THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case Number : 83 / 07

In the matter between

ISAAC SWARTZBERG **APPELLANT**

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES **RESPONDENT**

Coram : **MPATI DP, MTHIYANE, NUGENT, CLOETE et PONNAN JJA**

Date of hearing : **21 FEBRUARY 2008**

Date of delivery : **28 MARCH 2008**

SUMMARY

Attorney – re-admission of – s 15 (3)(a) of Attorneys Act 53 of 1979.

NEUTRAL CITATION

This judgment may be referred to as:
Swartzberg* v *Law Society, Northern Provinces
(83/2007) [2008] ZASCA 36 (March 2008)

PONNAN JA:

[1] In his book *Confessions of an Uncommon Attorney*, Reginald L Hine observes somewhat wryly:

'The law, precisely because it is not an exact science, is a most exacting profession, and you will find its practitioners driven to do other things - preferably illegal - to preserve their health of mind.'

One instinctively recoils, I am sure, at the breadth and harshness of that indictment and yet, albeit infrequently, one encounters conduct, as here, that is wholly incongruous with the calling of an honourable profession – conduct that may well serve to support that charge.

[2] The appellant, Mr Isaac Swartzberg, applied to the Pretoria High Court for his readmission and enrolment as an attorney. The application was opposed by the respondent, the Law Society of the Northern Provinces ('the Law Society'). Bosielo J (Pretorius J concurring) dismissed the application with costs, but granted leave to the appellant to appeal to this Court. The appellant, who is presently 77 years old, was originally admitted as an attorney on 18 October 1955 and practised as such in Pretoria for some 44 years. On 13 August 1999 and on the application of the Law Society, the appellant's name was struck from the roll of attorneys by Mynardt J.

[3] In brief, the gist of the complaints against the appellant were that he had failed to keep proper books of account both in general and as to trust monies over a protracted period resulting in deficiencies in his trust account of approximately R249 000. Moreover, he had devised a stratagem to conceal those shortages which remained undetected from at least 1996 until August 1998. He thus successfully hoodwinked his auditor into certifying that his books of accounts were being properly maintained and on the strength of that secured a fidelity certificate from the Law Society.

[4] For a fuller appreciation of the appellant's wrongdoing, however, it is nonetheless necessary to refer in greater detail to the allegations levelled by the Law Society against him in its application for his striking-off. First, the appellant had been instructed to

prosecute a third party claim on behalf of a certain Mr Uys. The claim was settled during 1994 and after payment of disbursements and deductions for fees a balance fell due for payment to his widow, Mr Uys since having died. By the time that payment was ultimately effected by means of a trust cheque to Ms Uys there were no longer any funds standing to her credit in the appellant's trust account. It followed therefore that the appellant had utilised trust monies standing to the credit of one of his other clients to effect the payment in question to Ms Uys.

[5] Second, one of the appellant's clients, a Mr Jacobs, alleged that he had been overcharged by the appellant, who had allegedly also not properly accounted to him. A disciplinary enquiry was held by the Law Society, before which the appellant declined to testify. The disciplinary committee concluded that the appellant had accepted money from a client for professional work for which he did not properly account and in the light of the fact that he had charged a seemingly exorbitant fee, he was guilty of overreaching.

[6] Third, one of the appellant's clients, Ms van der Linde, had lent and advanced the sum of R100 000 to the appellant. The appellant failed to effect repayment in accordance with his loan agreement with Ms van der Linde. Ultimately summons had to be issued on her behalf by new attorneys who had been instructed by her to recover the moneys. Before doing so however, her new attorneys encountered considerable difficulty in persuading the appellant to release her file to them.

[7] Fourth, Mr Bambise was employed for a period in excess of 20 years as a messenger by the appellant. During 1995 Mr Bambise's wife died and he was appointed the executor of her deceased estate. He turned to the appellant for assistance. On 31 January 1996 an amount of R198 356.35 was paid into the appellant's trust account in favour of that estate. It was withdrawn that very day by the appellant and a fee for the full amount was debited to that account. Mr Bambise was forced to consult another firm of attorneys to recover those moneys. The appellant eventually acknowledged his indebtedness to Mr Bambise by signing an

acknowledgment of debt in his favour. He did not however comply with his obligations under the acknowledgement and in due course summons had to be issued against him. Although the appellant denied all of the essential allegations in his plea and sought to delay finalisation of the matter by seeking a postponement, ostensibly on the basis that the matter was the subject of a disciplinary enquiry, he eventually settled the matter on the day of the trial. Notwithstanding the written settlement agreement and a consent to judgment, subsequent payment of the agreed instalments in reduction of his indebtedness to Mr Bambise was neither timeous nor in full. As at 13 August 1999 the total repaid by the appellant to Mr Bambise was a paltry R21 000. It thus fell to the fidelity fund of the Law Society to thereafter make good the shortfall.

[8] Although the appellant initially sought to oppose the application for his striking-off, he did not persist with his opposition. Nor did he file an answering affidavit in response to the allegations levelled against him by the Law Society.

[9] Flowing from those allegations the appellant was arraigned in the Pretoria Regional Court during 2000 on a charge of theft of R220 000 from his trust account. He was convicted on his plea of guilty and sentenced to a fine of R100 000 or three years' imprisonment. He elected to pay the fine. A further term of two years' imprisonment was conditionally suspended for a period of four years. One such condition was that he repay the amount of R220 000 to the Fidelity Fund of the Law Society within seven days of sentence. That condition, he duly complied with.

[10] During August 2002 the appellant brought an application – which was subsequently withdrawn – for his readmission. Of that application the appellant states in his present founding affidavit:

'Prior to the launching of the application I appeared before a committee of the Law Society in an attempt to persuade the Law Society that I qualified for readmission. Despite the fact that the Law Society was not so satisfied I brought the application. However, in due course I was advised by those representing me that the application would probably not succeed, and I proceeded to withdraw the application.'

[11] Eighteen months later, as the appellant puts it, he renewed the application for his readmission as an attorney. That application was dismissed with costs on the attorney-and-client scale by Daniels J (Makhafola AJ concurring) on 29 November 2004. In dismissing the application, Daniels J stated:

'[w]hen one reads the applicant's version of events it is difficult to understand why and on what basis he was ever charged. His explanation is exculpatory and he displays … a disregard of the facts. The applicant clearly does not understand the gravity of his errant ways. If he does not understand he cannot be heard to say he has remorse.'

[12] On 19 December 2005 the appellant deposed to his founding affidavit in support of the application which is the subject of this appeal. He there states:

'I have studied all the papers in the two aforesaid applications, as well as the judgment of His Lordship Mr Justice Daniels. I am ashamed by the realisation that I never actually came to terms with the fact that my acts of dishonesty demonstrated a material defect of character. On re-reading my own papers, it became clear to me that I continued to consider myself as an honest man who had succumbed to an isolated act of dishonesty, as to which I offered various excuses.'

[13] On 6 February 2006, the appellant appeared before the council of the Law Society. He thereafter filed a supplementary affidavit. The purpose, so he contends, was two-fold: first, he had been informed by the council of the Law Society that he '... had not made sufficient disclosure of the reasons for his demise as an attorney ...'; and, second, he had been requested to deal '... specifically with those persons who had been reimbursed by the attorneys' fidelity fund'. In his supplementary affidavit, the appellant describes his conduct thus:

'To hide what I was doing I used a mechanism of reversing fees' debits from time to time to balance the books. This is subterfuge because the reversal of debits was not accompanied with any payment. In this way the actual trust deficit continued to grow.'

He further states:

'I recognise that my conduct was reprehensible and unbecoming and I have overcome the trait of dishonesty displayed by me completely.'

[14] 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 practise as an attorney applies for his readmission,

'[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 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.'

(Per Corbett JA in *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A) at 557B-C.)

[15] In considering whether the *onus* has been discharged the court 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 perhaps even 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.'

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

[16] Section 15(3) of the Attorney's Act 53 of 1979, which makes express provision for the readmission and the re-enrolment of a person as an attorney, provides:

'A court may, on application made in accordance with this Act, readmit and re-enrol any person who was previously admitted and enrolled as an attorney and has been removed from or struck off the roll, as an attorney, if -

(*a*) such person, in the discretion of the court, is a fit and proper person to be so readmitted and re-enrolled; . . .'

Section 15(3)(*b*) is not relevant for present purposes.

[17] Section 15, according to Ackermann J, unquestionably confers

'… a discretion on the Court in deciding whether an applicant, whether for admission or re-admission as an attorney, is a "fit and proper person". Section 15(1), dealing with an admission, expressly provides that the Court has a discretion to decide whether the person applying "is a fit and proper person to be so re-admitted and re-enrolled". Section 15(3) deals specifically with re-admissions. A discretion in deciding

whether an applicant is a ”fit and proper person to be so re-admitted and re-enrolled” is now expressly conferred on the Court. It is also significant that, whereas s 15(1) provides that a Court “shall” admit and enrol a person as an attorney if the preconditions of ss (*a*) and (*b*) are fulfilled, ss (3) provides that a Court “may” “re-admit and re-enrol any person who was previously admitted and enrolled as an attorney and has been removed from or struck off the roll, as an attorney” if the preconditions of ss (*a*) and (*b*) are fulfilled. The fact that the word “may” is used in s 15(3), whereas “shall” is used in ss (1) is, …significant. It shows … that the Legislature wanted to differentiate between the Court’s functions under ss 15(1) and 15(3), and wished to confer a further discretion on the Court in regard to re-admissions under s 15(3). It seems that, even where the Court is satisfied that s 15(3)(*b*) has been complied with and that the person applying is, in terms of s 15(3)(*a*), “in the discretion of the Court” a “fit and proper person” the Court still has a residual discretion to refuse re-admission.’

(*Ex parte Aarons (Law Society Transvaal, Intervening)* 1985 (3) SA 286 (T) at 290C-G.)

[18] A factor of importance in any such application is the attitude adopted by the Law Society concerned. Any person who applies for readmission and enrolment as an attorney is required in terms of s 16 of the Act to satisfy the Law Society of the province where he or she applies that he or she is a fit and proper person to be readmitted and enrolled. Although it is not a condition precedent to readmitting a person to practice that the Law Society should first be satisfied as to his or her fitness, considerable weight must be given to the attitude adopted by the Law Society (*Behrman* at 557H).

[19] It was contended on behalf of the Law Society that the appellant did not make a sufficiently full disclosure of the details of the various activities engaged in by him since his striking-off. The appellant does state that he is ‘unable to present a work record in proof of his complete rehabilitation’. The Law Society had granted the appellant permission to obtain employment with the firm Van der Walt and Hugo. His employment with that firm, as is to be expected, was subject to conditions imposed by the Law Society. For reasons that remain unexplained, however, he did not take up that employment. On this aspect the appellant states:

‘In the past four years I have been approached on numerous occasions to assist people in legal matters. After consultations and the preparation of their brief, matters which require legal action are referred to the firm of attorneys Bloch, Gross and Partners. I then become a client of the firm. The firm debits me with its disbursements and fees, which I recover from the consultant, and I also receive a small remuneration from the consultant. In each case I specifically inform the consultant that I am not a practising attorney,

as I have been struck from the roll of attorneys. In each case I explain the procedure to the consultant, and I obtain the consultant's consent to Bloch, Gross and Partners being briefed in the matter. In each case Bloch, Gross and Partners opens a file in my name with reference to the particular consultant.'

[20] Of the appellant's arrangement with Bloch, Gross and Partners Inc, Mr Ernst William Serfontein, a senior director of that firm, states:

'After the applicant was struck off the roll of practising attorneys he approached me and requested me if I would accept referrals from him of clients who are in need of legal assistance. I accepted his proposal and since then several clients have been referred to me by him. The clients paid our firm directly and Mr Swarztberg had no involvement in the financial aspects relating to these clients. In many instances, however, he would assist us in the matter and we made use of his expertise without remuneration to him. In many matters he would brief Counsel and drew up documents and once we had drawn our bill he would see to it that our legal fees and disbursements were promptly settled by the client upon presentation of the bill.'

[21] That there are material discrepancies in the two versions is patent. Moreover, that arrangement in either guise had not been disclosed in the earlier application that came before Daniels J during 2005. That much is clear when one has regard to the following excerpt of the judgment of Daniels J:

'As to the applicant's activities subsequent to his striking off very little if anything that he did was related to the practise of the law. He was employed as a legal advisor, (according to the applicant at "a totally inadequate salary"), by Sure Benefit. For how long we do not know. We were not informed what his employment involved. He obviously did not have access to or control over finances of the organization. Upon perusing the present application one finds a single reference to attorney's work. I prefer to quote fully:

"2.1(2) With the permission of the director of the Law Society of the Northern Provinces I have briefed attorneys and shepherded my clients' interests when I was given permission by the Society to work for Van der Walt & Hugo. I was admonished not to let or allow any person to get the impression that I was an admitted lawyer. I was not to accompany clients to court nor consult at the chambers of counsel."

The impression is created that this occurred whilst he was employed by Van der Walt & Hugo with the consent of the society. It is, however, common cause that the applicant did not take up employment with the firm mentioned, or any other firm.'

There is thus much to be said for the argument not only that the founding affidavit is misleading in its brevity but also that the appellant failed to make full and frank

disclosure of the true position either in the current application or in the previous one that came before Daniels J. This from an applicant who ought to have been fully aware of the need to disclose all the facts.

[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.

[24] In his supplementary founding affidavit, the appellant explains why he persisted in keeping his practice open when the writing was clearly on the wall. He states:

'I found it difficult to meet office expenses… and I fell into the trap of forward debiting fees against trust funds. Most of my staff had been with me in excess of 20 years and I honestly did not want to injure them in any way. I regarded it as my duty to retain their employment. I realise that I should have pruned my expenditures severely at the time, but I did not wish to injure my employees, and my vanity prevented me from accepting the fact that I had to scale down.'

That suggests that he was motivated by a misguided sense of paternalism towards his staff. Not only does that assertion reflect a serious lack of insight into a defect of his character and attitude, but it is far too glib and rings hollow when, objectively viewed, the most morally reprehensible act perpetrated by the appellant in a series of rather serious transgressions stretching over a period in excess of two years was the theft from his long-standing employee, Mr Bambise. Given the relationship that existed between them it is hard to imagine a more scandalous breach of trust. That abuse of confidence was exacerbated by his dilatoriness in repaying what had been stolen from Mr Bambise. Furthermore, after cynically stringing Mr Bambise along for more than three years with false promises of repayment, the appellant was able when his personal liberty was threatened, not only to pay a fine of R100 000 but also to effect payment of R220 000 within seven days of being ordered to do so by the regional court, to escape incarceration.

[25] To his credit the appellant has expressed contrition and repentance. And whilst those expressions appear to be genuine and are usually a sound indicator of reformation or rehabilitation, they do not without more prove or establish such reformation or rehabilitation in this case. It is indeed so that the appellant's name was struck from the roll on 13 August 1999 and from his perspective eight long years have since passed. That ordinarily would have weighed heavily with a court confronted by an application of this kind. In this case, however, on the appellant's own version it was only after the judgment of Daniels J that he realised that his acts of dishonesty demonstrated a material defect of character. It thus took almost six years for the appellant to come to terms with the fact that he had behaved in a scandalous and dishonest fashion. Even then it was only after scathing criticism by a judge who refused his application for readmission that the scales finally fell from his eyes. And yet, only some 13 months were to pass before he deposed to the founding affidavit in this matter. Given the

seriousness of his misdeeds and his obduracy in coming to terms with them, this can hardly be regarded as sufficient time for the kind of critical introspection and reflection that must obviously precede an application of this kind.

[26] In the light of the extent of the moral reprehensibility involved, the absence of introspective evaluation and the haste with which the application was launched, I entertain substantial reservations as to whether the appellant has, even as yet, properly and correctly identified the defects of character and attitude involved in his misdeeds.

[27] 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.

[28] The appellant had a heavy onus to discharge. He had to prove to the satisfaction of the court that, by reason of his complete and permanent reformation, he is in no way likely to fail in the future to discharge all of the obligations appertaining to his profession. In the case of a serious defect of character, reformation is known to be difficult and, therefore, to establish reformation as sufficiently probable, might require more cogent evidence than in respect of a less serious fault. (*Kudo* v *Cape Law Society* 1977 (4) SA at 659 (A) at 676D-E). Little, if anything, is put forward by the appellant that might mitigate the heinousness of his conduct. Moreover, it must count against the appellant that his misdeeds were committed when he was no longer a young man. For, even at that mature age, the appellant was lacking in the most basic standards of his profession. He displayed a contempt for the law, the courts and for honest dealings with

his clients, at least one of whom occupied a position of particular vulnerability in relation to him. Simply put, the appellant was everything that an attorney ought not to be.

[29] To the extent that the appellant suggests that he has atoned for his wrongdoing, the atonement, in my view, was neither spontaneous nor voluntary, but rather contrived and induced by a desire for self-preservation. Thus, for example, the appellant has never, in the many years that have since passed, contacted either Mr Bambise or any of the other victims of his misdeeds to ascertain whether the fidelity fund of the Law Society has made good the financial loss suffered at his hands.

[30] Where the professional misconduct consists, as here, of theft, one would imagine that it would be relatively easy to establish that the person has undergone complete and permanent reformation. That could be done by placing evidence before a court that the individual concerned has for some length of time handled money without supervision and has proved his honesty. Obviously in the light of his somewhat chequered work history since the striking-off, no such evidence could have been adduced.

[31] It would be no exaggeration to say that, on such evidence as there is, the appellant has demonstrated a propensity toward inherent dishonesty. It may, in those circumstances, perhaps be postulated that the nature of the appellant's original lapse speaks of a defect of character incapable of reformation. But, to go so far as accepting such immutability of character may well be unnecessary. For in a case such as this, where proof of complete and permanent reformation is difficult because of the moral turpitude of the misdeeds committed by the appellant, the evidence tendered by the appellant falls far short of that proof.

[32] Where a person is struck-off the roll for the kind of conduct encountered here, he must realise that his prospects of being re-admitted 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 (*Visser v Cape Law Society* 1930 CPD 159 at 160).

[33] It follows, on the view that I take of the matter, that the appellant failed to discharge the onus of convincing the court that he is a fit and proper person to be readmitted as an attorney.

[34] In the result the appeal is dismissed with costs.

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V M PONNAN
JUDGE OF APPEAL

CONCUR:

MPATI DP
MTHIYANE JA
NUGENT JA

CLOETE JA:

[35] I have had the advantage of reading the judgment of my colleague Ponnan JA. I regret that I am constrained to come to a different conclusion.

[36] My learned colleague has catalogued the offences for which the appellant was struck off the roll as an attorney by Mynhardt J and Motata AJ some eight and a half years ago. They are undeniably serious. I remind myself, however, that the application which resulted in this appeal was not for an order striking the appellant off the roll, but for his readmission. Readmission is governed by s 15(3) of the Act, which provides (to the extent relevant) as follows:

'A court may, on application made in accordance with this Act, readmit and re-enrol any person who was previously admitted and enrolled as an attorney and has been removed from or struck off the roll, as an attorney, if ─

(a) such person, in the discretion of the court, is a fit and proper person to be so readmitted and re-enrolled . . .'.

[37] The onus which the appellant had to discharge was in essence to satisfy the court *a quo* that he could be trusted in the future should he be readmitted. That is the effect of the following passage in the judgment of Corbett JA in *Law Society, Transvaal v Behrman*:[1]

'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 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 . . .'.

The discretion conferred by s 15(3)(a), as in the case of s 22(1)(d)[2] (which deals with an application for the striking off of an attorney), involves in reality a weighing up of all relevant facts and, to this extent, a value judgment.[3] The relevant facts are set out in *Kudo v The Cape Law Society*.[4] If an applicant clears that hurdle, and only if he does so, the court has a residual discretion to refuse admission, because of the use of the word 'may' in s 15(3) (in contradistinction to the use of the word 'shall' in s 15(1)[5] which deals with admissions): *Ex parte Aarons (Law Society Transvaal, Intervening)*[6] (quoted with approval by my colleague Ponnan JA in para 16 of his judgment). The parameters of the discretion are nowhere circumscribed. An important factor relevant to the exercise of the discretion, bearing in mind that the court has *ex hypothesi* found the applicant to

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[1] 1981 (4) SA 538A at 557A-C.

[2] 'Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he practices ─

. . .

(d) if he, in the discretion of the court, is not a fit and proper person to continue to practice as an attorney.'

[3] cf *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at 51E-F; *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) at 14A and *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) at 615C-E.

[4] 1972 (4) SA 342 (C) approved in *Behrman* at 557E, and quoted in para 15 of the judgment of my colleague Ponnan JA.

[5] 'Unless cause to the contrary to its satisfaction is shown, the court shall on application in accordance with this Act, admit and enrol any person as an attorney if . . . '.

[6] 1985 (3) SA 286 (T) at 290E-G.

be a fit and proper person to be readmitted, would in my view be whether the applicant has been sufficiently punished for what he did. Rehabilitation is essential for readmission, because otherwise the applicant would not discharge the onus of proving that he/she is a fit and proper person to be readmitted; but that may not be sufficient if the court in the exercise of its residual discretion is not satisfied that the applicant should be readmitted yet.

[38] I shall first consider whether the appellant has discharged the onus. There has been a fundamental change in the attitude of the appellant as it was when he applied for readmission to the Pretoria High Court compared to the attitude he evinces now. The appellant's attitude when he brought his previous application is encapsulated in the following passage in the judgment of Daniels J (which, whilst it deals with the Uys matter, is equally apposite to all of the charges of misconduct):

'When one reads the applicant's version of events it is difficult to understand why and on what basis he was ever charged. His explanation is exculpatory and he displays as has been said a disregard of the facts. The applicant clearly does not understand the gravity of his errant ways. If he does not understand he cannot be heard to say that he has remorse.'

The appellant's attitude now is:

'I have studied all the papers in the two aforesaid applications[7] as well as the judgment of His Lordship Mr Justice Daniels. I am ashamed by the realisation that I never actually came to terms with the fact that my acts of dishonesty demonstrated a material defect of character. On re-reading my own papers, it became clear to me that I continued to consider myself an honest man who had succumbed to an isolated act of dishonesty, as to which I offered various excuses.'

The appellant went on to say:

'I am firmly convinced that I have become fully rehabilitated. The devastating consequences of my actions are also the severest taskmasters. It is inconceivable that I will ever commit an act of dishonesty again.'

[39] The appellant also filed a supplementary affidavit after he had been interviewed by the Council of the Law Society of the Northern Provinces. In that affidavit he said:

'I am a devout Christian and at the time I was a leading member of the Church of Jesus Christ of Latter-day Saints. In 1995 I held the office of Lay Bishop, and I also acted extensively as legal adviser to the Church. These duties took me all over South Africa and abroad. Because I was so deeply involved in the

[7] The aborted application for readmission and the previous application before Daniels J and Motata AJ.

affairs of the Church, I neglected my practice, but I failed to recognise that I was on a path of destruction. I wanted to maintain my position in the Church, but I also wanted to maintain my position as a senior practising attorney. I have come to recognise that I was driven by self-serving vanity, and nothing else.

My neglect of my legal practice soon translated into reality. I found it difficult to meet office expenses (salaries, rental of office space and the like), and I fell into the trap of forward debiting fees against trust funds. Most of my staff had been with me in excess of 20 years and I honestly did not wish to injure them in any way. I regarded it as my duty to retain their employment. I realise that I should have pruned my expenditure severely at the time, but I did not wish to injure my employees, and my vanity prevented me from accepting the fact that I had to scale down. Although I didn't realise it at the time, there is no escape from this treadmill. It leads inexorably to destruction. Nevertheless, I managed to convince myself that matters would take a turn for the better and that I would be able to surmount my problems.

To hide what I was doing, I used a mechanism of reversing fees debits from time to time so as to balance the books. This was a subterfuge because the reversal of debits was not accompanied with any payment at all. In this way the actual trust deficit continued to grow.'

In regard to Mr Bambise, the appellant said:

'My conduct was part of a survival strategy, in which I was sadly remiss. I recognise that my conduct was reprehensible and unbecoming. I am deeply ashamed of the entire event. I have overcome the trait of dishonesty displayed by me completely.'

In regard to Messrs Uys and Van der Linde, the appellant said:

'I have full appreciation of the fact that I shirked my duties as an attorney. My conduct was part of a pattern during a time when I had damaged my practice through neglect. I dishonestly attempted to save myself from disgrace, and in so doing I only managed to disgrace myself and the attorneys profession. My disgraceful conduct as a whole demonstrates a defect of character. It has taken me a long time to appreciate the extent of the defect which I displayed. As I have sought to demonstrate, I have overcome the defect completely.'

[40] The appellant also said in his supplementary affidavit:

'I have overcome the trait of dishonesty in my character in a number of ways, which have all operated together. I have done so by a process of deep introspection and prayer since my demise. I am a deeply committed Christian. I have recommitted myself to my faith and I have been cleansed of all inclination to dishonesty. This did not occur haphazardly. I confided in several members of my church and we actively discussed and prayed in order to establish my unreserved commitment to honesty and integrity. My wife and I followed the same honest and open process. The harsh consequences of my dishonesty have served as a severe taskmaster. I was filled with disgust at my own frailty. Since my demise I have been meticulously honest in everything that I have done and I have developed an incorruptible culture of honesty. I have come to the full realization that I disgraced the profession I served all my life at an advanced age, which left my life empty, forlorn and purposeless. I have come to realize the full import and

validity of the justified observations as to my inadequacy described in the judgments of Their Lordships Mr. Justices Mynhardt and Daniels. I have a deep desire to serve as an attorney again and to make amends for my inexcusable conduct. I humbly pray that I be granted such opportunity.'

[41] In support of his application, the appellant annexed affidavits by Dr Irma Labuschagne, a forensic criminologist who had testified in mitigation of sentence at his criminal trial, and Mr Groenewald, the incumbent Temple President of the appellant's church. Dr Labuschagne said there whereas the appellant had previously not expressed true remorse, he:

'now voices true insight into his criminal behaviour at the time and therefore, for the first time, shows deep remorse. He is not simply voicing regret. . .

He has made full restitution and made, in different ways and by truly applying himself, good the losses he had caused. He no longer creates the feeling that he simply repaid to get rid of the problem. His desire was born out of his insight with regard to injuries caused to others. It is my opinion that this is bound up with deep remorse.

When a person is merely sorry for himself because he is in trouble, there will be signs of

- attempts to blame others for the crime;
- own interests above all else, and
- attempts to find excuses for own behaviour.

Mr Swartzberg is no longer guilty of any of the above.'

The legal representative of the Law Society submitted that this evidence was 'of value'. I would put it far higher than that.

[42] Mr Groenewald said that he had been closely involved with the appellant for the past 33 years, both as a friend and as a member of the church. He said this:

'As a Church leader over the past 30 years I have come into daily contact with a great number of people from every sphere of society. Because of my vast experience I regard myself as an astute judge of character. I was severely disappointed by the Applicant for his criminal conduct which led to his conviction of theft and his striking from the roll of attorneys. I have scrutinized the Applicant closely and I have engaged him in many intensive discussions. I am completely satisfied that his remorse and full repentance are genuine. I am also satisfied that the Applicant had rehabilitated himself completely and that there is no danger that the Appellant will commit an act of dishonesty again.'

[43] The court a quo simply brushed this evidence aside and in so doing, committed a fundamental misdirection of fact. The court said:

'In my view, there is no sufficient and cogent evidence to demonstrate that the applicant has become completely and genuinely reformed. I regret to state that the affidavits by Dr Labuschagne and Mr Groenewald are of little value in this respect.'

No reasons for this conclusion were advanced and I find it inexplicable.

[44] The court *a quo* also had no regard to the affidavit of Mr Serfontein, the senior director of attorneys Bloch Gross & Associates Inc, which it had itself elicited. Serfontein said that he had come to know the appellant well during the appellant's association with the firm (which is described in paragraphs 19 and 20 of my learned colleague's judgment) and went on to say the following about the applicant:

'In fact, he has become a good friend and I can honestly say that he has openly discussed the reasons for his being struck off the roll with me and that he never attempted to justify the mistakes he had made in the past, except to show remorse and regret.

There can be no doubt that he deeply regrets what he has done and the fact that he has not been able to practise the profession that he loves so dearly and which he has for most of his life practised with so much enthusiasm and commitment, has had a profound effect on his life. I can honestly say that Mr Swartzberg has learned from his mistakes in the past and that it is extremely unlikely that he would ever make himself guilty of the same misconduct.

. . .

I would without hesitation consider employing him if re-enrolled. He has much to contribute to the profession in the future and is still highly respected by his colleagues.'

[45] I wish to deal in passing with the appellant's relationship with Bloch Gross & Associates Inc which the court *a quo* categorised as one which 'seriously raises eye-brows'. The arrangement was disclosed by the appellant in his founding affidavit and he was asked a few questions about it by the members of the Council of the Law Society ─ 12 in all, including the President and Vice-President, assisted by the Director, and the Heads of Members Affairs, Professional Affairs and Disciplinary Matters ─ who interviewed him. There was not the slightest suggestion at that meeting, or in the affidavit subsequently deposed to by the President of the Law Society opposing the application, that there was anything untoward about the relationship.

[46] I am mindful of the fact that a relatively short period elapsed between the date on which Daniels J gave judgment in the previous application (the judgment was delivered on 29 November 2004 and the copy in the record was apparently revised on 17 May 2005) and the date on which the appellant deposed to his founding affidavit (19 December 2005). I am also mindful of two other factors. The first is that the appellant is now 77 years old and the other is that the appellant narrowly escaped a custodial sentence for his previous acts of dishonesty ─ he will not be entitled to expect leniency should he again offend. These factors, together with the evidence of the appellant ─ supported as it is by an independent expert and two other persons who know the appellant well, one of whom is a senior attorney ─ lead me to conclude that the appellant discharged the onus. Indeed, I have difficulty in appreciating what more can be required of him in this regard. I would merely add that it was common cause that the appellant had repaid the amount which, according to the Law Society, was missing from his trust account and there is no reason to assume either that this amount was not sufficient to make good the loss suffered by the victims of his misdeeds, or that it was not paid over to them.

[47] That brings me to the exercise of the residual discretion. I emphasise that this question only arises because I have found that the court *a quo* misdirected itself in not finding that the appellant had discharged the onus. The court *a quo* did not get that far as it held that the onus had not been discharged. In my view, serious though the appellant's offences were, the period he has been off the roll ─ now some eight and a half years ─ is sufficient punishment, bearing in mind that he has repaid the monies stolen and is paying off the costs incurred by the Law Society in the previous proceedings. The consequences of the appellant's previous actions were dire. In his own words:

'At the age of 70 I had managed to reduce a reasonably successful life to one of utter desolation. I have no assets and no income and my wife and I survived on her meagre income from an inheritance.'

I see no reason to exercise the residual discretion against readmitting the appellant.

[48] The court *a quo* ordered the appellant to pay the costs of the Law Society. I would leave that order undisturbed as the Law Society is not an ordinary litigant and its

opposition was not unreasonable. I do consider, however, that the Law Society should pay the costs of the appeal.

[49] I would accordingly allow the appeal, with costs, to the extent of replacing the order dismissing the application with an order granting it.

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T D CLOETE
JUDGE OF APPEAL