



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 16857/23

In the matter between:

THIVENDRA MOODLEY

Applicant

and

**THE KWAZULU-NATAL LEGAL PRACTICE COUNCIL
LEGAL PRACTITIONERS FIDELITY FUND**

**First Respondent
Second Respondent**

JUDGMENT

Nicholson AJ (Sibiya J concurring):

Introduction

[1] The applicant, a former attorney that was disbarred from practice for unauthorised use of trust funds, now seeks readmission as a legal practitioner. Both respondents oppose this application.

Legal Framework

[2] An understanding of the legal framework is necessary before addressing the facts.

[3] The Legal Practice Act 28 of 2014 ('LPA'), including all relevant regulations and codes, is the current legal framework that regulates all aspects of legal practitioners, which includes both admissions and readmissions. Unlike the Attorneys Act 53 of 1979, which included specific provisions for readmission, the LPA only has provisions for admissions. Notwithstanding, considering Section 24(2)(c) of the LPA, amongst other criteria, provides that the high court must admit anyone who proves they are fit and proper to practice, it is understood that this also applies to readmission applications.¹ The court has a discretion in determining if an applicant is suitable for readmission and the applicant bears the burden of demonstrating, on a balance of probabilities, that they are fit to be readmitted.

[4] In *Swartzberg v Law Society, Northern Provinces*,² the SCA cautions: 'The question that now confronts a court is not whether the appellant has been sufficiently punished for his misdeeds. I have little doubt that, if that were the issue, a court may well have been satisfied that he has suffered enough. The issue is rather whether the appellant is a person who can safely be trusted to faithfully discharge all of the duties and obligations relating to the profession of an attorney. After all, because of the trust and confidence reposed by the public and the courts in practitioners, a court must be astute to ensure that the re-admission of a particular individual will not harm the prestige and dignity of the profession. For, by granting an application for re-admission, a court pronounces to the world at large that the individual concerned is a fit and proper person.'

[5] Although a court possesses a discretion regarding readmission, the principles for exercising this discretion were articulated in *Kudo v The Cape Law Society*,³ wherein the court determined that it must: '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.'

¹ *Maartens v South African Legal Practice Council* [2024] ZAGPPHC 610 para 7.

² *Swartzberg v Law Society of the Northern Provinces* [2008] ZASCA 36; 2008 (5) SA 322 (SCA) (*Swartzberg*) para 27.

³ *Kudo v Cape Law Society* 1972 (4) SA 342 (C) at 345H-346A.

[6] In the circumstances, considering *Kudo*, the principles to be considered for readmission are as follows:

- (a) The nature and degree of the conduct which occasioned the applicant's removal from the roll.
- (b) Any factors mitigating or aggravating the offence, including his conduct during the removal proceedings.
- (c) A review of the applicant's actions subsequent to his striking off.
- (d) Any expressions of remorse and efforts to repair any harm caused.

[7] These principles were expanded in *Law Society, Transvaal v Behrman*,⁴ where the court opined:

'Where a person whose name has previously been struck off the roll of attorneys on the ground that he was not a fit and proper person to continue to practise 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 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'.

[8] In *Behrman*, the principles for considering readmission were expanded to include:

- (a) Whether the applicant has made a genuine, complete and permanent reformation of his character.
- (b) Whether the defect of character or attitude which led to the applicant being found not fit and proper no longer exists.
- (c) An assessment that should the applicant be readmitted, he will in future conduct himself as an honourable member of the profession.

[9] In *Swartzberg*, the Supreme Court of Appeal ('SCA') endorsed *Behrman* and commented as follows:⁵

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

⁵ *Swartzberg* para 22-23.

[22] The fundamental question to be answered in an application of this kind is whether there has been a genuine, complete and permanent reformation on the appellant's part. 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. (*Aarons* at 294H.) 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.

[23] Amongst the matters to which a court must have regard are the nature and gravity of the conduct which occasioned the appellant's removal from the roll and the explanation given by him for such conduct (*Behrman* at 558G). The moral reprehensibility involved in the appellant's conduct is self-evident. The nature of the appellant's conduct involves very serious dishonesty and deception. He did not succumb to a sudden temptation and his fall from grace was not in consequence of an isolated act. His was deliberate and persistent dishonesty for personal financial gain over a protracted period.'

[10] In *Swartzberg*, agreeing with *Visser v Cape Law Society*,⁶ the court enlarged the criteria for readmission:⁷

'Where a person is struck off the roll for the kind of conduct encountered here, he must realise that his prospects of being readmitted to what after all is an honourable profession, will be very slim indeed. Only in the most exceptional of circumstances, where he has worked to expiate the results of his conduct and to satisfy the court that he has changed completely, will a court consider readmission at all'.

Background

[11] During or about February 2000 to about March 2002, the applicant successfully completed his articles of clerkship and passed the requisite board examination. On 2 December 2002, the applicant was duly admitted to practise as an attorney. Shortly thereafter, the applicant practised for his own account until 25 February 2009, when he was struck off the roll of attorneys.

⁶ *Visser v Cape Law Society* 1930 CPD 159 at 160.

⁷ *Swartzberg* para 32.

Reason for the applicant's striking off

[12] On or about 3 March 2006, Gengan Naidoo ('Mr Naidoo') instructed the applicant to attend to a transfer of immovable property, which was sold to one Johan Martinus Oosthuizen ('Mr Oosthuizen'). To that end, Mr Naidoo deposited an amount of R657 000.00 into the trust account of the applicant ('the property transaction'). However, when the monies were required to be paid over to Mr Naidoo, the applicant was unable to do so because he had misappropriated these monies, causing Mr Naidoo to continue servicing the bond over the property; notwithstanding, that the property had already been transferred to Mr Oosthuizen. Mr Naidoo eventually reported the applicant to the first respondent.⁸

[13] Mr Naidoo's report triggered an investigation that eventually found a discrepancy of R2 065 240.84 unaccounted for in the applicant's trust account, which had been misappropriated by the applicant. The applicant eventually repaid R460 000.00, and the balance of R1 605 240.84 was settled by the second respondent. The final account provided by the second respondent on 12 July 2018, after considering disbursements and recoveries, was R1 631 779.83, which the applicant owes to the second respondent.

Applicant's explanation/accounting for the misappropriated monies

[14] The applicant asserts he had briefed counsel for a complex criminal matter, where counsel had estimated their fees to be R350 000. However, he had only taken cover of R150 000,⁹ which he paid to counsel. Counsel reduced the balance of R200 000 to R152 000, which the applicant eventually paid to counsel by misappropriating monies from the trust account.

[15] At the conclusion of the criminal trial, the accused were fined R500 000. Since the client could only provide R337 000 for the fine, the applicant contributed an additional R173 000, which he accessed from the trust account, to cover the total amount.¹⁰

⁸ Founding affidavit, paragraphs 13 to 27.

⁹ Founding affidavit, page 15, paragraph 34.

¹⁰ Founding affidavit, page 16, paragraphs 38 and 39.

[16] Regarding the R657 000.00 involved in the property transaction that initiated the investigation, the applicant acknowledges the misappropriation of these funds to the prejudice to Mr Naidoo and Mr Oosthuizen,¹¹ but does not provide a detailed account of this misappropriation. However, based on the context of the applicant's explanation, it appears that this sum was gradually appropriated in smaller amounts as the applicant began using the trust account to address his debts. In the circumstances, the applicant only provides a detailed account for an amount of R325 000 of the R1 631 779.83 short fall.

[17] The applicant further states, without mentioning how much or when, out of desperation he resorted to taking loans from money lenders at very high interest rates, in order to repay the misappropriated monies. At the time of his removal from the roll, he had an outstanding debt of R550 000 to money lenders and was making monthly repayments of R65 000 by misappropriating monies from the trust account. The timing and amount of these loans, as well as the extent of the repayment before accessing the trust account to service the debt, remain unclear.

[18] The applicant's explanation regarding the misappropriated funds is vague, and therefore, lacks a full disclosure. Additionally, while applicant neither makes an assertion that his practise was trading in insolvent circumstances, nor disclosing his income from his practice, while asserting that he used the trust monies to service the interest repayment; buttresses the view that the applicant has not made a full disclosure.

2013 and 2018 applications

[19] Prior to this application, in 2013 and 2018, the applicant brought two other applications for readmission, which the applicant either withdrew or abandoned.¹² These applications too, were opposed by the first respondent.

¹¹ Founding affidavit, paragraphs 16. Paragraph 44 seems to suggest that he borrowed the R173 000 from the loan sharks.

¹² It is not clear from the papers if these applications were either abandoned or withdrawn.

[20] The first respondent opposed the 2013 application on *inter alia* the following grounds:¹³

- ‘1. he failed to deal fully with all the issues raised by the inspection committee;
2. he had made no attempts to repay the R1.6 million shortfall in his trust account;
3. he has not kept abreast of the law during the period he had been struck off the roll;
4. he had not dealt fully that he completely been rehabilitated in the three and a half years that he had been struck off the roll.’

[21] Regarding the 2018 application, the first respondent opposed this application for *inter alia*, the applicant’s failure to keep abreast with the law, and the uncertainty of the applicant being criminally prosecuted in the future for the theft of the trust funds.¹⁴

First respondent’s opposition

[22] The first respondent claims that readmission requires exceptional circumstances, which the applicant has not demonstrated. The following was submitted in this regard:¹⁵

- (a) The applicant has not accurately identified the defect of character that led to his actions.
- (b) The applicant’s actions do not reflect that he acted in accordance with the appreciation of such defect.
- (c) The applicant’s demonstrated history of a noncommitment to repay the misappropriated amounts casts doubts over the sincerity of his reformation.

[23] The first respondent argues that the applicant was struck off for misappropriating trust funds, a serious breach of professional integrity. The public needs to trust that legal practitioners will not misuse entrusted funds. The applicant has failed to meet ethical standards or show significant character improvement. He has not fully disclosed the details to the court or acknowledged his character flaws. Of the R2 065 240.84 owed, only R10 500 has been repaid, indicating a lack of remorse.

¹³ Founding affidavit, page 20, paragraph 49.

¹⁴ Founding affidavit, page 23, paragraphs 60 to 66.

¹⁵ First Respondent’s practice note, paragraph 6.

Second respondent's opposition

[24] The second respondent opposes the application for the following reasons:

- (a) The applicant places much emphasis on the complaint made by Mr Naidoo and does not make fair and frank disclosures about the other trust creditors.
- (b) The applicant has not made an effort to repair the harm by repaying the debt.

[25] The second respondent states that an agreement was made in 2010 for the applicant to repay the debt in instalments of R 2 000.00 per month, which the applicant failed to follow, having only made a repayment of R10 500 between 2010 and the present. The second respondent asserts that his failure to stick to the repayment agreement, is a clear demonstration of the applicant's lack of remorse.

[26] It is significant to mention at this point that, in the founding affidavit, the applicant admits that he only repaid an amount of R10,500 to the second respondent. However, the applicant does not disclose his salary when he was employed and does not make any significant payments even while he was employed. In his replying affidavit, the applicant makes no attempt to explain the noncompliance with the agreement.

[27] Additionally, in the answering affidavit, the second respondent asserts that in July 2022, the applicant advised it that he intends bringing a readmission application and his failure to make regular payments were due to him being unemployed. Accordingly, it appears that the applicant would repay the debt for the purposes of readmission and not as an act of contrition or remorse.

[28] In the circumstances, I agree with the sentiments expressed in *Ledwaba v South African Legal Practice Council and another*,¹⁶ where the court held:

'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

¹⁶ *Ledwaba v South African Legal Practice Council and another* [2023] ZAGPPHC 1975 para 29.

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.'

Discussion

[29] Regarding the issues raised in the 2013 and 2018 applications, to the applicant's credit, it appears that before filing this application, the applicant has indeed undertaken work at a law firm to reacquaint himself with practice and update his legal knowledge. Additionally, the applicant has proactively made enquiries with the Director of Public Prosecutions for KwaZulu-Natal to determine if there is a likelihood of being charged for the misdeed that is the subject of this application. It has been confirmed that there is no intention to prosecute the applicant. Therefore, these matters have been addressed satisfactorily.

[30] At the outset, I accept that the applicant's relative inexperience and youth may be considered as factors contributing to his actions.¹⁷ Conversely, his maturity at the time of this application should be considered in his favour. However, the mitigating weight is limited, given that the applicant had completed vocational training that included a course in professional ethics before his actions.

[31] In an article titled 'Trust Accounts and Trust Accounting',¹⁸ the learned author opined:

'A cornerstone of the Attorneys' profession is the client-centric approach taken on all matters involving the public, their clients, and the Law.

A lot of this stems from being able to trust (excuse the pun) your attorney to handle both your money and your affairs in a manner befitting someone in their position.'

[32] An attorney's trust account is essential to the practice of law and the operation of commerce. Therefore, it is important for the public to have confidence that deposits made into an attorney's trust account will be properly managed. An attorney is responsible for ensuring that deposited funds are used for their intended purposes,

¹⁷ Founding Affidavit: Page 19, paragraph 46.

¹⁸ A Koch 'Trust Accounts and Trust Accounting', dated 7 April 2022 <https://ajs.co.za/2022/07/04/trust-accounts-and-trust-accounting/> (last accessed 6 February 2025).

guided solely by their integrity. As the sole custodian of these funds, the attorney must exercise caution to avoid any misuse, particularly during challenging times.

[33] In *Vassen v Law Society of the Cape of Good Hope*,¹⁹ the SCA opined: 'the profession of an attorney, as of any other officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members; and it is the duty of the respondent Society to ensure, as far as it is able, that its members measure up to the high standards demanded of them. A client who entrusts his affairs to an attorney must be able to rest assured that that attorney is an honourable man who can be trusted to manage his affairs meticulously and honestly. When money is entrusted to an attorney or when money comes to an attorney to be held in trust, the general public is entitled to expect that that money will not be used for any other purpose than that for which it is being held, and that it will be available to be paid to the persons on whose behalf it is held whenever it is required.'

[34] At his disbarment, the applicant's character did not meet the standards demanded in *Vassen*, to be considered a 'fit and proper person', and therefore, he was struck off the roll of attorneys. The applicant's version suggests that he is unable to make a full account of the misuse of the trust monies, save to say they he dipped into the trust account to service a personal loan, demonstrates that the misuse of his trust account was so entrenched in his practice, which makes his transgression even more inexcusable. The applicant's transgression was not only a blight on himself but on the profession as a whole.

[35] The words of Vahed J, in *KwaZulu-Natal Law Society v Moodley and another*²⁰ are worth repeating here:

'[1] In an article titled *Are Lawyers Truly Greedy? An Analysis Of Relevant Empirical Evidence* published in *New England Law | Boston Legal Studies Research Paper* [Research Paper 13-15] on 9 October 2013 Paul F Teich wrote:²¹

"Since the early 1990s, the majority of Americans have repeatedly expressed the belief that lawyers charge too much for their services. The public is concerned not only about fee size but also about billing misconduct. It is claimed, for example, that lawyers routinely hide the reasons that fees are imposed, refuse to account for their hours, and

¹⁹ *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538F-J.

²⁰ *KwaZulu-Natal Law Society v Moodley and another* [2014] ZAKZPHC 33.

²¹ The paper was originally published as follows: PF Teich 'Are Lawyers Truly Greedy: An Analysis of Relevant Empirical Evidence' (2013) 19 *Texas Wesleyan Law Review* 837 at 838-839.

charge for services that have never been provided-that they routinely fee gouge. Understandably then, the majority also believe that lawyers earn excessive incomes and that the average practicing lawyer is quite literally 'greedy.'

Every lawyer should take the public's concern about greed seriously, and bar leaders should worry about the factors that provoke that concern. When deciding whether to secure a lawyer's help, Americans consider the likely cost of help to be critically important. Americans pay for personal legal services primarily from current income, and cost is the principal reason Americans avoid bringing otherwise insoluble law-related problems to lawyers. Further, if lawyers are routinely cheating clients, as is often charged, their dishonesty should be considered a shameful professionalism problem that disciplinary authorities need to aggressively confront and eliminate. Finally, public beliefs about lawyer greed are influential determinants of the profession's occupational prestige, and the reputation of lawyers affects public confidence in the justice system generally. Greed, in all its purported manifestations, is worth studying and addressing, and mistaken beliefs about lawyer behaviour and motivation are worth correcting."

[2] Teich could just have easily been describing the situation in South Africa because far too many cases involving lawyer greed are featuring on the court rolls these days and the present matter is yet another.'

[36] In the premises, the severity of the applicant's conduct that resulted in his removal from the position of attorney cannot be overstated.

[37] After being disbarred, the applicant had intermittent employment:

- (a) In October 2011, the applicant was employed as an operations manager at West Starr Investments for a period of eight months.
- (b) In 2015, the applicant was employed at Coastal Centre Service Station CC, as an operations manager for a period of two years.
- (c) From 9 March 2020 to 31 January 2023, the applicant was employed as a para-legal for a firm of attorneys.

[38] The applicant does not disclose his income during these stints of employment and fails to make any significant payments towards his debt to the second respondent, despite the generous repayment plan agreed to by the second respondent. He claimed he resigned to work on his readmission application, but since it's not a full-time job, he

could have been employed from 2017 to 2020 and used that income to repay the second respondent.

[39] The applicant has only repaid R10 500 to the second respondent. Despite this, he extensively travelled abroad in 2018, 2019, 2021, and 2022, sharing his travels on social media. He claims his wife funded the trips and his family supports him, but his online display of his travels, without meeting payment terms, shows a lack of remorse and contrition.

[40] In any case, the applicant's inability to comply with the agreement without seeking the indulgence of the second respondent until his readmission applications are filed does not reflect the characteristics of a 'fit and proper person'.

[41] While I do not endorse using *Kudo*²² and *Behrman*²³ as a tick box exercise, however, in this particular case since the applicant has neither fully disclosed the misuse of trust funds nor shown remorse, failing to meet two of the guidelines in *Kudo* and *Behrman*; I am not convinced that the applicant has proven that he is fit to be employed as a legal practitioner, making it unnecessary to evaluate the other factors.

[42] I agree with the sentiments of the judge in *Lethlaka v Law Society of the Northern Provinces*:²⁴

'The applicant has also failed to pay the Law Society's taxed costs relating to the application for his removal as well as the other applications referred to above and he has persisted in this failure until the present. It was submitted on behalf of the Law Society that the applicant was obliged to furnish this court with full particulars of the amounts taxed and to demonstrate an honest and earnest intention to pay the Law Society's costs in full as soon as possible. I agree with this submission. The applicant's laconic remark that he would pay the Law Society's costs once he is readmitted as an attorney, falls far short of what is expected of an attorney.'

[43] For completion, it's necessary to review the applicant's character flaws and whether he can identify them. Although, to his credit, the applicant takes full

²² *Kudo v Cape Law Society* 1972 (4) SA 342 (C).

²³ *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A).

²⁴ *Lethlaka v Law Society of the Northern Provinces* [2014] ZAGPPHC 902 para 34.

responsibility for his actions in both affidavits, he never identifies his character flaws. The applicant places emphasis on Mr Naidoo's report and accounts for only R325 000 of the R2 065 240.84 short fall. On the applicant's own version, the misappropriation started long before the criminal matter he refers to, but it is difficult to glean the timeline from the founding affidavit.

[44] Therefore, it appears that the applicant used the trust monies to prop up his lifestyle, which perhaps came to a head with the criminal matter and was only exposed due to Mr Naidoo's report. The decision to share holiday activities publicly, along with not fulfilling the repayment agreement with the second respondent, suggests that the applicant is insistent on presenting an image of success, and will take every opportunity to do so, no matter how misguided.

[45] Furthermore, although eventually concluding that he should have never defended the striking off application, the applicant, on the advice of his legal representatives, opposed the striking off application, relying on a technical defence of inadmissibility of certain evidence.²⁵ Although a striking off application is a legal issue and of course the applicant had a right to oppose that application; the core issue of a striking off application, is hardly a legal issue; it is whether the applicant is possessed with the characteristics of a fit and proper person. The applicant's actions fell short of this standard.

[46] His opposition to the application in the face of extremely deceitful conduct, while dislodging some blame to his legal practitioners is in itself concerning. The applicant appears oblivious to the fact that he consulted a legal practitioner on what is essentially a moral question, while asserting that it was mere 'short sightedness',²⁶ also calls into question his character.

Costs

[47] Costs are at the discretion of the court.

²⁵ Founding Affidavit, page 12 paragraphs 22 to 24.

²⁶ Founding Affidavit: Page 13, paragraph 25.

[48] In as far as the second respondent is concerned, I find no reason why the costs should not follow the result.

[49] Regarding the first respondent, while it is trite²⁷ that the first respondent's participation in these proceedings is akin to *amicus curiae*, and usually an *amicus* is not awarded costs; the first respondent's participation in these proceedings were much more than a normal *amicus*.

[50] By statute, the first respondent has a legal duty to regulate the legal profession and protect the general public. Accordingly, the first respondent's participation in this matter is imperative, and its submissions herein were of great assistance to the court. The participation of the first respondent herein necessitated the instructing of a legal practitioner, accordingly, I see no reason why it should not recover those costs; particularly, when the applicant prosecuted this matter, knowing very well that this application is opposed. Accordingly, he was aware of the risks of attracting a cost order.

Order

[51] In the result, I grant the following order:

1. The application is dismissed.
2. The applicant is directed to pay the costs of both the first and the second respondent on scale B of the high court tariff.



NICHOLSON AJ

Matter heard : 14 October 2024

Handed down :

²⁷ *Mtshabe v Law Society of the Cape of Good Hope* 2014 (5) SA 376 (ECM) para 62.

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