

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE DIVISION, KIMBERLEY]**

CASE NO: 1637/17

In the matter between:

MOSES SIPHO MZIAKO

Applicant

v

THE NORTHERN CAPE SOCIETY OF ADVOCATES

Respondent

Judgment: Tlaletsi JP
Heard on: 27 August 2018
Decided on: 07 September 2018
Coram: Tlaletsi JP *et* Williams J

RULING ON APPLICATION FOR LEAVE TO APPEAL
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Tlaletsi JP

- [1] The applicant is seeking leave to appeal against the whole judgment and order of this Court handed down on 01 June 2018. In terms of the said order the name of the applicant was struck off the roll of advocates which is kept by the Director General of the Department of Justice. He was further ordered to

pay the costs of the application on a scale as between attorney and own client.

[2] Section 17(1) of the Superior Courts Act,¹ (“the Act”) provides that:

Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter need consideration;

(b) The decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[3] In **S v Mabena and Another**² Nugent JA stated:

“[22] It is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the judge concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing argument, and decide whether there is a reasonable prospect that a higher court may disagree.....”

[4] The wording of the section in itself suggests that an applicant for leave to appeal faces a higher and stringent threshold than it was the case.³ The Judge or Judges must come to a conclusion that there is a reasonable prospect of success for leave to appeal to be granted.

[5] The applicant has raised several grounds of appeal upon which the judgment is challenged. These may be summarised thus: The Court erred:

5.1 by finding that this Court had the jurisdiction to entertain the matter despite the fact that the applicant’s “*domicilium citandi et executandi*”

¹ 10 of 2013

² 2007(1) SACR 482 (SCA)

³ Notshokovu v S (unreported, SCA case no 157/15 dated 07 September 2016).

address and work was within the jurisdiction of the Gauteng High Court which was the correct forum to entertain the matter. The Court misinterpreted s7 of the Act, the “Supreme Court Act and the Uniform Rules which provide that the application should be brought at the court where the respondent is domiciled and/or conducts business.

- 5.2 *“by ignoring the fact that the Admission of Advocates Act just like any other Act, cannot be read in isolation and that any application before court should comply with the procedural requirements such as that an applicant must establish locus standi, make express averments establishing the Court’s jurisdiction and the cause of action”.*
- 5.3 By not dismissing the respondent’s application on the basis that the respondent has failed to make an averment in the founding affidavit that it has *locus standi* and to further aver that the Court has jurisdiction.
- 5.4 By approaching the application as if the applicant was applying for admission as an advocate and determining whether he is fit and proper to be admitted as such.
- 5.5 By over-emphasizing the applicant’s character and previous convictions as if the applicant was applying for admission as an advocate.
- 5.6 By finding that a previous conviction is a bar to the applicant’s admission as an advocate when the Admission of Advocates Act does not prohibit an applicant who has a criminal record for admission. The presiding Judges, being vested with no power or authority to create law, misdirected themselves when they found that the applicant *“cannot be admitted as an advocate with a criminal record even if the record is more than 20 years or is expunged which attitude is considered as if the Honourable Judges were creating law with this regard.”*

5.7 By misconstruing the facts of the application and misinterpreted both the Kwa-Zulu Natal Society of Advocates' letter and the comments by Judge Hartzenberg.

5.8 By concluding that the applicant is not a fit and proper person by relying on untested facts and without affording the applicant an opportunity to lead evidence that he is a fit and proper person to continue to practice as an advocate.

[6] It bears mentioning that the application to have the applicant's name struck off the roll of advocates was *inter alia*, predicated on the following common cause or undisputed facts:

6.1 That in his application for admission he stated that "*I am a law abiding citizen and have no record or pending criminal case against me*".

6.2 He failed to disclose the fact that he was convicted of 13 counts of fraud, 11 counts of theft of motor vehicles, one count of theft of a motor vehicle engine and five counts of corruption by the Regional Court, Pretoria. On 30 August 1995 he was sentenced to four years imprisonment on each of the 13 counts of fraud, five years imprisonment on the theft of motor vehicles conviction, three years imprisonment on theft of a motor vehicle engine and three years imprisonment on each of the five counts of corruption. The total term of imprisonment amounted to 125 years. The sentences were ordered to run concurrently with the result that he was to serve an effective period of 25 years imprisonment. The effective sentence of 25 years was on appeal reduced to 18 years imprisonment.⁴

6.3 He failed to disclose that at the time of his sentencing he had been found guilty of fraud on four previous occasions and the period of suspension of the last conviction had not yet expired when the first of the latter offences was committed.

⁴ **Mziako v S** [2007] JOL 19263 (T)

6.4 He failed to disclose that prior his application for admission as an advocate to this court, he applied for admission as an advocate at the Kwa-Zulu Natal and Gauteng divisions of the High Court and that he withdrew his applications when they were opposed by the respective Societies of Advocates. The full facts surrounding his applications and the circumstances under which he discontinued his applications are set out in the judgment which is the subject of this application.

6.5 That he wilfully and intentionally misled the Court that admitted him as an advocate by stating that

“I am truthfully and faithfully unaware of any circumstances or any reason thereof (SIC) that could prevent the above Honourable Court to grant me such order to practice as an Advocate.”

[7] The applicant’s case in response to the above contentions was based on two points *in limine* and the defence to the merits of the application. The points *in limine* were to the effect that this Court lacks jurisdiction to entertain this application because the respondent conducts his practice in Pretoria and not in the Northern Cape and also that this Court has no jurisdiction to strike an advocate from the roll unless his/her misconduct transpired post admission.

[8] The applicant’s defence on the merits of the application was simply that there was no obligation on him to disclose the record of his previous convictions as it is not a requirement in terms of the Admission of Advocate Act; that since he has not been convicted of any offence or misconduct post his admission, he is a fit and proper person to continue to practice as an advocate. According to the applicant the misrepresentations, non-disclosures and his previous convictions are irrelevant as he has ultimately been admitted as an advocate irrespective of the circumstances in which he was admitted as such.

[9] I have dealt in great detail with all the issues raised by the applicant in the judgment sought to be appealed against. I deem it not necessary to burden this ruling with a repetition of my reasons for rejecting the applicant’s contentions. The said judgment should be regarded as incorporated as part

of this ruling on the application for leave to appeal. The judgment will also show that some of the grounds of appeal are indicative of the fact that the applicant has in fact misconstrued some of the findings made in the judgment.

[10] I am not satisfied that another court will come to a conclusion different from the one we reached in this matter. There is no compelling reason(s) why the appeal should be allowed. All that the applicant is seeking is a re-hearing of his case by an appellate court. This cannot be a basis for granting leave to appeal. He has not satisfied any of the requirements set in s17 of the Act or any law that would entitle him to leave to appeal. Leave to appeal is not merely there for the taking; a proper case for leave to appeal to be granted must be made out.

[11] There is no reason why costs should not follow the result.

[12] **In the result, the application for leave to appeal is dismissed with costs.**

LP Tlaletsi
Judge President

Williams J concurs in the Ruling made by Tlaletsi JP.

APPEARANCES:

For the Applicant:
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