



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4057/2023

In the matter between:

FUSI STEPHEN MACHEKA

Applicant

THE LEGAL PRACTICE COUNCIL FREE STATE

Respondent

CORAM: MOLITSOANE, J et JORDAAN, J

HEARD ON: 30 NOVEMBER 2023

JUDGEMENT BY: MOLITSOANE; J

DELIVERED ON: 22 MARCH 2024

- [1] This is an application were the readmission off the application as an attorney of this court. This application is opposed by the Legal Practice Council.
- [2] The applicant was admitted as an attorney of this court in terms of section 15 the repealed Act 53 of 1979. After his admission, he practiced under the name and style, Sizephe Macheka and Partners with the late Maliwa Johannes Dalinyebo Sizephe. The practice was however dissolved during 2005. Thereafter he practiced for his account under the name and style Fusi Macheka Incorporated. He also practiced in partnership with S Kamati as Kamati & Macheka Attorneys.

He was struck off the roll of practicing attorneys due to a number of misconduct charges levelled against him as more fully set out herein after.

- [3] In his Heads of Arguments he acknowledges that he was struck off the roll due to charges as contained in Annexure FSM 5 from pages 41 to 103 of his founding affidavit.

- [4] It is unnecessary to set out in detail the transgressions which led to the struck off of the applicant as he does not deal with them individually. There were twenty-two complaints levelled against the applicant. Most dealt with unprofessional conduct and theft of trust moneys. In almost all of them he was convicted and sentenced. It also needs to be told that when the Legal Practice Council instituted the struck off proceedings, he chose not to oppose the relief sought.

- [5] The essence of the applicant's case is that this court should have regard to what the applicant avers were the reasons which led to the conduct which ultimately made the court to hold that he was not fit and proper to remain as an attorney of this court. According to him, he has admitted that he did wrong and he had accepted the consequences flowing from his conduct.

- [6] He attributes the conduct that led to his striking off from the roll of practising attorneys, inter alia, to delegating his powers and responsibilities to his erstwhile employees contrary to the prescripts, standards and ethical conduct demanded from him as an attorney of this court. He further attributes the mismanagement of his professional practise to a huge number of instructions his practise accepted but failed to execute on. He makes this statement¹

"I also became reckless in the handling of financial affairs of the other practices, especially the trust account dealings.....As a result of the unlawful operations I could not establish the amount of money that my employees could have embezzled. Notwithstanding, that does not mean I am blaming them as thieves, I am the one who remained responsible for such theft of money and that is why I am prepared to pay the Fidelity Fund, should the court order me to do so. I am

¹ Page 12 of the record para 6.3.

the one who created suitable ground for theft to take place under my watch and I condoned the mala fide practice as I did not take any remedial action thus reconcile myself with the situation that made me equally guilty." (My emphasis)

- [7] He admits that he embezzled the trust monies of his clients and failed to account to them. According to him the abuse of alcohol, dagga and engaging in extra-marital relationships contributed to his unlawful conduct.

- [8] According to him he has turned a new leaf in his life. He professes that he has accepted Jesus Christ as his Lord and Saviour and that he participates in church activities. He contends that he has been rehabilitated and thus is a fit and proper person to be readmitted as an attorney of this court.

- [9] The respondent opposes the application on the basis that the applicant has not adduced evidence that he is a fit and proper person to be readmitted as an attorney of this court. According to the respondent, the applicant's conduct towards his clients and his complete disregard of the professional ethics continued unabated for a period of over 5 years.

- [10] The evidence of the respondent is that after the applicant was struck off the roll of the practising attorneys, the Attorneys Fidelity Fund had to deal with over 40 claims made against the applicant's trust account for monies stolen by the applicant. According to the respondent, the Fund settled over 25 claims totalling R1 131 790.92(one million one hundred and thirty thousand seven hundred and ninety rands and nine two cents) plus legal costs which ultimately, together with the settled claims, costs the Fund an amount of R1 319- 340 87(One million three hundred and nineteen thousand three hundred and forty rand and eighty-seven cents).

- [11] The issue which stands to be adjudicated is whether the applicant has made out a case for his readmission as a legal practitioner.

- [12] Section 15(3) of the repealed Attorneys Act 53 of 1979 contained specific provisions which dealt with readmissions. The Legal Practice Act 28 of 2014(the Act) refers only to admissions and has no express provisions regulating the

readmission of persons who were previously struck off the roll of practising legal practitioners. Section 24(2) (c) provides that the High Court must admit to practice and authorise to be enrolled as a legal practitioner any person who, on application, satisfies the court that he is a fit and proper person to be so admitted. It should be uncontested that the provisions of s24 of the Act should find application in the application for readmission.

- [13] The applicant bears the onus to prove that he is fit and proper to be readmitted. The question of the onus and its discharge in the application for readmission was set out as follows in *Kudo v Cape Law Society*²

“In considering whether the onus has been discharged the Court will 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 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. These considerations are not necessarily intended to be exhaustive and the case. They all, however, relate to the assessment of the applicant’s character reformation and the chances of his successful conformation in the future to the exacting demands of the profession the seeks to re-enter”

- [14] The readmission of a legal practitioner who was struck off the roll lies in the discretion of the court. The court in *Swarzberg v The Law Society of the Northern Provinces*³ held that:

“Where a person who has previously been struck off the roll of attorneys on the ground that he was not a fit and proper person to continue to practice as an attorney, applies for his re-admission, the 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 him adjudged not a fit and proper person, no longer exists; and that, if he is re-admitted, 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.”

² 1972(4) SA 342(C).

³ 2008(5) SA 322(SCA).

- [15] The applicant has misconstrued the onus saddled on him to discharge. The reading of his affidavit is replete with trying to inform the court of the harshness him and his family had to endure after his struck off the roll. He then spent a great deal of his time in trying to convince this court about how he has changed or turned another leaf in his life. The complaints against the applicant which ultimately led to his struck off are twenty-two in number. Save for engaging with the conduct which led to his struck off with reference to the stated complaints in general terms, the applicant has failed to engage and deal pertinently with the said complaints for this court to understand how they came about. Once the evidence is led as to how the misdemeanours came about, this court would be in a better position to engage with the previous conduct of the applicant in order to meaningfully engage with his future expected conduct and thus, the real issue, before us, whether he is fit and proper to be readmitted as a legal practitioner. The court must understand the defect in his conduct.
- [16] In the same breath, he puts the blame on his erstwhile employees by saying that his erstwhile employees embezzled some of the trust monies although he takes the blame for creating the situation, yet on the other hand, he still avers that he does "not blame them as thieves⁴." He has not laid charges against them. He has not sought to establish the extent of their criminality, if any. He only says let bygones be bygones.
- [17] Contrition alone is not enough. The applicant's conduct after his struck off also has to be looked at. After he was struck off the roll, in complete disregard to the order of this court, he continued to practice as an attorney fully knowing that he has been disbarred so to practice. He and Mr Chabane registered a close corporation and operated under the name and style Macheka and Chabane Legal Services. Both were convicted on a charge of civil contempt of court and both were accordingly sentenced. I take note that Mr Chabane has since been readmitted as an attorney of this court. But it must be noted that in making a decision whether the applicant is a fit and proper person to be readmitted, this court looks at what the applicant has identified as his own defect and to act

⁴ Page 012 of the paginated record.

according to his appreciation. Chabane was never struck off for the misdemeanours that led to the struck off the applicant.

- [18] In the answering affidavit the respondent avers that there were over 40 complaints against the Fund emanating from the conduct of the applicant. Twenty-five of those were settled and the cost to the Fund was over one million Rand. In his reply, the applicant does not engage with this averment save to take note of it. I am satisfied that he does not dispute this averment by the respondent. The applicant has misappropriated over one million rands of different trust creditors. Notwithstanding the fact that he has engaged the Fund since 2016 about negotiating monthly settlement of this amount and costs, the fact is that the money has not been paid. To contend that the applicant would pay the money once he has been readmitted brings to the fore the conduct not expected from a legal practitioner. I align myself with the remarks of Rabie J in *Letlhaka v Law Society of the Northern Provinces (GP)*⁵ in which the court said the following:

"The applicant's laconic remark that he would pay the Law Society's costs once he is readmitted as an attorney, falls short of what is expected of an attorney."

- [19] This court also takes note that the applicant was convicted of theft of trust monies in the amount of R49 702.45. He unsuccessfully appealed the conviction in all relevant courts of this country. He has since served his sentence. The worrying factor is the applicant's total disregard of the law. It appears that he is the Practise Manager in the legal firm, Mbodla Inc. There was a complaint against the said firm in 2022. The applicant appears on the letter head of the said firm and described as the Practice Manager. Mr Mbodla has deposed to an affidavit⁶ in that complaint. He says the following:

"2.12 I wish to put on record that the Complainant was not assisted by Mr Macheka, but by myself, although Mr Macheka was present at all consultations. Mr Macheka is a travelled individual with wealth of wisdom, legal expertise and experience in excess of thirty years. He currently serves as the Practice Manager of my practice. He is having a proven record of ushering many legal matters to success, and he is described as

⁵ Unreported case no:54065/2012 para 34, delivered on 11 November 2014.

⁶ Pages 275 to 281 of the paginated record.

a Legal Giant within our province, wherein many people in practice draw from him especially on very complicated matters."

[20] Section 33(4) of the Act regulates the circumstances under which a person who has been struck off may be employed in a legal practice. On his own version, the applicant is a Practice Manager at Mbodla Inc. He sits in consultations on legal matters pertaining to clients of the said practice. It is undisputed that he has no consent from the respondent to work in that practice. On his version, he violates section 33(4) of the Act. This conduct militates against the finding that the applicant is a fit and proper person to be admitted as a legal practitioner. The conduct shows little regard for the regulations of the profession.

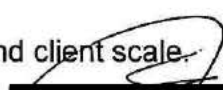
[21] In my view, it is unnecessary to traverse other grounds raised by the respondent as the applicant has dismally failed to make out a case for his readmission. I cannot find that he is a fit and proper person to be readmitted as a legal practitioner. I can find no reason why costs should not follow the costs.

ORDER

[23] In the premises, the following order is made:

1. The application is dismissed with costs on attorney and client scale.

I agree:



 P.E. MOLITSWANE, J



 M JORDAAN, J

For the applicant: Adv. Litabe
 Instructed by: Moloi and Partners
 Bloemfontein

For the respondent: D Qwelane
 Instructed by: Qwelane, Theron and Van Niekerk
 Bloemfontein