OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 30/7/15

CASE NO: 34315/2012

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: ~~YES / NO.~~	
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / ~~NO.~~	
(3) REVISED.	
30/07/2015	
DATE	SIGNATURE

IN THE MATTER BETWEEN

MAKETE JUDAH LETSOALE — Applicant

and

PRETORIA SOCIETY OF ADVOCATES — Intervening party

JUDGMENT

NOWOSENETZ AJ

[1] On 15 June 2012 the applicant filed this re- application for his admission as an advocate of this Court. Leave to intervene was granted to the Pretoria Society of Advocates (the Society) which has filed papers and opposed this application. It initially expressed the intention to investigate the circumstances of the applicant but abandoned this. This is the second admission application brought by the applicant. The first application was dismissed with costs on 16 February 2010 (case no 48239/ 08) by Thlapi J, Louw J concurring. In that judgment, it was made clear that the door was open to him to "clear the cobwebs".

[2] In a very comprehensive judgment, that Court found that on the application before it, the applicant had not demonstrated that he was a fit and proper person. The Society had intervened in that application too. The grounds for the failure of the first application stem from the adverse findings made in civil proceedings against the applicant in the judgment by Webster J. The case was instituted by the Legal Aid Board (plaintiff) against Khoaripe John Modiko (first defendant), Nana Thansaqa Doris Modiko (second defendant) and Impact Advisory Services CC (third defendant). The applicant was the sole member of the third defendant (Impact). Mr Modiko was a senior employee of the plaintiff and the Court found he had defrauded the Plaintiff in the amount of R559 477, 80 by submitting false invoices bearing the name of Impact as the service provider and receiving payment cheques from the plaintiff which he then deposited into the bank account of Impact. The applicant also benefited from the said deposits in that he entered into a verbal loan agreement with Mr Modiko and received R51 000 from the funds deposited in the Impact bank account by Mr Modiko.

[3] Webster J found both Mr Modiko and the applicant to be untruthful and unreliable witnesses and that the applicant's version was inherently improbable. He said: "I am satisfied that Letsoalo was party to the conspiracy to defraud the plaintiff." Judgment was granted against all the defendants jointly and severally. Mr Modiko was convicted of fraud but the applicant was never charged.

[4] The applicant has persisted at all material times, including both applications for admission that he was innocent and did not participate in the fraud. He alleged he

had no knowledge of the illegal source of the cheques paid into Impact's account. Mr Modiko was his close friend and had asked the applicant to register a close corporation for Mr Modiko's business activities. In the meantime, he admitted that he had allowed Mr Modiko to use the Impact bank account to deposit cheques received from undisclosed third parties. These deposits were made from August 2002 until March 2003. The applicant filed a detailed and lengthy affidavit presenting himself as a naïve and unsuspecting victim of Mr Modiko who had betrayed him by hiding the fictitious invoices from the applicant and using the applicant to cover up Mr Modiko's fraudulent scheme.

[5] The application before us is the third application for admission as an advocate. In the first application, the court was not satisfied that the applicant had explained the improbabilities in his version and found no basis to diverge from the findings of Webster J. Questions were raised about the applicant's involvement in Impact and the legal services it provided. In the intervening time since the first application, the applicant filed an application for leave to appeal but it was never prosecuted. He blames his attorney for dereliction of duty. He also states lack of funds as a factor in the failure to appeal. Impact has been dormant.

[6] The present application is characterized by a lengthy narrative by the applicant dealing with his friendship with Mr Modiko, the Anton pillar application and the search of the applicant's premises in April 2003 which did not yield any evidence connecting him to the fraud. He dealt with the criminal trial of Mr Modiko during which the applicant was state witness but Mr Modiko changed his plea to guilty and the applicant did not testify. He maintains he told the truth in the civil case. He submitted that the improbabilities were only inferences and the contradictions in his evidence were due to failed memory or his complacency and naiveté in dealing with Mr Modiko. He also gave a lengthy account of the loans. He used the funds to pay off consumer debts. He stated that the Legal Aid Board had not pursued its judgment against Impact nor has he been called upon to repay the Legal Aid Board. The applicant filed a Supplementary Affidavit containing his employment history, *curriculum vitae* and some letters of reference.

[7] As a point of departure, the judgment in the first application does not purport to prescribe or circumscribe the scope of the enquiry to be made by this or any another court in determining whether the applicant is a fit and proper person. This question lies in the discretion of the Court. This discretion is based upon all the facts placed before it. The facts should be viewed in their totality and not in isolation[1].

[8] When considering the striking off of an attorney van Dykhorst J observed in *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 854 C that ultimately when deciding when conduct is unprofessional or not is primarily a question of impression and feeling which the Court has based on long years of experience in practice. This approach has resonance in this case in assessing whether the conduct of the applicant in his business dealings and his career is that of a person of integrity and trustworthiness and is a suitable candidate to practice as an advocate.

[9] The Society contended that the onus is on the applicant to place all the evidentiary material he relies upon before this Court. This approach cannot be faulted. The applicant contends he has been truthful and honest and to this end it would have been expected of him to provide a full transcript of his testimony in the civil and criminal proceedings for a broader assessment of his creditworthiness to be made or to reconsider the adverse findings made by Webster J. Nothing of this nature has been placed before the court: Only the judgment of Webster J and an extract of the criminal proceedings dealing with the plea of guilty, conviction, sentence and the application for leave to appeal is filed of record. This Court must ascertain inter alia whether any new light has been cast on the concerns expressed by the Court in the first application.

[10] The inherent probabilities of the innocence of the applicant in allowing Mr Modiko to use Impact's account are still subject to serious criticism. No significant new facts have been adduced by the applicant. More questions than answers emerge. Mr Modiko, applicant's friend, was in full time employment of the Legal Aid

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[1] *Beyers v Pretoria Balieraad* 1966(2) SA 593 (A) 603 E-F; *Olivier v Die Kaapse Balie-Raad* 1972(3) SA 485(A) at 496 F-G; *Malan and another v The Law Society, Northern Provinces* [2009] 1 All SA 133 (SCA).

Board at all material times. He was the second most senior official. The applicant did not question what kind of business activities Mr Modiko was conducting outside his employment. According to his curriculum vitae, the applicant obtained a BA Hons. in Labour Relations in 1998 and ought to have been aware that employment contracts require employees to place their full productive capacity exclusively for the employer and extensive additional business activities are not commonly undertaken by employees particularly in senior management positions.

[11] Nor did the applicant question the large amounts flowing into the Impact bank account during the ensuing five months. The applicant gives no explanation at all why it was necessary for Mr Modiko to use the Impact account and not his own. Why was it necessary for Mr Moriko to register his own close corporation in order to have a banking account for his business? The applicant does not address these issues which should have troubled him but apparently did not. The first deposit took place in August 2002. The applicant only filed the application for the registration of a close corporation for Mr Modiko on 19 February 2003. He does not explain why he waited at least five months before taking steps to register Mr Modiko's company. No evidence was tendered of any yearly financial statements of Impact, and whether Impact was registered as a tax payer with the South African Revenue Services. In passing, the accounting officer of Impact was Mr Modiko.

[12] The issue of the loans is similarly disconcerting. No record of any loan transaction was tendered. On the face of it, the loan had no repayment date, nor interest payable. This hardly can be considered to be a bona fide arm's length dealing. The applicant says he used the funds for repaying consumer debt. It is hard not to suspect that he had a keen personal interest in the large payments flowing into Impact's account. The applicant was unjustly enriched at the expense of the Legal Aid Board. Even if the Legal Aid Board did not pursue repayment from the applicant, the least expected of him, would be to seek an honourable discharge of his liability to the Legal Aid Board. As a person seeking entry to the advocate's profession, his passivity in unjustly retaining the funds intended to assist needy litigants is plainly disgraceful. He could have inter alia offered to perform community service as a *quid pro quo* for his enrichment. The disquiet expressed by the court in

the first application has not been allayed. On the contrary, more questions than answers emerge. Despite the prolixity of his papers, the applicant has not been frank with the Court. The findings of Webster J remain intact.

[13] His employment record since April 2003 when he ceased conducting business as Impact, is relevant. He has been in formal employment until April 2013, his last employer being Tshwane University of Technology. He had three previous employers all of which were public entities. He attached letters of reference from individuals who have known him or worked with him but crucially not one reference was from any of his former employers. Prior to 2001 he had five different employers and he also filed no references from any of these employers. He started a business called Motheong Consulting and Advisory Services CC in January 2006 and states this as his current employment. This entity appears similar to Impact having no tangible professional achievement. The nature of the business is employment management and business consulting. His unstable employment record, coupled with the absence of references from any employers detracts from a character assessment of him as a reliable and respected employee. Thus there are no circumstances to mitigate the adverse character findings in the civil case or to show any admirable personal growth or career development.

[14] In sum the applicant has not demonstrated that he is a fit and proper person to be admitted as an advocate. "An advocate may not lack that sense of responsibility, honesty and integrity ...."[2]. An advocate should be scrupulous in his dealings: "The proper administration of justice could not easily survive if the professions were not scrupulous of the truth of their dealings with each other and with the Court"[3]. Practitioners (and aspiring practitioners) should show a zeal for ethical and responsible conduct. The overall impression of the applicant is that he is profoundly lacking in these respects.

ORDER

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[2] *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485 (A).

[3] *Ex Parte Swain* 1974 (2) SA 427 N at 434H.

1. The application for the admission of the applicant as an advocate is dismissed.

2. The applicant shall pay the costs of the intervening party, the Pretoria Society of Advocates.

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L NOWOSENETZ AJ
ACTING JUDGE OF THE HIGH COURT

I AGREE IT IS SO ORDERED

M F LEGODI
JUDGE OF THE HIGH COURT

Heard on:	25 May 2015
Judgment handed down:	30 July 2015
For the Applicant:	In Person
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