IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6344/2021

In the *ex parte* application of:

JOHAN VAN DER BERG Applicant

For his readmission as a legal practitioner and enrolment as an advocate.

and

Case No: 3090/2022

In the matter between:

JOHAN VAN DER BERG Applicant

and

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL First Respondent

THE WESTERN CAPE PROVINCIAL LEGAL PRACTICE COUNCIL Second Respondent

THE DISCIPLINARY OVERSIGHT COMMITTEE OF THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL Third Respondent

Coram: Le Grange ADJP *et* Cloete J

Heard: 31 May 2023

Delivered electronically: 31 July 2023

JUDGMENT

<u>THE COURT</u>:

<u>Introduction</u>

[1] This is an application for the applicant's readmission as a legal practitioner and enrolment as an advocate of the High Court of South Africa. The applicant also brought two related applications, namely a review to set aside the decision by the South African Legal Practice Council ("LPC") to oppose the readmission application, and an interlocutory one to compel the LPC to deliver the record of its decision in terms of uniform rule 53.

[2] On 18 January 2023 the parties agreed to an order consolidating the three applications. It was also recorded therein that:

> *'5. In the event that the readmission application is granted, the Applicant shall withdraw the review and interlocutory applications and Respondents shall request the Court to make an appropriate order as to costs in its judgment in the consolidated application.*
>
> *6. In the event that the readmission application is dismissed, the Applicant shall withdraw the review and interlocutory applications, and tender the Respondents' costs and the Respondents shall request the Court to make an appropriate order as to costs in its judgment in the consolidated application.'*

Relevant factual background

[3] The applicant was admitted as an advocate in April 1974. He attained silk status in about 1991. He practised continuously (albeit not fulltime from March 2001) until 22 March 2007 when the Supreme Court of Appeal upheld an order of the Western Cape High Court striking his name from the roll of advocates. It is common cause that the applicant's transgressions related to his representation of, and relationship with, one particular client.

[4] The Supreme Court of Appeal found:

> *'[49] In summary, the evidence discloses that the appellant acted in conflict with the duties of an advocate in various respects. He failed to disclose facts that were material to the truth of evidence that he permitted to be placed before the court and without which the evidence was misleading. He received fees other than through an attorney (which was merely a consequence of acting without proper instructions in the first place). He associated himself with a mandate that was detrimental to the reputation of the profession. And in executing the mandate he lent his name to false statements that had the potential to facilitate the perpetration of fraud…*
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> *[51] The various transgressions of the appellant should not be viewed in isolation. I accept that the appellant was not aware that the Chase Manhattan fund did not exist and was not a knowing party to the fraudulent scheme. I also accept that he had no fraudulent intent when he made the false statements. But the absence of such knowledge and fraudulent intent does not detract from the appellant's breach of his professional duties. A person who practises as an advocate is expected to know what those duties are and there are no grounds for excusing the appellant's various transgressions. This is not an inexperienced advocate whose judgement and appreciation of what his professional duties demand has yet to mature. The appellant has practised for more than thirty years and for sixteen years he has worn silk. The various transgressions, when viewed together, paint a picture of an advocate who is quite indifferent to the demands of his profession. His initial responses to the GCB, and his affidavit that is now before this court, betray not the slightest appreciation of where he has fallen short, but instead reflect indignation that his conduct should be called into question at all. I have no*

> *doubt that he is not fit to continue in practice and that the court was correct in ordering his name to be struck from the roll.'*
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> (Emphasis supplied).

[5] These findings are the backdrop against which we must consider and determine the readmission application. Also of relevance is that the applicant unsuccessfully applied to the Constitutional Court for leave to appeal the Supreme Court of Appeal order, and in addition brought two earlier readmission applications in the Northern Cape High Court, Kimberley, one in 2009 and the other in 2015, both of which he subsequently withdrew.

[6] As to the 2009 application the applicant stated:

> *'5. …On receipt of the opposing papers of the General Council of the Bar of South Africa ("the GCB"), and after consultation with my then legal team, I withdrew the application. However strongly I felt about the averments in the founding affidavit, I realised that my criticism of the conclusions of the GCB, the court a quo and the SCA were unfounded. Secondly, too little time (2 years) had passed since the order for my removal, and the application was therefore premature.'*

[7] In respect of the 2015 application he alleged:

> *'6. …At the hearing of the application on 11 March 2016, I again withdrew the application. I appeared in person and the Judge President sitting with an Acting Judge made it clear at the outset that he did not approve of me appearing in person. I realised that any endeavour to argue my application was futile in the light of the strong prima facie attitude adopted by the Court at the outset. After the tea adjournment and discussion with my attorney, I withdrew that application as well since I simply could not afford the services of counsel.'*

[8] These allegations were dealt with by the LPC in the answering affidavit as follows:

> *'58. Mr Van der Berg contends that he withdrew his 2009 application for readmission because he purportedly realised at the time that his criticisms of the GCB, the high court that originally struck him off and the SCA which dismissed his appeal against his striking off, were "unfounded".*
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> *59. Given that his trenchant attitude towards the GCB resurfaced in his 2015 readmission application, I submit that his contention that he withdrew his application in 2009, inter alia, because he realised that his criticisms of the GCB lacked merit do not withstand scrutiny.'*

[9] The applicant annexed his replying affidavit in the 2015 application to his founding papers before us. At paragraph 2.2 of that replying affidavit he declared *'for the reasons set out in my founding affidavit I unreservedly accept the findings of the Supreme Court of Appeal'*. (The affidavit is in Afrikaans and this is our translation). We do not know what those *'reasons'* were. The applicant undertook to make available to the court the full set of papers in the 2015 application. He did not do so but in any event he should have set out those *'reasons'* in his founding affidavit, and not expected of us to call upon him to provide them as he also invited us to do.

[10] In response to the applicant's averments about what transpired at the hearing of the 2015 application the deponent to the LPC's answering affidavit stated:

> *'61. The clear implication of these statements is that the Judge President was not prepared to give Mr Van der Berg a fair hearing because he appeared in person. These unwarranted allegations of bias against the Judge President are of grave concern and demonstrate a disturbing lack of insight on the part of Mr Van der Berg.*

> *62. Further on in his founding affidavit, Mr Van der Berg refers to the 73-page opposing affidavit delivered by the GCB in his 2015 readmission application and attempts to respond to the issues raised therein. What is clear, however, is that Mr Van der Berg did not withdraw his 2015 readmission application because he appreciated that he did not meet the requirements for readmission at that time.*
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> *63. Rather, he withdrew his application because of what he perceived to be a biased and unreasonable stance taken by the Judge President to him appearing in person.*
>
> *64. This too, demonstrates a failure to appreciate the nature of the concerns raised by the GCB in its opposing affidavit in the 2015 readmission application as regards his fitness to practice.'*

[11] It bears mention that the LPC also placed some reliance on the applicant's launching of the related review and interlocutory applications in an apparent attempt to demonstrate an obstructive attitude on his part. In our view this is unfounded since not only was the applicant entitled as a matter of law to pursue a review remedy but the papers in the review application demonstrate that the LPC flopped about in its dealings with the applicant and generally dragged its heels. Accordingly we do not consider this to be a factor of any significance.

The attitude of the CBSA and/or the GCB to the present application

[12] We raised with counsel during the hearing whether the Cape Bar Society ("CBSA") and/or the GCB should have provided input to assist the court. Counsel were *ad idem* that since the advent of the Legal Practice Act[1] ("LPA") this has been rendered nugatory. It appears that counsel were mistaken in

[1] No 28 of 2014, which came into effect on 20 September 2014.

this regard. In *Johannesburg Society of Advocates and Another v Nthai and Others*[2] (hereinafter referred to as *"Nthai"*) the Supreme Court of Appeal held:

> *'[25] The LPA does not, however, render nugatory the role of the GCB and the constituent Bars in the advocates' profession or in the professional conduct of advocates. It instead affirms the role of persons other than the LPC in these matters. Section 44(1) states that the provisions of the LPA--*
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> > *"…do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity".*
>
> *Section 44(2) adds:*
>
> > *"Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity…"*
>
> *[26] A legal practitioner or juristic person is accordingly entitled to approach the High Court for relief "in connection with" a complaint of misconduct against a legal practitioner. <u>This must include applications concerning the readmission of advocates previously removed from the roll on account of misconduct.</u> Section 44 must thus be construed to empower the Bars, which are juristic entities with legal personality and which have an interest in promoting and protecting the advocates' profession, to involve themselves in readmission applications and other matters concerning the professional misconduct of advocates…*
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> *'[35] …Advocates have a legal interest in protecting the status and dignity of their profession. It is well established that the GCB and its constituent Bars, including the JSA and the PSA, are the* custodes morum *of the advocates' profession. They act in the interest of the legal profession, the court and the public. Indeed, in a matter such as this, they may well have been failing in their duty had they failed to place the information at their disposal, which was obviously material to the question of Mr Nthai's fitness, before the court. The High Court was accordingly wrong to conclude that the GCB, the JSA and the PSA were no longer* custodes morum *of the advocates' profession and to conclude that the JSA and the PSA had no standing in the readmission application. The GCB and its constituent bars are voluntary associations with legal capacity as governed by their constitutions and not statutory bodies as supposed by the High Court…'*
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> (Emphasis supplied).

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[2] 2021 (2) SA 343 (SCA).

[13] We note that this application was served on the secretary of the Cape Bar Society of Advocates on 10 July 2021,[3] yet it adopted a supine approach and has provided no input whatsoever (and neither has the GCB). We are thus left to deal with the matter without the benefit thereof.

Legal Principles applicable to readmission applications

[14] It is convenient to first set out the applicable legal principles before turning to the case advanced by the applicant in order to establish whether he has met the threshold required. For this purpose we are of the view that it is sufficient to refer only to *Nthai* and the authorities to which the Supreme Court of Appeal had regard. It is helpful to quote extensively from that judgment:

> *'[17] …Where a person applies for readmission, who has previously been struck off the roll on the ground of not being fit and proper to continue to practise--*
>
> > *"[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…"*[4]
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> *[18] In considering whether the onus has been discharged* _the court must_*--*
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> > *"...have regard to the nature and degree of the conduct which occasioned 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*."[5] …

[3] The date might be 10 September 2021 – the handwriting is unclear.

[4] *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A) at 557B-C.

[36] …The enquiry into whether an applicant is a fit and proper person to be readmitted is a factual one. As it was put in Swartzberg v Law Society of the Northern Provinces*:*[6]

> *"… This involves an enquiry as to whether the defect of character or attitude which led to him being adjudged not fit and proper no longer exists… Allied to that is an assessment of the 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. It is thus crucial for a court confronted with an application of this kind to determine what the particular defect of character or attitude was. More importantly, it is for the appellant himself to 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. It seems to me that any true and lasting reformation of necessity depends upon such appreciation."*
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> …

[82] While Mr Nthai makes the bare allegation that he accepts that greed and dishonesty played a role in his transgressions, and that he has reflected upon and repented for these character flaws, his reliance on depression and anxiety as a contributory factor obscures the fact that Mr Nthai has not properly come to grips with the real elements of his transgressions and of his inherent character flaw. As it was pointed out in S v Matyityi*:*

> *"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case.'*[7]

Although stated of an accused person in the context of criminal proceedings, those considerations apply no less in this context.

…

[5] *Kudo v The Cape Law Society* 1972 (4) SA 342 (C) at 345H-346A, quoted with approval in *Behrman* at 557D-E.

[6] 2008 (5) SA 322 (SCA) para [22].

[7] *S v Matyityi* 2011 (1) SACR 40 (SCA) para [14].

[84] The High Court also gave considerable weight to the devastating impact of the media publicity on Mr Nthai and his family and the fact that his transgressions were made public. It accordingly concluded that Mr Nthai had been sufficiently punished for his transgressions. In the view of the High Court the case was about whether Mr Nthai should be given a second chance. To focus on forgiveness and whether Mr Nthai had been sufficiently punished, as the High Court did, is to fundamentally misconceive the nature of the enquiry.

[85] As long ago as Law Society v Du Toit *1938 OPD 103, it was said in regard to an application for the removal of an attorney:*

> *"… It is for the courts in cases of this nature to be careful to distinguish between justice and mercy. An attorney fulfils a very important function in the work of the court. The public are entitled to demand that a court should see to it that officers of the court do their work in a manner above suspicion. If we were to overlook misconduct on the part of officers of the court, if we were to allow our desire to be merciful to overrule our sense of duty to the public and our sense of importance attaching to the integrity of the profession, we should soon get into a position where the profession would be prejudiced and brought into discredit."*

This statement has been quoted and followed in a number of subsequent cases and, although it deals with an attorney, it is equally applicable to the case of an advocate.[8]

[86] Mr Nthai's application was accompanied by affidavits from no less than five persons who attested to his rehabilitation. He also detailed his employment and business ventures subsequent to his removal from the roll. The High Court placed great store by the evidence…

[87] …the High Court misconstrued the contention advanced on behalf of the PSA. Consequently, it did not engage with the gist of the argument, which was articulated thus by Wallis JA in Edeling's[9] *case:*

> *"Most of the references were unhelpful and meaningless, because all they did was paint a favourable picture of Mr Edeling, without indicating the extent of their knowledge of Mr Edeling's wrongdoings or whether they knew about the personality traits or character defects which gave rise to his misdeeds and led to his striking off. None referred to the fact that dishonesty lay at the root of the decision to strike him from the roll of advocates. In regard to similar character references, Wessels JP said in* Ex parte Wilcocks[10]:
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> > *"It is not sufficient to produce before the court a few certificates from interested friends or to say that he has led an honest life. The evidence with regard to that must be overwhelming: the court must be satisfied that it will make no mistake if it reinstates the applicant."*

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[8] *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T) at 358A-B.

[9] *Johannesburg Society of Advocates v Edeling* 2019 (5) SA 79 (SCA) at para [14].

[10] 1920 TPD 243 at 245.

> *It follows that the High Court could not, without more, on the strength of the character references have been satisfied that "it will make no mistake" in readmitting Mr Nthai.'*
>
> (Emphasis supplied).

Evaluation of the applicant's case for readmission

[15] The applicant submitted there has never been a suggestion of him having transgressed for financial gain, with an ulterior or improper motive, or that his conduct resulted in financial loss to anyone. He added that (at the time of deposing to his founding affidavit on 9 April 2021) the three transgressions had respectively occurred 20, 22 and 25 years previously.

[16] He stated that in the 2015 application he had confirmed (a) he would never again be guilty of such transgressions; (b) 8 years had passed since the Supreme Court of Appeal order; (c) it was never alleged that he was guilty of other similar behaviour; and (d) during the period between the High Court order and that of the Supreme Court of Appeal there was no suggestion he was a risk or danger to the public by continuing in practice, nor did the Cape Bar Council take steps to interdict him from doing so.

[17] He again confirmed that he unreservedly accepts the findings and conclusions of the Supreme Court of Appeal. However once searches in vain for a full and frank disclosure of what motivated or caused him to behave as he did. The only other submissions he made were that he was entitled to oppose the earlier striking off application because he was not guilty of the wrongdoings;

he was hounded by other litigants involved in the matter which gave rise to some of the charges; and the Supreme Court of Appeal set aside certain adverse findings of the High Court against him.

[18] He alleged *'I am monumentally sorry for the transgressions I have committed, thereby bringing the profession I had served… into disrepute'.* He tendered to give oral evidence and submit to cross-examination on the basis that *'there is no better way for the court to determine the sincerity of my reformation and remorse if it is unpersuaded by my affidavit'.*

[19] The applicant's approach is misguided. In the absence of an explanation of what caused him to commit the transgressions in the first place – something quite different from the findings of the Supreme Court of Appeal which he unreservedly accepts – he nonetheless requires of us to consider whether he is genuinely remorseful and reformed. Put differently one cannot test remorse and reformation without any frame of reference, and in a vacuum.

[20] At the heart of his striking off was what the Supreme Court of Appeal considered a serious character defect. The applicant singularly failed to identify or engage with that defect, and explain his appreciation thereof, despite having had at least two, and possibly three, separate opportunities to do so. Moreover he should have taken the court into his confidence fully and frankly in his founding affidavit to enable us to understand what may have been mitigating or perhaps aggravating features giving rise to his behaviour. This much is clear from *Nthai* where even though the appellant made some

bland attempt to convey what had motivated him to commit the transgressions, this was found to be entirely inadequate.

[21] The applicant annexed four affidavits in support of his application. Mr E Oosthuizen testified that the applicant is a long time friend and client of his short term insurance business. Over the years the applicant has maintained a large insurance portfolio in respect of his personal and commercial assets which mainly include wine and stock farming. In the 30 years the applicant has been his client Mr Oosthuizen submitted claims in excess of many thousands of rands on the applicant's behalf, and not a single one was rejected by the insurance company concerned. Mr Oosthuizen also often sought legal advice from the applicant *'off the record'* and found it to be of considerable assistance. He has great respect for the applicant as well as his insight and judgment.

[22] Mr C Visagie testified that he was previously the general manager of Karoo Vleisboere Bpk until his retirement in 2017. The applicant was well known to him over the years as a member thereof and during 2015 to 2017 also served as a director. Mr Visagie found the applicant's input as well as his insight and knowledge to be thorough and incisive. He too regularly consulted the applicant in regard to legal issues which Karoo Vleisboere Bpk experienced. The applicant's advice was of great assistance; he was a valued member and is also a well respected farmer in the community.

[23] Mr N Haycock testified that he is an attorney having practiced for 21 years. He has known the applicant for many years and considers him one of the best counsel he worked with. Since the applicant's *'removal'* from the roll of advocates in 2007, Haycock often sought his advice *'off the record'*. Despite the humiliation he suffered, and the findings and conclusions of the Supreme Court of Appeal *'which the applicant came to accept over the years, coupled with his intense remorse, he was always prepared to help if he could be of assistance'.* He also stated that the applicant is often approached by members of the public for advice and assistance in legal matters, many of which the applicant referred to Haycock.

[24] Finally, Mr J Maritz testified that he lives and works on a farm close to that of the applicant's. During 2007 the applicant built a church on his farm and made it available to the farmworkers in the community. There is no other farmer in the area who had assisted the farmworkers in this way.

[25] None of these affidavits indicate the deponent's extent of his knowledge of the applicant's wrongdoings or whether they knew about the personality trait or character defect which gave rise to his transgressions and led to his striking off. As held in *Nthai* it follows that this court cannot, without more, be satisfied on the strength of the character references that *'it will make no mistake'* in readmitting the applicant.

[26] The applicant placed the following factors before us in mitigation. At the time of deposing to his founding affidavit he was 74 years of age (he is thus

currently 76 years old) which means that he has spent approximately half of his adult life practicing law in one or other form. He has now (in his words) *'served a sentence'* of some 16 years. His erstwhile practice was successful. Apart from the striking off application he was never in 35 years of active practice found guilty of unprofessional conduct. The application to have his name struck from the roll of advocates related to one single client. He also referred to litigation in which he was personally involved and in which he was apparently found to be a credible witness; and set out the suffering and humiliation both he and his family had to endure as a result of the publicity around his striking off.

[27] But as was pointed out in *Nthai* to focus on forgiveness and whether the applicant has been sufficiently punished is to fundamentally misconceive the nature of the enquiry. At the risk of repetition the fundamental starting point was for the applicant to have made a full and frank disclosure of what motivated him to commit the transgressions since this is a crucial factor in evaluating whether, in light of all other relevant factors, he is a fit and proper person to be readmitted. His failure to do so on the papers before us means that he has not met the required threshold.

Costs

[28] In the LPC's opposing affidavit and heads of argument it was submitted that the applicant should be ordered to pay costs on an attorney and own client scale. However in its draft order handed up at the conclusion of the hearing

the LPC only asked for costs on the ordinary scale. We will thus make an order in terms of the draft provided.

[29] **In the result the following order is made:**

1. **The readmission application under case number 6344/2021 is dismissed with costs, such costs to include the costs attendant upon the employment of two counsel.**

2. **The applicant shall withdraw the review and interlocutory applications under case number 3090/2022 and tender the first respondent's costs or suit, including the costs attendant upon the employment of two counsel.**

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A LE GRANGE

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J I CLOETE

For applicant: Adv J Heunis SC
Instructed by: Ward Brink, J C Brink

For respondent: Adv R Williams SC, Adv S Mahomed
Instructed by: Mayats Attorneys, R Kagee