

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

DATE: 10 October 2023

SIGNATURE:

CASE NUMBER: 7468/2022

In the matter between:

MALALA GEOPHREY LEDWABA

Applicant

And

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

First Intervening Party

THE PRETORIA SOCIETY OF ADVOCATES

Second Intervening Party

Summary: *Application for readmission into the roll of Advocates. Breach of the 'referral rule'- Code of Conduct of the Legal Practice Act 28/2014. Applicant alleged rehabilitation and ready to rejoin the profession. However, application - dismissed - seriousness of the conduct. Costs granted against the applicant.*

JUDGEMENT

NTLAMA-MAKHANYA AJ

Introduction

- [1] The applicant applies for readmission and re-enrolment as an Advocate of the High Court of South Africa. The applicant was removed from the roll of Advocates on 04 October 2014 at the instance of an application that was brought by the Pretoria Society of Advocates (PSA) and granted by this court. The application, which the applicant opposed, was grounded on his arrest relating to serious offences with the consequent result of his conviction and sentence and the breach of the referral rule as envisaged in section 27 of the Conduct of Conduct of the Legal Practice Council Act 28 of 2014 (LPC Act) that deemed him unfit and not proper to remain as an Advocate. This application is premised on his changed character and now being a fit and proper person to be re-enrolled into the roll of Advocates.
- [2] The application is opposed by the Legal Practice Council (LPC) as the First Intervening Party and Pretoria Society of Advocates (PSA) as the Second Intervening Party. The LPC is a national body established in terms of section 4 of the LPC Act. The PSA is a 'voluntary association of the Bar alongside other Bars of the General Council of Bar of South Africa' with a 'separate legal personality and status to institute and defend proceedings in this court' which include amongst others, looking after the interests and of the integrity of the legal profession as is the case in this application.

[3] For the purpose of this application it is for the applicant to prove on a balance of probabilities that he is rehabilitated and fit for purpose in his quest for re-enrolment as an Advocate of the High Court of South Africa. It is not for this court in the exercise of its discretion to prove his rehabilitation but for him to adduce credible evidence that will attest to his changed status.

[4] Therefore, it is essential that I give a brief background on this matter.

Background

[5] The applicant was admitted to practice as an advocate on 15 November 1994 under case number: 20383/1994 until his subsequent removal from the roll of Advocates on 22 October 2014. It is 9 years since his removal from the roll that this matter is presented before this court to consider his application for readmission into the profession.

[6] It is common cause that the applicant had previously been arrested and charged with various charges ranging from theft to fraud just after his resignation from the employment of the National Directorate of Public Prosecutions (NPA) in 2006. He lodged an appeal against his conviction and sentence which was set aside by the Supreme Court of Appeal (SCA) in the year 2018. Although this does not have a bearing on this application, the applicant makes heavy reference to it as a factor that contributed to his woes and led to his subsequent removal that had an impact on all aspects of his life.

[7] I must also mention that the applicant never practiced as an advocate with a trust account as envisaged in section 34(2) of the LPA but has been working in the public service from 1985 until his resignation in 2005. He grew from the ranks of administrative clerk in the Department of Justice, (now Justice and Correctional Service) until becoming the Director of Special Investigations of the now defunct 'Scorpions' of the National Prosecuting Authority (NPA). Following his resignation from public service he was called to the Bar and undertook pupillage training which he completed in 2006 and was allocated chambers with the Duma-Nokwe Group. However, just before taking up the chambers, he was arrested as noted above. After his arrest, he was advised to suspend taking up the chambers pending the conclusion of his criminal trial.

- [8] Subsequent to the success of his appeal and the conviction and sentence being set aside by the SCA and after the lapse of 9 years of his name having been struck off the roll of Advocates, he submits this application for his readmission into the profession.
- [9] In this application he gives an account of his previous admission in 1994, work experience and of his criminal case which led to the application by PSA on 12 June 2014 for the removal of his name from the roll of Advocates which was granted by the Court on 22 October 2014. He also acknowledges the breach of the referral rule and cites the circumstances that led to such breach which were motivated by his socio-economic status. He also refers to various cases during and after his release from prison where he solicited payment directly from clients without an instructing attorney for their representation in court. Having learned from his mistake, he submits mitigating factors that justify his application for readmission as a changed person including the Psychologist Report, which during these proceedings, his Counsel dismissed as irrelevant. He also refers to a carefully 'crafted ploy' that resulted to his arrest and subsequent removal from the roll. He further contends that the flexible nature of the application of the referral rule does not today strictly prohibit advocates from receiving briefs directly from clients.
- [10] The application is opposed by the LPC, and the PSA and I will briefly summarise the submissions of these bodies. The grounds are traceable to the circumstances that led to the application on 12 June 2014 for his removal of the applicant from the roll, on 22 October 2014. These grounds are amongst others, that there were complaints regarding his arrest and charges of serious offences that involved acts of dishonesty and his breach of the referral rule. Great concern was raised by both bodies regarding the non-payment of the cost orders that were granted against him in the year 2014. The applicant's contestation of the removal application showed the lack of appreciation of the role of these bodies in protecting the integrity of the profession and the public. The mounting and persistence in the defence are also indicative of the lack of appreciation of the significance of the referral rule in the regulation of the relations between the profession and members of the public (clients).
- [11] The LPC also advised the applicant to withdraw his readmission application on 01 October 2022 to avoid the risk of a costs order because of the lack of prospects of

success due to his breaching of the referral rule. The applicant did not heed the advice and on 22 October 2022 the LPC resolved not to support his application. Integral to the lack of support appeared to be the failure of appreciation of the misconduct he committed and with no genuine and supporting evidence that attested to his rehabilitation, and remorse for his conduct. However, although the applicant submitted the Psychologist Report in response to the further enquiry relating to his rehabilitation, the said report did not give credence and support his alleged changed status. Even the author of the report was of the view that the applicant was overly eager to present himself in a positive light without disclosing the full extent of his transgressions.

- [12] The crux of this application is the applicant's breach of the referral rule that resulted in his subsequent removal from the roll of Advocates. There are also other factors such as the non-payment of the costs order that militates against this application. It is also prudent that I discuss the needed qualities of an Advocate that will serve as a determinant of his fitness for readmission into the profession.

Discussion and analysis

- [13] This application touches on the fundamentals of the needed attributes and skills of an Advocate which have been in existence since time immemorial. They require all the members of the profession to display unquestionable traits which are also not limited to the applicant. The impeccable conduct of the integrity of an Advocate is contained in both unwritten and written prescripts of the law. I am of the view that there is no distinction between these versions which are interrelated in upholding the integrity of the profession. Except for the technical expertise or character that is acquired through formal or legal qualification, it is known that members of the profession should display a high level of honesty; dignity; hard work and respect for the legal profession in its entirety, amongst other principles.

- [14] With regard to these qualities, Kirk-Cohen J in ***Law Society, Transvaal v Matthews 1989 (4) SA 395*** endorsed the distinct character of the profession as *'not a mere calling for a person to earn a living but the person pledges his or her loyalty to the respectable and honourable profession with the standard of conduct that has to inspire public*

confidence and requiring the absolute display towards the fulfilment of the integrity of the profession', (**paras F,G,J**).

[15] The distinct character of the profession was also given meaning by Lord Denning MR in **Rondel v W [1966] 3 All ER 657** in that the Advocate:

- (i) *is the minister of justice equally with the judge.*
- (ii) *has a monopoly of audience in the higher courts. No one save he can address the judge unless it be a litigant in person; and*
- (iii) *cannot pick or choose his clients [and] is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The [advocate] must defend him to the end, (p666).*

[16] The SCA provides the context that is setting the tone for the consideration of this application and its direct relevance to the fitness of the applicant for his readmission into the profession of Advocates. Ponnar JA in **Swartzberg v Law Society of the Northern Provinces 2008 (5) SA 322 (SCA)** set out steps that determines fitness for readmission into the profession in that:

- (i) *there has been a genuine, complete, and permanent reformation on the appellant's part [enquiring] the non-existence of the defect of character which led to the finding of the person being adjudged as not fit and proper.*
- (ii) *an assessment of the [applicant's] appellant's character reformation and the chances of his successful conformation in the future to the exacting demands of the profession that he seeks to re-enter.*
- (iii) *court to determine what the defect of character or attitude was, and*
- (iv) *consideration of the nature and gravity of the conduct which occasioned the [applicant's] removal from the roll and the explanation given by him for such conduct, (para 22).*

[17] These steps are linked to the obligation of the applicant himself as expressed by Ponnar JA in *Swartzberg* in that he must ***'first properly and correctly identify the defect of character or attitude involved and thereafter to act in accordance with that appreciation. For, until and unless there is such a cognitive appreciation on the part of the appellant, it is difficult to see how the defect can be cured or corrected'*** (my emphasis, **para 22**). Therefore, the primary responsibility for the success of the test for the proof of rehabilitation on a balance of probabilities lies at the doorstep of the applicant.

[18] I must mention that the applicant has been in a defensive mode since the quest for his removal of his name from the roll. This application is not distinct from the attitude that he has since displayed. The application is also a highlight of various factors that compromise the integrity of the profession, rendering unfit not just the applicant but all the legal practitioners that fall from grace in the upholding of its distinct character.

[19] The main feature of this application is the applicant's breach of the referral rule as envisaged in section 27 of the Code of Conduct of the LPC Act of 2014. The latter section provides that:

27.1 *Counsel undertakes to perform legal professional services in court-craft and knowledge of the law only upon the offer and acceptance of a brief.*

27.2 ***Counsel shall accept a brief only from an attorney, and counsel shall not accept a brief directly from any other person or entity for either litigious or non-litigious work of any kind, save that counsel may accept a brief:***

27.2.1 *from a justice centre;*

27.2.2 *to perform professional services on brief from an attorney or legal practitioner in another country, including the equivalent of a state attorney or the attorney general or director of public prosecutions, without the intervention of a South African attorney;*

27.3 *Counsel who act as arbitrators or umpires shall do so only on receipt of a brief from the parties' attorneys, or on receipt of instructions from an arbitration body.*

27.4 *Counsel shall receive fees charged only from or through the instructing attorney who gave the brief to counsel, except where such attorney, for reasons of insolvency, or for any other reason, is unable to pay, in which circumstances, with leave from the Provincial Council, counsel may receive the fees due from another source in discharge of the indebtedness of the attorney, (my emphasis).*

[20] In line with the regulation of the referral rule, the LPC Act amongst its other purposes is to 'regulate conduct of the legal practitioners so as to ensure accountable conduct', (**preamble**). The essence of the LPC is to promote the values of honesty and integrity in the profession.

[21] Similar lessons of a comparative nature regarding the uniqueness of regulating the referral rule are drawn from Lord Denning MR in **Rondell** above in that:

Advocate must accept the brief and do all he honourably can on behalf of his client. I say, "all he honourably can", because his duty is not only to his client. He has a duty to the court, which is paramount. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline; but he cannot be sued in a court of law, (p 666).

- [22] These lessons are of value because they inform the interpretation of the Constitution, 1996 and its effects on the application of the LPC Code of Conduct, which in this case, is directly linked to the context of assessing the fitness of the applicant.
- [23] The applicant presents before this court that he knew of the existence of the referral rule from time immemorial, long before his university experience, before his admission and with great emphasis, during his pupillage training. Despite taking an oath to uphold the values of the profession, his knowledge enabled him to manipulate and undermine it. His improper conduct was orchestrated to create an impression that he had been briefed by an attorney.
- [24] Having fully disclosed his primary wrong, the applicant relies on two factors that he is *unlikely* to commit the misconduct in the future in that 'he fully appreciates the wrong he committed and will not repeat breaching the referral rule. Secondly, he accepts that he compromised his assertion of being truthful to the profession and submits that the recurrence of the breach is '*unlikely*', (my emphasis).
- [25] The applicant's admission of breaching the referral rule and suggestion that he has taken responsibility for his actions in that he has since changed sounds hollow and remains uncertain. It is my view that the disclosure is nothing more than a '***trust me attitude***' which does not resonate with the discretion that has to be exercised by this Court. Although the cases he cited on his wrongdoing are taken by this court holistically and in the context of the situation he was faced with at the time: does it mean he is *unlikely* to repeat the same in the future, particularly with his view that the LPC Act does not strictly bar advocates from taking instructions directly from clients?
- [26] The '***trust me attitude***' does not prove his fulfilment of the cardinal test of the balance of probabilities that he is a fit and proper person. This court is harm strung by what appears to be the '*hope*' not to negate the prescripts of the profession. The weighing of different interests alongside the expectations on his fitness that would justify his quest for re-enrolment remains at arms-length for a substantive determination by this court of an affirmed changed status. The mere reliance on '***trust me***' and '***you will see***' approach is not rationally connected to the exercise of the discretion by this court in determining his fitness for readmission. The bar set by Ponnar JA in ***Swartzberg*** towards the fulfilment

of the proof of fitness is undermined by uncertainty on the future of the applicant's conduct in carrying himself with the deserving integrity of the profession.

[27] The breach of the referral rule was also not a single and overnight event, and the applicant showed the propensity to commit the alleged breach over a period of time creating uncertainty on his future conduct if readmitted. As similarly expressed by Ponnau JA in **Swartberg** in that the applicant '*did not succumb to a sudden temptation and his fall from grace was not in consequence of an isolated act. His conduct was deliberate and persistent dishonesty for personal financial gain over a protracted period*', (**para 22**). Therefore, his attitude towards the non-flexible nature of the referral rule as he sees no strict prohibition for practitioners to receive briefing directly from clients is an indication of his continued lack of insight on its significance. Such lack diminishes his assertion of a demonstrated understanding of the rule and its effect on the future regulation of his conduct with the clients he intends to serve. This is also linked to his forging ahead to submit the application even on advice by LPC to withdraw it due to the lack of prospects of success and to avoid the risk of a costs order due to his lack of recognition of the impact his conduct which further shows the lack of confidence in the legal community he wishes to re-enter. It is an indication of the perpetual disregard of compliance with the rules. His bold declaration that he has learnt from his mistake and is unlikely to happen in the future is compromised by his lack of potential to exercise self-restraint on matters relating to the regulation of the profession.

[28] The applicant's conduct even after his prison release was also motivated not just by mere socio-economic circumstances but a deeply entrenched conduct of deceit and fraudulence. His own admission attest to this contention in that he points out that '*he was followed by his network of inmates even after his release from prison and his situation was worsened by greed (nurtured by prospects of financial reward), frustration (deterioration of family circumstances) and compassion (for influential and not well-resourced inmates)*' (**paras 81-84: Founding Affidavit**). It is intriguing that a person who professes to understand the ethos of the profession would 'openly walk into the lion's den' whilst knowing the consequences relating to the breach in upholding its principles. The foundations of the profession are not designed for financial gain but the upholding of its integrity. Although he denies that his conduct amounted to touting, it is the considered view of this court that irrespective of the interpretation he attributes to his

conduct, the direct interaction with the clients which amounted to the breach of the referral rule is linked to 'touting'. I need not further explain the meaning of 'touting' because the applicant himself has 'put a rope around his neck and hanged himself' by citing various instances and cases where he directly sourced briefings and received monies from the members of the public which 'improved his financial status and circumstances started to become stable in his family'. It is also well-known that today the profession is influenced by the principles of the new dispensation and not some form of illicit activities that will tarnish its good name.

[29] The intervention by LPC and PSA as custodians of the prescripts of the profession and the insight they brought into this court relating to the fitness of the applicant is commendable. These bodies are not 'by-standers' and have a legal duty to ensure the protection of the status and dignity of the profession, (*Johannesburg Society of Advocates v Nthai [2020] ZASCA 171 para 35*). The evidence presented by these bodies, with an emphasis on the non-payment of the costs order that was granted against the applicant, shows his lack of regard for compliance not just with the rules but the credibility of the judiciary itself. If the applicant can boldly not comply with a court order that would attract contempt if not adhered to, his future conduct remains uncertain about his ethical and moral compass in upholding the good name of the profession. The applicant continues with his '*trust me approach*' on the payment of the costs order of this court which is still seized with whether to order his readmission or not. That he seeks to negotiate payment arrangements with PSA 9 years after the order was granted only exacerbates matters. It is also trite to mention that the applicant made a submission during argument, although not canvassed on the papers, about having made a proposal for an arrangement at the end of September 2023, which was not responded to by PSA. I find it weird that the applicant will only after 9 years of the costs order approach the PSA on the eve of hearing this application. The motive to submit the alleged proposed arrangement in anticipation of these proceedings questions his credibility and truthfulness as a person who seeks to e-enter the profession. The inference that is drawn from such a submission is that the applicant was trying to distract and blind this court in these proceedings regarding his lack of commitment to pay the costs ordered by this court.

[30] The applicant is also engaged in a 'cold war' with the profession (PSA and NPA) as envisaged in his Founding and Supplementary Affidavits in that they are blocking his way towards readmission and do not acknowledge that he has changed. He is in a defence mode of being wronged that resulted in his removal instead of acknowledging the wrong itself in line with the balance of probabilities tests. He points to the deterioration of his situation due to the actions of these bodies instead of taking full responsibility for his own actions. The pointing of fingers is not an indication of the proof of his fitness for readmission. He also takes aim at the Duma-Nokwe group as not being trustworthy for its advice to hold back on taking chambers as nothing more than its 'image protection'. In addition, the pointing fingers is extended to the trust he has against the judiciary as he highlights the fact that Acting Judge Botes that determined his removal was a member of PSA. Although he says he is not making an issue out of it, the insinuation is that the judiciary is also not trustworthy and not objective in the delivery of justice. This contention touches on the core content of section 165 of the Constitution, 1996, that captures the gist of the independence of the judiciary as grounded by both personal and institutional factors in the dispensation of justice without fear or favour. Considering the context of the independence of the judiciary, the future conduct of the applicant is of utmost importance as the officer of the court. A compromised profession is likely to influence the credibility and integrity of the judiciary in its judicial function with officers appearing before it with questionable traits.

[31] The applicant lacks the appreciation of the foundations of his being struck from the roll and for his application for readmission not being supported by LPC, (***Ngwenya v Society of Advocates, Pretoria 2006 (2) SA 87 (W) para 7***). The credibility of the bodies that represent the interests of the profession remains questionable in the eyes of the applicant. He still wants to be part of the community of advocates; thus, he does not have confidence in the carriage of the mandate of the LPC on its administration of the legal profession.

[32] The applicant also presents what seems to be justified mitigating factors that should provide an insight for this court into his rehabilitation. He highlights that:

- (i) he is a member of the Tennis Association and has held various leadership positions in this Association.

- (ii) he was also voted the best supporting parent.
- (iii) he was of further financial assistance to the Coaches that were deeply and financially impacted by the COVID-19 pandemic and unable to make ends meet.
- (iv) he takes full and primary responsibility for breaching the referral rule.
- (v) the supporting letter from his tennis associate is a testimony of his changed conduct.

[33] I have assessed what the applicant presented as mitigating factors for his re-admission. I find it difficult that they present any exceptional circumstance that would warrant absolution of him from the conduct complained of regarding his undermining of the integrity of the profession. These factors do not outweigh the conduct displayed of a continuous tendency to (in)directly source funds from unsuspecting clients of his legal status. Whilst his involvement with the Tennis Association is indicative of the applicant's endeavors to earn an honest living it merely serves as a positive social activity which does not say much about his quest for re-admission into the legal profession.

[34] I remain unpersuaded to accept his full disclosure as genuine and will serve as a foundation for his readmission. The letter of support from his tennis Colleague does not show the extent of understanding the gravity of the misconduct committed except for the financial support he provided to other struggling black coaches during the COVID-19 pandemic, (*Jelal v South African Legal Practice Council [2022] ZAKHPC 3 paras 43-45*).

[35] The gravity of this application is that the applicant does not see beyond the conduct complained of except for the narrow focus on his socio-political and legal challenges. His taking of monies from unsuspecting vulnerable members of the public touches on his gross misconduct in tarnishing the integrity of the profession. The significance of the referral rule entails the protection of the members of the public and is applicable whether an advocate is a member of the Bar or an independent bar. In my view, his being genuine and completely reformed, not adequately supported by evidence presented before this court remains unclear.

- [36] This court deals with an applicant who, by his own admission, understands the ethos of the profession, took an oath, practiced, and behaved in an unbecoming manner regarding the needed qualities of an advocate. It was incumbent on the applicant to show this court that he has genuinely reformed, and that the defect (moral lapse) as argued that rendered him unfit no longer exists and that he will conduct himself as an honourable member of the profession if he is readmitted. The doubt which is drawn from his continued non-recognition of the extent to which he has compromised the integrity of the profession creates an uncertainty regarding his future commitment to uphold the protection of the members of the public and administration of justice.
- [37] During argument, he dismissed as irrelevant the consideration of the collateral report which he himself submitted in support of his application as advised by the LPC. However, I need not comment on this report except for the motive for its submission if it was not to be considered by this court. If the report was irrelevant, what would make of him to undergo the sessions with the Psychologist and then submit it to this court? At first, he did not heed the advice not to submit this application and on the other hand, followed the advice for psychological assessment as part of the documentation and went further to submit it before this court. He unequivocally dismisses it as irrelevant to the question of his genuine rehabilitation for future healthy working relations with the profession. Let me repeat, the recommendation of the community he wants to re-align himself with is thrown out in a manner that questions the credibility of his rehabilitation claim. It is also not for this court to make assumptions about the impact of the report on him as the alleged changed person, but the motives for its submission remain unclear given his subsequent ambivalence and self-contradiction.
- [38] The applicant argues for readmission and that his removal should not be a lifespan order given that he has since rehabilitated and is now eligible for re-enrolment as an Advocate of the High Court. I am not satisfied that the applicant has demonstrated fulfilment of the probability test. His persistent defence and not taking full responsibility for his removal and pointing fingers at his former employer is an indication of a desire for readmission into the profession that he does not trust.
- [39] I find no demonstration that the applicant has proved that his 'moral lapse' has been cured let alone being changed or rehabilitated. I found no compelling circumstance that if

readmitted he is unlikely to make a mistake again. The integrity of the profession is the main feature of the administration of justice. I find it regrettable that this application must fail based on his lack of an acknowledgment of the foundations that regulate the profession.

[40] The applicant, as a former and prospective advocate, negated his claim for having changed by bringing this application prematurely due to his non-settling of the costs order granted against him by this court. With the background of not having paid the last costs order, his Counsel made a persuasive argument for this court not to grant cost orders in this current application. He substantiated his arguments by reliance on ***City of Johannesburg v Chaiman, Valuation Appeal Board 2014 (4) SA 10 SCA (para 34)*** and ***Hangar v Robertsons 2016 JDR 1101 (SCA) para 21*** judgments which were also provided to this court after the arguments. In these judgments, the court refused to grant a costs order in a matter that was argued by a single counsel as is the case in this application. I have carefully considered the merits of his arguments and considered the value of precedent setting in enriching the jurisprudence of our courts.

[41] However, due to the long-standing principle that each case is judged according to its own merits, the seriousness of his conduct coupled with his coming before this court with the full knowledge of his outstanding costs order outweighs the submissions for the non-granting of the costs order in this application. The applicant ought to have known that his non-payment of the costs order jeopardised his argument about his readiness to rejoin the profession. This is the consideration I considered regarding his argument and of the order as indicated below.

[42] Accordingly, I propose the following order be made:

[42.1] The application for readmission and re-enrolment of the Applicant is dismissed.

[42.2] The order of costs on an attorney and client scale is granted against the applicant.

**N NTLAMA-MAKHANYA
ACTING JUDGE, THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree and it is so ordered.

**SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date of hearing: 10 October 2023

Date of Delivery: 22 November 2023

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