to certify not only that the formal requirements for admission have been met (namely those set out in s 15(1)) but also that it is satisfied that the applicant is a fit and proper person to be readmitted. (See s 16(1).)

[63] In the light of these obligations and, in particular, in the light of the respondent's duty to protect both the interests of the profession and the public interest, it is extraordinary that the respondent did not consider it necessary, notwithstanding its decision not to oppose the application, to appear at the hearing of the matter and to advance submissions in relation to the matter which would assist the court in the exercise of its discretion. This is all the more astonishing in the light of the fact that this application raised novel and potentially far-reaching and significant questions of principle regarding the readmission of an attorney who is still on parole for a very serious offence.'

[40] In this matter, as a result of the Cape Law Society's approach, it became necessary for the court to request the Eastern Cape Society of Advocates to appear in the role that the Cape Law Society should have fulfilled. The evidence adduced by the amicus curiae and the arguments advanced by it were crucial to our decision.

<u>The order</u>

[41] I make the following order.

(a) The application is dismissed.

[20] Para 59.

[21] Paras 62-63.

(b) The Registrar is requested to furnish the Cape Law Society with a copy of this judgment.

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C Plasket

Judge of the High Court

I agree.

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NG Beshe

Judge of the High Court

APPEARANCES

For the applicant: S Cole instructed by Mili Attorneys

For the Amicus Curiae: T Paterson SC instructed by McCallum Attorneys